CRIMINOLOGY
RESEARCH GRANT

Pocketing the proceeds of crime: Recommendations for legislative reform

Professor Natalie Skead
Associate Professor Hilde Tubex
Professor Sarah Murray
Dr Tamara Tulich

Report to the Criminology Research Advisory Council
Grant: CRG 27/16–17

July 2020

This project was supported by a Criminology Research Grant.
The views expressed are the responsibility of the author and are not necessarily those of the Council.

Published by the Australian Institute of Criminology
GPO Box 1936 Canberra ACT 2601
Tel: (02) 6268 7166
Email: front.desk@aic.gov.au
Website: crg.aic.gov.au

ISBN 978 1 925304 55 8 (Online)

This research was supported by a Criminology Research Grant. The views expressed are those of the author and do not necessarily reflect the position of the Criminology Research Advisory Council or the Australian Government.

This report was reviewed through a double-blind peer review process.

Edited and typeset by the Australian Institute of Criminology.

Contents

v Acknowledgements
vi Acronyms and abbreviations
vii Abstract
viii Executive summary
viii Research aims
ix Findings
1 Introduction
2 Background and overview of Australian proceeds of crime confiscation schemes
4 Categories of confiscation
5 Current state of the literature
9 Aims of this study
10 Methodology
10 Comparative analysis
11 Criminological analysis
11 Empirical study
14 Comparative legislative analysis
14 New South Wales
16 Queensland
17 Western Australia
19 Comparisons of confiscation regimes by jurisdiction
21 Criminological analysis
21 Political imperatives
30 Addressing increasing crime rates
33 Revenue raising
35 Deterring serious drug-related and organised crime through incapacitation
38 Conclusions of criminological analysis
39 Findings of the empirical study
39 New South Wales
42 Queensland
44 Western Australia
53 Discussion and recommendations
54 Non-conviction-based civil proceedings
57 Executive discretion
59 Judicial discretion
62 Offences triggering confiscation
64 Definition of crime-used property
66 Disproportion, arbitrariness and lack of parity
68 Constitutional validity
70 Implementation of unexplained wealth
71 Third party interests
75 Release of property to cover legal costs
77 References
86 Appendix A: Detailed legislative mapping
87 New South Wales
99 Queensland
111 Western Australia
120 Appendix B: Empirical study

Figures

33 Figure 1: Total amount confiscated in New South Wales under CARA NSW (1990–2017)

34 Figure 2: Total amount confiscated in Queensland under CPCA Qld (2002–2016)

35 Figure 3: Total amount confiscated in Western Australia under CPCA WA (2000–2016)

Tables

4 Table 1: Confiscations available by jurisdiction

19 Table 2: Categories of confiscations in New South Wales, Queensland and Western Australia

31 Table 3: Reported drug trafficking offences per 100,000 people per month and drug production offences in Queensland (1998–2008)

32 Table 4: Drug-related offences and drug dealing and trafficking offences as a proportion of all reported offences in Western Australia (1994–2006)

86 Table A1: Australian proceeds of crime legislation

120 Table B1: Interviewees by jurisdiction and category

Acknowledgements

The authors acknowledge the funding contribution of the Australian Institute of Criminology through the Criminology Research Grants program.

The project team are grateful for the research assistance provided by Rhianna Chisholm, Terry East, Stephen Puttick and Charmaine Roughley over the course of the study and would like to acknowledge the significance of their contributions.

This research is current as at December 2018.

Acronyms and abbreviations

CARA NSW	*Criminal Assets Recovery Act 1990* (NSW)
CPCA NSW	*Confiscation of Proceeds of Crime Act 1989* (NSW)
CPCA Qld	*Criminal Proceeds Confiscation Act 2002* (Qld)
CPCA WA	*Criminal Property Confiscation Act 2000* (WA)
DPP	Director of Public Prosecutions
MDA WA	*Misuse of Drugs Act 1981* (WA)
NSW CC	New South Wales Crime Commission
NSW DPP	NSW Director of Public Prosecutions
NSW ODPP	Office of the Director of Public Prosecutions (NSW)
Qld ODPP	Office of the Director of Public Prosecutions (Queensland)
Queensland CCC	Crime and Corruption Commission Queensland
SDOCO	serious drug offender confiscation order (Queensland)
UWA	University of Western Australia
WA CCC	Western Australian Corruption and Crime Commission
WA ODPP	Office of the Director of Public Prosecutions for Western Australia

Abstract

This project, undertaken in 2017 and 2018, examined the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective. The study was undertaken in three Australian jurisdictions—Western Australia, New South Wales and Queensland—and looked into the attitudes to and impact of legislation related to confiscating the proceeds of crime. Forty interviews were conducted with a range of legal and government stakeholders and members of the public directly or indirectly involved in or affected by the operation of confiscation legislation. The report outlines a suite of best practice recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives.

Executive summary

Serious drug-related and organised crime poses considerable economic, political and social threats to Australian society. Legislation confiscating the proceeds of crime is an increasingly important tool in the global fight against serious drug-related and organised crime. Appropriately framed proceeds of crime legislation can deter and prevent crime, offset the costs of crime prevention and of policing, and recompense victims of crime and the community more broadly.

However, judges and legal commentators have raised concerns that Australian proceeds of crime laws do not strike the right balance between crime prevention and deterrence and the maintenance of legal principles and protections.

This study addresses these concerns through:

- a comparative doctrinal legal analysis of proceeds of crime legislation in Western Australia, New South Wales and Queensland:
  - *Criminal Property Confiscation Act 2000* (WA) (CPCA WA);
  - *Confiscation of Proceeds of Crime Act 1989* (NSW) (CPCA NSW);
  - *Criminal Assets Recovery Act 1990* (NSW) (CARA NSW); and
  - *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA Qld);
- a review of the existing criminological and legal literature on proceeds of crime legislation; and
- a qualitative empirical study involving interviews with key stakeholders in Western Australia, New South Wales and Queensland to capture the attitudes to and effects of proceeds of crime legislation in these jurisdictions.

Research aims

This project examines the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective. It formulates recommendations for ensuring that such legislation effectively targets those engaged in serious drug-related and organised crime without undermining accepted legal principles and protections. It produces a suite of recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives.

Findings

A number of common themes emerged from the legal and criminological analyses and from the empirical data collected. Generally, it was considered that confiscation of proceeds of crime legislation is an important component of a jurisdiction's legislative armoury against crime. However, it is clear from the project that there is a need for reform in a number of areas.

Non-conviction-based civil proceedings

All Australian jurisdictions provide for some form of non-conviction-based confiscation that is not dependent on criminal prosecution. Without exception, all confiscation proceedings are civil in nature with a civil standard of proof and civil rules of evidence.

The study's empirical data reflected the strong commentary in the literature against non-conviction-based civil confiscation that apply a lower standard of proof and shift the onus to the defendant in proceedings. Despite this, interviewees generally considered the combination of conviction-based and non-conviction-based confiscation to be necessary for the effective operation of confiscation regimes.

Recommendations:

Retain non-conviction-based scheme for unexplained wealth, but require evidence linking the defendant to some confiscable criminal activity, as in the NSW and Queensland schemes.

Retain non-conviction-based schemes for other categories of confiscation but amend legislation such that the legal burden of proof remains with the Crown.

Executive discretion

In all the confiscation regimes investigated, the decision whether to confiscate property lies with the relevant enforcement agency—the police, Office of the Director of Public Prosecutions, or crime commission, as the case may be.

Perhaps of greatest concern are the provisions in Western Australia and Queensland that provide for automatic confiscation in certain circumstances. In these instances, final confiscation is a matter of executive discretion, with the role of the judiciary being simply to declare as a matter of fact that the property confiscated.

Recommendations:

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

Integrate adjudication by courts into each stage of the confiscation process, including specifically at the final stage of confiscation.

Judicial discretion

A key concern emerging from the study was the absence of judicial relief against confiscation in some circumstances. Judicial avenues for relief are imperative on rule of law grounds to appropriately supervise prosecutorial and executive confiscation discretion and to balance the impact of the legislation against its clear purposes.

The Queensland regime, for example, includes a broad judicial discretion to refuse to make any order on public interest grounds. Similar provisions exist in New South Wales. By contrast, under the WA drug trafficker confiscation scheme, if the defendant is declared a drug trafficker, all of their property is automatically confiscated. The court must make an order to this effect and has no discretion in this regard.

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

Recommendation:

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

Offences triggering confiscation

Without exception, Australian legislation regulating the confiscation of proceeds of crime was introduced to address serious drug-related and organised crime. However, the Queensland and WA schemes cast the confiscation net far wider, potentially capturing lower-level criminal activity. In contrast, confiscation under the CARA NSW targets only more serious criminal activity.

When considering drug trafficker confiscations, interviewees expressed concerns about the quantity of a prohibited drug that would trigger a drug trafficker declaration and consequent confiscation. Similar concerns were expressed in relation to cannabis.

Recommendations:

Limit the offences triggering confiscation to those criminal activities that the legislation was initially directed at: serious drug-related offences, organised crime, and terrorism. This is best done by providing an exhaustive list of confiscable offences, as in the CARA NSW.

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

Definition of crime-used property

New South Wales, Queensland and Western Australia each provide for the confiscation of crime-used property (termed 'tainted property' under the CPCA Qld). In Queensland and Western Australia, the definition is wider than in New South Wales and includes property intended to be used in or in connection with an offence or part of an offence (s 104 (1)(a) CPCA Qld; s 146(1)(a) CPCA WA).

Courts have adopted a narrow interpretation of 'crime-used property', which requires sufficient proximity between the act or omission and the commission or facilitation of the confiscation offence. Despite this apparently narrow construction of crime-used property, the term is capable of very broad application.

Recommendations:

Narrow the definition of crime-used property to property that has a substantial connection to the criminal activity in question.

Provide for the confiscation of only that portion of crime-used property actually used in connection with the offence.

Allow for the exercise of judicial discretion in making a confiscation order, based on proportionality between the value of the confiscated property and the severity of the offence.

Disproportion, arbitrariness and lack of parity

Crime-used property confiscations in all three jurisdictions provide a stark illustration of the sometimes disproportionate and arbitrary operation of the legislation. The definition of crime-used property permits the confiscation of property that may have a tenuous link with relevant criminal activity. Moreover, the value of the property confiscated often has no bearing on the severity of that activity and can vary markedly from case to case. In Queensland and New South Wales, confiscation provisions are tempered by a public interest discretion. This is not the case in Western Australia.

The drug trafficker confiscation provisions in Western Australia provide another illustration of the potentially disproportionate, arbitrary and harsh operation of the scheme.

Recommendations:

Allow for a judicial discretion in making orders under the legislation, based on hardship and proportionality between the value of the property and the severity of the offence.

Ensure drug trafficker confiscation provisions require a substantial connection between the drug trafficking and the confiscable property, whether as crime-used property, crime-derived property, or criminal benefits.

Constitutional validity

Interviewees did not express significant constitutional concerns with the New South Wales, Queensland or WA confiscation schemes. One potential area of concern, however, is the application of some deeming provisions. Section 157(1)(d) of the CPCA WA, for example, provides that a person is taken to have been convicted of a confiscation offence even if 'the person was charged with a confiscation offence but absconded before the charge is finally determined'. Section 160 defines 'absconds' to include the situation where the person dies. There is no standard of proof to be met in relation to commission of the offence, which is deemed (vs CPCA NSW ss 5(1)(d), 16(b)). This means, for example, that a criminal benefits declaration can be made under s 16 with the deemed conviction also meaning, by the operation of s 16(2), that 'the respondent is conclusively presumed to have been involved in the commission of the offence'.

Recommendations:

Allow a party to lead evidence to refute what has been statutorily deemed.

Amend the burden of proof in deeming a person to have been convicted of an offence to be at the criminal standard, or, at the very least, at the civil standard.

Implementation of unexplained wealth confiscations

The difficulty and disparity in the success of implementing unexplained wealth schemes across Australia led to calls by a few interviewees for a national unexplained wealth scheme. This, however, has proved politically intractable. The architecture for such an arrangement is now in place through the National Cooperative Scheme on Unexplained Wealth set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). However, to date, only New South Wales has referred the necessary powers to allow it join the scheme and to work alongside the Commonwealth, the Northern Territory and the Australian Capital Territory.

What clearly emerged from many interviews was that success in unexplained wealth confiscation requires significant resourcing and skills, specifically in forensic accounting.

Recommendations:

Expand the National Cooperative Scheme on Unexplained Wealth to incorporate all Australian states and territories and to include:

- **a dedicated and adequately resourced multidisciplinary and independent expert body; and**
- **a fair and transparent mechanism for the allocation of confiscated wealth across jurisdictions.**

Until then, in jurisdictions not currently part of the scheme, appoint and adequately resource a dedicated, multidisciplinary independent expert body to implement, investigate and enforce the existing schemes.

Third party interests

The third party protection provisions in New South Wales and Queensland are complex and inconsistent, but they are largely effective. This is not the case in Western Australia.

Significant concerns in this regard emerged from the empirical study, particularly in relation to the impact of confiscation on innocent partners and dependent children.

While some interviewees considered such consequences to be acceptable 'collateral damage', the overriding impression was that this is a flaw in the legislation that must be addressed. Similar concerns are evidenced in the case law and commentary.

Recommendations:

Include effective and appropriate third party interest exclusion provisions that apply across the board to all types of restraint and confiscation.

Allow for a guided judicial discretion, taking into account hardship to third parties and the impact of the order on third party property rights.

Accurately define the property targeted by the legislation as being interests in property rather than the item of property itself, and then clearly and correctly identify it as such throughout the operative sections of the legislation.

Release of property to cover legal costs

The use of restrained funds for engaging legal representation has been an ongoing concern in the literature. This concern was reflected in the findings of the empirical study.

Each confiscation regime studied differs in its approach on this issue. However, all require—under either case law or applicable statutory provisions—court proceedings to seek the release of restrained property for the purposes of covering legal expenses.

Recommendation:

Provide means-tested legal aid funding through an administrative rather than a judicial process, assessed without regard to the value of the restrained assets.

It is noted that on 19 September 2018, the WA Attorney General, John Quigley, announced a review into the CPCA WA. The terms of reference of the review are relevant to several of the findings and recommendations detailed in this report. The authors made a submission to the review based on these findings and recommendations.

Introduction

Serious drug-related and organised crime poses a significant threat to Australia's national security, economy, and the community more generally. The Australian Crime Commission reports that:

> Organised crime is big business, with profits from transnational organised crime for 2009… around US$870b—an amount equal to 1.5 percent of global GDP at that time. This figure has almost certainly grown since then (2013: 5).

The Australian Crime Commission estimates that crime costs Australia nearly $47b a year (Smith et al. 2014: 76), with the cost of serious and organised crime estimated to be $36b per annum (Australian Crime Commission 2015a, 2015b). Successive Australian governments have affirmed the broad impact of such criminal activity, with the *National Organised Crime Response Plan 2015–2018* (Australian Government 2015: 2) stating '[s]erious and organised crime affects our community, economy, government and way of life'.

Legislation confiscating the proceeds of crime is perceived as an increasingly important tool in the global fight against serious drug-related and organised crime—for example, by disrupting criminal activity and impeding its financing. At the international level, this is reflected in conventions requiring state parties, including Australia, to enact domestic confiscation legislation and to suppress the financing of terrorism (see *United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substance* (1988); *United Nations Convention for the Suppression of the Financing of Terrorism* (1999); *United Nations Convention against Transnational Organized Crime* (2000); UNSCOR 2019). However, the United Nations Office on Drugs and Crime (2011: 5) estimates that, worldwide, '[l]ess than 1 per cent of global illicit financial flows are currently seized and frozen' pursuant to proceeds of crime legislation.

Australia, like many other countries, has introduced a raft of proceeds of crime confiscation statutes, primarily aimed at stripping those involved in criminal activity of any ill-gotten gains and of any property used in carrying out that activity. Each jurisdiction in Australia has legislation confiscating the proceeds of crime (see Table A1 in *Appendix A: Detailed legislative mapping*). Available statistics indicate that around $800m in criminal proceeds have been recovered between 1995–96 and 2013–14 under all Commonwealth, state and territory legislation—an average of approximately $44m per annum (Smith & Smith 2016). This is significantly less than the $36b estimated annual cost of serious drug-related and organised crime (Australian Crime Commission 2015a, 2015b).

Criminal proceeds confiscation legislation is intended both to stop criminals profiting from their offending and to incapacitate criminal activity by targeting its economic base—that is, by eradicating the working capital available and necessary to finance further criminal activity (Skead 2013; Skead & Murray 2015; see also Fisse 1992; Thornton 1994). In addition, the legislation creates an income pool for offsetting the costs of combating crime, and it results in at least some financial benefit to victims of crime and the community more broadly. This, together with the perceived effectiveness of this criminal justice tool as a means of deterring crime, makes the proliferation of confiscation legislation inevitable. In the current political climate, there is a strong appetite for robust confiscation legislation (Skead & Murray 2015).

However, there are concerns about the wide net such robust legislation inevitably casts and the implications this has in many instances: violating civil liberties, including fundamental property rights, and disregarding due process, natural justice and fairness. Confiscated property—real or personal—vests in the Crown. There is therefore a risk that confiscation legislation may affect the rights of third parties with an interest in confiscated property—such as dependent children, spouses, mortgagees, lessees, lessors, and co-owners. This proprietary impact is discordant with the objectives of the legislation. Furthermore, the reach of Australian proceeds of crime legislation may extend beyond the confiscation of property that is the proceeds of crime: it may result in the confiscation of legitimately acquired property. For example, in *Queensland v Henderson* (2011) 218 A Crim R 111, at [65], Keane J noted that 'the [Queensland] Act… operate[s] to authorise the forfeiture of property which is not derived from criminal activity by the current owner of the property'.

This project confronts the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective, and seeks to formulate recommendations for ensuring that such legislation effectively targets those engaged in crime without undermining accepted legal principles and protections.

Background and overview of Australian proceeds of crime confiscation schemes

Australia's first confiscation regime was introduced into the *Customs Act 1901* (Cth) in 1979. Division 3 of part XIII of that Act established a confiscation regime allowing the imposition of pecuniary penalties against those who engaged in prescribed narcotic dealings (Australian Law Reform Commission 1999). The wide-scale introduction of comprehensive proceeds of crime legislation followed from the mid–1980s, as part of concerted efforts to curb the exploding drug trade taking hold in Australia.

Legislation authorising the confiscation of the proceeds of crime following a criminal conviction emerged in Australian jurisdictions in the 1980s. These changes were in response to international efforts to counter transnational organised crime and to a series of domestic royal commissions into drug trafficking and organised crime (see, for example, Freiberg & Fox 2000; Skead & Murray 2015). There were compelling policy reasons for this legislation. In the second reading speech on the first Commonwealth Proceeds of Crime Bill 1987, the then Deputy Prime Minister and federal Attorney-General, Mr Lionel Bowen stated that:

> The Proceeds of Crime Bill provides some of the most effective weaponry against major crime ever introduced into this Parliament. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the profits and instruments of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive—profit—and prevent the re-investment of that profit in further criminal activity (1987: 2314).

The introduction of conviction-based proceeds of crime legislation by the Commonwealth, states and territories was not uniform (see Table A1 in *Appendix A: Detailed legislative mapping*). This led to a highly complex and unsatisfactory web of legislation dealing with proceeds of crime. The complexity of these regimes has increased with subsequent reform, which has 'resulted in progressively more expansive legislation' (Skead & Murray 2015: 463).

From the late 1980s onwards, after a number of inefficiencies were identified with conviction-based regimes, most Australian jurisdictions augmented their criminal confiscation regimes with non-conviction-based civil confiscation schemes (see, for example, Australian Law Reform Commission 1999; Freiberg & Fox 2000; Clarke 2002; Morris 2001; Lusty 2002). Non-conviction-based confiscation schemes allow for the confiscation of property in the absence of a criminal conviction, on the civil standard of proof, and 'on the basis of "unlawful" rather than "criminal" conduct' (Freiberg & Fox 2000: 242). All Australian jurisdictions provide for some form of non-conviction-based confiscation.

The most recent innovation in proceeds of crime legislation—introduced first in Western Australia in 2000—is the confiscation of unexplained wealth. This form of non-conviction-based confiscation goes a step further (see Parliamentary Joint Committee on Law Enforcement 2012: 9). Unexplained wealth provisions require a person who is suspected of having wealth exceeding their lawfully acquired wealth to pay to the Crown the value of that excess wealth. Typically, unexplained wealth provisions reverse the onus of proof to require the person responding to an unexplained wealth application to prove that their property and assets have been lawfully obtained. These features result in 'a greater likelihood that assets of crime will be confiscated' (Parliamentary Joint Committee on the Australian Crime Commission 2009: [5.50]). Unexplained wealth confiscation regimes now exist in all Australian jurisdictions except for the Australian Capital Territory.

While originally designed to combat drug trafficking, proceeds of crime legislation is also increasingly perceived as crucial to countering terrorism by freezing and confiscating property that is used in, for use in or derived from terrorism offences (see, for example, Explanatory Memorandum to the Proceeds of Crime Bill 2002 (Cth); Michaelson & Goldbarsht 2018). Additionally, there is a growing awareness in Australia and internationally of the connections between organised crime and terrorism (Australian Criminal Intelligence Commission 2017; Smith et al 2010; UNSCOR 2014; UNSCOR 2015a; UNSCOR 2015b; UNSCOR 2019), albeit that the exact links are 'are yet to be fully understood' (Ochoa 2018: 71).

Categories of confiscation

The circumstances in which property, real or personal, may be confiscated under Australian proceeds of crime legislation generally fall into four categories (see Skead 2013: 296; Skead 2016: 27):

- crime-used property confiscation (conviction-based, non-conviction-based and hybrid regimes)—where property is used in or in connection with the commission of a prescribed offence;
- crime-derived and criminal benefits property confiscation (conviction-based and non-conviction-based)—where property is derived from the commission of a specified offence, such as literary proceeds, or obtained by a person involved in the commission of a prescribed offence;
- unexplained wealth confiscation (non-conviction-based)—where a person's wealth exceeds the value of their lawfully acquired property; and
- drug trafficker confiscation (conviction-based and non-conviction-based)—where a person is declared or taken to be a declared drug trafficker.

All of these confiscations are available in five out of the nine Australian jurisdictions (see Table 1). However, proceeds of crime legislation in the remaining four jurisdictions do incorporate at least some of these confiscation categories.

Table 1: Confiscations available by jurisdiction

Jurisdiction	Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
Cth	✓	✓	✓	
NSW	✓	✓	✓	✓
Vic	✓	✓	✓	✓
Qld	✓	✓	✓	✓
WA	✓	✓	✓	✓
SA	✓	✓	✓	✓
Tas	✓	✓	✓	
ACT	✓	✓		
NT	✓	✓	✓	✓

Current state of the literature

There is a significant body of Australian and international research on the confiscation of property under proceeds of crime legislation (see, for example, Thornton 1994; Bagaric 1997; Bell 1999, Clarke 2002, 2004; Fisse 1992; Freiberg & Fox 1992, 2000; Gray 2012a, 2012b; King, Walker & Gurulé 2018; Moffitt 1985; Skead 2013, 2016; Skead & Murray 2015; Smith et al 2010; Smith & Smith 2016; Smith 2018, and the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union 1984, the Costigan commission). Much of the existing scholarship focuses on the sociological and criminological aspects of the regimes, including whether such legislation operates as a successful deterrent against the commission of targeted crime, the impact of the legislation on law enforcement practices, and how to evaluate the effectiveness of the regimes, particularly with limited data available and the staggered reform and implementation processes across Australia (see, for example, Bartels 2010; Fisse & Fraser 1993; Fraser 1990b; Freiberg & Fox 1992; Goldsmith, Gray & Smith 2014; Smith & Smith 2016). Recent work has examined how to improve the effectiveness of unexplained wealth confiscation regimes by removing or reducing legal and procedural impediments (Smith & Smith 2016).

Since the 1980s, legal commentators have identified concerns with the impact of Australian proceeds of crime legislation on individual rights, on relatives and innocent third parties, and on established legal principles; in particular, the principle of proportionality in sentencing and the presumption of innocence (Bagaric 1997; Clarke 2004; Croke 2010; De Brennan 2011; Feldman 1989; Fisse 1989a, 1989b; Fraser 1990b; Freiberg 1992). Commentators have also voiced disquiet about the retrospective operation of some confiscation legislation (Skead & Murray 2015) and about the potential impact of the regime in effectively limiting access to legal representation, in particular through the inability for a person to use confiscated funds to engage legal representation (Fisse 1989a; Freiberg 1992; Carew & Ollenburg 2006; Edwards 1999; Temby 1989; Thornton 1992). More recently, scholars have amplified concerns about the extension and 'normalisation' of conviction-based regimes to include non-conviction-based frameworks (De Brennan 2011), new species of confiscation orders, and 'superannuation orders' (Freiberg & Pfeffer 1993), and as a civil regulatory response to tax evasion (Leighton-Daly 2013a, 2013b).

The 'civilisation' of confiscation

There is an enduring debate in the literature about the appropriateness of using civil confiscation as an adjunct to or instead of measures available under the criminal law. In the early 1990s, Freiberg observed:

> Over recent years it has become evident that crime is being 'civilised'. By this I mean that there is under way a process by which the civil law is used in addition to, or instead of, the criminal law, or where civil procedures are integrated into criminal prosecutions. In practice, 'civilisation', represents a process of stripping citizens of their rights (1992: 50).

Gray (2012a) argues that non-conviction-based confiscation orders are in fact 'criminal' not 'civil' in nature, and that the enhanced procedural and evidentiary safeguards of the accusatorial process should therefore apply—such as the burden of establishing proof beyond reasonable doubt and the presumption of innocence (see also Feldman 1989; Fisse 1989a, 1989b, 1992; Freiberg 1992; Skead and Murray 2015: 464).

Unexplained wealth confiscation is a particularly concerning example (Clarke 2004:284). The Commonwealth Parliamentary Joint Committee on Law Enforcement reported:

> Unexplained wealth laws are more intrusive than proceeds of crime laws because, in their purest form, they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard (2012: 9).

These concerns are not universally held. For example, Bell (1999) suggests the arguments about the consequences of 'civilisation' on individual rights hold little weight as there is no liberty aspect to civil forfeiture proceedings. In a similar vein, Lusty (2002) argues that civil forfeiture regimes that reverse the onus of proof or incorporate a rebuttable presumption requiring a defendant or third party to demonstrate that property in question has been lawfully acquired are necessary, justifiable, and consistent with the presumption of innocence. For Lusty (2002), civil forfeiture is justifiable in principle, since it provides a civil remedy to society to compensate for the harm caused by such activity and to redress unjust enrichment.

The use of civil confiscation has clear benefits for law enforcement and prosecutorial authorities (Skead & Murray 2015; Campbell 2010). The civil nature of confiscation proceedings means that the civil standard of proof and civil rules of evidence apply—'necessarily making the Crown's job in securing a confiscation all the easier' (Skead & Murray 2015: 465). This is only enhanced in unexplained wealth confiscations that also shift the burden of proof from the Crown to the defendant. In the terrorism context, civil forfeiture regimes have the benefit of reducing the investigatory and prosecutorial challenges of establishing terrorism offences or a connection to terrorist activity to the criminal standard of proof (Bell 2004). This includes the increased reliance on national security intelligence—and, indeed, criminal intelligence, in the organised crime context—that may be incapable of supporting a prosecution or being used as evidence in a criminal trial (Zedner 2014; see also Roach 2010; Tulich 2012; Walker 2005). In relation to organised crime, Smith and Smith explain:

> Unexplained wealth legislation is viewed as the best way of preventing further crime. It enables law enforcement to attack the profit of criminal networks without needing to demonstrate a causal connection between the offences and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offence was committed. However, it is necessary to be mindful of the rights arguments related to unexplained wealth legislation, particularly if the Australian approach becomes more effective in the future (2016: 58).

At the same time, there is an acknowledgement in the literature of the practical challenges faced by law enforcement agencies and prosecutors in investigating criminal profits and ownership of assets in crime-derived and unexplained wealth confiscations. These matters require expertise beyond the investigating of crimes and proving of elements of an offence (Goldsmith, Gray & Smith 2014).

The consequences of 'civilisation' extend beyond law enforcement prerogatives and the rights of a particular individual who is subject to an order. For example, De Brennan (2011: 357) describes the impact of this 'function creep' on blameless relatives and other third parties.

Proprietary consequences: Innocent third parties

There is, however, little research on the proprietary consequences of confiscation legislation (Skead 2013, 2016; Skead & Murray 2015). While it is expected and accepted that proceeds of crime legislation will affect the property rights of criminals, by vesting title in their confiscated property in the Crown, there is a risk that confiscation of such property may also affect the rights of third parties with an interest in the confiscated property. Such third parties may include persons connected with the wrongdoer such as dependent children, spouses, partners, and beneficiaries, as well as unrelated third party interest-holders such as mortgagees, lessees, lessors, and co-owners.

Furthermore, the reach of Australian proceeds of crime legislation may extend beyond the confiscation of proceeds of crime: it may result in the confiscation of legitimately acquired property. Recent case law is illustrative. In the Northern Territory case of *Emmerson v Northern Territory* (2013) 33 NTLR 1, Barr J commented:

> Property forfeited…may be the fruits of many years of hard work…The property is forfeited irrespective of its provenance. Most people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay…However, the overlapping legislative scheme in question has travelled a very long way from the principle that crime should not pay…the forfeiture may take property which is unrelated to any criminal activity… (at [110], [111], [114]).

In a similar vein, in *Queensland v Henderson*, Keane J noted at paragraph 65 that 'the [Queensland] Act…operate[s] to authorise the forfeiture of property which is not derived from criminal activity by the current owner of the property'. And, in a case dealing with the WA legislation, McKechnie J lamented 'I see no way to avoid the clear purpose of the [Act]. It is an unfair result but one compelled by the words of the statute' (*Permanent Custodians Ltd v Western Australia* [2006] WASC 225, at [23]).

The courts

In spite of these and other comments by members of the judiciary lamenting the 'unfair, if not cruel' (*Director of Public Prosecutions (South Australia) v George* (2008) 102 SASR 246, at [233]) and draconian (*Director of Public Prosecutions (Northern Territory) v Green* [2010] NTSC 16, at [221]) nature of the confiscation regimes, Hickey is critical of the approach taken by Australian courts:

> The decision in *Cini* contributes to a growing body of decisions in which Australian courts have deemed it unnecessary to construct the forfeiture provisions of the POCA [*Proceeds of Crime Act 2002* (Cth)] in accordance with policy arguments or considerations of justice (2017: 119).

The role of the judiciary in proceeds of crime confiscation regimes is also controversial because judicial discretion has been removed in certain confiscation proceedings—which Skead and Murray (2015: 468) describe as automatic and non-judicial confiscations.

For example, in Western Australia, the court has no discretion in making an unexplained wealth declaration. If it is more likely than not that the respondent has unexplained wealth, the court must make the declaration sought (CPCA WA s 12(1)). The removal of discretion is also a feature of the Commonwealth proceeds of crime regime which has been the subject of criticism (Odgers 2007: 331).

Questions have also been raised about the constitutional validity of proceeds of crime regimes. However, the constitutional invalidity of current state or federal proceeds of crime regimes is considered to be unlikely (Clarke 2002, 2004; Skead & Murray 2015). Skead and Murray explain:

> Without avenues for constitutional invalidity, it is the role of the judiciary to apply the law as written by the legislature. The Parliament therefore has a pivotal role in ensuring that proceeds of crime appropriately balances the clear competing interests at stake. The authors contend that this crucial balancing process should be guided by rule of law considerations. (2015: 478–9)

These statements and controversies highlight the need for a thorough examination of the legislation, its implementation, and effect. There is the risk that much of this legislation is compromised by its undermining of accepted legal principles and protections and by its failure to target only those engaged in serious drug-related and organised crime. Despite this, there is a lack of empirical research into the impact and effectiveness of proceeds of crime legislation.

Absence of empirical research

The absence of empirical research into proceeds of crime legislation, and especially into the operation, impact, and effectiveness of such legislative regimes, has been noted by numerous scholars (Freiberg & Fox 2000; Bartels 2010; Clarke 2004). Freiberg and Fox explain:

> Little is known about how confiscation laws actually work. The reluctance to examine their impact is not confined to Australia. Though the literature on confiscation is considerable (especially in the United States), it tends to be descriptive, exegetical, or doctrinal in nature. Complex and difficult legislative initiatives are more often addressed by researchers of a jurisprudential rather than empirical bent. In Australia, the multi-jurisdictional nature of the undertaking also acts as a deterrent. (2000: 242–3)

Some empirical research has been undertaken in Australia, most notably a recent small empirical study comprising 20 interviews looking at the effectiveness of unexplained wealth confiscation (Smith & Smith 2016). However, to date there has been no empirical study examining the impact and effectiveness of the range of confiscations available under Australian confiscation of proceeds of crime legislative schemes.

It is acknowledged that the proceeds of crime confiscation schemes operating in each Australian jurisdiction are distinct (Skead 2013; Skead & Murray 2015), as is the overall criminal justice climate into which each scheme was introduced (Tubex et al. 2015). However, to date there has been no comparative, jurisdiction-based qualitative mapping and examination of the range of Australian confiscation of proceeds of crime legislative schemes. Legal scholarship has, in the main, provided a detailed survey of the legislation in a single jurisdiction (Thornton 1990; Weinberg 1989), an international comparative legislative review (McClean 1989), or a comparative doctrinal analysis of one or more aspects of the regime, such as unexplained wealth provisions (Bartels 2010; Feldman 1989; Skead 2013, 2016). There is therefore little understanding of the legal and criminological complexity and impact of the various legislative schemes.

Aims of this study

The overall aim of this project is to produce a suite of best practice recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives. This will be achieved through the first ever comparative criminological and legal analysis of Australian proceeds of crime legislation in three Australian jurisdictions: New South Wales, Queensland, and Western Australia.

More specifically, this project seeks to:

- complete an exhaustive mapping and legal and criminological analysis of the proceeds of crime legislation, case law, and contextual data in the three target states;
- undertake a comprehensive and comparative empirical examination of the attitudes to, and effects of, proceeds of crime regimes in the three target states through interviews with key stakeholders; and
- prepare a suite of best practice recommendations for the reform of Australian proceeds of crime legislation.

Methodology

The research process involved a combination of:

- comparative doctrinal legal analysis of proceeds of crime legislation in three Australian jurisdictions (New South Wales, Queensland, and Western Australia);
- a review of existing criminological and legal literature around proceeds of crime legislation; and
- a qualitative empirical study involving a range of interviews with key stakeholders in each target jurisdiction to capture the attitudes to and effects of proceeds of crime legislation.

Ethics approval was obtained from the University of Western Australia (UWA) on 20 February 2017 (protocol # RA/4/1/8869), in accordance with the requirements of the National Statement on Ethical Conduct in Human Research and the policies and procedures of UWA.

The project team formulated a suite of law reform recommendations based on the legislative and criminological mapping and the empirical data collection.

Comparative analysis

The project team mapped and compared the key features of the legislation in each target state. The legislative regimes in New South Wales, Queensland and Western Australia were selected as the legislation in each is distinct. The NSW regime has resulted in the highest monetary value of confiscations: between 1995–96 and 2013–14, New South Wales confiscated $321,305,348 of the total $793,177,166 confiscated from all Australian jurisdictions (Smith & Smith 2016: 51–52). The Queensland legislation has recently undergone significant reform to broaden its scope and application. Meanwhile, the WA scheme has been described as 'draconian' and 'extreme' (*Centurion Trust Co Ltd v Director of Public Prosecutions (Western Australia)* [2010] WASCA 133, at [75]). These three jurisdictions therefore provide a useful comparative core.

The desktop doctrinal legal analysis involved a review of extant legal documents, including Australian proceeds of crime statutes and associated legislation, proposed bills, related cases and parliamentary debates. This analysis highlighted those features in each jurisdiction's legislation which may be extreme and may result in overreach. It also highlighted features which are fair and legitimate—both in their framing and their application—and achieve the underlying and/or articulated objectives of the legislation, and may therefore be considered as best practice.

Criminological analysis

To understand the broader criminological context in which each of the schemes was introduced, an analysis of relevant aspects of the broader criminal justice system in these jurisdictions was conducted. The broader criminological information consisted of data and information on Australian organised and drug-related crime, relevant papers from the Australian Institute of Criminology and the Australian Criminal Intelligence Commission, information and publications on political stances and electoral platforms in relation to confiscation legislation, media reporting, parliamentary debates, criminological reports, and journal articles on these topics.

Empirical study

The project team undertook an empirical study to gather the perspectives of key stakeholders on issues relevant to the operation and efficacy of proceeds of crime legislation. The empirical study was based on semi-structured interviews to capture the attitudes to and effects of proceeds of crime legislation. Key stakeholders included police, members of the judiciary, legal practitioners, departments of attorneys-general, non-government agencies, politicians, academics, and members of the public who were directly or indirectly affected by the implementation of proceeds of crime confiscation legislation. In total, the project team interviewed 40 stakeholders.

The empirical study sought to:

- identify, through interviews with senior police officers working in this area, any issues related to implementing and enforcing proceeds of crime legislation and areas in need of reform;
- identify legal issues through interviews with judges and legal practitioners. Issues here related to the experience of Australian courts and legal practitioners in applying proceeds of crime legislation and areas in need of reform;
- acquire government perspectives through interviews with senior staff at the Office of the Director of Public Prosecutions in New South Wales and Western Australia and the NSW and Queensland Crime Commissions;
- understand the broader political and criminological context of proceeds of crime through interviews with politicians and academics working in the area; and
- gain insight into the impact of the legislation on a personal, social, and economic level through interviews with members of the public affected directly or indirectly by the confiscation of proceeds of crime. These interviews were limited to individuals in Western Australia.

The semi-structured interviews allowed the participants to develop and qualify their ideas, enabling rich insights into their experience with and the operation of the legislation. This approach revealed those areas of greatest practical concern and most in need of reform.

Recruitment

The initial invitations to participate in the research were sent to those in the legal profession known to be involved with proceeds of crime legislation, as well as to those identified by a search of practitioners involved in the implementation of this legislation, according to the key stakeholder categories as described above and in Table B1 in *Appendix B: Empirical study*. From there, snowball sampling was used, asking the interviewees to refer us to other relevant individuals working in this area. Members of the public in Western Australia were recruited through their legal representatives, who first contacted their clients for approval to participate before providing the research team with contact details.

Potential interviewees were first contacted by email. The email explained the aims of the research and the nature of an interviewee's involvement, including a Participant Information Form and Participant Consent Form approved by the UWA Human Research Ethics Committee (*Appendix B: Empirical study*).

Interviews

Interviews were conducted face to face at either UWA, the interviewee's office, the interviewee's home, or over the phone. Thirty-five interviews were conducted face to face. Five interviews were conducted over the phone because of the location of the participant. Two participants provided written comments—one in addition to the interview, and one because of unavailability at the time of the data collection. For the interviews in New South Wales and Queensland, two members of the project team travelled to Canberra, Sydney, and Brisbane to conduct the interviews. The vast majority of interviews were conducted by two members of the project team, according to best practice and to increase the validity of the data interpretation. The duration of the interviews typically varied between half an hour and an hour. All interviews with one exception (due to the interviewee's preference) were recorded with consent, de-identified, and professionally transcribed. The transcriptions were sent back to the interviewees for their approval. At this stage in the data collection, one interviewee withdrew from the research and the corresponding interview recording and transcript were deleted. Comments and corrections from the participants were taken into account and the amended transcripts were used for the data analysis.

Analysis of data

The transcribed interviews were subject to content analysis. This included systematically reading of all the transcripts, labelling the major themes (by each semi-structured question and other themes arising), organising the themes by key stakeholder category and by jurisdiction, and summarising the findings (see *Findings of the empirical study* below). As per the Participant Information Form (see *Appendix B: Empirical study*), quotes were anonymised and participants were given the opportunity to review and approve quotes. In both the *Criminological analysis* and *Discussion and recommendations* sections of this final report, the discussion is illustrated with quotes from these interviews.

Limitations of the empirical study

While most of the invited interviewees agreed to participate, some declined the invitation, mainly because they did not feel well-placed to be interviewed as they did not have current experience with the legislation. In such instances, they often referred the project team to other potential interviewees. If no response was received, a follow-up email was sent. Despite the efforts of the project team, some key stakeholders could not be interviewed. The project team regrets the absence of any police representative from Western Australia and any representative from the Queensland Office of the Director of Public Prosecutions (Queensland ODPP). Initial approval to participate was obtained from Western Australia Police Force (WA Police), but this never eventuated in a confirmed appointment. The Queensland ODPP declined to participate as it is not their practice to comment on policy or the legislative framework within which they operate. The NSW and Queensland interviews covered a broad range of stakeholders but were, in comparison with the WA interviews, limited in number. The project team acknowledge that the views of these interviewees may not be broadly representative of all those working in the area.

The data presented in the WA case studies was drawn primarily from the five interviews conducted with members of the public. The facts provided were corroborated only through the interviewees' legal representatives and media reports. As a result, the case studies may reflect a one-sided, subjective view of the interviewees' personal experiences with the legislation.

Comparative legislative analysis

For ease of reference, the detailed mapping of the legislative regime for each target jurisdiction, including the operation of the confiscation regimes and recent case law, is contained in *Appendix A: Detailed legislative mapping*. Table 2 below provides a comparison of the features of each regime by category of confiscation.

New South Wales

New South Wales, unlike the other jurisdictions studied, has two pieces of legislation governing the recovery of the proceeds of crime. The *Confiscation of Proceeds of Crime Act 1989* (CPCA NSW) contains a comprehensive regime for conviction-based crime-used property, crime-derived property, and drug trafficker confiscations. This regime is administered by the New South Wales Office of the Director of Public Prosecutions (NSW ODPP). The *Criminal Assets Recovery Act 1990* (CARA NSW) is administered by the New South Wales Crime Commission (NSW CC) and contains a non-conviction-based regime that targets those involved in serious drug crimes, as well as providing for unexplained wealth orders to recover criminal assets.

New South Wales was the first Australian jurisdiction to enact conviction-based proceeds of crime legislation, with the *Crimes (Confiscation of Profits) Act 1985* (NSW). Upon its introduction into the Legislative Assembly, then Attorney General, Mr Terry Sheahan (1985: 9570), described the Crimes (Confiscation of Profits) Bill as 'a major new weapon' in the 'Government's continuing assault on organized [sic] crime in New South Wales'. This Act permitted the confiscation of property that was used in or in connection with or derived from the commission of a serious offence. Sheahan continued:

> The Government accepts and recognizes [sic] that confiscation is a penalty that should be imposed only after a person is tried and convicted, and only after that person has had the advantage of all the important protections and rights available under the criminal justice system. (1985: 9572)

The Act provided for forfeiture and pecuniary penalty orders, as well as restraining orders to preserve assets pending confiscation proceedings. To protect innocent third parties, the Act included hardship provisions and judicial discretion in the determination of a forfeiture application. A 'major innovation' (Sheahan 1985: 9574) of the regime was enabling the Public Trustee (now the NSW Trustee & Guardian), when directed by the court, to control and manage property subject to an order.

Three years after the introduction of the 1985 Act, the NSW Government moved to reform the regime by significantly increasing existing powers and introducing tough new measures against drug traffickers. Drawing on legislation in the United Kingdom, the new *Confiscation of Proceeds of Crime Act 1989* (CPCA NSW) reversed the onus of proof as to the source of property and introduced an 'assumption' that all of a drug trafficking offender's assets at the time of conviction and any property dealt with in the preceding six years were the proceeds of crime (Dowd 1989: 7320–22). The Act empowered the New South Wales Director of Public Prosecutions (NSW DPP) to apply for conviction-based confiscation orders.

In 1990, New South Wales again led the way by introducing a non-conviction-based regime targeting those involved in serious drug crimes. This regime was enacted in the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW). Then Minister for Police and Emergency Services, Mr Ted Pickering (1990: 4266), explained:

> It is the Government's intention to urge the Commonwealth and other State governments to adopt complementary legislation, so that the fight against the drug trade will be an effective national campaign. The most innovative aspect of this legislation is that it will create a scheme of asset confiscation which operates outside and completely independently of the criminal law process.

Under this regime, the State Drug Crime Commission, an independent statutory authority, was given primary responsibility for the administration of the legislation. The commission could institute proceedings and apply to the Supreme Court of New South Wales on the basis that it was more probable than not that a person was involved in drug-related activities. Where satisfied that there were reasonable grounds for suspecting that a person was involved in drug-related activities, the Supreme Court had to make a restraining order (s 10). Once this order was made, the commission could apply for an assets forfeiture order and/or a proceeds assessment order. This regime was extended by the *Drug Trafficking (Civil Proceedings) Amendment Act 1997* (NSW) to encompass all 'serious criminal offences' and has since been renamed the *Criminal Assets Recovery Act 1990* (CARA NSW). The State Drug Crime Commission has since been renamed the NSW Crime Commission (NSW CC), and remains the responsible agency for initiating proceedings under the CARA NSW.

In 2010, New South Wales further augmented its proceeds of crime regime by introducing unexplained wealth confiscation—this time following Western Australia's lead. The *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW) amended the CARA NSW to include unexplained wealth orders for the recovery by the NSW CC of criminal assets. In the second reading speech on the bill for this Act, the Minister for Police and Finance explained:

> …the New South Wales Crime Commission can apply to the court for such an order when it has reasonable suspicions that the person is involved in serious criminal activity or when it holds reasonable suspicions that the person's wealth is derived from the serious criminal activity of another person or persons. The court must be satisfied on the balance of probabilities that the wealth is not, or was not, illegally acquired property. (Daley 2010)

In 2016, the CARA NSW was expanded once again to incorporate crime-used property substitution declarations.

In 2015–16, the estimated value of property confiscated pursuant to the CPCA NSW was $3.7m (NSW ODPP 2016: 25), and the estimated realisable value of confiscation orders under the CARA NSW was $33,092,706 (NSW Crime Commission 2016: 27).

In 2018, New South Wales enacted the *Unexplained Wealth (Commonwealth Powers) Act 2018* to refer its state powers for the purposes of joining the National Cooperative Scheme on Unexplained Wealth set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). It remains the only state so far to have done so.

Queensland

In Queensland, the *Criminal Proceeds Confiscation Act 2002* (CPCA Qld) provides for a non-conviction-based scheme for the confiscation of crime-used and crime-derived property and unexplained wealth. The Queensland Crime and Corruption Commission (Queensland CCC) administers these categories of confiscation. The Act further provides for a non-conviction-based serious drug offender confiscation scheme, also administered by the Queensland CCC; and a conviction-based scheme, administered by the Queensland ODPP.

Queensland's first proceeds of crime statute was the *Crimes (Confiscation) Act 1989* (Qld). This legislation commenced on 12 May 1989 and introduced a conviction-based confiscation scheme. It extended the forfeiture provisions already available in the *Drugs Misuse Act 1986* (Qld) to apply to all criminal activity and to proceeds of crime located outside of Queensland (see Clauson 1989: 4037–9). As with the NSW scheme, where a person was convicted of a serious offence the Act empowered a nominated court to make a forfeiture order and/or a pecuniary penalty order (s 6). It also provided for the preservation of assets through restraining orders pending confiscation proceedings (s 17). In 1995, the Act was amended to provide for the automatic forfeiture of property subject to a restraining order, unless the owner of the property could demonstrate that the property was not tainted (see Explanatory Note, Crimes (Confiscations of Profits) Amendment Bill 1994).

In line with most other Australian jurisdictions, in 2002 the Queensland Government moved to complement its conviction-based scheme with a non-conviction-based civil confiscation scheme. The *Crimes (Confiscation) Act 1989* (Qld) was replaced by the *Criminal Proceeds Confiscation Act 2002* (CPCA Qld), which came into operation on 1 January 2003. The Act 'improved and strengthened' the existing conviction-based scheme (Dixon 2002: 1), expanding the range of offences subject to automatic forfeiture. It also introduced a civil confiscation scheme, modelled on the CARA NSW (see Explanatory Note, Criminal Proceeds Confiscation Bill 2002).

In 2009, the Queensland regime was revised following a statutory review of the Act, which recommended the implementation of all but one of the recommendations of the Parliamentary Crime and Misconduct Committee's *2006 Report no. 71: Three year review of the Crime and Misconduct Commission*. The *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) amended the CPCA Qld to enable the confiscation of property held outside of Queensland. It also reversed the onus of proof, once the state has established that a person has engaged in 'serious crime related activity', requiring the respondent to then prove that their wealth was lawfully acquired.

The regime was expanded again in 2013, following an election promise from the Liberal National Party of Queensland to introduce 'tough new laws to target the ill-gotten gains of criminals' (Bleijie 2013: 1344). The *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) introduced an unexplained wealth scheme and a serious drug offender confiscation order scheme which enable forfeiture of lawfully acquired property. The Queensland CCC administers the civil confiscation scheme and the serious drug offender confiscation order scheme.

The Queensland CCC (2018: 6) reported that, from 1 July 2017 to 31 May 2018, $8.596m was forfeited to the state following the conclusion of 42 confiscation matters. In 2016–17, it was reported that property confiscated pursuant to the non-conviction-based and serious drug offender confiscation schemes in the CPCA Qld amounted to $8.994m, while $1.377m was collected pursuant to forfeiture orders and $79,796 pursuant to pecuniary penalty orders under the conviction-based scheme (Qld ODPP 2016: 21).

Western Australia

In Western Australia, the *Criminal Property Confiscation Act 2000* (CPCA WA) provides for the non-conviction-based confiscation of crime-used property, crime-derived property, criminal benefits, and unexplained wealth, and for the conviction-based confiscation of the property of a declared drug trafficker. The Office of the Director of Public Prosecutions for Western Australia (WA ODPP) is the responsible authority for all confiscation matters except unexplained wealth confiscation proceedings and those relating to criminal benefits. Responsibility for these matters has recently been transferred to the Western Australian Corruption and Crime Commission (WA CCC).

Proceeds of crime legislation was initially introduced into Western Australia in 1988 in the form of the *Crimes (Confiscation of Profits) Act 1988* (WA). Like the NSW equivalent, the WA Act provided for the conviction-based confiscation of property that was used in in connection with or derived from the commission of a serious offence. The Act empowered a nominated court, where a person was convicted of a serious offence, to make a forfeiture order and/or a pecuniary penalty order (s 6). It also provided for the preservation of assets through restraining orders pending confiscation proceedings (s 20). In considering whether to make a forfeiture order, the court could have regard to hardship (s 10).

However, the 1988 Act—like other Australian conviction-based regimes—was regarded as largely ineffective in combating organised crime, enabling 'certain individuals to retain dishonestly acquired personal wealth, [leaving] authorities with restricted capacity to locate or confiscate ill-gotten gains' (Barron-Sullivan 2000: 8611). These deficiencies related to the difficulty of gathering evidence to link property and/or wealth to criminal activity (Barron-Sullivan 2000: 8611) and are viewed as contributing to the burgeoning drug trade in Western Australia in the 1990s.

The Act was replaced in 2000 by the *Criminal Property Confiscation Act 2000* (CPCA WA), which commenced on 1 January 2001. The CPCA WA provides for the non-conviction-based confiscation of crime-used property, crime-derived property, criminal benefits and unexplained wealth, and for the conviction-based confiscation of the property of a declared drug trafficker. In the second reading speech on the Criminal Property Confiscation Bill 2000 (WA), the bill was touted as being 'the strongest and most effective of its kind in the world' (Barron-Sullivan 2000: 8611). This description was in no small part due to the extensive, non-conviction-based powers to confiscate unexplained wealth that the Act conferred on law enforcement agencies, the first powers of their kind in Australia.

However, these provisions have not been used. The current Minister for Environment, Mr Stephen Dawson, has observed:

> Although Western Australia was the first jurisdiction to implement what was considered to be groundbreaking legislation providing for the confiscation of unexplained wealth, those powers have seldom been used. In the 16 years since the commencement of the Criminal Property Confiscation Act, a total of 28 applications for unexplained wealth declarations have been made. However, since 2011, only one application has been made. This is because the DPP simply has not had the resources to pursue those applications. The result is that the Criminal Property Confiscation Act has not significantly benefited the fight against serious and organised crime in this state. The fight against organised crime is greatly enhanced by legislation that ensures that crime does not pay. Western Australia is armed with such legislation, but it is not being used. (2017: 4073)

In an effort to combat this underuse, in 2017, the McGowan government introduced a bill to grant the WA CCC powers to investigate, initiate, and conduct proceedings relating to unexplained wealth confiscation and to criminal benefits. The *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Act 2018* (WA) received Royal Assent on 13 July 2018.

On 16 August 2018, a private member's bill, the Misuse of Drugs Amendment Bill 2018, was introduced into the WA Legislative Council by Mr Aaron Stonehouse (2018: 4676d) to amend s 32A(1) of the *Misuse of Drugs Act 1981* (MDA WA) by inserting a provision, clause 4, that a court is not required to declare a person to be a drug trafficker if it is 'clearly unjust to do so'.

On 19 September 2018, Western Australia's Attorney General, John Quigley, announced a review of Western Australia's proceeds of crime confiscation legislation, to be conducted by former WA Chief Justice the Hon Wayne Martin AC, QC (Quigley 2018). The terms of reference for the review include considering whether the Act contains adequate safeguards to avoid 'undue hardship, unfairness or injustice to respondents and third parties'.

In 2016–17, $11.92m was recovered from all confiscation actions in Western Australia (WA ODPP 2017: 32–34). This included $6.47m recovered from drug trafficker confiscations and $5.38m recovered from crime-used or crime-derived property confiscations, leaving $70,000 from other confiscation categories.

Comparisons of confiscation regimes by jurisdiction

Each jurisdiction provides for all four of the categories of confiscation identified above. However, the categories in each jurisdiction differ in some key respects:

- whether a confiscation is conviction-based, non-conviction-based, or both;
- whether the court has discretion in the making of a restraining order or confiscation order or declaration;
- whether it is necessary to establish a connection between criminal or illegal activity and the property;
- whether the property is automatically confiscated; and
- which agency type has primary responsibility for the administration of the confiscation regime.

Table 2: Categories of confiscations in New South Wales, Queensland and Western Australia

Jurisdiction		Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
NSW	*Conviction-based*	✓	✓	✗	✓
	Non-conviction-based	✓	✓	✓	✓
	Must show connection between property and illegal activity	✓	✓	✓[a]	✓[b]
	Judicial discretion	varies per order	✗	✓	✗
	Third party protections	✓	✓	✓	✓
	Automatic confiscation	✗	✗	✗	✗
	Responsible agency	NSW ODPP and NSW CC	NSW ODPP and NSW CC	NSW CC	NSW ODPP and NSW CC

Table 2: Categories of confiscations in New South Wales, Queensland and Western Australia

Jurisdiction		Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
Qld	*Conviction-based*	✓	✓	✗	✓
	Non-conviction-based	✓	✓	✓	✗
	Must show connection between property and illegal activity	✗non-conviction-based ✓ conviction-based	✗non-conviction-based ✓ conviction-based	✓ [c]	all property from the six years prior to the application is confiscable
	Judicial discretion	✓	✓	✓	✓
	Third party protections	✓ extensive	✓ extensive	✓ extensive	✓ extensive
	Automatic confiscation	✓	✓	✓	✓[d]
	Responsible agency	Queensland ODPP	Queensland ODPP and Queensland CCC	Queensland CCC	Queensland ODPP
WA	*Conviction-based*	✗	✗	✗	✓
	Non-conviction-based	✓	✓	✓	✓
	Must show connection between property and illegal activity	✓	✓	✗	✗ all property is confiscable
	Judicial discretion	✗	✗	✗	✗
	Third party protections	✓ objections to restraint ✓ release of confiscable property	✓ objections to restraint ✓ release of confiscable property	✓ objections to restraint ✗ release of confiscable property	✓ objections to restraint
	Automatic confiscation	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed
	Responsible agency	WA ODPP	WA ODPP and WA CCC	WA ODPP and WA CCC	WA ODPP

a: Reasonable suspicion that the respondent has either engaged in serious crime related activity or has acquired property derived from the serious crime related activity of another person

b: Confiscation is limited to benefit/s derived from drug trafficking/serious crime related activity

c: Reasonable suspicion that the respondent has either engaged in serious crime related activity or has acquired property derived from the serious crime related activity of another person

d: Of restrained property of person convicted of a serious criminal offence

Criminological analysis

After the overview of the legislative history of proceeds of crime legislation in the three subject jurisdictions, this section draws on the criminological and legal literature, media reporting and available data, alongside some findings of the empirical study to examine the broader context in which the recent non-conviction-based civil legislative schemes were introduced and the underlying rationale for their introduction.

Political imperatives

A first and important driver for the introduction of the non-conviction-based civil legislative schemes was the political imperative to expand legislative powers to combat organised and drug-related crime, as can be seen from the parliamentary debates in all three jurisdictions subject to the research.

New South Wales

As indicated in the *Comparative legislative analysis* section, New South Wales was the first Australian jurisdiction to pass conviction-based proceeds of crime legislation, with the *Crimes (Confiscation of Profits) Act 1985* (NSW). During the second reading of the Crimes (Confiscation of Profits) Bill, then Attorney General Mr Terry Sheahan (1985: 9570) described it as 'a major new weapon which will be an important part of the Government's continuing assault on organized crime', designed to target 'criminals convicted of serious offences from which large profits are gained that are unlikely to be claimed by the victims of those offences'. Sheahan (1985: 9570) contended that the 'irresistible lure' of the profits made meant that existing penalties, such as long custodial sentences, were ineffective against organised and drug-related crime.

In 1989, the NSW Parliament reformed the conviction-based regime by expanding existing powers and introducing new measures against drug traffickers in the new CPCA NSW. During the second reading debate, then Attorney General Mr John Dowd (1989: 7320) touted the Confiscation of Proceeds of Crime Bill as ensuring the potential of confiscation legislation was 'fully realised' by 'providing those who are responsible for the Act's day-to-day operation with the means to carry out their responsibilities as effectively as possible'.

The bill received multi-partisan support in the parliament, with the Opposition expressing strong support for the provisions focusing on drug offences (Vaughan 1989: 8282). The Australian Democrats lauded the potential of the bill to target organised crime (Kirkby 1989: 82814). While concerns regarding the 'sweeping' nature of the new provisions were raised during debate in the Legislative Council (eg Legislative Council 1989: 8284–8286), they were outweighed by the need to target 'Mr Bigs' and the increasingly profitable drug trade (Legislative Council 1989: 8286). Dr Elisabeth Kirkby (Australian Democrats) explained (1989: 8286):

> In this case, the loss of those civil liberties is perhaps a small price to pay compared with what we are trying to achieve, which is to prevent these very vicious criminals, whom I would describe as far more vicious than many other criminals, from making enormous gains and profits from one of the worst trades of all, dealing in drugs.

In a similar vein, Mr Bryan Vaughan (Labor) (1989: 8284) argued with respect to the drug trade that '[n]othing that this Parliament can ever do will be enough to destroy this new evil empire'.

As indicated previously, in its initial form the CARA NSW was the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW). The scope of the Act was expanded in 1997 and it was renamed. The political responses to the original legislation must be understood in that context—it was far narrower in scope and more limited in its operation, compared with the current regime. This legislation was primarily driven by a 'tough on crime' policy response. In introducing the bill, then Premier, Mr Greiner (1990: 2528) observed:

> There is no doubt the proposed legislation is tough. But unless governments are willing to take a tough line on drug profits the situation described by Mr Justice Moffitt will continue to get worse. It is my intention to urge the Commonwealth and other State governments to adopt complementary legislation, so that the fight against the drug trade will be an effective national campaign.

Against this, however, Mr Greiner (1990: 2529) added:

> I want to emphasise, however, that no criminal consequences will flow from this legislation. Rather, the consequences are that the person has to justify, account for, and explain where his or her assets came from…No doubt some people will contend that this legislation is unfair—that it amounts to convicting people of offences on a lower standard of proof and without the protection of the criminal law. I have already said that this legislation is all about the accounting of profits in civil proceedings, not imposition of criminal sanctions in criminal courts…In the case of drug crime there is normally no identifiable victim with a recognised cause of action in the civil courts. In an important sense the whole community is the victim, and certainly those whose lives are destroyed by drugs are victims. What the proposed legislation will do is analogous to giving the Crown a civil right of action to recover, on behalf of the community, assets and profits obtained illicitly by people who benefit from the drug trade.

The Premier (1990: 2530–31) outlined a number of purported safeguards in, and limits to, the legislation as then drafted.

The legislation was supported by the then Opposition. According to Mr Robert Carr (Labor) (1990: 3516–17):

> Let it be argued that the provisions are draconian. Whether that adjective is appropriate or not, the provisions are nonetheless appropriate. That is why the Opposition is supporting the bill…The Premier was accurate in saying that many of the measures in the bill reflect provisions in income tax laws—for example, the reverse onus and the balance of probability…It is altogether appropriate that it also be reflected in laws directed at drug crimes…The proposed legislation is tough. Its toughness is appropriate; it is balanced by safeguards…

Mr Bryan Vaughan (1990: 4275), member of the then Opposition in the Legislative Council, asked rhetorically:

> Anyone concerned about civil liberties must be perturbed by some of the provisions in the bill. But what else can we do? The fabric of our society is threatened by drugs.

Nevertheless, some serious concern was expressed by other Members of Parliament.

Elisabeth Kirkby (Australian Democrats)

Dr Kirkby (1990: 4281), though supporting the legislation, raised many questions and concerns:

> The unusual feature about this piece of legislation is that it seeks to reverse the burden of proof. It also calls for a lower level of proof than is usually expected. To secure confiscation of assets, it will need to be shown, on the balance of probabilities only, that the person concerned is either in receipt of moneys that are the result of drug trafficking, or owns property that has been purchased with the proceeds of drug trafficking; and that is not the case in respect of the proceeds of normal criminal activity. It is also extremely unusual that, even if a person is found to be innocent of a charge, that person can be dealt with under proposed section 6(l)(b) of the Act. I believe that that provision will be considered by the majority of legal experts and academic people with a knowledge of the law as most unusual and probably very dangerous.

Jack Hallam (Australian Labor Party)

Mr Hallam (1990: 4301), then Leader of the Opposition, although supportive of the legislation, expressed similar concerns:

> I am concerned that, within this legislation, there is great potential for monumental mistakes, because of the wide-ranging powers to be given to the State Drug Crime Commission to reverse the onus of proof. …Officers in the State Drug Crime Commission could pervert justice in the course of their duties, as happened in the Grassby case…

Richard Jones (Australian Democrats)

Mr Jones (1990: 4312–13), expressing doubts as to the efficacy of any confiscation regime, added:

> In the United States of America property associated with the drug trade can be seized… The United States authorities have cracked down on drugs; it has been engaging in a war against drugs. The United States has no wars to fight, other than the war on drugs. Just as it lost the war in Vietnam, and just as Russia lost the war in Afghanistan, the United States will also lose the war on drugs. No matter how much property the authorities try to seize, no matter how much they crack down and they introduce draconian laws, corruption and organised crime will become more entrenched at the highest level. I know in my heart that this legislation will not work.

Ian Macdonald (Australian Labor Party)

Mr Macdonald (1990: 4313–15) noted:

> I support the general intent of this bill. I have no objection to the Government's scheme or proposals in relation to fighting both organised crime and the drug-related industry in this State. My objection, as it has been in relation to a number of measures that have been brought before this Chamber, is the continual attack on and diminution of civil liberties of ordinary citizens of this State. I propose to deal with only one or two provisions in this bill which I believe demonstrate clearly how zealots in this Government have overruled good sense, good judgment and wisdom in approaching the issue of drugs…The onus of proof is reversed. The test is also reduced. Clause 6 totally oversteps the mark; it is draconian in the extreme…This bill will impose penalties on people who have not been convicted. As far as I am concerned, if a person has not been convicted there is grave doubt as to whether he has been involved in actions in which certain individuals think he may have been involved…

Queensland

The CPCA Qld was not introduced into the Queensland Parliament until October 2002, long after the NSW legislation, and two years after the equivalent legislation in Western Australia. As in New South Wales, the Queensland legislation was in large part a response to political pressure and the desire of the then Queensland Government to appear 'tough on crime'. As the then Attorney-General of Queensland, Mr Rod Welford (Labor) (2002: 3859), commented on introducing the bill:

> Our government is committed to building and maintaining a safe community where law abiding citizens can have confidence that criminals are not permitted to profit from or make a living out of the proceeds of their crimes…Our government is determined to ensure crime does not pay. I commend the bill to the House.

The CPCA Qld was met with little objection from the then Opposition who supported the bill upon its introduction. Again, given both major parties generally supported the bill, criticism during its passage through the Queensland Parliament was limited.

Lawrence Springborg (National Party)

The primary criticisms made by the Opposition at the time were that the Government had acted too late in bringing the legislation to parliament:

> Whilst the Opposition is broadly supportive of this legislation, it is a little bit unfortunate that it is probably three to four years late in coming to this parliament. (Springborg 2002: 4939)

Further, there was criticism that the Government had voted down purportedly similar draft legislation introduced by the Opposition only a few weeks previously:

> The government does not give the Opposition any kudos but then introduces its own legislation a bit further down the track…Whilst there were some differences between the two bills, the differences were not all that major. There were some differences with regards to the process, but when we read it a lot of it was similar in substance and in what it sought and seeks to achieve on behalf of putting in place a civil forfeiture regime in this state. Unfortunately, because of the government's reticence, risk averseness and the dillydallying on this issue over the last few years, we have seen in this state a situation where criminal assets have gone unrecovered as a consequence of legislation which was not broad or effective enough to enable our state authorities to take the necessary action to recover such tainted assets. (Springborg 2002: 4940–41)

Finally, in response to criticisms by groups such as the Civil Liberties Council for Queensland and the Bar Association of Queensland, Mr Springborg (2002: 4942) commented:

> There is due regard to process. There is due regard to natural justice. The sky is not going to fall. If this is such a problem, if we are going to see all of these people unjustly wronged not only in Australia but also throughout the world, then where are they? Where are all of these examples of people who have been wrongly stripped of their assets because of the draconian actions of government in this country and elsewhere? Once again we are playing hypotheticals and we are taking risk averseness to the nth degree. It is not going to be a problem and it should not be a problem…

Peter Wellington (Independent)

Mr Wellington also supported the bill. With regards to the reversal of the onus of proof, Mr Wellington (2002: 4947) observed:

> I believe [the reverse onus] will prevent criminals from insulating themselves from law enforcement actions. This certainly is a forward and a very great step and I commend the minister for this initiative. I also support the minister's clear intent of taking strong action against these criminals. Let us make sure that Queensland is never seen as a safe haven for the laundering of illegal money or a home for criminals. Queensland does not want this dirty money…

And, further, that:

> The legislation is not just strong; the legislation is actually saving significant Queensland taxpayers' dollars. It is saving our Queensland police resources. It is saving our court system. It is saving solicitors. It is saving a whole range of services that are so often involved… (Wellington 2002: 4947)

Bill Flynn (One Nation)

Mr Flynn commended the overall purpose of the bill as 'quite laudable'. However, he noted that, even as a former police officer, he had significant concerns with various aspects of the legislation, particularly with reversing the onus of proof:

> First, I strike difficulty with the reversal of the onus of proof in certain circumstances…One of the things about the democratic society we live in and about our judicial system is that when we accuse somebody of something we generally have to demonstrate that they did what we accused them of. As much as we no doubt will pull into the net with impunity those who have got away with such acts for ages, there may be some situations where the law might get it wrong and there might be people who quite legitimately have not kept records or whatever and who are unable to justify the existence of such property… (Flynn 2002: 4950)

Elisa Roberts (One Nation)

Miss Roberts (2002: 4955–6) expressed concerns about the potential impact of the non-conviction civil based scheme on innocent third parties:

> …the clause has at its core a major flaw—that is, the notion that a person who has not been convicted of an offence and is therefore innocent can have his or her property forfeited. I am aware that many members of the public would gladly see the forfeiture of criminal proceeds, but one is either a criminal or not. There is no such thing as half guilty or half innocent. The fact that conviction of an offence is not a prerequisite to the confiscation of a person's property is beyond belief.…[it] takes away our basic rights and the freedom which we have in this country where we are only penalised if something is beyond reasonable doubt, where the onus is on the prosecution to prove that a person is guilty. How is a person supposed to fight a case if they have had all of their assets frozen? What are they supposed to do? Apply for legal aid and be told that they are not entitled to it? What about the wife or the child of the accused?

Elizabeth Cunningham (Independent)

In a similar vein Mrs Cunningham (2002: 4957) stated:

> …the basic tenets of justice need to be defended, and we will continue to defend them. We need the presumption of innocence to be defended. We need to know that people who are convicted of crimes have actually been identified. We need to know that people whose property is about to be confiscated will have some means of redress. This bill does not give those people redress. It does not give them justice. It does not give them a fair go.

Western Australia

Also in Western Australia, there was a strong political driver behind replacing the *Crimes (Confiscation of Profits) Act 1988* (WA) with the non-conviction-based CPCA WA. With the state election looming in February 2001 it was reported in the media:

> The West Australian Premier, Mr Richard Court, has signalled that law and order will be a key election platform for his Coalition Government as it attempts to win a third successive term…Mr Court said his Government needed to take heed of community concerns, particularly in areas like law and order, to win a third term…The Government's crackdown would include targeting the "Mr Bigs" of the drug industry and boosting front-line police numbers by 300. (Drummond 2000)

This 'tough on crime' challenge was keenly taken up by the Opposition:

> Opposition legal affairs spokesman Jim McGinty said the state government had been dragging its feet over the confiscation legislation. The move was recommended more than two years ago by a select committee into drugs and the government promised to introduce the laws a year ago. (Southwell & Burns 2000)

As both major political parties generally supported the bill, criticism in parliamentary debate was surprisingly limited to a select few members, generally members of minority parties and independents.

Jim McGinty (Labor Party)

As the primary spokesperson for the Opposition (Labor) on this bill, Mr McGinty was not necessarily critical of the bill's provisions in and of themselves but of the ability of the WA Government to appropriately administer the bill if passed. However, Mr McGinty did identify six areas in which the legislation challenged accepted criminal justice norms. These were: retrospectivity of operation, reversal of the onus of proof, breadth of application, impact on innocent parties, limited judicial discretion, and the fact that it was not conviction-based. He noted:

> This Bill contains a number of provisions that those of us who are interested in the rule of law might find repugnant at first blush. (2000a: 523[1])

Regardless, he also called for amendments to be made to toughen up the bill in relation to legal professional privilege and disclosure:

> The one criticism I make of the legislation is that it is not tough enough in dealing with the architects of the many schemes designed to promote criminality in this State. I urge the Government to look at an amendment along those lines. (2000b: 539[5])

Robert Wiese (National Party)

In addition to addressing the issues raised by Mr McGinty outlined above, Mr Wiese (2000a: 649–650[6]-[7]) noted that:

> As a person from a farming background, I found myself in the extraordinary situation of having to stand up for what I believe to be basic legal principles that have been part of the legislative framework of this State and of Australia for a long time…I have found myself battling alone for things that I believe are basic to our system of law. I am surprised and amazed that, as a person with no legal background, I am the one standing up for a range of things that I believe most lawyers would regard as sacrosanct in our system of law.

Mr Wiese was particularly concerned that the bill did not adequately recognise victims of crime or provide for their compensation. He introduced amendments to this effect. Mr Wiese (2000b: 2809[1]) was the primary critic of the bill in the Legislative Assembly, particularly during the consideration in detail stage of the debate:

> These questions should be of enormous concern to every member of this Parliament. I have not attempted to amend many of these provisions because they form the cornerstones of the Bill. To attempt to amend them would be to tear the legislation apart, and that is not practicable. I hope some members have enough gumption and respect for the precedent of law and the protections that the legislation of this country has given its citizens for centuries to reject this Bill. We should not throw those concepts out the door and set a precedent by passing this legislation. I guarantee that it will be used to enact other legislation that abandons these longstanding principles of law that are the cornerstones of our legislative system.

Phillip Pendal (Independent)

Mr Pendal (2000: 650[7]) agreed that the bill could not be amended:

> The member for Wagin is on the right track, but I am inclined to think the Bill is unamendable. It is essentially an obnoxious and evil piece of legislation which tramples upon a host of rights that are entrenched in the statute books not for the protection of the Mr Bigs and the crooks, but for the protection of ordinary Western Australians who will fall foul of this legislation.

Helen Hodgson (Australian Democrats)

Ms Hodgson (2000: 3527[2]) expressed concern with non-conviction-based confiscation:

> Our problem arises when one goes beyond that to a system that does not require conviction. Some of the issues in the Bill of the infringements of people's rights and the reversals of conventions and conditions of the law, of not only this State but this country, go beyond what is acceptable.

Giz Watson (Greens)

Ms Watson (2000: 3530[5]) expressed concern with the provisions providing for the reversal of the onus of proof, the civil standard of proof, and the limited discretion of the courts:

> Specific concerns of the Greens with the Bill are, firstly, the reversal of the onus of proof. Prior to being convicted, people will have to prove that they have come by a particular asset lawfully…Another matter of concern is that the standard of proof required by a person charged is the balance of probabilities; that is, a person must prove on the balance of probabilities that the asset was lawfully acquired. I acknowledge that that is a lesser standard of proof than beyond reasonable doubt. However, the fundamental issue of reversing the onus of proof proposed by the Bill is of great concern to the Greens. Members of the legal profession have raised this issue with me as they believe that this legislation will turn on its head some very fundamental principles of law. It has been noted that the Bill will remove the discretion of the courts. We have seen a lot of legislation introduced that is aimed at doing precisely that. I feel that it is a fundamental undermining of the separation of powers and the role of the court system in our administration of law.

In conclusion, then, in all three jurisdictions there was a strong political drive for the introduction of proceeds of crime legislation to be 'tough on crime' and, more particularly, to address serious drug-related and organised crime by taking away the profits of such crime. The main criticism by the Opposition in both Western Australia and Queensland was that the legislation was being introduced too late and/or was not tough enough. Nevertheless, some criticisms were noted in all three jurisdictions, which mainly related to aspects of the legislation that also emerged as concerns in the interviews undertaken for this report. These aspects are:

- the reach of the legislation;
- the overturning of fundamental principles of law;
- the interference with the separation of powers by taking away judicial discretion; and
- the civil nature of what are fundamentally criminal sanctions.

It must be emphasised that, despite these criticisms and despite the legislation being referred to as 'draconian', in all three jurisdictions the legislation enjoyed bipartisan support. This is a clear reflection of the law and order politics which have dominated Australian political debate since the 1980s in a number of jurisdictions (see Skead & Murray 2015; Tubex et al. 2015).

Addressing increasing crime rates

The parliamentary debates identified a second important justification for the introduction of non-conviction-based civil proceeds of crime legislation—that is, addressing increasing rates of serious drug trafficking and organised crime.

New South Wales

The project team was unable to locate drug-related crime data for New South Wales before 1990, and so relied upon other available evidence of the increasing rates of serious drug trafficking and organised crime before the NSW legislation was introduced.

The NSW Government justified the introduction of the Drug Trafficking (Civil Proceedings) Bill 1990, now the CARA NSW, by referring to highly publicised organised crime activities, particularly drug trafficking. For instance, during the second reading debate on the bill in the Legislative Assembly Premier Greiner (1990: 2527) referred to four royal commission inquiries into organised crime and illicit drugs:

- the Australian Royal Commission of Inquiry into Drugs (Williams commission);
- the Royal Commission of Inquiry into Drug Trafficking (Stewart commission);
- the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (Costigan commission); and
- the Royal Commission to inquire in respect of certain matters relating to allegations of organised crime in clubs (Moffitt commission).

All four inquiries recommended the adoption of law enforcement measures to target the profits of organised crime and of drug trafficking in particular. To this end, several of these royal commissions urged governments to introduce tougher confiscation schemes.

The NSW Government further justified the introduction of civil confiscation legislation by reference to certain highly publicised underworld figures identified by the Williams commission and the Costigan commission—including Barry Richard Bull and Richard Bruce 'Snapper' Cornwell. Also discussed during the parliamentary debates were the mafia-sanctioned murder of Liberal Party candidate Donald Mackay and the subsequent escape of mafia boss Robert Trimbole; the murder of Australian Federal Police Assistant Commissioner Colin Winchester; and the recent police crackdown on marijuana production and supply.

From the above we can conclude that, even if there was not necessarily an increase in the prevalence of drug-related and organised crime, there was certainly a legitimate concern about the need to address serious drug-related and organised crime and those who control it.

Queensland

For Queensland, the project team relied on the data published on the Queensland Police Service website that provides reported offence rates per 100,000 persons, recorded monthly and dating back to 1998 (Table 3).

Table 3: Reported drug trafficking offences per 100,000 people per month and drug production offences in Queensland (1998–2008)

Year	Reported drug trafficking offences	Reported drug production offences
1998	125	2,240
1999	147	1,847
2000	132	1,945
2001	91	1,938
2002	86	1,946
2003	148	3,180
2004	175	1,832
2005	216	1,706
2006	257	1,468
2007	273	1,480
2008	278	1,511

The available reported crime data does not demonstrate a significant increase in reported drug trafficking offences in the four years before the introduction of the CPCA Qld in 2002. Interestingly, the 2001 and 2002 figures show the lowest recorded trafficking reports. However, after the introduction of the Act there is a significant increase. However, it is difficult to determine if this is related to an increase in the prevalence of drug dealing and trafficking or to increased police activity in this area.

Similarly, reports of drug production offences appear stable from 1998 to 2002. A spike in reported production offences can be seen in 2003, with reports falling back within the normal range in 2004.

Western Australia

To verify the evidence basis of this claim for Western Australia, regard was had to the *Crime and justice statistics for Western Australia* provided by the UWA Crime Research Centre, with data on drug-related recorded offences available from 1998 to 2006. Table 4 represents the percentage of drug-related criminal offences that were reported to WA Police and subsequently recorded, and the percentage of these offences that relate to dealing and trafficking in illicit drugs.

Table 4: Drug-related offences and drug dealing and trafficking offences as a proportion of all reported offences in Western Australia (1994–2006)

Year	Offences recorded in Offence Information System that relate to drugs (%)	Drug offences that relate to dealing and trafficking %(*n*)
1994	4.2	0.2 (527 reports)
1995	3.9	0.2 (523 reports)
1996	5.0	0.2 (505 reports)
1997	5.0	0.18 (688 reports)
1998	4.9	4.8 (723 reports)
1999	5.2	4.8 (725 reports)
2000	5.0	4.6 (722 reports)
2001	5.0	5.8 (929 reports)
2002	4.9	5.6 (890 reports)
2003	4.5	6.8 (955 reports)
2004	4.7	10.7 (1,370 reports)
2005	5.9	9.9 (1,576 reports)
2006	5.8	9 (1,566 reports)

As can be seen, the percentage of drug-related offences in the six years before the introduction of the CPCA WA in 2000 constitutes a small proportion of the overall reported/recorded crime (below 5%) and it has remained relatively stable since, although it increased in 2005 and 2006. However, the percentage and number of reports of drug dealing and drug trafficking offences did increase significantly in 1998 before the introduction of the CPCA WA, and so it appears there was a legitimate concern regarding this crime trend and the need for it to be addressed. Interestingly, the percentage and number of reports continued to increase after the introduction of the legislation. As with Queensland, from this data it cannot be determined if this is related to an increase in the prevalence of drug dealing and trafficking or to increased police activity in this area.

As stated by one of the WA interviewees:

> …it's an impossible question because there are too many factors that impact. For example, if the Police decide to put resources into a particular activity like burglaries, then you'll see a drop in burglaries. If Police decide that they're going to concentrate on confiscation work, then you'll see more money being turned over and that's obviously taking money out of the criminal system. Confiscation has a role to play. What the impact of that is very difficult to ascertain…

In conclusion, in both Western Australia and New South Wales there was a legitimate concern related to serious drug-related and organised crime and the need for broader legislative means to deal with this. However, evidence to support such concerns could not be found for Queensland.

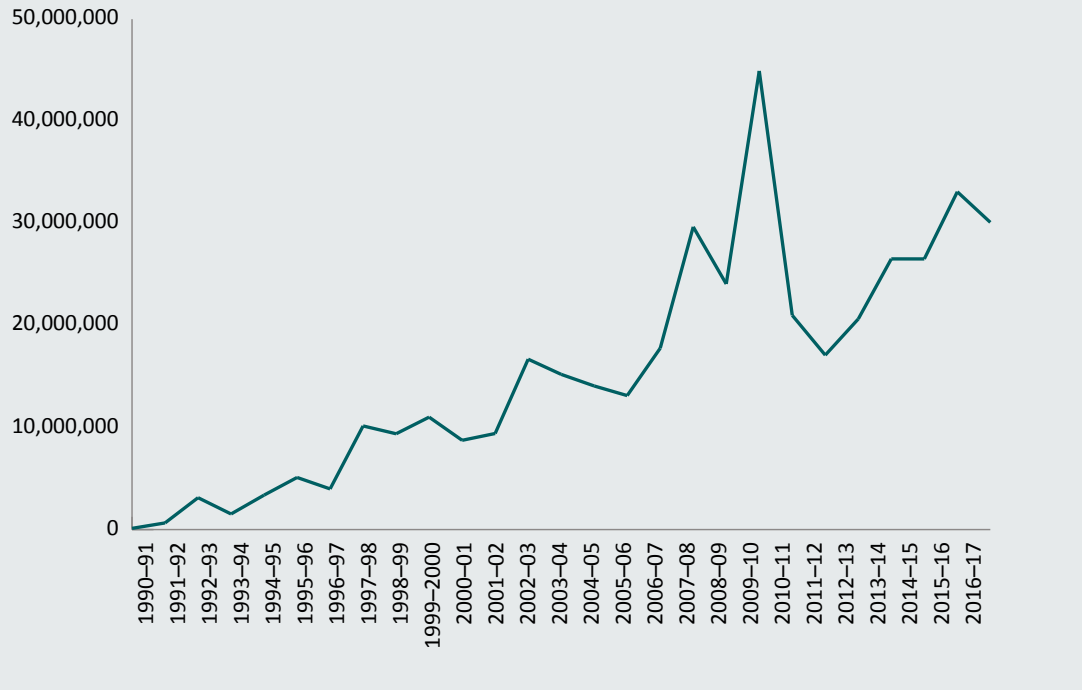
Revenue raising

Raising revenue was also referred to as a potential driver for the introduction of legislation confiscating the proceeds of crime, and this was found to be the case in all three jurisdictions examined.

New South Wales

In New South Wales, the amounts recovered under the CARA NSW are published in the annual reports of the NSW CC. Figure 1 shows the total amount confiscated each year since the CARA NSW came into force.

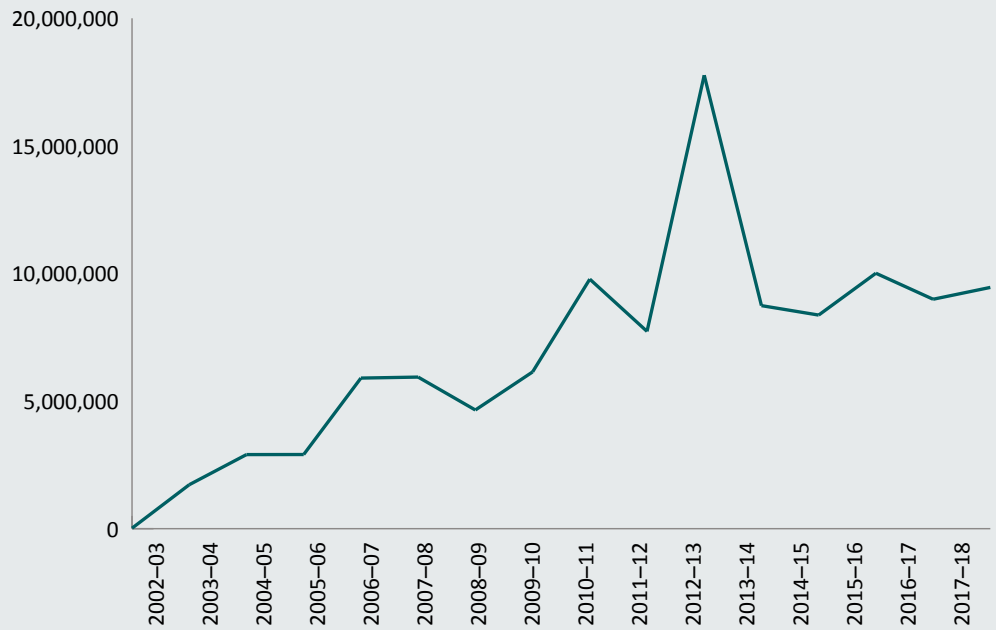
Figure 1: Total amount confiscated in New South Wales under CARA NSW (1990–2017) ($)



Queensland

In Queensland, the amounts recovered under the CPCA Qld are reported in the annual reports of the Queensland CCC and the Queensland ODPP. Figure 2 shows the total amount confiscated each year since the CPCA Qld came into force.

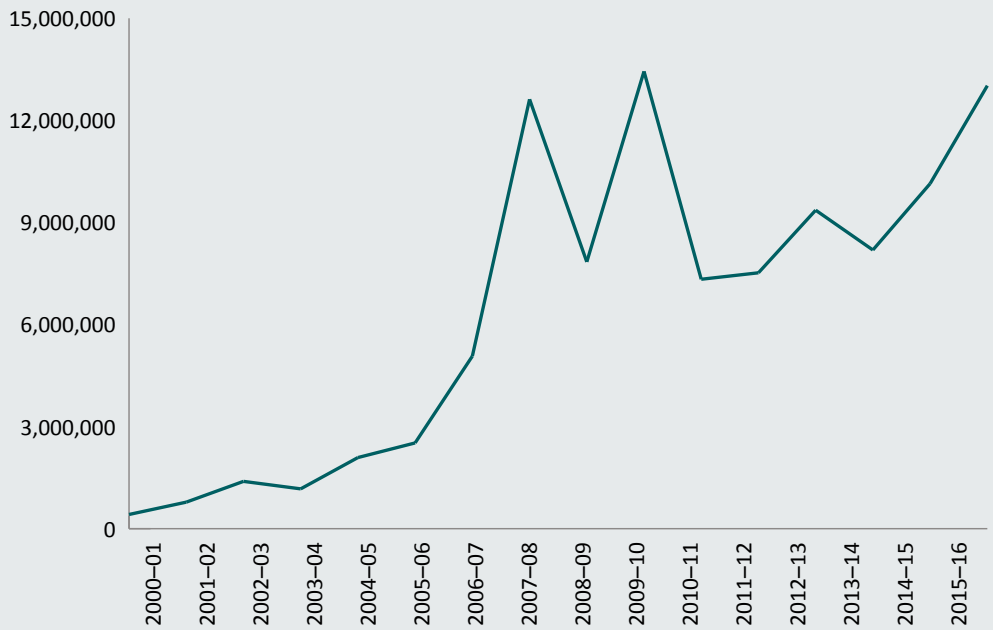
Figure 2: Total amount confiscated in Queensland under CPCA Qld (2002–2016) ($)



Western Australia

In Western Australia, the annual reports of the WA ODPP provide details on the number and value of confiscations under the CPCA WA. Figure 3 shows the total amount confiscated each year since the CPCA WA came into force.

Figure 3: Total amount confiscated in Western Australia under CPCA WA (2000–2016) ($)



From these figures, it is clear that the amounts confiscated under the schemes in all three jurisdictions have increased steadily since their introduction with spikes in some years. The NSW scheme has been by far the most successful in this regard, making good the political promise that the legislation would raise additional revenue for the state. However, as noted by some interviewees, the amount recovered is only a fraction of the total serious drug-related and organised crime economy, the cost of which has been estimated in 2015 as being $36b (Australian Crime Commission 2015a, 2015b).

Deterring serious drug-related and organised crime through incapacitation

A final driver behind the introduction of far-reaching civil confiscation legislation was to deter serious drug-related and organised crime by targeting and incapacitating the so-called ‘Mr Bigs’. As was reported in the WA media on the introduction of the CPCA WA:

> WA Director of Public Prosecutions Robert Cock QC, who helped draft the WA laws, said last year they would provide a new deterrent and help crack down on the Mr Bigs of the illicit drug trade who often amassed great wealth while escaping prosecution. (Southwell & Burns 2000)

And, further:

> The Mr Bigs of the WA drug world are getting away with it and the outlook for cutting down the illicit trade is bleak, according to the State's top judge. Acting Chief Justice Geoffrey Kennedy told a drug action conference at the weekend that big-time drug dealers rarely came before WA courts. Only the lower-level dealers and addicts were seen. "At this stage one can only be pessimistic about the prospects of eliminating trading in drugs," Justice Kennedy said. Director of Public Prosecutions Robert Cock QC said large-scale trafficking was unaffected by prosecutions. "I can confirm that most people charged would not fall into the category of Mr Bigs," Mr Cock said. Mr Cock said authorities should fight the drug menace with new tools such as the Profits of Crime Bill. The legislation introduced in State Parliament last month reverses the legal onus of proof so that suspects must prove they got their wealth through lawful means. WA Police Union president Michael Dean blamed recent problems in the drug squad for the poor results. He said well-known Perth drug barons had mounted a concerted campaign of complaints against the squad. (Reed 2000)

However, there was a consensus across interviewees from all three jurisdictions that the legislation had not been successful in targeting the 'Mr Bigs', and that it was primarily lower-level criminals that had been caught by the legislation. As various interviewees observed:

> It seems to me not one Mr Big has yet been caught. The Mr Bigs don't get caught because they are so smart—the street dealers are simple and naive and take too many risks.
>
> …I think there's also a risk that in practice, it is in fact used or can in fact be used to target the easiest targets, the low-hanging fruit. So complicated investigations, in relation to Mr Bigs, consume a lot of resources and require a lot of commitment and effort on the part of police investigators and other financial investigators and the DPP, because all agencies these days are cash-strapped. Whilst there may be good intentions when the legislation first comes in, I think over time, there's an increasing risk that it'll be used against easy targets.
>
> I certainly haven't seen any cases involving people who you could describe as being a Mr Big or a kingpin or anybody at the top of the pyramid. If indeed it was intended to uncover those individuals, I don't think it's anywhere near that goal—near achieving that goal. There have been some major confiscations proceedings and I'm aware of several involving many millions of dollars but they have been high-wealth individuals; they haven't been people who are the head of some sort of organised network…but I've not seen any cases involving people who are the head of any large networks or even medium-sized networks.

Therefore, it is questionable whether the legislation has achieved its objective of deterring serious drug-related and organised crime. Several interviewees expressed some doubt:

> Most criminals are more worried about whether they are caught or not, not whether or not they lose their property when they are caught. So [I have] serious concerns on whether or not it's acting as an effective deterrent.

> I heard a judge once, judge who's now retired, when the prosecutor was calling for deterrents—we need to send a message—he said, "I just wanna stop you there." He says, "Have a look at the back of the court. How many people from the press are here?" "None, Your Honour." "Who's gonna hear about this? Where's the deterrent if I get this bloke a big whack like you're asking me to do? Where's the deterrent other than to him?" "Well, people will hear from it. His family will probably." Pretty bad rope line that you're relying on.

Some interviewees did, however, recognise that the legislation had had some impact on behaviour, particularly in relation to the quantity of a drug that would trigger a confiscation:

> …it's a buyer beware situation, if you engage in criminal activities, you know what you are risking, and you should know, based on the regular reporting of the 'draconian' consequences of this legislation in the media. Certainty about these consequences is what is making this legislation effective.

> I think the most sophisticated drug dealers are aware of the impact of the 28 grams in cases. Anecdotally, that is sort of brought out by the fact that quite often you will see the quantities involved individually will be 27.8 grams or something like that.

Regardless, many legal practitioners commented that their clients were caught by surprise, not being aware of the far-reaching impact of the legislation on their property rights:

> The general view is out there amongst the drug populace…is that if they catch you with something that you've acquired as a result of your dealing or your lifestyle that's been funded by that, then you could potentially lose it. They don't know that you will lose everything that you've ever had irrespective of how it was gained. It's just not known.

> They're stunned. They're not surprised that their property is frozen. That doesn't surprise them. What stuns them is when I say to them, "If you're convicted, everything you own, everything you control and everything you have ever given away is gone," and they go, 'I know, but these assets have got nothing to do with crime'.

> Yeah, I would say most of them understood the concept. We had some prior awareness of the concept of confiscations legislation and that property can be seized and taken, and then you then have to show that it's legitimate. Were they other than superficially aware? I suspect not and that may be because, for a time, the confiscations agencies around the country have been fairly active in achieving settlements rather than litigating to an outcome. And so quite often, substantial confiscation proceedings resolve without achieving a judgement that generates publicity, and that then acts as a deterrent.

It is clear that, while it may have had some effect on drug-related criminal behaviour, non-conviction-based civil confiscation legislation in the three jurisdictions examined has not achieved its objective of capturing high-level criminals involved in serious drug-related and organised crime. Rather, it has primarily affected low-level offenders, many of who are unaware of the potentially far-reaching consequences of the confiscation. In this respect, the legislation has not had a significant deterrent effect.

Conclusions of criminological analysis

The introduction of a non-conviction-based civil confiscation scheme in New South Wales, Queensland and Western Australia was in each case underpinned by a strong, political 'tough on crime' imperative. It is apparent from the parliamentary debates and the absence of opposition to the introduction of the legislation that, although well-understood, the need for a robust stand on law and order outweighed the concerns that the legislation flouted fundamental principles of law and might have detrimental effects.

There is evidence that, before the introduction of the legislation in each state, serious drug-related crime was increasing, based on the information available for New South Wales and Western Australia. Queensland on the other hand, mainly seemed to follow the lead of the other jurisdictions. The legislation has achieved some demonstrated success in stripping those involved in criminal activity of their ill-gotten gains, thereby diminishing the economic base of criminal activity. In doing so, it has resulted in increased state revenue, with the value of confiscations growing steadily, albeit negligibly when compared with the overall cost of organised and drug-related crime in Australia. It is clear that, despite its reach, the legislation has not been effective in targeting high-level offenders. Instead, it has had an impact on less sophisticated, low-level drug users and traffickers and, more concerningly, on innocent third parties, as will be illustrated in the empirical findings.

Findings of the empirical study

These findings reflect the views of 40 interviewees on the broad themes discussed in the interviews. As noted in the Methodology section, the interviews were semi-structured, led by some general questions but giving interviewees the opportunity to provide further comments based on their experiences. The findings are presented by jurisdiction, according to the broad themes raised in the interviews. Interviewees were also categorised by reference to the nature of their interest in and experience with confiscation legislation. The interviewees are listed by category and by jurisdiction in Table B1 in *Appendix B: Empirical study*.

New South Wales

In New South Wales, six people were interviewed. While limited in number, the interviewees covered a broad range of the stakeholders that are involved in each stage of the confiscation process, including legal practitioners, police, the NSW ODPP, and the NSW CC. However, the project team acknowledge that the views of these individuals may not be broadly representative of all those working in the area.

Interviewees generally considered that the NSW dual-statute system works well, with NSW CC administering the CARA NSW and the NSW ODPP administering the CPCA NSW. Of note, it was reported that the NSW CC settles 98 per cent of matters. This success in negotiating settlements was attributed to the fact that investigations are conducted by forensic accountants, and the cost of settling is often far less than the cost of litigating.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

The main drivers for the introduction of confiscation legislation in New South Wales were identified in the reports of royal commissions and in the emergent understanding globally that removing the benefits of crime through confiscation is an effective way to disrupt and dismantle organised and serious crime. It was said there was a general view that the New South Wales civil confiscation scheme, introduced in 1990, was a great improvement and more effective than the previous conviction-based scheme. Initially, however, there were criticisms that this non-conviction-based scheme operated as a 'tax on criminals'.

One of the barristers interviewed was of the opinion that, while drug offenders were the initial target of the legislation, the subsequent broadening of its reach captured a whole range of other offenders. This interviewee referred to the popularity of law enforcement legislation for politicians who then rely on law enforcement officers to be ethical and responsible in the way they enforce the legislation.

It was mentioned by several interviewees that the political appetite for robust confiscation legislation in New South Wales was relatively weak compared with Western Australia. Examples given were the relatively late introduction of non-conviction-based crime-used property confiscation in New South Wales (2016) compared with Western Australia (2000), and the hesitation in New South Wales about introducing a civil standard of proof into the legislation. In the view of these individuals, another feature of the WA legislation that would not be accepted by the Parliament of New South Wales is the removal of judicial discretion from the confiscation process.

Q2. Who, in your experience, is affected by this legislation?

NSW interviewees agreed that the legislation does not capture the 'Mr Bigs' of organised crime, who tend to distance themselves from day-to-day criminal activities. The NSW police interviewee preferred the WA unexplained wealth scheme, which does not require a link to any specified criminal activity. It was considered unnecessarily burdensome to have to prove a link between a particular asset and specified criminal activity, particularly because property is often derived from a mix of legal and illegal activity.

Q3. Do you think this legislation is effective in achieving its aims?

The interviewees directly involved in the implementation of confiscation legislation were generally positive about its effectiveness.

While the CARA NSW is largely regarded as effective, some interviewees noted that it would be incorrect to describe it as successful given that only a very small percentage of the overall value of the NSW criminal economy is confiscated each year. However, confiscation legislation was still considered a useful way to discourage and dismantle organised crime, with the revenue it generates for the state being a welcome windfall. Generally, it was thought that more resources are required for the legislation to be successful.

The CPCA NSW was considered to be effective in achieving its aims. Third parties are adequately protected under the scheme, as there is judicial discretion as to whether to confiscate property or not. Additionally, the impact of the confiscation is less severe because the Act applies to the confiscation of less valuable property.

Interviewees were also of the shared view that the legislation is having a deterrent effect, with some general public awareness of its operation. However, this also means that it is important to move quickly on confiscations before property is disposed of.

Q4. What areas of the legislation, if any, need to be reformed?

The project team raised particular areas of concern with the legislation and invited further comments from interviewees on any other areas for improvement.

Non-conviction-based civil proceedings

The addition of the non-conviction-based civil confiscation scheme in the CARA NSW to the conviction-based scheme in the CPCA NSW was viewed positively.

However, one barrister disagreed with the lower standard of proof required by the CARA NSW—that is, a reasonable ground to suspect or on the balance of probabilities.

Lack of judicial discretion

One interviewee from a government agency expressed support for the removal of judicial discretion, as is the case in the WA regime. However, the interviewee did acknowledge the need for some discretion in exceptional individual circumstances.

The legal practitioners expressed strong support for a guided judicial discretion in the confiscation process, based on public interest, particularly in relation to crime-used confiscations where the risk of disproportionate and aberrant outcomes abound. One interviewee considered this to be an important restraint on executive decision-making.

Impact on (innocent) third parties

From the NSW CC interviewee's point of view, the third party protections in the CARA NSW are adequate, striking a good balance between achieving the objectives of the legislation and operating fairly.

One practitioner disagreed with this view, expressing concern about the impact of the legislation on innocent family members. Further, they observed that the legal costs of opposing restraint and confiscation can be prohibitive because of the civil nature of confiscation proceedings.

Further suggestions for improvement of the CARA NSW and the CPCA NSW

One interviewee suggested that the effectiveness of both statutes would be bolstered by the use of telephonic interception in investigations—although offenders are unlikely to disclose criminal activities over the phone, they do tend to discuss their property holdings and financial affairs.

The introduction of a uniform national scheme for recovering unexplained wealth received some support from interviewees from law enforcement agencies.

Queensland

In Queensland, six people were interviewed from the legal profession, the judiciary, the Queensland CCC and academia. Once again, the project team acknowledge that the interviewees' views may not be broadly representative of all those working in the area.

As in New South Wales, the responsibility for administration of the confiscation regime is divided between two entities. The Queensland ODPP is the responsible authority for the conviction-based scheme, and the Queensland CCC is responsible for the non-conviction-based scheme. A good working relationship between the Queensland ODPP, the Queensland CCC, and the Queensland Police Service (Queensland Police) was seen as critical to the effective operation of the scheme. As in New South Wales, the majority of cases handled by the Queensland CCC are settled before trial.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

Only one interviewee expressed a view on the rationale for introducing the CPCA Qld. In his view, the new non-conviction-based scheme was introduced into Queensland in 2002 because the existing conviction-based scheme was proving ineffective in capturing the ill-gotten gains of those involved in criminal activity.

Q2. Who, in your experience, is affected by this legislation?

Consistent with the views of interviewees in New South Wales and Western Australia, the prevailing view of Queensland interviewees was that the legislation has not been successful in capturing the ill-gotten gains of the 'kingpins' of drug-related and organised crime operating in that state. It was, however, seen as successful in targeting a number of 'high-wealth individuals' who had accumulated significant prosperity, with several confiscation cases involving millions of dollars.

One barrister interviewee stated that in his experience his clients were only 'superficially aware' of the possible consequences of the legislation. As noted above, one of the reasons for this is that most confiscation matters are settled out of court and therefore not reported in the media. This view was reinforced by a judge interviewee who indicated that, for the legislation to act as a deterrent, confiscation orders must be publicised so that people are aware of how the legislation operates.

Q3. Do you think this legislation is effective in achieving its aims?

In general, the comments on the effectiveness of the Queensland legislation were positive, but some problematic aspects were raised.

According to the Queensland CCC interviewees, the current structure of the CPCA Qld is unduly complex in the way it has brought three aspects of confiscation together in one statute. They stated it was in need of a full review and rationalisation. Nevertheless, they considered that all three aspects of the CPCA Qld have their place and have, to some extent, operated successfully in removing the financial benefits of crime and preventing them from being reinvested in further criminal activity—although it is considered not to be what one might call 'a big money spinner'.

Q4. What areas of the legislation, if any, need to be reformed?

Non-conviction-based civil proceedings

The barrister interviewee commented that one of the problems with a civil scheme is the burden that is placed on defendants to show that their assets are completely free from taint. Not all people are careful and organised in keeping their financial records, and so may not be able to demonstrate the legitimate source of their property. This is particularly the case for those who might be employed on a 'cash for services rendered basis'.

The barrister commented further that many practitioners involved in confiscation matters are criminal lawyers with limited understanding and experience of civil matters. As a consequence, it takes them longer to familiarise themselves with the legislation and the required civil procedures, which in turn increases costs and delays for their clients.

Expressing a more jurisprudential view, the judge interviewee considered that the purpose of confiscation legislation is to act as a deterrent, and that this is more appropriately achieved through civil proceedings, as criminal proceedings have a number of other aims including punishment, rehabilitation and retribution.

Lack of judicial discretion

In the barrister's view, judicial discretion is essential to allow for adjustment in exceptional circumstances. He considered that legislative drafting is at best an attempt to capture all the possible scenarios that can arise and that, as this is an impossible task, a public interest judicial discretion is needed.

By contrast, interviewees from the Queensland CCC were concerned that the public interest discretion in chapter 2A of the CPCA Qld creates too much uncertainty. They preferred the relative clarity of the hardship provision.

Impact on (innocent) third parties

The Queensland practitioner interviewee outlined the potential for the CPCA Qld to operate unfairly on innocent third parties—mainly family members of the offender. However, according to the judge, the inclusion of a judicial discretion in the legislation adequately addresses this concern.

Further suggestions for improvement of the CPCA Qld

There were no further suggestions for improving the CPCA Qld in the interviews conducted.

Western Australia

Twenty-six of the interviews were conducted in Western Australia, covering a broad range of stakeholders. While there was consensus between the interviewees on many of the issues raised in the interviews, the dissenting views are highlighted in the discussion below. Data obtained from the interviews with the five members of the public are collated in the WA case studies section.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

Political imperative

Interviewees directly involved in the introduction of the CPCA WA stated that there was a strong political driver behind its introduction. The Criminal Property Confiscation Bill 2000 (WA) was initially introduced into the WA Parliament by the then Liberal Attorney General, in what was described as a 'tough on crime pre-election bid'. As the Liberal Party was seeking a third term in office, the legislation was seen as a powerful 'vote-winning' tool. The electoral appeal stemmed from the claim that the legislation would combat organised and drug-related crime by targeting the so-called 'Mr Bigs' that were beyond the reach of the conviction-based confiscation legislation in force in Western Australia at the time. In response, the Labor Party felt politically compelled to endorse this 'law and order' initiative. When the election was called in February 2001, the CPCA WA had been passed but not yet proclaimed. The Labor Party won the election and implemented the legislation.

Addressing crime

Within the context described above, interviewees saw the main focus of the legislation as the targeting of high-level drug-related and organised crime. There was concern that drug trafficking was getting out of hand and required a stronger legislative reaction to serve as a deterrent. Interviewees also spoke of another underlying justification: that criminals should not profit from their illegal activity—'crime doesn't pay'. To overcome the normal evidentiary barriers to securing a criminal conviction in order to achieve a confiscation, the legislation introduced non-conviction-based confiscation.

Raising revenue

In addition, the fact that the WA Government could raise revenue through civil confiscation was said to be a welcome addition to the state budget, particularly given that this revenue was seen as potentially benefiting the community by being used to compensate victims and to deliver drug rehabilitation programs.

Dissatisfaction with judicial discretion

Another driver for the introduction of the CPCA WA was said to be political dissatisfaction with decisions under Western Australia's first confiscation legislation, particularly those related to sex offences. Two particular developments were noted. First, decisions determining that a property at which an offence was committed was not crime-used property, and, second, decisions determining that property should not be subject to confiscation where third parties might be affected. The legislation tightened the existing provisions related to crime-used property confiscations, including by removing judicial discretion.

Public opinion

Underlying all the above is the perception among interviewees that, in general, Western Australia is a punitive state in which law and order debates flourish and are electorally attractive. Several interviewees mentioned the general public view that sentencing was not severe enough and that an additional form of punishment was desirable.

Q2. Who, in your experience, is affected by this legislation?

Across the WA interviewees, there was a shared view that, for various reasons, no real 'Mr Bigs' had been caught by confiscation legislation. This was because high-end 'criminal bosses' are streetwise and know how to place themselves beyond the reach of the legislation—for instance, they do not have any significant assets in their own name, and enforcement agencies do not have the expertise or resources to track them down.

People affected by confiscation legislation were described as falling into two broad categories. First, there are low-profile drug dealers, mainly dealing to support their own drug habits—referred to as 'low-hanging fruit'—who are easy to catch but without significant confiscable assets. Second, there are the middlemen, who live a comfortable life but are not particularly well-off. The latter were considered more difficult to target because of the complexities of their financial arrangements. The interviewees considered that, in practice, the low-range offenders are therefore more commonly affected by confiscation.

Q3. Do you think this legislation is effective in achieving its aims?

Some interviewees, mainly those from the prosecutorial services, considered the legislation had achieved some important objectives. Some held the view that, while the legislation did not eradicate drug trafficking and organised crime, it has altered offender behaviour and has made deriving profit out of crime more difficult. One politician interviewee considered that most aspects of the legislation had been effective but the unexplained wealth provisions had not, and that greater investigative powers were required for this form of confiscation to be effective.

In a more general sense, most of the interviewees were, in principle, satisfied with the CPCA WA. However, they regarded the way the Act has been implemented and the disproportionate, arbitrary and disparate effects it can have as problematic. There is a view that the legislation would be acceptable if it was limited to confiscating the actual proceeds of crime. However, in its current form, the legislation allows for lawfully acquired property to be confiscated in certain circumstances.

Views on the deterrent effect of the legislation were mixed and are therefore presented by category of interviewees. Most legal practitioners indicated that their clients were not aware of the far-reaching impact of the CPCA WA, particularly in relation to declared drug trafficker and crime-used property confiscations. They therefore did not perceive the legislation as having a deterrent or preventative effect. In their experience, most clients were aware that they risked losing the proceeds of their illegal drug activity, but not that they stood to lose all their assets. These interviewees felt that, if deterrence was the aim of the legislation, its full reach should be more explicitly publicised. One interviewee referred to the lack of evidence in the criminological literature that more severe punishment has any deterrent effect at all. Another interviewee said that the risk of being caught is a more effective deterrent than the punishment that might ensue. Further, one interviewee commented that, when people get involved in taking drugs, 'rationality is the first thing that goes out of the window' and this negates any deterrent effect the risk of confiscation may have.

One judge stated that the data clearly proves that there is no deterrent effect because drug cases have kept increasing. However, increased public awareness of the legislation was noted. One judge indicated that some drug dealers try to circumvent confiscation by having just under the defined amount of a drug that would mean them being declared a drug trafficker.

By contrast, an interviewee from government stated that people engaging in criminal activity are—or at least should be—aware of the risks they are taking, particularly as the 'draconian nature' of the legislation is regularly reported on in the media.

Q4. What areas of the legislation, if any, need to be reformed?

Most interviewees had suggestions for improvements of the legislation. Only one interviewee was of the view that no adjustments were required. The interview questions highlighted some particular areas of concern that have been the subject of academic criticism, while other areas of concern emerged from the interviews. All are discussed below, and some are further developed in the *Discussion and recommendations* section of this report.

Non-conviction-based confiscation

Regardless of the category of interviewee, there was broad support for a non-conviction-based scheme. This was for several reasons. First, it is often very difficult to secure the conviction of high-end drug traffickers and those involved in organised crime. Second, there is a need to act swiftly in restraining property before it is concealed. Third, there are significant challenges in linking assets to specific criminal activity.

Executive discretion and the collaboration between WA Police and the WA ODPP

In responding to questions about the exercise of executive discretion and how the legislation was operationalised in practice, interviewees indicated that this had evolved over time. Initially, it seems there was a lack of clarity as to who was to take primary responsibility for initiating confiscation proceedings. Several interviewees expressed the view that initially the WA ODPP did not consider it had a discretion in taking action under the legislation, and either followed the lead taken by WA Police or consulted with WA Police as to whether to institute proceedings. More recently, it seems to be clearer where the discretion sits, with the WA ODPP, as an independent prosecutorial agency, exercising discretion on whether to proceed to confiscation or not.

Some interviewees felt uncomfortable with the WA ODPP exercising this discretion and leaving the court to merely 'rubber-stamp' the decision if all the administrative boxes are ticked. Of specific concern in this regard were the possible perverse incentives that may influence decision-making, such as meeting key performance indicators.

Lack of judicial discretion

There were strongly opposing views on this aspect of the CPCA WA.

From the prosecutorial and one politician's point of view, certainty and predictability are paramount, and judicial discretion would undermine the primary aims of the deliberately far-reaching legislation. Another politician disagreed and felt that judicial discretion was needed. However, this interviewee also recognised the public distrust in judicial decision-making and the consequent political difficulty in incorporating an acceptable degree of judicial discretion into the scheme.

Most other interviewees were supportive of some judicial discretion and the safeguards this ensures. In particular, with one exception, the judge interviewees were uneasy about the absence of judicial discretion in confiscation proceedings. Several reasons were given.

First, the role of the court would be watered down to a 'rubber-stamping' exercise. Second, no consideration could be given to the individual circumstances of each case and the flow-on effects of confiscation for any innocent third parties. Third, the implementation of the legislation would be too strongly influenced by political agendas and electoral gain. Fourth, no consideration could be given to the potential disproportionality between the confiscation and the seriousness of the offence. Fifth, the arbitrariness and potential for lack of parity in the extent of a confiscation—for example, for two offenders whose criminal activity may be similar but who have vastly different asset holdings.

Impact on (innocent) third parties

There were also opposing views on this aspect of the CPCA WA.

From the prosecutorial point of view, the statutory protections available to third parties are adequate, even if the conditions are onerous.

While there was some concern expressed by government agents in this regard, one interviewee considered it an inevitable consequence of confiscation legislation. That interviewee stated that, if such unfortunate consequences were publicised through the press, it might strengthen the deterrent effect of the legislation.

One of the politician interviewees questioned the 'innocence' of third parties who—knowingly or unknowingly, directly or indirectly—benefit from the defendant's criminal activity. On this view, it is not the responsibility of the state to protect these third parties from the choices made by their offending parent or partner. Rather, the legislation was introduced to combat crime, regardless of any 'collateral damage' to third parties.

Legal practitioner and judge interviewees were more concerned with the potential impact of the legislation on third parties and the difficulty they may have in protecting their shared assets. The hardship provision is very limited: it applies only to crime-used property confiscations and is very difficult to establish. These interviewees referred to several well-known cases reported in the media and to examples from their own experience. There was a consensus that women and children are particularly vulnerable to the adverse effects of confiscation. For these interviewees, the protections currently in place are inadequate. It was acknowledged that whether and to what extent third parties are really innocent and unaware of what is going on may be a vexed question. But, even if a third party has some awareness, other factors may come into play—for example, roles within the relationship or pressure from the defendant. It becomes more problematic when dependent children are involved as they can hardly be blamed for benefiting from the illegal activity of a parent. According to these interviewees, there should be more effective safeguards for truly innocent parties and children. Judicial discretion was considered an appropriate solution.

Transfer of unexplained wealth and criminal benefits confiscation powers

Some interviewees expressed guarded support for the recent transfer of powers relating to the unexplained wealth and criminal benefits confiscation schemes to the WA CCC. The predominant view was that this transfer would be an improvement, provided the following changes were also made. First, the WA CCC should act as an independent agency tasked with investigating the criminal activity as well as the confiscation matter. Currently this is not the case. Second, the WA CCC should be given wider investigative powers. Third, there should be a better integration of the activities of the WA CCC with those of WA Police and the WA ODPP. An alternative suggestion was that confiscation following criminal conviction should remain with the WA ODPP, and the WA CCC should take responsibility for non-conviction-based confiscations.

Several interviewees acknowledged that the WA CCC is better placed to pursue unexplained wealth confiscations than WA Police because they have more expertise. However, these interviewees also acknowledged that this will require the WA CCC to make more efficient use of resources than they do at present. However, even interviewees who supported the transfer of powers did not regard it as a panacea for the existing problems with implementing unexplained wealth confiscation if the WA CCC is not better resourced.

Other interviewees did not see the benefit of the transfer of responsibility for unexplained wealth confiscation to the WA CCC because, in their view, the WA ODPP is doing a good job in this area. Some interviewees even saw it as a dangerous shift of powers, with the WA CCC becoming the investigator, the prosecutor and the arbitrator, and the role of the courts being ultimately diminished throughout the process.

Further suggestions for improvement of the CPCA WA

A couple of interviewees expressed concern that the period of 28 days during which a person can object to a freezing order was too short, particularly for those living in regional and rural Western Australia, who may need longer to obtain legal advice and representation.

A further concern was that there is no mechanism in the CPCA WA to claim compensation for loss sustained where property is frozen and then released following a successful objection application.

WA case studies

The project team interviewed six members of the public who were affected by action taken under the CPCA WA. After the team sent out the interview transcripts, one interviewee withdrew from the project because of the possible impact on ongoing legal proceedings. The remaining five interviews are presented as case studies. The data have been de-identified and only general information is provided.

The case of Miss A

Miss A lives in regional Western Australia and inherited with her siblings their father's property, the family home. One of her brothers was living in the house when about 10 years ago he was charged with having sex with an under-aged person in the house. The property was frozen and freezing notices were issued to all of the siblings. They attended the police station as they were not familiar with criminal property confiscations. Miss A sought legal advice. She was charged $6,000 as the lawyer said she had to familiarise herself with this, at that time, 'rather new piece of legislation'. As Miss A thought she was being overcharged, she went on the internet and tried to find out about the legislation. This confirmed her initial impression that $6,000 was an excessive charge. She took the lawyer to court, the court found in Miss A's favour and her expenses were reimbursed.

Over the years, Miss A has consulted several lawyers. She has found many to be inexperienced with this legislation. She has paid thousands of dollars in an attempt to settle the case and recover her family home. This put enormous pressure on her and the family and placed a lot of strain on their relationships. At the time of the interview, the family were close to settling the case: the property will be released on Miss A paying the state the value of her brother's share in the property. The property is of significant emotional value to Miss A. It is the family home, it is where Miss A grew up, and it was built by her father. Miss A intends to buy out her other brothers and sisters so that she will have the full title to the house.

Miss A described this as a very stressful experience, which lasted 10 years, and she estimates it has cost her around $30,000. In addition, she has continued to pay the annual rates without getting any financial benefit from the property. Further, as no-one was permitted to live in the house and it is on a large block, she has had to pay someone to maintain and clear the land on a regular basis.

The case of Mr B

Mr B rented out his house. The tenant installed a hydroponic cannabis set-up in the roof. It caught fire and the police attended with the fire brigade. The insurance claim was paid out, and the property was repaired. The police froze the property on the basis that it was crime-used. Mr B settled out of court and agreed to pay a fairly modest sum to the state. There was only a negligible difference between the cost of litigating—and only potentially succeeding, even with a costs order on a party/party basis—and the cost of paying the agreed sum to the state, which made the latter a far more preferable option.

Mr B explained that he had suffered stress as a result of the freezing of the property and that it had cost him between $60,000 and $70,000 in lawyers' fees in addition to the 'without prejudice' payment of $34,000 to the state. Mr B lives in regional Western Australia and had great difficulty finding a lawyer with experience of criminal confiscations. The case took about 12 months to settle. Two years later Mr B is still paying back money he had to borrow from family. He describes his experience with the legislation as being 'barbaric'. He is particularly upset that he was not permitted to have legal representation at his interview with the WA ODPP, which he described as 'intimidating'. While he had heard of the legislation, he had no real understanding of it and so felt he needed legal support.

The case of Miss C

Miss C's partner had problems with addiction, which she knew about but which they were trying to address through counselling. According to Miss C, her partner was selling drugs to support his own habit but was not a drug dealer. The family home was lawfully acquired. On the night of the police raid, she was arrested together with her partner and drugs were found on the premises. She spent the night in jail, charges had been made at that time but were later dropped. She describes the great insecurity she experienced in not understanding what was happening or where to go for help. Although the family home was registered in her partner's name, over the years Miss C had contributed a considerable amount to its upkeep and to supporting the family. After a bad experience with her first lawyer—which cost her $25,000 over two months—Miss C decided to take things into her own hands. She resigned from her job, took over management of the family business, and represented herself in the confiscation proceedings. She was able to prove that she had contributed over 50 percent of the value of the house. The house was later sold to enable Miss C to settle the case. Miss C's partner finds it difficult to accept that he lost his share in the house and business that he worked so hard for through legal means. From her perspective, Miss C was mainly concerned about supporting her partner in seeking help for his addiction. She said this period had an enormous negative impact on her mental health. She spoke about having to find the strength to fight the system, without legal advice or any other support, to retain what was lawfully hers.

The case of Mr D

Mr D was running a business and was charged with supplying over 50 grams of a prohibited substance, triggering the drug trafficker confiscation provision. As a consequence, all his assets—reportedly worth between $3m and $4m—were frozen. Two and half years later, at the time of the interview, his property was still frozen. He is able to prove his income and the fact that his business and other assets were legally acquired. He has represented himself in the court proceedings so far because no funds have been released by the WA ODPP for his legal representation. He cannot pay off his loans to the bank, and is now at risk of bankruptcy.

Mr D was selling drugs to support his own habit. He was not aware of the fact that possessing over a certain quantity of that particular drug may result in a person being declared a drug trafficker. Mr D spent eight weeks in prison. However, at the time of the interview his criminal case had not yet proceeded to trial and he had not been convicted of any crime.

The case of Ms E

Ms E was married for about 24 years. The marriage was fraught with problems, largely fuelled by her husband's alcohol abuse and gambling. She threw her husband out of the family home 10 years ago. However, she did not have the resources to finalise the divorce and property distribution. The family home was registered in the names of both Ms E and her husband, and Ms E and her children continued to live in the home. This included paying mortgage repayments and attending to necessary repairs and maintenance.

Five years later, Ms E's son came across a newspaper article reporting that his father had been arrested with over 60 kilos of cannabis with a street value of around $500,000. Ms E's husband was convicted, declared a drug trafficker, and imprisoned. The family home became the subject of confiscation proceedings. Ms E contacted a lawyer. The lawyer charged her $36,000, but ultimately advised that he was not able to assist her as 'he couldn't win the case'. Ms E is still at risk of losing her home. As a result of his father's crime, her son lost his job in the import/export industry. He has been unable to find other stable work because background checks reveal his family history. Ms E is suffering debilitating emotional distress, is dependent on sleeping medication, and is currently battling cancer. Ms E says these conditions are as a result of all the stress. Ms E never had any involvement with drugs. She describes how she lost all her other assets during her marriage due to her husband's spending, and she does not understand why she is being victimised for her husband's crimes.

Discussion and recommendations

> There are some really ugly blotches on our justice landscape. (Interviewee)

As noted above, there were a number of drivers underlying the introduction and proliferation of non-conviction-based civil proceeds of crime legislation. These drivers included deterrence, incapacitation, and punishment. There were also political imperatives and enforcement agency priorities. Whether or not the legislation has achieved the principal objective of deterrence is difficult to determine and a matter of some doubt.

A number of common themes emerged from the legal and criminological analyses and the empirical data collected. Generally, it was considered that confiscation of proceeds of crime legislation is an important component of a jurisdiction's legislative armoury against crime. However, it is clear from the project that many, although not all, interviewees see a need for reform in a number of areas. As one interviewee commented:

> I think that the Act is probably due for a review and a revamp and being brought up to date. There were anomalies identified…I think we can learn from the experiences of other jurisdictions, which is why I'm interested in the outcome that you come to, and how it can be refined.

Areas of particular concern are identified below. There is a need for urgent revision of certain areas of the legislation to ensure the schemes achieve their legitimate objectives in an effective and fair manner.

While the need for reform appears to be widely acknowledged in the empirical data, the project team accepts that the political realities mean there has historically been very little appetite for legislative change to confiscation regimes. For instance, as one interviewee observed:

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

And another:

> It's very hard to backtrack. I mean I'm not saying it's not possible but…we'll need the support. If you don't have the support of both sides of the parliament, it would be difficult.

Non-conviction-based civil proceedings

All Australian jurisdictions now provide for some form of non-conviction-based confiscation that is not dependent on criminal prosecution. Without exception, all confiscation proceedings are civil in nature, with a civil standard of proof and civil rules of evidence. This means the Crown's task in securing a confiscation is made easier. Some jurisdictions go a step further, by diluting ordinary rules of evidence to permit hearsay evidence and some opinion evidence (eg CPCA WA ss 105 and 109).

Non-conviction-based regimes allow the restraint and confiscation of assets suspected of being tainted by criminality without securing a criminal conviction. There has been strong commentary against non-conviction-based civil confiscation proceedings. Such proceedings essentially wrap criminal sanctions in civil jackets:

> There is something deeply disturbing about the tendency to discard conviction as a pre-requisite to the imposition of sanctions. This readiness to accept or promote the idea that civil sanctions are non-punitive or less onerous leads inexorably to the lessening of procedural safeguards… (Freiberg 1992: 51)

Similar criticisms were reflected in the empirical data collected. One interviewee observed:

> …to achieve what the parliamentarians and police wanted they had to abandon the burden of proof, rule of law principles, so that proof was reversed, you had to prove you are innocent rather than the other way around which has been the basis of our law for centuries. Now, that is an enormous imposition on human rights.

And another:

> The lawyer in me says that we shouldn't be punishing anyone without a conviction. The political realist in me says that 'that's difficult'.

Further, although civil in nature, it is undeniable that confiscation proceedings are tightly bound up with the associated criminal investigations and/or proceedings. Having the two procedures operating in parallel creates an administrative burden. It also raises issues relating to both the substantive risk of double punishment—despite this intention being formally excluded by provisions such as s 9 of the CPCA Qld—and the investigative process. Interviewees described it thus:

> I think what I would do is rather than make it a civil action, I would make it a part of the criminal proceedings, so part of hybrid proceedings. I would legislate so the process doesn't have to be filed separately, it can just be filed in the criminal proceedings.
>
> So it was really a double punishment after the event…the first punishment obviously being the [criminal] penalty and then the confiscation.

Indeed, paragraph 55(iii) of the Queensland ODPP's *Director's guidelines* (2016) instructs Crown Prosecutors and legal officers '*to apply* for appropriate confiscation orders *at sentence*' (emphasis added).

Of particular note, the WA ODPP's *Statement of prosecution policy and guidelines* states that, 'where the confiscation of property is potentially a mitigating factor', the WA ODPP should act promptly and prior to conviction or sentence (WA ODPP 2018, Appendix 2: [5]). This suggests an inextricable and impermissible link between the two proceedings. This is despite both paragraph 22 of the guidelines and s 8(3) of the *Sentencing Act 1995* (WA) indicating that the added impact of the confiscation on the sentence imposed is not a relevant consideration in deciding whether to commence confiscation proceedings.

Regarding investigations, concerns were also expressed as to the cross-pollination of information between the civil and criminal investigations. One interviewee asked:

> The proceeds of crime police officers should keep what happens in those interviews separate from criminal investigations…Why can't WA police have Chinese walls?

As the Law Council of Australia (2014: 4) has pointed out, where civil confiscation proceedings precede criminal proceedings, the lack of separation between the civil and criminal proceedings poses a threat to the privilege against self-incrimination.

Unexplained wealth confiscations present a particularly extreme example. For instance, in New South Wales a court:

> …must make an unexplained wealth order if the court finds that there is a reasonable suspicion that the person engaged in a serious crime related activity or derived…property from any serious crime related activity. (CARA NSW s 28A(2))

This was criticised by one interviewee:

> I still say the lower standard of reasonable grounds to suspect to get an order against you, an unexplained wealth order to be calculated [sic], presented too low a standard.

The unexplained wealth confiscation provisions go even further in Western Australia by not requiring a link with any identified criminal activity. Wealth can be targeted simply if it is 'more likely than not that the total value of a person's wealth is greater than the value of the person's lawfully acquired wealth' (CPCA WA s 12(1)). In such circumstances, there is a presumption that the wealth is not lawfully acquired, and the onus is on the respondent to demonstrate on the balance of probabilities that their wealth was lawfully acquired. An interviewee described this particular provision as follows:

> [The WA unexplained wealth provisions are] better than the unexplained provisions pretty much in any other jurisdiction because they are not connected to criminal activity and that's a critical aspect...that's a much neater system.

Gray notes that unexplained wealth schemes effectively impose 'the "punishment" of taking a person's wealth or property away when no specific allegation of wrongdoing need be made, let alone proven beyond reasonable doubt' (Gray 2012b: 34).

Despite the criticism levelled at non-conviction-based civil proceedings, generally interviewees considered the addition of non-conviction-based confiscation to the earlier conviction-based schemes to be necessary for their effective operation:

> …if you're looking at the high end, they're never gonna get convicted of anything and yet they're clearly living off the profits of whatever, whether it be drugs, ammunition, guns, etc., prostitution, whatever. The legislation's not gonna work if it had to be conviction-based…it would just be too hard.
>
> I think it does have to be non-conviction-based, otherwise, it can't function…it is targeted at a particular social evil that is difficult to detect, difficult to prove a specific crime and yet, you know as a matter of common experience, it's not the only instance that's been involved.

While this view was expressed mainly in relation to unexplained wealth confiscations, non-conviction-based proceedings were also considered necessary in the initial freezing and restraint stages of other confiscations:

> You need to be able to react quickly. You can't wait. If you wait until conviction…[the property] will be gone.

Within the bounds of a non-conviction-based scheme, while there was little concern expressed as to the civil nature of the proceedings, there was considerable concern about shifting the burden of proof to the defendant and applying the lower, civil, standard of proof. In its submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 the Law Council of Australia stated:

> By reversing the onus of proof the…unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. (Senate Legal and Constitutional Affairs Legislation Committee 2009: [2.59])

Freiberg has expressed a similar view:

> It is not unreasonable, therefore, to argue that the criminal standard ought to be maintained in the process of making a confiscation order. Because the consequences of such orders are drastic and because the legislation is founded upon criminal activity, it is more important to focus upon the substance of the process and the severity of the sanction rather than upon the formalistic nature of the process described in the Act. (Freiberg 1992: 53)

Recommendations:

Retain the non-conviction-based scheme for unexplained wealth, but require evidence linking the defendant to some confiscable criminal activity, as in the NSW and Queensland schemes.

Retain the non-conviction-based schemes for other categories of confiscation, but provide that the legal burden of proof remains with the Crown.

Executive discretion

There is no provision in any of the three confiscation regimes investigated in this project mandating the institution of confiscation proceedings. Rather, the decision about whether to confiscate property lies with the relevant enforcement agency—the police, office of the Director of Public Prosecutions, or crime commission, as the case may be. One interviewee commented:

> …there's got to be some sort of filter put on what property is recovered by the State. If somebody is declared a drug trafficker, the opened bottle of milk in the fridge is confiscated. Well, we're not going to be doing anything about that. The hundred-dollar gift given to the daughter for Christmas last year is confiscated but again we are not going to do anything about that. The motor vehicle that is worth a couple of thousand dollars at best, we're not going do anything about that. But under the legislation, it's all been confiscated. So you're going to have to deal with, and our systems do deal with, those sorts of situations.

In *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, Gageler J (in dissent) expressed concern at this common feature in the Australian criminal property confiscation landscape. His Honour did, however, leave open the possibility of a constitutional challenge to the federal proceeds of crime regime where confiscation does not occur by statutory direction but rather on the basis of overt executive discretion:

> The penalty or sanction imposed by the legislative scheme, such as it is, lies in the threat of statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP. (at [135])

His Honour classified the extent of the prosecutor's discretion, allowing for 'civil forfeiture as a means of punishment for criminal guilt', as potentially resulting in an executive usurpation of the judicial function—that is, as 'purporting to confer on the DPP part of an exclusively judicial function' (see at [138]). Similarly, it has been observed that '[t]he role of the DPP is not to make judgements as to whether a particular sentence is appropriate or not' (Abetz 2011: 7081[1]).

Perhaps of greatest concern in this regard are the provisions encountered in Western Australia and Queensland that provide for automatic confiscation in certain circumstances. In these instances, final confiscation is a matter of executive discretion, with the role of the judiciary being simply to declare as an historical fact that the property is confiscated. One interviewee described this situation as follows:

> So the discretion is at the start rather than the end because the prosecutor will then decide whether or not to make the application and once the application is made then the court's hands are tied and the court almost becomes a rubber-stamping exercise.

In this regard, Gageler J (at [136]) did take some comfort in the fact 'that the DPP will exercise the discretion with the utmost propriety'.

However, the interviews suggested that this is not the case in all instances. For example, in one interview with a barrister it was reported that the threat of confiscation of a family home may have been used to extract a guilty plea and thus secure a conviction. The guilty plea was entered and the confiscation proceedings were then abandoned. This account is in direct conflict with the WA ODPP's *Statement of prosecution policy and guidelines 2018*, which provide that:

> The DPP will not negotiate in confiscation proceedings in order to secure or influence the entry of a plea of guilty to any offence. (WA ODPP 2018 at Appendix 2 [7])

The risk of the abuse of the confiscation legislation is heightened where confiscation metrics are reflected in enforcement agency performance measures. For example, a report by the Western Australian Auditor General (2018: 19), identifies '[t]he gross value of restrained (frozen) assets' and [t]he net proceeds from confiscated assets' as key performance indicators for both the WA ODPP and WA Police. The report notes concerns by both agencies with these performance measures. Further it states that competing agency priorities can result in conflicting interests in exercising prosecutorial discretion: '[d]ifferent agencies involved have quite distinct and independent roles and responsibilities…There is a risk that agencies will not appropriately prioritise confiscation activities'.

As noted by some interviewees:

> …it is encouraging the DPPs around Australia to put more of their staff towards following up proceeds of crime because it's a profit centre…If you're sitting there at the DPP and you're making a decision about what cases we're going to pursue and what you are not, you're obviously going to lean towards one that is going to bring revenue to you and make you look good in the eyes of the Attorney General and the Government.
>
> The DPP and the police in fact have targets for property confiscation. They are issued with targets and if they reach their targets they are paid bonuses…To me that is a clear perverse incentive.

The seemingly unlimited nature and extent of the executive discretion, and the consequent difficulty involved in its review, is particularly concerning when viewed through a rule of law lens (Fisse 1989b: 23). In 2011, then President of the Law Society of Western Australia Hylton Quail stated:

> A potentially greater threat to the rule of law…is the manner in which the Act is enforced by charging police officers and the police asset confiscation unit who are responsible for deciding in which matters confiscation will be pursued.…Criminal lawyers tell their clients to cross their fingers and hope they don't get a notice. (2011: 2)

One interviewee described it thus:

> I think either the judge should have that right to make that call or somebody other than the DPP. To me it just doesn't sit right. There's got to be someone that has a more a big picture perspective perhaps of the social consequences of what's gonna happen there.

As another interviewee highlighted:

> …because the legislation is so draconian [executive] discretion becomes the only discretion in the system.

In a similar vein, barrister Shash Nigam commented in an interview on ABC Radio that 'you have to try and settle these matters out of a court to try and get something back or try and get some sort of a result' (ABC Radio 2018).

Nevertheless, another interviewee noted:

> I wouldn't want to hamstring the DPP too much. Their job is difficult enough as it is…But there ought to be a system with clear lines of challenge to the DPP's exercise of discretion.

Recommendations:

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

Integrate adjudication by courts into each stage of the confiscation process, including specifically at the final stage of confiscation.

Judicial discretion

The effectiveness of confiscation legislation is often seen as bound up with the absence of judicial discretion (Australian Law Reform Commission 1999: [3.24]–[3.25]). This position was echoed in some interviews:

> It was fundamental to the enactment of the *Criminal Property Confiscation Act 2000* (WA) that the Court's discretion to order confiscation or not was to be limited. The reason for that stemmed from the decisions of the Court under the old legislation which the legislature considered erroneous because they took into account irrelevant matters or gave inappropriate weight to some factors.

> I think the judicial discretions have to be refined and limited, otherwise you would end up with the sorts of…you have to carefully craft the manner in which the discretion can be used, otherwise frankly you won't get anyone suffering the consequences of what they're up to.

Nevertheless, a key concern emerging from both the literature (eg Skead & Murray 2015; Odgers 2007: 330–1) and the empirical data is the unworkability of the legislation without the possibility of judicial relief in at least some circumstances. There are many instances where third parties have been significantly affected by confiscation schemes. For some interviewees this is the appropriate, albeit high, price of the respondent engaging in criminal activity. For others, there is seen to be a need for greater protection of third parties who are implicated through no fault of their own. It was considered that this is best done through the exercise of judicial discretion.

> …at the end of the day everything has to be looked at by a judge and so…That doesn't mean that there may not be a time where there's some unscrupulous investigator who is abusing the powers that are there…it's hard to legislate or guard against, you can only sort of say well the final recourse has to be the court.

However, not all interviewees supported the introduction of a broad, open judicial discretion:

> I think though the problem is that you then create that uncertainty and at the end becomes this enormous body of jurisprudence.
>
> Rather than some judge being left to sort of 'mmm yes, no you're a nice person, you're not a good person' whatever, I think the legislation ought to give you the guidelines.

In the WA context, there was also concern about powers that were introduced to facilitate confiscations in regional areas and vested in justices of the peace:

> A freezing notice is made by a justice of the peace, of course without notice to the owner or to anyone. There's no counter party present and in my view, it's the most remarkable power—given the consequences that flow from the issue of a freezing notice, it's astounding that justices of the peace have the power. I'd be a lot happier if they were with magistrates.

The rule of law dictates that some judicial avenues for relief are needed, not only to appropriately supervise prosecutorial and executive discretion but also to balance the potential impact of the confiscation legislation against its clear purposes. As one interviewee put it:

> For my part, the confiscation should relate to the proceeds of crime and unexplained wealth…And I think, there is room for judicial decision on this, is the ability to say, 'Well, this property was acquired in a way completely unrelated to any drug use and therefore should not be confiscated'.

The CPCA Qld, for example, includes broad judicial discretion to refuse to make any order on public interest grounds—for example, s 31(2)(a) in relation to non-conviction-based restraining orders; s 58(4) in relation to forfeiture orders; s 93ZZB(2) in relation to a serious drug offender confiscation order; and s 89G(2) in relation to unexplained wealth orders. Similar provisions exist in the CARA NSW.

Under the drug trafficker confiscation scheme operating in Western Australia, by contrast, if a defendant is declared a drug trafficker, all of their property is automatically confiscated, whenever it was acquired and whether or not it was connected with any criminal activity. The court is required to make an order to this effect and has no discretion in this regard (see CPCA WA s 8). In *Western Australia v Roth-Beirne* [2007] WASC 91, Hasluck J noted that:

> the obligation imposed upon the court…is mandatory. Once the court is satisfied that the statutory requirements have been met the court must make a declaration. (at [20])

This is despite the fact that the court may consider that a confiscation is unduly harsh—for example, if it renders both the defendant and their dependants impecunious—and goes beyond achieving the underlying objective of the legislation of ensuring crime does not pay.

There is a limited hardship provision incorporated into the crime-used property confiscation provisions in the CPCA WA (see particularly s 82(3)). There is no judicial discretion embedded in the other confiscation categories—unexplained wealth, crime-used substitution orders, crime-derived property, criminal benefits, and drug trafficker confiscations. While for the most part this absence of discretion appears intentional, the inclusion of a hardship provision for crime-used property confiscations but not for crime-used substitution confiscations is capricious and arbitrary. One interviewee said:

> She didn't have the protection of that because it wasn't crime-used. It was a crime-used substitution…So that protection, the hardship protection…didn't apply here because it was a crime-used property substitution declaration, so what they do is they can get a declaration that your assets to the value of the property in which the offence occurred are confiscated and that protection didn't extend…so she had to move out of the house. And I think that was probably the most egregious injustice that I saw in terms of punishing an innocent person.

This discrepancy was in issue in the case of *Director of Public Prosecutions (Western Australia) v Bowers* [2010] WASCA 46. Special leave to appeal to the High Court of Australia was granted (see *Bowers v Director of Public Prosecutions (Western Australia)* [2010] HCA Trans 277, 21 October 2010); however, the matter was settled before the appeal was heard.

In 2011, the then WA Attorney General acknowledged this anomaly but indicated that it was being addressed through the exercise of executive discretion (Porter 2011: 7083[3]). The then shadow Attorney General, John Quigley, recommended legislative amendments and said: '[i]f you allowed a discretion to exist within the courts to look at justice, I think the problem could be largely alleviated' (ABC News 2011).

While the inclusion of a hardship provision into each stage of the confiscation process is desirable, the objects of the legislation must also be considered. As Kirby P noted in *R v Lake* (1989) 44 A Crim R 63 (at 66–7):

> In considering hardship, it is necessary to bear in mind, of necessity, in achieving its objects, the Act will cause a measure of hardship in the deprivation of property. Indeed, that is its intention…Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own [in] effectiveness in every case.

Similarly, as one interviewee put it:

> …any confiscation of property is likely to have adverse effects on third parties…Such hardship however has to be balanced against the public interest.

Recommendation:

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

Offences triggering confiscation

Without exception, Australian confiscation of proceeds of crime legislation was introduced to address serious drug-related crime and organised crime. As drafted, however, the schemes in two of the states under review cast the confiscation net far wider, potentially capturing lower-level criminal activity.

For example, in Western Australia a 'confiscation offence' includes 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more' (CPCA WA s 141(1)(a)). Under s 313(1)(b) of the *Criminal Code Act Compilation Act 1913* (WA) 'any person who unlawfully assaults another is guilty of a simple offence and is liable…to imprisonment for 18 months and a fine of $18 000'. However, under s 221(1) if 'the offender is in a family relationship with the victim of the offence' or 'the victim is of or over the age of 60 years', the offender is then liable to imprisonment for three years and a fine of $36 000—and is therefore subject to crime-used property confiscation under the CPCA WA.

While assaulting another is not to be condoned, subjecting the offender to criminal confiscation laws based on the age or identity of the victim arguably goes well beyond the objectives that the WA laws were intended to achieve. In this respect, '[t]his legislation is cast more widely than the evil to which it is directed' (McGinty 2000c: 935[22]).

A 'serious criminal offence' under the Queensland confiscation regime means 'an indictable offence for which the maximum penalty is at least five years imprisonment' (CPCA Qld s 17(1)). Assuming similar sentencing norms, the extension of the possible period of imprisonment to five years would appear to go some way towards limiting confiscation to more serious targeted offences. However, this may not always be the case. For example, under s 75 of the *Criminal Code Act 1899* (Qld), a person who by words or conduct threatens to enter or damage a dwelling with intent to intimidate or annoy any person commits a crime that carries with it a possible imprisonment of two years. But if the offence is committed at night the offender is liable to imprisonment for five years, which triggers the confiscation provisions.

In comparison, confiscation under the CARA NSW targets more serious criminal activity—including activity relating to drug trafficking, sexual servitude, firearms, child prostitution and abuse or arson or to an offence that is:

> …punishable by imprisonment for five years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide. (CARA NSW s 6)

Even though narrower than the Queensland and WA schemes, the expansiveness of the application of the CARA NSW drew some criticism from interviewees:

> Law enforcement legislation is always popular with governments. There's an incentive to pass it without thinking it, necessarily thinking through all the possible implications. And then, you're left with the risk of overzealous law enforcement officers who will test the limits.

On drug trafficker confiscations, interviewees expressed concerns about the quantity of prohibited drugs triggering a drug trafficker declaration and consequent confiscation. Pursuant to the CPCA Qld, the serious drug offender confiscation provision may be triggered by a series of three drug possession offences involving as little as two grams of a dangerous drug, including heroin, cocaine and methylamphetamine (CPCA Qld ss 93A, 93F(2)(a)(ii); *Drugs Misuse Act 1986* (Qld) s 9; *Drugs Misuse Regulations 1987* (Qld) schedule 3). In Western Australia, the weight threshold for a single offence is 28.0 grams. Nevertheless, interviewees commented:

> The 28 grams…It doesn't take into account the purity of the drug, so if you're a smart drug dealer, you will have 27 grams of 90 percent pure, you're not going to lose your property. If you're not so smart, you'll have 28.1 grams of 30 percent pure you will lose your property. Now, the value between those two quantities…it's chalk and cheese. So what they should really do is talk about the purity of the drug if they're going to use a scale like the grams…And what I'm saying is that the 28 grams is in many cases meaningless and it's just what was considered to be a large quantity back in 2000 or 1999.
>
> The legislation will be infinitely more reasonable if it requires for example commercial quantities of drugs. Or at least large trafficable quantities before it applied…if they're actually a crime syndicate…they should be doing [commercial quantities] or they're not much of a crime syndicate.

Similar concerns were expressed in relation to cannabis:

> Now there is an issue there around the arbitrary definition around what is a drug trafficker in that three kilograms of cannabis is not necessarily a lot. It can be three kilos of cannabis or twenty plants but there's no guideline on what state those plants need to be in. They could be twenty seedlings. They could be twenty plants of which half of them are male plants which are useless. The three kilograms of cannabis might be roots and stems and stalks which you obviously don't use, you use the leaf or bud I think. So the definition of drug trafficker is rather arbitrary in regards to cannabis.

Recommendations:

Limit offences triggering confiscation to the criminal activity at which the legislation was initially directed—serious drug-related offences, organised crime, and terrorism. This is best done by providing an exhaustive list of confiscable offences, as does the CARA NSW.

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

Definition of crime-used property

> Only half in jest, Laurie Levy QC, who has argued more confiscation appeals than anyone else in the state, said in a recent paper that the only way to avoid the property confiscation provisions was to offend after parachuting out of an aeroplane. I actually think the DPP would argue the aeroplane is sufficiently connected (facilitating the commission of the offence) on the basis of a property-substitution value calculation. (Quail 2011: 3)

In each of the three state schemes under review, there are provisions relating to the confiscation of crime-used property (termed 'tainted property' under the CPCA Qld). Crime-used property is broadly defined. For example, under s 9B of the CARA NSW, it is 'property that was used in, or in connection with, a serious crime related activity'. In Queensland and Western Australia the definition is wider and includes property intended to be used in or in connection with an offence or part of an offence (CPCA Qld s 104 (1)(a); CPCA WA s 146(1)(a)).

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

The CPCA Qld provides an illustration of the intended application of the crime-used confiscation provisions (see schedule 1, part 3, s 5):

(1) A is convicted of the confiscation offences of—
  (a) supplying a dangerous drug; and
  (b) carrying on the business of unlawfully trafficking in a dangerous drug.

(2) A used a motor vehicle to transport the drug to a proposed buyer.

(3) Whether the drug was on A or in A's motor vehicle, the motor vehicle was used in connection with the commission of each offence mentioned in subsection (1).

(4) The motor vehicle is [crime-used property] under section 104 (1) (a).

In *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478, the High Court of Australia dismissed an appeal from a decision of the WA Court of Appeal (*Director of Public Prosecutions (WA) v White* (2010) 199 A Crim R 448), in which the Court of Appeal (McLure P) adopted the following narrow interpretation of crime-used property:

> The use must, at its widest, be indirectly in connection with the facilitation of a confiscation offence. There is a sufficient relationship between the act or acts constituting the use and the specific confiscation offence if the acts have the consequence or effect of facilitating that offence ((2010) 199 A Crim R 448 at [39]).

Despite this apparently narrow construction of crime-used property, it is capable of very broad application. In *White*, the respondent (White) had been found guilty of the wilful murder of Anthony Tapley. The murder occurred at a property leased by the respondent. The property was surrounded by a six-foot fence with barbed wire and two metal gates that were padlocked to prevent Tapley from leaving the property. The respondent shot several times at, and injured, Tapley while both men were on the property. Trying to escape from the respondent, Tapley ran towards and climbed up the gates. The respondent caught up with Tapley and shot him while he was on top of the gates. Tapley, still alive, fell off the gates onto the ground outside the property. The respondent unlocked the gates, walked out of the property and shot Tapley six times. The respondent dragged his body back onto the property before removing and incinerating it. McLure P found that:

> …the intentional locking of the gates was for the purpose, and had the effect, of preventing or impeding [the deceased's] departure from the [property] before the respondent had finished dealing with him. That use of the land facilitated [the deceased's] murder. (at [39])

The property was therefore found to be crime-used property.

As White did not own the crime-used property in question, the value of that property was confiscated from him pursuant to a substitution order.

In all three jurisdictions under review, there are many examples illustrating the breadth and arbitrariness resulting from the application of crime-used property provisions. Such provisions have been applied expansively even where courts have construed the term narrowly. For example, in *Queensland v Noble* [2018] QSC 59, the respondent was convicted following guilty pleas of multiple counts of serious animal cruelty. He was sentenced to three years imprisonment suspended for five years. Following his conviction, an application was made to the Supreme Court of Queensland to confiscate the property on which the offences had taken place, pursuant to the crime-used ('tainted') property confiscation provisions of the CPCA Qld. Crow J accepted that the property in question fell within the 'broad definition' under that Act. However, the Supreme Court also acknowledged that the property was acquired and paid for 21 years earlier—many years before the offences took place—and that 'no part of the value of the property had been acquired from unlawful and disgraceful conduct'. Further, 'there [was] no evidence to suggest there was any financial gain…from involvement in the serious criminal offences' (see at [34]). Moreover, the property had a total market value of $600,000 but only a portion of the property—perhaps one-eighth and specifically not the dwelling on the property—was used in connection with the respondent's offences (see at [40]). In addition the court noted that the respondent was 71 years of age and that the property was his sole source of income and the couple's 'most substantial retirement asset' (see at [59]). Yet, as the court observed, the crime-used property confiscation provision operated to apply to the whole property in an 'all or nothing' way (see at [36]). In considering that result, Crow J stated that 'the [confiscation] of the…property would be wholly disproportionate to the nature and gravity of the offences and would be manifestly unfair to both [the respondent and his wife]' (see at [78]).

A NSW interviewee considered judicial discretion to be an effective way of addressing such disproportionality:

> I think there needs to be a discretion about forfeiture of instruments of crime—and in some regimes there is none—because the effects can be entirely disproportionate to a particular offence. And it generates bad outcomes and bad law in my opinion.

Recommendations:

Narrow the definition of crime-used property to property that has a substantial connection to the criminal activity in question.

Provide for the confiscation of only that portion of crime-used property actually used in connection with the offence.

Allow for the exercise of judicial discretion in making a confiscation order, based on proportionality between the value of the confiscated property and the severity of the offence.

Disproportion, arbitrariness and lack of parity

Common themes emerging from the interview data were the potential disproportion, arbitrariness, and lack of parity of several features of the confiscation schemes in the jurisdictions under review.

One NSW interviewee noted the lack of parity in punishment that can arise from the separation of sentencing and confiscation proceedings:

> I think that is an area of concern because most sentencing regimes expressly prohibit confiscation outcomes being taken into account in sentencing and you can end up with two classes of people who are sentenced. Those who have nothing to confiscate and get a particular outcome and then those who do have something to confiscate and according to the letter of the law should receive exactly the same penalty despite the fact that they might lose a real property which represents their life savings.

Another commented:

> There's twin brothers, and they're both caught at the airport with a kilo of heroin in their bags. One (A) has lived a dissolute life, acquired nothing, and has only debts and a really bad past to go with it. His twin brother (B) has worked hard all his life and acquired a house, he has a family who live there, he's got assets, shares, superannuation—they both get caught, they both get brought in, they both get seven years jail, but in addition, there's a property declaration against both, but B loses his house in addition, he loses his family, he loses his business, he loses all his assets…That is—manifest hardship above and beyond what any other person sustains.

Crime-used property confiscations in all three jurisdictions provided a stark illustration of the potentially disproportionate and arbitrary operation of the legislation. As discussed above, the definition of crime-used property permits the confiscation of property that may have a somewhat tenuous link with relevant criminal activity. Moreover, the value of the property confiscated often has no relationship to the severity of the criminal activity, and can vary markedly from case to case:

> A man takes a girl out on a little dinghy and deals indecently with her and is sentenced to three years' jail. All that the DPP can apply to have confiscated is the dinghy, worth, say $500. However, if the man commits exactly the same crime on a $5 million yacht owned by a friend, the DPP can apply to have up to $5 million worth of honestly acquired assets of the offender confiscated in substitution for the $5 million yacht used in perpetuating the crime. So effectively, we as a community are saying that if this man commits the crime on a luxury yacht, he deserved to be given his jail sentence, plus a $5 million fine; but if [he] commits the crime on a dingy, a prison term plus a $500 fine is sufficient. With all due respect, I believe this makes a mockery of our legal system. (Abetz 2011: 7081[1])

In New South Wales and Queensland, these confiscation provisions are tempered by a public interest discretion. This is not the case in Western Australia. The WA drug trafficker confiscation provisions provide another compelling illustration of the potentially disproportionate, arbitrary, and harsh operation of the CPCA WA. Interviews with legal practitioners and respondents provided multiple examples of this, as does *Davies v Western Australia* [2005] WASCA 47. In Davies, close to 19 kilograms of cannabis was discovered in the ceiling cavity of the Davies' Perth home. Mr and Mrs Davies were aged 81 and 77 respectively and had been married for 58 years. Mr and Mrs Davies were both charged with and convicted of possession of cannabis with the intent to sell or supply it to another, under s 6(1)(a) of the MDA WA. The jury accepted that the Davies had allowed their son, Tyssul, to store the cannabis in their house and to retrieve it when he wished. Mr and Mrs Davies were each sentenced to a 16-month suspended sentence.

Under s 32A of the MDA WA, if a person is convicted of an offence under s 6(1) of that Act in respect of no less than three kilograms of cannabis, the court shall declare the person to be a drug trafficker on application by the Director of Public Prosecutions of WA (WA DPP). As a result, on conviction, Mr and Mrs Davies were declared 'drug traffickers'. Pursuant to the drug trafficker confiscation provisions in the CPCA WA, when a person is declared to be a drug trafficker under s 32A(1) of the MDA WA, all property owned or effectively controlled by the person at the time the declaration is made, and any property given away by the person at any time before the declaration is made, is confiscated. The confiscation in these circumstances is automatic—that is, there is no need for an application to be made to effect the confiscation. One interviewee described this operation thus:

> Moving on from that to drug trafficker confiscations…I think this is where some of the worse problems are right now…So, for anyone who's declared a drug trafficker, all of their property can be confiscated. Everything they've ever owned or ever given away potentially…And there doesn't seem to be a time limit on this either. So you could have given away a gift fifty years ago before you ever engaged in criminal activity and the DPP would be able to confiscate it.

Following their declaration as drug traffickers, the Davies' family home—their primary asset, built by Mr Davies 40 years earlier, and financed legitimately through many years of hard work—was confiscated. Indeed, perhaps the harshest aspect of this case is the disparity between the severity of the offences and the proprietary consequences of the convictions. Further, despite a stated objective of the WA proceeds of crime legislation being to deprive a person of 'the material gain that the criminal intends to get, or has got, from criminal activity' (Prince 2000: 934[21]), Davies clearly demonstrates that these provisions can operate more broadly to strip a person declared to be a drug trafficker or taken to be a declared drug trafficker of all of their gains, whether ill-gotten or not.

Recommendations:

Allow for a judicial discretion in making orders under the legislation, based on hardship and on proportionality between the value of the property and the severity of the offence.

Ensure drug trafficker confiscation provisions require a substantial connection between the drug trafficking and the confiscable property, whether as crime-used property, as crime-derived property or as criminal benefits.

Constitutional validity

Interviewees did not raise significant constitutional concerns with the confiscation schemes in New South Wales, Queensland or Western Australia.

While interviewees did point out the need for greater judicial discretion, its absence does not necessarily result in invalidity under the Kable principle (see *Kable v Director of Public Prosecutions (New South Wales)* (1996) 189 CLR 51 versus *South Australia v Totani* (2010) 242 CLR 1; Freiberg and Murray 2012: 341, 348–9).

The principle renders a state law invalid if it confers functions on a state court which substantially impair the court's institutional integrity and capacity to exercise federal judicial power under Chapter III of the *Constitution. International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 saw s 10 of the *Criminal Assets Recovery Act 1990* (NSW) invalidated for requiring mandatory ex parte restraining order hearings. More permissive wording is now typically used (eg CARA NSW s 10A(4); CPCA WA ss 41(2), 42, 57). Further, recent cases like *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 and Emmerson have seen the High Court of Australia emphasise the inherent powers of state Supreme Courts to address unfairness in proceedings and the scope of executive discretion, making findings of unconstitutionality less likely.

In *Emmerson*, the High Court found in relation to the *Criminal Property Forfeiture Act 2002* (NT):

> …that the determination of whether the statutory criteria are satisfied may readily be performed, because of the ease of proof of the criteria, does not deprive the process of its judicial character. (see French CJ and Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ at [65])

A challenge to the constitutionality of the Northern Territory provisions, which are based on the WA scheme, was unsuccessful in that case.

Further, the fact that legislation cuts across rule of law considerations will not necessarily render it unconstitutional (see Skead and Murray 2015: 479). With this said, this may be an area for future development as noted by Crennan and Kiefel JJ in *Momcilovic v The Queen* (2011) 245 CLR 1 (at [562]–[563]).

However, one area of potentially greater concern is the application of deeming provisions. A particularly stark example is evident in the CPCA WA where it provides that a person who absconds or dies may 'taken to be a declared drug trafficker', enlivening the drug trafficker confiscation provisions even if the person has not been convicted of a relevant drug offence (CPCA WA ss 159(2), 160(2); see also CPCA NSW ss 5(1)(d), 16(b)).

Notwithstanding this concern, arguments that these deeming provisions are unconstitutional are unlikely to succeed. In *Silbert v Director of Public Prosecutions for Western Australia* (2004) 217 CLR 181 a majority of the High Court indicated that s 6 of the *Crimes (Confiscation of Profits) Act 1988* (WA), by providing that a person was 'taken to have been convicted of a serious offence' if they had absconded, did not amount to a legislative determination of guilt (see also CPCA WA s 157; *Director of Public Prosecutions (Western Australia) v Smith as administrator of the estate of Leslie Thomas Hoddy (Dec)* [2008] WASC 141.) Similarly, Kirby J, while noting it 'attach[ed] serious consequences to a deemed "conviction"' (at [37]) found that there are no 'criminal consequences' which flow and that it is a 'legislative fiction…devic[e] used to identify persons of a class against whom application under the Act may be made' (at [42]-[45]). The provisions carried the 'normal hallmarks of judicial assessment, discretion, judgment and reconsideration' (at [48]) and were therefore valid. His Honour did note that a 'deeming provision' which precluded an individual 'from proving the truth of contested matters' would likely receive different constitutional treatment (see at [44]).

One provision which may depart too greatly from the judicial process is s 157(1)(d) of the CPCA WA. It provides that a person is taken to have been convicted of a confiscation offence even if 'the person was charged with a confiscation offence but absconded before the charge is finally determined'. The Act defines 'absconds' to include the situation where the person dies (s 160). There is no standard of proof to be met in relation to commission of the offence, as it is deemed (compare with CPCA NSW ss 5(1)(d), 16(b)). This means, for example, that a criminal benefits declaration can be made under s 16 and the deemed conviction will also mean (by the operation of s 16(2)) that 'the respondent is conclusively presumed to have been involved in the commission of the offence'. This is different to the approach taken originally, in s 53(2) of the *Crimes (Confiscation of Profits) Act 1988* (WA), discussed in *Silbert*, which provided that if a person is taken to have been convicted of a offence, 'a court must not make a forfeiture order in reliance on that conviction unless it is satisfied, beyond reasonable doubt, that the person committed the offence'.

These concerns were shared by some interviewees:

> I mean it's proceeds of crime, they should be able to prove the crime to a criminal standard. Whether or not they have to bring the prosecution, I accept there's reasons why that might not be right. So, for example, if someone actually puts themselves beyond the jurisdiction so that the charge can never be dealt with—so they flee—I accept that if the Crown can prove its case beyond reasonable doubt they should still be entitled to seize the assets. But I think the point is that it's, for me, it's not whether the person was in fact charged and convicted, it's the threshold test that it should be the beyond reasonable doubt standard that applies.

Recommendations:

Allow a party to lead evidence to refute what has been statutorily deemed.

Amend the burden of proof for deeming a person to have been convicted of an offence to the criminal standard of proof or, at the very least, the civil standard of proof.

Implementation of unexplained wealth

There was little concern expressed by interviewees about each Australian jurisdiction having its own confiscation regime or about these regimes differing in some respects. The fact that the schemes are harsher in some jurisdictions than in others may result in 'jurisdiction shopping', particularly for organised crime. However, this particular issue was not raised as a concern in the empirical study.

By contrast, the difficulty of implementing unexplained wealth schemes across Australia—and the disparity in the success of these schemes—led to calls by a few interviewees for a national unexplained wealth scheme. This idea has proven politically intractable, despite the architecture for such an arrangement now in place under the National Cooperative Scheme on Unexplained Wealth, set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). To date, only New South Wales has referred the necessary powers to the Commonwealth, allowing it to join the scheme and work alongside the Commonwealth, the Northern Territory and the Australian Capital Territory.

According to several interviewees, a national scheme presents several difficulties. Some of these relate to information-gathering, investigations, and allocation of confiscated wealth:

> There was an opportunity there that I think really was missed that we all had uniform laws across Australia for the recovery of unexplained wealth. That didn't happen, each jurisdiction went off and formulated their own different version of it, with in my mind, varying degrees of success.

The NSW CC *Annual report 2016–2017* states that at the date of reporting it had not yet received any payments flowing from successful shared confiscations (NSW Crime Commission 2017: 40). This is despite the NSW CC working with the Commonwealth to investigate confiscation matters since 2009. Schedule 5 of the *Unexplained Wealth Legislation Amendment Act 2018* (Cth) allows for the sharing of such proceeds by the Cooperating Jurisdiction Committee set by the Intergovernmental Agreement on the National Cooperative Scheme on *Unexplained Wealth (Unexplained Wealth Legislation Amendment Act 2018* (Cth) ss 297A and 297C).

What clearly emerged from many interviews was that, while unexplained wealth confiscations have the potential to target sophisticated organised crime syndicates, to be successful they require significant resourcing and skills, specifically in forensic accounting. The jurisdictions in which the unexplained wealth provisions are operating most effectively are those where there is a dedicated and independent expert team—such as in New South Wales, within the NSW CC. This may be contrasted with, for example, Western Australia, where unexplained wealth confiscations have historically been enforced by WA Police and/or the WA ODPP. In that state, there were no unexplained wealth confiscations in the period from 2010 to 2015. In the same period in New South Wales, close to $12m was confiscated by the NSW CC.

While supported by some interviewees, the transfer of unexplained wealth jurisdiction to the WA CCC in 2018 was received with some cynicism by others. This was primarily due to concerns about insufficient resourcing and expertise and the extent of the powers conferred on the WA CCC.

Recommendations:

Expand the National Cooperative Scheme on Unexplained Wealth to incorporate all Australian states and territories and to include:

- **a dedicated, adequately resourced, multidisciplinary and independent expert body; and**
- **a fair and transparent mechanism for the allocation of confiscated wealth across jurisdictions.**

Until then, in jurisdictions which are not currently part of the National Cooperative Scheme on Unexplained Wealth, appoint and adequately resource a dedicated, multidisciplinary and independent expert body to implement, investigate and enforce the existing schemes.

Third party interests

In recognition of the importance of protecting third party rights, it was noted in the Australian Law Reform Commission's *Confiscation that counts* report in 1999 that:

> [I]n the interests of simplicity, uniformity, certainty and fairness of operation, it is highly desirable that a single universally applicable test be formulated in relation to the grounds on which third party interests may be relieved from the application of restraining and forfeiture orders. (at [12.30])

It is clear from the legal analysis in the three jurisdictions under examination that a single universally applicable test has not been formulated. While the third party protection provisions in New South Wales and Queensland are complex and inconsistent, they are largely effective. This is not the case under the WA scheme where, in addition to being very limited, the provisions do not adequately protect third party interests.

Significant concerns in this regard emerged from the empirical study, particularly in relation to the impact of confiscation on innocent partners and dependent children. These concerns were expressed in many of the WA interviews:

> I mean, you've got a spouse and children living in the house, and they stand to become homeless…It's reasonable to think that in many cases, those people just go along with what usually hubby is doing because it's too hard to stop it…But the consequences to them is extraordinarily serious.

With one exception, all the members of the public interviewed in Western Australia were third parties who were caught up in confiscation proceedings and who faced the very real prospect of losing their family home as a result of the nefarious activities of others. This often brought with it long-lasting, devastating effects for the interviewees and their families.

While some interviewees from politics and government considered such consequences to be acceptable 'collateral damage', the overwhelming impression was that this potential harshness is a flaw in the legislation that must be addressed.

Concern about the impact of the legislation on third parties is also evidenced in the case law and commentary. Again, this is particularly the case with respect to the WA confiscation scheme which, unlike the schemes in New South Wales and Queensland, generally does not afford the court any discretion to refuse to make a confiscation order.

Following his announcement of a review of the WA confiscation legislation, the Attorney General, John Quigley, provided the following illustration in a radio interview in 2018:

> There's been cases continually coming to the floor which on the face of them would appear to be harsh to the point of being unjust. Now one of these—the most recent one that came across my desk—was the lady who was…an immigrant, a single mum raising a couple of kids working as a feather plucker in a chicken factory, fairly menial manual labour…Her husband deserted her. She kept on struggling with the finances, paying the mortgage on the family home. And then two or three years after he deserts her he gets involved with drugs with a new woman…commits an offence and as a result of his offending, because the family home was half in his name the home gets seized and no discretion in the courts to weigh the justice of this or not get seized and she's going to have to sell the home, and the kids will be out on the street or looking for state housing. (Radio 6PR 2018)

Although the potentially harsh operation of the legislation might be addressed by providing for the exercise of a guided judicial discretion, in some cases the problem is more fundamental. It is, at least in part, the result of two factors: first, inadequate provisions for the release of third party interests in restrained or confiscated property; and, second, a failure to identify correctly the 'property' that is the subject of an order.

Inadequate provision for release of third party interests in restrained or confiscated property

The CPCA WA allows for the release of restrained and/or confiscated property, provided that a number of conditions are met (ss 82(4), 83(2), 87(1)). These conditions drastically limit the circumstances in which property will be released. The applicant must be an owner of the property and innocent of any wrongdoing. Additionally—and, most critically—each other owner, including the respondent, must be innocent. In *Permanent Trustee Co Ltd v The State of Western Australia* [2002] WASC 22, for example, both the joint tenant and the registered mortgagee of restrained property were innocent owners. However, because the other joint tenant—also an owner of the property—was declared a drug trafficker (and therefore not innocent of wrongdoing), the conditions for the release of the property from confiscation were not satisfied and the property was confiscated.

Section 82(3) of the CPCA WA is a far broader release provision. It is specifically directed at protecting a spouse or de facto partner and/or dependent children who do not have an interest in the restrained property and who are at risk of homelessness as a result of the restraint. The conditions for s 82(3) to apply are, however, onerous and difficult to establish. In *Lamers v The State of Western Australia* [2009] WASC 3, Mr Lamers was declared a drug trafficker, which resulted in the automatic confiscation of his property. Mr Lamers lived in his home with Ms Willis, his de facto partner, and Ms Willis' daughters. Ms Willis objected to the confiscation of Mr Lamers' home on two grounds, including under s 82(3). Templeman J rejected Ms Willis' objection under s 82(3) for several reasons. One reason was that s 82(3) only applies to the release of property that has been restrained on the basis that it is crime-used. It does not apply to property restrained pursuant to the crime-derived, drug trafficker, unexplained wealth, criminal benefits, or substituted property provisions of the CPCA WA. The property in *Lamers* had been confiscated under the drug trafficker provisions, and therefore s 82(3) did not apply.

Another reason for rejecting Ms Willis' claim was that—even if s 82(3) did apply —there was no evidence that they would not be able to obtain alternative rental accommodation. This was despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, His Honour opined that:

> …if the confiscation legislation is to achieve its objective, it will necessarily cause a measure of hardship in the deprivation of property. However, if dispossession was sufficient to constitute undue hardship, the operation of the Act would effectively be frustrated. (at [77]–[78])

Failure to identify correctly the 'property' that is the subject of an order

The schemes in all three jurisdictions define 'property' as meaning 'any legal or equitable estate or interest in property' (CARA NSW ss 4, 7 & CPCA NSW s 4; CPCA Qld ss 3, 19, dictionary; CPCA WA s 3, glossary). Nonetheless, simply including 'estate' and 'interest' in property in the definition has failed to prevent the detrimental impact of the restraint and confiscation provisions on the proprietary rights and interests of third parties. The reasons for this failure are threefold.

First, the legislation reveals little conceptual understanding of the legal understanding of 'property'. In *Yanner v Eaton* (1991) 201 CLR 351, a majority of the High Court of Australia (Gleeson CJ and Gaudron, Kirby and Hayne JJ) distinguished between a property right and the thing that is the subject of a property right: 'property' does not refer to a thing but, rather, 'it is a description of a legal relationship with a thing' (see at 365–6). Although trite to say, it is also the case that 'any particular thing can be subject to a number of [legal and equitable] property rights at any given time' (Tarrant 2005: 234).

Second, establishing an equitable interest in property can be difficult. For example, in *Smith v Western Australia* [2009] WASC 189 the plaintiff was declared a drug trafficker. This resulted in the automatic confiscation of all his property, including his share in real property he co-owned with his wife. The plaintiff's mother and sister claimed to have lent the plaintiff money in circumstances that meant they also had an equitable interest in the property. McKechnie J dismissed their claim, doubting that they had an equitable interest in the property.

Third, while the statutory definitions of 'property' restrict the application of the restraint and confiscation provisions to interests in property held by defendants, the operative sections of the statutes are unclear as to whether restraining and confiscation orders apply to the 'thing' or the defendant's interest in the 'thing'. For example, in *White v Director of Public Prosecutions (Western Australia)*, French CJ, Crennan and Bell JJ said of the definition of 'property' in the CPCA WA that '[t]he definition is more limited than the usage of the term "property" in parts of the Act where it plainly refers to the land or things which are the subject of property interests' (at [5]).

This lack of clarity means that any and all persons who have an interest in any restrained and/or confiscated 'thing' will be adversely affected by the restraint or confiscation.

The uncertainty is exacerbated by s 9 of the CPCA WA, which provides in relation to land that, once confiscated, the land vests in the state '…free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights of way, easements and restrictive covenants)…'. This provision was described by one interviewee as 'extraordinary and draconian'. In *Smith v Western Australia*, McKechnie J stated that even if the mother and sister had succeeded in proving that they did have an equitable interest in the property, such an interest would be extinguished by the operation of s 9.

One interviewee provided further illustrations of the difficulties with this provision: if a person holds registered property as trustee and is declared a drug trafficker, all of the trust beneficiary's rights in the property are extinguished. So, too, if the defendant borrows money from a bank on security of a mortgage. On confiscation of the property, the mortgage is extinguished and the bank is left without any security for the loan.

Adequate protection of the property rights of innocent third parties requires clear and accurate identification and definition of the restrained or confiscation property. That property must be identified and defined as consisting of the defendant's proprietary interests in the physical item/s of property concerned, rather than as the physical thing itself.

Recommendations:

Include effective and appropriate third party interest exclusion provisions that apply across the board to all types of restraint and confiscation.

Allow for a guided judicial discretion which can take into account hardship to third parties and the impact of the order on third party property rights.

Accurately define the property targeted by the legislation as being interests in property rather than the item of property itself, and clearly and correctly identify it as such throughout the operative sections of the legislation.

Release of property to cover legal costs

The use of restrained funds for engaging legal representation has been an ongoing concern in the literature (eg Fisse 1989a; Freiberg 1992; Carew & Ollenburg 2006; Edwards 1999; Temby 1989; Thornton 1992). This was concern was reflected in the present empirical study, where it was considered by some to be 'a hugely vexed issue'.

Each confiscation regime studied differs in its approach on this issue. However, all require court proceedings to release restrained property to cover legal expenses (eg CPCA NSW s 43(6); CPCA Qld s 93V(f)). A similar provision to s 43(6) of the CPCA NSW existed in Western Australia's first proceeds of crime legislation (see *Silbert* discussed above), but was not retained in the current CPCA WA. However, in *Mansfield v Director of Public Prosecutions (Western Australia)* (2006) 226 CLR 486, the High Court held that a court, when making or varying a freezing order, may provide that certain property is exempt from a freezing order on condition it is used for legal expenses (at [53]-[54]). In practice, however, this approach has proven problematic. As one interviewee observed:

> Under *Mansfield*, if it's frozen under a freezing order, the court has to make an assessment. That is an awful position for any judge to be in. It's often dealt with by a judge other than the trial judge …and I will say to the judge, "Look, it's gonna cost this much and broadly it's gonna cost this much on this, this, and this "…sometimes that can leave the judge feeling, "I haven't really got…an explanation or a justification for why this figure is as high as this. I don't really know". But anything you tell the judge, you've gotta tell the other side as well.

One interviewee endorsed the federal legal aid mechanism over the state approaches of releasing property for legal costs:

> The federal approach to it…is the better one…what happens is you apply to Legal Aid…to be represented both in the proceeds of crime matter and in your criminal matters. They make an assessment of whether you satisfy the means test, disregarding the restrained property, and if you satisfy the means test, they then give you representation…I can tell Legal Aid anything including LPP [legal professional privilege] material, tell them exactly what's happening, what the advice to the client is, what the risks of the application are, prospects of success are…and it's all quarantined between me and Legal Aid. I give Legal Aid a fully itemised invoice and if they've got a problem with it, they'll ask me and have a discussion about it. Legal Aid then, at the end of a matter, write to the Attorney-General's department in Canberra and say, 'We expended $83,112.56 on Supreme Court matter, CIV, blah, blah—please pay us'. The Attorney-General's department gets no itemisation. It's a trust thing Legal Aid will do the right thing by them and it insulates the Commonwealth Government.

Other interviewees expressed further concerns with costs in the confiscation regimes:

> One of the other issues I think is very punitive about the system, is the costs regime, the fact that at least here it runs on a civil cost basis, so costs follow the event… for the same reason the government doesn't get its costs in criminal prosecution, I don't think they should get their costs [in confiscation matters]. I think that's prohibitive…I mean it's just straight out access to justice, that's why everyone is settling. They can't afford the litigation. So they've got no choice. And when you're seizing the smaller assets, cars and things like that, even if you do have the money, why would you risk it?

Another interviewee raised concerns about the implications of the costs regime on innocent third parties and about their ability to bring applications:

> I think a difficulty that perhaps politicians don't necessarily appreciate is that it's very difficult for someone with limited resources to slow down the confiscation machinery once it gets rolling. Because it's civil litigation which is expensive, basic things like filing things if you want to contest it; you've got to pay solicitors or barristers or find someone who's willing to do it pro bono or on spec. And there can be plenty of cases where there are meritorious claims for exclusion or hardship if those sorts of provisions are available, which might not be able to proceed simply because the relevant parties don't have the resources to pursue them.

Recommendation:

Provide means-tested legal aid funding through an administrative rather than a judicial process, assessed without regard to the value of the restrained assets.

References

URLs current as at April 2020

ABC News 2011. Calls for changes to confiscation laws. 27 June. http://www.abc.net.au/news/stories/2011/06/27/3254153.htm

ABC Radio 2018. WA to review crimes confiscation legislation. *The law report*. 30 October. https://www.abc.net.au/radionational/programs/lawreport/2018–10-30/10442770

Abetz P 2011. *Criminal Property Confiscation Act 2000* grievance. *Hansard* (WA Legislative Assembly) 8 September: 7081[1]

Australian Crime Commission 2015a. *The costs of serious and organised crime in Australia 2013–14.* Canberra: Australian Crime Commission. https://www.acic.gov.au/publications/intelligence-products/costs-serious-and-organised-crime-australia

Australian Crime Commission 2015b. *The costs of serious and organised crime in Australia 2013–14: Methodological approach.* Canberra: Australian Crime Commission. https://www.acic.gov.au/publications/intelligence-products/costs-serious-and-organised-crime-australia

Australian Crime Commission 2013. *Organised crime in Australia 2013.* Canberra: Australian Crime Commission

Australian Criminal Intelligence Commission 2017. *Organised crime in Australia 2017*. Canberra: Australian Criminal Intelligence Commission. https://www.acic.gov.au/publications/intelligence-products/organised-crime-australia

Australian Government 2015. *National organised crime response plan 2015–2018*. Canberra: Commonwealth of Australia. https://www.homeaffairs.gov.au/criminal-justice/files/national-organised-crime-response-plan-2015-18-accessible.pdf

Australian Law Reform Commission 1999. *Confiscation that counts: A review of the Proceeds of Crime Act 1987*. Report no. 87. Canberra: Commonwealth of Australia

Bagaric M 1997. The disunity of sentencing and confiscation. *Criminal Law Journal* 21(4): 191–203

Barron-Sullivan D 2000. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 29 June: 8611

Bartels L 2010. Unexplained wealth laws in Australia. *Trends & issues in crime and criminal justice* no. 395. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi395

Bell RE 2004. The confiscation, forfeiture and disruption of terrorist finances. *Journal of Money Laundering Control* 7(2): 105–125

Bell RE 1999. Civil forfeiture of criminal assets. *Journal of Criminal Law* 63(4): 371–384

Bleijie JP 2013. Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2013. *Hansard* (Queensland, Legislative Assembly) 1 May: 1344

Bowen L 1987. Proceeds of Crime Bill 1987. *Hansard* (Commonwealth House of Representatives) 30 April: 2314

Campbell L 2010. The recovery of 'criminal' assets in New Zealand, Ireland and England: Fighting organised and serious crime in the civil realm. *Victoria University of Wellington Law Review* 41(1): 15–36

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

Carr R 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Assembly) 16 May: 3516–7

Clarke B 2004. A man's home is his castle: Or is it? How to take houses from people without convicting them of anything: The *Criminal Property Confiscation Act 2000* (WA). *Criminal Law Journal* 28(5): 263–286

Clarke B 2002. Confiscation of 'unexplained wealth': Western Australia's response to organised crime gangs. *South African Journal of Criminal Justice* 15: 61–87

Clauson PJ 1989. Crimes (Confiscation of Profits) Bill. *Hansard* (Queensland Legislative Assembly) 4 April: 4037–4039

Royal Commission on the Activities of the Federated Ship Painters and Dockers Union 1984 (Costigan commission). *Final report*. Australian Government Printer. Canberra: Commonwealth of Australia

Croke C 2010. Civil forfeiture: Forfeiting civil liberties? A critical analysis of the *Crimes Legislation Amendments (Serious and Organised Crime) Act 2010* (Cth). *Current Issues in Criminal Justice* 22(1): 149–158

Cunningham E 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 27 November: 4957

De Brennan S 2011. Freezing notices and confiscation powers: New punitive roles for police? *Criminal Law Journal* 35(6): 345–360

Daley M 2010. Criminal Assets Recovery Amendment (Unexplained Wealth) Bill. *Hansard* (NSW Legislative Assembly) 22 June: 24497

Dawson S 2017. Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill. *Hansard* (WA Legislative Council) 14 September: 4073

Department of Justice and Attorney General (Qld), Office of the Director of Public Prosecutions 2016. *Director's guidelines*. https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf

Dixon N 2002. Expanding the criminal assets forfeiture regime: Criminal Proceeds Confiscation Bill 2002 (Qld). *Research Brief* 2002(33): 1

Drummond M 2000. Crime a key platform for WA Liberals. *Australian Financial Review*. 31 July: 5

Dowd J 1989. Confiscation of Proceeds of Crime Bill 1989. *Hansard* (NSW Legislative Assembly) 3 May: 7320–7325

Edwards D 1999. Confiscation that counts. *Reform* 75: 47–50

Feldman D 1989. Individual rights and legal values in proceeds of crime legislation: A comparative approach. *Anglo-American Law Review* 18(4): 261–288

Fisse B 1992. Confiscation of proceeds of crime: Discretionary forfeiture or proportionate punishment? *Criminal Law Journal* 16(3): 138–159

Fisse B 1989a. Confiscation of proceeds of crime: Funny money, serious legislation. *Criminal Law Journal* 13(6): 368–402

Fisse B 1989b. The Proceeds of Crime Act: The rise of money-laundering offences and the fall of principle. *Criminal Law Journal* 13(1): 5–23

Fisse B & Fraser D 1993. Some antipodean skepticisms about forfeiture, confiscation of proceeds of crime, and money laundering offenses. *Alabama Law Review* 44(3): 737–762

Flynn B 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 27 November: 4950

Fraser D 1990a. Money laundering, cash transactions reporting, and confiscation of the proceeds of crime: Introduction. *Current Issues in Criminal Justice* 2(2): 68–71

Fraser D 1990b. Lawyers, guns and money: Towards a comparative jurisprudence of organised crime. *Current Issues in Criminal Justice* 2(2): 122–145

Freiberg A 1992. Criminal confiscation, profit and liberty. *Australian and New Zealand Journal of Criminology* 25(1): 44–82

Freiberg A & Fox R 2000. Evaluating the effectiveness of Australia's confiscation laws. *Australian and New Zealand Journal of Criminology* 33(3): 239–265

Freiberg A & Fox R 1992. Forfeiture, confiscation and sentencing. In B Fisse, D Fraser & G Coss (eds), *The money trail: Confiscation of proceeds of crime, money laundering and cash transaction reporting*. Sydney: Law Book Company: 106–149

Freiberg A & Pfeffer M 1993. The (deferred) wages of sin: Confiscating superannuation benefits. *Criminal Law Journal* 17(3): 157–180

Freiberg A & Murray S 2012. Constitutional perspectives on sentencing: Some challenging issues. *Criminal Law Journal* 36(6): 335–355

Goldsmith A, Gray D & Smith R 2014. Criminal asset recovery in Australia. In G King, C King & C Walker (eds), *Dirty assets: Emerging issues in the regulation of criminal and terrorist assets*. Farnham, Surrey, UK: Ashgate Pub. Limited

Grant T 2016. Crimes (Serious Crime Prevention Orders) Bill 2016, Criminal Legislation Amendment (Organised Crime and Public Safety) Bill 2016. *Hansard* (NSW, Legislative Assembly) 22 March: 8036

Gray A 2012a. Forfeiture provisions and the criminal/civil divide. *New Criminal Law Review* 15(1): 32–67

Gray A 2012b. The compatibility of unexplained wealth provisions and 'civil' forfeiture regimes with Kable. *QUT Law & Justice Journal* 12(2): 18–35

Greiner N 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Assembly) 8 May: 2527–2531

Hallam J 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Council) 23 May: 4301

Hickey SJ 2017. Cini v Commissioner of the Australian Federal Police [2016] VSCA 227: Nothing soft about Australian proceeds of crime jurisprudence. *Criminal Law Journal* 41(2): 119–121

Hodgson H 2000. Criminal Property Confiscation Bill 2000 Criminal Property Confiscation (Consequential Provisions) Bill 2000. *Hansard* (WA, Legislative Assembly) 22 November: 3527 [2]

Jones R 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Council) 23 May: 4312–13

King C, Walker C and Gurulé J (eds) 2018. *The Palgrave handbook of criminal and terrorism financing law*. Cham, Switzerland: Palgrave Macmillan

Kirkby E 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Council) 23 May: 4281

Kirkby E 1989. Confiscation of Proceeds of Crime Bill 1989. *Hansard* (NSW Legislative Council) 23 May: 8284

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

Leighton-Daly M 2013a. Taxation, civil forfeiture and unexplained wealth: Part 1. *Taxation in Australia* 47(8): 509–512

Leighton-Daly M 2013b. Taxation, civil forfeiture and unexplained wealth: Part 2. *Taxation in Australia* 47(9): 574–577

Legislative Council of NSW 1989. Confiscation of Proceeds of Crime Bill 1989. *Hansard* (NSW, Legislative Council) 23 May: 8284–8286

Lusty D 2002. Civil forfeiture of proceeds of crime in Australia. *Journal of Money Laundering Control* 5(4): 345–359

McClean D 1989. Seizing the proceeds of crime: The state of the art. *International and Comparative Law Quarterly* 38(2): 334–360

Macdonald I 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Council) 23 May: 4313–15

McGinty J 2000a. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 17 August: 523[1]

McGinty J 2000b. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 17 August: 539[5]

McGinty J 2000c. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 7 September: 935[22]

Michaelson C & Goldbarsht D 2018. Legal and regulatory approaches to counter-terrorist financing: The case of Australia. In C King, C Walker & J Gurulé (eds), *The Palgrave handbook of criminal and terrorism financing law*. Cham, Switzerland: Palgrave Macmillan

Moffitt A 1985. *Quarter to midnight: The Australian crisis: Organised crime and the decline of the institutions of state*. North Ryde: Angus and Robertson

Morris T 2001. Great expectations: Australia's new proceeds of crime bill. *Platypus* 73: 31

New South Wales Crime Commission 2017. *Annual report 2016–2017*. Sydney: NSWCC

New South Wales Crime Commission 2016. *Annual report 2015–2016*. Sydney: NSWCC

NSW ODPP 2016. *Annual report 2015–2016*. Sydney: NSW ODPP. https://www.odpp.nsw.gov.au/sites/default/files/attachments/2015---2016-annual-report.pdf

Ochoa R 2018. Organised crime and terrorism nexus: Implications for Australia: A research note. In R Smith (ed), *Organised crime research in Australia 2018*. Research report no. 10. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/rr/rr10

Odgers S 2007. Proceeds of crime: Instrument of injustice? *Criminal Law Journal* 31(6): 330–331

Office of the Director of Public Prosecutions (NSW) see NSW ODPP

Office of the Director of Public Prosecutions (Qld) see Qld ODPP

Office of the Director of Public Prosecutions (WA) see WA ODPP

Parliamentary Joint Committee on Law Enforcement 2012. *Inquiry into Commonwealth unexplained wealth legislation and arrangements*. Canberra: Parliament of Australia

Parliamentary Joint Committee on the Australian Crime Commission 2009. *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*. Canberra: Parliament of Australia

Pendal P 2000. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 5 September: 650[7]

Pickering T 1990. Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW Legislative Council) 23 May: 4267

Porter C 2011. *Criminal Property Confiscation Act 2000* Grievance. *Hansard* (WA Legislative Assembly) 8 September: 7083[3]

Prince A 2000. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 7 September: 934[21]

Qld ODPP 2017. *Annual report 2016–2017*. Brisbane: Qld ODPP. https://www.publications.qld.gov.au/dataset/office-of-the-director-of-public-prosecutions-annual-reports

Qld ODPP 2016. *Director's guidelines: As at 30 June 2016*. Brisbane: Department of Justice and Attorney-General. https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf

Quail H 2011. President's report. *Brief* 38(7): 2

Queensland Crime and Corruption Commission 2018. *Parliamentary Crime and Corruption Committee public report: Activities of the Crime and Corruption Commission for the period 1 March to 31 May 2018*. Queensland: Crime and Corruption Commission

Queensland Police 2018. Offence numbers: Monthly from July 1997, accessed on 19 November 2018. https://data.qld.gov.au/dataset/offence-numbers-monthly-from-july–1997

Quigley J 2018. *Former Chief Justice to undertake review of WA's asset seizure laws*. Media release (WA Attorney General), 19 September. https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/09/Former-Chief-Justice-to-undertake-review-of-WAs-asset-seizure-laws.aspx

Radio 6PR 2018. Criminal confiscation laws to be reviewed. *Mornings with Gareth Parker*. 20 September. https://www.6pr.com.au/podcast/criminal-confiscation-laws-to-be-reviewed/

Reed D 2000. Mr Bigs go free. *West Australian*, 24 July 2000: 1

Roberts E 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 27 November: 4955–6

Roach K 2010. The eroding distinction between intelligence and evidence in terrorism investigations. In N McGarrity, A Lynch & G Williams (eds), *Counter-terrorism and beyond: The culture of law and justice after 9/11*. Abingdon, UK: Routledge

Senate Legal and Constitutional Affairs Legislation Committee 2009. Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009. Report. Canberra: Parliament of Australia

Sheahan T 1985. Crimes (Confiscation of Profits) Bill. *Hansard* (NSW Legislative Assembly) 13 November: 9570–74

Skead N 2016. Crime-used property confiscation in Western Australia and the Northern Territory: Laws befitting Draco's axones? *University of Western Australia Law Review* 41(1): 67–90

Skead N 2013. Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far. *Criminal Law Journal* 37(5): 296–314

Skead N & Murray S 2015. The politics of proceeds of crime legislation. *University of New South Wales Law Journal* 38(2): 455–491

Smith M & Smith RG 2016. *Exploring the procedural barriers to securing unexplained wealth orders in Australia*. Report to the Criminology Research Advisory Council. December. https://crg.aic.gov.au/reports/1617/unexplained-wealth.pdf

Smith RG (ed) 2018. *Organised crime research in Australia 2018*. Research report no. 10. Canberra: Australian Institute of Criminology. http://aic.gov.au/publications/rr/rr10

Smith RG, Jorna P, Sweeney J & Fuller G 2014. *Counting the costs of crime in Australia: A 2011 estimate*. Research and public policy series no. 129. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/rpp/rpp129

Smith RG, McCusker R & Walters J 2010. Financing of terrorism: Risks for Australia. *Trends & issues in crime and criminal justice* no. 394. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi394

Southwell M & Burns A 2000. Give it back: Asset laws will target shonky broker deals. *West Australian* 29 June: 1

Springborg L 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 27 November: 4939–42

Stonehouse A 2018. Misuse of Drugs Amendment Bill 2018. *Hansard* (WA Legislative Council) 16 August 2018: 4676d

Tarrant J 2005. Property rights to stolen money. *University of Western Australia Law Review* 32(2): 234–250

Temby I 1989. The Proceeds of Crime Act: One year's experience. *Criminal Law Journal* 13(1): 24–30

Thornton J 1994. Objectives and expectations of confiscation and forfeiture legislation in Australia: An overview. *Canberra Law Review* 1(1): 43–56

Thornton J 1992. Confiscating criminal assets: The Proceeds of Crime Act and related legislation. In B Fisse, D Fraser & G Coss (eds), *The money trail: Confiscation of proceeds of crime, money laundering and cash transaction reporting*. Sydney: Law Book Company: 13–30

Thornton J 1990. Confiscating criminal assets: The new deterrent. *Current Issues in Criminal Justice* 2(2): 72–89

Tubex H, Brown D, Freiberg A, Gelb K & Sarre R 2015. Penal diversity within Australia. *Punishment & Society* 17(3): 345–373

Tulich T 2012. Adversarial intelligence? Control orders, TPIMs and secret evidence in Australia and the United Kingdom. *Oxford University Commonwealth Law Journal* 12(2): 341–369

United Nations Office on Drugs and Crime 2011. *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*. Research report. Vienna: United Nations Office on Drugs and Crime

UNSCOR 2019. *Threats to international peace and security.* UN Security Council resolution: 8582nd meeting, 19 July. UN Doc S/RES/2482

UNSCOR 2015a. *Threats to international peace and security caused by terrorist acts.* UN Security Council resolution: 69th session, 7587th meeting, 17 December. UN Doc S/RES/2253

UNSCOR 2015b. *Threats to international peace and security caused by terrorist acts.* UN Security Council resolution: 69th session, 7590th meeting, 21 December. UN Doc S/RES/2255

UNSCOR 2014. *Threats to international peace and security.* UN Security Council resolution: 69th session, 7351st meeting, 19 December. UN Doc S/RES/2195

UWA Crime Research Centre. Crime and justice statistics for Western Australia. *Statistical Report* 1998–2006. Perth: University of Western Australia Crime Research Centre. www.able.uwa.edu.au/centres/crc/reports

Vaughan B 1990, Drug Trafficking (Civil Proceedings) Bill. *Hansard* (NSW, Legislative Council) 23 May: 4275

Vaughan B 1989. Confiscation of Proceeds of Crime Bill 1989. *Hansard* (NSW Legislative Council) 23 May: 8282

Walker C 2005. Intelligence and anti-terrorism legislation in the United Kingdom. *Crime, law and social change* 44(4): 387–422

WA ODPP 2018. *Statement of prosecution policy and guidelines 2018*. Perth: Government of Western Australia. https://www.dpp.wa.gov.au/_files/publications/Statement-of-Prosecution-Policy-and-Guidelines.pdf

WA ODPP 2017. *Annual report 2016–2017*. Perth: WA ODPP. https://www.dpp.wa.gov.au/_files/annual-reports/ODPP_Annual_Report_2016_17.pdf

Watson G 2000. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Council) 22 November: 3530[5]

Weinberg M 1989. The *Proceeds of Crime Act 1987*: New despotism or measured response? *Monash University Law Review* 15(3–4): 201–218

Welford R 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 22 October: 3859

Wellington P 2002. Criminal Proceeds Confiscation Bill 2002. *Hansard* (Queensland Legislative Assembly) 27 November: 4947

Western Australian Auditor General 2018. *Confiscation of the proceeds of crime: Report no. 5: May 2018*. Perth: Office of the Auditor General Western Australia. https://audit.wa.gov.au/reports-and-publications/reports/confiscation-of-the-proceeds-of-crime/auditor-generals-overview/

Wiese R 2000a. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 5 September: 649–50[6]-[7]

Wiese R 2000b. Criminal Property Confiscation Bill 2000. *Hansard* (WA Legislative Assembly) 14 November: 2809[1]

Zedner L 2014. Terrorizing criminal law. *Criminal Law and Philosophy* 8(1): 99–121

Appendix A: Detailed legislative mapping

Table A1: Australian proceeds of crime legislation		
Jurisdiction	**Initial legislation**	**Current legislation**
Cth	*Proceeds of Crime Act 1987* (Cth)	*Proceeds of Crime Act 2002* (Cth)
NSW	*Crimes (Confiscation of Profits) Act 1985* (NSW))	*Confiscation of Proceeds of Crime Act 1989* (NSW) *Criminal Assets Recovery Act 1990* (NSW)
Vic	*Crimes (Confiscation of Profits) Act 1986* (Vic)	*Confiscation Act 1997* (Vic)
Qld	*Crimes (Confiscation of Profits) Act 1989* (Qld)	*Criminal Proceeds Confiscation Act 2002* (Qld)
WA	*Crimes (Confiscation of Profits) Act 1988* (WA)	*Criminal Property Confiscation Act 2000* (WA)
SA	*Crimes (Confiscation of Profits) Act 1986* (SA)	*Criminal Assets Confiscation Act 2005* (SA) *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)
Tas	*Crime (Confiscation of Profits) Act 1993* (Tas)[a]	
ACT	*Proceeds of Crime Act 1991* (ACT)	*Confiscation of Criminal Assets Act 2009* (ACT)
NT	*Crimes (Confiscation of Profits) Act 1988* (NT)	*Criminal Property Forfeiture Act 2002* (NT)

a: Still in force

New South Wales

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

The CPCA NSW establishes a comprehensive regime for conviction-based crime-used, crime-derived, and drug trafficker confiscations. The principal objects are set out in s 3:

(a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State, and

(b) to provide for the forfeiture of property used in or in connection with the commission of such offences or substitutable tainted property, and

(c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property, and

(d) to provide for the enforcement in the State of forfeiture orders, pecuniary penalty orders and restraining orders…

The provisions of the Act are enlivened when a person is convicted of a 'serious offence' or a 'drug trafficking offence'. The Act defines 'conviction of serious offence' to include where a person has absconded in connection with the offence (s 5). Where a person has been convicted of either category of offences, the New South Wales Director of Public Prosecutions (NSW DPP) may apply to a court for a confiscation order against 'tainted property' or the benefits derived from the commission of such offences (CPCA NSW ss 13, 24, 29).

'Tainted property' is defined in s 4 as property that:

(a) was used in, or in connection with, the commission of a serious offence, or

(b) was substantially derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence, or

(c) was substantially derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence, or

(d) was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender's thoughts, opinions or emotions regarding the offence, in any public promotion.

A 'serious offence' is defined in s 7 as any indictable offence, the offence of supplying a prescribed substance under s 18A(1) of the *Poisons and Therapeutic Goods Act 1966* (NSW), or a prescribed offence, which includes the offence of publishing indecent articles. A 'drug trafficking offence' is defined as including the indictable offences of supplying prohibited drugs on an ongoing basis, possession of precursors for making prohibited drugs, and other specified drug-related (s 7). Drug trafficking offences are indictable offences and so fall within the definition of 'serious offences'.

Confiscation orders

The Act provides for three types of confiscation order: forfeiture orders, pecuniary penalty orders, and drug proceeds orders (s 13). An application for a confiscation order must be made within six months of conviction, except with leave of the Supreme Court (s 13(3)). Written notice of an application for a confiscation order must be given to all persons reasonably believed to have an interest in the targeted property, each of whom may be heard in relation to the application (s 14(1)).

Under s 16, the property of a person who has absconded may be confiscated if the court is satisfied, on the balance of probabilities, that the person has absconded and they have either been committed for trial for the offence or—having regard to all the evidence before it—a reasonable and properly instructed jury could lawfully find the person guilty of the offence. Despite being ostensibly conviction-based, it is clear that there are circumstances where there may be confiscation of the property of a person who has not actually been found guilty and convicted of an offence.

Forfeiture orders: Tainted property

Where a person has been convicted of a serious offence, the court may order that specified property be confiscated by the state, if satisfied that it is 'tainted property' and, having regard to the information before it, taking into account the ordinary use of the property and 'any hardship' that is reasonably likely to be caused to any person by making the order (ss 18(1)(a) and (b)). That is, the court must have regard to any inferences properly drawn about potential hardship in the context of the use of the property (see particularly *New South Wales Crime Commission v Hayward* [2018] NSWSC 571, at [18]; *Zahrooni v R; Director of Public Prosecutions (New South Wales) v Zahrooni* [2010] NSWCCA 252, at [61]). In determining whether property is tainted, the court is to consider 'the extent to which the property was used in or in connection with the commission of the crime' (see *Hayward; Zahrooni* at [60]; see also *R v Lake* (1989) 44 A Crim R 63; *R v Bolger* (1989) 16 NSWLR 115). In relation to criminal benefits, the court may also have regard to the public interest and the nature and purposes of the public promotion, including the social or educational value and research and rehabilitative purposes (s 18(1A)).

In *R v Hadad* (1989) 16 NSWLR 476, 484, McInerney J considered the court's discretion sufficiently wide to take into account any hardship occasioned to an innocent third party owner of crime-used property that may be affected by the legislation. While the forfeiture provisions are 'designed to cause a measure of hardship' (*R v Wealand* [2002] NSWCCA 471, at [28]; *R v Lake*), proportionality is a relevant consideration in the exercise of the discretion (*Hayward; Zahrooni* at [60]; *R v Lake*; *R v Bolger*). Debelle J in *Taylor v Attorney-General (South Australia)* (1991) 55 SASR 462 explained in relation to the South Australian equivalent:

> …broadly speaking, in the exercise of its discretion, the court will have regard to the circumstances of the offence, the extent to which the property was connected with the commission of the offence, the seriousness of the offending, the value of the property in relation to the offence and the likely consequences of an order for forfeiture upon the offender and others who might be affected by the order. (at 475)

In relation to the likely consequences of a forfeiture order on the offender, McCallum J in *Hayward* considered that it is not a purpose of confiscation legislation 'to inflict such hardship on offenders as to leave them in a position where rehabilitation upon release from custody is a virtual impossibility' (see at [26]). Under s 18(2A), when considering any hardship that may arise in relation to a respondent who is an Aboriginal person or a Torres Strait Islander, the court is mandated to take into account the responsibilities arising from the respondent's ties to extended family and kinship.

On the making of a forfeiture order, the property specified in the order automatically vests in the state (s 19(1)(a)). If the order relates to land, the respondent's estate or interest in that land must be specified in the order (s 18(5)). Under ss 19(1)(a) and (b), forfeited confiscated property vests in the state only to the extent of the estate, interest, or rights specified in the order and subject to all encumbrances to which the property was subject when the confiscation order was made. Where the property is land, it vests 'subject to every mortgage, lease or other interest recorded in the Register kept' under the *Real Property Act 1900* (NSW) (see s 19(1)(a)). While existing registered interests over the land are protected, registration of the state as proprietor of the land operates to automatically extinguish any unregistered interests in the confiscated property. In *Leros Pty Ltd v Terrara Pty Ltd* (1992) 174 CLR 407 the High Court of Australia held unanimously that an unregistered and uncaveated interest will be defeated and extinguished on the registration of a subsequent inconsistent dealing (418).

Within six months from the making of a forfeiture order, a third party may apply to the court for an order declaring their interest in the confiscated property and directing the state to transfer the property to the third party or to pay to the third party the declared value of their interest in the property (s 20). Under s 20 the court is required to make the order if the third party (1) was not a party to the commission of the relevant offence; and (2) acquired the interest either before the commission of the offence or for sufficient consideration and without actual or constructive knowledge that it was tainted property. A forfeiture order can be appealed by any person with an interest in the property, and may on appeal be confirmed, varied, or discharged (s 92).

Substituted tainted property declarations

The NSW DPP may apply to the court for a declaration that property, an interest in property, or combination of these, of a person who has been convicted of a serious offence is available for forfeiture. Written notice must be given to the person and any other person reasonably believed to have an interest in the property, who may then be heard in the application proceedings (s 33(4)). The court must make a substituted tainted property declaration if satisfied (under s 33(5)) that:

(a) the person has been convicted of a serious offence, and

(b) particular property became tainted property because it was used in, or in connection with, the commission of the serious offence, and

(c) the tainted property is not available for forfeiture because:

  (i) the person does not own, and does not have effective control of, the property, or

  (ii) the property has been sold or otherwise disposed of or cannot be found for any other reason.

Once the court makes a declaration, the property and/or interest in property is treated as tainted property available for forfeiture (s 33(9)).

Pecuniary penalty orders: Criminal benefits

Where a person has been convicted of a serious offence other than a drug trafficking offence, on the application of the NSW DPP, the court may assess the value of the benefits the person derived from the offence and may order that the person pay the state a pecuniary penalty of that value (s 24(1)). 'Benefits' are defined in s 4 as including a service or advantage. In considering whether to treat a benefit as a criminal benefit, the court may have regard to any matter it thinks fit, including, in the case of benefits derived from the commercial exploitation of one's criminal notoriety, the public interest and the nature and purposes of the public promotion of one's criminal notoriety; research and rehabilitative purposes; and social or educational value (s 25(2A)). The relevance of hardship to deciding whether or not to impose a pecuniary penalty is not settled in the case law (see *R v Fagher* (1989) 16 NSWLR 67; *R v Desire Patrick Pepin* [1996] NSWSC 345).

To assess benefits the court may consider, among other things, the value of any benefit or the money or property that came into the possession or control of the defendant or 'another person at the request or by the direction of the defendant' because the defendant committed the offence/s (ss 25(2)(a)–(c)). If evidence is led about the value of the defendant's property after the serious offence was committed, and that value exceeds the value of the defendant's property prior to the serious offence, then the court must treat the value of the benefits derived as being not less than the amount in excess. This is unless 'the defendant satisfies the court that the whole or a part of the excess was due to causes unrelated to the commission of the offence or offences' (ss 25(3) and (4)).

A pecuniary penalty order is enforced as a civil debt owed to the state (s 24(4), (5)). The provisions relating to pecuniary penalty orders apply irrespective of when or where the property or benefit was acquired (s 28). A pecuniary penalty order can be appealed as if it was, or was part of, the sentence imposed for the serious offence (s 93(2)). On appeal, the court may confirm, vary, or discharge the order (s 92(3)).

Drug proceeds orders: Criminal benefits

Where a person has been convicted of a drug trafficking offence, on the application of the NSW DPP the court must determine whether the person derived any benefit in connection with drug trafficking at any time and, if the court believes they did, it must assess the value of the benefit and order the person pay the state a pecuniary penalty of that value (s 29(1); *R v Hall* [2013] NSWCCA 47). 'Benefit' is defined in s 4 to include a service or advantage, and is taken to mean the 'net gain' as calculated through s 30 (see *Director of Public Prosecutions (New South Wales) v Colakoglu (Colakoglu); Director of Public Prosecutions (New South Wales) v Dodd; Director of Public Prosecutions (New South Wales) v Whitby; Director of Public Prosecutions (New South Wales) v EC [2015] NSWCCA 301)*. The calculation should be made 'by reference to the monetary sum actually derived by a particular person' not from the sum paid as the sale price to the person for drugs (see *Colakoglu* at [33]–[34]). A drug proceeds order is enforced as a civil debt owed to the state (s 29(4)).

To assess benefits, the court is to have regard to the information before it concerning matters in s 30(1). These include the value of the person's property at the time of conviction and of any property transferred to the person in the past six years; money received in connection with drug trafficking; and the market value of the drugs, disregarding expenses incurred in the commission of the offence/s (ss 30(1)(a),(d),(f); 30(6)). It is recognised that this is a difficult task, normally undertaken without audited accounts or documentary evidence, and of questionable reliability if based on evidence of participants (see *R v Fagher; R v Hall*). The decision in *Colakoglu* indicates that reasonable estimates need to be made.

Importantly, in assessing benefits, 'the court may also treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant' (s 32(1)). Section 10 provides that:

(1) Property, or an interest in property, may be subject to the effective control of a person… whether or not the person has:
    (a) a legal or equitable estate or interest in the property, or
    (b) a right, power or privilege in connection with the property.

To determine whether or not a property or an interest in property is in the effective control of a person, or there are reasonable grounds to so believe, the court may have regard to, among other things 'family, domestic or business relationships between persons having an interest in the property' (s 10).

A drugs proceeds order can be appealed as if it was, or was part of, the sentence imposed for the drug trafficking offence (s 93(2)). On appeal, the court may confirm, vary or discharge the order (s 92(3)).

Seizure, freezing notices and restraining orders

Short-term preservation of tainted property can be achieved through seizure. Seizure aims to prevent property reasonably believed to be tainted property from being concealed, lost or destroyed, or used in committing a serious offence (ss 36–7). Suspected tainted property may be seized provided charges in respect of the relevant confiscation offence have been laid or are likely to be laid within 48 hours (s 39).

The Act also provides for the making of both freezing orders and restraining orders in respect of tainted property. A freezing order may be made by an authorised officer, and confirmed by a court (ss 42C, 42L). A court may restrain the property of a person charged, to be charged, or convicted of a serious offence or of any other person (ss 43–4). An application for a restraining order may be made *ex parte*. Once an application has been made, the court may require the applicant to give notice to a person reasonably believed to have an interest in the property or part thereof, who is entitled to be heard in the restraint proceedings (s 44(1)). Where notice is not given and an order is made, the applicant must give notice of the making of the order to the person (s 44(2)). Once property is restrained, it is an offence for any person to knowingly deal with that property, punishable by either a fine equivalent to the assessed value of the property or up to two years imprisonment, or both (s 45A).

A court may not restrain the property of a person who was not involved in the commission of an offence, unless there are reasonable grounds for believing the property is tainted property or is subject to the exclusive control of a person who derived a benefit from the commission of the offence (s 43(4)(a)). Under s 43, provided the court is satisfied that there are reasonable grounds for the applicant's belief on which the application is based, the court has a general residual discretion to make a restraining order. The court may make a restraining order subject to any conditions, for example, that the defendant's reasonable living expenses, including those of dependants, and reasonable business expenses be met out of the property (s 43(6)).

Criminal Assets Recovery Act 1990 (NSW) (CARA NSW)

The CARA NSW contains non-conviction-based confiscation provisions relating to: property of a person suspected of engaging in serious crime related activity, property or proceeds derived from serious crime related activity, and unexplained wealth. The principal objects of the CARA NSW are set out in s 3 and, in addition to providing for confiscation without conviction, include 'to enable law enforcement authorities effectively to identify and recover property'. Confiscation proceedings under the CARA NSW are civil proceedings and the rules of evidence applicable to civil proceedings apply (s 5).

The Act applies to 'serious crime related activity' which is defined in s 6 as anything done by the person that was at the time a 'serious criminal offence'. It applies whether or not the person has been charged with the offence or, if charged, tried and acquitted or tried and convicted. This includes where the conviction has been quashed or set aside. A 'serious criminal offence' is defined in s 6 to include a drug trafficking offence (defined in similar terms to the CPCA NSW but including small quantities of a prohibited drug) and similar offences under the pre-existing *Poisons Act 1966* (NSW) and under other Commonwealth, state or territory laws. The definition also includes offences punishable by at least five years imprisonment involving 'theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide', as well as firearms offences, drug premises offences, and, among other things, destruction of or damage to property valued at over $500.

In 2016, the Act was amended to enable the non-conviction-based confiscation of crime-used property. This was to target '[o]rganised criminals who use intermediaries to distance themselves from their crimes' (Grant 2016: 8036). The Act now also applies to 'serious crime used property', which is, 'property that was used in, or in connection with, a serious crime related activity' (s 9B(1)). The Act now makes provision for the making of 'substituted serious crime use property declaration'. This is a 'declaration to the effect that an interest in property (or a combination of interests in properties) of a person who has engaged in serious crime related activity is available for forfeiture instead of serious crime use property that was used in, or in connection with, that activity' (s 22AA(2)).

Confiscation orders

The Act provides for three types of confiscation order: an assets forfeiture order, a proceeds assessment order, and unexplained wealth order.

Asset forfeiture orders: Interests in property

Under s 22, the New South Wales Crime Commission (NSW CC) may apply for an assets forfeiture order in respect of an interest/interests in property if:

- the interest/s in property are held by a person suspected of having engaged in serious crime related activity/ies;
- the interests are suspected crime-derived property resulting from a person's serious crime related activity/ies;
- the interest is held in a false name suspected to be fraudulently acquired property that is illegally acquired property; or
- an interest is suspected of being an available interest relating to serious crime use property or capable of being the subject of a substituted serious crime use property declaration.

The court must make an assets forfeiture order if the court finds it to be more probable than not:

- that a person did engage in serious crime related activities involving an indictable quantity or an offence punishable by five years of imprisonment or more in the six years preceding the making of the forfeiture application; or
- that the interests are fraudulently acquired property that is illegally acquired property; or
- that the interest is an available interest relating to 'serious crime use property' (see ss 22(2), 22(2A), 22(2B)).

'Illegally acquired property' is defined in s 9 as the proceeds of illegal activity (which includes serious crime related activity), the proceeds of the disposal of such property, or property acquired using illegally acquired property.

The order is to be made in respect of a specified interest/s in property and operates in rem against the specified interests, regardless of who owns or has effective control of the interest/s (s 22(4); see also *Hriss v New South Wales Crime Commission* [2002] NSWSC 23). Any interest in property that is the subject of an assets forfeiture order is forfeited to, and vests in, the Crown (s 23(1)(a)). It is an offence (punishable by a fine equivalent to the value of the interest concerned or up to two years imprisonment or both) to dispose of or otherwise deal with an interest in property that is the subject of an assets forfeiture order. That is unless the person can show they had no notice that the interest was subject to the order and no reason to suspect it was (s 23A).

The CARA NSW extends limited financial relief to the innocent dependants of a person whose interests in property are confiscated, where the dependants will suffer hardship as a result of the confiscation. This is achieved by permitting a court to order that the dependants be paid a specified amount from the proceeds of the sale of the interest/s (s 24). While the protection of innocent third parties is both justified and necessary, this protection may be inadequate if the interest is sold at undervalue. Further, no protection will be afforded in the event of the confiscated interest not being sold.

Notwithstanding, certain additional protections are afforded to innocent third parties. Under s 9(5)(a), an interest in property ceases to be crime-derived or illegally acquired—and therefore is no longer amenable to restraint and confiscation—when it is acquired by a bona fide purchaser for value without actual or constructive notice that it was crime-derived or illegally acquired (*Shields v New South Wales Crime Commission* [2007] NSWCA 309). The application of the 'bona fide purchaser without notice' principle in these circumstances ensures that an innocent third party who unknowingly purchases crime-derived property for sufficient consideration does not risk the confiscation of that property (*New South Wales Crime Commission v Mahoney* [2003] NSWSC 1030). No protection is afforded by the statute to bona fide volunteers who may not have given adequate consideration for their interest in the confiscated property.

Section 25 allows a court to make an order to exclude a proprietary interest from the operation of an assets forfeiture order on application by the owner or holder of the specified interest. A s 25 application will only succeed if the interest sought to be excluded was actually specified in the assets forfeiture order. It is not sufficient that an interest may be affected by the order (see generally *Hriss*). The court must not make the exclusion order unless the applicant demonstrates that the interest in question is not illegally acquired property (s 25(2)(b); see also *Mahoney*). The court is to declare the nature and extent of the excluded interest in the order (s 25(3)).

Under s 26, a court may declare that a specified proportion of the value of a confiscated interest in property that is not attributable to the proceeds of an illegal activity be excluded from an assets forfeiture order and, further, may order that the applicant be paid that specified proportion of the proceeds from the sale of the interest. It follows, therefore, that where an interest in property was acquired partly with the proceeds of illegal activity and partly from legitimately acquired funds, only that proportion of the interest that was illegally funded will be confiscated.

Section 57 allows for an order in relation to an interest in property to be extended to other interests in the property including lawfully acquired interests and interests held by innocent third parties. This extension is permitted if the proceeds from the disposal of the combined interests are likely to be greater than the disposal of the illegally acquired interest alone, or where the disposal of the illegally acquired interest alone would be impracticable or significantly more difficult (s 57(1)). In making such an order, a court may make other orders necessary for the protection of innocent third parties whose interests may be affected. Such orders may include a declaration that a specified amount be paid to the third party to compensate for the value of the interest confiscated (s 57(3)(a)). The potential impact of s 57 on the proprietary rights of innocent third parties is both clear and unjustified.

Substituted serious crime use property declarations

The NSW CC may apply for a 'substituted serious crime use property declaration', which is a declaration that an interest/s in property of the person is available for forfeiture 'instead of serious crime use property that was used in, or in connection with, that activity' (s 22AA(2)). The NSW CC must give written notice to the person and any other person reasonably believed to have an interest in the property, who may appear and be heard at the application hearing (s 22AA(4)). Under s 22AA(5), the Supreme Court must make a declaration if the court is satisfied that it is more probable than not that:

(a) the person has engaged in serious crime related activity, and

(b) the activity has resulted in particular property becoming serious crime use property for the purposes of this Act, and

(c) the serious crime use property is not available for forfeiture as referred to in s 9B(3).

Proceeds assessment orders: Illegal activity

The NSW CC may apply for a proceeds assessment order 'requiring a person to pay to the Treasurer an amount assessed by the court as the value of the proceeds derived by the person from an illegal activity, or illegal activities, of the person or another person that took place not more than six years before the making of the application for the order'. This is so whether or not any such activity is an activity on which the application is based (s 27).

The Supreme Court must make a proceeds assessment order if it finds that it is more probable than not that the person did, in the six years preceding the making of the application, engage in serious crime related activities involving an indictable quantity of prohibited drugs/plants or an offence punishable by five years imprisonment or more (s 27(2)). The court must make a proceeds assessment order if the court finds it to be more probable than not that the person derived proceeds from an illegal activity or such activities of another person, and knew or ought to have known the proceeds derived from illegal activity and the other person was, in the six years preceding the making of the application, engaged in serious crime related activities involving an indictable quantity or an offence punishable by five years imprisonment or more (s 27(2A)).

The amount assessed as the respondent's illegal activity proceeds in a proceeds assessment order is a civil debt due by the respondent to the state and is enforced through the usual civil enforcement processes. As a result, property available to be taken in satisfaction of the debt is limited to property or interests in property owned or effectively controlled by the respondent. The CARA NSW defines 'effective control of an interest in property' to include where a person 'does not have a legal or equitable estate or interest in the property, or…the person has no direct or indirect right, power or privilege in connection with the interest' (s 8). On the NSW CC's application, if the Supreme Court is of the opinion the property is effectively controlled by a person subject to a proceeds assessment order, the court must declare that the interest is available to satisfy the order to the extent other property is not available (s 29). The proceeds assessment order may then be enforced against the property (s 29(2)).

Unexplained wealth orders

In New South Wales, a person's unexplained wealth is the whole or any part of their current or previous wealth 'that the Supreme Court is not satisfied is not or was not illegally acquired property or the proceeds of an illegal activity' (s 28B(2)). The 'current or previous wealth' of a person is defined in s 28, and includes all interests in property owned, effectively controlled, 'expended, consumed or otherwise disposed of' at any time and 'any service, advantage or benefit provided' for the person or to another at their request. The respondent bears the burden of proving on the balance of probabilities that their current or past wealth is not or was not illegally acquired or the proceeds of an illegal activity (ss 28B(2), (3)).

The Act provides further that, on application for an unexplained wealth order, the court must make the order if it has a reasonable suspicion that the respondent has either engaged in a serious crime related activity or activities or has acquired property derived from the 'serious crime related activity' of another person (s 28A(2)). This feature, also adopted in the CPCA Qld, should operate to ensure that only those targeted by the unexplained wealth regime—that is, 'serious criminals' (Daley 2010: 24497)—will be caught by the legislation. A scheme which is—as is the case in Western Australia—reliant simply on a respondent having to prove on the balance of probabilities that their wealth was not unlawfully acquired carries the risk that a respondent who, for a variety of reasons, may not have retained accurate records relating to their property may not be able to prove that their wealth was lawfully acquired. Thus, despite not having engaged in serious crime or having acquired property from a person who engaged in serious crime, the respondent may nonetheless be caught by the scheme and deprived of legitimately acquired property. This is less likely to occur under the NSW and Queensland schemes.

Under s 28A(4), the court may refuse to make, or may reduce the amount payable under, an unexplained wealth order if 'it is in the public interest to do so'. In introducing the related Bill, then NSW Minister for Police, Mr Michael Daley, indicated that the public interest requirement is:

> a critical safeguard to the regime…the Court may exclude a portion of the wealth from the order to provide for dependents and ensure that they do not suffer any undue hardship as a result of the confiscation. (Daley 2010: 24497)

The concept of public interest is 'very broad' and 'multi-faceted' (see *Ruddock v Vadarlis (No 2*) (2001) 115 FCR 229 at [14], [19]) and would allow a court to take account of potential adverse proprietary implications for other third parties in determining whether or not to make an unexplained wealth order. In civil proceedings, where the evidentiary onus is cast upon the respondent through the imposition of the statutory presumption that wealth is unlawfully acquired, judicial discretion—albeit strictly prescribed—is entirely appropriate.

The amount assessed as the respondent's unexplained wealth in an unexplained wealth order is a civil debt due by the respondent to the state and is enforced through the usual civil enforcement processes. As a result, property available to be taken in satisfaction of the debt is limited to property or interests in property owned or effectively controlled by the respondent. Proprietary interests of third parties will not be affected by such taking. On the NSW CC's application, if the Supreme Court is of the opinion the property is effectively controlled by a person subject to an unexplained wealth order, the court must declare that the interest is available to satisfy the order to the extent other property is not available (s 29). The unexplained wealth order may then be enforced against the property (s 29(2)). Property available to satisfy the debt may be restrained to ensure its availability.

Seizure and restraining orders

The CARA NSW contains a number of information-gathering powers, including production and monitoring powers and search powers that authorise the seizure of certain property (s 39). The NSW CC may apply to the Supreme Court *ex parte* for a restraining order in respect of interests in property of any person or that are held in a false name (s 10A(1)(2)). Subject to undertakings as to damages and/or costs being given as required by the court, the court must make the order if satisfied that there are reasonable grounds for suspecting that the person engaged in serious crime related activity/ies or that the property is crime-derived or fraudulently acquired property that is illegally acquired property (s 10A(5)).

A restraining order is to be applied for and made in respect of specified interests, specified classes of interest, or all the interests in the subject property (s 10A(1)). In *Shields*, Beazley JA, with whom Hodgson and Tobias JJA agreed, considered that a restraining order made in respect of '[a]ll interests acquired by [a person]…using funds directly or indirectly sourced from…funds provided by [another person]' is sufficient identification of a 'specified class of interests in property' (at [100], [130]). The lawfully acquired interests of innocent third parties are protected by requiring a restraining order to specify the interests in property to which it applies.

A restraining order only remains in place for two working days unless there is an application for an assets forfeiture order pending in respect of the relevant interest (s 10D(1)(a)). Dealing with an interest in property with actual or constructive notice that the interest is the subject of a restraining order is an offence that carries a fine equivalent to the value of the interest dealt with or possible two years imprisonment (s 16(1)). A restraining order may, however, be set aside if there are no reasonable grounds for suspecting either that the restrained property was crime-derived or the person engaged in serious crime related activity/ies, or if the restraining order was obtained illegally or against good faith (s 10C(1)). A restraining order in respect of an interest in Torrens title real property may be registered or caveated under the *Real Property Act 1900* (NSW) (see ss 15(1), (3)).

Queensland

Criminal Proceeds Confiscation Act 2002 (Qld) (CPCA Qld)

Section 4 sets out the objects of the CPCA Qld, the principal of which is to 'remove the financial gain and increase the financial loss associated with illegal activity'. The Act creates three separate schemes to achieve its objects (s 4):

- a non-conviction-based scheme contained in chap 2—this is administered by the Queensland Crime and Corruption Commission (Queensland CCC) and provides for the confiscation of crime-used and crime-derived property and unexplained wealth. For chapter 2 confiscation orders, it is not necessary to demonstrate 'a connection between the property and the illegal activity' (Qld ODPP 2016: 21);
- a conviction-based serious drug offender confiscation scheme in chapter 2A—this is administered by the Queensland CCC and provides for the forfeiture of property of a convicted drug offender. For chapter 2A confiscation orders, it is not necessary to demonstrate 'a connection between the property and the criminal charges' (Qld ODPP 2016: 21); and
- a conviction-based scheme contained in chapter 3—this is administered by the Queensland Office of the Director of Public Prosecutions (Queensland ODPP) and provides for the confiscation of crime-used and crime-derived property. For chapter 3 confiscation orders, it is necessary to demonstrate a 'direct connection between the property and the criminal charges' (Qld ODPP 2016: 21).

Proceedings under the Act are civil proceedings, attracting the civil standard of proof and rules of evidence (s 8). The Act expressly provides that any penalties, restraining orders, or forfeiture orders imposed pursuant to the CPCA Qld do not amount to punishment or a sentence for any offence (s 9). Each chapter contains provisions for preservation of property by seizure and restraint and for related powers of the court to conduct examinations. An appeal lies to the Court of Appeal against an order made pursuant to the Act or against a refusal to make an order (s 263).

Chapter 2: Non-conviction-based confiscation scheme

Chapter 2 provides a comprehensive non-conviction-based regime for crime-used, crime-derived and unexplained wealth confiscation (see s 13). It provides for three types of confiscation order: forfeiture orders, proceeds assessment orders and unexplained wealth orders.

Chapter 2 targets 'serious crime related activity'. This is defined in s 16 to mean 'anything done by a person that was, when it was done, a serious criminal offence', whether or not the person has been charged, tried, acquitted, or had the conviction quashed or set aside. A 'serious criminal offence' is an indictable offence carrying a maximum penalty of five years or more imprisonment and also includes certain prescribed offences relating to prostitution (s 17). 'Serious crime related activity' can form the basis of several confiscation orders (s 90). However, the state is precluded from applying for a proceeds assessment order against a person if it has unsuccessfully applied for an unexplained wealth order on the basis of the same serious crime related activity, and vice versa (s 90(5)). The quashing of a conviction for a serious crime related activity does not affect the validity of a confiscation order based on that activity (ss 61, 89, 89P).

'Serious crime derived property' is defined as property that is all or part of the proceeds of a serious crime related activity, including property acquired using serious crime derived property (s 23). 'Illegally acquired property' is defined as 'all or part of the proceeds of an illegal activity' (s 22; see further *State of Queensland v Brooks* [2006] QCA 431). 'Illegal activity' means serious crime related activity, an offence against the law of Queensland or the Commonwealth, or any act or omission committed outside of Queensland that is a crime either in Queensland or where it was committed (s 15). The Act outlines circumstances in which property ceases to be illegally acquired or serious crime derived, including when it vests in a person on the distribution of a deceased estate, is acquired by Legal Aid Queensland as payment of reasonable legal expenses, or is acquired for sufficient consideration without actual or constructive knowledge of its character (s 26).

Restraining orders

The state may apply to the Supreme Court for a restraining order to preserve property of a prescribed respondent (s 28(1)). A prescribed respondent for the purposes of chapter 2 is a person suspected of having engaged in one or more serious crime related activities. A restraining order application must be supported by an affidavit of an authorised Queensland CCC officer or police officer stating the reason for their suspicion that the respondent has engaged in serious crime related activity or that the property is serious crime derived property (s 29). The court must not hear an application unless reasonable notice has been given to the person whose property is subject to the application, except where asked to do so by an appropriate officer (ss 30A(2), s 9). Those with an interest in the property subject to the restraining order application may be heard (s 30A(4)). Where no notice has been given, a person may apply to the Supreme Court for revocation of the order (s 50A).

If 'satisfied there are reasonable grounds for the suspicion on which the application is based', the court must make an order unless the it is satisfied this is not in the public interest (s 31). A restraining order remains in force for 28 days, except where: an application is on foot for a chapter 2 confiscation order; there are outstanding proceeds assessment or unexplained wealth orders against the person; or the Supreme Court extends the order (s 36). Contravention of a restraining order is a criminal offence. The offence is punishable for an individual by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment. It is a defence to show no actual or constructive knowledge of the order (s 52).

The court may order that reasonable living and business expenses of the respondent or dependants and/or debt incurred in good faith be paid out of restrained property, where the expenses and debt cannot otherwise be paid and the property is not illegally acquired (s 34). The court may not impose a condition providing for the payment of legal expenses related to proceedings under the Act or criminal proceedings in which the person is a defendant (s 34(4)) except where the court, on application, makes an administrative order for the payment of legal aid from restrained property under s 38(1)(f). However, a person is not prevented from giving Legal Aid Queensland a charge over restrained property for legal assistance (s 31(5)).

Property may be excluded from a restraining order where it is in the public interest to do so (s 48(2); s 50(3)). The court may exclude the property of a prescribed respondent if satisfied that it is 'more probable than not' that the property is not illegally acquired property and 'the property is unlikely to be required to satisfy a proceeds assessment order or unexplained wealth order' (s 48(1)). The court may exclude the property of any other person if satisfied the property was acquired in good faith, for sufficient consideration, and without knowledge that that the property was illegally acquired and 'in circumstances not likely to arouse a reasonable suspicion' (s 50).

Forfeiture orders

The state may apply to the Supreme Court for an order forfeiting restrained property (s 56). Written notice must be given to each person whose property is subject to the restraining order and to anyone who has an interest in the property, all of whom may appear at the hearing (s 57).

Under s 58, the court must make a forfeiture order if the court finds that it is more probable than not that:

- for a person suspected of engaging in serious crime related activity—the person engaged in serious crime related activity in the six years prior to the day the application was made; or
- for property suspected of being crime-derived—the property is serious crime derived property because of a serious crime related activity that happened during the six years prior to the application being made.

Property subject to a forfeiture order is forfeited to and vests absolutely in the state (s 59). It is an offence to knowingly deal with forfeited property. The offence is punishable for an individual by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment (s 60). A dealing in forfeited property will be void unless the dealing was in favour of a person who had no actual or constructive knowledge the property was forfeited, who acted in good faith, and who provided sufficient consideration (s 60(5)).

Proceeds assessment orders

The state may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the value of the proceeds derived from illegal activity that occurred in the six years leading up to the application (s 77(1)). Notice must be given to the person against whom the order is sought, as well as to anyone reasonably suspected of being affected by the order, all of whom may appear at the hearing (ss 77(2)–(3)).

The court must make a proceeds assessment order against a person if the court makes a finding of serious crime related activity—that is, the court finds it is more probable than not that during the six years before the application was made, the person engaged in serious crime related activity (s 78(1)). The court has discretion to refuse to make an order where it is not in the public interest (s 78(2)). A finding of serious crime related activity need not be based on 'a finding about the commission of a particular offence' but rather may be based on a finding that 'some offence that is serious crime related activity was committed' (s 78(3)).

The court must assess the value of the proceeds derived from the person's illegal activity. In doing so, the court must assess the value of any illegal activities of the person during the relevant period, not simply the value derived from the serious crime related activity that formed the basis of the application (s 79(4)). The amount payable under the proceeds assessment order is recoverable as a debt payable to the state (ss 13(7), 86).

The Queensland CCC must, within 28 days of the making of the order, provide a copy of the proceeds assessment order and written notice of the hardship provisions to all known dependants of the person against whom the order was made and to anyone else reasonably suspected of being affected by the order (s 80A).

Where a court makes a finding of serious crime related activity and evidence is led that the value of the person's property at the end of the six-year period exceeded the value at the beginning of the period, the court must treat the difference as proceeds derived from illegal activity, 'other than to the extent the court is satisfied the reason for the difference was not related to illegal activity' (ss 83(1)–(2)). Where a court makes a finding, and evidence is led about the person's expenditure in the six-year period, the court must treat the amount as proceeds derived from illegal activity, except to the extent it is satisfied the expenditure was funded from sources not related to illegal activity (s 83(1)(3)). In assessing the value of proceeds derived, the court must disregard any expenses incurred by the person in relation to the illegal activity (s 84).

A court may order that property under the 'effective control' of a person is available to satisfy a proceeds assessment order (s 87). To secure payment, once a proceeds assessment order is made and while the debt is outstanding, all of the interests of the person in property are charged in favour of the state (s 88).

Unexplained wealth orders

A person's unexplained wealth is regarded as (see ss 89L(2)–(3)):

- the person's current or previous wealth of which the state gives evidence, less the amount the person proves is lawfully acquired; or
- the person's expenditure for a period of which the state has given evidence, less the income for that period that the person proves was lawfully acquired.

The 'current or previous wealth' of a person is defined in s 89E. It is the total value of all of the person's property, including property 'disposed of' at any time, and 'all benefits provided to and benefits derived by the person' at any time, 'whether within or outside Queensland'.

The Supreme Court *must*, on the state's application, make an unexplained wealth order if satisfied that there is a reasonable suspicion that the person has engaged in one or more serious crime related activities, or has acquired without sufficient consideration serious crime derived property, and any of the person's current or previous worth was unlawfully acquired (s 89G). The court may refuse to make or may reduce the amount payable under an unexplained wealth order if 'it is in the public interest to do so' (ss 89G(2), 89H(3)).

Within 28 days of the making of the order the Queensland CCC must provide a copy of the unexplained wealth order, along with written notice of the hardship provisions, to all known dependants of the person against whom the order was made and to anyone else reasonably suspected of being affected by the order (s 89J).

The amount payable under the proceeds assessment order is recoverable as a debt payable to the state (ss 13(7), 89M). A court may order that property under the effective control of a person is available to satisfy an unexplained wealth order (s 89N). To secure payment, once an unexplained wealth order is made and while the debt is outstanding, all of the person's interests in property are charged in favour of the state (s 89O).

Chapter 2: Hardship and exclusion orders

Forfeiture orders

Where the Supreme Court is satisfied that hardship will be caused to a dependant of a person whose property is to be forfeited under a forfeiture order, the court may order the state pay the dependant out of the proceeds of the sale of the property the amount necessary to prevent hardship (s 62). An adult defendant must have had no knowledge of any serious crime related activity (s 62(2)).

The court is also empowered to make any orders it considers appropriate about an encumbrance over forfeited property if satisfied the encumbrance was taken in good faith, for valuable consideration, and in the ordinary course of business, and further, if the state undertakes to apply the proceeds towards discharging the encumbrance (s 63). 'Encumbrance' is defined in the dictionary in schedule 6 to the CPCA Qld as including 'any interest, mortgage, charge, right, claim or demand in relation to the property'. The court may release an interest in forfeited property from a forfeiture order on 'payment to the state of the amount the court decides is the value of the interest' where it is not against the public interest or where there is another reason not to release the interest (s 64).

A person who claims an interest in property subject to an application for forfeiture may apply for an order excluding property from forfeiture while the application is on foot (ss 65–6). Once an order is made, a person claiming an interest in forfeited property may apply for an 'exclusion order' or 'innocent interest exclusion order' within six months of the making of the order unless the person was given notice of or appeared at the application hearing, or, alternatively, with leave of the court (ss 66, 72).

The court 'must, and may only' make an exclusion order if satisfied that the applicant has an interest in the property and that it is more probable than not that the property is not illegally acquired (s 68). The court 'must, and may only' make an innocent interests exclusion order if the applicant establishes that it is more probable than not that the claimed portion of the value of the forfeited property was not the proceeds of an illegally activity (s 68). The Act also provides for the release and buying out of interests in forfeited property in ss 75–76.

Proceeds assessment orders and unexplained wealth orders

A dependant may apply to the Supreme Court for a hardship order within three months of the making of a proceeds assessment order, an unexplained wealth order or an order placing a charge over property, or after that time with leave of the court (ss 89A–89B; s 89Q). The dependant must give the state and anyone else with an interest in the property written notice of the application and the facts and grounds relied upon at least 28 days before the hearing date (ss 89A, 89Q).

The court may make a hardship order excluding 'special property' from a proceeds assessment order, an unexplained wealth order or an order placing a charge over property. 'Special property' is defined as property given under a will, or property that is or was the dependant's principal place of residence, providing the last change of ownership was more than six years before the serious crime related activity and the defendant occupied the property for two consecutive years as their primary place of residence in those preceding six years (ss 89C(3), 89S(3)). The court may make a hardship order if satisfied that the applicant is a dependant and that the operation of the order or charge would cause hardship to the defendant (ss 89C(1), 89S(1)). An adult defendant must have had no knowledge of any serious crime related activity (ss 89C(2), 89S(3)).

The state must not, without leave of the court, dispose of any property subject to an order or charge in the three months following the making of the relevant order or the hardship proceedings being decided (ss 89D, 89T).

Chapter 2A: Serious drug offender confiscation scheme

Chapter 2A provides for the restraint and forfeiture of property held by, or gifted from, a person convicted of a qualifying offence and in respect of who a serious drug offender certificate is in force (s 93A). A 'qualifying offence' is the offence of trafficking in dangerous drugs under the *Drugs Misuse Act 1986* (Qld), and certain supply, production, and possession of dangerous drug offences where committed within seven years of relevant pre-qualifying offences (s 93F).

Restraining orders

The state may apply to the Supreme Court for a restraining order in relation to property of a prescribed respondent or any other stated person (s 93H). A prescribed respondent for the purposes of the serious drug offender confiscation scheme is a person who has been convicted of a qualifying offence or has been, or is about to be, charged with a qualifying offence to which a restraining order application relates (s 93G). The provisions relating to the supporting documentation, notice, and rights to appear at an application are identical to chapter 2 restraining order applications (ss 93I-L; s 93ZQ).

The court must make an order if satisfied the application relates to the prescribed respondent and 'there are reasonable grounds for the suspicions on which the application is based', unless the court is satisfied it is not in the public interest (s 93M). The period of time that a restraining order remains in force depends on the circumstances in or the reasons for which it was made. Where made without notice to the prescribed respondent, this is for seven days; where made on the basis the respondent is about to be charged, for 48 hours. Otherwise it is for the period stated in the order or 12 months if no period is stated (s 93S). Contravention of a restraining order is an offence attracting the same penalties as chapter 2 offences (s 93ZT). In contrast to chapter 2 and 3 restraining orders, the court may order payment to Legal Aid Queensland from restrained property for expenses payable by the person for proceedings under the Act or as a defendant in criminal proceedings (s 93V(f)).

Property may be excluded from a restraining order under ss 93ZK–93ZN where it is in the public interest to do so. The court may exclude the property of a person other than a prescribed respondent from restraint if satisfied the property is not under the effective control of the prescribed respondent and was not a gift from the prescribed respondent that was given within six years from the charged offences (s 93ZN(1)). A restraining order over Torrens title property is to be registered and the Queensland CCC may lodge a caveat over restrained land (s 93ZS).

Serious drug offender confiscation order

A serious drug offender confiscation order (SDOCO) forfeits property held by or gifted from a prescribed respondent in the six years prior to being charged with a qualifying offence (s 93ZY). Property is not forfeited if it was acquired by a person for sufficient consideration and without actual or constructive knowledge that the prescribed respondent had committed a relevant offence (s 93ZY(2)). Property forfeited under an SDOCO vests absolutely in the state (s 93ZZF).

The state may apply to the Supreme Court for a SDOCO. Reasonable notice must be given to the prescribed respondent and to anyone else reasonably suspected of having an interest in the property subject to the SDOCO (s 93ZZ(5)). The prescribed respondent may file a response and must do so at least 14 days before the application hearing (s 93ZZA). The response must outline the details of the property, reasons for arguing the property is protected, and any public interest grounds (s 93ZZA).

The Supreme Court must make a SDOCO if satisfied that:

- the prescribed respondent has been convicted of a qualifying offence and a serious drug offender certificate has been issued and is in force; and
- the application was made within six months of the date of issue of the serious drug offender certificate.

The court may refuse to make an order if satisfied that making the order is not in the public interest (s 93ZZB).

An SDOCO may not be made if a chapter 2 confiscation order has been made on the basis of the illegal activity that constitutes the qualifying offence (s 93ZZB(3)). Property of a person other than the prescribed respondent that is under the effective control of the prescribed respondent may be forfeited if listed in the order (s 93ZZC). Any act or omission that defeats the operation of a SDOCO is an offence that is punishable, for an individual, by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment (s 93ZZH). A dealing in forfeited property will be void unless it was in favour of a person who had no actual or constructive knowledge the property was forfeited, who acted in good faith, and who provided sufficient consideration (s 93ZZH(5)).

Within 28 days of the making of the order, the Queensland CCC must provide a copy of the SDOCO and written notice of the right to apply for a hardship order to all known dependants of the person against whom the order was made and to anyone else considered to have an interest in the property (s 93ZZE).

Chapter 2A: Hardship and discharge orders

Where the Supreme Court is satisfied that the SDOCO will cause hardship to a dependant of a person whose property is to be forfeited, the court may order that the state either pay the dependant the amount necessary to prevent hardship out of the proceeds of the sale of the property or transfer the property to the dependant (s 93ZZR). An adult defendant must have had no knowledge of the relevant offence (s 93ZZQ). The court may make a hardship order excluding 'special property' from a SDOCO. 'Special property' is defined in the same terms as in chapter 2 (s 93ZZQ(3)).

A SDOCO is discharged if, among other reasons, the offence on which the order is based is quashed (s 93ZZS). A person whose property has been discharged may request, in writing, that the Attorney-General return the property and the Attorney-General must do so as soon as practicable after receiving the notice (s 93ZZU). Where property is no longer vested in the state, a person may seek an order from the Supreme Court declaring the value of property forfeited pursuant to a SDOCO, which the court must make (s 93ZZV). The applicant may then request, in writing, payment of the declared value from the Attorney-General—who, on receiving the notice, must arrange payment (s 93ZZV).

Chapter 3: Conviction-based confiscation scheme

This scheme provides for the confiscation of 'tainted property'—that is, property used in or derived from the commission of a 'confiscation offence', or any other benefit derived from the tainted property. Importantly, unlike non-conviction-based orders, confiscation can only occur after a person has been charged with or convicted of the offence (ss 94, 104). Queensland (like Western Australia) has a broader definition of 'tainted property' which includes 'property intended to be used, by a person in, or in connection with, the commission of an offence' (s 104(1)(a)).

A 'confiscation offence' is defined to include an indictable offence, an offence against the CPCA Qld punishable by imprisonment, a scheduled offence, or a prescribed offence, which includes the offence of public soliciting for prostitution (s 99). The definition of 'convicted' in s 106 includes (like in New South Wales) a person who has absconded in connection with the offence. However, a person will also be taken to have been convicted of a confiscation offence if they are acquitted of the offence because of unsoundness of mind or if the person is not amenable to justice for the offence because, for instance, they have absconded, are dead, or are found unfit to stand trial (ss 106(1)(c), (d), 110–12). Chapter 3 applies to convictions for confiscation offences secured on or after 12 May 1989 (ss 95–6).

Restraining orders

The state may apply to the Supreme Court for a restraining order in relation to property of a prescribed respondent or any other stated person (s 117). A prescribed respondent for the purposes of chapter 3 is a person who has been convicted of a confiscation offence or has been, or is about to be, charged with the confiscation offence to which a restraining order application relates (s 116). The provisions relating to the restraining order applications and notice are identical to the corresponding provisions in chapters 2 and 2A (ss 117–121).

Where the confiscation offence is a serious criminal offence—that is, publishable by more than five years imprisonment—and the court is satisfied that there are reasonable grounds for the applicant's suspicion on which the application is based, the court must make the restraining order unless it is not in the public interest to do so (s 122(2)). For all other confiscation offences, the court has residual discretion (see s 122(1)). The provisions relating to payment of expenses out of restrained property are the same as those relating to a chapter 2 restraining order (ss 122–30).

The Supreme Court may exclude property of the respondent or another person from a restraining order if it is in the public interest to do so, having regard to all the circumstances, including any 'financial hardship or other result of the property remaining restrained under the order' (ss 139(3), 140(5)). In addition, the court may exclude the property of a prescribed respondent from restraint if satisfied that the property is neither tainted nor available substitute property, that the relevant offence is not a serious offence, and that a pecuniary penalty order cannot be made (s 139(2)).

Property of another person may also be excluded on a number of grounds, including where the court is satisfied the applicant was not involved in the offence and the property was acquired after the offence and obtained in good faith, for sufficient consideration, and without actual or constructive knowledge it was tainted (s 140(4)). Where a prescribed respondent has been charged with a serious criminal offence, they may apply to the court for a declaration that property is not subject to automatic forfeiture. The court may make such a declaration if satisfied the property is not tainted and was lawfully acquired (s 141).

The period of time that a restraining order remains in force depends on the circumstances in which it was made. Where made without notice to the prescribed respondent, this is for seven days; where made on the basis the respondent is about to be charged, for 48 hours. Otherwise, this is for the period stated in the order or 12 months if no period is stated (s 128). The court is empowered to extend and set aside a restraining order, and to direct the sale of restrained property (ss 136–8). A restraining order over real property is to be registered, and the Queensland Office of the Director of Public Prosecutions (Queensland ODPP) may lodge a caveat over restrained land (s 142). Contravention of a restraining order is an offence attracting the same penalties as those prescribed under chapters 2 and 2A.

Forfeiture orders

The Queensland ODPP may apply for a forfeiture order within six months of a person being convicted of a confiscation offence, or thereafter with leave of the court (s 146). Written notice must be given to the person and to anyone else with an interest in the property, each of whom may appear at the hearing (s 147). Forfeited property vests absolutely in the state (s 153). A forfeiture order is discharged if the conviction is quashed or for other reasons (s 160).

The court has a wide discretion in assessing whether to make a forfeiture order. Under s 151(1), the court may make a forfeiture order if satisfied that:

(a) a person is convicted of a confiscation offence; and

(b) the conviction is the basis for the application for the forfeiture order against the property; and

(c) the court is satisfied the property, or an interest in the property, is tainted property; and

(d) the court, having regard to subsection (2), considers it appropriate to make the order.

The court must presume property is tainted if evidence is led that the property was in the person's possession when the offence occurred or immediately thereafter, and no evidence is presented tending to show it is not tainted (s 151(3)).

In considering whether it is appropriate to make the order, the court may have regard to an 'extremely broad' range of matters (see *Queensland v Noble* [2018] QSC 59 at [19]) as listed in s 151(2):

(a) any hardship that may reasonably be expected to be caused to anyone by the order; and

(b) the use that is ordinarily made, or was intended to be made, of the property; and

(c) the seriousness of the offence concerned; and

(d) anything else the court considers appropriate.

In determining appropriateness, Queensland courts have taken into account a variety of matters, including the value and use of the property, its utility to the offender, the extent of the connection of the property to the offence, the seriousness of the offending, the length of ownership, and the interests of innocent third parties in the property (see also *State of Queensland v Statham* [2016] QSC 189 at [28]). In relation to hardship in particular, Chesterton J stated in *Director of Public Prosecutions (Queensland) v Gadaloff* [1999] QSC 151:

> The authorities make it clear that the hardship referred to is something other than the consequence of the forfeiture order. Were it otherwise, the operation of the Act would be severely circumscribed (at [18]).

As with chapter 2, the court is empowered to make appropriate orders relating to the state's undertaking to apply the proceeds from the disposal of confiscated property towards discharging any encumbrances taken over that property in good faith, for valuable consideration, and in the ordinary course of the encumbrancee's business (s 152(1)). Section 152(1) provides extensive protection to a wide range of third parties who may hold an interest in the property, albeit that the protection afforded by the section is dependent upon the state volunteering to, effectively, pay out the title holder for the loss of their interest.

Tainted property substitution declarations

In the event of crime-used property being unavailable for forfeiture, the Act provides for the discretionary *in personam* confiscation from the convicted person of property in which they do have an interest and which is of the same nature or description as the unavailable property, regardless of its comparative value (s 153A-D). This confiscation is achieved by way of a 'tainted property substitution declaration' (s 153C).

Third party protections: Forfeiture

A court may order that a stated interest in the property of a stated person be released from forfeiture on the payment to the state of the court-assessed amount of the interest, where the court is satisfied that the transfer is not against the public interest or that there is any other reason not to release the interest (s 154).

A third party with an interest in property subject to a forfeiture application may apply for an 'innocent interest exclusion order'. A court must and may only make an innocent interest exclusion order if three criteria are satisfied. First, the applicant would have an interest in the property but for the confiscation. Second, the applicant was entirely innocent in relation to the confiscation offence. Third, the applicant acquired the interest in the confiscated property in good faith, for sufficient consideration, and without actual or constructive knowledge that the confiscated property was tainted (ss 155–7). An innocent interest exclusion order may be made before the confiscation by, and consequent vesting of tainted property in, the state. However, if the order is made after vesting, the state must transfer the excluded interest to the applicant or, if the state has disposed of the confiscated property, the state is required to pay the value of the excluded interest to the applicant (s 159).

Automatic forfeiture orders

There are circumstances in which property is automatically confiscated by and vested in the state without the need for a court order. Generally, specified property restrained on the grounds of a person being convicted of, or charged with, a serious criminal offence is automatically confiscated by the state either six months after the relevant conviction or on the finalisation of the person's appeal against the conviction, whichever is the later (ss 161–3). This period may be extended by a court by up to three months (ss 161, 163(5); see also *Queensland v Lindsay* [2005] QSC 166).

Third party protections: Automatic forfeiture

A third person claiming an interest in automatically confiscated property can apply to the court for either a 'third party order' or a 'buy-back order' (s 165). A third party order directs the state to return confiscated property that is still vested in the state—or its money equivalent if it is no longer vested in the state—to the third party (s 168; see also *Gadaloff*). A court may grant a third party order if four criteria are satisfied. First, the third party applicant would have an interest in the property but for the confiscation. Second, the applicant was entirely innocent in relation to the confiscation offence. Third, the applicant acquired the estate or interest in the confiscation property in good faith, for sufficient consideration, and without actual or constructive knowledge that the confiscated property was tainted. Fourth, the applicant's interest in the property was not under the effective control of the convicted or charged person before its confiscation (s 167(2)). Alternatively, a court may grant a third party order if satisfied that the property in question was not tainted property and the third party applicant's interest in that property was lawfully acquired (s 167(3)).

By contrast, a buy-back order permits a person to buy back their interest in confiscated property from the state. This may be granted where the applicant would have an interest in the property but for the confiscation, where it is not against the public interest to return the interest in the confiscated property to the applicant, and where there is no other reason why the interest should not be transferred back to the applicant (ss 169–170).

Finally, the CPCA Qld permits an innocent third party interest holder who is entitled (pursuant to an innocent interest exclusion order or a third party order) to the return transfer of their interest in the confiscated property to buy out any other interests in the confiscated property. The third party must give notice as prescribed and pay the value of any other interests to the state (s 173). This enables an innocent third party with a limited interest in confiscated property to acquire absolute title to the property through buying out all the other interests in the property.

Pecuniary penalties and special forfeiture orders

Within six months of the conviction or thereafter with leave, the state may apply to a court for an order that a person convicted of a confiscation offence pay the state the value of the benefits derived from that offence (s 178). The court may—or, if the offence is a major drug offence, must—assess the value of the benefits derived and order the person pay that amount to the state as a pecuniary penalty (s 184). Section 190 introduces a rebuttable presumption that certain property came into a person's possession or control because of the commission of the offence/s—that is, all property of the person when the application was made, and all property of the person in the five years before the application was made or between the offence and the application, whichever is shorter.

The Supreme Court may make a special forfeiture order if satisfied that the prescribed respondent 'has derived, is deriving or will derive benefits' under a contract made after 12 May 1989 in relation to the depiction of the offence in any media, electronic or entertainment form, or an expression of the person's 'thoughts, opinions or emotions' about the offence (s 200).

For both types of orders, the court may declare that certain property is under the 'effective control' of a person and available to satisfy the order (ss 198, 208).

Western Australia

Criminal Property Confiscation Act 2000 (WA) (CPCA WA)

This Act provides for the confiscation of the property of a declared drug trafficker, unexplained wealth, criminal benefits and crime-derived property, and crime-used property. Such property is termed 'confiscable property' (s 4). The Act targets 'confiscation offences' defined as including 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more' (s 141). The WA statute retrospectively targets crime-used and crime-derived property and criminal benefits regardless of when the alleged crime in respect of which the property was used was committed. It also targets unexplained wealth acquired at any time (s 5). Proceedings under the Act are classified as civil proceedings, with a civil standard of proof (on the balance of probabilities) and civil rules of evidence (ss 5(1), 102(2)(b), (d)). Notwithstanding ordinary rules of evidence, the CPCA WA permits receipt by the court of opinion and hearsay evidence on behalf of the state in certain circumstances (ss 105, 109).

Confiscation of property

The Act provides for the confiscation of property in satisfaction of a person's liability under an unexplained wealth declaration, a criminal benefits declaration, or a crime-used property substitution declaration (s 6). The Act also provides for the automatic confiscation of specified property of a declared drug trafficker and of property subject to a freezing notice (ss 7–8).

Declared drug trafficker confiscation

Under s 8 of the CPCA WA, all property owned, 'effectively controlled', or given away by a person who has been convicted of a confiscation offence and who is, therefore, declared to be a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (WA) (MDA WA) is confiscated. Under s 32A of the MDA WA, a person must be declared a drug trafficker by the court on application by the Director of Public Prosecutions for Western Australian (WA DPP) in three circumstances. First, if they have been convicted of a serious drug offence which is the third relevant offence in three years; second, if they have been convicted of a serious drug offence in respect of a prohibited drug or plant of a specified quantity; or, third, if they have been convicted of a relevant drug offence and were a member of a declared criminal organisation when the offence was committed. A 'serious drug offence' is defined in the MDA WA as the offences of: possessing a prohibited drug or plant with intent to sell; selling or supplying, or offering to sell or supply, a prohibited drug or plant; manufacturing or preparing a prohibited drug; cultivating a prohibited plant; or attempting or conspiring to commit any of these offences (see also *Palfrey v MacPhail* [2004] WASCA 257).

Section 159 defines a 'declared drug trafficker' to mean a person declared to be a drug trafficker under s 32A(1) of the MDA WA or 'taken to be' a declared drug trafficker. A person may be taken to be a declared drug trafficker if the person is charged with a serious drug offence under the MDA WA where conviction could result in them being declared a drug trafficker, and the person 'absconds in connection with the offence' or dies before the charge is disposed of or finally determined (ss 159–160). A person absconds in connection with an offence where the person has been arrested or a warrant for their arrest has been in force for at least six months in respect of the offence, the charge has not been disposed of or finally determined, and the person cannot be found or dies (s 160).

Once a person is declared a drug trafficker (or is declared as taken to be a declared drug trafficker), all their property is automatically confiscated by the state (s 8). The Act provides that all of the property owned or effectively controlled by the person when the declaration is made or when they absconded, as well as all of the property given away at any time, is confiscated (s 8(1)). A person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person' (s 156).

The confiscation in these circumstances is automatic. That is, there is no need for an application to be made to effect the confiscation. Under s 9, registrable real property vests absolutely in the state when the court makes a declaration under s 30 that the property has been confiscated. On application by the WA DPP for a declaration that property has been confiscated under s 30, a court must make the declaration. In *Director of Public Prosecutions (Western Australia) v Roth-Beirne* [2007] WASC 91, Hasluck J noted that 'the obligation imposed upon the Court [in this regard] is mandatory. Once the Court is satisfied that the statutory requirements have been met the Court must make a declaration' (see at [20]).

Unexplained wealth declaration

A person is regarded as having unexplained wealth for the purposes of the CPCA WA where the value of their wealth exceeds the value of their lawfully acquired wealth (s 144). 'Wealth' is defined in s 143 and includes all property owned, effectively controlled, acquired, or given away by the person at any time and any services, advantages and benefits acquired by the person.

The WA DPP or the Western Australian Corruption and Crime Commission (WA CCC) may apply to the court for an unexplained wealth declaration (s 11). If it is more likely than not that the respondent has unexplained wealth, the court must make the declaration sought (s 12(1)). The state is not required to establish that the respondent's wealth was not lawfully acquired. Rather, it is presumed that the wealth was not lawfully acquired, unless the respondent can prove the contrary (s 12(2)). The CPCA WA thereby effectively shifts the onus onto the respondent to prove that their wealth was lawfully acquired, potentially in the face of both hearsay and opinion evidence led by the state. It is sufficient that the respondent in unexplained wealth proceedings is unable to prove that it is more probable than not that they acquired property lawfully (s 12(1)). This is a low threshold for law enforcement agencies. The effect of an unexplained wealth declaration is that the respondent becomes liable to pay the state the amount the court assesses as their unexplained wealth (s 14). A debt arising under an unexplained wealth declaration is recoverable by the Crown through the restraining and confiscation of property that is owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Criminal benefits declaration

The WA DPP or WA CCC may apply to the court for a criminal benefits declaration for the recovery of criminal benefits. 'Criminal benefit' is defined as any property, service, advantage or benefit that a person has acquired, lawfully or not, because they were involved in a confiscation offence or any unlawfully acquired property, service, advantage, or benefit of a person who was involved in a confiscation offence (s 145).

Under s 16(1), a court must declare that a respondent has acquired a criminal benefit if it is more likely than not that:

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and

(b) the respondent is or was involved in the commission of a confiscation offence; and

(c) the property, service, advantage or benefit was wholly or partly derived or realised, directly or indirectly, as a result of the respondent's involvement in the commission of the confiscation offence, whether or not it was lawfully acquired.

Unless the respondent establishes the contrary, s 16(3) presumes that the property, service, advantage or benefit was acquired because of the involvement in the offence. Under s 17(1), a court must also declare that a respondent has acquired a criminal benefit if it is more likely than not that:

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and

(b) the property, service, advantage or benefit was not lawfully acquired.

Unless the respondent establishes the contrary, s 17(2) presumes that the property, service, advantage or benefit was not lawfully acquired where the respondent has been convicted of, or it is more likely than not they were involved in, a confiscation offence.

Section 157 stipulates when a person is taken to be convicted of a confiscation offence, which includes when a person has been charged with a confiscation offence but has absconded. A person 'absconds in connection with an offence' where the person has been arrested or a warrant for their arrest has been in force for at least six months in respect of the offence, the charge has not been disposed of or finally determined, and the person cannot be found or dies (s 160).

The effect of a criminal benefits declaration is that the respondent becomes liable to pay the state the amount the court assesses as the criminal benefit they acquired (s 14). A debt arising under a criminal benefits declaration may be recovered by the Crown through the restraining and confiscation of property owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Crime-used property confiscation

The crime-used property confiscation scheme embedded in the CPCA WA is solely non-conviction-based. That is, crime-used property is confiscable property whether or not any person has been charged with or convicted of a confiscation offence (see ss 4(c), 5; 146(2)(d)). Crime-used property is defined in s 146 to include property that is or was used in, or intended for use in, in connection with, or in facilitation of, a confiscation offence (s 146(1)). To establish that property was 'used', there must be sufficient proximity between the act or omission and the commission or facilitation of the offence (*Director of Public Prosecutions (Western Australia) v White* (2010) 41 WAR 249, at [30]; *Director of Public Prosecutions (Western Australia) v Sokmas* [2018] WASC 269, at [49]).

Where crime-used property is unavailable for confiscation, the WA DPP may apply to a court for a crime-used property substitution declaration against a person (s 21). The court must make an order declaring that other property owned by the respondent is available for confiscation if it is satisfied that the crime-used property is not available for confiscation and that the respondent made criminal use of the unavailable property (s 22). If the respondent has been convicted of the relevant offence, or if the WA DPP establishes that it is more likely than not that the crime-used property was in the respondent's possession at the time or immediately after the offence was committed, then the onus lies with the respondent to prove that they did not make criminal use of the property (ss 22(3), (4)). As noted, the Act outlines the circumstance in which a person will be taken to be convicted of a confiscation offence, including where a person has absconded after being charged with a confiscation offence (s 157).

The effect of a crime-used property substitution declaration is that the respondent becomes liable to pay to the state the value of the crime-used property as assessed and specified by the court (s 24). The value of crime-used property for the purposes of a substitution declaration is the 'full value' of the property irrespective of the amount, if any, the respondent outlaid (s 23). A debt arising under a substitution declaration may be recovered by the Crown in the same way as a debt arising under an unexplained wealth or criminal benefits declaration, including through the restraining and confiscation of property owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Recovery and restraint

Property owned by a respondent may be restrained and/or confiscated to satisfy a debt due under the Act (ss 6, 26). In addition, other 'confiscable property' the subject of a confiscable property declaration may be restrained and/or confiscated (ss 6, 26). Part 6 of the CPCA WA contains a number of grounds on which a person may object to the restraint and confiscation of property.

Restraining orders

Restrained property is automatically confiscated if an objection to its confiscation is not filed within the prescribed time or, if an objection is filed, if the objection is finally determined and the order restraining the property is not set aside (s 7; see further *White* at [50]; *Centurion Trust* at [217], [239]). On application by the WA DPP or WA CCC, the court must declare that the property has been confiscated (s 30).

The WA DPP or WA CCC may apply to the court, ex parte, for a freezing order restraining dealings in property (s 41). 'Property' is defined in the glossary to the CPCA WA as 'real or personal property of any description, wherever situated, whether tangible or intangible' and includes a legal or equitable interest in property. Among other things, the court may make a freezing order for all or any property 'owned or effectively controlled by the person or that the person has at any time given away' if either of the following are satisfied:

- 'an application has been made against the person for an unexplained wealth declaration, criminal benefits declaration, crime-used property substitution declaration or production order' (s 43(3)(b)); or
- the person has been charged with an offence, or is likely to be charged with an offence within 21 days, and, if convicted, the person could be declared to be a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (ss 43(5)(a), (b)).

Under s 156, a person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person.'

The court may also make a freezing order 'if there are reasonable grounds for suspecting that the property is crime-used or crime-derived' (s 43(8)). A finding that there are reasonable grounds for suspecting that property is crime-used or crime-derived is not dependent on a finding that a particular confiscation offence has been committed but rather on a finding that, on the balance of probabilities, some confiscation offence has been committed. This is regardless of whether anyone has been charged with or convicted of the offence (ss 102(2)(d), 106(a)–(b)). A confiscation offence, is defined in s 141 as including 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more'. More significantly, property may be found to be crime-used or crime-derived whether or not the identity of the person who owns or effectively controls the property is known (s 106(c)).

It is an offence to deal with restrained property with actual or constructive knowledge that it is restrained (ss 50(1), 50(3)). In the case of registered Torrens title property, notice is presumed following the registration of a restraining order (s 115(1)).

Objections to a restraining order

A person may object to the confiscation of frozen property. An objection must be brought within 28 days of receipt of notice of the restraining order, or of becoming aware—or from the day the objector could reasonably have been expected to have become aware—that the property has been restrained, or within any further time allowed by the court (s 79). The court may set aside the freezing notice or order on a number of grounds set out in ss 82–84. For example, property may be released from restraint if the objector establishes on the balance of probabilities that the property is not crime-used or crime-derived, or that frozen property is not effectively owned or controlled by the respondent (ss 82–84). Alternatively, a court may release restrained crime-used real property if the objector establishes, again on the balance of probabilities, that (under s 82(3)):

(a) the objector is the spouse, a de facto partner or a dependant of an owner of the property;

(b) the objector is an innocent party, or is less than 18 years old;

(c) the objector was usually resident on the property at the time [of the relevant offence];

(d) the objector was usually resident on the property at the time the objection was filed;

(e) the objector has no other residence at the time of hearing the objection;

(f) the objector would suffer undue hardship if the property is confiscated; and

(g) it is not practicable to make adequate provision for the objector by some other means.

The requirements of s 82(3) are onerous and have been strictly interpreted and applied (see eg *Lamers v the State of Western Australia* [2009] WASC 3). The protection it affords should be extended to applications for release from confiscation as well as release from restraint. They should also apply to all categories of restraint and confiscation.

Crime-used and crime-derived property may also be released from restraint if the court is satisfied on the balance of probabilities that three requirements are satisfied: first, the objector is the or an owner of the property; second, the person who made criminal use of, or benefit from, the property is not in effective control of the property; and, third, the objector and all other owners were innocent parties in relation to the relevant confiscation offence (ss 82–3). An innocent party is comprehensively defined in s 153 and includes a person who was not in any way involved in the commission of the confiscation offence, did not have actual or constructive knowledge of or took all reasonable steps to prevent its commission, and had no actual or constructive knowledge that—or took all reasonable steps to prevent—the property being used in connection with the commission of a confiscation offence.

Confiscable property declarations

Under s 27, the WA DPP or the WA CCC can apply for a confiscable property declaration—either at the time of applying for the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration, or at any other time. On hearing an application for a confiscable property declaration, the court may declare that property that is not owned by the respondent is available to satisfy the respondent's debt in two circumstances. First, if it is more likely than not that the respondent effectively controlled

the property at the time that the application for the unexplained wealth declaration was made or at the time a freezing notice was issued or made for the property. Second, if it is more likely than not that the respondent gave the property away at an earlier time (s 28(1)). Property declared to be confiscable is available to be given or taken in satisfaction of a debt arising under the Act if property owned by the respondent is insufficient to discharge the debt (s 29(2)).

A person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person' (s 156). In determining whether a person effectively controls property, any directorships, trusts, and family, domestic and business relationships may be relevant (s 156(2)). It follows that in the case of trust property—for example, where a trustee is declared a drug trafficker or is taken to be a declared drug trafficker—the property, being under the effective control of the trustee, is liable to automatic confiscation despite such property being held for the ultimate benefit of the beneficiaries.

The CPCA WA provides further that, following confiscation, title to real property registrable under the Torrens statute vests absolutely in the state on declaration by the court that the property has been confiscated and on registration of a memorial of the declaration. It follows, therefore, that property—including land registered under the *Transfer of Land Act 1893* (WA) (TLA land)—may be confiscated to satisfy an unexplained wealth declaration, a criminal benefits declaration, or a crime-used property substitution declaration against a respondent even though the respondent is not the owner—or the registered proprietor, in the case of TLA land—of the property. Clearly, this provision may have a significant impact on the rights and title of the owner (or registered proprietor) of property that is the subject of a confiscable property declaration.

The second category of confiscable property not owned by the respondent is somewhat remarkable. The CPCA WA does not specify what is meant by 'an earlier time'. Elsewhere in the CPCA WA there is reference to the property having been given away by the respondent 'at any time' (see, for example, s 84(1)). These terms would seem to suggest that property may be confiscated provided it has been, at some time in the past, given away by the respondent, regardless of whether the property was given away many years before the respondent began accumulating unexplained wealth and therefore lawfully acquired by the respondent. These provisions have the potential to deprive an entirely innocent person of lawfully acquired wealth.

The concerns surrounding the confiscable property provisions are further exacerbated by the presumption raised in s 28(2) of the CPCA WA that 'the respondent effectively controlled the property at the material time, or gave the property away, unless the respondent establishes the contrary'. This is a curious provision. It is not clear precisely what 'property' is presumed to be effectively controlled or given away by the respondent. Without any guidance from the explanatory memorandum or second reading speech of the CPCA WA, it is assumed that any property included by the WA DPP in the confiscable property declaration application is subject to the presumption. The onus rests with the respondent to establish that property was not under their effective control or was not given away by them at any time.

Release of confiscated property

Under s 85 a person may apply to the court for release of confiscated property within 28 days of them becoming aware, or being reasonably expected to have been aware, that the property was confiscated. Under s 87(1) the court may release property if satisfied that it is more likely than not that:

- immediately before the confiscation, the applicant was an owner or part-owner of the property; and
- the property is not effectively controlled by 'a person who made criminal use of the property, or by a person who…derived or realised the property…from the commission of a confiscation offence'; and
- the applicant was not aware, or cannot reasonably be expected to have become aware, that the property was liable to be confiscated until after the fact; and
- the applicant, and each other owner, is an innocent party in relation to the property.

'Innocent party' is defined in the glossary and in s 153 of the CPCA WA only with reference to 'crime-used' and 'crime-derived property'. There is no definition of 'innocent party' in relation to unexplained wealth. As noted by the court in *Bennett & Co (a firm) v Director of Public Prosecutions (Western Australia)* [2005] WASCA 141 (see at [61]), '[i]t can be seen, then, that an [applicant] is only able to establish that they fall within the definition of "innocent party" where the property is either crime-used or crime-derived'. Similarly, there is no reference to property not being effectively controlled by the person declared to have unexplained wealth. If the absence of any reference to unexplained wealth confiscations in these two conditions is deliberate, it means that obtaining a release of property confiscated pursuant to an unexplained wealth declaration is far easier than obtaining the release of property otherwise confiscated under the Act. Not only would the applicant not have to be an innocent party but the property may be released despite being in the effective control of the person declared to have unexplained wealth. This is unlikely to have been the intention of the legislature. It follows that such absence must be the result of a drafting oversight. This oversight leaves unclear which conditions need to be satisfied for the release of property from confiscation pursuant to the unexplained wealth declaration. It is submitted that it must have been the intention of the legislature that all the conditions of s 87(1) should apply to any application for the release of property from confiscation, regardless of the basis for the confiscation.

For innocent parties who have sustained a loss as a result of the operation of the Act, there are no provisions requiring adequate compensation.

Appendix B: Empirical study

Table B1: Interviewees by jurisdiction and category					
	NSW	Qld	WA	National	International
Senior police officers and/or ODPP	2	0	3		
Judges and legal practitioners	3	2	10		
Government and relevant crime commissions	1	2	4		
Non-governmental organisations				1	
Politicians	0	0	3		
Academics	0	2	0		1
Members of the public	0	0	6		
Total	6	6	26	1	1
Total number of interviewees					40

Associate Professor Hilde Tubex
UWA Law School, M253
The University of Western Australia
35 Stirling Highway, Crawley WA 6009
Tel: 0438913542
Email: hilde.tubex@uwa.edu.au

Participant Information Form

Project title: *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences.*

Name of Researchers: Associate Professor Natalie Skead , Associate Professor Hilde Tubex, Associate Professor Sarah Murray and Dr Tamara Tulich.

Invitation:

You are invited to participate in an interview as part of a study conducted by researchers at the University of Western Australia and funded by the Australian Institute of Criminology investigating the impact of and the attitudes towards proceeds of crime confiscation legislation.

You have been invited because you are an expert working in this area.

What is the project about?

Legislation confiscating the proceeds of crime is increasingly seen as an important tool in the global fight against organised crime, disrupting criminal activity and impeding the financing of terrorism. Appropriately framed proceeds of crime legislation can deter and prevent crime, offset the costs of crime prevention and policing, and recompense victims of crime and the community more broadly.

In this project we are examining confiscation legislation from a legal and criminological perspective, investigating the impact of and attitudes towards the legislation. This aim will be achieved through a comparative criminological and legal analysis of Australian proceeds of crime legislation in three Australian jurisdictions - New South Wales, Queensland and Western Australia – and a series of semi-structured interviews with a range of stakeholders with relevant expertise and/or experience with the jurisdictional/federal legislation. The project runs from March 2017 to September 2018 and the results of the research will be reported to the Australian Institute of Criminology and, with their approval, published in academic journals.

What does participation involve?

We anticipate that the semi-structured interviews will run for one hour. The interviews will be recorded and professionally transcribed. Transcription will be provided to you for review and amendment if needed. While we will have general points to discuss regarding proceeds of crime legislation, you will have the opportunity to develop and qualify your views, and to frame the agenda for discussion. Questions you might be asked are:

- What issues do you see regarding the proceeds of crime legislation? Are there any challenges related to proceeds of crime legislation from your perspective?
- What areas, if any, need to be reformed?
- What is your experience with proceeds of crime legislation?

Voluntary participation and withdrawal from the study

Your participation in this study is voluntary. You are entirely free to refuse to take part, withdraw your consent or discontinue your participation at any time without reason and you can decline to discuss particular topics. If you withdraw or discontinue your participation, any information you provided will be destroyed, unless you agree that the researchers may retain and use the information obtained prior to your withdrawal. We respect your right to withdraw and a decision to do so will not impact negatively on you in any way.

Your privacy

The information collected will be de-identified before being used for reporting to the Australian Institute of Criminology and academic publications. In case participants are quoted in reports and publications, the quotes will be anonymised and you will be given an opportunity to review and approve the quote in advance. Any information provided will be treated in confidence; all data from this project will be stored on a password protected computer. Any information that is obtained in connection with this study and that can be identified will remain confidential and will be disclosed only with your permission, except as required by law.

Benefits

This study has the potential to provide benefits to the Australian community by developing recommendations for law and policy reform with a view to equipping Australia to tackle transnational and domestic serious, organised and drug-related crime and terrorism, through robust and effective legislative regimes.

Contacts

If you would like to discuss any aspect of this study, please feel free to contact Hilde on 0438913542, or by email at Hilde.tubex@uwa.edu.au.

Sincerely,

Associate Professor Hilde Tubex

Chief Investigator

Approval to conduct this research has been provided by the University of Western Australia with reference number RA/4/1/8869, in accordance with its ethics review and approval procedures. Any person considering participation in this research project, or agreeing to participate, may raise any questions or issues with the researchers at any time. In addition, any person not satisfied with the response of researchers may raise ethics issues or concerns, and may make any complaints about this research project by contacting the Human Ethics office at UWA on (08) 6488 4703 or by emailing to humanethics@uwa.edu.au. All research participants are entitled to retain a copy of any Participant Information Form and/or Participant Consent Form relating to this research project.

Associate Professor Hilde Tubex
UWA Law School, M253
The University of Western Australia
35 Stirling Highway, Crawley WA 6009
Tel: 0438913542
Email: hilde.tubex@uwa.edu.au
www.law.uwa.edu.au

Participant Consent Form

Project title – *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences.*

I, _____ have read the information provided and any questions I have asked have been answered to my satisfaction. I agree to participate in this research project, realizing that I may withdraw at any time without reason and without prejudice.

I understand that all identifiable information that I provide is treated as confidential and will not be released by the investigator in any form that may identify me unless I have consented to this. The only exception to this principle of confidentiality is if this information is required by law to be released.

I agree to have my conversation audiotaped and transcribed ☐

_____ _____
Participant signature Date

Approval to conduct this research has been provided by the University of Western Australia, in accordance with its ethics review and approval procedures. Any person considering participation in this research project, or agreeing to participate, may raise any questions or issues with the researchers at any time.

In addition, any person not satisfied with the response of researchers may raise ethics issues or concerns, and may make any complaints about this research project by contacting the Human Ethics Office at the University of Western Australia on (08) 6488 3703 or by emailing to humanethics@uwa.edu.au

All research participants are entitled to retain a copy of any Participant Information Form and/or Participant Consent Form relating to this research project.

CRG reports

CRG 27/16–17

Natalie Skead is a Professor at The University of Western Australia Law School.

Hilde Tubex is an Associate Professor at The University of Western Australia Law School.

Sarah Murray is a Professor at The University of Western Australia Law School.

Tamara Tulich is a Senior Lecturer at The University of Western Australia Law School.

crg.aic.gov.au