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CRIMINAL PROPERTY CONFISCATION ACT 2000: DRUG TRAFFICKER CASES[*]

1. The *Criminal Property Confiscation Act 2000* (***CPCA***) provides for confiscation of property on 4 primary bases:

   a. Crime used (property used in the commission of an offence);

   b. Crime derived (what some people call proceeds of crime);

   c. Unexplained wealth; and

   d. (the subject of this paper) Drug trafficker (***DT***) declaration.

2. The CPCA also provides for confiscation by way of crime-used property substitution and criminal benefits declarations. In reality these are means of achieving the outcomes of the crime-used and crime-derived streams where the original tainted property is no longer available to be confiscated. Hence I do not classify them as 'primary' bases for confiscation.

3. Automatic confiscation under s 7 CPCA should also not be overlooked (although it is only triggered by a freezing notice issued on one of the other grounds).

4. The DT declaration ground makes up the bulk (by number and value) of confiscations in WA. Where the other grounds are relied upon, they are often as a 'fallback' to a drug trafficker case. That is to say they may be relied upon if the accused is acquitted.

The Drug Trafficker declaration process – An overview

5. The DT statutory regime is not contained solely within the CPCA. The *Misuse of Drugs Act 1981* (***MDA***) is an important part of an overlapping statutory scheme.

6. Section 32A MDA provides that a Court **shall** declare a person to be a drug trafficker if the person has been convicted of either:

[*] This paper was initially presented at a Legalwise Seminar on 26 March 2015.

a. A single offence involving a quantity of a drug that exceeds an amount listed in Schedule 7 or 8 of the MDA. By way of example the quantities that result in a first strike declaration include:

    i. 20 cannabis plants;

    ii. 28 grams of MDA, MDMA, cocaine or morphine;

    iii. 0.01 grams of LSD;

    iv. 5 grams of methadone; and

    v. 100 grams of opium.

(what I will call a 1st strike declaration)

b. Or alternatively has been convicted of 3 or more serious drug offences within 10 years (what I will call a '3rd strike' declaration).

7. Once a person has been declared under s 32A MDA; s 8 CPCA provides that each of the following is confiscated by operation of law:

    a. all property of the person;

    b. all property that is effectively controlled by the person;

    c. all property that the person has given away at any time.

8. Section 30 CPCA then provides that a court ***must*** make a declaration confirming confiscation if it finds that property has been confiscated by operation of s 8 CPCA.

9. I will return to say something more about each of those steps later in the paper.

10. But I would like to make this presentation practical, and take you through the steps in the order in which you will likely deal with them.

11. DT cases start long before conviction. When the Police arrest a person on a charge that could give rise to a DT declaration they typically apply

to a JP for a freezing notice under the CPCA. That is served on the accused (and others) at the time of, or shortly after, they are charged.

12. Hence that is where I will begin.

13. Many sections of the CPCA, including some I shall refer to, have been the subject of no, or only very limited, consideration in the case law. Questions of statutory construction frequently arise.

"In my time on the Bench I have seldom come across a piece of legislation as perplexing and difficult to construe as [the CPCA]. Perhaps that is not surprising. The legislation has previously been described as draconian and some of the concepts that emerge from it can justifiably be described as extreme." [1]

The Hon. Justice Owen

"…the Criminal Property Confiscation Act 2000 (WA) is an Act that lacks coherence and, for that reason, is drafted unsatisfactorily. These are powerful reasons to conclude that the disputed question of construction of section 7 of the Act should be resolved by preferring the construction adopted by the majority in the Court of Appeal in this matter that limits the cases in which there is … confiscation of property." [2]

The Hon. Justice Hayne

14. Each of the above passages come from proceedings between Centurion Trust Company and the State. Although it was not a DT case, the comments are equally applicable.

15. Any consideration of a dilemma under the CPCA must of course begin with the statutory text. But in either case one is likely to fairly quickly face questions of construction.

16. It is worth understanding how the CPCA came into being.

[1] *Centurion Trust Company v DPP* [2010] WASCA 133 at [75].
[2] *DPP (WA) v Centurion Trust Company Ltd* [2011] HCATrans 88, per Hayne J refusing special leave.

The CPCA passed parliament very quickly – in what has been described as a year that saw a law and order auction – each side seeking to outbid the other.

Although the Bill was introduced by a coalition government in 2000, it had the broad support of the ALP. Labor took office and Jim McGinty became Attorney General in 2001. This image of him with then DPP on the back of a confiscated bike became synonymous with the CPCA.

17. There are some brief explanatory notes that were tabled in Parliament. They should be consulted when dealing with any tension in the provisions of the CPCA.[3]

18. Litigation under the CPCA, including under s 30 for a declaration of confiscation, is civil.[4]

19. In my experience, as with most civil litigation, the vast majority of matters do not proceed to a contested hearing. Either opposition to confiscation evaporates (for instance following conviction), or consent orders are agreed. Very occasionally the State will withdraw (at least in relation to a particular piece of property).

20. Contested final order hearings are the exception, not the rule. Many of the final order hearings that proceed are narrowly focused; sometimes on a point of law. For reasons that will become apparent, final hearings of substance are invariably between the state and a third party (not the person who has been declared to be a trafficker).

21. Accordingly my focus today is on the issues that affect the majority of matters under the Acts; that is interlocutory matters. I aim to give you an overview of the key interlocutory issues.

22. I aim to address these issues both from the perspective of acting for a client who has been charged with an offence that could see him or her being declared a drug trafficker, and from the perspective of acting for a third party. The range of third parties potentially affected by the Acts

[3] The notes are not easy to find on the parliamentary website. I have provided a direct link to the notes at http://egreaves.com.au/practice-areas/confiscations-and-proceeds-of-crime/

[4] Section 102 CPCA; see also sections 315 & 317 of the Federal *Proceeds of Crime Act 2002* to like effect.

is wide. It includes spouses, parents and children. But also banks, business partners, creditors, debtors, tenants and many others.

First client contact

General comments

23. If a client approaches you to act for them in relation to a CPCA matter, only accept instructions if you:

    a. Firstly, have time available to deal with the matter urgently. If you are a sole practitioner in the middle of a 4 week trial you simply do not have the capacity to take on an instruction under the CPCA alone. Even at the bar I make a point of trying to see new confiscations clients ASAP, within a few business days. You should do the same; and

    b. Secondly, for all but the simplest matters it is desirable that you have some understanding of the criminal law, property law (including equity) and civil procedure before you try to come to terms with the CPCA.

GETTING PAID

24. Legal Aid is not available for CPCA matters. Rather, a request can be made to the DPP to convert a freezing notice into a freezing order. The State may agree to release funds, alternatively an application can, once the notice has been converted to an order, be made to the Court to release funds from the order. Someone other than the client may need to fund such an application and the provision of initial advice (or the lawyers may be prepared to do it on spec).

25. In essence, the Court (or the DPP by way of conferral) assess the reasonableness of a request for access to funds. In a routine DT case the prospects of getting much released are limited. The DPP will be careful to guard against applications for release of funds that serve no useful purpose and that would dissipate the funds available to be confiscated.

Costs of getting off the record

26. Remember these are civil proceedings. If you cease to act for your client and a new lawyer is not appointed you will need to apply under Order 8 rule 7 RSC to get off the record.

Telephone call from a client seeking advice about a Police interview

27. In some cases you may receive a call out of the blue from a potential client who is in the company of WA Police who wish to conduct an immediate, and compulsory, interview. If you do not practice in the area **you need to know what to do**.

28. What I might call the usual advice, to 'say nothing to the Police', is not going to work. If your client follows such advice they will likely be charged criminally under s 76(2) CPCA with contravening a lawful requirement. That attracts a fine of up to $100,000 and/or imprisonment for 5 years.

29. Section 76(1) of the CPCA provides that a police officer in the course of exercising certain powers under the CPCA may:

    (d) require a person to give to the officer any information within the person's knowledge or control that is relevant to locating property that is reasonably suspected of being confiscable;

    (e) require a person to give to the officer any information within the person's knowledge or control that is relevant to determining whether or not property is confiscable;

30. They are broad powers. Particularly para (e).

31. Advice to a client is likely to turn upon the jurisdictional question of whether the officer is exercising a relevant power, that is a search and/or seizure power under ss 73 or 74 of the CPCA. It is my firm view the powers under ss 73 and 74 are time limited. The Police cannot in my view seize property or documents under those provisions and come back a week later and purport to ask questions under s 76. I know from experience that view is not universally held by the Police. They regularly seek to conduct interviews a week or 2 later.

32. Assuming the s 76 power is active, you should in my view speak to the relevant Police officer and seek an assurance that the questioning will be recorded and an undertaking that answers given will not be disclosed within the Police service outside of the Proceeds of Crime Squad. You should confirm those assurances by emailing the relevant officer contemporaneously. Your client may want to you represent them during that interview. That is not an unreasonable request in my view. The Police may not always agree. This area of the law remains untested.

33. Assuming you are not asked to advise on a s 76 interview, then typically your first contact with a client who has a confiscations problem will be in the days or perhaps weeks after they are served with a document that prevents anyone in the world at large from dealing with or disposing of certain property (ie a Freezing notice or similar).

34. Regrettably in my experience important and valuable days are often wasted whilst the client seeks out adequate legal representation. Finding a suitably experienced lawyer is not easy.

35. Most commonly (indeed in the DT context, invariably) the document that has been served on your client will be a freezing notice issued by a Justice of the Peace.

36. Read it. Carefully. Re read it. Make sure you understand it.

37. Your client may have received a covering letter together with the notice or order. Ask for it. Seek instructions about (and confirm in writing) when your client received the notice/s. Determine the applicable time limits and diarise them. I will return to these in a moment.

38. Next check that you have been given everything that the letter says is enclosed. Sometimes multiple freezing notices are enclosed with one letter. They might look similar but in fact not be the same. Contact the author of the letter. Identify what you have been provided with, and check that there is nothing else you should have. Check the service date on your client, and confirm the advice in writing.

First client meeting

39. You now need to take **detailed** instructions from your client.

40. Even in the case of acting for a suspect, I recommend taking detailed early instructions. There will be cases, I have had a few in the last year, where you will obtain information that would (from an ethical perspective) limit in a forensic sense your ability to vigorously defend the client in any related criminal proceedings. That in my view is the necessary price that must be paid. You cannot adequately represent a client's interests under the Acts unless you have a full understanding of what the client says about their assets and how they were acquired. If that means someone else must defend them in the criminal proceedings so be it. You must not put your own commercial interests ahead of your client's best interests. If you wish to retain the criminal matter, it may be necessary to refer the confiscations matter off to another legal team.

41. Similarly, if you are being consulted by two or more joint owners (or interest holders) you need to consider whether there are any conflicts of interest. It might be in the accused's interest for the CPCA proceedings to be stayed pending the determination of their criminal charges. But that might not be in the interest of co-owners / other interested parties.

Why are detailed instructions needed? Early compulsory statements.

42. Confiscations proceedings are very different to criminal proceedings. You can defend a prosecution by testing the prosecution case, and without calling any evidence. You can only resist confiscation by running a positive case and adducing evidence. Hence you need more detailed instructions.

43. One of the first things you will be required to do is assist your client to provide a statutory declaration.[5]

44. In my experience most practitioners are aware that it is important to file an objection within 28 days of service of the freezing notice.

[5] CPCA s 37.

However there is also unfortunately a view that that the filing of the objection is the first step. It is not.

45. The statutory declaration must be given to the Police within 7 days. Too often the drafting of the statutory declaration is left to a junior and inexperienced lawyer, or worse the client is given a partially pre-completed form and told to complete it, sign it and return it. I cannot over emphasise the need to carefully take detailed instructions before the statutory declaration is sworn. What the client says in it can come back to haunt them. If they omit some fact that they later seek to rely on, the failure to refer to it could cast doubt on the fact itself.

46. I should also stress, because I have seen several people make the error, that the giving of the statutory declaration is NOT a quasi-objection. The freezing notice pro forma expresses this quite clearly. But as I say people still seem to fall into the trap of assuming that a statutory declaration will suffice.

47. It is useful to compare the CPCA's s 37 statutory declaration with its federal equivalent. Section 39 of the *Proceeds of Crime Act 2002* is the closest equivalent to s 37 CPCA. The Federal and State provisions have a different scope to one another.

    a. The CPCA statutory declaration is only required to identify ***WHO else*** is or may be an "interested party" in relation to the frozen property (that is to identify anyone who is or may have an interest in the frozen property that would allow them to succeed on an objection to confiscation). The statutory declaration must provide WA Police with the ***names and address/es*** of all such people. There is no obligation to, and in my view it is counter-productive, to put the client on oath and tell their story about "how" the interests came about.

    b. In contrast, s 39 POCA is wider. Careful attention should be given to the terms of any s 39 order to ascertain precisely who must give the affidavit, what it must cover and in relation to what period. Some narrative may well be required. As

these are Court orders, there is the possibility of applying to the Court to extend time / clarify the scope of the order etc.

48. Although it is not required by the CPCA, I think it good practice to identify on the face of the statutory declaration which freezing notices (by reference to their notice number) have been served on the maker of the statutory declaration, and what date service was effected.

49. Note that the statutory declaration is ***not*** filed in Court – they are given to the Police. Of course you should keep a copy.

50. The CPCA statutory declaration must be given within 7 days. Failure to do so is an offence punishable by fine of up to $5,000.

51. On occasion Police officers will offer to assist a client in writing their compulsory statement. I suggest that course is likely to result in your client volunteering information that they are not compelled to provide. I can see no advantage to the client in doing that (other than a misconceived short term saving in legal costs).

52. I return then to the question of detailed instructions. As I mentioned a moment ago, if your client fails to mention something in their compulsory statement that they later wish to assert, it is highly likely that their statement (and the omission of that material from it) will be relied upon against them.

53. Let's take a hypothetical example. Your client is a suspected drug trafficker (within the statutory meaning) and all his property has been frozen. He must give a statutory declaration to WA Police. A business associate of your client's may have an equitable interest in a frozen asset. If that is not stated in the statutory declaration, any evidence your client gives at a contested application years later in support of the asserted interest will be met with the answer that it was not declared in the statutory declaration. Your client's supporting evidence may not be accepted. The business associate's objection to confiscation may now fall to be determined on the strength of his or her uncorroborated evidence.

54. In the course of drafting the compulsory statement you should in my view also sense test it. If your client provides you with an inherently unbelievable story you should, tactfully, explore the story and test it. It is better that they be cross examined by their own lawyers before swearing it, rather than by the authorities after the event.

55. Let me stress though, the statutory declaration should not convey a narrative of HOW interests in property where acquired, simply who does or may have such interests.

Your clients' concerns

56. You should ascertain early on if your client, or a third party, will be prejudiced in some unusual way by the freezing notice. For instance is there a basis to apply for release of funds to meet business expenses? You should take instructions on prejudice early. Even if you are unable to do anything about it, put the Police / DPP on notice of the prejudice. That could assist your client if they claim damages later on. This is particularly so in relation to third parties but it applies to an accused too.

57. Similarly, early instructions should be taken in relation to the possibility of applying to have your client appointed to take control of the frozen property. This is particularly so under the CPCA. Section 91 allows the Court to appoint an owner of property to control and manage it, or even to sell it.

58. If the asset is earning an income, the terms of the freezing notice should be considered. The income will usually be frozen and payable to the Public Trustee. In the case of negatively geared property it will usually be possible to agree orders with the DPP that see that income used to pay the mortgage and upkeep expenses.

Banking

59. Many DT freezing notices will exclude some property from their scope. Sometimes an everyday transaction banking account will be excluded. However, if that account is with the same bank that the client has a secured loan from, and if secured property is frozen, it is highly likely the bank will lock down all accounts that have a

positive balance. Similarly internet banking will usually be locked out too.

60. I often advise my clients to open a new account with a new bank into which to have their income paid and from which they can operate their ongoing banking.

Court filings - objections / appearances etc

61. If your client has property (or an interest in property) that has been frozen you will need to file an objection.

62. The time limit for the CPCA objection ought not be overlooked. It is 28 days from the point at which your client becomes aware of the notice. Normally that will be 28 days from service of the notice.

    a. Unfortunately the Supreme Court Rules do not contain a ‘form’ of objection. The practice is to modify an originating summons.

    b. Similarly the Magistrates Court does not have an approved form for an objection. However Perth Magistrates Court at least have created a form (but it is not publicly available).

    c. Lawyers that practice in the area have developed their own templates/precedents.

63. The objection will be given a return date. In the Supreme and District Courts that can often be vacated if the objector and the State agree orders. A common order is that the objection be adjourned pending the determination of the criminal charges.

64. However such an adjournment may not always be in the interests of a third party (ie not the suspect) who want to object on the basis of s 84 – that they in fact own or have an interest in the property.

Examinations, the right to silence & stay of proceedings

65. The next interlocutory stage I want to address briefly is examinations.

66. The privilege against self-incrimination (often referred to as the right to silence) is sacred to criminal defence lawyers.

67. Less well known is the privilege against forfeiture. In essence it is a privilege that can be called upon by a person who is facing forfeiture of an asset. The person cannot at common law be called upon to make the case against themselves for forfeiture.[6]

68. The principle of legality applies to these privileges. In essence the principle of legality says that irresistible clarity is required before statutory words will be held to abrogate the privileges.[7]

69. But the principle of legality is not a constitutional entrenchment of privileges. It seems fairly clear to me the objection process mandated by Part 6 CPCA is sufficiently clear in its terms that it does abrogate the privilege against forfeiture.

70. Compulsory examinations under the CPCA make significant inroads into these privileges.

71. The State DPP are fairly conservative (unlike some eastern states counterparts). They will generally agree to a DT case being adjourned until the conclusion of the pending charges. It is unlikely the State will seek to use their examination power, at least against an accused, in a DT case.

72. There has been a considerable volume of recent case law out of NSW and Victoria about compulsory examinations.[8]

73. Careful consideration should be given to any examination application brought by the State.

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[6] See by analogy *DPP v Hicks* [2011] NSWSC 1060, concerning the *Proceeds of Crime Act 2002* (Cth).
[7] See numerous statements to this effect in *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v New South Wales Crime Commission* [2013] HCA 39.
[8] See most recently *Commissioner of the AFP v Zhao* [2015] HCA 5. See also http://egreaves.com.au/high-court-stay-proceeds-of-crime-zhao/2015/02/

THE FINAL STAGES OF A DRUG TRAFFICKER CASE

The DT declaration

74. Some months to years after the freezing notice has issued the accused may be convicted of an MDA offence. The DPP may then apply for a DT declaration (s 32A MDA).

75. The 3 strike basis for a DT declaration (s 32A(1)(a) MDA) is more complex, and less common.

    a. If you are acting for a client who is the subject of a third strike application you need to consider the judgment of the Chief Justice in ***T v Bolitho*** [2010] WASC 30.

    b. His Hon held at [23] – [26] that the prior convictions could have been entered at the same time.

    c. His Honour's judgment was analysed further in a non-confiscations case by the Court of Appeal earlier this year.[9] In the wake of the Court of Appeal's decision there seems little scope left to challenge the Chief Justice's decision in *T v Bolitho*.

76. The first strike basis for a DT declaration (s 32A(1)(b) MDA) is more straightforward. The focus is on whether the relevant drug offence was "in respect of" a sufficient "quantity" of a prohibited drug.

77. The term drug trafficker is plainly pejorative.[10]

    a. It is not always an accurate description of the conduct the offender has engaged in. The offender may have been growing 21 cannabis plants (mostly small seedlings) for their own use, but due to the quantity may be found to be a drug trafficker.

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[9] *Roe v D'Costa* [2014] WASCA 118 at [1], [2] and [51].

[10] *NT v Emmerson* at [51]. For more information on the decision see http://egreaves.com.au/high-court-decision-emmerson-criminal-property-confiscation-act-wa/2014/05/

b. The constitutional validity of an almost identical statutory regime was recently considered in ***Northern Territory v Emmerson*** [2014] HCA 13.

Quantities?

78. It has long been said in WA that the MDA (including s 32A(1)(b)) is concerned with the gross amount of a drug, not the pure amount. That was confirmed in relation to s 32A in ***Reid v DPP (WA)*** [2012] WASCA 190 per Beech J at [205] and McLure P at [19].

79. As a matter of interest Pullin JA dissented and at [102] – [104] described the result preferred by the majority as “capricious”. His Honour noted that a person who acquired 27g of a relevant drug could not be declared on that basis alone. But if the person was apprehended after adding some other substance to bulk it up, they could be declared.

80. *Reid* was concerned with an attempt offence, where there was no quantity involved. The DT declaration was upheld by the majority.

81. As I noted at the outset, once a DT declaration is made under s 32A MDA, all property of, and all property effectively controlled by the person so declared, is confiscated, as is all property that they have ever given away. [11]

82. There is one exception to the above, protected property. Section 129 CPCA provides some protection against confiscation. A person who is declared a DT can keep their family photos, necessary clothing and to a limited extent tools of trade, professional instruments and reference books. In practice the State is only interested in taking property it can sell. Household furniture is of no interest to the State.

The s 30 CPCA application for a declaration of confiscation

83. I stress, this is not an application for confiscation. The declaration process is a means to give certainty not only to the owners of

[11] CPCA; s8.

property but in the case of real property also to the registrar of titles and thereby the world.

84. Nevertheless s 30 declaration applications are important.

85. There is no utility in the person declared as a DT seeking to resist the declaration. By that stage there is nothing more they can say. All their worldly possessions have, in law at least, been confiscated.

86. The s 30 application must list the property against which the declaration is sought. Sometimes declarations are made in general terms that "all property of the person at a specified date" is confiscated and specific property is then identified as being captured by that general declaration. The Honourable Justice Hall (and several other members of the bench) have made a number of such orders.[12] Personally I favour specificity and see little purpose in a general declaration. It assists no one. As Justice Edelman very recently observed in Tran[13], and again in Ranford[14]:

> *Although a declaration should be made that the particular property that Mr Tran owned at the time he was declared to be a drug trafficker was confiscated, [a general declaration that all property owned by him] is not appropriate.*
>
> *A declaration must state the precise legal effect of the rights of the parties ... a declaration must do 'more than declare that the law dictates a particular result when certain facts in the material or pleadings are established' (such as establishing that certain things were owned or effectively controlled by Mr Tran when he was declared to be a drug trafficker or certain things were given away by Mr Tran prior to this date).*

87. Put simply, third parties with an interest in the property the subject of the application will be heard. If they can establish their interest the declaration will not be made in relation to their interest.

88. As I mentioned earlier it is possible that the interests of a third party will have been determined under a s 84 CPCA objection prior to the making of the DT declaration under the MDA. But in the majority of cases the objections (assuming there is an objection by the suspect

[12] See by way of example *Kuklinski v the State of Western Australia* [2012] WASC 239
[13] [2015] WASC 46 at [6] and following.
[14] [2015] WASC 45 at [3].

as well as by third parties) will have been adjourned until after the criminal proceedings.

89. Once a DT has been made, it is the DT, and not the freezing order that becomes relevant. Indeed s 84 (concerning objections) refers only to a person who has been or will be charged. Not a person who has been convicted.

90. Following a decision of Jenkins J published a month ago, it is now clear that once the DT has been made the objection process becomes redundant.[15] Nevertheless do not think objections to DT are pointless. They are not. Without an objection there is a risk of automatic confiscation under s 7. And once property has been confiscated under s 7 there is no ability to grant an extension of time in which to object under s 79(2)(b), because the property is no longer frozen.

What to expect at a s 30 declaration hearing

91. First of all there are some things that are not relevant.

    a. Whether the property was purchased using drug money.

    b. Whether the property was the matrimonial home, and the fact the Family Court might have given the (innocent) spouse half if they separated from the person against whom the DT declaration was made, unless an order was made by the Family Court before the freezing notice was issued.

    c. Whether confiscation will cause hardship..

92. I hear about at least one, and usually 2 or 3 of the above, in every DT brief I receive. Sadly the most useful advice you can give is "talk to your local member of Parliament."

93. The focus of a s 30 hearing in a DT case will be whether property is "property of" or "effectively controlled by" or "given away" by the

[15] *Koushappis v WA* [2015] WASC 64 at [41].

person who has been declared. For it is that property that is confiscated by s 8. I shall address each.

Property of

94. It sounds so simple. Yet it often isn't.

95. Property includes an interest in property. The terms property and interest are both used in the CPCA. Often without much consistency.

96. Constructive trusts are a regular feature of litigation under the CPCA.

97. The old law that used to apply (prior to amendments to the Family Law Act) to de facto couples is important. Cases where land is registered solely to the drug trafficker, and the spouse asserts an interest, must be determined by reference to whether the wife contributed to the acquisition of the property or otherwise contributed to its value. If they looked after the children whilst the DT worked and his earnings were applied to the acquisition of the house she does NOT have an equitable interest in the house.

98. More exotic interests that have been claimed by third parties resisting declarations of confiscation include a Quistclose trust, that is a trust for a specific purpose; see *Smith v WA* [2009] WASC 189.

99. There is little to be gained in this session by traversing the various means by which a person may acquire an equitable interest in property. They are many and varied. Establishing any interest is sufficient to exclude it (and thereby equity in the property) from the s 30 declaration.

Effective control

100. The State's appetite for arguing s 30 declarations on this ground seems limited. It requires significant investigative resources by the Police to build a case that property owned by X is in fact controlled by Y.

101. In many DT cases the Police only freeze the property that is legally owned by the suspect. Other assets that may be controlled by the suspect may be ignored, both at the freezing stage and then at the s 30 declaration stage.

102. The term “effective control” is defined broadly in s 156.

103. It is a term used in similar legislation around the country. The definitions are broadly similar. In a Queensland case the Courts held that property was subject to the effective control of a Mr Hart based in no small part on evidence as follows:

    a. Police raided some business premises.

    b. There were two women at the front reception desk. They were the only directors of companies that held valuable assets and conducted the business.

    c. Police asked for certain areas to be unlocked.

    d. The two women said something like ‘you will need to speak to Mr Hart, he has the keys.’

    e. The police were taken to see Mr Hart who was in a large executive chair behind a large executive desk in a private office out the back.

    f. He did indeed have the keys. And for that matter all the important records of the companies. And he thereafter took charge of responding to the search.

    g. The above was video recorded and played to the trial judge.[16]

104. The concept is concerned with the **fact** or **reality** of control, not legal or even equitable arrangements.

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[16] See *DPP v Hart* [2004] QDC 121 at [54] & [81]; confirmed on appeal in *DPP v Hart* [2005] 2 Qd R 246.

Mortgages

105. Curiously s 9(2) provides that registrable real property that is confiscated vests free of all interests including registered mortgages. It is a remarkable provision that has been the subject of much comment (both academically and judicially). It is, in the words I quoted earlier from Owen and Hayne JJ an “extreme” and I will venture, “unsatisfactory” way of dealing with mortgagees.

106. In practice, the State pay out mortgagees what they are due. This appears to be supported, obliquely at least, by s 152(1) which in a roundabout way appears to dictate what is to be done with the proceeds from the sale by the State of confiscated property.

Joint tenancies

107. The State, correctly in my view, will treat confiscation as severing a joint tenancy. The co-owner (who is not subject to the DT) will not have to prove a contribution to the purchase price or improvement of the property. The State will only seek half the equity in the property.

Interaction with other confiscation streams

108. I have not in the time available been able to address the interaction of the other confiscation streams (particularly crime-used and crime-derived). I just stress that the pathway to a successful objection against a freezing notice issued on either of those grounds is more complex. And in order for a client to succeed they must succeed in their objection on each and every ground. If you want some further reading about proving negatives (namely that property is not tainted) I commend the lead judgment of Bell J in *Henderson v Queensland* [2014] HCA 52.[17]

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[17] Mr Henderson inherited property from his father. He argued that he had thus met the statutory test for exclusion under Queensland’s confiscations law – which incidentally is very different to the CPCA test – namely he had shown the property was lawfully acquired, by him. The State of Queensland successfully argued that this was ‘not enough’. Because Mr Henderson did not give any consideration for his inheritance he had to also show that his father obtained the property by lawful means. For a further discussion of the facts of the case and the statute in question (but not the High Court judgment) see: http://egreaves.com.au/henderson-reverse-onus-confiscations/2014/06/.

Proceeds of Crime Act 2002

109. The coverage of this legislation in this paper is only superficial.

110. A client charged with a federal drugs offence will not be subject to action under the DT regime of the CPCA. A federal conviction does not (as a single strike) count as an offence that can ground a s 32A MDA declaration. Interestingly a federal offence can count as a prior strike if the third strike is a State MDA offence.

111. It is possible, although unlikely, a person charged with a federal offence might be subjected to CPCA action under another stream (crime used or crime derived or unexplained wealth).

112. It is far more likely the person will be the subject of action under the *Proceeds of Crime Act 2002*. It is a very different regime. The restraining order will be issued ex parte by a District or Supreme Court judge. Rather than commencing proceedings within 28 days, the accused need only file an appearance, and there is no strict time period for that. The adversary will be the Commissioner of the Australian Federal Police NOT the Commonwealth DPP (who will likely have carriage of the drug prosecution).

113. There is a strict time period (28 days) within which to apply to have a restraining order revoked. But it is not necessary to bring a revocation application in order to defeat confiscation. Most people do not bother to apply to revoke.

114. Only once a person is convicted[18] (or the AFP prove the offence on the balance of probabilities[19]) are the POCA forfeiture provisions invoked.

115. The offender can defeat forfeiture of restrained property by proving (on the balance of probabilities, the onus being on them) that the relevant property is not tainted. If they fail to prove the property is not tainted, then the property will be forfeited.[20]

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[18] Section 92 Proceeds of Crime Act.
[19] Section 47 Proceeds of Crime Act.
[20] Sections 73 and 94 Proceeds of Crime Act.