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CRIMINAL PROPERTY CONFISCATION ACT 2000: CRIME-USED AND CRIME-DERIVED CASES[⁂]

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

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

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

    c. Unexplained wealth; and

    d. Drug trafficker (***DT***) declaration.

2. Earlier in the year I presented a paper for LegalWise on DTs. I've been asked today to focus on CU and CD.

3. CU and CD cases are a little less common, certainly more complex and more interesting.

4. There are many similarities between CU and CD. CU is more common.

5. 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.

6. Automatic confiscation under s 7 CPCA should also not be overlooked.

7. The DT declaration ground makes up the bulk (by number and value) of confiscations in WA. Where CU (and to a lesser extent CD) grounds are relied upon, they are often as a fall-back to a drug trafficker case. That is to say they may be relied upon if the accused is acquitted.

[⁂] This paper was initially presented at a Legalwise Seminar on 20 November 2015.

Interpreting the CPCA

8. Before I turn to the CU and CD streams of the CPCA, I want to pause for a moment to observe that 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

9. The above passages come from the same CU case.

10. 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 of that text.

11. 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]

[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.
[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/

Litigation is civil

12. Litigation under the CPCA is civil.[4]

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

14. 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.

15. Accordingly I will say a bit about 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. I will then address the issues that affect the final determination of an objection to confiscation on CU and CD grounds, followed by some other miscellaneous topics. Finally I will take a brief look at the *Proceeds of Crime Act 2002* (Cth) and how it approaches CU and CD property. It is very different.

16. I aim to address these issues cognisant of the fact that the CPCA can affect a wide range of third parties, includes spouses, parents and children. But also banks, business partners, creditors, debtors, tenants and many others.

An overview of the CU and CD streams

17. CU and CD action is often, but need not, be grounded upon someone being charged. If there were even the slightest of doubt about that, s 106 is clear in its terms. Indeed findings can be made without the need for the sort of particularisation that would be required in a criminal proceeding.[5]

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

[5] For more on this topic see s 106 CPCA and *DPP (WA) v Gypsy Jokers* (2005) 153 A Crim R 8 at [58].

18. Most CU and CD matters start out with a freezing notice, issued under s 34(2). These are made by a JP, upon an application by a WA Police officer (usually from the Proceeds of Crime Squad).

19. A handful of CU and CD matters may start life in the Supreme Court on the application of the DPP for a freezing order under s 43(8). These are very much the exception.

20. Once a CU or CD freezing notice is served, the owner of the property or any interest in it has 28 days from the date of service to object to confiscation. The concept of objecting to confiscation is dealt with in ss 79, 82 and 83 CPCA.

21. In essence s 79 allows any person to object to the confiscation of frozen property. Sections 82 and 83 respectively prescribe the test the Court is to apply in finally determining an objection.

22. If an objection is successful the freezing notice or order is set aside.

23. However, if no objection is lodged, or if all objections are dismissed, the confiscation occurs by operation of law under s 7. That is to say a Court that dismisses an objection does not have to positively order confiscation. The act of dismissing the objection triggers the confiscation. This is perhaps the first contrast with the Proceeds of Crime Act. Under the Federal Act forfeiture can only occur with a positive order from the Court.

24. There is no doubt that an objector bears the onus of satisfying the Court of the relevant matters under ss 82 and 83. This is perhaps in contrast to the drug trafficker regime, where under ss 30 and 84 it appears at least in some circumstances there may be an onus on the State.

First client contact

General comments

25. 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; and

b. Secondly, for any CU or CD matter, it is desirable that you have a good understanding of the criminal law, property law (including equity) and civil procedure before you try to come to terms with the legislation.

Getting paid

26. Legal Aid is not available for CPCA matters. Rather, a request can be made to the DPP to convert a JP issued freezing notice into a Court made 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.

    a. They key authority is ***Mansfield***. The citation is (2006) 226 CLR 486.

    b. Useful further guidance is found in ***Chapman*** [2009] WASC 160 at [45] and ***Franchina*** [2014] WASC 463.

    c. Note that someone other than the client may need to fund the objection and such an application and the provision of initial advice (or the lawyers may be prepared to do it on spec).

    d. In that regard note the steep filing fee. However it is refundable on hardship grounds.

27. The prospects of the DPP agreeing to release property that is alleged to be crime-derived (ie the proceeds of crime) to fund litigation are weaker. That said I am not convinced that the statements in Mansfield can be readily read down. There will eventually be more case law on this question.

28. The DPP has on occasion sought to resist the release of property that is allegedly crime-used. Although I have found a firm application of *Mansfield* has been enough to get them over the line. This passage is particularly useful:

> *"There is not readily to be implied a denial of the powers of the Supreme Court when making or varying a freezing order to mould its relief to permit the use of funds to obtain legal assistance"* [6]

29. As to the quantum of funds to be released, in essence, the Court (or the DPP by way of conferral) will assess the reasonableness of a request for access to funds. 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. See generally *Franchina v WA* [2014] WASC 463. In that case the State argued that costs should be limited to the amount that the legal aid scale would provide for. The State was not successful in that argument (at [41]). The Court applied the ordinary Supreme Court scale.

Costs of getting off the record

30. 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.

Section 76 interviews

31. I addressed these interviews in the DT paper I delivered earlier in the year. They are compulsory interviews with no right to silence. However they can only be conducted where the Police are in the course of seizing property or conducting a search warrant.

32. I will not repeat what I said. I would encourage you to refer to that paper. It's on my website.[7]

[6] (2006) 226 CLR 486 at [50].
[7] http://egreaves.com.au/wp/wp-content/uploads/2015/03/20150326-Confiscation-paper-for-legalwise-Greaves-for-publication.pdf

Responding to a freezing notice (or order)

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 the Freezing Notice.

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. When you get a freezing notice, read it. Carefully. Re read it. Make sure you understand it.

36. Your client may have received a covering letter, or more likely a business card from the relevant Police officer, together with the notice or order. Ask for it. Call the officer and check the service date is what your client says it is, then confirm that by email to the Police officer. Then determine the applicable time limits and diarise them. I will return to these in a moment.

37. Also check that you have everything you should have. Sometimes multiple freezing notices are served at once. They might look similar but in fact not be the same.

First client meeting

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

39. Even in the case of acting for a suspect, I recommend taking detailed early instructions. There will be cases, I have had a few recently, in which it is necessary to obtain information that might (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 CPCA (or the POCA) 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 the client in the criminal proceedings so be it. Do 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.

40. Similarly, if you are being consulted by 2 or more joint owners (or interest holders) in relation to the same frozen asset, 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.

41. 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.

42. One of the first things you will be required to do is assist your client to provide a statutory declaration.[8]

43. In my experience most practitioners are aware that it is important to file an objection within 28 days of service of the freezing notice. However there is also unfortunately a view that that the filing of the objection is the first step. It is not.

44. The statutory declaration must be given to the Police within 7 days. Failure to provide it is a criminal offence. 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.

45. 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.

[8] CPCA s 37.

46. I will not in this paper compare the s 37 power with its federal counterpart. If you are interested again that was addressed in my DT paper.

47. 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.

48. Note that the statutory declaration is ***not*** filed in Court – it is given to the Police. Of course you should keep a copy. I like to get a receipt from the Police confirming the date on which it was provided to them.

49. 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. In practice the Police will give some latitude if requested. I suppose if stuck between a rock and a hard place I would say delay is less serious than making a statutory declaration that contains errors. If your client is in custody it may simply not be possible to take instructions, prepare the declaration and have it signed and delivered to the Police within 7 days. I suggest just keep the Police informed.[9]

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

51. In the course of drafting the statutory declaration 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.

52. Let me stress though, the statutory declaration should not convey a narrative of HOW interests in property were acquired, simply who does or may have such interests. Even in complex cases the statutory declaration

[9] Note also that s 23A(2) *Criminal Code* (WA) provides a defence in these terms: *"A person is not criminally responsible for an act or omission which occurs independently of the exercise of the person's will".*

should usually fit on one page. The skill is keeping it accurate without giving away information that your client is not compelled to disclose.

Your clients' concerns

53. 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.

54. 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. Section 91 CPCA allows the Court to appoint an owner of property to control and manage it, or even to sell it. Note though that obligations are imposed by the CPCA on a person who has control and management of property.

55. 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 investment 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

56. Many freezing notices will exclude some property. Sometimes some everyday transaction banking accounts will be excluded. Often business assets will be excluded. However, if an account is excluded, but the account is with the same bank that the client has a secured loan from, and if secured property is frozen, the bank may lock down all accounts that have a positive balance. Similarly internet banking will usually be locked out too.

57. I often advise my clients to open a new account with a different bank into which to have their ongoing income (which is almost never frozen) paid into and from which they can operate their ongoing banking.

Court filings - objections / appearances etc

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

59. The **time limit for the CPCA objection must 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. Perth Magistrates Court have created a form (but it's not publicly available). However I am reliably informed it soon will be.

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

60. 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 related criminal charges.

61. However such an adjournment may not always be in the interests of a third party (ie not the suspect) who wants to object, for instance on the ground that they are an "innocent party" (that being a concept addressed further below).

THE FINAL HEARING

62. Each of sections 82 and 83 have a number of alternative bases on which an objection can be made out.

63. Before turning to any of them, the starting point must be a thorough analysis of what the terms CD and CU each mean. In many cases (ie where property is frozen concurrently on both CU and CD grounds) the onus on the objector is to prove the property is neither of those things.

64. The terms CD and CU are defined in ss 148 and 146 respectively. Without limiting the scope of the provisions, they commence with the following general principles:

> Section 148(1) provides:
>
> > *Property that is wholly or partly derived or realised, directly or indirectly, from the commission of a confiscation offence is* ***crime-derived***
>
> Section 146(1)(a) provides:
>
> > *property is* ***crime-used*** *if —*
> >
> > *(a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence*

65. The term "confiscation offence" is defined in s 141. For most purposes it means *"an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more"*.

66. It is necessary to pick the definition of crime-used apart some more. As I have said CU is more common than CD. It's also harder for an objector to disprove. By way of example:

    a. Most people could prove that their family home is not crime-derived by demonstrating where the deposit came from, and by showing that their salary is paid to their bank account, from which they make regular mortgage repayments. I do not suggest that proof of this may not be factually complicated. It can be. It will often require forensic accounting evidence. But conceptually it is not that difficult.

    b. In contrast, showing that the family home is not crime-used is much harder. How do you show ***what*** the house was used for on each day of the last 10 years that you have owned it? Further how do you prove that you did not ***intend*** in the ***future*** to use your house for some nefarious purpose?

67. There are also important deeming provisions for CU. For example State Criminal Code Chapters XXII (offences against morality) and XXXI (sexual offences). The commission of any such offence on or in a property renders that property crime-used.

68. One of the expansive provisions on the CD side is s 148(2)(b): property bought with crime-derived property is itself crime-derived. A similar provision was explored in *Henderson v Queensland* [2014] HCA 52. Under a similar statute, Mr Henderson bore the onus of proving that half a million dollars cash that he had in the boot of his car was not crime-derived. He said it was the proceeds of sale of jewellery, which jewellery had been in the Henderson family for many years. Quite remarkably the primary judge believed him. But he was not satisfied that the jewellery had been lawfully acquired by Mr Henderson's long deceased father. The High Court upheld the findings below that Mr Henderson had not discharged his onus.

69. Lastly, before moving on to specific provisions of ss 82 and 83, I want to say something about tax offences. There are 'confiscations offences' in the *Criminal Code* (Cth) that can apply to tax fraud. For instance s 135.1 (general dishonesty).

70. Tax offences are often relied on by the State. In the CU context, if a person possesses money derived from income (particularly cash) the DPP may put the argument that in order to succeed on their objection, the person has to prove they did not intend (in the future) to evade their tax liabilities in relation to that income.

71. By way of analogy, in the criminal context (specifically on a federal charge of money laundering) it has been held that cash income is capable of being proceeds of tax fraud, notwithstanding that there is no obligation in law to pay tax out of the income that gives rise to that tax liability. The Court held

the evaded tax had been derived indirectly from the commission of an offence.[10]

72. Although this has not been tested under the CPCA I suspect the same outcome is likely. Namely cash income is capable of being crime-derived as well as crime-used. The timing of the obligation to lodge a tax return may be important.

Sections 82(1) and 83(1) – proving the property is not crime-used / crime-derived

73. This is the obvious basis, and the one I shall focus most attention on.

74. This involves the proof of a negative.

75. And for reasons that are now apparent, given the expansive definitions of CU and CD it actually requires proof of a great many negatives.

76. I commend the lead judgment of Bell J in *Henderson v Queensland* where her Honour said:

> *Mr Henderson was required to prove a negative. It was necessary for Mr Henderson to point to evidence of facts and circumstances supporting the conclusion that,* ***according to the course of common experience****, it was probable that the [property] was not illegally acquired property.* ***Discharge of the onus was not a mechanical exercise; it required that the primary judge be actually persuaded*** *as a matter of probability that the [property] was not illegally acquired property"*
> (emphasis added)

77. In the same case Justice Gageler explored the application of *Jones v Dunkel* [11] to the proof of negatives in this context.

[10] *Isbester v R* (2013) 280 FLR 184 at [48] [60] [61].
[11] The rule in *Jones v Dunkel* applies as much in confiscations proceedings as any other civil proceedings. The rule has previously been applied in proceedings under the Act: *Lambert v WA* [2014] WASC 145 at [16] and [27].

78. In some CU and CD matters the State may not advance a positive case as to how the property might be CU or CD. That puts an objector in a very difficult position.

79. In such cases it is helpful to recall that *Jones v Dunkel* is:

> *a 'particular application' of the inference recognised in Blatch v Archer*[12] *that provides that 'all evidence is to be weighed according to the proof which it was* ***in the power of one side to have produced****, and in the power of the other side to have contradicted.'* [13]
> (emphasis added)

80. In *DPP (Cth) v Diez* [2003] NSWSC 238 at [33] and [41] the Court said:

> *The Director … has the obligation to put an applicant … on notice (usually by cross-examination) of his intention to rely upon such inferences from the evidence which contradict his denial on oath that the property had been used in any unlawful activities …*
>
> *... there is realistically an obligation upon the applicant to deny on oath in general terms … (thus providing a prima facie case), and that his obligation to deal specifically with particular matters thereafter arises only where there is available from the evidence inferences in relation to those particular matters which tend to contradict that denial.* ***There is an obligation upon the Director to point to or to introduce evidence from which such inferences may become available.***

(emphasis added)

81. These authorities are, in my view critical. If one were to approach the task of proving that none of the things that might make property CU or CD in a given case, then it would be hard to imagine a CU or CD objection trial running for less than about 3 weeks. And it is almost impossible to imagine an objection ever succeeding – something would be missed that the State could point to in closing as a matter that had not been disproven by the objector.

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[12] [1774] Eng R 2; (1774) 1 Cowp 63 at 65.
[13] *Ho v Powell* (2001) 51 NSWLR 572; [2001] NSWCA 168 at [15].

82. Based on these authorities, I believe there is some obligation on the DPP to point towards something that might make the property CU or CD. At the very least the DPP needs to direct the objector's attention to that which is really contentious and that which they must really prove. The Supreme Court in particular (and the District Court to an extent) might also be called upon to impose such an obligation on the DPP in order to minimise delay and advance case flow management objectives – see RSC Order rules 4A and 4B.

83. I stress this approach is not necessarily accepted by the DPP. And we do not yet have the benefit of case law directly on point.

Sections 82(4) and 83(2) – innocent party

84. Even if property is crime-used or crime-derived, the freezing notice can still be set aside if the objector establishes that s/he is an innocent party. The objector must specifically establish that it is more likely than not:

(a) the objector is the owner of the property, or is one of 2 or more owners of the property; and

(b) the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence; and

(c) the objector is an innocent party in relation to the property; and

85. There is a fourth requirement, however it is not always necessary to prove it. The fourth requirement is:

(d) each other owner (if there are more than one) is an innocent party in relation to the property.

86. I will deal with the fourth requirement now and then leave it to one side. If only the first three, but not the fourth requirement are established, an objector is entitled to be paid *"an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property"*: See s 82(5) and 83(3). That is if you own a 25% interest in CU or CD property, and you can only establish that

you are an innocent party, you can still recover your 25% equity.

87. The concept of "owner" is important, because it is only an owner who can object.

88. The term is defined in the glossary

> ***owner**, in relation to property, means a person who has a legal or equitable interest in the property;*

89. It is an expansive definition that covers people who are not, in common parlance, owners.

90. In summary then ss 82(4) and 83(2) may provide a remedy for a person with only an interest in the frozen property, provided the person can satisfy the other limbs.

91. I am going to turn next to the third limb, which is the focus of the sections – namely the concept of an ***"innocent party"***.

    a. That term is also defined in s 153. That definition is broken down over 4 subsections. I won't reproduce them all.

    b. The first 2 subsections of s 153 deal with crime-used property only. A person is an innocent party in relation to such property if they:

        i. Had no reasonable grounds for suspecting that the relevant confiscation offence was being or would be committed, or

        ii. Took all reasonable steps to prevent the commission of the relevant confiscation offence, or

        iii. Had no reasonable grounds for suspecting that the property was being or would be used in the commission of the offence,

        iv. Took all reasonable steps to prevent the use of the property in the commission of the offence.

    c. Section 153(3) and (4) relate to crime-used and crime-derived respectively. They appear to me to provide that a bona fide

> purchaser for value without notice (a concept well known in property law) is an innocent party in relation to both crime-used and crime-derived property. They apply where the person acquires the property after the property has become crime-used or crime-derived.

92. A number of cases have been argued on 'innocent party'. Often the question is whether the wife knew of the husband's drug offending, which was occurring in the family home. Typically the Proceeds of Crime Squad of WA Police will have done a compulsory interview of the wife at the time the husband was charged. If done well that interview will have confirmed that the wife had the usual sort of access to all parts of the jointly owned property. Once that has occurred it becomes almost impossible for the wife to succeed on an objection arguing that she is an innocent party.

93. One relatively recent case that has become synonymous with this difficulty is *Lambert v WA* [2014] WASC 145. Commissioner Sleight held at [16(a)]:

> *I find that it is improbable that Ms Lambert was not aware of the existence of such an elaborate hydroponic system in a shed which was located in such close proximity to the house. In my opinion, it is improbable that Ms Lambert would not have been aware of the cultivation given the nature of the setup and the number of times that Mr Russell would have needed to attend the shed in order to maintain the cultivation.*

94. Those comments could be made in a great many cases of this nature.

95. I return now to the body of ss 82(4) and 83(2).

96. The most curious (in my opinion) of these limbs is the second. The objector must show that the property is not effectively controlled by what I will loosely call 'the offender'.

97. It is necessary to explore "effective control". The term is defined broadly in s 156 in these terms:

> *a person has effective control of property if the person does not have the legal estate in the property, but the property is directly or indirectly*

subject to the control of the person, or is held for the ultimate benefit of the person.

98. As an aside, the federal POCA uses the same term.[14] Under POCA multiple people can have effective control of property at the same time. Under the CPCA it is not clear whether multiple people can have effective control.

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

100. The natural meaning of the words "the property" may well suggest that the words are directed at the asset (take a house as a hypothetical example) as opposed to interests in that asset.

101. That approach is arguably supported by the fact that it is something of a strain on the language to talk about someone having the control of an interest in property (as opposed to the control of a physical asset).

102. But if that interpretation is correct, no one else can make good an objection if the house itself is under the effective control of the offender.

    a. Not even a bank with a registered mortgage.

    b. Certainly not a person with a lesser equitable interest.

103. The High Court has noted[15] that the NT equivalent of the CPCA (which is modelled on the CPCA) uses the words "property" interchangeably, sometimes to refer to an asset and sometimes to refer to an interest in an asset.

104. I suggest that in the present context the words "the property" are referring to "the property" referred to in the first limb. That is the words the property are capable of being limited to the interest. This interpretation limits the scope of confiscation, and is, in the words Hayne J quoted at [8] above, in my view to be preferred for that reason.

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[14] See *DPP v Hart* [2004] QDC 121 at [54] & [81]; confirmed on appeal in *DPP v Hart* [2005] 2 Qd R 246 for a useful example of effective control.
[15] *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [31]

Undue hardship in relation to crime-used property only – s 82(3)

105. At the start I stress there is no concept of setting aside a freezing notice on crime-**derived** grounds on account of hardship. The policy is that property that is crime-derived must be confiscated, and that if that causes hardship to third parties, too bad. Crime should not pay. Not even innocent young dependents.

106. However in relation to crime-used property there is a concept of **"undue hardship"**.

107. I have never argued it. It rarely (if ever) succeeds.

108. Undue hardship relief is available to dependants of an owner (in circumstances where the owner could not make good an objection – ie the owner cannot prove that they are an innocent party). The dependent must either be an innocent party or under 18. And in effect, the only property that can be 'saved' on this ground is the family home.

109. What makes undue hardship so difficult to demonstrate is the combined effect of ss 82(3)(f) and (g).

110. Relief is only available if (along with other matters):

> *(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.*

111. Dispossession of the home is not sufficient to constitute ***undue*** hardship: see the leading case on hardship, *Lamers* (2009) 192 A Crim R 471 at [78].

112. See also the recent decision of Tottle J in *Stribrny v WA* [2015] WASC 396 at [73] where his Honour said:

> *The question which I must answer is whether the hardship that will be suffered by [the objector] is greater hardship than would ordinarily flow from the confiscation of a family home - that is, whether it is undue hardship*

Sections 82(7) and 83(5) – buy back

113. This is seldom used, but if a person who will not otherwise succeed on an objection particularly wants to retain crime-used or crime-derived property they can apply for an order to pay its value to the State in substitution. This is not really likely to be contentious (other than perhaps as to the question of value). Putting aside questions of value an application under these provisions is likely to be resolved by consent with the DPP.

REMEDIES OTHERWISE THAN BY OBJECTION

114. There is no express means by which a freezing notice can be challenged under the Act.

115. The same is true of an *ex parte* freezing order made by the Court. However in that context it has been held that Order 58 rule 23 RSC applies and allows an affected party to seek to have the freezing order reviewed *inter partes*: see *Bennett and Co v DPP* [2005] WASCA 141.

116. Order 58 rule 23 cannot apply to a JP issued freezing notice.

117. The only mechanism I can think of to challenge the issue of a freezing notice is a prerogative writ. Certainly there is no jurisdiction in State Administrative Tribunal to challenge the decision either of the JP to issue it, or the decision of the Police officer to apply for it.

118. There is no case law on the point.

119. The JPs who issue freezing notices give no reasons, other than a statement built into the cover page of the notice that says:

> *"I, xxx, a JP for WA, UPON the application of a police officer within the meaning of the CPCA, and BEING satisfied of the matters set out in Schedule 1, ISSUE this freezing notice for the property referred to in Schedule 2 on each of the grounds identified in schedule 2 … [etc]"*

120. The second schedule will identify the items of property frozen, and whether each is frozen on DT, CU, CD or a combination of those grounds.

121. In order to understand the basis for the making of a freezing order it may be desirable to request a copy of the application for the freezing notice. By and large I have found the Police are willing to provide a copy, sometimes partially redacted. If there is a refusal, options to obtain a copy include Freedom of Information, an application for pre-action discovery or a subpoena issued in the objection proceedings. The difficulty with a subpoena may be that if the Police apply to set it aside, it will be hard to demonstrate the forensic relevance of the application to the substantive objection proceedings.

122. I routinely request a copy of the FN application when the FN is issued on CU and/or CD grounds.

123. I have as a result of matters set forth in those applications successfully made submissions to the DPP to cancel the notice entirely, or cancel it in relation to specific property or at least cancel it on one ground or another.

124. By way of example:

    a. I had a notice issued over a late model high performance V8 Mercedes-Benz cancelled on the basis that the FN application was devoid of evidence to show that my client (who had recently purchased it second hand) had any reason to suspect that it was crime-used / crime-derived in the hands of the seller.

    b. I had a notice issued over a farm (on which a cannabis crop was growing) cancelled on the CD ground. There was sufficient evidence to support a suspicion that the farm was CU, but no evidence to ground a suspicion that it was CD. Forensically this reduces what we have to prove on the objection.

    c. I have had individual items of property (including cash) cancelled.

125. Hence it is well worth asking for a copy of the FN application.

126. Particularly in the case of property said to be crime-used, it can also be worth reviewing the DPP's guidelines, which are published on their website.[16]

RELIEF WITHOUT LITIGATION OF AN OBJECTION?

127. Section 152 CPCA provides:

> *If property is sold by or for the State under this Act, the value of the property is taken to be equal to the proceeds of the sale after taking account of the following —*
>
> *(a) costs, charges and expenses arising from the sale;*
>
> *(b) if a freezing notice or freezing order is or was in force for the property — expenses incurred by the State or a person appointed to manage the property while the notice or order was in force;*
>
> *(c) if the property has been confiscated — any expenses incurred by the State or a person appointed to manage the property after it was confiscated;*
>
> *(d) any charges on the property.*

128. The provision is framed as a definition. I believe it is substantive. I do not have time in this paper to fully set out my reasoning. In summary:

a. Nowhere else in the CPCA does it say that a person who has a charge over property is to be paid out the sum secured by that charge upon confiscation.

b. Yet ss 9 and 10 provide that the confiscation of property results in the property vesting in the State absolutely and free of any encumbrances, including registered encumbrances.

[16] See Appendix 5, pages 43 and following, namely the Policy and Guidelines for the Confiscation Of Property Pursuant to the *Criminal Property Confiscation Act 2000*) of the Statement of Prosecution Policy and Guidelines 2005 available at http://www.dpp.wa.gov.au/_files/statement_prosecution_policy2005.pdf

c. Further, the term defined in s 152, value, is not used in the provisions that govern the sale of confiscated property: ss 89 and 90.

d. For s 152 to have any purpose it must be more than a definition.

129. Although it has never been decided, I believe s 152 demonstrates a parliamentary intention that chargees be paid out the value of their charge upon sale following confiscation.

130. A mortgage is a form of charge. So too is an equitable lien.

131. Thus a person who has an equitable lien may have a remedy outside the objection process. I stress the objection process is probably the better place to assert that interest. However this alternative that I have identified might be useful if the deadline for objecting has been missed and the property has been automatically confiscated under s 7.

INTERACTION WITH OTHER CONFISCATION STREAMS

132. I stress that the only pathway to success in CU and CD litigation is to succeed on all grounds.

133. If the owner of the property is also liable to be declared a drug trafficker that must also be reckoned with. I stress that property need not be frozen on the drug-trafficker ground to be confiscated pursuant to it. Confiscation on the DT ground occurs by operation of s 8 CPCA, not as a result of freezing.

PROCEEDS OF CRIME ACT 2002 (CTH)

134. The coverage of this legislation in this paper is limited.

135. The POCA has its own definitions, which do not entirely align with the CPCA. Most importantly, what the CPCA calls crime-used the POCA calls an instrument of crime. What the CPCA calls crime-derived the POCA calls proceeds of crime.

136. An important point about forfeiture of instruments under POCA. It is ALWAYS discretionary. Even where the AFP can prove the property is an

instrument and tick the boxes the Court retains a discretion to say 'that's excessive'. It's a discretion many would welcome in the CPCA on the CU ground, but which is absent.

137. Generally there is no discretion under the POCA in relation to property found to be the proceeds of crime.

138. The process for litigation under the POCA starts with a restraining order in the District or Supreme Courts. These can be *ex parte* or on notice.

139. If your client has been served with an *ex parte* restraining order there is a strict time period (28 days) within which to apply to have a restraining order revoked. There is a mechanism to apply (within the 28 days, for a further short extension). So if time is running out seek an extension.

140. Only once a person is convicted[17] (or the AFP prove the offence on the balance of probabilities[18]) are the POCA forfeiture provisions invoked.

141. Thus the AFP must prove a lot more before property is put in jeopardy.

142. I stress though, once the AFP has proven a serious criminal offence (either by relying on a conviction, or proving it civilly) the onus then switches such that the owner of the property must show that the property is not the proceeds or an instrument of crime.[19] Proof of that issue has a lot in common with the negative that must be proven under the CPCA in a crime-used or crime-derived case.

143. Also note the AFP can pursue purely asset directed forfeiture under s 49 POCA. If an exclusion application is made the onus is then on the AFP to secure forfeiture.[20]

[17] Section 92 Proceeds of Crime Act.
[18] Section 47 Proceeds of Crime Act.
[19] Sections 73 and 94 Proceeds of Crime Act.
[20] On this question see *Commissioner AFP v Courtenay Investments Limited [No 4]* [2015] WASC 101 at [103] to [141] and in particular at [113] to [118].