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BARRISTER

25 October 2018

The Honourable Wayne Martin AC QC
Review of the Criminal Property Confiscation Act 2000 (WA)
Department of Justice

By email: confiscationactreview@justice.wa.gov.au

Dear Mr Martin

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

1. Thank you for your letter of 20 September 2018 inviting me to make a submission to your review.

2. I anticipate many people will make submissions to you about the harsh, draconian and I suggest most significantly, the disproportionate operation of the CPCA. I could, and often do, echo those calls.

3. I expect you will receive many submissions that focus on the drug trafficker ground of confiscation. I doubt there is much I can add to the calls for its reform that I am sure you will receive.

4. I respectfully suggest that the crime-used ground is equally and, in some contexts, of even greater concern in terms of proportionality. In the federal sphere instruments of crime are only ever made liable to forfeiture subject to the exercise of judicial discretion; see ss 47(4), 48(2) and 49(4) of the *Proceeds of Crime Act 2002* (Cth) (**POCA**). Something similar would be a welcome addition to the CPCA. Just as mandatory sentencing is generally viewed unfavourably, mandatory confiscation of crime-used property in particular is frankly unreasonable. It has far harder to make a policy justification for the ***mandatory*** confiscation of an asset worth $1m used in a

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relatively minor offence, than it is for the profits of crime (ie crime-derived property).

5. I consider that my submission will be of greater utility to you, and hopefully by extension the wider community, if I focus attention upon some finer issues that those who do not practice under the Act on a daily basis and for a wide client-base, might not appreciate.

6. The balance of my submission is framed to mirror your terms of reference. I have not set out to propose re-drafts of parts of the CPCA. I do note that the High Court has described the CPCA as *lacking coherence* and being drafted *unsatisfactorily*[1], and that the original Bill was passed without so much as a detailed explanatory memorandum and with scant debate or scrutiny. I suggest there is a link between the history and the High Court's description of the Act.

(a) Safeguards

7. The use of the terms 'respondents and third parties' in your terms of reference should not go unnoticed. It rather misconstrues the realities.

    a. The respondent to litigation under the CPCA is usually the State of Western Australia. I assume that the terms of reference are using 'respondent' to mean 'suspect, whether charged or not' or perhaps simply 'owner of property the subject of litigation under the CPCA'. I use the term 'owner' in its very broad statutory sense – to describe any person with an interest in property.

    b. The term third party is likely to introduce more confusion than anything.[2] I assume the words third party are intended to describe a person 'not

[1] *DPP (WA) v Centurion Trust Company* [2011] HCATrans 88 per Hayne J, refusing special leave.

[2] Section 330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) uses the words *"third party"*. That section is presently the subject of consideration by the Court of Appeal of this State in an appeal from the decision of Allanson J in *Commissioner of the AFP v Ganesh Kalimuthu [No 3]* [2017] WASC 108 at [117]ff. The words third party were described (aptly) by Simpson J in *Commissioner of*

suspected / accused of unlawful activity, regardless of whether the person is charged or not'. If you find it useful to use the words 'third party' in your final report I respectfully implore you to define the term very carefully.

8. A broad judicial discretion to allow an objection to confiscation of property frozen solely on the crime-used ground would be the **single most welcome** amendment to protect the rights of people who are accused of no wrong-doing. It could cure all manner of other difficulties that have already been encountered, and probably others that are yet to be encountered.

    a. Such a safeguard would (to be fully effective) also need a further safeguard. I do not doubt that property can be both crime-used and crime-derived (in relation to the same offence). There has been much said in the authorities considering the POCA about that issue.[3] If a broad discretion to allow a crime-used objection is introduced (without a similar discretion for crime-derived objections) the Police and DPP will have an incentive to freeze on a 'technical' crime-derived ground.[4]

    b. I do not profess to know the drafting solution to this quandary. It may be that the best approach, if a discretion to uphold a crime-used objections is introduced, is also to introduce an 'exceptional grounds' discretion for crime-derived objections. It seems to me that judicial officers are unlikely to exercise a discretion to return the profits of crime (in the true sense) to anyone lightly.

9. Mortgagees are a group who have received some attention (including judicially).

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the AFP v Lordianto [2017] NSWSC 1196 at [101] as *"infelicitous"*. An appeal from that decision by Simpson J saw the NSW Court of Appeal unable to agree on the meaning of the words *"third party"* - *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199.

[3] For instance *Re DPP (Cth); s19 of the Proceeds of Crime Act 2002* (2005) 62 NSWLR 400 at [56].

[4] I suggest that is what occurred in *Commissioner of the Australian Federal Police v Fernandez* [2018] NSWCA 198 at [57]-[82].

a. Their rights, which are well protected under the Transfer of Land Act etc, are clearly trampled upon unnecessarily by the CPCA. Professor Skead has written extensively on that topic, and it will suffice for me to endorse the concerns she has expressed.

b. I would go a step further and suggest that there is another gap in relation to people with lesser (unregistered) interests in land. Take for instance an equitable charge over land for a relatively modest amount. Section 131(1)(b) provides that *the proceeds of the disposal of … confiscated property* shall be paid to the confiscated assets account. I assume that it was intended that the scheme reflected in s 152 would apply to the sale of confiscated property, and that s 152 may have been intended to offer a mechanism by which an equitable charge could be paid out after confiscation. However, s 131 does not use the word "value" which is what s 152 defines.

10. I also endorse the concerns expressed in the thesis by Bond, J (2018) *To what extent do the objection to confiscation provisions in the CPCA protect the family home.*[5]

11. Finally, a specific safeguard to protect legal practitioners who receive payment for services rendered in defending criminal charges, or defending proceedings under the CPCA would be most welcome.

a. As it stands, if crime-derived money is used to pay a person for services, the money will, in the service provider's hands, remain tainted and liable to forfeiture unless the service provider establishes under s83(1) and s148(8)(a) that they are an *innocent party* as defined in s 153(4). Section 153(4)(d) may prove highly problematic for a legal practitioner who received a payment for defending proceedings under the Act, or defending a criminal charge, should the State move to confiscate that payment down the track. That sub-section requires the service provider to demonstrate that at … *the time of acquiring the property … the person did not know and had no reasonable grounds for suspecting that the property was crime-derived*.

[5] Available at http://ro.ecu.edu.au/theses_hons/1512/

b. The situation with crime-used property is even more anomalous – the Act does not specify how property ceases to be crime-used. Section 148(8)(a) provides that property acquired by an innocent party ceases to be crime-derived. There is no similar provision in s 146 (which defines when property is crime-used). That itself is a drafting issue that should be corrected.

c. To the best of my knowledge the Police / DPP have never pursued a legal practitioner under the CPCA in relation to a payment received in the course of practice, the risk still raises a potential access to justice issue.

d. The federal POCA provides in s 330(4)(c) that property ceases to be proceeds or an instrument of crime (the equivalent of crime-derived or crime-used) *if the property is acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal charge.*

(b) effectiveness of investigatory powers

12. It may not surprise you to hear that I hold real concerns about the use of s76. That section was explored by the Court of Appeal in *Zannon v WA* [2016] WASCA 91 and again by a Court of which you were a member in *Mulholland v Winslow* [2018] WASCA 19. The combined effect of those decisions is to give WA Police incredibly broad powers to conduct compulsory interrogations, and then to disclose the product of those interrogations for purposes that go beyond the operation of the Act.

a. Section 76 does not so much as express a right to legal advice, or a right to have a lawyer present (nor does it abrogate any such right that may exist at common law). A set of rights around s76, and some oversight of how material obtained under s76 may be disclosed, would be welcome additions to the CPCA.

b. I would go further and suggest the powers in s76(1)(d) and (e) ought only be exercisable in cases of urgency where a Justice of the Peace is satisfied that an

investigation would be prejudiced, or assets dissipated, by the delay occasioned by applying for an examination order and convening an examination.

13. Every time there is a review of any confiscations legislation there seems to be a call from the relevant Police for new powers to tackle some perceived weakness in their arsenal. I do not of course know whether and if so what powers WA Police (or for that matter the DPP or the CCC) may suggest to you they would be assisted by. For the moment I make these simple points.

    a. My experience has been that the WA police officers tasked with CPCA investigations are grossly under equipped for the task. They do not have the necessary training or experience in financial matters. They are, by and large, Detectives who are rotated through the Proceeds of Crime (POC) squad for a few years and then moved on again. I have seen personal examples of POC Detectives not knowing what a statutory trust account is and not knowing what a discretionary trust is. A long-term approach to human resources in the POC squad by WA Police would achieve far more than any new legislative powers.

    b. Recent Parliamentary debates suggest the CCC will not be much better resourced. Reference[6] was made to a government proposal that the work be conducted by a team of 3 full time equivalent employees in the CCC's Financial Investigations Team (which team also has other responsibilities outside the CPCA).

(c) Parts 4, 6 and 7 of the CPCA

14. I have found it convenient to address these parts of the Act under parts A and D of the terms of reference.

[6] Hansard (Legislative Council), 28 June 2018, per the Hon Sue Ellery on behalf of the Attorney-General.

(d) Necessary or desirable amendments

15. The CPCA provides 2 classes of justice. One is dispensed where property is frozen under a Freezing Order made by the Court under s 43. Another (inferior class) where property is frozen under a Freezing Notice (issued under s 34 by a Justice of the Peace, upon an application by a Police officer). The distinction is intolerable.

    a. A freezing order can be varied as justice demands. A person whose property is frozen by a freezing notice has no right to go back to the Justice of the Peace (or the Court) and seek a variation.

    b. Specifically, a freezing order can be moulded to provide for living and business expenses: s 45(e). That often occurs after the freezing order has been made. None of this is possible with a freezing notice.

    c. A freezing order can also be varied to allow for legal expenses to be paid from frozen property. In different contexts see *Mansfield v DPP (WA)* (2006) 226 CLR 486, *DPP (WA) v Chapman* [2009] WASC 160, *Franchina v WA* [2014] WASC 463 and *EF v WA* [2017] WADC 159[7]. A freezing notice cannot.

    d. In *Kalbasi v WA* [2015] WASC 317 at [33] Mitchell J (as his Honour then was) recognised that an undertaking as to damages was generally appropriate where the State sought a freezing order. In contrast s 137 immunises the State (absent bad faith, which will usually be impossible to prove) from a claim for damages that flow from a freezing notice. I have seen this cause considerable hardship to several clients where charges that could have seen them declared

[7] *EF v WA* is in a sense the final and important piece of this jigsaw puzzle. Goetze DCJ held (over objection from the DPP) that property the subject of a Court issued freezing order on the crime-derived and crime-used grounds could be released for legal expenses. The decision is not publicly available. The key passages of the judgment are reproduced at https://egreaves.com.au/frozen-money-legal-fees/2018/06/ I am also happy to provide a copy of the full decision to those assisting you in the review upon request.

a drug-trafficker were dropped more than a year after their property was frozen, causing business to fail. As an aside, it would be desirable if:

i. s 43 set out (on its face, so it was plain to Judges considering urgent *ex parte* applications) that they must consider whether the applicant should be called upon to provide an undertaking as to damages; and

ii. the State were automatically responsible for losses that flow from the issue of a s 34 freezing notices in the event the property is not confiscated. That is a partial reversal of s 137.

e. In summary freezing notices are blunt tools that are subject to less stringent oversight and are likely to do more (irrecoverable) harm.

f. I recognise the utility of a quick and efficient freezing provision. If no one objects to confiscation there is no need for the Court to be troubled. However where a person objects they should have a right to have the freeze reviewed by the Court, applying the standards in s 43. The Court should decide if continued freezing is warranted. If it finds that it is, it should make a freezing order. If it finds to the contrary the freezing notice should be cancelled with costs and damages to be assessed.

16. If a person succeeds on an objection the starting point should be that they recover ***all*** their legal costs (ie on an indemnity basis). Of course I would allow for discretion so that a successful party who has acted unreasonably in the litigation may be denied indemnity costs. This would also be a welcome amendment to the CPCA. Something similar is found in s 323 of the POCA. The bar is undoubtedly set high for an objector to confiscation. When the bar is met, there are sound policy reasons to provide full recompense.

a. As an aside to this submission, I note that the present practice is for any costs orders made against the State to be paid by the DPP from its departmental budget. In circumstances where the State (broadly defined) reaps the fruits of

confiscation, it does seem to place an unreasonable burden on the DPP to make her office responsible for all adverse costs orders against the State).

17. Statutory declarations must be provided (under ss 37 and 47) by any person served with a freezing notice / order. That must be provided within 7 days. In my experience:

    a. These are largely useless documents. Most lay people (and a good number of lawyers) do not address the criteria – they give a rambling story about the frozen assets.
    b. Further, and more fundamentally, who has an interest in property is often obvious. The Court should have a power, like s 39 POCA, to make specific orders tailored to individual cases. There is no need for this standard obligation.
    c. Alternatively, 7 days is unreasonable. It places unreasonable demands on lawyers who have often never dealt with the CPCA and who have other cases to deal with. It places people who are in custody (particularly in rural prisons) in an almost impossible situation. If the provisions are to be retained the period should be extended to 28 days.
    d. I note that the DPP has previously suggested these powers should be extended (not contracted). The DPP has suggested[8] *the Act should provide that in a statutory declaration given in accordance with section 37 and 47 the declarant must state i) The last known address of the interested party if the current address is not known; and ii) Whether the declarant is or claims to be an interested party and if so, the property in relation to which an interest is claimed and the extent of that interest*. The first suggestion is sensible. However the second obligation would impose an almost impossible burden on a person who was not legally represented. It will often call for a detailed analysis of the facts by a person with a solid understanding of equity. The legal costs of advising a person what to say are likely to be substantial. The DPP has advanced no justification for imposing such an obligation.

[8] Recommendation 31 in its 2005 submission to Government.

18. In similar vein, 28 days is an unreasonably short amount of time to file an objection.

    a. Property is often frozen concurrently with a person being arrested and denied bail. It can take weeks before they even recognise the need to take action in relation to the freezing of their property. The first lawyer they contact will often be a criminal lawyer, who will, as often as not, refuse to take instructions in relation to CPCA matters.

    b. I can see no prejudice to the DPP or the State if this period was increased to 3 months.

    c. I can see no prejudice in amending s 79(4) to make clear that the time to lodge an objection can be extended even if the property has already been confiscated, in which case the confiscation is stayed, and if the objection so made is upheld, the confiscation is 'reversed'. In effect I advocate for the statutory reversal of *Centurion* [**2009**] WASCA 97 at [59] per McLure JA (Owen JA concurring at [1]) and *Centurion* [**2010**] WASCA 133 at [255] per Buss JA (Owen JA concurring at [74]).

19. The following miscellaneous amendments could be introduced by regulation or rules of Court. Nevertheless, it would be a lost opportunity not to mention these issues in the context of your review. The issues could be dealt with by amendment of the CPCA itself.

    a. Much time is wasted on issues of joinder and consolidation of objections to property frozen by freezing notice. The freezing of a fairly ordinary family home on the relatively routine drug-trafficker ground, can easily give rise to 4 separate objections from: the registered proprietor / suspect, the suspect's ex-spouse and the suspect's parents (claiming equitable interests) and a bank that has a mortgage over the secured property. Each objection must be filed as a separate originating summons: RSC O.81FA r 5(1). Perhaps a 'matter' could be deemed to be commenced before the relevant Court upon the

lodgement of the freezing notice, with all objections then to be filed in that matter. This would also ensure that control and management orders could not be accidentally made by consent in one objection without hearing from the other objectors.

b. The Law Society has previously called[9] for there to be no filing fee on an objection. I would support that. Naturally a person whose property has been frozen is likely to be short on funds. There is often no time to wait for a fee waiver.

c. Freezing orders are often made *ex parte*, usually without naming a respondent / defendant. This has recently caused issues with eFiling. The system will not allow an objection to be filed by a non-party. As you would no doubt expect the Principal Registrar has allowed these to be filed manually. But with the strict 28 day deadline, this is a concern. The Principal Registrar cannot always be expected to be immediately available.

d. A person against whom (or a person with an interest in property effected by) an *ex parte* order of any kind under the Act should, absent a suppression order, be provided (at no cost) with a transcript of the hearing at which the order was made within 2 business days of service of the order on the person. My experience of late has been that it takes a lot longer than that to obtain, and the respondent is required to pay for it. In the context of an *ex parte* order, that strikes me as unfair. A person so effected should also, in the same circumstances and timeframe, be entitled to copies of all documents that were before the Court on the *ex parte* hearing; although I acknowledge the DPP are already doing this.

20. The Law Society has previously suggested that the District Court be given exclusive jurisdiction in matters under the CPCA. That is ***not*** a proposal I would support.

[9] Submission to the Hon Jim McGinty MLA (then Attorney-General) on 19 October 2006; recommendation 1.

a. The District Court is a suitable Court for many matters, and it deals with them efficiently and appropriately.
b. The multi-million dollar CPCA matters clearly belong in the Supreme Court.
c. Without wishing to criticise the Magistrates Court I do feel that there are sound reasons to entirely remove that Court's jurisdiction under the CPCA. The Act is inherently complex and contains substantial abrogation of fundamental rights. It is appropriate that all matters be determined in superior courts, even those involving property of modest value. Further, for reasons I have never fully comprehended, it seems that all objections filed in the Magistrates Court must be filed at Perth. That largely removes the one possible benefit of that court retaining jurisdiction – a ready ability to hear smaller rural matters at their point of origin.

21. The DPP has previously suggested[10] that objections should be required to specify (on their face) which frozen property the objection relates to. Indeed, the form used by the Magistrates Court for an objection already calls for such specificity. I can see no real value in front loading this issue onto the face of the obligation. The majority of objections relate to all frozen property anyway. The Court can always order the parties to confer, to file pleadings, to file a statement of facts and issues etc.

22. The DPP has previously suggested[11] the Act should expressly allow Police to seize any frozen property *at any time*. Read literally that is a concerning suggestion. If the Supreme Court has made an order that an owner have control and management of frozen property under s 91, it is entirely inappropriate for the Police to seize control. In such a scenario the DPP should apply (*ex parte* if necessary) to cancel the control and management order and for ancillary directions that facilitate seizure.

(e) Misuse of Drugs Act – Cannabis plants

23. I question the need for Schedule VIII altogether. A preferable approach in my view would be to apply the provisions as to weight in Schedule VII to cannabis plants, and

[10] Recommendation 4 in its 2005 submission to Government.

[11] Recommendation 26 in its 2005 submission to Government.

specify that a plant is to be stripped of all consumable parts and only those parts weighed.

24. The difficulty, which is exacerbated by the present limit of 20 plants, is that some people who grow plants hydroponically may have a few mature plants, a few immature plants and many cuttings / saplings, most of which will die before they yield any consumable cannabis. Under the current regime any cutting that has taken seed is a 'plant'. This produces disproportionate results.

25. In similar vein, and although outside your terms of reference, in my view legislative force should be given to the views expressed (in dissent) by Pullin JA in *Reid v DPP (WA)* [2012] WASCA 190 at [102] – [104] about the approach to cutting agents.

26. I would also welcome an amendment to s32A of the *Misuse of Drugs Act* that gave judges a discretion **not** to declare that an offender is a drug-trafficker, if the offender satisfied the judge on the balance of probabilities that the offender was not engaged in selling or supplying drugs for reward (whether financial or otherwise).

Conclusion

27. The 2 most needed reforms that I recommend are:

    a. The introduction of judicial discretion; and

    b. Bringing the freezing notice regime into alignment with the freezing order regime (so that there are not 2 classes of justice under the Act).

28. I have strived for brevity and width of coverage in this submission. If I can assist by providing more detail on any point I would be happy to do so.

Yours sincerely

Edward Greaves