

# CRIME-USED PROPERTY CONFISCATION IN WESTERN AUSTRALIA AND THE NORTHERN TERRITORY: LAWS BEFITTING DRACO'S AXONES?

NATALIE SKEAD\*

## CONTENTS

I	Introduction .....	67
II	Crime-Used Property Defined .....	69
III	Crime-Used Property Confiscation .....	72
	A <i>In rem</i> and <i>in personam</i> confiscation .....	72
	B Case study: <i>Director of Public Prosecutions (Vic) v Le</i> .....	73
	C The position under the <i>CPCA WA</i> and the <i>CPFA NT</i> .....	74
	D <i>In rem</i> confiscation .....	75
	E <i>In personam</i> confiscation .....	83
IV	Conclusion .....	89

## I INTRODUCTION

On 15 March 2010, the following report appeared in *The West Australian*:

### TEST CASE FOR CONFISCATION LAWS

CHRISTIANA JONES - The West Australian, March 15, 2010, 2:35 am

WA's property confiscation laws are set to be tested by the High Court, with plans by a criminal to fight the State's bid to seize his wife and children's home as a "substitute" for the shed where he had sex with an underage girl.

In one of two landmark property seizure cases handed down last Friday, the WA Court of Appeal ruled the Director of Public Prosecutions should be allowed to confiscate the Bassendean family home of sex offender Aaron Bowers because the property he had "used" in his crime could not be seized because it belonged to the victim's family.

The move means Bowers' cancer-stricken wife and two children could be thrown out of their home unless the decision is overturned.

\* LLB, BCom (Witw.), SJD, GradCertTerTeach (W.Aust.). Associate Professor, Faculty of Law, University of Western Australia.

Three appeal judges said a previous judge had "erred in law" when he found the Beechboro property housing the shed in which Bowers' admitted committing his sex crime had not been "used" in the offence and only acted as "something to stand on".

The previous judge had also found the State should not be allowed to take Bowers' property as a substitute because an innocent spouse lived in it.

But the appeal judges said the safeguard only applied if the property being frozen was the one used in the crime and not in cases where it was being targeted as a "substitute".<sup>1</sup>

The report refers to the facts in *Director of Public Prosecutions (WA) v Bowers*,<sup>2</sup> and illustrates a legislative mechanism introduced into the confiscation of proceeds of crime legislative schemes of every Australian jurisdiction, including the federal scheme.

Australian proceeds of crime statutes allow for the confiscation of property, both real and personal, in four specified circumstances: where a person's wealth is unexplained; where property was used in the commission of a specified offence; where property was derived from the commission of a specified offence; and where property is or was owned by a declared drug trafficker. *Bowers* involved the second circumstance: the confiscation of 'crime-used' property.

In 1987, the then Deputy Prime Minister and Federal Attorney-General, Mr Lionel Bowen, outlined the broad objectives of proceeds of crime legislation in his second reading speech on the first Commonwealth Proceeds of Crime Bill 1987 (Cth):

The Proceeds of Crime Bill provides some of the most effective weaponry against major crime ever introduced into this Parliament. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the profits and instruments of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive – profit – and prevent the re-investment of that profit in further criminal activity.<sup>3</sup>

Crime-used property confiscations have the more specific aim of 'depriv[ing] a person of property used, or intended by an offender to be used, in relation to

<sup>1</sup> Christiana Jones, 'Test case for confiscation laws', *The West Australian* (online), 15 March 2010 <<https://au.news.yahoo.com/thewest/wa/a/6931750/test-case-for-confiscation-laws/>>.

<sup>2</sup> *DPP (WA) v Bowers* [2010] WASCA 46 ('*Bowers*'); Transcript of Proceedings, *Bowers v DPP (WA)* [2010] HCATrans 277 (21 October 2010).

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2314 (Lionel Bowen).

the commission of an offence ... and ... prevent[ing] the person from using the property to commit other offences'.<sup>4</sup>

This article uses a case study to provide a detailed comparative examination and analysis of the crime-used property confiscation regimes operating in Western Australia and the Northern Territory, jurisdictions with analogous statutory regimes. Particular focus will be placed on the impact of the regimes on the security and certainty of real property rights. While limited to these two jurisdictions, much of the analysis and commentary provided herein is equally applicable to the schemes operating in other Australian jurisdictions.

## II CRIME-USED PROPERTY DEFINED

The term 'crime-used property' is only used in the proceeds of crime statutes of Western Australia and the Northern Territory.<sup>5</sup> However, the concept of crime-used property is incorporated into the definitions of 'tainted property'<sup>6</sup> and 'instrument of crime'<sup>7</sup> in the statutes of the remaining jurisdictions. For convenience and consistency, the term 'crime-used property' will be used in this article.

In all jurisdictions, crime-used property includes 'property that was used in, or in connection with, the commission of a serious offence'.<sup>8</sup> The meaning of 'used in connection with' was considered by Underwood J in *Director of Public Prosecutions (Tas) v Devine*.<sup>9</sup> His Honour identified two approaches to interpreting the phrase. The first broad approach attributes a wider meaning to 'used in connection with' than simply 'used in', raising issues of proximity and

<sup>4</sup> *Confiscation of Criminal Assets Act 2003* (ACT) s 3(d). See also *Proceeds of Crime Act 2002* (Cth) s 5(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 3(b); *Confiscation Act 1997* (Vic) s 1(d); *Criminal Property Forfeiture Act 2002* (NT) ss 10(2)-(3).

<sup>5</sup> *Criminal Property Forfeiture Act 2002* (NT); *Criminal Property Confiscation Act 2000* (WA).

<sup>6</sup> The term 'tainted property' is used in the *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Proceeds Confiscation Act 2002* (Qld); *Confiscation Act 1997* (Vic); *Crime (Confiscation of Profits) Act 1993* (Tas); *Criminal Assets Confiscation Act 2005* (SA).

<sup>7</sup> The terms 'instrument' and 'instrument of crime' are used in the *Proceeds of Crime Act 2002* (Cth); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas).

<sup>8</sup> *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4. See also *Proceeds of Crime Act 2002* (Cth) s 329(2)(a); *Criminal Assets Confiscation Act 2005* (SA) s 7(b)(i); *Crime (Confiscation of Profits) Act 1993* (Tas) s 4.

<sup>9</sup> [2001] TASSC 8 ('*Devine*').

degree.<sup>10</sup> In *R v Hadad*,<sup>11</sup> McInerney J, with whom Enderby and Allen JJ agreed, adopted this expansive approach and stated:

the intention of the legislature is that a wide scope be given to the concept of tainted property. I do not accept that the legislature intended the courts to construe the section by requiring a substantial connection between the commission of the crime and the alleged tainted property.<sup>12</sup>

By contrast, the second, narrower approach requires a ‘substantial connection’ ‘in a very real sense’ between the property and the commission of the offence.<sup>13</sup>

On the facts in *Devine*, Underwood J was not required to reconcile the inconsistency between the two approaches. It is submitted, however, that where the language of a statute is unclear, any doubt as to the meaning of any term is to be ‘resolved in favour of the owner [of] the property or, by analogy, in favour of the claimant to the remedy against forfeiture’ in accordance with the principle that there is a rebuttable presumption that legislation does not interfere with vested property interests.<sup>14</sup> Therefore, the narrow meaning of ‘in connection with’ requiring a ‘substantial connection’ is to be preferred. This narrow construction was adopted unanimously by three members of the Court of Appeal in *Director of Public Prosecutions (WA) v White*.<sup>15</sup>

In some jurisdictions the definition of crime-used property includes ‘property *intended* to be used in, or in connection with, the commission of an offence’.<sup>16</sup> In Western Australia and the Northern Territory the definition of

<sup>10</sup> *R v Polain* (1989) 52 SASR 526; *R v Hadad* (1989) 16 NSWLR 476; *R v Sultana* (1994) 74 A Crim R 27; *R v Minienuou* (1989) 46 A Crim R 211; *R v Zerafa* [2003] NSWCCA 101; *DPP (NSW) v King* (2000) 49 NSWLR 729; *Taylor v A-G (SA)* (1991) 52 A Crim R 166; *DPP (SA) v George* (2008) 102 SASR 246 (Doyle CJ, White J agreeing).

<sup>11</sup> (1989) 16 NSWLR 476.

<sup>12</sup> *R v Hadad* (1989) 16 NSWLR 476, 482.

<sup>13</sup> *Re Application Pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd R 506; *Ward, Marles and Graham v The Queen* [1989] 1 Qd R 194; *DPP (Cth) v Jeffrey* (1992) 58 A Crim R 310; *R v Rintel* (1991) 52 A Crim R 209; *DPP (SA) v George* (2008) 102 SASR 246 (Vanstone J).

<sup>14</sup> *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 681; *DPP (WA) v A* [2008] WASC 258, [44]; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547. See also Jennifer Corrin, ‘Australia: Country Report on Human Rights’ (2009) 40(1) *Victoria University of Wellington Law Review* 37, 41-2.

<sup>15</sup> [2010] WASC 47 (‘White’).

<sup>16</sup> *Criminal Assets Confiscation Act 2005* (SA) s 7(b)(ii); *Proceeds of Crime Act 2002* (Cth) s 329(2)(b); *Confiscation of Criminal Assets Act 2003* (ACT) s 10(1)(a); *Criminal Property Forfeiture Act 2002* (NT) s 11(1)(a); *Criminal Proceeds Confiscation Act 2002* (Qld) s 104(1)(a); *Confiscation Act 1997* (Vic) s 3; *Criminal Property Confiscation Act 2000* (WA) s 146(1)(a) (emphasis added). *DPP (Vic) v Ali* [2008] VSC 167, [34]-[36].

crime-used property is very wide.<sup>17</sup> Section 11 of the *Criminal Property Forfeiture Act 2002* (NT) ('CPFA NT'), for example, defines crime-used property as including:

**11. Crime-used property**

(1) For this Act, 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 forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence; or
- (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or
- (c) an act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence.

The expansiveness of this definition is illustrated in *Bowers* and *White*. As reported in *The West Australian* article extracted above, in *Bowers* the first respondent pleaded guilty to three counts of sexually penetrating a child in contravention of the *Criminal Code Act Compilation Act 1913* (WA). The offences were committed at the complainant's home which was owned by the complainant's father. McLure P, with whom Owen and Buss JJA agreed, found the home at which the offences were committed to be crime-used property.<sup>18</sup> Although the property was crime-used property it was not owned by the respondent but by the complainant's father and therefore could not be confiscated. The legislation deals with this situation via *in personam* confiscation discussed below.

As noted, McLure P in *White* adopted a narrow construction of 'used in connection with':

The use must, at its widest, be indirectly in connection with the facilitation of a confiscation offence. There is a sufficient relationship between the act or acts constituting the use and the specific confiscation offence if the acts have the consequence or effect of facilitating that offence.<sup>19</sup>

<sup>17</sup> Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 68.

<sup>18</sup> *Bowers* [2010] WASCA 46. On 21 October 2010 the High Court of Australia granted the respondent special leave to appeal against the decision of the Supreme Court of Western Australia as to the construction of 'crime-used property' and 'criminal use' under the *CPCA WA*. The author understands the matter was settled before the appeal was heard. See Transcript of Proceedings, *Bowers v DPP (WA)* [2010] HCATrans 277 (21 October 2010). See also *White* [2010] WASCA 47; *White v DPP (WA)* [2011] HCA 20.

<sup>19</sup> *White* [2010] WASCA 47. See, also, *DPP (NT) v Mattiuzzo* [2011] NTSC 60.

Her Honour found the property in question fell within this definition. In *White*, the respondent was found guilty of wilful murder following a jury trial. The murder occurred at a property leased by the respondent. The property was surrounded by a six-foot fence with barbed wire and two metal gates at its entrance that were padlocked on the respondent's instructions, to prevent the deceased from leaving the property. The respondent shot several times at, and injured, the deceased while both men were on the property. Trying to escape from the respondent, the deceased ran towards and climbed up the gates. The respondent caught up with the deceased and shot him "straight up" in the buttocks<sup>20</sup> while he was on top of the gates. The deceased, still alive, fell off the gates onto the ground outside the property. The respondent unlocked the gates, walked out of the property and shot the deceased six times. The deceased died shortly after. The respondent dragged the deceased's body back onto the property before removing and incinerating it.<sup>21</sup> McLure P found that 'the intentional locking of the gates was for the purpose, and had the effect, of preventing or impeding [the deceased's] departure from the [property] before the respondent had finished dealing with him. That use of the land facilitated [the deceased's] murder'.<sup>22</sup> The property was, therefore, crime-used and the respondent had made 'criminal use' of it for the purposes of the *Criminal Property Confiscation Act 2000* (WA) ('CPCA WA'). The respondent's appeal on this issue was dismissed unanimously by the High Court.<sup>23</sup>

The expansiveness of the definition of crime-used property in Western Australia and the Northern Territory demonstrates the extensive nature of the proceeds of crime legislation applying in those, and other, Australian jurisdictions.

### III CRIME-USED PROPERTY CONFISCATION

#### A In rem and in personam confiscation

All Australian jurisdictions allow for the *in rem* confiscation of crime-used property in the first instance. *In rem* confiscation is confiscation of specific identified items of crime-used property: *in rem* confiscations operate against

<sup>20</sup> *White* [2010] WASCA 47, [5].

<sup>21</sup> *Ibid* [3]-[5]; *White v DPP (WA)* [2011] HCA 20, [4].

<sup>22</sup> *White* [2010] WASCA 47, [39].

<sup>23</sup> *White v DPP (WA)* [2011] HCA 20.

nominate objects. In some jurisdictions *in personam* confiscation is authorised as an alternative where *in rem* confiscation is not possible.<sup>24</sup> *In personam* confiscation is the confiscation of property equal in value to the assessed value of the crime-used property: *in personam* confiscations operate against specified persons rather than things.<sup>25</sup>

*In personam* confiscation is generally only available if, for one or other specified reason, the nominate item is not available for confiscation. Where authorised, *in personam* confiscation of property equal in value to unavailable crime-used property is achieved by way of what are termed alternatively 'crime-used property substitution declarations', 'instrument substitution declarations', 'tainted property substitution declarations'.<sup>26</sup>

#### B *Case study: Director of Public Prosecutions (Vic) v Le*

In *Director of Public Prosecutions (Vic) v Le*,<sup>27</sup> the High Court undertook a detailed discussion of the crime-used property confiscation provisions operating in Victoria. Because of the range of property interests raised in *Le*, it provides a useful and instructive fact and issue construct on which to analyse the crime-used property confiscation regimes operating in Western Australia and the Northern Territory.

Mr Le was the sole registered proprietor of an apartment. The apartment was subject to a registered mortgage. On 23 June 2003, Mr Le was charged with several drug-related offences. Shortly after, on 29 August 2003, Mr Le transferred title in the apartment to himself and his wife, Mrs Le, as joint tenants. The mortgagee consented to the transfer. The consideration for the transfer was 'natural love and affection'.<sup>28</sup> On 1 February 2005, Mr Le was

<sup>24</sup> *Criminal Proceeds Confiscation Act 2002* (Qld) ch 3 pt 4 div 2A, *Confiscation Act 1997* (Vic) pt 3 div 1A; *CPCA WA* pt 3 div 3; *CPFA NT* pt 6 div 3.

<sup>25</sup> See David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345, 346; Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in Brent Fisse, David Fraser and Graeme Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book, 1992) 106, 141-3; and John Thornton, 'Confiscating Criminal Assets: The New Deterrent' (1990) 2(2) *Current Issues in Criminal Justice* 72.

<sup>26</sup> 'Crime-used property substitution declaration' is used in Western Australia and the Northern Territory; 'tainted property substitution declaration' in Queensland and Victoria; and 'instrument substitution declaration' in South Australia.

<sup>27</sup> *DPP (Vic) v Le* (2007) 232 CLR 562 ('Le').

<sup>28</sup> *Ibid* 567-8

convicted of ‘trafficking in not less than a commercial quantity’ of heroin.<sup>29</sup> He was sentenced to four years imprisonment.

After the transfer of the property but before Mr Le’s conviction, the apartment, which the High Court considered to have been used by Mr Le in the commission of his crime, was made the subject of a restraining order<sup>30</sup> and automatically confiscated.<sup>31</sup> Mrs Le brought an application under s 52 of the *Confiscation Act 1997 (Vic)* for her interest in the apartment to be excluded from confiscation.

### C *The position under the CPCA WA and the CPFA NT*

The crime-used property confiscation schemes embedded in the *CPCA WA* and the *CPFA NT* are non-conviction based: crime-used property is confiscable whether or not any person has been charged with or convicted of a confiscation offence.<sup>32</sup> The statutes operate retrospectively, targeting crime-used property regardless of when the alleged crime in respect of which the property was used was committed.<sup>33</sup> All proceedings are civil proceedings<sup>34</sup> importing a civil standard of proof.<sup>35</sup>

Crime-used property is defined in the *CPCA WA* and the *CPFA NT* by reference to a ‘confiscation’ or ‘forfeiture’ offence which is defined in both statutes as including ‘any offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more’.<sup>36</sup> While the initial introduction of the proceeds of crime legislation in Australia was predicated on combating serious and organised crime, by incorporating crimes punishable by

<sup>29</sup> *Ibid* 568.

<sup>30</sup> *Ibid* 569.

<sup>31</sup> *Ibid* 570.

<sup>32</sup> *CPCA WA* ss 4(c), 5, 146(2)(d); *CPFA NT* ss 10(1)(b), 11(2)(d), 140(b).

<sup>33</sup> *CPCA WA* s 5(2)(d); *CPFA NT* s 10(b)(ii).

<sup>34</sup> *CPCA WA* s 102(1); *CPFA NT* s 136(1). See also *DPP (WA) v A* [2008] WASC 258, [21].

<sup>35</sup> *CPCA WA* s 102(2)(d); *CPFA NT* s 136(2)(d). A decision as to the existence of grounds for doing or suspecting anything may be based on hearsay evidence or information (*CPCA WA* s 109; *CPFA NT* s 143). The Explanatory Memorandum for the Criminal Property Confiscation Bill 2000 (WA) indicates the admissibility of hearsay evidence in this regard ‘is fundamental to the operation of the Act as it ensures that the State can take action at an early, and is not required to expend vast resources in strictly proving evidence before the Court.’: Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 56. For a discussion on these features of proceeds of crime legislation see Natalie Skead and Sarah Murray, ‘The Politics of Proceeds of Crime Legislation’ (2015) 38(2) *University of New South Wales Law Journal* 454.

<sup>36</sup> *CPCA WA* s 141(a); *CPFA NT* s 6(a).



no more than a two year term of imprisonment within the ambit of the *CPCA WA* and *CPFA NT*, the confiscation net in these jurisdictions has been cast much wider than initially intended or anticipated. Indeed, in *Director of Public Prosecution (NT) v Green*, Mildren J commented that 'the sheer breadth of the definition of "forfeiture offence" [in the *CPFA NT*] is 'breathtaking'.<sup>37</sup>

By way of example, under s 74 of the *Criminal Code Act Compilation Act 1913* (WA) if a person threatens to injure a residence with the intention of annoying another, that person is guilty of a misdemeanour. However, if the offence was committed at night, the offender is guilty of a crime and liable to up to two years imprisonment<sup>38</sup> and, therefore, is subject to crime-used property confiscation under the *CPCA WA*. While threatening to injure another's home is not condoned, subjecting the offender to criminal confiscation laws is arguably going well beyond the objectives those laws were intended to achieve. In this respect '[t]his legislation is cast more widely than the evil to which it is directed'.<sup>39</sup>

Both the *CPCA WA* and the *CPFA NT* provide for *in rem* and *in personam* confiscations.

## D In rem confiscation

### 1 Restraint of crime-used property

Long-term preservation of crime-used property pending confiscation is achieved by restraining dealings in the property.<sup>40</sup> An order restraining dealings in crime-used property may be made if there are reasonable grounds for

<sup>37</sup> *DPP (NT) v Green* [2010] NTSC 16 ('Green'), [21].

<sup>38</sup> *Criminal Code Act Compilation Act 1913* (WA) s 74.

<sup>39</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 935 (Jim McGinty).

<sup>40</sup> The *CPCA WA* and *CPFA NT* permit the identification and short-term preservation of suspected crime-used property by authorising the seizure by a police officer of property reasonably suspected of being crime-used property: *CPCA WA* s 33(1)(a); *CPFA NT* s 39(1); Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 18. The seized property may be removed and retained or guarded *in situ* for no longer than 72 hours without law enforcement bodies taking further action in respect of that property: *CPCA WA* s 33(3); *CPFA NT* s 39(3).

suspecting that the property is crime-used.<sup>41</sup> If registered land is restrained, a memorial thereof is to be lodged with the Registrar<sup>42</sup> and registered.<sup>43</sup>

In keeping with a non-conviction based scheme, a finding that there are reasonable grounds for suspecting that property is crime-used is not dependent on a finding that a particular confiscation offence has been committed, but rather that, on the balance of probabilities,<sup>44</sup> some confiscation offence has been committed,<sup>45</sup> regardless of whether anyone has been charged with or convicted of the offence.<sup>46</sup> More significantly, property may be found to be crime-used whether or not the identity of the person who owns or effectively controls the property is known.<sup>47</sup>

It is 'a very serious'<sup>48</sup> offence to deal with restrained property<sup>49</sup> unless the offender did not know and could not reasonably have known that the property was restrained.<sup>50</sup> The onus in this regard is on the person who deals with the property and who is taken to have notice that the property is restrained.<sup>51</sup> In the case of land, notice is presumed following the registration of a restraining order.<sup>52</sup> Any dealing in restrained property will have no effect in law or in equity on the rights of the State.<sup>53</sup> The meaning of dealing is cast widely and includes selling, gifting or otherwise disposing of the property, moving or using the property, accepting the property as a gift, taking any profit, benefit or proceeds from the property, creating, increasing or altering any legal or

<sup>41</sup> *CPCA WA* ss 43(8), 34(1), (2); *CPFA NT* ss 41, 43(1). See *DPP (WA) v Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61.

<sup>42</sup> *CPCA WA* s 36(2); *CPFA NT* s 53(1)(a).

<sup>43</sup> *CPCA WA* s 113(1); *CPFA NT* s 131(1).

<sup>44</sup> *CPCA WA* s 102(2)(d); *CPFA NT* s 136(2)(d).

<sup>45</sup> *CPCA WA* s 106(a); *CPFA NT* s 140(a). See *DPP (WA) v Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61, [65].

<sup>46</sup> *CPCA WA* s 106(b); *CPFA NT* s 140(b).

<sup>47</sup> *CPCA WA* s 106(c); *CPFA NT* s 140(c).

<sup>48</sup> *Permanent Trustee Co Ltd v Western Australia* [2002] WASC 22, [39].

<sup>49</sup> *CPCA WA* s 50(1); *CPFA NT* s 55(1).

<sup>50</sup> *CPCA WA* s 50(3); *CPFA NT* ss 55(3), (4).

<sup>51</sup> *CPCA WA* s 115(1); *CPFA NT* s 133(1). See *Bennett & Co (a firm) v DPP (WA)* [2005] WASC 141, [56].

<sup>52</sup> *CPCA WA* s 115(1); *CPFA NT* s 133.

<sup>53</sup> *CPCA WA* s 51; *CPFA NT* s 58. This does not affect the rights of the parties *inter partes*. For example, if restrained Torrens system land is sold to a purchaser with no notice of the restraining order and the transfer to the purchaser is not registered due to the ultimate confiscation of the property, the purchaser retains the right to bring an action against the vendor for breach of contract: Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 31.

equitable right or obligation in relation to the property; and effecting a change in the effective control of the property.<sup>54</sup>

The potential impact of a restraining order on innocent third party interest-holders could be severe. Consider, for example, the mortgagee in *Le*. On the grant of a restraining order, no dealing is permitted in respect of the apartment. Given the imprisonment of Mr Le and likelihood of the apartment ultimately being confiscated by the State, there may be little incentive for Mr Le to continue making mortgage repayments. Furthermore, he and Mrs Le may not be in a financial position to do so. However, for so long as the apartment remains restrained, the mortgagee, which on registration of the restraining order is presumed to have notice that the apartment is restrained, would not be permitted to exercise many of its remedies against the defaulting mortgagor. The mortgagee would not be entitled, for example, to take possession of the property or appoint a receiver to manage the property as this would effect a change to the effective control of the property. Nor could the mortgagee exercise its power of sale and dispose of the property. What is a mortgagee to do in this instance? Even if the restrained property is later released from restraint, it may be too late for the mortgagee to fully recoup the amount then owing under the mortgage: interest would have accrued in the interim, often at an increased rate; there is a risk the owners may have neglected the property knowing it is either to be confiscated or sold at a mortgagee's sale; the real estate market may have fallen significantly. As regards the co-owner, Mrs Le, by continuing to reside in the apartment, she may be regarded as 'using' it.

As Malcolm CJ commented in *Bennett & Co (a firm) v Director of Public Prosecutions (WA)*, '[f]reezing orders are a very significant interference with the rights of all those having an interest in the restrained property, even if that property is not ultimately confiscated'.<sup>55</sup>

<sup>54</sup> *CPCA WA* s 151; *CPFA NT* s 56.

<sup>55</sup> *Bennett & Co (a firm) v DPP (WA)* [2005] WASCA 141, [58].

## 2 *Objections to confiscation of restrained crime-used property*

One option for relief available to a third party who may be adversely affected by a restraining order over crime-used property is to object to the confiscation of that property.<sup>56</sup>

There are a number of grounds on which a person might object to the restraint and confiscation of crime-used property.<sup>57</sup> First, property may be released from restraint if the objector establishes on the balance of probabilities that the property is not crime-used.<sup>58</sup> A Court may also release restrained crime-used real property if the objector establishes that 'it is more likely than not that':

- (a) the objector is the spouse, a de facto partner or a dependant of an owner of the property;
- (b) the objector is an innocent party, or is less than 18 years old;
- (c) the objector was usually resident on the property at the time [of the relevant offence];
- (d) the objector was usually resident on the property at the time the objection was filed;
- (e) the objector has no other residence at the time of hearing the objection;
- (f) the objector would suffer undue hardship if the property is confiscated; and
- (g) it is not practicable to make adequate provision for the objector by some other means'.<sup>59</sup>

This protective provision is an appropriate measure for ensuring that the dependants of those involved in crime-related activities are not left without a residence. If she were able to show that she has no alternative accommodation, such a provision may well assist a person in the position of Mrs Le in *Le*. The requirements are, however, somewhat onerous. Not only are they conjunctive so that all seven must be established,<sup>60</sup> they have also been strictly applied by courts.

<sup>56</sup> *CPCA WA* s 79(1); *CPFA NT* s 59(1).

<sup>57</sup> The objection is to be brought within 28 days of being service notice of, or otherwise becoming aware of, the restraint: *CPCA WA* ss 79(2), (3); *CPFA NT* ss 60(1)-(2).

<sup>58</sup> *CPCA WA* s 82(1); *CPFA NT* s 63(1)(c).

<sup>59</sup> *CPCA WA* s 82(3); *CPFA NT* s 63(1).

<sup>60</sup> *DPP (NT) v Mattiuzzo* [2011] NTSC 60, [37].

In *Lamers v Western Australia*,<sup>61</sup> Mr Lamers was declared a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (WA) (*MDA WA*), resulting in the automatic confiscation of his property, including his home, under s 8(1) of the *CPCA WA*.<sup>62</sup> At the relevant time, Mr Lamers lived with Ms Willis, his de facto partner, and Ms Willis' daughters. Ms Willis objected to the confiscation of Mr Lamers' home on two grounds, including under the hardship provision in s 82(3)(f). Templeman J rejected Ms Willis' objection. His Honour considered that s 82(3) of the *CPCA WA* only applied to the release of restrained crime-used property.<sup>63</sup> The property the subject of Ms Willis' objection was confiscated on the basis that its owner was declared a drug trafficker. His Honour stated, however, that even if the hardship provisions in s 82(3) did apply, despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, there was no evidence that they would not be able to obtain alternative rental accommodation. In so finding, his Honour stated that 'if the confiscation legislation is to achieve its objective, it will necessarily cause a measure of hardship in the deprivation of property. However, if dispossession was sufficient to constitute undue hardship, the operation of the Act would effectively be frustrated'.<sup>64</sup>

Crime-used property may also be released from restraint if the court is satisfied on the balance of probabilities that the objector is the, or an, owner of the property; the person who made criminal use of the property is not in effective control of the property;<sup>65</sup> and the objector and all other owners were

<sup>61</sup> [2009] WASC 3 (*Lamers*).

<sup>62</sup> For a detailed discussion of the drug-trafficker confiscation provisions in Western Australia and the Northern Territory see Natalie Skead, 'Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far' (2013) 37(5) *Criminal Law Journal* 296.

<sup>63</sup> See also *Bowers* [2010] WASC 46, [14] Cf *DPP (WA) v A* [2008] WASC 258, [5], in which Hasluck J indicated that 'although s 82 is ostensibly concerned with and possibly confined to the release of crime-used property ... the scheme of the Act arguably suggests that it might have a wider application' and, further, s 82 is ambiguous and where there is such ambiguity the principles of statutory interpretation require a purposive approach to interpretation. On this approach, '[w]here an interpretation advanced by a party would lead to extraordinary and draconian result, it is unlikely that the legislature would have intended the act to operate in that way': *Palfrey v MacPhail* [2004] WASC 257'.

<sup>64</sup> *Lamers* [2009] WASC 3, [77]-[78].

<sup>65</sup> Under *CPCA WA* s 16 and *CPFA NT* s 7(1), a person has 'effective control' over property if he or she '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'. In *Solicitor-General v Bartlett* [2008] 1 NZLR 87, Stevens J considered that the respondent effectively controlled property

innocent parties in relation to the relevant confiscation offence.<sup>66</sup> Once again, the conditions are conjunctive such that all must be satisfied,<sup>67</sup> the burden of proof being on the objector.<sup>68</sup>

The requirement that all owners of the property be innocent parties would present difficulties for objectors such as the mortgagee, or indeed, Mrs Le in *Le*. As Mr Le remained a co-owner of the apartment and was not an innocent party, an objection to confiscation by the mortgagee or co-owner would be unsuccessful. However, while the apartment may not be released in this instance, the court may order that, when the apartment is sold after confiscation, the objector, be it the fee simple co-owner or the mortgagee, is to be paid out an amount equal to the objector's proportionate share in the property.<sup>69</sup> This provision suggests that it is the physical crime-used thing – in *Le*, the apartment itself – rather than the respondent's interest in that thing that is confiscated. Although this payout is likely to satisfy the mortgagee who will be paid out the amount outstanding on the mortgage, it may not satisfy the fee simple co-owner, Mrs Le. It may not have been in her plans to sell the property in the short-term. It may, for example, have been part of her retirement plans, which are not easily substituted.

In the Northern Territory, where an owner of restrained property is not an innocent party, the court has the option of setting aside the order provided it also orders the innocent objector to pay the Territory the value of the share of the property held by the party who is not innocent.<sup>70</sup> Although this may go some way to protecting the proprietary interests of innocent third party interest-holders, it does not go far enough. On reimbursing the Territory for

that he or she had the capacity to treat as his or her own. In *Harrison v Commissioner of Police* [2012] NTSC 45, [28], Mildren J citing *Connell v Lavender* (1991) 7 WAR 9, 22, affirmed that '[t]he expression contemplates control that is practically effective, in the sense that the person concerned has in fact the capacity to control possession, use, or disposition of the property'. For a detailed discussion on the far-reaching implications of this requirement see Skead, above n 62.

<sup>66</sup> *CPCA WA* s 82(4); *CPFA NT* s 63(1)(b). An innocent party is comprehensively defined and includes a person who was not in any way involved in the commission of the confiscation offence; did not have actual or constructive knowledge of or took all reasonable steps to prevent its commission; and had no actual or constructive knowledge that, or took all reasonable steps to prevent, the property being used in connection with the commission of a confiscation offence: *CPCA WA* ss 153(1)-(2); *CPFA NT* (NT) s 66(1).

<sup>67</sup> *DPP (NT) v Mattiuzzo* [2011] NTSC 60, [37].

<sup>68</sup> *Pearson v Western Australia* [2012] WASC 102, [39].

<sup>69</sup> *CPCA WA* s 82(5); *CPFA NT* s 63(2)(a).

<sup>70</sup> *CPFA NT* s 63(2)(b).

the value of the interest of the non-innocent party in the crime-used property, the statute does not provide for the innocent third party to thereby acquire the interest of the non-innocent party. The net result is that the Territory gets the value of the non-innocent party's interest in the crime-used property; the non-innocent party retains his or her interest in the property which is no longer at risk of confiscation; but the innocent third party is out of pocket with no *in rem* claim to the interest of the non-innocent party, the value of which he or she paid out. While the benefits of this provision to the Territory are evident, the benefits to the innocent third party are not.

### 3 *Confiscation of crime-used property*

In Western Australia, restrained crime-used property is automatically confiscated if an objection to its confiscation is not filed within the prescribed time<sup>71</sup> or, if an objection is filed, the objection is finally determined and the restraining order is not set aside.<sup>72</sup> On application by the Director of Public Prosecutions ('DPP'), the court must declare the property confiscated.<sup>73</sup>

By contrast, in the Northern Territory, a court must order that property restrained on suspicion of being crime-used is confiscated if satisfied that it is crime-used,<sup>74</sup> regardless of whether the owner or person with effective control of the property has been identified.<sup>75</sup> In both jurisdictions the court has no discretion.<sup>76</sup> The difference between the two schemes reflects the status of the Northern Territory as a Territory and the consequent constitutional restrictions against the confiscation of property other than on just terms.<sup>77</sup>

<sup>71</sup> *CPCA WA* s 7(1). See also *White* [2010] WASCA 47, [50].

<sup>72</sup> *CPCA WA* s 7(2). See also *Centurion Trust Co Ltd v DPP (WA)* [2010] WASCA 133, [217], [239].

<sup>73</sup> *CPCA WA* s 30.

<sup>74</sup> *CPFA NT* s 96(1).

<sup>75</sup> *CPFA NT* s 96(2).

<sup>76</sup> In *A-G (NT) v Emmerson* (2014) 88 ALJR 522, the majority of the High Court comprising French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ upheld the constitutional validity of an analogous provision in the Northern Territory scheme. Despite the curtailment of judicial discretion, the court is required to undertake an 'orthodox adjudicative process involving the hearing of evidence and the making of a determination which is subject to the usual processes of appeal' [68]. See Skead and Murray, above n 35. In *DPP (SA) v Alexander* (2003) 86 SASR 577, when considering analogous legislation in South Australia, DeBelle J was critical of the fact that judicial discretion is available in relation to the making of restraining orders but not on confiscation.

<sup>77</sup> *Commonwealth Constitution* s 51(xxxi). Gageler J's strong dissent in *A-G (NT) v Emerson* (2014) 88 ALJR 522 left open the possibility of a reconsideration of whether the confiscation of property under *CPCA NT* may be unconstitutional under s 51(xxxi).

In relation to confiscated real property, a memorial of the confiscation must be lodged with the Registrar<sup>78</sup> who must register the memorial.<sup>79</sup> On registration, the Registrar is to endorse on the Certificate of Title that the property is no longer subject to any pre-existing interests other than easements and restrictive covenants.<sup>80</sup> It is somewhat peculiar that the West Australian and Northern Territory legislatures saw fit to protect restrictive covenants and easements while expressly endorsing the extinguishment of other, arguably more valuable and significant, proprietary interests such as the rights of beneficiaries under trusts, leases and mortgages. This extinguishment occurs regardless of the prior registration of the mortgage, lease or other interest and of the fact that the interest holder may be innocent of any wrongdoing. In *Le* the interest of both the registered mortgagee and the co-owner, Mrs Le, would be extinguished.

The decision of McKechnie J in *Smith v Western Australia*<sup>81</sup> provides an illustration of the potential inequity of these extinguishment provisions. In *Smith*, the plaintiff was declared a drug trafficker resulting in the automatic confiscation of all property owned by him.<sup>82</sup> The confiscated property included the plaintiff's share in land that he co-owned as joint tenant with his wife. The plaintiff's mother and sister claimed to have lent money to the plaintiff in circumstances conferring on each of them an equitable interest in the confiscated land. The mother and sister sought to assert their equitable interests against the confiscated land. The State opposed the assertions claiming absolute title to the confiscated land.

McKechnie J dismissed the mother and sister's claims. His Honour found that, under the State's drug-trafficker confiscation regime, on the plaintiff being declared a drug trafficker, the property had been automatically confiscated. As a result, his Honour made a confiscation declaration.<sup>83</sup> McKechnie J then stated that the DPP was obliged to lodge a memorial for registration with the Registrar, which the Registrar was obliged to register. On such registration, McKechnie J continued, even if the plaintiff's mother and sister did have equitable interests in the confiscated land, which claims his Honour rejected,

<sup>78</sup> *CPCA WA* s 31(1); *CPFA NT* s 102(1).

<sup>79</sup> *CPCA WA* s 113(1); *CPFA NT* s 131(1).

<sup>80</sup> *CPCA WA* s 113(2); *CPFA NT* s 131(2)(e).

<sup>81</sup> [2009] WASC 189 (*Smith*).

<sup>82</sup> *CPCA WA* s 8(1).

<sup>83</sup> *Smith* [2009] WASC 189, [16].



'[t]he inevitable progress following declaration and lodging of the memorial will extinguish any equitable (or other) interest in [the property]'.<sup>84</sup> His Honour concluded that '[t]his is the scheme of the [CPCA WA]. If it is unfair, others must seek to change it. I can only decide the law'.<sup>85</sup>

The extinguishment of all rights, interest and title in confiscated property is particularly harsh given the stringent requirements that must be met before a court can release property from confiscation.<sup>86</sup>

Despite the apparently clear operation of the confiscation provisions in the CPCA WA, however, where real property that is subject to a registered mortgage has been confiscated, it appears that it is the practice of the DPP in Western Australia not to treat the mortgagee's registered interest as extinguished. In *Pellew v Western Australia*,<sup>87</sup> the State authorised the registered mortgagee to sell the confiscated land, agreeing that the proceeds would be applied firstly to settling the mortgage debt, with any surplus being paid over to the State. Pullen JA stated in this regard that '[b]y some method of interpretation the State in fact ... allows the mortgagee's interests to continue to be recognised and paid out if there is eventually a sale of the property by the State'.<sup>88</sup>

## E In personam confiscation

### 1 Unavailability of crime-used property

There may be circumstances in which crime-used property is not available for *in rem* confiscation. These circumstances include, for example, where the person who made criminal use of the property is not an owner or part owner or does not effectively control the property;<sup>89</sup> where a restraining order made in respect of the property has been set aside on application by the spouse, de facto partner or a dependant of the respondent under the hardship provisions; or where the property has been sold, disposed of or cannot be found.<sup>90</sup> In these

<sup>84</sup> Ibid [18]. See also *Koushappis v Western Australia* [2015] WASC 64.

<sup>85</sup> *Smith* [2009] WASC 189, [18].

<sup>86</sup> CPCA WA s 87; CPFA NT s 121(1). See eg *Koushappis v Western Australia* [2015] WASC 64.

<sup>87</sup> [2010] WASC 103.

<sup>88</sup> Ibid [11]. See Skead, above n 62.

<sup>89</sup> See, eg, *DPP (WA) v McPherson* [2012] WASC 342 ('*McPherson*'); *Bowers* [2010] WASC 46; *White* [2010] WASC 47, [3]-[5]; *White v DPP (WA)* [2011] HCA 20.

<sup>90</sup> CPCA WA s 22; CPFA NT s 82.

cases, ‘to ensure that [the offender] does not benefit from using someone else’s property in a crime, or in disposing of his property prior to it being restrained,’<sup>91</sup> the respondent is required to account for the value of the unavailable crime-used property by way of a crime-used property substitution declaration. As noted by EM Heenan J in *McPherson*:

If an offender makes use of some other person’s property, who is not in any way involved in the commission of those offences, then the [*CPCA WA*] provides for the confiscation of the property of the offender, even though that property was not involved in the commission of the offences.<sup>92</sup>

In *Bowers*, for example, as the crime-used property at which the first respondent committed the sexual offences was owned and controlled by the complainant’s father, it was not available for confiscation. In the circumstances, the DPP sought a substitution declaration against the first respondent.

In *White*, the respondent was the lessee of the crime-used property that ‘facilitated’<sup>93</sup> the murder. The litigation proceeded on the basis that all parties accepted that the crime-used property was unavailable for confiscation because it was leased, rather than owned, by the respondent.<sup>94</sup> The respondent was, therefore, required to account for the full value of the property pursuant to a substitution declaration. This view accords with that of Riley J in *Director of Public Prosecution (NT) v Green*, that the crime-used property to be restrained and ultimately confiscated ‘is the physical entity, the crime-used land, and not some legal interest in that land’.<sup>95</sup>

However, the Full Court, answering a reference from Riley J as to the correctness of his Honour’s findings, unanimously held that they were incorrect. Instead, it was held that, because ‘property’ and ‘land’ are both defined in the *CPFA NT* as including a legal or equitable interest in land, ‘the expression “crime-used property” refers equally to the physical land ... as well

<sup>91</sup> Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 12.

<sup>92</sup> *McPherson* [2012] WASC 342, [12].

<sup>93</sup> *White* [2010] WASCA 47, [39].

<sup>94</sup> *DPP (WA) v White* [2011] HCA 20, [3].

<sup>95</sup> *DPP (NT) v Green* [2009] NTSC 21, [28]-[29]. In this case, Riley J held that the crime-used land was not available for confiscation as it was only leased and not owned by the convicted respondent and the owner was an innocent party. His Honour did not, however, consider the meaning of ‘owner’ as defined in *CPFA NT* s 5, which includes any person holding a legal or equitable interest in the property. Riley J’s decision on this point was overturned unanimously by the Full Court in *Green* [2010] NTSC 16. See also *White v DPP (WA)* [2011] HCA 20, [5]-[12]; *Le* (2007) 232 CLR 562, 584-90.

as the legal or equitable interest in [the land]'.<sup>96</sup> Further, an 'owner' is a person with a legal or equitable interest in property. A lessee holds a legal or equitable interest in the leased land and is, therefore, an owner for the purposes of crime-used property confiscations. It followed, according to their Honours, that crime-used property of which the respondent was a lessee is available for confiscation – it is the leasehold estate that it confiscated.<sup>97</sup> In *Le* this would mean that it was only the residual interest Mr Le held in the apartment, after taking into account Mrs Le's part interest as well as the security interest of the mortgagee, that was crime-used and confiscable.

On a strict interpretation of the *CPFA NT*, and in particular the definitions found therein, this decision may be correct. However, thus analysed and applied, curious anomalies may result. In *Green*, the value of the crime-used property was around \$1.5 million. It was a rural block. Being a lessee, Green's leasehold interest in the block was confiscated as crime-used property. There are insufficient facts available to even hazard a guess as to the value of the leasehold interest, but it is unlikely to have been significant. Green had two residential properties elsewhere and was therefore likely to have had alternate accommodation.

Consider what the position might have been had the facts in *Green* been slightly different and Green had been a trespasser or mere licensee, rather than a lessee.<sup>98</sup> As a trespasser, he would have been on the property unlawfully. As a licensee, he would have occupied the property pursuant to a revocable licence. In neither case would Green have acquired a proprietary interest in the property.<sup>99</sup> Not having a legal or equitable interest, he would not have been an owner of the property. It would, therefore, not have been available for confiscation. Instead, Green would have been required to account for \$1.5 million, the value of the unavailable crime-used property, under a crime-used property substitution declaration. The author doubts the Northern Territory legislature intended such fortuitous variance in application of the legislation.

The extinguishment provisions alluded to above are seemingly inconsistent with the construction of crime-used property adopted by the Full Court in

<sup>96</sup> *CPFA NT*'s 5; *Green* [2010] NTSC 16, [31].

<sup>97</sup> *Green* [2010] NTSC 16, [37]-[40].

<sup>98</sup> The High Court has distinguished a lease from a licence on the basis that a lessee has exclusive possession of the leased property. A licensee does not: *Radaich v Smith* (1959) 101 CLR 209.

<sup>99</sup> *Ibid* 222.

*Green*. As noted, the *CPCA WA* and *CPFA NT* provide that on registration of the confiscation of real property any pre-existing interests, other than easements and restrictive covenants, are automatically extinguished.<sup>100</sup> This extinguishment provision provides strong evidence that it was intended that it is the physical land that is confiscated rather than an interest in the land. An easement is a right that attaches to land itself. It does not exist in relation to an interest in land. The reference to the continued existence of easements in the extinguishment provisions suggests that the legislation contemplates that it is the land itself that is confiscated rather than an interest in land. The interpretation in *Green* that it is the interest in land that is confiscated would render the easements exception in the extinguishment provisions in the *CPCA WA* and *CPFA NT* otiose.

## 2 *Making a substitution declaration*

On hearing an application for a substitution declaration, if satisfied that the crime-used property is not available for confiscation and that the respondent made criminal use of the unavailable property, the court is ‘obliged to assess the value of the crime-used property’<sup>101</sup> and make an order declaring other property to that value owned by the respondent is available for confiscation.<sup>102</sup>

If the respondent has been convicted of the relevant offence or, in the absence of a conviction, if the DPP establishes that it is more likely than not that ‘the crime-used property was in the respondent’s possession at the time, or immediately after, the offence was committed’, then the onus lies with the respondent to prove that he or she did not make criminal use of the property.<sup>103</sup> The rationale for this shifting of the onus is said to be that ‘it is easier for the respondent to prove that he did not make criminal use of the property than for the State to prove the contrary’.<sup>104</sup>

These deeming provisions reflect a common feature of Australian proceeds of crime legislation generally and are reflective of the underlying legislative

<sup>100</sup> *CPCA WA* s 113(2); *CPFA NT* s 131(2)(e).

<sup>101</sup> *McPherson* [2012] WASC 342, [6].

<sup>102</sup> *CPCA WA* s 22(1); *CPFA NT* s 81(2).

<sup>103</sup> *CPCA WA* s 22(3)-(4); *CPFA NT* s 83.

<sup>104</sup> Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 13.

policy of making confiscations easier to secure.<sup>105</sup> However, this shifting of the onus of proof in criminal confiscation proceedings through the use of evidentiary presumptions 'removes the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property'.<sup>106</sup>

On making a substitution declaration, the respondent becomes liable for the value of the crime-used property as assessed and specified by the court.<sup>107</sup> The value of crime-used property for the purposes of a substitution declaration is the 'full value' of the property<sup>108</sup> 'not just the value paid by the respondent in obtaining the use of the property'.<sup>109</sup>

### 3 *Recovering the debt under a substitution declaration*

A debt arising under a substitution declaration may be recovered through the restraining and confiscation of property owned, effectively controlled, or, in Western Australia, at any time given away by the respondent.<sup>110</sup> It follows that property may be confiscated to satisfy a substitution declaration against a respondent even though the respondent is not the owner of the property. In Western Australia, this would include property that was, at some time in the past, given away by the respondent, as occurred in *Le*, regardless of whether the property was given away years before the respondent engaged in the relevant unlawful conduct. The potential impact of this feature of the confiscation regime on an innocent donee and current owner of property, such as Mrs Le, is concerning. A donee may act in reliance upon the receipt of the gift of property to their detriment. For example, on becoming registered proprietor of the gifted property, a donee may sell his or her existing home intending to make the gifted property their family home. The income from the sale of the previous home may be invested in making improvements to the new family home. On

<sup>105</sup> As pointed out by the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009), these inclusions result in 'a greater likelihood that the assets of crime will be confiscated': [5.50]. See also Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]* (2009) [2.55]-[2.57].

<sup>106</sup> Senate Legal and Constitutional Affairs Committee, above n 105 [2.59].

<sup>107</sup> *CPCA WA* s 22(6); *CPFA NT* s 81(4).

<sup>108</sup> *CPCA WA* s 23(2); *CPFA NT* s 85(2).

<sup>109</sup> Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 13.

<sup>110</sup> *CPFA WA* ss 26(2), 43(3)(b); *CPFA NT* ss 88(2), 44(1)(b), 44(2).

confiscation of the gifted property, the donee may well be left not only homeless, but also out of pocket with no prospect of recompense for the value added to the gifted, but now confiscated, property.

In *Le*, Mrs Le applied for her interest in the apartment to be excluded from the confiscation. In considering whether the conditions for the exclusion of Mrs Le's interest in the property had been met, the Court examined whether Mrs Le had provided sufficient consideration for her interest or whether it had been gifted to her. Kirby and Crennan JJ, with whom Gleeson CJ agreed, held that 'natural love and affection' is 'sufficient consideration' for conveyancing purposes.<sup>111</sup> On this interpretation, it could not be said that Mr Le has 'given away an interest in the apartment to Mrs Le and her interest in the apartment could not be confiscated to satisfy a substitution declaration.

However, following the decision in *Le*, the Victorian legislature effected significant amendments to the *Confiscation Act 1997* (Vic). One such amendment inserted a definition of 'sufficient consideration', which now must 'reflect the market value of the property' and expressly does not include 'consideration arising from love and affection' and consideration arising from 'the fact of a family relationship between the transferor and the transferee'.<sup>112</sup> Similarly, in Western Australian and the Northern Territory, property transferred for consideration that is significantly less than the market value of the property is construed as a gift.<sup>113</sup> Clearly, the intention of the legislature is to provide no relief for a third party who has not given monetary, market-related consideration for his or her interest in the restrained or confiscated property. It follows, therefore, that Mrs Le's interest in the apartment, falling within the definition of a 'gift' would be confiscable.

#### 4 *Objection to restraint of property under a substitution declaration*

A Court may only set aside a restraining order pursuant to a substitution declaration if it is more likely than not that the property is not owned or effectively controlled and has not at any time been given away by the

<sup>111</sup> *Le* (2007) 232 CLR 562, 594. Gummow and Hayne JJ dissented on this point stating at 576-7 that '[w]hen used elsewhere in the general law, the term "sufficient consideration" imports a notion of tangible benefit or advantage conferred by the promisor upon the promisee ... or the conferral of some other form of practical benefit. However, natural love and affection imports no such benefit'.

<sup>112</sup> *Confiscation Act 1997* (Vic) s 3.

<sup>113</sup> *CPCA WA* Glossary; *CPFA NT* s 5.

respondent.<sup>114</sup> These objection provisions would have been of little assistance to Mrs Le in *Le*. It is true that confiscation pursuant to a substitution declaration is not directed at the nominate thing, the apartment in *Le*, as the crime-used property but rather as security for the value of the crime-used property.<sup>115</sup> However, as Mr Le was a co-owner of the apartment and had given away that part of which he was not owner to Mrs Le, the whole of the fee simple interest in the apartment was available as security for the debt Mr Le owed under the substitution declaration.<sup>116</sup>

It should be noted that in *Bowers*, the Western Australian Court of Appeal unanimously found that the hardship provisions safeguarding a respondent's innocent spouse, de facto partner or dependants apply only to objections to and the release of crime-used property and not property restrained or confiscated pursuant to an *in personam* substitution declaration.<sup>117</sup>

#### IV CONCLUSION

EM Heenan J noted in relation to the *CPCA WA* that the confiscation scheme 'exhibits the clearest intention by the legislature to interfere with, by means of confiscation, what would otherwise be fundamental property rights of a person whose property becomes liable to confiscation'.<sup>118</sup> Of course, this applies to the proceeds of crime confiscation regimes operating across Australia generally. However, Gray has commented that

a process which provides for the rights of *all parties claiming an interest in targeted assets* to be protected by court supervision is appropriate and necessary if the longer term viability and acceptance of confiscatory regimes is to be achieved.<sup>119</sup>

The foregoing analysis of the *in rem* and *in personam* crime-used property confiscation regimes in the proceeds of crime statutes of Western Australia and

<sup>114</sup> *CPCA WA* s 84(1)s 26(2); *CPFA NT* s 65(2).

<sup>115</sup> *McPherson* [2012] WASC 342, [17].

<sup>116</sup> *Permanent Trustee Co Ltd v Western Australia* [2002] WASC 22; *Permanent Custodians Ltd v Western Australia* [2006] WASC 225.

<sup>117</sup> *Bowers* [2010] WASC 46 [12]. See also *McPherson* [2012] WASC 342, [15].

<sup>118</sup> *McPherson* [2012] WASC 342, [11].

<sup>119</sup> David 'Earl' Gray, 'Confiscating the Proceeds of Crime in Victoria Australia: Recent Developments' (Paper presented in Wellington, New Zealand, 12 February 2008) available at <[http://www.opp.vic.gov.au/wps/wcm/connect/8dad2680404a17c1b469fff5f2791d4a/CONFISCATING\\_THE\\_PROCEEDS\\_of\\_CRIME\\_in\\_VIC\\_AU\\_S.pdf?MOD=AJPERES](http://www.opp.vic.gov.au/wps/wcm/connect/8dad2680404a17c1b469fff5f2791d4a/CONFISCATING_THE_PROCEEDS_of_CRIME_in_VIC_AU_S.pdf?MOD=AJPERES)> (emphasis added).

the Northern Territory reveals that these regimes do not have a process that fits that description.

While some legislative steps have been taken to afford protection to innocent third parties affected by the confiscation of crime-used property in these jurisdictions, they do not go far enough. Using *Le* as a case study, it has been demonstrated that there are circumstances in which the property rights of third parties, such as the mortgagee and co-owner in that case, may be ‘unfair[ly], if not cruel[ly]’<sup>120</sup> affected.

Mildren J, commenting in *Green* on the scheme operating in the Northern Territory, stated: ‘[t]he Act has been described by both counsel as draconian in its reach. I doubt whether even Dracos himself would have conceived of a law so wide reaching’.<sup>121</sup> This most certainly applies equally to the Western Australian scheme. While this article has focused on crime-used confiscations in these two jurisdictions, similar accusations may be directed at the crime-used confiscation schemes in other Australian jurisdictions, albeit to varying degrees.

<sup>120</sup> *DPP (SA) v George* (2008) 102 SASR 246, [233].

<sup>121</sup> *Green* [2010] NTSC 16, [22].