DUE PROCESS OR DUE PROCEEDS? CONFISCATION AND RELATED AML LAWS IN AND BEYOND AUSTRALIA

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CONTENTS

I INTRODUCTION

For more than thirty years, Australia has legislated against money laundering.[1] Anti-money laundering ('AML') laws are designed to prevent the movement of illicit wealth into and through the financial system, as well as to facilitate the enforcement of those laws when infiltration does occur.[2] The 'prevention pillar' involves requirements that private sector actors adequately identify new customers and report suspicious transactions to government authorities.[3] The 'enforcement pillar' supposes the criminalisation of laundering (and its predicate offences) in domestic law, as well as the restraint, removal and reallocation of 'dirty money' through asset freezes, seizures and confiscation.[4] Countries should cooperate with each other in such criminal and quasi-criminal matters.[5]

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1 Among the first statutes were the *Cash Transactions Reports Act 1988* (Cth) and *Proceeds of Crime Act 1987* (Cth). See further Richard Fox, 'The Expansion of Federal Criminal Law in Combating Money Laundering' in Wickrema Weerasooria, Neil Jensen and John Visser (eds), *Money Laundering: The Roles of Financial Industry and Law Enforcement in Combating Money Laundering: A Co-operative Approach* (Prospect Media, 1998) 11.

2 Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) 2–4; Peter Reuter and Edwin M Truman, *Chasing Dirty Money: The Fight against Money Laundering* (Peterson Institute for International Economics, 2004) 46; JC Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011) 27.

3 Reuter and Truman (n 2).

4 Ibid 47.

5 Sharman (n 2) 29.

As a suite of law and policy measures, AML controls have come to be regarded as an essential component of the mature state response to the 'dark side' of globalisation. The Commonwealth Attorney General's Department captures this sentiment when it writes that '[m]oney laundering … is a critical facilitator of most serious crimes and undermines the rule of law globally.'[6] Yet the campaign against illicit finance is beset by interlocking questions about its outcomes and processes. For illicit finance laws appear to entail departures from fundamental rights, at least in principle, if not always as interpreted by courts.[7] Those departures are justified by the importance of AML laws for preventing and deterring transnational crimes and remediating the effects of wrongdoing.[8] But it is hard to quantify the contribution of confiscation and related AML laws to their policy goals, not least because of the multiple goals that those regimes may seek to advance and the secret nature of the transactions.[9]

This Special Issue contributes to a discussion of the value of AML laws, focusing on powers to confiscate proceeds and instruments of crime in Australia. Its five articles were presented at a workshop that was held in Brisbane in late June 2023. Co-funded by the University of Queensland and the Academy of the Social Sciences in Australia ('ASSA'), the workshop saw social scientists from law, criminology and politics join representatives from government and civil society for two days of dialogue on the principled and practical challenges of AML control. The articles in this Special Issue give a sense of that rich discussion. This introduction describes the articles and uses them to make its own contribution on the emerging research priorities in this area.

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6 Australian Government, Attorney-General's Department, 'Reforming Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime: Overview' (Consultation Paper, May 2024) <https://consultations.ag.gov.au/crime/reforming-aml-ctf-financing-regime>.

7 See, eg, Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 30–39; Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25(1) *Australian and New Zealand Journal of Criminology* 44, 49; Radha Ivory, *Corruption Asset Recovery and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press, 2014) ch 5; Colin King and Jennifer Hendry, *Civil Recovery of Criminal Property* (Oxford University Press, 2023) 75–87, 139–154.

8 King and Hendry (n 7) 87. See, eg, *Phillips v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 41087/98, 5 July 2001) [52]; *Gogitidze v Georgia* (2016) 62 EHRR 14 [102]; *Balsamo v San Marino* (European Court of Human Rights, Third Section, Application Nos 20319/17 and 21414/17, 8 October 2019) [62], [93].

9 Terrence Halliday, Michael Levi and Peter Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism* (Report, Center on Law and Globalization, 2014) 5–6 <https://www.americanbarfoundation.org/resources/global-surveillance-of-dirty-money-assessing-assessments-of-regimes-to-control-money-laundering-and-combat-the-financing-of-terrorism>; JC Sharman, *A Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017) 13–15. See generally Peter Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave Macmillan, 2016) 15–16.

II THE INTERNATIONAL BACKDROP

The story behind this Special Issue starts with the US 'wars' on organised crime and drugs of the 1970s and 1980s.[10] According to Fernandez-Bertier, American politicians sought to destroy or disrupt criminal enterprises by preventing them from accessing or retaining capital.[11] As Sharman recounts, those efforts were seen as futile without multilateral cooperation, and, for slightly different reasons, several US allies were also adopting AML-style laws.[12] These states subsequently joined with others to create international instruments on transnational crime and related AML controls.[13] The Financial Action Task Force ('FATF') recommendations on illicit finance are soft but highly persuasive standards that operate through a core global 'club' and FATF-style regional bodies.[14] The UN conventions on narcotics trafficking, organised crime and corruption are formally binding and nearly universal in membership.[15] Regional treaties and supranational legislative documents are likewise obligatory, though more limited in geographic scope.[16]

III THE PROBLEMS OF CONFISCATION (IN AUSTRALIA)

Australia joined several of these initiatives and was an early adopter of anti-money laundering laws,[17] including on confiscation.[18] Now, throughout Australia, confiscation

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10 Michaël Fernandez-Bertier, 'The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime' in Katalin Ligeti and Michele Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 62–65; Sharman (n 2) 21–22.

11 Fernandez-Bertier (n 10) 62–63; Sharman (n 2) 27–28.

12 Sharman (n 2) 23–24. See also Fernandez-Bertier (n 10) 63–65.

13 Mary Alice Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013) ch 3.

14 Financial Action Task Force ('FATF'), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Standards*, adopted on 16 February 2022 (last updated November 2023) <https://www.fatf-gafi.org>. On the FATF, as an example of club governance, see Daniel W Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press, 2005) 122.

15 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 20 December 1988); *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003); *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005). See also *International Convention for the Suppression of the Financing of Terrorism*, open for signature 9 December 1999 (entered into force 1 April 2002).

16 See, eg, *Convention on Money Laundering, the Confiscation, Search and Seizure of the Proceeds of Crime*, opened for signature 8 November 1990, 1862 UNTS 69 (entered in force 1 September 1993); *Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing* [2015] OJ L 141/73.

17 Nicholas Ryder, *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge, 2012) 103.

18 See generally Jordan English, Samuel Hickey and Simon Bronitt, *Federal Proceeds of Crime Law* (Thomson Reuters Australia, 2023) [1.4]-[1.17]; Freiberg (n 7) 49; Natalie Skead et al, *Pocketing*

is possible even without proof of criminal conduct to the criminal standard and for a range of crimes.[19] Indeed, all Australian jurisdictions provide for unexplained wealth orders ('UWOs'), which 'require a person who is suspected of having wealth exceeding their lawfully acquired wealth to pay to the Crown the value of that excess wealth'.[20] Only some jurisdictions demand a reasonable suspicion of the commission an offence (quite less, a serious offence) for the making of a UWO.[21] Recently, Australia has implemented so-called 'Magnitsky' laws and imposed so-called 'Oligarch sanctions';[22] there have been moves in other common law countries to convert those seizures to confiscations.[23]

The adoption of confiscation and related AML laws in Australia is hardly surprising. The spread of those standards reflects processes of global policy diffusion, with their *Leitmofits* of coercive power and socialisation to norms.[24] There is also an inner logic to confiscation, as reflected in the early US moves to remove capital from organised/drug criminals. Confiscation statutes are typically justified as a means to prevent crime, remediate wrongdoing and, to a lesser extent, punish offenders.[25] They enable societies to express emotions such as disgust, resentment and envy, which may arise if criminal offending otherwise goes unpunished.[26] When adopted across borders, they promise to secure funds for economic and social development[27] and to combat the impunity of powerful economic and political actors.[28]

However, the scholarship reveals significant challenges to confiscation laws and the wider anti-money laundering regime. On the one hand, it is hard to ascertain the

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the Proceeds of Crime: Recommendations for Legislative Reform (Australian Institute of Criminology 2020) app A <www.aic.gov.au/sites/default/files/2020-07/CRG-27-1617-FinalReport_0.pdf>.

19 Skead et al (n 18) ix-x.

20 Ibid 3. See, eg, *Crime (Confiscation of Profits) Act 1993* (Tas) ss 141–142; *Criminal Property Confiscation Act 2000* (WA) s 12(1); *Criminal Property Forfeiture Act 2002* (NT) s 71; *Confiscation of Criminal Assets Act 2003* (ACT) s 98D; *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 9.

21 Skead et al (n 18) 97 on the *Criminal Assets Recovery Act 1990* (NSW) s 28A(2) and *Criminal Proceeds Confiscation Act 2002* (Qld) s 89G(1). See also *Confiscation Act 1997* (Vic) ss 40F(1), 40I, 40ZA; *Proceeds of Crime Act 2002* (Cth) ss 179B and 179E; *Serious Organised Crime (Unexplained Wealth) Act 2009* (SA) ss 9(1)-(2).

22 *Autonomous Sanctions Act 2011* (Cth) and *Autonomous Sanctions Regulations 2011* (Cth). See Anton Moiseienko, 'The Sins of the Fathers: Targeted Sanctions against Family Members of Primary Targets' (2024) 87(4) *Modern Law Review* 799.

23 *Rebuilding Economic Prosperity and Opportunity for Ukrainians Act of 2024* ('*REPO for Ukrainians Act*'), Pub L No 118-50; *Special Economic Measures Act*, SC 1992, c 17, ss 4(1)(b) and 5.4(1). See generally Stefan D Cassella, 'Yachts and Airplanes; What Procedures and Legal Theories Are Being Used to Forfeit Russian Assets in the United States?' [2022] (4) *eucrim* 273.

24 Hun Joon Kim and JC Sharman, 'Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms' (2014) 68(2) *International Organization* 417; Sharman (n 2) 2.

25 See, eg, English, Hickey and Bronitt (n 18); Skead et al (n 18) 2.

26 Gregory Dale, 'Crime, Confiscation and Emotion' (PhD Thesis, Monash University, 2022).

27 Jean-Pierre Brun, *Asset Recovery Handbook: A Guide for Practitioners* (International Bank for Reconstruction and Development/The World Bank, 2nd ed, 2021) <https://openknowledge.worldbank.org/handle/10986/34843> 1; Office of the United Nations High Commissioner for Human Rights ('OHCHR'), *Recommended Principles on Human Rights and Asset Recovery* (UN, 2022) 10 <https://www.ohchr.org/en/documents/tools-and-resources/ohchr-recommended-principles-human-rights-and-asset-recovery-2022>.

28 Kim and Sharman (n 24); Sharman (n 9) ch 1.

impact of a crime control policy whose scope is unclear, whose goals are diverse (and sometimes obscure) and whose crimes and money flows are largely hidden.[29] International organisations suggest that only a fraction of illicit wealth is ever recovered from 'bad guys' for the benefit of communities.[30] When confiscation is deployed to address crimes committed in Australia, the evidence of its ability to reduce offending is emerging but limited.[31] In the meantime, prominent Australian companies are periodically embroiled in AML compliance scandals.[32] Those cases give superficial credence to Australian research that found a multi-billion-dollar cost of serious and organised crime to the local economy in just one year.[33]

On the other hand, confiscation and related AML laws extend the state's influence in the private 'sphere' and thus call for an evaluation from a normative or public law perspective. Contributions here and elsewhere note the willingness of courts to tolerate confiscation within a liberal system of justice.[34] Those cases beg the question of whether judges have 'got it right' and, in turn, whether confiscation should be assessed according to supra-legal normative standards.[35] Further, to the extent that AML laws increase surveillance by and among non-state actors, they have been associated with a neo-liberal turn in criminal justice policy.[36] This too is problematic from a liberal point of view.[37] Finally, both in Australia and internationally, there are controversies about how governments reallocate confiscated wealth, including how they provide for victims of crime.[38]

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29 Halliday, Levi and Reuter (n 9) 5–6; Sharman (n 9) 13–15.

30 European Criminal Assets Bureau, *Does Crime Still Pay? Criminal Asset Recovery in the EU: Survey of Statistical Information 2010–2014* (Report, 2016) 12 <https://www.europol.europa.eu/publications-events/publications/does-crime-still-pay>; United Nations Office on Drugs and Crime ('UNODC'), *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes* (Report, 2011) 9; Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (International Bank for Reconstruction and Development/The World Bank and the OECD, 2014) 2, 19 <https://star.worldbank.org/publications/few-and-far-hard-facts-stolen-asset-recovery>.

31 Cf Crime and Corruption Commission, Queensland, *Research Report: The Impact of Proceeds of Crime Action on Offending Trajectories* (Report, May 2022) v, 3, 17 <https://www.ccc.qld.gov.au/publications/impact-proceeds-crime-action-offending-trajectories>; Skead et al (n 18) 8, 40, 53.

32 Australian Transaction Reports and Analysis Centre ('AUSTRAC'), 'Money Laundering in Australia: National Risk Assessment' (9 July 2024) 20 <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-national-risk-assessment-2024>.

33 Russell Smith and Amelia Hickman, *Estimating the Costs of Serious and Organised Crime in Australia, 2020–21*, AIC Statistical Report 38 (Australian Institute of Criminology, 2022) 1 <https://aic.gov.au/publications/sr/sr38>.

34 See references above (n 7) and Natalie Skead and Sarah Murray, 'Criminal Property Confiscation and Third-Party Rights: Giving the Hedgehog a Foxy Tail' 52(1) *University of Western Australia Law Review* 9.

35 Boucht (n 7) ch 5; King and Hendry (n 7) 199–202.

36 Carolin Liss and JC Sharman, 'Global Corporate Crime-Fighters: Private Transnational Responses to Piracy and Money Laundering' (2015) 22(4) *Review of International Political Economy* 693.

37 Radha Ivory, 'Due Diligence Debates in International Anti-Corruption and Money Laundering Law: From Content to the Construction of Risk' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press, 2020) 300.

38 Dale (n 26) ch 8; OHCHR (n 27) [57].

IV THE ARTICLES IN OVERVIEW

Confiscation and related AML laws therefore raise questions about means and ends, outcomes and processes. What is the evidence that confiscation (and related follow-the-money strategies) achieve the criminal justice goals of deterrence, incapacitation, remediation and retribution? To what extent do those laws reflect other objectives? Presuming that they are fit for those purposes, how well do contemporary confiscation procedures comply with, or advance, individual autonomy and human rights? Do confiscation laws sufficiently balance the state's desire to fund its law enforcement activities with the claims of alleged offenders, third parties and victims of crime to illicit wealth?

The articles that follow explore these problems in their different policy and legal contexts and from different inter- and intra-disciplinary perspectives. **Skead and Murray** use a mixture of doctrinal analysis and case studies to consider the position of third parties under Australian state and territory confiscation laws. Through a series of vignettes, they show how Australian confiscation laws cast a broad net over property in which innocent, or less culpable, individuals have an interest. This research (together with their previous work) suggests that Australian confiscation legislation is insensitive to considerations of proportionality, gender and the remediation of victims. It requires wide-ranging legislative reform, even if the authors anticipate that only small changes will be politically possible.

Taking a comparative approach, **Campbell and Clancy** critically evaluate Australian and UK unexplained wealth laws. Both countries allow confiscation, in some situations, without proof that a specific offence has been committed—even to the civil standard.[39] Considering the challenges of principle and performance, Campbell and Clancy argue that the stigmatic effects of unexplained wealth laws are not offset by gains in money laundering control. Of the UK, they write: 'UWO laws are an example of a political choice to prioritise the introduction of laws without appropriate accompanying resourcing and, where necessary, structural change in support of their implementation.'[40] The authors cast UWO regimes as a failed policy, given their current legal and institutional settings; they likewise propose reforms.

The incoherence of illicit finance controls is the target of **Paterson's** article on the interaction between 'know your customer' ('KYC') rules and privacy principles as they apply to 'crypto' assets. The duty on financial services firms to identify customers is central to AML regimes but a vulnerability in privacy law since it increases the pool of personal information that may be hacked by 'bad actors'. The potential for the AML and privacy regimes to conflict is particularly great when the currency itself has a technological basis and its exchanges are new market actors. Surveying the problems and proposed reforms, Paterson cautiously endorses the widening of KYC obligations

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[39] For Australia, see, eg, *Criminal Property Confiscation Act 2000* (WA) s 12(1). For the UK, see *Proceeds of Crime Act 2002*, s 362B(4)(a) (with respect to politically exposed persons).

[40] Liz Campbell and Áine Clancy, 'The Principled and Practical Limits to Unexplained Wealth Orders' (2024) 52(1) *University of Western Australia Law Review* 29.

on crypto exchanges and the use of technology to reduce pressure for formal legal change. She warns that each response will create new sources of incoherence and regulatory tension.

The final two articles focus on the symbolism of confiscation laws. **Dale** interrogates Australian asset substitution laws, which allow courts to either confiscate money that is equivalent in value to an instrument of crime or to take property of a similar nature to the instrument of crime.[41] Such laws were ostensibly designed to prevent offenders from avoiding confiscation laws because they did not own the asset that they had used to commit the crime. However, as Dale argues, the preventive and deterrent case for such powers is weak; at best, they are retributive in design, a modern *lex talionis*. As they fail even to achieve that (questionable) goal of eye-for-eye retribution, Dale submits that substitute asset confiscation regimes should be abolished except in a narrow range of cases.

Finally, **Phillips'** contribution considers asset reuse laws as pioneered in Italy and provided for by other countries, including Australia. She details two cases in which assets connected to the Calabrian 'ndrangheta were allegedly wasted and re-corrupted after their reallocation to community groups. By reference to those cases, Phillips develops a 'tentative novel framework to measure the symbolic impact of social reuse in mafia-infiltrated territory…'.[42] In so doing, she affirms the potential benefits of asset reuse regimes to symbolically combat Mafia power, but also calls for 'further research … into the less palatable side of this symbolically-targeted legislation, including the potential repercussions of failed projects on social consensus, and the impact of misconduct within third-sector beneficiaries…'.[43]

V DIRECTIONS FOR RESEARCH IN CONFISCATION AND AML CONTROL

The articles in this Special Issue thus confirm that confiscation and related AML laws are fixed but problematic features of international and domestic legal landscapes. They indicate that there is considerable loyalty to the ideas of asset recovery and money laundering control in the academic, judicial and policy communities. But there is also significant scholarly concern that the current laws may not, on balance, be delivering on their intended (quasi)criminal justice goals. All those who wrote here see a need for reform, in the sense of intentional, authoritative legal change with a view to improvement.

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41 *Criminal Proceeds Confiscation Act 2002* (Qld) pt 4, div 2A; *Confiscation Act 1997* (Vic) pt 3, div 1A; *Criminal Property Confiscation Act 2000* (WA) pt 3, div 3; *Criminal Property Forfeiture Act 2002* (NT) pt 6, div 3; *Criminal Assets Confiscation Act 2005* (SA) s 48; *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33; *Criminal Assets Recovery Act 1990* (NSW) s 22AA. The Commonwealth, Tasmania and the Australian Capital Territory make no provision for the forfeiture of substitute property for instruments of crime.

42 Amber Phillips, 'A Symbolic Defeat? Exploring Symbolism and Failure in the Social Reuse of Confiscated Mafia Real Estate in Italy' (2024) 52(1) *University of Western Australia Law Review* 101, 103.

43 Ibid 120.

These calls for reform indicate potential directions for confiscation and AML research. A first line of inquiry concerns the role of technology in the control of illicit finance. There is nothing new in the idea that computer algorithms could help or hinder anti-money laundering efforts.[44] What emerges from Paterson and Campbell and Clancy's articles, however, is a sense that radical advances in computer technologies could provide a 'way out' of the policy dilemmas that AML controls have historically entailed. Legal scholars have a special place in projects to test these intuitions, as they are intellectually primed to consider how new technological fixes could generate new governance challenges.

Second, the contributions indicate the importance of documenting how actors perceive confiscation and related AML laws at multiple levels of governance, if necessary, with new approaches and methodologies. Interviews, observations and experiments have contributed significantly to shaping the social science literature on AML control, in particular, the questions of why international and local actors adopt AML controls and whether they comply with them.[45] The articles in this special issue indicate the importance of also attending to the perceptions of (hyper-)local actors—from state politicians in Australia to the 'wives and girlfriends' of Londongrad to the townspeople of Calabria—in determining the need and scope for change to confiscation laws.

Finally, the articles raise the issue of whether it is possible to meaningfully improve confiscation and related AML laws. The contributors suggest that political will and path dependence are potential barriers to change in respect of proceeds of crimes law—and not just in Australia. Some, like Skead and Murray, foresee the possibility of improvement by increments. Others, like Paterson, Dale and Phillips, focus on the political and emotional drivers of confiscation and AML controls. That work, in turn, begs questions around the motive and nature of proposed reforms. What ideas, ideologies and affects prompt movements to improve confiscation and related AML laws, as well as to give those changes a particular procedural or institutional form?

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[44] See, eg, AUSTRAC (n 32) 20; FATF, 'Opportunities and Challenges of New Technologies for ALM/CTF' (July 2021) <https://www.fatf-gafi.org/en/publications/Digitaltransformation/Opportunities-challenges-new-technologies-for-aml-cft.html>. See further Doron Goldbarsht, 'Adapting Confiscation and Anti-Money Laundering Laws to the Digital Economy: Exploring the Australian Interplay between Proceeds and Technology' (2024) 27(3) *Journal of Money Laundering Control* 472, 481–482.

[45] Sharman (n 2); Sharman (n 9); Michael G Findley, Daniel L Nielson and JC Sharman, 'Causes of Non-Compliance with International Law: A Field Experiment in Anonymous Incorporation' (2015) 59(1) *American Journal of Political Science* 146; Skead et al (n 18). For an example of quantitative analysis in this space, see Crime and Corruption Commission, Queensland (n 31).