

CRIMINAL PROPERTY CONFISCATION AND THIRD-PARTY RIGHTS: GIVING THE HEDGEHOG A FOXY TAIL

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Criminal property confiscation in Australia has the potential to ensnare blameless third-parties and their property interests within its vast web. This paper explores, through a series of case studies, how inequitable outcomes can arise for both commercial and non-commercial associates, including family members, and what reforms are necessary to allow for a more just preservation of third-party rights and interests.

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I INTRODUCTION

Isaiah Berlin made famous a line by Archilochus that '[t]he fox knows many things, but the hedgehog knows one big thing'.¹ Increasingly relied upon to deter and prevent crime, the confiscation of proceeds of crime, at least in some Australian jurisdictions, can be criticised as falling more within the hedgehog camp by providing a blunt one-size-fits-all mechanism to achieve the overarching single-minded aim of targeting serious drug-related and organised crime. In doing so it fails to adequately take account of, and provide effective measures to address, the wide variety of impacts on innocent third-parties' rights and property interests.

Australian proceeds of crime legislation is patently broad in its reach. On introducing the inaugural Commonwealth Proceeds of Crime Bill in 1987, then Federal Attorney-General (and Deputy Prime Minister) Lionel Bowen explained that it:

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.²

The need for effective mechanisms to address burgeoning serious and organised crime has not altered in the decades that have followed. A recent report estimated that serious and organised crime cost Australia up to \$60.1 billion dollars in 2020-2021.³ Despite robust criminal property confiscation schemes being in place across the federation, only about \$114 million was recovered through confiscation in this period.⁴ Even in the face of the ongoing need for effective confiscation measures, however, best practice necessitates that these measures be tempered so as to ensure an appropriate balance between the compelling goal of preventing criminals profiting from nefarious activities, on the one hand, and individual rights on the other.

While the confiscation schemes of some Australian jurisdictions achieve a better balance than others, none provide absolute protection for blameless third parties who may get caught up in the confiscation web. In this article, after providing contextual background to Australian criminal property confiscation legislation in Part II, we explore how inequitable outcomes can arise for such third parties in Part III. We examine a series of case studies before analysing some of the causes for confiscation regulation failing in this regard. Although much of the discussion focuses on the Western Australian legislative scheme, which has been described as 'draconian',

¹ Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Princeton University Press, 2nd ed, 2013) 1.

² Australia, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2314 (Lionel Bowen, Attorney-General).

³ Russell G Smith and Amelia Hickman, *Estimating the costs of serious and organised crime in Australia 2020–21* (AIC, Statistical Report 38, 2022) 1
<https://www.aic.gov.au/sites/default/files/2022-04/sr38_estimating_the_costs_of_serious_and_organised_crime_v2.pdf>.

⁴ *Ibid* 42-43.

‘extreme’, and ‘unfair’,⁵ we also provide examples from other jurisdictions, including from the Victorian and the Federal schemes. We conclude with recommended changes which are needed to confiscation regimes to allow for the more just and equitable preservation of third-party rights and interests.

II AUSTRALIAN CRIMINAL PROPERTY CONFISCATION LANDSCAPE

Criminal property confiscation legislation is in place in all Australian jurisdictions.⁶ Broadly, the legislation targets four categories of property: unexplained wealth; crime-used or tainted-property; crime-derived property or criminal benefits; and drug trafficker property.

A Rationale

Criminal property confiscation legislation is intended to bolster the capacity of law enforcement to address organised and other serious crime. It aims to do so in four ways, namely, by:

- depriving offenders of the financial benefits of engaging in crime, which is said to be part of the punishment meted out to those involved in criminal activity;⁷
- deterring first-time offenders from offending and past offenders from re-offending by stripping away the material advantages of crime and the accumulation of wealth;⁸
- incapacitating offenders by removing the working capital required to finance further crime;⁹
- suppressing organised crime by tracing the money trail to those spearheading the illegal activities.¹⁰

⁵ *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 [24], [50]; *Centurion Trust v Director of Public Prosecutions for Western Australia* (2010) 201 A Crim R 324, 343 [75]; *Permanent Custodians Ltd v Western Australia* [2006] WASC 225 [23]; *Smith v Western Australia* [2009] WASC 189 [18].

⁶ *Proceeds of Crime Act 2002* (Cth); *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act 2002* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA).

⁷ *R v Fagber* (1989) 16 NSWLR 67; *R v McDermott* (1990) 49 A Crim R 105.

⁸ See *Riggs v Palmer* 115 NY 506, 514 (1889), where the view of the majority was that a person ‘shall not acquire property by his crime, and thus be rewarded for its commission’.

⁹ John Thornton, ‘Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia – an Overview’ (1994) 1(1) *Canberra Law Review* 43, 46.

¹⁰ Frank Costigan QC, ‘Organized Crime and a Free Society’ (1984) 17(1) *Australia and New Zealand Journal of Criminology* 7, 12. See also Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (August 2009) [5.4].

These aims form the underlying rationale for the introduction of, and continued review and strengthening of, proceeds of crime legislation in Australia. Section 5 of the *Proceeds of Crime Act 2002* (Cth), for example, sets out a detailed statement of the principal objectives of the Commonwealth legislation as being:

Section 5

Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and
- (b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived or realised, directly or indirectly, from certain offences;
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (da) to undermine the profitability of criminal enterprises; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; ...

In addition, criminal property confiscation legislation is said to: enhance public confidence in law enforcement's ability to fight serious and organised crime agencies and pursue associated strategies; contribute to efforts to remove prohibited substances 'from the streets'; compensate society—albeit inadequately—for the enormous social, personal and economic cost, of crime, and particularly drug-related crime;¹¹ and recoup at least some of the significant financial cost of preventing and suppressing organised criminal activities.¹²

B Conviction-Based Versus Non-Conviction-Based Confiscation

Australia's initial criminal property confiscation regimes provided for conviction-based confiscations pursuant to which a criminal conviction was the precursor to the

¹¹ *R v Allen* (1989) 41 A Crim R 51, 56.

¹² For a detailed discussion on the justification for proceeds of crime legislation, see David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345, 345; Arie Freiberg, 'Confiscating the Proceeds of White-Collar Crime' (Conference Paper, Australian Institute of Criminology Conference, 20 – 23 August 1991) 4; Mirko Bagaric, 'The Disunity of Sentencing and Confiscation' (1997) 21(4) *Criminal Law Journal (Australia)* 191; Thornton (n 9).

granting of a final confiscation or forfeiture order. This was considered a ‘measured response’ to organised crime.¹³

From the 1990s, Australian jurisdictions sought to strengthen their confiscation schemes by introducing civil or non-conviction-based confiscation legislation. It would seem that this trend was prompted by grossly inadequate confiscation results under the early conviction-based legislation,¹⁴ ie, that conviction-based confiscation had had a ‘negligible effect’ and resulted in the removal of a ‘miniscule proportion’ of the profits derived by criminals through organised crime.¹⁵

It was anticipated that a civil forfeiture regime would be far more effective as it would allow the confiscation of property through civil proceedings without having to establish a criminal nexus between the targeted property and criminal conduct. The Revised Explanatory Memorandum to the Proceeds of Crime Bill 2002 (Cth) stated the objective of the bill as being ‘to enhance the effectiveness of criminal laws of the Commonwealth and external Territories’.¹⁶

The introduction of civil forfeiture schemes commenced in New South Wales in 1990 with the enactment of the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW) (now the *Criminal Assets Recovery Act 1990* (NSW)) and was extended beyond drug-related crimes in 1997. Provisions allowing for non-conviction-based confiscation are now included in the proceeds of crime statutes in all Australian jurisdictions.

III INEQUITABLE THIRD-PARTY OUTCOMES: CASE STUDIES

While the rationale and benefits underpinning robust non-conviction-based criminal property confiscation legislation appear compelling, they must be viewed against the backdrop of the effect the legislation may have on the rights and circumstances of innocent third parties and the severe hardship they may experience as a result of confiscation. Using a series of case studies, in this Part III we provide stark illustrations of the impact of the criminal property confiscation schemes in Western Australia, Victoria and the Commonwealth on these third parties.

Aside from offenders—or alleged offenders—themselves, it is most commonly family members, including dependent children and partners, that are negatively impacted by criminal property confiscation.

Much of the commentary and case law on third-party rights in the context of criminal property confiscation concerns non-commercial third parties. However, a

¹³ Arie Freiberg and Richard Fox, ‘Evaluating the Effectiveness of Australia’s Confiscation Law’ (2000) 33(3) *Australia and New Zealand Journal of Criminology* 239, 239.

¹⁴ Ibid 249-250; Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987 (Cth)* (Report No 87, 1999) [4.142]; Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)* (July 2006) [2.7]; Lusty (n 12) 351; Tim Morris, ‘Great expectations — Australia’s new Proceeds of Crime Bill’ (2001) 73 *Platypus Magazine* 31, 33. See also Simon NM Young (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, 2009) 3.

¹⁵ Freiberg and Fox (n 13) 251, 260.

¹⁶ Revised Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth) 2.

review of the cases reveals that confiscation can also unfairly impinge on the rights of blameless commercial associates.

A Third Parties: Non-Commercial Associates

Mrs Nguyen

In announcing a review of the *Criminal Property Confiscation Act 2000* (WA) (*CPCA* (WA)) on popular radio, Attorney General of that state, John Quigley relayed Mrs Nguyen's circumstances to illustrate the potential impact of the legislation on blameless third-party family members:

There's been cases continually coming to the floor which on the face of them would appear to be harsh to the point of being unjust. Now one of these—the most recent one that came across my desk—was the lady who was... an immigrant, a single mum raising a couple of kids working as a feather plucker in a chicken factory, fairly menial manual labour... Her husband deserted her. She kept on struggling with the finances, paying the mortgage on the family home. And then two or three years after he deserts her he gets involved with drugs with a new woman... commits an offence and as a result of his offending, because the family home was half in his name the home gets seized and no discretion in the courts to weigh the justice of this or not get seized and she's going to have to sell the home, and the kids will be out on the street or looking for state housing.¹⁷

Notably, in this case it was not evident that Mr Nguyen's drug-trafficking was conducted at the seized family home or that the purchase of the family home or mortgage repayments were in anyway funded by Mr Nguyen's drug trafficking.

Azizi v Director of Public Prosecutions

In *Azizi*, the Victorian serious drug offence provisions in the *Confiscation Act 1997* (Vic) (*CA Vic*) resulted in a confiscation order against the marital home in Wollert (the Wollert home) jointly owned by Mr Osman and Mrs Azizi (but paid for exclusively by Mr Osman). Mr Osman, but not Mrs Azizi, was charged and convicted of offences under section 71 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) with the Wollert home subject to a 'serious drug offence restraining order' under the conviction-based confiscation provision in section 18(1) of the *CA (Vic)*. Mrs Azizi sought to have her interest in the Wollert home brought within the exclusion provisions in sections 20 and 22A of the *CA (Vic)* but was unsuccessful both at first instance and on appeal.

The exclusion order was denied on the basis that section 22A required not only that the:

- 'applicant was not, in any way, involved in the commission of the serious drug offence' (1)(a); and

¹⁷ Attorney General, John Quigley, 'Criminal confiscation laws to be reviewed', *Mornings with Gareth Parker* (Radio 6PR, 20 September 2018) <<https://www.6pr.com.au/podcast/criminal-confiscation-laws-to-be-reviewed/>>.

- ‘applicant’s interest in the property was not subject to the effective control of the accused on the earlier of the charge or the date of confiscation’ (1)(b)

but also that:

- ‘where the applicant acquired the interest from the accused, directly or indirectly, that it was acquired for sufficient consideration’ (1)(c).¹⁸

On the basis of the definition of ‘sufficient consideration’ in section 3(1) of the *CA (Vic)* being ‘consideration that reflects the market value of the property’, Mrs Azizi had not met the criterion in section 22A(1)(c). She sought to argue, however, that section 22A(1)(c) did not apply as she had not acquired her interest in the Wollert home ‘from the accused, directly or indirectly’. Justice Dyer rejected Mrs Azizi’s claim finding at first instance that ‘the interest claimed by Ms Azizi at the relevant date is a 50 per cent interest in the legal title of the property, ... which has been obtained indirectly from the accused as a gift’.¹⁹

The Court of Appeal concluded that:

In our view use of the term ‘indirectly’ is sufficiently, and deliberately, broad enough to capture the circumstances where an accused pays for property but ensures that an interest in the property is vested in a third party. Further, the purpose of the conditions that are imposed on the otherwise broad power of a court to exclude from a restraining order property of a person who was not involved in the offending—including s 22A(1)(c)—is to ensure that the accused cannot avoid the operation of the Act by a device such as making a gift of an interest in property to a third party. Thus, in the present case we consider that the trial judge was correct to conclude that the applicant had obtained her interest in the property indirectly from the accused.²⁰

As Skead has noted elsewhere:

the effect of the Court of Appeal’s broad interpretation of s 22A(1)(c) of the Act in *Azizi*, is to deprive the applicant and her children of their family home. This is a particularly harsh outcome for third parties who were not in any way involved in the accused’s wrongdoing... The CA arguably fails to recognise that an interest in property (whether legal or equitable) may be acquired legitimately otherwise than by making a financial market-related contribution to its acquisition.²¹

Notably, Mrs Azizi’s position was rendered more difficult by 2007 amendments to the *CA (Vic)*, which followed the High Court’s decision in *Director of Public Prosecutions v Le*.²² There, the Court had found that ‘natural love and affection’ constituted ‘sufficient consideration’. By the 2007 reforms, ‘sufficient consideration’ was expressly

¹⁸ Following 2022 amendments to the *CA (Vic)* (via the *Major Crime and Community Safety Legislation Amendment Act 2022* (Vic)) these provisions are now in ss 22A(1)(iii) and 22A(1)(iv).

¹⁹ *Azizi v DPP* [2021] VCC 423 [70].

²⁰ *Azizi v Director of Public Prosecutions* [2022] VSCA 71 [8] (Priest, T Forrest and Walker JJA).

²¹ Natalie Skead, ‘Azizi v Director of Public Prosecutions and the Meaning of “Property”’ (2022) 96(11) *Australian Law Journal* 793, 795-6.

²² (2007) 232 CLR 562. See Natalie Skead, ‘Crime-used property confiscation in Western Australia and the Northern Territory: Laws befitting Draco’s Axones?’ (2016) 41(1) *University of Western Australia Law Review* 67, 88.

defined to *exclude* ‘consideration arising from love and affection’ as well as the making of a ‘gift’.²³

The Court of Appeal acknowledged that the *CA (Vic)* is designed to result in ‘a harsh outcome’ but that unjust consequences for innocent family members were ameliorated by other provisions providing for dependants.²⁴ Mrs Azizi had not sought to rely on those other provisions.

Smith v Western Australia

The decision of McKechnie J in *Smith* provides an illustration of the potential impact of criminal property confiscation on family members other than the defendant’s partner and/or dependent children. In *Smith*, Smith was declared a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* (WA) (*MDA*). This declaration activated section 8 of the *CPCA (WA)* which provides:

- (1) When a person is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of a confiscation offence that was committed after the commencement of this Act, the following property is confiscated —
 - (a) all the property that the person owns or effectively controls at the time the declaration is made;
 - (b) all property that the person gave away at any time before the declaration was made, whether the gift was made before or after the commencement of this Act.

This provision resulted in the automatic confiscation of all Smith’s property.²⁵ The confiscated property included Smith’s share in a property in High Wycombe (‘the High Wycombe property’), which he co-owned with his wife. Smith’s mother and sister claimed to have lent Smith money in circumstances conferring on them an equitable interest in the High Wycombe property. Thus, his mother and sister sought to assert their equitable interest in the High Wycombe property. The State opposed their claims on the basis of section 9 of the *CPCA (WA)* which provides (relevantly) that:

- (1) Registrable real property that is confiscated ... vests absolutely in the State ... when —
 - (a) the Court declares ... that the property has been confiscated;
 - (b) a memorial ... is registered under section 113(1).
- (2) When registrable real property vests in the State under subsection (1) —
 - (a) the property vests free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants);
 - (b) any caveat in force in relation to the property is taken to have been withdrawn; and

²³ *Confiscation Act 1997* (Vic) s 3(1).

²⁴ *Azizi v Director of Public Prosecutions* [2022] VSCA 71 [65] (Priest, T Forrest and Walker JJA).

²⁵ *Criminal Property Confiscation Act 2000* (WA) s 8(1).

(c) the title in the property passes to the State.

As the State had not yet applied for a confiscation declaration or lodged a memorial of the confiscation with the Registrar of Titles as required under section 113 (1) of the *CPCA (WA)*, title to the confiscated land had not yet vested in the State pursuant to section 9. Notwithstanding the State's delay in this regard, McKechnie J dismissed the mother's and sister's claims. His Honour found that, on the plaintiff being declared a drug trafficker, the confiscated land had been automatically confiscated pursuant to section 8 of the *CPCA (WA)*. As a result, his Honour made a confiscation declaration.²⁶ The confiscation declaration required the State to lodge a memorial for registration with the Registrar of Titles, which memorial the Registrar of Titles was required to register. On such registration, his Honour held that, even if Smith's mother and sister did have equitable interests in the High Wycombe property—claims his Honour rejected—such interests would be extinguished by the operation of section 9 of the *CPCA (WA)*.²⁷ 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'.²⁸

Davies v Western Australia

In *Davies v Western Australia*,²⁹ Mr David Davies and Mrs Florence Davies, who were aged 81 and 77 respectively, were convicted of possessing cannabis with the intent to sell or supply it to another under section 6(1)(a) of the *MDA* and sentenced to a 16-month suspended sentence. The conviction arose from the Davies allowing their son, Tyssul (who had a key to their family home in Carlisle ('the Carlisle home')), to store and access a total of 19 kilograms of cannabis in a 'false ceiling' in the Carlisle home.³⁰ Roberts-Smith JA found that:

[w]here several people have joint possession of a prohibited drug they may each have a different intention with respect to it. That was the situation here. Tyssul's intention (as was accepted at his sentencing) was to sell or supply the cannabis to others. The appellants' intention was to allow Tyssul to remove it as and when required for his own purposes. The factual nature or basis of their possession was different.³¹

Although not strictly speaking third parties to the drug offences in this matter, the Davies' degree of blameworthiness (mere passive involvement in the possession with intent to sell offence) is reflected in their relatively lenient sentences.

The application of section 32A of the *MDA* saw Mr and Mrs Davies automatically declared 'drug traffickers' and described as 'Australia's oldest drug traffickers' in the press.³² As in *Smith*, this declaration activated section 8 in the *CPCA (WA)* and resulted

²⁶ *Smith v Western Australia* [2009] WASC 189 [16].

²⁷ *Ibid* [17].

²⁸ *Ibid* [18].

²⁹ [2005] WASCA 47.

³⁰ *Ibid* [2] (Steytler P).

³¹ *Ibid* [39].

³² 'Oldest Drug Offenders May Lose Home', *The Age* (online, 16 March 2005) <<https://www.theage.com.au/national/oldest-drug-offenders-may-lose-home-20050316-gdzsmc.html>>.

in the automatic confiscation of all the Davies' property including the Carlisle home, which they had built 40 years prior to the confiscation proceedings. As a result of the confiscation, the Davies were effectively rendered destitute and homeless.³³

What is evident in *Davies* is the lack of proportionality between the couples' lenient sentence and the impact of the confiscation of all their property, including property that had been lawfully acquired decades before the drug offences that then triggered the confiscation.

B Third Parties: Commercial Associates

Director of Public Prosecutions v Hogg

Hogg highlights the impact of criminal confiscation provisions on innocent commercial associates. In this case a tax agent, Hogg, engaged in a multi-million-dollar fraudulent tax minimisation scheme. Unaware of his fraud, Hogg's clients, mostly small business owners, invested over \$1 million in the scheme. The Commonwealth lost close to \$2.8 million in unpaid taxes as a result of fraudulent tax returns that Hogg had lodged on his clients' behalf.

Hogg pleaded guilty to charges of obtaining financial advantage by deception, obtaining property by deception and the federal charge of dishonestly causing a loss to the Commonwealth. He was sentenced to four-and-a-half years in prison; compensation orders worth over \$1 million were made in favour of Hogg's defrauded clients. In sentencing Mr Hogg, Judge Allen described the impact of Mr Hogg's actions on his clients:

one of your victims says that, as a result of what you did, he has suffered stress 'like I have never experienced before; depression, and exhaustion, physically and emotionally. Fear of possible bankruptcy and the impact on my family, and my employee's families.' Just think about that. These small business people fear not only for themselves and their own families, but for their employees and their families who will suffer if the Taxation Department relentlessly pursues them as may well happen...³⁴

The difficulty that arose, however, was that pursuant to the *Proceeds of Crime Act 2002* (Cth) (*POCA (Cth)*) the Commonwealth had obtained restraining orders against all of Mr Hogg's property (worth over \$1.4 million). This meant that the clients were precluded from recovering their losses pursuant to the compensation orders against Mr Hogg. The irony is that this compensation was pivotal to many of Hogg's clients being able to pay the unpaid taxes due to the Australian Taxation Office.

As we, and our co-author, have noted elsewhere:

The injustice of this case is clear. On the one hand, the Commonwealth not only stands to benefit from the confiscation of all Hogg's property, valued in excess of \$1.4 million, it is also pursuing the outstanding tax liabilities of Hogg's victims. Those tax liabilities

³³ We understand that, given their age and financial circumstances, the State agreed to lease the property to the couple at peppercorn rent for so long as they may wish to reside there: also 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, 299.

³⁴ *Director of Public Prosecutions v Hogg* [2018] VCC 631 [24].

were the direct result of Hogg's crimes; the very crimes that rendered Hogg's property liable to confiscation—double dipping, so to speak. On the other hand, Hogg's clients have not only lost all the money they paid to Hogg as their tax advisor which for many was their entire life savings, but they now have significant tax liabilities to the ATO and compensation orders that cannot be met as Hogg's property is currently restrained—'a double whammy' so to speak.³⁵

C Observations on Case Studies

In 2020, the Australian institute of Criminology published the Final Report ('2020 Report') on our empirical study into criminal property confiscation in New South Wales, Queensland and Western Australia ('the AIC study'). In that report, we and our co-authors noted the significant concerns regarding the impact of confiscation on innocent partners and dependent children.³⁶ One Western Australia interviewee in the AIC study stated:

I mean, you've got a spouse and children living in the house, and they stand to become homeless... It's reasonable to think that in many cases, those people just go along with what usually hubby is doing because it's too hard to stop it... But the consequences to them is [sic] extraordinarily serious. (Interviewee)³⁷

Although the general sentiment is that these 'harsh to the point of being unjust'³⁸ consequences represent a flaw in confiscation schemes, there is a contrary view that they are little more than acceptable 'collateral damage'. As noted in the 2020 Report, a politician interviewed in the AIC study:

questioned the 'innocence' of third parties, who, knowingly or unknowingly and directly or indirectly, benefit from the defendant's criminal activity. In this view, it is not the responsibility of the state to protect these third parties from the choices made by their offending parent or partner. Rather, the legislation was introduced to combat crime, regardless of the 'collateral damage' on third parties.³⁹

Despite some support, this view is a somewhat blunt approach to the protection of third-party rights. It fails to acknowledge the complexities inherent in assessing what a family member knew—or ought to have known—about the criminal conduct in question and, therefore, their degree of blamelessness. Even if it is established that a family member did have some awareness, it overlooks 'other factors [that] may come into play—for example, roles within the relationship or pressure from the defendant. It becomes more problematic when dependent children are involved as they can hardly be blamed for benefiting from the illegal activity of a parent'.⁴⁰ The issue for the court

³⁵ Natalie Skead, Sarah Murray and Tamara Tulich, 'The Futility of a "Hug" from the Commonwealth: Property Restraining Orders and the Fight for Victim Compensation Under the Commonwealth Proceeds of Crime Legislation' (2020) 44(1) *Criminal Law Journal* 43, 45-46 (footnotes omitted).

³⁶ Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, *Pocketing the Proceeds of Crime: Recommendations for Legislative Reform* (Report to the Criminology Research Advisory Council Grant: CRG 27/16-17, 2020).

³⁷ *Ibid* 72.

³⁸ Quigley (n 17).

³⁹ Skead, Tubex, Murray and Tulich (n 36) 48.

⁴⁰ *Ibid* 48.

becomes how to assess degrees of blameworthiness or innocence and the difficulty of determining where the burden of establishing this falls.⁴¹

Whatever one's view of the justification for a defendant's family members and other related non-commercial third-parties getting caught up in, and suffering the consequences of, confiscation, there is no justification for permitting confiscation to financially disadvantage unrelated and blameless commercial associates.

IV THE CAUSES OF INEQUITY FOR THIRD PARTIES

The unjust outcomes of confiscation for commercial and non-commercial third parties who are not directly or indirectly involved in the criminal conduct giving rise to the confiscation can be attributed to several notable features of confiscation regimes. We discuss four of these features below. They are (1) the broad scope of the confiscation regimes; (2) the limited judicial discretion not to order confiscation under these regimes; (3) the inadequacy of exclusionary provisions within these regimes; and (4) how the regimes allow for 'double-dipping'. We discuss the regimes together, while noting that not all statutes have all of these problematic features and, therefore, that the degree and efficacy of third protections from confiscation vary from jurisdiction to jurisdiction.

A The Reach of Property Confiscation Provisions

While there is jurisdictional variation, there are four broad categories of criminal property confiscation: 1) crime-used (or tainted) property confiscation; 2) crime-derived and criminal benefits property confiscation; 3) drug-trafficker confiscation; and 4) unexplained wealth confiscation. The reach of property confiscation is evident in all four categories.

Take the example of drug-trafficker confiscation. *Azizi, Nyugen, Smith and Davies* demonstrate the very wide net cast by the drug-trafficker provisions in the *CA (Vic)* and the *CPCA (WA)*. Under neither regime is there a need for the State to establish a nexus between the confiscated property and the drug trafficking and that the property is, therefore, the proceeds of crime.

The reach of the drug-trafficker provisions in both of these jurisdictions is extended even further by provisions that include in confiscated property not only property owned by the person declared to be a drug-trafficker or property in which they have an interest, but also property they control, or previously gave away and is now owned by another.⁴² The *CPCA (WA)* does not place a time limit on when the property was given away extending to property given away at any time. By contrast, the *CA (Vic)* is limited to property given away within 6 years of proceedings commencing under the Act.⁴³ Malcolm McCusker AC QC has noted in regards to the Western

⁴¹ See also Johan Boucht, 'The Bona Fide Defence in Confiscation Proceedings—A European Perspective' (Workshop Paper, 'Due Process or Due Proceeds? The Future of Confiscation and Related AML Laws in Australia', 29–30 June 2023).

⁴² *Criminal Property Confiscation Act 2000 (WA)* s 4(e); *Confiscation Act 1997 (Vic)* s 10.

⁴³ *Confiscation Act 1997 (Vic)* s 10(b)(1).

Australian provisions that confiscation could extend to estate administration.⁴⁴ One interviewee commented in the AIC study that ‘there doesn’t seem to be a time limit on this either. So you could have given away a gift fifty years ago before you ever engaged in criminal activity and the DPP would be able to confiscate it’.⁴⁵

B Limited Judicial Discretion in Protecting Third Parties

In some jurisdictions, third parties can be relieved of the harsh consequences of criminal property confiscation by the application of judicial discretion. The *CA (Vic)*, for example, provides, in section 26(1), that ‘The court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just’. Section 26(5) provides examples of orders that the court can make including an order ‘varying the property’ (a), ‘varying any condition to which the restraining order is subject’ (b) or ‘providing for the reasonable living expenses and reasonable business expenses of any person...’(c).⁴⁶

Similarly, the *Criminal Proceeds Confiscation Act 2002 (Qld)*⁴⁷ and *Criminal Assets Recovery Act 1990 (NSW)*⁴⁸ provide for judicial discretion to not make or to vary orders where it would be contrary to the public interest or cause hardship.

While not relied on in *Azizij*, the Court of Appeal in that case recognised the scope for such provisions to remedy unjust confiscation outcomes.⁴⁹ Their capacity to do so is illustrated in *Cobrs v Director of Public Prosecutions for Victoria*.⁵⁰ In similar circumstances to *Azizij*, the Court in *Cobrs* found the accused’s innocent estranged wife could benefit from the application of section 26(1) of the Act to reduce the harshness of the outcome by the Court ‘mak[ing] such orders in relation to the property to which the restraining order relates as it considers just’.⁵¹

By contrast and as discussed in IV.C.1 below, the *CPCA (WA)* has a very limited hardship provision and even then, only in the crime-used property context. Inexplicably, it makes no provision for judicial discretion in relation to other types of confiscation, including drug trafficker confiscation, unexplained wealth or criminal benefits or crime-derived property confiscation. The Northern Territory confiscation scheme mirrors the *CPCA (WA)*.

Executive discretion can ameliorate the impact of confiscation proceedings on third parties in particular cases. For instance, it is understood that the Davies were able

⁴⁴ Wayne Martin AC QC, *Review of the Criminal Property Confiscation Act 2000 (WA)* (WA Department of Justice, May 2019) [11.8] <<https://www.parliament.wa.gov.au/publications/tables/papers.nsf/displaypaper/4013477c99a84d2750a777e2482584c70012db72/%24file/tp-3477.pdf>> (‘Martin Report’). See also Natalie Skead, ‘Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory’ (n 33) 303.

⁴⁵ Skead, Tubex, Murray and Tulich (n 36) 67.

⁴⁶ If, by s 14(4), these ‘these expenses cannot be met from unrestrained property or income of the person’.

⁴⁷ See, eg, ss 31(2)(a), 58(4), 89G(2) and 93ZZB(2).

⁴⁸ See, eg, ss 12(1)(a), 21K, 24, 28A.

⁴⁹ *Azizij v Director of Public Prosecutions* [2022] VSCA 71 [75] (Priest, T Forrest and Walker JJA).

⁵⁰ *Cobrs v Director of Public Prosecutions for Victoria* [2022] VSC 695.

⁵¹ *Ibid* [44].

to continue to reside in their family home by paying the State a peppercorn rent.⁵² However, executive discretion does not substitute for entrenched protection within the legislation, nor does it ensure consistent and independent treatment of like cases in a court. In the Hon Wayne Martin AC QC's 2019 *Review of the Criminal Property Confiscation Act 2000 (WA)* ('the Martin Report'), the need for reform of the *CPCA (WA)* was recognised 'in all cases other than cases relating to crime-derived property' so as to 'confer a discretion upon a court to decline to order the confiscation of part or all of the relevant confiscable property in the public interest, or in the interests of justice' with legislative guidance provided.⁵³ As Allanson J observed in *Whittle v Western Australia* in relation to the drug-trafficker confiscation provisions:

The more general arguments relating to fairness and justice, are not supported by the text of the legislation. The Act is not ambiguous. Whether a confiscation is fair or just, and whether that confiscation will give rise to hardship, are not considerations to which I may have regard.⁵⁴

What is evident is that the protection available to third parties varies depending on the legislative discretion available to courts to alleviate hardship. Where judicial discretion exists, courts may decide that third parties have benefited from the criminality and that release provisions should not be applied. In the absence of such provisions in jurisdictions such as Western Australia and the Northern Territory, such determinations cannot be made.

C Inadequacy of Third-Party Exclusion Provisions

While property confiscation is designed to deprive those involved in criminal activity of their property, provisions allowing for the exclusion or release of an innocent third-party's interest in property from a restraint, freezing or confiscation order (collectively, 'third-party exclusion provisions') are a key mechanism to ensure the proprietary interests of innocent third parties are protected. However, the third-party exclusion provisions in several Australian jurisdictions are inadequate. This is because of: (1) limits on the types of confiscation within the scope of the third-party exclusion provisions; (2) the definition of 'property' in the statutes; and/or (3) the way the courts have interpreted the third-party exclusion provisions.

1 Types of Confiscation to which Exclusion Provisions Apply

A significant limitation on the protective operation of third-party exclusion provisions is the limited categories of confiscations to which they apply. This is a particular issue in Western Australia and the Northern Territory. As noted above, both the *CPCA (WA)* and the *Criminal Property Forfeiture Act 2002 (NT)* ('*CPFA (NT)*') limit the circumstances in which property can be released from a restraining—or freezing—

⁵² Natalie Skead, 'Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory' (n 33) 299.

⁵³ Martin (n 44) [8.20]-[8.21].

⁵⁴ [2012] WASC 244 [47].

order on grounds of hardship. The property targeted must have been crime-used. For example, section 82(3) of the *CPCA (WA)* provides:

The court may set aside the freezing notice or freezing order for the property [that was frozen on the ground that it is crime-used] 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; and
- (b) the objector is an innocent party, or is less than 18 years old; and
- (c) the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed; and
- (d) the objector was usually resident on the property at the time the objection was filed; and
- (e) the objector has no other residence at the time of hearing the objection; and
- (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.⁵⁵

The third-party exclusion provisions in the *CPCA (WA)* and *CPFA (NT)* applying to crime-derived property⁵⁶ are far narrower. They do not provide for consideration of ‘undue hardship’ and they stipulate onerous conditions, including that the third-party and every other person with an interest in the restrained property must be innocent of any involvement in the confiscation offence. Consequently, the provisions do not protect third-parties, like co-owners or mortgagees, who have an interest in property in which the person involved in the commission of the confiscation offence also has an interest.⁵⁷ For example, in *Permanent Trustee Co Ltd v Western Australia*,⁵⁸ even though the joint tenant and registered mortgagee were not involved in the declared drug-trafficker’s criminality, their interest in the restrained property could not be released from restraint or confiscation as one of the interest holders (the declared drug-trafficker joint tenant) was not an innocent party.

Inexplicably, there are no third-party exclusion provisions for hardship to a spouse, de facto partner or dependent applicable to restrained or confiscated criminal benefits, unexplained wealth or drug-trafficker property. In *Lamers v Western Australia*,⁵⁹ Mr Lamers was declared a drug trafficker, resulting in the automatic confiscation of all of his property, including the family home that he shared with his de facto partner, Ms Willis, and her daughter. The Court found that, despite the hardship Ms Willis and her

⁵⁵ See s 63(1)(a) for the equivalent provision in the *Criminal Property Forfeiture Act 2002* (NT).

⁵⁶ *Criminal Property Confiscation Act 2000* (WA) s 83; *Criminal Property Forfeiture Act 2002* (NT) s 64.

⁵⁷ Although ss 83(3) and (4) contemplate that if an objector fails to establish that all owners are innocent parties, a court can make a compensation order, to the value of the objector’s share in the property, once the property is sold.

⁵⁸ [2002] WASC 22.

⁵⁹ [2009] WASC 3.

daughter would suffer as a result of losing their home, the property could not be released from confiscation under section 82(3) of the *CPCA (WA)* for two reasons. First, this section provided for the release of property that had been restrained pending confiscation, rather than for the release of property that has already been confiscated. Second, Templeman J held that the hardship provisions in section 82(3) only applied to the release of property that had been restrained on the basis that it was crime-used and not to other classes of confiscable property, including drug-trafficker property. As Mr Lamers' property was automatically confiscated on him being declared a drug trafficker, Ms Willis' objection fell outside the protective net of section 82.⁶⁰

2 *Definition of and Limitations on 'Property'*

Meaning of 'property'

Another feature of confiscation legislation that may limit the effectiveness of third-party exclusion provisions is the nature of the property that is restrained or confiscated. In some jurisdictions, the meaning of 'property' in this context is the actual real or personal property itself—the land and improvements—rather than an individual's estate or interest in the real or personal property.

In *Azizi*, the wife's interest in the Wollert home was included in the confiscation because section 16(1) of the *CA (Vic)* extended the restraining order to the 'property in which the accused has an interest'. This meant that, rather than it only being the husband drug trafficker's interest in the Wollert home that was restrained, the restraining order targeted the whole of the Wollert home—the land and improvements—including Mrs Azizi's interest.

The property targeted by a restraining or confiscation order is also an issue in the Northern Territory. For example, under section 63(2)(b) of the *CPFA NT*,⁶¹ if one of the property owners is not innocent, the Court can only release the property if the innocent third-party reimburses the Territory for the value of the non-innocent party's share. It is clear, therefore, that it is the land itself that is restrained or confiscated rather than the interest in the thing or land of the person convicted or charged with the confiscation offence.

The Western Australian legislation provides another example. Section 9(1) provides that when confiscated, registered real property 'vests absolutely in the State'. As noted previously, section 9(2)(a) goes on to provide that 'the property vests [in the State] free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants)'.

As illustrated in *Smith*, this provision has the effect of extinguishing all rights, interests and estates held by any person in the land, regardless of their innocence.⁶²

The Martin Report on the *CPCA (WA)* recommend that the definition of property be clarified to 'clearly indicate whether the property which is to be frozen and

⁶⁰ *Lamers v The State of Western Australia* [2009] WASC 3 [60].

⁶¹ A similar provision is found in the *Criminal Property Confiscation Act 2000 (WA)* s 82(7).

⁶² See, eg, *Smith v Western Australia* [2009] WASC 189.

confiscated is an item of personal property or land, or the interest of a person in an item of property'.⁶³ It found specifically that 'the legislation should provide that it is only the interest of the offender that is liable to confiscation, not the interests of third parties such as co-owners or secured lenders'⁶⁴ and that it 'should expressly recognise and preserve legal and equitable proprietary interests of third parties, irrespective of whether they are registered'.⁶⁵

Meaning of 'sufficient consideration'

As illustrated in *Azizi*, the requirement of 'sufficient consideration' in section 20(1)(b) in the *CA (Vic)* appears to prevent the application of the third-party exclusion provisions to legal or equitable interests arising in ways other than through the payment of money, such as by estoppel⁶⁶ or a constructive trust.⁶⁷ The obvious question, however, is whether or not non-financial contributions can be quantified monetarily and therefore construed as 'sufficient consideration'. This may be difficult to argue following the 2007 amendments to the *CA (Vic)* referred to above. In *Azizi*, the Court of Appeal acknowledged that 'it is by no means clear that non-financial contributions can never amount to "sufficient consideration"... But that is a question for another day'.⁶⁸

3 Interpretation Considerations (vs Executive Discretion)

Proceeds of crime legislation is designed to operate harshly. This inevitably influences the way that judges interpret third-party exclusion provisions which can affect third-party rights adversely. On a practical level, what is also evident is the use of (inexplicably) generous executive decisions, which may not be applied consistently to all third-parties.

Lamers provides a good example of some of the interpretive challenges third parties can face. As noted, section 82(3) of the *CPCA (WA)* is restricted by its application to crime-used confiscations. Further, it requires a third-party to meet all seven separate requirements, including being innocent, usually being resident at the property, and it not being practicable to make adequate provision for that party by some other means. In *Lamers*, Templeman J's reading of this section highlighted the significant hurdles that third parties may face. His Honour found that there was insufficient evidence that Lamers' de facto partner would not be able to secure rental accommodation as an alternative to residing in the confiscated property.⁶⁹ His Honour went on to note:

...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

⁶³ Martin (n 44) [11.14].

⁶⁴ Ibid [16.24].

⁶⁵ Ibid [16.26].

⁶⁶ For eg, *Barry v Heider* (1914) 19 CLR 197.

⁶⁷ For eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Rasmussen v Rasmussen* [1995] VR 613.

⁶⁸ *Azizi v Director of Public Prosecutions* [2022] VSCA 71 [74].

⁶⁹ [2009] WASC 3 [77].

sufficient to constitute undue hardship, the operation of the Act would effectively be frustrated.⁷⁰

This harsh judicial application of the *CPCA (WA)* contrasts with the way that the executive has applied section 9(2)(a) in the *CPCA (WA)*. The provision notes that ‘registrable real property vests in the State’ ‘free from all interests... including... mortgages’. Skead has separately written that the Director of Public Prosecutions has not in the past enforced this requirement strictly in relation to registered mortgagee’s interests.⁷¹ In *Pellew v The State of Western Australia*,⁷² for example, the State permitted the registered mortgagee to sell the confiscated mortgaged land and apply the proceeds to settling the mortgage debt and discharging the mortgage. The balance of the proceeds from the sale of the land was paid to the State. As Pullin JA frankly observed ‘[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’.⁷³ It would be preferable for the legislation itself to provide for such interests to be recognised rather than rely on the relatively arbitrary route of executive discretion to not strictly apply the legislation.

Azizi also raised interpretation issues for the innocent third-party who is relying on the exclusion provisions. In *Azizi*, the State argued that, under section 22A(1)(c) of the *CA (Vic)*, Mrs Azizi had ‘acquired the interest from the accused, directly or indirectly’ as a gift and had not paid ‘sufficient consideration’. Mrs Azizi contended that ‘the natural and ordinary meaning of the word “from denotes passing of something from one person to another”⁷⁴ and that she had, therefore, not acquired her interest from her husband, but rather from the vendor of the property at the time of purchase. The Court of Appeal dismissed Mrs Azizi’s interpretation finding that:

A consideration of the text, context and purpose of s 22A(1)(c) reveals that the statutory language is sufficiently broad to capture the circumstances of the present case, where the accused contributed the entirety of the purchase price of the property, from funds in which the applicant had no legal or beneficial interest.⁷⁵

The Court read the *CA (Vic)* as a whole and stressed that like provisions are to be interpreted alike so as to ensure consistency throughout the Act. Their Honours concluded that section 22A(1)(c) was not to be interpreted narrowly when it was not ambiguous in nature. Having regard to the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, the Court understood the Act’s text, context and purpose as suggesting that the provision was designed to operate broadly to prevent defendants from circumventing the Act by underhanded means. Their Honours concluded by observing

⁷⁰ Ibid [78].

⁷¹ Skead, ‘Crime-used property confiscation in Western Australia and the Northern Territory’ (n 22) 83.

⁷² [2010] WASCA 103.

⁷³ Ibid [11].

⁷⁴ *Azizi v Director of Public Prosecutions* [2022] VSCA 71 [36] (Priest, T Forrest and Walker JJA) (emphasis added).

⁷⁵ Ibid [51].

that:

... a purpose of the Act, in particular in so far as it applies to serious drug offenders, is to achieve a harsh outcome: the confiscation of *all* property of a person convicted of a serious drug offence, including property received by a third party as a gift from the accused (subject only to a few limited exceptions).⁷⁶

D Double-Dipping

Hogg highlights a fourth cause of inequitable confiscation outcomes for innocent third-parties: double-dipping by the confiscating party. Compensation orders against Hogg in favour of his swindled clients could not be satisfied because of contemporaneous restraining orders brought by the Commonwealth under the *POCA (Cth)* against all Hogg's property. Notwithstanding these restraining orders, the Commonwealth, through the Australian Taxation Office, continued to pursue Hogg's clients for unpaid taxes and interest. The impact on the innocent clients was clear. Not only did Hogg defraud them, but the compensation awards against Hogg were rendered worthless as a result of the Commonwealth's restraining orders, which in turn deprived the clients of the funds needed to meet their tax liabilities. The Commonwealth may have been concerned that the restraining order was insufficient to cover the amounts owed as taxes by Hogg and his clients. However, at the very least the clients' tax liabilities ought to have been reduced by the amount recouped through the confiscation of Hogg's property.

V CONCLUSION

It is inevitable and widely accepted that criminal property confiscation regimes deprive those involved in criminal activity of the spoils of that activity. Indeed, such deprivation lies at the very heart of state efforts to introduce confiscation legislation. Some may even consider it appropriate to deprive innocent third-parties who, although not involved in the criminal activity themselves, may have benefitted directly or indirectly from the proceeds generated by the criminal activity—third parties such as dependent family members. What is incontrovertible, however, is that there is no justification for criminal property confiscation to financially disadvantage blameless third-parties who receive absolutely no direct or indirect benefit from the relevant criminal activity—commercial third-parties such as the defrauded clients in *Hogg*.

As discussed, there is a range of features in Australian confiscation regimes that have the potential to give rise to inequitable outcomes for innocent third-parties, although these features vary in substance, form and extent from jurisdiction to jurisdiction. Ideally, each jurisdiction's regime ought to be scrutinised and reformed to address each of these features and give the hedgehog legislation a foxy protective tail. For example, in relation to the Western Australian regime embodied in the *CPCA (WA)*, the first of the 53 recommendations in the Martin Report was that "The Western

⁷⁶ Ibid [65] (emphasis in original).

Australian Government give consideration to the repeal of the Act, and enactment of a new Act concerning criminal property confiscation in Western Australia'.⁷⁷

We, together with our co-authors, have previously recognised the unlikelihood of broad-based reform of potentially unjust criminal property confiscation schemes:

the political reality is that, even if the case for reform is compelling and underpinned by clear rule of law and natural justice imperatives, self-interest and electoral gain can pose a bar to achieving bipartisan consensus and necessary law reform.⁷⁸

In Western Australia, the announcement of the comprehensive review of the *CPCA (WA)* suggested a strong appetite on the part of the Labor government to reform the legislation.⁷⁹ Yet, despite a landslide election victory by Labor in that State in 2021 in which it won almost 90% of the seats in the Legislative Assembly, reform pursuant to the recommendations in the Martin Report has been slow. The changes were mostly limited to improving the efficiency and efficacy of the unexplained wealth provisions rather than addressing the inequity of the legislation for innocent third-parties.

Faced with this political reality and the unlikelihood of broad-based reform, at the very least, all criminal property confiscation statutes should embed a guided judicial discretion that allows a court to ameliorate harsh and unjust outcomes for innocent third-parties through appropriate orders on a case-by-case basis.

⁷⁷ Martin (n 44) 11.

⁷⁸ Natalie Skead, Tamara Tulich, Sarah Murray and Hilde Tubex, 'Reforming proceeds of crime legislation: Political reality or pipedream??' (2019) 44(3) *Alternative Law Journal* 176, 181.

⁷⁹ *Ibid.*