

THE POLITICS OF PROCEEDS OF CRIME LEGISLATION

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I INTRODUCTION

It is estimated that crime costs Australia nearly \$36 billion a year.¹ Drug-related crime represents a significant proportion of this cost² and is of increasing global concern.³ At an international level, the 1987 International Conference on Drug Abuse and Illicit Trafficking and the 1988 United Nations Conference for the Adoption of a Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances responded to this concern by adopting the *Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances*⁴ in 1988 to which Australia is a signatory. Article 5 of the *Convention* requires each party to 'adopt such measures as may be necessary to enable confiscation of (a) proceeds derived from [drug-related] offences'.⁵ Perhaps of even greater concern than the increasingly high incidence of drug-related crime is the growing threat of terrorism across the globe. In 2012, the Financial Action Task Force, an independent intergovernmental body, recommended that '[c]ountries should adopt measures ... to enable their competent authorities to freeze or seize and confiscate ... property that is the proceeds of, or used in, or intended or allocated

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1 Kiah Rollings, 'Counting the Costs of Crime in Australia: A 2005 Update' (Research and Public Policy Series No 91, Australian Institute of Criminology, 2008) xi <<http://www.aic.gov.au/documents/9/A/3/%7b9A333836-6275-4855-9C0B-20FB05B05992%7drpp91.pdf>>.

2 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (2007).

3 United Nations Office on Drugs and Crime, *Organized Crime* <<http://www.unodc.org/unodc/pt/organized-crime/index.html>>.

4 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) ('*Convention*').

5 *Ibid* art 5.

for use in, the financing of terrorism, terrorist acts or terrorists organisations'.⁶ Like many countries around the world, in an effort to quell these threats Australia has introduced a raft of proceeds of crime confiscation statutes primarily aimed at stripping those involved in criminal activity of their ill-gotten gains and of the property used in carrying out that activity.⁷

Proceeds of crime statutes operate in all Australian jurisdictions and allow for the confiscation of property, both real and personal, in specified circumstances. These circumstances include where a person's wealth is unexplained; where property is used in the commission of a specified offence; where property is derived from the commission of a specified offence; and where a declared drug trafficker 'owns' property. Such confiscation regimes have been described as 'strong and drastic sanction[s]' which 'go beyond the condemnation of goods used in, or derived from, crime'.⁸ For example, on introducing the Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2014 (SA), the then South Australian Attorney-General explained that 'all of [a declared drug trafficker's] property is confiscated without any exercise of discretion at all, whether or not it is lawfully acquired and whether or not there is any level of proof about any property at all'.⁹

Legislation confiscating the proceeds of crime not only stops criminals profiting from their nefarious activities but also results in the community obtaining at least some financial benefit from the scourge of crime. This, together with the simplicity and perceived effectiveness of this criminal justice tool as a means of fighting serious crime, makes the proliferation of confiscation legislation inevitable. In the current political climate, there is a strong political incentive and appetite for robust confiscation legislation.¹⁰ In 1989, Justice David Sentelle in the United States described the newly introduced

6 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Recommendations, February 2012) 12 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>.

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

8 *A-G (NT) v Emmerson* (2014) 88 ALJR 522, 528 [15], 529 [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('Emmerson').

9 South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014, 82 (John Rau, Attorney-General).

10 See, eg, Natalie Skead, 'Drug-Trafficker Property Confiscation Schemes in Western Australia and the Northern Territory: A Study in Legislation Going Too Far' (2013) 37 *Criminal Law Journal* 296; Brent Fisse, 'Confiscation of Proceeds of Crime: Funny Money, Serious Legislation' 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) 74.

confiscation regime pursuant to the *Racketeer Influenced and Corrupt Organizations Act*, 18 USC §§ 1961–8 (1970) as ‘the monster that ate jurisprudence’.¹¹ Justice Sentelle’s concern was the apparent flouting of civil liberties and the absence of due process, natural justice and fairness inherent in such legislation. As highlighted in this article, such a concern is equally pertinent to Australian proceeds of crime legislation. Any legislation depriving a person of his or her privately owned property without compensation is to be introduced and implemented with great caution. The perceived justifications for and desired outcomes of the legislation are to be carefully weighed against the violation of civil rights that the legislation may inflict, not only on the person who is the target of the confiscation proceedings but also, and perhaps more importantly, on innocent third parties affected by the confiscation.

The challenge for legislators lies in ensuring that proceeds of crime legislation is appropriately crafted. The courts’ role, while monitoring for constitutional infractions, is typically to interpret and apply the law and to leave its at times seemingly harsh operation to the outcomes of the political process. As noted by McKechnie J in relation to the Western Australian confiscation scheme: ‘[t]his is the scheme of the [*Criminal Property Confiscation Act 2000* (WA)]. If it is unfair, others must seek to change it. I can only declare the law’.¹²

It is in such an environment that this article argues that political vote-winning ‘tough on crime’ messaging should not be allowed to compromise robust legislative debate on balancing the protection of individual rights and interests with effective criminal confiscation regimes. The authors propose using the rule of law as a benchmarking framework to guide and inform that debate, thereby resulting in more defensible legislative decision-making. Part II sets out the history, rationale and operation of proceeds of crime regimes in Australia, illustrating respects in which they may be considered ‘less than ideal’ and the reasons why this might be the case. Part III considers the respective roles of the judiciary and legislature in ensuring the rule of law ideal. Part III(A) explores the courts’ role as an umpire in tempering the application of the legislation, ultimately highlighting, however, the expectation that courts defer to executive and legislative policy unless rare constitutional breaches emerge. Part III(B) proposes a normative guide for the legislature in formulating confiscation legislation in Australia which is not only effective and constitutionally valid, but which also sets a standard modelled on rule of law considerations.

11 See Justice David Sentelle, ‘RICO: The Monster that Ate Jurisprudence’ (Speech delivered at RICO, Rights and the *Constitution*, CATO Institute Conference, Washington DC, 18 October 1989).

12 *Smith v Western Australia* [2009] WASC 189, [18].

II PROCEEDS OF CRIME LEGISLATION: A SHARP POLITICAL TOOL

A Brief History

The confiscation of property from those engaged in criminal activity is not a 20th century innovation. The current proceeds of crime legislation in Australia may be said to have its genesis in the ancient English common law attainder and ‘corruption of blood’.¹³

Attainder is believed to have emerged in 1308¹⁴ and became an integral part of English criminal law during the reign of King Richard II. While the processes and procedures for attainder underwent significant changes over the centuries, the purpose and effect remained constant: extinction of civil rights on sentencing for treason and/or felony.

Regarded as the most heinous crimes of all, the only punishment for treason and felony was death. In addition, on conviction of these crimes, the offender was attainted, from the Latin *attinctus*, meaning ‘blackened’ or ‘stained’. The consequence of the attainder was that the offender’s real property and hereditary titles were forfeited to the Crown. For treason, the offender’s land was forfeited absolutely. For felonies, land was forfeited to the Crown for a year and a day and then, because felonies were considered a breach of the feudal bond, escheated to the Feudal Lord from whom the convict held tenure. A further consequence of attainder was the ‘corruption of the blood’ which rendered the convict *civilliter mortuus*,¹⁵ unable to inherit or bequeath property. Attainder and ‘corruption of blood’ resulted in the deprivation of all rights and protections afforded under law.¹⁶

Over the centuries, attainder came to be regarded as anachronistic and unjustly harsh. Ultimately attainder was abolished in England with the passing of the *Forfeiture Act 1870* (Imp) 33 & 34 Vict, c 23.¹⁷ The enactment of similar abolishing Acts followed in Australia.¹⁸ While attainder is no longer of any

13 *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 85 (Kirby P). See also *Emmerson* (2014) 88 ALJR 522, 528–9 [16]–[18] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

14 L W Vernon Harcourt, *His Grace the Steward and Trial of Peers* (Longmans, Green, and Co., 1907) 388 n 3. See also J G Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge University Press, 1970) 175–205.

15 Sir Edwardo Coke, *The First Part of the Institutes of the Laws of England. Or, a Commentary upon Littleton: Not the Name of the Author Only, but of the Law Itself* (London, 1629) 130a.

16 P Brett and P Waller, *Criminal Law* (LexisNexis Butterworths, 3rd ed, 1971) 110; Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 1, 476–7. See also *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 588 (Gibbs J); *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 85–6 (Kirby P).

17 See also C Attenborough, *Harris’s Principles of the Criminal Law* (Stevens and Haynes, 7th ed, 1896) 453.

18 See, eg, *Felons (Civil Proceedings) Act 1981* (NSW); *Forfeiture for Treason and Felony Abolition Act 1878* (Vic). See also *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 86 (Kirby P).

application in Australia, it may be argued that the notion of forfeiture attendant upon attainder has been reintroduced through proceeds of crime legislation ‘as part of the armoury of the State in responding to particular criminal offences’.¹⁹

B The Underlying Political Rationale

While proceeds of crime legislation may have its origins in attainder, the purpose and rationale underlying each scheme is quite different. The forfeiture of property under the principle of attainder was ancillary to the imposition of the death penalty for traitorous crimes against the Crown. The forfeiture of property for treason and felony ‘[had its] source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions’.²⁰ It follows that, rather than being imposed to achieve some social or political end, forfeiture of property for treason or felony occurred simply as a natural and necessary consequence of the feudal property system then in place. The inevitable execution of the traitor or felon was itself enough to achieve any desired social or political outcome, including deterrence.

By contrast, the introduction of proceeds of crime legislation from the late 20th century was seemingly premised on the worldwide effort to combat organised crime. Justice Moffitt, the then President of the New South Wales Court of Appeal, writing extra-judicially, opined:

A primary target for attack, if syndicates and their power are to be destroyed, is the money and assets of organised crime. There are many reasons to support this view. The goal of organised crime is money. The financial rewards are very great, and they are greater because the profits are tax-free. Money generates power; it allows expansion into new activities; it provides the motive for people to engage in such crime. It is used to put the leaders in positions, superior to that of others in the community, where they are able to exploit the law and its technicalities and so on. At the same time, it is the point at which organised crime is most vulnerable.²¹

Proceeds of crime legislation was, and still is, intended to provide a four-pronged weapon in the war against organised and other serious crime. First, it aims to *deprive* a person of the financial benefits of engaging in crime. This deprivation is seen as an important aspect of the punishment levelled against persons engaged in such criminal activity.²² Fisse and Fraser argue that the legislation makes engaging in criminal activity an expensive hobby as its confiscation of ‘both capital and income’ tend to make it ‘unprofitable’.²³

19 *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 86 (Kirby P). See also *R v Saffron [No 4]* (1989) 39 A Crim R 353, 356 (Kirby P).

20 Sir James Fitzjames Stephen, *History of the Criminal Law in England* (MacMillan, 1883) vol 1, 488.

21 Athol Moffitt, *A Quarter to Midnight – The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (Angus & Robertson, 1985) 143.

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

23 Brent Fisse and David Fraser, ‘Some Antipodean Skepticisms about Forfeiture, Confiscation of Proceeds of Crime and Money Laundering Offences’ (1993) 44 *Alabama Law Review* 737, 738.

Secondly, it seeks to *deter* reoffending by expunging the advantages of crime in keeping with the old adage ‘crime doesn’t pay’.²⁴ In the High Court case of *International Finance Trust Co Ltd v New South Wales Crime Commission*, French CJ acknowledged

the widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets.²⁵

The tale of Bruce Richard ‘Snapper’ Cornwall is illustrative. Cornwall, having been sentenced to 23 years imprisonment for drug offences, gloated in a letter to one of his protagonists: ‘I don’t give a fuck what they do to me as long as we keep safe all that we have worked for’.²⁶ The risk of not only imprisonment but, if Snapper Cornwall is to be believed, the permanent removal of the fruits of illegal endeavour, is likely to make a life of crime far less appealing.

Thirdly, confiscating the proceeds of crime is said to *incapacitate* criminal activity by targeting its economic base and eradicating the working capital available and necessary to finance further criminal activity.²⁷

Finally, through extensive information gathering provisions,²⁸ it aims to assist law enforcement bodies *trace* the money trail and thereby the crime chain. In 1983, Frank Costigan QC stated:

The first thing to remember is that the organisation of crime is directed towards the accumulation of money and with it power. The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organised criminals is to follow their money trails. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities.²⁹

These compelling justifications for proceeds of crime legislation have resulted in many nations worldwide employing such crime-fighting legislative

24 See *Riggs v Palmer*, 115 NY 506, 514 (Earl J) (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’.

25 (2009) 240 CLR 319, 345 [29] (*‘International Finance Trust’*).

26 Ian Temby, ‘The *Proceeds of Crime Act*: One Year’s Experience’ (1989) 13 *Criminal Law Journal* 24, 30.

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

28 *PoCA Cth* ch 3; *Confiscation of Criminal Assets Act 2003* (ACT) pt 12; *Confiscation of Proceeds of Crime Act 1989* (NSW) pt 4; *CARA NSW* pt 4; *Criminal Assets Confiscation Act 2005* (SA) pt 6; *Crime (Confiscation of Profits) Act 1993* (Tas) pt 5; *Confiscation Act 1997* (Vic) pt 13; *CPCA WA* pt 5.

29 Frank Costigan, ‘Organised Fraud and a Free Society’ (1984) 17 *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* (2009) 98 [5.4].

tools³⁰ with significant historical claims.³¹ Certainly, they reflect the stated underlying rationale for the introduction, and continued refinement and development, of proceeds of crime legislation in Australia. Section 3 of the *Proceeds of Crime Act 1987* (Cth), for example, sets out a clear statement of the three principal objectives of the initial Commonwealth legislation:

- (1) The principal objects of this Act are:
 - (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories;
 - (b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and
 - (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property.

A similar but more comprehensive statement of objectives has been included in the *Proceeds of Crime Act 2002* (Cth).³² Analogous objects provisions are also found in the statutes of a number of Australian states and territories.³³

In addition to the much repeated punishment-, deterrence-, incapacitation- and enforcement-related policy outcomes, one cannot ignore the ancillary social benefits underlying the confiscation of proceeds of crime: the importance of confiscation to the community's perception of and confidence in law enforcement agencies and strategies; the removal of prohibited goods from the streets; compensating society for the hardship and suffering that crime inflicts on both individuals and the community;³⁴ and reimbursing society for the human and financial expense of fighting organised crime.³⁵

A further potential benefit (or, perhaps even, objective) of proceeds of crime legislation³⁶ is the contribution it makes to consolidated revenue. During the

30 Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014).

31 *International Finance Trust* (2009) 240 CLR 319, 344 [25] (French CJ).

32 See *PoCA Cth* s 5.

33 *Confiscation of Criminal Assets Act 2003* (ACT) s 3; *CARA NSW* s 3; *CPFA NT* s 3; *CPCA Qld* s 4; *Confiscation Act 1997* (Vic) s 1.

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

35 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 *Journal of Money Laundering Control* 345, 345; Arie Freiberg, 'Confiscating the Proceeds of White-Collar Crime' (Paper presented at Australian Institute of Criminology Conference, Canberra, 20–23 August 1991) 4; Mirko Bagaric, 'The Disunity of Sentencing and Confiscation' (1997) 21 *Criminal Law Journal* 191; Thornton, above n 27.

36 In 1996, the Australian National Audit Office pointed out that when introducing the *Proceeds of Crime Act 1987* (Cth), the federal Attorney-General identified the three principal financial objectives of the legislation as being 1) to provide mechanisms to return significant revenue to the Commonwealth; 2) to provide significant financial benefit to the Commonwealth, the states and foreign countries with which Australia has mutual assistance arrangements; and 3) to return benefits which outweighed its administrative costs: see Australian National Audit Office, 'Recovery of Proceeds of Crime' (Audit Report No 23, 1996) 5; Arie Freiberg and Richard Fox, 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33 *Australia and New Zealand Journal of Criminology* 239, 244.

financial year ending 30 June 2012 alone, over \$45 million was confiscated under the *PoCA Cth*.³⁷ Since its commencement on 1 January 2003, property in excess of \$180 million has been confiscated under this statute.³⁸ Confiscation in the states and territories has varied dramatically.³⁹ Although the value of property confiscated pursuant to proceeds of crime confiscations may be considerable, it is questionable that this financial windfall is the driver of the legislation as the cost of administering, implementing and enforcing the confiscations far outweighs the financial benefits received.⁴⁰

Given the multitude of political and social benefits of proceeds of crime legislation, it is not surprising that there has been an increasing parliamentary focus across Australia on the effectiveness of such legislation as a weapon

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- 37 Director of Public Prosecutions (Cth), *Annual Report* (2011–12) 140, Table 5 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2011-2012.pdf>>.
- 38 Director of Public Prosecutions (Cth), *Annual Report* (2010–11) 156, Table 5 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2010-2011.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2009–10) 156, Table 5 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2009-2010.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2008–09) 129, Table 5 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2008-2009.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2007–08) 100, Table 5 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2007-2008.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2006–07) 79 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2006-2007.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2005–06) 79 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2005-2006.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2004–05) 55, Table 6 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2004-2005.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2003–04) 45, Table 6 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2003-2004.pdf>>; Director of Public Prosecutions (Cth), *Annual Report* (2002–03) 41, Table 6 <<http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2002-2003.pdf>>.
- 39 At the upper end of the scale, the New South Wales Crime Commission reported over \$19 million recovered under the *CARA NSW* in the financial year ending 30 June 2013: New South Wales Crime Commission, *Annual Report* (2012–13) 13–14 <http://www.crimecommission.nsw.gov.au/files/annual_report_2012-2013.pdf>. In addition, property valued at \$1.1 million was confiscated under the *Confiscation of Proceeds of Crime Act 1989* (NSW): Office of the Director of Public Prosecutions (NSW), *Annual Report* (2012–13) 40 <<http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2012-2013-annual-report.pdf?sfvrsn=6>>. Recovery in other jurisdictions in the same period amounted to \$16.98 million in Queensland: Office of the Director of Public Prosecutions (Qld), *Annual Report* (2012–13) 16 <http://www.justice.qld.gov.au/_data/assets/pdf_file/0020/215921/ODPP-Annual-Report-2012-13.pdf>; \$14.2 million in Victoria: Office of the Director of Public Prosecutions (Vic), *Annual Report* (2012–13) 19 <<http://www.opp.vic.gov.au/Home/Resources/Annual-Report-2011-12>>; \$9.36 million in Western Australia: Office of the Director of Public Prosecutions (WA), *Annual Report* (2012–13) 4 <http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2012_13.pdf>; \$2.32 million in South Australia: Director of Public Prosecutions (SA), *Annual Report* (2012–13) 26 <<http://www.dpp.sa.gov.au/03/2012-2013.pdf>>; and over \$1.87 million in the Australian Capital Territory: Director of Public Prosecutions (ACT), *Annual Report* (2012–13) 23 <http://www.dpp.act.gov.au/_data/assets/pdf_file/0010/497377/2012-2013-Annual-Report.pdf>. Confiscation figures for Tasmania and the Northern Territory are not publicly available.
- 40 Vivienne O'Connor and Colette Rausch (eds), *Model Codes for Post-conflict Criminal Justice* (United States Institute of Peace Press, 2007) vol 1, 163.

against serious and organised crime.⁴¹ To this end, the legislation in virtually all jurisdictions has been subject to ongoing scrutiny and reform. The reforms have resulted in progressively more expansive legislation. The initial conviction-based schemes of the mid-1980s have, due to their perceived inadequacy,⁴² been supplemented with civil regimes which are not dependent on criminal prosecution and conviction.⁴³ Confiscation legislation has become an additional tool to the standard criminal justice weaponry, and is an adjunct to conviction-based legislative devices.⁴⁴

An example of the recent expansion of proceeds of crime frameworks is the federal government's introduction on 5 March 2014 of the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth). This amendment is aimed at 'ensuring the Commonwealth has the toughest framework possible to target criminal proceeds'⁴⁵ by strengthening the operation of the unexplained wealth provisions including 'removing a court's discretion to make ... orders once relevant criteria are satisfied'.⁴⁶ In introducing this Bill, the federal Minister for Justice commented that

serious and organised crime poses a significant threat to Australian communities. The government is committed to ensuring our nation is safe and secure, and to taking tough steps to strike at the heart of organised crime ... Unexplained wealth laws turn the tables on criminals who live off the benefits of their illegal activities at the expense of hardworking Australians.⁴⁷

State examples include the Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2014 (SA) which seeks to introduce drug-trafficker confiscations into the South Australian legislative regime, and the *Criminal*

41 See, eg, Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999); Parliamentary Joint Committee on the Australian Crime Commission, *Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 29; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]* (2009); Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)* (Attorney-General's Department, 2006); Standing Committee of Attorneys-General, Parliament of Australia, *Communiqué* (16–17 April 2009). See also Freiberg and Fox, 'Effectiveness of Australia's Confiscation Laws', above n 36; Lusty, above n 35, 345.

42 See, eg, Freiberg and Fox, 'Effectiveness of Australia's Confiscation Laws', above n 36.

43 Lorana Bartels, 'A Review of Confiscation Schemes in Australia' (Technical and Background Paper, Australian Institute of Criminology, 2010) 2.

44 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic). See Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian & New Zealand Journal of Criminology* 44, 50.

45 Michael Keenan, 'Tighter Laws to Capture Spoils of Criminal Activities' (Media Release, 5 March 2014) <<http://www.ministerjustice.gov.au/Mediareleases/Pages/2014/First%20Quarter/5March2014Tighterlaws tocapturespoilsofcriminalactivities.aspx>>.

46 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) 2.

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 2014, 1641 (Michael Keenan).

Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013 (Qld) which inserts unexplained wealth confiscations into the Queensland regime, with retrospective effect.

C Australian Regimes of ‘Extreme[s]’

While the political and social benefits underlying proceeds of crime legislation appear irrefutable, these benefits must be viewed in light of the effect that the legislation may have on individual rights, including property rights. In particular, potential hardship can result to a defendant’s innocent family members and other blameless third parties who may have an interest in the targeted property. As Barr J in *Emmerson v Director of Public Prosecutions (NT)* noted:

Most people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay. If crime did pay, there would be no incentive for law-abiding members of the community not to commit crimes. However, the overlapping legislative scheme in question has travelled a very long way from the principle that crime should not pay.⁴⁸

The operation of the legislation tends to be unremitting and notoriously complex. In *Centurion Trust v Director of Public Prosecutions (WA)*, Owen JA, in attempting to construe the Western Australian confiscation provisions, commented that

in my time on the Bench I have seldom come across a piece of legislation as perplexing and difficult to construe as this one ... The legislation has previously been described as draconian and some of the concepts that emerge from it can justifiably be described as extreme.⁴⁹

This trend towards increasingly exacting proceeds of crime legislation is pervasive. The legislative features making this so are many and varied. Three general concerns arising from these schemes are discussed below.

First, it may be argued that, although civil in name, proceeds of crime confiscation proceedings are essentially criminal in nature.⁵⁰ Not only does confiscation effectively impose a proprietary penalty on a defendant who has engaged in criminal conduct⁵¹ but, in doing so, it pins a badge of criminality on the defendant. This is achieved via a civil court system in which liability is established on the lesser evidentiary standard: a balance of probabilities.

48 (2013) 33 NTLR 1, 38 [110] (Barr J).

49 (2010) 201 A Crim R 324, 343 [75]. See also *R v Bolger* (1989) 16 NSWLR 115, 117–18 (Allan J).

50 R E Bell, ‘Civil Forfeiture of Criminal Assets’ (1999) 63 *Journal of Criminal Law* 371, 382; Freiberg, ‘Criminal Confiscation, Profit and Liberty’, above n 44; Liz Campbell, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm’ (2010) 41 *Victoria University of Wellington Law Review* 15; Carol S Steiker, ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 775; Anthony Davidson Gray, ‘Forfeiture Provisions and the Criminal/Civil Divide’ (2012) 15 *New Criminal Law Review: An International and Interdisciplinary Journal* 32.

51 Bagaric, above n 35, 200–1.

Regardless of the objections that may be levelled at dressing what are essentially criminal proceedings in civil robes, the inescapable fact is that all Australian jurisdictions have now adopted the recommendations of the various Royal Commissions⁵² undertaken in the early 1980s and introduced non-conviction based, civil confiscation proceedings into their proceeds of crime statutes.

Being civil in nature, confiscation proceedings import a civil standard of proof and civil rules of evidence, necessarily making the Crown's job in securing a confiscation all the easier. Some statutes go even further in assisting the Crown in this regard. For example, section 136(2) of the *Criminal Property Forfeiture Act 2002* (NT) permits decisions under the Act to be based on 'hearsay evidence or hearsay information'.

Moreover, non-conviction based proceeds of crime legislation shifts the burden of proof from the Crown to the defendant. Unexplained wealth confiscations provide a useful example. As the Commonwealth Parliamentary Joint Committee on Law Enforcement stated:

Unexplained wealth laws are controversial because they reverse the longstanding legal tradition of the presumption of innocence. Under most unexplained wealth regimes, once certain tests or thresholds have been satisfied, it is the respondent who must prove that wealth has been legitimately acquired.

Unexplained wealth laws are more intrusive than proceeds of crime laws because, in their purest form, they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard ...⁵³

By way of example, under the *CPCA WA*, wealth is 'unexplained' and therefore confiscable 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.⁵⁴ However, the onus is not on the state to establish that the defendant's wealth was not lawfully acquired. Rather, it is presumed that the wealth was not.⁵⁵ The *CPCA WA* thereby effectively shifts the onus onto the defendant to

52 See, eg, New South Wales, Royal Commission of Inquiry in Respect of Certain Matters Relating to Allegations of Organised Crime in Clubs, *Final Report* (1974); Queensland, Tasmania, Victoria and Western Australia, Australian Royal Commission of Inquiry into Drugs, *Final Report* (1980); Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984); New South Wales, New Zealand, Queensland and Victoria, Royal Commission of Inquiry into Drug Trafficking, *Final Report* (1983); Commonwealth and New South Wales, Royal Commission of Inquiry into the Activities of the Nugan Hand Group, *Final Report* (1985).

53 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (2012), 9 [2.18]–[2.19].

54 *CPCA WA* s 12(1).

55 *CPCA WA* s 12(2). It is not clear from this section whether the burden placed on the defendant is an evidentiary burden only or whether the defendant bears the legal burden of proof. The section states that '[a]ny property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent *establishes* the contrary' (emphasis added). The use of the term 'establishes' would suggest that it is not sufficient for the defendant to simply lead evidence that his or her wealth was lawfully acquired, this fact must be 'established', that is, proved by the defendant. Thus analysed, the defendant has a legal burden of proof in this regard.

prove that his or her wealth was lawfully acquired. In addition, pursuant to section 28(2) of the *CPCA WA*, there is a presumption in relation to targeted property that ‘the respondent effectively controlled the property at the material time, or gave the property away, unless the defendant establishes the contrary’. The burden therefore rests with the defendant to establish that the targeted property was not under his or her effective control or was not given away by him or her at any time and is consequently not liable to confiscation.

The *CPCA WA* not only casts a burden of proof on the defendant. In some circumstances, innocent third parties who are caught up in the proceedings by having the misfortune of holding an interest in property restrained under the unexplained wealth provisions may also be saddled with such a burden. Once property has been restrained under the *CPCA WA*, dealing with that property by any person is an offence⁵⁶ unless the person did not know and could not reasonably have known that the property was frozen.⁵⁷ The burden in this regard is on the person, often a third party, who deals with the property who is taken to have notice that the property is restrained.⁵⁸

These evidence and proof features of proceeds of crime legislation may be said to fly in the face of Australia’s fundamentally adversarial system of law and undermine the notion that a defendant is ‘innocent until proven guilty’.

A second concern is the potential for the restraint and confiscation of property, pursuant to proceeds of crime legislation, to impact on the property rights of blameless third parties. This potential is particularly evident in relation to confiscated Torrens land. Each of the Australian proceeds of crime statutes provides for the vesting of legal title to confiscated land (or an estate or interest in land) in the Crown on compliance with registration requirements.⁵⁹ There is little, if any, uniformity in the effect of these vesting provisions. In particular, there is little, if any, uniformity on the impact of registration and vesting of the Crown’s interest on pre-existing estates or interests.

In some jurisdictions, the statute expressly provides that, on registration, confiscated land vests in the Crown free ‘from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants)’.⁶⁰ In these jurisdictions, the registration of the confiscation effectively extinguishes all existing estates and interests, registered and unregistered, in the confiscated land held by third parties.

56 *CPCA WA* s 50(1).

57 *CPCA WA* s 50(4).

58 *CPCA WA* s 115(1). See *Bennett & Co (A Firm) v DPP (WA)* (2005) 31 WAR 212, 224 [56] (The Court).

59 Pending registration, title to the confiscated land will vest in the Crown in equity only, although the Director of Public Prosecutions may take other steps to protect the Crown’s equitable interest in the property, including lodging a caveat over the property. See, eg, *PoCA Cth* ss 67(1), 96(1); *Confiscation of Criminal Assets Act 2003* (ACT) s 110; *Criminal Assets Confiscation Act 2005* (SA) s 90(2).

60 *CPFA NT* s 131(2); *CPCA WA* s 9.

In other jurisdictions, the legislation provides that, on registration of the confiscation, the land vests in the Crown as proprietor subject to all registered interests.⁶¹ While existing registered interests over the land are protected, registration of the Crown as proprietor of the land operates to automatically extinguish any unregistered interests in the confiscated property held by third parties.⁶²

By contrast, the vesting provisions in the *Confiscation Act 1997* (Vic) provide that, on confiscation, property vests in the Crown

subject to every mortgage, charge or encumbrance to which [the confiscated property] was subject immediately before the order was made ... and to – in the case of land, every interest registered, notified or saved under the *Transfer of Land Act 1958* ...⁶³

The Victorian legislation is exemplary in this regard. By using the conjunctive ‘and’ it effectively provides that, on vesting in the Crown, confiscated land remains subject to *all* pre-existing estates and interests, not just those that have been registered. This necessary and entirely appropriate third party protection is absent from the regimes in other jurisdictions.

It may be suggested that, while perhaps harsh, fault and responsibility for the consequences of confiscation lie squarely with the defendant rather than the legislature. It is conceded that confiscation pursuant to proceeds of crime legislation is a result of the defendant’s own conduct and, therefore, it may be considered that regardless of how severe it may be, the impact of confiscation on the property rights of the defendant is his or her fault and responsibility and is,

61 *Confiscation of Proceeds of Crime Act 1989* (NSW) s 19(1)(b); *CPCA Qld* s 215(3) read with *Land Title Act 1994* (Qld) s 184(1); *Crime (Confiscation of Profits) Act 1993* (Tas) s 17(1)(c). The proceeds of crime statutes of the Commonwealth, South Australia and the Australian Capital Territory are silent on the effect of the confiscated and vesting of Torrens land in the Crown on existing estates or interests. It is suggested that pursuant to the Torrens statutes in these two jurisdictions, the registered title of the Crown would similarly be subject to existing registered encumbrances but free from all unregistered estates and interests.

62 In *Leros Pty Ltd v Terrara Pty Ltd*, the High Court of Australia held unanimously that an unregistered and uncaveated interest will be defeated on the registration of a subsequent inconsistent dealing and, further, that ‘[o]nce that interest is defeated by registration of a subsequent inconsistent dealing bringing about the registration of a new proprietor, the first interest is extinguished for all purposes and cannot be asserted against any later proprietor’: (1992) 174 CLR 407, 418–19 (Mason CJ, Dawson and McHugh JJ).

63 *Confiscation Act 1997* (Vic) ss 3, 41(2). The *Confiscation Act 1997* (Vic) incorporates a rather curious feature in s 42. Under this section, if a court is satisfied that a security interest over confiscated property was created to limit the effect of the confiscation order, the court may discharge that security interest. It is unclear what is meant by ‘discharge’ in this regard as the term is not defined in the Act. Applying its ordinary meaning, discharge refers to the right to remove the mortgage as an encumbrance over the property on paying all that is owing under the mortgage debt: see generally LexisNexis, *Halsbury’s Laws of Australia* (at 29 August 2014) 295 Mortgages and Securities, ‘9 Right to Discharge Mortgage’ [295-6390]. On this definition, it would seem that s 42 of the *Confiscation Act 1997* (Vic) requires the state to pay out the outstanding mortgage debt. However, if the security interest was created to limit the effect of the confiscation order, perhaps the legislators envisaged that the security interest be discharged without settling the security debt. Clarity is required in this regard.

therefore, justified. In this sense, one may liken confiscation to imprisonment; it is the price you pay for engaging in criminal activities. The same analogy cannot be drawn, however, with the impact of proceeds of crime confiscation on the property rights of innocent third parties. This is a direct result of the expansive operation of the legislation. There is no analogous impact on third parties resulting from imprisonment – it is the offender and the offender alone who is imprisoned. Under proceeds of crime, it may be an innocent third party's property that is affected by the confiscation.

A third concern with Australian proceeds of crime legislation is the high incidence of effectively non-judicial confiscations. A number of Australian jurisdictions incorporate *both* conviction-based and non-conviction based confiscation procedures into their proceeds of crime statutes.⁶⁴ In these jurisdictions, conviction-based confiscation is typically automatic. That is, on conviction of a specified category of criminal offence,⁶⁵ any and all crime-used property, crime-derived property and criminal benefits are automatically confiscated without the need for a court order.⁶⁶ The confiscation in these instances is mandatory and administrative, without any opportunity for argument and adjudication before a competent court. Judicial involvement is limited to making a declaratory order confirming the automatic confiscation. There is no discretion as to whether the order should or should not be made. It must be made. Given the potential consequences of a confiscation order on the property rights of a range of parties, as discussed above, it is argued in Part III(B) of this article that at every stage of the confiscation process (and particularly at the stage of final confiscation) the courts should be vested with a discretion to consider the ramifications of the confiscation and vary orders made. This should be the case regardless of whether the defendant has been convicted of the relevant offence or not. Judicial involvement and discretion in the confiscation process is not recommended only on the basis of legal principle but also for the protection of blameless family members and third parties.

The features of proceeds of crime legislation discussed above illustrate just three aspects of the legislation that has earned it the reputation of being 'extreme' and 'harsh'.⁶⁷ Others, including the retrospective operation of the legislation, the

64 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic).

65 See, eg, *PoCA Cth* s 92; *Confiscation of Criminal Assets Act 2003* (ACT) s 58(2); *CPCA Qld* s 17; *Criminal Assets Confiscation Act 2005* (SA) s 4; *Confiscation Act 1997* (Vic) pt 3 div 2, sch 2.

66 Automatic confiscation is also available under the non-conviction based scheme contained in the *CPCA WA* ss 7, 30.

67 See, eg, *Burnett v DPP (NT)* (2007) 21 NTLR 39, 67 [40] (Martin (BR) CJ); *Centurion Trust Co Ltd v DPP (WA)* (2010) 201 A Crim R 324, 343 [75] (Owen JA); *DPP (SA) v George* (2008) 102 SASR 246, 291 [214] (White J); Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth) 33; South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2011, 3744 (Anastasios Koutsantonis).

absence of judicial discretion and the introduction of prosecutorial discretion, are discussed in Part III(B) below.

D Walking the Law and Order Tightrope

The ‘build a better mouse-trap’ approach to being ‘tough on crime’ is far from new. According to Freiberg:

when a moral panic is created ... when the end of civilization as we know it seems nigh, when a social object, like the elimination of organized crime or drug-trafficking seems worthy enough, the pressure to create legislation that allow fewer rights to individuals is intense and often proves irresistible.⁶⁸

Hogg and Brown, in their classic 1998 work, described the constant law and order barrage, ‘the uncivil politics of law and order’, as the staple of the Australian political machine.⁶⁹ Quite apart from its utility, proceeds of crime legislation is an ideal tool for conveying a political party’s community safety and drug-fighting platform.⁷⁰ Confiscating the proceeds of crime incapacitates criminals financially, destroys their business model and also allows society to recoup some of the felonious spoils. This appeal means that it is unlikely to fall off the politicians’ radar any time soon.⁷¹ As noted above, while there is considerable variation in proceeds of crime legislation around Australia, ongoing legislative reform in this area frequently sees jurisdictions keeping up with more extreme provisions introduced elsewhere.⁷²

Research conducted overseas suggests that confiscation legislation, when participants are aware of it, has incredibly high levels of popular support.⁷³ Popular support is so high that condemnation of proceeds of crime regimes is often aligned with ‘being “soft on crime”’ or as showing ‘more interes[t] in the civil liberties of drug dealers and criminals than in helping the Government to defend communities’.⁷⁴

The wide gamut of proceeds of crime legislation is also favoured by justice and prosecuting agencies as its breadth, including the lower burden of proof

68 Freiberg, ‘Criminal Confiscation, Profit and Liberty’, above n 44, 69. For a discussion of civil forfeiture legislation as a response to a ‘moral panic’ focused on organised crime in Ireland, see John Meade, ‘Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture’ (2000) 10 *Irish Criminal Law Journal* 11.

69 Russell Hogg and David Brown, *Rethinking Law & Order* (Pluto Press, 1998) 1–2.

70 See, eg, Grant Wardlaw, ‘Drug Control Policies and Organised Crime’ in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book, 1988) 152–3.

71 Richard Fox, ‘Future Directions in Criminal Law’ (Paper presented at the 4th National Outlook Symposium on Crime in Australia: New Crimes or New Responses, Canberra, 21–22 June 2011) 11; Paul J Larkin, Jr, ‘Public Choice Theory and Overcriminalization’ (2013) 36 *Harvard Journal Law & Policy* 715, 791.

72 South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014 (John Rau, Attorney-General) 82.

73 Campbell, above n 50, 34. See also Eva Gottschalk, UK Home Office, *Public Attitudes to Asset Recovery and Awareness of the Community Cashback Scheme* (Results from Opinion Poll, September 2010).

74 Campbell, above n 50, 32.

associated with civil provisions, can make confiscations more successful and orders easier to achieve than standard criminal prosecutions.⁷⁵

There are two obvious responses to the concern that misplaced law and order rhetoric is driving the proceeds of crime legislative machine. First, proceeds of crime regimes are recognised internationally as a valid tool to fight crime and organised criminal activities. Secondly, the Australian democratic process is designed to allow voters to elect their representatives, who in turn require majority parliamentary support for their criminal justice legislative platforms. The difficulty with these responses is that they assume that the parliamentary process will pursue crime-fighting amendments while balancing other considerations such as due process, individual rights and proportionate responses to crime. The law and order politics of criminal confiscations means that such assumptions are not necessarily accurate and that some legislative prudence guided by normative standards informed by the rule of law is required.

III A BALANCED PROCEEDS OF CRIME REGIME: A JUDICIAL OR LEGISLATIVE FUNCTION?

In a political climate in which a strong stance against crime garners the confidence of the electorate and wins votes, a defensible and lawful proceeds of crime regime is the responsibility of all arms of government. The role of the courts, however, is limited to applying the law and intervening at the margins where questions of constitutionality arise. It is the authors' view that the legislature bears the ultimate responsibility for ensuring that the politics of law and order, and the executive's policy agenda, does not compromise the integrity of confiscation legislation. In exploring the respective roles of the judiciary and legislature in this context, this Part proposes a normative guide for the formulation of proceeds of crime legislation which is not only effective and constitutionally valid, but which also sets a standard modelled on rule of law considerations.

A The Courts as Umpire

The courts are arguably the most visible part of the criminal justice process. High-profile cases are the routine diet of the news media with trials, convictions and sentences often being the subject of considerable public comment. However, the conspicuousness of the courts can lead to a perception that the courts have a substantive role to play in criminal policy. While judicial review by the courts

75 Ibid 35; Freiberg, 'Criminal Confiscation, Profit and Liberty', above n 44, 50; Tamara R Piety, 'Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process' (1991) 45 *University of Miami Law Review* 911, 924.

plays a crucial safeguarding role,⁷⁶ in most cases, rather than invalidating legislation, the courts apply and interpret the law as enacted by Parliament and as implemented by the executive. The experience of proceeds of crime legislation is no exception to the fact that courts, outside constitutional limits and established common law interpretative principles, must defer to legislative policy.⁷⁷

For example, in the recent High Court decision in *Attorney-General (NT) v Emmerson* considering the Northern Territory confiscation legislation, the majority stated that ‘whether ... punishment fits the crime ... is a matter for the legislature. It is irrelevant (and wrong) for the courts to attempt to determine whether any forfeiture ... is proportionate to the stated objectives’.⁷⁸ Their Honours continued:

It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both ‘deter’ and ‘deal with’ such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about the justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature.⁷⁹

There are several reasons for this approach.

First, constitutions in Australia, even more so at the state level, are devoid of sweeping constitutional guarantees or rights charters.⁸⁰ The framers of the *Commonwealth Constitution* favoured reliance on the common law and parliamentary process over constitutionally entrenched rights protections.⁸¹ Even the jurisdictions of Victoria and the Australian Capital Territory, which have enacted statutory rights charters, can have the protected rights overridden by their legislatures and do not confer on the judiciary the power to invalidate enactments for rights non-compliance. Regardless, the civil nature of much confiscation legislation means that constitutional safeguards, like those that exist in the United States and Canada, are typically not of assistance against such statutory proceeds of crime machinery.⁸²

76 *Australian Communist Party v Commonwealth* (1951) 83 CLR 2, 262–3 (Fullagar J); *Thomas v Mowbray* (2007) 233 CLR 307, 387–8 [229] (Kirby J); *Momcilovic v The Queen* (2011) 245 CLR 1, 89 [156] (Gummow J).

77 See, eg, *R v Lake* (1989) 44 A Crim R 63, 64 (Kirby P); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 [32] (Gleeson CJ).

78 (2014) 88 ALJR 522, 540 [75] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

79 Ibid 541–2 [85]. See also *Magaming v The Queen* (2013) 87 ALJR 1060, 1081 [108] (Keane J).

80 Cf, eg, the operation of the *Proceeds of Crime Act 2002* (UK) c 29 and its interaction with the *Human Rights Act 1998* (UK) c 42: Edward Rees, Richard Fisher and Richard Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002* (Oxford University Press, 4th ed, 2011) 11.

81 *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J). See also George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 52.

82 Freiberg, ‘Criminal Confiscation, Profit and Liberty’, above n 44, 69; Stacy J Pollock, ‘Proportionality in Civil Forfeiture: Toward a Remedial Solution’ (1994) 62 *George Washington Law Review* 456, 458.

Secondly, the dualist approach to international law sees Australia's international rights obligations only directly become part of Australian law following domestic incorporation of such rights into parliamentary enactments.⁸³ While this does not make international law irrelevant,⁸⁴ it does mean that the ability to challenge Australian legislation as contrary to international human rights obligations is significantly curtailed.

Thirdly, the nature of Australia's liberal democratic tradition positions the judiciary as the 'weaker' branch of government. Within this system, the courts play a supervising role, however, 'legislative supremacy'⁸⁵ is well established and foundational. Ultimately, outside constitutional limits, the judiciary's ability to invalidate legislation is constrained. While rule of law restrictions have been floated,⁸⁶ and common law tenets such as the principle of legality permit legislation to be read down to protect established rights where drafting allows it,⁸⁷ constitutional references to laws being enacted 'for the peace, order and good government' have not been held to be a substantive limitation on legislative action.⁸⁸ As Kirby J explained in *Baker v The Queen*:

It is a serious step for a court to hold that legislation enacted by an elected Parliament is constitutionally invalid. The *Constitution* gives expression to principles of parliamentary democracy, both federally and in the States. Normally, a law enacted by such a Parliament will be upheld by the courts. It is not their province to invalidate laws simply because such laws are regarded as bad, unjust, ill-advised or offensive to notions of human rights.⁸⁹

Similarly, Brennan CJ noted in *Nicholas v The Queen* that 'if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial'.⁹⁰

The courts therefore are 'neither the friend nor the enemy of confiscation law'.⁹¹ It is not the place of unelected judges to unpick legislation which is validly enacted and constitutional. Even when there are grounds for striking

83 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

84 Ibid.

85 *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister of Industrial Relations* (1986) 20 IR 19, 43 (Kirby P). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 [32] (Gleeson CJ).

86 *Momcilovic v The Queen* (2011) 245 CLR 1, 215–16 [562]–[563] (Crennan and Kiefel JJ). But see the cautionary words of Kirby P in *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister of Industrial Relations* (1986) 20 IR 19, 51.

87 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 202–3 [3], 230–1 [56] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31] (French CJ); Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

88 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

89 *Baker v The Queen* (2004) 223 CLR 513, 545 [87].

90 (1998) 193 CLR 173, 197 [37] ('*Nicholas*').

91 See Justice Chris Maxwell, 'The Role of Courts under Asset Confiscation Legislation' (Address delivered at the OPP Proceeds of Crime Conference, Melbourne, 6 October 2011) 10 <<http://www.austlii.edu.au/au/journals/VicJSchol/2011/22.pdf>>. See also: at 4.

down legislation, this can be the subject of legislative rebuke. Take the response to the *International Finance Trust* decision, discussed below. The 4:3 decision invalidating section 10 of the *Criminal Assets Recovery Act 1990* (NSW) was rebuked by Senator Steve Hutchins, who chaired the Parliamentary Joint Committee on the Australian Crime Commission, for a ‘complete disregard for the interests of public order and justice’ and demonstrating the Court’s failure to ‘accept that the social values underpinning our foundation document are changing along with the realities of life and social order’.⁹² As Maxwell J noted at a conference some months later:

Someone with a sharper appreciation of democratic fundamentals would have seen things rather differently. What happened was a demonstration of the separation of powers in action. It is vital for the health of our democracy that courts are ready and willing to perform their constitutional duty, by ensuring that both legislative and executive action remain within the limits of legal validity.⁹³

1 *Proceeds of Crime before the Courts*

Notwithstanding the confined role of the judiciary, at what point can and should courts, as constitutional guardians, intervene? Are there grounds on which proceeds of crime legislation can be challenged successfully? The answer varies depending on whether the courts are dealing with state or federal proceeds of crime legislation.

Commonwealth legislation can be questioned either as not falling within a Commonwealth head of power or as infringing an express or implied constitutional limit, such as Chapter III of the *Commonwealth Constitution*. The High Court’s expansive interpretation of Commonwealth legislative heads of power has made the former increasingly uncommon. Section 51(xxxi) (preventing acquisitions of property on other than just terms) of the *Commonwealth Constitution* operates as both a head of power and a limitation on power and would seem the provision most relevant to property confiscation. However, the Court’s interpretation of section 51(xxxi) as not applying to contexts in which the application of just terms is illogical, such as on the levying of fines or penalties, has rendered it of little use in the proceeds of crime context.⁹⁴ Justice Gageler’s strong dissent in *Emmerson* leaves open the degree to

92 Joel Gibson, ‘Anger as Crime Assets Unfrozen’, *The Sydney Morning Herald* (online), 18 November 2009 <<http://www.smh.com.au/national/anger-as-crime-assets-unfrozen-20091117-ikfa.html>>. See also Michael Pelly, ‘High Court Hears the Dog Bark Again’, *The Australian* (online), 4 December 2009 <<http://www.theaustralian.com.au/business/legal-affairs/high-court-hears-the-dog-bark-again/story-e6frg97x-1225806773274>>.

93 Maxwell, above n 91, 10.

94 See, eg, *Re DPP (Cth)*; *Ex parte Lawler* (1994) 179 CLR 270. Note also *Emmerson* (2014) 88 ALJR 522, which saw the majority refuse to apply the Northern Territory equivalent of s 51(xxxix), *Northern Territory (Self-Government) Act 1978* (Cth) s 50(1), to proceeds of crime legislation (Gageler J dissenting).

which there may be room for a reconsideration of the role for section 51(xxxi) in this legislative setting.⁹⁵

Chapter III of the *Commonwealth Constitution* would appear a more fertile ground for contesting confiscation laws. The federal Chapter III limitation, cemented by the High Court's seminal decision in *R v Kirby; Ex parte Boilermakers' Society of Australia*,⁹⁶ limits the ability of federal courts to exercise non-judicial (non-incidental) powers and requires federal judicial powers to be conferred on Chapter III courts, based on the operation of section 71 of the *Commonwealth Constitution*. This principle raises constitutional complexities for federal proceeds of crime legislation to the extent that it compromises the exercise of judicial power by federal judges.⁹⁷ This might occur through the conferral of judicial powers on non-judicial bodies or requiring Chapter III judges to exercise powers which cannot be classed as properly judicial.

State parliaments are decidedly less constrained than the Commonwealth legislature. State constitutions confer plenary legislative power on parliaments to make laws 'for the peace, order and good government' of the state, but this conferral has not been found to limit 'bad' laws that might be introduced through legislative will.⁹⁸ While the *Commonwealth Constitution* imposes some limits on the states through both express⁹⁹ and implied constitutional principle,¹⁰⁰ Chapter III aside, these are unlikely to have much relevance in the proceeds of crime context due to the legislation's subject matter and the intention for the Commonwealth scheme to not operate to the exclusion of state-based confiscations. Through the Chapter III derived principle initially expounded in *Kable v Director of Public Prosecutions (NSW)*,¹⁰¹ however, state legislation cannot require state courts to compromise their institutional integrity, or essential character as courts. This operates differently to the principle in *Boilermakers'* and is a result of the integrated role that Chapter III contemplates for state courts within the Australian judicial system, namely the vesting of state courts with

95 *Emmerson* (2014) 88 ALJR 522, 542 [91] ff.

96 (1956) 94 CLR 254 ('*Boilermakers*"); *A-G (Cth) v R; Ex parte Australian Boilermakers' Society* (1957) 95 CLR 529.

97 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 (Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ).

98 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408–10 (Gaudron, McHugh, Gummow and Hayne JJ).

99 See, eg, *Commonwealth Constitution* ss 92, 109.

100 See, eg, the implied freedom of political communication limits state legislatures: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. So too does the doctrine of intergovernmental immunity: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

101 (1996) 189 CLR 51 ('*Kable*').

federal jurisdiction pursuant to sections 71 and 77(iii).¹⁰² While, until recently, this principle had rarely been activated, cases such as *Re Criminal Proceeds Confiscation Act 2002*¹⁰³ and *International Finance Trust*¹⁰⁴ show that Chapter III can have implications for the validity of proceeds of crime legislative provisions. However, the *Kable* principle's range of operation is not extensive. Its province is extreme cases where confiscation provisions trespass upon the integrity of the judicial process.

What is clear is that establishing that proceeds of crime legislation has divested the 'process of its judicial character' is a difficult task indeed.¹⁰⁵ Courts have tended to construe legislative provisions in ways that do not interfere with either the institutional integrity of state courts or, for federal courts, 'in a manner which is [not] inconsistent with the essential character of a court or with the nature of judicial power'.¹⁰⁶ For example, constitutional issues do not surface simply because proceeds of crime provisions capture property acquired before a regime's enactment, because statutory criteria can be readily fulfilled¹⁰⁷ or because the onus of proof is inverted by civil confiscation provisions.¹⁰⁸ Rather, the prime candidates for invalidation are provisions which usurp the judicial process by compelling a court to make the order sought, which confer the ability to punish upon non-judicial bodies or which fundamentally compromise the integrity of the courts. That said, following Justice Gageler's reasoning in *Emmerson*, whether proportionality will come to influence the operation of section 51(xxxi) remains to be seen.

The examination of two contrasting recent examples of proceeds of crime challenges¹⁰⁹ reveals that grounds for constitutional invalidity, especially on the basis of Chapter III, are not commonly present even if rule of law difficulties abide.

2 *International Finance Trust*

In *International Finance Trust*,¹¹⁰ section 10 of the *CARA NSW* required the New South Wales Supreme Court to hear and determine, without notice to any person thereby affected, applications for restraining orders made ex parte by the

102 On the basis of the *Kable* principle as developed by subsequent cases such as *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45; *South Australia v Totani* (2010) 242 CLR 1.

103 [2004] 1 Qd R 40.

104 (2009) 240 CLR 319.

105 *Emmerson* (2014) 88 ALJR 522, 538 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

106 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas* (1998) 193 CLR 173, 185 (Brennan CJ).

107 *Emmerson* (2014) 88 ALJR 522, 538 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

108 *Silbert v DPP (WA)* (2004) 217 CLR 181, 186 [11] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Nicholas* (1998) 193 CLR 173, 190 (Brennan CJ).

109 See also *Re Criminal Proceeds Confiscation Act* [2004] 1 Qd R 40; *Silbert v DPP (WA)* (2004) 217 CLR 181; *DPP (NT) v Dickfoss* (2011) 28 NTLR 71.

110 (2009) 240 CLR 319.

New South Wales Crime Commission. The majority of the High Court, comprising French CJ, Gummow, Bell and Heydon JJ, held that section 10 was invalid under the *Kable* principle, although the reasons for this finding differed. As it was left to the discretion of the Commission to determine whether to bring an application on notice or not, the Chief Justice considered that '[t]he court's discretion as to the conduct of its own proceedings in the key area of procedural fairness is supplanted by the Commission's judgment'¹¹¹ so as to 'distor[t] the institutional integrity of the Court and affec[t] its capacity as a repository of federal jurisdiction'.¹¹²

By contrast, Gummow and Bell JJ, and Heydon J, based their respective decisions not solely on the mandatory *ex parte* nature of the application, but also on the absence of any mechanism for the 'effective curial enforcement of the duty of full disclosure on *ex parte* applications'.¹¹³ This resulted from the failure by the legislature to provide a procedure for the court to hear an application for the 'speedy dissolution'¹¹⁴ of the *ex parte* restraining order once notice of its grant had been given. Such failure was repugnant to the judicial process in a fundamental degree and represents an instance where constitutional law concerns and rule of law infractions may overlap. This correlation between constitutional invalidity and rule of law infraction based on the absence of judicial involvement in the confiscation process is discussed in Part III(B) below.

In a joint judgment, the minority (comprising Hayne, Crennan and Kiefel JJ) dissented on the grounds that the *CARA NSW* did not affect the court's inherent general law power in relation to an order made *ex parte* to reconsider the matter *inter partes* and set aside the order if satisfied that there were no grounds on which to make the order at the time of considering the revocation application.¹¹⁵

As might be expected, the New South Wales Parliament amended the *CARA NSW* in the aftermath of the decision in *International Finance Trust*. The amendments included the introduction of section 10A which, despite permitting an application for a restraining order to be made *ex parte*, confers a discretion on the court to require notice to be given.¹¹⁶ In addition, section 10C was introduced. Section 10C addresses the reasoning of Gummow and Bell JJ, and Heydon J, by allowing a court to set aside a restraining order on application by a person with an interest in the restrained property if either the Commission fails to satisfy the court that there are reasonable grounds for the relevant suspicion on which the application for the order was based or, more generally, if the order was obtained illegally or without good faith.

¹¹¹ Ibid 350 [45].

¹¹² Ibid 355 [56].

¹¹³ Ibid 366 [97] (Gummow and Bell JJ).

¹¹⁴ Ibid 383 [149] (Heydon J).

¹¹⁵ Ibid 374–6 [125]–[130].

¹¹⁶ *CARA NSW* s 10A(4).

The decision in *International Finance Trust* may be contrasted with that in *Director of Public Prosecutions (Cth) v Kamal*.¹¹⁷ In this case, the Western Australian Court of Appeal considered the constitutionality of section 26(4) of the *PoCA Cth*. Much like section 10 of the *CARA NSW*, section 26(4) of the *PoCA Cth* requires a court to ‘consider an application for a restraining notice without notice having been given if the DPP requests the court to do so’. It was argued on behalf of Mr Kamal, in accordance with the majority finding in *International Finance Trust*, that section 26(4) is ‘invalid as a legislative attempt to direct the outcome of an exercise of jurisdiction’.¹¹⁸ The Court unanimously rejected this argument on the basis that the *PoCA Cth* included an adequate safeguard whereby the court could reconsider and revoke a restraining order if satisfied that there were no grounds on which to make the order at the time of considering the revocation application.¹¹⁹ The different results in *International Finance Trust* and *Kamal* highlight the complexity of identifying the constitutional boundaries for judicial monitoring of executive action under proceeds of crime legislation.

3 *Emmerson*

*Emmerson*¹²⁰ was an appeal against the decision of the Northern Territory Supreme Court of Appeal relating to section 36A of the *Misuse of Drugs Act 1990* (NT) and section 94 of the *CPFA NT*. By 6:1 (Gageler J dissenting), the High Court allowed the appeal, concluding that the forfeiture scheme did not violate the principle in *Kable* or section 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth), which requires Northern Territory laws ‘with respect to the acquisition of property’ not to be made ‘otherwise than on just terms’.

The majority were of the view that these provisions were not incompatible with the institutional integrity of the Supreme Court of the Northern Territory. Their Honours recognised that the Court had inherent power to correct any abuses of process resulting from the prosecutorial discretion brought about by the scheme¹²¹ and noted that orders were made following a hearing ‘in open court, in circumstances where an affected party has a right to be heard, may have legal representation, and may make submissions and receive reasons’.¹²² The majority also commented that the ‘ease of proof of the [statutory] criteria’ did not compromise the judicial process undertaken by the Supreme Court.¹²³ Even

117 (2011) 248 FLR 64 (*Kamal*).

118 Ibid 99 [136] (McLure P), citing *International Finance Trust* (2009) 240 CLR 319, 360 [77] (Gummow and Bell JJ), 386 [157] (Heydon J); *South Australia v Totani* (2010) 242 CLR 1, 63 [133] (Gummow J).

119 *PoCA Cth* s 42(5).

120 (2014) 88 ALJR 522.

121 Ibid 538 [64] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

122 Ibid 538 [65].

123 Ibid.

assuming that the judge's discretion was significantly curtailed, the court still acts independently and undertakes an 'orthodox adjudicative processes involving the hearing of evidence and the making of a determination which is subject to the usual processes of appeal'.¹²⁴

The majority also rejected the 'unjust terms' argument and the contention that it is the court's role to weigh up the proportionality of the confiscation. Their Honours concluded that section 50(1) was inapplicable on the familiar section 51(xxxi) *Commonwealth Constitution* basis¹²⁵ that the provision of just terms would be discordant with the nature of a forfeiture sanction.¹²⁶

Dissenting on the 'unjust terms' issue, Gageler J noted that the discretion granted to the Supreme Court did not extend to 'limit[ing] the property restrained'¹²⁷ and that the 'property subject to a restraining order then forfeited on declaration need have no connection with those or any other criminal activities'.¹²⁸ For Gageler J, section 50(1) was activated by virtue of the disproportionate operation of the provisions which arbitrarily bring about 'statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP'.¹²⁹ His Honour also intimated that a Commonwealth Chapter III challenge to equivalent provisions might be possible on the basis that the nature of executive discretion contemplated 'to obtain civil forfeiture as a means of punishment for criminal guilt' amounts to a 'confer[ral] on the DPP part of an exclusively judicial function'.¹³⁰

Emmerson demonstrates the fine constitutional distinctions that may be drawn in the Chapter III context; constitutional arguments are often only successful at the margins. This is particularly the case in assessing whether sufficient curial supervision of confiscation orders is prescribed in legislation.

B Drafting Proceeds of Crime Legislation: A Normative Guide

The instances in which a constitutional challenge to proceeds of crime legislation will be successful are likely to be few and far between because of the sparse constitutional arguments that can be relied upon. Justice Mildren in *Director of Public Prosecutions (NT) v Dickfoss*,¹³¹ for instance, acknowledged the harshness of many features of the *CPFA NT*, but determined that '[h]arshness is not in itself an indication of invalidity'.¹³² Without avenues for constitutional invalidity, it is the role of the judiciary to apply the law as written by the

124 Ibid 539 [68].

125 See, eg, *Re DPP (Cth); Ex parte Lawler* (1993) 179 CLR 270.

126 *Emmerson* (2014) 88 ALJR 522, 541 [84] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

127 Ibid 543–4 [99].

128 Ibid 545 [104].

129 Ibid 549–50 [135].

130 Ibid 550 [138].

131 (2011) 28 NTLR 71.

132 Ibid 108 [110].

legislature. The Parliament therefore has a pivotal role in ensuring that proceeds of crime appropriately balances the clear competing interests at stake. The authors contend that this crucial balancing process should be guided by rule of law considerations.

The rule of law, while not uncontested,¹³³ has been recognised as fundamental to the basic operation of the Australian legal framework.¹³⁴ Its conceptions vary from ‘thick’ notions fleshed out with detailed rights guarantees to ‘thinner’, more procedurally based models.¹³⁵ The risk is that the rule of law loses its utility and meaning as a concept because of its ubiquity such that to different people it means quite different things, or at least idealised versions of the same thing.¹³⁶ Its disputed content notwithstanding, there is some consensus as to a skeletal version of the rule of law doctrine encompassing a legal system governed by non-arbitrary, certain and prospective rules which apply to all and which are subject to review by the courts.¹³⁷ This article does not argue for the application of a rich conception of the rule of law to proceeds of crime legislation. Instead, it seeks to sidestep the evident jurisprudential concerns by contending that proceeds of crime legislation should respect the core elements of the rule of law, stripped down to its bare essentials. On this basis, confiscation laws should aim to be clear, avoid retrospective operation, allow for fair processes, constrain arbitrary or unrestrained power and be amenable to judicial monitoring.¹³⁸

Australian constitutional principle, while paying heed to it, is distinguishable from the rule of law. As Evans explains, the rule of law does ‘not translate directly into propositions about constitutional validity’.¹³⁹ Declared constitutional validity is, therefore, not definitive of defensible confiscation legislation: just because a law is problematic on rule of law grounds, such as through limited

133 See, eg, Simon Evans, ‘The Rule of Law, Constitutionalism and the *MV Tampa*’ (2002) 13 *Public Law Review* 94, 95–6; Murray Gleeson, ‘Courts and the Rule of Law’ (Speech delivered at The Rule of Law Series, University of Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm#_edn14>; Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2000) 74 *Southern California Law Review* 1307, 1308; Peter M Shane, ‘The Rule of Law and the Inevitability of Discretion’ (2013) 36 *Harvard Journal of Law and Public Policy* 21.

134 *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 175 (Dixon J).

135 Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195; Rosenfeld, above n 133, 1309.

136 See, eg, Jeremy Waldron, ‘Is the Rule of Law an Essential Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137; Allan C Hutchinson and Patrick Monahan, ‘Democracy and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 97, 99; Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1.

137 See, eg, Raz, ‘The Rule of Law and Its Virtue’, above n 135.

138 See, eg, Gleeson, above n 133.

139 Evans, above n 133, 101.

judicial involvement in the confiscation process, does not necessarily mean that it is unconstitutional.

That said, in the Victorian Charter context of *Momcilovic v The Queen*, Crennan and Kiefel JJ considered the possibility of a more direct alignment between the two.¹⁴⁰ While not finally deciding, their Honours raised whether the rule of law, being a founding principle influencing the formulation of the *Commonwealth Constitution*, may confine state and federal parliamentary power.¹⁴¹ In the proceeds of crime context, the *possibility* is that an arbitrary, retrospective and extreme property confiscation scheme could reach a point at which the courts' complicity in such a scheme has to fall away on constitutionalised rule of law grounds. At least in the immediate future, the more likely scenario is that constitutional invalidity will occur in spaces where established constitutional law grounds overlap with rule of law infractions. For example, this may arise in cases where schemes compromise the integrity of the judicial process required by Chapter III, such as in relation to the provisions struck down in *International Finance Trust*. However, as constitutional validity does not always mirror rule of law compliance, this still leaves an important role of monitoring legislation for rule of law violations to the legislature.

Legislatures have a key role to play in drafting proceeds of crime regimes before they come to be challenged before the courts. This role is to ensure that Bills are appropriate in scope and range, are based on solid policy, constitutional and criminological advice and do not compromise the backbone of the rule of law. Most simply, this can occur through the process of parliamentary debate and parliamentary committees. The Commonwealth Parliamentary Joint Committee on Human Rights, even with its notable failings,¹⁴² has a crucial role here. This Committee, which arose out of the government's response to the Brennan Inquiry,¹⁴³ is charged with reporting to Parliament on proposed legislation's compliance with core human rights legislation.¹⁴⁴ This committee often has cause to turn its mind to rule of law related considerations.¹⁴⁵ Similarly, the Australian

140 (2011) 245 CLR 1, 215–16 [562]–[563].

141 Ibid 216 [563], citing the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *South Australia v Totani* (2010) 242 CLR 1, 155–6 [423] (Crennan and Bell JJ). See also *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 431 (Kirby J) referred to state 'laws' as being of a 'kind envisaged by the *Constitution*' and 'certain "extreme" laws ... fall[ing] outside that constitutional presupposition'.

142 Williams and Hume, above n 81, 20.

143 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

144 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See Parliament of Australia, *Parliamentary Joint Committee on Human Rights* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights>.

145 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

Capital Territory and Victoria, being the sole jurisdictions with statutory human rights charters, require legislation to be assessed for compliance with the statutorily protected rights which themselves often mirror rule of law entitlements and responsibilities.¹⁴⁶ Even jurisdictions without such charters should not be exempt from the necessity for detailed parliamentary review and debate respecting the importance of just laws and processes.

The challenge is how to ensure that legislatures that acknowledge rights protections do not automatically decline to include them in proceeds of crime enactments on political grounds. What is required is a genuine and transparent balancing process that weighs up the social and political benefits of confiscation legislation with the implications it may have not only for defendants, but also related and unrelated third parties. Particular attention needs to be given to avoiding the features of current Australian schemes that are inconsistent with the rule of law. These features include the absence of judicial discretion; deferral to executive discretion; retrospectivity; and atypical provisions relating to the burden and standard of proof.

1 Absence of Judicial Discretion

There are a broad range of approaches to the role of the judiciary in the implementation and operation of Australian proceeds of crime legislation: from no judicial discretion whatsoever¹⁴⁷ to broad, seemingly unfettered, discretion.¹⁴⁸ This spectrum of judicial scrutiny has significant rule of law implications.

In 1999, it was the Australian Law Reform Commission's view that, at least in relation to the confiscation of criminal profits, 'the retention by the courts of any discretion ... flies directly, and unacceptably, in the face of the principal objective ... of the [Proceeds of Crime] Act, namely, that a person should not be entitled to be unjustly enriched as a result of unlawful conduct' and further that 'the nature of that principle is such that it does not admit of exceptions, particularly discretionary exceptions'.¹⁴⁹ Respectfully, this position is untenable. Given the potentially significant consequences of confiscations under the legislation for both defendants and third parties, a key factor in striking the appropriate balance here is judicial discretion.

Concerns relating to proportionality, constitutional validity and third party protection dictate that at every stage of the confiscation process (from information gathering orders to restraining orders to final confiscation orders) the

146 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

147 Such as under the *CPCA WA*, where a court has no discretion in making an unexplained wealth order.

148 Such as under the *PoCA Cth*, where a court has a wide, seemingly unfettered discretion in making an unexplained wealth order. As to whether judicial discretion can ever be considered truly 'unfettered' or 'absolute', see Aharon Barak, *Judicial Discretion* (Yale University Press, 1989) 19; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 843; James Edelman, 'Judicial Discretion in Australia' (2000) 19 *Australian Bar Review* 285, 286.

149 Australian Law Reform Commission, above n 41, [3.24]–[3.25].

courts should be vested with some measure of discretion to consider the ramifications of an order before it is made.¹⁵⁰ While discretion may be seen as controversial, it is submitted that in order to provide an adequate and appropriate check on prosecutorial and other executive decision-making what is required is either legislatively constrained executive discretion with grounds to judicially review the exercise of that discretion, or, judicial discretion in cases where the executive's powers are not adequately constrained by statute.

From a constitutional point of view, cases like *International Finance Trust*¹⁵¹ demonstrate the function of judicial discretion within the judicial process. While failed attempts to challenge statutory provisions that impose mandatory sentences have shown that the absence of judicial discretion is not necessarily unconstitutional,¹⁵² what is clear is that if the judicature becomes nothing more than an executive or legislative pawn, constitutional roadblocks are likely. As French CJ explained in *South Australia v Totani*:

It has been accepted by this Court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities. The Parliament of a State may enact a law of a similar kind in relation to the exercise of jurisdiction under State law. It is also the case that 'in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence'. But these powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions.¹⁵³

Judicial discretion cannot be compromised to such an extent that the 'manner and outcome of the exercise' of a court's jurisdiction is overtaken;¹⁵⁴ that it unjustifiably removes core elements of the judicial process;¹⁵⁵ or that it requires orders to be made by legislative edict. Moreover, in cases where deeming provisions operate to remove judicial discretion, defendants may, by the operation of the provisions, be thwarted from 'proving the truth of contested matters'.¹⁵⁶ Aside from questions of constitutionality, such provisions offend against the rule of law and should not be included in proceeds of crime legislation.

150 See also Stephen Odgers, 'Proceeds of Crime: Instrument of Injustice?' (2007) 31 *Criminal Law Journal* 330, 330–1.

151 (2009) 240 CLR 319.

152 See, eg, Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' (2012) 36 *Criminal Law Journal* 335, 341, 348–9.

153 *South Australia v Totani* (2010) 85 ALJR 19, 43–4 [71] (citations omitted).

154 *International Finance Trust* (2009) 240 CLR 219, 352–3 [50] (French CJ).

155 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67] (French CJ). See also in the proceeds of crime context: *Lee v New South Wales Crime Commission* (2013) 215 CLR 196, 263 (Kiefel J).

156 *Silbert v DPP (WA)* (2004) 217 CLR 181, 195 [44] (Kirby J).

What is required is a ‘guided’¹⁵⁷ judicial discretion to permit judicial consideration of the proportionality between the impact of the confiscation on all interested parties on the one hand and achieving the objectives of the legislation on the other;¹⁵⁸ that is, balancing the public interest in achieving the objects of the legislation,¹⁵⁹ with the impact of the legislation on any person. Take, for example, the drug-trafficker confiscation schemes operating in Western Australia and the Northern Territory. Under these schemes, on being declared a drug-trafficker, *all* the defendant’s property, whenever acquired and whether connected with criminal activity or not, is automatically confiscated. A court *must* make an order to this effect¹⁶⁰ and has no discretion in this regard.¹⁶¹ In *Director of Public Prosecutions (WA) v Roth-Beirne*, Hasluck J noted that ‘the obligation imposed upon the Court ... is mandatory. Once the Court is satisfied that the statutory requirements have been met the Court must make a declaration’.¹⁶² It may be considered by a court, however, that, in rendering the defendant (and his or her dependants) impecunious, such confiscation goes far beyond achieving the underlying objective of the legislation of ensuring crime does not pay by stripping a defendant of his or her ill-gotten gains. In addition to restitution, deterrence and incapacitation, the confiscation inflicts severe and, arguably, disproportionate additional punishment on not only the defendant but also his or her dependants. Introducing into these confiscation provisions a guided judicial discretion allowing the courts to take into account considerations of proportionality, hardship and public interest is desirable.

Specifically in relation to third party interests, in making restraining or confiscation orders, it is suggested that courts should be explicitly directed to consider the effect of their orders on the property rights of innocent third parties. The potentially harsh operation of the legislation on third party interest holders is illustrated in *Permanent Custodians Ltd v Western Australia*.¹⁶³ In this case, the plaintiff contested a freezing order placed against land registered in the name of two co-owners. The freezing order was issued on the sole basis that one of the co-owners might be declared a drug trafficker and was limited to that co-owner’s interest in the property. The plaintiff held a first registered mortgage over the frozen property. As the co-owners had defaulted on their mortgage repayments, the plaintiff sought to enforce its rights under the mortgage by selling the property. While acknowledging the unfortunate inequity of the result and being

157 Ibid.

158 See Australian Securities Commission v Deloitte Touch Tohmatsu (1996) 70 FCR 93; Anthony Gray, ‘The Compatibility of Unexplained Wealth Provisions and “Civil” Forfeiture Regimes with *Kable*’ (2012) 12(2) *QUT Law & Justice Journal* 18. See also Odgers, above n 150, 330–1.

159 *DPP (SA) v Sienczewski* [2010] SASC 16, [32] (Duggan J).

160 *CPCA WA* s 8; *CPFA NT* ss 8–9, 94(1).

161 *Emmerson v DPP (NT)* (2013) 33 NTLR 1, 39 [111] (Barr J).

162 *DPP (WA) v Roth-Beirne* [2007] WASC 91, [20].

163 [2006] WASC 225.

‘mindful that a purpose of construction which minimises the interference with legitimate third party rights should be preferred’,¹⁶⁴ the Court concluded that a proper interpretation and application of the legislation necessitated a finding that resulted in the loss of mortgagee property rights by the plaintiff. Despite the plaintiff’s interest in the property not being the subject of the freezing order, in dismissing the plaintiff’s claim, the judge noted that ‘CPCA forbids dealing with frozen property in any way ... [and] actions by a mortgagee in selling the property is a dealing with the property’.¹⁶⁵

Certainly, the risk of incorporating judicial discretion into the confiscation process is that it becomes so open that judges may move away from applying legally defined standards towards a position of making decisions on policy grounds. However, members of the High Court have recognised that while inevitably policy interplays with judicial decision-making, the fluidity of this is confined by the judicial process and case method.¹⁶⁶

The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) provides the most recent example of a limited but appropriate degree of judicial discretion in the federal proceeds of crime regime. This Bill seeks to amend section 179E of the *PoCA Cth*, which provides that the court ‘must’ make a literary proceeds order, by adding the caveat in section 179E(6) that the court may refuse to do so ‘if it is not in the public interest’.¹⁶⁷

2 Unbridled Executive Discretion

As discussed above, Gageler J (in dissent) in *Emmerson* left open the possibility of a challenge to proceeds of crime regimes on the basis of overt executive discretion.¹⁶⁸ His Honour noted that confiscation under the *CPFA NT* did not occur by statutory provision but only if the Director of Public Prosecutions ‘considers [it] in the public interest’ to forfeit property ‘liable’ for

164 Ibid [19] (McKechnie J).

165 Ibid [14]–[15] (McKechnie J).

166 *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ), citing Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 195. See also *PoCA Cth* s 48(3)(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(1)(b); *CPCA Qld* ss 139(3), 140(5); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 20(4); *Crime (Confiscation of Profits) Act 1993* (Tas) s 16(2)(b); *Confiscation Act 1997* (Vic) s 33(5).

167 As to an uncircumscribed public interest discretion, the Full Court of the Federal Court noted in *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 124 that in evaluating what was or was not in the public interest ‘was essentially one of fact and degree, and by its very nature it will be something that is not easily susceptible to judicial review’. The presumed meaning is that the exercise of the discretion called for encompasses such a broad purview that it will be very difficult for an appellate tribunal to decide whether or not a trial judge has made an error of law in coming to a decision as to whether or not a matter is in the public interest or not. Further, in *Queensland v Kupfer* [2003] QSC 458, 462 White J considered that the public interest does not entail considerations of proportionality between the relevant confiscation offence and the extent and value of restrained property.

168 (2014) 88 ALJR 522, 550 [138].

confiscation pursuant to an application brought under the terms of the Act.¹⁶⁹ Even the majority, while not pursuing Justice Gageler's point, emphasised the Court's inherent power to protect against prosecutorial discretionary abuses.¹⁷⁰ Justice Gageler classified the extent of the prosecutor's discretion which entails 'civil forfeiture as a means of punishment for criminal guilt' as potentially resulting in executive usurpation of the judicial function.¹⁷¹ This could well present constitutional difficulties as the 'adjudgment and punishment of criminal guilt' is a well-established judicial function which cannot be assigned both federally¹⁷² and at the state level.¹⁷³

The unexplained wealth provisions enacted in several Australian jurisdictions¹⁷⁴ provide particularly extreme examples of this. Although classified as 'civil',¹⁷⁵ Gray notes that they effectively impose 'the "punishment" of taking a person's wealth or property away when no specific allegation of wrongdoing need be made, let alone proven beyond reasonable doubt'.¹⁷⁶ See, for example, section 71(1) of the *CPFA NT*, which provides that

[t]he court that is hearing an application under section 67 must declare that the respondent has unexplained wealth if it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth.

Further, section 10(4) provides that a person who has such an order made against him or her is 'taken to be involved in criminal activities'.¹⁷⁷

Perhaps of greatest concern in this regard are the automatic confiscation provisions encountered in those Australian jurisdictions that incorporate both conviction-based and non-conviction based confiscation procedures into their proceeds of crime statutes.¹⁷⁸ As noted in Part II above, in these jurisdictions

169 Ibid 549 [134], 550 [136].

170 Ibid 538 [64].

171 Ibid 550 [138].

172 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Magaming v The Queen* (2013) 87 ALJR 1060, 1072 [61]–[62], 1077 [82] (Gageler J dissenting).

173 *South Australia v Totani* (2010) 242 CLR 1, 50–1 [76] (French CJ), 67 [147] (Gummow J).

174 *PoCA Cth*; *CARA NSW*; *CPFA NT*; *CPCA Qld*; *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *CPCA WA*.

175 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) 9.

176 Gray, 'Unexplained Wealth Provisions and "Civil" Forfeiture Regimes', above n 158, 34.

177 By comparison, the recently amended *CPCA Qld* only allows unexplained wealth orders to be made on the basis of a reasonable suspicion that a person has engaged in 'serious crime related activities', 'has acquired, without giving sufficient consideration, serious crime derived property' and 'any of the person's current or previous wealth was acquired unlawfully': *CPCA Qld* s 89G, inserted by the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

178 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic).

conviction-based confiscation is typically automatic without the need for a court order.¹⁷⁹

It is submitted that such non-judicial confiscation procedures are not appropriate. As Freiberg and Fox contend:

The minimum prerequisite of expropriation of property as direct or indirect punishment for crime should be a judicial order pursuant to a finding of guilt, or conviction of an offence. Property should not be liable to be permanently confiscated simply upon the 'commission' of an offence, or for allegations of crime proven to non-criminal standards.¹⁸⁰

In light of Justice Gageler's comments, the executive discretion that is a feature of many Australian proceeds of crime regimes may well be the subject of future challenge before the courts. The seemingly unlimited nature and extent of the executive discretion and the consequent difficulty involved in its review is particularly concerning when viewed through a rule of law lens.¹⁸¹ To ensure fair mechanisms, proceeds of crime regimes ought to involve the courts in each stage of the confiscation process. In addition, courts ought to be vested with, at the very least, a guided discretion to ensure a fair and proportionate outcome in each case.

3 *Retrospective Operation of Legislation*

A number of Australian proceeds of crime statutes are retrospective in operation;¹⁸² that is, they attach 'new consequences to an event that occurred prior to [their] enactment'.¹⁸³ This retrospectivity generally relates to two aspects of the legislation: first, the legislation extends to criminal activities engaged in both before and after the statute was introduced; and, secondly, the legislation renders confiscable property acquired or received before or after the commencement of the statute.

179 Automatic confiscation is also available under the non-conviction based scheme contained in the *CPCA WA* s 30.

180 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, 143.

181 Brent Fisse, 'The *Proceeds of Crime Act*: The Rise of Money-Laundering Offences and the Fall of Principle' (1989) 13 *Criminal Law Journal* 5, 23.

182 See, eg, *PoCA Cth* s 14; *Confiscation of Criminal Assets Act 2003* (ACT) s 5; *CPFA NT* s 10(5)(b)(ii); *Criminal Assets Confiscation Act 2005* (SA) s 10; *Confiscation Act 1997* (Vic) s 157; *CPCA WA* s 5(1).

183 Elmer A Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264, 276.

There is a long history of opposition to retrospective legislation.¹⁸⁴ Retrospectivity is generally regarded as ‘trespass[ing] unduly on personal rights and liberties’¹⁸⁵ and therefore falls within the terms of reference of the Commonwealth Senate Standing Committee for the Scrutiny of Bills, a committee tasked with ‘assess[ing] legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary propriety’.¹⁸⁶ Despite the undesirability of introducing laws *ex post facto*, the High Court has confirmed, with some remaining uncertainty,¹⁸⁷ the Australian legislatures’ power to do so,¹⁸⁸ provided the intention to legislate retrospectively is explicit, clear and unambiguous.¹⁸⁹ It remains a presumption of statutory interpretation that, in the absence of such an intention, statutes do not operate retrospectively.¹⁹⁰ Regardless of its general validity, however, it is submitted that if a retrospective law goes so far as to usurp, and effectively remove, the judicial function, its constitutional validity may be called into question.¹⁹¹

While there is a general opposition to retrospective legislation, legislation that retrospectively declares previously lawful conduct committed prior to the commencement of the legislation to be a crime, or that imposes more severe legal punishment that follows from a criminal act, is generally considered the most repugnant¹⁹² and offensive to rule of law principles. It is acknowledged, however,

184 Thomas Hobbes, *Leviathan* (J M Dent & Sons, 1914) 166. See also Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1966 ed) vol 1, 45–6, cited in *Polyukhov v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ), 611 (Deane J), 642 (Dawson J), 718 (McHugh J). For a detailed discussion on the criticisms of retrospective law-making, see Charles Samford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006) ch 3. See also *Polyukhov v Commonwealth* (1991) 172 CLR 501.

185 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 37th Parliament* (1993–96) ch 2. This is also acknowledged in Explanatory Notes, Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Qld) 5.

186 See Parliament of Australia, *Senate Standing Committee for the Scrutiny of Bills* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills>.

187 James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (LexisNexis Butterworths, 2010) 214; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 234; Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166, 172.

188 *R v Kidman* (1915) 20 CLR 425; *Millner v Raith* (1942) 66 CLR 1; *Polyukhov v Commonwealth* (1991) 172 CLR 501 (but see Deane and Gaudron JJ dissenting).

189 *Wilson v Moss* (1908) 8 CLR 146; *Moss v Donohoe* (1915) 20 CLR 615; *Commissioner of Stamps (Qld) v Wienholt* (1915) 20 CLR 531.

190 *DPP (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

191 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); *Nicholas* (1998) 193 CLR 173, 186 (Brennan CJ); Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009).

192 Stephen Argument, ‘Retrospective Legislation: Not So “Super”’ (1993) 10 *Australian Bar Review* 57, 61. See also *Polyukhov v Commonwealth* (1991) 172 CLR 501, 642 (Dawson J).

that there are arguments that in some cases the introduction of retrospective legislation is justified. Woozley, for example, stated in relation to retrospectivity that ‘while it may be true that playing unfair is always bad, it does not follow that it is always wrong; and it will not be wrong in the case where, even if playing unfair is bad, playing fair is even worse’.¹⁹³ It may be argued that proceeds of crime legislation is a ‘necessary evil’¹⁹⁴ being the only alternative to ‘an evil of even greater magnitude’.¹⁹⁵

Proceeds of crime legislation is a crucial weapon in the government’s armoury against serious and organised crime. It is, however, a long-term solution. The future success of the legislation will not be significantly increased by retrospectively targeting conduct committed and property acquired before the legislation was first introduced. Rather, legislation that retrospectively exposes those who previously engaged in criminal conduct to more severe pecuniary consequences through the confiscation of property including property acquired well before the relevant criminal activity¹⁹⁶ may be seen as an indefensible infringement of a defendant’s civil rights, particularly of his or her property rights, and therefore inconsistent with the rule of law.

If incorporated, at the very least, retrospectivity should be limited to a reasonable period prior to the commencement of the legislation. For example, the *Criminal Proceeds Confiscation Act 2002* (Qld) replaced Queensland’s inaugural proceeds of crime statute, the *Crimes (Confiscation) Act 1989* (Qld), which commenced operation on 12 May 1989. Consequently, the confiscation provisions in the *CPCA Qld* apply to confiscation offences committed on or after that date.¹⁹⁷ Despite the *CPCA Qld* only having come into operation on 1 January 2003, this limited retrospective operation is entirely appropriate: it simply operates to extend a person’s liability for confiscation under the later statute to include his or her liability arising under the earlier repealed statute. Limiting the retrospective operation of the current legislation in this way seems a sensible alternative. More expansive retrospective provisions are unjust in view of the shifting of the onus of proof and evidentiary presumptions operating in civil confiscation procedures in some jurisdictions.¹⁹⁸ It is unjust and unreasonable to expect a defendant to lead evidence relating, for example, to the acquisition, accumulation or use of assets where that acquisition, accumulation or use may have occurred many years, even decades, before the assets were liable to confiscation under proceeds of crime legislation.

193 A D Woozley, ‘What Is Wrong with Retrospective Law?’ (1968) 18 *Philosophical Quarterly* 40, 53.

194 Samford, above n 184, 230.

195 Ibid 229.

196 See, eg, *Davies v Western Australia* (2005) 30 WAR 31.

197 *CPCA Qld* ss 95, 96(1).

198 See, eg, under the *CARA NSW*; *CPFA NT*; *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *CPCA WA*.

4 *Standard and Burden of Proof*

The policy underlying the imposition of a civil standard of proof and shifting the burden of proof onto the defendant in proceeds of crime confiscation cases is clear: confiscations will be far easier to secure, resulting in a more effective crime-fighting regime.¹⁹⁹ As pointed out by the Legal and Constitutional Affairs Legislation Committee, such features ‘represen[t] a departure from the axiomatic principle that those accused of criminal conduct ought to be presumed innocent until proven guilty’.²⁰⁰ In a similar vein, the Law Council of Australia stated in its submissions to the Committee that ‘[b]y reversing the onus of proof the proposed unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property’.²⁰¹ However, constitutionally, the alteration in the burden is unlikely to be challengeable in and of itself. In *Nicholas*, Brennan J drew on an earlier decision by Isaacs J²⁰² to distinguish a shift in the burden from a legislative determination of guilt and concluded that ‘[t]he reversal of an onus of proof affects the manner in which a court approaches the finding of facts but [it] is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates’.²⁰³

Much of the concern with Australian proceeds of crime legislation stems from the ‘civil’ nature of the legislation which belies its insoluble criminal yoke and punitive impact.²⁰⁴ An open acknowledgement that this is the case is required, accompanied by the consequential instatement of criminal law-like protections for defendants and third parties.²⁰⁵ There are significant practical concerns with shifting the burden of proof onto defendants in non-conviction based civil confiscation cases. First, proceedings may be brought against a defendant simply on the basis of a suspicion with the defendant bearing the burden of dispelling the suspicion.²⁰⁶ Secondly, there is the risk of a defendant having to lead evidence on a matter which may have occurred many years previously and in relation to which the defendant may not have any records or

199 As pointed out by the Parliamentary Joint Committee on the Australian Crime Commission, *Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 29, [5.50], these inclusions result in ‘a greater likelihood that the assets of crime will be confiscated’. See also Senate Legal and Constitutional Affairs Legislation Committee, above n 41, [2.55]–[2.57].

200 Senate Legal and Constitutional Affairs Legislation Committee, above n 41, [6.4].

201 Ibid [2.59], quoting Law Council of Australia, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, August 2009, 16.

202 *Williamson v Ah On* (1926) 39 CLR 95, 103–20.

203 (1998) 193 CLR 173, 190 (Brennan CJ). At the state level see also *Fardon v A-G (Qld)* (2004) 223 CLR 575, 600–1 [41] (McHugh J).

204 *Emmerson v DPP (NT)* (2013) 33 NTLR 1, 18–19 [41] (Riley CJ).

205 See, eg, Freiberg and Fox, ‘Forfeiture, Confiscation and Sentencing’, above n 180, 143.

206 See, eg, the shift in evidentiary onus in *CPFA NT* s 71(2); *CPCA WA* s 12(2).

recollection. This is particularly concerning in the context of retrospective proceeds of crime legislation discussed above.

Thirdly, even if the defendant is ultimately successful in discharging the onus, the cost (both financial and personal) that may be sustained as a result of effectively having to prove one's innocence are likely to be considerable. Fourthly, the Law Council of Australia has highlighted, drawing on *Lee v New South Wales Crime Commission*,²⁰⁷ the clear risk to the privilege against self-incrimination through encroachments on the 'accusatorial system of criminal justice'.²⁰⁸ Non-conviction based unexplained wealth regimes may present a defendant with the unenviable choice of risking forfeiture of his or her property or compromising the fairness of a possible future trial by giving the prosecution information that they would not otherwise have in relation to charges yet to be prosecuted.²⁰⁹

Finally, it is not good practice for a blameless third party to be required to discharge a burden of proof in relation to any matter arising in proceedings in which he or she has no involvement other than having the misfortune of holding an interest in property that is the subject matter of the proceedings.²¹⁰ This is the effect of the exclusion, objection and 'third party order' provisions in a number of Australian proceeds of crime statutes.²¹¹

IV CONCLUSION

Significant and compelling social, economic and political considerations underpinned the initial adoption of proceeds of crime legislation into Australia and continue to drive reform in this law and order arena. These considerations are all principally directed at a single overarching objective: providing an effective legislative weapon with which to fight serious and organised crime. The legislative schemes seek to achieve this through confiscation provisions aimed at punishment, deterrence, incapacitation and law enforcement. An examination of the Annual Reports of the Director of Public Prosecutions of each Australian jurisdiction indicates that the law enforcement agencies largely regard proceeds of crime legislation as an important and successful weapon in Australia's crime

207 (2013) 251 CLR 196.

208 Ibid 208–9 [14] (French CJ).

209 Law Council of Australia, Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*, 2 April 2014, 4.

210 Australian Law Reform Commission, above n 41, [12.15].

211 See, eg, *Confiscation of Criminal Assets Act 2003* (ACT) s 76(4); *CPFA NT* s 59(1); *CPCA Qld* s 165; *Criminal Assets Confiscation Act 2005* (SA) s 34(1)(b); *Confiscation Act 1997* (Vic) ss 20, 49, 51, 53; *CPCA WA* s 79(1).

fighting armoury.²¹² It is this success that continues to spur on parliaments to introduce increasingly robust and expansive legislative amendments and reforms.

In many cases, however, the success of the legislation comes at a significant cost. Most commonly, this cost is borne by third parties who are unconnected with any criminal activity or other wrongdoing. The analysis undertaken in this article reveals several features of Australian proceeds of crime legislation that bring into question, at times, its constitutionality, but also its conformity with basic rule of law tenets.

Clearly, it is appropriate for proceeds of crime legislation to capture property acquired nefariously. In tempering proceeds of crime regimes in Australia the baby need not be thrown out with the bath water. Instead, prudent drafting, fair and considered parliamentary debate, and public consultation and discussion should ensure that Australian legislation adequately balances valid legislative goals against other fundamental interests, including the rights of defendants and innocent third parties. The inevitability of law and order politics must not exclude, in the drafting of confiscation provisions, constitutional and broader rule of law considerations, including the importance of judicial discretion, monitored executive power, the avoidance of excessive retrospectivity, and awareness of the risks associated with shifting standards and burdens of proof.

Within Australia's liberal democratic framework, it is not the role of the courts to invalidate statutory provisions simply because they may be perceived as 'unfair' or 'too wide'. It is the responsibility of the executive and legislative arms to ensure that legislation is appropriately targeted, just and not a 'law and order' overreach. While the operation of provisions needs to be understood within the wider context of a particular jurisdiction's crime confiscation scheme, the mix of retrospective punishment-like provisions, severed from the establishment of clear criminal wrongdoing and the narrowing of judicial discretion may present a dangerous legislative cocktail which should be eschewed.

212 See above nn 37–9.