Crime and Corruption Commission
QUEENSLAND

Modernising Queensland's asset confiscation regime

A reform agenda for the *Criminal Proceeds Confiscation Act 2002* (Qld)

April 2024

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Organised crime and the asset confiscation regime

Contemporary serious and organised crime is complex, highly adaptive, and can be extremely lucrative. It frequently involves digital assets (including cryptocurrency), offshore links or elements, and decentralised financial transactions that are difficult for law enforcement to trace. Billions of dollars in criminal funds are estimated to flow through Queensland's criminal economy each year – in 2022–23 the value of money laundered in Queensland was estimated at between $10 and $25 billion.[1]

Meeting the challenge of serious and organised crime requires innovation, cross-agency collaboration, and significant investment. It also requires legislation that is fit-for-purpose and flexible enough to respond to the changing nature of the crimes it deals with.

Queensland's *Criminal Proceeds Confiscation Act 2002* (CPCA) is the State's key statute that is currently used to attack the profitability of serious and organised crime by enabling asset confiscation. The CPCA's aim is to remove financial gain, increase financial loss and heighten the risks associated with such crimes.

In 2023 the Crime and Corruption Commission (CCC) commenced a review of the CPCA to examine whether Queensland's asset confiscation regime was still effective in the face of a contemporary organised crime environment. It looked at the schemes available under the asset confiscation regime pertaining to countering the problem of crime-derived and used assets and money laundering, and preventing individuals from accumulating criminal wealth.

The proposed reform agenda

The review has identified the need for significant reform of the Act. The CCC identified 7 priority areas for reform and has made 10 recommendations designed to modernise Queensland's asset confiscation regime. Significant action is needed by the Queensland Government to ensure that the Act can have the disruptive impact on serious and organised crime that the Parliament intended.

Priority area 1: Make the money laundering offence contemporary, clear, and fit-for purpose

Queensland risks becoming a money laundering haven because its money-laundering offence has not kept up with the modernisation efforts made in other Australian jurisdictions.

Queensland's money laundering offence is confusing and, in a legal sense, not functional. It substantially relies upon the definition of "tainted property" in the CPCA which, unhelpfully, is defined to include "tainted property".

The offence is also based on a concept of "self-launderers" – that is, the offence assumes that someone who is engaging in serious criminal activity is also personally attending to any money laundering required to conceal the criminal activity.

This does not represent the modern reality of money laundering for serious crimes, where there is separation between the criminal offender (or offending) and the money laundering activities, and where the latter is increasingly undertaken by professional facilitators as a service, often using global networks.

Recommendation 1: *That Queensland's offences of money laundering and "possession of property suspected of being tainted" in the CPCA:*

(a) be amended to ensure they are contemporary, clear, and fit-for-purpose, and

(b) they cover laundering involving digital assets.

1 See page 8 of this report.

Priority area 2: Enable effective seizure of digital assets

Digital assets are commonly and increasingly being used as both an enabler of, and means of realising benefits from, serious criminal activity. The power to effectively seize such digital assets is essential to ensure:

- the ability to gather evidence of the use of, and benefits derived, from serious criminal activity
- the ability to attribute ownership and control of digital assets, and therefore identify those involved in committing serious crimes, and those involved in assisting serious criminal offending, and
- that digital assets used in, or derived from serious criminal activity, are preserved for evidentiary purposes and their ultimate forfeiture by a court, whether that forfeiture is conviction-based or based on civil confiscation action under the CPCA.

In Queensland, neither the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) nor the *Crime and Corruption Act 2001* (Qld) (CC Act) currently enable law enforcement to effectively seize digital assets as evidence because:

- there is no definition of a "digital asset", and
- there is no ability to seize a digital asset (in a way that takes effect control over it).

Recommendation 2: *That where relevant, the PPRA, CC Act, CPCA, and the Criminal Code Act 1899* (Qld)*, be amended to provide:*

a) a definition of a digital asset and digital asset access information

b) powers (and associated responsibilities) to facilitate effective seizure of digital assets.

Digital assets are highly volatile. It is in the interests of both the State and an accused or respondent, for a court to have the power to order that the asset be converted to a more stable store of value, such as cash, pending the outcome of a criminal of confiscation proceeding.

Recommendation 3: *That the CPCA, the PPRA, and the CC Act be amended to provide the courts with the authority to decide whether a digital asset restrained under the CPCA, or seized under the PPRA or CC Act, should be converted to a more stable currency or asset, pending the outcome of a criminal or asset confiscation proceeding.*

Priority area 3: Introduce an asset-focused confiscation mechanism

In some cases, assets are confiscated by law enforcement but no-one comes forward to claim ownership. Examples of this include large sums of cash or other valuable items seized by police, where the true owner refuses to come forward to avoid implicating themselves in a crime. In such circumstances, other jurisdictions have efficient mechanisms for administrative or automatic forfeiture.

Recommendation 4: *That the non-conviction-based scheme in the CPCA be expanded by introducing:*

(a) a new mechanism to target crime-related assets by way of automatic forfeiture in circumstances where ownership of a crime-related asset is not claimed by any person, and

(b) appropriate protections and safeguards for the new mechanism.

Priority area 4: Ensure that the CPCA delivers on objectives for disruptive impact

Three schemes under the Act are operating inefficiently or ineffectively: the unexplained wealth (UEW) scheme, the serious drug offender confiscation order (SDOCO) scheme and the non-conviction-based scheme.

The purpose of the UEW scheme is to provide a mechanism to confiscate assets that are suspected of exceeding a person's legitimate sources of income, if there is a reasonable suspicion the person has engaged in one or more serious crime related activities, and the person is unable to prove their excess assets were legitimately acquired.

In other Australian jurisdictions, UEW schemes do not require the State to produce evidence linking the UEW to specific serious criminal activity. In Queensland, however, the assessment process appears to require that connection due to inconsistencies between the requirements that enliven the scheme's jurisdiction and the way a court must assess UEW. The technicalities of the legislation thus, in practical terms, undermine the objectives and utility of the scheme.

Recommendation 5: *That the non-conviction-based scheme in the CPCA be amended to clarify the requirements for UEW orders to ensure that, in practice, the scheme is able to achieve its desired objectives.*

Queensland's SDOCO scheme is a conviction-based scheme, introduced in 2013 to substantially increase the risk, and decrease the profitability of engaging in serious drug crime, through a mechanism under which all the assets of a person convicted of a serious drug offence may be confiscated, whether acquired lawfully or not.

In practice the scheme has not been successful even though several thousand offenders have been certified by the Courts as liable for confiscation action under the scheme. It appears that the case law to guide meaning on what is "in the public interest" has limited the use of the SDOCO scheme.

Recommendation 6: *That the Queensland Government review the efficiency and effectiveness of the SDOCO scheme, and decide if the SDOCO scheme is to be retained. If the SDOCO scheme is retained, that the Queensland Government amend the CPCA to make the objectives of the SDOCO scheme clear, and consider giving guidance on the public interest considerations in making decisions relating to the SDOCO scheme.*

Confiscation matters under the non-conviction-based scheme are often closely associated with related criminal matters. While a criminal charge or a criminal conviction is not always required for asset confiscation, evidence to establish that a serious crime related activity occurred is required. Under the Queensland scheme, confiscation proceedings are often stayed by court order or put on hold by administrative arrangement, pending completion of a respondent's related criminal matter. However, criminal matters can take years to resolve. Delay reduces the efficiency and efficacy of asset confiscation by putting at risk the availability of evidence and impeding and frustrating the objects of the scheme.

There are legislative mechanisms in the New South Wales (NSW) and Commonwealth schemes to facilitate closed confiscation proceedings, and in NSW to ensure confiscation litigation is only stayed as a last resort where there is no other way of addressing prejudice in a criminal trial.

Recommendation 7: *That the Queensland Government amend the CPCA to give clear guidance on the principles that should determine whether a confiscation matter should be stayed when there is a related criminal proceeding.*

Priority area 5: Change how confiscated assets are used

Other jurisdictions allow the State to use confiscated assets for a range of purposes including victim compensation, crime reduction and offender rehabilitation.

In Queensland, the CPCA requires all assets confiscated under the civil scheme to be paid to Queensland's consolidated revenue. There is no mechanism for funds to be made available for specific public purposes such as the prevention of crime or compensation to the victims of crime. For this reason, the CPCA is not used to take action against serious offenders who have engaged in victim-centred crimes for profit.

It is also not used where the taking of confiscation action by the State against the offender reduces the pool of assets or funds from which a compensation order is likely to be made, thus depriving a victim of the opportunity to take their own civil action for compensation. Victims are often not financially able to take such action, and the cost is prohibitive, especially for high-volume, lower-value crimes such as frauds and scams.

In 2015, the Queensland Government announced it supported a recommendation of the Organised Crime Commission of Inquiry to allow victims of fraud to be compensated from confiscated assets, however, to date no amendment has been made to the relevant provisions.

Recommendation 8: *That the Queensland Government consider the creation of a mechanism for the use of confiscated funds other than payment directly to the Consolidated Fund.*

Priority area 6: Change agency responsibility to improve efficiency and agility

The current arrangements for administering and conducting confiscation proceedings under the civil and criminal confiscation schemes of the CPCA divide the responsibility for the civil confiscation scheme between the CCC and the Office of the Director of Public Prosecutions (DPP). This arrangement is ineffectual because it:

- does not facilitate access to efficient and timely expert legal advice for confiscation investigations, and legal services for confiscation litigation processes and strategies,
- gives rise to a risk for the DPP, who are required to manage both prosecutorial and civil litigation roles, in respect of matters involving substantially the same parties, and substantial overlap in issues, and
- in relation to the interoperability of the civil and criminal schemes, lack**s** the flexibility to engage the most effective and appropriate scheme for achieving the objectives of Queensland's confiscation regime.

Recommendation 9: *That the CPCA be amended to give the CCC:*

(a) sole responsibility for administering and conducting all confiscation proceedings under Chapters 2 and 2A (the non-conviction-based and SDOCO schemes, respectively), drawing on the models used by Commonwealth and NSW,

(b) concurrent responsibility for administering and conducting proceedings under Chapter 3 and Chapter 4 (the conviction-based scheme and special forfeiture orders, respectively), while providing that more than 1 proceeding against a respondent in respect of a conviction or related convictions cannot be commenced, and

(c) appropriate initial and ongoing resources to undertake the new responsibilities in a) and b).

Priority area 7: Schedule a further review of the CPCA

Asset confiscation regimes have evolved substantially in recent years, in response to the pace of change in the criminal environment and the proliferation of digital currencies. In the last five years, two jurisdictions have had their asset confiscation Acts reviewed, and other jurisdictions have had their Acts substantively amended. Within that context, Queensland's asset confiscation regime has lagged, with no action to implement significant recommendations for change for many years.

To ensure that the CPCA keeps pace with change, a further review is required.

Recommendation 10: *That the Queensland Government provide for a review of the scheme, to commence not more than five years after the introduction of substantive legislative amendments. The review should be conducted by an agency or person appointed by the Minister. A report on the review should be tabled in Parliament.*

1. Background to this review

Asset confiscation is one element of Queensland's multifaceted response to serious[2] and organised crime.[3] Queensland's key statute that enables asset confiscation is the *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA or the Act). The Act's main objective is to "remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity".[4] The Act seeks to:

> provide an effective strategy for undermining the profitability of organised and other serious crime and … allow the State to offset associated financial and social costs.[5]

In broad terms, the CPCA authorises and empowers certain public officials to apply to Queensland's Supreme Court to restrain or forfeit assets that are believed to be derived from, or used in connection with, criminal offending. Assets may be restrained or forfeited following a criminal conviction, or without a criminal conviction. Confiscated assets are handled and disposed of by Queensland's Public Trustee, and the proceeds are paid to Queensland's Consolidated Fund.

A complex, adaptive, and lucrative criminal environment

As one of the elements of Queensland's response to serious and organised crime, it is critical that the CPCA remains fit-for-purpose within a changing criminal environment.

Organised crime groups of all kinds are heavily involved in illicit market activities with strong links to global support chains through international networks. Often these groups operate using sophisticated business models and expertise to produce significant financial return for those involved.[6]

Financial and criminal investigations are consequently increasingly complex. A high proportion of matters involve criminal activities with an offshore link or element,[7] and increasingly digital assets, and decentralised financial transactions which are difficult to trace.[8] While responses to this complex environment exist, they require innovation, cross-agency collaboration, and significant investment. They also require legislation that is flexible enough to respond to a highly adaptive criminal cohort.

The illicit nature of money laundering activity, the absence of precise statistics and the sheer volume of funds placed or moved through unregulated sectors and across jurisdictions make it impossible to provide a definitive estimate of how much money is laundered in Queensland each year.

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2 A "serious criminal offence" is defined in section 17 of the CPCA as an indictable offence for which the punishment is at least 5 years imprisonment, or an offence prescribed under a regulation for this definition; this includes offences committed outside of Queensland which meet those criteria under Queensland law, and ancillary offences.

3 "Organised crime" is defined in Schedule 2 of the CC Act as criminal activity involving an indictable offence punishable by 7 or more years of imprisonment; involving 2 or more people; with substantial planning and organisation or systematic or continuing activity; and with a purpose to obtain profit, gain, power or influence.

4 Section 4(1), CPCA.

5 *Explanatory notes*, Criminal Proceeds Confiscation Bill 2002 (Qld), p. 1.

6 Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, pp. 515-521.

7 Australian Criminal Intelligence Commission (ACIC) 2022, *Annual report 2020-21*, pp. 14-15.

8 Hughes, C. and Brown, R. 2022, *Financial investigation for routine policing in Australia*, AIC, pp. 3-4.

The International Monetary Fund (IMF) has estimated that the value of money laundered globally each year is between 2 and 5 per cent of global Gross Domestic Product (GDP).[9]

Applying similar estimates to Australia, it suggests the amount of money laundered nationally in 2022 could range between $47.8 billion to $119.6 billion.[10] Applying this to Queensland, the value of money laundered in 2022-23 is between $10 billion to $25 billion.[11]

Given the multi-jurisdictional nature of organised crime, state-based estimates need to be treated with caution. However, the doses of methylamphetamine, cocaine, heroin and MDMA found in wastewater analysis undertaken by the ACIC,[12] suggests that the street level price of those doses, and therefore the criminal proceeds from their sale in Queensland in 2019-20, was $2.62 billion. That figure suggests that the GDP-based estimate used by the IMF is likely to be reasonably accurate, with Queensland's exposure to money laundering activity being typical of the global picture presented by UNODC.

About this review

In July 2023, the Crime Corruption Commission (CCC) commenced this review following recognition in successive inquiries that there are significant areas for reform of the CPCA that should be considered. This includes changes to the offence of money laundering (see page 25) and changing organisational responsibility within the asset confiscation regime (see page 41).[13]

As Figure 1 shows, the operation, effectiveness, and possible reform of the CPCA, have been discussed for many years. With the criminal environment changing at a rapid pace, and its impact on our ability to identify and take effective action for criminal asset confiscation under Queensland's existing regime, the CCC initiated this review to provide an evidence-based reform agenda for consideration by the Queensland Government.

Specifically, this review seeks to identify areas for reform to ensure the confiscation regime within Queensland is contemporary and effective.[14] With this review, Queensland joins other Australian jurisdictions that have recently had their asset confiscation statutes reviewed[15] or substantively amended.[16]

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9 IMF quoted in United Nations Office on Drugs and Crime (UNODC) 2011, *Estimating illicit financial flows resulting from drug trafficking and other transnational organised crimes*, p. 18.

10 Based on a $2.56 trillion (conversion at January 2022 exchange rates) estimate of the nominal Australian GDP for 2022 (The World Bank 2024, *GDP (current US$) – Australia*, p. 1). Note that the periodicity of this estimate is "annual", however Australia's GDP data is provided in financial years.

11 Based on the 2022-23 Gross State Product (GSP) of $503 billion (Department of Foreign Affairs and Trade 2023, *Queensland: recent economic indicators*, p. 1). Note that GSP is not completely equivalent to GDP, however this provides an indicative figure.

12 ACIC 2021, *National Wastewater Drug Monitoring Program*, Report 12.

13 See Callinan, I. and Aroney, N. 2013, *Review of the Crime and Misconduct Act 2001*; Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, pp. 551-552; and Parliamentary Crime and Corruption Committee (PCCC) 2021, *Review of the Crime and Misconduct Act 2001 and other matters: report of the independent Advisory Panel*, pp. 34-35.

14 Importantly, this review does not examine the validity of asset confiscation regime as a legislative instrument or law enforcement strategy. Instead, it focuses on the operation and effectiveness of the Act and the framework that embeds it in practice.

15 Martin, W. 2019, *Review of the Criminal Property Confiscation Act 2000* (WA); and Justice and Community Safety Directorate 2022, Statutory review of the Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020 (ACT).

16 New South Wales (NSW), Victoria, South Australia (SA), Northern Territory (NT), Australian Capital Territory (ACT) and the Commonwealth.

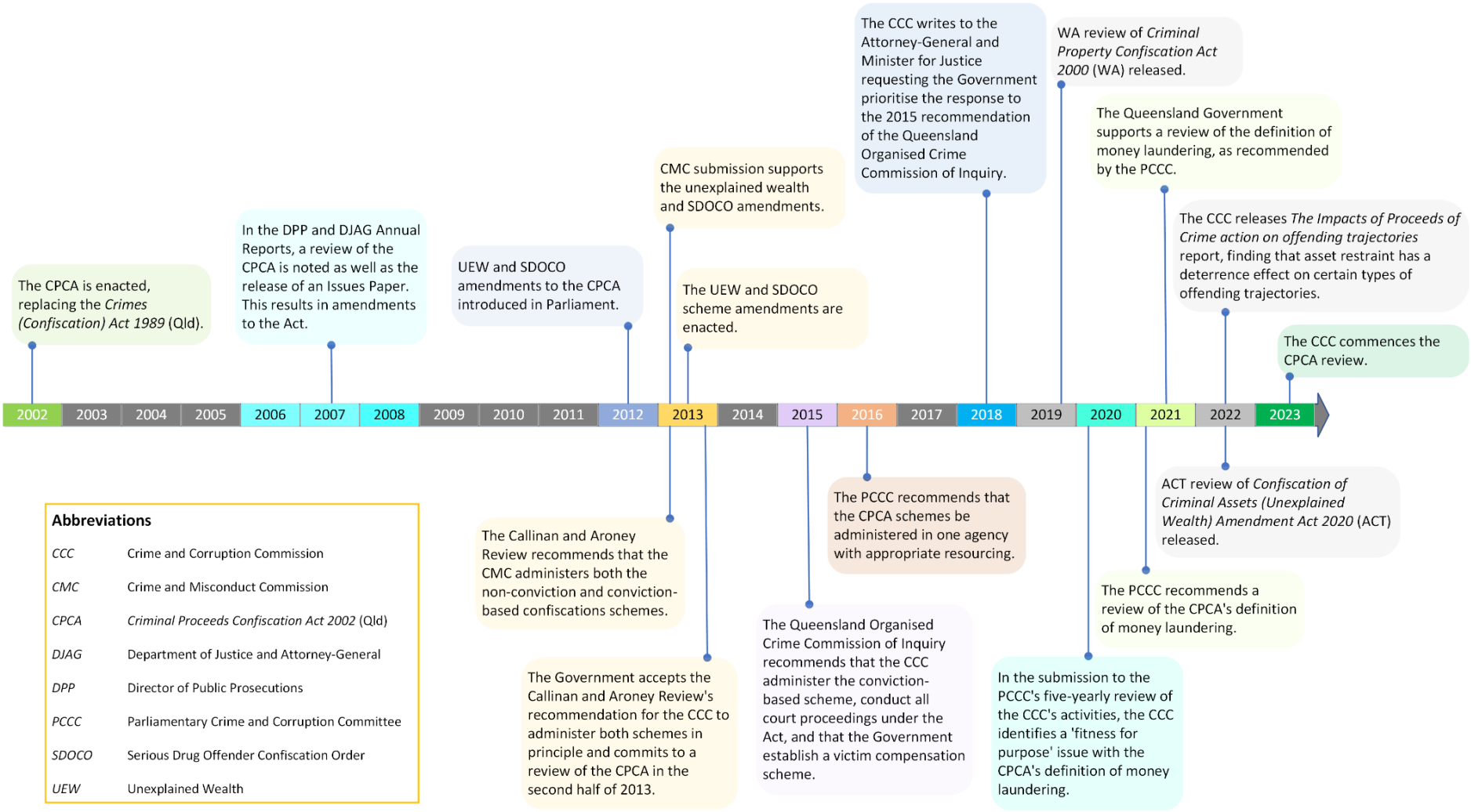

Figure 1. Key developments relevant to the CPCA review

Information sources

The review examined information from the following sources:

- four workshops conducted with Queensland practitioners and other public sector key stakeholders (almost 30 participants from 10 different agencies) over two months[17]
- six submissions to the review's public Discussion Paper[18]
- quantitative data provided by the CCC, Office of the Director of Public Prosecutions (DPP), and the Public Trustee of Queensland (PTQ)
- recent CCC records on asset confiscation matters, including a detailed review of confiscation files
- consultations with stakeholders of this review, including continuing engagement with workshop participants, and other Australian asset confiscation practitioners[19]
- 60 relevant publications returned from a rapid literature search on the operation of other proceeds of crime regimes, responses to organised crime, key requirements for proceeds of crime regimes in responding to the criminal environment, and the legal and policy environments proceeds of crime regimes operate in, and
- relevant CCC and Queensland Police Service (QPS) policy documents.

Some information that the review would like to have access to was not available. The findings and recommendations are based on the information that was available to the review. Any limitations, where known, are noted throughout the report.

While this review has attempted to make the language in this paper as accessible as possible, certain sections are necessarily technical. To assist readers who are new to asset confiscation, the next section provides a brief description of asset confiscation as a concept, what Queensland's asset confiscation regime is, and how it operates.

17 Representatives from the ACIC, Australian Federal Police (AFP), Australian Taxation Office (ATO), Australian Transaction Reports and Analysis Centre (AUSTRAC), CCC, Department of Justice and Attorney-General (DJAG), DPP, Queensland Law Society (QLS), QPS, and Queensland Treasury.

18 CCC 2023, *Review of the Criminal Proceeds Confiscation Act 2002 (Qld) – Discussion Paper*.

19 Representatives from the AFP, Corruption and Crime Commission (WA), NSW Crime Commission, and PTQ.

2. About asset confiscation

Asset confiscation regimes aim to attack the profitability of serious and organised crime by confiscating the assets gained from, or used to support, illicit activity. Asset confiscation has been adopted in many countries internationally as a strategy to combat organised crime.[20] Australia's modern approach to asset confiscation commenced in 1987[21] with the *Proceeds of Crime Act 1987* (Cth), which allowed for conviction-based confiscation. Since then, all Australian jurisdictions have implemented conviction-based confiscation legislation, and in time, expanded their scope to allow for non-conviction-based confiscation.[22] More recently, the link between money laundering and the financing of terrorism has been established and asset confiscation has been recognised as a tool to disrupt terrorism financing.[23]

This review analysed the intent statements of Australian asset confiscation legislation,[24] and identified seven intents: three intents that relate to functions or outcomes of the legislation, and four intents that relate to the targets of the legislation (see Figure 2).[25]

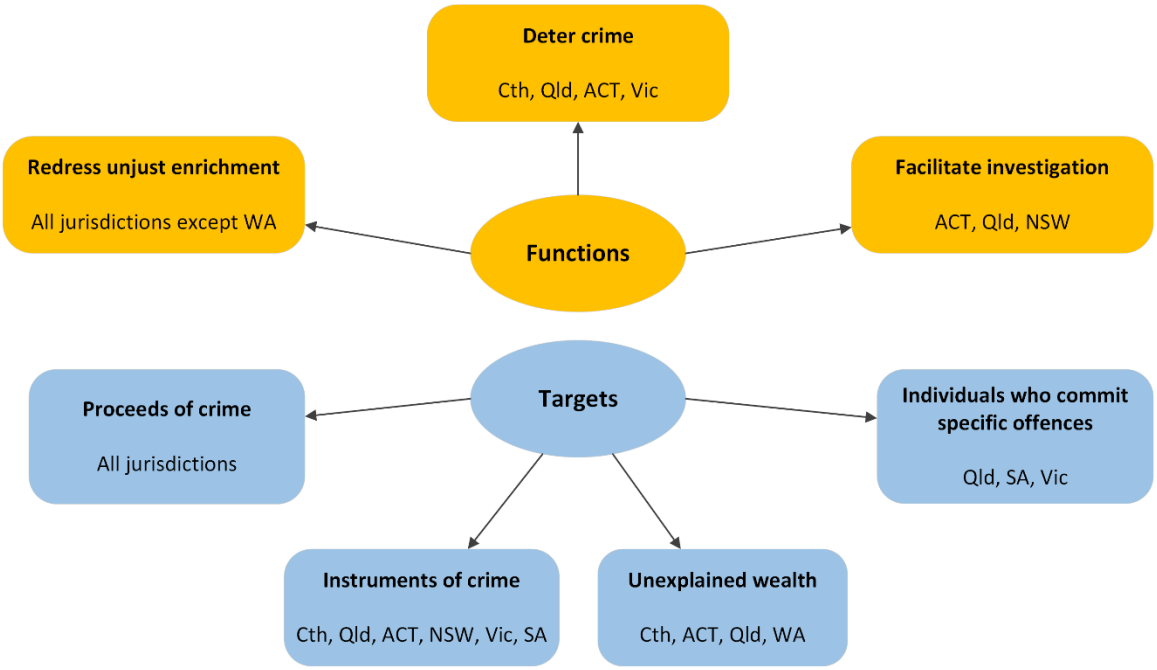

Figure 2. Functions and targets of Australian asset confiscation legislation.

20 Atkinson, C., Mackenzie, S. and Hamilton-Smith, N. 2017, *A systematic review of the effectiveness of asset-focussed interventions against organised crime*, p. 9.

21 Noting that the *Customs Act 1901* (Cth) provided for confiscation for particular drug offences prior to this.

22 Bartels, L. 2010, *A review of confiscation schemes in Australia*, AIC, pp. 7-8.

23 Australian Government 2023, *Australian Government response to the Senate Legal and Constitutional Affairs References Committee Report: Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime*, p. 3.

24 Statements in legislation, Hansard (first reading speeches) and Parliamentary Committees about the intent of confiscation legislation. The legislation included the CPCA and: *Criminal Assets Recovery Act 1990* (NSW) (CARA), *Confiscation of Proceeds of Crime Act 1989* (NSW), *Criminal Property Confiscation Act 2000* (WA), *Criminal Property Forfeiture Act 2002* (NT), *Crime (Confiscation of Profits) Act* 1993 (Tas), *Confiscation of Criminal Assets 2003* (ACT), and the *Proceeds of Crime Act 2002* (Cth) (POCA).

25 A similar exercise was conducted in 2010. See Bartels, L. 2010, *A review of confiscation schemes in Australia*, AIC, p. 1-2.

An introduction to the Queensland regime

In Queensland, the key statute that provides for asset confiscation is the CPCA.[26] The CPCA provides for three confiscation "schemes", which were introduced in steps:[27]

- In **1989** Queensland passed the *Crimes (Confiscation) Act 1989*, which established a scheme to restrain and forfeit assets based on a criminal conviction (**the conviction-based scheme** and **special forfeiture orders**).

This scheme built on the forfeiture provisions available under the *Drugs Misuse Act 1986* (Qld) and extended it to all persons convicted of a serious offence.[28] The *Crimes (Confiscation) Act 1989* (Qld) defined a serious offence as an indictable offence, a serious drug offence, an offence against the Act punishable by a term of imprisonment, an offence against Schedule 2 of the Act, or an offence prescribed by regulation.[29] While the *Crimes (Confiscation) Act 1989* (Qld) has since been repealed, the provisions relating to the conviction-based scheme and special forfeiture orders were incorporated into successive confiscation legislation – the CPCA.

- In **2002**, Queensland passed the CPCA, which saw the commencement of a scheme to restrain and forfeit assets without a criminal conviction (**the non-conviction-based scheme**).

This scheme aimed to address limitations identified under the conviction-based scheme by extending its application to all criminal proceeds accumulated by a person engaged in serious criminal activity, regardless of whether the proceeds relate to a specific offence or whether a conviction has been obtained.[30] The scheme enables a recovery action to be commenced if a court is satisfied, on the balance of probabilities, that a person is or has been involved in serious criminal activity during the previous six years and the person is unable to demonstrate how the property in question was lawfully acquired.[31]

- In **2013**, Queensland introduced a **serious drug offender confiscation order (SDOCO) scheme** and expanded the non-conviction-based scheme by introducing provisions for the recovery of **unexplained wealth (UEW)**.[32]

The amendments implemented the government's pre-election commitment to "introduce tough new laws to target ill-gotten gains of criminals."[33] Under the new SDOCO scheme, the state may confiscate all of a person's property if they are convicted of a qualifying serious drug offence, even if the property was lawfully acquired.[34] The UEW provisions enable a court to issue an order for the recovery of a person's property to the value of the person's UEW if there is a reasonable suspicion that the person has engaged in a serious criminal activity and any of the person's wealth was acquired unlawfully.[35]

This review uses the term "regime" to refer to the combination of these schemes, and the entire system of agencies, people, policies, and procedures that embed the CPCA in practice.

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26 Asset confiscation is also authorised under other Queensland legislation (e.g. Part 5 of the *Drugs Misuse Act 1986* (Qld)), but it is outside the scope of this review.

27 This is not an exhaustive list of amendments to Queensland's asset confiscation regime.

28 See Queensland Legislative Assembly, *Parliamentary Debates [Hansard], Legislative Assembly, 4 April 1989*, Hon. P Clauson, p. 4036.

29 Section 4 of the Crimes (Confiscation) Act 1989 (Qld).

30 *Explanatory notes*, Criminal Proceeds Confiscation Bill 2002 (Qld), p. 1.

31 *Explanatory notes*, Criminal Proceeds Confiscation Bill 2002 (Qld), p. 3.

32 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

33 See Queensland Parliament Hansard, *Record of proceedings: first session of the fifty-fourth Parliament: Wednesday, 1 May 2013*, Legislative Assembly, Hon. J. P. Bleijie, p. 1344.

34 See Chapter 2A of the CPCA.

35 Section 89G of the CPCA.

Purpose and operation of the Queensland asset confiscation regime

As described earlier, the CPCA's main objective is to "remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity".[36] The other important objectives are to:[37]

- assist enforcement agencies to trace assets that may be criminal in nature
- impact respondents (that is, individuals against whom confiscation action is taken) by depriving them of wealth or property that is either illegally acquired, connected to crime, or could not have been lawfully acquired, and increasing the financial risks of engaging in serious crime[38]
- enforce orders on respondents who currently reside or have assets in Queensland, even if the order was not made in Queensland
- protect honestly acquired property from forfeiture or other orders affecting property, and
- divert confiscated funds from respondents,[39] including from reinvestment in the criminal economy, into Queensland's Consolidated Fund.

The end-to-end process for asset confiscation – regardless of the specific scheme within the CPCA – can be simplified into six key stages, provided in Figure 3.[40]

Responsibility for the regime's operation is distributed across five entities:[41]

- The **QPS** is the typical source of referrals for asset confiscation. Their work in identifying and referring candidate asset confiscation matters is critical to the success of any asset confiscation action.
- The **CCC** administers the non-conviction-based confiscation scheme under Chapter 2 of the CPCA, and the serious drug offender confiscation scheme under Chapter 2A. In doing so, the CCC receives referrals for such matters or generates matters from the CCC's own work, and assesses and investigates those matters, in preparation for applying for a court order.
- The third scheme, a conviction-based scheme under Chapter 3 of the CPCA, is administered by the **DPP**. The DPP is also the solicitor on the record for all three schemes. That is, the DPP presents applications to court on behalf of the State, for all orders under the CPCA.
- The **Supreme Court of Queensland** is generally responsible for hearing applications and making orders.[42]

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36 Section 4(1), CPCA.

37 Adapted from section 4(2), CPCA.

38 Recent research by the CCC suggested that asset restraint deters individuals from reoffending, at least in the short to medium term. See: CCC 2022, *Research report: the impact of proceeds of crime action on offending trajectories*, p. 24**Error! Hyperlink reference not valid.**.

39 The QLS in their submission raised concerns about a respondent's inability to use restrained funds to engage legal representation during confiscation proceedings. While the Act allows a respondent to access Legal Aid, the QLS noted that Legal Aid funding for confiscation matters is limited. The review notes that the court may impose conditions allowing certain expenses to be paid out of a person's property restrained under a restraining order (section 34, CPCA). However, restrained property cannot be used for the payment of legal expenses payable because the person is a party to proceedings under the CPCA or is a defendant in criminal proceedings (section 34(4), CPCA). Analogous provisions exist under the SDOCO scheme and the conviction-based scheme (see sections 93Q(4), 93T(2), 93(V)(1)(f), 126(4), 129(2) and 130(1)(f), CPCA). There is also relevant case law to consider (for instance, *State of Queensland v Masman & Ors* [2009] QSC 430).

40 In real terms, the end-to-end process for asset confiscation has many steps, and can return to earlier steps. This process has been drafted in a way to apply to all schemes under the CPCA, despite the important nuances between the schemes.

41 Other agencies can and do perform a role, depending on the matter, but this paper focuses on the agencies routinely involved.

42 There are limited circumstances in which a Magistrates Court may make a forfeiture order because of a conviction for an offence (sections 150 and 183, CPCA), but the value of the order is limited to the jurisdiction of the court.

- The **PTQ** is responsible for collecting, storing, maintaining, and disposing of assets that are the subject of an order under the CPCA.

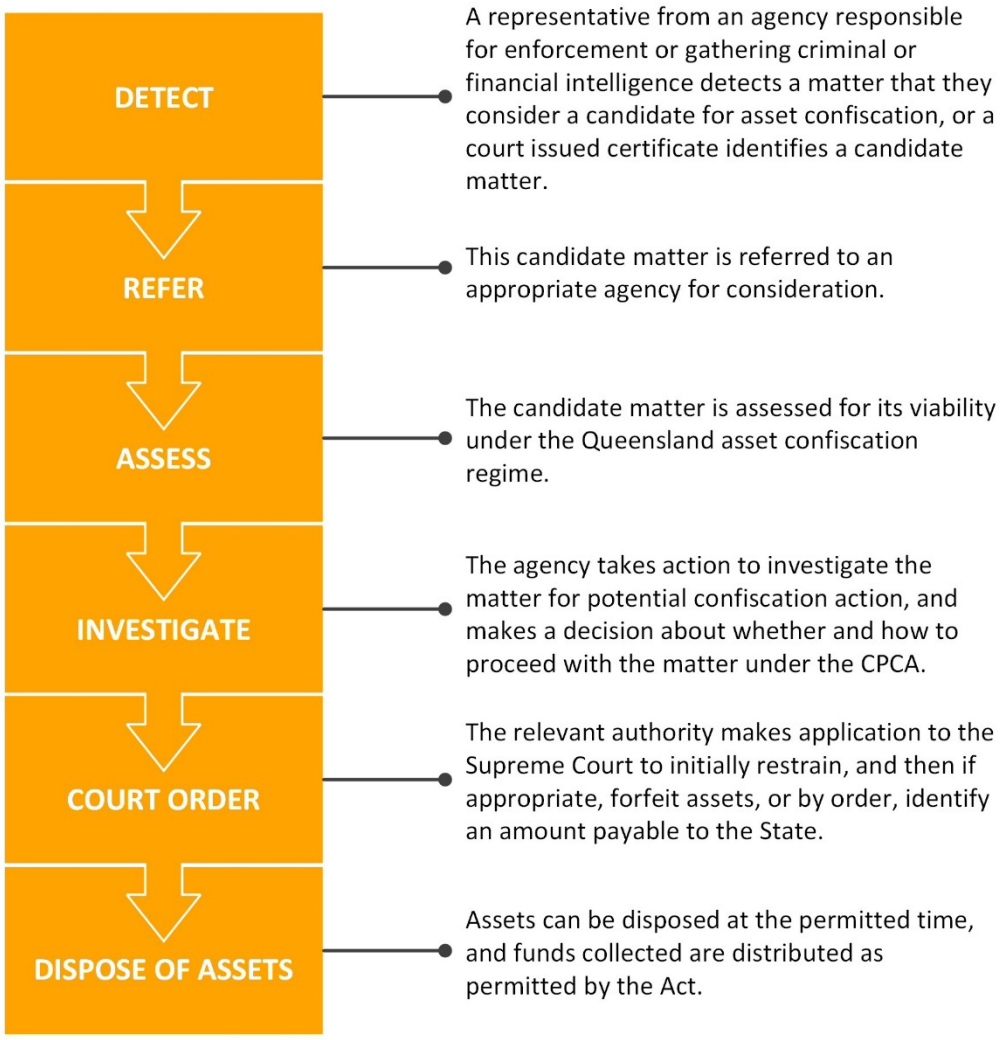

Figure 3. The end-to-end process for asset confiscation, simplified.

Queensland's asset confiscation mechanisms and protections

The mechanism to restrain and confiscate assets via the CPCA is through court orders. The CPCA provides for a substantial range of orders. There are important differences between orders available under each scheme in terms of the circumstances for which an application can be made, and what the court must consider before making an order.

This section summarises the headline orders that the CPCA provides. For accessibility, they are organised into four categories:

1. **Orders that preserve assets**[43] prevent assets from being sold or disposed of, as well as ensuring assets are maintained, while further investigations are undertaken or applications for

43 See sections 28, 93H, and 117, CPCA.

confiscation are commenced.[44] Also, the CPCA provides for related property seizure orders that authorise seizure of property restrained under a restraining order, or any other property the court considers appropriate.[45]

2. **Orders that assist in an investigation**[46] that is related to restraining or confiscation orders. They include examination orders and property particular orders, which require a person to attend an examination or supply written information relating to restrained property.
3. **Orders that protect vulnerable or innocent parties** include orders or other provisions that seek to protect the dependants of those who will forfeit property;[47] return forfeited property that is owned by an innocent third party;[48] discharge an order if a relevant conviction is overturned or the order appealed;[49] and otherwise exclude property from orders for permitted reasons.[50]
4. **Orders that confiscate assets, or identify an amount payable to the State** include forfeiture orders,[51] proceeds assessment orders,[52] UEW orders,[53] SDOCOs,[54] pecuniary penalty orders,[55] and special forfeiture orders.[56] Once these orders are made by a court, and when the appeal period has ended, the confiscated assets or the identified amount payable – minus any fees, charges, and any payment allowed under the CPCA[57] – are paid to Queensland's Consolidated Fund.[58]

In addition to those specific orders or provisions that offer protections, there are a range of safeguards that have a more general application. A key protection within the CPCA is the public interest provisions, which are a feature of all three schemes in the CPCA. In a 2020 paper, the AIC noted (emphasis added):[59]

> Judicial avenues for relief are imperative on rule of law grounds to appropriately supervise prosecutorial and executive confiscation discretion and to balance the impact of the legislation against its clear purposes. **The Queensland regime, for**

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44 In their submission the QLS raised concerns that lawfully acquired property can be restrained pending the hearing of a substantive application. The QLS acknowledged that there are valid policy reasons in place to combat serious crime, however, considered it to be fair and reasonable to allow a person to retain lawfully acquired assets. However, the review clarifies that a person subject to a restraining order (the prescribed respondent) may apply to the Supreme Court to amend the order to exclude particular property from the order (sections 47 and 48, CPCA). If the court considers it likely that the property will be required to satisfy a proceeds assessment order or an UEW order, it may be included in the forfeiture order regardless of whether it was lawfully acquired. However, to make such an order, the Court must be satisfied that it is more probable than not that, at any time within the 6 years before the application was made, the person engaged in a serious crime related activity. Thus, there are limited circumstances in which lawfully acquired property may be forfeited to the State.

45 See sections 38A(1)(d), and 93W(1)(d), CPCA.

46 Sections 38A, 93W, 130A, CPCA.

47 See Chapter 2, Part 5, Division 4; and Chapter 2A, Part 4, Division 4, CPCA.

48 Section 165, CPCA. The application must be made within six months of the property being forfeited to the state.

49 For instance, sections 160 and 93ZZS, CPCA.

50 For instance, see Chapter 2, Part 4, Division 2; and Chapter 3, Part 4, Division 3, CPCA.

51 See sections 56 and 146, CPCA.

52 See section 77, CPCA.

53 See section 89F, CPCA.

54 See section 93ZY, CPCA.

55 Section 178, CPCA.

56 Section 200, CPCA.

57 For instance, section 223 for PTQ, and sections 230 and 214(3) for Legal Aid Queensland.

58 See section 214. Assets forfeited under the non-conviction-based schemes must be paid into Queensland's Consolidated Fund (section 214(5)), but funds forfeited under the conviction-based scheme can be used for permitted purposes (section 214(1)-(4)).

59 Skead, N. et al. 2020, *Pocketing the proceeds of crime: recommendations for legislative reform*, AIC, p. *x*.

example, includes a broad judicial discretion to refuse to make any order on public interest grounds.

As well as the public interest provisions in the CPCA, the CCC[60] and the DPP[61] are bound as a Model Litigant[62] to act independently, impartially, and fairly, having regard to the public interest. Further, section 57 of the CC Act stipulates that the CCC must "act independently, impartially and fairly having regard to the purposes of the CC Act and the importance of protecting the public interest". Therefore, the public interest is considered by the CCC and the DPP before an asset confiscation matter goes to court, and in the court's consideration of the matter.

Another related key protection within the Queensland legal framework is the *Human Rights Act 2019* (Qld), which provides that agencies must make decisions in a way that is compatible with human rights, and authorises the Supreme Court to declare that a statutory provision can only be interpreted in a way that is compatible with human rights.[63]

60 Section 57 of the CC Act.

61 See DPP 2016, *Director's guidelines*, pp. 1-5

62 See DJAG 2023, *Model litigant principles*, p. 1.

63 Section 4(b) and (g), *Human Rights Act 2019* (Qld). The CPCA does not currently have any Human Rights Statements of Compatibility for any of its schemes or provisions, as its enactment and subsequent amendments occurred prior to the requirement to have such a statement. This requirement commenced on 1 January 2020; see Queensland Government 2024, *Human rights statements and certificates*, p. 1.

3. Data on Queensland's asset confiscation regime

This chapter presents key data sources collected for this review. Specifically, this chapter presents findings from official quantitative data, workshops with practitioners and stakeholders, and submissions to the review's Discussion Paper.[64] The review sought and examined data from the last five years to understand the activities and impacts from the CPCA.[65] The data offers important context to the matters raised in workshops and in submissions.

Types of orders, and decision making

This section describes the recent activity under Queensland's asset confiscation scheme for as much of the end-to-end process of asset confiscation (refer back to Figure 3) as the available data allows. This section relates to the non-conviction based scheme and SDOCO scheme only (Chapter 2 and 2A, CPCA), as no comparable data were available to the review for the conviction-based confiscation scheme's operation, or special forfeiture orders (Chapter 3 and 4, CPCA).

Types of court orders made

Under the non-conviction based and SDOCO schemes in the last financial year (2022-23), the confiscation orders were mostly consent forfeitures, with a smaller number of UEW and proceeds assessment orders (see Figure 4). Six matters were discontinued before they reached a "final order" status. There were no orders made in the last financial year under the SDOCO scheme.

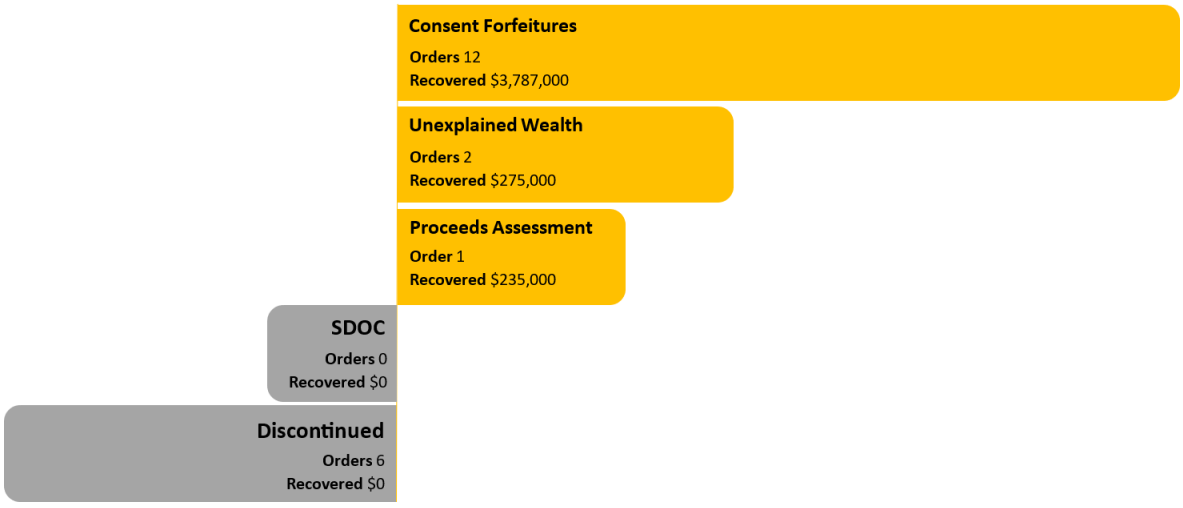

Figure 4. Activity under the non-conviction based and SDOCO schemes for the 2022-23 financial year.

Volume of matters considered for asset confiscation

The review obtained figures for the last five financial years to present whether matters considered for asset confiscation changed over time. Figure 5 shows that, from the data available to the review:

- The number of referrals into the civil confiscation scheme has reduced over time; the number received in 22-23 is half that received in 18-19.

64 Details about these data sources are provided at page 10.

65 Data was not always available for the full five-year period, due to normal organisational changes in data handling or coding over time.

- Most referrals originate from QPS, and the number of those have been falling since 2019-20.

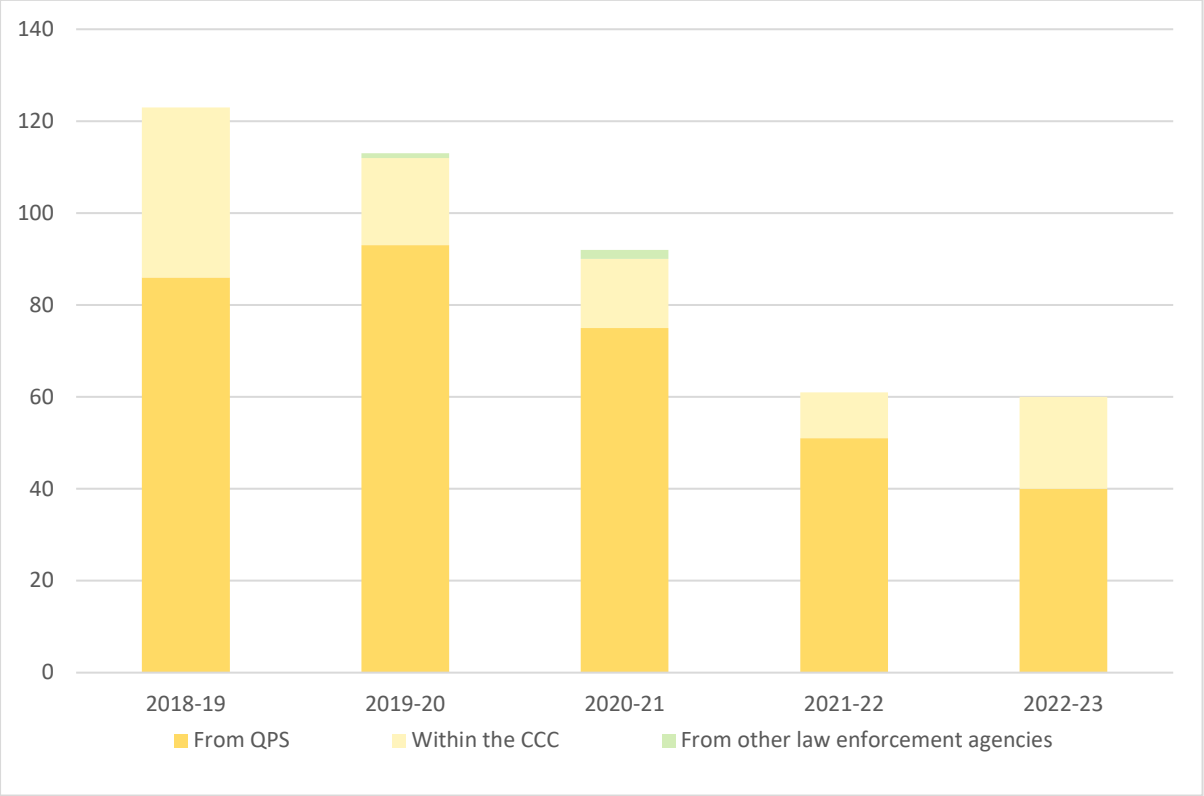

Figure 5. Matters considered for asset confiscation, by source of referral over time.

Decision making from commencement to finalisation

We examined the decision making in civil confiscation proceedings, from commencement through to finalisation. The review examined all matters the CCC received within the 2021 calendar year, and conducted a file review of those matters.[66] Of the 65 matters reviewed,[67] five were active at the end of the study period.[68]

Of the 60 settled[69] or finalised matters that commenced in 2021:

- Nine resulted in successful confiscations amounting to over $1.8 million. That is, 15% of matters considered by the CCC for civil confiscation in 2021 had successful confiscations by the end of February 2024.
- 51 matters were rejected either at assessment or preliminary investigation stages. That is, 85% of matters considered by the CCC for civil confiscation in 2021 were rejected at the assessment stage (25 matters) or rejected at the preliminary investigation stage (26 matters).

66 We used the 2021 calendar year to have a balance between data that is recent, but has sufficient proportion of settled (but awaiting finalisation) or finalised matters. The 2022 and 2023 calendar years had too few of such matters to be considered. See page 21 for results about the duration of matters.

67 A total of 67 matters were received (including from internal CCC sources), and four of those matters were merged into two matters, resulting in a total of 65 matters in the 2021 calendar year.

68 The end of the study period for this data source was 29 February 2024.

69 But awaiting finalisation.

As most matters were rejected, the review considered the recorded reasons for rejection.[70] File information provided the following as reasons for rejecting the matter for civil confiscation proceedings:

- Insufficient assets, or that if confiscation action were to be undertaken, an unjustifiable cost to the State would be incurred.[71]
- Insufficient evidence of serious crime related activity.
- The matter was more suitable to pursue under the conviction-based scheme or Part 5 of the *Drugs Misuse Act 1986* (Qld).
- No viable confiscation strategy was available.
- Otherwise *not in the public interest* to pursue the matter.

Throughout the file review, it was clear that the SDOCO scheme was rarely being used. The SDOCO scheme is described in Text box 1.

Text box 1. About the SDOCO scheme (Ch 2A of the CPCA)

Chapter 2A of the CPCA "enables proceedings to be started for the forfeiture of particular property of, or gifts given to someone else during a particular period by, a person who has been convicted of a qualifying offence for which a serious drug offence certificate has been issued." (CPCA, s 93A(1)).

Respondents are "eligible" for confiscation via Chapter 2A if they have a specific combination[72] of Serious Drug Offence Certificates issued for each serious drug offence of which they were convicted. The application for the Order must occur within six months of the qualifying Serious Drug Offence Certificate being issued to the respondent[73].

Using the data from 65 matters received in the 2021 calendar year:

- **Serious drug offender certificates were not a valuable source of referrals:** 29 individuals had a serious drug offender certificate issued, but in only in five matters was the SDOCO issued before the matter was received via another referral source. This highlights the SDOCO scheme as having limited unique contribution as a referral source.
- **Practitioners did not use the SDOCO scheme where possible:** Where a matter could be proceeded with under either the non-conviction based scheme or the SDOCO scheme, the practitioner opted to use the non-conviction-based scheme.
- **The SDOCO scheme has limited disruptive impact**: of the 14 matters that progressed to restraint of assets, none were matters proceeded with under the SDOCO scheme.

The most recent data (2022-23 financial year data) lends support to the file review data. In the 2022-23 financial year, there were 936 certificates issued for serious drug offence convictions, but no confiscation orders made under the SDOCO scheme.

This report discusses the SDOCO scheme again on page 35.

70 Note that there may be more than one reason for rejection.

71 Note that "insufficient assets" can be due to an inability to identify the assets deemed suitable for confiscation. For instance, if the assets appear legitimate, difficult to be valued (e.g., cryptocurrency, cattle), or not under effective control of the target/respondent.

72 One Category A offence; or three offences comprised of any combination of Category B and Category C offences, committed within 7 years. See section 93F, CPCA.

73 section 93ZZ(3), CPCA.

The efficiency and impact of the scheme

There are many ways to evaluate the performance, impact or efficiency of an asset confiscation regime. At the system-level,[74] examples of measures include:

- Funds returned to the Consolidated Fund, in the context of the cost to running Queensland's asset confiscation regime. This is one measure of *efficiency of the regime.*
- Funds returned to the Consolidated Fund, in the context of the estimated criminal profits made in Queensland. This is one measure of *disruptive impact*.
- The number of orders applied for, made, assessments or investigations commenced, and so on. This is one measure of *activity of the regime*.
- The proportion of orders converted from "restrained" to "forfeited". This is one measure of *appropriate targeting of the regime*.

This section presents some data that was available to the review, on the efficiency and impact of the scheme. It presents two measures of efficiency – return on investment (ROI) and duration of matters – and a discussion on the potential impact of asset confiscation on Queensland's criminal economy.

Return on investment

ROI is used by the AFP as a performance measure of efficiency and impact of their Criminal Asset Confiscation Taskforce.[75] This review calculated a measure of (ROI) of the Queensland scheme. Table 1 shows that Queensland's asset confiscation regime has a ROI of between 1.84 and 2.51, based on the three years of data available to the review.[76]

Table 1. ROI[a] of the Queensland scheme, over time.[77]

Year	ROI[b]: For every $1 spent administering the regime…
2019-20	…$1.84 was returned to the Consolidated Fund
2020-21	…$2.30 was returned to the Consolidated Fund
2021-22	…$2.51 was returned to the Consolidated Fund

Note [a]: The calculation used is [ROI = Benefits / Costs].

Note [b]: Excludes DPP costs, and PTQ's storage costs.

While this ROI has increased for each of the three years in Table 1, it should be viewed against the context of falling referral numbers (see Figure 5) and falling values returned to the Consolidated Fund (see Figure 6).

There are a range of possible explanations for the increase in ROI, including:

74 There are different ways to consider impacts at the criminal network level (e.g. Buscaglia, E. 2008, *The paradox of expected punishment: legal and economic factors determining success and failure in the fight against organised crime*, pp. 12-20) and at the individual level (e.g. CCC 2022, *Research report: the impact of proceeds of crime action on offending trajectories*, p. 25).

75 AFP 2022, *Annual report 2021-22*, pp. 54-55.

76 This is based on the "benefits" being the dollar value remitted to the Consolidated Fund, and the "costs" being the costs of running the CCC and PTQ business units responsible for asset confiscation in Queensland. However, costs expended by the DPP and the costs to store restrained assets by PTQ were not available to the review. Therefore, the above figures overestimate the ROI of Queensland's asset confiscation regime.

77 See also Appendix 1.

- Asset confiscation practitioners are working more efficiently and effectively in their roles, despite the drop in referrals over time. For instance, the CCC gave greater emphasis to "justifiable use of resources" in decisions about which confiscation matters to pursue.
- That investment directed to administering the scheme has reduced slightly faster than the drop in recovered funds over time.

While this review progressed efforts to estimate the ROI for Queensland's asset confiscation regime, there is more work to do on impact measurement of asset confiscation.[78]

Duration of matters

The review examined the duration of matters to learn about the efficiency of the asset confiscation regime. Only data about civil confiscation matters was available to the review.

Of the 15 civil confiscation matters that had assets recovered during the 2022-23 financial year, their duration from date of commencement varied from about eight months (259 days) to over seven years (2602 days).[79] The median duration was about two years (751 days).

Asset confiscation's potential impact on the criminal economy

Earlier in this report, the size of Queensland's criminal economy is estimated to be at least $10 billion (see page 8). In comparison:

- $3.1 million was spent administering Queensland's asset confiscation regime in 2021-22[80] (see Appendix 1)
- administering the regime generated $14.5 million in court-ordered forfeitures and payments in 2022-23
- $5.5 million was remitted to Queensland's Consolidated Fund from the operation of the CPCA in 2022-23.[81] The review obtained figures for the last five financial years to present these figures over time (see Figure 6).

78 One legal scholar's submission raised the importance of impact measurement, to ensure that the CPCA is having the intended impact on serious crime.

79 The review located files that resulted in recovered assets in the 2022-23 financial year, and had entered post-delivery stage at any date, and estimated duration based on their date of commencement.

80 Only data from the CCC and the PTQ were available to the review.

81 Figures provided by the CCC, DPP, and QPT.

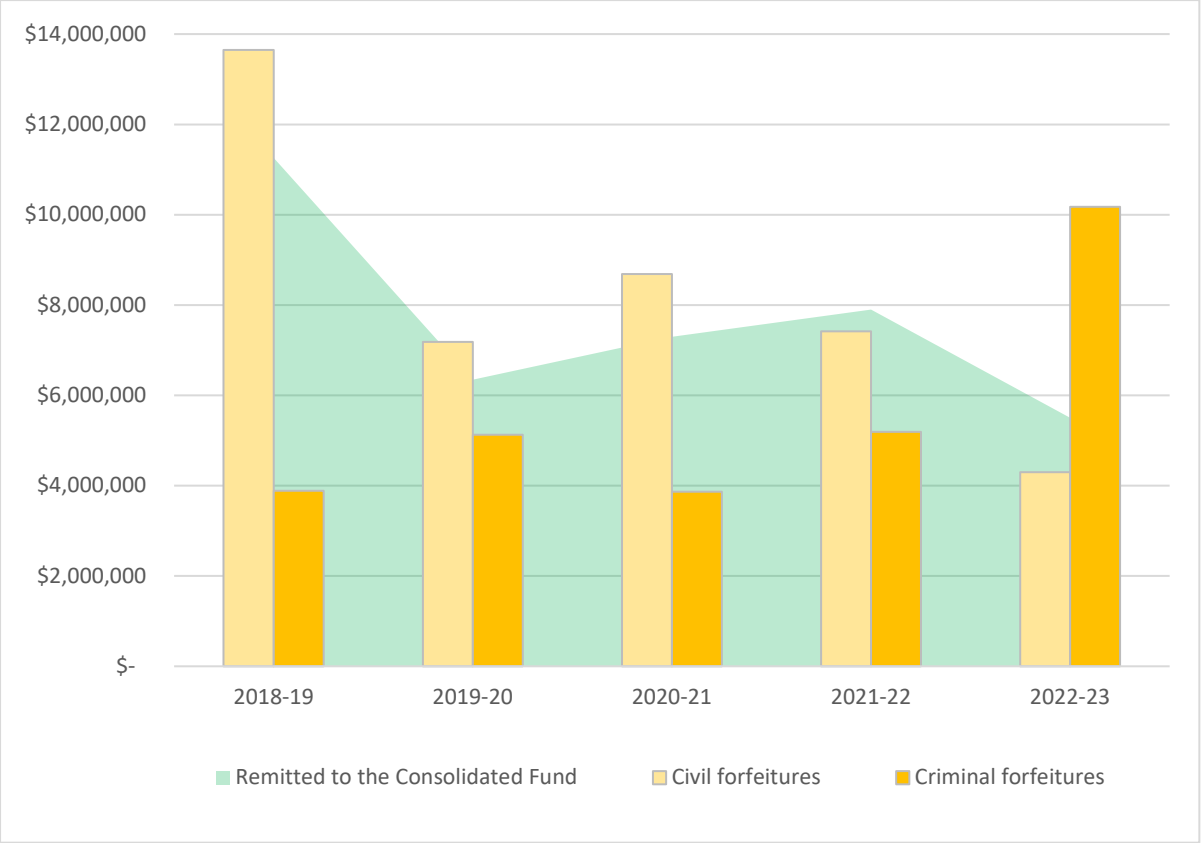

Figure 6. Dollar value of orders and funds remitted to the consolidated fund, by scheme and over time.

Figure 6 shows that, from the data available to the review:

- The value remitted to the Consolidated Fund has reduced from a high of $11.3 million in 18-19 to a low of $5.5 million in 22-23.
- The value of civil confiscation scheme forfeitures has reduced, while the value of the criminal confiscation scheme was steady before an increase in 22-23.

Overall, these figures indicate that the asset confiscation regime needs to have more impact on Queensland's criminal economy, which is estimated to be in excess of $10 billion.

Key themes from workshops

Four workshops were conducted, with participants representing 10 Queensland and Commonwealth agencies. Workshop participants raised a range of issues including:

- The contemporary criminal environment is constantly changing and adapting to new technologies and law enforcement methods, but the confiscation regime has not kept pace with the changing criminal environment, leading to fewer confiscation referrals, and lower-order or less sophisticated criminals.[82]

82 Recent research by the CCC supports this view: CCC 2022, *Research report: the impact of proceeds of crime action on offending trajectories*, p. 9; Similar concerns are expressed for Western Australia's (WA) confiscation scheme in Martin, W. 2019, *Review of the Criminal Property Confiscation Act 2000* (WA), p. 26.

- Higher-level criminals may not be as impacted by confiscation actions as lower-level criminals, but targeting these offenders has potential for greater disruptive impact.
- Digital assets, in particular cryptocurrencies, are increasingly used by organised crime and other criminals to launder money due to their mostly unregulated, near-instantaneous transactions across borders and the difficulty in tracing and confiscating them.[83]
- The Queensland asset confiscation regime is not fit-for-purpose in various ways, including the definition of money laundering within the CPCA (see page 25); the challenge in deciding whether to pursue asset confiscation when the offending has an identifiable victim (see page 38); and the value of the SDOCO scheme (see page 35).
- Public interest considerations[84] and differences in interpretation between agencies. Improved communication and earlier engagement between relevant teams will improve outcomes.
- The features of a high-impact multi-agency taskforce model for Queensland asset confiscation, including the required capabilities and powers such as information sharing.[85]
- The features of a single confiscation agency model, including the requirements to create information barriers within an agency, and the strengths and drawbacks of agency consolidation (see page 41).[86]
- The importance of identifying and measuring impacts of asset confiscation, but the challenges in doing so (see page 20).[87] This was due to the difficulty of measuring and placing a value on disruption, deterrence and the public perception of community safety.[88] Participants also noted that what constitutes "having a disruptive impact" is context-specific (e.g. it may differ in a rural or remote location, relative to south-east Queensland).

Submissions to the review

The review received six submissions to the Discussion Paper. These were from two legal entities (Bar Association of Queensland (BAQ), and QLS), one entity that is part of Queensland's asset confiscation regime (PTQ), two Australian legal scholars (Dr Gregory Dale and Associate Professor Mark Lauchs), and one member of the public.

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83 This is reflected in the literature, for example see Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, p. 512; Financial Action Task Force (FATF) 2021, *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*, p. 8; and AUSTRAC 2022, *AUSTRAC 2021-22 annual report*, p. 38. This is also a result of broader changes such as the move away from the use of cash after the COVID-19 pandemic (AUSTRAC 2022, *AUSTRAC 2021-22 annual report*, p. 38).

84 Public interest considerations include individual factors such as age and health; circumstances surrounding the charge that speak to credibility; proportionality between the seriousness of the crime and the impact of the confiscation; costs to the State involved in confiscation; ROI; and other legal considerations such as whether the respondent had effective control of assets.

85 Reciprocal systems for effective information sharing, including with the private sector, is identified as a gap in current global detection and response to fraud (Deloitte 2024, *Combating illicit finance: driving effective response across the judicial ecosystem*, pp. 5-8).

86 See Hughes, C. and Brown, R. 2022, *Financial investigation for routine policing in Australia*, AIC, p. 8 for a discussion on "organisational isolation"; it is also noted in CCC 2020, *PCCC five-yearly review submission*, p. 71 that the CCC has experience undertaking complex investigations involving multidisciplinary teams.

87 The separation of functions within a single agency is reflected in the experience of other law enforcement jurisdictions, see for example WA Audit Office 2018, *Confiscation of the proceeds of crime*, p. 3.

88 Tubex et al. 2022 observes that deterrence requires offenders to be aware of the legal consequences and that most legal practitioners consulted revealed their clients were ignorant of the ability of some jurisdictions to confiscate legitimately owned assets (Tubex et al. 2022, *A criminological analysis of proceeds of crime legislation in three Australian states*, p. 11).

Submissions considered a range of issues including:

- Increased prioritisation of the assets committed to the consolidated fund being used in support of crime prevention and victim support.
- Need for broad protections and safeguards to ensure the system is fit for purpose, via parliamentary or judicial oversight (e.g., access to lawfully acquired assets, with judicial leave, to pay legal fees and ensure proper representation).
- Insufficient outcome measures and systems evaluation considering ROI, cost benefit analyses, and overall impact on organised crime.
- Suggestions to increase the impact of the scheme, via cost reduction strategies such as a low-cost specialised court and greater efforts to identify and target high-value offenders.
- Lack of public interest and trust in the scheme resulting from limited reporting and misconceptions regarding the motivations of recovery schemes.[89]
- Potential for prejudice to respondents due to the link between UEW and criminal activities (e.g., where confiscation proceedings co-occur with criminal proceedings).

These are expanded on throughout *Recommendations to modernise the regime*.

89 Public perceptions are thought to be influenced by misconceptions that suggest asset recovery is associated with a motivation by law enforcement to increase revenue (see Tubex et al. 2022, *A criminological analysis of proceeds of crime legislation in three Australian states*, pp. 9-10). One submission recognised a need to be mindful that perceptions have undermined some overseas regimes.

4. Recommendations to modernise the regime

The information this review collected and analysed indicates that the disruptive potential of Queensland's asset confiscation regime requires improvement. In this chapter, the review presents 10 recommendations that seek to achieve seven priority outcomes:

- make the money laundering offence contemporary, clear, and fit-for-purpose, to respond to current and modern methods of money laundering
- enable effective seizure of digital assets, to respond to the use of digital assets in the criminal environment
- introduce an asset-focused confiscation mechanism, to respond efficiently to crime-used assets where the owner is unknown
- ensure that the CPCA delivers on objectives for disruptive impact, by clarifying provisions relating to the UEW orders, the SDOCO scheme, and when and how to progress confiscation matters when there is a related criminal matter
- change how confiscated assets are used, to enable more responsive approaches to serious crimes including victim-based crimes
- change agency responsibility to improve efficiency and agility, to make Queensland's asset confiscation regime more efficient and agile, and
- schedule a further review of the CPCA, to ensure currency and effectiveness of the Act.

The review did not receive submissions on all aspects of the proposed reforms set out in this Chapter.[90] However, to the extent relevant, the following discussion includes the views of submitters.

1. Make the money laundering offence contemporary, clear, and fit-for purpose

Queensland's money laundering offence is largely ineffectual and outdated and must be prioritised for legislative reform (see page 28).

Shortcomings of the current offences and definitions

The definition of money laundering in the CPCA is concerned with activities that involve – directly or indirectly – dealing with or concealing tainted property. The problem is that "tainted property" as defined in section 104 of the CPCA is confusing, self-referential, and circular in that it includes in the definition of tainted property, property that is "tainted property". [91] In this sense, the related definitions of money laundering and tainted property are not functional in a legal sense.

Outside the circular reference in the definition of tainted property, the only property captured by the term "tainted property" in the CPCA, is property to be used or intended to be used in connection with the commission of a criminal offence, or property derived from such property. This narrow

90 Submissions were sought, but not received, on proposed areas of reform relevant to Recommendations 1-5.

91 See recommendation 10 in PCCC 2021, *Review of the Crime and Corruption Commission's activities: report no. 106*, p. 34-35. While there have been sentence appeals where an offender has pleaded guilty to an offence of money laundering, it does not appear that the definition of money laundering in section 250 has been the subject of judicial consideration. Also, the tainted property examples provided in Schedule 1 Part 3 of the CPCA do not include an example of "tainted property" for the purpose of money laundering (i.e., for the purpose of section 104(1)(d) or (e)), which is one of the recommendations in FATF 2023, *International standards on combating money laundering and the financing of terrorism and proliferation*, p. 12.

linkage of tainted property to predicate offending is outdated as a basis for the offence of money laundering. Specifically, the narrow linkage does not represent the modern reality of money laundering activity, which is increasingly professionalised and available "as a service" in a global marketplace.

Further detail about the modern criminal techniques in money laundering are summarised in Text box 2.

Text box 2. Modern techniques in money laundering

The FATF monitors criminal organisations to identify emerging risks and publishes reports to raise awareness about the latest criminal techniques. In relation to money laundering, the FATF has identified the following trends:

- Criminal organisations are using a range of methods to launder the proceeds of crime, including bulk cash smuggling, cash couriers, trade-based money laundering, shell companies and the use of professional money launderers.[92] These practices are especially prevalent where the predicate offence involves drug trafficking or migrant smuggling.[93]
- The introduction of virtual services (e.g., the ability to open accounts remotely)[94] and technological advances (e.g., encrypted networks, crypto currency)[95] have enabled criminals to increase the scale, scope, and speed of their illegal activities.[96] Cyber-enabled fraud (CEF) is becoming increasingly common and generally involves organised criminal syndicates with distinct specialist sub-groups who are de-centralised across different jurisdictions. In addition, the location the CEF predicate offence occurs usually differs from the place the money laundering process occurs. Such organisations have capabilities to launder money quickly through a network of accounts, which often span across multiple jurisdictions and financial institutions making law enforcement actions extremely difficult.
- Criminal organisations are increasingly engaging in trade-based money laundering, which involves the utilisation of legitimate trading transactions to disguise and move criminal proceeds.[97] Trade-based money laundering techniques vary in complexity and may involve price misrepresentation, falsely described goods or the use of shell companies.
- The global art and antiques market is increasingly being used to launder the proceeds of crime and fund illegal activities.[98] Criminal groups utilise the historically secretive nature of the industry to hide beneficial owners, use fake sales or auctions, or under or over price products.
- The use of alternative money remittance services[99] to avoid the scrutiny and reporting requirements of traditional banking and money transfers.

92 FATF 2023 *Annual report*, p. 18; Australian Government 2023, *Australian Government response to the Senate Legal and Constitutional Affairs References Committee Report: Inquiry into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime*, pp. 3-4.; Legal and Constitutional Affairs References Committee 2023, *The adequacy and efficacy of Australia anti-money laundering and counter terrorism financing (AML CTF) regime*, pp. 9-10.

93 See FATF 2022, *Money Laundering and Terrorist Financing Risks arising from migrant smuggling* and FATF 2022, *Money Laundering from Fentanyl and Synthetic Opioids*.

94 Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, p. 512.

95 See Transparency International 2020, *Anti-money laundering in digital currencies*, p. 1-3.

96 FATF 2023, *Illicit financial flows from cyber-enabled fraud*, p. 3.

97 FATF 2021, *Trade-based money laundering: Risk Indicators*, p. 1.

98 FATF 2023, *Money laundering and terrorist financing in the Art and Antiquities marker*, p. 1.

99 Alternative money remittance services involve an unofficial value transfer system based on trust. A person wanting to send money to another person will give that money to a node (a recognised individual) in the network, who will inform another node (at the recipient's location) that will then pay the recipient. The nodes charge for this service and balance their books at a later date. The recipient is often in another country or at a great distance. An example of this is "Hawala"; see UNODC 2024, *"We don't ask*

Existing models and approaches

The definition of money laundering in other jurisdictions is dealt with very differently. Those definitions are simplified and clear. For instance, approaches taken by the Commonwealth, NSW, and Victorian Acts:

- offer clearer definitions that adequately separate the concepts of proceeds of crime and the properties used (or intended to be used) in the commission of a crime,[100] and
- do not have the same issues as Queensland's tainted property definition.[101]

Further, Commonwealth amendments in 2021 provide a model for Queensland in the way that legislation captures contemporary methods of money laundering. These 2021 amendments improve and clarify measures for targeting evolving criminal business models to address the behaviour of modern money laundering networks by:

- capturing money controllers through an extension of the offence of money laundering to persons who recklessly cause another person to deal with relevant money or other property, and
- creating new offences in relation to proceeds of general crime to overcome difficulties in linking money or other property to a specific indictable offence,[102] and capturing concealing behaviour to disguise specified attributes of relevant property.[103]

These amendments focused on money laundering networks which are:

> …typically led by "controllers" who issue directions to others to deal with particular money or other property. They intentionally keep these individuals ignorant of its criminal origins while themselves operating at an arm's length to avoid criminal liability. The criminal origins of money or other property is also typically obscured through complex legal and administrative arrangements, strict information compartmentalisation, encrypted communication services, and other methodologies employed to severely frustrate law enforcement's efforts to identify predicate offending (and therefore show that money or property is the proceeds of crime) … [The amendments] also target individuals who remain wilfully blind to the nature and origins of criminal assets that they deal with as a means of avoiding money laundering offences.[104]

Following the Commonwealth amendments, NSW amended their money laundering offences to achieve similar outcomes.[105] Features of the Commonwealth legislation also warrant consideration for Queensland.[106]

The need to amend Queensland's definition of money laundering has previously been recognised. In 2021, the CCC submitted to the PCCC's five-yearly review that the offence of money laundering in

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questions": Hawala payment system vulnerable to use by organized crime groups, including opiate traffickers and migrant smugglers, p. 1.

100 See section 400.4(1)(b)(i) proceeds of crime and (ii) instrument of crime of the *Criminal Code Act 1901* (Cth)), NSW (see sections 193A, 193B and 193D of the *Crimes Act 1900* (NSW)) and Victoria (see sections 193, 194 and 195A of the *Crimes Act 1958* (Vic)).

101 Section 193C of the *Crimes Act 1900* (NSW), section 195 of the *Crimes Act 1958* (Vic) and section 400.9 of the *Criminal Code Act 1995* (Cth) are preferred models.

102 And provides consistency with the 2015 decision of the NSW Court of Appeal in *Lin v The Queen* [2015] NSWCCA 204.

103 *Explanatory memorandum*, Crimes Legislation Amendment (Economic Disruption) Bill 2020 (Cth), p. 2.

104 *Explanatory memorandum*, Crimes Legislation Amendment (Economic Disruption) Bill 2020 (Cth), p. 2.

105 See 193BA *Crimes Act 1900* (NSW), and section 400.4(1A) of the *Criminal Code Act 1995* (Cth).

106 Workshops identified that the various challenges with the money laundering offence in the CPCA have resulted in a preference for the Commonwealth money laundering offence to be charged in Queensland, which has implications for what powers QPS can use in investigating these offences.

section 250 of the CPCA should be reviewed.[107] The PCCC agreed, noting that such a review would require public consultation. The Government supported the recommendation and committed to conducting a consultation with key stakeholders as part of a review of section 250.[108]

Recommendation 1

That Queensland's offences of money laundering and possession of property suspected of being tainted in the CPCA:

a. be amended to ensure they are contemporary, clear, and fit-for-purpose, and

b. they cover laundering involving digital assets.

2. Enable effective seizure of digital assets

Queensland's asset confiscation regime has significant legislative gaps that undermine efforts to seize, control, and handle digital assets. This section provides context about digital assets in the criminal environment, the gaps within Queensland's regime, and existing models and approaches to guide the implementation of Recommendations 2 and 3 (see page 30-31).

Digital assets in the criminal environment

Cryptocurrencies are increasingly being used by organised crime for: money laundering (which is a significant illicit use of cryptocurrency);[109] the purchase and sale of illicit goods and services through darknet market places; scams (particularly investment scams);[110] terrorism financing; tax evasion; ransomware; bribery; and embezzlement.[111] Digital assets are both an enabler of crime and a means to launder benefits derived from crime. Digital assets appeal to criminals due to in-built anonymity/pseudonymity and the ease of concealing and moving digital assets outside of regulated sectors and across borders.[112]

The criminal use of digital assets is a primary concern in the contemporary criminal environment,[113] with high-level criminals and criminal organisations assessed to be responsible for billions of dollars' worth of cryptocurrency transactions.[114] Digital assets are expected to continue to proliferate as the criminal environment increasingly becomes less physical, and the CPCA less effective for dealing with digital assets.

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107 PCCC 2021, *Review of the Crime and Corruption Commission's activities: report no. 106*, pp. 34-35.

108 Queensland Government 2021, *Review of the Crime and Corruption Commission's activities: Queensland Government's response*, pp. 4-5.

109 Europol 2021, *Europol spotlight: cryptocurrencies – tracing the evolution of criminal finances*, p. 5; Chainalysis (2024) estimates that in 2023, $22.2 billion USD (33.8 billion AUD) was moved from cryptocurrency wallets associated with illicit activities to centralised services such as digital currency exchanges, miners and mixers, which decreased from $31.5 billion USD ($48 billion AUD) in 2022. Chainalysis attributes this decrease to following a general market decrease as well as a move towards Decentralised Finance platforms. See Chainalysis 2024, *The 2024 crypto crime report*, pp. 23-24.

110 Scamwatch received over 10,412 reports of cryptocurrency scams with losses over $129.4 million (Fintel Alliance 2022, *Preventing the criminal abuse of digital currencies*, p. 9).

111 Cyber Security Industry Advisory Committee 2022, *Exploring cryptocurrency*, p. 6; Fintel Alliance 2022, *Preventing the criminal abuse of digital currencies*, p. 5; and Transparency International 2023, *Cryptocurrencies, corruption and organised crime: implications of the growing use of cryptocurrencies in enabling illicit finance and a corruption*, pp. 4-5.

112 Transparency International 2023, *Cryptocurrencies, corruption and organised crime: implications of the growing use of cryptocurrencies in enabling illicit finance and a corruption*, pp. 4-6.

113 Views expressed to the review in workshops and consultations.

114 This is supported by the available literature; see for example Chainalysis 2024, *The 2024 crypto crime report*, pp. 23-24 which estimates that addresses associated with illicit activities sent $22.2 billion USD to services such as mixers and exchanges.

The gaps in Queensland's legislative regime

The CPCA does not use the terms "cryptocurrency", "cryptoasset"[115] or "digital asset". However, digital assets are captured by the definition of "property" that the CPCA uses[116] because that definition captures intangible interests. While digital assets can be restrained and forfeited under the CPCA,[117] there are currently no specific provisions for investigative agencies in Queensland to facilitate effective seizure of digital assets. "Effective seizure" of a digital asset requires powers directed to removing the ability of an offender or respondent (or any other person acting on the respondent's behalf) to control the digital asset. It also would involve transferring that control to a relevant investigative agency, such as the QPS or the CCC, or as ordered by the Court.

This inability to seize digital assets is a critical gap in Queensland's responses to serious and organised crime and in Queensland's asset confiscation regime because seizure of digital assets is necessary for:

- gathering evidence of a criminal offence (including criminal activity for which confiscation action may be taken)
- attributing ownership of a digital asset, and
- ensuring that the asset is preserved (i.e. for both evidentiary purposes and restraint by a court in potential confiscation).

The review has identified that there are at least four elements to be considered as part of an effective power to seize a digital asset:

- a definition of what may be seized (the digital asset)
- the authority or power to transfer the asset beyond the respondent's control
- to facilitate transfer, the power to demand access information to the digital asset, including a definition of what access information comprises, and to demand reasonably necessary assistance by a person who has effective control of the digital asset, and
- an offence of failing to provide access information to the digital asset, or reasonable assistance.

Existing models and approaches

The Victorian model for facilitating effective seizure of digital assets

Section 92A of Victoria's *Confiscation Act 1997* (Vic) presents a model for the seizure of digital assets, using the definition "a digital representation of value, or contractual rights, that may be transferred, stored or traded electronically".[118] The insertion of a provision similar to section 92A in the PPRA and CC Act[119] would provide police and commission officers with the express power to seize digital assets during a search warrant and allow officers to take measures to secure control over those assets. It would require the insertion of a new definition of "digital asset" in the CC Act and the PPRA.[120]

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115 The ATO describes cryptoassets as "a subset of digital assets that use cryptography to protect digital data and distributed ledger technology to record transactions" (ATO 2023, *What are crypto assets?*, p. 1).

116 Section 19 of the CPCA, which largely relies on the definition of property in the *Acts Interpretation Act 1954* (Qld). That Act states: "property means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action".

117 Cryptocurrency can and has been handled by PTQ post-forfeiture.

118 Section 3(1) of *Confiscation Act 1997* (Vic).

119 Sections 154 and 154A of the PPRA and sections 88A and 88B of the CC Act.

120 Some consequential amendments throughout the CC Act and PPRA should also be considered to include the newly defined term "digital asset" into relevant provisions. For example, provisions relating to powers of police officers and commission officers under search warrants in sections 157 of the PPRA and section 92 of the CC Act.

While Victoria's section 92A authorises police to do certain things to secure and seize digital assets, it does not contemplate the situation where information to access the digital asset is only known to the suspect or offender. This shortcoming is addressed to some extent by sections 80A and 80B of the Victorian Act, which allow police to direct a person to provide any information or assistance that is reasonably necessary to access data from a computer or data storage device.

Queensland has similar provisions, but with important gaps. Sections 154 and 154A of the PPRA and sections 88A and 88B of the CC Act ensure that officers can gain access to the data that is stored on mobile phones, computers and other electronic devices after the physical device has been seized. These sections require a person to provide access to the device, and any necessary access information to the device, and allow an officer to gain access to, examine, make a copy of, or convert information if required, from the device. These sections, however, refer to "digital device", which does not include digital assets.[121]

The Queensland model for an offence of failing to provide access information

In Queensland, if a person fails to provide access information to access a digital device, that constitutes a criminal offence and carries a maximum penalty of five years imprisonment.[122] If amendments to the PPRA and CC Act expand their application to include digital assets, consideration should be given to a suitable offence provision, whether that be under the Criminal Code or elsewhere.

The United Kingdom model for handling volatile digital assets

Noting that digital assets can be highly volatile in their value, the United Kingdom (UK) has enacted legislative change[123] to "Enable detained cryptoassets, or those which have been frozen in a wallet, to be converted to cash pending the outcome of a final forfeiture hearing. This is to safeguard against significant fluctuations in market value."[124] The review recommends that the power to seize a digital asset should be accompanied by a provision like the UK approach that enables a court to order digital assets be converted to cash.

Recommendation 2

That where relevant, the PPRA, CC Act, CPCA, and Criminal Code, be amended to provide:

a. a definition of a digital asset and digital asset access information, and

b. powers (and associated responsibilities) to facilitate effective seizure of digital assets.

Recommendation 3

The CPCA, the PPRA, and the CC Act be amended to provide the courts with the authority to decide whether a digital asset restrained under the CPCA, or seized under the PPRA or CC Act, should be converted to a more stable currency or asset, pending the outcome of a criminal or asset confiscation proceeding.

121 Digital assets can be stored in password-protected software within a digital device; this software can also exist online and not be installed in a digital device.

122 Section 205A *Criminal Code*.

123 See Chapter 3F Conversation of cryptoassets in Proceeds of Crime Act 2002 (UK), as amended by "Schedule 9 Cryptoassets: Crime Recovery" of the Economic Crime and Corporate Transparency Act 2023 (UK).

124 Government of the United Kingdom 2023, *Policy paper: factsheet: cryptoassets – legislation,* p. 1.

3. Introduce an asset-focused confiscation mechanism

Confiscation mechanisms in other jurisdictions are worth considering for enhancing the effectiveness of Queensland's regime. This is because Queensland's current asset confiscation mechanisms adopt a focus on individuals, and so are not efficient or adequate where the target is the asset itself. This section describes this shortcoming of the current Queensland approach, describes existing models and approaches to guide the implementation of Recommendation 4 (see page 32).

Shortcomings of Queensland's approach

Queensland's confiscation regime is designed to restrain and facilitate forfeiture of criminally derived assets of a named individual. However, the regime does not work well where the owner of a particular asset cannot be identified even though there may be sufficient evidence to support its connection to a serious criminal offence.[125]

For instance, when police seize large sums of cash and other valuable items connected to evidence of serious criminal offending, the true owners may refuse to come forward or deny ownership, to avoid implicating themselves in a crime. In this circumstance, Queensland confiscation practitioners would need to conduct *in rem* proceedings. *In rem* proceedings are proceedings that are taken against or in respect of property, rather than against an individual. Notwithstanding that, in such a circumstance the State is not required to prove the property was derived from the serious crime related activity of a particular person. The State still must prove the relevant serious crime related activity occurred within 6 years before the *in rem* application is made.[126]

New South Wales and the ACT have provisions in their confiscations legislation that provide a more efficient mechanism than Queensland's *in rem* proceedings. *Criminal Proceeds Confiscation Regulation 2023* (Qld) recognises orders made under both schemes, so that they have legal force in respect of assets located in Queensland. However, the models in NSW and ACT are quite different in terms of court involvement, who applies, and the reach of the powers.

The NSW model for administrative forfeiture

In 2022, the NSW CARA was amended to include provisions to enable the administrative forfeiture of property that is reasonably suspected of being associated with serious crime related activity, regardless of whether the true owner of the property can be identified. "Administrative forfeiture" means that this type of confiscation mechanism does not involve the courts; the notice is issued by the NSW Crime Commission.

The provisions allow for the forfeiture of property (other than real property, which includes dwellings, buildings, land) that is seized or otherwise in possession of an investigative agency in connection with an investigation. Specifically, the NSW Crime Commission must first be reasonably satisfied that, broadly speaking, the property is illegally acquired, serious crime derived, or owned by a person who is suspected of engaging in serious crime related activity.[127]

If that requirement is met, the NSW Crime Commission can issue an assets forfeiture notice, which is published in several locations,[128] and if relevant, given to each person known or suspected to have a beneficial interest in the property. An assets forfeiture notice takes effect at the end of the dispute period (60 days) or, if a dispute claim is made (and it is not accepted), on the day the dispute claim is

125 Smith, M. and Smith, R. G. 2016, *Exploring the procedural barriers to securing unexplained wealth orders in Australia*, Criminology Research Advisory Council, p. 11.

126 Sections 28(3)(c) & 58(1)(b), CPCA.

127 See section 21C of the CARA for the criteria.

128 Irrespective of whether the owner of the property is known/suspected, the Commission must publish the notice in the Gazette, daily newspaper and on the NSW Crime Commission website (section 21C(4), CARA).

finally dismissed and the appeal period has ended, at which time the property is forfeited to the Crown.[129]

The ACT model for automatic forfeiture

The ACT's *Confiscation of Criminal Assets Act 2003* (CCA Act) contains provisions that allow for the restraint and forfeiture of "unclaimed tainted property", which covers tainted property that no person has asserted an interest in.

The term unclaimed tainted property is defined as property that "is tainted property in relation to an offence and is not claimed by anyone even if it is not possible to identify the offence or an offender".[130] Property is tainted if it was derived in any way from the commission of an offence, or was used (or intended to be used) in the commission of the offence.[131] Examples provided in the legislation include:

- a large amount of hydroponic equipment for growing plants found in a house suspected of being used for drug production that is not claimed by anyone, and
- a large amount of money found beneath a bridge in a bag that also contains traces of explosives.

Section 25 of the CCA Act allows for restraining orders to be made over unclaimed tainted property, known as the "automatic forfeiture regime". The application for a restraining order must be accompanied with an affidavit by a police officer that addresses the criteria outlined in section 28 of the Act, which includes a statement that (a) the police officer suspects that the property is unclaimed property and (b) the property has not been claimed by anyone.[132] The court must make a restraining order if satisfied that there are reasonable grounds for the suspicions and beliefs stated in the affidavit.[133] The property is automatically forfeited 14 days after the restraining order is made, subject to any exclusion order.[134]

While the administrative approach in NSW is attractive because it may be more efficient, in our view the ACT approach is preferrable because it engages the court as decision maker, and therefore offers greater transparency and independence.

Recommendation 4

That the non-conviction-based scheme in the CPCA be expanded by introducing:

a. a new mechanism to target crime-related assets by way of automatic forfeiture in circumstances where ownership of a crime related asset is not claimed by any person, and

b. appropriate protections and safeguards for the new mechanism.

Notes on implementation

If Recommendation 4 were to be implemented, an automatic forfeiture should include appropriate protections and safeguards, for instance:[135]

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129 Section 21F, CARA.

130 Section 11, CCA Act.

131 Section 10, CCA Act.

132 Sections 25 and 28, CCA Act.

133 Section 30, CCA Act.

134 Section 62, CCA Act.

135 The QLS's submission referred in general terms to the oversight of Queensland's asset confiscation regime. Their submission suggested that asset confiscation should be overseen by a Parliamentary Committee. The review notes that the scheme is already offered judicial oversight, as all applications must be heard by a Court, and orders can only be made by a Court. Further, the Parliamentary Commissioner may audit any parts of the CPCA that the CCC administers, as can the PCCC. Nonetheless, the Queensland Government may wish to consider the view of the QLS in implementing Recommendation 4.

- mechanisms for the exclusion and recovery of property[136]
- a requirement for notice to be given to persons reasonably suspected of having a beneficial interest in the property and published in an appropriate newspaper,[137] and
- a reasonable dispute period to allow the owner of the property to dispute the forfeiture notice by providing evidence of ownership and that the property was lawfully acquired.[138]

4. Ensure that the CPCA delivers on objectives for disruptive impact

The review identified three areas where there is a disparity between Parliament's stated intent for the CPCA, and what occurs in practice. The first concerns the UEW scheme, the second concerns the SDOCO scheme, and the third concerns the timely progress of confiscation matters where there is a related criminal matter.

Clarify the provisions about UEW orders

Queensland's UEW orders were introduced in 2013 to ensure that "Queensland will not become a safe haven for those wishing to hide their ill-gotten wealth."[139] UEW provisions allow law enforcement to confiscate the assets of people who profit from criminal activity while being distanced from the actual crime (for example, those higher up in organised crime groups), or have otherwise avoided prosecution.[140] They are part of the non-conviction scheme, first brought into effect in WA in 2000 and now present in all Australian jurisdictions, and aim to address inefficiencies with conviction-based schemes not capturing these types of offenders.[141]

UEW provisions function to confiscate assets that are suspected of exceeding the respondent's legitimate sources of income, and reverses the onus of proof to require the respondent to prove these assets were legitimately acquired.[142]

However, Australian jurisdictions have historically struggled with implementing successful UEW schemes. The AIC identified various barriers that contribute to this, including:

- a perception that it is not worthwhile as the amounts recovered are relatively small
- issues within responsible agencies including communication and coordination problems, inexperience with civil litigation, information sharing and privacy considerations, and
- UEW matters pursued as legal proceedings with an additional financial aspect as opposed to focused UEW matters.[143]

Shortcomings of Queensland's approach

Interpreting Queensland's provisions for what is required to make an UEW order is challenging because the Act is unclear about two connected parts of the UEW provisions:

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136 See, for example, section 21J, CARA and sections 62 and 76, *Criminal Assets Confiscation Act 2005* (SA).

137 See, for example, section 21C, CARA.

138 See, for example, sections 21G and 21H, CARA.

139 *Explanatory notes*, Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Qld), p. 2.

140 It is common for the criminal activities to be undertaken by low-ranking members of crime groups or people external to criminals, for example "money mules", some of whom may not be aware they are dealing with illicit funds (AFP quoted in Parliamentary Joint Committee on Law Enforcement 2012, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, p. 30; see also p. 31).

141 Skead et al. 2020, *Pocketing the proceeds of crime: recommendations for legislative reform*, AIC, p. 3.

142 Skead et al. 2020, *Pocketing the proceeds of crime: recommendations for legislative reform*, AIC, p. 3.

143 AIC 2016, *Procedural impediments to effective unexplained wealth legislation in Australia*, pp. 1-9.

- the nature of the connection required between, the serious crime related activity the person is reasonably suspected of having engaged in, and whether any of the person's wealth was acquired unlawfully, and
- how to determine the monetary value of the UEW order.

There is a potential inconsistency between the basis upon which making the UEW order under section 89G of the CPCA, and the assessment under section 89L of the CPCA of the amount payable under such an order (these provisions appear in Appendix 2). This is because, in practice, despite section 89G not specifically requiring a link between the unlawfully acquired wealth described in section 89G(1)(b) with either of the activities described in section 89G(1)(a), the assessment of UEW under section 89L necessarily requires regard to that connection.

For this reason, the onus of proof upon the State for a UEW order is difficult to discharge. Therefore, because other orders (such as forfeiture orders, proceeds assessment orders or pecuniary penalty orders) are more efficient to pursue, and likely to produce the same outcome, the UEW scheme is an unattractive strategy for taking confiscation action.

Models and approaches to consider

Other Australian jurisdictions approach UEW orders differently from Queensland. South Australia , WA and the NT have UEW provisions that do not require evidence to link the UEW to criminal activity. In contrast with Queensland's approach:

- In WA and the NT, a court must make a UEW declaration if satisfied that the individual's total wealth is greater than his or her lawfully acquired wealth.[144] That is, there is a presumption under those schemes that UEW is unlawfully acquired unless a respondent is able to satisfy the court otherwise.
- In SA, if a court finds that any component of an individual's wealth was not lawfully acquired, the court may make an UEW order.[145]

The QLS submitted to this review that the quashing of a conviction should lead to the revocation of an UEW order or an automatic review of the reasons for that order. The QLS states that this is particularly important in instances where the criminal conviction is the only one which has led to a finding of serious criminal activity.

However, this misconstrues the way the UEW scheme is designed to operate and also the different onus of proof and standard of proof that applies in criminal matters as compared to civil confiscation proceedings. Section 89G of the CPCA need not be based on a conviction, and the serious crime related activity used in an application need not be the activity that resulted in the UEW order. The wealth remains unexplained, regardless of the presence of specific convictions.

Recommendation 5

That the non-conviction-based scheme in the CPCA be amended to clarify the requirements for UEW orders to ensure that, in practice, the scheme is able to achieve its desired objectives.

144 Section 12(1), *Criminal Property Confiscation Act 2000* (WA); Section 71(1) *Criminal Property Forfeiture Act 2002* (NT).

145 Section 9(3) *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA).

Low disruptive impact of the serious drug offender confiscation scheme

The CPCA's SDOCO scheme commenced in 2013 and was intended to increase the risk[146] and decrease the profitability[147] of involvement in serious drug crime. Broadly, the scheme is intended to seek compensation for the burden of serious drug offences on the community.[148] It does this by allowing all of a serious drug offender's assets to be restrained and forfeited, including lawfully acquired assets.

However, different information sources indicate that the SDOCO scheme is not a useful mechanism in Queensland's asset confiscation regime, and is not having the impact that Parliament intended. Central to this is how public interest (such as in section 93ZZB(2) of the CPCA) is to be interpreted by a court in making decisions under the SDOCO scheme.

In their submission, the QLS commented on "public interest", and noted the importance of judicial discretion at every stage of the confiscation process.[149] This was also described as a positive element of Queensland's asset confiscation scheme by previous work of the AIC.[150]

In practice, however, the limited use of the SDOCO scheme can be attributed to the lack of clarity in the objectives of the SDOCO scheme, and therefore, the public interest factors that ought to be considered. This difficulty in understanding the countervailing public interest considerations in applying the scheme is demonstrated in the *State of Queensland v Deadman* [2015] QSC 241 and *Thompson v State of Queensland* [2016] QCA 218 (see Appendix 3 for case summaries).

Significantly, the Court of Appeal found that:

> the scope and objects of an Act do not limit the general discretion in a provision such as s 93ZZB(2) *beyond* indicating what is clearly extraneous to the proper exercise of the discretion. There is nothing in the subject matter, scope and purpose of Ch 2A that indicates that a consideration of a prescribed respondent's personal circumstances is "definitely extraneous" to any objects the legislature could have had in view." [67] p. 20.

If the personal circumstances of a respondent must be considered, then it is hard to identify circumstances where the public interest would favour forfeiture of all a drug offender's assets, including those that were lawfully acquired, because hardship would necessarily result. The difficulty then is, how a court is to determine – except for those assets the State is able to show were derived from serious criminal activity – what of the remainder of the person's lawfully acquired assets, should be forfeited under the SDOCO scheme. The legislation provides no guidance on how to resolve this question.

As shown in Figure 4, no SDOCO orders were made in 2022-23 (see page 17). Despite their lack of use in practice, the SDOCO scheme carries a significant resource impost. In the last five financial years, over 5400 serious drug offender certificates have been issued by Queensland Courts (see Appendix 1). This requires work by the prosecution at the time of sentencing, imposes an administrative burden on the courts in recording and sending the certificates to the DPP who then provide them to the CCC, and requires the ongoing monitoring and assessment by the CCC of new certificates issued.

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146 *Explanatory notes*, Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Qld), p. 2.

147 Queensland Parliament Hansard 2012, *Record of proceedings, first session of the fifty-fourth Parliament, Wednesday, 28 November 2012*, p. 2862.

148 *Explanatory notes*, Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Qld), p. 2.

149 Also recommended by Skead, N. et al. 2020, *Pocketing the proceeds of crime: recommendations for legislative reform*, AIC, p. x.

150 Skead, N. et al. 2020, *Pocketing the proceeds of crime: recommendations for legislative reform*, AIC, p. *x*.

Overall, the review considers that the current state means that Parliament's key policy objective of the SDOCO scheme is not being met, despite a significant amount of energy being expended on the certificates.

Recommendation 6

That the Queensland Government review the efficiency and effectiveness of the SDOCO scheme and decide if the SDOCO scheme is to be retained. If the SDOCO scheme is retained, that the Queensland Government amend the CPCA to make the objectives of the SDOCO scheme clear and consider giving guidance on the public interest considerations in making decisions relating to the SDOCO scheme.

Resolve when and how to progress confiscation matters when there is a related criminal matter

Confiscation matters almost always have related criminal matters, which regularly results in the confiscation matter being put on hold pending the outcome of the criminal matter.[151] It creates a circumstance where either the criminal or the confiscation matter is put at risk and creates a tension between the objects of the Act that are clearly designed for these proceedings to run collaterally, and in accordance with principles of natural justice.

This section describes the issue; describes the perspectives on the matter from the Act, case law, and a submission to the review; and identifies some existing models and approaches to guide the implementation of Recommendation 7 (see 38).

Why confiscation matters and criminal matters become linked

While a criminal charge or a criminal conviction is not required for civil asset confiscation, evidence to establish that a serious crime related activity occurred is still needed.[152] In practice, this means both proceedings are reliant on substantially the same evidence. Consequently, confiscation matters are routinely put on hold pending the outcome of a criminal prosecution because it is thought necessary to preserve the fundamental principles of criminal justice in relation to an accused's right to fair trial.

The decision about whether to progress or stay a confiscation matter when there is a related criminal matter has risks. For example:

- Allowing a confiscation proceeding to continue may prejudice the criminal matter. Also, a criminal proceeding may be undermined if settlement is reached in confiscation proceedings that rely on the same criminal activity and make determinations on the same facts, albeit on the basis of a different standard of proof.
- Conversely, putting the confiscation proceeding on hold may harm the confiscation matter. For instance, because a lengthy delay to the confiscation proceeding (while awaiting the conclusion of the criminal matter) may reduce the availability of evidence upon which the confiscation matter can rely.[153]
- Finally, and as a matter of process, there are two ways to put a confiscation matter on hold pending a criminal matter. The first is stay of the confiscation proceedings, which is ordered by the court. The second is by administrative arrangement or directions, which is an agreement

151 There are two ways to put a confiscation matter on hold pending a criminal matter: a court-ordered stay, or by administrative arrangement or directions, which is an agreement between the parties, and not ordered by a court.

152 Sections 58(1), 78(1), and 89G(1), CPCA.

153 This has been recognised in recent amendments to the POCA, which described that stays of proceedings "have flow on effects on the availability of evidence, would impede the operation of the non-conviction based scheme and would frustrate the objects of the POC Act." See *Explanatory memorandum*, Crimes Legislation Amendment (Proceeds and Other Measures) Bill 2015 (Cth), p. 28.

between the parties, and not ordered by a court. For the second way, there are implications under the Uniform Civil Procedure Rules (UCPR) because there are rules about how to continue a proceeding after a delay.[154] Specifically, the applicant must seek the court's leave to proceed if no step has been taken in the proceeding within two years, therefore putting the civil proceeding at risk of being dismissed.[155]

However, the civil proceedings under the CPCA's non-conviction-based scheme were intended to operate independently of the conviction-based scheme.[156] This is recognised in section 93 of the CPCA, which states:

> The fact that a criminal proceeding has been started against a person, whether or not under this Act, is not a ground on which the Supreme Court may stay a proceeding against or in relation to the person under this chapter that is not a criminal proceeding.

Section 93 has been recognised by the Courts,[157] though in such cases, it is still for the Judge, on application, to consider whether there is a real danger of injustice or miscarriage of the criminal proceeding, taking into account a range of factors, including the stage of advancement of the criminal matter and what protections can be implemented to avoid disclosure of a defence (*McMarhon v Gould* [1982] 7 ACLR 202).

Other perspectives

The BAQ's submission supports the current approach of staying confiscation proceedings pending the finalisation of a criminal matter. Their submission identified concerns about the potential for a respondent to suffer prejudice by defending a confiscation proceeding, given that the respondent may be compelled to attend an examination on oath about the person's affairs and property.[158] The BAQ noted that fundamental legal principles are waived during these examinations, including a person's right to silence and privilege against self-incrimination in exchange for certain immunities. Although examinations are conducted in private, the evidence given during the examination must be recorded (section 39D, CPCA) and may be shared with a prosecutor (section 41A, CPCA).

There are, however, a range of safeguards. For instance:

- The Harman undertaking (derived from the English case of *Harman v Secretary of State for Home Department* [1983] 1 AC 280 and expressed by the High Court of Australia in *Hearne v Street* (2008) 235 CLR 125) prevents a party from disclosing documents obtained in one proceeding through a compulsory process in a separate proceeding.
- In *Strickland and Galloway*, a decision of the High Court of Australia ([2018] HCA 53) the court made it clear that the decision to examine a witness must have regard, as far as reasonably practicable, to the potential impact on the witness's right to a fair trial. The CPCA contains provisions which counterbalance the concerns raised in *Strickland and Galloway*, including as mentioned, conducting examinations in private (section 39B), as well as limitations around the use of statements made in examinations (section 41A).

The BAQ submits that to avoid prejudice or embarrassment to a respondent:

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154 See rule 389 of the UCPR, Continuation of proceeding after delay.

155 See rule 280 of the UCPR, Default by plaintiff or applicant.

156 *Explanatory notes*, Criminal Proceeds Confiscation Bill 2002 (Qld), p. 3.

157 See for instance *State of Queensland v Shaw* [2003] QSC 436 and *State of Queensland v Bush* [2003] QSC 375; S6311 of 2003, 5 November 2003.

158 Examination powers are not the only area where this arises. See for instance property particular orders (section 42, CPCA).

- confiscation proceedings should be delayed following the determination of the application for a restraining order, where there are existing or foreshadowed criminal proceedings relating to the same conduct, and
- evidence from confiscation proceedings should not be available, at all, to the prosecution.

Recognising the tension between the objects of asset confiscation, and that of criminal prosecution, the review looked to existing models and approaches.

Existing models and approaches

The review identified existing models and approaches in the Commonwealth and NSW that may provide greater guidance on how to ease the tension between natural justice and the objects of the Act. Specifically, the Commonwealth's POCA:

- provides guidance on the circumstances where a court must stay proceedings (section 319(1)), must not stay proceedings (section 319(2)), and matters that it must have regard to in considering whether it is in the interests of justice to stay the proceedings (section 319(6)).
- allows confiscation proceedings to be held in closed court to prevent interference with the administration of criminal justice and to prevent the disclosure of information obtained through compulsory processes (such as examinations) where contrary to a non-disclosure order of a court.[159]

NSW made similar amendments to align with the POCA provisions.[160] They were introduced to require the NSW Crime Commission to consider the real risk of prejudice to the fair criminal trial of the person subject to a confiscation order,[161] and prevent the disclosure of evidence if proceedings for a relevant confiscation order have commenced or are imminent.[162]

Consideration should be given to whether Queensland's CPCA should have similar provisions, so that asset confiscation matters can progress in a timely way where appropriate.

Recommendation 7

That the Queensland Government amend the CPCA to give clear guidance on the principles that should determine whether a confiscation matter should be stayed when there is a related criminal proceeding.

Notes on implementation

If Recommendation 7 were to be implemented consideration should also be given to amending the UCPR to provide an exception regarding rule 389 in confiscation matters where the cause of the delay is a pending criminal matter.

5. Change how confiscated assets are used

The CPCA requires net funds from confiscated property to be paid into Queensland's Consolidated Fund. For funds confiscated under the non-conviction-based scheme, there is no mechanism for

159 See sections 319A and 266A of the POCA. However, the POCA still allows for examination material to be disclosed to a government entity which has a function of investigating or prosecuting offences against a law of the Commonwealth, the state or a territory, if the disclosure is for the purpose of assisting in the prevention, investigation or prosecution of an offence against a law that is punishable by imprisonment for at least 3 years. See sections 266A and Chapter 3, Part 3-1 of the POCA.

160 Confiscation of Proceeds of Crime Legislation Amendment Bill 2022 (NSW). See also Recommendation 9, NSW Department of Communities and Justice 2023, *Statutory review report: Crime Commission Act 2012*, p. 37.

161 Section 45AA(2) of the *Crime Commission Act 2012* (NSW).

162 Section 45AA(3) of the *Crime Commission Act 2012* (NSW).

appropriation of those funds to identified victims of crime, or any other specified purposes.[163] Of course, it is not one of the objects of the Act to restore confiscated funds to victims of crime.[164] Consequently, as a matter of practice,[165] the State does not normally act to restrain and confiscate the property of fraud offenders where there is an identifiable victim, because a victim has existing redress to restitution or compensation as ancillary orders in a criminal proceeding[166] or via private civil litigation.

However, serious fraud prosecutions, particularly those for high volume offending such as online scams and boiler room operations,[167] may take many years to progress through the Courts.[168] Even if a prosecution is successful, victims may not ultimately be compensated because an offender's assets have long been disbursed. Alternatively, compensation via private civil litigation is likely to be inefficient, or a victim has neither the means nor the evidence to successfully pursue that course.

At least two different inquiries in Queensland have recently explored the law enforcement response to fraud offenders, and their victims:

- In 2015 the Queensland Organised Crime Commission of Inquiry recommended that, for assets forfeited under the criminal asset confiscation scheme,[169] "the Queensland Government consider establishing a scheme to allow the victims of serious frauds to apply for compensation from property forfeited to the State". The Government accepted the recommendation and announced that DJAG and Queensland Treasury "will consider the establishment of such a scheme and report to the Attorney-General on its findings."[170] To date, a scheme of this kind has not been implemented.

  A confiscated asset fund may be a suitable mechanism to allow the restraint of property of fraud offenders ahead of potential restitution orders, and Text box 3 provides some examples of how confiscated assets can be directed in other jurisdictions.

- Recommendations 14 and 16 of the 2023 Report of the *Inquiry into Support provided to Victims of Crime*, proposed an urgent review of the financial assistance scheme, including that the review consider the scheme's expansion to be eligible to victims of fraud and other property crime.[171] The Government supported this recommendation in principle, observing that the objective of the financial assistance scheme was to assist victims of violent crime in their recovery and did not constitute a compensation scheme. The Government did, however, state that "[t]he review of the Financial Assistance Scheme will include consideration of the assistance needs of victims of property crime, existing programs and support and other options to enhance

163 Section 214, CPCA.

164 See section 4, CPCA.

165 Serious fraud offenders are only proceeded against for non-conviction-based asset confiscation by the State in exceptional cases. For instance, if the state was the entity defrauded, such as in the $16 million fraud on Queensland Health. See CCC 2013, *Fraud, financial management and accountability in the Queensland public sector: An examination of how a $16.69 million fraud was committed on Queensland Health*.

166 Section 35, *Penalties and Sentences Act 1992* (Qld).

167 Boiler Room scams involve high pressure, dishonest sales techniques, usually via on-line bating or cold calling, to entice victims into purchasing highly speculative, or non-existent investments products.

168 For example, charges laid in February 2016 by QPS and the CCC against several individuals over an alleged cold call investment scheme in 2016, have still not proceeded to trial, more than seven years later, see Willacy, M. 2016, *Mick Featherstone: former detective charged over alleged multi-million dollar fraud syndicate*, p. 1.

169 Chapter 3, CPCA.

170 DJAG 2016, *Government response: Queensland organised crime commission of inquiry's report*, p. 13.

171 Legal Affairs and Safety Committee 2023, *Inquiry into support provided to victims of crime*, p. 27.

recovery for these victims."[172] KPMG has been engaged to review the Financial Assistance Scheme.[173]

Text box 3. Australian examples of how confiscated assets fund can be directed.

The **Commonwealth POCA** allows confiscated funds to be returned to the Australian community to prevent and lessen the harms caused by crime.[174] Disposed assets are paid to the Confiscated Assets Account, which is overseen by the Australian Financial Security Authority as the Official Trustee (which also manages confiscated assets in general). These funds can be used to support community programs such as the National DNA Program for Unidentified and Missing Persons.[175]

The **NSW CARA** allows for confiscated funds to be paid for a range of purposes, including the Victims Support Fund (for victims of violence or modern slavery),[176] and "other amounts in aid of law enforcement, victims support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation or drug education as directed by the Treasurer in consultation with the Minister."[177]

The **Victorian Confiscations Act** allows confiscated funds to be sent to crime prevention and victims' aid fund,[178] which the Minister permit to be used for crime prevention programs or criminological research, or from which eligible victims can make a claim to the Victims of Crime Assistance Tribunal.

The review received two submissions on the matter from Australian legal scholars, and both advocated for a change from the current arrangement. One of these submissions provided specific detail, identifying three potential areas for redistribution of assets:

- providing a *"restorative function"* by compensating victims of crime
- fund a host of measures to promote a reduction in crime, but where the recipient is a law enforcement entity, this should be limited to re-investment of the costs of administering the regime
- fund rehabilitation programs directed to reduce reoffending by offenders.

The submission also provided features of an operating model, which included:

- The creation of a specialised committee to make decisions about the distribution of recovered assets, and the committee's powers and functions should be defined in the Act.
- A rigorous application process, including regular funding rounds and the public release of applications that are successful.
- State Government agencies and not-for-profit organisations can apply, including victims of crime support organisations.

This review acknowledges that resolving this matter may be a significant reform for Queensland's asset confiscation regime and approach to victims' compensation, and implementation would require substantial planning and investment.

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172 Queensland Government 2023, *Inquiry into support provided to victims of crime: Queensland Government response*, p. 9.

173 DJAG 2023, *Parliamentary Committee briefing note: Victims of Crime Assistance and Other Legislation Amendment Bill 2023, Community Support and Services Committee*, p. 3.

174 Section 298, POCA.

175 AFP 2023, *Taking the profit out of crime*, p. 1.

176 Section 32(3)(c) of the CARA; Victims Services 2023, *Eligibility criteria*, p. 1.

177 Section 32(3), CARA.

178 Section 134 of the *Confiscations Act 1997* (Vic); Justice and Community Safety 2023, *Asset confiscation*, p. 1.

Recommendation 8

That the Queensland Government consider the creation of a mechanism for the use of confiscated funds other than payment directly to the Consolidated Fund.

6. Change agency responsibility to improve efficiency and agility

The review explored two existing proposals to change the organisational responsibility within the asset confiscation regime. The two proposals – which have already received government support or support-in-principle as far back as 2016 – are to consolidate in one agency the responsibility for:

- asset confiscation investigation and litigation, for the non-conviction-based scheme and the SDOCO scheme,[179] and
- administering the non-conviction based and conviction-based schemes, including that a single agency represents the State in all court proceedings under the CPCA.[180]

The review identified that these proposals are even more relevant now. This section describes supporting and opposing perspectives about these proposals, and the review has considered them, and the previous support for the proposals, in framing Recommendation 9 (see page 45).

A single agency for the non-conviction-based and SDOCO schemes

The non-conviction based and SDOCO schemes currently operate by having the investigative function in one agency (the CCC), while the litigation function rests with another agency (the DPP).

Supporting perspectives

A key argument in support of the change is the close relationship that is required between investigators and litigators. Legal advice is central to the role of the solicitor on the record throughout the life cycle of a confiscation matter for example:

- Legal advice may be required to guide the early stages of an investigation and to identify suitable confiscation strategies. Early legal advice on complex property ownership questions may result in closing avenues of investigative inquiry or closure of the investigation entirely, thereby saving investigative resources and improving operational efficiency.
- Where examination of a person is required after assets are restrained, a collaboration between the solicitor and the investigator is required.
- Investigations and consequently further legal advice may be required to explore a respondent's claim that the assets sought to be confiscated are from legitimate sources.

Other arguments in support of agency consolidation are that the non-conviction-based and SDOCO schemes operate under a single strategic direction, policy environment, and risk appetite; and it creates a clearer division between prosecutions (the core function of the DPP), and asset confiscation proceedings (a function of the CCC and the DPP), which often relies on some of the

179 In 2016 the Queensland Government accepted in principle the Queensland Organised Crime Commission of Inquiry's recommendation to give the CCC the responsibility to litigate civil confiscation matters, thereby consolidating the investigator–litigator functions in one agency, the CCC (Recommendation 8.1).

180 This review notes that it has previously been recommended in two separate inquiries, in 2013 (Callinan, I. and Aroney, N. 2013, *Review of the Crime and Misconduct Act 2001 and other matters: report of the Independent Advisory Panel*) and in 2015 (Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, Recommendation 8.1, p. 14). The PCCC also gave their support to this recommendation in 2016 (PCCC 2016, *Review of the Crime and Corruption Commission: report no. 97*, Recommendation 26, p. 95). The Queensland Government supported (Queensland Government 2016, *Review of the Crime and Corruption Commission: Queensland Government response*, p. 13) or supported-in-principle (Queensland Government 2013, *Response to review of the Crime and Misconduct Commission*, p. 29) those recommendations.

same evidentiary material. Also, there are different considerations which apply in undertaking a criminal prosecution as against those for taking civil action to recover the proceeds of crime. This can give rise to a tension between the two functions being undertaken by the DPP, which would be resolved by removing the function from the DPP.

Specifically, the current allocation of responsibility creates a tension between the prosecutorial role of the DPP and that of its litigation function under the non-conviction-based scheme.[181] Consolidating the investigation-litigation function in the CCC would create a clearer distinction between civil confiscation proceedings and criminal prosecutions, reducing the risk of prejudice to a respondent, particularly in circumstances where related proceedings are likely to rely heavily on the same evidentiary material. It would also reduce the tension between the DPP's current dual roles.[182]

The DPP is an independent statutory officer, primarily responsible for the prosecution of criminal offences in Queensland. The DPP acts on behalf of the Crown in respect of criminal proceedings. The independence of the DPP (and officers) is central to the performance of the DPP's functions. The DPP may make decisions in relation to the conduct, continuation, or cessation of a criminal prosecution. The DPP does not act on the instructions of a client in relation to criminal prosecutions and is, for that reason, somewhat differently placed from other legal representatives – even other government lawyers.

Under the CPCA, the DPP's role is, arguably, different. The CPCA identifies that, for confiscation proceedings, the DPP is the solicitor on the record.[183] The role of the solicitor on the record confers certain duties – they are responsible to the court, their client, and the other parties to the litigation.[184] A solicitor acts on their client's instructions. This solicitor-client relationship is different in character from the relationship the DPP has in a criminal prosecution with the charging entity (usually police). Such a role arguably sits uncomfortably with the necessary independence of the DPP in its role in criminal prosecutions. This point is demonstrated in the following examples.

- In performing its prosecutorial role, the DPP necessarily assesses the strength of the evidence, what charges may be able to be proved beyond reasonable doubt, and what the provable factual basis is for resolving a criminal charge. Civil litigation, such as confiscation proceedings, require a different standard of proof. It is possible that the same evidence may be capable of proving some facts on the balance of probabilities in circumstances where the same evidence could not establish those facts beyond reasonable doubt. This may create a tension between the DPP's role in confiscation proceedings and criminal prosecutions where a different factual basis for resolution may present from the same evidence.
- A further tension is explained by the differences between the DPP's roles in independent decision-making in criminal proceedings, and the role as solicitor acting for a client in confiscation matters. In a criminal proceeding, the DPP will assess the evidence, and then make decisions based on that assessment. In the solicitor-client relationship, the solicitor is responsible for providing advice to the client, but it is the client who provides the instructions. The advice may identify a preferred course, but it is open to the client to make a different choice in the conduct of litigation, and where that course is reasonably open, the solicitor is obliged to act. This gives rise to the prospect that the DPP may have made a decision in respect of criminal proceedings which is at odds with the instructions a client may give in confiscation proceedings.

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181 PCCC 2021, *Review of the Crime and Corruption Commission's activities: report no. 106*, p. 103.

182 For example, Rule 25 of the 2011 Barristers' Rules, as amended, require a Barrister to act with independence in the interests of the administration of justice. However, removing the DPP's investigation-litigation function would not fully address the issues raised by the BAQ. Further legislative amendments would also be required, including provisions to prohibit the disclosure of examination material to the prosecution and mechanisms to allow stay of proceedings. Such amendments would have significant implications for the administration of the Act and require further consideration.

183 Section 12(3), CPCA.

184 See generally Begbie, T. 2015, *Duties to the court*, Australian Government Solicitor Legal Briefing No. 107.

In their 2013 report – the *Review of the Crime and Misconduct Act and other matters* – the Honourable Ian Callinan AC and Professor Nicholas Aroney observed:

> The regime for which the CMC is responsible engages the Office of the Director of Public Prosecutions as the solicitor on the record for non-conviction based confiscation applications. The reasons for doing so, we were told were historical, but the decision seems to have been made on a practical basis, and in particular out of a desire to avoid using Crown Law which, on the system of inter-agency cost accounting, would have charged professional fees at its usual rates for doing so.
>
> In consequence, although there is a division of responsibility for the two regimes in the legislation, the Director of Public Prosecutions is involved in both of them, the first in the sense the legislation intended, and the second as solicitors for the CMC.
>
> The Director of Public Prosecutions, Mr Moynihan SC, told us that he has some 12 staff in the confiscations division. His view was that the Division would be more appropriately placed elsewhere. His main reason was that the work of the confiscations division diverges fundamentally from other functions of the Office. [The reviewers] agree.[185]

The current DPP, Mr Todd Fuller KC, informed the review that his position remains the same as the former DPP[186] expressed in 2013.

Opposing perspectives

The key argument against co-locating the investigators and litigators in the same agency is that it may compromise the independence of legal advice provided for those matters.[187] In introducing the civil confiscation scheme into the legislation in 2002, the then-Attorney-General and Minister for Justice, the Honourable R. J. Welford, explained:

> The involvement of the DPP is intended to provide an important safeguard, providing an independent assessment of the basis on which legal action should proceed and ensuring that criminal prosecutions are not jeopardised or, indeed, overlooked where appropriate evidence exists.[188]

Consultation with other Australian jurisdictions indicates that the risk legal advice provided for confiscation litigation may lack independence from the investigative functions is one that can be adequately managed. Agencies such as the NSW Crime Commission and the AFP[189] manage this through adequate information barriers[190] that extend to information management access, physical location of investigative and legal functions, policies and procedures, and clear and separate lines of delegation. This kind of challenge and these responses to it are common in any agency that incorporates in-house counsel. The civil confiscation context is not unique in this regard.

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185 Callinan, I. and Aroney, N. 2013, *Review of the Crime and Misconduct Act 2001 and other matters: report of the independent Advisory Panel*, p. 200.

186 Now His Honour Judge Tony Moynihan KC, District Court Judge.

187 Adequate separation would also be required for those specialists who are expert witnesses in asset confiscation matters. See also Martin, W. 2019, *Review of the Criminal Property Confiscation Act 2000* (WA), p. 34.

188 Queensland Parliament Hansard 2002, *Legislative Assembly: Tuesday 22 October 2002*, p. 3859

189 The Criminal Assets Confiscation Taskforce.

190 See for instance, QPS 2023, *Information barrier guidelines* and The Law Society of New South Wales 2015, *Information barrier guidelines*.

Consolidating the responsibility for all schemes under the CPCA

At present Queensland's regime takes an approach to asset confiscation that is distributed amongst various agencies (see page 13). While detection and referral of a candidate matter can come via several pathways, the administration of the CPCA's schemes is largely conducted by two agencies – the CCC and the DPP (see Table 2).[191]

Table 2. Schemes of the CPCA, and agency responsibility.

Scheme	Administered by	Solicitor on the record[192]
Non-conviction-based scheme	CCC	DPP
Serious drug offender confiscation order scheme	CCC	DPP
Conviction-based scheme	DPP	DPP

The consolidation of the responsibility of all the schemes under the CPCA in a single agency, including acting on behalf of the State in legal proceedings has several advantages that may improve:

- the ability to identify high value targets, run parallel criminal and financial investigations[193] on those targets, and ensure that evidence is collected during the criminal investigation that also supports asset confiscation[194]
- the agility between schemes, and reduce or eliminate gaps in decision making about matters
- the efficient and effective functioning of the regime, because it focuses responsibility and accountability for outcomes, and
- the opportunity to monitor, review, and evaluate the functioning of the regime.

While having a single agency that can use any scheme under the CPCA means that all options under the regime are available to one agency – providing the necessary agility between options more suited to complex asset confiscation matters – for more straightforward conviction-based confiscation matters, it would be more efficient for the DPP to continue to apply for forfeiture orders at sentencing.[195] [196]

191 Despite the term "single confiscation agency", there is no suggestion to fully consolidate the end-to-end asset confiscation function from detect to dispose (see Figure 3).

192 This is performed by the DPP's Confiscations Unit, which is structurally separate from the DPP's prosecutors.

193 Noting that the CCC is the only agency with the investigative powers (contained within the CC Act and the CPCA, as well as ordinary police powers) to achieve optimal results under all schemes.

194 This would require a clearer division between prosecutions (which is the role of the DPP), and any civil asset confiscation proceedings (which would be the CCC's role), which often use some of the same material that appears in the prosecution's criminal brief of evidence.

195 The argument was made by the former DPP that, as the responsible agency for Chapter 2A matters, the CCC already administers a conviction-based scheme (Byrne, M. 2015, *Report: Queensland Organised Crime Commission of Inquiry*, P. 552).

196 If it was thought necessary that the solicitor on the record should be separated from the investigating agency, then that function should, at the least, move from the DPP. This is this review's and the DPP's position.

Recommendation 9

That the CPCA be amended to give the CCC:

a. sole responsibility for administering and conducting all confiscation proceedings under Chapters 2 and 2A (the non-conviction-based and SDOCO schemes, respectively), drawing on the models used by Commonwealth and NSW;

b. concurrent responsibility for administering and conducting proceedings under Chapter 3 and Chapter 4 (the conviction-based scheme and special forfeiture orders, respectively), while providing that more than 1 proceeding against a respondent in respect of a conviction or related convictions cannot be commenced, and

c. appropriate initial and ongoing resources to undertake the new responsibilities in a) and b).

Notes on implementation

If Recommendation 9 were to be implemented, consideration should be given to:

- the Commonwealth approach, where the AFP have, since 2012, taken primary responsibility for the Commonwealth asset confiscation role, while the Commonwealth DPP has a far smaller role[197]
- whether the CPCA should continue to exist in one Act, or should be split into two Acts, like in NSW,[198] one for the civil confiscation regime,[199] and one for the criminal confiscation regime.[200]

Responsible agencies would also need to generate new inter-agency and intra-agency ways of working, and develop appropriate policies and procedures.

7. Schedule a further review of the CPCA

In the last five years, two jurisdictions have had their asset confiscation Acts reviewed,[201] and other jurisdictions have had their Acts substantively amended.[202] Within that context, review of Queensland's asset confiscation regime has lagged, with no action to implement significant recommendations for change for many years.

While this review sought to identify a reform agenda for the most urgent or significant changes, a scheduled review of the Act is justified on three bases:

- This review identified a multitude of challenges, but makes recommendations only for the most significant or urgent changes.[203]

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197 See Commonwealth Director of Public Prosecutions 2024, *Criminal Confiscations*, p. 1. Of special relevance, "From 2 April 2012 the CDPP no longer commenced criminal confiscation action in non-conviction based matters or conviction based matters commenced by restraining order. The CDPP retains responsibility for taking criminal confiscation action in matters where the restraint of property is not required to preserve the property for confiscation and the person has been convicted of an offence. All other matters are conducted by the Taskforce."

198 This has the advantage of clear separation in roles in the NSW regime, and the nature of proceedings.

199 Confiscation of Proceeds of Crime Act 1989 (NSW).

200 CARA.

201 Martin, W. 2019, *Review of the Criminal Property Confiscation Act 2000* (WA); and Justice and Community Safety Directorate 2022, *Statutory review of the Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020* (ACT).

202 NSW, Victoria, SA, NT, ACT and the Commonwealth.

203 For instance, workshop participants advised that the drafting of the Act undermines efficiency on a regular basis, and should be substantially redrafted for clarity. They noted that there was near duplication in many points in the Act (e.g. restraining orders under section 28 and section 117), and unnecessary complexity including circularity. Some examples have already been mentioned earlier in the report, but practitioners offered many examples.

- The pace of change in the criminal environment.
- To evaluate the operation and effectiveness of legislative change arising from this review's recommendations.

To ensure that Queensland's asset-confiscation practitioners are optimally positioned to effectively recover the proceeds of crime and disrupt criminal activity, the review proposes a further review of the CPCA to ensure currency and effectiveness of legislation.

Recommendation 10

That the Queensland Government provide for a review of the scheme, to commence not more than five years after the introduction of substantive legislative amendments. The review should be conducted by an agency or person appointed by the Minister. A report on the review should be tabled in Parliament.

Appendix 1. Key activity and outcomes, 2018-19 to 2022-23

	2018-19	2019-20	2020-21	2021-22	2022-23
Chapter 2 and 2A inputs and restraints[204]					
Inputs					
Number of referrals received by the CCC[205]	123	113	92	61	60
Number of SDOCs by date issued	1128	1173	1051	1127	936
Processing					
Value of assets restrained	$28,249,000	$8,995,000	$20,159,000	$8,786,000	$5,223,00
Value of forfeitures	$13,652,000	$7,181,000	$8,688,000	$7,419,000	$4,297,000
Chapter 3 outcomes					
Forfeiture orders collected	$3,696,000	$4,993,000	$3,788,000	$5,073,000	$10,082,000
PPO collected	$191,750	$131,485	$76,914	$119,804	$90,265
Confiscation regime remittance and ROI					
Remitted to the Consolidated Fund	$11,260,000	$6,350,000	$7,300,000	$7,900,000	$5,500,000
Costs of administering the scheme (CCC and PTQ)	--	$3,447,644	$3,179,853	$3,148,148	--
Return on investment[206]	--	1.84	2.30	2.51	--

204 The figures in this Appendix are generated from data provided by the CCC, PTQ, and from DPP 2024, *2022-2023 annual report*, p. 36.

205 This includes matters generated by the CCC, either from the Proceeds of Crime unit, or investigation teams.

206 Note the limitations of this estimate, described on page 20.

Appendix 2. Excerpts from the CPCA, on unexplained wealth orders

89G Making of unexplained wealth order

(1) The Supreme Court must, on an application under section 89F, make an unexplained wealth order against a person if it is satisfied there is a reasonable suspicion that—

(a) the person—

(i) has engaged in 1 or more serious crime related activities; or

(ii) has acquired, without giving sufficient consideration, serious crime derived property from a serious crime related activity of someone else, whether or not the person knew or suspected the property was derived from illegal activity; and

(b) any of the person's current or previous wealth was acquired unlawfully.

89H Amount payable under unexplained wealth order

(1) An unexplained wealth order must state, as the amount required to be paid to the State, the value of the person's unexplained wealth.

(2) The value of the person's unexplained wealth must be assessed by the Supreme Court under division 2.

(3) However, the court may reduce the amount that would otherwise be payable as assessed under division 2 if it is satisfied it is in the public interest to do so.

89L Assessment for unexplained wealth order

(1) The ***unexplained wealth*** of a person is the amount mentioned in subsection (2) or (3).

(2) For subsection (1), the amount may be the amount equivalent to—

(a) the person's current or previous wealth of which the State has given evidence; less

(b) any of the current or previous wealth mentioned in paragraph (a) that the person proves was lawfully acquired.

(3) Alternatively, for subsection (1), the amount may be the amount equivalent to the person's expenditure for a period of which the State has given evidence less the income for that period that the person proves was lawfully acquired.

(4) For subsection (2), the value of a thing included as current or previous wealth is—

(a) if the wealth has been disposed of, the greater of—

(i) the value when the wealth was acquired; or

(ii) the value immediately before the wealth was disposed of; or

(b) otherwise, the greater of—

(i) the value when the wealth was acquired; or

(ii) the value when the application for the unexplained wealth order was made.

(5) However, the court may—

(a) treat, as the value of the person's current or previous wealth, the value it would have had if it had been acquired at the time the court decides the application; and

(b) without limiting paragraph (a), have regard to any decline in the purchasing power of money between the time the current or previous wealth was acquired and the time the court decides the application.

(6) In this section—

acquired includes provided or derived.

Appendix 3. Summary of two cases under the SDOCO scheme

State of Queensland v Deadman [2015] QSC 241
State of Queensland v Deadman; Thompson v State of Queensland [2016] QCA 218

In September 2016 the Court of Appeal delivered its decision in two related appeals, dealing with the scope of the "public interest" discretion reposed in s93ZZB(2) of the CPCA. (The initial *Thompson* decision was unreported.)

In the case of Mr Deadman

The State sought to confiscate Mr Deadman's interest in his home at Riverview, following his conviction in the District Court for trafficking in and producing cannabis for which he was sentenced to two and a have years imprisonment with immediate parole. Mr Deadman argued that the Court should consider his personal circumstances in deciding whether it was in the public interest to make the order. Those circumstances were:

- That Mr Deadman was aged 65 years. The home had been purchased with a mortgage in 1972 for $27,000 by he and his wife, and they had paid off the property in 1994. Mr Deadman and his wife divorced in 2005, by which time they also had $90,000 equity in an investment unit. In the divorce settlement, the investment unit was sold, and in order to pay out his wife's interest in their home, Mr Deadman re-mortgaged the property. In 2011, Mr Deadman had accessed his superannuation to pay out the second mortgage, which had increased due to his gambling debts. When subsequently charged with trafficking and producing cannabis, Mr Deadman re-mortgaged the house a third time to pay his legal fees and to pay off a credit card.
- At the time of the State's application, Mr Deadman had approximately $3,000 in personal assets, including a car, and his home was estimated to be worth $255,000. He estimated that he had made $9,000 from selling Cannabis. Mr Deadman was receiving an aged pension, had various health problems (diabetes, arthritis, high blood pressure and depression) and had gambling problems. He estimated that if forced to rent a unit to live in, he would have only $384 per fortnight for living expenses.
- Mr Deadman said he was remorseful for his offending, had cooperated with the police investigation, had plead guilty at an early stage and had received counselling for his gambling problem.

In determining and refusing the State's application for forfeiture of Mr Deadman's house under the SDOCO scheme, the trial Court considered Mr Deadman's personal circumstances and the impact on him of forfeiting his home, leaving him vulnerable and increasing the risk of him again turning to crime, and needing to access additional State funded health services.

The Court considered there was little general deterrence to others, if any, to be achieved from the confiscation of Mr Deadman's home, and that:

> … apart from increasing the wealth of the State, it [was] difficult to discern the objects of the Act which are not connected with depriving offenders of property obtained from, or used in, criminal activities. [35] (p. 12).

On appeal, the State argued that an offender's personal circumstances and private interests, such as their age, health and financial position, should not be taken into consideration under section 93ZZB(2) of the CPCA in determining whether an order to confiscate his property under the SDOCO

scheme was in the public interest. The State also argued that in refusing to make the order, the trial Court failed to give any weight to the objects of the scheme. The Court of Appeal did not agree.

The Court of Appeal found that:

> … the scope and objects of an Act do not limit the general discretion in a provision such as s 93ZZB(2) *beyond* indicating what is clearly extraneous to the proper exercise of the discretion. There is nothing in the subject matter, scope and purpose of Ch 2A that indicates that a consideration of a prescribed respondent's personal circumstances is "definitely extraneous" to any objects the legislature could have had in view. [67] p. 20.
>
> As counsel for the respondent submitted, it must be accepted that parliament envisaged circumstances where, despite the preconditions of conviction of a qualifying offence and issue of a certificate, the Court would conclude that the making of the serious drug offender confiscation order would not be appropriate. The Act does not limit the matters that might be considered in assessing whether the making of the order is in the public interest. Whilst the Court must have regard to the subject matter, scope and purpose of the legislative scheme, limitation of the public interest to those objects would render the discretion created by s 93ZZB(2) redundant. [74] p. 22.

In the case of Mr Thompson

On 12 March 2015, the appellant, Ronald Edward Thompson, was sentenced on his own plea for offences involving possession, production and trafficking of cannabis and was sentenced to two years imprisonment suspended after three months. The schedule of facts indicated that the appellant had grown cannabis and sold cannabis to a group of four friends for up to two years with sales of approximately $3,900 each year. Thompson would use the excess income to buy alcohol or fuel. [77] p. 22.

The State of Queensland applied for a SDOCO forfeiting real property and a savings account in Mr Thompson's name. The real property was the appellant's residence. The $14,000 in the savings account constituted the appellant's only savings. His only remaining property comprised two vehicles, one of which was the subject of a chattel mortgage for about $40,000 and for which he was liable to pay $870 per month, and various items of plant and equipment related to his agricultural fencing business.

At first instance, on 8 May 2015, the trial court declined to have regard to Thompson's personal circumstances in granting the order as sought by the State.

On appeal in 2016, Mr Thompson argued that he had been attempting to re-establish his agricultural fencing business since his release from jail on 11 June 2015. He also submitted that the forfeiture of his only savings and main asset (his residence) represented a real impediment to his rehabilitation. [78] pp. 22-23.

Having regard to its decision that the trial court in *Deadman* was correct in its interpretation of the "public interest" discretion in section 93ZZB of the CPCA (that it permitted consideration of the respondent's personal circumstances), the Court of Appeal considered that Thompson must succeed in his appeal.

The respondent also conceded, if the decision in Deadman was correct, that it was open to the Court to be satisfied that the making of a SDOCO against the appellant was not in the public interest to the

extent that it went beyond forfeiting the sum of $5,000 in the appellant's savings account that represented the benefit to the appellant of his offending. The State agreed that, if that conclusion were to be reached, it was open to this court pursuant to section 93ZZF(2) to exclude the property of the appellant that did not represent the proceeds of the offending. [81] p. 23.

The primary judge having failed to have regard to the appellant's personal circumstances, the exercise of the discretion miscarried. Accordingly, the Court of Appeal amended the order of the trial Judge so that the only assets of Mr Thompson to be forfeited were $5,000 of the savings in his account [82] p. 23.

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