To what extent do the objection to confiscation provisions in Part 6 of the Criminal Property Confiscation Act 2000 (WA) protect the family home of an 'innocent party' from confiscation?

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To what extent do the objection to confiscation provisions in Part 6 of the *Criminal Property Confiscation Act 2000 (WA)* protect the family home of an 'innocent party' from confiscation?

This thesis is presented in partial fulfilment of the degree of Bachelor of Laws (Honours)

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ABSTRACT

The Western Australian Government stated that the Criminal Property Confiscation Act 2000 (WA) (‘CPCA’) will provide ‘the strongest and most effective’ confiscation powers in the world.1 It was observed by the High Court that the CPCA has enabled a confiscation of property scheme that has a ‘significant impact upon personal and property rights.’2 Strong powers to fight crime are justified, but it is critical that these powers are used responsibly and that innocent parties are protected. This thesis considers the extent to which the objection to confiscation provisions in Part 6 of the CPCA (‘the protections’) operate to protect the family home of an ‘innocent party’.

Any Act that enables the state to deprive an innocent person of their family home is a significant piece of legislation demanding a thorough examination. Surprisingly, this is something which has only occurred to a limited extent in academic scholarship at this point in time. This thesis will address this shortcoming by providing a thorough overview of the protections for the family homes of innocent parties from confiscation, identifying issues arising from these protections and providing commentary on possible amendments to these protections.

1 Western Australia, Parliamentary Debates, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).
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I certify that this thesis does not, to the best of my knowledge and belief:

(i) incorporate without acknowledgment any material previously submitted for a degree or diploma in any institution of higher education;

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Signed.....

Dated..... 1 November, 2017
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CHAPTER ONE: INTRODUCTION

The *Criminal Property Confiscation Act 2000* (WA) (‘CPCA’) is an Act that enables the State of Western Australia to deprive its citizens of privately-owned assets, ‘a highly intrusive act of state.’³ The CPCA commenced on January 1, 2001,⁴ replacing the *Crimes (Confiscation of Profits) Act 1998* (WA) which was believed to be ‘inadequate and outdated legislation.’⁵ The CPCA, on the other hand, was ‘a new weapon in the fight against criminal activity’, particularly in relation to organised crime and the drug trade.⁶ The Government of the time firmly believed that the CPCA, ‘will be the strongest and most effective [Act] of its kind in the world.’⁷

The CPCA departed from the *Crimes (Confiscation of Profits) Act 1998* (WA) in a number of ways.⁸ The most significant of these reforms was a move from a conviction based regime to a non-conviction based regime, following a recommendation of the Australian Law Reform Commission.⁹ Whereas the *Crimes (Confiscation of Profits) Act 1998* (WA) only allowed confiscation when ‘a person is convicted of a serious offence’,¹⁰ the CPCA allows confiscation to occur even

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⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).
⁶ Ibid.
⁷ Ibid.
¹⁰ *Crimes (Confiscation of Profits) Act 1998* (WA) s 6(1).
when no offence has been committed.\textsuperscript{11} Proceedings under the \textit{CPCA} are civil, rather than criminal, which is significant due to the application of a lesser evidentiary standard (the balance of probabilities) and civil rules of evidence, which increases the ease by which the State can secure a confiscation.\textsuperscript{12} This task is made even easier because the \textit{CPCA} admits opinion and hearsay evidence on behalf of the State in certain circumstances.\textsuperscript{13} Additionally, the onus of proof may in some situations be reversed, so the individual must establish the property was lawfully acquired.\textsuperscript{14}

The intention of the \textit{CPCA} is to enable ‘confiscation of proceeds of criminal activity and property used in criminal activity.’\textsuperscript{15} Section 4 of the \textit{CPCA} provides five bases of confiscation to achieve this objective.\textsuperscript{16} The first is unexplained wealth, which occurs when ‘the total value of a person’s wealth exceeds the value of the person’s lawfully acquired wealth’.\textsuperscript{17} Criminal benefits can be confiscated, which refers to ‘property, services, advantages and benefits obtained by a person who has been involved in the commission of a confiscation offence’.\textsuperscript{18} Thirdly, property that is crime-used, which is ‘property used in or in connection with commission of a

\textsuperscript{11} See, eg, \textit{CPCA ss 4(a), 5(2)(c)}.
\textsuperscript{13} \textit{CPCA s 105}.
\textsuperscript{14} See, eg, \textit{CPCA ss 12(2), 82(1), 83(1)}.
\textsuperscript{15} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).
\textsuperscript{16} See also Joseph McGrath, ‘Responding on Behalf of a Client whose Assets are Frozen by the State: Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 3.
\textsuperscript{17} \textit{CPCA s 4(a)}.
\textsuperscript{18} \textit{CPCA s 4(b)}.
confiscation offence’ is confiscable. Crime-derived property can be confiscated, which is ‘property derived directly or indirectly from the commission of a confiscation offence’. The final type of property that may be confiscated is property that is or was owned by a declared drug trafficker. In relation to crime-used property, a secondary base of confiscation exists when the crime-used property is not available for confiscation. This is known as crime-used property substitution and enables confiscation of property equal in value to the crime-used property from the respondent. As drug trafficker and crime-used property confiscation are the most commonly used grounds of confiscation, these bases will be the primary focus of this thesis.

Despite the ‘significant impact of the legislation upon personal and property rights’, the CPCA has received little scholarly attention. Existing scholarly work is focused on the various bases of confiscation described above. The impact of confiscation on innocent parties, such as the innocent wife who has the family

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19 CPCA s 4(c).
20 CPCA s 4(d).
21 CPCA s 4(e).
22 CPCA s 22.
23 CPCA s 23(1).
home confiscated as a result of her husband’s drug trafficking, has escaped significant scrutiny.\(^27\) The potential for the \textit{CPCA} to produce this outcome was acknowledged by the Western Australian Parliament and provisions were included in the \textit{CPCA} to protect innocent parties from these ‘unjust consequences’ (‘the protections’).\(^28\) As the \textit{CPCA} has been described as ‘perplexing and difficult to construe’,\(^29\) lacking ‘coherence’ and being ‘drafted unsatisfactorily’,\(^30\) the mere existence of these protections is unlikely to provide significant reassurance to an innocent party.

This thesis will seek to examine these protections by considering the following four questions; firstly, how is an innocent party defined by the \textit{CPCA}, secondly, what is the scope of the protections available to protect the family home of an innocent party, thirdly, what issues have arisen from these protections and fourthly, how these protections may be improved. Currently there are no secondary sources that directly address these research questions. These questions are of critical importance as depriving citizens of privately-owned assets is a ‘highly intrusive act


\(^{28}\) Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 29 June 2000, 8613 (Dan Barron-Sullivan).


of state’. 31 This is particularly so when the asset in question is the home of innocent people, who are ‘innocent’ not just in a general sense, but as defined by the Act that enables the confiscation. 32 By focusing on these four questions, a thorough overview of the protections for the family home of innocent parties will be provided, as well as a consideration of the significant issues arising from the protections and recommendations for improving the operation of the protections.

Due to the vast scope of potential hypothetical issues that could be considered in relation to the protections, this thesis will be focused on issues that have emerged from the case law to date. 33

Although it is acknowledged that a number of issues exist in relation to the confiscation powers contained in the CPCA, this thesis will not be addressing these issues. 34 This thesis is focused on the protections, and any proposed improvements will be in relation to the protections, not to the confiscation powers. 35 These improvements will focus on ensuring that the protections are coherent and consistent, as opposed to radically changing the CPCA. Additionally,

32 This definition will be discussed in chapter four.
34 Examples of these issues include the constitutional validity of the drug trafficker confiscation scheme and the scope of the crime-used property definition. On these issues see Natalie Skead, ‘Drug-trafficker Property Confiscation Schemes in Western Australia and the Northern Territory: A Study in Legislation going too far’ (2013) 37 Criminal Law Journal 296, 306-12 and Natalie Skead, ‘Crime-used Property Confiscation in Western Australia and the Northern Territory: Laws Befitting Draco’s Axones?’ (2016) 41(1) University of Western Australia Law Journal 67, 69-72.
35 This is largely due to the fact that the confiscation powers have attracted some scholarly attention, while the protections have received only brief consideration.
the definition of ‘innocent party’ that is provided in the *CPCA* will not be critically evaluated. The question of how to define innocence, particularly in the context of a non-conviction based confiscation scheme, is philosophically complex and beyond the scope of this thesis.

Before considering the research questions, literature relevant to the topic will first be considered and critiqued, with any gaps in the literature being identified. Chapter three will then consider why a traditional research methodology will be adopted for this thesis. This will involve a discussion of the research methodologies utilised by previous authors on the *CPCA* and the strengths and weaknesses of these approaches. These approaches will then be compared to the methodology to be applied in this thesis, which will also be critically assessed. Chapters four to seven will then consider the four questions in the order stated above. The final chapter will contain a conclusion on the findings of this thesis.

Any Act that potentially enables the state to deprive an innocent person of their family home is an exceptional piece of legislation that demands a thorough examination. This thesis will perform this examination, clarifying to what extent the family home of an innocent party is protected under the *CPCA*, as well as observing issues with the protections and recommendations for improvements.
CHAPTER TWO: LITERATURE REVIEW

I. INTRODUCTION

There are very few secondary sources that address the CPCA. The only authors who have produced peer reviewed literature that considers innocent parties under the CPCA are Dr Natalie Skead and Dr Ben Clarke. The limited scholarship in this area is acknowledged by Skead who writes, ‘there is little scholarship on the impact of the legislation on the property rights of defendants, and more importantly, innocent third parties.’ As the literature by Clarke is dated and only addresses the research question in passing, this review will focus primarily on the work of Skead. In addition to being the most relevant, her work is also the most recent and the most extensive. The remaining sources considered by this literature review are non-peer reviewed papers by Mr Edward Greaves, Mr Joseph McGrath, Mr Alain Musikanth and Mr Michael Seaman.

II. DEFINING INNOCENT PARTIES

Although every source acknowledges the possible adverse ramifications of the CPCA on innocent parties, there is very little scholarship on who an ‘innocent party’ is under the CPCA. Skead notes that the CPCA does define ‘innocent party’ but does not include the definition or provide any commentary regarding the

37 See, eg, Joseph McGrath, ‘Responding on Behalf of a Client whose Assets are Frozen by the State: Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 21 (written prior to his Honour’s appointment to the Supreme Court of Western Australia).
definition. This is due to the definition in the CPCA being in reference to crime-used and crime-derived property only, while Skead’s chapter focuses on unexplained wealth. However, her work would have been complemented by a consideration of the definition, as the ‘innocent party’ criteria most likely still applies to unexplained wealth declarations, as Skead herself acknowledges. Greaves observes that the definition provided in sections 153(3) and (4) of the CPCA draws on well-known principles of property law and as a result requires little further explanation. This is a reasonable conclusion, however the definition provided in sections 153(1) and (2) does not have an equivalent level of clarity. The definition of ‘innocent party’ is critical as it is central to a number of the protections contained in the CPCA. As the literature indicates a clear awareness of the possible issues for innocent parties, it is surprising that the definition in the CPCA is usually overlooked and in the rare instances when it is noted, is passed over very briefly.

39 Ibid 216.
41 Greaves does briefly discuss the case of Lambert v Western Australia (2014) 240 A Crim R 268 in which the spouse of a drug trafficker objected to the confiscation of the family home on the grounds that she was an innocent party, see Edward Greaves, ‘Criminal Property Confiscation Act 2000: Crime-Used and Crime-Derived Cases’ (Paper presented at Legalwise Seminar, 20 November 2015) 18.
42 See, eg, Joseph McGrath, ‘Responding on Behalf of a Client whose Assets are Frozen by the State: Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 12.
III. PROTECTIONS AVAILABLE TO INNOCENT PARTIES

Part 6 of the CPCA contains provisions that enable property to be released if certain criteria are satisfied. Of particular relevance are sections 82, 83 and 87, which specifically refer to innocent parties, while section 84 provides a general objection provision that is indirectly relevant.

Sections 82 and 83 are similar provisions that provide for the release of crime-used and crime-derived property respectively. Lamers v Western Australia is discussed by a number of authors to illustrate how strictly the hardship provision in section 82(3) is applied by the court. In this case, the family home was confiscated as a result of a drug trafficker declaration. Notably the hardship provision only applies to crime-used property, a feature that has escaped any detailed attention in the literature.

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43 For a summary of the various criteria, see Appendix 1. In the context of sections 82, 83 and 84 the property is ‘released’ in the sense that the freezing notice or freezing order is set aside. In relation to section 87, the property is released by the making of a court order for the release of the confiscated property (CPCA s 87(1)).


For a release to be granted under section 87, the applicant must meet five criteria. The final criterion, that any other owner must also be an innocent party in relation to the property, significantly limits the protection available to an innocent party. Skead and Clarke both agree that this condition results in a number of difficulties and inequities.\(^{47}\) Skead provides a useful case study of this issue using *Director of Public Prosecutions (Vic) v Le*.\(^{48}\)

The final relevant section to innocent parties is section 84, which has attracted significant attention.\(^{49}\) Skead’s 2011 article is of particular value and represents the most detailed analysis of any of the protections in the *CPCA*. Skead argues that the assistance provided by section 84 is limited and inadequate.\(^{50}\) This is because if a property is frozen as it is subject to confiscation, innocent parties are prevented from dealing with the property. Dealing with frozen property is a


\(^{50}\) Natalie Skead, ‘Unexplained Wealth: Indefeasibility and Proceeds of Crime Legislation in Australia Carruthers’ in Penny Carruthers, Sharon Mascher and Natalie Skead (eds), Property and Sustainability: Selected Essays (Thomson Reuters Australia, 2011) 211.
serious offence unless the offender did not know or could not reasonably have known that the property was frozen.\textsuperscript{51} ‘Deal’ is defined broadly in section 151 of the \textit{CPCA} to cover most conceivable actions in relation to property. Skead\textsuperscript{52} cites \textit{Permanent Trustee Co Ltd v Western Australia}\textsuperscript{53} and \textit{Permanent Custodians Ltd v Western Australia}\textsuperscript{54} as examples of the inadequacy of these provisions for an innocent party, albeit parties with a commercial interest in property.

Despite common agreement amongst the authors about the risks the \textit{CPCA} poses for innocent parties, there is very little literature on the scope of the protections the \textit{CPCA} provides generally, and for the family home specifically. It is only the work of Skead, particularly her 2011, 2013 and 2016 works, and the work of Greaves that goes beyond a superficial commentary of the issues and discusses some of the protections provided by the \textit{CPCA} in detail. Beyond the work of Skead and Greaves, the remaining secondary sources are of little relevance to the research questions. Despite the significant value of the work by Skead and Greaves, these contributions are still limited due to their focus on a particular confiscation power, rather than focussing on innocent parties and considering the protections as a whole. This is a significant gap in the research and as a result it is difficult to make any comment about the extent of the protections in the \textit{CPCA}.

\textsuperscript{51} \textit{CPCA} ss 50(1), 50(3).
\textsuperscript{53} [2002] 26 WAR 1.
\textsuperscript{54} [2006] WASC 225 (29 September 2006).
IV. CONCLUSION

The lack of protection for innocent parties is an issue that has been observed in the literature but not addressed in great depth. As demonstrated, the existing literature deals only with protections available to innocent parties in specific circumstances and in limited detail. There is simply no literature that provides any sort of overview of the protections available to innocent parties from the confiscation powers contained in the CPCA or any consideration of how these protections apply to the family home. The absence of detailed consideration of the definition of ‘innocent party’ is indicative of the limited scholarship in this area.
CHAPTER THREE: RESEARCH METHODOLOGY

I. INTRODUCTION

The topic being addressed is to what extent do the objection provisions contained in Part 6 of the CPCA protect the family home of an 'innocent party' from confiscation? This topic will consider the following four research questions; how is an innocent party defined by the CPCA, what is the scope of the protections available to protect the family home of an innocent party, what issues have arisen from these protections and how these protections may be improved. There are no secondary sources that directly address these research questions. The secondary sources that do indirectly address the research questions all adopt a traditional ‘black-letter’ law approach, such as Skead55 and Greaves.56 These sources seek to derive principles from the legislation and the decided cases, making the traditional approach the appropriate methodology. As the goal of this research is to provide a comprehensive overview of the protections provided in the CPCA in relation to the family home of an innocent party, it is appropriate that this research also adopts this traditional approach.

II. THE TRADITIONAL APPROACH

The traditional approach, often called ‘black-letter law’ or the doctrinal approach, focuses on ‘deriving principles and values from decided cases and re-assembling decided cases into a coherent framework.’\textsuperscript{57} Accordingly, this traditional approach relies heavily on legislation and case law. As this thesis is an analysis of legislation and its application, the traditional approach is the most appropriate. This thesis will consider the definition of innocent party and the extent of the protections available to protect the family home of an innocent party by considering the relevant sections of the legislation, which will include a discussion of relevant case law and legislative materials. The consideration of the issues that have arisen from these protections and possible improvements will then be considered primarily by reference to case law, using legislative materials and secondary sources as required.

It is acknowledged that the traditional approach has been criticised for being inward-looking and failing to understand the operation of law in society.\textsuperscript{58} It is also limited in that it can only serve as a general guide that needs to be applied to a particular set of facts. Non-traditional research seeks to overcome these issues by incorporating other disciplines,\textsuperscript{59} and in so doing considers the law in a broader

\textsuperscript{57} Mike McConvill and Wing Hong Chui (eds), \textit{Research Methods for Law} (Edinburgh University, 2007) 1.

\textsuperscript{58} Ibid 4-5.

\textsuperscript{59} Such as sociology, political science and economics, see Mike McConvill and Wing Hong Chui (eds), \textit{Research Methods for Law} (Edinburgh University, 2007) 5.
social and political context. Some non-traditional methods, such as interviewing innocent parties may provide some insight, particularly as the majority of confiscation objections do not proceed to a hearing, but such a method would require a considerable investment of resources with no guarantee of adding significant value to the thesis. Despite the limitations of the traditional methodology, and the potential benefits of non-traditional methods, on balance it is considered that the traditional methodology is the appropriate tool with which to address these research questions.

Although the use of the traditional research methodology is common in the literature, this thesis will be novel as a result of its focus and scope. Despite all secondary sources acknowledging the potential injustice that could occur for innocent parties as a result of the *CPCA*, there are no sources that provide a detailed analysis of the protections from confiscation available to innocent parties. As the *CPCA* enables property to be confiscated under five main heads, the majority of secondary literature is focussed on one or two of these particular heads. There are numerous examples of this approach, such as the work of Skead and Greaves, which provides two examples in relation to crime-used property.

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60 Ibid 5.
This approach is problematic to the extent that there is no research that identifies common problems across the protections and no commentary regarding the protections as a whole. Rather, the secondary sources deal with the protections in isolation, which is valuable in relation to that particular protection, but of little assistance in determining the scope of the protections as a whole. As this thesis is not focussing on a particular confiscation power, but rather focusses on innocent parties, it will be a new contribution to the field. This focus on innocent parties provides a framework to the thesis and avoids the often piecemeal approach to this issue evident in the secondary sources to this point.

The distinction between descriptive and analytical research is a relevant one to this research topic. Descriptive research seeks to describe the state of affairs as it exists at the present, while analytical research seeks to use the facts or information available to make a critical evaluation of the material.64 This thesis will do both, as chapters four and five will describe the state of affairs in relation to innocent parties and the protections available to them through an analysis of the legislation and case law. Chapters five and six will then examine issues that have arisen from the protections and provide suggestions to address these issues. To adopt the slightly different language of Bell, this thesis will seek to answer both

analytical and normative questions. Analytical questions attempt to define the legal rules, while normative questions address what the law should be.\footnote{John Bell, ‘Legal Research and the Distinctiveness of Comparative Law’ in Mark Van Hoecke (ed), Methodologies of Legal Research (Hart, Oxford, 2011) 157.}

III. CONCLUSION

The traditional research approach is an appropriate methodology to adopt for this thesis. It is the same methodology adopted by the secondary sources, which is unsurprising, as this literature also seeks to clarify the law on the topic by analysis of the legislation and case law. The contribution of the thesis to existing scholarship arises from a consideration of the \textit{CPCA} as a whole with regard to the protections available for the family home of an innocent party. This holistic approach will address significant gaps regarding the protections for innocent parties in the scholarship to date.
CHAPTER FOUR: DEFINING INNOCENT PARTIES

I. INTRODUCTION

In order to determine the scope of the protections for innocent parties contained in the CPCA, it is essential to firstly determine who exactly is an ‘innocent party’. This chapter seeks to explain the scope of this definition, firstly by reference to the CPCA itself, and secondly by considering how the definition has been applied by the judiciary. This definition is critical, as a number of the protections depend on the person making the objection fulfilling the innocent party definition.

II. INNOCENT PARTY

Section 153 of the CPCA defines an ‘innocent party’. The definition has four subsections, subsections one to three relate to crime-used property, while subsection four relates to crime-derived property.

A. Sections 153(1) and (2)

Section 153(1) provides that an innocent party in relation to crime-used property is a person who was not involved in the offence and did not know, and had no reasonable grounds for suspecting that the relevant confiscation offence was being or would be committed, or took all reasonable steps to prevent its commission. It is directed towards circumstances where the relevant criminal act was committed on the property.66 Under section 153(2), also in relation to crime-used property, a person is an innocent party if that party did not know, and had

no reasonable grounds for suspecting that the property was being or would be used in the commission of the offence; or took all reasonable steps to prevent the use of the property in the commission of the offence. In contrast to section 153(1), section 153(2) is directed at circumstances where the property was used in, or in connection with, the relevant offence.\textsuperscript{67}

A simple application of sections 153(1) and 153(2) of the \textit{CPCA} is found in \textit{Powell v The State of Western Australia}.\textsuperscript{68} Mr Powell had pleaded guilty to a number of drug related offences after a search by police had located 21 cannabis plants and additional cannabis material\textsuperscript{69} in a shed on the property. Cannabis was also found in the master bedroom and on a table on the porch of the residence.\textsuperscript{70} Ms Murphy, Mr Powell’s de facto partner, was found not to be an innocent party as she knew the relevant confiscation offence was being committed on the property and did not ‘attempt to prevent the commission of the offences or the use of the property for that purpose’.\textsuperscript{71}

\textsuperscript{67} \textit{Stribrny v Western Australia} [2015] WASC 396 [59].
\textsuperscript{68} [2014] WASC 435 (20 November 2014).
\textsuperscript{69} Specifically:
\begin{itemize}
  \item two vacuum sealed bags containing 877 g of processed cannabis head,
  \item six cannabis plants (weighing a total of 1.331 kg) in the process of being dried,
  \item a further bag containing 20 g of cannabis material
  \item a black plastic bag containing cannabis leaf and stem which was unusable.
\end{itemize}
\textit{Powell v The State of Western Australia} [2014] WASC 435 (20 November 2014) [3].
\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid [28].
B. Sections 153(3) and (4)

Sections 153(3) and (4) of the CPCA both relate to situations where a person has acquired the property after the property has been crime-used or crime-derived.\(^\text{72}\)

In Greaves’ opinion these subsections provide that a person is an innocent party in relation to both crime-used and crime-derived property if they are a bona fide purchaser for value without notice.\(^\text{73}\) Any transaction that takes place with the ‘intention of avoiding the operation’ of the CPCA is specifically excluded under both subsections.\(^\text{74}\) Sections 153(3) and (4) have not been the subject of judicial consideration.

III. REASONABLE GROUNDS FOR SUSPECTING

An essential condition in all four subsections is that the person ‘did not know and had no reasonable grounds for suspecting’.\(^\text{75}\) An example of how this phrase is applied is found in *Lambert v Western Australia*.\(^\text{76}\) In *Lambert* the police located 33 plants of cannabis being hydroponically grown in a rear shed in close proximity to the house by Mr Russell, the partner of Ms Lambert.\(^\text{77}\) Ms Lambert contended that she was an innocent party as she was not involved in the commission of the offence and did not know, and had no reasonable grounds for

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\(^{73}\) Ibid.

\(^{74}\) *CPCA* s 153(3)(d), 153(4)(e).

\(^{75}\) In relation to subsection one this applies to suspicion that the confiscation offence was being or would be committed. Subsection two relates to suspicion the property was being or would be used in or in connection with the commission of the relevant confiscation offence. In subsections three and four the suspicion relates to the property being crime-used and crime-derived respectively. See *CPCA* ss 153(1)(b), 153(2)(a), 153(3)(b), 153(4)(d).

\(^{76}\) *Lambert v Western Australia* 2014) 240 A Crim R 268 (‘Lambert’).

\(^{77}\) Ibid 269, 278.
suspecting that the offence was being committed. As noted by Commissioner
Sleight in *Lambert*, the High Court established in *George v Rockett* that:

> When a statute prescribes that there must be "reasonable grounds" for a state of
> mind - including suspicion and belief - it requires the existence of facts which are
> sufficient to induce that state of mind in a reasonable person.\(^9\)

Ms Lambert failed in her application based on the existence of a number of facts, primarily the elaborate nature of the hydroponic system and its close proximity to the house.\(^8\) The facts made it ‘improbable’ Ms Lambert was not aware of the drug cultivation.\(^9\) As she did not satisfy the innocent party definition, her objection was dismissed and the family home was confiscated.\(^\)\(^4\)

A similar scenario to *Lambert* occurred in *Stribrny v Western Australia*.\(^\)\(^3\) Here Mr Stribrny established an elaborate and sophisticated hydroponic system in the rear bedrooms of the family home.\(^\)\(^4\) Ms Stribrna, the wife of Mr Stribrny, claimed to be an innocent party. Justice Tottle accepted the submission that knowledge or reasonable grounds for suspicion must be made out, ‘in respect of each element of the relevant confiscation offence or wilful blindness to those elements.’\(^\)\(^5\) The relevant elements in *Stribrny* were the cultivation of cannabis and an intent to sell

\(^78\) Ibid 275.
\(^79\) *George v Rockett* (1990) 170 CLR 104, 112.
\(^81\) Ibid 278. As section 102(1) of the *CPCA* establishes that applications made under the *CPCA* are civil proceedings, a question of fact is to be decided on the balance of probabilities.
\(^82\) *Lambert v Western Australia* (2014) 240 A Crim R 268, 284.
\(^83\) *Stribrny v Western Australia* [2015] WASC 396 (22 October 2015) (‘Stribrny’).
\(^84\) Ibid [44]-[46].
\(^85\) Ibid [60].
or supply.\textsuperscript{86} Based on the existence of a similar set of facts to \textit{Lambert}, Justice Tottle was not satisfied on the balance of probabilities that Ms Stribrna did not know that the property was being used for the cultivation of cannabis\textsuperscript{87} and that she did not have reasonable grounds for suspecting that the cannabis was being grown with intent to sell or supply to others.\textsuperscript{88}

\textit{BJF v The State of Western Australia}\textsuperscript{89} presents an unusual contrast. Here the husband, Mr F, was convicted of cultivating cannabis, amongst other offences.\textsuperscript{90} The cultivation occurred in a locked shed located between 10 and 20 metres from the house.\textsuperscript{91} There were 17 cannabis plants growing in the shed.\textsuperscript{92} His wife, Mrs F, was found to be an innocent party as she was not involved in the commission of any of the confiscation offences and, ‘did not know, and had no reasonable grounds to suspect, that any of those offences was being committed.’\textsuperscript{93} Justice Murray does not expand any further on the factual basis for making this determination. In light of \textit{Lambert} and \textit{Stribrny}, this conclusion reveals some inconsistency in how the definition of innocent party is judicially applied. The decisions in \textit{Lambert} and \textit{Stribrny} are respectfully preferred as it is difficult to accept that the cultivation of drugs using a hydroponic system in a shed close to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{86} Ibid [61].
\item \textsuperscript{87} Ibid [66].
\item \textsuperscript{88} Ibid [68].
\item \textsuperscript{89} \textit{BJF v The State of Western Australia} (2011) 210 A Crim R 262 (‘BJF’).
\item \textsuperscript{90} Ibid 263 [3].
\item \textsuperscript{91} Ibid 263 [2].
\item \textsuperscript{92} Ibid.
\item \textsuperscript{93} Ibid 267 [25].
\end{itemize}
\end{footnotesize}
the home would not provide ‘reasonable grounds for suspecting’ the offence was occurring.

IV. RELEVANCE TO OTHER BASES OF CONFISCATION

As has been observed, the innocent party definition in section 153 only applies in relation to crime-used property and crime-derived property. Consequently, its relevance to property confiscated on the grounds of an unexplained wealth declaration, a criminal benefits declaration, a drug trafficker declaration or a crime-used substitution order is unclear. This was noted in Bennett & Co (a firm) v Director of Public Prosecutions (Western Australia) where it was observed that, ‘an objector is only able to establish that they fall within the definition of “innocent party” where the property is either crime-used or crime-derived.’94 This issue will be considered further in chapters six and seven.

V. CONCLUSION

The definition of ‘innocent party’ contained in the CPCA only applies when the property is either crime-used or crime-derived. An innocent person is essentially a person that did not know and had no reasonable grounds for suspecting that either the confiscation offence was being or would be committed, the property was being or would be used in or in connection with the confiscation offence or the property was crime-used or crime-derived. This is a question of fact to be determined on the balance of probabilities by considering if facts exist which are

94 Bennett & Co (a firm) v Director of Public Prosecutions (WA) (2005) 31 WAR 212, 226 [61].
sufficient to induce suspicion in the mind of a reasonable person. This test is applied quite consistently by the court, with the case of *BJF* appearing to be an exception.
CHAPTER FIVE: THE PROTECTIONS

I. INTRODUCTION

The CPCA contains four protections available to innocent parties. These are contained in sections 82(4), 83(2), 82(3) and 87(1). Section 84 contains a protection that does not require a party to be innocent, but nonetheless is of relevance to innocent parties. The scope of these sections, and application in protecting the family home of innocent parties is considered in this chapter.

It is important to note that any objections made under sections 82, 83 and 84 must be filed on or before the 28th day after the service of the freezing notice or freezing order, although the court can allow further time. If no objection is filed within this period, the property will be confiscated. Once the property is confiscated, objections can only occur under section 87. Objections under section 87 must occur ‘within 28 days after the person became aware, or can reasonably be expected to have become aware, that the property has been confiscated.’

95 CPCA ss 7(1), 79(2), 79(3). This notice should be served on any interested party, see CPCA ss 36(1)(b) and 46(1)(b). An interested party is defined in the glossary to the CPCA as, ‘any person with an interest in the property that would enable the person to succeed on an objection to the confiscation of the property.’
96 CPCA s 79(4).
97 CPCA s 7(1); Joseph McGrath, ‘Responding on Behalf of a Client whose Assets are Frozen by the State: Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 7; see also Alain Musikanth, ‘The Criminal Property Confiscation Act: Acting on Behalf of a Commercial Client with an Interest in the Asset’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 6-7.
98 CPCA s 85(2).
II. CRIME-USED AND CRIME-DERIVED PROPERTY

Sections 82(4) and 83(2) apply to crime-used and crime-derived property respectively. Both sections enable the court to set aside a freezing notice or a freezing order against the interest of an innocent party in a family home providing a number of conditions are met as considered below.

A. Sections 82(4) and 83(2)

Section 82(4) requires the objector to be able to establish that it is more likely than not that:

(a) the objector is the owner of the property, or is one of 2 or more owners of the property; and

(b) the property is not effectively controlled by a person who made criminal use of the property; and

(c) the objector is an innocent party in relation to the property; and

(d) each other owner (if there are more than one) is an innocent party in relation to the property.

Section 83(2) repeats conditions (a), (c) and (d). The only difference is in condition (b) which provides, ‘the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence.’ These conditions are conjunctive and the burden of proof is on the objector. The term ‘owner’ is defined in the glossary.

99 A summary of these protections are found in Table 1 of Appendix A.

100 Natalie Skead, ‘Crime-used Property Confiscation in Western Australia and the Northern Territory: Laws Befitting Draco’s Axones?’ (2016) 41(1) University of Western Australia Law Journal 67, 80.
of the *CPCA* to mean in relation to property, ‘a person who has a legal or equitable interest in the property.’ As noted by Greaves, this expansive definition allows for these sections to provide a remedy to people who have an interest in the property, not just those who are ‘owners’ in the ordinary sense of the word.\(^{101}\)

In *McLeod v Western Australia*\(^ {102}\) the second plaintiff (‘the son’), who was the son of the first plaintiff (‘the father’),\(^ {103}\) objected to the confiscation of the home of which he was the sole registered proprietor, and which his father resided. The father had pleaded guilty to, and was convicted of, cultivating cannabis and possessing cannabis with intent to sell or supply it.\(^ {104}\) It was not disputed that the property was crime-used and that the son was an innocent party.\(^ {105}\) As conditions (a) and (c) were not disputed and condition (d) was irrelevant as the son was the sole owner, condition (b) was the only issue in dispute. Effective control is defined in section 156(1) of the *CPCA*:

> A person has effective control of property if the person does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person.\(^ {106}\)

For a number of reasons, such as the father’s contribution of $117,417.30 towards the purchase of the property, Justice Jenkins was satisfied that the property was


\(^{102}\) (2015) 248 A Crim R 473 (*McLeod*).

\(^{103}\) No disrespect is intended by referring to the parties as ‘the father’ and ‘the son’.

\(^{104}\) *McLeod v Western Australia* (2015) 248 A Crim R 473, 474 [3].

\(^{105}\) Ibid 476 [17]-[18].

\(^{106}\) A non-exhaustive list of considerations that may be taken into account when determining effective control is contained in section 156(2).
subject to the control of the father. As condition (b) was not established, the son’s objection to confiscation failed.

B. Sections 82(5) and 83(3)

Sections 82(5) and 83(3) are substantively identical and provide that if the objector establishes the matters set out in conditions (a), (b) and (c) but fails to establish (d), the court may order that when the property is sold, that the objector be paid an amount equal to the objector’s share in the property.

In *Stavrianakos v The State of Western Australia*, Mr Tony Stavrianakos had purchased a home from prize money won in the Saturday lotto. Ten years after purchasing the home, Tony was convicted of one count of manufacturing methamphetamine and one count of attempting to manufacture methamphetamine at the home. His former de facto partner, Ms Lesley Maxfield and their children, Ms Angie Craven, Mr Nick Stavrianakos and Mr Jonathan Stavrianakos (the third to sixth plaintiffs) contended that the lotto ticket was purchased with contributions from all of them and that as a result he held the prize money on trust for them all.

107 Other reasons included that the son purchased the property on the father’s recommendation, only the father lived on the property between the time of purchase to when the freezing notice was issued, and the son did not know the address of the property when interviewed by the police. See *McLeod v Western Australia* (2015) 248 A Crim R 473, 487-8 [86].

108 *Stavrianakos v Western Australia* [2016] WASC 64 (3 March 2016) (‘*Stavrianakos*’).

109 The parties will be referred to by their first names for ease of identification, no disrespect is intended.

110 *Stavrianakos v Western Australia* [2016] WASC 64 (3 March 2016) [6].

111 Ibid [1].
The judgment states that it was ‘common ground’ that the third to sixth plaintiffs were innocent parties and that the property was not effectively controlled by Tony.\textsuperscript{112} There is no explanation as to the reasoning behind this agreement. Finding that the third to sixth plaintiffs were innocent parties is not surprising as Angie and Nick never lived at the property and Lesley and Jonathan had vacated the property by early 2000, more than nine years before the police search. The agreement that Tony did not effectively control the property may seem unusual in light of the similarity to the circumstances in \textit{McLeod}, but as the definition of effective control in section 156(1) is prescriptive, a person with legal estate in the property cannot be found to have effective control of the property.

As a result, conditions (b) and (c) of section 82(4) were satisfied. Condition (d) would not be satisfied as Tony was an owner and not an innocent party. Therefore, section 82(5) applied, provided that condition (a) is satisfied, namely that the third to sixth plaintiffs were owners of the property. Justice Tottle found that Tony held the property on constructive trust for each of the third to sixth plaintiffs and himself.\textsuperscript{113} Therefore, Tony and the third to sixth plaintiffs each held a one-fifth equitable interest in the property. As the term ‘owner’ includes a person who has an ‘equitable interest in the property’ condition (a) was satisfied. As a result, section 82(5) applied and Justice Tottle ordered that each of the third

\textsuperscript{112} Ibid [275].
\textsuperscript{113} Ibid [317].
to sixth plaintiffs be paid an amount equal to one fifth of the net proceeds of sale of the property, once the outstanding mortgage amount had been satisfied.\footnote{Ibid [331].}

The case of \textit{BJF} discussed in chapter four provides another example of section 82(5) applying in similar factual circumstances to \textit{Stavrianakos}. In this case the innocent party, Mrs F, was entitled to an amount equal to her one-half share as a joint tenant.\footnote{\textit{BJF v The State of Western Australia} (2011) 210 A Crim R 262, 273 [61].}

C. \textit{Hardship}

Section 82(3) contains a protection aimed specifically at circumstances when the family home is crime-used. The protection depends on hardship and does not have an equivalent elsewhere in the \textit{CPCA}. It is also the only provision that allows an objector to object to the confiscation of the wrongdoer’s interest in the property.\footnote{The term ‘wrongdoer’ is used for the sake of simplicity to describe the individual involved who is not an innocent party. No disrespect is intended. The term ‘respondent’ cannot be used as the State of Western Australia is the respondent in objection proceedings.} Consequently, in a situation of a family home held by two partners as joint tenants, it enables the home to be protected from confiscation. In contrast, all of the other protections do not stop the confiscation and sale of the home, but only ensure the innocent party is compensated for the value of the confiscated interest.
In order for section 82(3) to be satisfied, a number of conditions must all be fulfilled before a release is granted.\(^{117}\) These conditions restrict the hardship provision to applications made by an innocent spouse, de facto partner or dependant who is less than 18 years old.\(^{118}\) The scope of this protection is reduced further due to criteria (f) and (g), that the objector must suffer undue hardship and it must not be practicable to make adequate provision for the objector by some other means.\(^{119}\)

The meaning of ‘undue hardship’ was considered by Justice Murray in \textit{BJF}.\(^{120}\) When considering criteria (f) and (g) Justice Murray relied upon decision of \textit{R v Lake}\(^{121}\) which considered the then recently enacted \textit{Crimes (Confiscation of Profits) Act 1985} (NSW). In this quotation Kirby \textit{P} states that the hardship provision:

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\(^{117}\) The conditions are:
\begin{enumerate}
\item[(a)] the objector is the spouse, a de facto partner or a dependant of an owner of the property; and
\item[(b)] the objector is an innocent party, or is less than 18 years old; and
\item[(c)] the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed; and
\item[(d)] the objector was usually resident on the property at the time the objection was filed; and
\item[(e)] the objector has no other residence at the time of hearing the objection; and
\item[(f)] the objector would suffer undue hardship if the property is confiscated; and
\item[(g)] it is not practicable to make adequate provision for the objector by some other means.
\end{enumerate}

\textit{Criminal Property Confiscation Act 2000} (WA) s 82(3).


\(^{119}\) Ibid.

\(^{120}\) (2011) 210 A Crim R 262.

\(^{121}\) (1989) 44 A Crim R 63.
must not be so interpreted as to frustrate the achieving of the purpose of Parliament in enacting the exceptional provisions of the Act. Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own ineffectiveness in every case.122

After considering this quote and the context of the CPCA, Justice Murray concluded that ‘undue hardship’ is suffering that, ‘goes beyond what is warranted and becomes excessive or disproportionate.’123 It must be a hardship that is greater than the hardship that would ‘ordinarily flow from the confiscation’.124 Ultimately, Justice Murray concluded that although the loss of the family home would be significant, it would not amount to undue hardship. If it was to amount to undue hardship, the result would be that confiscation of the home of an innocent party that was crime-used could never occur.125

In Stibrnny,126 Ms Stribrna was deemed not to be an innocent party, meaning that the criteria found in section 82(3)(b) was not met. Nevertheless, Justice Tottle did consider if the hardship criteria found in section 82(3)(f) and (g) would be satisfied, using the definition of undue hardship from BJF.127 Justice Tottle found that although the confiscation would result in significant distress and hardship, nevertheless it did not exceed the ordinary consequences that flow from the confiscation of a family home. His Honour was not satisfied that the confiscation

123 Ibid 271 [48].
124 Ibid 271 [49].
125 Ibid 273 [58]-[59].
127 Ibid [73].
of the property would result in the plaintiffs getting divorced and Ms Stribrna and her children needing to leave Australia in order to live with her family in the Czech Republic.\footnote{Ibid [72].} Although not explicitly stated by Justice Tottle, it is suggested that if these circumstances existed, this would have constituted undue hardship.

\textit{Lamers}\footnote{(2009) 192 A Crim R 471 (‘Lamers’). This decision was unsuccessfully appealed in \textit{Willis v The State of Western Australia (No 3) [2010] WASCA 56 (31 March 2010).}} provides further authority that dispossession alone cannot constitute undue hardship. It is also notable as the case involved property confiscation on the basis of a drug trafficker declaration being made, rather than due to the property being crime-used. Despite this, the de facto partner of Mr Lamers, Ms Willis, objected to the confiscation of the house under section 82(3). This was based on section 82(2) which provides that, ‘If the court finds that the property is crime-used, or is not required to decide whether the property is crime-used, the court may make an order under subsection (3) or (4).’ As the court was not required to determine if the property was crime-used, counsel for Ms Willis argued that the court could make an order under subsection (3) or (4).\footnote{Lamers v Western Australia (2009) 192 A Crim R 471, 480 [64].} This submission was not accepted by Justice Templeman, who found that section 82 applies only to crime-used property, and section 82(2) refers to circumstances ‘in which property is frozen on the ground that it is crime-used even though … the court is not required to decide whether the property was actually crime-used.’\footnote{Ibid 481 [73].}
As there was no suggestion the property was crime-used, an objection could not be made under section 82.\(^{132}\)

D. Sections 82(7) and 83(5)

For crime-used and crime-derived property respectively, sections 82(7) and 83(5) allow for a freezing notice or order to be set aside if the objector pays the State the amount equal to the value of the property. Although these subsections do operate as protections for the family home of an innocent party, it is unlikely that an individual would have the financial means to be in a position to effectively buy back their family home from the State.\(^ {133}\) In addition, although these sections protect the home, they do not protect the objector from the financial consequences of the confiscation. As a result, these subsections will not be considered in detail.

III. OTHER BASES OF CONFISCATION\(^ {134}\)

A. Frozen Property

Section 84 is the only protection that applies to drug trafficker declarations, unexplained wealth declarations, criminal benefits declarations and crime-used property substitution declarations before the property is confiscated.\(^ {135}\) As this

\(^{132}\) Ibid 481 [74].

\(^{133}\) See, eg, BJF v The State of Western Australia (2011) 210 A Crim R 262, 273 [60].

\(^{134}\) A summary of these protections is provided in Table 2 of Appendix A. Table 3 of Appendix A provides a guide to the protections considered in relation to the type of confiscation.

\(^{135}\) Centurion Trust Company Ltd v Director of Public Prosecutions (WA) (2010) 201 A Crim R 324, 362 [159].
section does not apply to crime-used and crime-derived confiscation, and the innocent party definition only applies to crime-used and crime-derived confiscation, this section does not mention innocent parties. Nevertheless, it is still relevant to innocent parties as it allows for a freezing notice or order to be set aside if the court finds it is more likely than not that the wrongdoer does not own or effectively control the property, and has not at any time given it away. As McLure P observed, ‘third party ownership interests in the same property will only be frozen and confiscated if the respondent or accused controlled those interests or had given them away.’

Skead argues that all this section achieves is protection from a confiscation that should have never occurred in the first place. If the wrongdoer does not own or effectively control the property and has not given away the property, then the freezing order should never have been granted to begin with. Although this is true, it may also be overly simplistic, as due to the expansive definition of ‘owner’ contained in the CPCA, determining ownership is not necessarily a straightforward matter. This is particularly apparent when there are part owners and ‘exotic’ forms of equitable interests involved, such as constructive and Quistclose trusts. An example of this section being used with some success in relation to a

136 Centurion Trust Company Ltd v Director of Public Prosecutions (WA) (2010) 201 A Crim R 324, 333-4 [31].
drug trafficker declaration is found in *Campana v Western Australia*. Here, Mrs Campana successfully protected her half share in the family home from confiscation.

It is important to stress that in relation to a drug trafficker declaration, that once this declaration is actually made, any objections under section 84, or any other section, become redundant. Section 84(2), which applies to drug trafficker declarations, is only of assistance when a person ‘is or will be charged’. Once a person is convicted it is no longer relevant.

B. Confiscated Property

Section 87(1) applies to the release of confiscated property, as opposed to property that is the subject of a freezing notice or order. Section 85(1) provides that a person may apply for the release of property that has been confiscated under section 6 or 7. This applies to property that has been confiscated for any reason, except the property of a declared drug trafficker, which occurs under

140 Ibid [61].
142 Ibid.
143 For a summary of when property is treated as ‘confiscated’ under the CPCA see Alain Musikanth, ‘The Criminal Property Confiscation Act: Acting on Behalf of a Commercial Client with an Interest in the Asset’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009) 14-5.
section 8.\textsuperscript{144} This was confirmed in \textit{Centurion}\textsuperscript{145} and \textit{Lamers} where Justice Templeman found the court had no jurisdiction, ‘to release property confiscated under s 8 of the \textit{CPCA’}.\textsuperscript{146}

Section 87(1) provides the conditions that must be satisfied for the court to order a release of any property under section 85.\textsuperscript{147} Section 87(3) operates in the same manner as sections 82(5) and 83(3) to enable an objector to receive their share in the property if condition (e) cannot be established. Conditions (a), (b), (d) and (e) in section 87 essentially repeat the conditions found in 82(4) and 83(2). It is only condition (c) which is novel to section 87. As was noted in \textit{Centurion}, condition (c) ‘significantly restricts the power of the court to make an order for the release of


\textsuperscript{145} \textit{Centurion Trust Company Ltd v Director of Public Prosecutions (WA)} (2010) 201 A Crim R 324, 362 [162].

\textsuperscript{146} \textit{Lamers v Western Australia} (2009) 192 A Crim R 471, 481 [59].

\textsuperscript{147} It must be more likely than not that:

\begin{itemize}
  \item[(a)] immediately before the confiscation of the property, the applicant owned the property, or was one of 2 or more owners of the property; and
  \item[(b)] the property is not effectively controlled by a person who made criminal use of the property, or by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence; and realised the property, directly or indirectly, from the commission of a confiscation offence; and
  \item[(c)] the applicant did not become aware, and can not reasonably be expected to have become aware, until after the property was confiscated, that the property was liable to confiscation under section 6 or 7; and
  \item[(d)] the applicant is or was an innocent party in relation to the property; and
  \item[(e)] each other owner (if there are more than one) is or was an innocent party in relation to the property.
\end{itemize}

\textit{Criminal Property Confiscation Act 2000 (WA) s 87(1).}
confiscated property.\textsuperscript{148} Although this restriction is acknowledged, there is no case law that illustrates the failure to fulfil condition (c) resulting in the failure of an objection under section 87.

IV. CONCLUSION

The family home of an innocent party can only be completely spared from confiscation if the hardship provision contained in section 82(3) is satisfied. Due to the strict interpretation of ‘undue hardship’, and that section 82(3) only applies to crime-used property, the likelihood of this occurring is remote. If the hardship provision is not satisfied, the protections can only operate to protect the interest of the innocent party, not the home itself. As the case of \textit{McLeod} indicates, the fact that one is an innocent party is no guarantee that the objection will be successful. The existence of other conditions beyond being an innocent party means that a family home can be confiscated even if all the owners are innocent parties.

\textsuperscript{148} \textit{Centurion Trust Company Ltd v Director of Public Prosecutions (WA)} (2010) 201 A Crim R 324, 363 [167].
CHAPTER SIX: ISSUES ARISING FROM THE PROTECTIONS

I. INTRODUCTION

This chapter will critically consider a number of significant issues arising out of the protections discussed in chapter five. These issues relate to the effective control condition, the hardship protection, the lack of discretion afforded the court and the scope of the innocent party definition. These issues are not an exhaustive list, but an attempt to address the most significant issues emerging from the cases.

II. EFFECTIVE CONTROL

The most significant issue that arises from sections 82(4) and 83(2) is the requirement that the property is not effectively controlled by a person who made criminal use of the property. This is highlighted by McLeod where in order to fulfil the ‘innocent party’ condition, the son had to establish that he did not know or have reasonable grounds for suspecting that the offence was being committed.\textsuperscript{149} Therefore, it assisted the son to establish a degree of separation from the property, which he achieved successfully. However, this degree of separation from the property played a large part in his failure to establish that his father did not have effective control of the property.

The cases of McLeod and Stavrianakos share a number of factual similarities. Both cases involved circumstances where the father committed drug offences on a

\textsuperscript{149} CPA s153(1)-(2).
property owned by innocent family members who did not reside on the property.\textsuperscript{150} In \textit{Stavrianakos}, the innocent parties were entitled to relief proportionate to their share in the property.\textsuperscript{151} In \textit{McLeod}, no relief was available to the innocent party.\textsuperscript{152} The key difference was that in \textit{McLeod}, the wrongdoer was not the legal owner, while in \textit{Stavrianakos} the wrongdoer was the legal owner. Despite Mr Stavrianakos being both the legal owner and having effective control as a matter of fact, he did not have effective control as defined by section 156(1). In contrast, as the father in \textit{McLeod} was not the legal owner, he could be found to have effective control. The \textit{CPCA} and other resources do not explain why a legal owner cannot also be in effective control.

The explanatory notes to Criminal Property Confiscation Bill 2000 states in relation to clause 82(4) that, ‘It would be unjust for the crime-used property to be confiscated if all owners were innocent.’\textsuperscript{153} Yet this is precisely what occurred in \textit{McLeod} as the son was the sole owner of the property. Although it could have been argued that the father had an equitable interest and was therefore an ‘owner’, this was not established.\textsuperscript{154} \textit{McLeod} demonstrates that crime-used property can be confiscated when the property is under the effective control of the wrongdoer, even if all the owners are innocent parties. Ironically, the outcome for the son in \textit{McLeod} would have been better if his father were a joint legal owner,

\begin{footnotes}
\footnotetext[150]{\textit{McLeod v Western Australia} (2015) 248 A Crim R 473, 474 [3]; \textit{Stavrianakos v The State of Western Australia} [2016] WASC 64 (3 March 2016) [6].}
\footnotetext[151]{\textit{Stavrianakos v The State of Western Australia} [2016] WASC 64 (3 March 2016) [331].}
\footnotetext[152]{\textit{McLeod v Western Australia} (2015) 248 A Crim R 473, 488 [89].}
\footnotetext[153]{Explanatory Notes, Criminal Property Confiscation Bill 2000 (WA), 47.}
\footnotetext[154]{\textit{McLeod v Western Australia} (2015) 248 A Crim R 473, 487 [86].}
\end{footnotes}
as in this case the son’s interest in the property would then have been protected, as the father would not have then been in effective control. Although the house would still have been confiscated, the son would have received an amount equal to one half of the value of the property.

III. THE HARDSHIP PROTECTION

The most obvious issue with the hardship protection is that it only applies to property that is crime-used. In explaining why the hardship provision applied to crime-used property and not crime-derived property, the Western Australian Parliamentary Secretary noted that, ‘the intention of the Act is to ensure that no person benefits from crime.’\textsuperscript{155} A spouse or a dependant, ‘should not have the benefit of living in a house which has been derived from the commission of a confiscation offence.’\textsuperscript{156} As a result, the CPCA intentionally ensures that no one, even an innocent party, does not have the benefit of living in a house which has been derived from the commission of a confiscation offence.\textsuperscript{157} As Greaves succinctly explains, ‘property that is crime-derived must be confiscated, and that [sic] if that causes hardship to third parties, too bad. Crime should not pay.’\textsuperscript{158} It is likely that this same explanation also extends to confiscation resulting from drug trafficking, unexplained wealth and criminal benefits.\textsuperscript{159} With this explanation in

\textsuperscript{155} Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 29 June 2000, 8613 (Dan Barron-Sullivan).
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
\textsuperscript{159} CPCA s 12(1).
mind, the exclusion of property confiscated as a result of a crime-used property substitution declaration from the benefit of the hardship provision is perplexing. No explanation is provided in the CPCA or by Parliament.

An example of these difficulties is found in Western Australia v Bowers,\(^\text{160}\) where Mr Bowers had pleaded guilty to three counts of sexual offences against a child.\(^\text{161}\) As the offences occurred at a home owned by the victim’s father, this property could not be confiscated. As a result, a substitution order was issued and Mr Bowers was required to account for the full value of the property pursuant to a substitution declaration. The Director of Public Prosecutions (‘DPP’) also obtained a freezing order under section 43(3)(c) of the CPCA over Mr Bowers’ interest in his matrimonial home in Bassendean.\(^\text{162}\) Justice Templeman set aside the freezing order on the basis that Mr Bowers had not made criminal use of the property owned by the victim’s father,\(^\text{163}\) and even if he had, the hardship provision was satisfied by Mrs Bowers.\(^\text{164}\) This decision was overturned on appeal by the DPP in Director of Public Prosecutions (WA) v Bowers. McLure P, Owen and Buss JJA found that Mr Bowers had made criminal use of the property\(^\text{165}\) and that the hardship provision only applied to crime-used property, not property used as security for crime-used property substitution declaration proceedings.\(^\text{166}\)

\(^\text{161}\) Director of Public Prosecutions (WA) v Bowers (2010) 41 WAR 245, 245.
\(^\text{162}\) Ibid.
\(^\text{163}\) Western Australia v Bowers (8 May 2009) [25].
\(^\text{164}\) Ibid [29]; Director of Public Prosecutions (WA) v Bowers (2010) 41 WAR 245, 247 [8].
\(^\text{165}\) Director of Public Prosecutions (WA) v Bowers (2010) 41 WAR 245, 247 [9].
\(^\text{166}\) Ibid 248 [12].
Bowers and her children were denied relief because Mr Bowers’ offence was not committed at his home, but at a home belonging to someone else.\textsuperscript{167}

IV. LACK OF DISCRETION

One feature of the \textit{CPCA} is the lack of discretion that the court is afforded regarding confiscation orders.\textsuperscript{168} This is perhaps most evident in relation to drug trafficker confiscations. The court has no discretion in making a drug trafficker declaration\textsuperscript{169} and no discretion in declaring that all the property of the drug trafficker is confiscated.\textsuperscript{170} Section 84(2) provides the only avenue for relief for innocent parties when property is frozen as a result of a drug trafficking declaration. Consequently, the only objection that can be successfully made is that the frozen property is not owned or effectively controlled by the wrongdoer and the property has not been given away by the wrongdoer.\textsuperscript{171} No discretion is afforded in regard to factors such as innocence, hardship or proportionality.

It was explicitly observed in \textit{Whittle v Western Australia} that in relation to drug trafficker declarations the \textit{CPCA} simply does not allow for considerations of ‘whether a confiscation is fair or just, and whether that confiscation will give rise

\textsuperscript{167} \textit{Western Australia v Bowers} (8 May 2009) [32].
\textsuperscript{168} Stephen Hall and Jeff Scholz, ‘Ill-gotten gains?’ (2000) 27(11) \textit{Brief} 6, 10 (written prior to Justice Hall’s appointment to the Supreme Court of Western Australia).
\textsuperscript{169} \textit{Misuse of Drug Act} 1981 (WA) s 32A(1).
\textsuperscript{170} \textit{CPCA} s 30(2), s 8 (1)-(2).
\textsuperscript{171} \textit{CPCA} s 84(1)-(2).
to hardship.’\textsuperscript{172} Here, the family home was confiscated as Ms Whittle was declared a drug trafficker. The objection against confiscation made by the children failed as the drug trafficker declaration had already been made. It was submitted by the next friend for the son of Ms Whittle that the children were worse off than if their mother had committed murder.\textsuperscript{173} He also observed the children would have fulfilled the protections available for crime-used and crime-derived property.\textsuperscript{174} However, Allanson J found that, ‘general arguments relating to fairness and justice, are not supported by the text of the legislation.’\textsuperscript{175}

Likewise, in \textit{Tran v The State of Western Australia} the ‘difficulties in the life of the plaintiff and members of his family’\textsuperscript{176} could not be considered in relation to drug trafficker confiscations. Mr Tran was a refugee from Vietnam.\textsuperscript{177} He lived in his family home with his wife and daughter for four years, before leaving to live with his girlfriend.\textsuperscript{178} At this time he signed a statutory declaration which he believed divested him of his interest in the family home. However, Martino J found this declaration was not effective and that even if it was, the transfer would have been

\textsuperscript{173} \textit{Whittle v Western Australia} [2012] WASC 244 (5 July 2012) [32].
\textsuperscript{174} Ibid [34].
\textsuperscript{175} Ibid [47].
\textsuperscript{176} \textit{Tran v The State of Western Australia} [2017] WASC 200 (20 July 2017) [21] (‘Tran’).
\textsuperscript{177} Ibid [11].
\textsuperscript{178} Ibid.
a gift and therefore, the home would still have been confiscated.\textsuperscript{179} As no discretion was available, the order for confiscation had to be made.\textsuperscript{180}

V. INNOCENT PARTY DEFINITION

As section 87(1) mirrors the provisions in sections 82(4) and 83(2), the same issue regarding effective control arises. However, an additional issue does arise in section 87(1) in relation to innocent parties. As has been noted, section 87 applies to property that has been confiscated for any reason,\textsuperscript{181} except property of a declared drug trafficker. The problem that arises is that the definition of innocent party in section 153 of the \textit{CPCA} only applies to crime-used and crime-derived property,\textsuperscript{182} yet sections 87(1)(d) and (e) both require the innocent party definition to be satisfied. Further, section 87(1)(b) refers to effective control, but only in relation to property that is crime-used or crime-derived.\textsuperscript{183} Skead speculates that either the failure to include any reference to the other confiscation bases is deliberate so that the process for obtaining the release of property is far easier, or the more likely scenario that the failure to include the other confiscation bases in the definitions is a drafting oversight.\textsuperscript{184} This oversight leaves the

\textsuperscript{179} Ibid [19]; \textit{CPCA} s 8(1)(b).
\textsuperscript{180} \textit{Tran v The State of Western Australia} [2017] WASC 200 (20 July 2017) [21].
\textsuperscript{181} ‘Any reason’ being unexplained wealth, criminal benefits, crime-used property, crime-derived property and crime-used property substitution.
\textsuperscript{184} Ibid.
application of section 87 to these bases unclear. In the present state of ambiguity, the correct principle of construction would be to interpret section 87, ‘so as to respect a person’s property rights’. As noted by Cole JA, ‘Unless no other interpretation is possible, justice requires that statutes should not be construed so as to enable the confiscation of an individual’s property without payment of just compensation.’

VI. CONCLUSION

The protections contained in the CPCA give rise to a number of issues. Amongst the most obvious and significant in relation to a family home are the effective control criteria contained in sections 82(4)(b), 83(2)(b) and 87(1)(b) and the exclusion of property confiscated as a result of a crime-used property substitution declaration from the hardship protections. The lack of discretion afforded the court, particularly in relation to section 84, is problematic as the protections can only apply if the property is not owned or effectively controlled by the wrongdoer and the property has not been given away by the wrongdoer. There is no scope for the court to consider hardship, innocence or proportionality. The protection for confiscated property is also problematic, as conditions (b) and (d) of section 87(1) can only be fulfilled if the property is crime-used or crime-derived. How

185 Ibid.
186 Jeffrey v Director of Public Prosecutions (Cth) (1995) 79 A Crim R 514, 517 quoted in Director of Public Prosecutions (WA) v White (2009) 194 A Crim R 192, 202; see also Permanent Trustee Co Ltd v Western Australia (2002) 26 WAR 1, 6 [29].
these conditions apply to confiscation resulting from unexplained wealth, criminal benefits and crime-used property substitution declarations is unknown.
CHAPTER SEVEN: RECOMMENDATIONS

I. INTRODUCTION

A number of issues relating to the protections for innocent parties contained in the CPCA have been observed. This chapter makes recommendations to address these issues with the aim of improving the protections available to innocent parties whose family home is confiscated or subject to confiscation. These recommendations seek to improve the consistency and clarity of the protections, without undermining the purpose of the CPCA.

II. EFFECTIVE CONTROL

The first recommendation is to alter the application of the effective control condition found in sections 82(4)(b), 83(2)(b), 84(1), 84(2) and 87(1)(b). As the comparison of McLeod and Stavrianakos illustrates, the effective control condition can result in a significant disparity in outcome, with no justifiable reasoning. As a determination that effective control exists effectively means that the wrongdoer was a de facto owner of the property, it is appropriate that an innocent party is protected in the same manner as if the wrongdoer was an owner. Therefore, the effective control condition should be amended so that the innocent party would be entitled to a proportionate share in the property. For example, in McLeod if the father had been a non-innocent owner, the son would have been entitled to half of the value of the property, rather than receiving no protection at all. Applying the effective control condition in this manner would ensure that an innocent party is protected consistently, regardless of whether the wrongdoer has
a legal estate in the property or not. This amendment would not undermine the intention of the _CPCA_, rather it would simply ensure that the innocent owner is protected in a consistent manner.

Any argument that this amendment would lead to individuals seeking to avoid confiscation by registering property in the name of another person is without foundation. Only a proportion of the property would be exempt from confiscation, and as such it is no more open to abuse than the current possibility of having multiple legal owners of a property to reduce the proportion of the property that is confiscated. The possibility of avoiding confiscation in this manner is further reduced by the fact that a person is not an innocent party if that person acquired the property with the intention of avoiding the operation of the _CPCA_.

Additionally, in appropriate cases the court has been willing to find the existence of a trust in relation to property, which enables the property to be confiscated despite the wrongdoer not being the legal owner. An example of this is found in the case of _Curran v The State of Western Australia (No 2)_ where the parents of a declared drug trafficker were found to be holding the property on constructive trust for the drug trafficker. As a result, the drug trafficker was determined to be the owner of the property and the property was confiscated. Despite the drug

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188 _CPCA_ ss 153(3)(d), 153(4)(e).
189 [2012] WASC 464 (30 November 2014) (‘Curran’).
190 _Curran v The State of Western Australia (No 2)_ [2012] WASC 464 (30 November 2014) [99].
trafficker not being the legal owner, as the property was being held on trust for him, the confiscation was appropriate.  

Amending the application of the effective control condition as discussed would have no impact on this outcome.

Finally, in relation to crime-used property, the effective control definition should be applied cautiously. Unlike the other bases of confiscation, if effective control does not exist, a confiscation order may still be made. For crime-used property, a substitution order can be made when the wrongdoer does not own or have effective control of the crime-used property. As a result, in situations where there is any doubt about the existence of effective control, it is preferable for effective control to be found not to exist, and for a substitution order to be made. This approach ensures an innocent owner’s home is not confiscated incorrectly. This would be an ideal outcome in cases like McLeod, as it protects the property rights of the innocent party, without frustrating the intention of the CPCA.

The effective control condition should be amended so that if the wrongdoer is found to have effective control, the outcome for the innocent party would be the same as if the wrongdoer were a ‘non-innocent’ owner. This amendment would remove the discrepancy in protection provided to the innocent parties evident in McLeod and Stavrianakos. Again, the amendment would not undermine the

192 CPCA s 22(2)(b); White v Director of Public Prosecutions (WA) (2011) 243 CLR 478, 490 [36].
intention of the *CPCA*, but would ensure an innocent party has some protection regardless of whether the wrongdoer is the legal owner or not. Ideally a substitution mechanism, like the mechanism for crime-used property, would exist for all types of confiscation. Such a mechanism would enable the effective control condition to be removed altogether, as a substitution order could be made against the wrongdoer, which would protect the innocent owner. As this mechanism does not exist, the proposed amendment is the preferred solution, as it provides consistency and some protection for innocent owners. However, in relation to crime-used property, a substitution order should be ordered where possible to protect the innocent owner.

III. THE HARDSHIP PROTECTION

The hardship provision is severely limited by the fact that only a spouse, de facto partner or a dependant of an owner of the property who is usually resident at the property and is either an innocent party or less than 18 years old can object. Added to this is the requirement that the objector must suffer undue hardship, meaning that the hardship must go beyond the hardship ordinarily resulting from the confiscation of a family home.\(^{193}\) The cases in this area, such as *Stribrny*, demonstrate how difficult it is to meet the conditions required for a successful objection under section 82(3). These limitations, although harsh, are appropriate

\(^{193}\) *Stribrny v The State of Western Australia* [2015] WASC 396 (22 October 2015) [73].
since, ‘otherwise the Act, would have, within it, the seeds of its own ineffectiveness in every case.’\textsuperscript{194}

The problem with the hardship provision is not the strictness of its application, but that it does not apply to confiscation resulting from crime-used property substitution. In relation to crime-derived property, unexplained wealth and criminal benefits, this is justified by parliament’s intention that ‘no person should benefit from crime.’\textsuperscript{195} Although not explicitly articulated, it is a reasonable assumption given the purpose of the \textit{CPCA}, that drug trafficker confiscations are excluded from the hardship provision as a further deterrent for this activity. However, there is no justification for the hardship provision not to apply to crime-used property substitution, as the case of \textit{Bowers} illustrates. Due purely to the fact that Mr Bowers’ offence was not committed at his home, but at a home belonging to someone else, Mrs Bowers and her children were unable to access the hardship protection. This outcome is unjust, as rather than the punishment fitting the crime, the punishment was determined by where the offence took place.\textsuperscript{196}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{194} \textit{R v Lake} (1989) 44 A Crim R 63, 67.
\item \textsuperscript{195} Western Australia, \textit{Parliamentary Debates, Legislative Assembly}, 29 June 2000, 8613 (Dan Barron-Sullivan).
\item \textsuperscript{196} See also Natalie Skead, ‘Crime-used Property Confiscation in Western Australia and the Northern Territory: Laws Befitting Draco’s Axones?’ (2016) 41(1) \textit{University of Western Australia Law Journal} 67, 85.
\end{itemize}
\end{footnotesize}
As confirmed by the High Court decision in *White*\(^{197}\) when it comes to confiscation, any property that is determined to be crime-used can lead to a substitution order being made. However, when it comes to the objection provisions, a distinction between crime-used property and property subject to a crime-used substitution order is maintained. This was noted by Templeman J in the first instance judgment in *Bowers* who found, ‘where s 82 refers to crime-used property, the legislature must have intended it to apply also to property which is substituted for crime-used property, thereby avoiding what would otherwise be an unjust result’.\(^{198}\) The Court of Appeal disagreed, upholding the DPP’s appeal and stating ‘there is no proper basis to conclude that the legislature intended that s 82(3)’ applied to substituted property.\(^{199}\) This is ‘an extremely unjust result’\(^{200}\) that can only be explained by drafting oversight. The *CPCA* should be amended to ensure that all crime-used property confiscation, both direct and by a substitution declaration, are subject to the hardship protection.

IV. AFFORD GREATER DISCRETION TO THE COURT

Although these specific recommendations would result in the injustices evident in *McLeod* and *Bowers* being avoided in the future, these injustices could arguably have been prevented if the court had been afforded greater judicial discretion. Given the significant impact that can result from property confiscation it is an

\(^{197}\) *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478.

\(^{198}\) *Western Australia v Bowers* [2009] WASC 136 (8 May 2009) [33].

\(^{199}\) *Director of Public Prosecutions (WA) v Bowers* (2010) 41 WAR 245, 248 [14].

\(^{200}\) *Western Australia v Bowers* [2009] WASC 136 (8 May 2009) [32].
appropriate safeguard, particularly in relation to innocent parties, for the courts to be, ‘vested with a discretion to consider the ramifications of the confiscation and vary orders made.’\textsuperscript{201}

An example of a situation where this discretion would be appropriate is in drug trafficker confiscation. Under the \textit{Misuse of Drug Act 1981} (WA) (‘\textit{MDA}’) a person is declared to be a drug trafficker based on either a single offence that exceeds an amount listed in Schedule 7 or 8, or by being convicted of three or more serious drug offences within ten years.\textsuperscript{202} Under Schedule 8 of the \textit{MDA}, the number of cannabis plants for the purposes of drug trafficking is twenty. Cases such as \textit{McLeod}, \textit{BJF} and \textit{Stribrny}, demonstrate that when property is used for drug related offences but the criteria for a drug trafficker declaration are not satisfied, the property will be confiscated as crime-used.\textsuperscript{203} As a crime-used property confiscation, an innocent party could object under section 82(4) and the hardship provision, section 82(3). However, if the property had been used to grow twenty or more cannabis plants, an innocent party could only object under section 84(2).

It is difficult to see any reasonable explanation as to why an innocent party can have the benefit of a hardship provision when the party’s spouse has cultivated seventeen cannabis plants (as in \textit{BJF}), but if three more plants had been cultivated,


\textsuperscript{203} The amount of cannabis plants grown were fifteen in \textit{McLeod}, seventeen in \textit{BJF} and fourteen in \textit{Stribrny}. 
the hardship provision would not apply. Affording the court some discretion would be valuable in such a circumstance. This is in keeping with the purpose of the CPC, since one of the reasons the hardship provision was included in the CPC was to protect innocent spouses and dependents when the family home is used for hydroponic drug cultivation. 204

Additionally, as a result of the operation of section 159(2)(e) and section 160, a person can be taken to be a declared drug trafficker when a person is charged and then absconds or dies before the charge is disposed of or finally determined. As Skead notes, this results in the concerning potential for all of a deceased person’s property to be confiscated if the deceased was charged with a drug-related offence, a warrant of arrest was issued, and the deceased died before the matter was finally resolved. 205 In this situation, it would again be beneficial for the court to have some discretion in protecting an innocent party, such as the partner of the deceased. In addition to these hypothetical situations, cases such as Whittle and Tran demonstrate other factual situations where providing some judicial discretion would be valuable in ensuring the protection are applied appropriately.

204 Western Australia, Parliamentary Debates, Legislative Assembly, 29 June 2000, 8613 (Dan Barron-Sullivan).
The Commonwealth equivalent of the *CPCA*, the *Proceeds of Crime Act 2002* (Cth) (‘*PoCA*’) does enable the court to retain discretion in some circumstances. For example, forfeiture of crime-used property is always discretionary, despite there being generally no discretion in relation to crime-derived property.\(^{206}\) In relation to crime-used property, section 48(3) *PoCA* allows the court to consider any hardship that may be caused, the ordinary use of the property and the gravity of the offence or offences when considering a forfeiture order. It also allows the discretion to consider the public interest in a number of circumstances.\(^{207}\)

It is evident that the *CPCA* was drafted in such a way to ensure the confiscation powers have a very wide scope and application. The Explanatory Notes contains numerous comments that a definition is defined broadly to ensure the effective operation of the *CPCA*.\(^{208}\) This scope was observed during the parliamentary debates surrounding the *CPCA*, where it was remarked that the *CPCA* ‘is cast more widely than the evil to which it is directed.’\(^{209}\) As a result, some judicial discretion is appropriate to protect innocent parties caught in the expansive net of confiscation powers contained in the *CPCA*. The introduction of ‘a guided judicial discretion’ into the *CPCA*, that allows ‘the courts to take into account


\(^{207}\) See, eg, *Proceeds of Crime Act 2002* (Cth) ss 17(4), 19(3), 20(4) 20A(4), 47(4), 49(4), 57(a), 103(b), 154(a), 179EA(6)(b).

\(^{208}\) Explanatory Notes, Criminal Property Confiscation Bill 2000 (WA), 67-72.

considerations of proportionality, hardship and public interest is desirable. This is true generally, but is particularly so when a confiscation impacts upon the family home of an innocent party.

V. CLARIFY THE SCOPE OF THE INNOCENT PARTY DEFINITION

The final issue relates to the protection contained in section 87. As has been noted, the definition of innocent party in section 153 of the CPCA only applies to crime-used and crime-derived property, yet sections 87(1)(d) and (e) both require the innocent party definition to be satisfied. Further, section 87(1)(b) refers to effective control, but only in relation to property that is crime-used or crime-derived. As section 87 applies to property that has been confiscated for all reasons, except property of a declared drug trafficker, it is appropriate to amend the innocent party definition to ensure that innocent parties in relation to unexplained wealth, criminal benefits and crime-used property substitution are included in this protection.

213 All reasons being unexplained wealth, criminal benefits, crime-used property, crime-derived property and crime-used property substitution.
Although section 87 does not apply to drug trafficker confiscation, the expansion of the innocent party definition should also relate to drug trafficker confiscation. If this is done, then the innocent party condition can be included in sections 84(1) and 84(2), resulting in consistency across all of the protections. As the CPCA currently stands the only requirements for a successful objection under section 84 is that the individual establishes ownership and that the wrongdoer does not control that ownership or had not given away that ownership. Unlike the crime-used and crime-derived protections, the ‘innocence’ of the owner is not considered, which makes a successful objection easier to obtain. This is particularly unusual given the intention of the CPCA was to target unexplained wealth and the drug trade.  

VI. CONCLUSION

Significant improvements could be made to the protections contained in the CPCA as a result of some minor changes. The four recommendations made in this chapter, amending the effective control provision, expanding the hardship provision to include crime-used property substitution orders, the introduction of a guided judicial discretion, and amending the innocent party definition to cover all bases of confiscation, would improve the consistency and clarity of these protections, while remaining consistent with the intended purpose of the CPCA.

214 Western Australia, Parliamentary Debates, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).
A person can only be an ‘innocent party’ as defined by the CPCA if the confiscation is in relation to crime-used and crime-derived property. To be ‘innocent’ the individual must not have known and had no reasonable grounds for suspecting that the confiscation offence was being or would be committed. If a person satisfies this definition, the only way that the family home can be completely protected from confiscation is if the hardship provision contained in section 82(3) of the CPCA is satisfied. This provision is only available to crime-used property. There are a number of criteria that must be satisfied, but critically the objector must be an innocent spouse, de facto or dependent of the owner, and must be able to demonstrate that the confiscation would result in suffering that is greater than the hardship that would ‘ordinarily flow from the confiscation’.215 If the hardship provision is not applicable, then an innocent party is only able to protect that party’s interest in the family home. This means that the home is still confiscated and sold, but after the sale the innocent party is paid an amount equal to the value of that interest.216

In relation to crime-used and crime-derived property, the interest of an innocent party can be protected by establishing innocence, ownership and that the property is not effectively controlled by the person who committed the offence.217

215 BIF v The State of Western Australia (2011) 210 A Crim R 262, 271 [49].
216 CPCA ss 82(5), 83(3).
217 CPCA ss 82(4), 83(5).
If the confiscation does not relate to crime-used or crime-derived property, the objector must establish that wrongdoer does not own or effectively control the property, and has not at any time given it away. There is no requirement that the objector be an innocent party.\(^{218}\) Finally, for all types of confiscation except drug trafficker confiscation, an objection can be made for release of the confiscated property provided the objector is an innocent party, an owner of the property, the property is not effectively controlled by the wrongdoer and the objector is not aware the property was liable for confiscation, and could not reasonably have been expected to become aware, until after the confiscation took place.\(^{219}\)

Cases such as *McLeod* and *Bowers* are instructive in demonstrating the injustice that can result under the current operation of the protections. In order to improve the protections and ensure that they operate in a consistent and equitable manner, it is suggested that the effective control condition is amended, the hardship provision is expanded to include crime-used property substitution orders, some guided judicial discretion is introduced, and the innocent party definition is amended to include all bases of confiscation. Such amendments would not defeat the intention of the *CPCA*, but would ensure that the protections that currently exist are effective in protecting the property of innocent owners.

\(^{218}\) *CPCA* s 84(1)-(2).

\(^{219}\) *CPCA* s 87(1).
This thesis has provided an overview of the extent a family home of an innocent party is protected by the CPCA. This overview has revealed the protections to be severely limited. There are a number of circumstances in which the home of an innocent person can be confiscated. Even with the amendments proposed by this thesis, the protections would still be limited to very specific circumstances, in keeping with the object of the CPCA. Although the application of the protections may still be harsh in some circumstances, such as the hardship protection, the protections will be significantly easier to construe and apply. This thesis has not attempted to radically alter the scope of the protections, merely to ensure that what currently exists is coherent and consistent. As the protections currently stand they could aptly be described as ‘perplexing and difficult to construe’ and ‘extreme’. When it comes to an innocent person attempting to protect their family home, this is a completely unacceptable situation that requires rectification.


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D Other

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Explanatory Notes, Criminal Property Confiscation Bill 2000 (WA)

Foss, Peter, ‘Criminal Property Confiscation Act 2000- 68 of 2000’ in Western Australia, Western Australian Government Gazette, No 285, 29 December 2000, 7901


McGrath, Joseph, ‘Responding on Behalf of a Client whose Assets are Frozen by the State: Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009)

Seaman, Michael, ‘Recent Developments in Respect to the Criminal Property Confiscation Act 2000’ (Paper presented at Continuing Professional Development on the Seizure of Client’s Assets by the State, Law Society of Western Australia, 18 March 2009)

Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 June 2000

Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 September 2000
# APPENDIX A: SUMMARY OF PROTECTIONS FOR INNOCENT PARTIES

## I. TABLE 1: CRIME-USED AND CRIME-DERIVED PROTECTIONS

<table>
<thead>
<tr>
<th>Section</th>
<th>Type of Confiscation</th>
<th>Conditions</th>
</tr>
</thead>
</table>
| 82(4)   | Crime-Used           | (a) the objector is the owner of the property, or is one of 2 or more owners of the property  
(b) the property is not effectively controlled by a person who made criminal use of the property  
(c) the objector is an innocent party in relation to the property  
(d) each other owner (if there are more than one) is an innocent party in relation to the property  
(e) the objector would suffer undue hardship if the property is confiscated  
(f) it is not practicable to make adequate provision for the objector by some other means. |
| 83(2)   | Crime-Derived        | (a) the objector is the owner of the property, or is one of 2 or more owners of the property  
(b) the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence.  
(c) the objector is normally resident on the property at the time the objection was filed  
(d) the objector is the spouse, a de facto partner or a dependent of an owner of the property  
(e) the objector is an innocent party, or is less than 18 years old  
(f) the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed at the time the objection was filed  
(g) the objector has no other residence at the time of hearing the objection  
(h) the objector has no other residence at the time of hearing the objection  
(i) the objector would suffer undue hardship if the property is confiscated  
(j) it is not practicable to make adequate provision for the objector by some other means. |
| 82(3)   | Crime-Used           | (a) the objector is the spouse, a de facto partner or a dependent of an owner of the property  
(b) the objector is an innocent party, or is less than 18 years old  
(c) the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed  
(d) the objector is an innocent party, or is less than 18 years old  
(e) the objector has no other residence at the time of hearing the objection  
(f) the objector would suffer undue hardship if the property is confiscated  
(g) it is not practicable to make adequate provision for the objector by some other means. |
### TABLE 2: PROTECTIONS FROM OTHER TYPES OF CONFISCATION

<table>
<thead>
<tr>
<th>Section</th>
<th>Type of Confiscation</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>84(1)</td>
<td>Unexplained Wealth</td>
<td>Does not own or effectively control the property or was an innocent party in relation to the property</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(e) each other owner (if there are more than one) is or was an innocent party in relation to the property</td>
</tr>
<tr>
<td>84(2)</td>
<td>Crime-Used Property</td>
<td>Does not own or effectively control the property</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(d) the applicant is or was an innocent party in relation to the property</td>
</tr>
<tr>
<td>87(1)</td>
<td>Criminal Benefits</td>
<td>Has not given the property away</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) the applicant did not become aware, and can not reasonably be expected to have become aware, until after the property was confiscated, that the property was liable to confiscation under section 6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) the property is not effectively controlled by a person who made criminal use of the property, or was crime-derived</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) immediately before the confiscation of the property, the applicant owned the property, or was applies to confiscated property only</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>84(2)</td>
<td>Drug Trafficker</td>
<td>Does not own or effectively control the property</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) criminal benefits</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
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<td>Section</td>
<td>Overview</td>
</tr>
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<td>---------------------</td>
<td>---------</td>
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</tr>
<tr>
<td>Crime-Used</td>
<td>82(4)</td>
<td>Applicant is an innocent owner, property not effectively controlled by wrong-doer, each other owner is an innocent party.</td>
</tr>
<tr>
<td></td>
<td>82(3)</td>
<td>Hardship Provision only available to spouse, de facto or dependant of an owner of the property.</td>
</tr>
<tr>
<td></td>
<td>87(1)</td>
<td>Applicant was an innocent owner before the confiscation, property not effectively controlled by wrong-doer, each other owner is an innocent party.</td>
</tr>
<tr>
<td>Crime-Derived</td>
<td>83(2)</td>
<td>Applicant is an innocent owner, property not effectively controlled by wrong-doer, each other owner is an innocent party.</td>
</tr>
<tr>
<td></td>
<td>87(1)</td>
<td>Applicant was an innocent owner before the confiscation, property not effectively controlled by wrong-doer, each other owner is an innocent party.</td>
</tr>
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<td>Drug Trafficker</td>
<td>84(2)</td>
<td>The wrong-doer does not own or effectively control the property and has not given the property away.</td>
</tr>
<tr>
<td></td>
<td>84(1)</td>
<td>The wrong-doer does not own or effectively control the property and has not given the property away.</td>
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<tr>
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<td>84(1)</td>
<td>The wrong-doer does not own or effectively control the property and has not given the property away.</td>
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<td>Crime-Derived Property</td>
<td>84(1)</td>
<td>The wrong-doer does not own or effectively control the property and has not given the property away.</td>
</tr>
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<td></td>
<td>87(1)</td>
<td>Applicant was an innocent owner before the confiscation, property not effectively controlled by wrong-doer, each other owner is an innocent party.</td>
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