

NIGAMS LEGAL

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Our ref: SN:MP:8005

Your ref:

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The Honourable John Robert Quigley MLA
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By email: Minister.Quigley@dpc.wa.gov.au

Dear Sir

RE: CRIMINAL PROPERTY CONFISCATION ACT 2000

I refer to recent communications between us in relation to the above matter, and thank you for inviting me to provide you with my submissions in relation to the said matter.

As discussed, over the past 10 years it has become increasingly evident that the manner in which the Criminal Property Confiscation Act ("the Act") has been interpreted by the Court, and, is being used by the State, has resulted in a countless number of miscarriages of justice. The current formulation of the Act does not require that there be a nexus at any level between the respective asset, and, the crime being used to pursue that asset.

The purpose of this correspondence is to identify the said miscarriages of justice and set out the proposed amendments to the legislation that would cure the problem.

HARDSHIP PROVISIONS

Under section 82(3) of the Act, the Court may set aside a freezing notice or freezing order for crime-used property if the objector establishes that it is more likely than not that:-

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

Drug Trafficker

The Act does not provide for any similar hardship provisions for innocent parties if the property was frozen as a result of a Drug Trafficker declaration.

In relation to Drug Trafficker declarations, section 8 of the Act states that when a person is declared to be a Drug Trafficker, the following property is confiscated:-

- (a) all the property that the person **owns or effectively controls** at the time the declaration is made;
- (b) all the property that the person **gave away at any time before** the declaration was made, whether the gift was made before or after the commencement of the Act.

Case example

In the matter of *TTTN and TQGT v The State of Western Australia*, the plaintiffs were the wife and daughter of the Offender, who had been convicted of a Drug Trafficker offence.

In this matter, the frozen property was the family home, which was located in Girrawheen and purchased by the Offender and Mrs N in 2002. The property was not purchased at any level from unlawfully obtained money. The said property was frozen in 2012.

The Offender moved out of the family home in 2005 to reside with his girlfriend. From this time, Mrs N paid the mortgage and paid for all expenses relating to the property. The Offender visited his daughter occasionally between 2005 and 2010

at the family home in Girrawheen. In 2010, Mrs N and the Offender officially separated. Mrs N and their daughter continued to reside at the family home in Girrawheen.

On the 3rd September 2012, Mrs N contacted the Offender and asked him to transfer his half share of the family home to her as he had left her and their daughter to start a new life residing with his girlfriend.

Following this conversation, the Offender decided to transfer his half share of the family home to Mrs N and agreed to meet with her so that he could sign what he believed to be the paperwork to that effect.

Later that day, the Offender signed a Statutory Declaration which stated that "I agree to transfer the ownership of property at 33 Gummow Way, Girrawheen W.A. as of today to TTTN DOB 18/06/1964. I agree never to claim my portion of the property from now going forward."

The Offender felt guilty for what he had done to Mrs N and his daughter, and also recognised that Mrs N had been servicing the mortgage and attending to the payment of all expenses relating to the property. He wanted to give his half share of the family home to them as compensation.

After the Offender signed the Statutory Declaration on the 3rd September 2012, he believed that Mrs N was the sole owner of the family home.

A few weeks later, the Offender was charged with two counts of possession of a prohibited drug, namely methylamphetamine, with intent to sell or supply, contrary to section 6(2) of the *Misuse of Drugs Act 1981* (WA) and one count of possession of a prohibited drug, namely heroin, with intent to sell or supply it to another, contrary to section 6(1)(a) of the *Misuse of Drugs Act 1981* (WA). The said offences occurred in the home of the Offender and his girlfriend in Alexander Heights. His girlfriend was also charged.

On the 13th September 2012, a Freezing Notice was issued in respect of the Offender. The said Freezing Notice froze the family home in Girrawheen. A few days later, Mrs N was also served with a Freezing Notice. She filed a Statutory Declaration declaring that amongst others, she and her daughter were interested parties in respect of the family home.

The Offender was sentenced to a period of 13 years imprisonment. The DPP applied for a Drug Trafficker declaration under section 32A(1) of the *Misuse of Drugs Act 1981*, which was granted by the sentencing Judge.

In April 2014, the DPP advised the Offender and Mrs N of their intention to proceed with an application to confiscate the Offender's share of the property on the grounds that the Offender had been declared a Drug Trafficker.

It was never suggested that Mrs N or their daughter were, at any level, involved in the criminal offences relating to this matter. Nor was it ever suggested that the family home was used in any way, in the commission of the criminal offences relating to this matter.

Mrs N was employed as a factory hand with Ingham's Chicken. She was in receipt of \$926.00 (gross) per week. She did not own any other property. She did not have any savings and did not own any shares in any public company or otherwise. She had superannuation benefits in the sum of around \$37,000.00.

Their daughter was employed as a cleaner for Unique Commercial Cleaning and Detailing on a full time basis. She was in receipt of between \$35,000.00 and \$40,000.00 (gross) per annum. She did not own any real property (any house). She had under \$1,000.00 in superannuation benefits and does not have any significant savings. She was also studying at TAFE.

Despite the above, the DPP refused Mrs N and her daughter's request that the matter be settled by enabling them to buy back the portion the Offender's share of the property that was being sought to be confiscated at a discount to market price.

Should the DPP continue with its application to confiscate the Offender's share of the property, and it has indicated that it will; Mrs N and her daughter will be without a home and will suffer undue hardship.

As the legislation in relation to Drug Trafficker declarations current stands, the undue hardship caused to Mrs N and her daughter is not a matter that can be taken into account by a Court.

Crime substituted

The Act does not provide for any similar hardship provisions for innocent parties if the property was frozen as a result of a crime-used property substitution declaration.

In relation to property frozen on crime-used substituted grounds, section 22(2) of the Act states that crime-used property is not available for confiscation if:-

- (a) the respondent does not own, and does not have effective control of

- the property; or
- (b) where the property was or is owned or effectively controlled by the respondent, and was or is frozen
 - (c) where the property was or is owned or effectively controlled by the respondent, and was or is frozen — the freezing notice or freezing order has been or is to be set aside under section 82(3) in favour of the spouse, a de facto partner or a dependant of the respondent; or
 - (d) (c) in any other case — the property has been sold or otherwise disposed of, or cannot be found for any other reason.

In *The Director of Public Prosecutions (WA) v Bowers* [2010] WASCA 46, the Court of Appeal found that section 82(3) has no application where the confiscation of property is sought to be made on the basis of a crime-used property substitution declaration.

In principle this cannot be right. It would appear that the poor drafting of the Act is being used to create a distinction where one was not intended.

EQUITABLE INTERESTS

As outlined above, in accordance with section 8(1) of the Act, when a person is declared to be a Drug Trafficker, all property that the person owns or effectively controls at the time the declaration is made is automatically confiscated to the State.

When the Supreme Court makes a declaration under section 30 of the Act declaring that the property has been confiscated and a memorial is registered under section 113(1) of the Act, the property will then vest in the State of Western Australia.

By operation of section 9(2) of the Act, the property will vest free of all other interests, whether those interests are registered interests or not.

The above also applies to situations where the property is subject to a mortgage or bank loan. A strict interpretation of the Act makes it clear that once the property is confiscated to the State as a result of a Drug Trafficker declaration, a bank does not have an interest in the property, despite the bank loaning money for the said property.

It is interesting to note that in the above scenario, the State has an unwritten agreement with the banks in Western Australia whereby despite the bank not having a legal interest in the property, the State will always recognise the

bank's interest and ensure that any mortgage or loan is paid back to the bank.

The State does not display the same attitude when the loan is with a third party.

Case example

In the matter of *H and Others v The State of Western Australia*, the Offender was convicted of one count of cultivation a prohibited plant (cannabis with intent to sell and supply it to another) contrary to section 7(1)(a) of the *Misuse of Drugs Act 1981 (WA)* and one count of possession of a prohibited plant (cannabis) with intent to sell and supply it to another) contrary to section 6(1)(a) of the *Misuse of Drugs Act 1981 (WA)*. He was sentenced to a total of 9 months imprisonment and declared a Drug Trafficker.

The Applicant was 59 years of age and had four children, who were also plaintiffs in this matter. In July 2011, four different Freezing Notices freezing various property were issued in respect of the Applicant on Drug Trafficker grounds. The Offender's four sons, his brother, his nephew and his mother all declared an interest in some of property. It was never alleged that any of the property was funded by proceeds of crime at any level.

In 2007, one of the Applicant's sons, namely Christopher, was involved in an accident which resulted in him becoming a quadriplegic. Since the accident, Christopher had been living in a Homeswest house. His Homeswest house was not equipped for a paraplegic and he was unable to move around in his wheelchair inside the house.

In 1999, the Applicant purchased a property in Lynwood. In 2005, he purchased the neighbouring property. Soon after, he demolished the properties. He had intended to build five units on these two blocks and was going to sell the units for a profit. The Applicant spoke to his brother, namely Robert. He calculated that he needed around \$300,000.00 to develop the land in this way. Robert saw this as an investment opportunity, and agreed to loan the Offender \$100,000.00 so that he could develop the blocks. The agreement was that when the Offender sold one of his other investment properties, he would repay Robert the \$100,000.00 plus an extra \$75,000.00. On account of this agreement, Robert transferred the \$100,000.00 to the Offender's Commonwealth Bank account.

Other members of the Offender's family also agreed to invest some money in the development. His mother, namely Gertruda, gave him \$60,000.00 by way of a bank cheque and Christopher gave him \$40,000.00. Robert's son, namely Sam (the Offender's nephew), invested \$100,000.00.

This was formalised into a written loan agreement between the parties.

Prior to being charged with the confiscable offences, the Applicant had paid Robert \$25,000.00 back and Sam \$25,000.00 back. Other than that, he had not paid any of the money that he borrowed for developing the property back.

It was intended that one of the five units would be for Christopher and would be specially designed to take into account his disability.

Despite the State being provided with a copy of the loan agreements between the Applicant and his family members/the plaintiffs, their interests in the frozen property in Lynwood were not recognised and the property was confiscated in its entirety.

MERE INCIDENTAL USE

Section 141 of the Act sets out the meaning of the term confiscation offence as follows:-

- (1) In this Act, *confiscation offence* means —
- (a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or
 - (ba) any offence against a law in force anywhere in Australia, in any case where —
 - (i) the involvement or suspected involvement of a person in the commission of an offence, or the commission or suspected commission of an offence by a person, or the conviction of a person for an offence, is relevant for the purposes of any proceedings under this Act against that person or for the purposes of any provision of this Part or Parts 5, 6, 8, 10 or 11; and
 - (ii) at the time of the person's involvement or suspected involvement in the commission of the offence or, as the case requires, the time of the commission or suspected commission of the offence by the person, the person is or was a controlled person under a control order under the Criminal Organisations Control Act 2012 ;
- or
- (b) any other offence that is prescribed for the purposes of this definition.
- (2) An offence of a kind referred to in subsection (1)(a) is a confiscation offence even if a charge against a person for the offence is dealt with by a court whose jurisdiction is limited to the imposition of sentences of imprisonment of less than 2 years.

Section 146 of the Act states that property is crime-used if:-

- (1) For the purposes of this Act, property is crime-used if —
 - (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence; or
 - (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or
 - (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

- (2) Without limiting subsection (1), property described in that subsection is crime-used whether or not —
 - (a) the property is also used, or intended or able to be used, for another purpose; or
 - (b) anyone who used or intended to use the property as mentioned in subsection (1) has been identified; or
 - (c) anyone who did or omitted to do anything that constitutes all or part of the relevant confiscation offence has been identified; or
 - (d) anybody has been charged with or convicted of the relevant confiscation offence.

Section 146 of the Act must be read together with section 147, which states:-

For the purposes of this Act, a person makes criminal use of property if the person, alone or with anyone else (who need not be identified) uses or intends to use the property in a way that brings the property within the definition of crime-used property.

The Court's examination of the legislation as it is currently drafted has confirmed that 'mere incidental use' is enough to render a property crime-used.

Case example

In *White v DPP (WA)* [2011] HCA 20, the respondent was found guilty of wilful murder following a jury trial. The murder occurred at a property leased by the respondent. The property was surrounded by a six-foot fence with barbed wire and two metal gates at its entrance that were padlocked on the respondent's instructions, to prevent the deceased from leaving the property. The respondent shot several times at, and injured, the deceased while both men

were on the property. Trying to escape from the respondent, the deceased ran towards and climbed up the gates. The respondent caught up with the deceased and shot him “straight up” in the buttocks’ while he was on top of the gates. The deceased, still alive, fell off the gates onto the ground outside the property. The respondent unlocked the gates, walked out of the property and shot the deceased six times. The deceased died shortly after. The respondent dragged the deceased’s body back onto the property before removing and incinerating it.

In the *Director of Public Prosecutions (WA) v White* [2010] WASCA 47, McLure P found that ‘the intentional locking of the gates was for the purpose, and had the effect, of preventing or impeding [the deceased’s] departure from the [property] before the respondent had finished dealing with him. That use of the land facilitated [the deceased’s] murder’. The property was, therefore, crime-used and the respondent had made ‘criminal use’ of it for the purposes of the Act. The respondent’s appeal on this issue was dismissed unanimously by the High Court.

Every offence committed in this State is committed on property of some kind. If that offence is a confiscation offence, that is, an offence which is punishable by imprisonment of two years imprisonment or more, a person has made criminal use of crime-used property. It is not necessary that the person receive a sentence of two years imprisonment for the respective offence; all that it required it that the legislation allows for two years or more imprisonment as a sentence. Once a person has made criminal use or crime-used property, that person has no legal basis to run an argument against confiscation in the Court.

Examples

Under the current interpretation of the Act, in each of the following case scenarios, the Offender has no legal argument against confiscation:-

1. The Offender is walking in Kings Park with a friend. After a verbal altercation with a stranger, the Offender pushes over the stranger and is subsequently charged with aggravated common assault. The Offender pleads guilty to the offence in the Perth Magistrates Court and receives a nominal fine and a spent conviction. As it stands now, the State can apply for a substituted crime-used property declaration seeking an Order from the Court that the Offender forfeit the value of Kings Park to the State.
2. The Offender is hosting a barbeque at his residence in Peppermint Grove. During the barbeque, the Offender rolls a joint of cannabis with the intention of sharing it with a friend. The police attend the residence and charge the Offender with possession of cannabis with intent to sell/supply

it to another. The Offender pleads guilty to the offence in the Perth Magistrates Court and receives a nominal fine and a spent conviction. As it stands now, the State can apply for a crime used property declaration seeking an Order from the Court that the Offender forfeit his residence to the State.

The scenarios set out above are not fanciful. There have been cases in which the factual matrix was comparable to the ones above, and the Offender was the subject to confiscation proceedings.

The concept of mere incidental use constituting use is an extremely dangerous one. It nearly always creates a penalty that is overwhelmingly disproportionate and ruinous in the circumstances.

PRESUMPTION OF UNLAWFULNESS

Unlike the Commonwealth confiscation legislation, being the *Proceeds of Crime Act 2002 (Cth)*, the Act does not allow for one to rebut the presumption of unlawfulness.

Under the Commonwealth confiscation legislation, wealth is 'unexplained' and therefore liable for forfeiture if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. The onus is then on the respondent to prove that his or her wealth was lawfully acquired.

In relation to Drug Trafficker declarations and property frozen on crime used/crime substituted grounds, the fact that one can prove that the frozen property was lawfully obtained is irrelevant.

It is essential that there be a section in the Act than enables this presumption to be rebutted, as is the case in equivalent legislation in all other States (other than in the Northern Territory, which consciously wished to mimic our Act).

Case example

In the matter of *MD v The State of Western Australia*, the Offender's residence in Bayswater was frozen on Drug Trafficker grounds. She was charged with one count of cultivating cannabis with intent to sell or supply, contrary to section 7(1)(a) of the *Misuse of Drugs Act 1981 (WA)* and one count of possession of cannabis, with intent to sell or supply, contrary to section 6(2) of the *Misuse of Drugs Act 1981 (WA)*.

The Offender was aged 76 years and pleaded guilty to these charges. She explained that she cultivated the cannabis for her son, who was aged 42 years, resided with her and suffered from Bipolar and Affective Schizoid Disorder and Florid Psychotic attacks from Cerebral irritation. He had been receiving psychiatric treatment, including as an involuntary inpatient, for over 20 years and had also been diagnosed with co-morbid cannabis abuse. He had been using cannabis on a daily basis for the last 25 years.

Prior to being charged, the Offender began to cultivate cannabis in her own backyard exclusively to provide her son for therapeutic purposes only. When her son experienced symptoms as a result of his Bipolar Disorder, the use of cannabis calmed him down and sedated him. When he was unable to obtain cannabis, he became aggressive, violent towards the Offender, self-harming and suffered from paranoia. There had been many occasions in the past, where, as a result of him not being able to obtain cannabis, he has, whilst being in a psychotic state, physically assaulted the Offender, including holding a knife to the her throat. The police have attended the residence on many occasions as a result of the Offender's son's behaviour.

The Offender had never sold any of the cannabis and had never supplied any cannabis to anyone other than her son. She never used the cannabis herself. This was accepted by the State and the Sentencing Judge and the Offender received a suspended sentence.

The Offender's residence which was frozen was purchased by her and her husband (deceased in 1999) as joint tenants for the sum of \$242,000.00. They moved in to the frozen property immediately following its purchase and had been living at the said property ever since. The funds used to purchase the frozen property came from the sale of the previous family home. There was no mortgage on the frozen property at the time of its purchase. The Offender had worked all her life as a nurse while her husband worked in the judicial system. There was no dispute that the property was purchased using funds that were lawfully obtained.

Following a couple of years of negotiations between the State and the Offender, the State agreed to cancel the Freezing Notice on public interest grounds. Should this matter have proceeded to Court, the property would have been confiscated as she did not have a runnable legal argument. The Offender and her lawyers had to ensure the matter did not proceed to Court and settled at an Informal Conference.

SUGGESTED LEGISLATIVE AMENDMENTS

1. A hardship provision similar to that contained in section 82(3)(f) of the Act available for Drug Trafficker declarations and property frozen on crime-used property substitution grounds.
2. Equitable interests, including those of debtors should be recognised in the Act.
3. The ability to allow the rebuttable of the presumption that property was unlawfully obtained in relation to Drug Trafficker declarations and property frozen on crime-used/crime-used substitution grounds by demonstrating, on the balance of probabilities, the source of the funds/property.

Should you have any queries in relation to the above, please do not hesitate to contact me.

I look forward to hearing from you.

Yours faithfully

SHASH NIGAM

