



# Crime doesn't pay

CONFISCATING THE ASSETS OF CRIMINALS IS ONE WAY THAT THE LEGAL SYSTEM MERITORIOUSLY SEEKS TO ENSURE THAT “CRIME DOESN'T PAY” AND PROVIDE COMPENSATION TO VICTIMS OF CRIME, BUT IT CAN ALSO PRODUCE SOME UNINTENDED EFFECTS. **BY NICOLE SPICER AND VENETIA STEWART**

Asset confiscation laws perform a valuable adjunct to criminal prosecution. By employing a civil burden of proof, confiscation laws increase the state's capacity to deprive offenders of their ill-gotten gains, reduce the capital available for further criminal activities, and deter profit-motivated offending by both criminals and the community at large.

Victoria's asset confiscation scheme, the *Confiscation Act 1997* (Vic) (the Act), was specifically enacted to confiscate the proceeds of serious crimes, in particular to ensure that drug trafficking and cultivating does not pay.<sup>1</sup> Now, however, the Act applies to all manner of crimes,<sup>2</sup> and operates in a way that routinely exceeds the bounds of its original focus on ill-gotten gains. What has emerged from confiscation proceedings is that “innocent third parties” – parties neither charged with nor partaking in the offending – commonly face the very real possibility of forfeiture of their property due to the criminal activity of another person.

The connection between innocent third parties and the operation of Victoria's asset confiscation scheme is not immediately obvious. It arises from the Act's pursuit of property, rather than persons. Indeed, the Act's *in rem* operation delivers a fruitful confiscation scheme.<sup>3</sup> But it also creates the downstream potential to catch third parties, through no actual wrongdoing or fault of their own, save a shared interest in property associated with an offender or an offence.

The problems are compounded when the innocent third party is also a victim of family violence (FV). The 2015 Royal Commission into Family Violence (RCFV) found that, more often than not, FV victims are the intimate female partners and children of male abusers.<sup>4</sup> For the sake of illustration, this article sometimes refers to the “innocent third party” as the accused's “wife”.<sup>5</sup> Paradoxically, some victims of FV are at risk of paying a severe legal, financial and personal price for the crimes committed by their abusers.

## Restraining orders

The key prerequisite to achieving a confiscation outcome is obtaining a restraining order over “property”, such as houses, land, shares, jewellery, cars and cash.<sup>6</sup> A restraining order can be made

in anticipation of a criminal conviction or after a conviction, or in anticipation of civil forfeiture (no conviction).<sup>7</sup> There is no loss of title at this stage. Rather, the restraining order restricts “dealings with property” in order to preserve the property for later confiscation or other purposes.<sup>8</sup>

In addition to facilitating the restraint of “tainted” property,<sup>9</sup> in certain circumstances the Act allows a restraining order to be sought over *any* “property in which the accused has an interest”,<sup>10</sup> including property “believed” to have been under the accused’s “effective control”.<sup>11</sup> Consequently, the Act casts a wide net over property while by and large disregarding whether the property is owned solely by an accused, or whether the property was lawfully acquired, owned, shared or used by any non-offender third parties. In fact, provided the procedural preconditions for an application are met, courts have no residual discretion to refuse to make a restraining order.<sup>12</sup> As such, the order will generally be made, *ex parte*, over the entire property. Hence, from the outset, the broad definition of property combined with the relative ease of obtaining a restraining order, makes it exceptionally difficult for third parties with an interest in the sought-after property to avoid the Act’s net. This lays the foundations for later disadvantage, including punitive consequences, for innocent third parties. The likely effect of such disadvantage is magnified when the third party is also experiencing FV victimisation.

## Exclusion orders

In most instances, a third party’s only option is to apply to have their interest excluded from the operation of the restraining order.<sup>13</sup> The importance of making an exclusion application cannot be understated. For instance, where a restraining order has been imposed over property in connection with an “automatic forfeiture offence”,<sup>14</sup> all property covered by a restraining order will be forfeited to the state 60 days after conviction without any requirement to apply to the court or to notify affected parties unless exclusion proceedings have been commenced.<sup>15</sup>

## Exclusion tests

The exclusion tests under the Act are an important safeguard against unfair application of the confiscation regime. However, both procedurally and substantively, the exclusion tests do not currently recognise the particular issues that arise for FV victims.

First, the reverse onus nature of the exclusion provisions means that although a third party, for instance the wife of an accused, has not been charged with or committed any crimes, she must initiate and pursue exclusion proceedings.

Second, the wife must establish her legal interest in the restrained property and prove by way of sworn evidence the extent of that interest. If the wife’s name is not on the title, or if the funds to purchase the property came from the accused, she will struggle to prove any legal interest.

From a practical perspective, the wife will need to support her application with evidence in affidavit form, exhibiting all relevant historical financial documents. Accessing this information will be particularly problematic in cases of economic abuse because she is unlikely to control or have access to financial dealings and documentation.<sup>16</sup>

Additionally, where the property is considered “tainted” by virtue of an association with illegal activities, third parties are effectively rendered *prima facie* as blameworthy as the accused and must establish, *inter alia*, that they were “not in any way involved” with, and did not hold a “reasonable suspicion” of, the offending.<sup>17</sup> The fact that the third party is not charged with the offence is insufficient: the exclusion test is concerned with knowledge of, rather than actual participation in, the prohibited activities. Indeed, exclusion has been refused on the basis of wilful blindness or reluctance to make inquiries for fear of learning the answer. Such was the result in *Le v DPP (Le)* in which the Court of Appeal was unconvinced that the wife did not know her husband was using their home to grow commercial quantities of cannabis.<sup>18</sup> In another case, *Grillo v DPP (Grillo)*, the Court refused to exclude an elderly mother’s interest in the family home because she “had the legal power to stop [her son’s] criminal activities but failed to do”.<sup>19</sup> Notably, in both of these cases, the court found that the affected parties (the wife and the elderly mother) were not credible witnesses, and rejected their claims of lack of knowledge on the basis that they were “implausible”. By contrast, the Court in *Grillo* found that the elderly father with dementia lacked sufficient understanding or capacity to be involved in the criminal activity and granted his application for an exclusion order in relation to his interest. While the question of FV did not ostensibly arise in either *Le* and *Grillo*, the underlying assumption that third parties possess the free will and agency to prevent illegality and quarantine their property from misuse has immense capacity to harm a FV victim’s claim for exclusion if applied without concern for the applicant’s wider circumstances.

More often than not, the abuser also has “effective control” of the sought-after property,<sup>20</sup> which is yet another basis for refusing an application for an exclusion order. Somewhat ironically, the “effective control” test focuses on the reality of the relationship between the parties and the restrained property, but in doing so, penalises FV victims for the very fact that they are subject to controlling, coercive and dominating conduct by their abusers.<sup>21</sup>

### SNAPSHOT

- Family violence victims who unwittingly become entangled in Victoria’s asset confiscation regime can find themselves in a surprisingly precarious legal position.
- Victorian legislation should be reviewed to recognise the complex dynamics and nature of family violence and provide more effective protections for family violence victims and survivors.
- Such changes would align with the recommendations of the 2015 Royal Commission into Family Violence to improve the operation of the justice system for these particularly vulnerable individuals and families.

## Access to justice

Navigating the procedural complexity of the Act puts lawyers, and non-lawyers, to the test.<sup>22</sup> Yet, just getting to the exclusion stage of confiscation proceedings is predicated on third parties quickly and effectively coming to terms with their predicament. For FV victims caught up in the regime, the task may be insurmountable. This is because in addition to FV victimisation, most FV victims will also face myriad other problems, including being 10 times more likely than others to face family, civil, criminal and other legal problems.<sup>23</sup> Consequently, FV victims are also more likely to suffer from stress-related illness, physical ill health, relationship breakdown, income loss and financial strain.<sup>24</sup> Women and children often leave their homes to escape violence and subsequently experience insecure housing or homelessness.<sup>25</sup> In situations of economic abuse, the wife's precarious financial position often means that her ability to be self-sufficient is constrained. Moreover, the RCFV found that FV victims find it harder than others to make complaints against their abuser and obtain the support they need for their compounding issues.<sup>26</sup>

From this position of disadvantage, the wife must obtain timely and accurate advice on her exposure to forfeiture and the necessity to take action. The wife may hold a mistaken belief that her partner's defence lawyer is also "looking after" her interests (but she is not their client), or that she is not exposed because she has "done nothing wrong" (again incorrect, the reverse onus legal tests presume involvement). Underlining the importance of obtaining sound advice is the fact that, where the accused is convicted or pleads guilty to an automatic forfeiture offence, a third party may lose their property before even being aware of that possibility.<sup>27</sup>

Even if the wife knows she needs help, legal aid is seldom available for confiscation proceedings.<sup>28</sup> The Act provides for the release of restrained funds for "reasonable living and business expenses",<sup>29</sup> but not for funding legal expenses.<sup>30</sup> That prohibition was designed to prevent defendants from dissipating their (presumed) ill-gotten gains on a "Rolls Royce defence",<sup>31</sup> but it also prevents third parties from defending their property rights notwithstanding their lack of participation in the offending. The wife may have no choice but to deplete her savings, incur debt and sell assets to engage legal representation. Paradoxically, such a course of action may also diminish her protective factors against abuse, and thereby increase her vulnerability to further violence.<sup>32</sup> Like other victims of crime, if the wife can bear the prospect of testifying against the interests of her abuser, she is likely to experience the added trauma of having to repeat and prove her story in multiple legal forums for multiple purposes.<sup>33</sup>

## Forfeiture and relief from hardship

Relief from forfeiture on "undue hardship" grounds is available in cases of simple (discretionary) forfeiture,<sup>34</sup> but is absent from the more routinely invoked automatic forfeiture provisions.<sup>35</sup>

Where available, "undue hardship" is interpreted narrowly. The person applying for exclusion must prove that forfeiture will result in "something more" than the hardship that ordinarily flows from deprivation of the property itself.<sup>36</sup> The "something more" threshold makes sense where the applicant is the offender, otherwise the Act would have "the seeds of its own [in]effectiveness in every

case".<sup>37</sup> It makes less sense when applied to an innocent third party, especially one experiencing FV, because property loss is central to the hardship they will suffer.

Despite the apparent inflexibility of the hardship ground, case law shows that the courts, in imposing discretionary orders for forfeiture, are alive to the need to strike a fair balance between deterring people from committing crimes and the need to protect the interests of innocent third parties who stand to be drastically affected by forfeiture proceedings.

For example, in *DPP v Tran* Warren CJ weighed up the seriousness of the offending against the consequences of forfeiting the family home, and refused to make the orders because it would be manifestly unfair to render the offender homeless and also harm his innocent wife and son.<sup>38</sup>

Similarly, in *DPP v Smith* the Supreme Court found that confiscation of a family's bush property, which had been used by the offender to grow cannabis, would be manifestly unfair to the offender's innocent husband's expenditure, labour and efforts in developing the property.<sup>39</sup>

In *DPP v Gyurcsik* the Supreme Court actively inquired into the potential hardship that might be suffered by the offender's elderly mother should the family home be forfeited, and ultimately the Court's finding that the seriousness of cultivating cannabis in this instance did not outweigh the impact to the mother and other family members if forfeiture of their home was ordered.<sup>40</sup>

Applications for forfeiture were also dismissed by the Supreme Court in *DPP v Nikolaou* because of concerns that confiscation of the family home (used to cultivate cannabis) would result in the offender being unable to provide the necessities of life for his dependent children,<sup>41</sup> and by the County Court in *DPP v Arpacı* because forfeiture of the car used in a culpable driving causing death offence would have worsened the already parlous financial situation of the offender's family.<sup>42</sup>

These examples show that where there is scope for the exercise of judicial discretion, it can sometimes be "broad and multifaceted",<sup>43</sup> and mollify the disproportionate impact of forfeiture on third parties relative to their degree of "involvement". But such latitude is unavailable for restraining order or automatic forfeiture order applications. Where available, it is purely ameliorative, to be considered only after the sought-after orders have been obtained.<sup>44</sup> By that stage, FV victims will already have felt the effect of indefinite restraint and uncertainty as to their future vicarious liability. Further, we are yet to see how the currently unasked question of FV would weigh on the court's residual hardship discretion. These issues collectively highlight that legislative amendment to increase the recognition, scope and application of safeguards for innocent third parties, with a specific acknowledgement of the particular hardships which may accompany FV, would be a valuable legal response to lessen the impact of FV victimisation.

## Conclusion

Following the RCFV, there has been significant legal and policy reform in this state to reduce FV and lessen the compounding legal, financial, social, health and other effects that FV victimisation entails for families and individuals.<sup>45</sup> The Act itself may have fallen

outside the RCFV's purview, but recognition that FV and criminal wrongdoing often coincide in a confiscation context is now overdue.

Recently, the Western Australian confiscation scheme has come under review due to concerns about its potential impacts to third parties.<sup>46</sup> It is the authors' view that the Victorian scheme warrants similar attention, with a focus on providing better procedural and substantive protections for FV victims, and adopting a victims perspective of the justice system. The potential for injustice can be addressed by taking a more nuanced, holistic approach to justice in confiscation matters involving FV victims. Such changes are necessary and desirable to align with wider improvements to the justice system flowing from the RCFV. Surely this can be achieved without undermining the principle that "crime doesn't pay". ■

**Nicole Spicer** has been a practising solicitor for 22 years and has a special interest in the intersection between criminal and civil legal proceedings. She is an LIV accredited specialist in criminal law (since 2002), is on the executive of the LIV Criminal Law Section and works as a supervising lawyer and consultant at Stary Norton Halphen and as a sessional academic at Monash and Deakin Universities.

**Venetia Stewart** is a law graduate at Clayton Utz. She recently completed her law degree at Monash University in which she was awarded the Professor the Honourable Marilyn Warren AC Prize for Best Master of Laws (Juris Doctor) Student.

1. Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 13 November 1997 (Jan Wade, Attorney-General) 1146, 1146. Although the *Proceeds of Crime Act 2002* (Cth) also operates in Victoria, this article focuses only on the Victorian regime.
2. See Schedules 1 and 2 of the *Confiscation Act 1997* (Vic). NB: All further legislative references refer to the *Confiscation Act 1997* (Vic) unless otherwise stated.
3. For the 2017-18 financial year, Victoria's asset confiscation scheme returned \$25 million to the Consolidated Fund plus \$2.4 million in victim compensation payments: Parliament of Victoria, *Asset Confiscation Operations: Annual Report 2017-18* (2 August 2018) 4.
4. See RCFV, *Report and Recommendations* (March 2016) ch 2. See also P Cox, "Violence against women: Additional analysis of the Australian Bureau of Statistics", Personal Safety Survey, 2012 (2016) 01.01 *ANROWS Horizons* 30–32.
5. It is also not uncommon for non-offender third parties to be the parents, children, husband, other relatives or a business associate of the primary offender.
6. "Property" is defined broadly in s3(1).
7. Refer to s14 (re restraining orders), s15 (re purposes of charge-based restraining orders) and s36I (re purposes of civil forfeiture restraining orders).
8. The meaning of "dealing with property" is provided in s11.
9. "Tainted property" is defined in s3(1).
10. "Property in which the accused has an interest" is defined in s10.
11. "Effective control of property" is defined in s9.
12. See s18 (charge-based restraining orders) and s36M (civil forfeiture restraining orders).
13. See ss20-22 (re charge-based restraining orders) and ss36U-36V (re civil forfeiture restraining orders).
14. See Schedule 2.
15. See s35.
16. Economic abuse is included within the definition of family violence: *Family Violence Protection Act 2008* (Vic), s5.
17. Note 13 above.
18. See *Le v DPP* (Vic) (2007) 171 A Crim R 196 at [21]-[25], [32]-[36].
19. *Grillo v DPP* [2011] VSC 575 at [104].
20. "Effective control" is defined in s9.
21. Such conduct falls within the definition of family violence: *Family Violence Protection Act 2008* (Vic), s5.
22. See generally Nicole Spicer, "Plead now pay later: Civil consequences of criminal proceedings" (2012) 86(10) *LLJ* 48.
23. Christine Coumarelos, "Quantifying the legal and broader life impacts of domestic and family violence" (2019) *Justice Issues: Law and Justice Foundation of New South Wales*, Paper 32.
24. Note 23 above.
25. Crime Statistics Agency (2016) *Royal Commission into Family Violence Specialist Homelessness Services Collection data – July 2011 to June 2014*, Table 3.
26. See RCFV, *Summary and Recommendations* (March 2016) 8.
27. The writers are personally aware of several specific incidences in which this has occurred.
28. See s143.
29. Section 14(4).
30. Section 14(5).
31. Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 13 November 1997 (Jan Wade, Attorney-General) 1146, 1148.
32. RCFV, *Summary and Recommendations* (March 2016) 169.
33. The RCFV recognised this issue, see Recommendation 61.
34. Schedule 1 offences.
35. Schedule 2 offences. NB: The undue hardship ground is also available under the civil forfeiture regime.
36. *Lake v R* (1989) 44 A Crim R 63 [66]–[67] (Kirby P).
37. Note 36 above.
38. *DPP v Tran* [2004] VSC 218 adopting the test *R v Winand* (1994) 73 A Crim R 497, 500–501.
39. *DPP v Smith* [2007] VSC 98.
40. *DPP v Gyurcsik* [2007] VSC 424.
41. *DPP v Nikolaou* [2008] VSC 111.
42. *DPP v Arpac* [2018] VCC 285.
43. *DPP (Vic) v Cini* [2013] VSCA 103; 38 VR 83 [31].
44. See, eg, *DPP v Ali (No 2)* [2010] VSC 503 [35].
45. Daniel Andrews, Premier of Victoria & Fiona Richardson, Minister for the Prevention of Family Violence (2016) "It's time to fix our broken family violence system", media release, 30 March 2016. See, eg, recognition of family violence in bail determinations under the *Bail Act 1977* (Vic), s5AAAA "Family Violence Risks"; reforms to the *Residential Tenancies Act 1997* (Vic), as amended by the *Residential Tenancies Act 2018* (Vic), that provide further protections in relation to tenancies held by family violence victims.
46. The Department of Justice (WA), *Review of the Criminal Property Confiscation Act 2000* (WA) was initiated in 2017; expected release date for the final report is currently unknown. NB: Full endnotes available on request.

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