

Confiscation of the Proceeds of Crime

Executive Summary

Report 5: May 2018

Introduction

This audit assessed if agencies are effectively and efficiently identifying and confiscating property, and distributing proceeds of crime.

We focused on how Western Australia Police Force, the Office of the Director of Public Prosecutions and the Department of Justice ensure crime-related assets are seized, frozen and eventually confiscated under the *Criminal Property Confiscation Act 2000*. We considered the Public Trustee's role in managing and disposing of assets on behalf of the Office of the Director of Public Prosecutions and reviewed how the Department of Justice distributes money from the sale of the proceeds of crime.

Background

WA Police regard the confiscation of proceeds of crime as a key strategy for disrupting criminal activity, especially serious and organised crime. Taking away high-value assets serves the public interest by reducing the incentive for engaging in criminal activities.

Under the *Criminal Property Confiscation Act 2000* (Act) property can be confiscated when it is, for example:

- obtained from a criminal offence
- used to commit a crime (crime used)
- results from crime (crime derived)
- owned, controlled or given away by a declared drug trafficker (drug trafficking asset)
- equal in value to a person's unexplained wealth.

Proceeds from the sale of confiscated assets has increased. In 2013-14, \$8 million was deposited into the Confiscation Proceeds Account and \$10 million in 2014-15. This involved 435 and 443 assets respectively, with most of the financial return to the State coming from the sale of real estate.

Confiscations activity

Together, Western Australia Police Force (Police), the Office of the Director of Public Prosecutions (DPP) and the Department of Justice (Justice) coordinate asset confiscation (Figure 1). While not directly involved in confiscations, the Public Trustee is engaged to manage and dispose of some assets on behalf of the State at the request of the DPP.

The Act applies when a person commits a confiscation offence as defined in the Act. For example, an offence punishable with a prison sentence of 2 years or more. Confiscations activity starts when Police identify assets and apply to a Justice of the Peace for a freezing notice. However, Police may seize certain assets before a freezing notice is issued.

The DPP conducts litigation under the Act and is responsible for the control and management of frozen assets, unless the Court appoints another party. Under the Act, the DPP can appoint others to manage frozen property on its behalf. For example, the Public Trustee, Police or the owner of the frozen property.

If a defendant is found guilty and other conditions met, the DPP can lodge the court documents to confirm confiscation, and organise disposal of the assets. Disposal occurs usually in

conjunction with the Public Trustee or Police. The DPP banks proceeds from disposal into the Account.

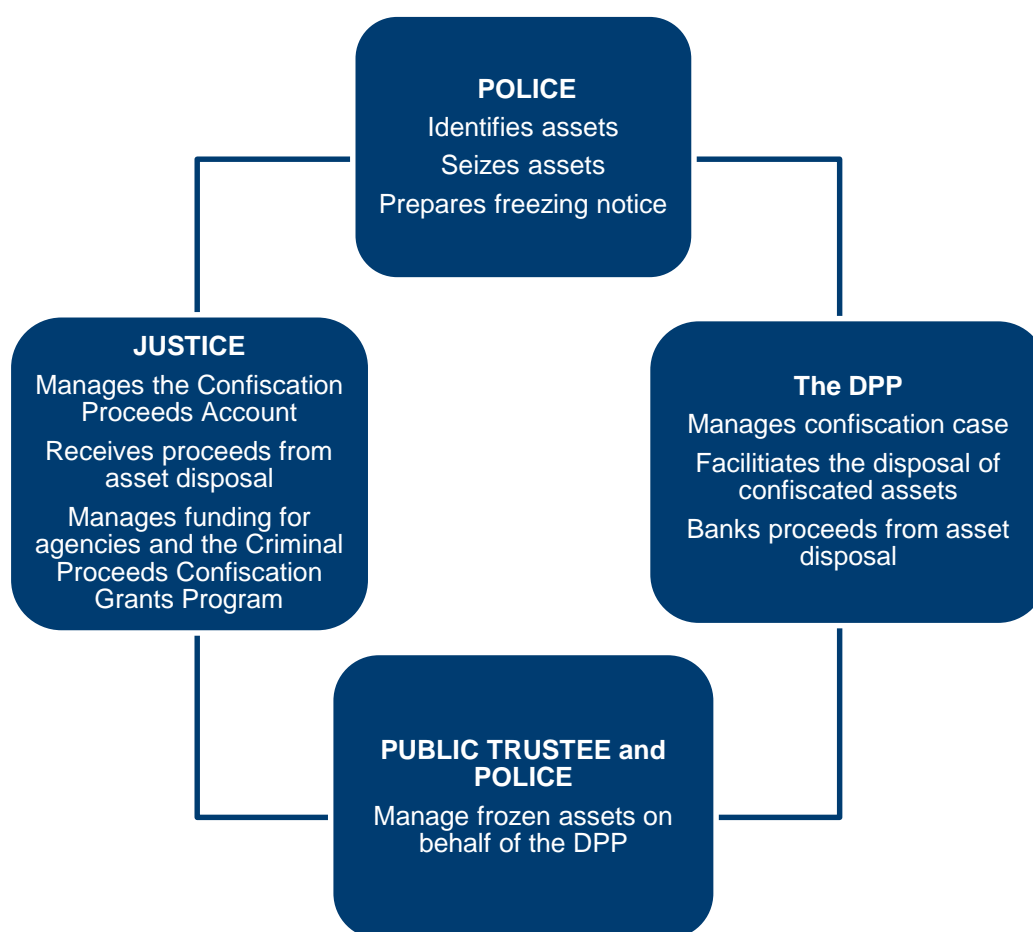


Figure 1: Agencies' roles and responsibilities

If an accused is found not guilty, the freezing notice is usually cancelled and assets returned to the accused. However, a conviction is not always necessary in order for confiscation action to start or proceed. For example, in the case of crime used and crime derived assets.

It is important to note that identifying, stopping and prosecuting crime are the core focus areas for the agencies involved. Crime is not pursued on the basis of assets that can be confiscated.

Confiscation Proceeds Account

Since 2010-11, the annual amount banked into the Account has ranged from \$7.3 million to \$13.0 million. Justice manages the Account. The Confiscation Proceeds Accounts Committee recommends which applications to the Criminal Proceeds Confiscation Grants Program (Grants Program) to fund. Money paid out of the Account (Figure 2) is at the direction of the Attorney General.

Money in the Account is allocated for purposes including:

- administering the Act
- carrying out investigations and operations relating to asset confiscation
- storing seized or frozen assets
- supporting victims of crime
- preventing and reducing drug abuse and drug related crime
- in aid of law enforcement.

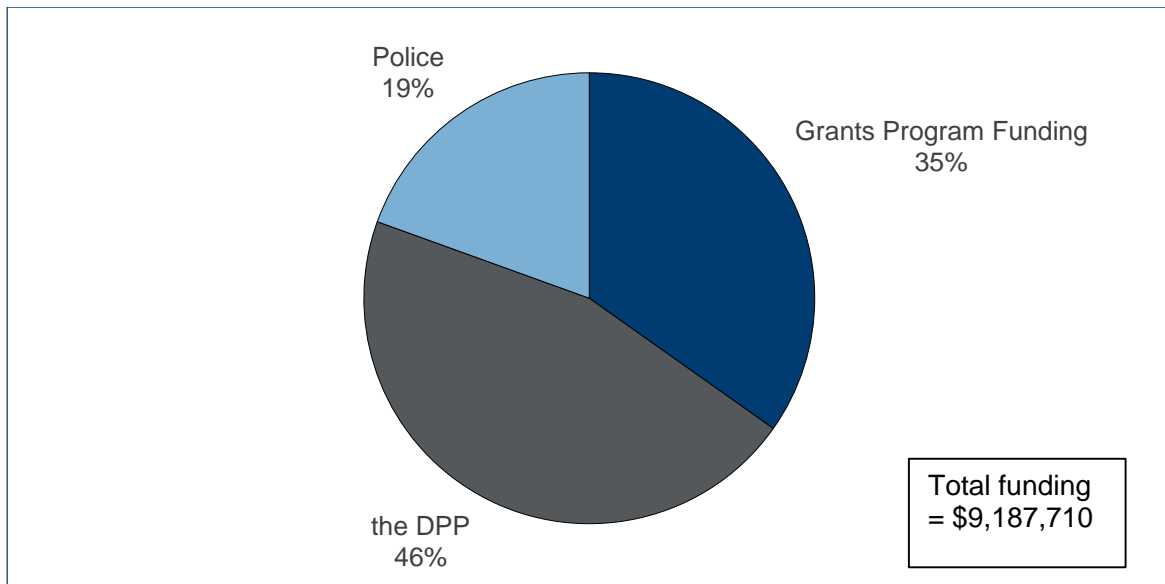


Figure 2: Allocation of funds from the Confiscation Proceeds Account in the 2015-16 financial year

Through a Memorandum of Understanding, Police receive funds from the Account to pay for activities that target organised crime, support public reporting of criminal activity through the Crime Stoppers program, and asset storage. Police's current funding period runs from July 2016 to June 2018.

The DPP receive Account funds through a Letter of Agreement. The funds are used to operate its confiscations and prosecutions teams. The current funding period runs from 1 July 2017 to 30 June 2021.

When income into the Account exceeds specified annual targets, the DPP and Police become eligible for bonus payments. In 2015 and 2016, the DPP's target was \$9 million and Police's target was \$12 million. Bonus payments are subject to the same conditions and acquittal requirements as annual funding.

Neither Justice nor the Public Trustee receive direct funding from the Account. Justice pays for its confiscation activities from its appropriated funding. The Public Trustee fulfils its duties on a fee for service basis using a schedule of predetermined fees and Account funds are used to pay these fees.

In 2015, Justice introduced performance measures into the funding agreements with Police and the DPP. These measure the number of new, ongoing, finalised and successfully prosecuted cases, plus the value of frozen assets and the net proceeds from the disposal of confiscation.

The Account also funds the Grants Program managed by Justice. Grants are paid to a range of organisations, including youth services, charities and religious organisations to fund community based programs supporting victims of crime, and preventing and reducing drug abuse.

Audit conclusion

The DPP and Police follow adequate processes to identify and confiscate the proceeds of crime. Decisions to seize and freeze assets correctly consider the public interest and the likely financial return to the State. However, because the impact of confiscation activities is not easily known or measurable, none of the agencies know what impact confiscating assets is having on crime.

Seized assets need to be better managed to minimise deterioration in condition and value between seizure and sale. Poor management exposes the State to risk if deteriorated assets

are returned to their owners, and reduces the financial return available to the State to fund future confiscation activities and the Grants Program.

More clarity is needed around the outcomes that the DPP and Police are to achieve from the \$6.6 million of Account funding they receive each year. This will allow the effectiveness of Account funding paid to these agencies to be assessed. Work is also required to better understand the cost of agencies' confiscation processes and areas where efficiency can be improved. Ensuring Account funds are put to the best use and spent efficiently helps to support the sustainability of confiscations work.

Justice manages the Grants Program well. It has a sound approach for assessing applications, making recommendations for funding and ensuring clear acquittal of funds.

Key findings

The DPP and Police have sound processes to recover property that support confiscations activities and the likely financial return to the State. These include:

- Police's Proceeds of Crime Squad (POCS) follows guidance material to identify the greatest number of assets it can seize in each relevant criminal case.
- POCS staff duly considered asset value and public interest when seizing and freezing assets. We saw instances of cancelled freezing notices when the assets did not meet the value and public interest criteria. This means they are less likely to pursue assets that will not provide a return to the State.
- The DPP adequately completed the necessary steps to progress confiscation matters.

Disposal and banking of proceeds were timely. Our review of case file documentation shows that the DPP took just over 3 months in 2014-15 from the issue of the confiscation declaration, for it to dispose of assets and bank the proceeds to the Account.

Assets are not maintained to maximise their value and therefore the return to the State. We found:

- Agencies are yet to agree on how to maintain frozen assets. In a case we reviewed, the State received \$405,000 less than the original estimated value of a luxury yacht due to inappropriate storage, as well as general depreciation and market changes. The State could be liable to compensation payments if it returns deteriorated assets to their owners.
- Although the DPP has a statutory responsibility to maintain frozen assets, external parties it engages to manage assets on its behalf, such as the real estate owner, Police and the Public Trustee, do not always maintain the assets and the DPP cannot compel them to do so. In one case we reviewed, increased debt and property damage resulted in the State not receiving any money from the sale.

The DPP and Police receive around \$6.6 million in annual funding from the Account but funding agreements provide a limited view into what outcomes are to be achieved. The DPP's most recent agreement, dated 13 September 2017, provides \$21.2 million in funding over the next 4 years, but is silent on what the DPP is to achieve. Similarly, Police receive \$1.15 million each year for combating organised crime but their funding agreement provides no guidance on expected outcomes.

The State does not know if funding to Police and the DPP is spent effectively. Performance measures are assigned to agencies that are not completely empowered to achieve them. For example, Police are required to measure the gross value of frozen assets, but cannot know the ongoing value of frozen assets managed by others.

There is no clear understanding of what it costs the State to carry out confiscation activities. Neither the DPP nor Police assign costs to discrete confiscation processes. We acknowledge that confiscation processes are not the same for every matter and vary in the work required to

complete them. However, the State's understanding of the actual cost and sustainability of confiscations work is limited, as are opportunities for the DPP and Police to improve the efficiency of their confiscation processes.

Justice uses a sound approach to distribute Account funds through the Grants Program. We reviewed 36 of the 308 grant applications from 2010 to 2015, and found they were assessed, funded and managed in line with the policy framework and guidelines. All 16 of the successful applicants met the reporting requirements set out by Justice, which included provision of a 6-monthly status and financial report, and a final funding acquittal with project outcomes and audited financial statements. This information provides Justice with a clear view of whether grant recipients spent Account funds correctly.

Recommendations

1. **By 30 June 2018, Justice, the DPP and Police should agree and implement an approach to maintain frozen assets to preserve asset value and reduce risks of loss to the State.**
2. **To enhance the governance and accountability for Account funds paid to the DPP and Police, Justice should consider recommending changes to:**
 - a. **funding agreements to clarify what outcomes are to be achieved**
 - b. **performance measures, to better measure and assess the effectiveness of the use of Account funds.**

Agency responses

Department of Justice

I refer to an email dated 13 April 2018 from your office advising of the amendment to Recommendation 2a in the final report due to the removal of the finding on the use of Confiscation Proceeds Account funding for activities not directly related to confiscations.

While the Department is pleased with this revised finding and the subsequent amendment to the recommendation, I advise that the Department will not be making changes to the funding agreements for the following reasons:

1 Application on the use of Allocated Funds

The Department disagrees with the audit finding that funding agreements for the Office of the Director of Public Prosecutions (DPP) and Western Australia Police Force (Police) provide limited direction on what the money can be spent on. The funding agreements with both agencies were drawn up on advice from the State Solicitor's Office and the Department of Treasury. The funding allocation to the DPP is available for purposes determined by the DPP for its Confiscations Practice (as reflected in the funding agreement), and not just for confiscation activities. The use of allocated funds to the Police is clearly stated in the Memorandum of Understanding (MOU) between the Minister for Police and the Attorney General.

The Department considers there is more than sufficient clarity in the funding arrangements with these agencies; a view shared by the DPP. Both the Department and the DPP have been consistent in our feedback to the Office of the Auditor General (OAG) that under the DPP's funding arrangement with the Attorney General, funds may be used for operational activities not directly related to confiscations. This is in accordance with S131 (2) (g) of the

Criminal Property Confiscations Act 2000 which states that funds may be used 'for any other purpose in aid of law enforcement'.

The intent of the MOU is for allocated funds to be used by Police to increase their capability to combat organised crime in Western Australia. The use of these funds (including what these funds cannot be used for) is clearly stated in the MOU.

These funding arrangements allow the agencies to exercise their discretion in the use of allocated funds within the parameters for which the funds have been allocated. A prescriptive funding arrangement with both agencies would serve little purpose other than severely limiting activities to disrupt crime.

2 Performance Measures / Outcomes

The performance measures were drafted on the advice from the Department of Treasury whose views were:

- Indicators for the DPP appear to strike a good balance between measuring the Confiscation Unit's performance while not using too many resources to compile; and
- Measuring the level and extent of increased police investigations into organized crime fits the intent of the confiscation legislation.

These performance measures provide an indication of outputs and outcomes achieved directly from the efforts invested in confiscation activities. For example, the number of new, ongoing and finalized cases or level and extent of increased investigations into organized crime are good indicators of crime being disrupted. The time and resources used to issue and process freezing notices is secondary as the primary purpose of confiscation activities is to disrupt crime.

Through the performance measures we do know, to some extent, the impact of confiscation activities in disrupting crime.

The Office of the Director of Public Prosecutions

The legislative framework of the *Criminal Property Confiscation Act 2000* ('CPCA') and the fact that different agencies, all of which are independent of each other, have responsibility for different tasks under the CPCA makes it very difficult, if not impossible, for any agency to control or guide the activities of any other agency.

The DPP has long submitted that confiscations activities should be centralised in one agency, with that agency having powers to investigate, issue notices, manage property and conduct confiscation proceedings. This would likely resolve, or at least make possible the resolution of, many of the issues identified by the OAG. Creation of such an agency would require amendment of the CPCA. However, it is understood the scope of this inquiry did not seek to explore the legislative framework or judicial interpretation of it, or the restrictions created thereby.

The DPP does not manage property, lacking the expertise and resources to do so. The responsibility for the management of property, when delegated under the CPCA to the Public Trustee and WA Police, falls upon those agencies. In many, if not most, other cases, the court appoints the owner of the property to manage it. Under the CPCA, it is for those agencies or people to take reasonable steps to appropriately store or manage the property and to appropriately maintain it. The DPP has no power to define the obligation as it applies to others. Further, and in any event, the DPP has no realistic power under the CPCA to enforce compliance with this requirement of the CPCA.

The recommendation that Justice, the DPP and Police should "agree and implement an approach to maintain frozen assets to preserve asset value and reduce risks of loss to the State" fails to address the significant complexities of defining maintenance obligations more specifically than is already contained in the CPCA. It also fails to acknowledge the

framework created by the CPCA, the judicial interpretation of obligations under the CPCA, and, again, the inability to enforce compliance, rendering any agreement futile in the case of dispute.

The examples of depreciation in property value cited fail to properly account for some highly significant matters, including the fact that the initial values assigned to property are estimates only, not valuations. Changes in market values of assets can significantly change over the course of a confiscations proceeding, which can take many years to finalise.

In the case of the yacht referred to, the only actual valuation of it (as opposed to estimate) found it would be worth \$300,000 in top condition, and that \$60,000 was required to restore it to that condition. Reasons for any reduction in value over time were not apportioned, rendering attribution of any specific loss to inadequate storage speculative.

It is necessary to strike a balance between expenditure to preserve property and the likely amount to be realised from the sale of the property, if confiscated. The primary purpose of confiscation activities is to disrupt crime, not to generate income. Disproportionate expenditure on maintenance to prevent depreciation, even ordinary depreciation due to the passage of time, may be counterproductive to this purpose if it substantially diverts funds from confiscation and law enforcement activities.

It is unclear what is suggested should have been done to prevent the increase in debt on the frozen house and land. In this regard, as in a number of others, the audit's scope excluded consideration of the critical impact of judicial precedent on the manner in which the DPP complies with its obligations under the CPCA.

The DPP does not disregard factors such as the cost of proceeding or the likely return to the State in conducting confiscations proceedings. However, the complexities of the CPCA and the tasks completed under the CPCA do not allow for a "one size fits all" approach. Analytics are available to enable calculation of annual costs. Identifying exact costs of individual cases or processes would be a costly and wasteful use of resources which are more appropriately spent for the purposes of the CPCA.

The DPP reports its costs to carry out confiscation activities at an aggregate level. Costs are known and reported to the Department of Justice as required under the agreement between the DPP and the Attorney General, which enables the sustainability of the DPP's Confiscations Practice to be determined.

Western Australian Police Force

The Western Australia Police Force generally accepts the findings and recommendations of the Performance Audit: Confiscation of the Proceeds of Crime and will meet the time-frames as specified within the report. However, the Western Australia Police Force is of the view that in accordance with the Key Performance Measures set out in the Memorandum of Understanding – Criminal Property Confiscation Proceeds Funding Arrangements for Organised Crime (2016), detailed information is provided to government outlining key agency operational results and outcomes.

The Western Australia Police Force considers that confiscation funding should be utilised to fund all operational activity of the Proceeds of Crime Squad in managing investigations initiated by them utilising the *Criminal Property Confiscation Act 2000* legislation.