

Due process or due proceeds? The future of confiscation and related AML laws in Australia

29 & 30 June 2023, The University of Queensland (UQ), St Lucia, Brisbane

Summary

This workshop appraised Australian confiscation and related anti-money laundering (AML) laws for their effectiveness and their compatibility with fundamental rights. Its backdrop was persistent concerns with the circulation of 'dirty money' in Australia and the difficulties of calibrating confiscation laws to achieve punishment objectives. Social scientists from law, criminology and politics joined representatives from government and civil society over two days at UQ, to explore key issues around the recovery of illicit wealth. This dialogue between sectors and across disciplines will be reflected in a special journal issue that will enhance the research base on confiscation and AML measures in Australia, supporting laws and policies that will both work and be just into the future.

Convenors

Dr Radha Ivory (UQ), Dr Gregory Dale (UQ), and Emeritus Professor Arie Freiberg AM, FASSA (Monash).

Overview

Anti-money laundering measures seek to prevent and suppress the movement of illicit wealth through the legitimate economy. Pioneered in the US 'War on Drugs', they were subsequently promoted through international law as measures to combat various transnational crime types and related acts of money laundering.

Australia was an early adopter of AML laws, including laws that enable confiscation. Now, throughout Australia, confiscation is possible with and without proof of criminal conduct to the criminal standard in a criminal trial. Indeed, in most states and territories, confiscation can occur simply on the basis that persons cannot explain why their assets exceed their lawfully acquired wealth. Recently, Australia has implemented so-called 'Magnitsky' laws and imposed so-called 'Oligarch sanctions', which use asset freezes to respond to the commission of human rights abuses, acts of corruption and international aggression in Ukraine.

The appeal of confiscation laws reflects both processes of global policy diffusion around money laundering and the inner logic of confiscation as a sanction. Confiscation statutes are typically justified as a means to prevent crime, remediate wrongdoing and, to a lesser extent, punish offenders. They enable societies to express emotions such as disgust, resentment and envy, which may arise if criminal offending goes unpunished. When adopted across borders, they promise to secure funds for economic and social development and to combat the impunity of powerful economic and political actors.

However, the scholarship reveals significant practical and principled objections to confiscation laws and the wider anti-money laundering regime. The first challenge is effectiveness. The objectives of confiscation and related AML laws are often hard to discern, and the predicate offences and money flows are largely hidden. Both factors create significant challenges for measurement. When confiscation is deployed to address crimes committed in Australia, the evidence of its ability to reduce offending is emerging but limited. What are the goals of confiscation and AML laws and what is the evidence that they achieve those outcomes?

The second challenge is respecting due process. Procedures that enhance the prospects of confiscation may interfere with guarantees to a fair and lawful hearing, as well as rights to property and equal treatment, of alleged offenders and 'third' parties to the crime. Further, both in Australia and internationally, there are controversies about how governments reallocate confiscated wealth, in particular, how they provide for victims of crime. Finally, confiscation and associated AML laws have been associated with a neo-liberal turn in criminal justice policy, which increases surveillance by and

among non-state actors. In that way too, they may be at odds with liberal preferences for individual freedom in the 'private' sphere. Presuming that they work, when are confiscation and associated AML laws compatible with fundamental rights?

Sessions

These two core questions were the subject of the seven substantive sessions of the workshop:

1. **'Evidencing effectiveness – The performance of confiscation and related anti-money laundering (AML) laws'** commenced Day 1 with a showcase of research on the rationales for confiscation laws. It heard about research that sought to measure the deterrent effect of freezing orders and research that sought to explain confiscation laws as products of emotions in policymaking. The session also reflected on the practice of executing asset freezes, seizures and confiscation orders under proceeds of crime laws.
2. **'Confiscation and individual rights (Part 1) – The principled limits on civil confiscation schemes'** shifted the discussion to the effects of confiscation on non-offenders. A series of vignettes illustrated the broad scope of state confiscation laws in Australia and their potential impact on the families of alleged criminals, as well as victims of their crimes. The principled reasons for protecting third parties in confiscation cases were also considered in this session, using European human rights cases and restitution law as a guide.
3. **'Confiscation laws and individual rights (Part 2) – The principled limits to unexplained wealth orders (UWOs) and asset disclosure regimes'** then engaged with objections to regimes that enable access information by threatening civil consequences for non-disclosure. On one view, those processes further lower and shift the burden of proof, potentially casting aspersions of guilt on ostensibly innocent parties. From another perspective, those processes enhance financial accountability, particularly for misconduct that could otherwise be committed with impunity beyond a country's borders.
4. **'Mapping a changing terrain – The global "threat landscape" for confiscation and related AML laws'** closed Day 1 with a series of keynote addresses on Australian and international experiences. The workshop heard about UK debates regarding the use of illicit wealth laws to respond to the war in Ukraine and foreign corruption, as well as a 2022 report on potential reforms to confiscation law in England and Wales. Closer to home, the session considered the role of confiscation in achieving justice, including for victims of crime, in diverse, multi-jurisdictional matters, as well as the balance between state and individual interests in confiscation proceedings.
5. **'Restraining wealth with economic sanctions – Magnitsky laws, Oligarch sanctions and the global movement against impunity'** started Day 2 by reflecting on the so-called 'freeze to seize' debate that has been launched in connection to the war in Ukraine. Many Western countries have sanctioned the Russian state and associated individuals by freezing their assets. Some advocate confiscating those frozen assets and using them to make reparations to Ukraine. Both the political and emotional reasons for using such approaches were explored in this session, as was the legal framework for that debate in Australia.
6. **'Proceeds and technology – Adapting confiscation and related AML laws to the digital economy'** turned to developments in computer science and how they are shaping public and private sector efforts to give effect to confiscation and related AML laws. The challenge and opportunities from technology ranged from difficulties tracking and seizing cryptocurrencies, to ensuring rights to privacy and the protection of consumer data that is collected by financial institutions in meeting their AML obligations.
7. **'Dealing with confiscated assets – The use of dirty money to support victims of crime'**, closed the substantive part of the workshop with a discussion of how confiscation laws could be used to repair the harms caused by organised and other serious forms of criminality. This session considered an international case study and reflected on its implications for scholars and policymakers in Australia.

Participants

The workshop's twenty-nine participants included legal academics with diverse specialisations (criminal, international, private, AML and consumer law), scholars of international relations and criminology, and representatives from state and federal government bodies, the non-government and private sectors, and legal practice. While most people attended in person, some joined the discussion through video conferencing technology.

Outcomes

Designed and conducted in this way, the workshop enabled a discussion of confiscation and related AML laws that was informed both by practice and current social scientific research. A selection of academic papers from the workshop will be published in a special issue of the *University of Western Australia Law Review* during 2024 and, in that way, made available online to the public free-of-charge. The academic findings of the special issue will be also shared with non-academic audiences through anticipated online outputs next year.

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