

**PROCEEDINGS AT HEARING
OF
DECEMBER 17, 2020**

COMMISSIONER AUSTIN F. CULLEN

INDEX OF PROCEEDINGS

Witness	Description	Page
	Proceedings commenced at 4:00 p.m.	1
	Colloquy	1
Natalie Skead (for the commission)	Examination by Ms. Patel	2
	Proceedings adjourned at 5:10 p.m.	43
	Proceedings reconvened at 5:14 p.m.	43
Natalie Skead (for the commission)	Examination by Ms. Patel (continuing)	43
	Proceedings adjourned at 6:31 p.m.	84
	Proceedings reconvened at 6:45 p.m.	84
Natalie Skead (for the commission)	Examination by Ms. Friesen	85
	Examination by Ms. Magonet	88
	Examination by Mr. Rauch-Davis	99
	Colloquy	102
	Proceedings adjourned at 7:15 p.m.	103

INDEX OF EXHIBITS FOR IDENTIFICATION

Letter	Description	Page
---------------	--------------------	-------------

No exhibits for identification marked.

INDEX OF EXHIBITS

No.	Description	Page
------------	--------------------	-------------

388	Curriculum Vitae of Dr. Natalie Skead	3
-----	---------------------------------------	---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

December 17, 2020

(Via Videoconference)

(PROCEEDINGS COMMENCED AT 4:00 P.M.)

THE REGISTRAR: Good afternoon. The hearing is now resumed, Mr. Commissioner.

THE COMMISSIONER: Thank you, Madam Registrar.

Yes, Ms. Patel.

MS. PATEL: Thank you, Mr. Commissioner. Today we have with us Dr. Natalie Skead of the University of Western Australia to speak to us on the topic of Australian civil forfeiture schemes.

THE COMMISSIONER: Thank you.

MS. PATEL: And I believe that Dr. Skead has chosen to be affirmed.

**NATALIE SKEAD, a witness
called for the
commission, affirmed.**

THE REGISTRAR: Please state your full name and spell your first name and last name for the record.

THE WITNESS: Natalie Kym Skead, N-a-t-a-l-i-e S-k-e-a-d.

THE REGISTRAR: Thank you.

THE COMMISSIONER: Yes, Ms. Patel.

MS. PATEL: Thank you, Mr. Commissioner.

Madam Registrar, if we could pull up

1 Dr. Skead's CV.

2 **EXAMINATION BY MS. PATEL:**

3 Q Dr. Skead, do you recognize this as your CV?

4 A Yes, it is.

5 Q All right. I'll just go through some of your
6 qualifications as set out here and then I'll you
7 a few background questions about your research
8 and your work.

9 You are the dean and head of school at the
10 University of Western Australia School of Law;
11 is that correct?

12 A That's correct.

13 Q All right. And I note that you have your doctor
14 of juridical science from the University of
15 Western Australia. You also have a graduate
16 certificate in tertiary education from the same
17 school; is that right?

18 A That's correct.

19 Q And just in that connection I'll move on shortly
20 to your research in various legal areas,
21 including proceeds of crime, but one of your
22 areas of research interest is also
23 post-secondary teaching; is that right?

24 A That's correct.

25 Q Before coming to the University of Western

1 Australia in 2002, you were a practising lawyer
2 in South Africa?

3 A I was, yes.

4 Q And I note that you've published extensively on
5 a number of topics, including one we've touched
6 on, teaching, property law and the area that
7 we're particularly interested today is proceeds
8 of crime laws; is that right?

9 A That's right.

10 Q Okay. And in particular you've written
11 extensively about Australia's various proceeds
12 of crime legislative schemes and have advocated
13 for their reformation in certain ways; is that
14 right?

15 A Yes, that's correct.

16 MS. PATEL: Mr. Commissioner, if we could please have
17 this marked as the next exhibit.

18 THE COMMISSIONER: Very well. I think that's
19 exhibit 388.

20 THE REGISTRAR: Yes, exhibit 388.

21 THE COMMISSIONER: Thank you.

22 **EXHIBIT 388: Curriculum Vitae of Dr. Natalie**
23 **Skead**

24 MS. PATEL: Madam Registrar, we can take this
25 document down now. Thank you.

1 Madam Registrar, I wonder if you could
2 please pull up the overview report attaching
3 various writings of Dr. Skead.

4 Q And we'll stay on the first page here,
5 Dr. Skead. I just -- you've written several
6 pieces on proceeds of crime legislation and I
7 simply want to review the titles and dates of a
8 few of them here. This is by no means an
9 exhaustive collection of all your writings in
10 the area, but you're the author of "Drug
11 Trafficker Property Confiscation Schemes in
12 Western Australia in the Northern Territory, a
13 Study in Legislation Going Too Far" published in
14 2013?

15 A Yes.

16 Q All right. And you are also the author of an
17 article titled with a coauthor Sarah Murray,
18 "The Politics of Proceeds of Crime Legislation,"
19 published in 2015?

20 A Yes.

21 Q And similarly you're the author of an article
22 "Crime-Used Property Confiscation in Western
23 Australia and the Northern Territory" published
24 in 2016?

25 A Yes.

1 MS. PATEL: Madam Registrar, could you scroll down
2 just a little bit. I think this goes only to
3 Appendix E -- oh, just up a bit. Thank you.
4 Sorry.

5 Q You are also the author with three coauthors of
6 an article entitled "Reforming Proceeds of Crime
7 Legislation: Political Reality Or Pipe Dream?"
8 That was published in 2019?

9 A Yes.

10 Q Okay. And the last sample of your writing we
11 have here is the submission made by yourself in
12 the same -- the coauthors to the previous
13 article, Sarah Murray, Hilde Tubex and Tamara
14 Tulich, "Submission: Review of the *Criminal*
15 *Property Confiscation Act 2000*" and it says
16 "(WA)" and that's Western Australia, I take it.

17 A Yes, that's correct.

18 Q And that's a submission -- the document that I
19 have, actually, isn't dated. The appendix isn't
20 dater either. When was that submission made?

21 A That was submitted in December 2018.

22 MS. PATEL: And, Madam Registrar, you can take this
23 down now. And in connection with that last
24 piece, Madam Registrar, could you please bring
25 up exhibit 374, which is the overview report

1 asset forfeiture internationally, appendix F,
2 and the PDF page number is 1051. Oh, you're
3 there. Perfect. If you could just scroll down,
4 Madam Registrar, to the next page. That's fine.
5 Thank you.

6 Q Dr. Skead, you were also a coauthor along with
7 the same authors that we noted before for the
8 last two articles of this piece "Pocketing the
9 Proceeds of Crime: Recommendations for
10 Legislative Reform"; is that right?

11 A Yes, that's right.

12 Q We'll return to this piece, but if you could
13 just very briefly, I wonder, tell us what this
14 report is and what it strives to do.

15 A Sure. This report was the outcome of an
16 extensive legislative review that was funded by
17 the Australian Institute of Criminology,
18 examining the confiscation of proceeds of crime
19 legislative schemes in three Australian states,
20 in New South Wales, in Queensland and in Western
21 Australia. The reason why we selected those
22 three particular states is because they have
23 differing legislative schemes. And so it was an
24 opportunity to compare and contrast across three
25 different jurisdictions and what the final

1 report seeks to do is to make recommendations
2 for reform in respect of all three but in fact
3 as it turns out, following the analysis and
4 review, is focused on one particular
5 jurisdiction more than the others.

6 Q And what jurisdiction is that?

7 A And that is Western Australia. So Western
8 Australia has of the three what has been
9 referred to several times by courts as the
10 harshest most draconian scheme. And so drawing
11 on some of the good practice in the others, in
12 the other two schemes, we have made
13 recommendations for reform. I will say, though,
14 that there are also recommendations for
15 reforming in relation to Queensland and New
16 South Wales because none of them are ideal.

17 Q [Indiscernible] 2020, and it contains within it
18 a summary of non-conviction based confiscation
19 schemes, and can we assume given the date that
20 the description of those schemes are up to date?

21 A The report was completed in December 2018, so it
22 took some time to publish but has been revised a
23 long way particularly in with respect to
24 unexplained wealth. So it is certainly as at I
25 would say March 2020 up to date.

1 MS. PATEL: Thank you. Madam Registrar, we can take
2 this down for now. Thank you.

3 Q Dr. Skead, I wonder if you could start by
4 situating us a little bit with respect to
5 Australian proceeds of crime legislation just by
6 starting with the early history of such proceeds
7 of crime confiscation provisions in Australia.

8 A Yes. It is a recent history, so it's not a
9 terribly early history. Australia introduced
10 its first criminal property confiscation
11 legislation in 1979 by way of amendments to the
12 *Customs Act 1901*, and that confiscation scheme
13 was directed solely at drug offences, so drug
14 dealing offences.

15 It very quickly became apparent that form
16 of confiscation needed to be more robust, and so
17 what we observed from 1979 into the 1980s and
18 particularly around mid-1980 is all Australian
19 jurisdictions -- and I should say that there are
20 essentially nine of them, including the federal
21 jurisdiction, so there are six states, two
22 territories and then there is the
23 Commonwealth -- introduced confiscation
24 legislation in the 1980s, all of which was
25 conviction based.

1 And that really was, I think, both a
2 national and international recognition of the
3 proliferation of drug offences and the
4 internationalization of drug offences. So it
5 was directed specifically, that this legislation
6 was directed specifically at addressing the
7 increase in global drug trafficking in
8 particular, and the result of both international
9 and national conferences, reviews, et cetera.

10 Q And [indiscernible]?

11 A Sorry. So that legislation was in place for
12 about 10 years, underwent national review and
13 what became clear is that it simply wasn't
14 working, and there was a recognition that in
15 order to have an effective confiscation scheme,
16 it had to be civil, civil based non-conviction
17 based. And so from 1995 we see the emergence of
18 non-conviction based schemes, either solely
19 non-conviction based or a blended conviction and
20 non-conviction based scheme.

21 Q And what were the problems with conviction based
22 confiscation schemes?

23 A Just simply too difficult to secure
24 confiscations because of the criminal nature of
25 the -- of the proceedings and the need to secure

1 a conviction. There are obviously views as to
2 whether a civil-based scheme that is not
3 criminal in nature and doesn't rely on a
4 conviction in order to confiscate is an
5 appropriate response.

6 Q And certainly later in our discussion we'll turn
7 directly to some of the criticisms of the
8 non-conviction based schemes that we're going to
9 review, and you've published extensively on
10 those, and we'll review those.

11 The non-conviction based schemes were first
12 introduced I think you said in the mid-1990s.
13 Where were the jurisdictions that first took
14 them up?

15 A New South Wales was the first jurisdiction but
16 they -- and they did so by retaining -- so New
17 South Wales is unique in Australia in that it
18 has two separate statutes. It has the earlier
19 conviction based statute as well as the later
20 non-conviction based statute. It was followed
21 soon after by Western Australia that has a
22 solely non-conviction based scheme. The
23 Northern Territory followed soon after and
24 really mirrored the Western Australian scheme.
25 The Commonwealth introduced its blended scheme

1 in 2002, and the other states and territories
2 followed. So the last jurisdiction, the last
3 state to introduce non-conviction based civil
4 forfeiture was Tasmania and that was fairly
5 recent.

6 Q You mentioned that the political and factual
7 impetus for conviction based schemes was a
8 perception of the -- an international perception
9 of the problem of drug trafficking. Was that --
10 were the Australian schemes addressed at solely
11 the problem of global or transnational drug
12 trafficking or was there also a concern with
13 domestic drug trafficking?

14 A Certainly both. Certainly both. I think the
15 federal scheme is obviously more focused on
16 transnational, but the state scheme is both.
17 And I should say it became -- the non-conviction
18 based schemes, although still primarily prompted
19 by drug trafficking, also started to shift focus
20 a bit, and we've seen that more recently as
21 well. So other transnational type serious
22 offences, terrorism, pedophilia, et cetera, so
23 while initially the sole focus was illicit
24 drugs, that has -- it's tended to broaden.

25 Q We heard from witnesses from the UK earlier this

1 week who've spoken about the UK approach
2 evolving to address problems and increased
3 perception of problems of grand corruption.
4 Have those -- has that been a concern in
5 Australia to date?

6 A Not that I'm aware of.

7 Q Just briefly, in one of your papers you describe
8 the proceeds of crime legislation as a
9 four-pronged weapon in the war against organized
10 and other serious crime and you set out the
11 objectives of proceeds of crime legislation
12 generally as to deprive, deter, incapacitate and
13 trace. And I'm wondering if you could just tell
14 us a little bit about those goals and
15 specifically how they connect to proceeds of
16 crime legislation.

17 A Sure. The first of those obviously is to ensure
18 that those engaging in criminal activity don't
19 benefit from that activity. So deprive them of
20 any benefits that may flow from their criminal
21 activity. And the second is closely related,
22 and that is to deter by sending a strong message
23 that you will not benefit from criminal activity
24 and you will not be permitted to retain any
25 financial benefits that flow. The third of

1 those objectives really relates to, I think,
2 more organized type crime, and so incapacitating
3 organized crime by cutting off the economic base
4 for that crime, so you remove the income stream
5 and -- in that way hope to thwart the
6 continuation of crime. But it also assists --
7 and I think it's fair to say that the
8 legislation has been least successful in
9 relation to those the fourth of those objectives
10 and that is tracing. So --

11 Q And [indiscernible]?

12 A Tracing funds in order to find the crime chain.
13 So chase the money chain in order to identify
14 the crime chain. But there are other
15 benefits -- or other objectives, I do think it
16 is seen in some respects as a way of increasing
17 public confidence in law enforcement, so that's
18 very much a political objective as well as
19 compensating victims and to some extent revenue
20 raising.

21 Q Now, you did mention that there's nine
22 jurisdictions within Australia, including the
23 Commonwealth, that have proceeds of crime
24 legislation, and just for your Canadian
25 audience, I wonder if you could briefly explain

1 the constitutional arrangements without making
2 this into an entire class on Australian
3 constitutional law, but the constitutional
4 arrangements that result in there being both
5 Commonwealth and state and territorial
6 legislation addressing proceeds of crime in
7 Australia.

8 A I'm afraid any constitutional law lesson that I
9 would give would be a very short 10-minute
10 lesson because I'm not a constitutional law
11 expert. Australia is a federation, as I said
12 with six states and two territories, and so
13 there are two levels of law making. Criminal
14 law -- and that may seem odd to refer to the
15 criminal law in the context where we're talking
16 about civil forfeiture, but I think broadly
17 speaking confiscation legislation is regarded as
18 falling within the criminal law sphere certainly
19 constitutionally -- criminal law is typically a
20 subnational responsibility, so a state
21 responsibility other than of course federal
22 offences. So you have the federal scheme which
23 covers confiscation in response to federal
24 offences and foreign offences and state schemes
25 that deal with state-based offences. I hope

1 that's enough for you.

2 Q I think that's satisfactory for our purposes.

3 Thank you.

4 Now, you say in -- actually in each of your
5 papers, really, that there's four types of
6 non-conviction based -- and one of them is a
7 hybrid conviction or non-conviction based
8 forfeiture in the various schemes. And can you
9 just tell us, first of all, what are the four
10 times of confiscation that we can find in the
11 various legislative schemes of proceeds of
12 crime.

13 A There is the crime-used property confiscation
14 scheme, sometimes referred to as tainted
15 property or instruments of crime. And that's in
16 place in all jurisdictions. There's
17 crime-derived property -- and actually strictly
18 speaking we're dealing with two different types
19 of forfeiture here, but just for convenience, I
20 have in all of my writings I've put them
21 together. What we're talking about here is the
22 criminal benefits that a person acquires
23 directly from the criminal activity. So you
24 steal a car, the car is the criminal benefit.
25 But also financial benefits, financial or indeed

1 non-financial benefits that you derive
2 subsequently as a result of your criminal
3 activity. And a classic example here is
4 literary proceeds. So you exploit your ill fame
5 through, for instance, selling -- writing and
6 selling a book.

7 We then have -- and that's also -- those
8 confiscation are also available in all
9 jurisdictions. There is -- a more recent
10 introduction, and it started with the West
11 Australian non-conviction based scheme that was
12 introduced in 2000, is the unexplained wealth
13 confiscations. So WA was the first jurisdiction
14 to introduce unexplained wealth. It's now in
15 place in seven of the eight jurisdictions and of
16 course the Commonwealth.

17 And then some jurisdictions, not all, have
18 specific confiscations relating to drug
19 trafficking. So whereas others include those
20 confiscations within the crime-derived property
21 scheme, others have hived it off and created its
22 own scheme.

23 Q And I'll return to both the drug trafficker
24 confiscation schemes and the unexplained wealth
25 orders, but first I'd ask you if you could tell

1 us a little bit about how the crime-used
2 property or instrument of crime provisions work,
3 if there's a standard operation of that process
4 of that confiscation power across jurisdictions.
5 If you could just tell us what the legislative
6 power is and how the authorities who are
7 authorized to use it go about using it.

8 A One thing worth noting is that every
9 jurisdiction has a different scheme. And so
10 there is -- I've referred to it in some of my
11 writing. I've just been reading over some of it
12 in the last couple of days. It's a tangled web,
13 and it certainly is -- so it's very difficult to
14 give a simple response without sort of delving
15 into the devils of the detail within each
16 scheme. But I will try and give you an a
17 broad-based idea.

18 So there are two forms. There's WA and
19 there's the Northern Territory -- WA I'm
20 referring to Western Australia. WA and the
21 Northern Territory have a solely non-conviction
22 based scheme with a very broad definition of
23 what is crime-used property. Other schemes are
24 both conviction and non-conviction based,
25 including the federal scheme depending on the

1 severity of the offence in question.

2 So if it is a less severe offence, a less
3 serious offence, it's conviction based, you
4 require a conviction in order to confiscate
5 instruments of crime. The same applies to the
6 crime derived. So it's worth speaking about
7 both of those schemes together because they are
8 very similar in all jurisdictions -- across
9 jurisdictions.

10 For more serious offences there is no need
11 for a conviction, but the -- even across
12 jurisdictions what is a severe offence and what
13 isn't differs, so in Western Australia and the
14 Northern Territory it's two years and other
15 jurisdictions it's three years and some it's
16 five. It is a very wide definition, crime-used
17 property. That's property used directly or
18 indirectly in connection with a criminal
19 offence. It is property that has been used to
20 facilitate a criminal offence, property that has
21 been used to store the benefits of a criminal
22 offence. So it casts a very, very wide net, and
23 there have been a number of really odd cases
24 that illustrate, I think, that the arbitrariness
25 and in some cases the potential disproportion of

1 crime-used property confiscations.

2 Q I think it would probably be helpful for us to
3 hear an illustration of that oddness that you've
4 just described. Are there any particular cases
5 that come to mind?

6 A There are. There was a case coming out of
7 Western Australia that went all the way to the
8 High Court but was settled. It was a case
9 involving intercourse with a child that occurred
10 on the complainant's father's property. The
11 legislation is wide enough to construe that
12 property as crime-used property. It was the
13 property on which the offence was committed.

14 Q Sorry. It was the property of the victim's
15 father?

16 A Correct.

17 Q Okay.

18 A Correct. Yep. So that offence could really
19 have occurred anywhere. It could have occurred
20 in a tent on a camping site or it could have
21 occurred on a beach or it could have occurred in
22 the Ritz Carlton. It just so happened that it
23 happened on a property owned by the victim's
24 father. It is crime-used property and therefore
25 liable to confiscation. Now, what's also in

1 place is what is referred to in the Australian
2 schemes -- and likely in Canadian schemes; I'm
3 not sure -- is both *in rem* and *in personam*
4 confiscation. So with crime-used property,
5 initially it is *in rem*, so you are targeting the
6 thing, the property itself, the nominate
7 property that was the instrument of the crime.
8 However, in a situation like ours where that
9 property, that thing is not liable to
10 confiscation because it is not actually owned or
11 controlled by the respondent, there is an *in*
12 *personam* substitution confiscation which is the
13 value of that property, confiscation from the
14 property of the respondent to the value of the
15 instrument of crime. And then that's recovered
16 in various ways, depending on which jurisdiction
17 you happen to be in.

18 And so that illustrates the arbitrariness
19 of the scheme in that it just depends on where
20 the offence might occur. And so the example
21 given in the report was an example from a former
22 judge, actually, who said, you know, you can
23 commit that offence in a rubber dinghy or you
24 can commit that offence on a multimillion dollar
25 yacht, and that will determine what can be

1 confiscated.

2 Q So that I understand properly, the crime-used
3 property there, that is an *in rem* proceeding,
4 and there's a necessity to show that the
5 property was used in the crime but then if the
6 property is not subject to confiscation because
7 it's not owned or controlled by the person who --
8 and sorry, does this -- a substitution order is
9 dependent on there being a conviction or not?

10 A No. It depends on the jurisdiction. In Western
11 Australia and the Northern Territory; it's not
12 in other jurisdictions it depends on the
13 severity of the offence.

14 Q I see.

15 A For less severe offences which are under the
16 Commonwealth scheme an indictable offence is an
17 offence which is liable to a 12-month
18 imprisonment. Where you're dealing with simply
19 an indictable offence you require a conviction.
20 That's conviction based. And similar schemes in
21 Queensland, Tasmania and New South Wales, et
22 cetera. But for more serious offences it is all
23 non-conviction based.

24 Q For the substitution order, just to finish the
25 thought of the previous question was that for

1 the substitution order there's no need to show
2 any connection between the property which is
3 substituted for the crime-used property and the
4 offence?

5 A It's simply a debt.

6 Q I see.

7 A So it's recoverable as a debt to the Crown.
8 From any property.

9 Q And what jurisdictions are substitution orders
10 available in?

11 A They're available certainly in Western Australia
12 and the Northern Territory, Queensland, New
13 South Wales, South Australia. I stand to be
14 corrected, but I think also Victoria.

15 Q And I'll just mention we don't need to go to it,
16 but in your report "Pocketing the Proceeds of
17 Crime," which we've looked at the cover page of,
18 you do have a very useful chart that sets out
19 the non-conviction based confiscation provisions
20 that -- or the proceeds of crime confiscation
21 provisions in various jurisdictions and I'll
22 just note that that's at page 19 of the paper.
23 And it's a useful reference. The --

24 A Sorry to interrupt, Ms. Patel, but the
25 Commonwealth also has what they refer to as

1 pecuniary penalty orders, so that is the
2 equivalent of a substitution order.

3 Q Does that attach to a conviction-based
4 confiscation or non-conviction based?

5 A Again, that depends on the severity. So the
6 Commonwealth scheme is one of those blended
7 schemes that depends on the severity of the
8 offence.

9 Q The process for obtaining a crime-used property
10 order, a confiscation order, what is the
11 process? And I'm anticipating that probably the
12 answer depends on whether or not it's attached
13 to a conviction or not, but maybe it would be
14 best to step back and ask -- and we'll maybe
15 start with Western Australia. To whom is such
16 an order available? To which authorities are
17 such orders available?

18 A To the police or to the director of public
19 prosecutions, and that's not just in Western
20 Australia. That's in all jurisdictions.

21 Q And the process for obtaining one where it's
22 attached to a conviction, does it simply -- is
23 it simply an application that flows
24 post-conviction?

25 A No. Well, it depends, but it is a process that

1 is quite separate from the criminal proceedings.
2 So these are civil proceedings that operate
3 alongside but quite separately from the criminal
4 proceedings. And not necessarily at the same
5 time. So they're not necessarily synchronous.
6 They are typically, like all confiscations,
7 they're typically preceded by a restraining
8 order. And so that's to protect the property
9 and ensure that it's not dissipated or disposed
10 of, destroyed in the interim. So there is a
11 restraining order that's applied for. And then
12 it depends on which jurisdiction you're in as to
13 how long it is before that order is made final,
14 whether the making of a final order requires
15 court action or whether it's automatic. So,
16 again, depending on the severity of the offence
17 and whether or not there's a conviction, the
18 restraining order can result in automatic
19 forfeiture or automatic confiscation. But
20 they're not -- the two proceedings are quite
21 separate.

22 Q It's a civil proceeding that's brought
23 separately?

24 A Correct. And it can be before. In many --
25 well, certainly the restraining proceedings,

1 restraining order proceedings are typically
2 brought much earlier than the other -- than the
3 criminal proceedings.

4 Q And you mentioned that the proceeds of crime
5 confiscations are closely related to the
6 instrument confiscations. Are they available --
7 in what circumstances are they available and how
8 does that process unfold?

9 A So the process is generally the same. So the
10 police or the director of public prosecutions
11 with exercise their discretion as to whether to
12 institute proceedings to confiscate either
13 crime- used or crime-derived property or both.
14 And typically if there is property that falls
15 within one or the other, they will bring an
16 application to confiscate both. The process is
17 the same, so you have a restraining order
18 followed by either automatic confiscation or a
19 forfeiture or confiscation order. And as I
20 said, the type of property is either property
21 that is derived directly or indirectly from the
22 actual commission of the crime or proceeds that
23 are generated subsequently as a result of the
24 criminal activity.

25 Q And with respect to proceeds or crime-used

1 property applications that don't flow from a
2 conviction, what is the standard that the
3 applicant has to meet in order to obtain the
4 order? What do they have to show and to what
5 standard?

6 A It's to a civil standard, and again, it
7 depends -- there are slight variations depending
8 on which jurisdiction you have to be in -- or
9 you happen to be in. The most common is
10 property that is reasonably suspected of being
11 crime-used or crime-derived. So there needs to
12 be a reasonable suspicion.

13 Q And on meeting that test of showing a reasonable
14 suspicion that property is crime-derived or
15 crime-used, what is the -- does the burden shift
16 in any way, or is it simply the confiscation
17 order made?

18 A The burden sits initially with the applicant to
19 establish the reasonable suspicion. Once
20 established, it is then for the respondent to --
21 the respondent then bears the onus of showing
22 that the property is not crime-used or
23 crime-derived.

24 Q So in the first instance it's not on the
25 applicant to show on a balance of probabilities

1 that it is crime-used or crime-derived but
2 merely that on a balance of probabilities
3 there's a reasonable suspicion that it's
4 crime-used or crime-derived; is that correct?

5 A So there are reasonable -- it's variously
6 framed. So there are reasonable grounds for
7 suspecting or they reasonably suspect, there is
8 a reasonable suspicion. In WA I think the
9 terminology that's used is that it's more likely
10 than not. So it's very loose. It's imprecise.
11 It's not a difficult standard to meet. And very
12 quickly the onus shifts to the respondent.

13 It also doesn't have to -- it doesn't have
14 to be connected with a specific offence, so the
15 applicant doesn't have to point to a particular
16 offence for which that property was an
17 instrument, for example, just to an offence.
18 Without categorizing or pointing to the
19 particular offence.

20 Q And we're going to spend some time looking at
21 unexplained wealth orders, but I would -- before
22 we go there, I'll leave that for the last of
23 these four different kinds of powers, because we
24 would like to spend some time on that, and I'd
25 like to move on, though, to the drug trafficker

1 confiscation powers, unless there's anything
2 with respect to instruments or proceeds that you
3 think is important to mention about any of the
4 various Australian schemes.

5 A Only to say that -- only to say that there are
6 some jurisdictions which temper the potential
7 arbitrariness of the application. And I'm
8 talking specifically about crime-used
9 confiscations here, with a guided judicial
10 discretion, and so there is capacity for a court
11 to consider the disproportion, for example,
12 between the offence. If there has been a
13 conviction, the punishment, the sort of
14 sentence, and then also the extent of the
15 potential confiscation. And to moderate the
16 confiscation in response to that. So there are
17 some jurisdictions that's not the case in
18 Western Australia or the Northern Territory.
19 It's also not the case with automatic
20 confiscations. And there are some real
21 questions around automatic confiscations about
22 constitutional validity and whether it is an
23 instance of the executive assuming a judicial
24 function [indiscernible] for automatic
25 forfeiture.

1 Q And could you -- when we think of the
2 constitutional validity of these kinds of
3 schemes, we tend in Canada to think about, you
4 know, whether one level of government is
5 encroaching on another level's jurisdiction or
6 perhaps human rights concerns. What is the
7 constitutional consideration exactly that you're
8 saying that these schemes give rise to --

9 A It's a separation of powers and whether you have
10 either the legislature or the executive
11 encroaching on what is fundamentally or should
12 be fundamentally a judicial function.

13 Q And what is considered to be fundamentally a
14 judicial function?

15 A The decision-making and application of
16 legislation. So if courts don't have a
17 discretion and are required to make an order
18 because the confiscation is automatic and there
19 is no adjudication of the matter, it has been
20 argued that that is an assumption of the
21 judicial function. Those actions have generally
22 been unsuccessful, so there have been several of
23 them that have gone all the way up to the High
24 Court. And typically they've been unsuccessful
25 because there is still a checklist that has to

1 be gone through in order for the court to make
2 that final order, and that in and of itself
3 is -- so ensuring that all the conditions are
4 met in order for the property to be
5 automatically confiscated is seen as part of the
6 judicial function. And exercising a judicial
7 function, although it's very limited.

8 Q You anticipated my next question, which is --
9 which was whether any of those challenges had
10 been successful.

11 A Yeah, so few have. A couple have. And
12 generally where they have, the states have
13 responded simply by tweaking the language in the
14 legislation to overcome what was the
15 constitutional bar. So the constitutional
16 attacks on the legislation haven't been terribly
17 successful.

18 Q Moving on to -- and just by the way, we will
19 return to criticisms of the non-conviction based
20 schemes generally in our conversation, so there
21 will be an opportunity to go back to criticisms
22 of the proceeds and instruments legislation, if
23 you have any further comments. But I wanted to
24 move on to the drug trafficker confiscation
25 power. And if you -- I think perhaps maybe if

1 you could explain what that is with reference to
2 the Western Australian legislation?

3 A Yes. I think it's probably best illustrated by
4 reference to Western Australia and the Northern
5 Territory because in the other jurisdictions
6 that have over time started to introduce
7 specific drug trafficker schemes, they're not
8 vastly different; they don't vary much from the
9 other schemes. But in Western Australia and the
10 Northern Territory, they are really extreme and
11 quite startling, and primarily because they are
12 non-conviction based and the -- they target not
13 only property that's used or derived as a result
14 of the drug trafficking offence, but in fact
15 everything that is owned, controlled by or has
16 at any time been given away by the respondent.

17 So if you have an offence that triggers --
18 a drug-related offence that triggers the drug
19 trafficking declaration provisions in the *Misuse*
20 *of Drugs Act* -- and I think it's fairly low
21 level, and there have been comments made about
22 that too, the kinds of -- the quantities that
23 trigger the drug trafficker provisions are
24 relatively low. But once they are triggered and
25 once the declaration as a drug trafficker

1 provision and the *Misuse of Drugs Act* are
2 triggered, then all property owned by the
3 respondent can be confiscated. So what we see
4 happening in this state and also in the Northern
5 Territory is property that has been held by the
6 respondent for decades, long before they ever
7 became involved in drug trafficking, been
8 confiscated, property that has no connection
9 whatsoever with the offence being confiscated.
10 So there's this entire disconnect between the
11 offence and the property that is targeted by the
12 legislation.

13 Q And how do -- you say there's offences that
14 trigger the confiscation. What are the ways in
15 which the legislation is triggered? And I
16 understand there's both a conviction-based way
17 that it's triggered and a non-conviction based
18 way that the confiscation is triggered?

19 A It's all non-conviction based. All
20 non-conviction based. So it's 28 grams of
21 certain drugs like heroin and cocaine and
22 methamphetamine, et cetera, or 20 plants, the
23 equivalent of 20 plants or 3 kilograms of
24 cannabis will render a person liable to be
25 declared a drug trafficker under the *Misuse of*

1 *Drugs Act.* And a person who has been or who is
2 taken to be, who may be declared a drug
3 trafficker, is subject to the drug trafficker
4 confiscation scheme.

5 Q Just so I understand this, I understand that
6 there's the two -- you can be declared a drug
7 trafficker or that you can come to be declared
8 to be taken as a declared drug trafficker, so I
9 wanted to start with the one -- the first one.
10 How is it that one comes to be a declared drug
11 trafficker? Is that based on a conviction that
12 happened previously, or is it -- how does it
13 come about?

14 A Yes. So that is -- so when I say it's purely
15 non-conviction based, of course most
16 confiscations under the drug trafficker
17 confiscation scheme do flow from a conviction.
18 But they don't necessarily have to flow from a
19 conviction. So many of them are the result of a
20 person having been convicted and declared a drug
21 trafficker. But that's not a requirement. So
22 when I say it's non-conviction based, that
23 doesn't exclude conviction based, of course. So
24 it's simply a distinction between a person who
25 has in fact been declared or a person who may be

1 taken to be declared. And that doesn't require
2 a conviction.

3 Q And so in the case of a person who is declared
4 to be a drug trafficker, what do they need to do
5 in order to be declared a drug trafficker?

6 A Conviction of possession of a certain minimum
7 quantity.

8 Q Of -- you said 28 grams of -- I forget the
9 substance and then 3 kilos --

10 A They're [indiscernible] drugs. So, for example,
11 heroin, cocaine, methamphetamine.

12 Q All right. So that's -- I understand that. So
13 if a person is convicted of a drug offence and
14 there's a certain quantity of drug involved,
15 they are -- they can be declared a drug
16 trafficker, and is that a separate application
17 that is made by the authority seeking
18 confiscation, or is that something that happens
19 in the course of the criminal process?

20 A Generally it happens at the time of the
21 conviction.

22 Q And then the one -- and I have to look at my
23 notes in order to be able to say this
24 correctly -- how does one come to be declared to
25 be taken to be declared as a drug trafficker?

1 A Terrible, isn't it? It's just awful. I'm sure
2 they could have done a better job of that.

3 If you are charged with a drug-related
4 offence that on conviction would render you
5 liable to be declared a drug trafficker, but you
6 abscond or you die, then you are declared to be
7 taken to be declared a drug trafficker.

8 Q And then the same confiscation consequences flow
9 from that?

10 A Correct, yes.

11 Q And on the heels of that, you've written that
12 the drug trafficker confiscation scheme has been
13 an effective inclusion in proceeds of crime
14 legislation, but you ask whether the legislation
15 goes beyond its stated objective and impacts
16 unjustifiably on defendants and third parties.
17 I just want to break that down into two parts.

18 First of all, you say that the drug
19 trafficker confiscation schemes have been
20 effective. And what do you mean by that?

21 A They've been effective in the sense that the
22 vast majority of confiscations both in this
23 state and across the country have been drug
24 trafficker confiscations or confiscations
25 related to serious drug offences. And certainly

1 in Western Australia it is by far, it has been
2 by far the most effective scheme in terms of
3 both the number and quantum of confiscations.
4 So in that respect, it has certainly been
5 successful.

6 Q It has given rise to a large number of
7 confiscations of property?

8 A Proportionately compared to the other three
9 categories.

10 Q And the second part of the statement is you ask
11 whether the legislation goes beyond its stated
12 objective and impacts unjustifiably on
13 defendants and third parties. And if you could
14 just speak a little bit about how it impacts
15 unjustifiably on defendants and then maybe
16 unpack the statement about the impact on third
17 parties after that.

18 A Certainly. In relation to defendants, because
19 the confiscation provisions extend beyond
20 property that is in some way connected with the
21 crime, whether as an instrument or whether as a
22 benefit, and extends to all of the property
23 owned, owned and controlled not just at this
24 point in time but at any time but has
25 subsequently been given away, it's liable to

1 confiscation. So that the case study I use and
2 you would have read that in one of the papers
3 was an elderly couple. I think she was 78 and
4 he was 81. And they had -- the family home, the
5 family home he had built 40 years previously.
6 It had been their family home for 40 years.
7 Their son had become involved in drug
8 trafficking, and there were indications that
9 they were somehow involved. Certainly they were
10 found in possession of more than 20 plants and
11 more than 3 kilograms, which they said they were
12 storing for their son. And they lost their home
13 despite the fact that the home was not the
14 proceeds of crime. And I suppose the point I
15 make is there is a disconnect between what this
16 legislation is named, and it's named that
17 because that encapsulates the objective and
18 that's to strip people of the gains they have
19 made from the criminal activity, and what it is
20 actually doing which is stripping them of
21 everything they have owned lawfully and
22 unlawfully over many years.

23 So that's an illustration of -- because
24 nobody would object to a fundamental principle
25 that you shouldn't benefit from your criminal

1 activity. And certainly I don't take that
2 position. But at the same time there needs to
3 be a limit on the reach of the legislation as to
4 precisely what property it captures within its
5 net. And it ought to be limited to property
6 that is unlawfully acquired or that is used or
7 facilitates criminal activity.

8 The second question -- if you're happy for
9 me to move on.

10 Q Yeah, I just wanted to make a note just for the
11 record that that -- I believe you're talking
12 about the story of Mr. and Mrs. Davies, and
13 that's found at page -- just that account that
14 you gave is found at page 298 of the article at
15 appendix A of the overview report containing
16 selected writings of Dr. Natalie Skead. That's
17 just for our own record there. And yes, please,
18 I believe you were going to speak about the
19 impact on third parties.

20 A Yes. Which is I think the most striking feature
21 of this particular drug trafficker scheme is
22 it's -- there is an absence of judicial
23 discretion, and so there's no opportunity for a
24 court to consider the broader ramifications of a
25 confiscation order, which is automatic, so on

1 being declared or being declared to be taken to
2 be declared a truck trafficker confiscation is
3 automatic. Without judicial oversight.

4 One of the -- in the course of our funded
5 project, we spoke with members of the public who
6 had been caught up in confiscation proceedings.
7 And one of the interviewees was a mother of two,
8 twin boys, whose husband had left her 10 years
9 previously. They had together bought a house,
10 the family home. It had been registered in his
11 name. He was the party that was working. She
12 was raising the children. She didn't question
13 the property was registered in his name. He
14 left, but it had a significant mortgage. So
15 there was very little equity in the property.
16 He left and she serviced the mortgage
17 repayments. She attended to the maintenance of
18 the property. She had managed to accrue some
19 equity in the property, which in the meantime
20 had increased in value.

21 10 years later he was found at the border
22 between Western Australia and South Australia
23 with 68 kilograms of cannabis. And they
24 commenced confiscation proceedings against the
25 family home even though he had -- they hadn't

1 settled the property matters arising out of the
2 divorce.

3 So although she clearly had an interest, an
4 equitable interest, as the registered proprietor
5 of the property, it was his and it was
6 confiscated or was to be confiscated. That
7 matter hasn't been finalized. I think there is
8 a recognition that in those circumstances a
9 mother and her two children are -- will be left
10 homeless and they're really the ones that will
11 suffer as a result of the estranged father and
12 ex-husband's criminal activity. And there is no
13 discretion. The court has no discretion to
14 ameliorate that hardship.

15 Q And it's an issue that you returned to
16 repeatedly in your writings on proceeds of crime
17 is looking at the legislative structure of these
18 provisions is in many of them that lack of
19 judicial discretion to confiscate or not?

20 A It's not only that. It is -- so there are other
21 aspects -- that I think is the easiest way, the
22 most sensible reform. But there are other
23 aspects of the Western Australian and Northern
24 Territory drug trafficker provisions that are
25 quite startling. Actually, from a -- so my

1 background is as a property lawyer. And it was
2 I think those aspects, the property law
3 implications of the legislation that really
4 struck me and interested me more than a decade
5 ago.

6 The legislation provides that on
7 confiscation the property vests in the crown.
8 And if it is land -- and typically it is land,
9 because that is the most valuable asset that a
10 person owns -- the Crown becomes the registered
11 proprietor. So we have a torrens system, a land
12 registration system which is in place in Canada.
13 On the Crown becoming registered, the
14 legislation provides that all other interests,
15 registered or unregistered, are automatically
16 extinguished.

17 So even though one might argue well, if the
18 wife has contributed towards the mortgage
19 repayments for 10 years, she would have an
20 interest, an equitable interest in this
21 property, a certain proportion, and then you can
22 all work out what that might be. That's
23 irrelevant because on the Crown -- on the
24 property vesting in the Crown and the Crown
25 becoming the registered proprietor, all those

1 interests, all those other interests that
2 anybody else holds, including, remarkably,
3 mortgagees, lessees, et cetera, are
4 automatically extinguished. So there are
5 inadequate protections in the legislation for
6 third party interest holders, whether they're
7 family members and dependents or whether they're
8 not.

9 Q I imagine that this is not a consequence that is
10 a happy one for banks and other institutional
11 lenders. Has the legislation been challenged on
12 this basis or -- I'm not sure what the legal
13 basis would be, but has it been challenged by
14 those kinds of third parties that have interests
15 which suddenly disappear on operation of the
16 statute?

17 A So that's a really great question, and curiously
18 it hasn't. And that's because the executive
19 action doesn't match the legislation --

20 IT SUPPORT: Excuse me. Could we please take a
21 recess.

22 MR. MCGOWAN: Mr. Commissioner, that's our technical
23 staff. I gather there's some sort of problem
24 with the live stream with the connection. So
25 I'm going to ask that we stand down for five

1 A And I think I had started to answer that by
2 indicating that the law enforcement practice
3 doesn't quite match the language of the
4 legislation, and in fact as was noted in a
5 particular case which involved the confiscation
6 of a mortgaged property in which the judge in
7 question commented that for some reason the
8 applicant had left it to the mortgagee bank to
9 arrange for the sale of the property and to
10 recover the proceeds from the sale of the
11 property what was required to discharge the
12 mortgage.

13 The point really that was being made in
14 that case is there is no requirement and in fact
15 there is no provision in the legislation for
16 this to occur, but that appears to be the
17 practice -- the common practice of the
18 enforcement agency, so the DPP and the police,
19 which is why we haven't seen any expressed
20 concern raised by banks and other financial
21 institutions. It is -- it's remarkable
22 legislation that when you do discuss it with
23 those who are working with it on a daily basis,
24 there is a level of disbelief that that is in
25 fact what -- how the legislation was intended to

1 operate because in practice it is operating
2 differently. But of course that's not ideal.

3 Q Has there been any assessment of the
4 effectiveness of the drug trafficker
5 confiscation schemes on drug trafficking crimes,
6 the level of criminality in those jurisdictions
7 where they're available to authorities?

8 A There hasn't been. We undertook as part of our
9 project a very limited assessment because that
10 wasn't part of our methodology. And it seems
11 not. When you compare what is being confiscated
12 and the number and -- number and value of
13 confiscations, they are but a mere fraction of
14 what drug offences in particular are costing the
15 country. So figures like 47 billion have been
16 thrown around in the last couple of years
17 compared with confiscations that barely get to
18 eight digits.

19 Q And has there been any research that correlates
20 the availability of the drug trafficker
21 confiscation with crime rates? Has that been an
22 area of study?

23 A No. Certainly not one that I've been involved
24 in. Others might have. But there hasn't been
25 discourse in that regard in relation to this

1 particular legislation.

2 Q I'd like to move on to ask you about unexplained
3 wealth orders under Australian legislation.

4 We've heard -- you mentioned that Western
5 Australia introduced an unexplained wealth order
6 power in 2000, and that other jurisdictions have
7 followed suit, and I understand that the
8 Commonwealth implemented an unexplained wealth
9 power as well more recently than 2000 anyways;
10 is that correct?

11 A [Indiscernible].

12 Q When did the Commonwealth power -- when was that
13 enacted?

14 A The Commonwealth was introduced in 2010.

15 Q And can you with reference to -- let's start --
16 I understand each scheme operates a little bit
17 differently, but perhaps we can start with the
18 Western Australian scheme, the earliest one, and
19 if you could tell us how an unexplained wealth
20 order is obtained there.

21 A It is obtained simply on application. There is
22 no requirement -- there is no requirement to
23 establish any kind of preliminary connection
24 between a person's unexplained wealth and a
25 specific offence. Rather applications are

1 brought -- and the WA scheme has been said to
2 facilitate what are called fishing expeditions
3 that can be brought simply on a suspicion, on a
4 whim. There is no onus on the applicant
5 whatsoever. If an application is brought the
6 onus shifts immediately to the respondent to
7 establish that their wealth was lawfully
8 obtained.

9 Q And so in Western Australia when an authority
10 goes to court to obtain an unexplained wealth
11 order, what is the order that's obtained? What
12 is the remedy that is obtained from the court?

13 A It is an unexplained wealth order, which is an
14 *in personam* order. So it's not an *in rem*. It's
15 not targeting particular assets, particular
16 property, but rather it is an *in personam*
17 judgment, one might call it, against the
18 respondent, but it is accompanied -- so where
19 it's in other jurisdictions that order is
20 enforced as a judgment debt, it is enforced by
21 way of confiscation in Western Australia.

22 Q And so I understand that there's both a
23 preliminary unexplained wealth order and then
24 ultimately a confiscation. Is that how the
25 scheme operates?

1 A So it's not a preliminary. There is an
2 unexplained wealth order, and then there is a
3 confiscation order. So the unexplained wealth
4 order is the *in personam* order to a particular
5 value, and then the confiscation order is the
6 confiscation of property owned, controlled or
7 previously given away by the respondent to that
8 value.

9 Q And what's the legal effect of the first order
10 of the unexplained wealth order? Does it act to
11 freeze property, for instance?

12 A Generally all of these are generally preceded by
13 restraining proceedings.

14 Q I see.

15 A It would be very uncommon for any
16 confiscation -- any of the four categories of
17 confiscations to not be preceded by an
18 application for a restraining order, and that's
19 for reasons that I stated earlier, just to
20 ensure that the property pool of the respondent
21 is maintained.

22 Q And we'll stick with Western Australia, but in
23 Western Australia what does the applying -- what
24 does the applicant have to show in order to
25 obtain an unexplained wealth order in the first

1 instance?

2 A You're doing going to scoff at this, I suspect.
3 Nothing. They don't have to show anything.
4 Doesn't have to be a reasonable suspicion. They
5 simply bring an application. And the onus is
6 immediately on the respondent to prove the
7 lawful source of their property. And the
8 standard is -- so it's -- you wouldn't even call
9 it necessarily to -- that the court is operating
10 to a civil standard. So if after hearing the
11 matter it is more likely than not that the
12 respondent has unexplained wealth, the court
13 must make the order.

14 Q And that's at the first instance, the first
15 order that's sought. So on the first order, the
16 applicant is coming to court and trying to --
17 making an application and persuading the court
18 that it is more likely than not that the
19 respondent has unexplained wealth. Is that --

20 A No.

21 Q Sorry. I'm a bit at sea. Maybe perhaps you
22 could walk us through the -- what it is that the
23 applicant has to show at first instance in the
24 Western Australian scheme.

25 A The applicant does not have to show anything.

1 The applicant simply has to bring an application
2 calling upon the respondent to show that their
3 wealth was lawfully acquired.

4 Q And is there any discretion in the judge not to
5 grant the application?

6 A If after hearing the matter it is more likely
7 than not that the respondent has unexplained
8 wealth, there is no discretion.

9 Q So the -- and you say after hearing the matter
10 if the court concludes that it is more likely
11 than not that the person has unexplained wealth,
12 is that in the course of determining whether to
13 give the first order, the unexplained wealth
14 order, or is that with respect to the
15 confiscation itself at the second stage?

16 A No, that's the first order.

17 Q I see.

18 A And then the second order is in satisfaction of
19 that unexplained wealth order there is then a
20 confiscation order. But there would have been a
21 preliminary restraining order made earlier on in
22 the proceedings to protect property for
23 confiscation in the event that an unexplained
24 wealth order is made.

25 Q I see. And so there's an initial restraining

1 order, and then there is an unexplained wealth
2 order. And the unexplained wealth order is
3 obtained on the court being persuaded it is more
4 likely than not that the respondent has
5 unexplained wealth. And can you -- what is
6 meant by "unexplained wealth"? Is it
7 statutorily defined?

8 A It is. It is. I'm trying not to shuffle too
9 many -- where the value of a person's wealth
10 exceeds the value of his or her lawfully
11 acquired wealth.

12 Q I see. And once the unexplained wealth order is
13 given, is there a further process where the
14 respondent has an opportunity to have it set
15 aside or to rebut the finding?

16 A I suppose they could take it on appeal, but what
17 are you -- I'm not sure what they would appeal.
18 Simply the finding of the court that it's more
19 likely than not that person has unexplained
20 wealth. It is the most remarkable scheme,
21 almost unbelievable, in the onus that it puts on
22 a person to prove the lawful genesis of their
23 wealth. And what makes it even more remarkable
24 is that it operates retrospectively. So it
25 could be wealth obtained at any time in your

1 past where somebody may not have kept records.
2 It may be very difficult to prove how you
3 acquired wealth over, you know, 10 years ago or
4 15 years ago or 20 years ago. So it's a -- I
5 consider that there are very good reasons why I
6 have expressed so robustly in my scholarship
7 concerns about the harshness of the legislation,
8 particularly in Western Australia and the
9 Northern Territory.

10 Q So there is an opportunity at some point in the
11 process before the unexplained wealth order is
12 given for the respondent to lead evidence about
13 how the wealth was acquired; is that right?

14 A Yes.

15 Q I see. And who is -- in that process, who does
16 the burden fall on to show that wealth was
17 obtained lawfully or unlawfully?

18 A On the respondent. To show that it was obtained
19 lawfully.

20 Q Okay. On a balance of probabilities or you said
21 more likely than not?

22 A On the balance of probabilities that it was more
23 likely than not.

24 Q That's the Western Australian scheme. Does the
25 Commonwealth scheme differ in any material respect?

1 A Fortunately it does. And the schemes in all
2 other jurisdictions do in the sense that there
3 is an initial onus on the applicant to show that
4 there are reasonable grounds for suspecting that
5 the respondent has unexplained wealth. So there
6 is a threshold, sort of an initial hurdle that
7 has to be overcome before the onus is then
8 shifted to the respondent to prove that their
9 wealth was lawfully obtained.

10 Q And if the -- in either instance under the
11 Western Australian scheme or the Commonwealth
12 scheme, if a respondent cannot show that the
13 wealth was legally obtained or lawfully
14 obtained, what is the consequence?

15 A Provided there is a reasonable suspicion, so in
16 other jurisdictions, provided there is a
17 reasonable -- there are reasonable grounds for
18 suspecting that wealth was unlawfully obtained,
19 if the respondent is not able to demonstrate
20 that it was lawfully obtained, then there will
21 be an unexplained wealth order made. That is
22 the equivalent of -- so unlike in Western
23 Australia where that is followed by an *in rem*
24 confiscation order, under the other schemes it
25 is -- the unexplained wealth order is *in*

1 *personam*, it is a judgment set and it is
2 enforced as a judgment set against the property
3 of the respondent.

4 Q And is the order made against a specific
5 identified property?

6 A No. No.

7 Q It's an *in personam* order generally against
8 them?

9 A It's an order against the person to a particular
10 value. And then enforced as such.

11 Q The how is that value determined?

12 A So herein lies the difficulty with unexplained
13 wealth orders. That is -- and why I think in
14 Australia they haven't been as successful as it
15 was hoped. It is a very difficult process to
16 establish the quantum of wealth that is
17 unexplained which requires extensive forensic
18 accounting and expertise. But it is what
19 proportion of this person's wealth was not
20 lawfully acquired. And that is the value of the
21 order.

22 Q And can you tell us a little bit more about why
23 it would be difficult to establish the extent of
24 a person's wealth?

25 A Typically these actions are not brought against

1 somebody like me who earns a salary and has the
2 steady stream of predictable income. That's
3 easy to trace. It is a person, firstly, whose
4 wealth is very difficult to pin down. So even
5 just establishing the wealth, so to speak, of
6 the respondent is a complex and difficult
7 exercise. Then going through the process of
8 earmarking how much of that wealth was lawfully
9 acquired and how is another complex exercise.
10 The balance then is unexplained.

11 But, you know, if you're dealing with
12 somebody who has -- and typically these
13 applications are going to be brought against a
14 respondent who has a sizable estate. Working
15 through that with forensic accountants and
16 experts is not a simple process.

17 Q It sounds like it might be expensive as well.

18 A Very expensive.

19 Q And so picking up on some comments that you've
20 just made, what has been the outcome of the
21 availability of unexplained wealth orders in
22 Australia? Have they been used and -- we'll
23 start with the question of have they been used
24 and are there -- do you have any insight on how
25 much they've been taken up, to what extent?

1 A Not a great deal. In Western Australia
2 initially there were I think 16 unexplained
3 wealth confiscations. I think there have been
4 in fact in the 20 years of legislation being in
5 place around 16. Confiscations, they were early
6 on, so there haven't been any in recent years.
7 New South Wales had some success. They are now
8 involved in the national scheme, and there have
9 been no confiscations under the national scheme.
10 So they have proven spectacularly unsuccessful,
11 I would say, given what was hoped.

12 Part of that -- I'm not sure if you would
13 like me to go into my observations about why
14 that might be.

15 Q Please, yes.

16 A Part of that is in other jurisdictions, other
17 than New South Wales, it's law enforcement
18 agencies that implement the legislation, so
19 you've really got the police and you've got the
20 office of the director of public prosecutions
21 that are bringing these applications, and they
22 simply do not have the expertise, and they do
23 not have the time and they do not have the
24 money. So it is a complex lengthy and very
25 expensive process with no guarantee of success.

1 There have been queries about whether it
2 should be another agency that should pick up the
3 responsibility of unexplained wealth orders, and
4 that has occurred in Western Australia with the
5 Crown commission recently being given
6 responsibility for unexplained wealth orders.
7 It seems to me -- and this is having spoken to
8 those involved in the enforcement of the
9 legislation across three jurisdictions. It
10 seems to me that the authorities are leaving it
11 to the Australian Tax Office to pursue people
12 who are suspected of having unexplained wealth.
13 So because the tax office has the expertise,
14 this is what they do as a matter of course. It
15 is considered easier and more appropriate to
16 leave that difficult work to the ATO.

17 Q And does the tax office have the ability to
18 bring applications for unexplained wealth
19 orders?

20 A No. So it's quite a different process. It's
21 just tax evasion, tax avoidance. So they're
22 quite unrelated, but as I understand it, the
23 rationale is you're getting the same outcome.
24 So you're removing -- you're stripping them of
25 their unlawful wealth but through a different

1 process.

2 Q I'll return -- I think you mentioned that New
3 South Wales had some early success with
4 unexplained wealth orders, and I'd like to
5 return to that, but first just again a question
6 for the benefit of your Canadian audience. Can
7 you explain -- you mentioned the phrase "the
8 crime commission." What is a crime commission?

9 A So the crime commission is a different body from
10 the office of the -- so they're not an
11 enforcement body as much as a body that oversees
12 enforcement in each state. So each state as
13 well as the -- at a federal level there is a
14 crime commission that oversees the legislation
15 and the implementation of the legislation within
16 a jurisdiction. But typically they [indiscernible]
17 direct enforcement responsibilities.

18 Q Sorry, they direct enforcement responsibilities?

19 A Yes.

20 Q I see. So is it a body -- is not a
21 prosecutorial body nor a law enforcement body
22 precisely?

23 A No, it's not.

24 Q Okay. And in certain jurisdictions do they have
25 the ability to bring applications for

1 unexplained wealth orders?

2 A Well, they do if they have been granted that
3 ability. So in New South Wales, for example,
4 the New South Wales Crime Commission has the
5 responsibility of the unexplained wealth scheme.
6 So -- and the crime commission has the
7 expertise -- in New South Wales they have a team
8 of people who are dedicated to confiscation.
9 And in fact it's not only unexplained wealth,
10 it's confiscations more broadly are overseen and
11 enforced through the Crown commission. But
12 that's embedded in the legislation, so they're
13 granted the authority to do so in the
14 legislation. And it's because they have
15 dedicated teams, it's because they have the
16 necessary expertise that they have had more
17 success in confiscations generally, including in
18 unexplained wealth. But still in unexplained
19 wealth not to the extent of, for example, drug
20 trafficker confiscation.

21 Q So that's going back to the other question that
22 I was going to follow up on, is the -- is it the
23 fact of the -- in New South Wales, success
24 there, do you attribute that to the resources
25 and the dedicated resources there put towards

1 unexplained wealth orders to pursuing them?

2 A Indeed. And because it's got a dedicated
3 team -- so you will have -- within the police
4 you've got, you know, police enforcing law at a
5 really grassroots level but then also making the
6 decision as to whether to confiscate and then
7 seeing the process through. They simply don't
8 have the targeted and specific expertise that's
9 required. The director of public -- the office
10 of the Director of Public Prosecutions generally
11 have a small confiscation team, but again, it is
12 generally really small. Their primary focus is
13 the criminal proceedings and securing
14 convictions. Yes.

15 Q No, please finish your thought and then I can
16 hold my question.

17 A But what you have with the crime commission --
18 so the crime commission is not interested in
19 convictions; it's not interested in bringing
20 criminal prosecutions. Its sole focus is -- and
21 as I said it's dedicated, there were resources
22 dedicated to implementing the confiscation
23 legislation. And it's for that reason that they
24 have had more success.

25 Q And if the -- my question was going to be what

1 types of resources does the commission -- the
2 crime commission have that's dedicated
3 specifically to confiscation matters?

4 A It's people. So forensic accountants.

5 Q So not just people who are dedicated to the task
6 but people with specialized expertise, is
7 that --

8 A So of course they have solicitors, but in
9 addition to solicitors they have other expertise
10 that's required, which you don't have with the
11 DPP or the police force.

12 Q Okay. Are there any other structural factors
13 which you believe have led to the success, the
14 relative success of the New South Wales Crime
15 Commission in pursuing unexplained wealth
16 orders?

17 A Perhaps I should just reframe how I presented
18 it. I wouldn't say it's successful. But I
19 would say that of all the jurisdictions it's
20 been the most successful. But I would not --
21 certainly would not call it a success. Part of
22 the problem -- and I think it's a problem in New
23 South Wales and in fact in all other
24 jurisdictions is it's rarely the case that a
25 person against whom an unexplained wealth

1 application is brought is operating within the
2 borders of their state or within the country.
3 And so most commonly you're dealing with
4 transnational crime. And it's for that reason
5 there has been debate about introducing a
6 national scheme because of the competency at a
7 federal level to pursue transnational criminal
8 activity.

9 Q And can you tell us a little bit about the --
10 that national cooperative scheme, what gave rise
11 to it and how is it to operate?

12 A So the genesis of it was the recognition that
13 these matters -- as I've said, just as I've
14 explained really, that it would be a rare case
15 where a person with significant unexplained
16 wealth has derived that wealth through their
17 criminal activities within a state or within the
18 country. And to be clear, they are operating at
19 an international level, which requires federal
20 support, federal intelligence and federal
21 resources. But also information sharing and
22 research sharing across state borders.

23 So in concept it really was a very sensible
24 option to take. It's been unsuccessful in that
25 only New South Wales has joined the scheme.

1 It's the only jurisdiction -- other than the
2 territories which necessarily are part of the
3 scheme. New South Wales is the only one of the
4 six Australian states that has joined the
5 scheme, and since joining the scheme have not
6 generated any funds from confiscation of
7 unexplained wealth. And that, I think, is where
8 the reluctance has come from the other states.
9 It's an extraordinary idea that, you know -- and
10 I appreciate this may sound facile, but it did
11 come out of some of our empirical research.
12 They're our criminals; we want the money that we
13 confiscate from them and we don't want to have
14 to share it at a federal level or between
15 states, and so this concern about sharing of the
16 proceeds from confiscations, but also concerns
17 about information sharing.

18 Q What are the concerns about information sharing?

19 A The burden, really, of information sharing and
20 the complexity of it. That's not to say that
21 there isn't some level of information sharing as
22 it is, but the -- I suppose it's very much bound
23 up with the first concern, and that is
24 information sharing that is going -- that is for
25 the benefit, financial benefit of another

1 jurisdiction as opposed to information sharing
2 for our own benefit.

3 Q So it's a concern with the burden of information
4 sharing obligations rather than with concerns
5 about sharing -- the information being shared
6 itself?

7 A Yes. Oh, yes, absolutely. Absolutely. I think
8 the other issue with unexplained wealth is very
9 often, you know, if there is -- if a person has
10 been earmarked as somebody to watch in relation
11 to unexplained wealth, generally there will be
12 some other reason why they have been earmarked
13 as somebody watch. And often that will be
14 related to serious drug-related offences and so
15 it's easier just simply to proceed on other --
16 on the other categories of confiscation and
17 unexplained wealth.

18 Q Based on your research, what is the assessment
19 of the effectiveness of unexplained wealth
20 orders on addressing drug trafficking or
21 organized crime issues?

22 A In concept very effective. But if you're not
23 able to implement it effectively, then not.

24 Q And has there been any consensus as to whether
25 there has been effective implementation?

1 A Given the very low rate of unexplained wealth
2 confiscations, I would say it is generally
3 accepted that it has not been very successful.

4 Q You have -- thank you. We've gone through the
5 description of generally four tools available in
6 Australia with respect to confiscation.

7 And I'd now like to move into a discussion
8 of criticisms of the non-criminal --
9 non-conviction based confiscation schemes
10 generally, which is the topic you've written on
11 extensively. And some of those thoughts are
12 reflected in your recent paper "Pocketing the
13 Proceeds of Crime." And I wanted to touch on a
14 couple of the issues that you address there, and
15 I think the first thing that you touch on was
16 something we've already discussed, is lack of
17 judicial discretion. Is the lack of judicial
18 discretion in the application of proceeds of
19 crime legislation something that you've seen as
20 being universally a problem across the
21 Australian legislative regimes?

22 A It's more problematic in some jurisdictions than
23 others. There are some jurisdictions that do it
24 pretty well. There are some jurisdictions where
25 there is no discretion at all. There are some

1 where there is discretion for certain kinds of
2 applications but not others. There are some
3 where it is a fairly limited, narrow, guided
4 discretion and others where it is a broader
5 discretion.

6 And also in our recent funded project, we
7 did hear different views, actually, in relation
8 to the issue of judicial discretion, including
9 from judges. So on the one hand it is my strong
10 view from the work that I have done that
11 judicial discretion is essential to avoid many
12 of the pitfalls of confiscation legislation, and
13 in particular to avoid the harms that can
14 result. And often these harms are -- they're
15 unexpected. So you have certain harms that are
16 typical. So you have, you know, the dependent
17 family members, you have other interest holders,
18 and then you have harms that just come out of
19 the blue.

20 There was a recent case, a recent Victorian
21 case, if you don't mind me sharing with you,
22 because it was just a real surprise to me. This
23 was an accountant who had a dodgy scheme that he
24 got many of his clients to contribute to. So
25 they were contributing their life savings to

1 this fabulous scheme that he had put together,
2 but in fact he was expropriating. He was
3 stealing their money really. He was convicted
4 and, as part of the sentencing, compensation
5 orders were made to his clients. Now, they have
6 no connection to him other than he was their
7 financial advisor. In the meantime, his
8 property gets confiscated and that property
9 includes what he has stolen and the actual --
10 and the tracing, the assets into which the money
11 that he had stolen -- the traced, you know what
12 I mean, the tracing principal. So you know, he
13 stole a million dollars and bought property that
14 increased in value of a million dollars. All of
15 that property was confiscated under the
16 Victorian scheme.

17 His former clients are sitting with
18 compensation orders that were made in the
19 criminal proceedings which are really judgment
20 debts, but they have no way of enforcing them.
21 So even though his assets, the accountant's
22 assets are really the product of what he has
23 stolen, the property and the money that he has
24 stolen from his clients, they have no interest
25 in those new assets and have no way of accessing

1 them because they've been restrained and are to
2 be confiscated. And so unintended surprising
3 consequences that require a safety net where at
4 the final decision-making a court can consider
5 these implications, the effects of the
6 legislation, of the implementation of the
7 legislation in its strict form. And moderate
8 orders -- exercise their discretion in
9 moderating orders to ensure that there are no
10 unjust harsh outcomes on what are purely
11 innocent third parties.

12 So that's the case for a judicial
13 discretion and I suggested that it should take
14 into account public interest, it should take
15 into account severe hardship of third parties,
16 so of course we expect that the -- we would
17 expect that the respondent will suffer hardship.
18 That's the very point of the legislation, but
19 severe hardship to third parties. And also
20 disproportionality. So although there may not
21 be hardship or may not be in the public
22 interest, if it is clearly so disproportionate
23 to the offence, and that can be judged by
24 reference to the sentence, the punishment for
25 the offence, there should be an ability for a

1 court to intervene.

2 Q And my question was going to be where in the
3 process do you think that judicial discretion is
4 the most important and do I understand correctly
5 from what you said it's at that final stage of
6 the making the confiscation order or is it at
7 another point in the process that judicial
8 discretion is key?

9 A I think at it's two points in the process. At
10 the restraining point. Because restraining is a
11 significant end cost on property owners and
12 those who have an interest in property,
13 including, for instance, co-owners, mortgagees,
14 lessees, trustees, et cetera, so it should be at
15 both stages, both the restraining stage and the
16 final confiscation stage.

17 I should -- I feel compelled to share
18 the -- another view, because it is a view that
19 came out in our empirical research, including in
20 our conversations with judges, but particularly
21 with enforcement agencies, and that is the
22 uncertainty that can often arise where you have
23 a nonspecific discretion that can be exercised
24 by a court. I'll just leave you to think about
25 that.

1 proceedings. They look the same, they smell the
2 same, they feel the same. They're not the same.
3 And it's this pervasive misconception that they
4 are -- that the confiscation proceedings are
5 part of the criminal proceedings and that they
6 occur at the same time and they're synchronous,
7 et cetera that really highlights the perception
8 that they are part and parcel of the same
9 exercise. And so it is difficult
10 philosophically to think of them as an entirely
11 separate proceeding that occur quite -- that are
12 quite unrelated from one another in a
13 non-conviction based scheme.

14 Having said that, the civil -- the
15 conviction-based scheme simply was not working
16 and so there is a recognition, there's a broad
17 based recognition that non-conviction based
18 civil proceedings are required. That
19 necessarily entails a civil standard of proof by
20 definition. What is particularly concerning,
21 though, is the shifting of the onus and the
22 presumptions and the many, many deeming
23 provisions that one sees peppering this
24 legislation. There needs to be a threshold that
25 applicants must meet before any burden can be

1 shifted to the respondent.

2 Now, in all other types of confiscations
3 other than unexplained wealth, I don't see why
4 at any point the onus needs to shift to the
5 respondent. They are civil proceedings; the
6 burden is on the applicant to a civil standard.
7 Unexplained wealth, the very need to introduce
8 unexplained wealth schemes encapsulates the
9 difficulty with applicants in bringing these
10 applications. So perhaps there is an argument
11 that at some point it is appropriate for the
12 onus to shift, but at the very least there must
13 be some reasonable basis for bringing the
14 application. And in some jurisdictions, at
15 present, there simply isn't.

16 Q Do you think that any of the Australian
17 jurisdictions that have unexplained wealth
18 orders have articulated the threshold
19 appropriately, and if so, how have they done so?

20 A They've all articulated it in terms of
21 reasonable suspicion, which I don't think is
22 tight enough. It's too low a threshold to then
23 expect a respondent to discharge their onus.
24 And that tended to be the view of certainly the
25 practitioners, the solicitors and barristers who

1 are working in this area across Australia,
2 including in New South Wales which has a
3 reasonable suspicion threshold. It's too low.

4 Q And what do you say is the appropriate threshold?

5 A I'm not sure what -- so we haven't made specific
6 recommendations as to what it should be, so I'm
7 not able to answer that question.

8 Q But in your view none of the jurisdictions that
9 you're surveyed in Australia have hit the
10 threshold appropriately?

11 A No, I don't think they have.

12 Q I didn't -- a question that I meant to ask you
13 previously is Western Australia introduced its
14 unexplained wealth order schemes in 2000, the
15 Commonwealth in 2010. What was the mischief
16 that they were aimed at? Why were they deemed
17 necessary?

18 A They deemed -- so unexplained wealth orders are
19 targeting those very sophisticated and intricate
20 organized drug cartels and organized crime
21 groups where they are very good at hiding and
22 concealing their wealth but they live an
23 extravagant lifestyle. And the other schemes,
24 including drug trafficker schemes -- which were
25 initially targeted at what they refer to as the

1 Mr. Bigs but were never successful in capturing
2 those offenders, those sort of kingpin
3 offenders. So it was another option for trying
4 to capture those offenders which hasn't been
5 successful either.

6 Q Is it your view that non-conviction based
7 forfeiture in Australia has more successfully
8 targeted low-level traffickers, drug
9 traffickers, rather than those Mr. Bigs that you
10 referred to?

11 A Absolutely. There is no question about it.
12 Even the case law is replete with sort of the
13 middlemen or the lower -- in fact, no. The
14 smaller players don't even make it to courts
15 because it is too expensive and they can't
16 afford it. But the case law is replete with the
17 middlemen who are clearly operating in a much
18 bigger scheme, but they are not driving the
19 scheme at all. And that's because it's easy.
20 It's easier.

21 Q And what's required to target the higher level
22 traffickers or higher level organized crime with
23 these provisions?

24 A I think the key to the success of an unexplained
25 wealth regime is a properly resourced team of

1 experts, a properly resourced agency who takes
2 all responsibility for it, properly resourced,
3 have expertise, but with that would have to come
4 the recognition that that is expensive and that
5 unexplained wealth orders are not about revenue
6 raising.

7 I think often -- so with the success they
8 have had is these quick wins. So, you know, you
9 confiscate a family home in a middle class
10 suburb. It's a quick win. It's easy. The
11 legislation is so tight there's no arguments.
12 Easy to trace ownership, et cetera. So that
13 financially is probably worth the effort and the
14 benefit may outweigh the cost. That's unlikely
15 to be the case with unexplained wealth orders.
16 It is getting to the root of the problem and
17 putting a dent in the massive organized groups
18 that are really controlling the drug trade in
19 Australia and elsewhere. So you're not going to
20 be making money from this; it's going to cost
21 you. But what really are the objectives of the
22 scheme? And I think it's important to identify
23 to remind ourselves of what it is that these
24 schemes that non-conviction based forfeiture was
25 intended to achieve. And it's not about how

1 much money you raise through your confiscations
2 and what it costs you.

3 Q And do you think that evaluating success of a
4 confiscation regime by the amount of assets --
5 the amount of money essentially that it makes in
6 seizing the assets, the value of the assets that
7 it seizes, is that an appropriate way to measure
8 success?

9 A I think it's the simplest way to measure
10 success, but I do think it's blunt.

11 Q Is it an appropriate measure for determining if
12 there's an impact on criminal activity?

13 A Well, I think there are other ways of doing it.
14 It's not just about the drug trade because very
15 often, you know, the drug trade isn't operating
16 in isolation from other types of crime. It
17 is one way of assessing the effectiveness, but
18 it's certainly not the only way. And the fact
19 that other ways of assessing levels of crime may
20 point to an increase in crime regardless doesn't
21 mean that the confiscation schemes aren't
22 helping in some respects. So I guess it depends
23 on what you mean by effectiveness.

24 Q I suppose going back to the -- you ask the right
25 question. You have to ask what was the point of

1 the scheme in the first place, and if the goal
2 was to address serious organized crime, then --
3 what questions could you ask to determine if a
4 confiscation scheme is effectively having an
5 impact, if it's having an impact on serious
6 organized crime --

7 A Sorry.

8 Q No, besides numbers of assets, values of assets
9 confiscated?

10 A I suppose it's the scale of the impact that
11 perhaps we're talking about. You know, it is
12 the object -- the objects were to deprive, to
13 deter, to incapacitate and to trace. I'm not
14 sure that the level and quantity of confiscation
15 would necessarily point to meeting the tracing
16 objective. Probably not. But the simple fact
17 of confiscation does certainly deprive, deter
18 and incapacitate at some level. It's not the
19 panacea. It is one weapon in the armoury.

20 Q And just so I make sure that I've got this
21 point, you said that putting resources into the
22 agencies that pursue unexplained wealth orders
23 is key. Now, what specifically are the
24 resources that you say those agencies require?

25 A People, money to pay the people and time. So

1 all too often we see, you know, coming up to the
2 end of the reporting year frenetic activity to
3 secure restraining orders and confiscation
4 orders to meet KPIs. But these -- unexplained
5 wealth proceedings will take a great deal of
6 time. They need time, they need patience, they
7 need tenacity, and most importantly they need
8 experienced people that will cost a great deal
9 of money.

10 Q At page 71 of your report, just for the record,
11 it's 1135 of the PDF, exhibit F of the
12 international writings on asset forfeiture, you
13 say -- this is from "Pocketing the Proceeds of
14 Crime," Dr. Skead. You say:

15 "What clearly emerged from many interviews
16 was that, while unexplained wealth
17 confiscations have the potential to target
18 sophisticated organized crime syndicates,
19 to be successful they require significant
20 resourcing and skills, specifically in
21 forensic accounting."

22 And so is forensic accounting in particular the
23 expertise that you think is required for the
24 successful pursuit of unexplained wealth orders?

25 A I think it is. Can you hear me?

1 Q I can now. There was a moment where it seemed
2 that you were muted.

3 A Yes. Because currently there are legal experts
4 who are driving the implementation of the
5 schemes. There are public prosecutors. There
6 are solicitors and barristers, and so we have
7 the legal expertise well covered. What we don't
8 have is an understanding of -- and it's almost
9 the tracing exercise, a financial tracing
10 exercise of wealth, that is a forensic
11 accounting exercise and that is the expertise
12 that is sorely lacking.

13 Q You also say that what is required is a
14 dedicated and independent expert team such as
15 found in New South Wales. Can you explain what
16 you mean by "dedicated and independent" and how
17 that factors into the success?

18 A Dedicated in that they're not attending to, for
19 example, the criminal proceedings at the same
20 time. Their focus is the implementation of the
21 confiscation legislation, and in particular
22 unexplained wealth. And that, too, is what I'm
23 referring to in relation to the independence.
24 There's a real problem around, as I see it --
25 and there are other papers that I've written

1 that aren't in the pack -- around the exercise
2 of executive discretion as to -- as to who to
3 target for confiscation proceedings. And it
4 seems that in some instances it is somewhat
5 arbitrary. And -- well, no, I was going to say
6 capricious, but I retract that. But it does
7 seem arbitrary because it's left to enforcement
8 agencies that are not necessarily independent.
9 It should be -- in terms of unexplained wealth,
10 the independent body should be the body that
11 determines whether or not to institute
12 proceedings, who to institute them against and
13 then to pursue it through to the end. So it's
14 independent from other law enforcement
15 activities that might cloud decision-making but
16 also that might dilute expertise because they're
17 dealing with other matters at the same time.

18 Q What advice would you give to British Columbia
19 as it contemplates the possibility of adding
20 some kind of unexplained wealth order
21 legislation to its arsenal of civil forfeiture
22 powers? What would you urge British Columbia to
23 keep in mind and what advice would you give
24 either about legislative structure or
25 operational structure?

1 A I think the first piece of advice I would give,
2 which has proved really difficult in Western
3 Australia, is you can't backtrack. So you need
4 to be really judicious in how you initially and
5 what it is you initially introduce with the
6 appreciation that the legislation can be
7 tightened. So as and when there appear to be
8 loopholes or it appears to be weak in a
9 particular area, that can be tightened, those
10 holes can be plugged. But going in as Western
11 Australia did with this incredibly robust
12 draconian scheme at the outset has proven
13 intractable. It is very difficult, in fact I
14 would say probably impossible, politically to
15 come back from that position. So that would be
16 my first piece of advice. Not only in relation
17 to unexplained wealth, but reforming a scheme
18 more broadly.

19 Q And just that intractability, is that because
20 of -- why is that? What would be the perception
21 of a government that pulls back on the powers
22 that have been given by way of unexplained
23 wealth orders, for example?

24 A Weak on crime. It's the card that's played. It
25 doesn't matter who's in power, that is the

1 political card that is played. I have been
2 speaking with politicians about this for well
3 over 10 years and there are periods of great
4 interest and then just step away because it's
5 not the right time. It's never the right time
6 for either side, and we have a very sort of
7 bipartisan political landscape where it's one or
8 the other and there's very little on the
9 margins. And so those on the margins are able
10 to speak -- to speak boldly about the
11 legislation, but not those with real skin in the
12 game. So it is politically very unpopular and
13 in fact the tighter you make it, the better as
14 far as the public is concerned because there is
15 a lack of understanding of the detail and the
16 intricacies of the legislation, but the
17 perception is that it is, you know, this really
18 fantastic, essential tool.

19 Q That was your first point, be careful what you
20 legislate at first. And then what was your -- I
21 interrupted you as you were about to say your
22 second point.

23 A The second point is to ensure that there is an
24 appropriate threshold. And as I said, I'm not
25 sure what that is. I don't think we've got it

1 right in any Australian jurisdiction. I don't
2 believe it is reasonable suspicion, but there
3 has to be some minimum threshold that must be
4 met in order to bring an application and for it
5 to be heard and for the onus then to shift to a
6 respondent to have to demonstrate the legitimate
7 source of their wealth.

8 The third point relates to retrospectivity,
9 which is a real issue for respondents.
10 Retrospective legislation is problematic in any
11 event, but where you're casting an onus, a
12 significant onus, on a respondent to prove facts
13 which they were not aware they would ever have
14 to prove and may not have the ability to prove
15 is problematic.

16 Fourth, I would suggest, as I would with
17 all other aspects of confiscation legislation,
18 is a guided judicial discretion to avoid
19 perverse outcomes, perverse and unjust outcomes.
20 And the fifth I would say is take a great deal
21 of care with the agency that is -- in
22 constructing the agency and empowering the
23 agency that is going to be implementing the
24 legislation with an appreciation that it may
25 well cost financially more than you're going to

1 gain from it.

2 And finally -- sorry, that was to be the
3 final one. The final final is appreciating that
4 with these confiscation orders in particular,
5 you're going way beyond in terms of
6 implementation, you're having to extend way
7 beyond the borders of British Columbia, and so
8 cooperation, cross border cooperation is
9 essential.

10 Q Thank you, Dr. Skead.

11 MS. PATEL: Mr. Commissioner, I think that those are
12 my questions for this witness, but perhaps we
13 could take a break and over the break I'll just
14 check my notes and confer with my colleague and
15 make sure that I've not left anything out.

16 THE COMMISSIONER: Great, very well. We'll take
17 15 minutes, thank you.

18 THE REPORTER: This hearing is adjourned for a
19 15-minute recess until 6:46 p.m.

20 **(WITNESS STOOD DOWN)**

21 **(PROCEEDINGS ADJOURNED AT 6:31 P.M.)**

22 **(PROCEEDINGS RECONVENED AT 6:45 P.M.)**

23 **NATALIE SKEAD, a witness**
24 **for the commission,**
25 **recalled.**

1 THE REGISTRAR: Thank you for waiting. The hearing
2 is now resumed, Mr. Commissioner.

3 THE COMMISSIONER: Thank you, Madam Registrar.

4 Yes, Ms. Patel.

5 MS. PATEL: I have nothing further, Mr. Commissioner.

6 Thank you.

7 THE COMMISSIONER: Thank you. Ms. Friesen on behalf
8 of the province has been allocated 20 minutes.

9 MS. FRIESEN: Yes. Thank you, Mr. Commissioner.

10 **EXAMINATION BY MS. FRIESEN:**

11 Q Dr. Skead, I take it you can hear me?

12 A I can, yes.

13 Q Great. Thank you. I'm counsel for the
14 province. My name is Cherisse Friesen. I just
15 have a few questions for you regarding
16 unexplained wealth orders specifically in the
17 jurisdiction of Western Australia. And so as I
18 understand your evidence, the decision regarding
19 whether an application for an unexplained wealth
20 order is pursued is a matter of executive
21 discretion; correct?

22 A Yes.

23 Q And can you describe what factors the prosecutor
24 or the applicant would evaluate in order to
25 determine whether to bring that application?

1 A I wish I could. They haven't been forthcoming
2 as to what factors they do take into account, so
3 I'm afraid I can't answer that question. I
4 don't know. And that is -- I think that is a
5 broader concern with the executive discretion
6 that is embedded in the legislation more
7 broadly, not just in relation to unexplained
8 wealth, that there is a pervasive executive
9 discretion as to when and in what circumstances
10 to initiate confiscation proceedings, that is
11 really unbounded and unguided and there is no
12 accountability for not only explaining why
13 proceedings may have been brought in a
14 particular case, but more importantly, why
15 proceedings were not brought in other cases.

16 Q Right. Okay. Thank you. And beyond the high
17 level of professionalism that would be exercised
18 by the DPP in applying that executive discretion
19 and with respect to the unexplained wealth
20 orders in deciding to make that application, are
21 there any other safeguards that you're aware of
22 to ensure the proper use of the applications?

23 A No. The former Attorney General of Western
24 Australia's comment was that -- was simply
25 that -- in fact, a justice of the High Court,

1 Justice Gageler, who did express some concern
2 about the unbridled executive discretion in the
3 context of the Northern Territory legislation
4 which is mirrored on the Western Australia
5 legislation, was simply that we can take some
6 comfort from the fact "that the DPP will
7 exercise the discretion with the utmost
8 propriety." That's a safeguard we have, yes.

9 Q Okay. Well, is there any evidence that the
10 exercise of that discretion, executive
11 discretion is applied in a discriminatory
12 fashion or is there a perceived risk that it may
13 be applied in a discriminatory fashion?

14 A I don't think there is. What is evident is that
15 there is a tendency to pick low-lying fruit. So
16 where a confiscation is going to be a simple
17 process [indiscernible] likely without court
18 action, without any opposition, tends to be
19 prosecuted, which is why we see so few
20 confiscations making it to the courts, most
21 confiscations don't or they are settled, and in
22 New South Wales we've met with the Crown
23 commissioner and he indicated that matters are
24 settled because it is too costly. There isn't
25 any indication that it will be implemented in a

1 discriminatory fashion, and I don't believe it
2 would be. But whether or not that is enough of
3 a safeguard, remains a question, I think.

4 MS. FRIESEN: Okay. Thank you, Dr. Skead. Those are
5 my questions.

6 THE COMMISSIONER: Thank you, Ms. Friesen.

7 Now we have Ms. Magonet for the British
8 Columbia Civil Liberties Association who also
9 has been allocated 20 minutes.

10 MS. MAGONET: Thank you, Mr. Commissioner.

11 **EXAMINATION BY MS. MAGONET:**

12 Q Dr. Skead, can you hear me?

13 A Yes, I can.

14 Q Brilliant. Thank you. I have -- my first
15 questions are related to legal aid funding
16 available in Australia in civil asset recovery
17 situations. I believe from your research that
18 you've recommended that legal aid funding should
19 be available in asset confiscation cases. Is
20 that correct?

21 A We have, and it is, but currently it takes into
22 account -- in the means test it takes into
23 account the assets that are subject to
24 restraint. Our recommendation is that the means
25 test should exclude the confiscatable property

1 so that it is a means test that reflects the
2 means that are actually available to the
3 respondent.

4 Q And why in your view is it important that legal
5 aid be available in asset confiscation cases?

6 A For the same reason that legal aid should be
7 available in all other cases. Everybody has the
8 right to be heard, has the right to a fair trial
9 and that would apply in confiscation cases just
10 as it would apply in other criminal proceedings.
11 Confiscation proceedings are more expensive
12 because they are civil in nature, and so the
13 fees rack up fairly quickly. And there is, in
14 my view, as much a right to be adequately
15 represented in other matters as in confiscation
16 matters.

17 Q Thank you. I now have a question about a point
18 you made earlier in regards to advice to British
19 Columbia when considering whether to adopt
20 unexplained wealth orders and how to do so. You
21 mentioned that such -- when adopting legislation
22 concerning civil asset recovery BC should bear
23 in mind that it can be difficult to backpedal,
24 so if you adopt a strict regime it can be hard
25 to move back from that. Would you say that that

1 same concern bears true in deciding whether to
2 adopt unexplained wealth orders at all? In
3 other words, if BC does adopt UWOs that it would
4 be difficult to get rid of them once they're
5 here?

6 A I think there's no doubt about that. It's not
7 getting rid of any other crime fighting tool.
8 The more weapons we have in our armoury the
9 better equipped we are to fight a crime, and
10 particularly serious organized drug-related
11 transnational crime. I think it would be very,
12 very difficult to remove legislation that has
13 been introduced, absolutely.

14 Q Thank you. In your submission on the review of
15 *the Criminal Property Confiscation Act* in
16 Western Australia, I believe that you raised
17 concerns about the fact that the offences which
18 can trigger confiscation are not limited to
19 serious drug-related crimes and organized crime.
20 It's quite a broad scope of offences. What
21 types or concerns are raised by a confiscation
22 regime that targets a broad scope of unlawful
23 activity?

24 A It's a question of proportionality. In most
25 instances -- so although it is a non-conviction

1 based scheme, in most cases a confiscation will
2 be ordered in parallel with a conviction. So
3 the person in question is already being
4 convicted, they are already being punished at a
5 criminal level. Confiscation adds another level
6 of punishment, and if we think about the kinds
7 of crimes, for instance, in WA that could be
8 caught, and even in Queensland, for instance,
9 that might be caught by confiscation
10 proceedings, we do need to question whether they
11 warrant the time, the money and the additional
12 punishment that is levied as a result.

13 So in Western Australia it is an indictable
14 offence that is subject to a possible
15 imprisonment of two years. There are some very
16 low level offences that would trigger
17 confiscation proceedings and that's not the
18 object. It was never the purpose of this
19 legislation. The purpose of this legislation
20 was to confront head-on serious crime that is
21 posing a serious risk to our communities, to
22 society and the way in which we live. And so to
23 clog up a system with confiscations that respond
24 to less serious crimes is unjustifiable, I would
25 suggest.

1 discretion; retrospectivity; and atypical
2 provisions relating to the burden and
3 standard of proof."

4 I take it that it's your view that asset
5 forfeiture regimes that allow for confiscation
6 with no judicial oversight would raise serious
7 rule of law concerns. Is that correct.

8 A I would state it more broadly than that. It's
9 schemes that have the potential and do as a
10 matter of fact operate harshly on entirely
11 innocent third parties without the capacity or
12 ability for courts to intervene to ameliorate
13 those harsh consequences.

14 Q Thank you. Perhaps this is somewhat captured by
15 what you just said, so forgive me. Can I also
16 take it to be your view that the -- that regimes
17 that allow for no judicial discretion would
18 raise this concern -- this rule of law concern
19 and this impact on third parties concern?

20 A I think -- I'd like to frame it slightly
21 differently, and that is that I think including
22 a judicial discretion, a guided judicial
23 discretion, guards against the perverse outcomes
24 and harsh and unjust outcomes that could
25 eventuate.

1 Q When legislation provides for judicial
2 discretion but that discretion is quite narrow
3 in the context of civil asset forfeiture, is it
4 your view that harsh outcomes and rule of law
5 concerns may still arise?

6 A Sorry, could you repeat that question.

7 Q Certainly. So you've been speaking about the
8 types of concerns that can arise when an asset
9 forfeiture regime provides for no judicial
10 discretion. Is it your view that where there is
11 guided judicial discretion within the regime but
12 that it's quite narrow that these rule of law
13 concerns may still arise?

14 A They're far less likely to arise. But it is
15 possible. One thing I have learned in my years
16 of researching in this area is that you can
17 never be sure you've pinpointed every possible
18 harsh and perverse outcome because there will be
19 always be another one just sitting around the
20 corner. But a capacity for a court to have
21 oversight and ensure through the exercise of a
22 discretion appropriate outcomes is, in my view,
23 the best safeguard.

24 Q Thank you. Earlier you were speaking about
25 reversed onus provisions in asset forfeiture

1 regimes. Is it your view that these types of
2 provisions may underline the privilege against
3 self-incrimination by forcing an individual to
4 choose between defending themselves in a
5 confiscation case at the risk of potential
6 criminal charges or not doing so and risking
7 confiscation?

8 A I think that is a risk even regardless of the
9 shifting of the onus. Divorcing the civil
10 forfeiture proceedings from the criminal
11 proceedings carries with it that risk,
12 absolutely. Particularly where the confiscation
13 proceedings precede -- so, for instance, very
14 often the restraining orders proceedings will
15 precede any criminal proceedings, and there is a
16 significant risk in that context of
17 self-incrimination when a respondent is seeking
18 to avoid restraint.

19 Q And that risk exists even in the absence of a
20 reverse onus provision?

21 A I think it does, yes.

22 Q Thank you. Is it your view that presumptions in
23 civil asset forfeiture regimes can function
24 similarly to reverse onus provisions?

25 A Presumptions and damning provisions -- and as

1 I've mentioned, the legislation across the board
2 are peppered with presumptions and damning
3 provisions -- do have the necessary effect of
4 effectively shifting the onus onto the
5 respondent to rebut the presumption. Assuming
6 it is a presumption that can't be rebutted.
7 There are some damning provisions that are
8 strict.

9 Q Earlier you stated that outside the unexplained
10 wealth context there's no reason to shift the
11 burden to the respondent. Does that view -- do
12 you also hold this view with respect to
13 presumptions?

14 A Yes. I do.

15 Q Thank you.

16 A They're all really aimed at easing the task for
17 the applicant. That task is already simplified
18 because it is a lower standard of proof, and we
19 need to question, I think, whether it is
20 necessary to ease it even further through the
21 mechanism of a presumption or damning provisions
22 or reversing the onus.

23 Q Thank you. I just have one last question. In
24 your submission on the review of the *Criminal*
25 *Property Confiscation Act* in Western Australia,

1 you write about the risk of abuse of
2 confiscation legislation that can arise when
3 confiscation metrics are reflected in
4 enforcement agency performance measures. So my
5 understanding from reading that was that
6 confiscation metrics might include things like
7 the value of restrained assets or the net
8 proceeds. So that those would be performance
9 targets for the agency. What types of risk of
10 abuse can occur when these targets exist for an
11 agency?

12 A I wouldn't perhaps with hindsight use the term
13 "abuse." I think that is putting it too
14 strongly. But I think there is a risk of
15 applications, easy win applications that might
16 otherwise not be pursued because they don't
17 really serve the objectives of the scheme in
18 order to meet indicators.

19 Now, this is not something that I play
20 lightly and would not have included it in the
21 report was there not evidence pointing to it.
22 It is very limited evidence, I should say, but
23 there was anecdotal evidence, but in addition it
24 appeared from the documents that we received
25 that the guidelines and other documents received

1 from various agencies that in fact there are
2 these indicators and there are these metrics
3 that are used. And whenever you have metrics,
4 you run the risk of further enthusiasm.

5 Q So even if such metrics do not lead to abuse, if
6 you would want to qualify that statement, would
7 you take the position they could at the very
8 least distort the objectives of the agency?

9 A So I should just be very clear that the reason I
10 wouldn't say it's abuse is because it's strictly
11 in accordance with the statutory regime. So it
12 is simply acting as the agency is authorized to
13 act in accordance with the regime. The flaw
14 lies with the regime itself rather than with the
15 implementation of the regime, but because there
16 is an executive decision, there is the capacity
17 for enforcement to determine when it is and when
18 it isn't appropriate, when it is or when it
19 isn't in the public interest to proceed under
20 the scheme. So it's probably a question that
21 really comes back to the issue of executive
22 discretion and the breadth of that discretion.

23 MS. MAGONET: Thank you. Those are my questions.

24 THE COMMISSIONER: Thank you, Ms. Magonet. Now
25 Mr. Rauch-Davis on behalf of Transparency

1 International Coalition who has been allocated
2 15 minutes.

3 MR. RAUCH-DAVIS: Thank you.

4 **EXAMINATION BY MR. RAUCH-DAVIS:**

5 Q Dr. Skead, I just have a few questions emanating
6 from your work "The Politics of Proceeds of
7 Crime Legislation." In that piece you write
8 that one of the objectives of proceeds of crime
9 legislation is to trace the crime chain. I
10 believe you also gave testimony to that effect
11 today. Is that right? Do I have that right?

12 A [Indiscernible.]

13 Q Pardon me. I didn't hear that.

14 A Yes, yes, you have right.

15 Q Thank you. What do you mean by the crime chain?

16 A So where you have syndicates and money is --
17 essentially money laundering, isn't it, what
18 we're talking about, and tracing proceeds from
19 one asset to another from one person to another,
20 that is the confiscation -- the confiscation
21 processes allow that tracing to occur provided
22 you have the requisite expertise of course.

23 Q Right. And the tracing effort involves both the
24 asset in question as well as the person?

25 A Correct. Assets and people, yes.

1 Q Yes. And I believe in your evidence today you
2 mention that this is the least successful
3 objective, or you made a remark to that effect.

4 A Yes.

5 Q Why do you say that?

6 A It's the same reason unexplained wealth orders,
7 I think, have been the least successful of
8 the four types of confiscation processes in
9 Australia. And that is the -- tracing is a
10 notoriously difficult exercise, financial
11 tracing. It's a notoriously difficult exercise
12 regardless of whether it's within the criminal
13 proceeds or within a corporate context or a
14 propriety settlement between partners. It is a
15 difficult exercise for which, I'd suggest, the
16 vast majority of lawyers are ill-equipped and
17 police officers are ill-equipped. And so
18 it's the lack of expertise and the cost and the
19 complexity involved and the more sophisticated
20 the organized crime syndicate, the more
21 difficult the exercise.

22 Q Isn't part of the problem in tracing or having
23 effective tracing is that investigations often
24 hit a dead end at complex corporate structures?

25 A They do.

1 Q And that includes things like shell companies,
2 nominee ownership and complex trust structures;
3 right?

4 A Correct. Correct, which is why I mentioned that
5 often there are -- most commonly this is just
6 left to the Australia tax office to sort out
7 through the tax evasion processes.

8 Q And so all of that creates quite a distortion in
9 the crime chain and that's why there hasn't been
10 success in tracing efforts in Australia; right?

11 A M'mm-hmm.

12 Q Are you aware Australia doesn't have a corporate
13 beneficial owner registry?

14 A Yes, I am aware.

15 Q What did a corporate beneficial ownership
16 registry assist in these types of tracing
17 efforts?

18 A It may well assist, but we do need to be
19 mindful, as I stated earlier, that these are
20 typically transnational cross border
21 arrangements, and once they cross the border, it
22 becomes very difficult. And they are
23 sophisticated. They very rarely actually
24 emanate from within Australia. Typically they
25 are international with Australian nodes.

1 Q Right. But I take it you would agree that a
2 corporate beneficial ownership registry would
3 help facilitate tracing efforts involved in all
4 proceeds of crime legislation; right?

5 A Yes.

6 MR. RAUCH-DAVIS: Thank you. Those are my questions.

7 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

8 Anything arising, Ms. Magonet?

9 MS. MAGONET: No, Mr. Commissioner.

10 THE COMMISSIONER: Thank you. Ms. Friesen.

11 MS. FRIESEN: No, Mr. Commissioner.

12 THE COMMISSIONER: Ms. Patel.

13 MS. PATEL: No, Mr. Commissioner. Thank you.

14 THE COMMISSIONER: Thank you. Thank you very much,
15 Dr. Skead, for your time and the valuable
16 insights that you've given us into the regime in
17 Australia and your assessment of the strengths
18 and weaknesses of that regime. I think it will
19 prove very helpful to us as we move forward in
20 this commission of inquiry. So I'm grateful to
21 you and you're now excused from further
22 testimony. Thank you.

23 THE WITNESS: Thank you, Mr. Commissioner. It was a
24 pleasure and all the best with your inquiry.

25 THE COMMISSIONER: Thank you.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(WITNESS EXCUSED)

THE COMMISSIONER: Ms. Patel, I think we're adjourned
to tomorrow morning at 9:30, our regular time.
Is that correct?

MS. PATEL: Yes, that's correct, Mr. Commissioner.

THE COMMISSIONER: Thank you.

THE REGISTRAR: The hearing is adjourned until
December 18th, 2020, at 9:30 a.m.

(PROCEEDINGS ADJOURNED AT 7:15 P.M. TO DECEMBER 18, 2020)