

Proceeds of Crime

Australian Federal Police

Australian Financial Security Authority

Attorney-General's Department

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Canberra ACT
22 March 2017

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Australian Federal Police, the Australian Financial Security Authority and the Attorney-General's Department, titled *Proceeds of Crime*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely



Rona Mellor PSM
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

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Summary and recommendations

Background

1. The *Proceeds of Crime Act 2002* (the POCA) provides a scheme (the 'POCA scheme') to trace, restrain and confiscate the proceeds of crimes against Commonwealth law. It seeks to disrupt, deter and reduce crime by undermining the profitability of criminal enterprises, depriving persons of the benefits derived from crime, and preventing reinvestment of the proceeds in further criminal activity.

2. The POCA also provides a scheme that allows for confiscated funds to be given back to the community in an endeavour to prevent and reduce the harmful effects of crime in Australia. This mechanism has provided funding to non-government and community organisations, local councils, as well as Commonwealth and state police forces and Commonwealth criminal intelligence entities.

Audit objective and criteria

3. The audit objective was to assess whether the Australian Federal Police (AFP), Australian Financial Security Authority (AFSA) and the Attorney-General's Department (AGD) effectively carried out key operational and advisory functions related to property and proceeds under the *Proceeds of Crime Act 2002*.

4. To form a conclusion against the audit objective, the ANAO adopted the following high-level audit criteria:

- effective restraint is achieved by the AFP and/or AFSA through the timely implementation of appropriate court orders;
- AFSA administers restrained property in an efficient and economical manner and consistent with relevant court orders;
- AFSA disposes of forfeited property in an appropriate manner and transfers the net proceeds to the Confiscated Assets Account;
- AGD provides advice to the Minister for Justice on which proposals for funding from the Confiscated Assets Account represent the best value for money; and
- the AFP and AFSA report against benchmarked performance measures.

Conclusion

5. The AFP, AFSA and AGD effectively carry out key operational and advisory functions related to property and proceeds under the *Proceeds of Crime Act 2002*.

6. Risk based planning procedures are in place for deciding which property should be restrained and what conditions should be placed on the property when seeking a restraining order. The manner in which restraining orders are implemented depends on the type of property under restraint. For the major classes of property, AFP and AFSA processes have worked well and custody and control of property has been achieved in a way that minimises the risk of the property being dissipated.

7. AFSA has appropriate custodial arrangements in place for all types of property. Legislative and administrative constraints currently limit the ability of the Official Trustee¹ to achieve improved rates of return from the substantial amount of funds held in the restrained and forfeited monies bank accounts and the Confiscated Assets Account. AFSA also manages property in a way that is consistent with the relevant court orders and disposes of forfeited property in an appropriate manner in order to maximise the sale proceeds.

8. The AGD has established effective processes to identify the possible use of funds from the Confiscated Assets Account. It has also advised the Minister for Justice on proposals to assist in achieving value for money from expenditure. During the financial years 2010–11 to 2015–16, the main beneficiaries of funding have been Commonwealth law enforcement and criminal intelligence agencies. Significant funding has also been approved for non-government, community organisation and local council projects, with the New South Wales, Victorian and Queensland police forces also receiving funding.

9. The AFP publicly reports the estimated recovery value of property restrained each year. When combined with the Australian Crime Commission's (ACC's) public reporting of the estimated value of property confiscated each year, this illustrates the trends in the amount of criminal proceeds intercepted by the POCA scheme. AFSA also undertakes limited public reporting on its administration of property. This reporting does not include information on the costs of administering property under its custody and control, which is an important aspect of its overall performance in relation to the proceeds of crime. However, AFSA has made some improvements in its internal reporting capacity about the costs of managing property and is in the early stages of developing benchmarks for some aspects of these costs.

Supporting findings

Restraining property

10. Planning and decision-making procedures by the Criminal Assets Confiscation Taskforce investigators and litigators relating to restraint are risk-based. Where the AFP has judged that the risk of dissipation² is high, restraining order applications include a provision for custody and control of the property to be granted to AFSA.

11. Restraining orders are implemented in a timely manner and in a way that minimises the risk of property being dissipated. However, the AFP could do more to register orders involving motor vehicles on the Personal Property Securities Register (PPSR) in a timely manner.

Custody and disposal of property

12. Custodial arrangements for property that has been placed into the custody and control of AFSA vary depending on the type of property restrained. Testing demonstrates that appropriate custodial arrangements are in place for all types of property. Management of the funds held in the restrained and forfeited monies bank accounts and the Confiscated Assets

1 This is the 'Commonwealth Official Trustee in Bankruptcy'. As noted in chapter 1, the Official Trustee's powers and functions are exercised by AFSA under delegated arrangements.

2 Dissipation occurs where property is disposed of or disappears such that recovery may not be possible.

Account reflect legislative and administrative constraints that limit the ability of the Official Trustee to achieve improved rates of return from the substantial amount of funds held in these accounts.

13. AFSA manages property in a way that is consistent with the relevant court orders. Where consent, variation and/or exclusion orders are granted by the court, AFSA has acted consistently with the court order.

14. In 2015–16, the disposal processes utilised by AFSA have achieved sale proceeds from forfeited property which have exceeded the estimated value of the property, as determined by an independent and/or certified valuer, in 76 per cent of matters, including all of the higher-value property.

How funds from the Confiscated Assets Account are used

15. The processes through which the possible use of funds—stand-alone projects or grant programs—are identified and submitted for the Minister for Justice’s approval have evolved over time. In recent years, more structured and targeted processes have been implemented in order to assist in achieving better overall outcomes from Confiscated Assets Account funding. The AGD provided the Minister with relevant advice to assist him in meeting his decision making obligations.

16. The main beneficiaries of funding from the Confiscated Assets Account have been Commonwealth criminal intelligence or law enforcement entities. Significant funds have been approved for non-government, community organisation and local council projects, mainly through the Safer Streets Programme. The New South Wales, Victorian and Queensland police forces have also received funding.

Performance Monitoring and Reporting

17. The AFP publicly reports on the estimated recovery value of property restrained each year and whether the AFP has met the benchmark set for that year. It also internally monitors another key performance measure—the estimated value of property confiscated each year—which is publicly reported by the ACC. These two measures illustrate the trends in the criminal proceeds intercepted by the POCA scheme. In the context of a current AFP wide review of performance measures, additional metrics could be developed to provide better information both on the AFP’s performance in litigating POCA cases and, in the longer term, the effect of the POCA scheme on the underlying criminal economy.

18. AFSA’s public reporting on its administration of property under its custody and control is limited to high-level information. It is in the early stages of developing an improved internal reporting capacity to monitor the costs of managing property under AFSA custody and control. This work could also be used to enable public reporting of the costs to administer such property, which is an important aspect of AFSA’s overall performance and responsibilities under the POCA scheme.

Recommendation

Recommendation No.1

Paragraph 3.13

The Australian Government should implement arrangements to facilitate improved rates of returns from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account.

Attorney-General's Department Response: *Noted.*

Australian Federal Police Response: *Noted.*

Australian Financial Security Authority Response: *Noted.*

Summary of entity responses

19. The summary responses to the report from the Attorney-General's Department, the Australian Federal Police and the Australian Financial Security Authority are provided below. These responses were provided under a single covering letter from the Secretary of the Attorney-General's Department. The letter and full responses are at Appendix 1.

Attorney-General's Department

The Attorney-General's Department (AGD) administers the *Proceeds of Crime Act 2002* (the Act) which provides a scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth law. It seeks to disrupt, deter and reduce crime by undermining the profitability of criminal enterprises, depriving persons of the benefits derived from crime, and preventing reinvestment of the proceeds in further criminal activity.

The Act also provides a scheme that allows for confiscated funds to be given back to the community in an effort to prevent and reduce the harmful effects of crime in Australia. This mechanism has provided funding to non-government and community organisations, local councils, as well as Commonwealth and State police forces and Commonwealth criminal intelligence agencies.

Section 297 of the Act makes provision for various payments from the Confiscated Assets Account (CAA), including payments under a program approved by the Minister under section 298 of the Act. The CAA is administered by the Australian Financial Security Authority (AFSA).

Section 298 of the Act allows the Minister for Justice to approve programmes of expenditure for one or more of four purposes:

- Crime prevention measures
- Law enforcement measures
- Measures relating to treatment of drug addiction, and
- Diversionary measures relating to illegal use of drugs.

There is often a significant time delay between assets being restrained and the completion of legal processes leading to the confiscation and realisation of assets. It is common for the realised value of confiscated assets to be less than their estimated value at the time they were restrained. This arises where the value of assets changes over time, and where legal fees are deducted before confiscated funds are finally received into the CAA.

Australian Federal Police

The Australian Federal Police (AFP) welcomed the opportunity to contribute to the Australian National Audit Office (ANAO) performance audit on the effectiveness of the Proceeds of Crime scheme.

The AFP acknowledges the commentary provided in the report and notes the ANAO's conclusion that the AFP, AFSA and AGD effectively carry out key operational and advisory functions related to property and proceeds under the *Proceeds of Crime Act 2002 (Cth)*.

Australian Financial Security Authority

AFSA notes the report's findings that for the major classes of property AFSA processes have worked well and custody, control and disposal of property have been achieved in a way that minimises the risk of the property being dissipated.

In respect of the bank accounts, AFSA currently earns a rate of return on funds in the restrained and forfeited bank accounts and the Confiscated Assets Account in accordance with the provisions of the *Proceeds of Crime Act 2002*.

AFSA will work with key stakeholders and agencies to facilitate arrangements that improve rates of return from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account whilst ensuring compliance with the *Proceeds of Crime Act 2002*.

Audit Findings

1. Background

Introduction

1.1 Initial legislative confiscation schemes were established by the Commonwealth and Australian states from the mid-1980s following recommendations made by a number of inquiries, notably the 1983 Royal Commission of Inquiry into Drug Trafficking. These schemes were seen as a way of targeting not only those persons directly involved in carrying out crime, but also those who ‘direct, finance and reap the most reward from crime’.³

1.2 Since the 1980s, the various Australian confiscation schemes have been extensively amended, including allowing in certain cases for property to be permanently confiscated without the need for any person to be convicted of a crime.⁴ Such ‘non-conviction’ based confiscation can only occur where a court makes an order to this effect. The schemes seek to disrupt, deter and reduce crime by: undermining the profitability of criminal enterprises; depriving persons of the benefits derived from crime; and preventing reinvestment of proceeds in further criminal activity. Various international agreements also provide for cooperation between countries in the investigation of suspected unlawful activity and enforcing relevant court orders where property is located overseas.⁵

Key common steps under the Proceeds of Crime scheme

1.3 The Commonwealth confiscation scheme is created by the *Proceeds of Crime Act 2002* (POCA).⁶ A simplified representation of the key aspects of the scheme relating to property restraint and confiscation is shown in Figure 1.1.

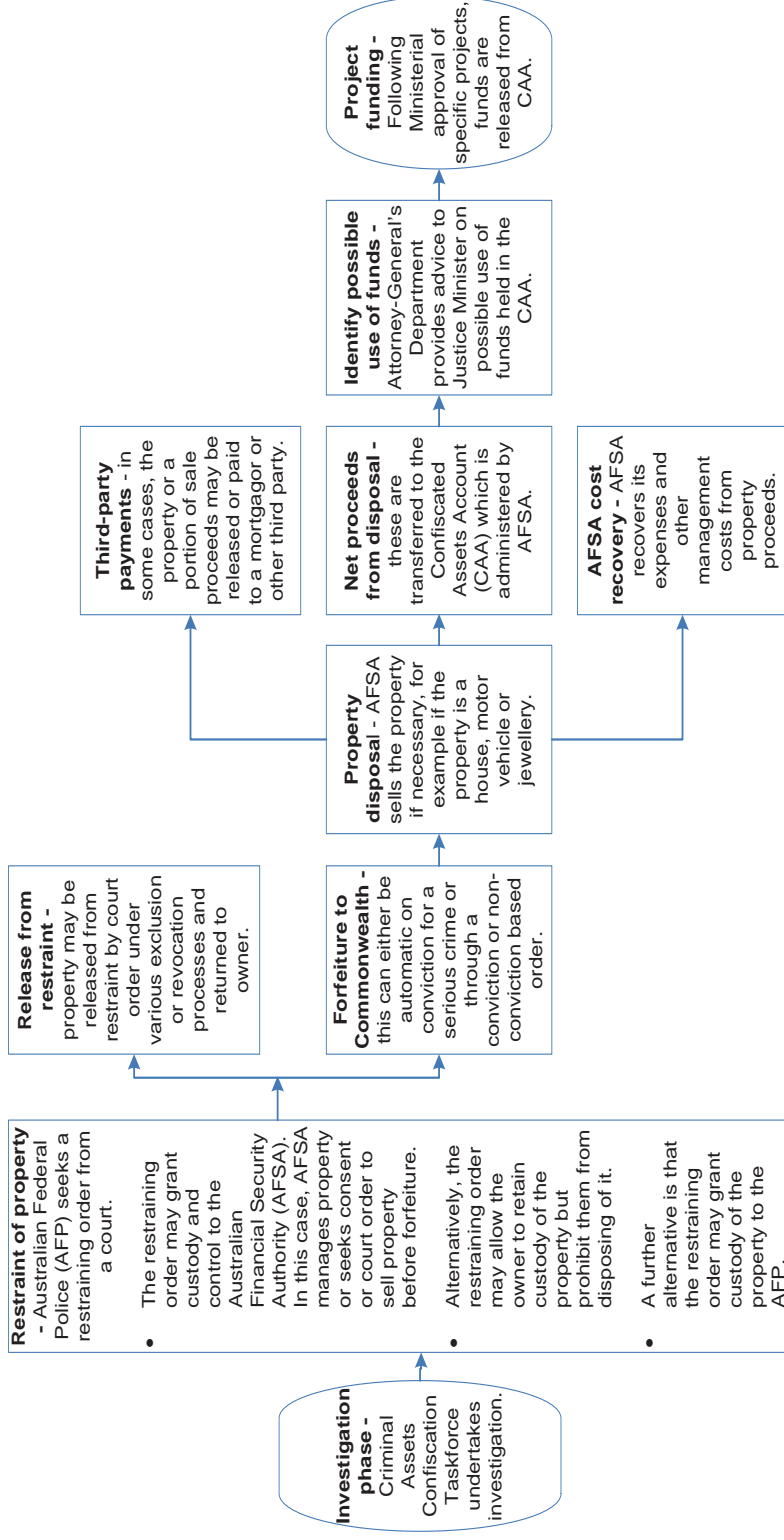
3 The Hon Lionel Bowen, Hansard, 30 April 1987, p. 2314.

4 The Tasmanian *Crime (Confiscation of Profits) Act 1993* has no provision for non-conviction based forfeiture, but allows for confiscation of unexplained wealth.

5 These may be bilateral mutual assistance treaties, or multilateral conventions such as the United Nations Convention Against Corruption that include asset recovery.

6 The ‘original’ Commonwealth confiscation scheme legislation, the *Proceeds of Crime Act 1987*, has not been repealed. It remains in effect to handle some legacy cases commenced before the 2002 legislation. Less than \$1 million of property remains restrained under the *Proceeds of Crime Act 1987* and is not considered by this audit.

Figure 1.1: Key steps in restraining and confiscating the proceeds of crime



Source: ANAO analysis.

1.4 The investigation and identification of property potentially subject to the POCA is mainly undertaken by the Criminal Assets Confiscation Taskforce. The Taskforce was created in 2011 and is led by the Australian Federal Police (AFP). The other members of the Taskforce are the Australian Taxation Office and the Australian Criminal Intelligence Commission, with staff seconded from other Commonwealth entities as needed.⁷

1.5 Under the POCA restraint provisions, the AFP^{8,9} can seek a court order to restrain property that is suspected to be the proceeds, or an instrument of, criminal activity under Commonwealth laws¹⁰, or the property of a person suspected of such criminal activity.¹¹ Such orders prohibit, or impose restrictions on, any person from disposing or dealing with the property, including by destroying, transferring ownership to another party, or giving it away.¹² Amongst other things, restraining orders allow law enforcement agencies to investigate suspected unlawful activity whilst minimising the possibility of the relevant property being dissipated due to the suspects being alerted to the investigation.¹³ Where the property includes bank account funds or similar, the order effectively requires the relevant financial institution to prevent any movement of funds out of specified account(s). A restraining order may be registered with the applicable state or territory land titles office or on the Personal Property Securities Register (PPSR).¹⁴

1.6 A restraining order may leave the property in the custody of its owner, or the AFP if the property was seized as part of a police search. Alternatively, a restraining order may give 'custody and control' of specified property to the Commonwealth Official Trustee in Bankruptcy (Official Trustee). The Official Trustee is a body-corporate, whose powers are exercised under delegation by officers of the Australian Financial Security Authority (AFSA).¹⁵ Restrained property under AFSA's custody and control is not Commonwealth property, rather it is held on trust. During 2015–16,

7 For example, as at November 2016 the Taskforce included a secondee from the Australian Border Force.

8 Technically, the AFP's power to undertake litigation under the POCA lies with its chief executive, the AFP Commissioner. References to the AFP in this report include situations where AFP employees are exercising functions delegated from the AFP Commissioner.

9 The Commonwealth Director of Public Prosecutions (CDPP) may also undertake litigation under the POCA, but this is limited to situations where the restraint of property is not required to preserve the property for confiscation, and the person has been convicted of an offence. The property confiscated in 2015–16 through CDPP litigation was valued at \$3.6 million, and the CDPP litigation is not considered in this audit.

10 POCA does not cover less serious offences that carry a maximum penalty of no more than 12 months imprisonment.

11 Applications for restraining orders can also be on the basis of 'unexplained wealth' or deriving literary proceeds relating to a suspected offence, but these constituted only about two per cent of restraining order applications in 2015–16.

12 Breaching the order is a criminal offence under section 37 of the POCA. There have been two successful prosecutions under section 37 in recent years.

13 Applications for restraining orders may be heard by the court in the absence of the property owner or other third parties. Should the order be granted, the owner may subsequently appeal the order or seek to have specified property excluded from the order.

14 The PPSR is a national register administered by AFSA where debts and other interests or encumbrances on personal property, including certain court orders, can be registered. It is designed to allow potential buyers to assess whether there is clear title to the relevant property and it also protects the position of the party holding the interest.

15 For the purposes of this audit, references to AFSA include situations where AFSA officers are undertaking functions and exercising powers attributable to the Official Trustee under the POCA.

property with an estimated recovery value¹⁶ of \$96.5 million was restrained¹⁷, of which approximately \$81.6 million was restrained under AFSA's custody and control.¹⁸ The cumulative total estimated recovery value of property under restraint as at September 2016 was \$467.9 million.¹⁹ Of this, \$199.0 million of property was under AFSA's custody and control.

1.7 Permanent confiscation of property—where ownership of the property passes to the Commonwealth—can occur in a number of ways. Automatic forfeiture occurs when a person is convicted of specified serious offences and the relevant property has already been restrained. More commonly, forfeiture is through a court order, including situations where a person has not been convicted of an offence, but the court is satisfied on the balance of probabilities that the person has committed a serious offence or that the property is the proceeds or instrument of such an offence. In 2015–16, property with an estimated recovery value of \$57.4 million was forfeited. Property may also be confiscated through pecuniary penalty orders (PPOs), literary proceeds orders (LPOs) or unexplained wealth orders (UWOs).²⁰ In 2015–16, six PPOs were made, totalling \$1.5 million. No LPOs or UWOs were made.

1.8 Once property is forfeited and any appeal process has been exhausted, any non-monetary property such as real estate, motor vehicles or jewellery will be sold by AFSA. The proceeds from such sales, plus relevant forfeited funds held in dedicated Official Trustee bank accounts, are transferred to the Confiscated Assets Account after AFSA have deducted their fees and any third-party service provider expenses. In 2015–16, \$59.7 million was transferred into the Confiscated Assets Account.²¹ As at 1 July 2016, the balance of the account was \$112.6 million.

1.9 The Attorney-General's Department (AGD) provides advice to the Minister for Justice on the use of funds from the Confiscated Assets Account, particularly for purposes prescribed by section 298 of the POCA. These purposes are:

- crime prevention measures;
- law enforcement measures;
- measures relating to treatment of drug addiction; and
- diversionary measures relating to the illegal use of drugs.

16 'Recovery value' accounts for factors such as mortgages or other third-party interests over the property that are likely to be deducted from the proceeds that ultimately may be transferred into the Confiscated Assets Account (see paragraph 1.8) following forfeiture.

17 AFP 2015–16 Annual Report, p. 32.

18 Note that this is the gross value of the property as AFSA records on restrained property do not record the estimated recovery value. The remaining property restrained in 2015–16 was retained either by the AFP or its owners.

19 Depending on the complexity of relevant cases, the need to collect additional evidence, and the progress of POCA litigation and any associated criminal prosecutions, property may remain under restraint for several years.

20 The amount payable to the Commonwealth under such orders can be enforced through a debt recovery process. The Commonwealth may obtain a restraining order under the POCA to assist in the recovery process.

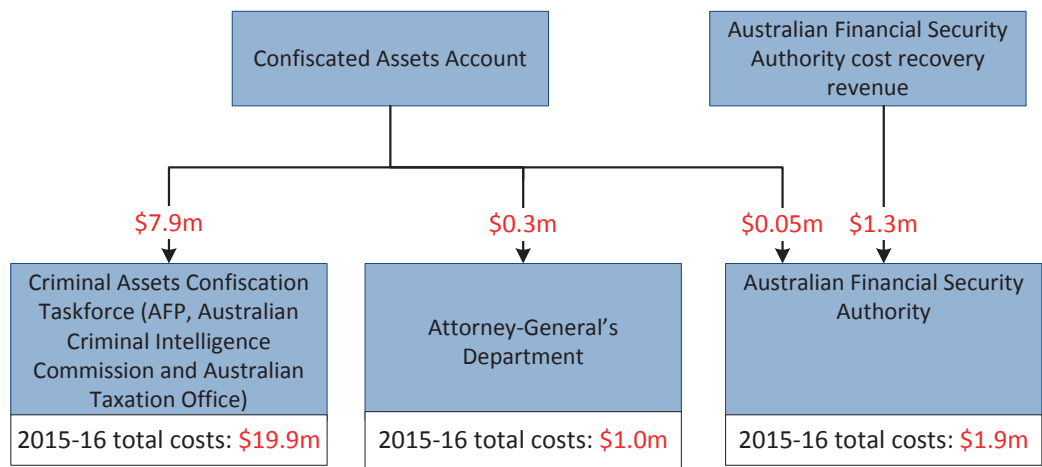
21 In any one year, the reported value of forfeiture and other forms of confiscation may be significantly different from the amount transferred into the Confiscated Assets Account. Reasons contributing to this may include time lags between obtaining orders and the sale of relevant property by AFSA, variation between the relevant property's estimated recovery value as recorded in the AFP's records and its eventual sale price, and the amount of fees and expenses deducted by AFSA before proceeds are transferred to Confiscated Assets Account.

1.10 In 2015–16, the Minister approved a total of \$47.5 million of section 298 funding to a range of Commonwealth and state based criminal intelligence or law enforcement entities, local councils and non-government and community organisations.

Costs and funding of Proceeds of Crime activities

1.11 The Criminal Assets Confiscation Taskforce (which includes the AFP, the Australian Criminal Intelligence Commission and the Australian Taxation Office), AFSA, and the AGD all have functions in the operation of the broader proceeds of crime scheme. The estimated costs, including third-party service provider costs, for each of these functions in 2015–16 as they relate to proceeds of crime activities is shown in Figure 1.2. Where they received funding from the Confiscated Assets Account or through cost recovery sources, this is also shown. Of the \$19.9 million costs for the Taskforce, \$18.0 million is attributable to the AFP.

Figure 1.2: 2015–16 cost of entity proceeds of crime functions and funding received from the Confiscated Assets Account or cost recovery sources for these functions in 2015–16



Source: ANAO analysis based on Information supplied by AFP, AFSA, AGD, ACIC and ATO.

Audit approach

1.12 The audit objective was to assess whether the AFP, AFSA and AGD effectively carried out key operational and advisory functions related to property and proceeds under the *Proceeds of Crime Act 2002*.

1.13 To form a conclusion against the audit objective, the ANAO adopted the following high-level audit criteria:

- effective restraint is achieved by the AFP and/or AFSA through the timely implementation of appropriate court orders;
- AFSA administers restrained property in an efficient and economical manner and consistent with relevant court orders;

- AFSA disposes of forfeited property in an appropriate manner and transfers the net proceeds to the Confiscated Assets Account;
- AGD provides advice to the Minister for Justice on which proposals for funding from the Confiscated Assets Account represent the best value for money; and
- the AFP and AFSA report against benchmarked performance measures.

1.14 In addition to discussions with relevant staff in the AFP, AFSA and AGD, and a review of key policy, procedural and risk management documentation, the audit methodology included:

- AFP—examination of documentation regarding the commencement of initial POCA litigation for all cases which commenced in 2015–16; and financial and performance information from the AFP PROMIS case management system.
- AFSA—inspection of storage facilities in Brisbane, Sydney and Melbourne and external viewing of real estate in Sydney and Melbourne; detailed review of a sample of 84 cases (from a total population of 255 cases) either finalised²² by AFSA during 2015–16 or still under their management as at 1 July 2016; financial and performance information from the AFSA Proceeds of Crime Case Management System (POCMAN) or relating to the Confiscated Assets Account; and relevant analysis from the ANAO’s auditing of AFSA’s 2015–16 financial statements.
- AGD—departmental advice to the Minister for Justice relating to 44 proposals for funding from the Confiscated Assets Account which the Minister approved between 2010–11 and 2015–16.

1.15 The performance audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of \$437 654.

1.16 The team members for this audit were Angus Martyn, Anne White, Ben Cantrill, Joyce Knight, Andrew Rodrigues; and Fiona Knight.

22 ‘Finalised’ means that all property for the case has been forfeited or otherwise been dealt with, all net proceeds have been transferred to the Confiscated Assets Account, and AFSA has closed the file on the case.

2. Restraining property

Areas examined

This chapter examines how the Australian Federal Police (AFP) decides which property should be included in applications for restraining orders, including whether custody and control of property should be awarded to the Australian Financial Security Authority (AFSA). It also examines how restraining orders are implemented and what actions are taken by the AFP and AFSA to minimise the risk of restrained property being dissipated.

Conclusion

Risk based planning procedures are in place for deciding which property should be restrained and what conditions should be placed on the property when seeking a restraining order. The manner in which restraining orders are implemented depends on the type of property under restraint. For the major classes of property, AFP and AFSA processes have worked well and custody and control of property has been achieved in a way that minimises the risk of the property being dissipated.

Are risk-based planning procedures in place for deciding which property should be restrained and what conditions should be placed on the property?

Planning and decision-making procedures by Criminal Assets Confiscation Taskforce investigators and litigators relating to restraint are risk-based. Where the AFP has judged that the risk of dissipation is high, restraining order applications include provision for custody and control of the property to be granted to AFSA.

2.1 Potential *Proceeds of Crime Act 2002* (POCA) cases are initially reviewed by the multi-entity Criminal Assets Confiscation Taskforce (CACT) through its regular case forum meetings. The CACT uses a prioritisation matrix to inform the decision whether individual cases will be accepted for further investigation. Case forum meetings are also used to identify appropriate treatment options, such as referral to the AFP Criminal Assets Litigation (CAL) area for commencement of litigation or referral to the Australian Taxation Office (ATO) for action, such as the raising of a tax liability.

2.2 Referral to the CAL area is done via a standard template which contains key information about the case, including the details of the property that is suspected of being the proceeds of, or instrument of crime. The AFP litigators consider the merits of the case, and then provide written advice to the CAL state office coordinator recommending that the coordinator seek approval from the CAL manager to commence legal action under the POCA.²³ The ANAO examined the advices for all new matters in which the AFP commenced POCA litigation in 2015–16 (41 cases in total). The advice for each case outlines the property proposed to be restrained, its estimated recovery value, information outlining what, if any, alternative courses of action regarding the property have been considered, and summary information on relevant risks.

23 POCA litigation is a separate process from any prosecution of the underlying criminal activity, although some POCA orders may be made on the basis of a criminal conviction.

2.3 The level of information regarding the relevant risks varied in the advices examined by the ANAO. Key risks that were addressed included the possible dissipation of property; location of the property; possible effects of restraint on third parties; whether the estimated cost of POCA litigation was likely to exceed \$500 000; and the potential for costs or damages being awarded against the AFP in the event that all, or a part of, the property was returned to the owner or another party with an interest in the property. If the risk assessment identified that the case was likely to be the subject of public scrutiny, generate high levels of publicity, and/or where the estimated value of assets to be restrained was likely to exceed \$25 million the case was to be classed as high risk. High risk cases are referred to the AFP Commissioner for approval. There was only one such matter for 2015–16. The Commissioner approved commencement of POCA proceedings and obtained initial restraining orders in November 2015.

2.4 The advice provided to the CAL manager also sets out whether it is proposed to pursue the matter through civil (non-conviction) or conviction based forfeiture of property; or alternatively through a pecuniary penalty order, a literary proceeds order, or an unexplained wealth order. For the matters that commenced in 2015–16, 90 per cent were intended to be pursued via civil (non-conviction) forfeiture.^{24,25} Civil based restraining and forfeiture POCA litigation may proceed in parallel with separate criminal prosecution, although the courts retain the ability to place a stay on the POCA litigation if it considers it in the interests of justice to do so.

2.5 As part of its risk based approach, the AFP can apply to the court for custody and control of restrained property to be awarded to AFSA. Internal AFP guidelines provide that this is the default position in applications for restraining orders submitted to the court for all types of property ‘unless there is a good reason to the contrary’. The AFP also advised the ANAO that custody and control is normally sought for bank accounts, seized cash, and for real estate, or other forms of physical property where there are indications of an imminent sale, or if the property is a high value motor vehicle, marine vessel or aeroplane.

2.6 In the 41 new cases litigated by the AFP in 2015–16, 32 (78 per cent) involved restraining orders which gave custody and control of specified property to AFSA.²⁶ In the nine cases where custody and control of the property was not given to AFSA, eight of the nine involved property seized by the AFP upon execution of a search warrant or involved real estate. One case involved a bank account where the AFP contacted the financial institution directly advising that the funds in the bank account were to be restrained.

2.7 Where the AFP intends to apply for custody and control of property to be granted to AFSA the AFP may consult with AFSA prior to lodging the application for the restraining order. Consultation between AFSA and the AFP where the application seeks to have custody and control awarded to AFSA has been emphasised in a Memorandum of Understanding between the AFP and AFSA which came into effect in September 2016.²⁷ Such consultation provides AFSA with an

24 The advice for a further five per cent of cases indicated that possibly both conviction and non-conviction based forfeiture orders might be sought.

25 The sample of 84 cases either finalised by AFSA during 2015–16 or still under their management as at 1 July 2016 contained a slightly lower percentage (81 per cent) of civil-based POCA litigation.

26 The sample of 84 cases contained a similar percentage (82 per cent) of cases where the restraining orders also gave custody and control to AFSA.

27 This replaced a previous Memorandum of Understanding.

opportunity to discuss with the AFP the potential costs and/or resources that may be required to preserve property that the AFP proposes to include in a restraining order. In the two months following the entry of the MOU, the AFP consulted with the AFSA about those proposed orders involving motor vehicles and real property. There was no consultation in relation to orders where the main property to be restrained was cash or bank accounts. AFSA advised the ANAO that it considered this was appropriate as pre-order consultation was really only relevant in instances where there was 'an added degree of complexity as to how the order(s) might be implemented or ... [involved] ... a unique asset ... or perhaps significant AFSA resourcing'.

2.8 In cases where the AFP intends to apply to the court for AFSA to have custody and control of property, the advice to the CAL manager does not currently address if AFSA has been consulted. To reflect the increased emphasis on consultation in the MOU, the template used to provide advice to the CAL manager could include a provision noting whether AFSA has been consulted and if so whether they have raised any concerns about the property to be included in the proposed order. This would reduce the likelihood of the AFP having to return to court to seek an amendment to an order authorising the release of specified property from AFSA's custody and control.

Once obtained, are restraining orders implemented in a timely manner and in a way that minimises the risk of property being dissipated?

Restraining orders are implemented in a timely manner and in a way that minimises the risk of property being dissipated. However, the AFP could do more to register orders involving motor vehicles on the Personal Property Securities Register (PPSR) in a timely manner.

2.9 The risk of property being dissipated prior to implementation of orders is managed through a range of methods, including having order applications heard in the absence of the property owner(s) and having orders provide for delayed notification to the property owner(s).

2.10 Once a restraining order has been granted by the courts the initial actions to implement the restraining order are undertaken by the AFP. Where the court directs AFSA to take custody and control of restrained property, the AFP will provide a copy of the order to AFSA. The ANAO's testing²⁸ demonstrated that in 83 per cent of cases the copy was provided to AFSA no later than the next calendar day. Of the remaining 17 per cent, representing 11 cases, most of the property involved had already been seized by law enforcement agencies, was real estate or some other type of property where the risk of the property being dissipated in the short-term was low.

2.11 The specific actions undertaken by the AFP, and if applicable, AFSA to implement the order and minimise the risk of dissipation depends on the type of property involved.²⁹

28 The testing was based on a sample of 84 matters administered by AFSA from 2003 to 2016, which included 63 matters where AFSA was given custody and control at the restraining stage. The sample was drawn from a total of 255 matters. Of the 255 matters, 109 were finalised by AFSA in 2015–16 and 146 were under active AFSA's management as at 30 June 2016.

29 Where property is located overseas, a restraining order may require the owner to transfer it back to Australia. Alternatively, the AFP, through the International Crime Cooperation Central Authority in the Attorney-General's Department, may seek assistance from government authorities in the relevant country. As at September 2016, Australia currently has 15 active mutual assistance requests to other countries seeking proceeds of crime action, including restraint, confiscation and repatriation, involving some \$4 million of restrained property.

Bank Accounts

2.12 Funds held in bank accounts are the most readily dissipated form of property.

2.13 When bank accounts are restrained, the AFP provides the relevant financial institution with a copy of the court order via a dedicated email address. The order effectively requires that the relevant financial institution prevent any movement of funds out of bank account(s) identified in the restraining order. Across the 41 new matters litigated by the AFP in 2015–16, 22 involved bank accounts. The ANAO found that in 18 of the 22 cases (82 per cent), the AFP provided a copy of the court order to the financial institution on the same day the order was made. In three of the four other cases, notice was given the day after the order, with notice in the remaining case being given two days after the order was made.

2.14 Where AFSA has been directed to take custody and control of the restrained bank account(s), AFSA contacts the financial institution and directs that the balance of funds held in the account(s) is to be transferred to the restrained monies bank account held by AFSA. As at November 2016, \$145.6 million in restrained bank account funds was in the custody and control of AFSA.

2.15 The ANAO tested a sample of 84 matters initiated between 2003 and 2016. This testing identified 32 matters (involving a total of 302 bank accounts) where a restraining order directed AFSA to take custody and control of the relevant bank accounts. In 89 per cent of these cases, AFSA contacted the relevant financial institution to direct that the funds be transferred no later than seven calendar days after the court order was granted.³⁰ In 84 per cent of cases, AFSA received the funds no later than 14 calendar days after the date the request had been sent to the relevant financial institution.³¹

2.16 The funds held in the account/s to be restrained can fluctuate between the time the AFP CAL team are considering applying for, and the date that the court grants, the restraining order. The ANAO reviewed 20 cases, each involving multiple bank accounts that were transferred to AFSA following a custody and control order. In five of these cases, the balances of one or more of the transferred accounts were at least \$10 000 less than AFP pre-restraining estimates and two of these involved amounts of over \$1 million.

2.17 As a result of the ANAO's audit, the AFP undertook an analysis on the five cases and provided the results to the ANAO. This analysis indicated that the reduction in the account balances between the pre-restraining estimates and the date of actual restraint was mainly due to the account holders using the relevant funds to purchase or develop property, or transferring funds to other accounts. The analysis concluded that in these cases the relevant property and accounts had also been restrained.

30 Out of the 11 per cent of cases where AFSA took more than seven calendar days to contact the relevant financial institution, three per cent of these were due to a delay in AFSA being notified that the order had been granted.

31 For the remaining 16 per cent of cases, covering 35 bank accounts where AFSA received restrained funds later than 14 days after the date of request, 15 were due to the Christmas shut-down period; 13 were due to a delay by the bank. For 12 of these accounts the bank provided confirmation of the balance of the accounts and that access had been removed. For the remaining seven accounts for which funds were not received within 14 days, these were either a term deposit, located overseas, held in trust, or the initial request was not received by the bank.

Real Estate

2.18 As at 1 July 2016, AFSA held real estate valued at \$77.4 million in its custody and control, including property that had been forfeited but not yet disposed of.

2.19 To restrain real estate, AFP procedures require that the restraining order is registered against the property title through the relevant state or territory land titles office, legally securing the property and preventing the owner from dealing with it. Where custody and control is awarded to AFSA, AFSA conducts a search to check whether the restraining order has been registered by the AFP on the title.³²

2.20 Of the 84 AFSA administered matters that were selected for testing by the ANAO, 20 involved AFSA being given custody and control of real estate. Collectively, these 20 matters involved 71 individual pieces of real estate. AFSA was able produce evidence of the results of the title searches for 54 of the 71 pieces. Of these 54, ANAO testing showed that the restraining order had been registered by the AFP for 40 of the pieces and for 14 that the restraining order had not been registered at the time the search was done. In the remaining 17 instances, the results of the title search were not recorded by AFSA: 15 of these relate to a single case dating back to 2003. Since 2011 only one piece of real estate has been identified by the ANAO where AFSA records did not record if a title search had been undertaken.³³

2.21 For the 14 pieces of real estate where the title search conducted showed that the restraining order had not been registered, AFSA advised the ANAO that in all of these cases AFSA contacted the AFP and were advised by the AFP that for five pieces of real estate that the restraining order had been lodged but the dealing had not yet been registered on the title.³⁴ In order to obtain more complete information on the registration of the restraining order by the AFP, the ANAO tested a smaller sample of nine pieces of real estate, using AFP records. This showed that the restraining order was registered in all cases within two calendar days.

Motor vehicles, marine vessels and aeroplanes

2.22 As at 1 July 2016, 61 motor vehicles, marine vessels and aeroplanes, worth an estimated \$7.1 million were in the custody and control of AFSA.³⁵

2.23 Once the restraining order is granted, AFP procedures mandate the registration of an interest on the Personal Property Securities Register (PPSR). Where AFSA has been directed to take custody and control of the motor vehicle, marine vessel and/or aeroplane, AFSA conducts a search on the PPSR to confirm that the AFP has registered its interest and arranges for the collection, transportation and storage of the vehicle.

32 Where the results of the search show that the restraining order has not been lodged, AFSA records do not consistently record what action has been taken.

33 If the title search that is undertaken by AFSA shows that the restraining order has not been lodged AFSA is to contact the AFP to advise them and a record of the conversation including the response from the AFP is to be placed on the file. The ANAO identified 14 pieces of real estate from AFSA records where the initial title searches showed that the restraining order had not been lodged. A search by AFSA for records where the AFP was advised of this could not be located.

34 For the remaining nine pieces of real estate, AFSA did not record the AFP's response to AFSA's contact.

35 The total estimated value is based on the most recent valuation obtained by AFSA and provided to the ANAO.

2.24 To test how promptly the AFP registers the interest on the PPSR the ANAO examined a sample of 11 restrained motor vehicles across nine matters. This testing showed that interests had been registered for eight vehicles on average 20 calendar days after the restraining order had been granted by the court. For two vehicles the initial registration failed and due to an administrative oversight by the AFP was not followed up. For the remaining vehicle no interest was lodged.³⁶ In this matter the AFP advised that the vehicle was collected by AFSA at the time that the search warrants were executed.

2.25 The registration of an interest is most important if the vehicle has not been placed into the custody and control of AFSA or a variation and/or exclusion order has been lodged seeking the vehicles release.³⁷ In these circumstances the registration of the interest acts as a safeguard to ensure that the AFP can recover its interest in the vehicle if the vehicle is sold or otherwise disposed of in breach of the restraining order.

2.26 Testing undertaken by the ANAO on a sample of 84 matters initiated between 2003 and 2016 identified that across 23 matters, AFSA was directed to take custody and control of 121 motor vehicles, marine vessels and/or aeroplanes. Of the 121 motor vehicles, marine vessels and aeroplanes, 114 were placed into the custody and control of AFSA at the time of restraint. Of these 114 items, AFSA disclaimed interest in 50.³⁸ Out of the 64 vehicles a review of AFSA records located the results of the PPSR search for only 37 of the remaining vehicles, with the results of the other 27 being unknown.³⁹

2.27 Since 2015 a total of nine vehicles have been restrained and placed into the custody and control of AFSA. For these nine vehicles, AFSA's record-keeping has been somewhat more consistent, with the results of the PPSR search being recorded for eight. Of these eight, the search confirmed that an interest has been registered by the AFP in seven. As a result of the ANAO's audit, AFSA advised the ANAO it would review its written work instructions to further improve staff performance regarding recording PPSR (and land title) search results and any follow-up action where a search shows restraining orders have not been registered.

36 The AFP has advised the ANAO that 10 out of the 11 vehicles in the sample were placed into the custody and control of AFSA at the time of restraint. In these circumstances, there was negligible risk that the vehicles could be sold or otherwise disposed of in breach of the restraining order.

37 The AFP has acknowledged that where restrained vehicles remain in the custody of the owner, there is a risk that the asset could be dissipated if an interest in the vehicle is not registered on the PPSR in a timely manner.

38 These vehicles were connected to the one AFP operation and deemed to be of low value. Thirty six were disclaimed under the discretion provided to AFSA under the relevant restraining order. For the remaining 14 vehicles, AFSA obtained a subsequent variation to the restraining order to exclude these vehicles from the order. In all cases, the vehicles are still under restraint but under the control of the respective owners.

39 Out of the 37 PPSR searches located, the results for 14 of the searches found that no interest had been registered. For these 14 motor vehicles AFSA was unable to provide evidence that they had notified the AFP in accordance with their internal procedures.

2.28 The ANAO also tested the timeframe to achieve control. A review of AFSA records by the ANAO found records specifying the actual date on which physical control was obtained for 34 (60 per cent) out of 57 motor vehicles, marine vessels and aeroplanes placed into the custody and control of AFSA. Of these 34, AFSA gained control over 32 (94 per cent) no later than 14 calendar days after the court order was granted.⁴⁰

⁴⁰ Records confirming the actual date that physical control had been achieved could not be located for 23 vehicles. For 11 of these the date of the initial report confirming that custody and control of the vehicles had been achieved has been used to identify the date that AFSA achieved actual physical custody and control. The remaining 12 aeroplanes and motor vehicles placed into the custody and control of AFSA relate to a single matter which commenced in 2003.

3. Custody and disposal of property

Areas examined

This chapter examines the Australian Financial Security Authority's (AFSA) management and disposal of restrained and forfeited property.

Conclusion

AFSA has appropriate custodial arrangements in place for all types of property. Legislative and administrative constraints currently limit the ability the Official Trustee to achieve improved rates of return from the substantial amount of funds held in the restrained and forfeited monies bank accounts and the Confiscated Assets Account. AFSA also manages property in a way that is consistent with the relevant court orders and disposes of forfeited property in an appropriate manner in order to maximise the sale proceeds.

Recommendation

The ANAO has made one recommendation aimed at facilitating improved financial management of funds held in restrained and forfeited bank accounts and the Confiscated Assets Account.

Does AFSA have appropriate custodial arrangements in place?

Custodial arrangements for property that has been placed into the custody and control of AFSA vary depending on the type of property restrained. Testing demonstrates that appropriate custodial arrangements are in place for all types of property. Management of the funds held in the restrained and forfeited monies bank accounts and the Confiscated Assets Account reflect legislative and administrative constraints that limit the ability of the Official Trustee to achieve improved rates of return from the substantial amount of funds held in these accounts.

3.1 Where the court has directed the Official Trustee to take custody and control of property ('controlled property'), it can be a considerable period of time before the property is potentially forfeited to the Commonwealth.⁴¹ Of all the cases finalised by AFSA in 2015–16 where property was placed into the custody and control of AFSA, 39 per cent took more than two years to complete. Across the 40 active matters in the AFSA sample, as at 1 July 2016, it had been on average, 3.6 years since the date of the initial restraining order.⁴²

3.2 Under the *Proceeds of Crime Act 2002* (POCA), the Official Trustee may do anything that is 'reasonably necessary for the purpose of preserving the controlled property'.⁴³ Custodial arrangements to preserve property vary depending on the type of property under restraint. The

41 Where conviction does not occur, or the court directs that the property is to be excluded or released from restraint, AFSA is to return property to the owner.

42 Of the active matters tested, there are four matters which have been active for over 10 years.

43 Under the POCA, these include becoming a party to the any civil proceedings affecting the property, ensuring the property is insured, realising or otherwise dealing with any of the property that is securities or investments. If any of the property is a business, the POCA provides that employing or terminating the employment of persons in the businesses or doing anything necessary or convenient to carry on the business on a sound commercial basis also falls within the scope of preserving the relevant property.

most common types of restrained property include bank accounts; real estate; motor vehicles, marine vessels and/or aeroplanes; seized cash; and jewellery.

3.3 AFSA maintains insurance with Comcover for the real estate; motor vehicles, marine vessels and aeroplanes; and other property in its custody and control valued at over \$10 000. As at 1 July 2016, the policy provided approximately \$42 million of insurance cover, for an annual premium of \$213 500.⁴⁴

Bank Accounts

3.4 As discussed at paragraph 2.14, where custody and control of restrained bank accounts has been granted to AFSA, AFSA contacts the relevant institution and directs them to transfer the funds in the account(s) to the Official Trustee restrained monies account. All of the restrained money from all cases is held in this single account.⁴⁵ These funds are held in trust pending the outcome of POCA litigation and are not Commonwealth money.

3.5 For internal management and accounting purposes, AFSA creates a separate 'virtual' bank account for each account restrained.⁴⁶ These virtual accounts are used to identify and track the funds restrained from each bank account but do not hold any actual funds. If the restrained funds are forfeited, AFSA transfers the total amount that was restrained plus any interest which has accrued into the AFSA forfeited monies account, where it is held pending final transfer to the Confiscated Assets Account.

3.6 The ANAO's auditing of AFSA's 2015–16 financial statements demonstrated that the relevant bank reconciliation controls are operating effectively. Transactions in and out of the restrained and forfeited accounts were supported by appropriate approvals and relevant documentation. Transactions in and out of the Confiscated Assets Account were also in accordance with the purpose of the account as set down by the POCA.

3.7 As shown in Figure 3.1, funds held in the restrained and forfeited monies accounts⁴⁷ and the Confiscated Assets Account have grown substantially in recent years.

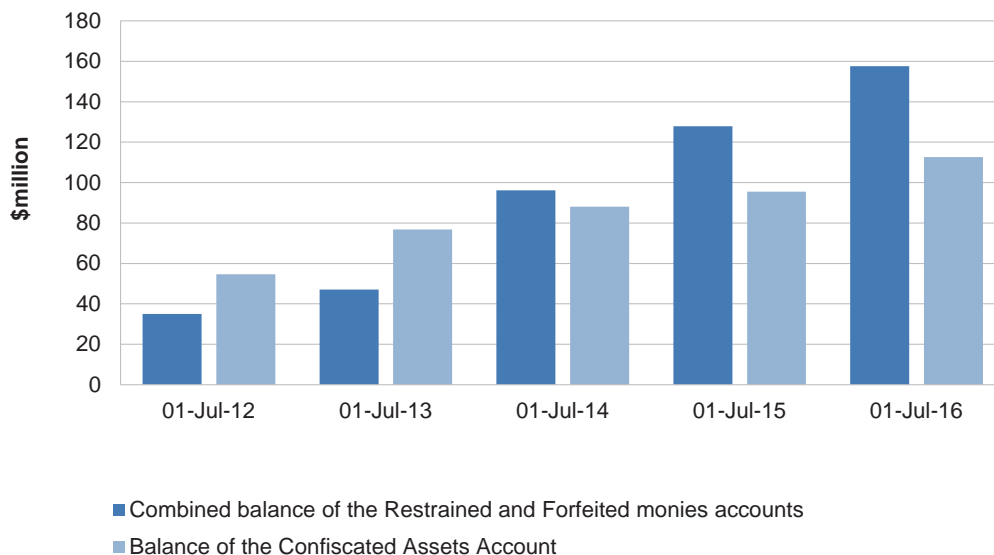
44 The insurance policy covers all Official Trustee functions. There is no premium breakdown for 'POCA only' property and activities.

45 AFSA does maintain some separate accounts for restrained funds that are held in foreign currencies, but these are not material compared to the Australian dollar account and are not considered in this audit.

46 If multiple bank accounts are restrained for the one case, a corresponding number of virtual bank accounts will be created by AFSA.

47 The majority is held in the restrained monies account. As at 30 June 2016, \$128.08 million of \$157.53 million was held in that account.

Figure 3.1: Growth of funds held in the proceeds of crime bank accounts between 2011–12 and 2015–16



Source: AFSA.

3.8 Banking services to AFSA and the Official Trustee, including the restrained and forfeited monies accounts and the Confiscated Assets Account, are provided by the Commonwealth Bank of Australia (CBA). All these accounts are business transaction accounts where the funds are held ‘at call’. In 2016, AFSA and the Official Trustee renewed the existing contract for banking services with the CBA⁴⁸, which provides that the variable interest rate offered on the accounts:

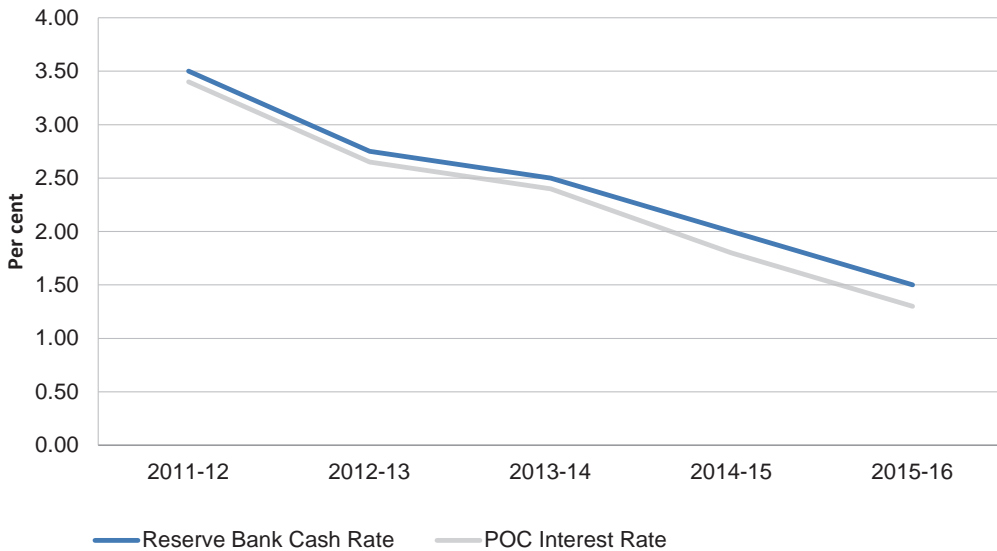
shall make appropriate allowance for the overall quantum of funds invested ... which should result in provision of a better interest rate compared to the interest rates available to retail investors.⁴⁹

This rate is periodically reviewed and agreed between AFSA and the CBA. While the rate is not explicitly linked to any benchmark, over the last several years it has declined from 3.4 per cent to 1.3 per cent as at December 2016, mirroring similar falls in the Reserve Bank of Australia (official) cash rate.

48 AFSA renewed the banking services contract using an existing Department of Immigration and Border Protection open tender agreement with the CBA for banking services which permits other Commonwealth entities to ‘piggyback’ on the terms of that agreement. AFSA advised the ANAO that it considered this allowed both AFSA and the Official Trustee to ‘access advantageous pricing’ for banking services and had a ‘significant cost benefit’ through not having to run a tender process from scratch. AFSA’s evaluation of the CBA’s renewal offer contained an extensive analysis of life-of-contract costings in comparison to the (then) existing arrangement.

49 Schedule 2(B), Item 6 (a) and (h).

Figure 3.2: Comparison of Interest rate achieved on proceeds of crime bank accounts with the Reserve Bank (official) cash rate



Source: AFSA.

3.9 AFSA advised the ANAO that it considered that the 1.3 per cent interest rate currently being applied to accounts would not be bettered by another banking institution, as at-call accounts generally receive an interest rate considerably below the official cash rate.⁵⁰

3.10 AFSA's position is that there are also some practical and legal constraints on the Official Trustee that limit the manner in which the funds in the relevant accounts can be managed. The practical constraints include the need to release funds from the accounts, for example pursuant to a court order, or for the Confiscated Assets Account, a ministerial decision. For restrained funds, the legal restraint related to the scope of the mandate for the Official Trustee to invest funds to generate a return, as opposed to the mere preservation of the funds. For the Confiscated Assets Account, an officer of AFSA would require a delegation from the Finance Minister under the *Public Governance Performance and Accountability Act 2013* in order to invest the relevant funds.

3.11 An analysis of all accounts with balances over \$100 000 that were transferred into the Confiscated Assets Account in 2015–16 showed that, prior to transfer, funds stayed in the restrained monies account for an average of 423 days and funds in the forfeited account stayed for an average of 95 days.⁵¹ A separate ANAO analysis of the 32 matters (or 302 bank accounts) identified four matters where a court order directed AFSA to withdraw funds from restrained bank accounts, and one matter where criminal charges were withdrawn and the balance of the

⁵⁰ AFSA was however unable to provide evidence to ANAO of what interest rates were available from, or would be offered by, other major banks for an on-call transaction account with a similar running balance. AFSA did provide evidence of rates from 'retail' business transactional accounts (these ranged from 0.7 to 1.0 per cent), but these could be established with balances as little as \$5000.

⁵¹ The median figures were lower at 296 and 26 days respectively.

restrained funds (\$1.85 million) had to be released to the owner.⁵² For the four matters, where the court directed that funds be released, the amounts varied from \$750 000 to less than \$5000.⁵³ The identification of only five matters out of 32 suggests that calls on the restrained monies account due to court orders occur infrequently and as such the risk of a rapid reduction in the overall account balance is relatively low.

3.12 In view of the significant growth in the funds being held in the relevant accounts in recent years and the length of time that funds are routinely held at least in the restrained monies account, it would be timely to implement revised administrative and legislative arrangements applying to the management of all of the accounts, having regard to the underlying policy objectives of the *Proceeds of Crime Act 2002*.

Recommendation No.1

3.13 The Australian Government should implement arrangements to facilitate improved rates of returns from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account.

Attorney-General's Department Response: *Noted.*

3.14 *The Department agrees with the report's finding at page 25 that there are '... some practical and legal constraints on the Official Trustee that limit the manner in which the funds in the relevant accounts can be managed'.*

3.15 *The Department notes that the policy objectives of the legislative framework underpinning the treatment and distribution of restrained and forfeited funds and funds held in the Confiscated Assets Account are aimed primarily at the reduction of crime and prevention of further investment of criminal proceeds in criminal activity. The framework set out for expenditure from the Confiscated Assets Account also facilitates reinvestment of confiscated funds into programs and activities that reduce crime, improve community safety and facilitate enhanced law enforcement capabilities.*

3.16 *The Department is of the view that the legislative framework does not currently envisage the increasing of returns in light of the overarching policy objectives. However, the Department will consult with Government on this matter.*

Australian Federal Police Response: *Noted.*

3.17 *As the recommendation relates to implementing arrangements to facilitate improved rates of returns from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account which is a matter for AGD and AFSA, the AFP makes no comment in relation to the recommendation.*

52 The funds in this matter were restrained for 418 days prior to the date that the charges were withdrawn. The court order also allowed AFSA 28 days in which to release the funds.

53 The funds were required to make payments to settle the property-owners debts or pay the owner's reasonable living expenses.

Australian Financial Security Authority Response: *Noted.*

3.18 AFSA notes the ANAO's recommendation in the report, and will work with key stakeholders and agencies to facilitate arrangements that improve rates of return from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account whilst ensuring compliance with the Proceeds of Crime Act 2002.

Real Estate

3.19 When real estate is placed into the custody and control of AFSA, the actions that AFSA undertakes vary depending on the occupancy status of the property. Where the property is occupied, achieving custody and control of the property is an administrative action. AFSA sends a letter to the respondent, their legal representative, property manager—if relevant, or the tenant notifying them that the property is under the custody and control of AFSA. The letter includes a copy of the custody and control order. Where a piece of real estate is vacant AFSA engages a locksmith to change the locks on the property to prevent the owner accessing and potentially damaging the property.

3.20 Separate to the administrative actions undertaken to notify the relevant parties that the property has been placed into AFSA's custody and control, AFSA also carries out an inspection, obtains a valuation and takes other actions as necessary to determine the condition of the property and value it for insurance purposes. Where a property is occupied by the owner⁵⁴, or tenanted, AFSA contacts the occupant to arrange an inspection and valuation of the property. Where a property is tenanted under an existing lease AFSA does not seek to amend or cancel the lease. AFSA's actions in these cases are limited to redirecting the rental proceeds into the restrained monies account or as otherwise directed in the restraining order.

3.21 Testing by the ANAO of the 71 pieces of real estate referred to at paragraph 2.20 showed that significant time may pass before AFSA is able to determine the occupancy status, and arrange for an inspection and valuation of the property. This has occurred in situations where the real estate is occupied but no standard lease agreement is in place; the owner has sought court approval to sell; the property is a commercial premises; the premises is occupied by a relative of the owner; or where the property is still under construction.

Motor vehicles, marine vessels and/or aeroplanes

3.22 Motor vehicles are physically seized and transported to secure storage facilities while aeroplanes and marine vessels generally remain at existing hangars and marinas. The ANAO inspected dedicated third-party storage premises in Brisbane, Sydney and Melbourne. Security arrangements varied, but no obvious deficiencies were observed. All motor vehicles, marine vessels and aeroplanes listed in AFSA's records as being stored at the inspected premises were sighted by the ANAO and were receiving some degree of preventative care and maintenance. Examples of vehicles sighted during these inspections are shown at Figure 3.3.

54 Of the real estate included the ANAO's testing of AFSA processes, seven (15 per cent) were occupied by the owner, 26 (57 per cent) were tenanted and 13 (28 per cent) were vacant.

Figure 3.3: Examples of vehicles under the custody and control of AFSA



Source: Photographs from fieldwork undertaken by the audit team in August 2016.

3.23 During 2016, AFSA reviewed several storage arrangements, including through physical inspections of the storage facilities. As a result of these reviews, AFSA changed motor vehicle storage providers in Sydney and Brisbane to reduce storage costs and improve levels of care and maintenance, thereby achieving better overall value for money.

3.24 The level of care and maintenance that is to be provided for motor vehicles is outlined in the letter/s sent by AFSA engaging the agent to provide the storage facilities. For the aeroplanes in the custody and control of AFSA, AFSA sought expert advice on the care and maintenance required to preserve the aeroplanes. For the marine vessels that are currently in the custody and control of AFSA, the degree of maintenance required for the vessels has also been documented.

3.25 For motor vehicles, marine vessels and aeroplanes in the custody and control of AFSA, an annual valuation and inspection process is undertaken. As part of this exercise, the valuing agent provides confirmation that maintenance to preserve the motor vehicles, marine vessels and aeroplanes has been undertaken. For aeroplanes that are restrained a register is maintained at the premises where all work undertaken is noted and signed. A review by the ANAO of the storage and maintenance invoices for the motor vehicles, marine vessels and aeroplanes showed that the invoices noted what maintenance had been undertaken on the relevant motor vehicles or aeroplanes requested. For one of the marine vessels, the recommended annual change of engine oils has not occurred. The valuations carried out on these vessels based on the condition observed stated that minimal maintenance had been carried out on both vessels. For one of the vessels the

valuation recommended that in order to achieve the maximum recovery value, considerable funds⁵⁵ would need to be expended to restore the vessel to operational status.

Seized Cash

3.26 Where cash has been seized by the AFP or a state police force, and the court has directed that the value of the cash is to be placed into the custody and control of AFSA, the AFP or equivalent state police force transfers the value of the cash seized into the relevant account held by AFSA. Consequently, AFSA's custody arrangements for seized cash are the same as for restrained bank account funds.

Jewellery

3.27 Jewellery placed into the custody and control of AFSA has usually been seized by the AFP or a state police force. Where the property is transferred into the custody and control of AFSA the jewellery is collected by AFSA case officers, escorted by AFP officers, and deposited into a safe deposit box held by AFSA.

Pre-forfeiture sale of property

3.28 Ordinarily, AFSA is unable to sell restrained property until after it has been forfeited to the Commonwealth or the owner has agreed to pre-forfeiture sale.⁵⁶ AFSA can apply to the court under section 280 of the POCA to continue with a proposed disposal of property prior to forfeiture over the objection of the owner if it is uneconomical to continue to store and maintain the property. These circumstances include where AFSA considers that the property is likely to depreciate or the holding costs are likely to constitute a significant proportion of the value of the property.

3.29 A review of the 84 matters sampled by the ANAO identified 18 matters comprising 75 motor vehicles which had the potential to lose value through depreciation or where holding and maintenance costs were likely to represent a significant proportion of the value of the property. Across the 18 matters, three of the older matters, comprising 21 motor vehicles, marine vessels and aeroplanes have depreciated in value by an estimated \$2.0 million while under restraint.⁵⁷

3.30 AFSA was able to provide evidence in seven of the 18 matters that they had contacted the owner advising of their intention to dispose of the property. The owner/s objected to pre-forfeiture sale in three of these matters and no sale occurred at that point. In four out of the seven matters, one consented to pre-forfeiture sale, and for the remaining three matters the vehicle was

55 The estimate of funds required as provided by the valuer is \$50 000. For the vessel this comprises more than ten per cent of the estimated sale price achievable.

56 Section 278 of the POCA states that 'The Official Trustee may dispose of the controlled property, by sale or other means: a) with the agreement of all parties with an interest in the property; or b) if the property is likely to lose value in the opinion of the Official Trustee; or c) if, in the Official Trustee's opinion, the cost of controlling the property until the Official Trustee finally deals with it is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with; or d) if in the opinion of the Official Trustee, the disposal of the property or part of the property is necessary to pay, under Part 4-2, a legal aid commission's costs.

57 In one of these matters the restrained property has depreciated by an estimated \$0.923 million. In this matter, the court has directed undertaking requires AFSA to provide additional notice (60 days) of its intention to pursue pre-forfeiture disposal.

repossessed by the financing company, was subsequently forfeited and sold, or the owner requested additional information regarding the reserve price to be set. For eleven matters, no records of AFSA seeking pre-forfeiture sale of the motor vehicle/s restrained were located.

3.31 From April 2016, AFSA has sought consent for pre-forfeiture sale of restrained property in a more regular and systematic manner.⁵⁸ To help decide when to pursue pre-forfeiture disposal, AFSA has recently developed modelling tools to estimate future annual holding costs and forecast the progressive decline in property value through depreciation in order to demonstrate that it is no longer economical for AFSA to retain custody and control of the vehicle. AFSA has also instituted a test case to seek a court order for a pre-forfeiture sale over the objection of the owner. This is due to be heard in February 2017.

Is property managed in a way that is consistent with the relevant court orders?

AFSA manages property in a way that is consistent with the relevant court orders. Where consent, variation and/or exclusion orders are granted by the court, AFSA has acted consistently with the court order.

3.32 Once a restraining order has been granted either the AFP or the owner may apply for amendments to be made to the order. Examples of amendments sought can include: the release and/or exclusion of specified property from restraint; the release or exclusion of restrained property from the custody and control of AFSA; consent to sell restrained property; establishing conditions allowing restrained property to remain with the owner; and/or authorising the payment of living expenses or debts from restrained funds.

3.33 In the 84 matters sampled, 35 (42 per cent) have had consent, variation, and/or exclusion orders applied for and granted by the court. In all of the 35 matters AFSA, upon notification of the order has acted in accordance with directions of the court and in the timeframes specified in the court order.

Do AFSA's disposal processes support the achievement of maximised sale proceeds from property forfeited?

In 2015–16, AFSA's disposal processes have achieved sale proceeds from forfeited property which have exceeded the estimated value of the property in 76 per cent of matters, as determined by an independent and/or certified valuer, including all of the higher-value property.

3.34 Once property has been forfeited to the Commonwealth and AFSA has been advised by the AFP that any appeal period which applies has lapsed, AFSA is able to dispose of the property.

58 AFSA has established a new process where for all new matters case officers are to issue letters of notification to the owner that AFSA intends to sell restrained assets which have been assessed as likely to reduce in value, and/or will incur significant maintenance or holding costs. For existing matters, AFSA has rolled this process into the annual valuation process for restrained property stored by AFSA.

3.35 As part of the disposal process AFSA procures a valuation of the property prior to engaging an agent to assist with the sale. The ANAO's review of relevant cases in the sample showed that in the case of real estate, a certified valuer is engaged to provide an at 'arms-length' valuation of the property. For other forms of property such as motor vehicles and jewellery, AFSA engages an agent to provide a valuation of the property and an agent to manage the sale of it. In the case of motor vehicles, valuations are either sourced from the agent storing the vehicles, or an independent valuer. In the case of jewellery, valuations have been commissioned from an agent or employee of the same entity ultimately engaged by AFSA to undertake the sale.

3.36 In terms of procuring an agent to handle the marketing and sale of the property, AFSA records demonstrate that it consistently obtains multiple quotes and evaluated each quote received to determine the best value for money option. When considering value for money AFSA addresses financial and non-financial criteria including the knowledge base, responsiveness, availability and reliability of prospective suppliers.

3.37 To test how effective AFSA's disposal process is at maximising proceeds 21 finalised cases which included real estate, motor vehicles and/or jewellery were identified. Overall AFSA has achieved gross sale proceeds in excess of the valuation in 16 (76 per cent) of finalised cases.⁵⁹ Of these 16 cases, five included real estate valued in excess of \$1 million.

3.38 Out of the 21 matters, the sale proceeds failed to meet the expectations outlined in the accepted valuation on three occasions. In one of these matters the sale proceeds fell short of the valuation by more than \$10 000.⁶⁰ This matter involved the sale of high grade diamonds at auction, where the sale price was \$16 500 below the valuation.

59 In two of the 21 matters, the disposal process was a mortgagee sale and the other was managed by the AFP. In both cases, the proceeds of the sale were placed into the custody and control of AFSA.

60 For the other two matters the sale proceeds fell short of the valuation by no more than \$2500.

4. How funds from the Confiscated Assets Account are used

Areas examined

This chapter examines how, for the period 2010–11 to 2015–16, the Attorney–General’s Department (AGD) has identified options for the possible use of funds in Confiscated Assets Account, how it has advised the Minister for Justice on these options, and the main beneficiaries of funding.

Conclusion

The AGD has established effective processes to identify the possible use of funds from the Confiscated Assets Account. It has also advised the Minister for Justice on proposals to assist in achieving value for money from expenditure. During the financial years 2010–11 to 2015–16, the main beneficiaries of funding have been Commonwealth law enforcement and criminal intelligence agencies. Significant funding has also been approved for non-government, community organisation and local council projects, with the New South Wales, Victorian and Queensland police forces also receiving funding.

How does the Attorney–General’s Department identify the possible use of funds in the Confiscated Assets Account?

The processes through which the possible use of funds—stand-alone projects or grant programs—are identified and submitted for the Minister for Justice’s approval has evolved over time. In recent years, more structured and targeted processes have been implemented in order to assist in achieving better overall outcomes from Confiscated Assets Account funding.

4.1 The purposes for which funds in the Confiscated Assets Account may be used are prescribed by sections 297 and 298 of the *Proceeds of Crime Act 2002* (POCA). Section 297 mainly relates to various administrative matters that are closely connected with the operation of the POCA scheme, and are generally fairly modest amounts.⁶¹ Historically, the bulk of expenditure is under section 298, which provides that the relevant Minister (currently the Minister for Justice) may approve expenditure for the following purposes:

- crime prevention measures;
- law enforcement measures;
- measures relating to treatment of drug addiction; and
- diversionary measures relating to illegal use of drugs.

4.2 Funding under section 298 has been provided to a range of Commonwealth and state government entities, non-government organisations, community groups and local councils. The processes through which the possible use of funds—such as stand-alone projects, expansion or

61 An example was the reimbursement of legal aid commissions for the cost of representing a person in POCA litigation. Some \$209 534 was paid from the Confiscated Assets Account for this purpose in 2015–16.

continuation of existing activities, or grant programs—are identified and subsequently submitted for the Minister's formal approval has varied significantly in recent years. They have included:

- broader government decisions (including relating to election commitments);
- coordinated funding rounds for entities; and
- ad-hoc requests from Commonwealth and state entities and non-government organisations.

4.3 From 2011 through to 2014, the ANAO identified that the AGD provided written advice to the Minister on three occasions regarding improving the identification and funding processes in order to achieve better overall outcomes from section 298 expenditures. As part of this improvement process, the AGD commissioned a review by the Australian Institute of Criminology (AIC), including an assessment of how non-government and community organisations had been funded. This review was commissioned in light of previous broadly-aimed funding rounds administered by the AGD that resulted in only 145 projects being funded from over 1800 non-government and community organisation applicants.

4.4 The AIC review recommended the adoption of more clearly defined funding priorities and a two-stream funding process: an open process for smaller community-based organisations; and a closed tender process to provide innovative solutions for specific crime prevention activities. Following that review, funding processes targeted towards non-government organisations, community groups and local councils have been more focussed. In 2013, the \$38.0 million National Crime Prevention Fund was launched, which incorporated a mix of closed and competitive funding streams specifically targeting street and gang-related crime. In 2014, this funding was largely redirected into the Safer Streets programme, which had a similar focus and was also comprised of a mix of funding streams.

4.5 Until around 2011, government entity proposals seeking funding through section 298 had been dealt with on an individual basis. This meant that proposals were put forward by the AGD for ministerial consideration without the AGD necessarily having any knowledge of what other proposals might be being developed by other entities for possible section 298 funding. Some improved coordination measures were introduced in 2011, and in 2014 the Minister approved a more competitive bi-annual process. This revised process involved the AGD inviting Commonwealth and state entities to submit proposals which would then be assessed against generic funding guidelines. This approach has the advantage of enabling comparisons of the relative merits of different proposals.⁶² After the Minister short-lists preferred proposals, these are subject to a costing agreement process by the Department of Finance before being resubmitted to the Minister for final approval.

4.6 Some relatively large government entity projects have been funded outside of the bi-annual process. These include \$14.7 million to expand the Australian Federal Police (AFP)–led Fraud and Anti-Corruption Centre. This funding was approved in May 2016.

62 In 2014, the Government also decided on a policy that required the Minister to seek Government authorisation to approve more than \$30 million of new proposals in a single financial year.

Does the Attorney-General's Department provide the Minister for Justice with relevant advice on the proposals?

The AGD provided the Minister with relevant advice to assist him in meeting his decision-making obligations.

4.7 The ANAO reviewed the AGD's advice relating to 44 proposals for stand-alone projects or grant programs which the Minister approved during 2010–11 to 2015–16. Before formally approving funding via a signed section 298 'expenditure instrument', the Minister received written advice on the relevant proposal in all cases. The advices provided assurance that the proposals were consistent with the purpose of section 298. Most commonly this was through either a clear statement that the proposal was consistent with section 298, or that it had been assessed as being eligible for funding under generic or specific guidelines attached to the advice.⁶³ These guidelines contained an extract from section 298. All of the more recent advices contained information on the Minister's decision-making responsibilities under the Commonwealth Resource Management Framework, including the *Public Governance Performance and Accountability Act 2013*.

4.8 The advices reviewed by the ANAO also provided information on the amount of uncommitted funds in the Confiscated Assets Account and any other financial information that might constrain the Minister's ability to fund further proposals. Where the advice involved multiple government entity proposals generated through a coordinated funding round, the advice included commentary on the merits of each proposal, although did not always provide specific recommendations or rank the proposals.

4.9 In the majority of cases the Minister followed the AGD's funding recommendations, however four cases were identified where the Minister did not fund all recommended projects, or agreed to fund the projects for a lower amount.

4.10 Until late 2015, the AGD did not recognise that funding state police proposals would constitute a grant. As a result, the AGD had not developed specific 'one-off' grant guidelines against which the relevant proposal could be assessed and inform the advice provided to the Minister. The development and use of such guidelines were mandatory requirements under the 2013 *Commonwealth Grant Guidelines* and 2014 *Commonwealth Grant Rules and Guidelines*.

4.11 An example of this occurred in June 2015, when after receiving advice from the AGD; the Minister approved \$3.3 million of funding to the NSW police for its continued involvement in the joint Commonwealth–NSW *Polaris* waterfront crime taskforce. The Minister wrote to the NSW Police Commissioner notifying him of his decision. The AGD subsequently recognised that such funding was in fact a grant. It then developed 'one-off' grant guidelines and in December 2015 asked the Minister to approve the guidelines and re-confirm his funding approval. The funding was then provided to the NSW police. Subsequent advice regarding similar proposals have complied with the mandatory requirements of the 2014 *Commonwealth Grant Rules and Guidelines*.

63 A minority of the earlier advices did not contain information on the Minister's obligations as a decision-maker under the (then) *Financial Management and Accountability Act 1997*.

4.12 Where relevant, the Minister was also provided advice on the legal risks involved in grant programs arising from the High Court's decision in the *Williams* case.⁶⁴ Options for mitigating risk were also canvassed.

Who have been the main beneficiaries of funding from the Confiscated Assets Account?

The main beneficiaries of funding from the Confiscated Assets Account have been Commonwealth criminal intelligence or law enforcement entities. Significant funds have been approved for non-government, community organisations or local council's projects, mainly through the Safer Streets Programme. The New South Wales, Victorian and Queensland police forces have also received funding.

4.13 From the 2010–11 to 2015–16 financial years the Minister for Justice approved \$161.0 million in funding under section 298. This figure excludes approximately \$54.8 million where the approval was subsequently reversed by the Minister and the funds were not paid.⁶⁵

4.14 For Commonwealth criminal intelligence or law enforcement entities, \$86.7 million was approved, mainly to the AFP (\$51.3 million) and the Australian Crime Commission⁶⁶ (\$28.9 million). Of the funding going to the AFP and the Commission, \$30.0 million wholly or partly supports these entities' proceeds of crime operations. A breakdown is provided in Table 4.1.

4.15 A total of \$21.6 million in funding was approved for the New South Wales, Victorian and Queensland police forces to support their involvement in separate Commonwealth–State taskforces targeting waterfront crime. A breakdown is provided in Table 4.1. Of this, \$12.0 million went to New South Wales, on the condition that the proceeds from property confiscated through the *Polaris* taskforce operations was to be transferred back to the Commonwealth under an equity sharing arrangement. As at 30 June 2016, New South Wales had transferred \$1.1 million. In addition, property with an estimated value of \$3.7 million has been forfeited directly to the Commonwealth through POCA litigation, with a further \$6.6 million of property restrained by the Commonwealth but not yet forfeited.

64 *Williams v Commonwealth of Australia* [2012] HCA 23 highlighted the requirement for certain grant or funding programs to be underpinned by a relevant Commonwealth power in the Constitution.

65 The bulk of this relates to the 2014 decision not to continue with National Crime Prevention Fund. The other significant reversals occurred when funding for AFP, Customs and Border Protection, and the Australian Commission for Law Enforcement Integrity projects were obtained through whole of Government budgetary processes, meaning that proceeds of crime funding was no longer required.

66 Now part of the Australian Criminal Intelligence Commission.

Table 4.1: Funding to Commonwealth and state entities

Recipient	Project(s)	Total funding (\$ million)
Australian Federal Police	Criminal assets confiscation taskforce; anti-gang squads; aerial surveillance capability; fraud and anti-corruption centre; big data visualisation capability	51.32
Australian Crime Commission	Criminal assets confiscation taskforce; criminal intelligence database and information-sharing systems; anti-money laundering; secondments to overseas agencies; waste water analysis capability; mobile surveillance capacity; national organised crime taskforce	28.99
NSW Police	Polaris waterfront crime taskforce	12.00
Victorian Police	Trident waterfront crime taskforce	8.14
Australian Transactions and Reports Centre	Enhanced registration system for financial remittance providers	2.95
Australian Commission for Law Enforcement Integrity	Surveillance capacity enhancement pilot project	2.65
Queensland Police	Jericho waterfront crime taskforce	1.50
Attorney-General's Department	Anti-corruption policy statement	0.74

Source: AGD submissions to Minister for Justice.

4.16 \$52.7 million was approved for projects to be undertaken by non-government or community organisations or local councils, across a wide variety of activities. The majority (\$37.4 million) of this funding was under the two funding rounds of the Safer Streets programme.

Table 4.2: Funding to non-government and community organisations and local councils

Recipient	Project(s)	Total funding (\$ million)
Various local councils and non-government and community organisations (including Neighbourhood Watch Australasia and Youth off the Streets)	Enhancing security and safety of community through improved environmental design; closed circuit TV monitoring; security infrastructure; lighting and early intervention and crime prevention activities (Safer Streets programme)	37.4
Youth Off the streets	Early intervention outreach activities (National Crime Prevention Fund)	5.0
Various local councils and non-government and community organisations	Graffiti Prevention	3.0
Police-citizens youth clubs / Blue Light organisations	Early intervention outreach activities	1.9
Anti-Slavery Project; Australian Catholic Religious Against Trafficking Humans; Project Respect and Scarlet Alliance	Various anti-people trafficking activities	1.6
Neighbourhood Watch Australasia	Establish national office and undertake various activities with police and communities	1.5
Various non-government and community organisations	Improve security and domestic violence crisis accommodation facilities	1.0
Crime Stoppers	Dob-in-a-dealer	1.0
Firearm Safety Foundation Victoria	Improve firearm safety	0.3

Source: AGD submissions to Minister for Justice.

4.17 Information on projects funded under section 298 is available from the AGD's annual reports and grant register. For 2015–16, all government–entity projects funded, and total funding amounts are set out in the 2015–16 annual report. Information on the Safer Streets Projects is available from the AGD's grant register.

5. Performance Monitoring and Reporting

Areas examined

This chapter examines the various performance-related monitoring and reporting undertaken by the Australian Federal Police (AFP) and Australian Financial Security Authority (AFSA) pursuant to their respective roles under the *Proceeds of Crime Act 2002* (POCA).

Conclusion

The AFP publicly reports the estimated recovery value of property restrained each year. When combined with the Australian Crime Commission's (ACC's)⁶⁷ public reporting of the estimated value of property confiscated each year, this illustrates the trends in the amount of criminal proceeds intercepted by the POCA scheme.

AFSA also undertakes limited public reporting on its administration of property. This reporting does not include information on the costs of administering property under its custody and control, which is an important aspect of its overall performance in relation to the proceeds of crime. However, AFSA has made some improvements in its internal reporting capacity about the costs of managing property and is in the early stages of developing benchmarks for some aspects of these costs.

Does the AFP appropriately monitor and report on its performance?

The AFP publicly reports on the estimated recovery value of property restrained each year and whether the AFP has met the benchmark set for that year. It also internally monitors another key performance measure—the estimated value of property confiscated each year—which is publicly reported by the ACC. These two measures illustrate the trends in the criminal proceeds intercepted by the POCA scheme. In the context of a current AFP-wide review of performance measures, additional metrics could be developed to provide better information on the AFP's performance in litigating POCA cases and, in the longer term, the effect of the POCA scheme on the underlying criminal economy.

5.1 Through the Criminal Assets Confiscation Taskforce (CACT), the AFP has a key role in investigating and identifying property potentially subject to restraint and confiscation under the POCA. The AFP Criminal Assets Litigation (CAL) team then has responsibility for obtaining the relevant POCA court orders to give effect to the Taskforce's decisions.

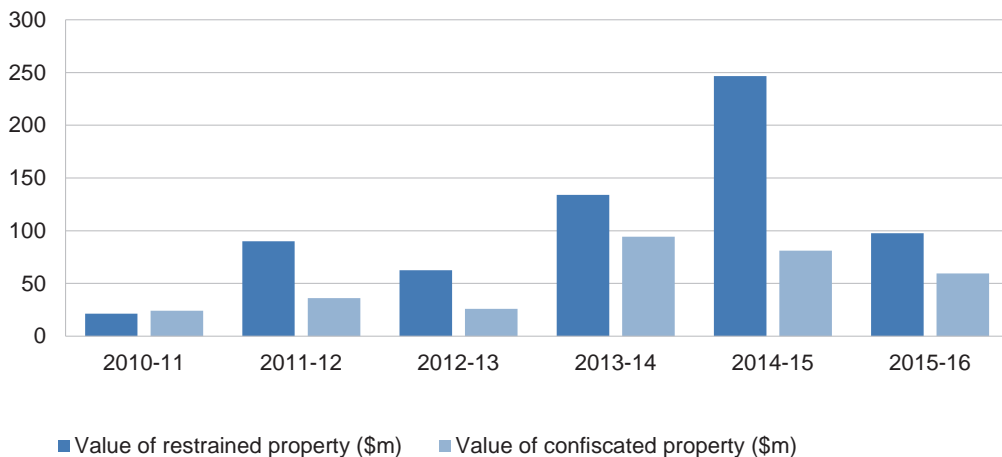
5.2 The AFP publicly reports on the estimated recovery value of property restrained each financial year. This provides an indication of the AFP's success in, at least temporarily, depriving persons of the proceeds or instruments of suspected or proven criminal activity and preventing possible reinvestment of these in further criminal enterprises. The AFP's current performance measure for POCA matters is that the value of restrained property for the relevant year is higher than the annual average for the previous five years. With this average increasing from \$65.6 million

67 On 1 July 2016, the Australian Crime Commission became part of a new entity, the Australian Criminal Intelligence Commission.

to \$111.1 million due to the record amount restrained in 2014–15⁶⁸, the amount restrained in 2015–16 (\$96.5 million) meant the AFP did not meet this performance measure. The AFP's annual report states that the spike in restrained property in 2014–15 and the complex nature of the relevant cases has 'had a direct impact on [the taskforce's] capacity to pursue new restraint action in 2015–16'.

5.3 The AFP commenced internal reporting on the value of confiscated property from 2014.⁶⁹ The ACC, a member of the CACT, publically reports on both the value of restrained and confiscated property.

Figure 5.1: Restrained and Confiscated Property 2010–11 to 2015–16



Source: AFP, ACC, and CDPP Annual Reports.

5.4 The AFP does not currently collect performance information on the litigation of POCA matters. The AFP Police Realtime Online Management Information System (PROMIS) database⁷⁰ does not have the reporting capability to readily monitor what proportion of the estimated recovery value of property restrained is eventually confiscated. Compiling this information requires a manual process.⁷¹ The annual reporting of the amount of confiscated property is

68 The 2014–15 year was notable in that a single case accounted for \$147.4 million. In comparison, only \$10.4 million was restrained in the highest value case for 2015–16.

69 Internal monitoring is mainly done through the regular case officer and senior management forums related to Criminal Assets Confiscation Taskforce operations. A short 'Performance Snapshot' report containing information on matters such as amounts restrained and forfeited, and the number of order applications are included as agenda papers for these forums.

70 The PROMIS database covers a wide range of AFP operations and is not restricted to POCA matters.

71 This difficulty in part reflects a lack of relevant connectivity within the AFP and between the AFP and AFSA in recording POCA information. Most of the larger POCA matters are initially recorded by the CACT in PROMIS under an 'operation' name and given an ID number. The AFP CAL team may then run several POCA litigation cases against different individuals related to the one operation. Each case is then assigned a different ID number that is unique to the AFP CAL records system. Where a custody and control order or forfeiture order is obtained and AFSA become involved, AFSA manually enters it into its case management system, using a different ID number again.

appropriate in that it shows trends in the permanent deprivation of the proceeds or instruments of suspected or proven criminal activity. The considerable time lags between restraint and confiscation means that such reporting alone does not however give a clear picture of how successful the AFP has been in achieving confiscation from initial restraining action commenced in previous years. During the course of the audit, the AFP advised the ANAO that a review of AFP performance measures relating to the POCA scheme, including litigation, would be included as part of broader development work to incrementally 'evolve' performance measurement across the AFP as a whole over the next four years.⁷² This process provides an opportunity to consider the feasibility of developing performance measures that provide some indication of the effect of the POCA scheme on the underlying criminal economy and its success in achieving key legislative objectives.^{73,74} An efficiency-based performance measure—for example, one that compares the annual total cost of AFP POCA operations to the annual value of restrained and confiscated property—could also form part of a revised suite of measures.

5.5 In 2014 Australia was evaluated against the Financial Action Task Force (FATF) international standards on the combatting of money laundering and terrorism financing. The evaluation included an assessment of the overall effectiveness of the Commonwealth, State and Territory schemes to seize and confiscate the proceeds and instruments of crime. Australia was assessed as 'moderately effective', which was in line with the assessment results for Canada, Austria, Singapore, Belgium, Malaysia, and Norway, but below the 'substantially effective' rating obtained by Spain and Italy.

Does AFSA appropriately monitor and report on its performance?

AFSA's public reporting on its administration of property under its custody and control is limited to high-level information. It is in the early stages of developing an improved internal reporting capacity to monitor the costs of managing property under AFSA custody and control. This work could be also be used to enable public reporting of the costs to administer such property, which is an important aspect of AFSA's overall performance and responsibilities under the POCA scheme.

5.6 AFSA administers property for which it has been given custody and control as a trustee, manages any necessary disposal of property that has been forfeited, and maintains the Confiscated Assets Account. AFSA's 2015–16 performance measure is that it takes 'action to identify, locate, secure and achieve control or dispose of property in accordance with timeframes contained in court orders, or in any event as soon as practicable after receipt of court orders and

72 While the AFP advised that the first tranche of changes to the AFP performance framework was likely to take effect from 2017–2018, as at November 2016 no decision had been made on the timing on any changes relating to POCA reporting.

73 Under the POCA these legislated objectives include deterring persons from breaching Commonwealth laws, preventing the reinvestment of funds in further criminal activities, and undermining the profitability of criminal enterprises.

74 Any work in this area could build on a 2014 report commissioned by the AFP to develop measures to evaluate the 'disruptive impact' of the POCA scheme on organised crime—the Proceeds of Crime Disruption Index (POCDI). POCDI is a downstream measure of the reduction in funds available to organised crime for re-investment in criminal enterprise. The consultancy concluded that on average, for every dollar of criminal assets recovered, a further \$4.30 of criminal activity was prevented.

the Confiscated Assets Account is maintained in accordance with relevant requirements'. AFSA's annual report stated that it had achieved this measure.⁷⁵

5.7 AFSA's own internal performance measures contain quantitative benchmarks, notably that action to control property be initiated within 24 hours of receiving the court order from the AFP, and that control of the property is to be achieved within two weeks of locating it. AFSA monitors performance against these on a monthly basis. For the 2016 calendar year, AFSA reported that action was initiated to control property within 24 hours after receiving the court order 100 per cent of the time and control of the property was achieved within two weeks 97 per cent of the time. ANAO testing indicated that once provided with the relevant court orders by the AFP, AFSA has been able to achieve control of property consistent with relevant restraining orders with the exception of one motor vehicle.

5.8 AFSA's proceeds of crime functions operate on a cost recovery basis, however its performance measures do not include the costs of managing property under its control. AFSA staff time spent on the management of individual cases is charged at \$62.50 per every 15 minute increment, with the cumulative cost (called Official Trustee fees) being deducted by AFSA from the proceeds of the disposal of the property once the matter is finalised. Expenses incurred through third party service providers—such as maintenance and storage costs, valuation costs, legal and conveyancing costs, sales commissions—can be recovered directly from funds in restrained or forfeited bank accounts at the time the expenses are incurred. Where there are no (or insufficient) bank funds in the individual cases, AFSA draws on the Official Trustee body corporate bank account, and then reimburses that account from the proceeds of property once sold. Where property is not forfeited and is returned to its owner, the owner is not liable for AFSA's costs during the period the property was restrained. In such situations, AFSA can recover any service provider expenses from the Confiscated Assets Account, but Official Trustee fees must be written off.^{76,77}

5.9 Over the last six years, AFSA's total costs (combined Official Trustee fees and service provider costs) as a proportion of the net property proceeds in cases finalised by AFSA each year has fluctuated significantly from a high of 6.2 per cent in 2012–13 to 0.9 per cent in 2015–16. This fluctuation is closely connected with the nature of the property under AFSA's custody and control. The value of the relevant property can also affect the cost to net proceeds ratio. For example, the base cost of storing a vehicle at a particular facility will be the same regardless of its value. The total costs of administering cases where only cash or bank accounts have been restrained are generally much lower than those involving property that requires some active management or disposal of the property by AFSA. As an example, one older matter from 2003 that was finalised in 2015–16 involved property (notably a boat) valued a little over \$400 000, but marina-related costs totalled \$245 000 and Official Trustee fees \$30 000. Another case from 2005 (finalised in 2014–15)

75 The ANAO's auditing of AFSA's 2015–16 financial statements demonstrated that transactions in and out of the Confiscated Assets Account were in accordance with the purpose of the account as set down by the POCA.

76 Similarly, where a case is finalised by AFSA and the net proceeds are insufficient to fully cover any outstanding service provider expenses, these (but not Official Trustee fees) can be recovered from the Confiscated Assets Account.

77 Historically, the Official Trustee has received a subsidy from AFSA to meet shortfalls in receiving proceeds of crime revenue. This potentially includes situations where Official Trustee fees have been written off. In 2015–16, the Official Trustee received a subsidy of \$400 000.

involving property valued at \$3.2 million incurred \$101 000 in Official Trustee fees. By comparison, several cases from 2014 that were finalised in 2015–16 involving only cash or bank account funds (totalling several million dollars each), total administration costs (Official Trustee fees) were typically between \$2000 and \$5000. Two-thirds of cases finalised in 2015–16 involve cash or bank account funds only.

5.10 Information on the costs of administering property relating to particular cases is provided by AFSA to the AFP through periodic and final reports. Any revenue (for example, bank account interest or rental income) is included in these reports. The final report also records the net proceeds to be transferred into the Confiscated Assets Account.

5.11 In 2016, AFSA commenced work to improve internal reporting capacity to more readily allow the monitoring of the costs to manage property under AFSA custody and control. AFSA is also in the early stages of developing benchmarks for the amount of Official Trustee fees that might be expected to be incurred for managing property. AFSA advised the ANAO that initially, cost benchmarks are to be developed for cases only involving bank accounts or cash, since these types of cases are reasonably comparable. As part of this increased focus on the monitoring of costs and development of benchmarks, AFSA could usefully revise its performance measures and/or public reporting to include information on the costs of administering property under its custody and control.



Rona Mellor PSM

Canberra ACT
22 March 2017

Appendices

Appendix 1 Entities' responses



Australian Government
Attorney-General's Department

Secretary

16/6542

3 March 2017

Mr Grant Hehir
Auditor-General
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Auditor-General *Grant*

Proposed Performance Audit Report on Proceeds of Crime – joint portfolio response from the Attorney-General's Department, Australian Federal Police and the Australian Financial Security Authority

I write in response to Ms Michelle Kelly's letter of 3 February 2017, also sent to Commissioner Colvin of the Australian Federal Police and Ms Ingram of the Australian Financial Security Authority, which provided the Australian National Audit Office's (ANAO) proposed audit report on the *Proceeds of Crime Act*.

I appreciate the opportunity to provide written comments on the proposed report. I provide comments on behalf of the Attorney-General's Department, the Australian Federal Police and the Australian Financial Security Authority.

The Attorney-General's Department, the Australian Federal Police and the Australian Financial Security Authority each *notes* the ANAO's recommendation.

Attached to this letter is a joint formal response from the three agencies to the proposed recommendation and a summary of each response for inclusion in the tabled report.

The action officer for this matter is Ms Kelly Williams, Assistant Secretary – Criminal Law Policy Branch, who can be contacted on 6141 2770.

Yours sincerely

Chris Moraitis PSM

cc: Ms Michelle Kelly, Group Executive Director, Performance Audit Services Group, ANAO
Mr Andrew Colvin APM OAM, Commissioner, Australian Federal Police
Ms Veronique Ingram PSM, Chief Executive, Australian Financial Security Authority

3-5 National Circuit, Barton ACT 2600 Telephone (02) 6141 6666 www.ag.gov.au ABN 92 661 124 436



March 2017

Summary of agency responses to the Proceeds of Crime audit report

Attorney-General's Department

The Attorney-General's Department (AGD) administers the *Proceeds of Crime Act 2002* (the Act) which provides a scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth law. It seeks to disrupt, deter and reduce crime by undermining the profitability of criminal enterprises, depriving persons of the benefits derived from crime, and preventing reinvestment of the proceeds in further criminal activity.

The Act also provides a scheme that allows for confiscated funds to be given back to the community in an effort to prevent and reduce the harmful effects of crime in Australia. This mechanism has provided funding to non-government and community organisations, local councils, as well as Commonwealth and State police forces and Commonwealth criminal intelligence agencies.

Section 297 of the Act makes provision for various payments from the Confiscated Assets Account (CAA), including payments under a program approved by the Minister under section 298 of the Act. The CAA is administered by the Australian Financial Security Authority (AFSA).

Section 298 of the Act allows the Minister for Justice to approve programmes of expenditure for one or more of four purposes:

- Crime prevention measures
- Law enforcement measures
- Measures relating to treatment of drug addiction, and
- Diversionary measures relating to illegal use of drugs.

There is often a significant time delay between assets being restrained and the completion of legal processes leading to the confiscation and realisation of assets. It is common for the realised value of confiscated assets to be less than their estimated value at the time they were restrained. This arises where the value of assets changes over time, and where legal fees are deducted before confiscated funds are finally received into the CAA.

Australian Federal Police

The Australian Federal Police (AFP) welcomed the opportunity to contribute to the Australian National Audit Office (ANAO) performance audit on the effectiveness of the Proceeds of Crime scheme.

The AFP acknowledges the commentary provided in the report and notes the ANAO's conclusion that the AFP, AFSA and AGD effectively carry out key operational and advisory functions related to property and proceeds under the *Proceeds of Crime Act 2002* (Cth).

Australian Financial Security Authority

AFSA notes the report's findings that for the major classes of property AFSA processes have worked well and custody, control and disposal of property have been achieved in a way that minimises the risk of the property being dissipated.

In respect of the bank accounts, AFSA currently earns a rate of return on funds in the restrained and forfeited bank accounts and the Confiscated Assets Account in accordance with the provisions of the *Proceeds of Crime Act 2002*.

AFSA will work with key stakeholders and agencies to facilitate arrangements that improve rates of return from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account whilst ensuring compliance with the *Proceeds of Crime Act 2002*.

Response to Recommendation

The Australian Government should implement arrangements to facilitate improved rates of returns from funds in the restrained and forfeited bank accounts and Confiscated Assets Account.

Attorney-General's Department

The Department **notes** this recommendation.

The Department agrees with the report's finding at page 25 that there are "... some practical and legal constraints on the Official Trustee that limit the manner in which the funds in the relevant accounts can be managed".

The Department notes that the policy objectives of the legislative framework underpinning the treatment and distribution of restrained and forfeited funds and funds held in the Confiscated Assets Account are aimed primarily at the reduction of crime and prevention of further investment of criminal proceeds in criminal activity. The framework set out for expenditure from the Confiscated Assets Account also facilitates reinvestment of confiscated funds into programs and activities that reduce crime, improve community safety and facilitate enhanced law enforcement capabilities.

The Department is of the view that the legislative framework does not currently envisage the increasing of returns in light of the overarching policy objectives. However, the Department will consult with Government on this matter.

Australian Federal Police

The AFP **notes** the ANAO's recommendation. As the recommendation relates to implementing arrangements to facilitate improved rates of returns from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account which is a matter for AGD and AFSA, the AFP makes no comment in relation to the recommendation.

Australian Financial Security Authority

AFSA **notes** the ANAO's recommendation in the report, and will work with key stakeholders and agencies to facilitate arrangements that improve rates of return from funds in the restrained and forfeited bank accounts and the Confiscated Assets Account whilst ensuring compliance with the *Proceeds of Crime Act 2002*.

Editorial matters

AGD, AFP and the AFSA have not identified any editorial matters for the ANAO's consideration.

