



New South Wales

# Confiscation of Proceeds of Crime Amendment Bill 2005

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Confiscation of Proceeds of Crime Act 1989*, the *Civil Liability Act 2002*, the *Crimes Act 1900* and the *Forfeiture Act 1995* as follows:

- (a) to include offences relating to drug precursors and the ongoing supply of prohibited drugs as offences on which confiscation orders under the Principal Act may be based,
- (b) to limit the circumstances in which certain drug offences may be offences on which a confiscation order may be based to offences involving more than a small quantity of a prohibited plant or prohibited drug,
- (c) to make procedures relating to applications for penalty orders based on drug offences (*drug proceeds orders*) consistent with those for orders based on other offences (*pecuniary penalty orders*) and to also make assessments of proceeds of such offences for the purposes of drug proceeds orders consistent with those for the purposes of pecuniary penalty orders,
- (d) to provide for a new procedure for freezing and dealing with property that is or may be tainted property in relation to a serious offence or benefits derived

from a serious offence or drug offences proceeds, being a process initiated by a notice issued by an authorised justice and confirmed by a court dealing with the relevant offence,

- (e) to provide for the recognition and enforcement of additional interstate instruments relating to confiscation of property,
- (f) to provide for the supervision of and control by the Public Trustee of damages awarded to offenders suffering from mental illness, being damages arising out of conduct or in circumstances that would (but for that illness) have constituted a serious offence,
- (g) to enact new money laundering offences,
- (h) to enable the Supreme Court to apply the forfeiture rule (that is, the rule that prevents a person who is found guilty of murder from benefiting from the victim's estate) to persons found not guilty of murder by reason of mental illness,
- (i) to make other consequential amendments and provisions of a savings and transitional nature.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Confiscation of Proceeds of Crime Act 1989* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *Civil Liability Act 2002* set out in Schedule 2.

**Clause 5** is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 3.

**Clause 6** is a formal provision that gives effect to the amendments to the *Forfeiture Act 1995* set out in Schedule 4.

## **Schedule 1      Amendment of Confiscation of Proceeds of Crime Act 1989**

### **Drug trafficking offences**

**Schedule 1 [6]** substitutes the definition of *drug trafficking offence* in section 4 of the *Confiscation of Proceeds of Crime Act 1989* (the *Principal Act*). On conviction for an offence included in this definition, a person may be made the subject of a drug proceeds order or a forfeiture order under the Principal Act. The new definition

includes an additional offence relating to possession of precursors for prohibited drugs and also limits the application of the Principal Act to offences involving more than a small quantity of a prohibited plant or prohibited drug.

### **Drug proceeds orders**

The provisions of the Principal Act relating to drug proceeds orders have not yet commenced. Currently, they provide that a drug proceeds order must be granted by a court if a person is convicted of a drug trafficking offence and the court determines that the person has received a payment or reward in connection with drug trafficking. In assessing those payments or rewards and making an order, a court may order that the amount payable is the amount that may be realised at the time the order is made rather than the amount of the payments or rewards received. The amendments will now require the court to make a drug proceeds order against a person convicted of a drug trafficking offence if the prosecution applies for such an order and if the court determines that the person has derived a benefit from drug trafficking at any time. The amount of the order will be the amount assessed as the benefits derived. This aligns drug proceeds orders with pecuniary penalty orders with respect to assessment of property that may be confiscated.

**Schedule 1 [19]** amends section 13 of the Principal Act to make the procedures for applying for drug proceeds orders the same as those currently applying to pecuniary penalty orders. **Schedule 1 [5] and [20]–[22]** make consequential amendments.

**Schedule 1 [25]** substitutes sections 29 and 30 of the Principal Act. Proposed section 29 requires a court that convicts a person of a drug trafficking offence to order the person to pay a pecuniary penalty equal to the benefits the person derived in connection with drug trafficking if it believes the person has derived a benefit in connection with drug trafficking and if an application is made for the order. The previous requirement for a court to take any such order into account before imposing a fine has been removed. Proposed section 30 sets out procedures for the assessment of benefits derived in connection with drug trafficking. The court is to have regard to the same kind of matters considered in relation to pecuniary penalty orders, that is, property that came into the possession or control of the person because of drug trafficking, benefits provided as a result of any public promotion, the market value of similar prohibited plants or prohibited drugs and usual payments for doing the acts constituting the offence and the value of the person's property and income and expenditure within the previous 6 years. **Schedule 1 [26]** makes a consequential amendment.

**Schedule 1 [27]** amends section 31 of the Principal Act to remove provisions relating to amounts that may be realised from payments or rewards in connection with drug trafficking, as these are no longer relevant to the assessment process. The amendment also omits provisions relating to evidence as to the value of substances, which are re-enacted by **Schedule 1 [28]**.

**Schedule 1 [28]** inserts proposed section 31A which contains provisions of general application relating to evidence that may be given in proceedings for drug proceeds orders as to the market value of substances involved in drug trafficking offences.

**Schedule 1 [29]** repeals sections of the Principal Act that are no longer relevant to the assessment of benefits from drug trafficking. The amendment also inserts proposed section 32 which contains provisions, similar to those relating to pecuniary penalty orders, setting out the circumstances when a court may treat property subject to the effective control of the defendant as property of the defendant. The proposed section also provides for notice to be given to persons having an interest in the property and confers a right on such persons to appear and give evidence at the proceedings for the drug proceeds order. **Schedule 1 [15]** makes a consequential amendment.

### Freezing notices

Currently, a restraining order may be obtained under the Principal Act in the Supreme Court against property of a person (the *defendant*) who has been, or is about to be, charged with a serious offence. An order may relate to specified property or property of the defendant generally. The proposed Act provides for an additional procedure to restrain dealings in specified property by offenders pending the hearing of criminal proceedings and the outcome of an application for a confiscation order. The new procedure enables authorised justices to issue freezing notices which must be confirmed by a court dealing with the relevant offence and also provides for orders to be made in relation to the property pending the outcome of proceedings.

**Schedule 1 [33]** inserts proposed Division 1A (proposed sections 42A–42V) of Part 3.

Proposed section 42A defines expressions used in the proposed Division.

Proposed section 42B enables an authorised officer to apply to an authorised justice for a freezing notice in respect of specified property if the officer has reasonable grounds to believe that a person has committed a serious offence and the property is tainted property in respect of the offence or the person has derived benefits from committing the offence. (Property is *tainted property* if it is used in the commission of an offence or is derived or realised from such property or is derived or realised as a result of the commission of an offence or as a result of a public promotion.) A freezing notice may also be applied for in relation to property of a person other than the person who committed the offence.

Proposed section 42C enables an authorised justice to issue a freezing notice if the authorised justice is satisfied that the person has been convicted of, or charged with, an offence or is likely to be so charged and there are reasonable grounds for the beliefs of the authorised officer set out in the application.

Proposed section 42D provides for the form of a freezing notice.

Proposed section 42E enables applications for freezing notices to be made by telephone or facsimile in urgent circumstances.

Proposed section 42F requires notice of the issue of a freezing notice to be given by the applicant to the defendant, the owner of affected property and any other person subject to the freezing notice.

Proposed section 42G makes it an offence to give false or misleading information in, or in connection with, an application for a freezing notice.

Proposed section 42H requires records to be kept of the grounds for issuing a freezing notice but does not require the identity of a person to be recorded if an authorised justice is satisfied that the safety of the person might be jeopardised.

Proposed section 42I requires a person who obtains a freezing notice to apply to an appropriate court for confirmation of the notice within 14 days after it is issued.

Proposed section 42J provides for notice to be given to third parties of an application to confirm a freezing notice.

Proposed section 42K enables a defendant, an authorised officer or a person who has an interest in property affected by a freezing notice to apply to an appropriate court to have the notice set aside or varied. Any such application may be heard before the day set down for the confirmation application.

Proposed section 42L sets out the circumstances in which an appropriate court may confirm a freezing notice. The notice may be confirmed if there has been a conviction or proceedings have been commenced and there are reasonable grounds to believe the matters set out in the affidavit supporting the application. The affidavit must contain a statement as to belief relating to the defendant's guilt and a statement that the property is tainted property or that the defendant derived benefits because of committing the offence. In the case of property of another person, the affidavit must contain a statement that the property is tainted property or is subject to the effective control of the defendant who has derived benefits from the offence. A court that confirms a freezing notice must also make property orders under proposed section 42M.

Proposed section 42M requires an appropriate court that confirms a freezing notice to make an order directing the Commissioner of Police (the *Commissioner*) to take control of the property, to dispose of it in a specified manner and to retain any proceeds. The court may also instead, if it thinks it appropriate in the circumstances of the case, make other orders in relation to the property, including orders that the defendant not dispose of the property or the Public Trustee or Commissioner retain or take control of the property. Orders may also be made providing for the payment of reasonable living expenses to the defendant and regulating other matters relating to the control of the property.

Proposed section 42N enables the appropriate court to refuse to confirm a freezing notice unless the State gives undertakings with respect to the payment of damages or costs in relation to the notice.

Proposed section 42O makes it an offence to knowingly contravene a freezing notice. It also enables an application to be made to have a disposition of or dealing with property set aside if it is made or done in contravention of a freezing notice.

Proposed section 42P sets out the circumstances when a freezing notice ceases to have effect, including if the defendant is not charged with a serious offence at the end of the period of 48 hours after the issuing of the notice.

Proposed section 42Q enables a court to set aside or vary a freezing notice if it makes a forfeiture order in respect of property subject to the notice or a pecuniary penalty order or drug proceeds order against the defendant concerned.

Proposed section 42R enables a freezing notice to be discharged by the payment to the State of an amount equal to the value of the property subject to the notice.

Proposed section 42S provides for the return of property, or payment of the proceeds of property, on a freezing notice ceasing to be in force.

Proposed section 42T provides for the Commissioner to enter into arrangements with the Public Trustee or any other person with respect to the management of property under the control of the Commissioner under a freezing notice.

Proposed section 42U enables an appeal to be made against a refusal to confirm a freezing notice by the Attorney General, the Director of Public Prosecutions or the Commissioner.

Proposed section 42V enables an appropriate court to vary a freezing notice or to set it aside, or to make an order with respect to the carrying out of an undertaking with respect to the payment of costs or damages by the State. An application may be made by an appropriate officer, the owner of the property, a person directed to take control of the property or any other person given leave by the court.

**Schedule 1 [1]** defines *appropriate court* for the purposes of an application for a freezing notice.

**Schedule 1 [2]** amends the definition of *appropriate officer* in section 4 of the Principal Act to make the Commissioner for the Independent Commission Against Corruption an appropriate officer for the purposes of freezing notices.

**Schedule 1 [3]** defines *authorised officer* for the purposes of an application for a freezing notice.

**Schedule 1 [24]** amends section 27 of the Principal Act to enable property declared by a court to be under the effective control of a person to be made subject to a freezing notice for the purpose of using the property to satisfy a pecuniary penalty order.

**Schedule 1 [40]** inserts a new heading, as a result of the application of provisions of general application to both restraining orders and freezing notices.

**Schedule 1 [41]** substitutes section 46 of the Principal Act so as to apply provisions that currently enable the Public Trustee to have the expenses of defending a criminal charge of a defendant who is subject to a restraining order taxed to the Commissioner in respect of any such expenses of a defendant who is subject to a freezing notice.

**Schedule 1 [42]–[48]** amend section 47 of the Principal Act to confer on the Commissioner and the Public Trustee, in relation to property subject to a freezing notice, the power to apply for a direction to pay to the State an amount under a pecuniary penalty order out of property subject to a freezing notice. This power is already conferred on the Public Trustee in relation to property subject to a restraining order.

**Schedule 1 [49]–[52]** amend section 48 of the Principal Act to make property subject to a freezing notice subject to a charge to secure payment of an amount under a pecuniary penalty order or a drug proceeds order if such an order is made against the person subject to the notice.

**Schedule 1 [53]–[58]** amend section 49 of the Principal Act to enable particulars of a freezing notice to be recorded on registers of title to, or charges over, property that is subject to the notice.

**Schedule 1 [59]** amends section 51 of the Principal Act to make it an offence to hinder or obstruct the Public Trustee or the Commissioner in the performance of obligations under a freezing notice.

**Schedule 1 [60]** inserts proposed section 51A which removes the right of a person to rely on the privilege against self-incrimination if the person is required to furnish a statement to the Public Trustee or the Commissioner giving particulars of property but prevents any such statement from being used in criminal proceedings.

**Schedule 1 [61] and [62]** amend section 52 of the Principal Act to extend protection against liability currently given to the Public Trustee in relation to liability for charges for property subject to a restraining order to property subject to a freezing notice. Protection is also extended to the Commissioner when the Commissioner has control of property under a freezing notice.

**Schedule 1 [63] and [64]** amend section 53 of the Principal Act to enable the Public Trustee and the Commissioner to receive fees for the exercise of functions in relation to property subject to a freezing notice.

**Schedule 1 [65]–[67]** amend section 54 of the Principal Act to enable a court to revoke a freezing notice if the defendant concerned gives satisfactory security for the payment of any pecuniary penalty that may be imposed or gives other undertakings satisfactory to the court.

**Schedule 1 [68]** omits a section containing provisions relocated by another amendment.

**Schedule 1 [69] and [70]** amend section 57 of the Principal Act to extend evidentiary provisions relating to the Public Trustee's right to act under a restraining order to the Public Trustee and the Commissioner in relation to the right to act under a freezing notice.

**Schedule 1 [71]** amends section 62 of the Principal Act to apply to proceedings relating to freezing notices provisions preventing non-disclosure of documents on grounds of self-incrimination or breach of an obligation.

**Schedule 1 [76]** amends section 74 of the Principal Act to restrict the jurisdiction of Local Courts dealing with offences relating to the contravention of freezing notices to matters involving property not exceeding \$10,000 in value.

**Schedule 1 [77]** amends section 74 of the Principal Act to confer on the Supreme Court jurisdiction to deal with offences relating to the contravention of freezing notices to matters involving property exceeding \$10,000 in value.

**Schedule 1 [96] and [97]** amend section 89 of the Principal Act to enable freezing notices to be applied to property in another State for the purposes of the registration of the notice in the other State.

**Schedule 1 [98]–[101]** amend section 90 of the Principal Act to apply provisions for payment of costs on variation of an order registered in another State to freezing notices registered in another State.

**Schedule 1 [104]** makes a consequential amendment.

### **Restraining orders**

**Schedule 1 [34]** amends section 43 of the Principal Act to enable an application to be made for a restraining order after a person has been convicted of a serious offence, in addition to before or after a person has been charged. **Schedule 1 [35]** makes a consequential amendment.

**Schedule 1 [36]** amends section 43 of the Principal Act to prohibit a restraining order from being made in respect of property affected by a freezing notice or an application for a freezing notice.

**Schedule 1 [37]** amends section 45 of the Principal Act to insert a provision requiring notice to be given of an application for a further order relating to a restraining order.

**Schedule 1 [68]** makes a consequential amendment.

**Schedule 1 [38]** renumbers section 50, relating to contravention of restraining orders, as a result of the application of certain provisions to both restraining orders and freezing notices.

**Schedule 1 [39]** renumbers section 55, relating to the duration of restraining orders, as a result of the application of certain provisions to both restraining orders and freezing notices.

**Schedule 1 [82]** makes an amendment consequential on the renumbering of provisions.

### **Recognition of interstate instruments**

**Schedule 1 [7] and [9]–[11]** amend section 4 of the Principal Act to insert a new definition of *interstate crime related property declaration* and to extend other existing definitions of interstate instruments to instruments other than orders. (In some jurisdictions restraining orders and confiscation orders take the form of declarations or other kinds of instruments.)

**Schedule 1 [14]** amends section 4 of the Principal Act to include the Australian Capital Territory as a State for the purposes of the Act. This has the effect of extending recognition provisions relating to laws of other States to the Australian Capital Territory.

**Schedule 1 [79] and [80]** amend section 77 of the Principal Act to enable the registration of interstate crime related property declarations under the Act.



**Schedule 1 [81]** amends section 77 of the Principal Act to provide that a sealed copy of an interstate instrument is not required for registration if it is not the practice of the issuing court or body to seal copies of the instrument concerned.

**Schedule 1 [82]** inserts proposed section 78A which provides for registered interstate crime related property declarations to be enforced as interstate forfeiture orders, subject to the regulations.

**Schedule 1 [84] and [85]** amend section 80 of the Principal Act to prevent a State court from revoking, varying or limiting an interstate crime related property declaration.

**Schedule 1 [86] and [87]** amend section 81 of the Principal Act to provide for the duration of registration of interstate crime related property declarations.

**Schedule 1 [88] and [89]** amend section 82 of the Principal Act to enable the Supreme Court to cancel the registration of interstate crime related property declarations if registration was improperly obtained or the declaration ceases to be in force in the State in which it was made.

**Schedule 1 [90]–[94]** amend section 85 of the Principal Act to provide for the interim registration of facsimile copies of interstate crime related property declarations.

### **Other amendments**

**Schedule 1 [4]** omits the definitions of *bank*, *building society* and *credit union* from section 4 of the Principal Act. Those terms are no longer used in the definition of *financial institution*, which is to be amended by **Schedule 1 [8]** to refer to authorised deposit-taking institutions.

**Schedule 1 [12]** amends section 4 of the Principal Act to include as tainted property for the purposes of the Principal Act property that is substantially derived from property used in the commission of a serious offence or from a serious offence or a public promotion related to a serious offence. **Schedule 1 [30]** amends section 35 of the Principal Act to make a similar amendment.

**Schedule 1 [13]** amends section 4 of the Principal Act to recognise that court attendance notices may not be able to be served.

**Schedule 1 [16] and [17]** amend section 6 of the Principal Act to update references to informations.

**Schedule 1 [18], [72], [73] and [78]** amend sections 7, 69, 72 and 74 of the Principal Act to replace references to the money laundering offence currently contained in the Principal Act with references to new offences to be inserted by Schedule 3 to the proposed Act into the *Crimes Act 1900*.

**Schedule 1 [23]** amends section 18 of the Principal Act to require a court considering any hardship likely to arise from a forfeiture order to take into account responsibilities arising from an Aboriginal person or Torres Strait Islander's ties to extended family and kinship.

**Schedule 1 [31]** amends section 35 of the Principal Act to include as property that may be the subject of search and seizure powers property substantially derived from a public promotion involving the depiction of a serious offence or the expression of the offender's thoughts, opinions or emotions regarding a serious offence.

**Schedule 1 [32]** amends section 41 of the Principal Act to update references to the commencement of proceedings.

**Schedule 1 [74]** omits Division 1 of Part 5 of the Principal Act, which contains the money laundering offence. **Schedule 1 [75]** makes a consequential amendment.

**Schedule 1 [95]** amends section 87 of the Principal Act to limit the amount of property that may be the subject of a forfeiture order to property the value of which does not exceed the maximum amount that may be awarded by a Local Court when exercising its general civil jurisdiction.

**Schedule 1 [103]** amends section 91 of the Principal Act to update an outdated reference.

**Schedule 1 [106]** enables regulations to be made containing savings and transitional provisions as a result of the enactment of the proposed Act.

**Schedule 1 [107]** inserts savings and transitional provisions into Schedule 1 to the Principal Act as a result of the enactment of the proposed Act. **Schedule 1 [105]** makes a consequential amendment.

## **Schedule 2      Amendment of Civil Liability Act 2002**

### **Damages arising out of criminal conduct by persons suffering from mental illness**

Damages payable to persons who are injured as a result of engaging in criminal conduct are limited by the *Civil Liability Act 2002*. Damages payable to a person in respect of injury or damage arising from the criminal conduct of the person, being a person who was suffering mental illness at the time of the conduct, are limited to damages other than damages for non-economic loss or loss of earnings. The amendments insert proposed Division 2 of Part 7 (proposed sections 54B–54H) into the *Civil Liability Act 2002* which provides for any damages awarded to such a person to be subject to control by the Public Trustee.

**Schedule 2 [2]** inserts proposed Division 2 of Part 7.

Proposed section 54B contains definitions of terms used in the proposed Division.

Proposed section 54C applies the proposed Division to damages awarded in respect of injury or damage to a person that occurred at the time of, or following, conduct that, on the balance of probabilities, would have constituted a serious offence if the person had not been suffering from a mental illness, being conduct that contributed materially to the injury or damage or risk of injury or damage to the person. The Division will not apply to damages awarded against certain public sector defendants that are required to be paid into a victim trust fund.

Proposed section 54D requires a court that awards the damages to make an order (a *damages supervision order*) that the Public Trustee take control of the amount of damages. The order must be made if the court is satisfied that it is an award of damages to which the proposed Division applies and that it is in the best interests of the person to make the order. The Public Trustee must ensure that the amount of damages is used to cover past, present and future costs of treatment, rehabilitation and care.

Proposed section 54E contains additional matters that may be included in a damages supervision order.

Proposed section 54F provides that a damages supervision order may be made even though the estate of the person concerned is under the supervision of the Protective Commissioner and excludes the operation of the *Protected Estates Act 1983* if a damages supervision order is made.

Proposed section 54G makes it an offence to hinder or obstruct the Public Trustee in the exercise of the Public Trustee's obligations under a damages supervision order.

Proposed section 54H provides for the proof of the entitlement of the Public Trustee to act in relation to property subject to the order.

**Schedule 2 [1]** makes a consequential amendment.

**Schedule 2 [3]** enables regulations of a savings and transitional nature to be made as a consequence of the proposed Act.

### **Schedule 3      Amendment of Crimes Act 1900**

**Schedule 3** inserts proposed Division 1A (proposed sections 193A–193G) of Part 4 into the *Crimes Act 1900*. The proposed Division contains offences relating to proceeds derived from crime.

Proposed section 193A contains definitions of terms used in the proposed Division. It defines *dealing with* property to include receiving, possessing, concealing or disposing of property, bringing property into New South Wales and engaging directly or indirectly in a transaction and also defines *instrument of crime*, *proceeds of crime* and *serious offence*.

Proposed section 193B replaces the money laundering offence formerly contained in the *Confiscation of Proceeds of Crime Act 1989*. The proposed section makes it an offence to deal with proceeds of crime (that is, proceeds of a serious offence) knowing that it is proceeds of crime and intending to conceal that it is proceeds of crime (maximum penalty 20 years imprisonment), to deal with proceeds of crime knowing that it is proceeds of crime (maximum penalty 15 years imprisonment) and to deal with proceeds of crime being reckless as to whether it is proceeds of crime (maximum penalty 10 years imprisonment).

Proposed section 193C makes it a summary offence to deal with property, that is property there are reasonable grounds to suspect is proceeds of an unlawful activity, (maximum penalty 50 penalty units or imprisonment for 2 years, or both). It will be

a defence if a defendant proves that he or she had no reasonable grounds for suspecting that the property was proceeds of an offence.

Proposed section 193D makes it an offence to deal with property (being money or other valuables) intending that the property will become an instrument of crime if the property subsequently becomes such an instrument (maximum penalty 15 years imprisonment). It will also be an offence to deal with property being reckless as to whether or not the property subsequently will become an instrument of crime if the property subsequently becomes such an instrument (maximum penalty 10 years imprisonment). Proceedings for the offences may not be commenced without the consent of the Director of Public Prosecutions.

Proposed section 193E enables alternative verdicts to be reached.

Proposed section 193F contains evidentiary provisions.

Proposed section 193G inserts a transitional provision.

## **Schedule 4      Amendment of Forfeiture Act 1995**

The forfeiture rule is a rule at common law that prevents a person who has unlawfully killed another person from acquiring a benefit as a result of the killing. Under the *Forfeiture Act 1995* (the ***Principal Act***), a person who would otherwise be subject to the forfeiture rule may apply to the Supreme Court to modify the rule to enable the person to acquire a benefit if the Court is satisfied that justice requires the effect of the rule to be modified. However, the *Principal Act* provides that the power to modify the forfeiture rule does not apply to unlawful killings that constitute murder. Such killings are still subject to the common law. At common law the rule does not apply in the case of a person suffering from mental illness at the time of killing another person, and found not guilty or who would have been found not guilty, because of that illness.

**Schedule 4 [5]** inserts proposed Part 3 (proposed sections 10–14) into the *Principal Act* to enable the Supreme Court to apply the forfeiture rule in a case where a killer has been found not guilty by reason of mental illness.

Proposed section 10 contains definitions of terms used in the proposed Part.

Proposed section 11 enables the Supreme Court to make an order (a ***forfeiture application order***) applying the forfeiture rule to a person who has killed another person and who is found not guilty of murder by reason of mental illness, if an application is made by an interested person. The Court may make an order if satisfied that justice requires the rule to be applied as if the offender had been found guilty of murder. On an order being made, the forfeiture rule is to apply for all purposes as if the offender had been found guilty of murder.

Proposed section 12 requires applications for the application of the forfeiture rule to be made within 6 months of the person being found not guilty of murder.

Confiscation of Proceeds of Crime Amendment Bill 2005

Explanatory note

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Proposed section 13 enables the Supreme Court to revoke a forfeiture application order on the application of an interested person.

Proposed section 14 enables a forfeiture application order to be made in relation to a killing occurring before or after the commencement of the proposed Part and certain proceedings.

**Schedule 4 [3]** amends section 3 of the Principal Act to insert a definition of *forfeiture application order*.

**Schedule 4 [1], [2] and [4]** make consequential amendments.





New South Wales

# Confiscation of Proceeds of Crime Amendment Bill 2005

## Contents

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	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Confiscation of Proceeds of Crime Act 1989 No 90	2
4 Amendment of Civil Liability Act 2002 No 22	2
5 Amendment of Crimes Act 1900 No 40	2
6 Amendment of Forfeiture Act 1995 No 65	2
Schedule 1 Amendment of Confiscation of Proceeds of Crime Act 1989	3
Schedule 2 Amendment of Civil Liability Act 2002	35
Schedule 3 Amendment of Crimes Act 1900	39
Schedule 4 Amendment of Forfeiture Act 1995	43







New South Wales

# Confiscation of Proceeds of Crime Amendment Bill 2005

No. , 2005

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## **A Bill for**

An Act to amend the *Confiscation of Proceeds of Crime Act 1989*, the *Civil Liability Act 2002*, the *Crimes Act 1900* and the *Forfeiture Act 1995* with respect to the seizure and restraint of property connected with criminal activity, the supervision of damages paid to offenders suffering from mental illness, money laundering offences and the application of the forfeiture rule to persons found not guilty of murder by reason of mental illness; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Confiscation of Proceeds of Crime Amendment Act 2005</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6
<b>3 Amendment of Confiscation of Proceeds of Crime Act 1989 No 90</b>	7
The <i>Confiscation of Proceeds of Crime Act 1989</i> is amended as set out in Schedule 1.	8 9
<b>4 Amendment of Civil Liability Act 2002 No 22</b>	10
The <i>Civil Liability Act 2002</i> is amended as set out in Schedule 2.	11
<b>5 Amendment of Crimes Act 1900 No 40</b>	12
The <i>Crimes Act 1900</i> is amended as set out in Schedule 3.	13
<b>6 Amendment of Forfeiture Act 1995 No 65</b>	14
The <i>Forfeiture Act 1995</i> is amended as set out in Schedule 4.	15

<b>Schedule 1</b>	<b>Amendment of Confiscation of Proceeds of Crime Act 1989</b>	1
		2
	(Section 3)	3
<b>[1] Section 4 Definitions</b>		4
	Insert after paragraph (b) of the definition of <i>appropriate court</i> in section 4 (1):	5
		6
	, or	7
	(c) in relation to a freezing notice, the court or Magistrate in which or before whom proceedings (including committal proceedings) for a serious offence on which the freezing notice is based are held.	8
		9
		10
		11
<b>[2] Section 4 (1), definition of “appropriate officer”</b>		12
	Insert “or freezing notices” after “restraining orders” in paragraph (b).	13
<b>[3] Section 4 (1), definition of “authorised officer”</b>		14
	Insert “, Division 1A of Part 3” after “orders” in paragraph (b).	15
<b>[4] Section 4 (1), definitions of “bank”, “building society” and “credit union”</b>		16
	Omit the definitions.	17
<b>[5] Section 4 (1), definition of “confiscation order”</b>		18
	Omit “or a pecuniary penalty order”.	19
	Insert instead “, pecuniary penalty order or drug proceeds order”.	20
<b>[6] Section 4 (1), definition of “drug trafficking offence”</b>		21
	Omit the definition. Insert instead:	22
	<i>drug trafficking offence</i> means an offence under section 24A (possession of precursors for manufacture or production of prohibited drugs) or 25A (offence of supplying prohibited drugs on an ongoing basis) of the <i>Drug Misuse and Trafficking Act 1985</i> or an offence, involving more than a small quantity of a prohibited plant or prohibited drug within the meaning of that Act, under any of the following sections of that Act:	23
		24
		25
		26
		27
		28
		29
	(a) section 23 (offences with respect to prohibited plants),	30
	(b) section 24 (manufacture and production of prohibited drugs),	31
		32
	(c) section 25 (supply of prohibited drugs),	33
	(d) section 26 (conspiring),	34

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(e)	section 27 (aiding, abetting etc commission of offence in New South Wales),	1 2
(f)	section 28 (conspiring to commit and aiding etc commission of offence outside New South Wales).	3 4
<b>[7]</b>	<b>Section 4 (1)</b>	5
	Insert in alphabetical order:	6
	<i>facsimile</i> includes a reference to any electronic communication device which transmits information in a form from which written material is capable of being reproduced with or without the aid of any other device or article.	7 8 9 10
	<i>freezing notice</i> means a notice issued under section 42C.	11
	<i>interstate crime related property declaration</i> means a declaration or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.	12 13 14 15
	<i>telephone</i> includes radio, facsimile and any other communication device.	16 17
<b>[8]</b>	<b>Section 4 (1), definition of “financial institution”</b>	18
	Omit paragraphs (a)–(c). Insert instead:	19
	(a) an authorised deposit-taking institution, or	20
<b>[9]</b>	<b>Section 4 (1), definition of “interstate forfeiture order”</b>	21
	Insert “or other instrument” after “order”.	22
<b>[10]</b>	<b>Section 4 (1), definition of “interstate pecuniary penalty order”</b>	23
	Insert “or other instrument” after “order”.	24
<b>[11]</b>	<b>Section 4 (1), definition of “interstate restraining order”</b>	25
	Insert “or other instrument” after “order”.	26
<b>[12]</b>	<b>Section 4 (1), definition of “tainted property”</b>	27
	Insert “substantially” before “derived” wherever occurring in paragraphs (b), (c) and (d).	28 29
<b>[13]</b>	<b>Section 4 (2)</b>	30
	Omit “being issued with a court attendance notice”.	31
	Insert instead “being issued with a court attendance notice or being a person against whom an information has been laid”.	32 33

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<b>[14] Section 4 (8)</b>	1
Omit “is regarded as a State”.	2
Insert instead “and the Australian Capital Territory are regarded as States”.	3
<b>[15] Section 4 (9)</b>	4
Insert after section 4 (8):	5
(9) For the purposes of this Act, the <i>value of property</i> (other than cash) in relation to any person holding the property:	6
(a) if any other person holds an interest in the property, is the market value of the first-mentioned person’s beneficial interest in the property (less the amount required to discharge any encumbrance, other than a forfeiture order, on that interest), and	7
(b) in any other case, is its market value.	8
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<b>[16] Section 6 Meaning of “absconding”</b>	14
Omit “an information has been laid” from section 6 (1) (a).	15
Insert instead “a court attendance notice or information has been filed or laid”.	16
<b>[17] Section 6 (1) (b)</b>	17
Insert “or notice” after “information”.	18
<b>[18] Section 7 Meaning of “serious offence” and “serious drug offence”</b>	19
Omit “section 73 (money laundering) in relation to the proceeds of an offence” from paragraph (e) of the definition of <i>serious drug offence</i> .	20
Insert instead “section 193B (money laundering) or 193D (dealing with property that subsequently becomes an instrument of crime) of the <i>Crimes Act 1900</i> in relation to the proceeds of an offence, or an offence,”.	21
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<b>[19] Section 13 Applications for confiscation orders</b>	25
Omit section 13 (2). Insert instead:	26
(2) If a person is convicted of a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:	27
(a) a forfeiture order against property that is tainted property in respect of any drug trafficking offences,	28
(b) a drug proceeds order against the person in respect of benefits derived by the person from the commission of any drug trafficking offences.	29
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Confiscation of Proceeds of Crime Amendment Bill 2005

Schedule 1 Amendment of Confiscation of Proceeds of Crime Act 1989

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<b>[20] Section 13 (3A) (a) (ii)</b>	1
Insert “or 30 (1) (b)” after “section 25 (2) (a1)”.	2
<b>[21] Sections 14 (2) and 15 (2) (b) and (5)</b>	3
Insert “or drug proceeds order” after “pecuniary penalty order” wherever occurring.	4 5
<b>[22] Section 18 Forfeiture orders</b>	6
Omit “section 13 (1) (a) or (2)” wherever occurring in section 18 (1) and (4). Insert instead “section 13 (1) (a) or (2) (a)”.	7 8
<b>[23] Section 18 (2A)</b>	9
Insert after section 18 (2):	10
(2A) In considering any hardship reasonably likely to arise on the part of an Aboriginal person or a Torres Strait Islander convicted of a serious offence, the court must take into account responsibilities arising from the person’s ties to extended family and kinship.	11 12 13 14
<b>[24] Section 27 Court may lift corporate veil etc</b>	15
Insert “or freezing notice” after “restraining order” in section 27 (3) (b).	16
<b>[25] Sections 29 and 30</b>	17
Omit the sections. Insert instead:	18
<b>29 Drug proceeds orders</b>	19
(1) If an application is made for a drug proceeds order against a person (in this Division called the <i>defendant</i> ) convicted of a drug trafficking offence, the court must:	20 21 22
(a) determine whether the defendant has derived any benefit in connection with drug trafficking at any time, and	23 24
(b) if the court believes the defendant has so benefited, assess the value of any such benefit, and	25 26
(c) order the defendant to pay to the State a pecuniary penalty equal to the amount so assessed.	27 28
(2) If:	29
(a) property that is the proceeds of drug trafficking has been forfeited under this Act or a law of the Commonwealth, a Territory or another State, or	30 31 32

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(b)	a forfeiture order is proposed to be made against property that is proceeds of drug trafficking,	1 2
	the pecuniary penalty to be made is taken to be reduced by an amount equal to the value of the property as at the time of the making of the forfeiture order.	3 4 5
(3)	If:	6
(a)	a court makes an order under this section in relation to an offence, and	7 8
(b)	in calculating the penalty amount, the court took into account a proposed forfeiture order in respect of property, and	9 10 11
(c)	an appeal against the forfeiture order is allowed or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made,	12 13 14
	an appropriate officer may apply to the court for a variation of the order to increase the penalty amount by the value of the property and the court may, if it considers it appropriate to do so, vary the order accordingly.	15 16 17 18
(4)	An amount payable by a defendant to the State in accordance with an order made under this section is, for all purposes, taken to be a civil debt due by the defendant to the State.	19 20 21
(5)	An order made by a court under this section may be enforced as if it were an order made by the court in civil proceedings instituted by the State against the defendant to recover a debt due by the person to the State.	22 23 24 25
<b>30</b>	<b>Assessment of proceeds of drug trafficking</b>	26
(1)	A court is to assess the benefits (if any) derived in connection with drug trafficking by having regard to information before the court concerning all or any of the following matters:	27 28 29
(a)	the money, or the value of property other than money, that came into the possession or control of the defendant, or another person at the request or by the direction of the defendant, at any time in connection with drug trafficking by the defendant,	30 31 32 33 34
(b)	the value of any benefit that was provided for the defendant, or for another person at the request or direction of the defendant, in respect of the defendant's involvement or participation in a public promotion relating to drug	35 36 37 38

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- trafficking (or such part of the value of the benefit as is commensurate with the proportion of the defendant's involvement or participation that is concerned with drug trafficking), 1
  - (c) the value of any benefit, other than a benefit of a kind referred to in paragraph (a) or (b), that was provided for the defendant, or another person at the request or by the direction of the defendant, because of drug trafficking by the defendant, 2  
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  - (d) the market value, at the time of the drug trafficking, of substances similar or substantially similar to the prohibited drug or prohibited plant involved in the drug trafficking offence or offences, 10  
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  - (e) the amount that was, or the range of amounts that were, ordinarily paid for the doing of an act or thing similar or substantially similar to the doing of the act or thing constituting the drug trafficking, 14  
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  - (f) the value of the defendant's property appearing to the court: 18  
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    - (i) to have been held by the defendant at any time since his or her conviction, or 20  
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    - (ii) to have been transferred to the defendant at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant, 22  
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  - (g) the value of the defendant's income and expenditure: 26
    - (i) at any time since his or her conviction, or 27
    - (ii) at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant. 28  
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  - (2) In considering whether to treat a benefit of the kind referred to in subsection (1) (b) as a benefit derived in connection with drug trafficking, a court may have regard to any matter that it thinks fit, including the public interest and any research, educational or rehabilitative purpose of the public promotion concerned. 31  
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  - (3) If evidence is given that the value of the defendant's property or the defendant's income or expenditure: 36  
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    - (a) after the defendant committed drug trafficking offences, or 38
    - (b) during and after the end of the period of 6 years that ended when proceedings for the drug trafficking offences were last instituted against the defendant, 39  
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	exceeded the value of the defendant's property or income or expenditure before the defendant committed the drug trafficking offences or before the commencement of that period then the court must treat the value of the benefits derived by the defendant because of drug trafficking by the defendant as being not less than the amount of the excess.	1 2 3 4 5 6
(4)	Subsection (3) does not apply to the whole or a part of the excess referred to in that subsection if the defendant satisfies the court that it was due to causes unrelated to drug trafficking or the commission of other serious offences.	7 8 9 10
(5)	For the purposes of assessing the value of the proceeds of drug trafficking in a case where a drug proceeds order has previously been made against the defendant, the court must leave out of account any of the defendant's proceeds of drug trafficking that are shown to the court:	11 12 13 14 15
	(a) to have been taken into account in determining the amount to be recovered in respect of drug trafficking under a previous drug proceeds order or pecuniary penalty order, or	16 17 18 19
	(b) to have been recovered under an order made under the <i>Criminal Assets Recovery Act 1990</i> .	20 21
(6)	In assessing the value of the proceeds of drug trafficking of a defendant convicted of a drug trafficking offence or offences, any expenses or outgoings of the defendant in connection with the commission of the offence or offences must not be deducted.	22 23 24 25
(7)	This section applies to and in relation to property that comes into the possession or under the control of a person either within or outside New South Wales, and to benefits that are provided for a person either within or outside New South Wales.	26 27 28 29
<b>[26]</b>	<b>Section 31 Statements relating to drug trafficking</b>	30
	Omit "payment or other reward was received" from section 31 (3) (b) and (6) wherever occurring.	31 32
	Insert instead "benefit was derived".	33
<b>[27]</b>	<b>Section 31 (4) and (7)–(9)</b>	34
	Omit the subsections.	35

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<b>[28] Section 31A</b>	1
Insert after section 31:	2
<b>31A Evidence as to value of drugs and other matters</b>	3
(1) In proceedings for an application for a drug proceeds order, a member of NSW Police, a member of the Australian Federal Police or a Customs officer may give evidence (whether in person or in a statement tendered to the court by the prosecution under this Division):	4
(a) as to the market value, at the time of a drug trafficking offence in relation to a substance, or substantially similar substances, and	5
(b) as to the amount, or the range of amounts, ordinarily paid for the doing of a similar or substantially similar act or thing to the offence.	6
(2) The evidence may be given by a person who is experienced in the investigation of indictable offences under (or similar to offences under) the <i>Drug Misuse and Trafficking Act 1985</i> .	7
(3) Any such person may give evidence, to the best of his or her information, knowledge and belief:	8
(a) as to the amount that was the market value of a prohibited drug or prohibited plant within the meaning of the <i>Drug Misuse and Trafficking Act 1985</i> at a particular time or during a particular period, or	9
(b) as to the amount, or the range of amounts, ordinarily paid at a particular time, or during a particular period, for the doing of an act or thing in relation to any such prohibited drug or prohibited plant,	10
despite any rule of law or practice relating to hearsay evidence and the testimony is, in the absence of evidence to the contrary, evidence of the matter testified to.	11
<b>[29] Section 32</b>	12
Omit sections 32–34. Insert instead:	13
<b>32 Court may look at property subject to effective control of defendant</b>	14
(1) In assessing the value of benefits derived by a person because of drug trafficking, a court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant.	15
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(2)	On application by an appropriate officer, a court may make an order declaring that specified property is available to satisfy a drug proceeds order, if it is of the opinion that the property is subject to the effective control of a defendant against whom the court has made a drug proceeds order.	1 2 3 4 5
(3)	If a court declares that property is available to satisfy a drug proceeds order:	6 7
(a)	the order may be enforced against the property as if the property were property of the person against whom the order is made, and	8 9 10
(b)	a freezing notice or restraining order may be made in respect of the property as if the property were property of the person against whom the order is made.	11 12 13
(4)	An appropriate officer must give written notice of an application under this section to the defendant and to any other person the appropriate officer has reason to believe may have an interest in the property.	14 15 16 17
(5)	The defendant and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.	18 19 20
<b>[30]</b>	<b>Section 35 Definitions</b>	21
	Insert “substantially” before “derived” wherever occurring in the definition of <i>tainted property</i> in section 35 (1).	22 23
<b>[31]</b>	<b>Section 35 (1), definition of “tainted property”</b>	24
	Insert after paragraph (c) of the definition of <i>tainted property</i> :	25
	, or	26
	(d) was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender’s thoughts, opinions or emotions regarding the offence, in any public promotion.	27 28 29 30
<b>[32]</b>	<b>Section 41 Return of seized property</b>	31
	Omit “an information has been laid in respect of the relevant serious offence (or criminal proceedings have otherwise been commenced in respect of the relevant serious offence)” from section 41 (2) (b).	32 33 34
	Insert instead “criminal proceedings have been commenced in respect of the relevant serious offence”.	35 36

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<b>[33] Part 3, Division 1A</b>	1
Insert after Division 1:	2
<b>Division 1A Freezing notices</b>	3
<b>42A Definitions</b>	4
In this Division:	5
<i>authorised justice</i> means an authorised officer within the	6
meaning of the <i>Criminal Procedure Act 1986</i> .	7
<i>defendant</i> has the same meaning as in section 42B.	8
<b>42B Applications for freezing notices</b>	9
(1) An authorised officer may apply to an authorised justice for a	10
freezing notice in respect of specified property of a person if the	11
person (the <i>defendant</i> ) has been, or is about to be, charged with,	12
or has been convicted of, a serious offence and the authorised	13
officer has reasonable grounds for believing that:	14
(a) if the defendant has not been convicted of the offence, the	15
defendant committed the offence, and	16
(b) the property is tainted property in relation to that offence	17
or the defendant derived benefits because of having	18
committed the offence or, if the offence is a drug	19
trafficking offence, the property is the defendant's	20
proceeds of drug trafficking.	21
(2) An authorised officer may apply to an authorised justice for a	22
freezing notice in respect of the property of a person if another	23
person (the <i>defendant</i> ) has been, or is about to be, charged with,	24
or has been convicted of, a serious offence and the authorised	25
officer has reasonable grounds for believing that:	26
(a) the property is tainted property in relation to the offence	27
with which the defendant has been or is about to be	28
charged, or of which the defendant has been convicted, or	29
is the defendant's proceeds of drug trafficking, or	30
(b) the property is subject to the effective control of the	31
defendant and the defendant has derived a benefit, directly	32
or indirectly, from the commission of the serious offence.	33
(3) An application for a freezing notice (other than a telephone	34
freezing notice) must be in writing in the form prescribed by the	35
regulations and must be made by the applicant in person.	36

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(4) The applicant must provide (either orally or in writing) any further information that the authorised justice requires concerning the grounds on which the freezing notice is sought.	1 2 3
<b>42C Issue of freezing notices</b>	4
(1) An authorised justice may issue a freezing notice if satisfied that:	5
(a) the defendant is likely to be charged with the offence or a related offence within 48 hours or has been charged with or convicted of a serious offence, and	6 7 8
(b) there are reasonable grounds for the belief of the officer as to the matters set out in subsection (2) (c) and (d) (i) or (e) (i) or (ii) (if applicable).	9 10 11
(2) An authorised justice must not issue a freezing notice unless:	12
(a) the application includes details of the authority of the applicant to make the application, and	13 14
(b) the application includes the grounds on which the notice is being sought, and	15 16
(c) the application is supported by a statement by the applicant that the applicant believes that the defendant has committed a serious offence, if the defendant has not been convicted of the offence, and	17 18 19 20
(d) in the case of property of the defendant, the application is supported by a statement by the applicant:	21 22
(i) that the applicant believes that the property to which the application relates is tainted property in relation to that offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, the property is the defendant's proceeds of drug trafficking, and	23 24 25 26 27 28
(ii) setting out the grounds on which the applicant holds those beliefs, and	29 30
(e) in the case of property of a person other than the defendant, the application is supported by a statement by the applicant that the applicant believes that:	31 32 33
(i) the property is tainted property in relation to the offence with which the defendant has been charged or convicted or is the defendant's proceeds of drug trafficking, or	34 35 36 37
(ii) the property is subject to the effective control of the defendant and the defendant has derived a benefit,	38 39

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	directly or indirectly, from the commission of the offence,	1
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	and setting out the grounds on which the applicant holds those beliefs, and	3
		4
	(f) the statements and any other information given by the applicant in or in connection with the application are verified before the authorised justice on oath or affirmation or by affidavit.	5
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(3)	In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant, the authorised justice may have regard to the matters referred to in section 10.	9
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(4)	A freezing notice may not be issued in respect of property affected by a restraining order or forfeiture order or the subject of an application for a restraining order or forfeiture order under this Act.	13
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(5)	A freezing notice under this Act and a restraining order under the <i>Criminal Assets Recovery Act 1990</i> may not be made so as to be in force in respect of the same interest in property at the same time.	17
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(6)	The issue of a freezing notice is a ministerial function and is not a judicial function.	21
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<b>42D</b>	<b>Form of freezing notice</b>	23
(1)	A freezing notice must direct that:	24
	(a) specified property not be disposed of, or otherwise dealt with by the defendant or by any other person, except in the manner and circumstances (if any) specified in the notice, and	25
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	(b) the property be held in the custody of the Commissioner of Police or the defendant or another person, pending the determination of an application for confirmation of the freezing notice.	29
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(2)	A freezing notice is to be in the form prescribed by the regulations.	33
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<b>42E</b>	<b>Telephone freezing notices</b>	35
(1)	An authorised officer may make an application by telephone for a freezing notice.	36
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(2)	An authorised justice must not issue a freezing notice on an application made by telephone unless the authorised justice is	38
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	satisfied that the notice is required urgently and that it is not practicable for the application to be made in person.	1 2
(3)	An application under this section must be made by facsimile if the facilities to do so are readily available for that purpose.	3 4
(4)	If it is not practicable for an application for a freezing notice to be made by telephone directly to an authorised justice, the application may be transmitted to the authorised justice by another person on behalf of the applicant.	5 6 7 8
(5)	An authorised justice who issues a freezing notice on an application made by telephone must:	9 10
	(a) complete and sign the notice, and	11
	(b) furnish the notice to the person who made the application or inform that person of the terms of the notice and of the date and time when it was signed.	12 13 14
(6)	If a freezing notice is issued on an application made by telephone, the applicant is to complete a form of freezing notice in the terms indicated by the authorised justice under subsection (5) (b) and write on it the name of that authorised justice and the date and time when the notice was signed.	15 16 17 18 19
(7)	A form of freezing notice so completed is taken to be a freezing notice issued in accordance with this Act.	20 21
(8)	A freezing notice is to be furnished by an authorised justice by transmitting it by facsimile, if the facilities to do so are readily available, and the copy produced by that transmission is taken to be the original document.	22 23 24 25
<b>42F</b>	<b>Notice of issue of freezing notice</b>	26
(1)	An applicant for a freezing notice must give notice of the issuing of the notice to the defendant, any owner of property affected by the notice and any other person subject to the notice.	27 28 29
(2)	Notice must be given in accordance with the regulations.	30
<b>42G</b>	<b>False or misleading information in applications</b>	31
(1)	A person must not, in or in connection with an application for a freezing notice, give information to an authorised justice that the person knows to be false or misleading in a material particular. Maximum penalty: 100 penalty units, or imprisonment for 2 years, or both.	32 33 34 35 36
(2)	This section applies to an application by telephone as well as in person.	37 38

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(3)	This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.	1 2
<b>42H</b>	<b>Record of proceedings before authorised justice</b>	3
(1)	An authorised justice who issues a freezing notice must cause a record to be made of all relevant particulars of the grounds the authorised justice has relied on to justify the issue of the notice.	4 5 6
(2)	The regulations may make provision for or with respect to:	7
(a)	the keeping of records in connection with the issue and execution of freezing notices, and	8 9
(b)	the inspection of any such records, and	10
(c)	any other matter in connection with any such records.	11
(3)	Any matter that might disclose the identity of a person must not be recorded pursuant to this section if the authorised justice is satisfied that the safety of any person might be jeopardised by doing so.	12 13 14 15
<b>42I</b>	<b>Application to confirm freezing notice</b>	16
(1)	An application for confirmation of the notice is to be made to the appropriate court by an authorised officer, not later than 14 days after a freezing notice is issued.	17 18 19
(2)	The application is to be set down for hearing on the first date for committal or trial proceedings for the serious offence on which the freezing notice was based that occurs after the application is made, or as soon as practicable after the application is made.	20 21 22 23
(3)	An applicant for confirmation of a freezing notice must give notice of the application to the defendant, any owner of property affected by the notice and any other person subject to the notice.	24 25 26
(4)	A person given notice under this section is entitled to appear and to adduce evidence at the hearing of the application.	27 28
(5)	Notice must be given in accordance with rules of court.	29
<b>42J</b>	<b>Notice to third parties</b>	30
	If an application has been made to an appropriate court to confirm a freezing notice in respect of property:	31 32
(a)	the court may, if it thinks fit, require the officer making the application to give notice of the application to a person who the court has reason to believe has an interest in the property or part of the property, and	33 34 35 36



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(b)	a person to whom the court requires notice to be given under this section is entitled to appear and to adduce evidence at the hearing of the application.	1 2 3
<b>42K</b>	<b>Appeals against freezing notices issued by authorised justices</b>	4
(1)	A defendant, an authorised officer or another person claiming an interest in property affected by a freezing notice may, at any time before the notice is confirmed, apply to the appropriate court to have the freezing notice set aside or varied.	5 6 7 8
(2)	An application may be heard before the day set down for hearing the application to confirm the notice.	9 10
(3)	On an application, the appropriate court must proceed to deal with the matter under section 42L, whether or not an application has been made under section 42I.	11 12 13
<b>42L</b>	<b>Confirmation of freezing notices</b>	14
(1)	An appropriate court may, on an application under section 42I or 42K:	15 16
(a)	confirm the freezing notice (with or without variation), or	17
(b)	set aside the freezing notice.	18
(2)	An appropriate court may confirm a freezing notice if it is satisfied that:	19 20
(a)	the application is supported by an affidavit by an authorised officer that complies with this section, and	21 22
(b)	having regard to the matters contained in the affidavit or other evidence given in the proceedings, there are reasonable grounds to believe the matters set out in the affidavit, and	23 24 25 26
(c)	proceedings have been commenced against the defendant for a serious offence or the defendant has been convicted of a serious offence, and	27 28 29
(d)	the property concerned is not affected by a restraining order, or an application for a restraining order under this Act or the <i>Criminal Assets Recovery Act 1990</i> , and	30 31 32
(e)	it is appropriate in the circumstances to confirm the notice.	33
(3)	The affidavit of the authorised officer supporting the application must set out the officer's belief, and the grounds for the belief, that the defendant committed the serious offence concerned	34 35 36

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Confiscation of Proceeds of Crime Amendment Bill 2005

Schedule 1 Amendment of Confiscation of Proceeds of Crime Act 1989

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- (including details of any conviction) and as to one or more of the following in relation to property the subject of the freezing notice: 1  
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- (a) in the case of property of the defendant, that the property is tainted property in relation to the offence or the defendant derived benefits because of having committed the offence or the property is the defendant's proceeds of drug trafficking, 4  
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- (b) in the case of property of a person other than the defendant, that: 9  
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- (i) the property is tainted property in relation to the offence or is the defendant's proceeds of drug trafficking, or 11  
12  
13
- (ii) the property is subject to the effective control of the defendant and the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence. 14  
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- (4) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant, the appropriate court must have regard to the matters referred to in section 10. 18  
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- (5) The appropriate court must make orders of a kind referred to in section 42M in relation to property to which a freezing notice applies if it confirms the freezing notice. Any such order is taken, for the purposes of this Act, to be included in the terms of the freezing notice. 22  
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- (6) If evidence is given at the hearing that property to which the application relates was in the possession of the defendant at or immediately after the commission of the offence: 27  
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29
- (a) if there is no evidence given tending to show that the property was not used in, or in connection with, the commission of the offence—the court must presume that the property was used in, or in connection with, the commission of the offence, or 30  
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- (b) in any other case—the court must not confirm a freezing notice in relation to the property unless it is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence. 35  
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<b>42M Orders for the management of property</b>	1
(1) An appropriate court that confirms a freezing notice is to make an order directing the Commissioner of Police:	2
	3
(a) to take control of the property (if it is not under the control of the Commissioner) and, in any case, dispose of the property or the part of the property specified in the order, in the manner specified in the order, and	4
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(b) to retain any proceeds until they are payable under this Act to another person or the State.	8
	9
(2) An appropriate court may, if it thinks it appropriate to do so in the circumstances of the case, make one or more of the following orders instead of the order referred to in subsection (1):	10
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	12
(a) an order directing that the property, or the part of the property specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or any other person, except in the manner and circumstances (if any) specified in the order,	13
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(b) an order directing the Public Trustee or the Commissioner of Police to retain control or to take control of the property or the part of the property specified in the order,	18
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	20
(c) an order directing that the property or the part of the property specified in the order be returned to or retained by the defendant or another person,	21
	22
	23
(d) an order that the defendant or another person be allowed access to the property or the part of the property specified in the order.	24
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	26
(3) In determining whether it is appropriate in the circumstances to make an order of a kind referred to in subsection (1) or (2), the appropriate court is to have regard to the following matters:	27
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(a) whether a defendant who is in custody is likely to be granted bail,	30
	31
(b) any hardship that is reasonably likely to be caused to the defendant or a third party,	32
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(c) if the defendant is an Aboriginal person or a Torres Strait Islander, when considering any hardship that is reasonably likely to be caused to the defendant or a third party, the responsibilities arising from the defendant's ties to extended family and kinship,	34
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(d) the nature of the property and whether it is unique in nature,	39
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(e)	the case against the defendant,	1
(f)	the expenses relating to storage and maintenance of the property,	2 3
(g)	the use that is ordinarily or had been intended to be made of the property.	4 5
(4)	In addition to any other order under this section, the appropriate court may make one or more of the following orders:	6 7
(a)	an order providing for the provision, out of the property, of the defendant's reasonable living expenses, business expenses or reasonable expenses in defending a criminal charge,	8 9 10 11
(b)	if the freezing notice directs the Public Trustee or the Commissioner of Police to take control (but not to dispose) of the property:	12 13 14
(i)	an order regulating the manner in which the Public Trustee or Commissioner is to exercise his or her functions under the notice or order, or	15 16 17
(ii)	an order determining any question relating to the property to which the notice relates, including any question relating to the liabilities of the owner or the exercise of the functions of the Public Trustee or Commissioner, or	18 19 20 21 22
(iii)	an order directing the owner or a director of a body corporate that is the owner to give to the Public Trustee or Commissioner, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out the particulars of the property, or dealings with the property, that the court thinks proper,	23 24 25 26 27 28 29 30
(c)	such other ancillary or consequential orders as the court thinks appropriate in the circumstances.	31 32
(5)	An order under this section directing the sale of property must require it to be sold for not less than its value at the time of the sale.	33 34 35
<b>42N</b>	<b>Undertakings as to payment of damages or costs</b>	36
(1)	An appropriate court may refuse to confirm a freezing notice if the State refuses or fails to give the court such undertakings as the court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the notice.	37 38 39 40 41

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- (2) For the purposes of an application to confirm a freezing notice, an appropriate officer may, on behalf of the State, give to the appropriate court such undertakings with respect to the payment of damages or costs, or both, as are required by the court. 1  
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- 42O Contravention of freezing notices** 5
- (1) A person who knowingly contravenes a freezing notice is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property subject to the notice (as determined by the appropriate court) or by imprisonment for a period not exceeding 2 years, or both. 6  
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- (2) If: 11
- (a) a freezing notice is made against property, and 12
- (b) the property is disposed of, or otherwise dealt with, in contravention of the notice, and 13  
14
- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith, 15  
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- an appropriate officer may apply to the Supreme Court for an order that the disposition or dealing be set aside. 18  
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- (3) The Supreme Court may, on an application under subsection (2), make an order: 20  
21
- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place, or 22  
23
- (b) setting aside the disposition or dealing as from the day of the order and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order. 24  
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- 42P Duration of freezing notices** 29
- A freezing notice ceases to be in force if any of the following occurs: 30  
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- (a) if the defendant has not been charged with a serious offence at the end of the period of 48 hours after the issuing of the notice, 32  
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34
- (b) on an appropriate court refusing to confirm the freezing notice or if an application for confirmation of the notice has not been made within 14 days after it is issued, 35  
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- (c) if the charge is withdrawn and the defendant is not charged with a related offence by the time of the withdrawal, 38  
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(d)	if the defendant is acquitted of the charge or the charge is dismissed and the defendant is not charged with a related offence by the time of the acquittal or dismissal,	1 2 3
(e)	if the appropriate court refuses to make a forfeiture order in relation to the property to which it relates and:	4 5
	(i) an appeal against the refusal is finally determined, or	6 7
	(ii) the time for making an appeal against the refusal expires and an appeal is not made before the time expires,	8 9 10
(f)	if a court makes an order setting aside the freezing notice in respect of the whole of the property to which it relates.	11 12
<b>42Q</b>	<b>Effect of other orders on freezing notices</b>	13
(1)	If, while a freezing notice in respect of property is in force, a court makes a forfeiture order in respect of the property or makes a pecuniary penalty order or a drug proceeds order against the defendant subject to the notice, the court or an appropriate court may:	14 15 16 17 18
	(a) if it considers it appropriate, make an order setting aside the freezing notice in respect of the whole or a specified part of the property, and	19 20 21
	(b) make any other order or orders it considers appropriate in relation to the operation of the freezing notice.	22 23
(2)	If, while a freezing notice in respect of property is in force, a court refuses to make a forfeiture order in respect of the property or refuses to make a pecuniary penalty order or drug proceeds order against the defendant, the court or an appropriate court may:	24 25 26 27 28
	(a) if it considers it appropriate, make an order in relation to the period for which the freezing notice is to remain in force, and	29 30 31
	(b) make any other order or orders it considers appropriate in relation to the operation of the freezing notice.	32 33
(3)	An order under this section may:	34
	(a) set aside the freezing notice wholly or in part, or	35
	(b) take effect:	36
	(i) on the making of the forfeiture order, pecuniary penalty order or drug proceeds order, or	37 38
	(ii) at a specified time, or	39

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	(iii) if relevant, on the payment of a penalty amount to the State, or	1 2
	(iv) on the happening of some other specified event.	3
<b>42R</b>	<b>Purchase of property</b>	4
(1)	The payment to the State of an amount equal to the value of property subject to a freezing notice operates to discharge the freezing notice (except in so far as the court otherwise directs).	5 6 7
(2)	For the purposes of this section, the value of property is the value agreed between the Attorney General and the person seeking to discharge the freezing notice.	8 9 10
(3)	A payment may not be made under this section before a freezing notice is confirmed by a court.	11 12
<b>42S</b>	<b>Return of property</b>	13
(1)	If a freezing notice ceases to be in force and the property concerned is not subject to any other order under this Act, the person who is lawfully entitled to it may apply to the Attorney General for the return of the property or for payment of an amount equal to the value of the property together with interest calculated from the date, and at the rate, prescribed by the regulations.	14 15 16 17 18 19 20
(2)	The Attorney General must, if satisfied that the person is lawfully entitled to the property, return the property or pay the amount, as the case requires, not later than 6 months after receipt of the application.	21 22 23 24
(3)	If the person who is lawfully entitled to property or to be paid an amount under this section cannot be ascertained or an application is not made within 6 months of the freezing notice ceasing to be in force, the property is to be dealt with as if it had been forfeited under this Act.	25 26 27 28 29
<b>42T</b>	<b>Arrangements for management of property</b>	30
	The Commissioner of Police may enter into arrangements with the Public Trustee or any other person with respect to the management of property that is under the control of the Commissioner under a freezing notice.	31 32 33 34
<b>42U</b>	<b>Appeals against refusal to confirm freezing notice</b>	35
(1)	The Attorney General, the Director of Public Prosecutions or the Commissioner of Police may appeal to the appeal court against a refusal by an appropriate court to confirm a freezing notice.	36 37 38

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(2)	On an appeal, the appeal court may make any order that an appropriate court may make on an application for confirmation of a freezing notice.	1 2 3
(3)	An order made by the appeal court under this section is taken to have been made by the appropriate court, but is not on that account subject to further appeal.	4 5 6
(4)	In this section, the <i>appeal court</i> is:	7
(a)	in relation to a Magistrate, Local Court, the Children's Court or District Court—the Supreme Court, and	8 9
(b)	in relation to the Supreme Court—the Court of Criminal Appeal.	10 11
<b>42V</b>	<b>Court may make further orders relating to freezing notices</b>	12
(1)	An appropriate court that confirms a freezing notice or a court that is dealing with proceedings for a serious offence in relation to which a freezing notice has been issued may, at any time, make any orders ancillary to the freezing notice that the court considers appropriate.	13 14 15 16 17
(2)	Without limiting the generality of subsection (1), the court may make any one or more of the following orders:	18 19
(a)	an order varying the terms of the freezing notice, including the property to which it relates and any conditions of the notice,	20 21 22
(b)	an order with respect to the carrying out of any undertaking with respect to the payment of costs or damages given by the State in connection with the confirmation of the freezing notice,	23 24 25 26
(c)	an order setting aside the freezing notice in respect of the whole or part of the property.	27 28
(3)	An order under this section may be made on the application of any of the following persons:	29 30
(a)	an appropriate officer,	31
(b)	the owner,	32
(c)	a person directed by the freezing notice to take control of property subject to the notice,	33 34
(d)	any other person with the leave of the court.	35
(4)	A person who makes an application under this section must give notice of the application, as prescribed by the regulations or rules of court, to each other person who is entitled, by virtue of subsection (3) (a)–(c), to make an application under this section.	36 37 38 39



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<b>[34]</b>	<b>Section 43 Restraining orders</b>	1
	Insert “, or has been convicted of,” after “charged with” in section 43 (1).	2
<b>[35]</b>	<b>Section 43 (4) (a) (i)</b>	3
	Insert “or has been convicted of” after “charged”.	4
<b>[36]</b>	<b>Section 43 (9)</b>	5
	Insert after section 43 (8):	6
	(9) A restraining order may not be made in respect of property affected by a freezing notice or the subject of a current application for a freezing notice under this Act.	7 8 9
<b>[37]</b>	<b>Section 45 Supreme Court may make further orders relating to restraining orders</b>	10 11
	Omit section 45 (6) and (7). Insert instead:	12
	(6) A person who makes an application under this section in relation to a restraining order must give notice of the application, as prescribed by the regulations or rules of court, to each other person who is entitled, by virtue of subsection (3) (a)–(c), to make an application under this section in relation to the order.	13 14 15 16 17
<b>[38]</b>	<b>New section 45A</b>	18
	Renumber section 50 as section 45A and insert after section 45.	19
<b>[39]</b>	<b>New section 45B</b>	20
	Renumber section 55 as section 45B and insert after new section 45A.	21
<b>[40]</b>	<b>Part 3, Division 3, heading</b>	22
	Insert before section 46:	23
	<b>Division 3      General provisions applying to restraining orders and freezing notices</b>	24 25
<b>[41]</b>	<b>Section 46</b>	26
	Omit the section. Insert instead:	27
	<b>46    Order for taxation of legal expenses to be met out of restrained or frozen property</b>	28 29
	(1) If:	30
	(a) the Supreme Court makes a restraining order directing the Public Trustee to take control of property or an appropriate	31 32

Confiscation of Proceeds of Crime Amendment Bill 2005

Schedule 1 Amendment of Confiscation of Proceeds of Crime Act 1989

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	court makes a freezing notice directing the Public Trustee or Commissioner of Police to take control of property, and	1
	(b) the order or notice makes provision for meeting, out of the property or part of it, a person's reasonable expenses in defending a criminal charge,	2
	the Public Trustee or Commissioner may apply to the court for an order under subsection (3).	3
(2)	The Public Trustee or Commissioner must give to the person written notice of an application under this section.	4
(3)	On an application, the court may order that the expenses be taxed as provided in the order or notice or may dismiss the application.	5
(4)	An applicant for an order need not, except as ordered by the court after the application is made, take any steps for the purpose of meeting the expenses as provided by the restraining order or freezing notice unless and until:	6
	(a) an order under subsection (3) in relation to the expenses is complied with, or	7
	(b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, otherwise than by the making of such an order.	8
<b>[42]</b>	<b>Section 47 Public Trustee or Commissioner of Police to discharge confiscation order</b>	9
	Insert "or Commissioner of Police" after "Public Trustee" where firstly occurring in section 47 (1) (a).	10
<b>[43]</b>	<b>Section 47 (1) (a) and (4) (a)</b>	11
	Insert "or freezing notice" after "restraining order" wherever occurring.	12
<b>[44]</b>	<b>Section 47 (1) (b)</b>	13
	Omit "or drug proceeds order".	14
<b>[45]</b>	<b>Section 47 (1)</b>	15
	Insert "or Commissioner" after "Public Trustee" where secondly and thirdly occurring.	16
<b>[46]</b>	<b>Section 47 (2), (4), (5) and (6)</b>	17
	Insert "or Commissioner" after "Public Trustee" wherever occurring.	18
<b>[47]</b>	<b>Section 47 (4) (a)</b>	19
	Insert "or Commissioner's" after "Public Trustee's" wherever occurring.	20

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<b>[48] Section 47 (6)</b>	1
Omit “or drug proceeds order” wherever occurring.	2
<b>[49] Section 48 Charge on property subject to restraining order or freezing notice</b>	3
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Omit section 48 (1) (a). Insert instead:	5
(a) in reliance on the charging, or the proposed charging, of a person with, or the conviction of a person of, a serious offence, a court has made a restraining order or confirmed a freezing notice in respect of property of a person, and	6
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<b>[50] Section 48 (1)</b>	10
Insert “or freezing notice” after “restraining order” where secondly occurring.	11
<b>[51] Section 48 (2) (c) (iii)</b>	12
Omit the subparagraph. Insert instead:	13
(iii) if the restraining order or freezing notice directed the Public Trustee or the Commissioner of Police to take control of the property—by the owner of the property with the consent of the Public Trustee or the Commissioner, or	14
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	18
<b>[52] Section 48 (4) (a)</b>	19
Insert “or Commissioner” after “Public Trustee”.	20
<b>[53] Section 49 Registration of restraining orders and freezing notices</b>	21
Insert “or freezing notice” after “restraining order” wherever occurring in section 49 (1).	22
	23
<b>[54] Section 49 (2)</b>	24
Omit “a restraining order”. Insert instead “an order or notice”.	25
<b>[55] Section 49 (2)</b>	26
Omit “section 50”. Insert instead “section 42O or 45A”.	27
<b>[56] Section 49 (2)</b>	28
Omit “the restraining order”. Insert instead “the order or notice”.	29
<b>[57] Section 49 (3)</b>	30
Insert “or freezing notice” after “restraining order”.	31

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<b>[58] Section 49 (3)</b>	1
Insert “or notice” after “the order”.	2
<b>[59] Section 51 Hindering or obstructing Public Trustee or Commissioner of Police</b>	3
Omit section 51 (1). Insert instead:	4
(1) A person must not hinder or obstruct the Public Trustee or the Commissioner of Police in the performance of their obligations under a restraining order or freezing notice.	5
Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.	6
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<b>[60] Section 51A</b>	11
Insert after section 51:	12
<b>51A Orders to furnish statements to Public Trustee or Commissioner of Police</b>	13
(1) A person directed by an order under section 42M or 45 to furnish a statement to the Public Trustee or Commissioner of Police is not excused from:	14
(a) furnishing the statement, or	15
(b) setting out particulars in the statement,	16
on the ground that the statement or particulars might tend to incriminate the person or make the person liable to a forfeiture or penalty.	17
(2) A statement furnished to the Public Trustee or Commissioner under any such order, and any information, document or thing obtained as a direct or indirect consequence of the statement, is not admissible against the person in any criminal proceedings except a proceeding in respect of the falsity of the statement.	18
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<b>[61] Section 52 Protection of Public Trustee and Commissioner of Police from liability in certain cases</b>	28
Insert “or Commissioner of Police” after “Public Trustee” wherever occurring in section 52 (2) and (3).	29
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	31
<b>[62] Section 52 (2) and (3)</b>	32
Insert “or freezing notice” after “restraining order” wherever occurring.	33
<b>[63] Section 53 Fees payable to Public Trustee or Commissioner of Police</b>	34
Insert “or Commissioner of Police” after “Public Trustee” wherever occurring.	35

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<b>[64] Section 53</b>	1
Insert “or freezing notice” after “restraining order”.	2
<b>[65] Section 54 Court may revoke orders or notices</b>	3
Omit “the Supreme Court has made a restraining order, the Court may, on application made to it by the person, revoke the order”.	4
	5
Insert instead “a court has made a restraining order or confirmed a freezing notice, the court may, on application made to it by the person, revoke the order or notice”.	6
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	8
<b>[66] Section 54 (a) and (b)</b>	9
Omit “Court” wherever occurring. Insert instead “court”.	10
<b>[67] Section 54 (2)</b>	11
Insert at the end of section 54:	12
(2) A person who makes an application under this section must give notice of the application, as prescribed by the regulations or rules of court.	13
	14
	15
<b>[68] Section 56 Notice of applications under this Part</b>	16
Omit the section.	17
<b>[69] Section 57 Certificate by Public Trustee or Commissioner of Police</b>	18
Insert “or freezing notice” after “restraining order” wherever occurring.	19
<b>[70] Section 57 (2)</b>	20
Insert at the end of section 57:	21
(2) If a freezing notice is in force directing the Commissioner of Police to take control of property, a certificate by the Commissioner:	22
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	24
(a) certifying that the freezing notice has been made and is in force, and	25
	26
(b) stating the terms of the freezing notice,	27
is to be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the Commissioner’s right to act under the notice, without production of any further proof.	28
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<b>[71] Section 62 Effect of production orders on proceedings etc</b>	1
Insert “or to confirm a freezing notice” after “drug proceeds order” in section 62 (3).	2 3
<b>[72] Section 69 Making of monitoring orders</b>	4
Omit “section 73 (money laundering)” from section 69 (3).	5
Insert instead “Division 1A of Part 4 of the <i>Crimes Act 1900</i> ”.	6
<b>[73] Section 72 Protection where financial information given</b>	7
Omit “section 73 (money laundering)”.	8
Insert instead “Division 1A of Part 4 of the <i>Crimes Act 1900</i> ”.	9
<b>[74] Part 5, Division 1 Money laundering</b>	10
Omit the Division.	11
<b>[75] Part 5, Division 2, heading</b>	12
Omit the heading.	13
<b>[76] Section 74 Proceedings for offences</b>	14
Omit “under section 50 (contravention of restraining orders)” from section 74 (2).	15 16
Insert instead “under section 42O or 45A”.	17
<b>[77] Section 74 (3)</b>	18
Omit “under section 50 shall”.	19
Insert instead “under section 42O or 45A must”.	20
<b>[78] Section 74 (4)</b>	21
Omit “or 73 (money laundering)”.	22
<b>[79] Section 77 Registration of interstate instruments</b>	23
Insert “, interstate crime related property declaration” after “interstate forfeiture order” wherever occurring in section 77 (1) and (3).	24 25
<b>[80] Section 77 (1) and (4)</b>	26
Insert “or declaration” after “the order” wherever occurring.	27

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<b>[81] Section 77 (2) and (2A)</b>	1
Omit section 77 (2). Insert instead:	2
(2) An interstate forfeiture order, interstate crime related property declaration or interstate restraining order is to be regarded as registered under this Act when a copy of the order or declaration (being a copy sealed by the court or person that made the order or declaration) is registered in accordance with the rules of the Supreme Court.	3 4 5 6 7 8
(2A) A sealed copy of an interstate forfeiture order, interstate crime related property declaration or interstate restraining order is not required for the purposes of registration if it is not the practice of the court or body that issued the order or declaration to seal copies of the order or declaration.	9 10 11 12 13
<b>[82] Section 78A</b>	14
Insert after section 78:	15
<b>78A Effect of registration of interstate crime related property declarations</b>	16 17
(1) A registered interstate crime related property declaration is, subject to the regulations, to be enforced as if it were a registered interstate forfeiture order and this Part applies accordingly.	18 19 20
(2) Regulations may be made for or with respect to the circumstances in which a registered interstate crime related property declaration is to be treated as a registered interstate forfeiture order.	21 22 23
<b>[83] Section 79 Effect of registration of interstate restraining orders</b>	24
Omit “48, 54, 55” from section 79 (2). Insert instead “45B, 48, 54”.	25
<b>[84] Section 80 Revocation or variation of registered orders or declarations</b>	26
Insert “, registered interstate crime related property declaration” after “interstate forfeiture order”.	27 28
<b>[85] Section 80</b>	29
Insert “or declaration” after “an order”.	30
<b>[86] Section 81 Duration of registration</b>	31
Insert “, interstate crime related property declaration” after “interstate forfeiture order” in section 81 (a).	32 33

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<b>[87] Section 81</b>	1
Insert “or declaration” after “order” where thirdly, fourthly and fifthly occurring.	2 3
<b>[88] Section 82 Cancellation of registration</b>	4
Insert “, interstate crime related property declaration” after “interstate forfeiture order” in section 82 (1).	5 6
<b>[89] Section 82 (1) (b) and (2)</b>	7
Insert “or declaration” after “order” wherever occurring.	8
<b>[90] Section 85 Interim registration of facsimile copies</b>	9
Insert “, interstate crime related property declaration” after “interstate forfeiture order” in section 85 (1) (a).	10 11
<b>[91] Section 85 (1) (b)</b>	12
Insert “or declaration” after “order”.	13
<b>[92] Section 85 (1)</b>	14
Omit “the rules of the Supreme Court”.	15
Insert instead “the requirements of the court or body that issued it”.	16
<b>[93] Section 85 (4)</b>	17
Insert “or interstate crime related property declaration” after “interstate forfeiture order”.	18 19
<b>[94] Section 85 (4)</b>	20
Insert “or declaration” after “the order”.	21
<b>[95] Section 87 Provisions relating to courts</b>	22
Omit “\$10,000” from section 87 (2) and (3) wherever occurring.	23
Insert instead “the maximum amount that may be awarded by a Local Court when exercising its general civil jurisdiction”.	24 25
<b>[96] Section 89 Interstate operation of New South Wales orders and notices</b>	26
Omit “or restraining order” wherever occurring.	27
Insert instead “, restraining order or freezing notice”.	28
<b>[97] Section 89 (1), (2), (3) (a), (b) and (c)</b>	29
Insert “or notice” after “the order” wherever occurring.	30



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<b>[98]</b>	<b>Section 90 Costs incurred on variation of orders or notices on application by third parties</b>	1
	Omit “the Supreme Court” from section 90 (1) (a). Insert instead “a court”.	2
<b>[99]</b>	<b>Section 90 (1) (a)</b>	3
	Omit “or restraining order”.	4
	Insert instead “, restraining order or freezing notice”.	5
<b>[100]</b>	<b>Section 90 (1)</b>	6
	Omit “Supreme Court may”. Insert instead “court may”.	7
<b>[101]</b>	<b>Section 90 (2), (3), (4) and (5)</b>	8
	Omit “Supreme Court” wherever occurring. Insert instead “court”.	9
<b>[102]</b>	<b>Section 90 (6)</b>	10
	Omit the subsection. Insert instead:	11
	(6) In this section:	12
	<i>third party</i> , in relation to a forfeiture order, restraining order or freezing notice, means a person who is not the subject of the order or notice.	13
	<i>vary</i> includes limit the manner in which an order or notice applies.	14
<b>[103]</b>	<b>Section 91 Duty not payable</b>	15
	Omit “stamp duty is payable under the <i>Stamp Duties Act 1920</i> ”.	16
	Insert instead “duty is payable under the <i>Duties Act 1997</i> ”.	17
<b>[104]</b>	<b>Section 91 (b)</b>	18
	Insert “or section 42S (return of property)” after “orders”.	19
<b>[105]</b>	<b>Schedule 1 Savings, transitional and other provisions</b>	20
	Insert before clause 1:	21
	<b>Part 1 Preliminary</b>	22
<b>[106]</b>	<b>Schedule 1, clause 2 (1)</b>	23
	Insert at the end of clause 2 (1):	24
	<i>Confiscation of Proceeds of Crime Amendment Act 2005</i> (but only to the extent that it amends this Act)	25
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		28
		29
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<b>[107] Schedule 1, Part 2</b>	1
Insert after clause 3:	2
<b>Part 2 Provisions consequential on Confiscation of Proceeds of Crime Amendment Act 2005</b>	3 4
<b>4 Definition</b>	5
In this Part:	6
<i>amending Act</i> means the <i>Confiscation of Proceeds of Crime Amendment Act 2005</i> .	7 8
<b>5 Freezing notices</b>	9
Division 1A of Part 3, as inserted by the amending Act, applies to or in respect of:	10 11
(a) property acquired or seized before or after the commencement of that Division, and	12 13
(b) persons who committed serious offences (whether or not they were charged with those offences) before or after the commencement of that Division.	14 15 16
<b>6 Interstate orders and other instruments</b>	17
This Act, as amended by the amending Act, applies to or in respect of interstate forfeiture orders, interstate crime related property declarations and interstate restraining orders in force immediately before the commencement of this clause.	18 19 20 21

<b>Schedule 2</b>	<b>Amendment of Civil Liability Act 2002</b>	1
	(Section 4)	2
[1]	<b>Part 7, Division 1, heading</b>	3
	Insert before section 51:	4
	<b>Division 1</b>	5
	<b>Limitations on damages</b>	5
[2]	<b>Part 7, Division 2</b>	6
	Insert after section 54A:	7
	<b>Division 2</b>	8
	<b>Supervision of damages arising out of</b>	9
	<b>criminal conduct by persons suffering from</b>	10
	<b>mental illness</b>	10
<b>54B</b>	<b>Definitions</b>	11
	In this Division:	12
	<i>award</i> of damages means an award of damages by a court	13
	(including such an award pursuant to judgment entered in	14
	accordance with an agreement between the parties to a claim for	15
	damages).	16
	<i>damages supervision order</i> means an order granted under	17
	section 54D.	18
	<i>serious offence</i> means an offence punishable by imprisonment	19
	for 6 months or more.	20
<b>54C</b>	<b>Application of Division</b>	21
(1)	This Division applies to an award of damages to which this Part	22
	applies if:	23
(a)	the award is made in respect of a civil liability that arises	24
	out of injury or damage to the person, and	25
(b)	the injury or damage occurred at the time of, or following,	26
	conduct of the person that, on the balance of probabilities,	27
	would have constituted a serious offence if the person had	28
	not been suffering from a mental illness at the time of the	29
	conduct, and	30
(c)	the conduct contributed materially to the injury or damage	31
	or to the risk of injury or damage.	32
(2)	This Division does not apply to offender damages within the	33
	meaning of Division 6 of Part 2A.	34

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(3)	This Division does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned:	1 2 3
(a)	constitutes an offence (whether or not a serious offence), or	4 5
(b)	would have constituted an offence (whether or not a serious offence) if the defendant had not been suffering from a mental illness at the time of the conduct.	6 7 8
(4)	This Division does not apply to an award of damages made before the commencement of this Division.	9 10
<b>54D</b>	<b>Damages supervision orders</b>	11
(1)	A court that makes an award of damages must make an order directing the Public Trustee to take control of the amount of damages if it is satisfied, on the balance of probabilities, that the amount of damages is an amount to which this Division applies and that it is in the best interests of the person to whom the damages were awarded to make the order.	12 13 14 15 16 17
(2)	The Public Trustee must ensure that an amount of damages subject to a damages supervision order is used to cover the costs of past, present and future medical or other therapeutic treatment, rehabilitation costs and care costs of the person awarded the damages, subject to the terms of the order.	18 19 20 21 22
(3)	A damages supervision order may not take effect before the later of the final determination of any appeal relating to the award of damages or the end of the period during which any such appeal may be made.	23 24 25 26
(4)	A damages supervision order may be made whether or not the person awarded the damages is a mentally ill person (within the meaning of the <i>Mental Health Act 1990</i> ) or a mentally incapacitated person when the order is made.	27 28 29 30
(5)	Any part of an award payable or paid for properly payable legal expenses incurred in connection with proceedings for damages may not be made subject to a damages supervision order.	31 32 33
(6)	The Public Trustee holds the amount of damages in trust for the person awarded the damages.	34 35

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<b>54E</b>	<b>Additional matters relating to damages supervision orders</b>	1
(1)	A damages supervision order may:	2
(a)	require an amount of damages to be paid to the Public Trustee instead of, or by or on behalf of, the person awarded the damages, and	3 4 5
(b)	regulate the manner in which the Public Trustee may exercise his or her functions under the order, and	6 7
(c)	determine any matter relating to the payment of amounts of the damages, including:	8 9
(i)	the purposes for which amounts may be disbursed, and	10 11
(ii)	the obligations of the Public Trustee and the person awarded the damages, and	12 13
(d)	make such other provision as the court thinks fit in the circumstances of the case.	14 15
(2)	A damages supervision order ceases to have effect:	16
(a)	if it is revoked by a court, or	17
(b)	on the death of the person awarded the damages.	18
(3)	If a damages supervision order ceases to have effect, any remaining amount of damages, or the proceeds of an amount of damages, is (subject to any order of a court and to payment of any fees or other expenses of the Public Trustee) to be paid to the person awarded the damages or the legal personal representative of the person.	19 20 21 22 23 24
<b>54F</b>	<b>Estates under supervision of Protective Commissioner</b>	25
(1)	A damages supervision order may be made in relation to a person even though the estate of the person is subject to management under the <i>Protected Estates Act 1983</i> .	26 27 28
(2)	The <i>Protected Estates Act 1983</i> does not apply to or in respect of property of a person whose estate is subject to management under that Act to the extent that the property is the subject of a damages supervision order.	29 30 31 32
<b>54G</b>	<b>Hindering or obstructing Public Trustee</b>	33
(1)	A person must not hinder or obstruct the Public Trustee in the performance of the Public Trustee's obligations under a damages supervision order.	34 35 36
	Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.	37 38

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(2) In this section: 1

*Public Trustee* includes members of staff within the meaning of 2  
the *Public Trustee Act 1913* and agents of the Public Trustee. 3

**54H Evidence of Public Trustee's right to act** 4

If a damages supervision order is made directing the Public 5  
Trustee to take control of property, a certificate under the hand of 6  
the Public Trustee or an officer referred to in section 50 of the 7  
*Public Trustee Act 1913* and sealed with the Public Trustee's 8  
seal: 9

(a) certifying that the damages supervision order has been 10  
made and is in force, and 11

(b) stating the terms of the order, 12

is to be accepted by all courts, officers and other persons, whether 13  
acting under any Act or not, as evidence of the matters so 14  
certified and stated and of the Public Trustee's right to act under 15  
the damages supervision order, without production of any other 16  
proof. 17

**[3] Schedule 1 Savings and transitional provisions** 18

Insert at the end of clause 1 (1): 19

*Confiscation of Proceeds of Crime Amendment Act 2005* (but 20  
only to the extent that it amends this Act) 21

<b>Schedule 3</b>	<b>Amendment of Crimes Act 1900</b>	1
	(Section 5)	2
<b>Part 4, Division 1A</b>		3
Insert after Division 1:		4
<b>Division 1A</b>	<b>Money laundering</b>	5
<b>193A</b>	<b>Definitions</b>	6
	In this Division:	7
	<i>deal with</i> includes:	8
	(a) receive, possess, conceal or dispose of, or	9
	(b) bring or cause to be brought into New South Wales,	10
	including transfer or cause to be transferred by electronic	11
	communication, or	12
	(c) engage directly or indirectly in a transaction, including	13
	receiving or making a gift.	14
	<i>instrument of crime</i> means property that is used in the	15
	commission of, or to facilitate the commission of, a serious	16
	offence.	17
	<i>proceeds of crime</i> means any property that is substantially	18
	derived or realised, directly or indirectly, by any person from the	19
	commission of a serious offence.	20
	<i>serious offence</i> means:	21
	(a) an offence (including a common law offence) against the	22
	laws of New South Wales, being an offence that may be	23
	prosecuted on indictment, or	24
	(b) the offence of supplying any restricted substance	25
	prescribed for the purposes of section 16 of the <i>Poisons</i>	26
	<i>and Therapeutic Goods Act 1966</i> that arises under	27
	section 18A (1) of that Act, or	28
	(c) an offence committed outside New South Wales	29
	(including outside Australia) that would be an offence	30
	referred to in paragraph (a) or (b) if it had been committed	31
	in New South Wales.	32
<b>193B</b>	<b>Money laundering</b>	33
	(1) A person who deals with proceeds of crime:	34
	(a) knowing that it is proceeds of crime, and	35

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	(b) intending to conceal that it is proceeds of crime, is guilty of an offence.	1 2
	Maximum penalty: imprisonment for 20 years.	3
(2)	A person who deals with proceeds of crime knowing that it is proceeds of crime is guilty of an offence.	4 5
	Maximum penalty: imprisonment for 15 years.	6
(3)	A person who deals with proceeds of crime being reckless as to whether it is proceeds of crime is guilty of an offence.	7 8
	Maximum penalty: imprisonment for 10 years.	9
(4)	It is a defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant dealt with the proceeds of crime to assist the enforcement of a law of the Commonwealth, a State or a Territory.	10 11 12 13
<b>193C</b>	<b>Dealing with property suspected of being proceeds of crime</b>	14
(1)	A person who deals with property that is property that there are reasonable grounds to suspect is proceeds of crime is guilty of a summary offence.	15 16 17
	Maximum penalty: 50 penalty units or imprisonment for 2 years, or both.	18 19
(2)	It is a defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had no reasonable grounds for suspecting that the property was substantially derived or realised, directly or indirectly, from an act or omission constituting an offence against a law in force in the Commonwealth, a State or a Territory or another country.	20 21 22 23 24 25
<b>193D</b>	<b>Dealing with property that subsequently becomes an instrument of crime</b>	26 27
(1)	If:	28
	(a) a person deals with property intending that the property will become an instrument of crime, and	29 30
	(b) the property subsequently becomes an instrument of crime,	31 32
	the person is guilty of an offence.	33
	Maximum penalty: imprisonment for 15 years.	34
(2)	If:	35
	(a) a person deals with property being reckless as to whether the property will become an instrument of crime, and	36 37



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(b) the property subsequently becomes an instrument of crime,	1
the person is guilty of an offence.	2
Maximum penalty: imprisonment for 10 years.	3
(3) Proceedings for an offence under this section must not be commenced without the consent of the Director of Public Prosecutions.	4
(4) It is a defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant dealt with the proceeds of crime to assist the enforcement of a law of the Commonwealth, a State or a Territory.	5
(5) In this section:	6
<i>property</i> means money or other valuables.	7
<b>193E Alternative verdicts</b>	8
(1) If on the trial of a person for an offence under section 193B (1), the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied that the accused is guilty of an offence under section 193B (2) or (3), it may find the accused not guilty of the offence charged but guilty of the other offence, and the accused is liable to punishment accordingly.	9
(2) If on the trial of a person for an offence under section 193B (2), the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied that the accused is guilty of an offence under section 193B (3), it may find the accused not guilty of the offence charged but guilty of the other offence, and the accused is liable to punishment accordingly.	10
(3) If on the trial of a person for an offence under section 193D (1), the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied that the accused is guilty of an offence under section 193D (2), it may find the accused not guilty of the offence charged but guilty of the other offence, and the accused is liable to punishment accordingly.	11
<b>193F Proof of other offences not required</b>	12
(1) To avoid doubt, it is not necessary, in order to prove for the purposes of an offence under this Division that property is proceeds of crime, to establish that:	13
(a) a particular offence was committed in relation to the property, or	14

Confiscation of Proceeds of Crime Amendment Bill 2005

Schedule 3      Amendment of Crimes Act 1900

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(b)	a particular person committed an offence in relation to the property.	1 2
(2)	To avoid doubt, it is not necessary, in order to prove for the purposes of an offence under this Division that property will be an instrument of crime, to establish:	3 4 5
(a)	an intention or risk that a particular offence will be committed in relation to the property, or	6 7
(b)	an intention or risk that a particular person will commit an offence in relation to the property.	8 9
<b>193G</b>	<b>Transitional provision</b>	10
	This Division applies to or in respect of acts or omissions in relation to proceeds of crime arising from serious offences committed before or after the commencement of this Division.	11 12 13

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<b>Schedule 4</b>	<b>Amendment of Forfeiture Act 1995</b>	1
	(Section 6)	2
<b>[1] Long title</b>		3
	Insert “to apply the forfeiture rule to certain persons who are found not guilty on the grounds of mental illness;” after “benefits;”.	4 5
<b>[2] Part 1, heading</b>		6
	Insert before section 1:	7
	<b>Part 1 Preliminary</b>	8
<b>[3] Section 3 Definitions</b>		9
	Insert in alphabetical order:	10
	<i>forfeiture application order</i> means an order made under section 11.	11 12
<b>[4] Part 2, heading</b>		13
	Insert before section 5:	14
	<b>Part 2 Forfeiture modification orders</b>	15
<b>[5] Part 3</b>		16
	Omit section 10. Insert instead:	17
	<b>Part 3 Forfeiture application orders</b>	18
<b>10 Definitions</b>		19
	In this Part:	20
	<i>interested person</i> does not include an offender or a person claiming through an offender.	21 22
	<i>offender</i> means a person who has killed another person and been found not guilty of murder by reason of mental illness.	23 24
<b>11 Power of Supreme Court to apply forfeiture rule</b>		25
(1)	If a person who has killed another person is not subject to the forfeiture rule because the person has been found not guilty of murder by reason of mental illness, any interested person may	26 27 28

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	make an application to the Supreme Court for an order that the rule apply as if the offender had been found guilty of murder.	1 2
(2)	On any such application, the Court may make an order applying the forfeiture rule to the offender if it is satisfied that justice requires the rule to be applied as if the offender had been found guilty of murder.	3 4 5 6
(3)	In determining whether justice requires the rule to be applied, the Court is to have regard to the following matters:	7 8
	(a) the conduct of the offender,	9
	(b) the conduct of the deceased person,	10
	(c) the effect of the application of the rule on the offender or any other person,	11 12
	(d) such other matters as to the Court appear material.	13
(4)	If a forfeiture application order is made, the forfeiture rule is to apply in respect of the offender for all purposes (including purposes relating to anything done before the order was made) as if the offender had been found guilty of murder.	14 15 16 17
<b>12</b>	<b>Time for applications for forfeiture application orders</b>	18
(1)	Unless the Supreme Court gives leave for a late application to be made, an application for a forfeiture application order must be made within 6 months after the day on which it is determined that the offender was not guilty of murder.	19 20 21 22
(2)	The Court may give leave for a late application if the Court considers it just in all the circumstances to give leave.	23 24
<b>13</b>	<b>Revocation of forfeiture application orders</b>	25
(1)	If the Supreme Court has made a forfeiture application order, an interested person may make an application to the Court for the revocation of the order if the Court considers it just in all the circumstances to give leave for such an application to be made.	26 27 28 29
(2)	On any such application, the Court may revoke the forfeiture application order concerned.	30 31
(3)	Section 11 (2) and (3) apply to the determination of any such application in the same way as they apply to the making of a forfeiture application order. In determining whether to revoke the forfeiture application order, the Court is also to have regard to the effect on the offender and other persons of any such revocation.	32 33 34 35 36

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- (4) If a forfeiture application order is revoked, the forfeiture rule has, and is taken to have had, no effect in relation to the offender for all purposes (including purposes relating to anything done before the order was revoked), subject to the terms on which the Court revokes the order. 1  
2  
3  
4  
5

**14 Transitional provision** 6

- (1) A forfeiture application order may be made in respect of any of the following: 7  
8
- (a) a killing occurring before or after the commencement of this Part, 9  
10
- (b) the application of the forfeiture rule in probate or administration proceedings commenced before or after the commencement of this Part, but not probate or administration proceedings determined before the commencement of this Part. 11  
12  
13  
14  
15
- (2) Nothing in this Part affects any determination of a court concerning the application of the forfeiture rule in any proceedings that was made before the commencement of this Part. 16  
17  
18  
19