

CONFISCATION OF PROCEEDS OF CRIME ACT 1989
No. 90

NEW SOUTH WALES



TABLE OF PROVISIONS

PART 1—PRELIMINARY

1. Short title
2. Commencement
3. Principal objects
4. Definitions
5. Meaning of "conviction of serious offence"
6. Meaning of "absconding"
7. Meaning of "serious offence" and "serious drug offence"
8. Related offences
9. Meaning of "dealing with property"
10. Effective control of property
11. Act to bind Crown
12. Application

PART 2—CONFISCATION

Division 1—Applications for confiscation orders

13. Applications for confiscation orders
14. Notice of applications
15. Amendment of applications
16. Making of confiscation orders if person has absconded
17. Procedure on applications

Division 2—Forfeiture orders

18. Forfeiture orders
19. Effects of forfeiture orders
20. Effects of forfeiture orders on third parties
21. Discharge of forfeiture orders
22. Orders pending forfeiture

Division 3—Pecuniary penalty orders

23. Application of Division
24. Pecuniary penalty orders
25. Assessment of pecuniary penalty
26. Discharge of pecuniary penalty orders
27. Court may lift corporate veil etc.

Confiscation of Proceeds of Crime 1989

Division 4—Drug proceeds orders

28. Application of Division
29. Drug proceeds orders
30. Assessment of proceeds of drug trafficking
31. Statements relating to drug trafficking
32. Amount to be recovered under drug proceeds order
33. Realisable property etc.
34. Variation of drug proceeds orders

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION

Division 1—Search powers

35. Definitions
36. Search warrants
37. Seizure of property pursuant to warrants
38. Search and arrest of persons pursuant to warrants
39. Issue of warrants if charge not laid
40. Commissioner of Police responsible for seized property
41. Return of seized property
42. Obstruction etc. of person executing warrant

Division 2—Restraining orders

43. Restraining orders
44. Notice of applications and orders
45. Court may make further orders
46. Order for taxation of legal expenses to be met out of restrained property
47. Public Trustee to discharge confiscation order
48. Charge on property subject to restraining order
49. Registration of restraining orders
50. Contravention of restraining orders
51. Hindering or obstructing Public Trustee
52. Protection of Public Trustee from liability in certain cases
53. Fees payable to Public Trustee
54. Court may revoke restraining orders
55. Time when restraining order ceases to be in force
56. Notice of applications under this Part
57. Certificate by Public Trustee

PART 4—INFORMATION GATHERING POWERS

Division 1—Production orders

58. Applications for production orders
59. Making of production orders
60. Form of production orders
61. Powers under production orders
62. Effect of production orders on proceedings etc.
63. Variation of production orders
64. Failure to comply with production orders

Division 2—Search powers

65. Powers to search for, and seize, documents relevant to locating etc. property
66. Application for search warrant for location etc. of property
67. Search warrant for location etc. of property

Division 3—Monitoring orders

68. Monitoring orders
69. Making of monitoring orders
70. Existence and operation of monitoring order not to be disclosed
71. Communication of information by financial institutions to prescribed authorities
72. Protection for financial institution where information given

Confiscation of Proceeds of Crime 1989

PART 5—OFFENCES

Division 1—Money laundering

73. Money laundering

Division 2—Miscellaneous

74. Proceedings for offences

75. Proof of certain matters not required

76. Conduct by directors, servants or agents

PART 6—INTERSTATE ORDERS

77. Registration of interstate orders

78. Effect of registration of interstate forfeiture orders

79. Effect of registration of interstate restraining orders

80. Revocation or variation of registered orders

81. Duration of registration

82. Cancellation of registration

83. Charge on property subject to registered interstate restraining orders

84. Powers of Public Trustee in relation to interstate restraining orders

85. Interim registration of facsimile copies

PART 7—MISCELLANEOUS

86. Restriction on making applications

87. Provisions relating to courts

88. Commissioner for the Independent Commission Against Corruption

89. Interstate operation of forfeiture or restraining orders

90. Costs incurred on variation of forfeiture or restraining orders on application by third parties

91. Stamp duty

92. Appeals

93. Operation of other laws not affected

94. Notices

95. Regulations

96. Repeal of Crimes (Confiscation of Profits) Act 1985 No. 181 and Crimes (Confiscation of Profits) Regulation 1986

97. Savings, transitional and other provisions

SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS



CONFISCATION OF PROCEEDS OF CRIME ACT 1989 No. 90

NEW SOUTH WALES



Act No. 90, 1989

An Act to provide for the confiscation of the profits of crime and the forfeiture of property in certain circumstances; to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of the profits of crime and the forfeiture of property; to repeal the Crimes (Confiscation of Profits) Act 1985; and for connected purposes. [Assented to 13 June 1989]

Confiscation of Proceeds of Crime 1989

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Confiscation of Proceeds of Crime Act 1989.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Principal objects

3. The principal objects of this Act are—

- (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State; and
- (b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and
- (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property; and
- (d) to provide for the enforcement in the State of forfeiture orders, pecuniary penalty orders and restraining orders made in respect of offences against the laws of other States.

Definitions

4. (1) In this Act—

“account” means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for—

- (a) a fixed term deposit; and
- (b) a safety deposit box;

“agent” includes, if the agent is a corporation, the officers and agents of the corporation;

“appeal” includes a proceeding in the nature of an appeal;

“appropriate court” means—

- (a) in any case, the Supreme Court; or
- (b) in relation to—

- (i) a forfeiture order made in reliance on the conviction of a person for a serious offence; or
- (ii) a pecuniary penalty order against a person convicted of a serious offence; or
- (iii) an application for such a forfeiture order or pecuniary penalty order,

Confiscation of Proceeds of Crime 1989

the court before which the person was convicted of the offence;

“appropriate officer” means—

- (a) in any case—the Director of Public Prosecutions; or
- (b) in relation to restraining orders—the Commissioner for the Independent Commission Against Corruption; or
- (c) in relation to a function exercised before or in relation to a Local Court (other than a function under Division 2 of Part 3)—the Commissioner of Police; or
- (d) in relation to a function prescribed for the purposes of this paragraph by the regulations—a person so prescribed or a person of a class or description so prescribed;

“approved” means approved by the Minister in writing for the purposes of the provision in which the term occurs;

“authorised officer” means—

- (a) a member of the Police Force; or
- (b) a person authorised in writing by the Minister either generally or in a special case to act as an authorised officer for the purposes of section 43 (restraining orders) or Part 4;

“bank” means—

- (a) the Reserve Bank of Australia; or
- (b) a bank within the meaning of the Banking Act 1959 of the Commonwealth; or
- (c) a person who carries on State banking within the meaning of section 51 (xiii) of the Constitution of the Commonwealth;

“benefit” includes service and advantage;

“building society” means a society registered or incorporated as a building society, permanent building society, co-operative housing society or similar society under an Act;

“confiscation order” means a forfeiture order or a pecuniary penalty order;

“corresponding law” means a law of another State that is for the time being declared by the regulations to be a law that corresponds to this Act;

“credit union” means a credit union or society carrying on business under an Act;

“Customs Act” means the Customs Act 1901 of the Commonwealth;

“Customs officer” means an officer of Customs within the meaning of the Customs Act;

“director”, in relation to a financial institution or corporation, includes—

Confiscation of Proceeds of Crime 1989

- (a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory—a constituent member of the body corporate; and
 - (b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and
 - (c) any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;
- “drug proceeds order” means an order made under section 29;
- “drug trafficking” means any act constituting a drug trafficking offence;
- “drug trafficking offence” means an offence under any of the following sections of the Drug Misuse and Trafficking Act 1985:
- (a) section 23 (offences with respect to prohibited plants);
 - (b) section 24 (manufacture and production of prohibited drugs);
 - (c) section 25 (supply of prohibited drugs);
 - (d) section 26 (conspiring);
 - (e) section 27 (aiding, abetting etc. commission of offence in New South Wales);
 - (f) section 28 (conspiring to commit and aiding etc. commission of offence outside New South Wales);
- “encumbrance”, in relation to property, includes any interest, mortgage, charge, right, claim and demand in respect of the property;
- “executive officer”, in relation to a financial institution or a corporation, means any person, by whatever name called and whether or not he or she is a director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation;
- “facsimile copy” means a copy obtained by facsimile transmission;
- “financial institution” means—
- (a) a bank; or
 - (b) a building society; or
 - (c) a credit union; or
 - (d) a body corporate that is, or that, if it had been incorporated in Australia, would be, a financial corporation within the meaning of section 51 (xx) of the Constitution of the Commonwealth;
- “fixed term deposit” means an interest bearing deposit lodged for a fixed period;
- “forfeiture order” means an order made under section 18;
- “interest”, in relation to property, means—
- (a) a legal or equitable estate or interest in the property; or

Confiscation of Proceeds of Crime 1989

- (b) a right, power or privilege in connection with the property, whether present or future and whether vested or contingent;
- “interstate forfeiture order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- “interstate pecuniary penalty order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- “interstate restraining order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- “interstate serious offence” means an offence (including a common law offence, where relevant) against the laws of another State, being an offence in relation to which an interstate forfeiture order or interstate pecuniary penalty order may be made under a corresponding law of that State;
- “monitoring order” means an order made under section 69;
- “officer” means a director, secretary, executive officer or employee;
- “pecuniary penalty order” means an order made under section 24;
- “penalty amount” means—
- (a) in relation to a forfeiture order made against a person, the amount specified in relation to the forfeiture order under section 21 (2); or
 - (b) in relation to a pecuniary penalty order made against a person, the amount that the person is, under the pecuniary penalty order, liable to pay to the State; or
 - (c) in relation to a drug proceeds order made against a person, the amount that the person is, under the drug proceeds order, liable to pay to the State;
- “premises” includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof;
- “prescribed authority” means—
- (a) the Commissioner of Police; or
 - (b) the State Drug Crime Commission; or
 - (c) the Independent Commission Against Corruption; or
 - (d) the Corporate Affairs Commission; or
 - (e) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of a State or Territory prescribed for the purposes of this definition;
- “proceeds”, in relation to a serious offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence;

Confiscation of Proceeds of Crime 1989

“production order” means an order made under section 59;

“property” includes real and personal property and any estate or interest in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest;

“property-tracking document”, in relation to a serious offence, means—

(a) a document relevant to—

(i) identifying, locating or quantifying property of a person who committed the offence; or

(ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence;
or

(b) a document relevant to—

(i) identifying, locating or quantifying tainted property in relation to the offence; or

(ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence;

“relevant offence”, in relation to tainted property, means an offence by reason of the commission of which the property is tainted property;

“relevant period”, in relation to the conviction of a person for a serious offence, means the period of 6 months after—

(a) where the person is to be taken to have been convicted of the offence because of section 5 (1) (a)—the day on which the person was convicted of the offence; or

(b) where the person is to be taken to have been convicted of the offence because of section 5 (1) (b)—the day on which the order in relation to the offence was made under section 556A of the Crimes Act 1900; or

(c) where the person is to be taken to have been convicted of the offence because of section 5 (1) (c)—the day on which the court took the offence into account under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986; or

(d) where the person is to be taken to have been convicted of the offence because of section 5 (1) (d)—the day on which the person is taken to have absconded under section 6;

“restraining order” means an order made under section 43;

“State”, when not used in a geographical sense, means the Crown in right of New South Wales, and (except in relation to the payment of money to the State) includes a State authority;

“State authority” means a Minister of the Crown, a statutory body representing the Crown, a member of the Police Force or a person or body prescribed by the regulations for the purposes of this definition or of a class or description so prescribed;

Confiscation of Proceeds of Crime 1989

“tainted property” means property that—

- (a) was used in, or in connection with, the commission of a serious offence; or
- (b) was derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence; or
- (c) was derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence;

“unlawful activity” means an act or omission that constitutes an offence against a law in force in the Commonwealth, a State or a Territory.

(2) A reference in this Act to a person being charged with an offence is a reference to an information being laid against the person for the offence whether or not—

- (a) a summons to require the attendance of the person to answer the information has been issued; or
- (b) a warrant for the arrest of the person has been issued.

(3) A reference in this Act to a benefit derived by a person includes a reference to—

- (a) a benefit derived, directly or indirectly, by the person; and
- (b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.

(4) A reference in this Act to the property of a person includes a reference to property in respect of which the person has a beneficial interest.

(5) A reference in this Act to acquiring property, or an interest in property, for sufficient consideration is a reference to acquiring the property, or the interest, for a consideration that is sufficient and that, having regard solely to commercial considerations, reflects the value of the property, or the interest.

(6) For the purposes of this Act, a person shall not be regarded as being a director of a financial institution or corporation within the meaning of paragraph (c) of the definition of “director” in subsection (1) only because the directors act on advice given by that person in the proper performance of the functions attaching—

- (a) to his or her professional capacity; or
- (b) to his or her business relationship with the directors of the financial institution or corporation.

(7) In this Act—

- (a) a reference to a function includes a reference to a power, authority and duty; and

Confiscation of Proceeds of Crime 1989

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

(8) For the purposes of this Act, the Northern Territory is regarded as a State.

Meaning of "conviction of serious offence"

5. (1) For the purposes of this Act, a person shall be taken to have been convicted of a serious offence if—

- (a) the person has been convicted, whether summarily or on indictment, of the offence by a court; or
- (b) the person has been charged with the offence and the court hearing the charge has made an order in relation to the offence under section 556A of the Crimes Act 1900; or
- (c) the person has been sentenced for another offence and the court has, in passing sentence on the person, taken the offence into account under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986; or
- (d) the person has been charged with the offence and, at any time before the determination of the charge, the person has absconded.

(2) If, by virtue of subsection (1), a person is to be taken to have been convicted of a serious offence, then, for the purposes of this Act—

- (a) the person shall, in a case to which paragraph (a) or (b) of that subsection applies, be taken to have been so convicted by the court referred to in the relevant paragraph; and
- (b) the conviction shall be taken to have been quashed—
 - (i) if the person is to be taken to have been convicted of the offence because of subsection (1) (a)—when the conviction is quashed or set aside; or
 - (ii) if the person is to be taken to have been convicted of the offence because of subsection (1) (b)—when the order made under section 556A of the Crimes Act 1900 is quashed or set aside; or
 - (iii) if the person is to be taken to have been convicted of the offence because of subsection (1) (c)—when the decision of the court under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986 is quashed or set aside; or
 - (iv) if the person is to be taken to have been convicted of the offence because of subsection (1) (d)—when, after the person is subsequently brought before a court in respect of the offence with which the person was charged, the person is discharged in respect of the offence or the conviction for the offence is quashed or set aside.

Confiscation of Proceeds of Crime 1989

(3) For the purposes of this Act, where an information has been laid alleging the commission of a serious offence by a person, the person shall be taken to have been charged with the offence (but nothing in this subsection limits any other way in which a person is to be taken to be charged with an offence).

Meaning of "absconding"

6. (1) For the purposes of this Act, a person shall be taken to have absconded if and only if—

- (a) an information has been laid alleging the commission of a serious offence by the person; and
- (b) a warrant for the arrest of the person has been issued in relation to that information; and
- (c) reasonable attempts to locate the person pursuant to the warrant have been unsuccessful during the period of 6 months commencing on the day the warrant was issued,

and the person shall be taken to have so absconded on the last day of that period of 6 months.

(2) A reference in this Act, in relation to the conviction of a person for a serious offence, to the commission of the offence shall, where the person is to be taken to have been convicted of the offence because of section 5 (1) (d), be read as a reference to the alleged commission of the offence by the person.

Meaning of "serious offence" and "serious drug offence"

7. In this Act—

"serious drug offence" means—

- (a) an offence referred to (before the commencement of the Drug Misuse and Trafficking Act 1985) in section 45A of the Poisons Act 1966—
 - (i) of supplying any drug of addiction or prohibited drug within the meaning of that Act; or
 - (ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act; or
 - (iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises; or
- (b) a drug trafficking offence; or
- (c) a prescribed offence involving drugs or an offence of a prescribed kind involving drugs; or

Confiscation of Proceeds of Crime 1989

- (d) an offence, which involves theft, fraud, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery, corruption or harbouring criminals, committed in connection with an offence referred to in paragraph (a), (b) or (c); or
- (e) an offence under section 73 (money laundering) in relation to the proceeds of an offence referred to in paragraph (a), (b), (c) or (d); or
- (f) an offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e);

“serious offence” means—

- (a) an offence (including a common law offence) against the laws of New South Wales, being an offence that may be prosecuted on indictment; or
- (b) the offence of supplying any restricted substance prescribed for the purposes of section 16 of the Poisons Act 1966 that arises under section 18A (1) of that Act; or
- (c) an offence prescribed for the purposes of this paragraph by the regulations or an offence of a kind so prescribed.

Related offences

8. For the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences are substantially the same acts or omissions.

Meaning of “dealing with property”

9. For the purposes of this Act, dealing with property of a person includes—

- (a) if a debt is owed to that person—making a payment to any person in reduction of the amount of the debt; and
- (b) removing the property from New South Wales; and
- (c) receiving or making a gift of the property.

Effective control of property

10. (1) Property, or an interest in property, may be subject to the effective control of a person within the meaning of this Act whether or not the person has—

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege in connection with the property.

(2) In determining—

- (a) whether or not property, or an interest in property, is subject to the effective control of a person; or

Confiscation of Proceeds of Crime 1989

- (b) whether or not there are reasonable grounds to believe that property, or an interest in property, is subject to the effective control of a person,
- regard may be had to—
- (c) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property; and
- (d) a trust that has a relationship to the property; and
- (e) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (c) or trusts of the kind referred to in paragraph (d), and other persons.

Act to bind Crown

11. (1) This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) Nothing in this Act renders the Crown liable to be prosecuted for an offence.

Application

12. (1) Parts 2 and 3 do not apply to a person's conviction of an offence if the person was convicted of the offence before the commencement of those Parts.

(2) Subsection (1) does not apply in relation to interstate forfeiture orders, interstate pecuniary penalty orders or interstate restraining orders.

(3) Subject to subsection (1), this Act applies to—

- (a) an offence committed, or believed to have been committed, at any time (whether before or after the commencement of this section); and
- (b) a person's conviction of an offence at any time (whether before or after the commencement of this section).

PART 2—CONFISCATION**Division 1—Applications for confiscation orders****Applications for confiscation orders**

13. (1) If a person is convicted of a serious offence other than a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:

- (a) a forfeiture order against property that is tainted property in respect of the offence;

Confiscation of Proceeds of Crime 1989

- (b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.
- (2) If a person is convicted of a drug trafficking offence, an appropriate officer may apply to an appropriate court for a forfeiture order against property that is tainted property in respect of the offence.
- (3) An application must be made before the end of the relevant period in relation to the conviction.
- (4) An application may be made under subsection (1) (b) in relation to one or more serious offences.
- (5) If an application under subsection (1) or subsection (2) has been finally determined, no further application may be made under that subsection in relation to the same conviction, except with the leave of the Supreme Court or in such circumstances as are prescribed.
- (6) The Supreme Court shall not grant leave unless satisfied that—
- (a) the tainted property, or the benefit, to which the new application relates was identified only after the first application was determined; or
 - (b) necessary evidence became available only after the first application was determined; or
 - (c) the Court is otherwise satisfied that it is in the interests of justice to grant the leave.

Notice of applications

14. (1) If an appropriate officer applies for a forfeiture order against property in respect of a person's conviction of a serious offence—
- (a) the appropriate officer shall give written notice of the application to the person and to any other person the appropriate officer has reason to believe may have an interest in the property; and
 - (b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application; and
 - (c) the court may, at any time before the final determination of the application, direct the appropriate officer to give or publish notice of the application to a specified person or class of persons, in the manner and within the time that the court considers appropriate.
- (2) If an appropriate officer applies for a pecuniary penalty order against a person—
- (a) the appropriate officer shall give the person written notice of the application; and
 - (b) the person may appear and adduce evidence at the hearing of the application.

Amendment of applications

15. (1) A court may, at any time before the final determination of an application for a confiscation order made to it and whether or not the period for making such an application has expired, amend the application as it thinks fit, either at the request of the appropriate officer who made the application or with the approval of the appropriate officer.

(2) The court shall not amend the application so as to—

- (a) include additional property in an application for a forfeiture order; or
- (b) include an additional benefit in an application for a pecuniary penalty order,

unless the court is satisfied that—

- (c) the property or benefit was not reasonably capable of identification when the application was originally made; or
- (d) necessary evidence became available only after the application was originally made.

(3) If the amendment of an application for a forfeiture order would have the effect of including additional property in the application for the forfeiture order, the applicant for the amendment shall give written notice of the application to amend to any person who the applicant has reason to believe may have an interest in the property to be included in the application for the forfeiture order.

(4) Any person who claims an interest in the property to be included in the application for the forfeiture order may appear and adduce evidence at the hearing of the application to amend.

(5) If the amendment of an application for a pecuniary penalty order against a person would have the effect of including an additional benefit in the application for the pecuniary penalty order, the applicant shall give the person written notice of the application to amend.

Making of confiscation orders if person has absconded

16. If a person is, because of section 5 (1) (d), to be taken to have been convicted of a serious offence, a court shall not make a confiscation order in reliance on the person's conviction of the offence unless the court is satisfied, on the balance of probabilities, that the person has absconded and—

- (a) the person has been committed for trial for the offence; or
- (b) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

*Confiscation of Proceeds of Crime 1989***Procedure on applications**

17. (1) If an application is made to a court for a confiscation order in respect of a person's conviction of a serious offence, the court may, in determining the application, have regard to the transcript of any proceedings against the person for the serious offence.

(2) If—

- (a) a person is to be taken to have been convicted of a serious offence because of section 5 (1) (c); and
- (b) an application is made to a court for a confiscation order in respect of the conviction,

the reference in subsection (1) to proceedings against the person for the serious offence includes a reference to proceedings against the person for the other offence referred to in section 5 (1) (c).

Division 2—Forfeiture orders**Forfeiture orders**

18. (1) If a person has been convicted of a serious offence and an application is made to a court under section 13 (1) (a) in relation to specified property and—

- (a) the court is satisfied that the property is tainted property in relation to the offence; and
- (b) the court has taken into consideration (having regard to information before the court)—
 - (i) the use that is ordinarily or had been intended to be made of the property; and
 - (ii) any hardship that may reasonably be likely to arise (whether on the part of that or any other person) following the making of the order,

the court may order that the property is forfeited to the State.

(2) In considering any hardship that may be likely to arise on the part of a person convicted of a serious offence, the court shall not take into account the sentence imposed in respect of the offence.

(3) If the court orders that property (other than money) is forfeited to the State, the court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.

(4) If, at the hearing of an application made under section 13 (1) (a) in reliance on the conviction of a person for a serious offence, evidence is given that property to which the application relates was in the possession of the person at or immediately after the commission of the offence, then—

Confiscation of Proceeds of Crime 1989

- (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 shall presume that the property was used in, or in connection with, the commission of the offence; or
- (b) in any other case—the court shall not make an order under this section 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.

(5) A court making a forfeiture order in respect of property may specify in the order the extent of the estate, interest or rights in the property that are affected by the order and, where the order is to apply to land, the court shall do so.

Effects of forfeiture orders

19. (1) If a court makes a forfeiture order in respect of property—

- (a) the property vests in the Crown in right of New South Wales (or in such State authority as is specified in the forfeiture order) to the extent of the estate, interest or rights (if any) specified in the forfeiture order; and
- (b) the property so vests subject to every charge or encumbrance to which the property was subject immediately before the forfeiture order was made and, in the case of land under the provisions of the Real Property Act 1900, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act; and
- (c) if the property is not already in the possession of the State, the State may take possession of the property.

(2) Nothing in subsection (1) affects the operation of section 86 of the Real Property Act 1900 in relation to a forfeiture order made in respect of land.

(3) If a court makes a forfeiture order in respect of property—

- (a) the property shall not, except with the leave of an appropriate court and in accordance with any directions of the court, be disposed of, or otherwise dealt with, by or on behalf of the State, before the relevant time; and
- (b) if, at the relevant time, the forfeiture order has not been discharged, the property may be disposed of, or otherwise dealt with—
 - (i) in accordance with any direction of the Attorney General or of a person authorised by the Attorney General for the purposes of this subparagraph; or
 - (ii) in accordance with any other applicable law.

(4) In subsection (3)—

Confiscation of Proceeds of Crime 1989

“relevant time”, in relation to property that is the subject of a forfeiture order, means—

(a) if—

- (i) the period provided for the lodging of an appeal against the forfeiture order has expired without such an appeal having been lodged—the expiration of that period; or
- (ii) an appeal against the forfeiture order has been lodged—the time when the appeal lapses or is finally determined, as the case requires; or

(b) if—

- (i) the period provided for the lodging of an appeal against the conviction for the relevant serious offence has expired without such an appeal having been lodged—the expiration of that period; or
- (ii) an appeal against the conviction has been lodged—the time when the appeal lapses or is finally determined, as the case requires,

whichever is the later.

Effects of forfeiture orders on third parties

20. (1) If, in reliance on the conviction of a person for a serious offence, a court makes a forfeiture order in respect of property, any other person (in this section referred to as the “applicant”) who claims an interest in the property may, at any time within the period of 6 months after the day on which the forfeiture order was made, apply to the court for an order under this section in respect of that interest.

(2) If the court to which the application is made is satisfied, on the balance of probabilities, that—

- (a) the applicant was not, in any way, involved in the commission of the relevant serious offence; and
- (b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant acquired the interest—
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property,

the court shall make an order declaring the nature, extent and value of the applicant’s interest in the property and—

- (c) if the property is still in the possession of the State—directing that the property be transferred to the applicant or declaring that there is payable to the applicant the amount specified in the order as the value of the applicant’s interest in the property; or

Confiscation of Proceeds of Crime 1989

- (d) in any other case—declaring that there is payable to the applicant the amount specified in the order as the value of the applicant's interest in the property.
- (3) In deciding, for the purpose of subsection (2) (c), whether to direct that property be transferred to an applicant or to declare that an amount is payable to an applicant, the court shall have regard to—
- (a) the nature, extent and value of the applicant's interest in the property; and
 - (b) if the court is aware that any other person claims an interest in the property—the nature, extent and value of that claimed interest; and
 - (c) any other matter that seems to the court to be relevant.
- (4) A person who applies to a court for an order under this section shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the hearing of the application.
- (5) A court may not make an order under this section in respect of the interest of an applicant who—
- (a) has been given notice under section 14 (1) (a) in relation to the application for the forfeiture order; or
 - (b) has appeared under section 14 (1) (b) at the hearing of the application for the forfeiture order,
- unless the court is satisfied that the making of the order is justified on special grounds.
- (6) Special grounds referred to in subsection (5) include any of the following that are relevant:
- (a) that the applicant was unable to appear at the hearing of the application for the forfeiture order;
 - (b) that the applicant did not appear at that hearing for a good reason;
 - (c) that particular evidence adduced by the applicant in connection with the application under subsection (1) was not available to the applicant at the time of the hearing of the application for the forfeiture order.
- (7) A reference in this section to the transfer of property includes, without limiting the meaning of that expression, the transfer of land or an estate or interest in land by a conveyance, transfer or other appropriate transaction.

Discharge of forfeiture orders

21. (1) A forfeiture order is discharged—

- (a) if the conviction in reliance on which the order is made is subsequently quashed; or

Confiscation of Proceeds of Crime 1989

- (b) if the forfeiture order is discharged by the court which hears an appeal against it under section 92 (appeals).

(2) The payment to the State of the amount specified in a forfeiture order as the value of the property in respect of which the forfeiture order is made operates (except in so far as the court otherwise directs) to discharge the forfeiture order.

(3) If a forfeiture order in respect of property is discharged (whether on an appeal against the making of the forfeiture order or as provided by this section) the person who had possession of the property before possession of it was taken by or on behalf of the State may, by application in writing to the Attorney General, request the return of the property and, on receipt of the application by the Attorney General—

- (a) if the property is still in the possession of the State—the Attorney General shall arrange for the property to be returned to the person; or
 (b) in any other case—there is payable to the person the amount realised on disposal of the property by the State.

(4) If—

- (a) a person applies to the Attorney General under subsection (3) for the return of property that is in the possession of the State; and
 (b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), the Attorney General shall inform the first-mentioned person that the property will be returned to the first-mentioned person on payment to the State of an amount equal to the amount paid as mentioned in paragraph (b) and, if that amount is paid to the State, the Attorney General shall arrange for the property to be so returned.

(5) If—

- (a) a person applies to the Attorney General under subsection (3) for the return of property that is not in the possession of the State; and
 (b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), there is payable to the first-mentioned person the amount realised on disposal of the property by the State, reduced by an amount equal to the amount paid as mentioned in paragraph (b).

(6) In this section—

- (a) a reference to the return of property includes, without limiting the meaning of that expression, the return of land or an estate or interest in land by a conveyance, transfer or other appropriate transaction; and
 (b) a reference to a person who had possession of property includes a reference to any person who is entitled to the property.

Confiscation of Proceeds of Crime 1989

Orders pending forfeiture

22. (1) If a person (in this section referred to as the "defendant") has been convicted of a serious offence and an application is likely to be made to a Local Court or the District Court under section 13 for the making of a forfeiture order in relation to particular property, an appropriate officer may apply to the Local Court or District Court, *ex parte*, for an order under this section in respect of the property.

(2) A court to which an application is made under subsection (1) may, if it is satisfied that a forfeiture order may be made in respect of the property, by order direct that the property (or such part of the property as is specified in the order) is not to be disposed of by the person convicted of the serious offence or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.

(3) If, while an order under this section is in force—

- (a) a court makes a forfeiture order in respect of property to which the order relates; or
- (b) no application for a forfeiture order is made before the end of the relevant period in relation to the defendant's conviction,

the court who made the order may—

- (c) if it considers it appropriate, make an order setting aside the order in respect of the whole or a specified part of the property; and
- (d) make such other order or orders as it considers appropriate in relation to the operation of the order.

Division 3—Pecuniary penalty orders**Application of Division**

23. This Division applies to—

- (a) property that comes into the possession, or under the control, of a person either within or outside the State and either before or after the commencement of this Division; and
- (b) benefits that are provided to a person either within or outside the State and either before or after the commencement of this Division.

Pecuniary penalty orders

24. (1) If a person has been convicted of a serious offence other than a drug trafficking offence and an application is made under section 13 (1) (b) for an order in respect of the offence, the court may—

- (a) assess, in accordance with section 25, the value of the benefits derived by the person because of having committed the offence; and
- (b) order the person to pay to the State a pecuniary penalty equal to the value so assessed.

*Confiscation of Proceeds of Crime 1989***(2) If—**

- (a) property that is the proceeds of the offence has been forfeited under this Act or a law of the Commonwealth, a Territory or another State; or
- (b) a forfeiture order is proposed to be made against property that is proceeds of the offence,

the pecuniary penalty to be paid shall be taken to be reduced by an amount equal to the value of the property as at the time of the making of the order under this section.

(3) If—

- (a) a court makes an order under this section in relation to an offence; and
- (b) in calculating the penalty amount, the court took into account a proposed forfeiture order in respect of property; and
- (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,

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.

(4) An amount payable by a person to the State in accordance with an order made under this section shall, for all purposes, be taken to be a civil debt due by the person to the State.

(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 person to recover a debt due by the person to the State.

Assessment of pecuniary penalty**25. (1) In this section—**

“offence period”, in relation to an application under section 13 (1) (b) made in reliance on the conviction of a person for 2 or more serious offences, means the period commencing when the earliest of those offences was committed and ending when the latest of those offences was committed.

(2) For the purposes of an application for a pecuniary penalty order against a person (in this section called the “defendant”), the value of the benefits derived by the defendant because of having committed a serious offence or serious offences shall be assessed by a court having regard to information before the court concerning all or any of the following matters:

- (a) the money, or the value of the property other than money, that came into the possession or under the control of—
 - (i) the defendant; or

Confiscation of Proceeds of Crime 1989

- (ii) another person at the request or by the direction of the defendant,
because of the defendant's having committed the offence or any of the offences;
 - (b) the value of any benefit, other than a benefit of the kind referred to in paragraph (a), that was provided for—
 - (i) the defendant; or
 - (ii) another person at the request or by the direction of the defendant,
because of the defendant's having committed the offence or any of the offences;
 - (c) if the offence or any of the offences consisted of the doing of an act or thing in relation to a prohibited drug or prohibited plant as respectively defined in the Drug Misuse and Trafficking Act 1985—
 - (i) the market value, at the time of the offence, of similar or substantially similar substances; and
 - (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar or substantially similar act or thing;
 - (d) the value of the defendant's property—
 - (i) if the application relates to a single serious offence—before and after the commission of the offence; or
 - (ii) if the application relates to 2 or more serious offences—before, during and after the offence period;
 - (e) the defendant's income and expenditure—
 - (i) if the application relates to a single offence—before and after the commission of the offence; or
 - (ii) if the application relates to 2 or more offences—before, during and after the offence period.
- (3) If, at the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences, evidence is given that the value of the defendant's property—
- (a) after the defendant committed the serious offence; or
 - (b) during and after the end of the offence period,
- exceeded the value of the defendant's property before the defendant committed the serious offence or before the commencement of the offence period then, for the purposes of section 24, the court shall, subject to subsection (4), treat the value of the benefits derived by the defendant because of having committed the offence or offences as being not less than the amount of the excess.

Confiscation of Proceeds of Crime 1989

(4) If, after evidence has been given at the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences that the value of the defendant's property—

- (a) after the defendant committed the serious offence, exceeded the value before the serious offence was committed; or
- (b) after the end of the offence period, exceeded the value before the commencement of the offence period,

the defendant satisfies the court that the whole or a part of the excess was due to causes unrelated to the commission of the offence or offences—

- (c) if the defendant so satisfies the court in respect of the whole of the excess—subsection (3) does not apply to the excess; or
- (d) if the defendant so satisfies the court in respect of a part of the excess—subsection (3) applies to the excess as if it were reduced by the amount of that part.

(5) In calculating, for the purposes of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences, the value of benefits derived by the defendant because of having committed the offence or offences, any expenses or outgoings of the defendant in connection with the commission of the offence or offences shall not be deducted.

(6) 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.

(7) At the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences—

- (a) a member of the Police Force; or
- (b) a member of the Australian Federal Police; or
- (c) a Customs officer,

who is experienced in the investigation of indictable offences under, or similar to offences under, the Drug Misuse and Trafficking Act 1985 may testify, to the best of his or her information, knowledge and belief—

- (d) with respect to the amount that was the market value of a prohibited drug or prohibited plant as respectively defined in that Act at a particular time or during a particular period; or
- (e) with respect 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 such a prohibited drug or prohibited plant,

despite any rule of law or practice relating to hearsay evidence and the testimony shall, in the absence of evidence to the contrary, be evidence of the matter testified to.

Discharge of pecuniary penalty orders

26. (1) A pecuniary penalty order is discharged—

- (a) if the conviction in reliance on which the order is made is subsequently quashed; or
- (b) the pecuniary penalty order is discharged by the court which hears an appeal against it under section 92 (appeals).

(2) If a pecuniary penalty order is registered under the Service and Execution of Process Act 1901 of the Commonwealth, notice of the discharge of that order must be given as prescribed by the rules of the Supreme Court.

Court may lift corporate veil etc.

27. (1) In assessing the value of the benefits derived by a person because of having committed a serious offence or serious offences, a court may treat as property of the person any property that, in the opinion of the court, is subject to the effective control of the person.

(2) On application by an appropriate officer, a court may, if in its opinion particular property is subject to the effective control of a person against whom the court has made a pecuniary penalty order, make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.

(3) If a court declares that property is available to satisfy a pecuniary penalty order—

- (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
- (b) a 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.

(4) If an appropriate officer makes an application for an order under subsection (2) that property is available to satisfy a pecuniary penalty order against a person—

- (a) the appropriate officer shall give written notice of the application to the person and to any other person who the appropriate officer has reason to believe may have an interest in the property; and
- (b) the person and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

Division 4—Drug proceeds orders**Application of Division**

28. This Division applies to proceeds of a drug trafficking offence that come into the possession of a person either before or after the commencement of this Division.

Confiscation of Proceeds of Crime 1989

Drug proceeds orders

29. (1) If a person (in this Division called the "defendant") who has not previously been sentenced or otherwise dealt with in respect of his or her conviction for a drug trafficking offence or offences appears before a court to be sentenced in respect of the offence or offences, the court shall—

- (a) determine whether the defendant has received any payment or other reward in connection with drug trafficking; and
- (b) if the court believes the defendant has so benefited, assess the value of any such benefit; and
- (c) assess the amount that may be recovered if a drug proceeds order is made against the defendant; and
- (d) order the defendant to pay to the State a pecuniary penalty equal to the amount so assessed.

(2) An order made under subsection (1) shall be taken into account—

- (a) before imposing any fine on the defendant; and
- (b) in making any forfeiture order in respect of the defendant's conviction,

but shall otherwise be left out of account in determining the appropriate sentence or other manner of dealing with the defendant.

(3) An amount payable by a person to the State in accordance with an order made under subsection (1) shall, for all purposes, be taken to be a civil debt due by the person to the State.

(4) An order made by a court under subsection (1) may be enforced as if it were an order made by the court in civil proceedings instituted by the State against the person to recover a debt due by the person to the State.

Assessment of proceeds of drug trafficking

30. (1) In this section, a reference to the value of the proceeds derived by the defendant from drug trafficking is a reference to the aggregate of the values of the payments or other rewards received in connection with drug trafficking at any time.

(2) A court may, for the purposes of determining whether a person has benefited from drug trafficking and if so, assessing the value of the proceeds of the drug trafficking, make the following assumptions, except to the extent that any of the assumptions are shown to be incorrect in the defendant's case:

- (a) that any property appearing to the court—
 - (i) to have been held by the defendant at any time since his or her conviction; or
 - (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,

Confiscation of Proceeds of Crime 1989

was received by the defendant, at the earliest time at which the defendant appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by the defendant;

- (b) that any expenditure of the defendant since the beginning of that period was met out of payments received by the defendant in connection with drug trafficking carried on by the defendant;
- (c) that, for the purpose of valuing any property received or assumed to have been received by the defendant at any time as such a reward, the defendant received the property free of any other interests in it.

(3) For the purpose of assessing the value of the defendant's proceeds of drug trafficking in a case where a drug proceeds order has previously been made against the defendant, the court shall leave out of account any of the defendant's proceeds of drug trafficking that are shown to the court to have been taken into account in determining the amount to be recovered under that order.

(4) 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 drug trafficking offence or offences shall not be deducted.

Statements relating to drug trafficking

31. (1) If—

- (a) there is tendered to a court by the prosecution a statement as to any matters relevant to determining whether the defendant has benefited from drug trafficking or to the assessment of the value of the defendant's proceeds of drug trafficking; and
- (b) the defendant accepts to any extent any allegation in the statement, the court may, for the purposes of that determination and assessment, treat the defendant's acceptance as conclusive of the matters to which it relates.

(2) If—

- (a) a statement is tendered under subsection (1) (a); and
- (b) the court is satisfied that a copy of that statement has been served on the defendant,

the court may require the defendant to indicate to what extent the defendant accepts each allegation in the statement and, so far as the defendant does not accept any such allegation, to indicate any matters the defendant proposes to rely on.

(3) If the defendant fails in any respect to comply with a requirement under subsection (2), the defendant may be treated for the purposes of this section as accepting every allegation in the statement apart from—

Confiscation of Proceeds of Crime 1989

- (a) any allegation in respect of which the defendant has complied with the requirement; and
- (b) any allegation that the defendant has benefited from drug trafficking or that any payment or other reward was received by the defendant in connection with drug trafficking carried on by the defendant or another.

(4) If—

- (a) there is tendered to a court by the defendant a statement as to any matters relevant to determining the amount that might be realised at the time the drug proceeds order is made; and
- (b) the prosecution accepts to any extent any allegation in the statement, the court may, for the purpose of that determination, treat the acceptance by the prosecution as conclusive of the matters to which it relates.

(5) An allegation may be accepted or a matter indicated for the purposes of this section either—

- (a) orally before the court; or
- (b) in writing in accordance with the rules of court.

(6) No acceptance by the defendant under this section that any payment or other reward was received by the defendant in connection with drug trafficking carried on by the defendant or another shall be admissible in evidence in any proceedings for an offence.

(7) Without limiting the matters that may be included in a statement tendered under this section, a statement may be tendered—

- (a) as to the market value, at the time of a drug trafficking offence in relation to a substance, of similar or substantially similar substances; and
- (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.

(8) Evidence as to the matters mentioned in subsection (7) may be given by—

- (a) a member of the Police Force; or
- (b) a member of the Australian Federal Police; or
- (c) a Customs officer,

who is experienced in the investigation of indictable offences under (or similar to offences under) the Drug Misuse and Trafficking Act 1985.

(9) A person referred to in subsection (8) may testify, to the best of his or her information, knowledge and belief—

- (a) as to the amount that was the market value of a prohibited drug or prohibited plant as respectively defined in the Drug Misuse and Trafficking Act 1985 at a particular time or during a particular period; or

Confiscation of Proceeds of Crime 1989

(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 such a prohibited drug or prohibited plant, despite any rule of law or practice relating to hearsay evidence and the testimony shall, in the absence of evidence to the contrary, be evidence of the matter testified to.

Amount to be recovered under drug proceeds order

32. (1) The amount to be recovered under a drug proceeds order shall be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the drug proceeds order is made (whether by an acceptance under section 31 or otherwise), the court may issue a certificate giving the court's opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3).

(3) If the court is satisfied that the amount that might be realised at the time the drug proceeds order is made is less than the amount the court assesses to be the value of the defendant's proceeds of drug trafficking, the amount to be recovered in the defendant's case under the drug proceeds order shall be the amount appearing to the court to be the amount that might be so realised.

Realisable property etc.

33. (1) In this Division, "realisable property" means—

- (a) any property held by the defendant; and
- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act; and
- (c) any property subject to the effective control of the defendant.

(2) Property is not realisable if a forfeiture order is in force in respect of the property.

(3) For the purposes of sections 31 and 32 the amount that might be realised at the time a drug proceeds order is made against the defendant is the sum of the following:

- (a) the total of the values at that time of all the realisable property held by the defendant (less the total amounts payable in pursuance of any obligation having priority, within the meaning of subsection (6), at that time);
- (b) the total of the values at that time of all gifts caught by this Act.

(4) For the purposes of this Act the value of property (other than cash) in relation to any person holding the property—

Confiscation of Proceeds of Crime 1989

(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

(b) in any other case, is its market value.

(5) For the purposes of this Division, the value at the time a drug proceeds order is made of a gift caught by this Act or of any payment or reward shall be taken to be whichever is the greater of the following:

(a) the value of the gift, payment or reward to the recipient when he or she received it adjusted to take account of subsequent changes in the value of money;

(b) the value, disregarding any forfeiture order, of—

(i) property which he or she received (not being cash); or

(ii) property which, in whole or in part, directly or indirectly represents in his or her hands the property received so far as it represents property received.

(6) For the purposes of subsection (3), an obligation has priority at any time if it is an obligation of the defendant to—

(a) pay an amount due in respect of a fine, or other order of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the drug proceeds order; or

(b) pay any sum to be paid in priority to unsecured debts under section 109 of the Bankruptcy Act 1966 of the Commonwealth or section 441 of the Companies (New South Wales) Code in the defendant's bankruptcy commencing on the date of the drug proceeds order or winding up under an order of a court.

(7) A gift (including a gift made before the commencement of section 29) is caught by this Act if—

(a) it was made by the defendant at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant; or

(b) it was made by the defendant at any time and was a gift of property—

(i) received by the defendant in connection with drug trafficking carried on by the defendant or another; or

(ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by the defendant in that connection.

(8) For the purposes of this Division—

Confiscation of Proceeds of Crime 1989

- (a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration provided by the defendant; and
- (b) in those circumstances, the preceding provisions of this section shall apply as if the defendant had made a gift of a share in the property that bears to the whole property the same proportion as the difference between the values referred to in paragraph (a) bears to the value of the consideration provided by the defendant.

Variation of drug proceeds orders

34. (1) If, on an application by the defendant in respect of a drug proceeds order, the court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order, the court shall issue a certificate to that effect, giving the court's reasons.

(2) For the purposes of subsection (1)—

- (a) in the case of realisable property held by a person who has been adjudged bankrupt or whose estate has been sequestrated, the court shall take into account the extent to which any property held by the person may be distributed among creditors; and
- (b) the court may disregard any inadequacy in the realisable property which appears to the court to be attributable wholly or partly to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made a gift caught by this Act from any risk of realisation under this Act.

(3) If a certificate has been issued under subsection (1), the defendant may apply to the court for the amount to be recovered under the order to be reduced.

(4) The court shall, on an application under subsection (3), substitute for the amount to be recovered under the order whatever lesser amount the court thinks just in all the circumstances of the case.

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION**Division 1—Search powers****Definitions**

35. (1) In this Part—

“authorised justice” means—

- (a) a Magistrate; or

Confiscation of Proceeds of Crime 1989

(b) a justice of the peace employed in the Attorney General's Department;

"forfeiture order" includes an interstate forfeiture order;

"relevant serious offence", in relation to property that is tainted property, means the serious offence by reason of the commission of which the property is tainted property;

"serious offence" includes an interstate serious offence;

"tainted property" includes property that—

(a) was used in, or in connection with, the commission of an interstate serious offence; or

(b) was derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of an interstate serious offence; or

(c) was derived or realised, directly or indirectly, by any person, as a result of the commission of an interstate serious offence.

(2) The question of whether a person has been charged with or convicted of an interstate serious offence shall, for the purposes of this Part, be determined in accordance with the corresponding law of the State concerned.

Search warrants

36. (1) A member of the Police Force may apply to an authorised justice for the issue of a search warrant under this Part if the member has reasonable grounds for believing that there is in or on any premises tainted property of a particular kind.

(2) The authorised justice to whom the application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force—

(a) to enter the premises; and

(b) to search the premises for tainted property of the particular kind.

(3) There shall be set out in a warrant issued under this Part—

(a) a statement of the purpose for which the warrant is issued, which shall include a reference to the nature of the relevant serious offence; and

(b) a description of the kind of property authorised to be seized.

(4) Nothing in this Part limits the operation of Part 2 of the Search Warrants Act 1985.

(5) Part 3 of the Search Warrants Act 1985 applies to a search warrant issued under this Part.

Seizure of property pursuant to warrants

37. (1) A member of the Police Force executing a search warrant issued under this Part may seize property of the kind specified in the warrant.

(2) If, in the course of searching, in accordance with a warrant issued under this Part, for property that is tainted property in relation to a particular serious offence, being property of a kind specified in the warrant, a member of the Police Force finds any property that the member believes on reasonable grounds to be—

- (a) tainted property in relation to the serious offence, although not of a kind specified in the warrant; or
- (b) tainted property in relation to another serious offence,

and the member believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction or its use in committing, continuing or repeating the serious offence or the other serious offence, the warrant shall be taken to authorise the member to seize that property.

(3) The power conferred by this section to seize a thing includes—

- (a) a power to remove the thing from the premises where it is found; and
- (b) a power to guard the thing in or on those premises.

Search and arrest of persons pursuant to warrants

38. A member of the Police Force executing a search warrant issued under this Part—

- (a) may search a person found in or on the premises whom the member reasonably suspects of having property of the kind specified in the warrant; and
- (b) may arrest and bring before a justice of the peace any person found in or on the premises whom the member reasonably suspects of having committed an offence in respect of property seized pursuant to section 37.

Issue of warrants if charge not laid

39. A warrant may be issued under this Part in relation to property whether or not a person has been charged with the relevant serious offence, but an authorised justice shall not issue a warrant under this Part in relation to property where a person has not been charged with the relevant serious offence unless the authorised justice is satisfied—

- (a) that the property is tainted property; and
- (b) that it is likely that a person will be charged within 48 hours with the relevant serious offence.

Commissioner of Police responsible for seized property

40. If property is seized pursuant to a warrant issued under this Part, the Commissioner of Police shall arrange for the property to be kept until it is dealt with in accordance with this Act, and shall ensure that all reasonable steps are taken to preserve the property while it is so kept.

Return of seized property**41. (1) If—**

- (a) property has been seized pursuant to a warrant issued under this Part; and
- (b) at the time when the property was seized, a person has not been charged with the relevant serious offence; and
- (c) before the expiration of 7 days after the property was seized, a person has not been charged with that offence,

then, unless an application for a forfeiture order is made in respect of the property, the Commissioner of Police shall arrange for the property to be returned, at the expiration of that period, to the person from whose possession it was seized.

(2) If—

- (a) property has been seized pursuant to a warrant issued under this Part; and
- (b) either before the property was seized, or after it was seized but before the expiration of 7 days after it was seized, 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),

then, unless an application for a forfeiture order is made in respect of the property, the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized—

- (c) if the person is convicted of the offence—at the expiration of 6 months after the relevant time; or
- (d) if the person is discharged or acquitted of the offence—as soon as possible after the relevant time.

(3) If—

- (a) property has been seized pursuant to a warrant issued under this Part; and
- (b) a court having jurisdiction to do so refuses to make a forfeiture order in respect of the property in relation to the relevant serious offence,

the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized as soon as possible after the relevant time.

Confiscation of Proceeds of Crime 1989

(4) Where property has been seized pursuant to a warrant under this Part, a person from whose possession the property was seized may apply to an appropriate court for an order under subsection (5).

(5) If the court is satisfied that neither it nor any other court having jurisdiction to do so would make a forfeiture order in respect of the property, the court may make an order—

- (a) directing that the property be returned to the person from whose possession it was seized; or
- (b) directing that the person be allowed access to the property, on such terms and conditions (if any) as the court thinks fit.

(6) A person who applies to a court for an order under subsection (5) shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the hearing of the application.

(7) A reference in this section to a person from whose possession property was seized includes a reference to any person who is entitled to the property.

(8) A reference in this section to the relevant time is a reference to—

- (a) subject to paragraph (b), the date of the conviction, discharge or acquittal, or of the refusal to make the forfeiture order, as the case requires; or
- (b) if there is a right of appeal—
 - (i) where the period provided for the lodging of the appeal has expired without such an appeal having been lodged—the expiration of that period; or
 - (ii) where an appeal has been lodged—the time when the appeal lapses or is finally determined.

Obstruction etc. of person executing warrant

42. A person shall not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued under this Part.

Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

Division 2—Restraining orders

Restraining orders

43. (1) If a person (in this section referred to as the “defendant”) has been, or is about to be, charged with a serious offence, an appropriate officer may apply to the Supreme Court, *ex parte*, for an order in respect of—

- (a) specified property of the defendant; or
- (b) all the property of the defendant (including property acquired after the making of the order); or

Confiscation of Proceeds of Crime 1989

- (c) specified property of the defendant and all other property of the defendant (including property acquired after the making of the order); or
- (d) all the property of the defendant (including property acquired after the making of the order) other than specified property; or
- (e) specified property of a person other than the defendant.

(2) If—

- (a) an application made to the Supreme Court under subsection (1) in reliance on the charging, or the proposed charging, of the defendant with a serious offence is supported by an affidavit of an authorised officer stating that the authorised officer believes that—

- (i) the defendant committed the offence; and

- (ii) the property to which the application relates is tainted property in relation to the offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, is the defendant's proceeds of drug trafficking; and

- (iii) the property is the property of the defendant, and setting out the grounds on which the authorised officer holds those beliefs; and

- (b) the Court considers that, having regard to the matters contained in the affidavit, there are reasonable grounds for holding those beliefs,

the Court may, by order—

- (c) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order; and
- (d) if the Court considers that the circumstances so require—direct the Public Trustee to take control of the property, or such part of the property as is specified in the order.

(3) Where an application is made under subsection (1) in reliance on the proposed charging of a person with a serious offence, the Supreme Court shall not make a restraining order unless it is satisfied that the person is likely to be charged with the offence or a related offence within 48 hours.

(4) If an application under this section seeks a restraining order against specified property of a person other than the defendant, the Supreme Court shall not make a restraining order against the property unless—

- (a) the application is supported by an affidavit of an authorised officer stating that—

- (i) the authorised officer believes that the property is tainted property in relation to the serious offence with which the defendant has been, or is about to be, charged or is the defendant's proceeds of drug trafficking; or

Confiscation of Proceeds of Crime 1989

(ii) the authorised officer believes that—

(A) the property is subject to the effective control of the defendant; and

(B) the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence; and

(b) the Court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.

(5) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

(6) A restraining order may be made subject to such conditions as the Supreme Court thinks fit and, without limiting the generality of this, may make provision for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:

(a) the defendant’s reasonable living expenses (including the reasonable living expenses of the defendant’s dependants (if any)) and reasonable business expenses;

(b) the defendant’s reasonable expenses in defending a criminal charge.

(7) The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to 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 order.

(8) For the purposes of an application under subsection (1), an appropriate officer may, on behalf of the State, give to the Supreme Court such undertakings with respect to the payment of damages or costs, or both, as are required by the Court.

Notice of applications and orders

44. (1) If an application has been made to the Supreme Court for a restraining order in respect of property—

(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

(b) a person to whom the Court requires notice to be given under paragraph (a) is entitled to appear and to adduce evidence at the hearing of the application.

(2) If—

(a) a restraining order has been made in respect of property of a person; and

Confiscation of Proceeds of Crime 1989

- (b) the person was not notified of the application for the making of the restraining order,

the officer who made the application shall give notice to the person, as prescribed by the regulations or by rules of court, of the making of the order.

Court may make further orders

45. (1) If the Supreme Court makes a restraining order, the Court may, at the time when it makes the restraining order or at any later time, make any ancillary orders that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:

- (a) an order varying the restraining order in respect of the property to which it relates;
- (b) an order varying any condition to which the restraining order was subject;
- (c) an order for the examination on oath of—
 - (i) a person (in this section called the “owner”) whose property is subject to the restraining order; or
 - (ii) another person,

before the Court, or an officer of the Court prescribed by the regulations or by rules of court, concerning the affairs of the owner, including the nature and location of any property of the owner;

- (d) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given by the State in connection with the making of the restraining order;
- (e) if the restraining order directs the Public Trustee to take control of property—
 - (i) an order regulating the manner in which the Public Trustee may exercise his or her functions under the restraining order; or
 - (ii) an order determining any question relating to the property to which the restraining order relates, including any question relating to—
 - (A) the liabilities of the owner; or
 - (B) the exercise of the functions of the Public Trustee, with respect to the property; or
 - (iii) an order directing—
 - (A) the owner; or
 - (B) if the owner is a body corporate—a director of the body corporate specified by the Court,

Confiscation of Proceeds of Crime 1989

to furnish to the Public Trustee, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out such particulars of the property, or dealings with the property, of the owner as the Court thinks proper.

(2) Without affecting the generality of subsection (1), where the Supreme Court makes, or has made, a restraining order, the Court may, at the time it makes the restraining order or at any later time, whether on application made to it or on its own motion, make an order authorising another court—

- (a) to make an order setting aside the restraining order in respect of the whole or a part of the property; or
- (b) to make other orders in relation to the operation of the restraining order,

to the extent and in the circumstances specified in the order of the Court.

(3) An order under subsection (1) or (2) may be made on application—

- (a) by an appropriate officer; or
- (b) by the owner; or
- (c) where the restraining order directed the Public Trustee to take control of property—by the Public Trustee; or
- (d) with the leave of the Supreme Court—by any other person.

(4) Where a person is examined before the Supreme Court or an officer of the Supreme Court pursuant to an order under subsection (1), the person is not excused from answering a question when required to do so by the Court or officer on the ground that the answer to the question might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(5) Where a person is examined before the Supreme Court or an officer of the Supreme Court pursuant to an order under subsection (1), a statement or disclosure made by the person in answer to a question put in the course of the examination, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except in—

- (a) a proceeding in respect of the giving of false testimony in the course of the examination; or
- (b) a proceeding for the making of a forfeiture order, for the purpose only of facilitating the identification of the property to be subject to the forfeiture order; or
- (c) a proceeding for the making of a pecuniary penalty order, for the purpose only of facilitating the assessment of the amount of the pecuniary penalty; or

Confiscation of Proceeds of Crime 1989

(d) a proceeding for the making of a drug proceeds order, for the purpose only of facilitating the assessment of the amount to be recovered under the order.

(6) A person directed by an order under subsection (1) to furnish a statement to the Public Trustee is not excused from—

- (a) furnishing the statement; or
- (b) setting out particulars in the statement,

on the ground that the statement or particulars might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(7) If a person furnishes a statement to the Public Trustee under an order made under subsection (1)—

- (a) the statement; and
- (b) 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.

Order for taxation of legal expenses to be met out of restrained property

46. (1) If—

(a) the Supreme Court makes a restraining order directing the Public Trustee to take control of property; and

(b) the order makes provision for meeting, out of the property or part of it, a person's reasonable expenses in defending a criminal charge, the Public Trustee may apply to the Court for an order under subsection (3).

(2) The Public Trustee shall give to the person written notice of an application under subsection (1).

(3) On an application under subsection (1), the Supreme Court may order that the expenses be taxed as provided in the order or may dismiss the application.

(4) If the Public Trustee makes an application under subsection (1), it need not, except as ordered by the Supreme Court after the application is made, take any steps for the purpose of meeting the expenses as provided by the restraining order unless and until—

- (a) an order under subsection (3) in relation to the expenses is complied with; or
- (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.

Public Trustee to discharge confiscation order**47. (1) If—**

- (a) the Public Trustee has, under a restraining order, taken control of particular property, or of all the property, of a person; and
- (b) a confiscation order or drug proceeds order has been made in reliance on the conviction of the person,

an appropriate court may, on application by the Public Trustee, make an order (in this section referred to as the "later order") directing the Public Trustee to pay to the State, out of that property, an amount equal to the penalty amount.

(2) For the purpose of enabling the Public Trustee to comply with the later order, the appropriate court may, by that order or by a subsequent order—

- (a) direct the Public Trustee to sell or otherwise dispose of such of the property that is under the control of the Public Trustee as the court specifies; and
- (b) appoint an officer of the court or any other person to execute any deed or instrument in the name of the person who owns or has an estate, interest or right in the property and to do all acts and things necessary to give validity and operation to the deed or instrument.

(3) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person who owned or had an estate, interest or right in the property.

(4) As soon as practicable after the making of the later order, the Public Trustee—

- (a) shall apply the money which has come into the Public Trustee's possession or under the Public Trustee's control because of the sale or disposition of any of the property specified in the later order, or the subsequent order, or otherwise in the course of performing the Public Trustee's duties in respect of the property to which the restraining order relates, in payment of—
 - (i) the fees payable in connection with; and
 - (ii) the expenses incurred by the Public Trustee in or in connection with,

the performance of the duties imposed on the Public Trustee under the restraining order, including the expenses incurred by the Public Trustee in or in connection with the sale or disposition of any of the property to which the restraining order relates; and

- (b) shall, subject to subsection (5), pay the remainder of the money referred to in paragraph (a), after the payments referred to in that paragraph have been made, to the State.

Confiscation of Proceeds of Crime 1989

(5) If the money to which subsection (4) (b) applies exceeds the penalty amount, the Public Trustee shall—

- (a) pay to the State, out of that money, an amount equal to the penalty amount; and
- (b) pay the balance of that money to the person.

(6) Where the Public Trustee pays, in accordance with the later order, money to the State in respect of the liability of a person under a confiscation order or drug proceeds order, the liability of the person under the confiscation order or drug proceeds order shall, to the extent of the payment, be taken to be discharged.

Charge on property subject to restraining order

48. (1) If—

- (a) in reliance on the charging, or the proposed charging, of a person with a serious offence, the Supreme Court has made a restraining order in respect of particular property, or of all the property, of the person; and
- (b) in reliance on the conviction of the person for the offence, a court subsequently makes a pecuniary penalty order or drug proceeds order against the person,

then, on the making of the pecuniary penalty order or drug proceeds order, there is created, by force of this section, a charge on all the property to which the restraining order applies to secure the payment to the State of the penalty amount.

(2) If a charge is created by subsection (1) on property of a person on the making of a pecuniary penalty order or drug proceeds order, the charge ceases to have effect in respect of the property—

- (a) on the discharge of the pecuniary penalty order or drug proceeds order on the hearing of an appeal against the making of the pecuniary penalty order or drug proceeds order; or
- (b) on payment by the person to the State of the penalty amount; or
- (c) on the sale or other disposition of the property—
 - (i) pursuant to an order made by the Supreme Court under section 47; or
 - (ii) by the owner of the property with the consent of the Supreme Court; or
 - (iii) if the restraining order directed the Public Trustee to take control of the property—by the owner of the property with the consent of the Public Trustee; or
- (d) on the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge,

whichever first occurs.

Confiscation of Proceeds of Crime 1989

(3) A charge created on property by subsection (1) on the making of a pecuniary penalty order or drug proceeds order—

- (a) is subject to every charge or encumbrance to which the property was subject immediately before the pecuniary penalty order or drug proceeds order was made and, in the case of land under the provisions of the Real Property Act 1900, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act; and
- (b) has priority over all other encumbrances whatever; and
- (c) subject to subsection (2), is not affected by any change of ownership of the property.

(4) If a charge is created by subsection (1) on property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind—

- (a) the Public Trustee or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law; and
- (b) if the charge is so registered, a person who purchases or otherwise acquires the property after the registration of the charge shall, for the purposes of subsection (2), be taken to have notice of the charge.

(5) Where a charge under this section relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

Registration of restraining orders

49. (1) If a restraining order applies to property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions shall, on application by an appropriate officer, record on the register kept under those provisions the particulars of the restraining order.

(2) If the particulars of a restraining order are so recorded, a person who subsequently deals with the property shall, for the purposes of section 50, be taken to have notice of the restraining order.

(3) If a restraining order applies to land under the provisions of the Real Property Act 1900, a caveat may be lodged under that Act in relation to the order.

Contravention of restraining orders

50. (1) A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both.

(2) If—

- (a) a restraining order is made against property; and
- (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order; and
- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

an appropriate officer may apply to the Supreme Court for an order that the disposition or dealing be set aside.

(3) If an application is made under subsection (2) in relation to a disposition or dealing, the Court may make an order—

- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place; or
- (b) setting aside the disposition or dealing as from the day of the order under this subsection 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.

Hindering or obstructing Public Trustee

51. (1) A person shall not hinder or obstruct the Public Trustee in the performance of the Public Trustee's obligations under a restraining order.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

(2) In this section—

“Public Trustee” includes the deputies, officers and employees on the staff and agents of the Public Trustee.

Protection of Public Trustee from liability in certain cases

52. (1) Section 45 of the Public Trustee Act 1913 applies to and in respect of the functions of the Public Trustee under this Act in the same way as it applies to and in respect of the functions of the Public Trustee under that section, but nothing in this section shall be read as limiting the operation of that section.

(2) The Public Trustee is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the State on or in respect of property of which the Public Trustee has been directed by a restraining order to take control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of the restraining order, except to the extent (if any) of the rents and profits received by the Public Trustee in respect of that property on or after the date of the restraining order.

Confiscation of Proceeds of Crime 1989

(3) If the Public Trustee, having been directed by a restraining order to take control of a business carried on by a person, carries on that business, the Public Trustee is not personally liable—

- (a) for any payment in respect of long service leave for which the person was liable; or
- (b) for any payment in respect of long service leave to which a person employed by the Public Trustee in his or her capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order.

(4) In this section—

“Public Trustee” includes the deputies, officers and employees on the staff and agents of the Public Trustee.

Fees payable to Public Trustee

53. If the Public Trustee takes control of property in accordance with a restraining order, the Public Trustee is entitled to receive such fees, in respect of the exercise of his or her functions in relation to the property, as may be prescribed.

Court may revoke restraining orders

54. If in reliance on the charging, or the proposed charging, of a person with a serious offence, the Supreme Court has made a restraining order, the Court may, on application made to it by the person, revoke the order if the person—

- (a) gives security satisfactory to the Court for the payment of any pecuniary penalty that may be imposed on the person under this Act in respect of the person's conviction for the offence; or
- (b) gives undertakings satisfactory to the Court concerning the person's property.

Time when restraining order ceases to be in force

55. (1) If, at the end of the period of 48 hours after the making of a restraining order in reliance on the proposed charging of a person with a serious offence, the person has not been charged with the offence or a related offence, the order ceases to be in force at the end of that period.

(2) If, when a restraining order was made in reliance on the charging of a person with a serious offence—

- (a) the charge is withdrawn and the person is not charged with a related offence by the time of the withdrawal, the restraining order ceases to be in force when the charge is withdrawn; or
- (b) the person is acquitted of the charge and the person is not charged with a related offence by the time of the acquittal, the restraining order ceases to be in force when the acquittal occurs.

Confiscation of Proceeds of Crime 1989

(3) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the Supreme Court may—

- (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

(4) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court (other than the Supreme Court) makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the court may—

- (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order,

but the court may make an order under this subsection only if, and to the extent and in the circumstances, it is authorised to do so by an order of the Supreme Court under section 45 (2).

(5) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court refuses to make a forfeiture order in respect of the property or refuses to make a pecuniary penalty order against the person, the Supreme Court may—

- (a) if it considers it appropriate, make an order in relation to the period for which the restraining order is to remain in force; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

(6) An order under subsection (3), (4) or (5) may be made so as—

- (a) to set aside the restraining order wholly or in part; and
- (b) to take effect—
 - (i) on the making of the first-mentioned order; or
 - (ii) at a specified time; or
 - (iii) if relevant, on the payment of a penalty amount to the State; or
 - (iv) on the happening of some other specified event,

and, when the first-mentioned order takes effect, the restraining order ceases to be in force to the extent to which it is set aside.

*Confiscation of Proceeds of Crime 1989***Notice of applications under this Part**

56. (1) A person who makes an application under section 45 in relation to a restraining order shall give notice of that application, as prescribed by the regulations or by rules of court, to each other person who is entitled, by virtue of section 45 (3) (a)–(c), to make an application under section 45 in relation to the restraining order.

(2) A person who makes an application under section 54 in relation to a restraining order shall give notice of that application, as prescribed by the regulations or by rules of court.

Certificate by Public Trustee

57. If a restraining order is made directing the Public Trustee to take control of property, a certificate under the hand of the Public Trustee or an officer referred to in section 50 of the Public Trustee Act 1913 and sealed with the Public Trustee's seal—

- (a) certifying that the restraining order has been made and is in force; and
- (b) stating the terms of the restraining order,

shall 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 Public Trustee's right to act under the restraining order, without production of any other proof.

PART 4—INFORMATION GATHERING POWERS**Division 1—Production orders****Applications for production orders**

58. (1) If—

- (a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that that or some other person has possession or control of a property-tracking document or property-tracking documents in relation to the offence; or
- (b) an authorised officer has reasonable grounds for suspecting that—
 - (i) a person has committed a serious offence; and
 - (ii) a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence,

the authorised officer may—

- (c) lay before the Supreme Court an information on oath setting out those grounds; and
- (d) apply to the Court for a production order against the person suspected of having possession or control of the document or documents.

Confiscation of Proceeds of Crime 1989

(2) If an authorised officer applying for a production order in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that—

- (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person,

the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence.

(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

Making of production orders

59. (1) If an application is made under section 58 for a production order against a person, the Supreme Court may make an order that the person—

- (a) produce to an authorised officer any property-tracking documents that are in the person’s possession or control; or
- (b) make available to the authorised officer, for inspection, any property-tracking documents that are in the person’s possession or control.

(2) An order under subsection (1) (a) shall not be made in respect of bankers’ books.

(3) The Supreme Court shall not make an order under this section unless—

- (a) the informant or some other person has given the Court, either orally or by affidavit, such information (if any) as the Court requires concerning the grounds on which the order is sought; and
- (b) the Court is satisfied that there are reasonable grounds for making the order.

(4) In this section—

“bankers’ books” means any accounting records used in the ordinary business of banking, and includes ledgers, day-books, cash-books and account books.

Form of production orders

60. (1) A production order that a person produce a document or documents to an authorised officer shall specify the time when and the place where the document is or documents are to be produced.

Confiscation of Proceeds of Crime 1989

(2) A production order that a person make a document available to an authorised officer for inspection shall specify the time or times when the document is or documents are to be made available.

Powers under production orders

61. (1) If a document is produced to an authorised officer under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- (c) make copies of the document;
- (d) retain the document if, and for so long as, retention of the document is reasonably necessary for the purposes of this Act.

(2) If a document is made available to an authorised officer for inspection under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- (c) make copies of the document.

(3) If an authorised officer retains a document under a production order, the authorised officer shall, on request by the person to whom the order was addressed—

- (a) give the person a copy of the document certified by the authorised officer in writing to be a true copy of the document; and
- (b) unless the person has been given a copy of the document under paragraph (a)—permit the person to do any one or more of the following:
 - (i) inspect the document;
 - (ii) take extracts from the document;
 - (iii) make copies of the document.

Effect of production orders on proceedings etc.

62. (1) A person is not excused from producing or making available a document when required to do so by a production order on the ground that—

- (a) the production or making available of the document might tend to incriminate the person or make the person liable to a penalty; or
- (b) the production or making available of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.

Confiscation of Proceeds of Crime 1989

(2) If a person produces or makes available a document under a production order—

(a) the production or making available of the document; or

(b) any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document, is not admissible against the person in any criminal proceedings except proceedings for an offence against section 64.

(3) For the purposes of subsection (2), proceedings on an application for a restraining order, a forfeiture order, a pecuniary penalty order or a drug proceeds order are not criminal proceedings.

Variation of production orders

63. Where the Supreme Court makes a production order requiring a person to produce a document to an authorised officer, the person may apply to the Court for a variation of the order and, if the Court is satisfied that the document is essential to the business activities of the person, the Court may vary the production order so that it requires the person to make the document available to an authorised officer for inspection.

Failure to comply with production orders

64. Where a person is required by a production order to produce a document to an authorised officer or to make a document available to an authorised officer for inspection, the person is guilty of an offence if the person—

(a) contravenes the order without reasonable excuse; or

(b) in purported compliance with the order produces or makes available a document known to the person to be false or misleading in a material particular without—

(i) indicating to the authorised officer to whom the document is produced or made available that the document is false or misleading and the respect in which the document is false or misleading; and

(ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information.

Maximum penalty: If the offender is a natural person—100 penalty units or imprisonment for 2 years, or both, or if the offender is a body corporate—500 penalty units.

Division 2—Search powers**Powers to search for, and seize, documents relevant to locating etc. property**

65. An authorised officer may—

(a) enter premises; and

Confiscation of Proceeds of Crime 1989

(b) search the premises for any property-tracking document in relation to a serious offence; and

(c) seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a property-tracking document in relation to a serious offence,

but only if the entry, search or seizure is made—

(d) with the consent of the occupier of the premises; or

(e) under a warrant issued under section 67.

Application for search warrant for location etc. of property

66. (1) If—

(a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence; or

(b) an authorised officer has reasonable grounds for suspecting that—

(i) a person has committed a serious offence; and

(ii) there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence,

the authorised officer may—

(c) lay before the Supreme Court an information on oath setting out those grounds; and

(d) apply to the Court for a search warrant under section 67 in respect of the premises.

(2) If an authorised officer applying for a warrant under section 67 in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that—

(a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and

(b) property specified in the information is subject to the effective control of the person,

the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

Search warrant for location etc. of property

67. (1) If an application is made under section 66 for a search warrant in respect of premises, the Supreme Court may issue a search warrant authorising an authorised officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable—

- (a) to enter in or on the premises; and
- (b) to search the premises for documents of the kind referred to in section 66 (1); and
- (c) to seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a document of that kind.

(2) The Supreme Court shall not issue a search warrant under this section unless the Court is satisfied that—

- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document; or
- (b) a production order has been given in respect of the document and has not been complied with; or
- (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with; or
- (d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without notice to any person.

(3) The Supreme Court shall not issue a search warrant under this section unless—

- (a) the informant or some other person has given the Court, either orally or by affidavit, any further information that the Court requires concerning the grounds on which the search warrant is sought; and
- (b) the Court is satisfied that there are reasonable grounds for issuing the search warrant.

(4) There shall be stated in a search warrant issued under this section—

- (a) the purpose for which the warrant is issued, including a reference to the nature of the serious offence that has been or is believed to have been committed; and
- (b) whether entry is authorised to be made at any time of the day or night or only during specified hours of the day or night; and
- (c) a description of the kind of documents authorised to be seized; and
- (d) a date, not being later than one month after the day of issue of the warrant, on which the warrant ceases to have effect.

Confiscation of Proceeds of Crime 1989

(5) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, an authorised officer finds—

(a) any document that the authorised officer believes, on reasonable grounds, to be—

- (i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant; or
- (ii) a property-tracking document in relation to another serious offence; or

(b) any thing that the authorised officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence,

and the authorised officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be taken to authorise the authorised officer to seize that document or thing.

Division 3—Monitoring orders

Monitoring orders

68. (1) On application made by an authorised officer the Supreme Court may make an order directing a financial institution to give information of the kind referred to in subsection (2) to a specified prescribed authority.

(2) A monitoring order shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

(3) A monitoring order shall apply in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).

(4) A reference in this section to a transaction conducted through an account includes a reference to—

- (a) the making of a fixed term deposit; and
- (b) in relation to a fixed term deposit—the transfer of the amount deposited, or any part of it, at the end of the term.

Making of monitoring orders

69. (1) The Supreme Court shall not make a monitoring order unless satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought—

- (a) has committed, or is about to commit, a serious drug offence; or
- (b) was involved in the commission, or is about to be involved in the commission, of such an offence; or

Confiscation of Proceeds of Crime 1989

(c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

(2) A monitoring order shall specify—

- (a) the name or names in which the account is believed to be held; and
- (b) the kind of information that the institution is required to give; and
- (c) the prescribed authority to which the information is to be given; and
- (d) the manner in which the information is to be given.

(3) If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made shall be disregarded for the purposes of the application of section 73 (money laundering) in relation to the institution.

(4) A financial institution that has been given notice of a monitoring order shall not knowingly—

- (a) contravene the order; or
- (b) provide false or misleading information in purported compliance with the order.

Maximum penalty: 1,000 penalty units.

Existence and operation of monitoring order not to be disclosed

70. (1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person (including the person to whom the order relates) except—

- (a) if the order specifies the Commissioner of Police as the prescribed authority to which information is to be given—the Commissioner of Police or a member of the Police Force; or
- (b) if the order specifies some other prescribed authority as the authority to which information is to be given—a member, or member of staff, of the authority; or
- (c) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or
- (d) a barrister or solicitor, for the purpose of obtaining legal advice or representation in relation to the order.

Maximum penalty: 1,000 penalty units.

(2) A person of a kind referred to in subsection (1) (a), (b), (c) or (d) to whom the existence or operation of a monitoring order has been disclosed (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) shall not—

- (a) while he or she is such a person—disclose the existence or operation of the order, except to another person of a kind referred to in subsection (1) (a), (b), (c) or (d) for the purpose of—
 - (i) if the disclosure is made by a person referred to in subsection (1) (a) or (b)—the performance of that person's duties; or

Confiscation of Proceeds of Crime 1989

- (ii) if the disclosure is made by an officer or agent of the institution—ensuring that the order is complied with or obtaining legal advice or representation in relation to the order; or
- (iii) if the disclosure is made by a barrister or solicitor—giving legal advice, or making representations, in relation to the order; or
- (b) when he or she is no longer such a person—make a record of, or disclose, the existence or the operation of the order in any circumstances.

Maximum penalty: 10 penalty units or imprisonment for 2 years, or both.

(3) Nothing in subsection (2) prevents the disclosure by a person of a kind referred to in subsection (1) (a) or (b) of the existence or operation of a monitoring order—

- (a) for the purposes of, or in connection with, legal proceedings; or
- (b) in the course of proceedings before a court.

(4) A person of a kind referred to in subsection (1) (a) or (b) shall not be required to disclose to any court the existence or operation of a monitoring order.

(5) A reference in this section to disclosing the existence or operation of a monitoring order to a person includes a reference to disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

Communication of information by financial institutions to prescribed authorities

71. (1) If a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that—

- (a) the information may be relevant to an investigation of, or the prosecution of a person for, a serious offence; or
- (b) the information would otherwise be of assistance in the enforcement of this Act or the regulations,

the institution may give the information to a prescribed authority.

(2) An action, suit or proceeding does not lie against—

- (a) a financial institution; or
- (b) an officer, employee or agent of the institution acting in the course of the person's employment or agency,

in relation to any action taken by that institution or person pursuant to subsection (1).

Protection for financial institution where information given

72. If a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to section 71 (1) as soon as practicable after forming the belief referred to in that subsection, the institution or person shall be taken, for the purposes of section 73 (money laundering) not to have been in possession of that information at any time.

PART 5—OFFENCES**Division 1—Money laundering****Money laundering**

73. (1) In this section—

“transaction” includes the receiving or making of a gift.

(2) A person shall not engage in money laundering.

Maximum penalty:

(a) if the offender is a natural person—2,000 penalty units or imprisonment for 20 years, or both; or

(b) if the offender is a body corporate—6,000 penalty units.

(3) A person shall be taken to engage in money laundering if, and only if—

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, knowing that the money or property is proceeds of a serious offence; or

(b) the person receives, possesses, conceals, disposes of or brings into New South Wales any money, or other property, knowing that the money or property is proceeds of a serious offence.

(4) A person shall not be convicted of an offence under this section unless the prosecution proves beyond reasonable doubt that, at the time the person—

(a) engaged in a transaction involving money or property; or

(b) received, possessed, concealed, disposed of or brought into New South Wales money or property,

the person knew the money or property was proceeds of unlawful activity.

(5) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant engaged in money laundering to assist the enforcement of a law of the Commonwealth, a State or a Territory.

Division 2—Miscellaneous**Proceedings for offences**

74. (1) Except as otherwise provided by this section, proceedings for an offence against this Act shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(2) A Local Court may not deal with an offence under section 50 (contravention of restraining orders) unless it is satisfied that the value of the property concerned does not exceed \$10,000.

(3) Proceedings for an offence under section 50 shall, if the value of the property concerned is more than \$10,000, be dealt with before the Supreme Court in its summary jurisdiction.

(4) Proceedings for an offence under section 69 (making of monitoring orders) or 73 (money laundering) shall be dealt with on indictment.

Proof of certain matters not required

75. In any legal proceedings, a certificate signed by the Secretary of the Attorney General's Department certifying that a specified person was or was not an authorised officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts so certified.

Conduct by directors, servants or agents

76. (1) If it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or taken by subsection (2) to have been engaged in, by the body corporate, it is sufficient to show that a director, servant or agent of the body corporate (being a director, servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate—

- (a) by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

shall be taken, for the purposes of this Act, to have been engaged in by the body corporate.

(3) If it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct taken by subsection (4) to have been engaged in by the person, it is sufficient to show that a servant or agent of the person (being a servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

Confiscation of Proceeds of Crime 1989

(4) Conduct engaged in on behalf of a person other than a body corporate—

- (a) by a servant or agent of the person within the scope of his or her actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

shall be taken, for the purposes of this Act, to have been engaged in by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that knowledge, intention, opinion, belief or purpose.

(6) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, a State or a Territory.

PART 6—INTERSTATE ORDERS

Registration of interstate orders

77. (1) If an interstate forfeiture order or interstate restraining order expressly applies to property in New South Wales, the order may be registered under this Act.

(2) An order shall be regarded as registered under this Act when a copy of the order (being a copy sealed by the court that made the order) is registered in accordance with the rules of the Supreme Court.

(3) Any amendments made to an interstate forfeiture order or interstate restraining order (before or after registration) may be registered in the same way, and any such amendments do not, for the purposes of this Act, have effect until they are registered.

(4) An application for registration may be made by the person on whose application the order or amendments were made, by an appropriate officer or by a person affected by the order or amendments.

Effect of registration of interstate forfeiture orders

78. (1) A registered interstate forfeiture order may be enforced in New South Wales as if it were a forfeiture order made under section 18 (1) at the time of registration.

(2) This Act (other than section 92 (appeals)) applies to a registered interstate forfeiture order as it applies to a forfeiture order made under section 18 (1).

Confiscation of Proceeds of Crime 1989

(3) A registered interstate forfeiture order does not operate so as to vest property (or any estate, interest or right in property) otherwise than in the Crown in right of New South Wales.

(4) A registered interstate forfeiture order does not operate so as to vest property in the Crown in right of New South Wales if the order has already operated to vest the property in the Crown in some other capacity or in some other person or entity.

Effect of registration of interstate restraining orders

79. (1) A registered interstate restraining order may be enforced in New South Wales as if it were a restraining order made under section 43 (2) at the time of registration.

(2) This Act (other than sections 43, 44 (1), 48, 54, 55 and 56 (2)) applies to a registered interstate restraining order as it applies to a restraining order made under section 43 (2).

Revocation or variation of registered orders

80. A court of the State may not revoke or vary a registered interstate forfeiture order or registered interstate restraining order or limit the manner in which such an order applies.

Duration of registration

81. If—

- (a) an interstate forfeiture order or interstate restraining order is registered under this Act; and
 - (b) the order ceases to be in force in the State in which it was made,
- the registered order continues to be enforceable in New South Wales (as if the order were still in force in the State in which it was made) until the registration is cancelled under section 82.

Cancellation of registration

82. (1) The registration of an interstate forfeiture order or interstate restraining order may be cancelled by the Supreme Court if—

- (a) the registration was improperly obtained; or
- (b) the order ceases to be in force in the State in which it was made.

(2) An application for cancellation of the registration of an order may be made by the person on whose application the order was made, by an appropriate officer or by a person affected by the order.

Charge on property subject to registered interstate restraining orders

83. (1) If—

- (a) an interstate restraining order is made against property of a person in connection with an interstate serious offence committed or alleged to be committed by the person; and

Confiscation of Proceeds of Crime 1989

- (b) an interstate pecuniary penalty order is made against the person in connection with that offence; and
- (c) the interstate restraining order is registered under this Act; and
- (d) the interstate pecuniary penalty order is registered in a court of New South Wales under the Service and Execution of Process Act 1901 of the Commonwealth,

then, on the registration referred to in paragraph (c) or the registration referred to in paragraph (d) (whichever last occurs), a charge is created on the property to secure payment of the amount due under the interstate pecuniary penalty order.

(2) Where a charge is created by subsection (1) on property of a person to secure payment of the amount due under an interstate pecuniary penalty order, the charge ceases to have effect in respect of the property—

- (a) on the interstate pecuniary penalty order ceasing to have effect (because the conviction, if any, in reliance on which the order was made has been quashed or for any other reason); or
- (b) on the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order; or
- (c) on payment of the amount due under the interstate pecuniary penalty order; or
- (d) on the person becoming bankrupt; or
- (e) on the sale or other disposition of the property—
 - (i) under an order made by a court under the corresponding law of the State in which the interstate pecuniary penalty order was made; or
 - (ii) by the owner of the property with the consent of the court that made the interstate pecuniary penalty order; or
 - (iii) where the interstate restraining order directed a person to take control of the property—by the owner of the property with the consent of that person; or
- (f) on the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge,

whichever first occurs.

(3) A charge created on property by subsection (1)—

- (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and
- (b) has priority over all other encumbrances; and
- (c) subject to subsection (2), is not affected by any change of ownership of the property.

Confiscation of Proceeds of Crime 1989

(4) Where a charge is created by subsection (1) on property of a particular kind and the provisions of any law of New South Wales provide for the registration of title to, or charges over, property of that kind—

- (a) the Public Trustee or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law; and
- (b) if the charge is so registered, a person who purchases or otherwise acquires an interest in the property after the registration of the charge shall, for the purposes of subsection (2) (f), be taken to have notice of the charge at the time of the purchase or acquisition.

(5) If a charge under this section relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

Powers of Public Trustee in relation to interstate restraining orders

84. If—

- (a) an interstate restraining order is registered under this Act; and
- (b) the restraining order directs an official of the State in which it was made to take control of property,

the Public Trustee may, in accordance with an agreement between the Public Trustee and the official, exercise the same powers in relation to the property as the official would have been able to exercise if the property were located in that State.

Interim registration of facsimile copies

85. (1) A facsimile copy of—

- (a) a sealed copy of an interstate forfeiture order or interstate restraining order; or
- (b) a sealed copy of any amendments made to such an order,

shall be regarded for the purposes of this Act as the same as the sealed copy, if the facsimile copy is itself certified in accordance with the rules of the Supreme Court.

(2) Registration effected by means of a facsimile copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a facsimile copy has been registered by that time.

(3) Registration of the sealed copy before the end of the period referred to in subsection (2) has effect as from the day of registration of the facsimile copy.

(4) Although registration of a facsimile copy of an interstate forfeiture order ceases to have effect in the circumstances mentioned in subsection (2), any forfeiture already made in relation to the order is not affected.

PART 7—MISCELLANEOUS**Restriction on making applications**

86. If an application for a confiscation order has been made to an appropriate court, no further application in relation to the same matter may be made to another court, except with the leave of the Supreme Court or in such circumstances as may be prescribed.

Provisions relating to courts

87. (1) If an application is made for a confiscation order to a court before which a person was convicted of a serious offence—

- (a) the application may be dealt with by that court; and
- (b) any function may be exercised by that court in relation to the confiscation order,

whether or not that court is constituted in the same way as it was constituted when the person was convicted of the offence.

(2) A Local Court may not, in relation to the conviction of a person for a particular offence, make a forfeiture order in respect of property unless it is satisfied that the value of the property (together with the value of any other property the subject of any other undischarged forfeiture order made by the Local Court in relation to the same conviction of that person) does not exceed \$10,000.

(3) A Local Court may not make a pecuniary penalty order against a person unless it is satisfied that the amount payable under the order (together with the amount payable under any other undischarged pecuniary penalty order made against the person by the Local Court) would not exceed \$10,000.

(4) A Local Court may not make a forfeiture order in respect of land, except in such circumstances as may be prescribed.

(5) For the purposes of this section, the value of property shall be as determined by the Local Court.

Commissioner for the Independent Commission Against Corruption

88. The Commissioner for the Independent Commission Against Corruption may exercise any functions under this Act only after consultation with the Director of Public Prosecutions, and shall consider whether any such function should instead be exercised by the Director.

Interstate operation of forfeiture or restraining orders

89. (1) For the purpose of enabling a forfeiture order or restraining order to be registered under the corresponding law of another State, the order may be expressed to apply to property in that State.

Confiscation of Proceeds of Crime 1989

(2) For the purpose of enabling a forfeiture order or restraining order to be registered under a law in force in a Territory, the order may be expressed to apply to property in the Territory.

(3) A forfeiture order or restraining order does not apply to property in a corresponding State or in a Territory, except in so far as—

- (a) a corresponding law of that State provides that the order has effect in that State following registration under that law; or
- (b) a law in force in that Territory provides that the order has effect in the Territory following registration under that law; or
- (c) the property was movable property and was located elsewhere than in a corresponding State or in a Territory when the order took effect.

(4) In this section—

“corresponding State” means a State for which a declaration of a corresponding law is in force under this Act.

Costs incurred on variation of forfeiture or restraining orders on application by third parties

90. (1) If—

- (a) the Supreme Court makes an order under this Act varying a forfeiture order or restraining order that is registered under a corresponding law of another State; and
- (b) the variation is made on the application of a third party and affects the interests of the third party in relation to property in that other State,

the Supreme Court may order that the actual costs incurred by the third party in applying for and obtaining the variation be paid to the third party.

(2) The Supreme Court may instead order that part only of those costs be paid, if it is satisfied that special circumstances warrant such an order.

(3) The costs shall be paid by a person or authority specified by the Supreme Court.

(4) The Supreme Court may direct in what manner the costs are to be ascertained.

(5) Nothing in this section limits the powers of the Supreme Court to award costs under any other law.

(6) In this section—

“third party”, in relation to a forfeiture order or restraining order, means a person who is not the subject of the order;

“vary” includes limit the manner in which an order applies.

Stamp duty

91. No stamp duty is payable under the Stamp Duties Act 1920 in respect of—

- (a) the transfer of any property under section 20 (effects of forfeiture orders on third parties); or
- (b) the return of any property under section 21 (discharge of forfeiture orders).

Appeals

92. (1) Without affecting any other right of appeal, a forfeiture order in relation to any property is appellable by any person who has an interest in the property—

- (a) in the case of a person convicted of an offence in reliance on which the forfeiture order was made—as if the order were, or were part of, a sentence imposed in respect of the offence; or
- (b) in any other case—as if the person had been convicted of a serious offence and the order were, or were part of, a sentence imposed in respect of the offence.

(2) Without affecting any other right of appeal, a pecuniary penalty order or drug proceeds order is appellable as if it were, or were part of, a sentence imposed in respect of the offence in relation to which the order was made.

(3) On appeal, a forfeiture order, pecuniary penalty order or drug proceeds order may be confirmed, discharged or varied.

(4) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against a refusal by a court to make a forfeiture order, pecuniary penalty order or restraining order, and the Court of Criminal Appeal may in its discretion make such order as could have been made in the first instance.

(5) A forfeiture order, pecuniary penalty order or restraining order made by the Court of Criminal Appeal under subsection (4) shall be taken to have been made by the Supreme Court under this Act, but is not on that account subject to further appeal.

Operation of other laws not affected

93. Nothing in this Act limits or restricts the operation of any other law providing for the forfeiture of property.

Notices

94. (1) The regulations may make provision for or with respect to the giving of notices under this Act.

(2) Rules of court may make provision for or with respect to the giving of notices under this Act.

Confiscation of Proceeds of Crime 1989

(3) If a notice is required to be given under this Act and the regulations or rules of court make provision for or with respect to the giving of the notice, the notice shall be given in accordance with the relevant provisions.

(4) The regulations shall prevail to the extent of any inconsistency with the rules of court.

(5) A reference in this section to rules of court includes a reference to regulations made under the Justices Act 1902.

Regulations

95. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation declaring a kind of order to be within a definition may do so by reference to the interstate serious offences involved.

(3) A regulation declaring a law to be a law that corresponds to this Act may provide that the declaration applies only for prescribed provisions of this Act.

Repeal of Crimes (Confiscation of Profits) Act 1985 No. 181 and Crimes (Confiscation of Profits) Regulation 1986

96. (1) The Crimes (Confiscation of Profits) Act 1985 is repealed.

(2) The Crimes (Confiscation of Profits) Regulation 1986 is repealed.

Savings, transitional and other provisions

97. Schedule 1 has effect.

**SCHEDULE 1—SAVINGS, TRANSITIONAL AND
OTHER PROVISIONS**

(Sec. 97)

Definitions

1. In this Schedule—

“the 1985 Act” means the Crimes (Confiscation of Profits) Act 1985.

Regulations

2. (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to this Act or a later date.

Confiscation of Proceeds of Crime 1989

SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS—
continued

- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication; or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Effect of repeal on acts done or decisions made

3. If this Act repeals and re-enacts (with or without modification) a provision of the 1985 Act, any act done or decision made under the provision repealed has effect after the repeal as if it had been done or made under the provision so re-enacted.

[*Minister's second reading speech made in—
Legislative Assembly on 3 May 1989
Legislative Council on 23 May 1989*]

CONFISCATION OF PROCEEDS OF CRIME BILL 1989

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to replace the present Crimes (Confiscation of Profits) Act 1985 ("the 1985 Act") with legislation which increases the existing powers relating to the confiscation of the profits of crime and which provides for the confiscation of proceeds of drug trafficking. The proposed Act will re-enact the 1985 Act with modifications for the following purposes:

- (a) to facilitate the identification, location and quantification of property associated with, or derived from, crime;
- (b) to provide for the making of penalty orders (to be known as drug proceeds orders) against persons convicted of drug trafficking offences;
- (c) to create a new offence of money laundering;
- (d) to extend the ambit, and enhance the effectiveness, of the restraining orders which could be made under the 1985 Act;
- (e) to provide for the registration in New South Wales courts of orders for the freezing and confiscation of property made under corresponding State and Territory laws and which relate to property located in New South Wales.

The provisions additional to the 1985 Act are primarily found in proposed Division 4 of Part 2 (drug proceeds orders), proposed Division 2 of Part 3 (restraining orders) and Parts 4 (information gathering powers) and 6 (interstate orders). Extensive changes are also made to facilitate the following of the money trail. These include an extended definition of the term "tainted property" as used in the 1985 Act and development of the concept of "effective control of property".

To facilitate enforcement throughout Australia of legislation relating to the confiscation of the profits of crime, the proposed Act uses concepts and language reflecting provisions of similar Australian legislation.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Confiscation of Proceeds of Crime 1989

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

Clause 3 states the principal objects of the proposed Act.

Clause 4 contains definitions for the purposes of the proposed Act. In addition to definitions equivalent to those contained in the 1985 Act, definitions are included for the purposes of the new provisions relating to drug proceeds orders (Division 4 of Part 2), information gathering powers (Part 4), interstate orders (Part 6) and the following of the money trail.

An important definition relating to drug proceeds orders is that of "drug trafficking offence". A drug trafficking offence is an indictable offence under section 23, 24, 25, 26, 27 or 28 of the Drug Misuse and Trafficking Act 1985.

Important definitions relating to information gathering powers include the following:

"financial institution" defines the bodies which may be directed by a monitoring order made under proposed Part 4 to give information concerning certain accounts to a member, or member of the staff, of a prescribed authority (which is defined to include the Commissioner of Police, the State Drug Crime Commission, the Independent Commission Against Corruption, the Corporate Affairs Commission and certain other prescribed bodies).

"property-tracking document" defines the documents (for example, bank passbooks) that may be the subject of a production order. These are documents relevant to identifying, locating or quantifying property associated with crime or relating to the transfer of such property.

Important definitions relating to interstate orders include definitions of "corresponding law" (that is, a law of another State or Territory that is for the time being declared by the regulations to be a law that corresponds to the proposed Act), "interstate forfeiture order", "interstate pecuniary penalty order", "interstate restraining order" and "interstate serious offence".

Other important definitions include a revised definition of "tainted property" and a new definition of "authorised officer".

The definition of "tainted property" (which is defined in section 3 of the 1985 Act to mean property used in, or in connection with, the commission of a serious offence or derived or realised, directly or indirectly, by any person as a result of the commission of a serious offence) is extended to include property derived or realised from property used in the commission of a serious offence. The extended definition will enable forfeiture orders and restraining orders to be made, and search warrants to be issued, in respect of such property.

"Authorised officers" are defined as persons authorised by the Minister to carry out functions under section 43 (restraining orders) and Part 4 (information gathering powers).

Clause 4 also provides, as does section 3 (4) of the 1985 Act, that a person shall be taken to have been charged with an offence if an information has been laid, and contains some machinery provisions.

Clause 5 provides, as does section 3 (3) of the 1985 Act, that a person shall be taken to have been convicted of an offence where a section 556A order under the Crimes Act 1900 has been made, where the offence has been taken into account in passing sentence in respect of another offence, or where the person has absconded.

Clause 6 specifies, as does section 3 (5) of the 1985 Act, the circumstances in which and time at which a person is taken to have absconded.

Confiscation of Proceeds of Crime 1989

Clause 7 contains the same definition of "serious offence" as that contained in section 3 of the 1985 Act.

Clause 7 also contains a new definition, that of "serious drug offence". The definition is based on the definition of "serious drug offence" in section 3 of the State Drug Crime Commission Act 1985. The provisions relating to monitoring orders in proposed Part 4 relate to actions that can be taken concerning serious drug offences.

Clause 8 defines related offences for the purposes of the proposed Act. Related offences are those where the elements of the offences are substantially the same acts or omissions.

Clause 9 defines the expression "dealing with property" for the purposes of the proposed Act. The proposed section will make it clear that making a payment to a person in reduction of a debt owed to the person, removing property from New South Wales and receiving or making a gift of property amount to dealing with property.

Clause 10 clarifies the meaning of "effective control of property" for the purposes of the proposed Act. Provisions of the proposed Act will enable drug proceeds orders, restraining orders, pecuniary penalty orders and production orders to be made against property in the effective control of a person convicted of a serious offence, believed to have committed an offence or who derived a benefit, directly or indirectly, from the commission of an offence. The proposed section will make it clear that a person can have effective control over property whether or not the person has a legal or equitable estate or interest in the property or a right, power or privilege in connection with the property. The section will provide that, in determining whether a person has effective control, regard may be had to such matters as shareholdings in the property, a trust that has a relationship to the property and family and domestic and business relationships of the persons with an interest in the property.

Clause 11 states, as does section 4 of the 1985 Act, that the proposed Act will bind the Crown.

Clause 12 delineates the application of the proposed Act and contains provisions of a transitional nature.

PART 2—CONFISCATION

Division 1—Applications for confiscation orders

Clauses 13–16 provide for applications for confiscation orders (that is, forfeiture orders and pecuniary penalty orders) under the proposed Act. As under Parts 2 and 3 of the 1985 Act, applications may be made to the court where the offender was convicted or to the Supreme Court. Provision is made for giving interested parties notice of application proceedings and a right to appear in them.

Clause 17 provides that when an application is made to a court for a confiscation order in respect of a person's conviction of an offence the court may have regard to the transcript of any proceeding against the person for the offence. The provision will expedite confiscation proceedings and avoid the need to rehear evidence adduced in the criminal proceedings.

Division 2—Forfeiture orders

Clauses 18–21 make provision, as does Part 2 of the 1985 Act, for orders for the forfeiture of tainted property, the effect of those orders and the manner in which they may be discharged.

The provisions basically follow the provisions of sections 5–8 of the 1985 Act.

Confiscation of Proceeds of Crime 1989

Clauses 18 and 21, which are equivalent to sections 5 (forfeiture orders) and 8 (discharge of forfeiture order), respectively, of the 1985 Act, make it readily apparent that a court must specify the amount of the value of the property subject to a forfeiture order at the time the order is made. Proposed section 18 (3) also makes it clear that the requirement to specify the value applies only to property other than money.

Proposed clause 18 (2) makes it clear that the sentence imposed on a person is not to be taken into account in determining whether hardship could arise from the making of a forfeiture order.

Clause 22 provides for the making by a Local Court or the District Court of an order similar to a restraining order pending the making of a forfeiture order in respect of property. The order may direct that the property may not be disposed of except in a specified manner or specified circumstances.

Division 3—Pecuniary penalty orders

Clauses 23–26 make provision, as does Part 3 of the 1985 Act, for the issue of orders for the payment of pecuniary penalties equal to the assessed value of the benefits derived from the commission of offences. A pecuniary penalty order will not be able to be made in relation to a conviction for a drug trafficking offence. Orders in relation to drug trafficking offences may instead be made under proposed Division 4 of the Part.

The provisions basically follow the provisions of sections 10 and 11 of the 1985 Act.

Clause 25, which is equivalent to section 11 of the 1985 Act, includes within the matters to which a court must have regard in assessing the amount of a pecuniary penalty evidence of a member of the Police Force, a member of the Australian Federal Police or a Customs officer as to the market value of prohibited substances.

Clause 26 provides that a pecuniary penalty order will be discharged if the conviction in reliance on which the order is made is subsequently quashed or discharged by the court hearing an appeal against it under proposed section 92 (appeals).

Clause 27 enables a court to treat as property of the defendant (for the purposes of assessing benefit derived by the person from the commission of an offence) any property which it is satisfied is subject to the effective control of the defendant. Under the proposed section the court will be able to order that property that has been the subject of a sham transaction designed to conceal the origin of the property or put the property outside the ambit of the proposed Act is available to satisfy a pecuniary penalty order.

Division 4—Drug proceeds orders

The proposed Division provides for the making of a new form of order (to be known as a drug proceeds order) to confiscate the proceeds of drug trafficking. The Division is based on certain provisions contained in the Drug Trafficking Offences Act 1986 of the United Kingdom.

Clause 28 makes it clear that the Division will apply to proceeds of a drug trafficking offence that came into a person's possession before or after the commencement of the proposed Division.

Clause 29 requires a court which has convicted a person for drug trafficking to take certain steps before sentencing the person. If the court is of the opinion that the convicted person has benefited from drug trafficking, it must assess the value of the benefit derived. After determining the amount that might be realised from the property concerned, the court will be required to order the person to pay that amount to the State.

Confiscation of Proceeds of Crime 1989

Clause 30 provides that in determining whether a person has benefited from drug trafficking and in assessing the value of any such benefit the court may make certain assumptions. These are that any property which appears to have been held by the defendant at any time since conviction or to have been transferred to the defendant at any time within the 6 years immediately preceding the institution of proceedings against the defendant was a payment or reward in connection with drug trafficking and that any expenditure in that period was met out of proceeds of drug trafficking.

Clause 31 provides that statements relevant to the determinations and assessments to be made under clause 30 may be tendered by the prosecution and in some cases may be treated as conclusive. The statements may contain evidence as to the market value of the substances in relation to which the drug trafficking offence occurred.

Clause 32 requires the court to determine the amount to be recovered under a drug proceeds order. The court is required to determine the value of proceeds derived from the defendant's drug trafficking and the amount that may be realised from the defendant. The amount of the drug proceeds order will be the value of the proceeds, or the amount that might be realised, whichever is less.

Clause 33 details the types of property that will be realisable under clause 32. The amount is the total value of all realisable property held at the time of the order less the total value of any obligations (for example, amounts due under orders of courts or sums payable to secured creditors in bankruptcy) together with certain gifts "caught by the Act". These are gifts either made within the 6 year period before the institution of proceedings, gifts or property received in connection with drug trafficking or property which represents property received by the defendant in drug trafficking.

Clause 34 provides for the variation of a drug proceeds order if realisable property is inadequate to meet an amount that remains unrecovered under the order.

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION

Division 1—Search powers

Clauses 35–42 make provision, as does Part 5 of the 1985 Act, for the issue of search warrants to members of the Police Force in respect of premises if there are grounds for believing there is tainted property of a particular kind in or on the premises.

The provisions basically follow the provisions of sections 26–33 of the 1985 Act. Some modifications have been made to complement the provisions of proposed Part 6 (interstate orders).

The modifications make provision for the application of the search and seizure provisions to property the subject of interstate forfeiture orders or that is tainted property in relation to interstate serious offences.

Division 2—Restraining orders

Clauses 43–57 make provision, as does Part 4 of the 1985 Act, for the making of applications to the Supreme Court for the issue of orders restraining the disposal of the property of persons who have been, or are about to be, charged with serious offences or directing the Public Trustee to take control of any such property.

The provisions basically follow sections 12–25 of the 1985 Act. However, the following modifications are made:

Clause 43, which is the equivalent of section 12 (restraining orders) of the 1985 Act, differs from that section in that it provides that a restraining order (under which property may not be disposed of or otherwise dealt with if a charge is pending in respect of an offence) may be made—

Confiscation of Proceeds of Crime 1989

- (a) against the property of a defendant acquired after the making of the order (proposed section 43 (1) (b)); and
- (b) against property of some other person if there are reasonable grounds to believe that the property is under the effective control of the defendant and is derived directly or indirectly from the commission of the offence (proposed section 43 (1) (e) and (4)).

Under the proposed section the court may make a composite order relating to all the property of the defendant including specified property. The orders listed in the section may be made either alone or in combination.

Provision is also made to enable authorised officers (see the proposed definition in clause 4) to make affidavits in support of applications for restraining orders.

Clause 45, which is the equivalent of section 14 (court may make further orders) of the 1985 Act, differs from that section in that it makes provision—

- (a) for a court to make ancillary orders in relation to the affairs of a defendant or other person whose property is subject to a restraining order to complement the restraining order (proposed section 45 (1) (c)); and
- (b) so that a person directed by an order under the section to furnish to the Public Trustee a statement of specified particulars of property of the person will not be excused from furnishing the statement on the ground that it might tend to incriminate the person and to provide that evidence obtained as a direct or indirect consequence of furnishing such a statement will not be admissible in civil or criminal proceedings other than those for the making of a pecuniary penalty order or drug proceeds order and then only to facilitate the assessment of the amount of the penalty or recoverable under the order (proposed section 45 (5), (6)).

Clause 46 provides for the making of an order for the taxation of legal expenses to be met out of restrained property.

Clause 49, which is equivalent to section 17 (registration of restraining orders) of the 1985 Act, differs from that section in that the particulars of restraining orders that are required to be recorded on the register under the proposed section need not be prescribed.

Clause 50, which is equivalent to section 18 (contravention of restraining orders) of the 1985 Act, differs from that section in that it—

- (a) provides for the imposition of a fine, of an amount equivalent to the value of the property, for disposing of, or dealing with, property in contravention of a restraining order (under that section the maximum fine that may be imposed is \$5,000) (proposed section 50 (1)); and
- (b) enables an appropriate officer to apply to the Supreme Court to set aside a disposition of, or dealing with, property in contravention of a restraining order if the disposition or dealing is not for sufficient consideration or not in favour of a person who acted in good faith (proposed section 50 (2)).

Clause 55, which is equivalent to section 23 (time when restraining order ceases to be in force) of the 1985 Act, differs from that section in that it omits the 6 month limitation in that section on the duration of a restraining order made in reliance on the charging or proposed charging of a person. The proposed section will eliminate the need to make an application, at the end of the 6 month period, for a further order. As under section 23, a restraining order made in reliance on the proposed charging of a person ceases to be in force if the person is not charged within 48 hours.

Confiscation of Proceeds of Crime 1989

PART 4—INFORMATION GATHERING POWERS

The proposed Part, which is based on Part 4 of the Proceeds of Crime Act 1987 of the Commonwealth, provides for the making of 2 new forms of orders. These are production orders in relation to property-tracking documents and monitoring orders to obtain information concerning the movement of funds through financial institutions.

Division 1—Production orders

Clauses 58–62 deal with the procedure for the making and granting of applications for production orders. An authorised officer will be able to apply to the Supreme Court for an order directing a person to produce, or make available for inspection, property-tracking documents in the possession of the person. If a document is required to be produced or made available for inspection the authorised officer may be empowered, subject to specified guidelines, to inspect, take extracts from and make copies of it and retain it if necessary.

Clause 63 enables the Supreme Court, when it is satisfied that documents required to be produced are essential to the business activities of the person to whom an order is directed, to vary the order to require the person to make the documents available for inspection instead.

Clause 64 creates offences in relation to breaches of production orders. These include contravention of an order without reasonable excuse and providing a document that is false or misleading in some respect without indicating that fact to the person to whom it is produced.

Division 2—Search powers

Clause 65 makes provision for entry, search and seizure as an alternative, or in addition to, production orders. The proposed section will enable an authorised officer to enter and search premises for a property-tracking document with the consent of the occupier of the premises or pursuant to a search warrant issued for the purpose. It enables the seizure of any document found in the course of a search if it is believed on reasonable grounds to be a property-tracking document.

Clauses 66 and 67 provide for the making of applications to, and the issue of search warrants by, the Supreme Court to authorised officers if there are reasonable grounds for suspecting that a person has been convicted of, or has committed, a serious offence and that there may be, in or on premises, property-tracking documents in relation to the offence.

The Supreme Court may treat a document as a property-tracking document if the applicant for the search warrant states that there are reasonable grounds for believing that the offender derived a benefit from the offence, that the property is under his or her effective control and that the document is relevant to identifying, locating or quantifying the property. The warrant may authorise the seizure of documents.

The proposed sections include guidelines for the issue of search warrants (for example, when the document cannot be identified for the purpose of obtaining a production order or when issue of a production order is unlikely to be effective because there are reasonable grounds to believe it would not be complied with).

Division 3—Monitoring orders

Clauses 68 and 69 create a new mechanism to enable a prescribed authority to gain information quickly about movements of funds in relation to bank accounts operated by particular persons. The provisions are directed particularly at drug related offences.

Confiscation of Proceeds of Crime 1989

Under the proposed sections the Supreme Court may grant a monitoring order directing a financial institution to give information obtained by the institution to an authorised officer about every transaction conducted through accounts held by a person with the institution over a specified period of less than 3 months. A monitoring order may be made only if the Court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose accounts the information is sought has committed, or is about to commit, a serious drug offence or is implicated in some other specified way.

A financial institution which is, or has been, the subject of a monitoring order is protected against prosecution for an offence against proposed section 73 (money laundering) by providing that the existence of the order can be disregarded for the purposes of that section.

Clause 70 prevents the disclosure of the existence or operation of a monitoring order other than to the prescribed authority to which the information is to be provided under the order itself, to the officers or agents of the institution to ensure compliance with the order or to a barrister or solicitor to obtain legal advice or representation in relation to the order.

Clause 71 protects financial institutions from legal action for making information available to prescribed authorities in respect of accounts that the institutions believe on reasonable grounds might be relevant to an investigation or prosecution of an offence or of assistance in the enforcement of the proposed Act.

Clause 72 protects financial institutions, and officers, employees or agents of financial institutions, who give information to prescribed authorities pursuant to proposed section 71 from the operation of proposed section 73 (money laundering).

PART 5—OFFENCES

Division 1—Money laundering

Clause 73 creates an offence of laundering money or other property that is the proceeds of crime committed in New South Wales.

A person engages in money laundering if the person engages, directly or indirectly, in a transaction that involves money or other property that the person knows is the proceeds of serious crime or receives, possesses, conceals, disposes of or brings into New South Wales such property.

Division 2—Miscellaneous

Clause 74, which is the equivalent of section 41 (proceedings for offences) of the 1985 Act, differs from that section in that it makes provision for certain new offences (relating to monitoring orders and money laundering) to be dealt with on indictment.

Clause 75 complements the proposed provisions relating to authorised officers by providing for certificate evidence of their authorisation in legal proceedings.

Clause 76 assists the establishment of the state of mind of a body corporate engaging in conduct affected by the proposed Act.

PART 6—INTERSTATE ORDERS

Proposed Part 6 enables the reciprocal enforcement of orders to freeze and confiscate profits made from criminal activities in Australian jurisdictions.

Confiscation of Proceeds of Crime 1989

The proposed Part provides a system under which forfeiture orders and restraining orders may be enforced interstate, and under which search warrants may be issued in the State in which a search is to be conducted.

Clause 77 deals with the registration in the State of a forfeiture order or restraining order made interstate which is expressed to apply to property in the State.

Clause 78 states that an interstate forfeiture order shall be enforced in the same manner, once registered, as a forfeiture order made under proposed section 18 (1).

Clause 79 states that an interstate restraining order may be enforced in the same manner, once registered, as a restraining order made under proposed section 43.

Clause 80 prevents a court of the State revoking or varying registered interstate orders.

Clause 81 provides for the continuation in force of a registered interstate order after it ceases to be in force in the State in which it was made until it is cancelled under proposed section 82.

Clause 82 provides for the cancellation of registration of an interstate order.

Clause 83 provides that, if an interstate pecuniary penalty order is made, and an interstate restraining order is made and registered before or after the interstate pecuniary penalty order is registered, then on registration of the later of the 2 orders a charge is created on the property to secure payment due under the interstate pecuniary penalty order.

Clause 84 provides that, when an interstate restraining order is registered and it directs an official of the State in which it was made to take control of property, the Public Trustee may enter into an agreement with the official and thereby exercise the same powers that the official would have been able to exercise if the property were in that State.

Clause 85 provides for the interim registration of facsimile copies of interstate restraining and forfeiture orders and amendments to such orders.

PART 7—MISCELLANEOUS

Proposed Part 7 contains basically the same provisions (with some modifications for changed style) found in Part 6 of the 1985 Act.

The main differences are:

Clause 87, which is the equivalent of section 35 (provisions relating to courts) of the 1985 Act, differs from that section in that it—

- (a) increases from \$5,000 to \$10,000 the value of property in relation to which a Local Court may make a forfeiture order (proposed section 87 (2)); and
- (b) increases from \$5,000 to \$10,000 the amount up to which a Local Court may make a pecuniary penalty order (proposed section 87 (3)).

Clause 89 provides for forfeiture or restraining orders to be registered under a corresponding law of another State.

Clause 90 provides that if such an order is varied on the application of a third party in relation to the party's interests in another State the costs may be paid to the third party.

Clause 92 provides for the making of appeals in respect of drug proceeds orders.

Confiscation of Proceeds of Crime 1989

Clause 95, which is the equivalent of section 44 (regulations) of the 1985 Act, differs from that section in that it also provides for the making of regulations necessary to give effect to proposed Part 6 (interstate orders).

Clause 96 repeals the 1985 Act and the regulations made under that Act.

Clause 97 gives effect to Schedule 1 which sets out savings, transitional and other provisions.

Schedule 1 contains savings, transitional and other provisions consequent on the proposed repeal of the 1985 Act. The provisions will operate so that, for example, a confiscation order or restraining order made, or a search warrant issued, under the 1985 Act will have effect as if made or issued under the proposed Act.

CONFISCATION OF PROCEEDS OF CRIME BILL 1989

NEW SOUTH WALES



TABLE OF PROVISIONS

PART 1—PRELIMINARY

1. Short title
2. Commencement
3. Principal objects
4. Definitions
5. Meaning of "conviction of serious offence"
6. Meaning of "absconding"
7. Meaning of "serious offence" and "serious drug offence"
8. Related offences
9. Meaning of "dealing with property"
10. Effective control of property
11. Act to bind Crown
12. Application

PART 2—CONFISCATION

Division 1—Applications for confiscation orders

13. Applications for confiscation orders
14. Notice of applications
15. Amendment of applications
16. Making of confiscation orders if person has absconded
17. Procedure on applications

Division 2—Forfeiture orders

18. Forfeiture orders
19. Effects of forfeiture orders
20. Effects of forfeiture orders on third parties
21. Discharge of forfeiture orders
22. Orders pending forfeiture

Division 3—Pecuniary penalty orders

23. Application of Division
24. Pecuniary penalty orders
25. Assessment of pecuniary penalty
26. Discharge of pecuniary penalty orders
27. Court may lift corporate veil etc.

Confiscation of Proceeds of Crime 1989

Division 4—Drug proceeds orders

28. Application of Division
29. Drug proceeds orders
30. Assessment of proceeds of drug trafficking
31. Statements relating to drug trafficking
32. Amount to be recovered under drug proceeds order
33. Realisable property etc.
34. Variation of drug proceeds orders

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION

Division 1—Search powers

35. Definitions
36. Search warrants
37. Seizure of property pursuant to warrants
38. Search and arrest of persons pursuant to warrants
39. Issue of warrants if charge not laid
40. Commissioner of Police responsible for seized property
41. Return of seized property
42. Obstruction etc. of person executing warrant

Division 2—Restraining orders

43. Restraining orders
44. Notice of applications and orders
45. Court may make further orders
46. Order for taxation of legal expenses to be met out of restrained property
47. Public Trustee to discharge confiscation order
48. Charge on property subject to restraining order
49. Registration of restraining orders
50. Contravention of restraining orders
51. Hindering or obstructing Public Trustee
52. Protection of Public Trustee from liability in certain cases
53. Fees payable to Public Trustee
54. Court may revoke restraining orders
55. Time when restraining order ceases to be in force
56. Notice of applications under this Part
57. Certificate by Public Trustee

PART 4—INFORMATION GATHERING POWERS

Division 1—Production orders

58. Applications for production orders
59. Making of production orders
60. Form of production orders
61. Powers under production orders
62. Effect of production orders on proceedings etc.
63. Variation of production orders
64. Failure to comply with production orders

Division 2—Search powers

65. Powers to search for, and seize, documents relevant to locating etc. property
66. Application for search warrant for location etc. of property
67. Search warrant for location etc. of property

Division 3—Monitoring orders

68. Monitoring orders
69. Making of monitoring orders
70. Existence and operation of monitoring order not to be disclosed
71. Communication of information by financial institutions to prescribed authorities
72. Protection for financial institution where information given

Confiscation of Proceeds of Crime 1989

PART 5—OFFENCES

Division 1—Money laundering

73. Money laundering

Division 2—Miscellaneous

74. Proceedings for offences

75. Proof of certain matters not required

76. Conduct by directors, servants or agents

PART 6—INTERSTATE ORDERS

77. Registration of interstate orders

78. Effect of registration of interstate forfeiture orders

79. Effect of registration of interstate restraining orders

80. Revocation or variation of registered orders

81. Duration of registration

82. Cancellation of registration

83. Charge on property subject to registered interstate restraining orders

84. Powers of Public Trustee in relation to interstate restraining orders

85. Interim registration of facsimile copies

PART 7—MISCELLANEOUS

86. Restriction on making applications

87. Provisions relating to courts

88. Commissioner for the Independent Commission Against Corruption

89. Interstate operation of forfeiture or restraining orders

90. Costs incurred on variation of forfeiture or restraining orders on application by third parties

91. Stamp duty

92. Appeals

93. Operation of other laws not affected

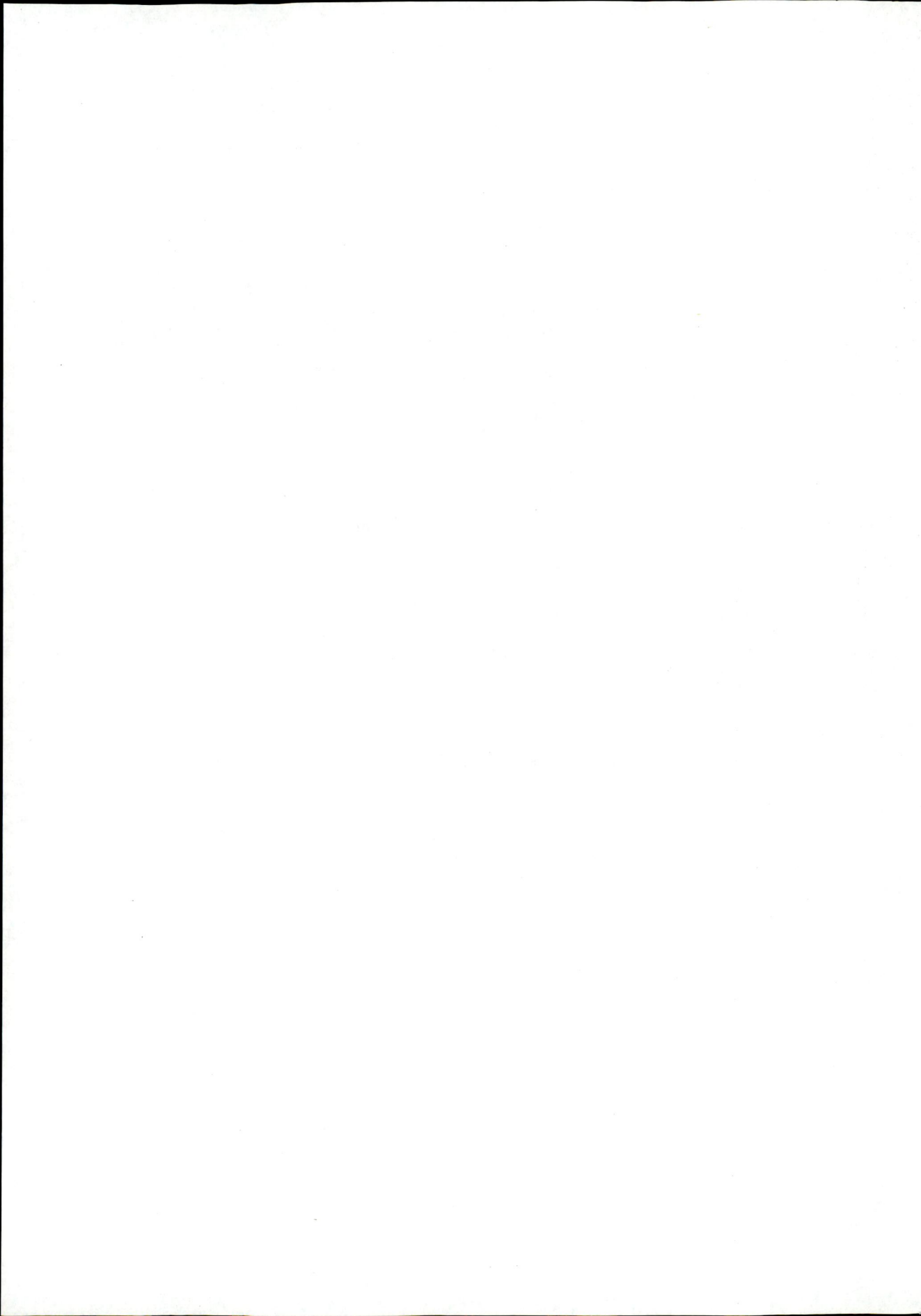
94. Notices

95. Regulations

96. Repeal of Crimes (Confiscation of Profits) Act 1985 No. 181 and Crimes (Confiscation of Profits) Regulation 1986

97. Savings, transitional and other provisions

SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS



CONFISCATION OF PROCEEDS OF CRIME BILL 1989

NEW SOUTH WALES



No. , 1989

A BILL FOR

An Act to provide for the confiscation of the profits of crime and the forfeiture of property in certain circumstances; to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of the profits of crime and the forfeiture of property; to repeal the Crimes (Confiscation of Profits) Act 1985; and for connected purposes.

Confiscation of Proceeds of Crime 1989

The Legislature of New South Wales enacts:**PART 1—PRELIMINARY****Short title**

1. This Act may be cited as the Confiscation of Proceeds of Crime Act
5 1989.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Principal objects

- 10 3. The principal objects of this Act are—
- (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State; and
 - (b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and
 - 15 (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property; and
 - (d) to provide for the enforcement in the State of forfeiture orders, pecuniary penalty orders and restraining orders made in respect of offences against the laws of other States.

20 Definitions**4. (1) In this Act—**

“account” means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for—

- 25 (a) a fixed term deposit; and
(b) a safety deposit box;

“agent” includes, if the agent is a corporation, the officers and agents of the corporation;

“appeal” includes a proceeding in the nature of an appeal;

30 “appropriate court” means—

- (a) in any case, the Supreme Court; or
- (b) in relation to—

- (i) a forfeiture order made in reliance on the conviction of a person for a serious offence; or
- 35 (ii) a pecuniary penalty order against a person convicted of a serious offence; or
- (iii) an application for such a forfeiture order or pecuniary penalty order,

Confiscation of Proceeds of Crime 1989

the court before which the person was convicted of the offence;

“appropriate officer” means—

- (a) in any case—the Director of Public Prosecutions; or
- 5 (b) in relation to restraining orders—the Commissioner for the Independent Commission Against Corruption; or
- (c) in relation to a function exercised before or in relation to a Local Court (other than a function under Division 2 of Part 3)—the Commissioner of Police; or
- 10 (d) in relation to a function prescribed for the purposes of this paragraph by the regulations—a person so prescribed or a person of a class or description so prescribed;

“approved” means approved by the Minister in writing for the purposes of the provision in which the term occurs;

“authorised officer” means—

- 15 (a) a member of the Police Force; or
- (b) a person authorised in writing by the Minister either generally or in a special case to act as an authorised officer for the purposes of section 43 (restraining orders) or Part 4;

“bank” means—

- 20 (a) the Reserve Bank of Australia; or
- (b) a bank within the meaning of the Banking Act 1959 of the Commonwealth; or
- (c) a person who carries on State banking within the meaning of section 51 (xiii) of the Constitution of the Commonwealth;

25 “benefit” includes service and advantage;

“building society” means a society registered or incorporated as a building society, permanent building society, co-operative housing society or similar society under an Act;

30 “confiscation order” means a forfeiture order or a pecuniary penalty order;

“corresponding law” means a law of another State that is for the time being declared by the regulations to be a law that corresponds to this Act;

35 “credit union” means a credit union or society carrying on business under an Act;

“Customs Act” means the Customs Act 1901 of the Commonwealth;

“Customs officer” means an officer of Customs within the meaning of the Customs Act;

“director”, in relation to a financial institution or corporation, includes—
Cf

Confiscation of Proceeds of Crime 1989

- (a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory—a constituent member of the body corporate; and
- 5 (b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and
- (c) any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;
- 10 “drug proceeds order” means an order made under section 29;
- “drug trafficking” means any act constituting a drug trafficking offence;
- “drug trafficking offence” means an offence under any of the following sections of the Drug Misuse and Trafficking Act 1985:
- 15 (a) section 23 (offences with respect to prohibited plants);
- (b) section 24 (manufacture and production of prohibited drugs);
- (c) section 25 (supply of prohibited drugs);
- (d) section 26 (conspiring);
- 20 (e) section 27 (aiding, abetting etc. commission of offence in New South Wales);
- (f) section 28 (conspiring to commit and aiding etc. commission of offence outside New South Wales);
- “encumbrance”, in relation to property, includes any interest, mortgage, charge, right, claim and demand in respect of the property;
- 25 “executive officer”, in relation to a financial institution or a corporation, means any person, by whatever name called and whether or not he or she is a director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation;
- “facsimile copy” means a copy obtained by facsimile transmission;
- 30 “financial institution” means—
- (a) a bank; or
- (b) a building society; or
- (c) a credit union; or
- 35 (d) a body corporate that is, or that, if it had been incorporated in Australia, would be, a financial corporation within the meaning of section 51 (xx) of the Constitution of the Commonwealth;
- “fixed term deposit” means an interest bearing deposit lodged for a fixed period;
- “forfeiture order” means an order made under section 18;
- 40 “interest”, in relation to property, means—
- (a) a legal or equitable estate or interest in the property; or

Confiscation of Proceeds of Crime 1989

- (b) a right, power or privilege in connection with the property, whether present or future and whether vested or contingent;
- 5 “interstate forfeiture order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- “interstate pecuniary penalty order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- 10 “interstate restraining order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;
- “interstate serious offence” means an offence (including a common law offence, where relevant) against the laws of another State, being an offence in relation to which an interstate forfeiture order or interstate pecuniary penalty order may be made under a corresponding law of that State;
- 15 “monitoring order” means an order made under section 69;
- “officer” means a director, secretary, executive officer or employee;
- “pecuniary penalty order” means an order made under section 24;
- 20 “penalty amount” means—
- (a) in relation to a forfeiture order made against a person, the amount specified in relation to the forfeiture order under section 21 (2); or
 - 25 (b) in relation to a pecuniary penalty order made against a person, the amount that the person is, under the pecuniary penalty order, liable to pay to the State; or
 - (c) in relation to a drug proceeds order made against a person, the amount that the person is, under the drug proceeds order, liable to pay to the State;
- 30 “premises” includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof;
- “prescribed authority” means—
- (a) the Commissioner of Police; or
 - (b) the State Drug Crime Commission; or
 - 35 (c) the Independent Commission Against Corruption; or
 - (d) the Corporate Affairs Commission; or
 - (e) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of a State or Territory prescribed for the purposes of this definition;
- 40 “proceeds”, in relation to a serious offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence;

Confiscation of Proceeds of Crime 1989

“production order” means an order made under section 59;

“property” includes real and personal property and any estate or interest in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest;

“property-tracking document”, in relation to a serious offence, means—

(a) a document relevant to—

(i) identifying, locating or quantifying property of a person who committed the offence; or

(ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or

(b) a document relevant to—

(i) identifying, locating or quantifying tainted property in relation to the offence; or

(ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence;

“relevant offence”, in relation to tainted property, means an offence by reason of the commission of which the property is tainted property;

“relevant period”, in relation to the conviction of a person for a serious offence, means the period of 6 months after—

(a) where the person is to be taken to have been convicted of the offence because of section 5 (1) (a)—the day on which the person was convicted of the offence; or

(b) where the person is to be taken to have been convicted of the offence because of section 5 (1) (b)—the day on which the order in relation to the offence was made under section 556A of the Crimes Act 1900; or

(c) where the person is to be taken to have been convicted of the offence because of section 5 (1) (c)—the day on which the court took the offence into account under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986; or

(d) where the person is to be taken to have been convicted of the offence because of section 5 (1) (d)—the day on which the person is taken to have absconded under section 6;

“restraining order” means an order made under section 43;

“State”, when not used in a geographical sense, means the Crown in right of New South Wales, and (except in relation to the payment of money to the State) includes a State authority;

“State authority” means a Minister of the Crown, a statutory body representing the Crown, a member of the Police Force or a person or body prescribed by the regulations for the purposes of this definition or of a class or description so prescribed;

Confiscation of Proceeds of Crime 1989

“tainted property” means property that—

- (a) was used in, or in connection with, the commission of a serious offence; or
- 5 (b) was derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence; or
- (c) was derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence;

“unlawful activity” means an act or omission that constitutes an offence
10 against a law in force in the Commonwealth, a State or a Territory.

(2) A reference in this Act to a person being charged with an offence is a reference to an information being laid against the person for the offence whether or not—

- 15 (a) a summons to require the attendance of the person to answer the information has been issued; or
- (b) a warrant for the arrest of the person has been issued.

(3) A reference in this Act to a benefit derived by a person includes a reference to—

- 20 (a) a benefit derived, directly or indirectly, by the person; and
- (b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.

(4) A reference in this Act to the property of a person includes a reference to property in respect of which the person has a beneficial interest.

25 (5) A reference in this Act to acquiring property, or an interest in property, for sufficient consideration is a reference to acquiring the property, or the interest, for a consideration that is sufficient and that, having regard solely to commercial considerations, reflects the value of the property, or the interest.

30 (6) For the purposes of this Act, a person shall not be regarded as being a director of a financial institution or corporation within the meaning of paragraph (c) of the definition of “director” in subsection (1) only because the directors act on advice given by that person in the proper performance of the functions attaching—

- (a) to his or her professional capacity; or
- 35 (b) to his or her business relationship with the directors of the financial institution or corporation.

(7) In this Act—

- (a) a reference to a function includes a reference to a power, authority and duty; and

Confiscation of Proceeds of Crime 1989

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

(8) For the purposes of this Act, the Northern Territory is regarded as a State.

5 **Meaning of "conviction of serious offence"**

5. (1) For the purposes of this Act, a person shall be taken to have been convicted of a serious offence if—

(a) the person has been convicted, whether summarily or on indictment, of the offence by a court; or

10 (b) the person has been charged with the offence and the court hearing the charge has made an order in relation to the offence under section 556A of the Crimes Act 1900; or

15 (c) the person has been sentenced for another offence and the court has, in passing sentence on the person, taken the offence into account under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986; or

(d) the person has been charged with the offence and, at any time before the determination of the charge, the person has absconded.

20 (2) If, by virtue of subsection (1), a person is to be taken to have been convicted of a serious offence, then, for the purposes of this Act—

(a) the person shall, in a case to which paragraph (a) or (b) of that subsection applies, be taken to have been so convicted by the court referred to in the relevant paragraph; and

(b) the conviction shall be taken to have been quashed—

25 (i) if the person is to be taken to have been convicted of the offence because of subsection (1) (a)—when the conviction is quashed or set aside; or

30 (ii) if the person is to be taken to have been convicted of the offence because of subsection (1) (b)—when the order made under section 556A of the Crimes Act 1900 is quashed or set aside; or

35 (iii) if the person is to be taken to have been convicted of the offence because of subsection (1) (c)—when the decision of the court under section 447B of the Crimes Act 1900 or section 21 of the Criminal Procedure Act 1986 is quashed or set aside; or

40 (iv) if the person is to be taken to have been convicted of the offence because of subsection (1) (d)—when, after the person is subsequently brought before a court in respect of the offence with which the person was charged, the person is discharged in respect of the offence or the conviction for the offence is quashed or set aside.

Confiscation of Proceeds of Crime 1989

(3) For the purposes of this Act, where an information has been laid alleging the commission of a serious offence by a person, the person shall be taken to have been charged with the offence (but nothing in this subsection limits any other way in which a person is to be taken to be charged with an offence).

Meaning of “absconding”

6. (1) For the purposes of this Act, a person shall be taken to have absconded if and only if—

- (a) an information has been laid alleging the commission of a serious offence by the person; and
- (b) a warrant for the arrest of the person has been issued in relation to that information; and
- (c) reasonable attempts to locate the person pursuant to the warrant have been unsuccessful during the period of 6 months commencing on the day the warrant was issued,

and the person shall be taken to have so absconded on the last day of that period of 6 months.

(2) A reference in this Act, in relation to the conviction of a person for a serious offence, to the commission of the offence shall, where the person is to be taken to have been convicted of the offence because of section 5 (1) (d), be read as a reference to the alleged commission of the offence by the person.

Meaning of “serious offence” and “serious drug offence”

7. In this Act—

“serious drug offence” means—

- (a) an offence referred to (before the commencement of the Drug Misuse and Trafficking Act 1985) in section 45A of the Poisons Act 1966—
 - (i) of supplying any drug of addiction or prohibited drug within the meaning of that Act; or
 - (ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act; or
 - (iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises; or
- (b) a drug trafficking offence; or
- (c) a prescribed offence involving drugs or an offence of a prescribed kind involving drugs; or

Confiscation of Proceeds of Crime 1989

(d) an offence, which involves theft, fraud, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery, corruption or harbouring criminals, committed in connection with an offence referred to in paragraph (a), (b) or (c); or

5 (e) an offence under section 73 (money laundering) in relation to the proceeds of an offence referred to in paragraph (a), (b), (c) or (d); or

10 (f) an offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e);

“serious offence” means—

(a) an offence (including a common law offence) against the laws of New South Wales, being an offence that may be prosecuted on indictment; or

15 (b) the offence of supplying any restricted substance prescribed for the purposes of section 16 of the Poisons Act 1966 that arises under section 18A (1) of that Act; or

(c) an offence prescribed for the purposes of this paragraph by the regulations or an offence of a kind so prescribed.

20 **Related offences**

8. For the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences are substantially the same acts or omissions.

Meaning of “dealing with property”

25 9. For the purposes of this Act, dealing with property of a person includes—

(a) if a debt is owed to that person—making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from New South Wales; and

(c) receiving or making a gift of the property.

30 **Effective control of property**

10. (1) Property, or an interest in property, may be subject to the effective control of a person within the meaning of this Act whether or not the person has—

(a) a legal or equitable estate or interest in the property; or

35 (b) a right, power or privilege in connection with the property.

(2) In determining—

(a) whether or not property, or an interest in property, is subject to the effective control of a person; or

Confiscation of Proceeds of Crime 1989

(b) whether or not there are reasonable grounds to believe that property, or an interest in property, is subject to the effective control of a person,

regard may be had to—

- 5 (c) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property; and
- (d) a trust that has a relationship to the property; and
- 10 (e) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (c) or trusts of the kind referred to in paragraph (d), and other persons.

Act to bind Crown

11. (1) This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its
15 other capacities.

(2) Nothing in this Act renders the Crown liable to be prosecuted for an offence.

Application

12. (1) Parts 2 and 3 do not apply to a person's conviction of an offence
20 if the person was convicted of the offence before the commencement of those Parts.

(2) Subsection (1) does not apply in relation to interstate forfeiture orders, interstate pecuniary penalty orders or interstate restraining orders.

(3) Subject to subsection (1), this Act applies to—

- 25 (a) an offence committed, or believed to have been committed, at any time (whether before or after the commencement of this section); and
- (b) a person's conviction of an offence at any time (whether before or after the commencement of this section).

30

PART 2—CONFISCATION**Division 1—Applications for confiscation orders****Applications for confiscation orders**

13. (1) If a person is convicted of a serious offence other than a drug
35 trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:

- (a) a forfeiture order against property that is tainted property in respect of the offence;

D1

Confiscation of Proceeds of Crime 1989

(b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.

5 (2) If a person is convicted of a drug trafficking offence, an appropriate officer may apply to an appropriate court for a forfeiture order against property that is tainted property in respect of the offence.

(3) An application must be made before the end of the relevant period in relation to the conviction.

(4) An application may be made under subsection (1) (b) in relation to one or more serious offences.

10 (5) If an application under subsection (1) or subsection (2) has been finally determined, no further application may be made under that subsection in relation to the same conviction, except with the leave of the Supreme Court or in such circumstances as are prescribed.

(6) The Supreme Court shall not grant leave unless satisfied that—

15 (a) the tainted property, or the benefit, to which the new application relates was identified only after the first application was determined; or

(b) necessary evidence became available only after the first application was determined; or

20 (c) the Court is otherwise satisfied that it is in the interests of justice to grant the leave.

Notice of applications

14. (1) If an appropriate officer applies for a forfeiture order against property in respect of a person's conviction of a serious offence—

25 (a) the appropriate officer shall give written notice of the application to the person and to any other person the appropriate officer has reason to believe may have an interest in the property; and

(b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application; and

30 (c) the court may, at any time before the final determination of the application, direct the appropriate officer to give or publish notice of the application to a specified person or class of persons, in the manner and within the time that the court considers appropriate.

35 (2) If an appropriate officer applies for a pecuniary penalty order against a person—

(a) the appropriate officer shall give the person written notice of the application; and

40 (b) the person may appear and adduce evidence at the hearing of the application.

Amendment of applications

15 **15. (1)** A court may, at any time before the final determination of an application for a confiscation order made to it and whether or not the period for making such an application has expired, amend the application as it thinks fit, either at the request of the appropriate officer who made the application or with the approval of the appropriate officer.

(2) The court shall not amend the application so as to—

(a) include additional property in an application for a forfeiture order; or

10 (b) include an additional benefit in an application for a pecuniary penalty order,

unless the court is satisfied that—

(c) the property or benefit was not reasonably capable of identification when the application was originally made; or

15 (d) necessary evidence became available only after the application was originally made.

(3) If the amendment of an application for a forfeiture order would have the effect of including additional property in the application for the forfeiture order, the applicant for the amendment shall give written notice of the application to amend to any person who the applicant has reason to believe may have an interest in the property to be included in the application for the forfeiture order.

25 (4) Any person who claims an interest in the property to be included in the application for the forfeiture order may appear and adduce evidence at the hearing of the application to amend.

(5) If the amendment of an application for a pecuniary penalty order against a person would have the effect of including an additional benefit in the application for the pecuniary penalty order, the applicant shall give the person written notice of the application to amend.

30 Making of confiscation orders if person has absconded

35 **16.** If a person is, because of section 5 (1) (d), to be taken to have been convicted of a serious offence, a court shall not make a confiscation order in reliance on the person's conviction of the offence unless the court is satisfied, on the balance of probabilities, that the person has absconded and—

(a) the person has been committed for trial for the offence; or

(b) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

*Confiscation of Proceeds of Crime 1989***Procedure on applications**

17. (1) If an application is made to a court for a confiscation order in respect of a person's conviction of a serious offence, the court may, in determining the application, have regard to the transcript of any proceedings
5 against the person for the serious offence.

(2) If—

(a) a person is to be taken to have been convicted of a serious offence because of section 5 (1) (c); and

10 (b) an application is made to a court for a confiscation order in respect of the conviction,

the reference in subsection (1) to proceedings against the person for the serious offence includes a reference to proceedings against the person for the other offence referred to in section 5 (1) (c).

Division 2—Forfeiture orders15 **Forfeiture orders**

18. (1) If a person has been convicted of a serious offence and an application is made to a court under section 13 (1) (a) in relation to specified property and—

20 (a) the court is satisfied that the property is tainted property in relation to the offence; and

(b) the court has taken into consideration (having regard to information before the court)—

(i) the use that is ordinarily or had been intended to be made of the property; and

25 (ii) any hardship that may reasonably be likely to arise (whether on the part of that or any other person) following the making of the order,

the court may order that the property is forfeited to the State.

30 (2) In considering any hardship that may be likely to arise on the part of a person convicted of a serious offence, the court shall not take into account the sentence imposed in respect of the offence.

(3) If the court orders that property (other than money) is forfeited to the State, the court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.

35 (4) If, at the hearing of an application made under section 13 (1) (a) in reliance on the conviction of a person for a serious offence, evidence is given that property to which the application relates was in the possession of the person at or immediately after the commission of the offence, then—

Confiscation of Proceeds of Crime 1989

- (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 shall presume that the property was used in, or in connection with, the commission of the offence; or
- 5 (b) in any other case—the court shall not make an order under this section 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.
- (5) A court making a forfeiture order in respect of property may specify
10 in the order the extent of the estate, interest or rights in the property that are affected by the order and, where the order is to apply to land, the court shall do so.

Effects of forfeiture orders

19. (1) If a court makes a forfeiture order in respect of property—
- 15 (a) the property vests in the Crown in right of New South Wales (or in such State authority as is specified in the forfeiture order) to the extent of the estate, interest or rights (if any) specified in the forfeiture order; and
- 20 (b) the property so vests subject to every charge or encumbrance to which the property was subject immediately before the forfeiture order was made and, in the case of land under the provisions of the Real Property Act 1900, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act; and
- 25 (c) if the property is not already in the possession of the State, the State may take possession of the property.
- (2) Nothing in subsection (1) affects the operation of section 86 of the Real Property Act 1900 in relation to a forfeiture order made in respect of land.
- (3) If a court makes a forfeiture order in respect of property—
- 30 (a) the property shall not, except with the leave of an appropriate court and in accordance with any directions of the court, be disposed of, or otherwise dealt with, by or on behalf of the State, before the relevant time; and
- 35 (b) if, at the relevant time, the forfeiture order has not been discharged, the property may be disposed of, or otherwise dealt with—
- (i) in accordance with any direction of the Attorney General or of a person authorised by the Attorney General for the purposes of this subparagraph; or
- (ii) in accordance with any other applicable law.
- 40 (4) In subsection (3)—

Confiscation of Proceeds of Crime 1989

“relevant time”, in relation to property that is the subject of a forfeiture order, means—

(a) if—

- 5 (i) the period provided for the lodging of an appeal against the forfeiture order has expired without such an appeal having been lodged—the expiration of that period; or
- (ii) an appeal against the forfeiture order has been lodged—the time when the appeal lapses or is finally determined, as the case requires; or

10 (b) if—

- (i) the period provided for the lodging of an appeal against the conviction for the relevant serious offence has expired without such an appeal having been lodged—the expiration of that period; or
- 15 (ii) an appeal against the conviction has been lodged—the time when the appeal lapses or is finally determined, as the case requires,

whichever is the later.

Effects of forfeiture orders on third parties

20 **20. (1)** If, in reliance on the conviction of a person for a serious offence, a court makes a forfeiture order in respect of property, any other person (in this section referred to as the “applicant”) who claims an interest in the property may, at any time within the period of 6 months after the day on which the forfeiture order was made, apply to the court for an order under
25 this section in respect of that interest.

(2) If the court to which the application is made is satisfied, on the balance of probabilities, that—

(a) the applicant was not, in any way, involved in the commission of the relevant serious offence; and

30 (b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant acquired the interest—

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property,
35

the court shall make an order declaring the nature, extent and value of the applicant’s interest in the property and—

(c) if the property is still in the possession of the State—directing that the property be transferred to the applicant or declaring that there is payable to the applicant the amount specified in the order as the value of the applicant’s interest in the property; or
40

Confiscation of Proceeds of Crime 1989

(d) in any other case—declaring that there is payable to the applicant the amount specified in the order as the value of the applicant's interest in the property.

5 (3) In deciding, for the purpose of subsection (2) (c), whether to direct that property be transferred to an applicant or to declare that an amount is payable to an applicant, the court shall have regard to—

- (a) the nature, extent and value of the applicant's interest in the property; and
- 10 (b) if the court is aware that any other person claims an interest in the property—the nature, extent and value of that claimed interest; and
- (c) any other matter that seems to the court to be relevant.

(4) A person who applies to a court for an order under this section shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the
15 hearing of the application.

(5) A court may not make an order under this section in respect of the interest of an applicant who—

- (a) has been given notice under section 14 (1) (a) in relation to the application for the forfeiture order; or
- 20 (b) has appeared under section 14 (1) (b) at the hearing of the application for the forfeiture order,

unless the court is satisfied that the making of the order is justified on special grounds.

25 (6) Special grounds referred to in subsection (5) include any of the following that are relevant:

- (a) that the applicant was unable to appear at the hearing of the application for the forfeiture order;
- (b) that the applicant did not appear at that hearing for a good reason;
- 30 (c) that particular evidence adduced by the applicant in connection with the application under subsection (1) was not available to the applicant at the time of the hearing of the application for the forfeiture order.

(7) A reference in this section to the transfer of property includes, without limiting the meaning of that expression, the transfer of land or an estate or
35 interest in land by a conveyance, transfer or other appropriate transaction.

Discharge of forfeiture orders

21. (1) A forfeiture order is discharged—

- (a) if the conviction in reliance on which the order is made is subsequently quashed; or

Confiscation of Proceeds of Crime 1989

(b) if the forfeiture order is discharged by the court which hears an appeal against it under section 92 (appeals).

(2) The payment to the State of the amount specified in a forfeiture order as the value of the property in respect of which the forfeiture order is made operates (except in so far as the court otherwise directs) to discharge the forfeiture order.

(3) If a forfeiture order in respect of property is discharged (whether on an appeal against the making of the forfeiture order or as provided by this section) the person who had possession of the property before possession of it was taken by or on behalf of the State may, by application in writing to the Attorney General, request the return of the property and, on receipt of the application by the Attorney General—

(a) if the property is still in the possession of the State—the Attorney General shall arrange for the property to be returned to the person; or

(b) in any other case—there is payable to the person the amount realised on disposal of the property by the State.

(4) If—

(a) a person applies to the Attorney General under subsection (3) for the return of property that is in the possession of the State; and

(b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), the Attorney General shall inform the first-mentioned person that the property will be returned to the first-mentioned person on payment to the State of an amount equal to the amount paid as mentioned in paragraph (b) and, if that amount is paid to the State, the Attorney General shall arrange for the property to be so returned.

(5) If—

(a) a person applies to the Attorney General under subsection (3) for the return of property that is not in the possession of the State; and

(b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), there is payable to the first-mentioned person the amount realised on disposal of the property by the State, reduced by an amount equal to the amount paid as mentioned in paragraph (b).

(6) In this section—

(a) a reference to the return of property includes, without limiting the meaning of that expression, the return of land or an estate or interest in land by a conveyance, transfer or other appropriate transaction; and

(b) a reference to a person who had possession of property includes a reference to any person who is entitled to the property.

*Confiscation of Proceeds of Crime 1989***Orders pending forfeiture**

22. (1) If a person (in this section referred to as the “defendant”) has been convicted of a serious offence and an application is likely to be made to a Local Court or the District Court under section 13 for the making of a forfeiture order in relation to particular property, an appropriate officer may apply to the Local Court or District Court, *ex parte*, for an order under this section in respect of the property.

(2) A court to which an application is made under subsection (1) may, if it is satisfied that a forfeiture order may be made in respect of the property, by order direct that the property (or such part of the property as is specified in the order) is not to be disposed of by the person convicted of the serious offence or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.

(3) If, while an order under this section is in force—

(a) a court makes a forfeiture order in respect of property to which the order relates; or

(b) no application for a forfeiture order is made before the end of the relevant period in relation to the defendant’s conviction,

the court who made the order may—

(c) if it considers it appropriate, make an order setting aside the order in respect of the whole or a specified part of the property; and

(d) make such other order or orders as it considers appropriate in relation to the operation of the order.

Division 3—Pecuniary penalty orders**Application of Division**

23. This Division applies to—

(a) property that comes into the possession, or under the control, of a person either within or outside the State and either before or after the commencement of this Division; and

(b) benefits that are provided to a person either within or outside the State and either before or after the commencement of this Division.

Pecuniary penalty orders

24. (1) If a person has been convicted of a serious offence other than a drug trafficking offence and an application is made under section 13 (1) (b) for an order in respect of the offence, the court may—

(a) assess, in accordance with section 25, the value of the benefits derived by the person because of having committed the offence; and

(b) order the person to pay to the State a pecuniary penalty equal to the value so assessed.

E1

*Confiscation of Proceeds of Crime 1989***(2) If—**

(a) property that is the proceeds of the offence has been forfeited under this Act or a law of the Commonwealth, a Territory or another State;
or

5 (b) a forfeiture order is proposed to be made against property that is proceeds of the offence,

the pecuniary penalty to be paid shall be taken to be reduced by an amount equal to the value of the property as at the time of the making of the order under this section.

10 **(3) If—**

(a) a court makes an order under this section in relation to an offence;
and

(b) in calculating the penalty amount, the court took into account a proposed forfeiture order in respect of property; and

15 (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,

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,
20 if it considers it appropriate to do so, vary the order accordingly.

(4) An amount payable by a person to the State in accordance with an order made under this section shall, for all purposes, be taken to be a civil debt due by the person to the State.

25 (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 person to recover a debt due by the person to the State.

Assessment of pecuniary penalty**25. (1) In this section—**

30 “offence period”, in relation to an application under section 13 (1) (b) made in reliance on the conviction of a person for 2 or more serious offences, means the period commencing when the earliest of those offences was committed and ending when the latest of those offences was committed.

35 (2) For the purposes of an application for a pecuniary penalty order against a person (in this section called the “defendant”), the value of the benefits derived by the defendant because of having committed a serious offence or serious offences shall be assessed by a court having regard to information before the court concerning all or any of the following matters:

40 (a) the money, or the value of the property other than money, that came into the possession or under the control of—

(i) the defendant; or

Confiscation of Proceeds of Crime 1989

- (ii) another person at the request or by the direction of the defendant,
because of the defendant's having committed the offence or any of the offences;
- 5 (b) the value of any benefit, other than a benefit of the kind referred to in paragraph (a), that was provided for—
- (i) the defendant; or
- (ii) another person at the request or by the direction of the defendant,
10 because of the defendant's having committed the offence or any of the offences;
- (c) if the offence or any of the offences consisted of the doing of an act or thing in relation to a prohibited drug or prohibited plant as respectively defined in the Drug Misuse and Trafficking Act 1985—
- 15 (i) the market value, at the time of the offence, of similar or substantially similar substances; and
- (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar or substantially similar act or thing;
- 20 (d) the value of the defendant's property—
- (i) if the application relates to a single serious offence—before and after the commission of the offence; or
- (ii) if the application relates to 2 or more serious offences—before, during and after the offence period;
- 25 (e) the defendant's income and expenditure—
- (i) if the application relates to a single offence—before and after the commission of the offence; or
- (ii) if the application relates to 2 or more offences—before, during and after the offence period.
- 30 (3) If, at the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences, evidence is given that the value of the defendant's property—
- (a) after the defendant committed the serious offence; or
- (b) during and after the end of the offence period,
- 35 exceeded the value of the defendant's property before the defendant committed the serious offence or before the commencement of the offence period then, for the purposes of section 24, the court shall, subject to subsection (4), treat the value of the benefits derived by the defendant because of having committed the offence or offences as being not less than
- 40 the amount of the excess.

Confiscation of Proceeds of Crime 1989

(4) If, after evidence has been given at the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences that the value of the defendant's property—

5 (a) after the defendant committed the serious offence, exceeded the value before the serious offence was committed; or

(b) after the end of the offence period, exceeded the value before the commencement of the offence period,

the defendant satisfies the court that the whole or a part of the excess was due to causes unrelated to the commission of the offence or offences—

10 (c) if the defendant so satisfies the court in respect of the whole of the excess—subsection (3) does not apply to the excess; or

(d) if the defendant so satisfies the court in respect of a part of the excess—subsection (3) applies to the excess as if it were reduced by the amount of that part.

15 (5) In calculating, for the purposes of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences, the value of benefits derived by the defendant because of having committed the offence or offences, any expenses or outgoings of the defendant in connection with the commission of the offence or offences shall
20 not be deducted.

(6) 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.

25 (7) At the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences—

(a) a member of the Police Force; or

(b) a member of the Australian Federal Police; or

(c) a Customs officer,

30 who is experienced in the investigation of indictable offences under, or similar to offences under, the Drug Misuse and Trafficking Act 1985 may testify, to the best of his or her information, knowledge and belief—

(d) with respect to the amount that was the market value of a prohibited drug or prohibited plant as respectively defined in that Act at a
35 particular time or during a particular period; or

(e) with respect 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 such a prohibited drug or prohibited plant,

40 despite any rule of law or practice relating to hearsay evidence and the testimony shall, in the absence of evidence to the contrary, be evidence of the matter testified to.

Discharge of pecuniary penalty orders

26. (1) A pecuniary penalty order is discharged—

- (a) if the conviction in reliance on which the order is made is subsequently quashed; or
- 5 (b) the pecuniary penalty order is discharged by the court which hears an appeal against it under section 92 (appeals).

(2) If a pecuniary penalty order is registered under the Service and Execution of Process Act 1901 of the Commonwealth, notice of the discharge of that order must be given as prescribed by the rules of the
10 Supreme Court.

Court may lift corporate veil etc.

27. (1) In assessing the value of the benefits derived by a person because of having committed a serious offence or serious offences, a court may treat as property of the person any property that, in the opinion of the court, is
15 subject to the effective control of the person.

(2) On application by an appropriate officer, a court may, if in its opinion particular property is subject to the effective control of a person against whom the court has made a pecuniary penalty order, make an order declaring that the whole, or a specified part, of that property is available to
20 satisfy the pecuniary penalty order.

(3) If a court declares that property is available to satisfy a pecuniary penalty order—

- (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
- 25 (b) a 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.

(4) If an appropriate officer makes an application for an order under subsection (2) that property is available to satisfy a pecuniary penalty order
30 against a person—

- (a) the appropriate officer shall give written notice of the application to the person and to any other person who the appropriate officer has reason to believe may have an interest in the property; and
- 35 (b) the person and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

Division 4—Drug proceeds orders**Application of Division**

28. This Division applies to proceeds of a drug trafficking offence that
40 come into the possession of a person either before or after the commencement of this Division.

*Confiscation of Proceeds of Crime 1989***Drug proceeds orders**

29. (1) If a person (in this Division called the "defendant") who has not previously been sentenced or otherwise dealt with in respect of his or her conviction for a drug trafficking offence or offences appears before a court to be sentenced in respect of the offence or offences, the court shall—

- (a) determine whether the defendant has received any payment or other reward in connection with drug trafficking; and
- (b) if the court believes the defendant has so benefited, assess the value of any such benefit; and
- 10 (c) assess the amount that may be recovered if a drug proceeds order is made against the defendant; and
- (d) order the defendant to pay to the State a pecuniary penalty equal to the amount so assessed.

(2) An order made under subsection (1) shall be taken into account—

- 15 (a) before imposing any fine on the defendant; and
- (b) in making any forfeiture order in respect of the defendant's conviction,

but shall otherwise be left out of account in determining the appropriate sentence or other manner of dealing with the defendant.

20 (3) An amount payable by a person to the State in accordance with an order made under subsection (1) shall, for all purposes, be taken to be a civil debt due by the person to the State.

25 (4) An order made by a court under subsection (1) may be enforced as if it were an order made by the court in civil proceedings instituted by the State against the person to recover a debt due by the person to the State.

Assessment of proceeds of drug trafficking

30 (30. (1) In this section, a reference to the value of the proceeds derived by the defendant from drug trafficking is a reference to the aggregate of the values of the payments or other rewards received in connection with drug trafficking at any time.

(2) A court may, for the purposes of determining whether a person has benefited from drug trafficking and if so, assessing the value of the proceeds of the drug trafficking, make the following assumptions, except to the extent that any of the assumptions are shown to be incorrect in the defendant's case:

- (a) that any property appearing to the court—
 - (i) to have been held by the defendant at any time since his or her conviction; or
 - 40 (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,

Confiscation of Proceeds of Crime 1989

was received by the defendant, at the earliest time at which the defendant appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by the defendant;

5 (b) that any expenditure of the defendant since the beginning of that period was met out of payments received by the defendant in connection with drug trafficking carried on by the defendant;

(c) that, for the purpose of valuing any property received or assumed to have been received by the defendant at any time as such a reward,
10 the defendant received the property free of any other interests in it.

(3) For the purpose of assessing the value of the defendant's proceeds of drug trafficking in a case where a drug proceeds order has previously been made against the defendant, the court shall leave out of account any of the defendant's proceeds of drug trafficking that are shown to the court to have
15 been taken into account in determining the amount to be recovered under that order.

(4) 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 drug
20 trafficking offence or offences shall not be deducted.

Statements relating to drug trafficking**31. (1) If—**

(a) there is tendered to a court by the prosecution a statement as to any matters relevant to determining whether the defendant has benefited
25 from drug trafficking or to the assessment of the value of the defendant's proceeds of drug trafficking; and

(b) the defendant accepts to any extent any allegation in the statement, the court may, for the purposes of that determination and assessment, treat the defendant's acceptance as conclusive of the matters to which it relates.

30 (2) If—

(a) a statement is tendered under subsection (1) (a); and

(b) the court is satisfied that a copy of that statement has been served on the defendant,

the court may require the defendant to indicate to what extent the defendant
35 accepts each allegation in the statement and, so far as the defendant does not accept any such allegation, to indicate any matters the defendant proposes to rely on.

(3) If the defendant fails in any respect to comply with a requirement under subsection (2), the defendant may be treated for the purposes of this
40 section as accepting every allegation in the statement apart from—

Confiscation of Proceeds of Crime 1989

(a) any allegation in respect of which the defendant has complied with the requirement; and

(b) any allegation that the defendant has benefited from drug trafficking or that any payment or other reward was received by the defendant in connection with drug trafficking carried on by the defendant or another.

(4) If—

(a) there is tendered to a court by the defendant a statement as to any matters relevant to determining the amount that might be realised at the time the drug proceeds order is made; and

(b) the prosecution accepts to any extent any allegation in the statement, the court may, for the purpose of that determination, treat the acceptance by the prosecution as conclusive of the matters to which it relates.

(5) An allegation may be accepted or a matter indicated for the purposes of this section either—

(a) orally before the court; or

(b) in writing in accordance with the rules of court.

(6) No acceptance by the defendant under this section that any payment or other reward was received by the defendant in connection with drug trafficking carried on by the defendant or another shall be admissible in evidence in any proceedings for an offence.

(7) Without limiting the matters that may be included in a statement tendered under this section, a statement may be tendered—

(a) as to the market value, at the time of a drug trafficking offence in relation to a substance, of similar or substantially similar substances; and

(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.

(8) Evidence as to the matters mentioned in subsection (7) may be given by—

(a) a member of the Police Force; or

(b) a member of the Australian Federal Police; or

(c) a Customs officer,

who is experienced in the investigation of indictable offences under (or similar to offences under) the Drug Misuse and Trafficking Act 1985.

(9) A person referred to in subsection (8) may testify, to the best of his or her information, knowledge and belief—

(a) as to the amount that was the market value of a prohibited drug or prohibited plant as respectively defined in the Drug Misuse and Trafficking Act 1985 at a particular time or during a particular period; or

Confiscation of Proceeds of Crime 1989

(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 such a prohibited drug or prohibited plant, despite any rule of law or practice relating to hearsay evidence and the testimony shall, in the absence of evidence to the contrary, be evidence of the matter testified to.

Amount to be recovered under drug proceeds order

32. (1) The amount to be recovered under a drug proceeds order shall be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the drug proceeds order is made (whether by an acceptance under section 31 or otherwise), the court may issue a certificate giving the court's opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3).

(3) If the court is satisfied that the amount that might be realised at the time the drug proceeds order is made is less than the amount the court assesses to be the value of the defendant's proceeds of drug trafficking, the amount to be recovered in the defendant's case under the drug proceeds order shall be the amount appearing to the court to be the amount that might be so realised.

Realisable property etc.

33. (1) In this Division, "realisable property" means—

- (a) any property held by the defendant; and
- (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act; and
- (c) any property subject to the effective control of the defendant.

(2) Property is not realisable if a forfeiture order is in force in respect of the property.

(3) For the purposes of sections 31 and 32 the amount that might be realised at the time a drug proceeds order is made against the defendant is the sum of the following:

- (a) the total of the values at that time of all the realisable property held by the defendant (less the total amounts payable in pursuance of any obligation having priority, within the meaning of subsection (6), at that time);
- (b) the total of the values at that time of all gifts caught by this Act.

(4) For the purposes of this Act the value of property (other than cash) in relation to any person holding the property—

Confiscation of Proceeds of Crime 1989

(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

5 (b) in any other case, is its market value.

(5) For the purposes of this Division, the value at the time a drug proceeds order is made of a gift caught by this Act or of any payment or reward shall be taken to be whichever is the greater of the following:

10 (a) the value of the gift, payment or reward to the recipient when he or she received it adjusted to take account of subsequent changes in the value of money;

(b) the value, disregarding any forfeiture order, of—

(i) property which he or she received (not being cash); or

15 (ii) property which, in whole or in part, directly or indirectly represents in his or her hands the property received so far as it represents property received.

(6) For the purposes of subsection (3), an obligation has priority at any time if it is an obligation of the defendant to—

20 (a) pay an amount due in respect of a fine, or other order of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the drug proceeds order; or

25 (b) pay any sum to be paid in priority to unsecured debts under section 109 of the Bankruptcy Act 1966 of the Commonwealth or section 441 of the Companies (New South Wales) Code in the defendant's bankruptcy commencing on the date of the drug proceeds order or winding up under an order of a court.

(7) A gift (including a gift made before the commencement of section 29) is caught by this Act if—

30 (a) it was made by the defendant at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant; or

(b) it was made by the defendant at any time and was a gift of property—

35 (i) received by the defendant in connection with drug trafficking carried on by the defendant or another; or

(ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by the defendant in that connection.

(8) For the purposes of this Division—

Confiscation of Proceeds of Crime 1989

- 5 (a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration provided by the defendant; and
- 10 (b) in those circumstances, the preceding provisions of this section shall apply as if the defendant had made a gift of a share in the property that bears to the whole property the same proportion as the difference between the values referred to in paragraph (a) bears to the value of the consideration provided by the defendant.

Variation of drug proceeds orders

15 **34. (1)** If, on an application by the defendant in respect of a drug proceeds order, the court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order, the court shall issue a certificate to that effect, giving the court's reasons.

(2) For the purposes of subsection (1)—

- 20 (a) in the case of realisable property held by a person who has been adjudged bankrupt or whose estate has been sequestered, the court shall take into account the extent to which any property held by the person may be distributed among creditors; and
- 25 (b) the court may disregard any inadequacy in the realisable property which appears to the court to be attributable wholly or partly to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made a gift caught by this Act from any risk of realisation under this Act.

30 (3) If a certificate has been issued under subsection (1), the defendant may apply to the court for the amount to be recovered under the order to be reduced.

(4) The court shall, on an application under subsection (3), substitute for the amount to be recovered under the order whatever lesser amount the court thinks just in all the circumstances of the case.

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION

35

Division 1—Search powers**Definitions**

35. (1) In this Part—

“authorised justice” means—

- (a) a Magistrate; or

Confiscation of Proceeds of Crime 1989

(b) a justice of the peace employed in the Attorney General's Department;

"forfeiture order" includes an interstate forfeiture order;

"relevant serious offence", in relation to property that is tainted property,
5 means the serious offence by reason of the commission of which the property is tainted property;

"serious offence" includes an interstate serious offence;

"tainted property" includes property that—

(a) was used in, or in connection with, the commission of an
10 interstate serious offence; or

(b) was derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of an interstate serious offence; or

(c) was derived or realised, directly or indirectly, by any person, as a
15 result of the commission of an interstate serious offence.

(2) The question of whether a person has been charged with or convicted of an interstate serious offence shall, for the purposes of this Part, be determined in accordance with the corresponding law of the State concerned.

20 Search warrants

36. (1) A member of the Police Force may apply to an authorised justice for the issue of a search warrant under this Part if the member has reasonable grounds for believing that there is in or on any premises tainted property of a particular kind.

25 (2) The authorised justice to whom the application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force—

(a) to enter the premises; and

(b) to search the premises for tainted property of the particular kind.

30 (3) There shall be set out in a warrant issued under this Part—

(a) a statement of the purpose for which the warrant is issued, which shall include a reference to the nature of the relevant serious offence; and

(b) a description of the kind of property authorised to be seized.

35 (4) Nothing in this Part limits the operation of Part 2 of the Search Warrants Act 1985.

(5) Part 3 of the Search Warrants Act 1985 applies to a search warrant issued under this Part.

Seizure of property pursuant to warrants

37. (1) A member of the Police Force executing a search warrant issued under this Part may seize property of the kind specified in the warrant.

(2) If, in the course of searching, in accordance with a warrant issued under this Part, for property that is tainted property in relation to a particular serious offence, being property of a kind specified in the warrant, a member of the Police Force finds any property that the member believes on reasonable grounds to be—

(a) tainted property in relation to the serious offence, although not of a kind specified in the warrant; or

(b) tainted property in relation to another serious offence, and the member believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction or its use in committing, continuing or repeating the serious offence or the other serious offence, the warrant shall be taken to authorise the member to seize that property.

(3) The power conferred by this section to seize a thing includes—

(a) a power to remove the thing from the premises where it is found; and

(b) a power to guard the thing in or on those premises.

Search and arrest of persons pursuant to warrants

38. A member of the Police Force executing a search warrant issued under this Part—

(a) may search a person found in or on the premises whom the member reasonably suspects of having property of the kind specified in the warrant; and

(b) may arrest and bring before a justice of the peace any person found in or on the premises whom the member reasonably suspects of having committed an offence in respect of property seized pursuant to section 37.

Issue of warrants if charge not laid

39. A warrant may be issued under this Part in relation to property whether or not a person has been charged with the relevant serious offence, but an authorised justice shall not issue a warrant under this Part in relation to property where a person has not been charged with the relevant serious offence unless the authorised justice is satisfied—

(a) that the property is tainted property; and

(b) that it is likely that a person will be charged within 48 hours with the relevant serious offence.

Commissioner of Police responsible for seized property

40. If property is seized pursuant to a warrant issued under this Part, the Commissioner of Police shall arrange for the property to be kept until it is dealt with in accordance with this Act, and shall ensure that all
5 reasonable steps are taken to preserve the property while it is so kept.

Return of seized property**41. (1) If—**

- (a) property has been seized pursuant to a warrant issued under this Part; and
- 10 (b) at the time when the property was seized, a person has not been charged with the relevant serious offence; and
- (c) before the expiration of 7 days after the property was seized, a person has not been charged with that offence,

then, unless an application for a forfeiture order is made in respect of the
15 property, the Commissioner of Police shall arrange for the property to be returned, at the expiration of that period, to the person from whose possession it was seized.

(2) If—

- 20 (a) property has been seized pursuant to a warrant issued under this Part; and
- (b) either before the property was seized, or after it was seized but before the expiration of 7 days after it was seized, an information has been laid in respect of the relevant serious offence (or criminal proceedings have otherwise been commenced in respect of the
25 relevant serious offence),

then, unless an application for a forfeiture order is made in respect of the property, the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized—

- 30 (c) if the person is convicted of the offence—at the expiration of 6 months after the relevant time; or
- (d) if the person is discharged or acquitted of the offence—as soon as possible after the relevant time.

(3) If—

- 35 (a) property has been seized pursuant to a warrant issued under this Part; and
 - (b) a court having jurisdiction to do so refuses to make a forfeiture order in respect of the property in relation to the relevant serious offence,
- the Commissioner of Police shall arrange for the property to be returned to
40 the person from whose possession it was seized as soon as possible after the relevant time.

Confiscation of Proceeds of Crime 1989

(4) Where property has been seized pursuant to a warrant under this Part, a person from whose possession the property was seized may apply to an appropriate court for an order under subsection (5).

(5) If the court is satisfied that neither it nor any other court having jurisdiction to do so would make a forfeiture order in respect of the property, the court may make an order—

- (a) directing that the property be returned to the person from whose possession it was seized; or
 - (b) directing that the person be allowed access to the property,
- 10 on such terms and conditions (if any) as the court thinks fit.

(6) A person who applies to a court for an order under subsection (5) shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the hearing of the application.

15 (7) A reference in this section to a person from whose possession property was seized includes a reference to any person who is entitled to the property.

(8) A reference in this section to the relevant time is a reference to—

- (a) subject to paragraph (b), the date of the conviction, discharge or acquittal, or of the refusal to make the forfeiture order, as the case requires; or
- 20 (b) if there is a right of appeal—
 - (i) where the period provided for the lodging of the appeal has expired without such an appeal having been lodged—the expiration of that period; or
 - 25 (ii) where an appeal has been lodged—the time when the appeal lapses or is finally determined.

Obstruction etc. of person executing warrant

42. A person shall not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued under this Part.

30 Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

Division 2—Restraining orders**Restraining orders**

43. (1) If a person (in this section referred to as the “defendant”) has been, or is about to be, charged with a serious offence, an appropriate officer may apply to the Supreme Court, ex parte, for an order in respect of—

- (a) specified property of the defendant; or
- (b) all the property of the defendant (including property acquired after the making of the order); or

Confiscation of Proceeds of Crime 1989

- (c) specified property of the defendant and all other property of the defendant (including property acquired after the making of the order); or
- 5 (d) all the property of the defendant (including property acquired after the making of the order) other than specified property; or
- (e) specified property of a person other than the defendant.

(2) If—

- 10 (a) an application made to the Supreme Court under subsection (1) in reliance on the charging, or the proposed charging, of the defendant with a serious offence is supported by an affidavit of an authorised officer stating that the authorised officer believes that—

(i) the defendant committed the offence; and

15 (ii) the property to which the application relates is tainted property in relation to the offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, is the defendant's proceeds of drug trafficking; and

20 (iii) the property is the property of the defendant, and setting out the grounds on which the authorised officer holds those beliefs; and

- (b) the Court considers that, having regard to the matters contained in the affidavit, there are reasonable grounds for holding those beliefs,

the Court may, by order—

25 (c) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order; and

30 (d) if the Court considers that the circumstances so require—direct the Public Trustee to take control of the property, or such part of the property as is specified in the order.

(3) Where an application is made under subsection (1) in reliance on the proposed charging of a person with a serious offence, the Supreme Court shall not make a restraining order unless it is satisfied that the person is likely to be charged with the offence or a related offence within 48 hours.

35 (4) If an application under this section seeks a restraining order against specified property of a person other than the defendant, the Supreme Court shall not make a restraining order against the property unless—

(a) the application is supported by an affidavit of an authorised officer stating that—

40 (i) the authorised officer believes that the property is tainted property in relation to the serious offence with which the defendant has been, or is about to be, charged or is the defendant's proceeds of drug trafficking; or

Confiscation of Proceeds of Crime 1989

(ii) the authorised officer believes that—

(A) the property is subject to the effective control of the defendant; and

(B) the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence; and

(b) the Court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that belief.

(5) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

(6) A restraining order may be made subject to such conditions as the Supreme Court thinks fit and, without limiting the generality of this, may make provision for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:

(a) the defendant’s reasonable living expenses (including the reasonable living expenses of the defendant’s dependants (if any)) and reasonable business expenses;

(b) the defendant’s reasonable expenses in defending a criminal charge.

(7) The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to 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 order.

(8) For the purposes of an application under subsection (1), an appropriate officer may, on behalf of the State, give to the Supreme Court such undertakings with respect to the payment of damages or costs, or both, as are required by the Court.

Notice of applications and orders

44. (1) If an application has been made to the Supreme Court for a restraining order in respect of property—

(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

(b) a person to whom the Court requires notice to be given under paragraph (a) is entitled to appear and to adduce evidence at the hearing of the application.

(2) If—

(a) a restraining order has been made in respect of property of a person; and

Confiscation of Proceeds of Crime 1989

- (b) the person was not notified of the application for the making of the restraining order,

the officer who made the application shall give notice to the person, as prescribed by the regulations or by rules of court, of the making of the order.

5 **Court may make further orders**

45. (1) If the Supreme Court makes a restraining order, the Court may, at the time when it makes the restraining order or at any later time, make any ancillary orders that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the
10 following orders:

- (a) an order varying the restraining order in respect of the property to which it relates;
- (b) an order varying any condition to which the restraining order was subject;
- 15 (c) an order for the examination on oath of—
- (i) a person (in this section called the “owner”) whose property is subject to the restraining order; or
- (ii) another person,
- 20 before the Court, or an officer of the Court prescribed by the regulations or by rules of court, concerning the affairs of the owner, including the nature and location of any property of the owner;
- (d) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given by the State in connection with the making of the restraining order;
- 25 (e) if the restraining order directs the Public Trustee to take control of property—
- (i) an order regulating the manner in which the Public Trustee may exercise his or her functions under the restraining order; or
- (ii) an order determining any question relating to the property to
30 which the restraining order relates, including any question relating to—
- (A) the liabilities of the owner; or
- (B) the exercise of the functions of the Public Trustee, with respect to the property; or
- 35 (iii) an order directing—
- (A) the owner; or
- (B) if the owner is a body corporate—a director of the body corporate specified by the Court,

Confiscation of Proceeds of Crime 1989

5 to furnish to the Public Trustee, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out such particulars of the property, or dealings with the property, of the owner as the Court thinks proper.

(2) Without affecting the generality of subsection (1), where the Supreme Court makes, or has made, a restraining order, the Court may, at the time it makes the restraining order or at any later time, whether on application made to it or on its own motion, make an order authorising another court—

- 10 (a) to make an order setting aside the restraining order in respect of the whole or a part of the property; or
 (b) to make other orders in relation to the operation of the restraining order,

to the extent and in the circumstances specified in the order of the Court.

- 15 (3) An order under subsection (1) or (2) may be made on application—
 (a) by an appropriate officer; or
 (b) by the owner; or
 (c) where the restraining order directed the Public Trustee to take control of property—by the Public Trustee; or
 20 (d) with the leave of the Supreme Court—by any other person.

(4) Where a person is examined before the Supreme Court or an officer of the Supreme Court pursuant to an order under subsection (1), the person is not excused from answering a question when required to do so by the Court or officer on the ground that the answer to the question might tend
 25 to incriminate the person or make the person liable to a forfeiture or penalty.

(5) Where a person is examined before the Supreme Court or an officer of the Supreme Court pursuant to an order under subsection (1), a statement or disclosure made by the person in answer to a question put in the course
 30 of the examination, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except in—

- 35 (a) a proceeding in respect of the giving of false testimony in the course of the examination; or
 (b) a proceeding for the making of a forfeiture order, for the purpose only of facilitating the identification of the property to be subject to the forfeiture order; or
 40 (c) a proceeding for the making of a pecuniary penalty order, for the purpose only of facilitating the assessment of the amount of the pecuniary penalty; or

Confiscation of Proceeds of Crime 1989

(d) a proceeding for the making of a drug proceeds order, for the purpose only of facilitating the assessment of the amount to be recovered under the order.

(6) A person directed by an order under subsection (1) to furnish a statement to the Public Trustee is not excused from—

- (a) furnishing the statement; or
- (b) setting out particulars in the statement,

on the ground that the statement or particulars might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(7) If a person furnishes a statement to the Public Trustee under an order made under subsection (1)—

- (a) the statement; and
- (b) 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.

Order for taxation of legal expenses to be met out of restrained property

46. (1) If—

(a) the Supreme Court makes a restraining order directing the Public Trustee to take control of property; and

(b) the order makes provision for meeting, out of the property or part of it, a person's reasonable expenses in defending a criminal charge, the Public Trustee may apply to the Court for an order under subsection (3).

(2) The Public Trustee shall give to the person written notice of an application under subsection (1).

(3) On an application under subsection (1), the Supreme Court may order that the expenses be taxed as provided in the order or may dismiss the application.

(4) If the Public Trustee makes an application under subsection (1), it need not, except as ordered by the Supreme Court after the application is made, take any steps for the purpose of meeting the expenses as provided by the restraining order unless and until—

- (a) an order under subsection (3) in relation to the expenses is complied with; or
- (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.

Public Trustee to discharge confiscation order**47. (1) If—**

- (a) the Public Trustee has, under a restraining order, taken control of particular property, or of all the property, of a person; and
- 5 (b) a confiscation order or drug proceeds order has been made in reliance on the conviction of the person,

an appropriate court may, on application by the Public Trustee, make an order (in this section referred to as the “later order”) directing the Public Trustee to pay to the State, out of that property, an amount equal to the

10 penalty amount.

(2) For the purpose of enabling the Public Trustee to comply with the later order, the appropriate court may, by that order or by a subsequent order—

- (a) direct the Public Trustee to sell or otherwise dispose of such of the property that is under the control of the Public Trustee as the court specifies; and
- 15 (b) appoint an officer of the court or any other person to execute any deed or instrument in the name of the person who owns or has an estate, interest or right in the property and to do all acts and things
- 20 necessary to give validity and operation to the deed or instrument.

(3) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person who owned or had an estate, interest or right in the property.

(4) As soon as practicable after the making of the later order, the Public

25 Trustee—

(a) shall apply the money which has come into the Public Trustee’s possession or under the Public Trustee’s control because of the sale or disposition of any of the property specified in the later order, or the subsequent order, or otherwise in the course of performing the Public Trustee’s duties in respect of the property to which the restraining order relates, in payment of—

30

- (i) the fees payable in connection with; and
- (ii) the expenses incurred by the Public Trustee in or in connection with,

35 the performance of the duties imposed on the Public Trustee under the restraining order, including the expenses incurred by the Public Trustee in or in connection with the sale or disposition of any of the property to which the restraining order relates; and

(b) shall, subject to subsection (5), pay the remainder of the money referred to in paragraph (a), after the payments referred to in that

40 paragraph have been made, to the State.

Confiscation of Proceeds of Crime 1989

(5) If the money to which subsection (4) (b) applies exceeds the penalty amount, the Public Trustee shall—

(a) pay to the State, out of that money, an amount equal to the penalty amount; and

5 (b) pay the balance of that money to the person.

(6) Where the Public Trustee pays, in accordance with the later order, money to the State in respect of the liability of a person under a confiscation order or drug proceeds order, the liability of the person under the confiscation order or drug proceeds order shall, to the extent of the payment,
10 be taken to be discharged.

Charge on property subject to restraining order

48. (1) If—

(a) in reliance on the charging, or the proposed charging, of a person with a serious offence, the Supreme Court has made a restraining order in respect of particular property, or of all the property, of the person; and
15

(b) in reliance on the conviction of the person for the offence, a court subsequently makes a pecuniary penalty order or drug proceeds order against the person,

20 then, on the making of the pecuniary penalty order or drug proceeds order, there is created, by force of this section, a charge on all the property to which the restraining order applies to secure the payment to the State of the penalty amount.

(2) If a charge is created by subsection (1) on property of a person on the making of a pecuniary penalty order or drug proceeds order, the charge ceases to have effect in respect of the property—

(a) on the discharge of the pecuniary penalty order or drug proceeds order on the hearing of an appeal against the making of the pecuniary penalty order or drug proceeds order; or

30 (b) on payment by the person to the State of the penalty amount; or

(c) on the sale or other disposition of the property—

(i) pursuant to an order made by the Supreme Court under section 47; or

35 (ii) by the owner of the property with the consent of the Supreme Court; or

(iii) if the restraining order directed the Public Trustee to take control of the property—by the owner of the property with the consent of the Public Trustee; or

(d) on the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge,

40 whichever first occurs.

Confiscation of Proceeds of Crime 1989

(3) A charge created on property by subsection (1) on the making of a pecuniary penalty order or drug proceeds order—

- 5 (a) is subject to every charge or encumbrance to which the property was subject immediately before the pecuniary penalty order or drug proceeds order was made and, in the case of land under the provisions of the Real Property Act 1900, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act; and
- (b) has priority over all other encumbrances whatever; and
- 10 (c) subject to subsection (2), is not affected by any change of ownership of the property.

(4) If a charge is created by subsection (1) on property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind—

- 15 (a) the Public Trustee or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law; and
- (b) if the charge is so registered, a person who purchases or otherwise acquires the property after the registration of the charge shall, for
- 20 the purposes of subsection (2), be taken to have notice of the charge.

(5) Where a charge under this section relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

Registration of restraining orders

25 **49. (1)** If a restraining order applies to property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions shall, on application by an appropriate officer, record on the register kept under those provisions the particulars of

30 the restraining order.

(2) If the particulars of a restraining order are so recorded, a person who subsequently deals with the property shall, for the purposes of section 50, be taken to have notice of the restraining order.

35 (3) If a restraining order applies to land under the provisions of the Real Property Act 1900, a caveat may be lodged under that Act in relation to the order.

Contravention of restraining orders

40 **50. (1)** A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both.

(2) If—

- (a) a restraining order is made against property; and
- (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order; and
- 5 (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

an appropriate officer may apply to the Supreme Court for an order that the disposition or dealing be set aside.

10 **(3)** If an application is made under subsection (2) in relation to a disposition or dealing, the Court may make an order—

- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place; or
- 15 (b) setting aside the disposition or dealing as from the day of the order under this subsection 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.

Hindering or obstructing Public Trustee

20 **51. (1)** A person shall not hinder or obstruct the Public Trustee in the performance of the Public Trustee's obligations under a restraining order.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

(2) In this section—

25 "Public Trustee" includes the deputies, officers and employees on the staff and agents of the Public Trustee.

Protection of Public Trustee from liability in certain cases

30 **52. (1)** Section 45 of the Public Trustee Act 1913 applies to and in respect of the functions of the Public Trustee under this Act in the same way as it applies to and in respect of the functions of the Public Trustee under that section, but nothing in this section shall be read as limiting the operation of that section.

35 **(2)** The Public Trustee is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the State on or in respect of property of which the Public Trustee has been directed by a restraining order to take control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of the restraining order, except to the extent (if any) of the rents and profits received by the Public Trustee in respect of that property on or after the date of the restraining order.

Confiscation of Proceeds of Crime 1989

(3) If the Public Trustee, having been directed by a restraining order to take control of a business carried on by a person, carries on that business, the Public Trustee is not personally liable—

- 5 (a) for any payment in respect of long service leave for which the person was liable; or
- (b) for any payment in respect of long service leave to which a person employed by the Public Trustee in his or her capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order.

10 (4) In this section—

“Public Trustee” includes the deputies, officers and employees on the staff and agents of the Public Trustee.

Fees payable to Public Trustee

15 53. If the Public Trustee takes control of property in accordance with a restraining order, the Public Trustee is entitled to receive such fees, in respect of the exercise of his or her functions in relation to the property, as may be prescribed.

Court may revoke restraining orders

20 54. If in reliance on the charging, or the proposed charging, of a person with a serious offence, the Supreme Court has made a restraining order, the Court may, on application made to it by the person, revoke the order if the person—

- 25 (a) gives security satisfactory to the Court for the payment of any pecuniary penalty that may be imposed on the person under this Act in respect of the person’s conviction for the offence; or
- (b) gives undertakings satisfactory to the Court concerning the person’s property.

Time when restraining order ceases to be in force

30 55. (1) If, at the end of the period of 48 hours after the making of a restraining order in reliance on the proposed charging of a person with a serious offence, the person has not been charged with the offence or a related offence, the order ceases to be in force at the end of that period.

(2) If, when a restraining order was made in reliance on the charging of a person with a serious offence—

- 35 (a) the charge is withdrawn and the person is not charged with a related offence by the time of the withdrawal, the restraining order ceases to be in force when the charge is withdrawn; or
- (b) the person is acquitted of the charge and the person is not charged with a related offence by the time of the acquittal, the restraining order ceases to be in force when the acquittal occurs.
- 40

Confiscation of Proceeds of Crime 1989

(3) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the Supreme Court may—

- (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

(4) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court (other than the Supreme Court) makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the court may—

- (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order,

but the court may make an order under this subsection only if, and to the extent and in the circumstances, it is authorised to do so by an order of the Supreme Court under section 45 (2).

(5) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court refuses to make a forfeiture order in respect of the property or refuses to make a pecuniary penalty order against the person, the Supreme Court may—

- (a) if it considers it appropriate, make an order in relation to the period for which the restraining order is to remain in force; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

(6) An order under subsection (3), (4) or (5) may be made so as—

- (a) to set aside the restraining order wholly or in part; and
- (b) to take effect—
 - (i) on the making of the first-mentioned order; or
 - (ii) at a specified time; or
 - (iii) if relevant, on the payment of a penalty amount to the State; or
 - (iv) on the happening of some other specified event,

and, when the first-mentioned order takes effect, the restraining order ceases to be in force to the extent to which it is set aside.

*Confiscation of Proceeds of Crime 1989***Notice of applications under this Part**

56. (1) A person who makes an application under section 45 in relation to a restraining order shall give notice of that application, as prescribed by the regulations or by rules of court, to each other person who is entitled, by virtue of section 45 (3) (a)–(c), to make an application under section 45 in relation to the restraining order.

(2) A person who makes an application under section 54 in relation to a restraining order shall give notice of that application, as prescribed by the regulations or by rules of court.

10 **Certificate by Public Trustee**

57. If a restraining order is made directing the Public Trustee to take control of property, a certificate under the hand of the Public Trustee or an officer referred to in section 50 of the Public Trustee Act 1913 and sealed with the Public Trustee's seal—

15 (a) certifying that the restraining order has been made and is in force; and

(b) stating the terms of the restraining order,

shall 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 Public Trustee's right to act under the restraining order, without production of any other proof.

PART 4—INFORMATION GATHERING POWERS**Division 1—Production orders****Applications for production orders**

25 58. (1) If—

(a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that that or some other person has possession or control of a property-tracking document or property-tracking documents in relation to the offence; or

30 (b) an authorised officer has reasonable grounds for suspecting that—

(i) a person has committed a serious offence; and

(ii) a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence,

35 the authorised officer may—

(c) lay before the Supreme Court an information on oath setting out those grounds; and

(d) apply to the Court for a production order against the person suspected of having possession or control of the document or documents.

Confiscation of Proceeds of Crime 1989

(2) If an authorised officer applying for a production order in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that—

- 5 (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person,

10 the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence.

(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

15

Making of production orders

59. (1) If an application is made under section 58 for a production order against a person, the Supreme Court may make an order that the person—

- 20 (a) produce to an authorised officer any property-tracking documents that are in the person’s possession or control; or
- (b) make available to the authorised officer, for inspection, any property-tracking documents that are in the person’s possession or control.

(2) An order under subsection (1) (a) shall not be made in respect of bankers’ books.

25 (3) The Supreme Court shall not make an order under this section unless—

- (a) the informant or some other person has given the Court, either orally or by affidavit, such information (if any) as the Court requires concerning the grounds on which the order is sought; and
- 30 (b) the Court is satisfied that there are reasonable grounds for making the order.

(4) In this section—

“bankers’ books” means any accounting records used in the ordinary business of banking, and includes ledgers, day-books, cash-books and account books.

35

Form of production orders

60. (1) A production order that a person produce a document or documents to an authorised officer shall specify the time when and the place where the document is or documents are to be produced.

Confiscation of Proceeds of Crime 1989

(2) A production order that a person make a document available to an authorised officer for inspection shall specify the time or times when the document is or documents are to be made available.

Powers under production orders

5 **61. (1)** If a document is produced to an authorised officer under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- 10 (c) make copies of the document;
- (d) retain the document if, and for so long as, retention of the document is reasonably necessary for the purposes of this Act.

(2) If a document is made available to an authorised officer for inspection under a production order, the authorised officer may do any one or more
15 of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- (c) make copies of the document.

(3) If an authorised officer retains a document under a production order,
20 the authorised officer shall, on request by the person to whom the order was addressed—

- (a) give the person a copy of the document certified by the authorised officer in writing to be a true copy of the document; and
- 25 (b) unless the person has been given a copy of the document under paragraph (a)—permit the person to do any one or more of the following:
 - (i) inspect the document;
 - (ii) take extracts from the document;
 - (iii) make copies of the document.

30 Effect of production orders on proceedings etc.

62. (1) A person is not excused from producing or making available a document when required to do so by a production order on the ground that—

- 35 (a) the production or making available of the document might tend to incriminate the person or make the person liable to a penalty; or
- (b) the production or making available of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.

Confiscation of Proceeds of Crime 1989

(2) If a person produces or makes available a document under a production order—

(a) the production or making available of the document; or

5 (b) any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document, is not admissible against the person in any criminal proceedings except proceedings for an offence against section 64.

10 (3) For the purposes of subsection (2), proceedings on an application for a restraining order, a forfeiture order, a pecuniary penalty order or a drug proceeds order are not criminal proceedings.

Variation of production orders

15 63. Where the Supreme Court makes a production order requiring a person to produce a document to an authorised officer, the person may apply to the Court for a variation of the order and, if the Court is satisfied that the document is essential to the business activities of the person, the Court may vary the production order so that it requires the person to make the document available to an authorised officer for inspection.

Failure to comply with production orders

20 64. Where a person is required by a production order to produce a document to an authorised officer or to make a document available to an authorised officer for inspection, the person is guilty of an offence if the person—

(a) contravenes the order without reasonable excuse; or

25 (b) in purported compliance with the order produces or makes available a document known to the person to be false or misleading in a material particular without—

30 (i) indicating to the authorised officer to whom the document is produced or made available that the document is false or misleading and the respect in which the document is false or misleading; and

(ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information.

35 Maximum penalty: If the offender is a natural person—100 penalty units or imprisonment for 2 years, or both, or if the offender is a body corporate—500 penalty units.

Division 2—Search powers**Powers to search for, and seize, documents relevant to locating etc. property**

65. An authorised officer may—

40 (a) enter premises; and

Confiscation of Proceeds of Crime 1989

- (b) search the premises for any property-tracking document in relation to a serious offence; and
- (c) seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a property-tracking document in relation to a serious offence,
- 5 but only if the entry, search or seizure is made—
- (d) with the consent of the occupier of the premises; or
- (e) under a warrant issued under section 67.

Application for search warrant for location etc. of property10 **66. (1) If—**

- (a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence; or
- 15 (b) an authorised officer has reasonable grounds for suspecting that—
- (i) a person has committed a serious offence; and
- (ii) there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence,
- 20 the authorised officer may—
- (c) lay before the Supreme Court an information on oath setting out those grounds; and
- (d) apply to the Court for a search warrant under section 67 in respect of the premises.

25 **(2) If an authorised officer applying for a warrant under section 67 in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that—**

- 30 (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person,

35 the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

40 **(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).**

Search warrant for location etc. of property

5 67. (1) If an application is made under section 66 for a search warrant in respect of premises, the Supreme Court may issue a search warrant authorising an authorised officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable—

- (a) to enter in or on the premises; and
- (b) to search the premises for documents of the kind referred to in section 66 (1); and
- 10 (c) to seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a document of that kind.

(2) The Supreme Court shall not issue a search warrant under this section unless the Court is satisfied that—

- 15 (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document; or
- (b) a production order has been given in respect of the document and has not been complied with; or
- 20 (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with; or
- (d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without notice to
25 any person.

(3) The Supreme Court shall not issue a search warrant under this section unless—

- 30 (a) the informant or some other person has given the Court, either orally or by affidavit, any further information that the Court requires concerning the grounds on which the search warrant is sought; and
- (b) the Court is satisfied that there are reasonable grounds for issuing the search warrant.

(4) There shall be stated in a search warrant issued under this section—

- 35 (a) the purpose for which the warrant is issued, including a reference to the nature of the serious offence that has been or is believed to have been committed; and
- (b) whether entry is authorised to be made at any time of the day or night or only during specified hours of the day or night; and
- (c) a description of the kind of documents authorised to be seized; and
- 40 (d) a date, not being later than one month after the day of issue of the warrant, on which the warrant ceases to have effect.

Confiscation of Proceeds of Crime 1989

(5) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, an authorised officer finds—

- 5 (a) any document that the authorised officer believes, on reasonable grounds, to be—
- (i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant; or
 - (ii) a property-tracking document in relation to another serious offence; or
- 10 (b) any thing that the authorised officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence, and the authorised officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be taken to authorise the
- 15 authorised officer to seize that document or thing.

Division 3—Monitoring orders**Monitoring orders**

68. (1) On application made by an authorised officer the Supreme Court may make an order directing a financial institution to give information of

20 the kind referred to in subsection (2) to a specified prescribed authority.

(2) A monitoring order shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

(3) A monitoring order shall apply in relation to transactions conducted

25 during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).

(4) A reference in this section to a transaction conducted through an account includes a reference to—

- 30 (a) the making of a fixed term deposit; and
- (b) in relation to a fixed term deposit—the transfer of the amount deposited, or any part of it, at the end of the term.

Making of monitoring orders

69. (1) The Supreme Court shall not make a monitoring order unless

35 satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought—

- (a) has committed, or is about to commit, a serious drug offence; or
- (b) was involved in the commission, or is about to be involved in the commission, of such an offence; or

Confiscation of Proceeds of Crime 1989

(c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

(2) A monitoring order shall specify—

- 5 (a) the name or names in which the account is believed to be held; and
 (b) the kind of information that the institution is required to give; and
 (c) the prescribed authority to which the information is to be given; and
 (d) the manner in which the information is to be given.

10 (3) If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made shall be disregarded for the purposes of the application of section 73 (money laundering) in relation to the institution.

(4) A financial institution that has been given notice of a monitoring order shall not knowingly—

- 15 (a) contravene the order; or
 (b) provide false or misleading information in purported compliance with the order.

Maximum penalty: 1,000 penalty units.

Existence and operation of monitoring order not to be disclosed

20 70. (1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person (including the person to whom the order relates) except—

- 25 (a) if the order specifies the Commissioner of Police as the prescribed authority to which information is to be given—the Commissioner of Police or a member of the Police Force; or
 (b) if the order specifies some other prescribed authority as the authority to which information is to be given—a member, or member of staff, of the authority; or
 30 (c) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or
 (d) a barrister or solicitor, for the purpose of obtaining legal advice or representation in relation to the order.

Maximum penalty: 1,000 penalty units.

35 (2) A person of a kind referred to in subsection (1) (a), (b), (c) or (d) to whom the existence or operation of a monitoring order has been disclosed (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) shall not—

- 40 (a) while he or she is such a person—disclose the existence or operation of the order, except to another person of a kind referred to in subsection (1) (a), (b), (c) or (d) for the purpose of—
 (i) if the disclosure is made by a person referred to in subsection (1) (a) or (b)—the performance of that person's duties; or

Confiscation of Proceeds of Crime 1989

- (ii) if the disclosure is made by an officer or agent of the institution—ensuring that the order is complied with or obtaining legal advice or representation in relation to the order; or
- 5 (iii) if the disclosure is made by a barrister or solicitor—giving legal advice, or making representations, in relation to the order; or
- (b) when he or she is no longer such a person—make a record of, or disclose, the existence or the operation of the order in any circumstances.
- 10 Maximum penalty: 10 penalty units or imprisonment for 2 years, or both.
- (3) Nothing in subsection (2) prevents the disclosure by a person of a kind referred to in subsection (1) (a) or (b) of the existence or operation of a monitoring order—
- (a) for the purposes of, or in connection with, legal proceedings; or
- 15 (b) in the course of proceedings before a court.
- (4) A person of a kind referred to in subsection (1) (a) or (b) shall not be required to disclose to any court the existence or operation of a monitoring order.
- (5) A reference in this section to disclosing the existence or operation of
- 20 a monitoring order to a person includes a reference to disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

Communication of information by financial institutions to prescribed authorities

- 25 **71. (1)** If a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that—
- (a) the information may be relevant to an investigation of, or the prosecution of a person for, a serious offence; or
- 30 (b) the information would otherwise be of assistance in the enforcement of this Act or the regulations,
- the institution may give the information to a prescribed authority.
- (2) An action, suit or proceeding does not lie against—
- (a) a financial institution; or
- 35 (b) an officer, employee or agent of the institution acting in the course of the person's employment or agency,
- in relation to any action taken by that institution or person pursuant to subsection (1).

Protection for financial institution where information given

72. If a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to section 71 (1) as soon as practicable after forming the belief referred to in that subsection, the institution or person shall be taken, for the purposes of section 73 (money laundering) not to have been in possession of that information at any time.

PART 5—OFFENCES**Division 1—Money laundering****Money laundering**

10 73. (1) In this section—

“transaction” includes the receiving or making of a gift.

(2) A person shall not engage in money laundering.

Maximum penalty:

15 (a) if the offender is a natural person—2,000 penalty units or imprisonment for 20 years, or both; or

(b) if the offender is a body corporate—6,000 penalty units.

(3) A person shall be taken to engage in money laundering if, and only if—

20 (a) the person engages, directly or indirectly, in a transaction that involves money, or other property, knowing that the money or property is proceeds of a serious offence; or

(b) the person receives, possesses, conceals, disposes of or brings into New South Wales any money, or other property, knowing that the money or property is proceeds of a serious offence.

25 (4) A person shall not be convicted of an offence under this section unless the prosecution proves beyond reasonable doubt that, at the time the person—

(a) engaged in a transaction involving money or property; or

30 (b) received, possessed, concealed, disposed of or brought into New South Wales money or property,

the person knew the money or property was proceeds of unlawful activity.

(5) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant engaged in money laundering to assist the enforcement of a law of the Commonwealth, a State or a Territory.

Division 2—Miscellaneous**Proceedings for offences**

74. (1) Except as otherwise provided by this section, proceedings for an offence against this Act shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(2) A Local Court may not deal with an offence under section 50 (contravention of restraining orders) unless it is satisfied that the value of the property concerned does not exceed \$10,000.

(3) Proceedings for an offence under section 50 shall, if the value of the property concerned is more than \$10,000, be dealt with before the Supreme Court in its summary jurisdiction.

(4) Proceedings for an offence under section 69 (making of monitoring orders) or 73 (money laundering) shall be dealt with on indictment.

Proof of certain matters not required

75. In any legal proceedings, a certificate signed by the Secretary of the Attorney General's Department certifying that a specified person was or was not an authorised officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts so certified.

Conduct by directors, servants or agents

76. (1) If it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or taken by subsection (2) to have been engaged in, by the body corporate, it is sufficient to show that a director, servant or agent of the body corporate (being a director, servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate—

(a) by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

shall be taken, for the purposes of this Act, to have been engaged in by the body corporate.

(3) If it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct taken by subsection (4) to have been engaged in by the person, it is sufficient to show that a servant or agent of the person (being a servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

Confiscation of Proceeds of Crime 1989

(4) Conduct engaged in on behalf of a person other than a body corporate—

(a) by a servant or agent of the person within the scope of his or her actual or apparent authority; or

5 (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

10 shall be taken, for the purposes of this Act, to have been engaged in by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that knowledge, intention, opinion,
15 belief or purpose.

(6) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, a State or a Territory.

PART 6—INTERSTATE ORDERS**20 Registration of interstate orders**

77. (1) If an interstate forfeiture order or interstate restraining order expressly applies to property in New South Wales, the order may be registered under this Act.

25 (2) An order shall be regarded as registered under this Act when a copy of the order (being a copy sealed by the court that made the order) is registered in accordance with the rules of the Supreme Court.

30 (3) Any amendments made to an interstate forfeiture order or interstate restraining order (before or after registration) may be registered in the same way, and any such amendments do not, for the purposes of this Act, have effect until they are registered.

(4) An application for registration may be made by the person on whose application the order or amendments were made, by an appropriate officer or by a person affected by the order or amendments.

Effect of registration of interstate forfeiture orders

35 78. (1) A registered interstate forfeiture order may be enforced in New South Wales as if it were a forfeiture order made under section 18 (1) at the time of registration.

40 (2) This Act (other than section 92 (appeals)) applies to a registered interstate forfeiture order as it applies to a forfeiture order made under section 18 (1).

Confiscation of Proceeds of Crime 1989

(3) A registered interstate forfeiture order does not operate so as to vest property (or any estate, interest or right in property) otherwise than in the Crown in right of New South Wales.

5 (4) A registered interstate forfeiture order does not operate so as to vest property in the Crown in right of New South Wales if the order has already operated to vest the property in the Crown in some other capacity or in some other person or entity.

Effect of registration of interstate restraining orders

10 79. (1) A registered interstate restraining order may be enforced in New South Wales as if it were a restraining order made under section 43 (2) at the time of registration.

(2) This Act (other than sections 43, 44 (1), 48, 54, 55 and 56 (2)) applies to a registered interstate restraining order as it applies to a restraining order made under section 43 (2).

15 **Revocation or variation of registered orders**

80. A court of the State may not revoke or vary a registered interstate forfeiture order or registered interstate restraining order or limit the manner in which such an order applies.

Duration of registration

20 81. If—

(a) an interstate forfeiture order or interstate restraining order is registered under this Act; and

(b) the order ceases to be in force in the State in which it was made, the registered order continues to be enforceable in New South Wales (as if
25 the order were still in force in the State in which it was made) until the registration is cancelled under section 82.

Cancellation of registration

82. (1) The registration of an interstate forfeiture order or interstate restraining order may be cancelled by the Supreme Court if—

30 (a) the registration was improperly obtained; or

(b) the order ceases to be in force in the State in which it was made.

(2) An application for cancellation of the registration of an order may be made by the person on whose application the order was made, by an appropriate officer or by a person affected by the order.

35 **Charge on property subject to registered interstate restraining orders**

83. (1) If—

(a) an interstate restraining order is made against property of a person in connection with an interstate serious offence committed or alleged to be committed by the person; and

Confiscation of Proceeds of Crime 1989

- (b) an interstate pecuniary penalty order is made against the person in connection with that offence; and
- (c) the interstate restraining order is registered under this Act; and
- (d) the interstate pecuniary penalty order is registered in a court of New South Wales under the Service and Execution of Process Act 1901 of the Commonwealth,

5

then, on the registration referred to in paragraph (c) or the registration referred to in paragraph (d) (whichever last occurs), a charge is created on the property to secure payment of the amount due under the interstate pecuniary penalty order.

10

(2) Where a charge is created by subsection (1) on property of a person to secure payment of the amount due under an interstate pecuniary penalty order, the charge ceases to have effect in respect of the property—

15

(a) on the interstate pecuniary penalty order ceasing to have effect (because the conviction, if any, in reliance on which the order was made has been quashed or for any other reason); or

(b) on the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order; or

20

(c) on payment of the amount due under the interstate pecuniary penalty order; or

(d) on the person becoming bankrupt; or

(e) on the sale or other disposition of the property—

25

(i) under an order made by a court under the corresponding law of the State in which the interstate pecuniary penalty order was made; or

(ii) by the owner of the property with the consent of the court that made the interstate pecuniary penalty order; or

30

(iii) where the interstate restraining order directed a person to take control of the property—by the owner of the property with the consent of that person; or

(f) on the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge,

whichever first occurs.

(3) A charge created on property by subsection (1)—

35

(a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and

(b) has priority over all other encumbrances; and

40

(c) subject to subsection (2), is not affected by any change of ownership of the property.

Confiscation of Proceeds of Crime 1989

(4) Where a charge is created by subsection (1) on property of a particular kind and the provisions of any law of New South Wales provide for the registration of title to, or charges over, property of that kind—

- 5 (a) the Public Trustee or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law; and
- (b) if the charge is so registered, a person who purchases or otherwise acquires an interest in the property after the registration of the charge shall, for the purposes of subsection (2) (f), be taken to have
10 notice of the charge at the time of the purchase or acquisition.

(5) If a charge under this section relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

Powers of Public Trustee in relation to interstate restraining orders

15 **84.** If—

- (a) an interstate restraining order is registered under this Act; and
- (b) the restraining order directs an official of the State in which it was made to take control of property,

20 the Public Trustee may, in accordance with an agreement between the Public Trustee and the official, exercise the same powers in relation to the property as the official would have been able to exercise if the property were located in that State.

Interim registration of facsimile copies

85. (1) A facsimile copy of—

- 25 (a) a sealed copy of an interstate forfeiture order or interstate restraining order; or
- (b) a sealed copy of any amendments made to such an order,

30 shall be regarded for the purposes of this Act as the same as the sealed copy, if the facsimile copy is itself certified in accordance with the rules of the Supreme Court.

(2) Registration effected by means of a facsimile copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a facsimile copy has been registered by that time.

35 (3) Registration of the sealed copy before the end of the period referred to in subsection (2) has effect as from the day of registration of the facsimile copy.

(4) Although registration of a facsimile copy of an interstate forfeiture order ceases to have effect in the circumstances mentioned in subsection (2),
40 any forfeiture already made in relation to the order is not affected.

PART 7—MISCELLANEOUS**Restriction on making applications**

86. If an application for a confiscation order has been made to an appropriate court, no further application in relation to the same matter may be made to another court, except with the leave of the Supreme Court or in such circumstances as may be prescribed.

Provisions relating to courts

87. (1) If an application is made for a confiscation order to a court before which a person was convicted of a serious offence—

- 10 (a) the application may be dealt with by that court; and
(b) any function may be exercised by that court in relation to the confiscation order,

whether or not that court is constituted in the same way as it was constituted when the person was convicted of the offence.

15 (2) A Local Court may not, in relation to the conviction of a person for a particular offence, make a forfeiture order in respect of property unless it is satisfied that the value of the property (together with the value of any other property the subject of any other undischarged forfeiture order made by the Local Court in relation to the same conviction of that person) does
20 not exceed \$10,000.

(3) A Local Court may not make a pecuniary penalty order against a person unless it is satisfied that the amount payable under the order (together with the amount payable under any other undischarged pecuniary penalty order made against the person by the Local Court) would not exceed
25 \$10,000.

(4) A Local Court may not make a forfeiture order in respect of land, except in such circumstances as may be prescribed.

(5) For the purposes of this section, the value of property shall be as determined by the Local Court.

30 Commissioner for the Independent Commission Against Corruption

88. The Commissioner for the Independent Commission Against Corruption may exercise any functions under this Act only after consultation with the Director of Public Prosecutions, and shall consider whether any such function should instead be exercised by the Director.

35 Interstate operation of forfeiture or restraining orders

89. (1) For the purpose of enabling a forfeiture order or restraining order to be registered under the corresponding law of another State, the order may be expressed to apply to property in that State.

Confiscation of Proceeds of Crime 1989

(2) For the purpose of enabling a forfeiture order or restraining order to be registered under a law in force in a Territory, the order may be expressed to apply to property in the Territory.

(3) A forfeiture order or restraining order does not apply to property in
5 a corresponding State or in a Territory, except in so far as—

- (a) a corresponding law of that State provides that the order has effect in that State following registration under that law; or
- (b) a law in force in that Territory provides that the order has effect in the Territory following registration under that law; or
- 10 (c) the property was movable property and was located elsewhere than in a corresponding State or in a Territory when the order took effect.

(4) In this section—

“corresponding State” means a State for which a declaration of a corresponding law is in force under this Act.

15 **Costs incurred on variation of forfeiture or restraining orders on application by third parties**

90. (1) If—

- 20 (a) the Supreme Court makes an order under this Act varying a forfeiture order or restraining order that is registered under a corresponding law of another State; and
- (b) the variation is made on the application of a third party and affects the interests of the third party in relation to property in that other State,

25 the Supreme Court may order that the actual costs incurred by the third party in applying for and obtaining the variation be paid to the third party.

(2) The Supreme Court may instead order that part only of those costs be paid, if it is satisfied that special circumstances warrant such an order.

(3) The costs shall be paid by a person or authority specified by the Supreme Court.

30 (4) The Supreme Court may direct in what manner the costs are to be ascertained.

(5) Nothing in this section limits the powers of the Supreme Court to award costs under any other law.

(6) In this section—

35 “third party”, in relation to a forfeiture order or restraining order, means a person who is not the subject of the order;

“vary” includes limit the manner in which an order applies.

Stamp duty

91. No stamp duty is payable under the Stamp Duties Act 1920 in respect of—

- 5 (a) the transfer of any property under section 20 (effects of forfeiture orders on third parties); or
- (b) the return of any property under section 21 (discharge of forfeiture orders).

Appeals

10 92. (1) Without affecting any other right of appeal, a forfeiture order in relation to any property is appellable by any person who has an interest in the property—

- (a) in the case of a person convicted of an offence in reliance on which the forfeiture order was made—as if the order were, or were part of, a sentence imposed in respect of the offence; or
- 15 (b) in any other case—as if the person had been convicted of a serious offence and the order were, or were part of, a sentence imposed in respect of the offence.

(2) Without affecting any other right of appeal, a pecuniary penalty order or drug proceeds order is appellable as if it were, or were part of, a sentence imposed in respect of the offence in relation to which the order was made.

20

(3) On appeal, a forfeiture order, pecuniary penalty order or drug proceeds order may be confirmed, discharged or varied.

(4) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against a refusal by a court to make a forfeiture order, pecuniary penalty order or restraining order, and the Court of Criminal Appeal may in its discretion make such order as could have been made in the first instance.

25

(5) A forfeiture order, pecuniary penalty order or restraining order made by the Court of Criminal Appeal under subsection (4) shall be taken to have been made by the Supreme Court under this Act, but is not on that account subject to further appeal.

30

Operation of other laws not affected

93. Nothing in this Act limits or restricts the operation of any other law providing for the forfeiture of property.

Notices

35 94. (1) The regulations may make provision for or with respect to the giving of notices under this Act.

(2) Rules of court may make provision for or with respect to the giving of notices under this Act.

Confiscation of Proceeds of Crime 1989

(3) If a notice is required to be given under this Act and the regulations or rules of court make provision for or with respect to the giving of the notice, the notice shall be given in accordance with the relevant provisions.

(4) The regulations shall prevail to the extent of any inconsistency with the rules of court.

(5) A reference in this section to rules of court includes a reference to regulations made under the Justices Act 1902.

Regulations

95. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation declaring a kind of order to be within a definition may do so by reference to the interstate serious offences involved.

(3) A regulation declaring a law to be a law that corresponds to this Act may provide that the declaration applies only for prescribed provisions of this Act.

Repeal of Crimes (Confiscation of Profits) Act 1985 No. 181 and Crimes (Confiscation of Profits) Regulation 1986

96. (1) The Crimes (Confiscation of Profits) Act 1985 is repealed.

(2) The Crimes (Confiscation of Profits) Regulation 1986 is repealed.

Savings, transitional and other provisions

97. Schedule 1 has effect.

**SCHEDULE 1—SAVINGS, TRANSITIONAL AND
OTHER PROVISIONS**

(Sec. 97)

Definitions

1. In this Schedule—

“the 1985 Act” means the Crimes (Confiscation of Profits) Act 1985.

Regulations

2. (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to this Act or a later date.

Confiscation of Proceeds of Crime 1989

SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS—
continued

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—

- 5 (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication; or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Effect of repeal on acts done or decisions made

- 10 3. If this Act repeals and re-enacts (with or without modification) a provision of the 1985 Act, any act done or decision made under the provision repealed has effect after the repeal as if it had been done or made under the provision so re-enacted.
-

