



New South Wales

Drug Trafficking (Civil Proceedings) Amendment Bill 1997

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Drug Trafficking (Civil Proceedings) Act 1990* as follows:

- (a) to extend the operation of the Act so that it applies to certain serious criminal offences punishable by 5 years imprisonment or more, in addition to the serious drug offences that it currently applies to,
 - (b) to remove certain jurisdictional barriers so as to allow recovery of property located outside the State,
 - (c) to expand the operation of proceeds assessment orders so that the proceeds of all criminal activities can be recovered once an order is made against a person on the basis of the person having engaged in serious criminal activity,
 - (d) to introduce some pre-conditions to the release of funds restrained under the Act for payment of legal expenses,
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- (e) to create an offence of attempting to deal with property in contravention of a restraining order,
- (f) to provide that legal professional privilege will not be grounds for refusing to produce a document or answer a question on a court-ordered examination of a person following the making of a restraining order against the person,
- (g) to allow the Supreme Court to direct the owner of property to provide information about the property and dealings with it,
- (h) to allow the Public Trustee to recover costs from the Confiscated Proceeds Account when restrained property is not ultimately forfeited,
- (i) to allow the examination of the spouse or de facto spouse of a person against whom a restraining order has been made,
- (j) to prevent the passing of property subject to a restraining order to a surviving joint owner on the death of a person subject to the order,
- (k) to make it clear that a restraining order does not apply to property acquired after the order is made unless the order specifically provides otherwise,
- (l) to make further provision with respect to production orders (relating to preventing disclosure of an order, legal professional privilege and time for compliance),
- (m) to provide for the status of analysts' certificates given under the Act,
- (n) to provide for the admissibility of transcripts of examination,
- (o) to make it clear that the Crime Commission has a reasonable opportunity to conduct examinations arising from restraining orders before being required to give notice of grounds for the contesting of an application to exclude property from an assets forfeiture order,
- (p) to make further provision concerning search warrants (with respect to legal professional privilege for seized property tracking documents, the persons who can apply for a search warrant, and the disposal of property seized under a search warrant),
- (q) to deal with other miscellaneous matters including providing for the procedure for applying for a monitoring order, the mode of service of a monitoring order and the procedure for applying for a search warrant.

Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the *Drug Trafficking (Civil Proceedings) Act 1990*.

Clause 4 is a formal provision that gives effect to the Schedule of amendments to the *Supreme Court Rules 1970*.

Schedule 1 Amendment of Drug Trafficking (Civil Proceedings) Act 1990

Extension of Act to serious crime related activities

The Act provides for the forfeiture of property of a person who is suspected of having engaged in certain serious drug crime and other serious crimes committed in connection with a serious drug crime. **Schedule 1 [12]** and the consequential amendments referred to below will extend the range of offences to which the Act will apply to include a range of serious offences (whether or not committed in connection with a drug crime) that are punishable by 5 years imprisonment or more. The offences include theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery and homicide. The Act will now apply to "serious crime related activity" rather than "drug-related activity" as at present.

Schedule 1 [2] changes the name of the Act to the Criminal Assets Recovery Act to reflect the broader application of the Act.

Schedule 1 [1], [3]–[8], [10], [11], [13], [15], [16], [32], [33], [38], [39], [49] and [50] make consequential amendments.

Removal of jurisdictional boundaries

Schedule 1 [14] extends the jurisdictional coverage of the Act to include property situated outside the State, so as to enable action under the Act to be taken to recover property located outside the State.

Proceeds assessment orders

Currently a proceeds assessment order can be obtained to require a person suspected of having engaged in serious drug crime (now to be extended to other serious crimes) to pay the amount assessed by the Court as the proceeds of the suspected crime to the State.

Schedule 1 [37] and [41]–[48] extend the operation of a proceeds assessment order to the proceeds of all illegal activities engaged in by the person against whom the order is made. Further amendments are made so that where the Court has assessed the person's assets and expenditure over a six year period, it will be presumed that expenditure and increases in assets are derived from proceeds except where it can be shown they are not sourced from illegal activities.

The Bill will also clarify provisions that deal with the calculation of proceeds to make it clear that the proceeds of a "controlled buy" from an undercover investigator include the full amount of money received regardless of whether some or all of it was passed on to another party.

Schedule 1 [40] authorises the making of orders ancillary to proceeds assessment orders.

Legal expenses

The Act currently enables the Court to release restrained property funds for reasonable legal expenses to defend an application for a forfeiture order or to defend criminal charges.

Schedule 1 [19] and [30] introduce some pre-conditions to the release of funds for legal expenses, the effect of which is as follows:

- unrestrained property must be used first for legal expenses,
- property that is shown to be illegally acquired cannot be released for legal expenses,
- a person seeking release must first lodge a Statement of Affairs disclosing all assets and liabilities,
- the person must have taken all reasonable steps to bring their property within the jurisdiction of the Court.

The Bill will also enable regulations to be made prescribing maximum allowable costs for legal services provided. Until a regulation is made the Court will continue to determine what are reasonable expenses.

Restraining orders

Schedule 1 [17] and [27]–[29] will extend the prohibition on dealing with property that is the subject of a restraining order to include attempting to deal with it.

Schedule 1 [23] provides that legal professional privilege will not be a valid reason for refusing to answer a question or produce a document on a court-ordered examination following the issue of a restraining order.

Schedule 1 [21], [22] and [26] allow the Court, following the issue of a restraining order over property, to direct that the owner of property provide the Commission or Public Trustee with a statement setting out details of the property and dealings with the property concerned.

Schedule 1 [24] and [25] clarify certain exceptions to protections based on privilege in the context of an examination of a person who is the subject of a restraining order.

Schedule 1 [31] and [51] authorise the Public Trustee to recover its costs from the Confiscated Proceeds Account where it takes control of property subject to a restraining order and the property is not ultimately forfeited.

Schedule 1 [20] authorises the Court to order an examination of a person's spouse or de facto spouse in relation to their affairs if a restraining order has been made against the person.

Schedule 1 [69] provides that for the purposes of a restraining order the death of the owner of an interest in restrained property that is a joint interest does not cause the interest to transfer to a surviving joint owner. Instead the restraining order operates as though the person had not died.

Schedule 1 [18] makes it clear that a restraining order does not apply to interests in property acquired after the making of the order unless the Court specifically directs that it does.

Production orders

Production orders are orders made by the Court, on application of the Commission, that require a person or organisation to produce for examination documents or records that enable tracing of the ownership of property.

Schedule 1 [55] enables the Commission to accept a statutory declaration in lieu of attendance before the Commission by a person who does not have a document that they are required to produce under a production order.

Schedule 1 [56] makes it an offence for a person in receipt of a production order to disclose, subject to a range of exceptions, the fact that the production order has been made.

Schedule 1 [52] and [53] amend the provision that deals with the making of production orders to provide that the order may specify that documents may be inspected between specified times rather than at a specified time.

Schedule 1 [54] provides that documents must be produced pursuant to a production order regardless of any claim for legal professional privilege.

Monitoring orders

The Act enables the Supreme Court to make monitoring orders that require a financial institution to provide information to the Commission about transactions conducted with the institution by a nominated person over a specified period of time (maximum 3 months). The orders enable the Commission to track and monitor a person's financial transactions over the period concerned.

Schedule 1 [64] provides how an application to the Supreme Court for an order is to be made.

Evidentiary matters

Schedule 1 [67] (proposed section 54 (3)) provides for an analyst's certificate issued in relation to drugs to have the same status in proceedings under the Act as it has in proceedings under the *Drug Misuse and Trafficking Act 1985*.

Schedule 1 [67] (proposed section 54 (4)) provides that when proceedings for an order under the Act relate to an offence, a transcript of criminal proceedings for the offence can be considered by the Court in determining the application.

Schedule 1 [67] (proposed section 54 (5)) provides that in proceedings for an order under the Act the transcript of any examination of a person under section 12 of the Act will be admissible as evidence.

Assets forfeiture orders

Schedule 1 [34] authorises the Supreme Court to make an order ancillary to an assets forfeiture order when it makes the primary order or at any time later.

Schedule 1 [35] creates an offence of knowingly dealing with property that is subject to an assets forfeiture order.

Schedule 1 [36] makes it clear that where a person whose property is subject to an application for a forfeiture order applies for an exclusion order and the Commission proposes to contest the exclusion application, the Commission is to have a reasonable time to conduct examinations prior to giving notice of grounds.

Search warrants

The Act currently enables a full-time member of the Commission or a member of the Police Force to apply to an authorised justice for a search warrant. The same classes of persons can apply to the Supreme Court for a warrant to search for property-tracking documents.

Schedule 1 [63] provides that legal professional privilege does not prevent seizure of property-tracking documents pursuant to a warrant enabling seizure of property-tracking documents, but documents seized over objection that they are privileged will not be admissible in criminal proceedings against the person able to claim the privilege.

Schedule 1 [57]–[59], [61] and [62] provide for applications for a search warrant to be made by an authorised officer of the Commission.

Schedule 1 [60] provides that where property has been seized pursuant to a search warrant, a court can direct that it be disposed of by providing it to the Commission if it is to be used in evidence in any proceedings under the Act.

Miscellaneous

Schedule 1 [9], [65], [66] and [68] make minor consequential or ancillary amendments.

Schedule 1 [70] and [71] contain savings and transitional provisions.

Schedule 2 Amendment of Supreme Court Rules 1970

Schedule 2 makes a consequential amendment to the *Supreme Court Rules 1970*.



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New South Wales

Drug Trafficking (Civil Proceedings) Amendment Act 1997

No , 1997

A Bill for

An Act to amend the *Drug Trafficking (Civil Proceedings) Act 1990* to extend the offences to which the Act applies, to extend the operation of proceeds assessment orders, to make further provision with respect to legal expenses, the enforcement of restraining orders, compliance with production orders, monitoring orders and assets forfeiture orders, evidentiary matters, and search warrants; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*.

2 Commencement

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

**3 Amendment of Drug Trafficking (Civil Proceedings) Act 1990
 No 23**

The *Drug Trafficking (Civil Proceedings) Act 1990* is amended as set out in Schedule 1. 10

4 Amendment of Supreme Court Rules 1970

The *Supreme Court Rules 1970* are amended as set out in Schedule 2. The amendment made by this section does not prevent the later amendment or repeal of the provision amended. 15

Schedule 1 Amendment of Drug Trafficking (Civil Proceedings) Act 1990

(Section 3)

[1] Long title

Omit “drug-related activities” wherever occurring.
Insert instead “serious crime related activities”.

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[2] Section 1 Short title

Omit the section. Insert instead:

1 Name of Act

This Act is the *Criminal Assets Recovery Act 1990*.

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[3] Section 3 Principal objects

Omit “drug-related activities” wherever occurring.
Insert instead “serious crime related activities”.

[4] Section 4 Definitions

Omit the definitions of *drug-derived property* and *drug-related activity* in section 4 (1).

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Insert instead in alphabetical order:

serious crime derived property means an interest in property that is serious crime derived property as provided by section 9.

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serious crime related activity means serious crime related activity referred to in section 6.

[5] Section 4 (1)

Omit “drug-related activity” in the definition of *illegal activity*.
Insert instead “serious crime related activity”.

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Schedule 1 Amendment of Drug Trafficking (Civil Proceedings) Act 1990

[6] Section 4 (1)

Omit "Confiscated Drug Proceeds" in the definition of *Proceeds Account*.

Insert instead "Confiscated Proceeds".

[7] Section 4 (1)

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Omit "drug-related activity" wherever occurring in paragraph (a) of the definition of *property-tracking document*.

Insert instead "serious crime related activity".

[8] Section 4 (1)

Omit "drug-derived property" wherever occurring in paragraph (b) of the definition of *property-tracking document*. 10

Insert instead "serious crime derived property".

[9] Section 4 (7)

Insert after section 4 (6):

- (7) Notes included in this Act are explanatory notes and do not form part of this Act. 15

[10] Section 6 Meaning of "serious crime related activity"

Omit "drug-related activity" and "serious drug offence" in section 6 (1).

Insert instead "serious crime related activity" and "serious criminal offence" respectively. 20

[11] Section 6 (2)

Omit "serious drug offence".

Insert instead "serious criminal offence".

[12] Section 6 (2) (d) and (e)

Omit the paragraphs. Insert instead:

- (d) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide, or
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[13] Section 6 (2) (f)

Omit “, (d) or (e)”. Insert instead “or (d)”.

[14] Section 7 Meaning of “interest in property”

Insert after section 7 (2):

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- (2A) A reference in this Act to an interest of a person in property includes a reference to an interest of a person in property situated outside New South Wales (including outside Australia).

[15] Sections 9, 10, 38, 39, 48

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Omit “drug-derived property” wherever occurring.
Insert instead “serious crime derived property”.

[16] Sections 9, 10, 24, 38, 39, 48, 51, 56, 61, 62, 66

Omit “drug-related activity” and “drug-related activities” wherever occurring.
Insert instead “serious crime related activity” and “serious crime related activities” respectively.

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[17] Section 10 Restraining orders

Omit section 10 (1). Insert instead:

- (1) A restraining order is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order. 5

[18] Section 10 (2A)

Insert after section 10 (2): 10

- (2A) A restraining order does not apply to an interest acquired after the order is made unless the order expressly provides that it does so apply.

[19] Section 10 (5) (b)

Insert "subject to section 16A," before "the reasonable". 15

[20] Section 12 Supreme Court may make further orders

Insert after section 12 (1) (b):

- (b1) an order for the examination on oath of a person who is the spouse or a de facto partner (as defined in the *De Facto Relationships Act 1984*) of the owner of an interest in property that is subject to the restraining order, before the Court or before an officer of the Court prescribed by the rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that owner has an interest, 20
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[21] Section 12 (1) (c1)

Insert after section 12 (1) (c):

- (c1) an order directing a person who is or was the owner of an interest in property that is subject to the restraining order or, if the owner is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission or Public Trustee, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the owner has or had an interest as the Court thinks proper, 5 10

[22] Section 12 (1) (d) (iii)

Omit the subparagraph. 15

[23] Section 13 Privilege

Insert at the end of section 13 (1) (b):

, or

- (c) the answer or production would disclose information that is the subject of legal professional privilege. 20

[24] Section 13 (2) (a)

Omit the paragraph. Insert instead:

- (a) proceedings in respect of the false or misleading nature of a statement or disclosure made under this Act, or 25

[25] Section 13 (2) (b) and (c)

Omit the paragraphs. Insert instead:

- (b) proceedings on an application under this Act, or
- (c) proceedings ancillary to an application under this Act, or

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[26] Section 13 (3) and (4)

Insert “or the Commission” after “Public Trustee” wherever occurring.

[27] Section 15 Recording of restraining order

Insert “or attempts to deal with” after “deals with” in section 15 (2). 10

[28] Section 16 Contravention of restraining order

Omit “by disposing of, or otherwise dealing with” from section 16 (1).

Insert instead “by disposing of or attempting to dispose of, or by otherwise dealing with or attempting to otherwise deal with”. 15

[29] Section 16 (4)

Omit the subsection. Insert instead:

- (4) It is not a contravention of a restraining order to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property under the authority of this Act. 20

[30] Sections 16A, 16B

Insert after section 16:

16A Restrictions on payment of legal expenses from restrained property

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|-----|--|----|
| (1) | The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person: | 5 |
| (a) | no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person's unrestrained property, | 10 |
| (b) | no provision is to be made in relation to any particular interest in property if the Supreme Court is satisfied that the interest is illegally acquired property, | 15 |
| (c) | no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court, | |
| (d) | no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court, | 20 |
| (e) | any such provision must specify the particular interest in property out of which the expenses concerned may be met. | 25 |
| (2) | A person's <i>unrestrained property</i> is any interest in property of the person: | |
| (a) | that is not subject to a restraining order under this Act, or | 30 |
| (b) | that the Supreme Court is satisfied is not within the Court's jurisdiction (whether or not it is subject to a restraining order under this Act), or | |

- (c) that the Supreme Court is satisfied would not be available to satisfy a proceeds assessment order against the person (assuming such an order were to be made against the person).

16B Maximum legal expenses that can be met from restrained property 5

- (1) Despite provision in a restraining order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any maximum allowable cost for the service that is fixed under this section. 10
- (2) For the purposes of this Act, the regulations may fix maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge. 15
- (3) Regulations under this section can fix costs by applying, adopting or incorporating, with or without modification, the provisions of any Act or any instrument made under an Act (for example, regulations under the *Legal Profession Act 1987*) or of any other publication, whether of the same or a different kind, as in force on a particular day or as in force for the time being. 20
- (4) This section operates only to limit the amount of the legal expenses that are authorised to be met out of property that is subject to a restraining order and does not limit or otherwise affect any entitlement of a legal practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum. 25

[31] Section 19 Fees payable to Public Trustee 30

Insert "If the interest is not disposed of, the Public Trustee is entitled to be paid those fees from the Proceeds Account." at the end of the section.

[32] Section 22 Making of assets forfeiture order

Omit section 22 (2) and (3). Insert instead:

- (2) The Supreme Court must make an assets forfeiture order if the Court finds it to be more probable than not that the person whose suspected serious crime related activity, or serious crime related activities, formed the basis of the restraining order was, at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in:
 - (a) a serious crime related activity involving an indictable quantity, or
 - (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.
- (3) A finding of the Court for the purposes of subsection (2) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:
 - (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
 - (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.

[33] Section 22 (6)–(8)

Omit “drug-related activity” wherever occurring.
Insert instead “serious crime related activity”.

[34] Section 23 Effect of assets forfeiture order

Omit subsection (4). Insert instead:

- (4) The Supreme Court may, when it makes an assets forfeiture order or at any later time, make any ancillary orders that the Court considers appropriate. For example, the Court may make ancillary orders for and with respect to facilitating the transfer to the Crown of interests in property forfeited to the Crown under such an order. 5

[35] Section 23A

Insert after section 23: 10

23A Dealing with forfeited property prohibited

- (1) A person must not dispose of or otherwise deal with an interest in property that is the subject of an assets forfeiture order.
- (2) A person who contravenes subsection (1) is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the interest concerned (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both, unless it is proved that the person had no notice that the interest was subject to the order concerned and no reason to suspect that it was. 15
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- (3) This section does not prevent a person from being dealt with for a contempt of the Supreme Court, but a person may not, for the action, be punished both for a contempt of the Court and under this section. 25
- (4) If an interest in property is disposed of or otherwise dealt with in contravention of this section and the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith, the disposition or dealing is void. 30
- (5) It is not a contravention of this section if an interest in property is disposed of or dealt with under the authority of this Act.

[36] Section 25 Exclusion of property from restraining order and assets forfeiture order

Insert at the end of section 25 (7):

In such a case, the Commission is not required to give the applicant notice of those grounds, and the application must not be heard, until the Commission has had a reasonable opportunity to conduct an examination of the applicant under section 12.

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[37] Section 27 Making of proceeds assessment order

Omit section 27 (1)–(3). Insert instead:

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(1) The Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived from an illegal activity, or illegal activities, of the person that took place not more than 6 years before the making of the application for the order, whether or not any such activity is an activity on which the application is based as required by subsection (2).

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(2) The Supreme Court must make a proceeds assessment order if the Court finds it to be more probable than not that the person against whom the order is sought was, at any time not more than 6 years before the making of the application for the order, engaged in:

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(a) a serious crime related activity involving an indictable quantity, or

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(b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.

(3) A finding of the Court for the purposes of subsection (2) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:

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- (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
- (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity. 5

[38] Section 27 (5)

Omit "drug-related activity". 10
Insert instead "serious crime related activity".

[39] Section 27 (6)

Omit "drug-related activity" and "drug-related activities".
Insert instead "serious crime related activity" and "serious crime related activities" respectively. 15

[40] Section 27 (12)

Insert after section 27 (11):
(12) The Supreme Court may, when it makes a proceeds assessment order at any later time, make any ancillary orders that the Court considers appropriate. 20

[41] Section 28 Assessment of proceeds of serious crime related activity

Omit "a drug-related activity, or drug-related activities" from section 28 (1).
Insert instead "an illegal activity, or illegal activities". 25

[42] Section 28 (1) (a), (b) and (e)

Omit "drug-related activity" wherever occurring.
Insert instead "illegal activity".

[43] Section 28 (1) (c)

Omit the paragraph. Insert instead:

- (c) the market value, at the time of the illegal activity or of each illegal activity, of a plant or drug similar, or substantially similar, to any involved in the illegal activity or each illegal activity, and the amount that was, or the range of amounts that were, ordinarily paid for an act similar, or substantially similar, to the illegal activity or each illegal activity,

[44] Section 28 (1) (d)

Omit “the drug-related activity or each drug related activity”.
Insert instead “the illegal activity or each illegal activity”.

[45] Section 28 (2)–(4)

Omit section 28 (2)–(4). Insert instead:

- (2) If evidence is given at the hearing of an application for a proceeds assessment order that the value of the defendant’s property after an illegal activity or illegal activities exceeded the value of the defendant’s property before the activity or activities, the Supreme Court is to treat the excess as proceeds derived by the defendant from the activity or activities, except to the extent (if any) that the Supreme Court is satisfied the excess was due to causes unrelated to an illegal activity or activities.
- (3) If evidence is given at the hearing of an application for a proceeds assessment order of the amount of the defendant’s expenditure during the period of 6 years before the making of the application for the order, the Supreme Court is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities, except to the extent (if any) that the Supreme Court is satisfied the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.

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- (3A) The Supreme Court is not to take expenditure into account under subsection (3) to the extent that the Court is satisfied that it resulted in the acquisition of property the value of which is taken into account under subsection (2). 5
- (4) In making an assessment as provided by this section, none of the following amounts are to be subtracted:
- (a) expenses or outgoings incurred by the defendant in relation to the illegal activity or activities, 10
- Note.** For example, in the case of an illegal activity involving the sale of drugs, in determining the value of the proceeds derived by the defendant from the sale of drugs there is to be no reduction on account of any expenditure by the defendant in acquiring the drugs.
- (b) the value of any proceeds derived as agent for or otherwise on behalf of some other person (whether or not any of the proceeds are received by that other person). 15
- Note.** For example, where the defendant is paid money for drugs in the course of a "controlled buy" but was acting merely as an agent or messenger for some other person (and gives the money to the other person), in calculating the proceeds derived by the defendant the amount given to the other person is not to be subtracted and the full amount is considered to have been derived by the defendant. 20
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[46] Section 28 (5) (a)

Omit "control". Insert instead "effective control".

[47] Section 28 (5) (b)

Omit "a drug-related activity".
Insert instead "an illegal activity". 30

[48] Section 28 (6)

Omit "drug-related activities".
Insert instead "illegal activities involving plants or drugs".

[49] Part 3, Division 3, heading

Omit the heading. Insert instead:

Division 3 Confiscated Proceeds Account

[50] Section 32 Establishment and use of Proceeds Account

Omit “Confiscated Drug Proceeds Account”.

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Insert instead “Confiscated Proceeds Account”.

[51] Section 32 (3) (a1)

Insert after section 32 (3) (a):

(a1) to the Public Trustee—such amounts from time to time as the Treasurer is satisfied the Public Trustee is entitled to be paid under section 19, and

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[52] Section 33 Making of production order

Omit “at a specified time and place” from section 33 (2) (a).

Insert instead “at a specified time, or between specified times, and at a specified place”.

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[53] Section 33 (2) (b)

Insert “, or between specified times,” after “times”.

[54] Section 35 Effect of production order on proceedings etc

Insert at the end of section 35 (1) (b):

, or

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(c) the production or making available of the document would disclose information that is the subject of legal professional privilege.

[55] Section 37 Failure to comply with production order

Insert at the end of section 37:

- (2) It is sufficient compliance with a requirement of a production order that a person produce a document or make a document available if: 5
 - (a) the person has provided the Commission with a statement verified by statutory declaration to the effect that the person does not have possession and does not have control of the document, and
 - (b) the Commission has notified the person in writing that the Commission is prepared to accept provision of the statement as compliance with the order. 10

[56] Section 37A

Insert after section 37: 15

37A Prohibited disclosures about production orders

- (1) A person against whom a production order is made must not disclose:
 - (a) the existence or nature of the order, or
 - (b) any information to a person from which the person could reasonably be expected to infer the existence or nature of the order. 20

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.
- (2) Subsection (1) does not apply to a production order unless it (or a notice accompanying it) specifies that information about the order must not be disclosed. 25
- (3) A person does not contravene this section if:
 - (a) the disclosure is made to an employee, agent or other person in order to obtain a property-tracking document to comply with the order and the employee, agent or other person is directed not to inform the person to whom the document relates about the matter, or 30

- (b) the disclosure is made to obtain legal advice or representation in relation to the order, or
- (c) the disclosure is made for the purposes of, or in the course of, legal proceedings.

[57] Section 38 Search warrants 5

Omit "A full-time member of the Commission or a member of the Police Force" from section 38 (1).

Insert instead "An authorised officer".

[58] Section 38 (1)

Omit "the member". Insert instead "the authorised officer". 10

[59] Section 38 (2)

Omit the subsection. Insert instead:

- (2) The authorised justice to whom the application for a search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer (who, if a member of the Police Force, need not be named in the warrant) to enter the premises and there search for any or all of the property or evidence referred to in subsection (1). 15

[60] Section 42A 20

Insert after section 42:

42A Disposal of seized property to Commission

- (1) Anything seized pursuant to section 7 of the *Search Warrants Act 1985* may under subsection (3) of that section be directed by a court or Magistrate to be disposed of by being delivered into the custody or control of the Commission if the court or Magistrate is satisfied that the thing seized is proposed to be used in evidence in any proceedings under this Act. 25

Drug Trafficking (Civil Proceedings) Amendment Act 1997

Schedule 1 Amendment of Drug Trafficking (Civil Proceedings) Act 1990

- (2) Anything so delivered to the custody or control of the Commission is taken to have been seized (when it was delivered) pursuant to a search warrant under this Division.

[61] Section 44 Application for search warrant for location of property-tracking document 5

Omit "a full-time member of the Commission, or a member of the Police Force,".

Insert instead "an authorised officer".

[62] Section 44 10

Omit "the member". Insert instead "the authorised officer".

[63] Section 47A

Insert after section 47:

47A Legal professional privilege

- (1) The fact that a document contains or may contain information that is the subject of legal professional privilege does not prevent seizure of the document under the authority of a search warrant issued under this Division. 15
- (2) If a person objects to the seizure of a document under the authority of such a search warrant on the ground that the document contains or may contain information that is the subject of legal professional privilege, any information, document or thing obtained as a direct or indirect consequence of the seizure of the document is not admissible in any criminal proceedings against the person entitled to claim that privilege. 20
25

[64] Section 48 Monitoring orders

Omit section 48 (1). Insert instead:

- (1) If an authorised officer has reasonable grounds for suspecting that a financial institution may obtain information about transactions conducted by a particular person with the institution, the officer may:
 - (a) lay before the Supreme Court an information on oath setting out those grounds, and
 - (b) apply to the Court for the making of an order directing the financial institution to give to the Commission, or to an authorised officer nominated by the Commission, information obtained by the institution about transactions conducted by the person with the institution.

[65] Section 48 (5) 15

Insert after section 48 (4):

- (5) If the Supreme Court makes a monitoring order, the Commission must give notice of the order to the financial institution to which the order applies.

[66] Part 5, heading 20

Omit the heading. Insert instead:

Part 5 General

[67] Section 54 Proof of certain matters

Insert after section 54 (2):

- (3) In any proceedings under this Act, a certificate referred to in section 43 of the *Drug Misuse and Trafficking Act 1985* is prima facie evidence of the same matters of which it is prima facie evidence in legal proceedings under that Act, without proof of the signature, employment or appointment of the person appearing to have signed the certificate.

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- (4) In any proceedings on an application for an order under this Act, the court may, in determining the application, have regard to the transcript of any proceedings against a person for an offence to which the application relates and to the evidence given in any such proceedings. 5
- (5) In any proceedings on an application for an order under this Act, the transcript of any examination under section 12 is evidence of the answers given by a person to a question put to the person in the course of the examination. 10

[68] Part 6, heading

Omit the heading.

[69] Section 58A

Insert after section 58:

58A Effect of death of joint owner of restrained property 15

- (1) If a person has an interest in property as joint owner of the property, the person's death after a restraining order is made in respect of the interest does not (while the order is in force) operate to vest the interest in the surviving joint owner or owners and the restraining order continues to apply to the interest as if the person had not died. 20
- (2) An assets forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died. 25
- (3) If a restraining order ceases to apply to an interest in property without an assets forfeiture order being made in respect of that interest, subsection (1) is taken not to have applied to the interest.

[70] Section 66A

Insert after section 66:

66A Savings and transitional provisions

Schedule 1 has effect.

[71] Schedule 1

5

Insert after section 70:

Schedule 1 Savings and transitional provisions

(Section 66A)

Part 1 General

1 Savings and transitional regulations

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- (1) The regulations may include provisions of a savings or transitional nature consequent on the enactment of this Act and the following Acts:

Drug Trafficking (Civil Proceedings) Amendment Act 1997

15

- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or from a later date.

- (3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

20

- (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

25

- (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.

30

**Part 2 Drug Trafficking (Civil Proceedings)
Amendment Act 1997**

2 Meaning of "1997 amending Act"

In this Part:

1997 amending Act means the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*. 5

**3 Application of amendments to earlier serious crime
related activities**

An amendment made by the 1997 amending Act extends to a serious crime related activity that took place before the commencement of the amendment. 10

4 Application of amendments to existing orders

- (1) An amendment made by the 1997 amending Act that relates to restraining orders, assets forfeiture orders or production orders, or orders ancillary to any of those orders, extends to orders, and applications for orders, made before the commencement of the amendment, except as otherwise provided by this Part. 15
- (2) Section 16A does not extend to a restraining order made before the commencement of the section unless the restraining order does not, as at that commencement, make provision under section 10 (5) (b). 20
- (3) Section 16B extends to a restraining order made before the commencement of the section but not so as to apply in respect of a legal service provided before the commencement of the section. 25
- (4) The amendment made by the 1997 amending Act to section 16 (1) does not apply to a contravention of a restraining order that took place before the commencement of the amendment. 30
- (5) The amendment made to section 25 (7) by the 1997 amending Act extends to an application for an exclusion order made but not heard before the commencement of the amendment.
- (6) Section 58A does not apply in the case of a joint owner of property who died before the commencement of that section. 35

5 Application of amendments to search warrants

- (1) An amendment made by the 1997 amending Act with respect to search warrants does not apply to a search warrant issued before the commencement of the amendment, except as provided by this clause. 5
- (2) Section 42A extends to anything seized before the commencement of the amendment.

6 Application of amendments to pending proceeds assessment order applications

- (1) This clause applies to an application for a proceeds assessment order that was made under section 27 before the commencement of the amendments made to that section by the 1997 amending Act and that had not commenced to be heard before the commencement of those amendments. 10
15
- (2) An application to which this clause applies is taken to have been made under section 27 as amended by the 1997 amending Act, and both that section and section 28 apply as amended by the 1997 amending Act to the application. 20

7 Evidentiary matters

- (1) Section 54 (3) extends to a certificate referred to in that subsection issued before the commencement of the subsection.
- (2) Section 54 (4) extends to a transcript of any proceedings that took place before the commencement of the subsection. 25
- (3) Section 54 (5) extends to a transcript of any examination that took place before the commencement of the subsection. 30

8 Change of name of Proceeds Account

The change of name by the 1997 amending Act of the Account established under section 32 does not affect the identity or continuity of that Account.

Drug Trafficking (Civil Proceedings) Amendment Act 1997

Schedule 2 Amendment of Supreme Court Rules 1970

**Schedule 2 Amendment of Supreme Court Rules
1970**

(Section 4)

Part 77, Division 25A, Rule 84C

Insert “, 44 or 48 (1)” after “section 33 (1)”.

5



New South Wales

Drug Trafficking (Civil Proceedings) Amendment Act 1997 No 68

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New South Wales

Drug Trafficking (Civil Proceedings) Amendment Act 1997 No 68

Act No 68, 1997

An Act to amend the *Drug Trafficking (Civil Proceedings) Act 1990* to extend the offences to which the Act applies, to extend the operation of proceeds assessment orders, to make further provision with respect to legal expenses, the enforcement of restraining orders, compliance with production orders, monitoring orders and assets forfeiture orders, evidentiary matters, and search warrants; and for other purposes. [Assented to 10 July 1997]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*.

2 Commencement

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

**3 Amendment of Drug Trafficking (Civil Proceedings) Act 1990
No 23**

The *Drug Trafficking (Civil Proceedings) Act 1990* is amended as set out in Schedule 1.

4 Amendment of Supreme Court Rules 1970

The *Supreme Court Rules 1970* are amended as set out in Schedule 2. The amendment made by this section does not prevent the later amendment or repeal of the provision amended.

Schedule 1 Amendment of Drug Trafficking (Civil Proceedings) Act 1990

(Section 3)

[1] Long title

Omit “drug-related activities” wherever occurring.
Insert instead “serious crime related activities”.

[2] Section 1 Short title

Omit the section. Insert instead:

1 Name of Act

This Act is the *Criminal Assets Recovery Act 1990*.

[3] Section 3 Principal objects

Omit “drug-related activities” wherever occurring.
Insert instead “serious crime related activities”.

[4] Section 4 Definitions

Omit the definitions of *drug-derived property* and *drug-related activity* in section 4 (1).

Insert instead in alphabetical order:

serious crime derived property means an interest in property that is serious crime derived property as provided by section 9.

serious crime related activity means serious crime related activity referred to in section 6.

[5] Section 4 (1)

Omit “drug-related activity” in the definition of *illegal activity*.
Insert instead “serious crime related activity”.

[6] Section 4 (1)

Omit "Confiscated Drug Proceeds" in the definition of *Proceeds Account*.

Insert instead "Confiscated Proceeds".

[7] Section 4 (1)

Omit "drug-related activity" wherever occurring in paragraph (a) of the definition of *property-tracking document*.

Insert instead "serious crime related activity".

[8] Section 4 (1)

Omit "drug-derived property" wherever occurring in paragraph (b) of the definition of *property-tracking document*.

Insert instead "serious crime derived property".

[9] Section 4 (7)

Insert after section 4 (6):

- (7) Notes included in this Act are explanatory notes and do not form part of this Act.

[10] Section 6 Meaning of "serious crime related activity"

Omit "drug-related activity" and "serious drug offence" in section 6 (1).

Insert instead "serious crime related activity" and "serious criminal offence" respectively.

[11] Section 6 (2)

Omit "serious drug offence".

Insert instead "serious criminal offence".

[12] Section 6 (2) (d) and (e)

Omit the paragraphs. Insert instead:

- (d) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide, or

[13] Section 6 (2) (f)

Omit “, (d) or (e)”. Insert instead “or (d)”.

[14] Section 7 Meaning of “interest in property”

Insert after section 7 (2):

- (2A) A reference in this Act to an interest of a person in property includes a reference to an interest of a person in property situated outside New South Wales (including outside Australia).

[15] Sections 9, 10, 38, 39, 48

Omit “drug-derived property” wherever occurring.
Insert instead “serious crime derived property”.

[16] Sections 9, 10, 24, 38, 39, 48, 51, 56, 61, 62, 66

Omit “drug-related activity” and “drug-related activities” wherever occurring.
Insert instead “serious crime related activity” and “serious crime related activities” respectively.

[17] Section 10 Restraining orders

Omit section 10 (1). Insert instead:

- (1) A restraining order is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order.

[18] Section 10 (2A)

Insert after section 10 (2):

- (2A) A restraining order does not apply to an interest acquired after the order is made unless the order expressly provides that it does so apply.

[19] Section 10 (5) (b)

Insert “subject to section 16A,” before “the reasonable”.

[20] Section 12 Supreme Court may make further orders

Insert after section 12 (1) (b):

- (b1) an order for the examination on oath of a person who is the spouse or a de facto partner (as defined in the *De Facto Relationships Act 1984*) of the owner of an interest in property that is subject to the restraining order, before the Court or before an officer of the Court prescribed by the rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that owner has an interest,

[21] Section 12 (1) (c1)

Insert after section 12 (1) (c):

- (c1) an order directing a person who is or was the owner of an interest in property that is subject to the restraining order or, if the owner is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission or Public Trustee, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the owner has or had an interest as the Court thinks proper,

[22] Section 12 (1) (d) (iii)

Omit the subparagraph.

[23] Section 13 Privilege

Insert at the end of section 13 (1) (b):

, or

- (c) the answer or production would disclose information that is the subject of legal professional privilege.

[24] Section 13 (2) (a)

Omit the paragraph. Insert instead:

- (a) proceedings in respect of the false or misleading nature of a statement or disclosure made under this Act, or

[25] Section 13 (2) (b) and (c)

Omit the paragraphs. Insert instead:

- (b) proceedings on an application under this Act, or
- (c) proceedings ancillary to an application under this Act, or

[26] Section 13 (3) and (4)

Insert “or the Commission” after “Public Trustee” wherever occurring.

[27] Section 15 Recording of restraining order

Insert “or attempts to deal with” after “deals with” in section 15 (2).

[28] Section 16 Contravention of restraining order

Omit “by disposing of, or otherwise dealing with” from section 16 (1).

Insert instead “by disposing of or attempting to dispose of, or by otherwise dealing with or attempting to otherwise deal with”.

[29] Section 16 (4)

Omit the subsection. Insert instead:

- (4) It is not a contravention of a restraining order to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property under the authority of this Act.

[30] Sections 16A, 16B

Insert after section 16:

16A Restrictions on payment of legal expenses from restrained property

- (1) The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person:
 - (a) no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person's unrestrained property,
 - (b) no provision is to be made in relation to any particular interest in property if the Supreme Court is satisfied that the interest is illegally acquired property,
 - (c) no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court,
 - (d) no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court,
 - (e) any such provision must specify the particular interest in property out of which the expenses concerned may be met.
- (2) A person's *unrestrained property* is any interest in property of the person:
 - (a) that is not subject to a restraining order under this Act, or
 - (b) that the Supreme Court is satisfied is not within the Court's jurisdiction (whether or not it is subject to a restraining order under this Act), or

- (c) that the Supreme Court is satisfied would not be available to satisfy a proceeds assessment order against the person (assuming such an order were to be made against the person).

16B Maximum legal expenses that can be met from restrained property

- (1) Despite provision in a restraining order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any maximum allowable cost for the service that is fixed under this section.
- (2) For the purposes of this Act, the regulations may fix maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge.
- (3) Regulations under this section can fix costs by applying, adopting or incorporating, with or without modification, the provisions of any Act or any instrument made under an Act (for example, regulations under the *Legal Profession Act 1987*) or of any other publication, whether of the same or a different kind, as in force on a particular day or as in force for the time being.
- (4) This section operates only to limit the amount of the legal expenses that are authorised to be met out of property that is subject to a restraining order and does not limit or otherwise affect any entitlement of a legal practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum.

[31] Section 19 Fees payable to Public Trustee

Insert "If the interest is not disposed of, the Public Trustee is entitled to be paid those fees from the Proceeds Account." at the end of the section.

[32] Section 22 Making of assets forfeiture order

Omit section 22 (2) and (3). Insert instead:

- (2) The Supreme Court must make an assets forfeiture order if the Court finds it to be more probable than not that the person whose suspected serious crime related activity, or serious crime related activities, formed the basis of the restraining order was, at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in:
 - (a) a serious crime related activity involving an indictable quantity, or
 - (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.
- (3) A finding of the Court for the purposes of subsection (2) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:
 - (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
 - (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.

[33] Section 22 (6)–(8)

Omit “drug-related activity” wherever occurring.

Insert instead “serious crime related activity”.

[34] Section 23 Effect of assets forfeiture order

Omit subsection (4). Insert instead:

- (4) The Supreme Court may, when it makes an assets forfeiture order or at any later time, make any ancillary orders that the Court considers appropriate. For example, the Court may make ancillary orders for and with respect to facilitating the transfer to the Crown of interests in property forfeited to the Crown under such an order.

[35] Section 23A

Insert after section 23:

23A Dealing with forfeited property prohibited

- (1) A person must not dispose of or otherwise deal with an interest in property that is the subject of an assets forfeiture order.
- (2) A person who contravenes subsection (1) is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the interest concerned (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both, unless it is proved that the person had no notice that the interest was subject to the order concerned and no reason to suspect that it was.
- (3) This section does not prevent a person from being dealt with for a contempt of the Supreme Court, but a person may not, for the action, be punished both for a contempt of the Court and under this section.
- (4) If an interest in property is disposed of or otherwise dealt with in contravention of this section and the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith, the disposition or dealing is void.
- (5) It is not a contravention of this section if an interest in property is disposed of or dealt with under the authority of this Act.

[36] Section 25 Exclusion of property from restraining order and assets forfeiture order

Insert at the end of section 25 (7):

In such a case, the Commission is not required to give the applicant notice of those grounds, and the application must not be heard, until the Commission has had a reasonable opportunity to conduct an examination of the applicant under section 12.

[37] Section 27 Making of proceeds assessment order

Omit section 27 (1)–(3). Insert instead:

- (1) The Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived from an illegal activity, or illegal activities, of the person that took place not more than 6 years before the making of the application for the order, whether or not any such activity is an activity on which the application is based as required by subsection (2).
- (2) The Supreme Court must make a proceeds assessment order if the Court finds it to be more probable than not that the person against whom the order is sought was, at any time not more than 6 years before the making of the application for the order, engaged in:
 - (a) a serious crime related activity involving an indictable quantity, or
 - (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.
- (3) A finding of the Court for the purposes of subsection (2) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:

- (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
- (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.

[38] Section 27 (5)

Omit “drug-related activity”.

Insert instead “serious crime related activity”.

[39] Section 27 (6)

Omit “drug-related activity” and “drug-related activities”.

Insert instead “serious crime related activity” and “serious crime related activities” respectively.

[40] Section 27 (12)

Insert after section 27 (11):

- (12) The Supreme Court may, when it makes a proceeds assessment order at any later time, make any ancillary orders that the Court considers appropriate.

[41] Section 28 Assessment of proceeds of serious crime related activity

Omit “a drug-related activity, or drug-related activities” from section 28 (1).

Insert instead “an illegal activity, or illegal activities”.

[42] Section 28 (1) (a), (b) and (e)

Omit “drug-related activity” wherever occurring.

Insert instead “illegal activity”.

[43] Section 28 (1) (c)

Omit the paragraph. Insert instead:

- (c) the market value, at the time of the illegal activity or of each illegal activity, of a plant or drug similar, or substantially similar, to any involved in the illegal activity or each illegal activity, and the amount that was, or the range of amounts that were, ordinarily paid for an act similar, or substantially similar, to the illegal activity or each illegal activity,

[44] Section 28 (1) (d)

Omit “the drug-related activity or each drug related activity”.
Insert instead “the illegal activity or each illegal activity”.

[45] Section 28 (2)–(4)

Omit section 28 (2)–(4). Insert instead:

- (2) If evidence is given at the hearing of an application for a proceeds assessment order that the value of the defendant’s property after an illegal activity or illegal activities exceeded the value of the defendant’s property before the activity or activities, the Supreme Court is to treat the excess as proceeds derived by the defendant from the activity or activities, except to the extent (if any) that the Supreme Court is satisfied the excess was due to causes unrelated to an illegal activity or activities.
- (3) If evidence is given at the hearing of an application for a proceeds assessment order of the amount of the defendant’s expenditure during the period of 6 years before the making of the application for the order, the Supreme Court is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities, except to the extent (if any) that the Supreme Court is satisfied the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.

(3A) The Supreme Court is not to take expenditure into account under subsection (3) to the extent that the Court is satisfied that it resulted in the acquisition of property the value of which is taken into account under subsection (2).

(4) In making an assessment as provided by this section, none of the following amounts are to be subtracted:

(a) expenses or outgoings incurred by the defendant in relation to the illegal activity or activities,

Note. For example, in the case of an illegal activity involving the sale of drugs, in determining the value of the proceeds derived by the defendant from the sale of drugs there is to be no reduction on account of any expenditure by the defendant in acquiring the drugs.

(b) the value of any proceeds derived as agent for or otherwise on behalf of some other person (whether or not any of the proceeds are received by that other person).

Note. For example, where the defendant is paid money for drugs in the course of a "controlled buy" but was acting merely as an agent or messenger for some other person (and gives the money to the other person), in calculating the proceeds derived by the defendant the amount given to the other person is not to be subtracted and the full amount is considered to have been derived by the defendant.

[46] Section 28 (5) (a)

Omit "control". Insert instead "effective control".

[47] Section 28 (5) (b)

Omit "a drug-related activity".
Insert instead "an illegal activity".

[48] Section 28 (6)

Omit "drug-related activities".
Insert instead "illegal activities involving plants or drugs".

[49] Part 3, Division 3, heading

Omit the heading. Insert instead:

Division 3 Confiscated Proceeds Account

[50] Section 32 Establishment and use of Proceeds Account

Omit "Confiscated Drug Proceeds Account".

Insert instead "Confiscated Proceeds Account".

[51] Section 32 (3) (a1)

Insert after section 32 (3) (a):

- (a1) to the Public Trustee—such amounts from time to time as the Treasurer is satisfied the Public Trustee is entitled to be paid under section 19, and

[52] Section 33 Making of production order

Omit "at a specified time and place" from section 33 (2) (a).

Insert instead "at a specified time, or between specified times, and at a specified place".

[53] Section 33 (2) (b)

Insert " , or between specified times," after "times".

[54] Section 35 Effect of production order on proceedings etc

Insert at the end of section 35 (1) (b):

, or

- (c) the production or making available of the document would disclose information that is the subject of legal professional privilege.

[55] Section 37 Failure to comply with production order

Insert at the end of section 37:

- (2) It is sufficient compliance with a requirement of a production order that a person produce a document or make a document available if:
 - (a) the person has provided the Commission with a statement verified by statutory declaration to the effect that the person does not have possession and does not have control of the document, and
 - (b) the Commission has notified the person in writing that the Commission is prepared to accept provision of the statement as compliance with the order.

[56] Section 37A

Insert after section 37:

37A Prohibited disclosures about production orders

- (1) A person against whom a production order is made must not disclose:
 - (a) the existence or nature of the order, or
 - (b) any information to a person from which the person could reasonably be expected to infer the existence or nature of the order.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) Subsection (1) does not apply to a production order unless it (or a notice accompanying it) specifies that information about the order must not be disclosed.
- (3) A person does not contravene this section if:
 - (a) the disclosure is made to an employee, agent or other person in order to obtain a property-tracking document to comply with the order and the employee, agent or other person is directed not to inform the person to whom the document relates about the matter, or

- (b) the disclosure is made to obtain legal advice or representation in relation to the order, or
- (c) the disclosure is made for the purposes of, or in the course of, legal proceedings.

[57] Section 38 Search warrants

Omit "A full-time member of the Commission or a member of the Police Force" from section 38 (1).

Insert instead "An authorised officer".

[58] Section 38 (1)

Omit "the member". Insert instead "the authorised officer".

[59] Section 38 (2)

Omit the subsection. Insert instead:

- (2) The authorised justice to whom the application for a search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer (who, if a member of the Police Force, need not be named in the warrant) to enter the premises and there search for any or all of the property or evidence referred to in subsection (1).

[60] Section 42A

Insert after section 42:

42A Disposal of seized property to Commission

- (1) Anything seized pursuant to section 7 of the *Search Warrants Act 1985* may under subsection (3) of that section be directed by a court or Magistrate to be disposed of by being delivered into the custody or control of the Commission if the court or Magistrate is satisfied that the thing seized is proposed to be used in evidence in any proceedings under this Act.

- (2) Anything so delivered to the custody or control of the Commission is taken to have been seized (when it was delivered) pursuant to a search warrant under this Division.

[61] Section 44 Application for search warrant for location of property-tracking document

Omit “a full-time member of the Commission, or a member of the Police Force,”.

Insert instead “an authorised officer”.

[62] Section 44

Omit “the member”. Insert instead “the authorised officer”.

[63] Section 47A

Insert after section 47:

47A Legal professional privilege

- (1) The fact that a document contains or may contain information that is the subject of legal professional privilege does not prevent seizure of the document under the authority of a search warrant issued under this Division.
- (2) If a person objects to the seizure of a document under the authority of such a search warrant on the ground that the document contains or may contain information that is the subject of legal professional privilege, any information, document or thing obtained as a direct or indirect consequence of the seizure of the document is not admissible in any criminal proceedings against the person entitled to claim that privilege.

[64] Section 48 Monitoring orders

Omit section 48 (1). Insert instead:

- (1) If an authorised officer has reasonable grounds for suspecting that a financial institution may obtain information about transactions conducted by a particular person with the institution, the officer may:
 - (a) lay before the Supreme Court an information on oath setting out those grounds, and
 - (b) apply to the Court for the making of an order directing the financial institution to give to the Commission, or to an authorised officer nominated by the Commission, information obtained by the institution about transactions conducted by the person with the institution.

[65] Section 48 (5)

Insert after section 48 (4):

- (5) If the Supreme Court makes a monitoring order, the Commission must give notice of the order to the financial institution to which the order applies.

[66] Part 5, heading

Omit the heading. Insert instead:

Part 5 General

[67] Section 54 Proof of certain matters

Insert after section 54 (2):

- (3) In any proceedings under this Act, a certificate referred to in section 43 of the *Drug Misuse and Trafficking Act 1985* is prima facie evidence of the same matters of which it is prima facie evidence in legal proceedings under that Act, without proof of the signature, employment or appointment of the person appearing to have signed the certificate.

- (4) In any proceedings on an application for an order under this Act, the court may, in determining the application, have regard to the transcript of any proceedings against a person for an offence to which the application relates and to the evidence given in any such proceedings.
- (5) In any proceedings on an application for an order under this Act, the transcript of any examination under section 12 is evidence of the answers given by a person to a question put to the person in the course of the examination.

[68] Part 6, heading

Omit the heading.

[69] Section 58A

Insert after section 58:

58A Effect of death of joint owner of restrained property

- (1) If a person has an interest in property as joint owner of the property, the person's death after a restraining order is made in respect of the interest does not (while the order is in force) operate to vest the interest in the surviving joint owner or owners and the restraining order continues to apply to the interest as if the person had not died.
- (2) An assets forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died.
- (3) If a restraining order ceases to apply to an interest in property without an assets forfeiture order being made in respect of that interest, subsection (1) is taken not to have applied to the interest.

[70] Section 66A

Insert after section 66:

66A Savings and transitional provisions

Schedule 1 has effect.

[71] Schedule 1

Insert after section 70:

Schedule 1 Savings and transitional provisions

(Section 66A)

Part 1 General

1 Savings and transitional regulations

- (1) The regulations may include provisions of a savings or transitional nature consequent on the enactment of this Act and the following Acts:

Drug Trafficking (Civil Proceedings) Amendment Act 1997

- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or from a later date.
- (3) To the extent to which a provision referred to in subclause (1) 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.

Part 2 Drug Trafficking (Civil Proceedings) Amendment Act 1997

2 Meaning of "1997 amending Act"

In this Part:

1997 amending Act means the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*.

3 Application of amendments to earlier serious crime related activities

An amendment made by the 1997 amending Act extends to a serious crime related activity that took place before the commencement of the amendment.

4 Application of amendments to existing orders

- (1) An amendment made by the 1997 amending Act that relates to restraining orders, assets forfeiture orders or production orders, or orders ancillary to any of those orders, extends to orders, and applications for orders, made before the commencement of the amendment, except as otherwise provided by this Part.
- (2) Section 16A does not extend to a restraining order made before the commencement of the section unless the restraining order does not, as at that commencement, make provision under section 10 (5) (b).
- (3) Section 16B extends to a restraining order made before the commencement of the section but not so as to apply in respect of a legal service provided before the commencement of the section.
- (4) The amendment made by the 1997 amending Act to section 16 (1) does not apply to a contravention of a restraining order that took place before the commencement of the amendment.
- (5) The amendment made to section 25 (7) by the 1997 amending Act extends to an application for an exclusion order made but not heard before the commencement of the amendment.
- (6) Section 58A does not apply in the case of a joint owner of property who died before the commencement of that section.

5 Application of amendments to search warrants

- (1) An amendment made by the 1997 amending Act with respect to search warrants does not apply to a search warrant issued before the commencement of the amendment, except as provided by this clause.
- (2) Section 42A extends to anything seized before the commencement of the amendment.

6 Application of amendments to pending proceeds assessment order applications

- (1) This clause applies to an application for a proceeds assessment order that was made under section 27 before the commencement of the amendments made to that section by the 1997 amending Act and that had not commenced to be heard before the commencement of those amendments.
- (2) An application to which this clause applies is taken to have been made under section 27 as amended by the 1997 amending Act, and both that section and section 28 apply as amended by the 1997 amending Act to the application.

7 Evidentiary matters

- (1) Section 54 (3) extends to a certificate referred to in that subsection issued before the commencement of the subsection.
- (2) Section 54 (4) extends to a transcript of any proceedings that took place before the commencement of the subsection.
- (3) Section 54 (5) extends to a transcript of any examination that took place before the commencement of the subsection.

8 Change of name of Proceeds Account

The change of name by the 1997 amending Act of the Account established under section 32 does not affect the identity or continuity of that Account.

Schedule 2 Amendment of Supreme Court Rules 1970

(Section 4)

Part 77, Division 25A, Rule 84C

Insert “, 44 or 48 (1)” after “section 33 (1)”.

[Minister's second reading speech made in—
Legislative Assembly on 17 June 1997
Legislative Council on 27 June 1997]

BY AUTHORITY