



New South Wales

## Forfeiture Bill 1995

### Explanatory note

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

#### Overview of Bill

The object of this Bill is to confer a discretion on the Supreme Court to enable it to modify, where justice requires, the operation of the unwritten rule of public policy known as the *forfeiture rule*. The forfeiture rule precludes a person who has unlawfully killed another from acquiring a benefit as a result of the death. In *Troja v Troja* (1994) 33 NSWLR. 269, the New South Wales Court of Appeal held that the application of the rule at common law was not a discretionary matter, but was an inflexible rule of law that the courts had to apply without regard to the particular circumstances of the case.

The provisions of the proposed Act (which are based partly on the provisions contained in the *Forfeiture Act 1982* of the United Kingdom and the *Forfeiture Act 1991* of the Australian Capital Territory) will operate to confer a statutory discretion on the Supreme Court only where the application of the common law forfeiture rule results in injustice. The conferral of the statutory discretion is not intended to prevent the development of the common law towards a more flexible approach to the application of the forfeiture rule.

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## Outline of provisions

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

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

**Clause 3** defines certain words and phrases used in the proposed Act such as *benefit*, *forfeiture rule* and *unlawful killing*.

**Clause 4** provides that the proposed Act does not apply to murders. It also makes clear that the proposed Act extends to unlawful killings occurring outside the State and to certain property located outside the State.

**Clause 5** enables the Supreme Court, on application from any interested person, to order that the forfeiture rule is to have a modified operation in relation to an offender and others affected by the offender's action if the Court considers that the justice of the case requires it.

**Clause 6** enables the Court to mould an order modifying the effect of the forfeiture rule (*a forfeiture modification order*) to suit the circumstances of the case.

**Clause 7** provides that an application for a forfeiture modification order must be made within 12 months from the date of the death of the person who was killed unlawfully (if the forfeiture rule operates from the date of death) or within 12 months from the date on which the forfeiture rule operates (if the rule operates subsequently to the date of death), unless the Court gives leave for a late application. Leave for a late application may be granted if, subsequently to the making of the original order, the offender is pardoned or the offender's conviction is quashed or set aside in circumstances where there is no further right of appeal. Leave may also be granted in cases where the offender's identity as the killer is not discovered until after the expiration of the relevant 12 month period or in such other circumstances as the Court considers just.

**Clause 8** enables the Court to revoke or vary forfeiture modification orders in certain circumstances.

**Clause 9** deals with certain transitional matters. It ensures that a forfeiture modification order can be made in respect of:

- unlawful killings committed before the commencement of the proposed Act as well as to killings committed after its commencement, and
- pending proceedings.

Forfeiture Bill 1995

Explanatory note

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However, the proposed Act will not apply to acquisitions of property before the commencement of the proposed Act by persons other than the offender or persons claiming through an offender. The proposed Act will also not affect determinations of courts in proceedings concerning the application of the forfeiture rule made before the commencement of the proposed Act.

**Clause 10** provides that the Minister is to conduct a review of the operation of the proposed Act after 5 years of its enactment.





New South Wales

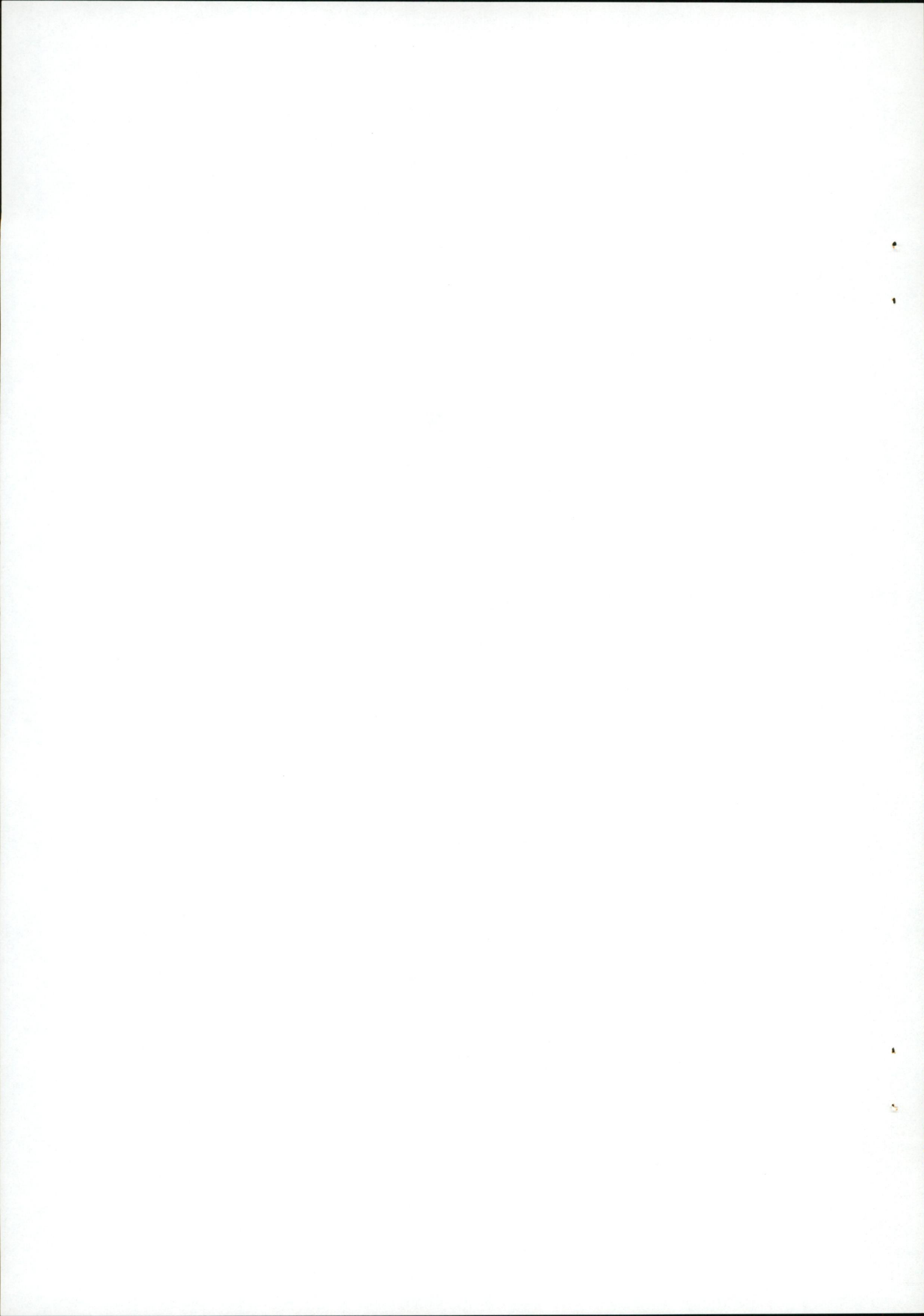
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New South Wales

## Forfeiture Bill 1995

No. , 1995

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### **A Bill for**

An Act to provide relief for persons guilty of unlawful killing, and other persons, from forfeiture of benefits; and for related purposes.

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Forfeiture Act 1995*.

**2 Commencement**

This Act commences on a day to be appointed by proclamation.      5

**3 Definitions**

In this Act:

*benefit* includes any interest in property and any entitlement under the *Family Provision Act 1982*.

*deceased person* means a person who is unlawfully killed.      10

*forfeiture modification order* means an order made under section 4.

*forfeiture rule* means the unwritten rule of public policy that in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing.      15

*interested person* means any of the following persons:

- (a) an offender,
- (b) the executor or administrator of the estate of a deceased person,      20
- (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person,
- (d) a person claiming through an offender,
- (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.      25

*offender* means a person who has unlawfully killed another person.



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***unlawful killing*** means:

- (a) any homicide committed in the State that is an offence, and
- (b) any homicide that would be an offence if committed within the State,

and includes aiding, abetting, counselling or procuring such a homicide and unlawfully aiding, abetting, counselling or procuring a suicide. 5

#### **4 Application of Act**

- (1) This Act applies to the following:
  - (a) an unlawful killing whether occurring within or outside the State, 10
  - (b) property:
    - (i) located within the State, or
    - (ii) located outside the State, but only to the extent to which courts of the State have jurisdiction to make orders concerning the property. 15
- (2) This Act does not apply to the following:
  - (a) an unlawful killing committed in the State that constitutes murder,
  - (b) an unlawful killing that would constitute murder if committed in the State. 20

#### **5 Power of Supreme Court to modify effect of forfeiture rule**

- (1) If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule. 25
- (2) On any such application, the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified.
- (3) In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the following matters: 30
  - (a) the conduct of the offender,
  - (b) the conduct of the deceased person,
  - (c) the effect of the application of the rule on the offender or any other person, 35
  - (d) such other matters as appear to the Court to be material.

**6 Forfeiture modification orders may be moulded to suit circumstances**

- (1) The Supreme Court may make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit.
- (2) For example, the Court may modify the effect of the forfeiture rule in relation to property:
  - (a) in the case of more than one interest in the same property (for instance, a joint tenancy) affected by the rule—by excluding the operation of the rule in relation to any or all of the interests, and
  - (b) in the case of an offender who has an interest in real property (such as a family home) and personal property affected by the rule—by excluding the application of the rule in relation to all the property or some of the property.
- (3) If the Court makes a forfeiture modification order, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.

**7 Time for applications for forfeiture modification orders**

- (1) Unless the Supreme Court gives leave for a late application to be made under subsection (2), an application for a forfeiture modification order must be made:
  - (a) if the forfeiture rule operates immediately on the death of a deceased person to prevent the offender from obtaining the benefit concerned—within 12 months from the date of the death of the deceased person, or
  - (b) if the forfeiture rule subsequently prevents the offender from obtaining the benefit—within 12 months from the date on which the forfeiture rule operates to preclude the offender from obtaining the benefit.
- (2) The Court may give leave for a late application if:
  - (a) the offender concerned is pardoned by the Governor after the expiration of the relevant period, or
  - (b) the offender's conviction is quashed or set aside by a court after the expiration of the relevant period and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or

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- (c) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
  - (d) the Court considers it just in all the circumstances to give leave.

## **8 Revocation and variation of forfeiture modification orders**

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- (1) If the Supreme Court has made a forfeiture modification order, an interested person may make an application to the Court for the revocation or variation of the order if:
  - (a) the offender concerned is pardoned by the Governor after the making of the order, or 10
  - (b) the offender's conviction is quashed or set aside by a court after the making of the order and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
  - (c) in all other cases—if the Court considers it just in all the circumstances to give leave for such an application to be made. 15
- (2) On any such application, the Court may revoke or vary the forfeiture modification order concerned.
- (3) The provisions of sections 5 (2) and (3) and 6 (1) and (2) apply to the determination of any such application in the same way as they apply to the making of a forfeiture modification order. In determining whether to revoke or vary the forfeiture modification order, the Court is also to have regard to the effect on the offender and other persons of any such revocation or variation. 20  
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- (4) If a forfeiture modification order is revoked or varied, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was revoked or varied):
  - (a) in the case of a revocation—subject to the terms on which the Court revokes the order, and 30
  - (b) in the case of a variation—subject to modifications made by the varied order.

**9 Transitional provisions**

- (1) A forfeiture modification order may be made in respect of:
  - (a) an unlawful killing occurring before or after the commencement of this Act, or
  - (b) the application of the forfeiture rule in proceedings commenced but not determined before the commencement of this Act. 5
- (2) A forfeiture modification order is not to be made modifying the effect of the forfeiture rule in respect of any interest in property that, in consequence of the rule, has been acquired before the commencement of this Act by a person other than the offender or a person claiming through the offender. 10
- (3) However, nothing in this Act affects any determination of a court concerning the application of the forfeiture rule in any proceedings that was made before the commencement of this Act. 15

**10 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. 20
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years. 25



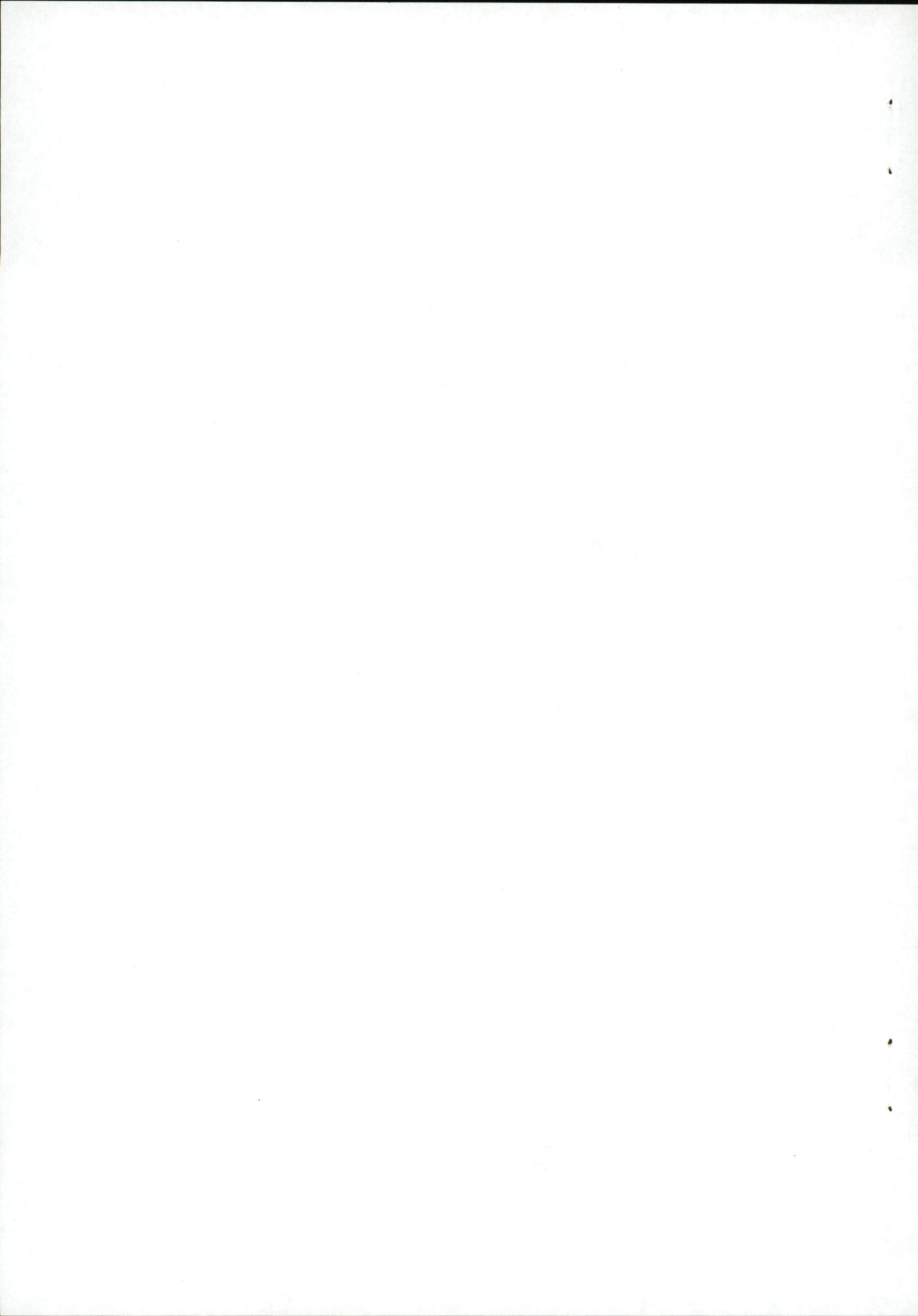
New South Wales

# Forfeiture Act 1995 No 65

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New South Wales

## **Forfeiture Act 1995 No 65**

Act No 65, 1995

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An Act to provide relief for persons guilty of unlawful killing, and other persons, from forfeiture of benefits; and for related purposes. [Assented to 12 December 1995]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Forfeiture Act 1995*.

**2 Commencement**

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

**3 Definitions**

In this Act:

***benefit*** includes any interest in property and any entitlement under the *Family Provision Act 1982*.

***deceased person*** means a person who is unlawfully killed.

***forfeiture modification order*** means an order made under section 4.

***forfeiture rule*** means the unwritten rule of public policy that in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing.

***interested person*** means any of the following persons:

- (a) an offender,
- (b) the executor or administrator of the estate of a deceased person,
- (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person,
- (d) a person claiming through an offender,
- (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.

***offender*** means a person who has unlawfully killed another person.



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*unlawful killing* means:

- (a) any homicide committed in the State that is an offence, and
- (b) any homicide that would be an offence if committed within the State,

and includes aiding, abetting, counselling or procuring such a homicide and unlawfully aiding, abetting, counselling or procuring a suicide.

#### **4 Application of Act**

- (1) This Act applies to the following:
  - (a) an unlawful killing whether occurring within or outside the State,
  - (b) property:
    - (i) located within the State, or
    - (ii) located outside the State, but only to the extent to which courts of the State have jurisdiction to make orders concerning the property.
- (2) This Act does not apply to the following:
  - (a) an unlawful killing committed in the State that constitutes murder,
  - (b) an unlawful killing that would constitute murder if committed in the State.

#### **5 Power of Supreme Court to modify effect of forfeiture rule**

- (1) If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule.
- (2) On any such application, the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified.
- (3) In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the following matters:
  - (a) the conduct of the offender,
  - (b) the conduct of the deceased person,
  - (c) the effect of the application of the rule on the offender or any other person,
  - (d) such other matters as appear to the Court to be material.

**6 Forfeiture modification orders may be moulded to suit circumstances**

- (1) The Supreme Court may make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit.
- (2) For example, the Court may modify the effect of the forfeiture rule in relation to property:
  - (a) in the case of more than one interest in the same property (for instance, a joint tenancy) affected by the rule—by excluding the operation of the rule in relation to any or all of the interests, and
  - (b) in the case of an offender who has an interest in real property (such as a family home) and personal property affected by the rule—by excluding the application of the rule in relation to all the property or some of the property.
- (3) If the Court makes a forfeiture modification order, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.

**7 Time for applications for forfeiture modification orders**

- (1) Unless the Supreme Court gives leave for a late application to be made under subsection (2), an application for a forfeiture modification order must be made:
  - (a) if the forfeiture rule operates immediately on the death of a deceased person to prevent the offender from obtaining the benefit concerned—within 12 months from the date of the death of the deceased person, or
  - (b) if the forfeiture rule subsequently prevents the offender from obtaining the benefit—within 12 months from the date on which the forfeiture rule operates to preclude the offender from obtaining the benefit.
- (2) The Court may give leave for a late application if:
  - (a) the offender concerned is pardoned by the Governor after the expiration of the relevant period, or
  - (b) the offender's conviction is quashed or set aside by a court after the expiration of the relevant period and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or

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- (c) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
  - (d) the Court considers it just in all the circumstances to give leave.

## **8 Revocation and variation of forfeiture modification orders**

- (1) If the Supreme Court has made a forfeiture modification order, an interested person may make an application to the Court for the revocation or variation of the order if:
  - (a) the offender concerned is pardoned by the Governor after the making of the order, or
  - (b) the offender's conviction is quashed or set aside by a court after the making of the order and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
  - (c) in all other cases—if the Court considers it just in all the circumstances to give leave for such an application to be made.
- (2) On any such application, the Court may revoke or vary the forfeiture modification order concerned.
- (3) The provisions of sections 5 (2) and (3) and 6 (1) and (2) apply to the determination of any such application in the same way as they apply to the making of a forfeiture modification order. In determining whether to revoke or vary the forfeiture modification order, the Court is also to have regard to the effect on the offender and other persons of any such revocation or variation.
- (4) If a forfeiture modification order is revoked or varied, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was revoked or varied):
  - (a) in the case of a revocation—subject to the terms on which the Court revokes the order, and
  - (b) in the case of a variation—subject to modifications made by the varied order.

## **9 Transitional provisions**

- (1) A forfeiture modification order may be made in respect of:
  - (a) an unlawful killing occurring before or after the commencement of this Act, or
  - (b) the application of the forfeiture rule in proceedings commenced but not determined before the commencement of this Act.
- (2) A forfeiture modification order is not to be made modifying the effect of the forfeiture rule in respect of any interest in property that, in consequence of the rule, has been acquired before the commencement of this Act by a person other than the offender or a person claiming through the offender.
- (3) However, nothing in this Act affects any determination of a court concerning the application of the forfeiture rule in any proceedings that was made before the commencement of this Act.

## **10 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

[Minister's second reading speech made in—  
Legislative Council on 25 October 1995  
Legislative Assembly on 21 November 1995]

BY AUTHORITY