

**The author(s) shown below used Federal funds provided by the U.S. Department of Justice and prepared the following final report:**

**Document Title: Comparative Evaluation of Unexplained Wealth Orders**

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**Document No.: 237163**

**Date Received: January 2012**

**Award Number: 2010F\_10078**

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# COMPARATIVE EVALUATION OF UNEXPLAINED WEALTH ORDERS



PREPARED FOR THE  
U.S. DEPARTMENT OF JUSTICE  
NATIONAL INSTITUTE OF JUSTICE

## FINAL REPORT October 31, 2011

Order Number: 2010F\_10078

Booz | Allen | Hamilton

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## I. EXECUTIVE SUMMARY

Unexplained Wealth Order (UWO) laws, a relatively recent development in confiscation and forfeiture jurisprudence, target the proceeds derived from criminal activities. Like traditional *in personam* and *in rem* forfeiture, their primary objective is to deprive criminals from acquiring or benefiting from unlawful activities. However by using UWOs the state does not have to first prove a criminal charge, as is the case with conviction based forfeiture. Likewise, the state does not have to first prove that the property in question is the instrument or proceed of a crime, as is generally the case in *in rem* asset forfeiture. UWO laws differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner who must prove a legitimate source for his wealth and the forfeiture proceeding is instituted against a person rather than against the property. These seemingly radical features of UWO laws (no proof of the property being connected to a crime and a reversed burden of proof) have, in practice, been tempered by courts, prosecutors and police, but still are a powerful, and controversial, tool for seizing assets where traditional methods likely would have been ineffective.

Several countries have debated the possibility of introducing UWOs into their legal systems, but most have decided to maintain traditional confiscation regime, *in personam* following conviction, and *in rem* proceedings targeting property. Few have ventured into the area of UWOs, and some of those that have done so have faced constitutional and legal challenges. For example, in Italy the Constitutional Court declared law 12 *quinquies* to be unconstitutional after two years of use determining that shifting the burden of proof violates the Italian constitution. Other countries have adopted only some aspects of UWO laws, e.g., United Kingdom, South Africa, some states in Canada, and New Zealand, have a presumption in favor of forfeiture for unlawful activities or specific offenses, but not full UWOs. Other countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offenses targeting the proceeds of corruption where the reversed burden of proof is part of the offense but yet apply only to political officials and not to all crimes and individuals as do UWO laws. A similar approach was followed by France with an amendment to its criminal code which introduced reversed burden of proof forfeiture measures targeting certain specific criminal offenders but it is still a post-conviction method. Only three countries thus far have adopted full UWOs – no proof of the property being connected to a crime and a reversed burden of proof. These are Australia, Colombia, and Ireland.

Under the parameters of this study, two countries were selected for in-depth review. Owing to their shared traits with the U.S.: common law legal systems (the courts of both countries frequently cite U.S. decisions), long established democratic traditions, and a common language, Ireland and Australia were selected. Moreover, Australia was selected as it is the only country in the world that identified these laws explicitly as unexplained wealth.

Ireland has had the most success of any country implementing UWOs. Its Proceeds of Crime Act (PoCA) of 1996 set forth the legislative framework for UWOs (although they are called “POCA Orders” in Ireland they are referred to as “Unexplained Wealth Orders” in this report for consistency). In addition the Irish Criminal Asset Bureau (CAB) Act of 1996 established the institutional framework to support POCA’s implementation. This legislation was the direct product of public outrage over the murder of an investigative journalist and a police detective by drug dealers. To this day there is still strong public support for the laws.

The single factor most important to the success of Ireland’s UWO (PoCA) law is the CAB. By forming an elite, well-resourced unit, with staff from not only police and prosecutors, but also tax and social welfare agencies, Ireland has been able to fully exploit the statute. Members of the CAB retain the powers and duties vested in them by their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized so, e.g., a CAB police agent also has the tax authority of a CAB revenue agent, and a CAB revenue agent has the arrest authority of a CAB police agent. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime not only from by way of UWO

forfeitures but also by taxing these and denying social welfare payments to the respondents who own or control such property. Further, the CAB has access to a large database, Police Using Lead System Effectively (PULSE) which contains comprehensive information on all citizens' criminal, traffic, tax, property, customs, social welfare and consumer credit records. This enables the CAB to gather large and comprehensive amounts of information to compare assets to income and thereby determine whom they should target.

In addition, the Irish High Court appoints a judge, assisted by a special registrar, to work solely on forfeiture cases for a period of at least two years. This provides the CAB with direct and speedy access to the courts and a judge knowledgeable in forfeiture law. The CAB also has been very selective in the cases it pursues choosing only those of the type which garner public support.

The Irish law has had a significant impact on dismantling and disrupting criminal activities. Although anecdotal, it is widely reported by law enforcement officials and in the media<sup>1</sup> that during the first five years of its enactment the law has resulted in a significant setback to those engaged in criminal activities targeted. With the frequency of certain crimes dropping, it is assumed that a number of criminal enterprise leaders have relocated to other countries such as Holland.

From 1998 through 2009 (date of the most recent available data), the CAB obtained 110 forfeiture orders under the law totaling approximately US\$16M. This figure understates CAB's effectiveness since it does not include cases in which the CAB decided to use tax laws to seize assets originally investigated under UWO (PoCA). The ability to tax property derived from crime is one of the CAB's most effective weapons. Since 1998 the CAB has obtained a total of US\$160M through this method.

Australia adopted its first UWO law in 2000, four years after Ireland, but its UWO use has not been as widespread as in Ireland. Initiated at the state and territory level, these started in Western Australia (WA) in response to increased drug trafficking and drug-related deaths in the state. The WA UWO law was followed by the Northern Territory (NT) three years later. Victoria, Queensland, and South Australia subsequently adopted comprehensive forfeiture statutes including conviction and non-conviction processes that contain many aspects of UWOs. Only within the past year has a similar law (with some restrictions) been enacted at the federal (Commonwealth) level, and also in the state of New South Wales.

Compared to Ireland, relatively little forfeiture has been achieved via UWOs in Australia. Several factors are responsible for this, including a push-back by the Australian courts, caution on the part of prosecutors to bring actions under these new laws, disagreements between police and prosecutors over how strenuously to use the law, a lack of forensic accounting staff, and strict forfeiture laws for drug crimes that in some cases obviate the need for UWOs. Another factor is that the property owner can meet his evidentiary burden simply by stating that the funds in question were an inheritance or gambling winning. Since in Australia such income does not have to be reported to tax officials, there is no record that prosecutors can use to contradict the respondent's claim. Consequently, this shifts the burden back to the government, but there is no paper trail evidence that these funds would create in many other countries making it difficult for the government to disprove the property owner's claims. Another factor in Australia that has stemmed the progress of UWOs is the downward public support most notably as a result of case in which an elderly couple had their house seized after their son was convicted of possessing cannabis concealed in the roof of the home. Finally, and not least among the reasons for the lack of quantifiable success of UWOs in Australia and distinction from Ireland is the absence of a CAB-like agency. There is no centralized effort at the Federal level to coordinate UWO actions in Australia and there is not the cross-agency buy-in or cooperation like that observed in Ireland.

Notwithstanding, a number of forfeitures have been made under Australian UWOs. In Western Australia along there has been 27 UWO applications since enactment of the law in 2000, of which 21 led to forfeiture of assets. Still, it is evident that UWO provisions have not been used extensively in Australia,

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<sup>1</sup> Interviews with the director of the DPP, former heads of the CAB, and barristers.

and in cases where they have been used only a relatively small amount of funds were recovered totaling only approximately US\$6.3M over a period of 10 years. In fact, no UWO applications were brought for a three-year period (2004–2007) following the controversial home seizure case described above.

As the Australian federal government only recently introduced UWOs, no cases have yet been instituted under its provisions. Cognizant of the critical role that the CAB has played in Ireland, the Australian federal government is establishing its own the Criminal Asset Confiscation Task Force, modeled after the Irish CAB. It is expected to begin operations in early 2012.

In both countries, the sweeping nature of the UWO statutes has been tempered in practice. Australian and Irish prosecutors, while only required to meet a burden of probable cause before the burden shifts to the property owner, in practice produce significantly more evidence than one would in a probable cause setting in the U.S., e.g., with a search or arrest warrant, even though the standard of proof is roughly the same. The level of proof that Australian and Irish prosecutors produce in UWO hearings corresponds more closely to our clear and convincing evidence standard. The Irish CAB for instance regularly produces multi-volume books of forensic accounting in support of even small UWO (PoCA) forfeitures.

In terms of the applicability of UWO laws to the U.S., some of the provisions of UWOs would be new to the U.S. while others are not. For instance, U.S. courts have long upheld as constitutional a reversed burden of proof in civil forfeiture proceedings, after the government makes its initial probable cause showing. In short, a reversed burden of proof UWO would likely withstand constitutional challenge in the U.S. *if* the Court were convinced that it is an *in rem* proceeding, a notable departure from the Civil Asset Forfeiture Reform Act (CAFRA).

There are two UWO concepts that would be novel to the U.S.: 1) the unexplained wealth concept and 2) the lack of a requirement to show a nexus between an offense and the property. If the U.S. were to consider enactment of a UWO statute it would have to resolve these issues to the satisfaction of reviewing courts. Regarding the first concept, one key to Ireland's UWO success has been the CAB's ability to proactively identify individuals with unexplained wealth. The use of a PULSE-like information exchange or fusion database system through which law enforcement can proactively compare citizens' assets to income would raise the concern of civil liberties advocates in the U.S. Regarding the second concept, the U.S. has always required that the forfeited property be the proceeds or instrumentality of a crime. A law that makes the mere lack of a valid explanation for the possession of property sufficient reason for government seizure would raise the concern of property rights advocates.

The new Australian federal UWO law addresses some of the concerns likely to be present in the U.S. It provides greater forfeiture protections to the respondents and innocent third party property owners, has a requirement that the government show a nexus between an offense and the property, and has a "safety valve" that gives court discretion to dismiss UWO actions if they are determined to be unjust. It might serve as the basis for U.S. laws that may be drafted in the future.



## II. INTRODUCTION

### 2.1 Purpose of the Report

The purpose of the report is to inform readers (practitioners and policymakers) on UWOs as an alternative to existing forfeiture and confiscation regimes, describe its key features, assess their application, and evaluate their effectiveness in two selected countries. In addition, the report identifies a number of issues policymakers should heed when contemplating introduction of UWOs in the U.S.

Recognizing that UWOs are a relatively new development in the area of forfeiture and confiscation laws, this report focuses on highlighting and describing key elements that distinguish UWOs from other confiscation laws. The report opens with a review of confiscation legislation in over 30 countries around the world with the purpose of identifying those that have enacted UWOs and those that have enacted non-conviction based legislation that have elements of UWOs, and other countries that have in place conviction based legislation with elements of UWOs. All these type of legislation have been classified in four different groups: i) countries that have true UWOs; ii) countries with non-conviction based laws that have some form of UWOs; iii) countries with conviction based laws that have some elements of UWOs; and iv) countries that have introduced illicit enrichment provisions, targeting proceeds of corruption.

Even though laws are relatively recent and at early stages of their implementation, the second section of the report makes an attempt to identify the effect these laws have had in the two selected counties (Ireland and Australia). The report addresses the background and specific circumstances that lead to introduction of UWOs and assesses the practical application of the law in the respective countries, obstacles and challenges faced during implementation, and lessons learned. To the extent possible, provided relevant and accessible data, the report also evaluates their effectiveness by comparing a predetermined set of metrics such as the size of seized assets, the rate of successful seizures versus those later overturned in the courts, and other similar metrics. Further, relying on mostly anecdotal evidence, the report attempts to assess the impact the UWOs have had in preventing and deterring crime by requesting feedback from agencies (prosecution, law enforcement, etc.) and professional experts (lawyers, civil society groups) engaged in implementing the laws. It is worth noting, however, that evaluating the impact of any law UWOs and its impact on deterring crime is a complex and difficult task. It requires precise data sets that can accurately correlate legislation to enforcement and to judgment. It also requires a prediction of crime rates, holding all other variables (other legislation, law enforcement techniques, and criminal behavior to name a few) constant for any given year in order to establish a baseline with which to measure the impact of the law. Such an endeavor is well beyond the scope of this report therefore any claims of the results or impact of UWO laws should be taken within the context in which the data were obtained, primarily through interviews with representatives of implementing agencies, law enforcement officials, other public officials, civil society groups, lawyers and media reports.

The concluding section of the report provides an overview of the forfeiture legal framework in the United States, assessing the ramifications of transferring these laws to the U.S. In this regard, key legal and policy issues are identified that policymakers should heed when contemplating introduction of UWO in the U.S.

Finally, although the report includes a description of conviction and non-conviction based laws in different countries around the world, the purpose of this report is not to conduct an evaluation of these laws, but to simply describe different laws that contain key elements unique to UWOs. Further the report does not attempt to educate readers on other conviction and non-conviction based laws as it assumes basic knowledge and understanding of these systems.

## 2.2 Scope of Work and Methodology

Booz Allen Hamilton has been commissioned by the National Institute of Justice (NIJ) to conduct a comparative evaluation of UWOs worldwide, with a detailed study of two countries' UWOs. The contractual scope of work includes the following:

1. Literature review of existing legal and other studies that have examined the benefits and pitfalls associated with unexplained wealth orders.
2. A full listing of all countries that have implemented some form of unexplained wealth orders and for what offenses (e.g. corruption, money laundering, etc.). This discussion can include laws that do not exist at the national level but rather at the state or regional level as well (e.g. Swiss canton's law as opposed to Switzerland's national law).
3. A full description of the process to seize unexplained wealth, with actual or potential bottlenecks identified.
4. A discussion of reporting requirements for each country. Reporting requirements include not only statements of seizures for unexplained wealth, but requirements for government officials, private citizens or others to report the sources of their wealth in a transparent way.

The analysis section in this document compares the unexplained wealth orders of two countries and provides the following information:

1. A full description of the laws and their usage in the country (to include copies of the legal codes and a discussion of how the laws were drafted and implemented).
2. An evaluation of the effectiveness of the laws and their application in the country. Effectiveness should be measured in terms of assets seized, the rate of successful seizures versus those later overturned in the courts and other similar metrics.
3. Lessons learned from the implementation of unexplained wealth orders, including a discussion of the obstacles in implementing such laws and the public's impression of the law.
4. A transferability analysis for each country examined. Put simply, if the U.S. were to adopt that country's law, what would U.S. lawmakers have to consider given the different legal codes and criminal justice systems between the countries.

## Methodology

While much has been written on the techniques of standard confiscation regimes and how criminals evade them, little has been published (in English) in the legal community on UWOs, testifying to their novelty. The Australian Institute of Criminology in July 2010 published one of the more thorough articles thus far written on the subject. More on the subject has been written in media reports, mostly focusing on Australia's UWO.

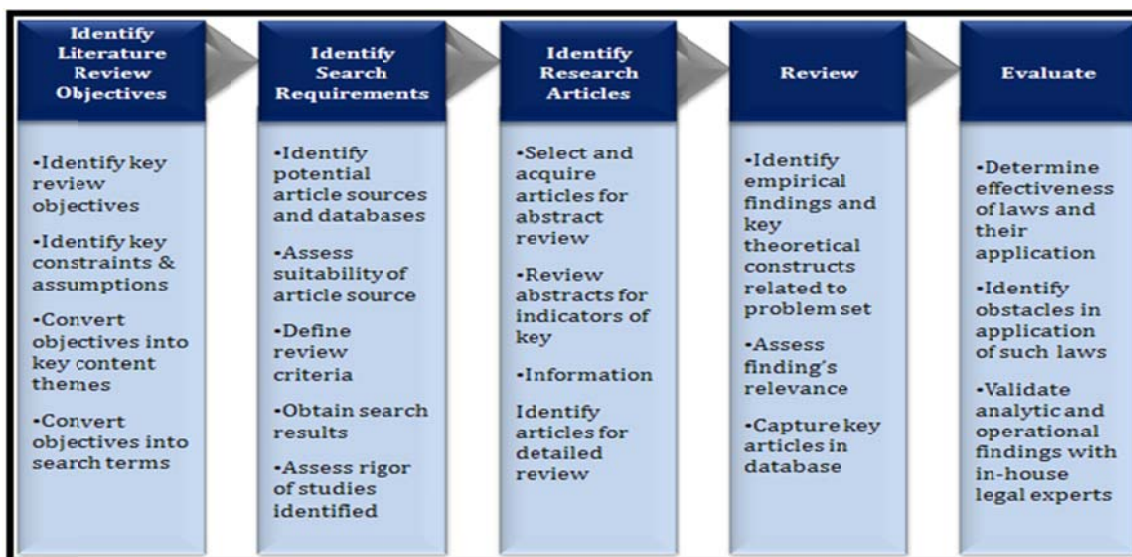
The relatively small amount of extant literature on the subject drove the methodology of this report. It is a data gathering and analysis effort based on independent research of original sources (statutes, legislative histories, case files, interviews with prosecutorial, law enforcement officials, defense attorneys, academics, etc.).

To determine the effectiveness and transferability of UWO laws, this report begins with a comprehensive review of current UWO laws (and any derivation thereof) enacted in a number of foreign nations. This is followed by a deep dive into two select countries (Ireland and Australia) that are much further ahead in the adoption, implementation and, in the case of Ireland, execution of UWOs. Finally, the report evaluates to what extent these laws have been effective and lessons learned for U.S. policymakers to determine whether it is worthwhile to propose enactment of such a law (or elements thereof) taking into account the inherent challenges in our legal system and public response. To accomplish this, Booz Allen followed a four-phased approach that focused on high quality standards of research and analysis while maximizing efficiencies to ensure budget and schedule constraints were kept in check.

**Phase 1 Desk Research and Draft Report** - The first step in this phase is what we call Desk Research. The objective is to identify the study objectives, design the study approach, collect available data and literature, and put together the draft deliverable all before establishing contacts and interviews with foreign subject matter experts.

Immediately upon task initiation, the research team worked closely with NIJ to validate this strategy, scope of the research, and schedule and budget constraints. This drove the identification of types of sources that would be of suitable rigor to be included in the Desk Research and data collection effort. Where applicable, we used primary sources, refereed journals, and other open-source material that demonstrated appropriate reliability and accuracy. In addition to traditional open source data collections, through major subscription-based research repositories like Westlaw, Lexis Nexis and JSTOR we had access to legal journals and articles written on the subject matter. In addition, the team reviewed recent international legal and foreign government studies since the majority of the information sources such as background on the law's rationale, challenges, constitutional and other issues were in these countries' publication sources and language. This initial phase of data collection was conducted locally at Booz Allen facilities using in-house expertise and subject matter experts in academia that were part of the research team. The ability to conduct this effort locally reduced travel time and allowed for a more cost-effective data collection effort.

Once the appropriate data sources were identified, the data collection effort was carried out using our case study or evidence-based approach depicted in **Error! Reference source not found.** This approach has been successfully tested and used to guide the conduct of literature reviews, identification of data gaps, and support the development of evidence-based, social science frameworks. This method assisted in reducing risk by directing research focus and source identification, and avoiding duplication of effort.



Our research and analysis team collected and categorized results of criminal and other legal justice literature reviews. Based on the type and quality of data collected, and in view of the objective of identifying the prevalence of UWOs and their implementation, we employed the most relevant analytical approaches and tools. In addition, we incorporated a case study method for our initial review and analysis of data and sources collected.

This approach is an important and widely used methodology in socio-legal research as it has a particular relevance to complex and well-defined problem sets. Our explicit goals within this phase of the work were focused on identifying the study objectives and collect pertinent data while ascertaining the

obstacles faced by countries that have implemented UWOs, as well as relevant public opinion. Through the implementation of our case study approach we have identified lessons learned from the implementation of UWOs throughout the world by conducting a comparative analysis of the most relevant legal cases in our selected countries. The research and analysis team compiled results of Australia's and Ireland's unexplained wealth order and conducted analyses to determine relevant patterns, trends, casual-type relationships and conforming standards that will address the objectives of the study regarding the transferability of each country's law to U.S. standards. In addition, to guide our data collection, we developed a protocol that we used for both record searches and interviews with participants.

There were two key outcomes of Phase One: 1) the identification of the two countries on which to focus our study and 2) a draft report and preliminary findings. For the selection of the countries, the research team reviewed legislation of a number of countries around the world that had implemented some form of UWOs. Of all the countries reviewed, two countries were selected based on a set of criteria<sup>2</sup> identified by the research team which among others included whether the country had a full UWO (no proof of the property being connected to a crime and reversed burden of proof), the relevance of a country's legal system to the United States, and the political system of the country. Ultimately Australia and Ireland were selected as the two in-depth countries from the three countries that were found to have full-UWO laws.

For the second outcome, we presented our preliminary findings to NIJ to verify that the findings were consistent with expectation and that the countries selected were appropriate (prior to making budget commitments). Included in the presentation was a near- full description of the supervisory and technical strategies and procedures for UWO usage in each country, a preliminary evaluation of the effectiveness of those strategies and the application in the country, lessons learned from their implementation, and preliminary thoughts on the transferability of certain strategies and approaches that could be piloted in the U.S. This presentation was an in-person meeting allowing for a free and open forum of thoughts, concerns, and validation of the approach. It was an opportunity for NIJ to validate the findings, for the research team to communicate holes in the data that need to be gathered remotely, and set the parameters for the remaining pieces in the final report.

We also began drafting the final report. With much of the research complete, leaving the site visits to validate findings, our team developed the outline of the report, compiled results of the desk research, and developed a matrix and full descriptions of the laws and their usage in each country identified. This table, described in Section III of the report, is divided in four categories; 1) Countries that have implemented true UWO and apply them to all offenses and reverse the burden of proof (Australia, Colombia and Ireland); 2) Countries with non-conviction based confiscation laws that apply them to all offenses and have the presumption in favor of forfeiture; 3) Countries that have conviction based confiscation laws applicable to all offenses, reversing the burden of proof to the defendant; and 4) Countries that have illicit enrichment targeting PEP's, reversing the burden of proof to the defendant in a criminal proceeding.

**Phase 2 Site Visits** - After exhausting local research opportunities and conducting the preliminary analyses, we identified foreign nationals in the countries of interest with expertise and knowledge in the area of civil forfeiture, and if available, knowledge in unexplained wealth orders, to further refine and target or data collection. These individuals were legal practitioners, government officials, policy makers, academia, and representatives of the defense bar with the goal of obtaining a deeper understanding and local perspective of the effect of UWO laws on the countries in which we reviewed.

In addition, by utilizing NIJ resources, we were able to establish contacts with the U.S. embassies in the two selected countries (Australia and Ireland) and establish contacts with the highest U.S. government officials engaged or knowledgeable in this area. In Australia, Western Australia and Ireland, we met with

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<sup>2</sup> For a full list of criteria's see Appendix G

the representatives of the General Attorney's Office, the Director of Public Prosecution, law enforcement, representatives of the private bar, academics and others involved in the policy making related to UWOs<sup>3</sup>.

***Phase 3 Analysis and Conclusions*** - In this phase, all data gathered from the previous phases were rigorously evaluated to verify intermediate conclusions and to develop new results. To conduct this analysis, we began by assessing the qualitative and quantitative data to develop functions that describe the relationship between the variables we select. These variables included asset seizures, the number of successful prosecutions, amounts of money seized, and requirements for the burden of proof and the nexus between an offense and the property seized.

***Phase 4 Findings Presentation*** - The objective of the final report (*this document*) is to be comprehensive while anticipating and outlining the considerations that U.S. lawmakers would have to make if adopting each foreign country's law given the different constitutional guarantees, legal codes and criminal justice systems. Consideration was given to all aspects of the legal value chain, incorporating input from all interviewees and sources of input at each decision point.

***Challenges and Resolution*** - There were two major challenges to successful completion of this study. The first was gaining access to the required information. Large amounts of data were collected from disparate sources and all of them were not available for public review. It is also important to note that some data were contradictory and required time for verification and triangulation. At certain times it was difficult to obtain access to some of the data for several reasons: its sensitivity (sealed case files for example, settled cases for which there were no court records), or its currency (for ongoing court cases and investigations). Further, some data were obtained from proprietary sources. Gaining access to this information from multiple entities within several countries with varied requirements and regulations posed a unique cooperative challenge. The second challenge lied in the analysis, specifically normalizing the results from information gained from disparate sources with inherent differences to make meaningful comparisons. Key areas of difference include types of legal system, varying perspectives, amount of accessible information, and length of time in force for each law.

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<sup>3</sup> See Appendix F. Containing contact details of people interviewed.

### III. FINDINGS

#### Background on Asset Forfeiture

UWOs are a relatively recent development in confiscation and forfeiture law, targeting the proceeds of criminal activities without a predicate offense. They are designed to further strengthen the fight against organized crime, by enhancing the powers of the state in depriving criminal enterprises of their illicitly acquired property, particularly those individuals for whom insufficient evidence exists for criminal conviction.

The importance of confiscating proceeds of crime has long been recognized as an effective tool in disrupting the activities of organized crime. The underlying reason is that profit or financial gain is the main motive for criminals to engage in criminal activities. This profit is used to fund lavish lifestyles, as well as invest in future criminal activities. Indeed, removing the profit motive is considered to act both as a preventive and a deterrent to criminals by diminishing their capacity to invest in future criminal activities. The strategy of hitting criminals where it hurts most, “their pockets”, is regarded as an effective strategy by law enforcement agencies for organized crime. While organized crime has shown resilience and a high level of adaptability to other law enforcement strategies, removal or reduction of assets is considered to have an impact on their operations. Thus, confiscation of criminal proceeds is embraced by many countries through conviction and non-conviction based confiscation mechanisms.

In an effort to combat criminal activity such as drug trafficking and other organized crime, a number of countries have laws that allow authorities to confiscate assets that are suspected to be the proceeds of illegal activity or property facilitating the crimes. In conviction based confiscation, or criminal forfeiture as it is called in the United States, the defendant is deprived of his assets based on the crimes for which he is convicted. Because it is part of the defendant’s sentence in his criminal prosecution, conviction based confiscation is an action against a person, or *in personam*. In the U.S., criminal forfeiture is a bifurcated proceeding that happens after conviction and the government must show by preponderance of the evidence that the defendant’s property was either used in the facilitation of, or derived from, one of the crimes for which he was convicted.<sup>4</sup> The criminal forfeiture authorities in the U.S. were dramatically expanded as part of the USA PATRIOT Act.

Alternatively or in parallel, some countries have laws that allow the government to confiscate the assets without a conviction. The non-conviction based confiscation, or civil forfeiture as it is known in the U.S., is brought as an action against the property itself, or *in rem*. U.S. civil forfeiture laws are nearly as old as the country<sup>5</sup> but their use increased greatly in the 1980’s as part of enhanced drug enforcement. Civil forfeiture requires the state to prove that the property is the instrumentality or proceed of a crime, typically by the civil burden of proof or a preponderance of the evidence, which is the standard used in the U.S., U.K. Ireland, Italy, and Colombia.<sup>6</sup> However, in some countries, the standard is different. In

Unexplained wealth laws require a person who lives beyond his apparent means to justify the legitimacy of his financial circumstances.

Australian Crime Commission

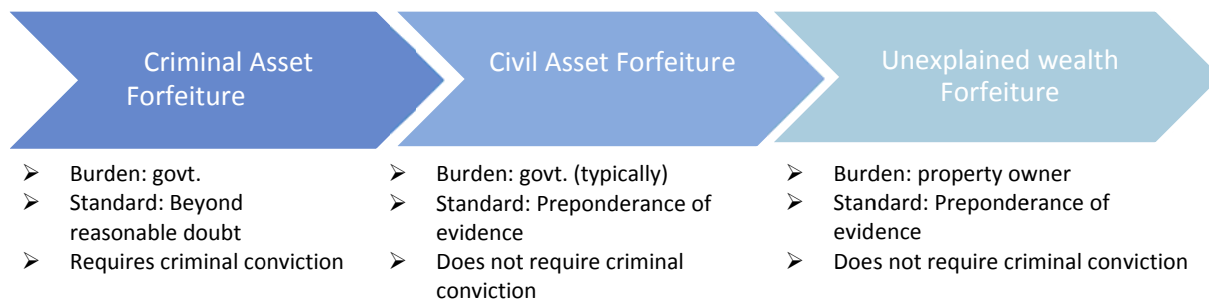
<sup>4</sup> There also is another form of *in personam* forfeiture, the confiscation of property that has been legislatively deemed to be contraband (e.g., drugs, certain weapons), even though there may have been no underlying criminal conviction.

<sup>5</sup> The first statute authorizing civil forfeiture was enacted by Congress in 1789 as a sanction for the use of ships in customs violations, Act of July 31, 1789, Sections 12, 36; 1 Stat. 39, 47. The concept dates back to Biblical times, Exodus 21:28: “If an ox gores a man or a woman, and they die: then the ox shall surely be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.”

<sup>6</sup> The U.N. Convention against Corruption 2003 (UNCAC), Article 54(1)(c), recommends use of the preponderance of the evidence standard.

Canada, for instance, there have been recent developments in some provinces to follow the U.S. model.<sup>7</sup> South Africa on the other hand requires proof “on a balance of probabilities”<sup>8</sup>, that the property is an instrumentality of an offense or the proceeds of unlawful activities” for property to be forfeited in a civil action.<sup>9</sup>

## Unexplained Wealth Orders in Perspective



Over the past two decades, a large number of international conventions and instruments designed to combat organized crime, money laundering and corruption have adopted the strategy of targeting proceeds of crime as a way to reduce and deter crime. This includes United Nations Conventions against Transnational Organized Crime<sup>10</sup> (2000 Palermo), the United Nations Conventions against Illicit Traffics in Narcotics Drugs and Psychotropic Substances<sup>11</sup> (1998, Vienna). All these conventions contain non-mandatory provisions encouraging states to include non-conviction based confiscation or asset confiscation, placing the burden of proof on the property owner to show legitimacy of property. The Financial Action Task Force (FATF) has been influential in getting the international community to recognize the importance of confiscation laws to combat money laundering and terrorism financing, as well as the crimes underlying money laundering.<sup>12</sup> In addition, the United Nations Convention against Corruption<sup>13</sup> of 2003 encourages countries, subject to their constitutional and legal principles, to introduce illicit enrichment as a criminal offense, defined as a significant increase in the assets of public official that he or she cannot reasonably explain.

Building on the concepts behind confiscation, some states have adopted unexplained wealth orders to heighten the fight against organized crime in particular by making it easier for the state to identify, seize and subsequently confiscate assets of those engaged in criminal activities. Several countries have debated the possibility of introducing UWOs into their legal systems, but most have decided to maintain traditional confiscation regimes. Few have ventured into the area of UWOs, and those that have, have faced constitutional and legal challenges. For example, the Italian Constitutional Court declared law *12quinquies* to be unconstitutional, after only two years of use, when it determined that shifting the burden of proof violates the Italian constitution. Other countries (e.g., United Kingdom, some jurisdictions in Canada, and New Zealand) have a presumption in favor of forfeiture for unlawful

<sup>7</sup>Max M. Nelson, *Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and Canadian Crossroads*, 41 U. Miami Inter-Am. L. Rev. 43, (Fall 2009).

<sup>8</sup>The civil standard of proof—balance of probability is a term used in most other countries that is the same as the U.S. civil standard—preponderance of evidence.

<sup>9</sup>South African Prevention of Organized Crime Act of 1998, Ch. 5, Pt. 1.

<sup>10</sup>See Article 7 of the Palermo Convention

<sup>11</sup>Article 7 of the Vienna Convention; “Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings”.

<sup>12</sup>See recommendations 3 of the 40 + 9 FATF recommendations.

<sup>13</sup>Article 20 of UNCAC, establishing illicit enrichment as a criminal offense when committed intentionally. Illicit enrichment is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

activities or specific offenses as part of civil forfeiture proceedings, but not full UWOs. Some countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offenses targeting the proceeds of corruption, where the reversed burden of proof is part of the offense, but apply only to public officials, and not to all crimes. A similar approach was followed by France with an amendment to the criminal code, introducing criminal offenses in which the reversed burden of proof is a central element of the offense. For example, individuals associated with drug dealers who cannot reasonably explain their assets will be convicted and deprived of their assets. Three countries have full or pure UWOs: Australia, Colombia, and Ireland. Currently, the U.S. has no provision in its law for forfeiture based simply on unexplained wealth.

UWOs are part of non-conviction based asset confiscation because they do not require criminal convictions. However, they contain a number of features that substantially differentiate them from traditional non-conviction based asset forfeiture authorities. The first difference is that UWOs are an *in personam* forfeiture proceeding, whereby an action is brought against the person who owns or possesses the unexplained wealth or property. Secondly, the state does not have to show a predicate offense<sup>14</sup>. In traditional confiscation, the state must demonstrate that the property is derived from or facilitates a crime. In a UWO proceeding, the state is only required to show on civil standard of proof-preponderance of evidence (that it is more likely than not) that the respondent owns or possesses unexplained wealth, without specifically identifying the criminal activity that originated the wealth. This leads us to the third difference, reversed burden of proof. Once the state discharges its burden of proof, the burden shifts to the respondent to show that the property is lawful.

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<sup>14</sup> As will be discussed in detail in Section 3.2.2.1 while there is no predicate offense requirement under Irish law, in practice the CAB has set a higher standard of proof for the state, showing that the respondent has been engaged in criminal behavior. The CAB does not have to show that a specific offense was committed, but it is sufficient to show that there are reasons to suspect that the person has been engaged in criminal activities. Similarly in Section 3.2.1.6 while the WA law does not have a requirement for a predicate offense, in practice the courts have imposed a higher burden on the DPP, obliging them to show some connection between the respondent and crime. The new Australian federal UNEXPLAINED WEALTHHUNEXPLAINED WEALTHHO has a requirement for a predicate offense.



### 3.1. REVIEW OF ASSET FORFEITURE AND CONFISCATION SYSTEM

This section walks through the four categories of UWOs and the countries that fall within each one. It is organized accordingly:

Section 3.1.1) Countries that have implemented true UWOs and apply them to all offenses and reverse the burden of proof

- Columbia (note: Australia and Ireland are covered in more detail in Section 3.2)

Section 3.1.2) Countries with non-conviction based confiscation laws that apply them to all offenses and have the presumption in favor of forfeiture

- Antigua and Barbuda
- Canada
- New Zealand
- South Africa
- United Kingdom

Section 3.1.3) Countries that have conviction based confiscation laws applicable to all offenses, reversing the burden of proof to the defendant; and

- Austria
- France
- Italy
- Netherlands
- Switzerland

Section 3.1.4) Countries that have illicit enrichment targeting PEP's, reversing the burden of proof to the defendant in a criminal proceeding

- Hong Kong
- Singapore

#### 3.1.1 Countries that implemented UWOs and apply them to all offenses and reverse the burden of proof

As stated earlier, three countries have full UWOs and apply them to all offenses: Australia, Colombia and Ireland. Australia and Ireland are the two countries that were selected for in-depth analysis in this study, and therefore are explored later (see Section 3.2). Colombia has not been one of the countries selected for an in-depth study, thus here we only provide an overview of the Colombian UWO law.

##### Colombia

Efforts by the Colombian government to dismantle drug trafficking networks, attack organized crime structures, and fight money laundering have led to numerous legislative initiatives, including the Anti-Money Laundering Law and National Drug Act of 1986 and 1996. In strengthening measures to fight organized crime, in 2002 the government adopted the Civil Asset Forfeiture Law, widely referred to as Law 793. The law was a joint initiative of the Ministry of Justice and the Ministry of Interior, supported by the National General Prosecutor's Office and the National Anti-Narcotics Office. The law codified illicit enrichment as an illegal activity for which assets can be forfeited by a court if the owner cannot justify their legitimate origin. Moreover, the law shifted the burden of proof onto the respondent to justify the legitimate origin of his or her assets and property. This law is regarded as one of the most comprehensive forfeiture laws in Latin America.<sup>15</sup> Although conviction based confiscation of assets has

<sup>15</sup>U.S. Department of State in the report of 2008. Available online at: <http://www.estandardsforum.org/colombia/standards/anti-money-laundering-combating-terrorist-financing-standard>, accessed January 6, 2011

been used in Colombia since 1930, the introduction of non-conviction based assets forfeiture is a novel concept in the country's legislation.

Colombia also has in place several illicit enrichment laws that criminalize unlawful accumulation of wealth by individuals and public servants during the time they are in the office. The burden of proof is on the respondent or the public official to justify the source of wealth and the proceedings are criminal with a standard of proof beyond reasonable doubt. The illicit enrichment offense for public servants carries a sentence of 6 to 10 years and for individuals 5 to 10 years of imprisonment and payment of an equivalent amount to the value derived from the unlawful conduct.

In its fight against drug trafficking problems, Colombia has enacted several laws that target proceeds of crime, as outlined above. Due to the focus of the report on unexplained wealth orders we are focusing on the Civil Asset Forfeiture Law (Law 793) of 2002 and providing a description of the operation of the Act and key challenges faced in the course of the implementation.

#### *Non-conviction based asset forfeiture*

In 2002, the Colombian government introduced two laws to strengthen the system of civil asset forfeiture. Law 793 was designed to resolve earlier inefficiencies in the system and improve the management of asset forfeiture cases by imposing strict time limits on proceedings, reducing the time allowed to submit challenges and requesting accelerated forfeiture actions by the judiciary. The law also placed an obligation on interested third parties to demonstrate their legitimate interest in the property to protect their rights. Law 785 introduced a number of policies to strengthen the management of seized assets by establishing a fund for the administration of seized and forfeited assets, designating the National Drug Enforcement Directorate (NDED) as the agency responsible for managing seized assets.

Pursuant to law 793 the court can order the forfeiture of assets whether or not the respondent has been convicted of an offense. Forfeiture is imposed against the owner's property (*in rem*) and the prosecution is not required to establish a causal linkage between the concerned assets and a criminal offense. The court can order forfeiture if the prosecution establishes that one of the following grounds exists: illegal enrichment offense, acts against the public treasury, a corruption offense, or other specified criminal activities.<sup>16</sup> Property subject to inheritance is subject to forfeiture if the property is considered to have been derived from or involved in offenses listed in Article 2<sup>17</sup> of the law.

The court can order forfeiture of assets or property when—

- There has been an unjustified increase in personal assets, at any time, and no explanation of the origin of assets is offered, or
- The property is derived directly or indirectly from illegal activities, or
- The property was used as a means or an instrument to carry out an illegal activity, or
- The property is derived from transfer or exchange of other resources derived from illegal activities, or the property or rights involve legally obtained property used or intended to be used to conceal or mix with illegal property, or
- When the legal origin of the property sought during the trial cannot be demonstrated.

Court proceedings are initiated by the Office of the Prosecutor General (OPG), with the Comptroller General, Police and Investigation Agencies, and the National Drug Enforcement Directorate (DNE)

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<sup>16</sup> Articles 1, 2, and 3 of Law 793 of 2002. Illegal activities referred to under these articles include: Conduct against Public Treasury such as embezzlement, illegal interest in contracts, contracts violating legal requirements, illegal monopolies, theft of national security and defense goods and equipment, offenses against public welfare, improper use of privileged information, utilization of secrets or information under seal, and activities that cause serious damage to social welfare, such as public health, social and economic order, public administration, the rule of constitutional law, kidnapping, kidnapping for extortion, extortion, and pimping.

<sup>17</sup> See *ibid* at 4.

obliged to report to the OPG the existence of any property that may be subject to the forfeiture order. The law authorizes the NDE to be a party to the forfeiture proceedings initiated by the OPG, with full authority to present evidence, request preventive measures, and contest any decisions made. The law also provides that any person can be rewarded with up to 5 percent of the total amount forfeited to the state if he or she provides useful information to the prosecutor related to the property that may lead to the forfeiture order.

The forfeiture proceedings are independent of any criminal proceeding. Proceedings are governed by the rules of civil proceedings and the civil standard of proof is applied. In practice proceedings are lengthy and complex, and present many opportunities to appeal the evidence and the decisions. The OPG initiates the proceedings, can order preventive measures, can issue a freezing or seizure order, and can prevent anyone from disposing of or otherwise dealing with the property. If a freezing or seizure order is not issued during the investigation stage, one can be issued during the initial proceedings at the request of the prosecutor *ex officio*. The Solicitor General and all interested parties will be notified of such an order within five days from the day the order was issued. If parties cannot be identified, the court will consider it sufficient if a notice has been left at the address on records for the interested parties. Third parties also will be notified through an edict, posted at the Office of the Clerk as well as through national newspapers and radio. If no party has responded the court will identify a *guardian ad litem*.

After the notification periods have expired, the court will review the evidence within 30 days, the prosecution will decide whether or not to pursue the forfeiture order, and will send the case to the assigned judge. The judge, depending on the evidence, will issue a forfeiture order or will abstain from doing so. The only avenue available for appeal is the direct appeal to a superior court within 30 days. A judgment that is not appealed is required by law to undergo a consolatory judicial review.

Reversal of the burden of proof is permitted under Colombian legislation, shifting the burden onto the respondent to provide satisfactory evidence to establish the legitimate origin of his or her assets. The Colombian Constitutional Court has endorsed the reversal of the burden of proof in civil asset forfeiture, describing it as a “dynamic burden of proof” holding that “requiring the one who is better able to prove a fact, to be the one to prove it. In forfeiture cases, the owner is in a better position to prove the lawful origin of his or her property and undermines the prosecution’s attempt to prove the illicit origin of the assets.”<sup>18</sup> Further, the court held that shifting the burden of proof onto the respondent is acceptable because it is a civil proceeding and no penalty is imposed on the individual. The respondent has the right to provide new evidence to challenge decisions made within the process; usually, a person with lawful income has no trouble proving the legal origin of his or her assets. The Constitutional Court held that the law protects only the rights of those who acquire property by licit means. Those who acquire property unlawfully cannot claim the protection provided by the legal system. The main purpose of the law is to capture the results of the illegal activity.

Financial investigations are carried out by law enforcement, Financial Information and Analysis Unit (UIAF) and the General Prosecutor (Fiscalia). Their role is to gather sufficient evidence from various sources including prior judgments and court decisions, public deeds and real estate records, operation reports of buying, selling, money transfer, travels and the like and provide them to the attorney general to initiate the case.

The UIAF, established as part of the Ministry of Treasury and Public Credit in 1999, is considered one of the most sophisticated financial intelligence units in the developing world. It is an independent unit with administrative autonomy in staff administration and has administrative autonomy and legal capacity. The UIAF has developed a system of Risk Management of Asset Laundering and Terrorism Financing (SARLAFT).

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<sup>18</sup>Constitutional Court, Sentence C-740-03, Judge Dr. Jaime Cordoba Trivino

Cooperation between the UIAF and the financial sector is positive because the banks are not restricted by the confidentiality clause when a financial institution suspects money laundering activity. Further, under the Anti-Money Laundering Law, financial institutions are required to report cash transaction of more than 5,000 pesos and maintain records of account holders and financial transaction for a period of five years.

**Effectiveness** Notwithstanding the amendments introduced by Laws 793 and 785 to improve and expedite the process for resolving forfeiture cases, the general consensus is that the results have been far from satisfactory. The complexity of the legal system continues to slow the resolution of forfeiture cases, while those involved in violating the law adapt remarkably quickly to the new policies and laws introduced by the government. On the other hand, the government institutions face many challenges that slow implementation of the laws. The Fiscalía (General Prosecutor) has a large backlog of cases and lacks adequate human resources (prosecutors and judicial police) to carry out investigations and fight money laundering.<sup>19</sup>

The main obstacles are faced by prosecutors in small towns, provinces that are ruled either by armed groups or by local traditional landlords. When procedures are initiated to seize property, the Fiscalía faces several challenges. For example, such procedures must address issues related to many property deeds because most of the municipal records are inaccurate. Also, it is not uncommon for local staff to refuse to cooperate, either because they are corrupt or they are controlled by those whose property rights may be challenged. In addition, the records often are maintained manually, which means they can be easily manipulated or forged, and powerful landlords use their power to impede modernization of records. It is not uncommon for the records of seized property to disappear altogether; in such cases, the Fiscalía has no means of proving the existence and the ownership of property or assets.<sup>20</sup>

Asset management of seized assets has also been an area of great concern in Colombia. Law 785 designated the NDED as the agency responsible for managing seized assets from the time of seizure until a court makes the final decision on the forfeiture or return of assets to the owner. DNE is responsible for verifying the status of seized property, maintaining an inventory of the seized assets, identifying interim management of the property through an open solicitation process, and ensuring reasonable preservation of the economic value of the property.

Some elements of the asset management system are considered highly successful; other elements require further improvements to preserve the value of the seized assets and to reduce the maintenance costs. Assigning private real estate properties and leasing of hotels through specialized hotel operators has been highly successful, while on the other hand management problems related to maintaining inventory records has proved highly challenging, especially when it comes to motor vehicles, which are maintained in a number of different locations. Further, the law does not provide any discretion when seizing assets, which means that all assets are seized, regardless of their condition or value. It takes years for the court to make a final decision on assets; steps have not been taken to remedy the situation because it requires corresponding increases in personnel to manage the new systems. Until the end of November 2008, DNE had received 80,860 assets to manage while forfeiture was in the process. Of those assets, 12,397 (15.3%) had been returned to their owners, who had obtained favorable judicial sentences. Only 7,734 (9.6%) had been forfeited, and the remaining 60,729 (75.1%) were in the judicial process. This demonstrates the slowness of the forfeiture process and the delays in reaching final decisions.<sup>21</sup>

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<sup>19</sup> Francisco E. Thoumi & Amrcela Anzola: Extra-legal Economy, Dirty Money, Illegal capital inflows and outflows and money laundering in Colombia

<sup>20</sup> Francisco E. Thoumi and Marcela Anzola, Extra –legal Economy, Dirty Money, Illegal capital inflows and outflow and money laundering in Colombia, Second Draft University of Texas, Austin

<sup>21</sup> Clara Garrido “Illicit Enrichment: Theory and Practice in Colombia”; Stolen Asset Recovery- A good practices Guide for Non-conviction Base Asset Forfeiture, 2009 The International Bank for Reconstruction and Development/The World Bank

### 3.1.2 Countries with non-conviction based asset forfeiture laws that apply to all offenses with a presumption in favor of forfeiture

#### Antigua and Barbuda

Antigua and Barbuda have in place a multitude of laws targeting the proceeds and instruments of unlawful activities as well as laws on illicit enrichment. One of the first laws adopted targeting the proceeds of crime was the Proceeds of Crime Act (PoCA)<sup>22</sup> of 1993, which established a conviction-based confiscation and forfeiture<sup>23</sup> of property derived from scheduled offenses. Introduction of the Money Laundering Prevention Act (MLPA)<sup>24</sup> in 1996, in addition to providing for administrative seizure and forfeiture of currency (money seized at border crossings) also introduced non-conviction-based asset forfeiture without a requirement of a predicate offense. Further, in 2004, Antigua and Barbuda also adopted the Prevention of Corruption Act (PCA), introducing illicit enrichment offense primarily targeting government officials and civil servants who were suspected of committing a corruption offense. These provisions enabled the state to confiscate any property acquired by the respondent as a result of the commission of an offense. The person alleged to have committed a corruption offense bears the burden of proof and is required to adduce evidence to satisfy the court that the property in question was acquired through lawful means. In addition to these laws, the Misuse of Drugs Act (MDA) of 1998 provides for seizure and confiscation of narcotic substances, following conviction.

PoCA and MLPA are key laws in the legal framework of Antigua and Barbuda in targeting proceeds and instrumentalities derived from illegal activities. Both acts provide for conviction and non-conviction based forfeiture and confiscation, seizure, and restraint of property. Proceedings under the MLPA are civil in nature and all the facts of the case are decided on the civil standard of proof-balance of probabilities. The initial burden of proof is on the prosecution or the special entity authorized to institute proceedings under the MLPA, the Supervisory Authority. After the Supervisory Authority meets the initial burden of proof satisfying the court that the property in question is tainted property, the burden shifts to the defendant, compelling him or her to justify the legality of the property. A novel concept introduced with MLPA is the automatic forfeiture of seized property within 90 days. Proceedings under PoCA are decided based on a criminal standard of proof, beyond reasonable doubt.

#### *Targeting proceeds of crime under PoCA and MLPA*

The objectives of PoCA are multifaceted, but the main objective is to deprive persons of the proceeds, benefits, and property derived from commission of a scheduled offense<sup>25</sup> and of property used in commission of an offense (instrumentalities of crime). PoCA's objective is to enable law enforcement authorities to trace and confiscate property constituting proceeds of an offense. The definition of the "proceeds" of an offense is defined in the preamble of PoCA as "*any property that is derived obtained or realized, directly or indirectly by any person from the commission of a scheduled offense.*"<sup>26</sup> Similar definition of "proceeds" is contained in the MLPA, with the difference that it does not only cover proceeds from specific offenses, but it includes proceeds derived from any offense committed in Antigua or Barbuda or elsewhere<sup>27</sup>.

The PoCA provides for confiscation and forfeiture of proceeds following conviction of a defendant for commission of a scheduled offense, which means that the prosecution can apply for confiscation or a

<sup>22</sup> Available at <http://www.laws.gov.ag/acts/1993/a1993-13.pdf>, accessed March 21, 2011

<sup>23</sup> Confiscation and forfeiture are used in the PoCA of 1993. Confiscation is used to describe in personam conviction based regime, and forfeiture is used to describe in rem conviction based regime.

<sup>24</sup> Available at [http://www.antigua-barbuda.com/finance\\_investment/MoneyLaunderingPreventionAct18-9-02.pdf](http://www.antigua-barbuda.com/finance_investment/MoneyLaunderingPreventionAct18-9-02.pdf), accessed March 22, 2011

<sup>25</sup> See PoCA, 1993, p. 62

<sup>26</sup> Section 3(1) of the Proceeds of Crime Act of 1993 and section 2(1) of the Money Laundering Prevention Act of 1996

<sup>27</sup> See Section 2(ii) (b); an offense committed elsewhere includes "any foreign law, whether or not it is specified by regulation under this Act which prescribes dealings in property which is the proceeds of crime, which, if it was committed in Antigua and Barbuda, would be an offense against this Act or any other law of Antigua and Barbuda".

forfeiture order only after the defendant's conviction. Forfeiture orders are brought against "tainted" property<sup>28</sup>, while confiscation orders are brought against a person convicted of an offense in relation to the benefits derived from that offense. Differing from PoCA, provisions under MLPA are broader and can be applied in cases when a person has not been convicted. Moreover, the statute provides that a person is taken to be convicted of an offense, if he or she is convicted of an offense either in Antigua or Barbuda or elsewhere, or if the person has been found guilty of an offense or the court has declared that the person has absconded.

### **Restraining and freezing orders under PoCA and MLPA**

Proceedings under PoCA generally commence with an application for a restraining or a freezing order to prevent property from being disposed of or dissipated. The court can make an order restraining property on an *ex parte* application of the Director of the Public Prosecution (DPP) supported by an affidavit. The affidavit must state whether or not the person is convicted of or charged for commission of a scheduled offense, the specified property, and reasonable grounds to believe that the person has benefited from the offense. If the court is satisfied, it will issue a restraining order, prohibiting a person from dealing with the property, and also can appoint a Public Trustee to manage or deal with the property. The court requires that all parties affected by the restraining order be notified. Similarly, in conviction based confiscation proceeding under the MLPA, the High Court will issue a freezing order on application of the Supervisory Authority, if the defendant has been convicted of or will be charged with a money laundering offense. In cases when the defendant has not been convicted of an offense it is required that the application be supported by an affidavit submitted by an authorized officer<sup>29</sup> stating the grounds on which he or she based suspicions that the defendant had committed an offense. In cases when the application is made relying on proposed charging of the defendant, the order will not be made unless the defendant is charged within 30 days. Any person contravening a restraining order can be fined or imprisoned.

### **Forfeiture and confiscation under PoCA**

The PoCA of 1993 provides for a conviction-based *in rem* forfeiture to be instituted against the property and conviction-based *in personam* confiscation against the person to deprive him of benefits derived from commission of the scheduled offenses. Both proceedings are instituted by the DPP to a competent court, after the person has been convicted of a scheduled offense, but within a 12-month period from the day the person was convicted of, or charged, with an offense. For the purpose of the forfeiture and confiscation proceedings, the person is assumed to have been convicted of an offense if he or she has been convicted summarily or if there is an indictment or if a person was charged with the offense, found guilty, and discharged. Although PoCA provides for confiscation of property only following a conviction, it also contains a provision that enables the court to complete forfeiture proceedings before the defendant has been sentenced. This proceeding can be characterized as non-conviction based as no sentence has been imposed against the person or no determination of guilt has been made.

The burden of proof the prosecution has to meet in a forfeiture proceedings differs from the confiscation proceeding. In an application for a forfeiture order, the DPP must establish that the property in question is tainted property,<sup>30</sup> but in a confiscation proceeding, the DPP must establish that the defendant has benefited from the commission of scheduled offenses. In determining whether or not the property is tainted, the court will consider the following:

<sup>28</sup> See section 19(2) (a)(b)(c) of PoCA 93- Tainted property is considered property that is used in, or in connection, or has derived as a result of the commission of the offense of which offense the person was convicted of.

<sup>29</sup> An authorized officer is defined in Part 1, section 2 of the Act to mean a person authorized by the Supervisory Authority to perform certain acts or functions under this Act.

<sup>30</sup> Tainted property is defined to be "(i) property used in, or in connection with the commission of the offense; (ii) property derived, realized or obtained, directly or indirectly from the commission of the offense.

- (a) if the property was used in, or in connection with the scheduled offense, where the evidence establishes that the property was in the person's possession at the time of, or immediately after the commission of the offense;*
- (b) if the property was derived or obtained as a result of the offense, if evidence shows that property or money was found in person's possession, or in a building, during investigation or search; and*
- (c) the increased value of property will be considered to have derived from the offense, if the evidence shows that the increase resulted after the commission of the offense for which the person was convicted and evidence shows that the value of all property of the defendant exceeds the value of property prior to the offense and that the court is satisfied that persons income cannot account for the value increase.*

In deciding whether or not to impose forfeiture, the court also will consider the gravity of the scheduled offense, the interests of third parties in the property, the hardship caused to any other person, and the ordinary use of the property.

In a confiscation proceeding, in determining whether or not the defendant has benefited from the offense, the court will, unless the contrary is proved, presume that all property held by the defendant when the application is made, or held at any time within a period of six years from the day the application is made, is property derived from the commission of the scheduled offenses for which the defendant is convicted. This includes all expenditures incurred by the defendant or any property received at any time. Moreover, in a confiscation proceeding, when the prosecution tenders a statement alleging that the person has benefited from an offense and determines the value of that benefit, the court will provide the defendant with an opportunity to respond to the prosecutor's statement. The defendant's failure to respond will be treated as acceptance of the allegations; similar opportunity is provided to the prosecutor on the defendant's tendered statement. In confiscation proceedings, the burden shifts to the property owner, first under section 19 (3), whereby the court will make a certain presumption unless the defendant adduced evidence to justify a legitimate source of the property. And second, sections 20 (1) and (2) provide the defendant with an opportunity to rebut the prosecutor's allegation and to present sufficient evidence proving the legitimacy of the property. The first situation is a clear example of the reversal of the burden of proof onto the defendant to present evidence and establish legitimacy of his or her property, but in the second instance it is more a rebuttal of the allegations made by the prosecution. No reversal of the burden of proof is provided under the forfeiture regime.

Another difference between the forfeiture and confiscation regimes is that under the forfeiture regime, an order can be issued to forfeit either the "tainted property," including immovable property or the defendant will be ordered to make a payment of an equal amount if the property is not available for forfeiture. In the confiscation regime, the court will order the defendant to pay a specific amount of money equivalent to the property or a sum of money realizable at the time the order is issued.

Both regimes provide for the protection of third parties, whereby the court will exclude property or an interest in a property on an application made by an innocent third party if satisfied that the person was not involved in the commission of an offense and that he or she had acquired property for sufficient consideration.

The statute also provides for variation and amendment of forfeiture and confiscation orders. Finally, if the defendant fails to make a payment or to deliver property as specified in the forfeiture or confiscation order, the court may impose a fine and imprisonment; the value of the fine or the number of years of imprisonment will depend on the value ordered to be paid. The defendant or third parties can be compensated if a forfeiture order was issued based on serious defaults in the investigation and if the defendant has suffered substantial loss. Under PoCA the court can make an order allowing for payment of reasonable living and business expenses from the frozen property, including defendant's reasonable legal expenses incurred in a proceeding under this act.

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### **Non-conviction based asset forfeiture under the MLPA**

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**Seizure, detention, and forfeiture of currency** Under the MPLA customs officers, custom guards, and police officers are granted the authority to seize and detain for a period of up to 7 days any discovered currency of more than \$10,000, if they have grounds to suspect that the currency is proceeds or an instrumentality of an offense. The detention period can be extended on the application of the Supervisory Authority,<sup>31</sup> until proceedings against the person from whom the money was seized have been concluded; however, the period cannot be extended for a period longer than two years from the day the money was seized. Seized money can be partially or fully released if the court is satisfied that the grounds on which the money was detained no longer exist or that continued detention could not be justified. Magistrate court may make an order forfeiting the currency if satisfied that the currency is proceeds from some form of unlawful activity<sup>32</sup> or an instrumentality of any offense (whether the person has been convicted or not). In determining whether or not the currency is proceeds or an instrument of an offense, the court will consider the use ordinarily made, or intended to be made, of currency and claims of any third party to an interest showing that they were not involved or aware of any unlawful use of currency. The act requires that notifications be sent to all parties with an interest in the currency. Similarly, PoCA provides for seizure of property if there are reasonable grounds to suspect that the property is tainted.

**Non-conviction based forfeiture** The MLPA provides for conviction and non-conviction based forfeiture. A characteristic of the MLPS forfeiture regime is the automatic forfeiture of property, whereby property can be forfeited to the Crown, 90 days after one of the following takes place, whichever is later: (a) a freezing order was issued or (b) the defendant has been convicted of an offense. Conviction-based forfeiture is governed by section 20 (a) and 20 (b(1)), whereby 90 days following conviction of the defendant of a money laundering offense the property is forfeited. Non conviction-based forfeiture is governed by section 20b (ii), which empowers the court to forfeit property subject to a freezing order issued on the grounds that the person will be charged or proposed to be charged with an offense or a related offense. The court will order forfeiture of the property 90 days after the forfeiture order is issued.

The law also empowers the respondent to exclude the whole or part of the property or an interest in the property (s. 19 b(5)) from a forfeiture order, if he or she is able to satisfy the court that the property is not proceeds or an instrument of an offense, or is in any way related to any unlawful activity. By way of this provision the burden of proof is reversed to the defendant to show that his or her property is not proceeds or an instrument of a money laundering offense.

The law provides protection for third parties with an interest in the property, empowering them to seek an exclusion order, even after a forfeiture order has been made. An application for exclusion will be permitted only if a court is satisfied that the person was not involved in the commission of an offense, his or her interest in property was not a result of a gift or under effective control of the defendant, and the applicant did not know that the property may have been an instrument of an offense, or could have not reasonably known that the property was an instrumentality of the offense.

Further, the statute allows for amendment of a forfeiture order or submission of a new application for a property related to the same offense<sup>33</sup>. All funds derived from released or sold property are deposited into a Forfeiture Fund established under the administration and control of the minister. The fund is used for

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<sup>31</sup>Ministry responsible for national drug control and security, as the designated agency responsible for implementation of the MLPA, establishes a specific entity Supervisory Authority to supervise financial institutions in monitoring implementation of the Act and instituting proceedings for forfeiture and freezing orders.

<sup>32</sup>Unlawful activity is defined in MLPA to mean an act or omission that constitutes an offense against a law in force in Antigua and Barbuda or against a law in a foreign country, if it was committed in Antigua and Barbuda, be an offense against a law (section 2(1)). Similarly PoCA, section 3, defines it to be an act or omission that constitutes an offense against a law in force in Antigua and Barbuda or against a law of any other country.

<sup>33</sup>See s.5(4) new application is allowed only if the court is satisfied that the benefits or advantages were identified after the previous application was determined, or new evidence become available at a later date. S.7 provides also that an application can be amended during the proceeding.



anti-money laundering activities, with the exception of 20 percent, which is set aside for administrative fees. In addition, the Act also contains provisions on the mutual legal assistance Act, on matters concerning money laundering offenses.

Finally Antigua and Barbuda enacted the Corruption Prevention Act (CPA) in 2004 to prohibit corruption and impose penalties for persons who committed corruption offenses. The Act was intended to be used against any person employed by the government or other public body who solicits or receives gifts, loans, fees, or advantage in exchange for performing or abstaining from performing, or expediting, delaying, hindering, or preventing the performance of an official duty by a public official.

The offense of illicit enrichment in Antigua is similar to the provisions incorporated in many statutes of other countries, criminalizing unexplained wealth derived as a result of an offense and shifting the burden of proof onto the defendant to defend himself and show how he was able to maintain that standard of living and how he acquired those pecuniary resources or property. If the court is not satisfied that the property and pecuniary resources were lawfully acquired, it can, in addition to the penalties, confiscate the pecuniary resources or property that the accused could not explain. The defendant has a right to appeal the court's decision. A safeguard has been included in the statute, potentially preventing malicious or false allegations by making it an offense to make false allegations or provide false information.

**Monitoring, examination, and production orders** Both PoCA and MLPA provide for an array of investigative powers, such as production, examination, and monitoring orders. However, limitations are imposed on these powers to limit the negative effect they may have on parties to proceedings. For example, under MLPA, a person can be examined by a court, and he or she cannot be excused from answering the questions on the grounds that the answer might incriminate him or her. However, the Act prohibits the use of information obtained during examination, or any other investigation technique, as evidence in criminal proceedings against the person, except in a proceeding for giving false testimony in the course of examination. Part IV of the Act overrides secrecy obligations or other restriction on disclosure of information. The Supervisory Authority is empowered to share information related to any suspicious transactions with any governmental agency inside or outside Antigua and Barbuda.

The police officer is authorized under PoCA to issue a production order, directing a person who has a document relevant to identifying, locating, or quantifying tainted property, to produce it or to make it available to the police officer. This does not include accounting records used in the ordinary business of a bank. The person producing the document will not bear any consequences for producing the document and it cannot be used against the person in any criminal proceedings except if the person fails to comply with the order. Further, on an application by a police officer, a judge can issue a monitoring order directing a financial institution to disclose information about transactions conducted by the account holder if there are suspicions that the person is about to or has committed a scheduled offense or has benefited from an offense. The financial institution is prohibited from disclosing to anyone the fact that such an order was issued. Finally, the PoCA enables the DPP, for the purpose of an ongoing investigation that is authorized by a judge, to request the Commissioner of Inland Revenue to disclose tax information to the DPP.

## Canada

Canada has both conviction and non-conviction-based *in rem* asset forfeiture. Conviction-based asset confiscation is governed by the Criminal Code while non-conviction-based forfeiture is governed by the provincial civil asset forfeiture laws. The Canadian constitution empowers the federal parliament to legislate criminal law and the provincial legislature to legislate civil law.

Most of the Canadian states have introduced non-conviction asset forfeiture laws, joining the ranks of states that have such laws, such as Ireland, U.K., United States, Australia, and South Africa.<sup>34</sup> The first

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<sup>34</sup> See generally Simmers, Jeffrey, "Perspectives on Civil Forfeiture" in Young, Simon, ed., *Civil*

jurisdiction in Canada to introduce civil asset forfeiture was Ontario, with the Remedies for Organized Crime and Other Unlawful Activities Act in 2001, known as the Civil Remedies Act of 2001, followed by Manitoba, Saskatchewan, British Columbia, Nova Scotia, and Quebec. Canada has not yet adopted a civil forfeiture law at the federal level that would unify the non-conviction forfeiture regime across the country.

The first non-conviction based forfeiture statute enacted in Canada was in the state of Ontario. The statute is an *in rem* forfeiture proceeding, targeting the proceeds and the instruments derived or used in a commission of unlawful activity. Forfeiture proceedings are *in rem* and as such as instituted against the property attaching “guilt” to the property. The statute of Ontario is a result of a broad international and local research of confiscation and forfeiture legislation, including U.S. Australia, U.K. and Ireland. Though it is widely believed that the *in rem* forfeiture served as the main model, the Ontario statute contains a number of features that are unique and original to it, such as presumption in favor of forfeiture of instrumentalities of crime, compensation of victims who suffered from the unlawful activity to name a few.

Following enactment of the Ontario statute, other states of Canada followed and enacted similar statutes, largely mirroring provisions of Ontario however they do contain elements that set them apart. The key differentiating feature is the inclusion of presumption in favor of forfeiture. While the statute of Ontario and Alberta have included such presumption only in regards to forfeiture of instrumentalities of the crime, other statutes including British Columbia, Saskatchewan and Nova Scotia have a presumption favoring forfeiture for both proceeds and instrumentalities of the crime. The statutes generally have a requirement of a predicate offense, requiring of the state to show that an offense was committed and establish a link between the proceeds and the offense. It is important to note, that although all non-conviction civil forfeiture laws of the Canadian provinces are *in rem*, they all contain a requirement to identify the person who is in possession or ownership of the property. However, failure of the applying authority (prosecution or the chief of police) to identify the owner will not prevent forfeiture of property. Further, all statutes provide for compensation of losses incurred as a result of restraining or forfeiture order if the order is later revoked, it provides for victim’s rights, and reimbursement of the respondent’s legal expenses. In addition the statutes establish a fund from which payments are made to compensate victims, support activities that fight crime and provide for compensation of police and law enforcement forces for costs incurred under a proceeding under this Act.

It is important to note that while in general non-conviction asset forfeiture statutes provide for forfeiture of proceeds derived from certain offenses, usually for serious and organized crime, the statutes of Canadian provinces are construed in a broad manner to capture proceeds acquired or resulting from any unlawful activity. The definition of unlawful activity is broad and includes any offense that is considered as such under an Act of Canada, Ontario, or other provinces and territories, or an act committed outside of Canada, that is an offense in Canada.

Opponents of the law have argued that the provincial governments are trying to carry out criminal proceedings in a civil forum, but this argument was dismissed by the courts, which held that this is an *in rem* proceeding targeting property acquired from unlawful activities and is not directed toward a person. In addition, the Supreme Court of Canada upheld the constitutionality of civil forfeiture Act of Ontario in *Attorney General of Ontario v. \$29,020*<sup>35</sup> where the respondent challenged the right of the provincial government to encroach on the right of the federal government to legislate criminal law. The Supreme Court upheld the constitutionality of the provincial legislation, contending that civil forfeiture laws fall under the jurisdiction of the provincial power.

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*Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13.

<sup>35</sup> Court case: *Attorney General of Ontario v. \$29,020 in Canadian Currency et al.*

## Ontario

Ontario was the first jurisdiction in Canada to introduce non-conviction (civil) forfeiture laws, with the Remedies for Organized Crime and other Unlawful Activities Act in 2001<sup>36</sup> (referred to as the Civil Remedies Act). The purpose of the Act<sup>37</sup> is to (1) compensate those who suffered pecuniary and/or non-pecuniary losses as a result of unlawful activities, (2) deprive those benefiting from unlawful activities of their ill-derived assets, (3) to prevent re-investment of the ill-gained benefits in future unlawful activities, and (4) to prevent injury to the public that may result from conspiracies to engage in unlawful activities.<sup>38</sup> The Act sets forth three avenues to forfeit assets of suspects: (i) proceeds of unlawful activities, (ii) instruments of unlawful activity, and (iii) conspiracies that injure the public. Of these, the third forfeiture proceeding is a proceeding unique to the state of Ontario.

**Restraining Order** Parts 2 and 3 of the Act empower the Superior Court of Justice, on application by the Attorney General, to issue statutory interlocutory order for the preservation of property, including a restraining order, possession and delivery or safekeeping of property, and appointing a receiver and manager of the property. The Superior Court will issue any of the above only if it is satisfied that there are reasonable grounds to believe that the property is proceeds or an instrument of unlawful activity and if it is in the interest of justice. Any of the orders above can be issued *ex officio*.

The Act also empowers the court to cover reasonable legal expenses to persons with an interest in the property subject to an interlocutory order, if it finds that he or she has disclosed all interests in other properties and they are not sufficient to cover the legal expenses incurred as a result of the proceeding. In practice, legal expenses are covered at the legal aid rate for civil lawyers in the province.

**Forfeiture Order** The proceedings for the proceeds of unlawful activities and instruments of unlawful activity are commenced with an application of the Attorney General (AG) of Ontario to the Superior Court of Justice. The court issues a forfeiture order if it finds that the property is the proceeds of unlawful activity, except where to do so would not be in the interest of justice. “Proceeds of unlawful activity” is defined in part 2 of the Act to mean property acquired, directly or indirectly in whole or in part, as a result of unlawful activity. Similarly, the Superior Court will issue a forfeiture order in relation to instrumentalities of crime (part 3 of the Act) if there is proof that property was used to engage in unlawful activity that in turn resulted in the acquisition of other property or serious bodily harm to any person, in the absence of evidence to the contrary. In regard to the property alleged to be an instrument of crime, the statute provides that the respondent is required to rebut the prosecutor’s statement to avoid forfeiture of the property. It is interesting to note that no such presumption is provided for property considered to be proceeds of crime. Further unlawful activity is defined to be any offense that is considered as such under an Act of Canada, Ontario, or other provinces and territories, or an act committed outside of Canada, that is an offense in Canada. This determines that property derived or used in an offense could be subject of a forfeiture order, be it a minor or a serious offense.

The Act targets only forfeiture of property located in Ontario, and does not provide for forfeiture of property in other provinces or territories, although it allows the forfeiture of property located in Ontario when it has resulted from an offense committed outside of the province. Further, the Act is retroactive, meaning that it can be applied regardless if an offense was committed prior to or after the Act came into force.

The statute has incorporated provisions to protect the interests of legitimate and responsible owners. A legitimate owner is defined in the Act as the person who has not acquired the property as a result of unlawful activity, has acquired it for a fair value and from a lawful owner. A responsible owner is defined

<sup>36</sup> Available at: [http://www.e-laws.gov.on.ca/html/source/statutes/english/2001/elaws\\_src\\_s01028\\_e.htm](http://www.e-laws.gov.on.ca/html/source/statutes/english/2001/elaws_src_s01028_e.htm)

<sup>37</sup> See Part I of the Act.

<sup>38</sup> Unlawful activity is defined in Part 2 of the Act to be “an act or omission that is (a) an offense under an Act of Canada, Ontario or another province or territory of Canada, or (b) is an offense under an Act of a jurisdiction of Canada, if a similar act or omission would be an offense under an Act of Canada or Ontario.”

as the person who has an interest in the property and who has done all that could reasonably be done to prevent the property from being used to engage in unlawful activity, including the duty to notify law enforcement agencies of the activity or refuse or withdraw permission that the person has the authority to give. The law established a statute of limitations of 15 years from the first day the property was acquired, after which proceedings to forfeit proceeds of crime cannot be initiated. No limitation is set for proceedings to forfeit property considered an instrument of unlawful activity.

Part 4 of the Civil Remedies Act provides for a forfeiture regime under the “conspiracies that injure the public,” whereas in a proceeding commenced by the Attorney General of Ontario, the Superior Court of Justice is authorized to issue any order that the court considers just if it finds that: “(i) two or more persons conspired to engage in unlawful activity; (ii) one or more of the parties to the conspiracy knew or ought to have known that the unlawful activity would be likely to result in injury to the public; and (iii) injury to the public has resulted from or would be likely to result from the unlawful activity” (s. 13). The “injury to the public” is defined in Part IV section 12 of the Act to include “any unreasonable interference with the public’s interest in the enjoyment of property, unreasonable interference with the public’s interest in question of health, safety, comfort or convenience, and any expenses incurred by the public, including any expenses or increased expenses by the Crown of Ontario, a municipal corporation or a public body.” The court may also issue an order requesting a person to do or refrain from doing anything specified in the order, or to pay damages to the Crown in Ontario for any injury to the public. The court will presume that the defendant was engaged, over the period of 5 years, or conspired to engage in unlawful activity on at least two occasions from which activities an injury to the public was caused, unless the defendant adduces evidence to establish the contrary. Such orders will not be issued if a person claims a right to those damages or has initiated a proceeding seeking payment. The statute establishes a statute of limitations of 15 years from the date the cause of actions arose.

Property forfeited to the Crown, under any of the regimes outlined above, is paid to the special account known as the Consolidated Revenue Fund for special purposes. The Minister of Finance is authorized to make payments out of the account for purposes stipulated in the statute: “(a) to compensate persons who suffered pecuniary and non-pecuniary losses; (b) to assist victims of or to prevent unlawful activities; and (c) to reimburse expenses incurred by the Crown of Ontario, municipal corporation, or a public body, as a result of any proceedings under this Act”. There is no limit as to the extent of the costs that can be covered by this account. Claims for compensation are adjudicated administratively by independent adjudicators. Proceedings initiated under this Act are civil proceedings and findings of fact are made on the civil standard of proof, balance of probabilities. The court may find that an offense was committed, even if no person has been charged with the offense, or that the charge was made, but withdrawn, or the person was acquitted of charges.

The Attorney General is authorized to collect personal information on anyone to assist him in determining whether or not to initiate or conduct a proceeding under this Act or to enforce an order. The Attorney General will collect information by asking the person directly or in any other manner. Further, despite the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* and any confidentiality provisions, any person who has information that may be useful to the work of the Attorney General is obliged to disclose it. An exception is made in relation to personal health information of any person, unless an application by the Attorney General is made to the Superior Court of Justice in a hearing from which the public is excluded. The Attorney General enjoys immunity for any proceeding or action initiated under this Act.

## Alberta

In Alberta, forfeiture is regulated by the Victims Restitution and Compensation Act<sup>39</sup> (VRCA), enacted in 2001. According to the Act, an illegal act is any offense under the Criminal Code or the Controlled Drug

<sup>39</sup> Available at: <http://www.canlii.org/en/ab/laws/stat/sa-2001-c-v-3.5/latest/sa-2001-c-v-3.5.html>

and Substances Act, or any offense carried out in contravention of any act in Alberta. Illegally acquired property is defined to be any property acquired directly or indirectly from an illegal act, including an increase in value of property or a decrease of debt paid from proceeds resulting from an illegal act (s. 3). An instrument of illegal activity is defined in section 3.1 to be property used or likely to be used in carrying out an illegal act, which, in turn, would result in or was likely to or was intended to result in property or in bodily harm to any person, and is realized from the same or other disposition of property derived from an illegal act.

The minister<sup>40</sup> or his designee is empowered to file an application to restrain and forfeit property in the civil courts. The proceedings are commenced with an application of the minister for any of the following purposes: (i) obtain restitution or compensation for property victims and other persons; (ii) remove financial incentives to commit illegal acts; (iii) prevent use of illegal property to carry out future illegal activities; and (iv) other purposes. The minister will initiate proceedings only after a peace officer or investigator has conducted investigations and has reasonable grounds to believe that an illegal act was committed and that the concerned property was acquired as a result of that act.

**Proceeds of Unlawful Activity** Property is restrained *ex parte* on an application by the minister supported by an affidavit providing grounds on which the belief that the property was acquired illegally, was based, including details related to the location and description of the property, the person believed to be in control or possession of the property, and the persons who may have an interest in the property, and the illegal act alleged to have been carried out. Further, the affidavit also may include information related to the victims (s. 4(2) of the VRCA 2001). The court granting the order prohibiting any person from dealing with the property will also appoint a civil enforcement agency to manage the property. The hearing date must be set within 45 days from the day a restraining order was made, to decide on the disposition of the property. The law also enables the state to restrain property for a short period of time up to 10 days by a peace officer, if there are reasonable grounds to believe that the property was acquired by illegal means. Any person failing to comply with the peace officer's direction is guilty of an offense and can be subject to a fine or imprisonment of six months or both.

Powers of the court are broad and include discretion to confirm or revoke the restraining order, return the property to the owner, provide compensation for actual loss incurred because of the restraining order, and vary any of the terms of the restraining order, release all or a portion of the restrained property and issue any ancillary order that the court considers appropriate. It is important to note that the court will grant an order to restrain concerned property even if no one has been charged with, found guilty of, or convicted of or held responsible for any illegal act in relation to the restrained property.

At the main disposal hearing, the minister bears the initial burden of proof to show that the restrained property was acquired by illegal means. The burden then shifts onto the respondent to establish the origin, nature, and the extent of his or her rights in property proving that he or she was not involved in the commission of the illegal act and, if the property was acquired after an illegal act, that he/she did not know and would not reasonably be expected to know that the property was acquired illegally (s. 13). An exception to the reversal of the burden of proof is provided when the respondent is the Crown or some other public body that incurred costs while protecting the safety or health of persons. If the minister is not able to satisfy the court that the property was acquired as a result of unlawful activity, the court may revoke the restraining order and compensate the respondent for the loss suffered (s. 14). If the minister satisfies the court, it will grant a property disposal order, ordering disposal of the property and payment to the Crown of the proceeds and payments for the purposes as defined by the statute, including payments made to the property victims or making payments of grants.

**Instrument of illegal activity** Similar to proceeds of illegal activity, the minister may commence an action if a peace officer has conducted an investigation and has reasonable grounds to believe that either

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<sup>40</sup> S 1 (b) of the Act defines that the Minister, means the Minister of Justice, Attorney General and includes any person acting on behalf of the Minister.

an illegal act was committed and that the property was used in carrying out the alleged act or that the illegal act resulted in or could likely result in acquisition of other property or in bodily harm to any person. Similarly to the proceeds proceeding, the application can be made *ex parte* on an affidavit of the minister providing sufficient details related to the description, location, and owner or possessor of the property.

Other steps in the procedure in regard to issuing the restraining order, interim actions of the peace officer and the disposal hearing, are identical to those under the proceeds of illegal activity. The standard of proof is the balance of probabilities. The Act does not require the minister to establish that anybody was charged with or convicted of an offense to satisfy the court that a property is proceeds or an instrument of unlawful activity. The minister has the burden of proof to show that it is likely that the property was derived as a result of illegal activity or was an instrument of such activity. The burden then shifts to the respondent to adduce evidence to the contrary. The respondent is given an opportunity before the main disposal hearing to adduce evidence establishing legal origin of his or her interest in the property, or can do so in the main hearing. Part two of the Act provides for restitution assistance post-conviction, ensuring that victims can be compensated and that failure to comply with these provisions can lead to fines and imprisonment.

### Saskatchewan

According to the Saskatchewan Seizure of Criminal Property Act (SCPA) of 2005,<sup>41</sup> amended 2009, the chief of police may apply to the court for a forfeiture order if he or she is satisfied that the property is proceeds or an instrument of unlawful activity. The application identifies the property and provides sufficient details to make it easy to identify it and name the owner of the property and any other person with an interest in the property. The proceeds of unlawful activity are defined in the Act to mean property acquired directly or indirectly, in whole or in part, as a result of unlawful activity; the instrument of unlawful activity means a property likely to be used in unlawful activity to acquire other property or to cause bodily harm to a person (s. 2 of the Act). A Court of Queen's Bench may, on application by the chief of police, issue an interim order to preserve the value of the property, including a restraining order, possession and safekeeping of the property, appointing a receiver of the property, etc. An interim order can be issued *ex officio* for a period not to exceed ten days. A motion for extension of an interim order can be issued only if all parties are notified.

The court will issue an order forfeiting the property to the Crown if it finds that property is proceeds or an instrument of unlawful activity, unless it is not in the interest of justice. The standard of proof is a civil standard of proof. The burden of proof is shifted to the property owner. There is a statutory presumption that if the property is owned by a member of a criminal organization, a corporation if one of its directors or officers is a member of a criminal organization, or a person who has acquired the property for significantly less than its fair market value, is considered to be proceeds of unlawful activity, unless the contrary is established. Further, the Act defines the persons considered to be members of criminal organizations as those convicted of a criminal organization offense, if the person was found guilty, and even if the person was acquitted of an offense or if the charges were withdrawn or stayed. Similarly, the court will presume that a property is an instrument of an unlawful activity unless evidence is given to establish the contrary. This makes the respondent or the owner of the property responsible for presenting sufficient evidence at the court to establish that his or her property is not proceeds or an instrument of unlawful activity.

Protection from forfeiture is provided to legitimate owners. Forfeited property, if not in cash, shall be sold and its proceeds distributed to cover the costs of the Crown in the rights of Saskatchewan for expenses incurred selling the property, the chief of police for expenses incurred in bringing the application for forfeiture, and to any other entity for any other prescribed purpose. At the hearing, the police chief is

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<sup>41</sup> Seizure of Criminal Property Act of Saskatchewan, 2005, available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S46-001.pdf>

obliged to advise the court of all registered interest in the property or any other interest known to him or her.

The Act provides for an appeal of the forfeiture order to the Court of Appeal. The decision of the Court of Appeal is final and cannot be appealed.

### **Manitoba**

Manitoba adopted the Criminal Property Forfeiture Act in 2004,<sup>42</sup> introducing non-conviction asset forfeiture enabling the state to seize and forfeit assets that are considered to be proceeds or instruments of unlawful activities. The purpose of the Act is to prevent those engaged in unlawful activities from keeping property acquired as a result of unlawful activities as well as preventing them from using the property for commission of future unlawful activities.

The chief of police<sup>43</sup> may apply to a competent court for an interim (restraining) or a forfeiture order. In the application he must provide sufficient details on the property, name the owner(s) of the property and any other person who may have an interest in the property. On motion by the police chief, the court may make an interim order to preserve property and notices must be sent to the owner and other persons with an interest in the property. The law provides that a Court must issue a forfeiture order, unless it would not be in the interests of justice to do so, if it finds that the property is proceeds or an instrument of unlawful activity.

The burden of proof is on the respondent to establish that the property sought to be forfeited is not proceeds or the result of illegal activities. There is a statutory presumption that all of the property owned by a member of a criminal organization, a corporation if a member of a criminal organization is one of its officers or director, or a person to whom the property was transferred for significantly less than its fair market value, is proceeds of unlawful activity, unless the respondent adduces evidence to establish the contrary. The Act also includes a statutory rebuttable presumption that a person is a member of a criminal organization if he or she has been found guilty or been convicted of a criminal organization offense. It is not relevant for the purpose of forfeiting a person's property if the person was charged with and acquitted of an offense, or if those charges are withdrawn or stayed.

Similarly, statutory presumptions are established for instruments of unlawful activity. The court will presume that the property used to engage in unlawful activity resulting in acquisition of other property or in serious bodily harm to a person, is an instrument of unlawful activity, in the absence of evidence to the contrary.

The judge may issue special orders to protect people with an interest in property that is subject to forfeiture. Banks, credit unions, insurance companies, government, and some other interest holders are entitled to automatic protection, while others must prove to the judge that they did not know about the unlawful activity or did all that reasonably could be done to prevent the property from being used to engage in unlawful activity.

Forfeited property must be sold by the government after it has paid any costs the government incurred while selling the property and reimbursing the police for expenses incurred during the proceedings under this Act. The remaining funds are paid to the Victim's Assistance Fund to support victim's services or crime prevention programs and to the Legal Aid Services Society of Manitoba.

There are no limitation periods to bringing an application under this Act. The police chief or any other person acting under the authority of this Act enjoys immunity and no action can be brought against them.

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<sup>42</sup> The Criminal Property Forfeiture Act 2004, available at <http://web2.gov.mb.ca/laws/statutes/ccsm/c306e.php>

<sup>43</sup> As defined in the Act, could be: (i) Chief of police of municipality of Manitoba; (ii) Commanding Officer of the Canadian Mounted Police in Manitoba; and (iii) special constable appointed under the Provincial Police Act in charge of police services for First Nations Communities

## British Columbia

Following the other jurisdictions in Canada, British Columbia adopted in April 2006 the Civil Forfeiture Act, introducing non-conviction based forfeiture of unlawfully acquired assets and property. The Act in general mirrors the provisions of the Ontario and Manitoba Acts<sup>44</sup>, but differs in a number of areas (e.g., reduces the time limit for commencing a proceeding under this Act to 10 years, does not provide reimbursement of the respondent's legal expenses, and sets clear guidelines for the court to determine what constitutes an unlawful activity and if the property constitutes proceeds of crime). In addition, the definition of the proceeds of crime is expanded to include not only the property that was created as a result of unlawful activities but also the decrease in debts that occurred soon after an unlawful activity was committed. The forfeiture proceeding is a civil proceeding, with a civil standard of proof on balance of probabilities, and all the rules governing civil proceedings apply. It provides for reversal of the burden of proof, shifting the burden onto the respondent to prove the legitimacy of assets subject to the forfeiture order. The act has retroactive power, meaning that it can be applied for offenses committed before the Act came into effect.

The person responsible for originating an application for a forfeiture order is the Director of the Civil Forfeiture Office, appointed under the Public Service Act, and designated by the Minister of Public Safety. The director may delegate responsibilities to a person or to a class of persons in writing, which includes the responsibility to initiate and conduct forfeiture proceedings, collect and manage information, etc.

On application by the director, the Supreme Court, if satisfied that the property in question is proceeds or an instrument of proceeds of unlawful activity, must issue a forfeiture order. If the court finds that it is not in the interest of justice to issue such an order, it may refuse to issue it, limit its application, or include limitations. A forfeiture order may be issued concerning all or part of the property or an interest in the property that was derived as a result of unlawful activity. The application must specify the owner of the property, referred to as the registered owner, as well as any other person who controls the property but is not the registered owner. Further, the director may apply and the court may issue interim preservation orders to preserve the value of the property, if there are reasonable grounds to believe that the property is proceeds of an instrument of unlawful activity, unless doing so would not be in the interest of justice. The court may issue protection orders to address property interest in instruments held by an "uninvolved property holder in instruments case."

For a court to issue a forfeiture order it must make two determinations: (1) if an unlawful activity was committed, and (2) if the property constitutes the proceeds of crime. In determining if an unlawful activity was committed, the court will consider if the person was convicted, charged, and found guilty of an offense, although the court may find that an unlawful activity was committed even if no one was convicted, or found guilty, or if the person was charged but charges were withdrawn or stayed. A copy of the charge signed by an authorized person is sufficient admissible evidence for the court. After determining that an unlawful activity was committed, the court will proceed to determine whether or not the property is proceeds of such activity. The court will find that a property is proceeds if there is proof that a person participated in an unlawful activity that resulted in or is likely to have resulted in the person acquiring a financial benefit, unless the respondent is able to give evidence to establish the contrary. For the purpose of this Act the presumption of advancement does not apply to a transfer of property.

Money and the proceeds realized from the forfeited property are paid into a Civil Forfeiture Account and can be distributed by the director with the approval of the Minister of Finance for the following purposes: (i) compensation of victims; (ii) remedy of unlawful activities; (iii) prevention of crime; (iv) administration of this Act; and (v) any other purpose.

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<sup>44</sup> See generally James McKeachie and Simser, Jeffrey, "Civil Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009)



## Quebec

Quebec's Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity, 2007,<sup>45</sup> introduced a non-conviction based asset forfeiture of property derived from or used to engage in unlawful activity. Note that Quebec has a civil law tradition that differs from the common law tradition of the other provinces, although it appears that the civil forfeiture regime has been modeled after common law models, such as that in Ontario<sup>46</sup>. Proceedings are governed by the rules of the Civil Procedure Code and rules of evidence are those applicable in civil matters. The overall responsibility for administration of the Act is vested in the Minister of Justice.

The Act has a dual purpose<sup>47</sup>: (i) to provide for forfeiture of property derived from or used to engage in unlawful activity so that the persons who, in whatever capacity, hold rights in such property or use such property are not allowed to keep the resulting benefit, unless they are in good faith, and (ii) to provide for the administration of forfeited, seized, or restrained property under federal laws and to allow for the disposition of such property for socially useful purposes, such as assisting victims of crime as well as the prevention, detection, and repression of crime. Unlawful activities are offenses under the Criminal Code, chapter C-46, the Controlled Drugs and Substances Act (CDSA) (chapter 19), and offenses under Schedule 1 of this Act. This Act is applicable only to property located in Quebec.

Proceedings are initiated by the Attorney General, who may apply to a court for a forfeiture order of whole or part of the property that is considered to have been derived from or used to engage in unlawful activity. The same provision provides that the Attorney General also may apply for an incidental application requesting the court to declare rights in the forfeited property unenforceable because of their fictitious or simulated nature. For the court to issue a forfeiture order, it must be convinced that the property is the proceeds or an instrument of unlawful activity; to issue an order to forfeit an instrument of unlawful activity, the court also must be convinced that the owner participated or was aware that the property was used to engage in such activity or could not reasonably have been unaware that the property was used in such activity. The statute adds another standard if unlawful activities include offenses listed in Schedule 1. In that instance, the court must be convinced that the activity resulted in substantial economic gain for the owner, possessor, or holder. Offenses listed under Schedule 1 include environmental consumer protection, labor relations, and others. This was held to be a safeguard, as designated offenses do not have the same gravity as offenses under the Criminal Code; requiring the proof of substantial economic gain will temper the use of these provisions.<sup>48</sup>

The statute enables law enforcement to take away property that is held, owned, or possessed by persons close to the property holder/respondent, such as blood relatives up to the second degree, spouse, and those living with the person.

The statute contains a statutory presumption that a property identified in the application derives from unlawful activity if the "defendant's legitimate income is significantly disproportionate to the defendant's patrimony or lifestyle or both."<sup>49</sup> Despite the resemblance to the unexplained wealth provisions of the Australian Civil Forfeiture Acts, it differs substantially from them in that its application is further conditioned with the following provisions:

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<sup>45</sup> Available online at:

<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2007C34A.PDF>, accessed March 2, 2011

<sup>46</sup> See generally James McKeachie and Simser, Jeffrey, "Civil Asset Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009).

<sup>47</sup> Division I of the Act Purpose and Scope

<sup>48</sup> See James McKeachie & Simser, Jeffrey, "Civil Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13

<sup>49</sup> See s. 11. of the Act

- 1) *frequently participates in unlawful activity likely to result in personal economic benefit;*
- 2) *participates in the unlawful activity of a criminal organization within the meaning of the Criminal Code or acts in association with such an organization; or*
- 3) *is a legal person one of whose directors or officers participates in the unlawful activity of a criminal organization within the meaning of the Criminal Code or a legal person in which a person who participates in such activity holds a substantial interest.*
- 4) *A person convicted of a criminal organization offense within the meaning of the Criminal Code is presumed to participate in the unlawful activity of or to act in association with a criminal organization.*

It is held that proving participation in criminal organization will be more challenging for the prosecution. Criminal Code defines the criminal organization to be:

- *Criminal organization means a group, however organized, that*
- *Is composed of three or more persons in or outside Canada, and*
- *Has one of its main purposes or main activities the facilitation of commission of one or more serious offenses that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.*<sup>50</sup>

Statutory presumptions are based on predicate offenses, meaning that presumptions will come into effect or be applied only if a person has been convicted for an offense indicated in Schedule 1 of the Penal Code or has been convicted of a criminal organization offense. The statute is silent about whether or not the burden in these cases shifts to the property owner to show the legitimacy of the property.

The statute has incorporated provisions to protect the rights of good faith owners or possessors if the nature and extent of their rights is specified in the application of the Attorney General. Further, the statute stipulates that proceeds of unlawful activity retain their nature regardless of who is their owner or possessor, unless the owner is able to establish that he or she was not or could not have reasonably been aware of unlawful origin of the property.

**Seizure orders** The Attorney General may apply for authorization to seize property, at any time during or even before the proceedings, if he or she has reason to believe that forfeiture of the property would otherwise be jeopardized, or that the property may be destroyed or severely damaged. The application is supported by an affidavit affirming that the property is proceeds or an instrument of unlawful activity and stating facts giving rise to the seizure.

**Administration and management of property** The statute contains provisions on the administration and management of proceeds and instruments of unlawful activity. Administration and management of seized and forfeited property under the statute is entrusted to the Attorney General, who in turn may designate another person to administer the property. The Forfeiture Act also grants the Attorney General legal authority to administer and deal with property that is either forfeited civilly or seized and restrained under a federal statute. Quebec and the federal government have found it necessary to pass statutes in this regard.<sup>51</sup> There are also provisions addressing forfeited money and its relationship to the consolidated revenue fund.

### **Nova Scotia**

Nova Scotia passed its Civil Forfeiture Act in December 2007, largely mirroring the provisions of the Ontario and British Columbia Acts. The purpose of the Act is to prevent persons who engage in unlawful

<sup>50</sup> See generally James McKeachie & Simser, Jeffrey, “Perspectives on Civil Forfeiture” in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13.

<sup>51</sup> See the Seized Property Management Act 1993 (federal) and the Law Enforcement and Forfeited Property Management Statute Law Amendment Act 2005 (Ontario)

activities and others from keeping property acquired as a result of unlawful activity and preventing property from being used to engage in unlawful activity. The definition of the instrument and the proceeds of unlawful activity is similar to those in the British Columbia Act (see above). The Act empowers the Supreme Court to freeze and forfeit proceeds and instruments of unlawful activities in a civil proceeding. The Management Assets and Disposition Act of 2007 establishes an entity, the “manager of assets,” who can bring civil forfeiture proceedings to a court and who can manage property that is the subject of civil or, in some cases, criminal proceedings. There is a statutory protection for uninvolved interest holders based on an interest of justice test. The court has the authority to refuse to issue a forfeiture or preservation order if it finds that it is not in the interest of justice to do so.

### *Public Debate in Canada*

As the first jurisdiction to introduce non-conviction based asset forfeiture statutes, the debate surrounding introduction of the statute in Ontario was heated and intense. Its supporters held that the statute is necessary and crucial in dismantling serious and organized crime as well as in acting as a deterrent for future criminal activities. In contrast, its opponents, including lawyers and publicists, expressed their grave concerns in relation to the Act. One of the areas of concern was that easing the burden of proof from beyond reasonable doubt to civil burden of proof will infringe on civil rights; it enables the state to more easily seize and forfeit property; and it has an imminent potential to abuse the rights of innocent people. Opponents further contended that according to the Canadian constitution, criminal law is the responsibility of the federal government, and that, therefore, adoption of non-conviction based forfeiture laws targeting proceeds of crime is encroachment on federal law. First, it is considered that it encroached on the federal government’s responsibility to legislate criminal law; second, it was a matter of criminal conduct in a civil proceeding, and third, it violated the presumption of innocence. The principle of presumption of innocence was violated on two grounds. One, by labeling the proceedings “civil,” it reduced the standard of evidence to civil standards of proof thus it required convincing a judge on a civil standard of proof that it is more likely than not that a person has committed an offense, which could be major or minor, for the court to issue an order forfeiting any person’s property to the state.<sup>52</sup> Two, the burden of proof is no longer on the state to show that a property is the proceeds or an instrument of an offense. Therefore, the statutes include a presumption of guilt requiring the defendant to prove innocence to retain his or her property.

Serious concerns were raised in regard to the broad and far-reaching powers of the Act. Specifically, the state forfeiture of property could be ordered for unlawful activities. In the Act, unlawful activities are defined to include anything that constitutes an offense under any federal or provincial law, from minor crimes to serious organized criminal activities. The individuals who drafted the Act expressed that the definition of unlawful activities in the state was purposefully left broad to enable the state to capture proceeds and instruments used for commission of an offense.

The law also was criticized for the risk it presents to possibly deprive innocent people of their assets, if they cannot in a timely manner provide sufficient evidence or if they cannot meet the high standards of evidence set by the Act. For example, according to the responsible owner clauses of the Act, an innocent property owner whose child sells drugs from his or her room of the same property, risks losing the property, if the property owner fails to do anything, such as notify the police of the activities going on his or her house. In this case, it may mean reporting one’s own child. Considerable attention was paid to the potential abuse of power by law enforcement officials in issuing forfeiture orders, motivated by various incentives, increased budgets, promotions, and so on.

In a paper produced for the Law Commission of Canada in April 1999, Professors Margaret E. Beare and R.T. Naylor of York University’s Nathanson Centre for the Study of Organized Crime and Corruption concluded “Although the entire notion of controlling crime by taking away the capital and the motivation

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<sup>52</sup> Karen Slick, “*Civil Remedies Act Will Harm the Innocent and Corrupt the State*” September 3, 2009 <http://www.karenelick.com/CCF090903.html> accessed February 2011.

is superficially appealing, there is no proof in logic or in practice that it actually works. There is, however, ample proof that it can pose a threat to civil liberties and civilian control over police forces”<sup>53</sup>

*Non-conviction based forfeiture acts and Canadian case law*

The Canadian constitution vests the federal government with the power to legislate and enforce criminal law, including establishment of the criminal court, while the property and civil rights are vested in the provincial governments. Critics of non-conviction forfeiture statutes often have criticized the provincial governments to legislate criminal matters, holding that they are infringing on the federal government’s authority.

The constitutionality of the non-conviction based asset forfeiture statutes was challenged and upheld by the Supreme Court of Canada in *Chatterjee v. Ontario*<sup>54</sup> contending that Ontario’s Civil Remedies Act (CRA) providing for forfeiture of property considered to be proceeds or an instrument of crime is *ultra vires* provincial jurisdiction and as such does not violate the federal government’s criminal law powers. The appellant, Mr. Chatterjee, was stopped by the Ontario police for a routine traffic violation. Information revealed that he was in breach of a probation order and a search of his car incidental to the arrest, discovered cash (\$29,020) and items that could be associated only with the illicit drug trade, that the car smelled of marijuana, but no drugs were found. The respondent was never charged with any offense in relation to the money, items, or with any drug-related activity. Money and equipment were seized and a forfeiture order was granted.

In the lower courts, the appellant contended that the forfeiture law was *ultra vires* provincial jurisdiction and also infringed on rights guaranteed by the Canadian Charter of Rights and Freedoms. But at the Supreme Court of Canada, the appellant focused his appeal on the grounds that the CRA forfeiture provisions were *ultra vires* the province because they encroach on the federal criminal law power. The Supreme Court upheld the constitutionality of the CRA and its power to forfeit tainted property.

The court portrayed the appellant’s arguments as based on “an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation.” Reference also was made to a decision in a recent case, *Canadian Western Bank v. Alberta*, 2007 SCC 22, (2007) 2 S.C.R. 3, where the federalist concept of proliferating jurisdictional enclaves is discouraged. In this case the court held that “courts should favor, where possible, the ordinary operation of statutes enacted by *both* levels of government.” The court held that the CRA was enacted to deter crime and compensate victims, and that the former goal is broad enough that both levels of government can pursue it. The court further held that the effects of crime affect the federal level as well as the provincial levels of the government. In addition, the court held that CRA is an *in rem* forfeiture of proceeds and as such differs from criminal law, which in addition to a prohibition issues a penalty. CRA proceedings do not involve an allegation that a person committed an offense, are not tied to charging, convicting, or punishing an offender, and do not impose penalty, punishment, or imprisonment. The court further held that “the provincial CRA does not conflict with the Criminal Code,” and that the Parliament expressly preserved such remedies in section II of the Criminal Code.

Another aspect of the Act was challenged at court when the respondent argued that a restraining order in relation to possible proceeds of crime impacted the respondent’s right to a fair trial because it implies an involvement in crime. However, the court in Canada, in *R v. Trang*, held that the essence of a restraining order was to impose a temporary restraint on property while issues were determined and that an application for a restraining order was not part of the criminal trial against the defendant.

<sup>53</sup> See also: <http://www.karenselick.com/NP001207.html>

<sup>54</sup> *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (2009) 1 S.C.R. 624

In *Turner v. Manitoba*,<sup>55</sup> the court was asked to consider a charter challenge to the provisions of the Wildlife Act that provided for the mandatory forfeiture of items used in the commission of offenses under the Act. The court concluded that forfeiture was not cruel and unusual punishment under section 12 of the Charter, and cited the decision reached in *R v. Porter*.<sup>56</sup> In that case the court held that while forfeiture could be considered punishment, it was not cruel and unusual. The court noted that the thrust of cruel and unusual was directed to physical and emotional constraints of the person and not to the individual's financial or property loss.

However, the case law has defined a two-prong test in establishing that a property is an instrument of unlawful activity. In *Attorney General of Ontario v. Marijuana Growing Equipment et al.*,<sup>57</sup> an application was brought against real property used in an outdoor marijuana-growing operation, on the basis that the real property was an instrument of unlawful activity. One of the owners admitted during cross examination that she had been running a marijuana-growing operation, on which occasion the court established that the first test was met, that the property was an instrument of a crime. The second part of the test was the acquisition of other property, which was easily met because the owner sold marijuana for profit.

*R. v. Buhay*<sup>58</sup> is a leading Supreme Court of Canada decision on the Charter rights protecting against unreasonable search and seizure (s. 8) and the criteria for the exclusion of evidence under section 24(2). The court held that for evidence to be excluded on the Collin test, the seriousness of the breach must be determined by looking at factors such as good faith and necessity. On the facts, marijuana found in a bus station locker was excluded from evidence because the police had insufficient reason to search it without a warrant.

### New Zealand

New Zealand introduced the Criminal Proceeds (Recovery) Act in 2009<sup>59</sup>, replacing the Proceeds of Crime Act of 1990. The new law, while retaining conviction-based forfeiture of instruments of crime as provided for in the Proceeds of Crime Act of 1990, introduces non conviction-based forfeiture of other property representing the proceeds of crime. The Attorney General's office vetted the Act with the New Zealand Bill of Rights Act of 1990.

The main purpose of the Act, as stipulated in Part 1, is to establish a regime for the forfeiture of property, derived directly or indirectly from significant criminal activity, or that represents the value of a person's unlawfully derived income. The intent expressed by the legislators are multipurpose and are intended to: (i) eliminate chances for those undertaking unlawful activities to retain the acquired profit; (ii) deter significant criminal activities; (iii) reduce the chances to reinvest the profit in new criminal activities; and (iv) deal with foreign restraining and forfeiture orders.

The law clearly states that all proceedings related to restraining and forfeiture orders under this Act are civil proceedings in nature and that the civil standard of evidence applies. The Act contains detailed provisions on the restraining, forfeiture, and registration of foreign forfeiture orders.

**Restraining Order** Part II of the Bill (s. 24–26)—provides for restraining of property, which has the effect of prohibiting the person subject to an order from disposing of or otherwise dealing with the property. The Act differs from other Acts in that it divides the responsibility for filing an application for a restraining order between the commissioner and the prosecutor. The commissioner is authorized to apply for a restraining order when the property is considered to be tainted property and or profit derived as a

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<sup>55</sup>*Turner v. Manitoba*, 2000 MBWB 94

<sup>56</sup>*R v. Porter*, (1989) 26 FTR 69

<sup>57</sup>*Ontario v. Marijuana Growing Equipment*,

<sup>58</sup>*R. Buhay*, 2003] 1 S.C.R. 631, 2003, SCC 30

<sup>59</sup> Criminal Proceeds (Recovery) Act 2009, No8 available at: <http://www.legislation.govt.nz/act/public/2009/0008/latest/DLM1451001.html>

result of unlawful activities. The prosecutor is authorized to file a restraining order for property that is considered to be an instrument of crime.

The statute empowers the Commissioner of Police to apply and the High Court (s. 24) to issue a restraining order related to specific tainted property, even if there is no respondent, if they are satisfied that there are reasonable grounds to believe that the property is tainted. Tainted property is defined in the Act to be any property that has in whole or in part been acquired as a result of significant criminal activity. Similarly, the Commissioner of Police applies for and the High Court (s. 25) issues a restraining order if they are satisfied that there are reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity. Significant criminal activity has been defined to mean (s. 6) “that if proceeded against the respondent; the offense would amount to offending that consists of one or more offenses punishable by a maximum term of imprisonment of 5 years or more and proceeds of which exceed the value of \$30,000.” It is presumed that a person has undertaken such activity if the person was charged and convicted of an offense in connection with the activity, or if the person has been acquitted or if his or her conviction has been quashed or set aside.

On application by the prosecutor (s. 26), the High Court, after a hearing, may issue a restraining order related to an instrument of a crime if the circumstances are that: (i) the respondent has been charged with a qualifying instrument forfeiture offense or (ii) the court is satisfied it has reasonable grounds to believe that the property referred to in the application is an instrument of crime used to facilitate the qualifying instrument forfeiture offense. It also may issue a restraining order if the court is satisfied that there are reasonable grounds to believe that: (i) the respondent will be charged with a qualifying instrument forfeiture offense within 48 hours; and (ii) the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offense. Instrument forfeiture offense is defined to be an offense punishable by a maximum term of imprisonment of five years or more and includes an attempt to commit, conspire to commit, or be an accessory to an offense if the maximum term of imprisonment for that attempt, conspiracy, or activity is five years or more.

The statute authorizes the court issuing the restraining order to issue ancillary orders, providing for reasonable living costs of the respondent or his or her defendants, reasonable business expenses, or payment of any debt out of the restrained property to be paid out of the restrained property.

Safeguards are incorporated in the statute, protecting the interest of innocent third parties if the applicant proves on the balance of probabilities his or her interest in the property, and that he or she has not benefited from unlawful activity or was not involved in the commission of the offense. In addition, the court may issue other ancillary orders as it deems fit, including orders directing the official assignee to control the restrained property, preserve its value, make mortgage payments, and so on. The restraining order lapses either at the end of 1 year from the day the order was issued or when a decision on the forfeiture order is made, whichever takes place first. The restraining time period related to property considered an instrument of crime expires at the end of the 48-hour period, if the defendant is not charged with an offense.

**Forfeiture orders** The commissioner may apply to the High Court for two types of forfeiture orders: (i) Asset Forfeiture order and (ii) Profit Forfeiture order. Application for a forfeiture order can be made *ex parte* if approved by the High Court, in which case the court may direct the applicant to notify the respondent as well as any person with an interest in the property as soon as practicable.

*Asset Forfeiture Order* The commissioner filing an application for an asset forfeiture order is required to provide sufficient details in the application on the property that is alleged to be tainted property, grounds on which the belief that the property is tainted is based, and the name of the respondent and any third party with an interest in the property. The High Court must issue an asset forfeiture order if it is satisfied on the balance of probabilities that specific property is tainted. However, the statutes provide that if there are no respondents who have claimed ownership or interest in the property, the court may not issue a forfeiture order unless the court is satisfied, on the balance of probabilities, that a restraining order was

issued earlier in regard to the same property, that the restraining order has been in place for one year, and that the commissioner has contacted or has made reasonable efforts to notify all persons who may have had an interest in the property.

In addition, the High Court may, on an appeal from the respondent, grant an exclusion order, excluding part of the property or an interest in the property from the forfeiture order, if it believes that the respondent will suffer undue hardship if the property is included in the asset forfeiture order.

*Profit Forfeiture Order.* Similarly to the asset forfeiture order on an application of the commissioner the High Court must issue a profit forfeiture order if it is satisfied that the respondent has unlawfully benefited from significant criminal activity. The commissioner is required to provide sufficient details to satisfy the court on the following elements: (i) the respondent was involved in, and benefited from, significant criminal activity within 7 years from the day the application was made; (ii) specify the value of the benefit; and (iii) identify the property in which the respondent holds interest and the nature of those interests. Then the court will presume that the respondent has benefited from a significant unlawful activity, which presumption may be rebutted by the respondent on the balance of probabilities. It appears as after the commissioner discharges his burden of proof, the burden shifts to the respondent to rebut the commissioner's claims.

The court is expected to specify the maximum recoverable amount to be forfeited, by either considering the amount specified in the application or by seeking an independent valuation of the property by a third-party expert. The statute also provides that the court will treat effective control over property as an interest in the property.

Within six months after the forfeiture order is issued, or at a later stage, any other person with an interest in the property may apply for relief for special reasons. Special reasons may include the following: the applicant had a good reason for failing to attend the hearing of the application for a non-conviction forfeiture order or if new evidence was not reasonably available at the time of the hearing. The court may issue an order for relief from non-conviction based forfeiture order on grounds of undue hardship.

*Instrument Forfeiture Order* On application by the prosecutor, the District Court may issue an instrument forfeiture order if it is satisfied that the property was used to commit or to facilitate the commission of a qualifying forfeiture offense, being an offense punishable by a maximum term of five years of imprisonment or more.

Until the appeal period has expired, unless a court has granted leave, the property forfeited under the instrument forfeiture order cannot be disposed of or otherwise dealt with on behalf of the Crown. Only after the appeal period expires or a final decision on the appeal has been made, can the official assignee dispose of the forfeited property.

If a court issues an instrument forfeiture order as part of the sentence imposed on a person convicted of a qualifying instrument forfeiture offense, and the conviction is subsequently quashed, the quashing of the conviction discharges the instrument forfeiture order. In that case the official assignee is required to transfer the property to the former owner or to pay the person an amount equal to the value of the person's interest in the property.

Another instrument available is the prohibition of double benefit, which means that if an application for relief is made under Sentencing Act 2002 regarding an interest in property, an amount equal to the amount must be deducted from any amount required to be paid under section 74(3)(b) to that applicant in respect of that interest. Protection safeguards are incorporated in the statute to protect the interest of the third parties.

**Property management** An official assignee is required to preserve the value of the restrained property under his or her custody and control. In addition, the official assignee may be a part of civil proceedings

affecting the property, ensuring property, and realizing or otherwise dealing with securities of investments and doing anything necessary to carry on the business.

**Investigative powers** The Commissioner of Police is in charge of investigation and may appoint any person to conduct an investigation of the affairs, or an aspect of the affairs, or execute a search warrant.

It is relevant to note that the Commissioner of Police and the Commissioner of Inland Revenue Services are both authorized to have a written agreement on information exchange between the two entities. However, limitations are imposed as to whom the information may be disclosed to, limiting it to the authorized person, to the person for whom the information was obtained, and to any person in connection with the proceedings taken under this Act. If no proceeding is to be initiated, the Commissioner of Police is required to destroy all information obtained.

The statute authorizes the commissioner to apply to a judge for a search warrant, production and examination order<sup>60</sup> if the commissioner has reason to believe that a person has access to documents relevant to an investigation. Applications are made in writing, specifying the grounds on which they are based and describing the documents and the property.

The commissioner applies and the judge issues an examination order if satisfied that the commissioner has reasonable grounds to believe that a person has information that is sought through the order. A person subject to an examination order is required to appear before the commissioner, answer questions, and supply information specified in the notice. The person subject to the examination order is allowed to be accompanied by a lawyer. Any disclosure of information under this Act, if made by any of the above orders, is not considered to constitute a breach of an obligation of secrecy or non-disclosure.

The approach taken by New Zealand empowers the official assignee, as property manager, to apply to a court for a search warrant to search any place or thing if the official assignee believes that there are grounds to believe that the property proposed to be under the restraining order is in or on the place or thing, or will come into or onto the place or thing. Any person who fails to comply with a search warrant, production, or examination order commits an offense and is liable on indictment to imprisonment for a term not exceeding 1 year or a fine not exceeding \$15,000, or if it is a corporate body, to a fine not exceeding \$40,000.

Further, the commissioner is authorized to settle with any person related to the property subject to a forfeiture order. However, settlement agreements have a binding effect on parties only if they are approved by the High Court. The High Court must approve settlement if it is satisfied that it is consistent with the purpose of the Act and is in the interest of justice.

### South Africa

Forfeiture of the proceeds of crime was introduced in South Africa for the first time in 1992 in the Drug Trafficking Act. As a conviction-based regime, it allowed forfeiture of assets derived from drug-trafficking offenses. Although the drug-trafficking offenses were tried in criminal proceedings with the criminal standard of proof, beyond reasonable doubt, proceedings in which assets were forfeited were civil with a civil standard of proof, balance of probabilities. This regime was expanded with the Proceeds of Crime Act in 1996, allowing forfeiture of the proceeds derived from any offense, after the defendant was convicted. However, it was not until 1998 that a full-fledged non-conviction based (civil) asset forfeiture provisions was introduced with the Prevention of Organized Crime Act (POCA<sup>61</sup>) in 1998.

The POCA retained the conviction-based forfeiture (Chapter 5) introduced by the two earlier pieces of legislation and introduced a non-conviction-based regime (Chapter 6) aimed at the proceeds of unlawful

<sup>60</sup> Defined supra, at s.102, 104 & 106 of the Act 2009.

<sup>61</sup> Prevention of Organized Crime Act (POCA ), Act No.121 1998



activities<sup>62</sup> and the instrumentalities of crime. To ensure implementation and to strengthen the use of POCA, the South African legislature established a specialized agency—Asset Forfeiture Unit (AFU)—under the National Prosecuting Authority (body established after 1994) headed by the National Director of Public Prosecutions (NDPP). Implementation of POCA was significantly affected by enactment of the Bill of Rights soon after. The Bill of Rights serves to protect individual rights, including the protection to private property, right to equality, and the right to freedom and security of persons. Conversely, the constitution imposes a positive duty on the state, including the AFU and NDPP, to protect, promote, and respect these rights. This created a tension between the public interests served by asset forfeiture and the private interests directly affected by it. However, despite extensive litigation, none of the provisions of the POCA 1998 have to date been declared unconstitutional.

South Africa’s POCA is modeled after the U.K.’s Criminal Justice Act of 1998, and South African courts have over the years relied on the decisions and elaborations of the courts in the U.K.<sup>63</sup>

#### *Criminal asset forfeiture under Chapter 5*

Forfeiture of the proceeds derived from an offense, after a defendant’s conviction, is governed by the provisions of Chapter 5 of POCA, commonly referred to as criminal forfeiture. The proceedings are governed by the rules of civil procedure and the civil standard of proof is applied, “preponderance of evidence.”<sup>64</sup> According to Chapter 5 of POCA, proceeds that have derived from any offense can be subject to forfeiture, including individual “ordinary” and organized crime offenses such as racketeering and criminal gang activities (Chapter 3 of POCA). Confiscation proceedings may be conducted in parallel with the main trial or after the defendant has been sentenced, if the court is convinced that inquiries will unreasonably delay the main trial, or with the request of the public prosecutors, to delay the proceeding until after the sentence. The proceedings may be held in front of the same judge hearing the main trial against the defendant, depending on the judge’s availability.

Provisions of Chapter 5 stipulate that on the prosecutor’s application, the court convicting the defendant can inquire if the defendant has derived any profit from the offense for which he or she is being tried, or any other offense for which the defendant has been convicted at the same trial, or other criminal activities that the court finds to be sufficiently related to the offenses of which the defendant was convicted. The prosecutor’s application to initiate inquiries of the defendant’s benefits must be approved by the National Director.<sup>65</sup> In inquiring and determining that the proceeds are the proceeds of crime, the court will consider evidence presented at the main trial, as well as other evidence the court may consider necessary. The court also may order the prosecutor to submit to the court a statement in writing under oath on matters pertaining to determination of the value of the defendant’s proceeds (Article 21.(1)(a)). A copy of the statement is required to be sent to the defendant 14 days before the statement is sent to the court. The defendant has the right to dispute allegations made in the statement and present the grounds for dispute. If the defendant does not dispute the statements, the court shall consider the statements as conclusive proof.

The court also may request the defendant to submit a statement in writing to the court under oath on any matter related to the determination of the amount that may be realized (Article 21(3) (a)). Similarly, the court will request the defendant to submit a copy of the statement to the public prosecutor 14 days before the statement is presented to the court. The court’s order to the defendant to submit a statement can be considered as partial reversal of the burden of proof to the defendant, during the proceeding. The article highlights that the defendant’s statement can be on any matter related to the matter involved, which is the

<sup>62</sup> Section 6 of Prevention of Organized Crime Act (POCA), amended in 2004, also covers “property associated with terrorist and related activities”

<sup>63</sup> “Phillips, whereby the court relied on the decision of *Her Majesty’s Advocate v. McIntosh* (2001) All ER (D)”—Asset Forfeiture in South Africa Raylene Keightley

<sup>64</sup> Chapter 5 of POCA, Provisions 13 (1), (2), (3)

<sup>65</sup> In the text of the Statute it is stated the National Director which is further defined in the preamble to include any functionary in the National Prosecuting Authority

defendant's property. Subsequently, the defendant's statement will present relevant facts or evidence that would establish the legitimacy of the concerned property.

Similarly, Article 22(2)(b) provides that if the court is conducting an inquiry into a defendant's property for the purpose of issuing a restraining order, has requested from the defendant to disclose facts related to any property over which he or she may have effective control and the location of such property (section 26(7)), and the defendant fails to disclose such facts or furnishes false information, the court also will accept these facts as prima facie evidence that the property represents the proceeds of unlawful activities. Therefore, if the defendant fails to disclose facts related to his or her property and is asked to do so by the court, the court will interpret this as an admission that the concerned assets were derived from an offense. If the court finds that the defendant has benefited from the offense, in addition to the imposed sanction, the court will order the defendant to pay a set amount of money to the state. For the court to determine whether or not the defendant derived any profit, and its extent, it will inquire whether the defendant has had any legitimate source of income from which he or she could have acquired assets or property (article 22(3)(a), (b)). If the court finds that the defendant has not had legitimate income over the fixed period to justify legal origin of the property, the court will accept this as prima facie evidence that the property represents the proceeds of crime. The defendant has the opportunity to rebut this presumption by presenting new evidence to the court to justify his or her sources of legitimate income.

If the court determines that the defendant has benefited from an offense, the amount to be forfeited cannot be higher than the value the defendant has acquired from the offense. Although the status determines the upper limit above which no forfeiture order can be issued, it is left to the discretion of the court to determine any appropriate amount below the upper limit. Thus, the court will seek to issue a forfeiture order that is rationally connected to the purpose sought to be achieved by that order. In this regard it has been held in *Sheikh*<sup>66</sup> that it is intended to ensure a defendant disgorges the fruits of his or her criminal conduct, as well as to act as a deterrent. Further, in the same case, the court held that not only direct but also indirect benefits can be subject to forfeiture, including benefits derived by a shareholder of a company that was enriched through the shareholder's criminal activity. If it is found that the defendant has benefited from an offense, section 22(3) provides that all property held by the defendant at the time of conviction or 7 years before the prosecution was initiated, all property held and all expenditures incurred during that period, was derived from, or met out of the proceeds of the defendant's unlawful activities. The burden is then placed on the defendant to rebut these presumptions. The presumptions were held to be "unobjectionable" by the High Court in *Phillips*,<sup>67</sup> where it was noted that although the defendant had raised constitutional objection to the presumptions in the affidavit filed at court, the matter was not pursued in argument before the court. To date, this presumption has not been challenged by either the Constitutional Court or the SCA.

If the defendant has died or absconded after conviction and the court believes there are reasonable grounds that a confiscation order would have been issued if the defendant were alive, the court will, on the application by the National Director, inquire whether or not the defendant acquired any profit from an offense. If the court finds that the defendant benefited from an offense, a confiscation order will be issued.

Pending a conviction or confiscation order, to preserve the property and its value, the court may issue a restraining order. The application for a restraining order will be made by the National Director, prohibiting any person affected by the order from dealing in any manner with the property to which it applies. A restraining order will be granted over realizable property as specified in the restraining order, or over all property transferred to the defendant, as well as any property held by any third party who may have received affected gifts from the defendant. The court also may order the defendant to disclose any other assets unknown to the court. A restraining order can be issued before the criminal proceeding against the defendant has started, if the court is satisfied that the defendant will be charged with an

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<sup>66</sup>*Shabir Shaik and Others v. The State*, Case No. 248/06 (2006) ZASCA, 6, November 2006

<sup>67</sup>*NDPP v. Phillips and Others*, 2002 (4) SA 60 (W)

offense and if there are reasonable grounds to believe that a confiscation order may be issued.<sup>68</sup> The restraining order may be varied or rescinded, either at the request of the defendant or by the court if it deems it is in the interest of justice. Further, if the court is satisfied that the person whose property was restrained, or that his or her family will face undue hardship, it will make such provisions to cover reasonable living expenses. Similar provisions can be made to cover reasonable legal expenses in connection with any proceeding instituted against the defendant.

To prevent any realizable property from being disposed of or removed, the court may order the seizure of such property. The seized property then will be placed under the care of the *curator bonis*, who will be responsible for its administration and management until a final decision is made by the court. The decision on seizure may be rescinded or varied on the application by the defendant or any third party with any interest in the property.

Realization of property is initiated by the court if the defendant fails to satisfy a confiscation order and which is executed against the affected property. The court, on the application by the National Director and after the proceedings against the defendant are concluded and no appeal is filed, appoints a *curator bonis* to conduct realization of the realizable property. Realizable property is any property held by the defendant as well as any property held by a third party who may have received gifts from the defendant. This has been interpreted to include properties not held by the defendant, owned by a third party, if there is evidence that the defendant has an interest in it. Broader interpretation of the provision was applied to include properties that are in reality owned by the defendant but have been transferred to a third party to avoid confiscation. The law provides that no realization of the property will be made until the claims of third parties with any interest in the property are satisfied. The court-appointed *curator bonis* will be responsible for realizing the property and making any realized payments to the state.

#### *Non-conviction based asset forfeiture—Chapter 6*

The introduction of non-conviction based (civil) forfeiture regime in South Africa pioneered civil forfeiture of property without prior conviction. The key difference between the forfeiture proceedings under Chapter 5 and those under Chapter 6 is that the provisions of the latter do not require criminal conviction or even prosecution of the person whose property is subject to forfeiture. Forfeiture is focused on the tainted property and is granted only in regard to the actual proceeds derived from unlawful activities or instrumentalities of the crime. It is imposed as a measure against the person's property and is not a penalty imposed against the person. Its general aim is to strip the respondent of the property or assets derived from his or her wrongdoings. The statute stipulates that forfeiture can be ordered for offenses included in schedule 1 of POCA.<sup>69</sup>

Non-conviction based asset forfeiture under Chapter 6 consists of two phases: (1) preservation phase, whereby a court grants an order to preserve the property; and (2) forfeiture phase, whereby the court grants a final order, forfeiting the property to the state.

The prosecutor may apply *ex parte* to a High Court for a preservation order, which prohibits any person from dealing in any manner with the concerned property. If there are reasonable grounds to believe that the property is either an instrumentality of an offense referred to in Schedule 1 of POCA, or represents the proceeds of unlawful activities, the court will grant such an order. There are no statutory requirements for the prosecutors to show to the court that an application for a forfeiture order will be made. Based on

<sup>68</sup>*NDPP v. Kyriakou* – “... court held that NDPP does not have to prove as a fact that confiscation will be made, discretion of the court should be sparingly exercised and only in the clearest of cases where the consideration in favor substantially outweigh the considerations against....”

*NDPP v. Rautenbach* – “...court needs to only ask whether there is evidence that might reasonably support a conviction and a consequent confiscation order and whether that evidence may be reasonably believed....”

<sup>69</sup>Offenses under Schedule 1 of POCA include: murder, rape, kidnapping, public violence, arson, offenses dealing with gambling, offenses related to the Corruption Act, extortion, etc For a full list of Schedule 1 offenses, please see Prevention of Organized Crime Act (POCA) of 1998 at: <https://www.fic.gov.za/DownloadContent/LEGISLATION/ACTS/02.POCA.pdf>

section 38 (1), the prosecutor is authorized to apply *ex parte* for a preservation order without notifying interested parties; this section was challenged in the court on the basis that it infringes on the right of access to the court. The Constitutional Court upheld the constitutionality of section 38, holding that the principle of *audi alteram partem* was not excluded, meaning that in considering applications for preservation orders, the court still can apply the principle related to the provisions orders and return days provided for in Chapter 5 (Criminal Forfeiture). In reality, the AFU is tasked to conduct assessments based on the facts of the case and to determine whether or not a notice will be served.

Although the prosecutor is allowed to make an application for forfeiture *ex parte*, section 39 requires that after the preservation order is issued, notifications must be sent by the prosecutor to all persons with an interest in the property and that the notification be published in the *Gazette*. The prosecutor also is required to give notice of a forfeiture application to all persons who made an appearance with the intention to oppose after receiving notice of the preservation order. Persons making an entrance shall submit an affidavit containing the identity of the person, nature and extent of his or her interest, and the basis for defense based on which the forfeiture order is opposed (section 39(5)). Interested parties opposing forfeiture orders usually do so at the forfeiture stage of the proceedings, either in the forum of an appeal or an application for a variation of rescission. The preservation order will be in effect for 90 days, when it will expire, unless an application for forfeiture was made, an unsatisfied forfeiture order is pending, or the order is rescinded before the expiration of the period. Further, if it is considered necessary to preserve the property from being disposed of or transferred, the court will authorize its seizure. In such instances, provisions have been made to allow for appointment of a *curator bonis*, similar to the criminal forfeiture proceedings.

When a preservation order has been issued against a property, the court can make provisions for reasonable living expenses and/or legal expenses, if it is satisfied that those expenses could not be covered from other properties that are not subject to the preservation order, and if the defendant has disclosed under oath all of his or her assets and liabilities.

The public prosecutor can apply to a High Court for an order to forfeit property to the state, giving a 14-day notice to every person who entered an appearance. The statute also allows for late entry of appearance if the person was not aware of the existence of the forfeiture order, but before the judgment is given. For the court to grant a forfeiture order it must be satisfied on a balance of probabilities that the property is either an instrumentality of a Schedule 1 offense or is the proceeds of unlawful activities. Both statutory requirements have been a subject of consideration by the courts. Regarding the definition of the proceeds of unlawful activities,<sup>70</sup> the SCA held that the definition is wide and should be narrowed and focus its analysis on the “connection” between the proceeds and unlawful activities, holding that “some sort of consequential relation should be required between the proceeds and unlawful activities.”<sup>71</sup> It was held that the definition of proceeds does not refer to offenses, but to the “proceeds of unlawful activities,” which means that it includes “conduct which constitutes a crime or which contravenes any law.”<sup>72</sup> The meaning of “instrumentality of an offense” has been even more intensely deliberated, holding that the definition contained in POCA<sup>73</sup> is too wide. In *Cook*, SCA expressed its concerns that if the definition is interpreted literally it could lead to arbitrary deprivation of property and breach of the protections guaranteed by the Constitution (section 25). Further, the court concluded that a narrow interpretation of the definition of instrumentality was required, that the property must play a reasonable role in the commission of the

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<sup>70</sup> The proceeds of unlawful activities are defined to include “any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”.

<sup>71</sup> NDPP v. *Rautenhach* 2005 (4) SA (603) SCA

<sup>72</sup> NDPP v. *Mohunram*

<sup>73</sup> “An instrumentality of an offense means any property which is concerned in the commission or suspected commission of an offense at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.” See POCA 1(1)

offense; that is, it should in a substantial sense facilitate the offense.<sup>74</sup> The court held that this can be established based on the way the property has been organized, arranged, constructed, or furnished to enable or facilitate the commission of the crime. The court, in *Cook*, also held that an incidental relationship between the property and the offense is not sufficient to establish that the property is an instrumentality of the crime; however, the more incidents that can be established, the easier it is to draw a connection.

After the court has established, on balance of probability, that a property is an instrumentality of an offense, it will issue a forfeiture order. The validity of the order will not be affected either by the absence of a person with an interest in the property or by the outcome of the criminal proceeding. The prosecutor is required to notify a person with interest in the property that there are reasonable grounds to believe that the property is an instrumentality of an offense. If the court finds that the interest of third parties was acquired legally, or if the person has not known or suspected that the property is the proceeds of unlawful activity, it may exclude his or her interest from forfeiture. In such a case, the person bears the burden of proof to present evidence that he or she did not know that the property is an instrumentality of the crime or the proceeds of unlawful activity.

Courts were concerned that if forfeiture were ordered every time a property was found to be an instrumentality of a crime that it could lead to arbitrary deprivation of property. Thus, it determined that an inquiry be conducted into proportionality analysis before forfeiture of any property is ordered. The court looked at a number of factors, including: whether or not the property is integral to the commission of the offense, whether or not forfeiture would prevent further commission of the offense and the social consequences of the offense, whether or not the innocent owner defense would be available to the owner, the nature and use of the property, and the effect on the respondent of the forfeiture.<sup>75</sup> After this inquiry, the court further narrowed and defined cases in which forfeiture of concerned property will be granted, evaluating the impact of forfeiture on the persons affected by the decision, and evaluating thoroughly the importance the property had for the commission of the crime. It seems that the court narrowed the implementation of forfeiture only in cases when the property was essential to the commission of the offense, and also granted and expanded the rights of innocent owners. Finally, in *Mohunram*, the court held that the NDPP has the onus to establish the proportionality of forfeiture sought, not the respondent.

The statute provides further protections for rights of any person affected by the forfeiture order. Section 54 allows a person with an interest in forfeited property, to apply for an excluding order 45 days after the forfeiture order was issued. The application should be accompanied with an affidavit containing relevant information on the title of property, acquisition time and circumstances and the relief sought. The applicant is also allowed to present further facts, evidence and witnesses on his or her behalf. Witnesses and other evidence can be also presented by the prosecutor. And lastly, provisions on appeal enable any person to challenge the forfeiture order at a higher court.

#### *PoCA and South African case law*

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As stated earlier, although none of the POCA provisions were declared unconstitutional, substantive case law was developed since its implementation. Many aspects of the statute were challenged and the South African courts have, until now, upheld it. Thus, it is surprising to note that although Chapter 5 holds a number of statutory presumptions, which are considered by the court as *prima facie* evidence in determining the lawfulness of property, or shifting the burden of proof onto the defendant, these have not been challenged by the respondents. Most of the cases related to non-conviction forfeiture appear to be in the area of defining the meaning of the “instrumentalities of an offense” and establishing the connection

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<sup>74</sup> Raylene Keightley “Asset forfeiture in South Africa under the Prevention of Organized Crime Act 121 of 1998”, *Civil Forfeiture of Criminal Property*, Simon N.M. Young

<sup>75</sup> *Prophet v. NDPP* 2006 (2) SACR 525 (CC)

between the offense and the instrumentality of the property as well as proportionality analyses, as noted above.

An important case in civil asset forfeiture is *NDPP v. Mohamed No and Others*,<sup>76</sup> where the Constitutional Court held that Chapter 6 *provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offense, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted.* The court ascertains that forfeiture orders are not dependent on the institution or on successful conclusion of a criminal prosecution. The objective of civil forfeiture is to strip profits from those who have acquired them through unlawful activities. However, it is considered that Chapter 6 may lead to arbitrary deprivation or unjustifiable violation of the rights protected by the Constitution, precisely because it does not require the establishment beyond a reasonable doubt that an offense was committed. Forfeiture is focused on the “guilt” of the property rather than on the wrongdoing of the owner.

Further the courts dealt with the definition of the scope of POCA, deliberating on whether POCA was limited to organized crime offenses, such as racketeering, money laundering, or criminal gang activities. The court held that *while the ambit of asset forfeiture provisions of POCA 1998 extend beyond organized crime, it held that use of asset forfeiture outside of the ambit of organized crime would not always be appropriate and justified.* This issue also was debated by the Constitutional Court in *Mohunram v. NDPP*,<sup>77</sup> where the court held that it was unconvinced by the contention that Chapter 6 of POCA can reasonably be interpreted so as to apply only to so-called “organized crime” offenses. Judgments in *Mohunram* agree that fighting organized crime is a relevant factor in proportionality analysis, but that it is not necessarily a decisive factor. The court expressed concerns about disproportionate application of forfeiture, but was reluctant to interpret the purpose of POCA to target only property used as an instrumentality for commission of “organized crime” offenses.

Forfeited money is paid into the Criminal Assets Recovery Account (CARA), which is part of the National Revenue Fund. The CARA is administered by the Criminal Asset Recovery Committee, consisting of the Minister of Safety and Security, Minister of Finance, the National Director, and two other members. Its role is to make recommendations regarding allocation of moneys to institutions, organizations, or law enforcement agencies. Powers to institute an investigation to determine unlawful origin of property are vested in the Director of Public Prosecutions.

### United Kingdom

The confiscation regime in the United Kingdom (U.K.) before consolidation by the Proceeds of Crime Act of 2002 was governed by various laws such as the Drug Trafficking Act of (1986), which provided for mandatory confiscation of the proceeds from drug-trafficking offenses, which was amended and consolidated in 1994. Further, part VI of the Criminal Justice Act (1988), amended by the Criminal Justice Act (1993) and further developed by the Proceeds of Crime Act (1995), governed confiscation of the proceeds from indictable and other summary offenses. By 1999, it was noticeable that the confiscation track record in the U.K. was poor, despite these confiscation powers. Few confiscation orders were issued and even fewer of what was ordered was being collected. As a result, the government ordered a study to evaluate the confiscation system in the U.K. The Performance and Innovative Unit (PIU) of the U.K. Cabinet Office conducted the evaluation and published a report in 2000 identifying key weaknesses in the national confiscation regime and making a number of recommendations to enhance it, including enactment of cohesive and comprehensive legislation. Responding to the recommendations, the U.K. legislators enacted the Proceeds of Crime Act in 2002, creating a comprehensive confiscation and asset recovery system, establishing the Asset Recovery Agency (ARA), consolidating criminal law with regard to money laundering and confiscation, introducing non conviction-based civil recovery and the use of revenue powers in relation to criminal gains, and developing ways to exchange information between the

<sup>76</sup> 2002 SA 843 (CC0 (12 June 2002)

<sup>77</sup> 2007 (2) SACR 145 (CC) (26 March 2007)

new agency and other authorities. The new legislation was described as representing “the new era focused on depriving the organized criminals of their illicit gains, and disrupting funding for future activities, thus showing crime will not pay.”<sup>78</sup>

The Proceeds of Crime Act of 2002 provides four procedures or regimes for seizure, forfeiture, and confiscation of the proceeds of crime: (1) in criminal proceedings following conviction of the defendant; (2) in civil proceedings in front of the High Court, also known as civil asset recovery; (3) taxation of incomes or gains suspected of being derived from crime; and (4) confiscation by police or customs and excise of cash suspected of being the proceeds of crime.

### *Conviction based confiscation*

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The aim of the conviction based confiscation proceedings is to recover profits and financial benefits derived from defenders’ criminal conduct. Chapter 2 of POCA provides for confiscation of the proceeds of crime following the conviction. Confiscation procedure can be initiated by the public prosecutor or *ex officio* by the court, after the defendant has been convicted of a crime. Before initiating the confiscation procedure, the court must determine if the defendant has benefited from its criminal activity. After establishing the benefit, the court must determine if the defendant has a criminal lifestyle. For “criminal lifestyle” to stand, the following conditions must be satisfied: (i) the offense must have been committed over a period of at least 6 months and the benefit derived from the offense exceeds £5,000; (ii) if the defendant’s conduct forms part of a course of criminal activity and if he or she has benefited from that conduct (in the proceeding in which the defendant was convicted, he or she was convicted for three or more offenses); and (iii) if the defendant is convicted for offenses unlikely to be committed once (e.g., human trafficking, money laundering, drug and arms trafficking). To ascertain the financial benefits of the defendant, the court relies on the following assumptions: that any property transferred to the defendant over the past 6 years, from the day the proceedings against the defendant were initiated, is assumed to derive from crime, that all expenses incurred during the past six years are assumed to be covered by the profit derived from crime; and that any property transferred to or obtained by the defendant is considered to be free of any interest. The statutory assumptions aid in determining the defendant’s benefit from the crime, unless the court considers this will give rise to a serious injustice, or unless the defendant can prove that the assumptions are incorrect.

If the court decides that the criminal lifestyle standard is not met, then it will continue to determine whether or not the defendant has gained any financial or other benefit from the criminal conduct. If the court affirms that the defendant has profited from his or her conduct, it must calculate the profit gained from the particular offense. In this case, the prosecutor must prove beyond reasonable doubt the causal link between the particular offense and the derived benefit.

After determination of the amount from which the defendant benefited, the court determines the recoverable amount, which can be paid to the state; however, the court also must assume when calculating benefit that the victims of the conduct have or will start a proceeding to recover the loss, injuries, or damages caused to them as a result of the conduct. In determining the final amount, the court applies the general rule that the final recoverable amount should equal the profit made from the conduct. However, if that amount is no longer available, the court will decide its reduction accordingly. In addition, to prevent dissipation or transfer of assets, the court can issue a restraining or freezing order, ordering the defendant not to deal with the assets.

The law provides that a confiscation hearing can be held before the defendant is sentenced for the offense and for a maximum of two years after the date he or she was convicted. The payment order should be enforced within a specified period of time, as ordered by the court. If the defendant fails to make the payment, the court can order imprisonment, which is ordered in addition to the primary sentence. Both the prosecutor and the defendant can apply for a variation or discharge of the confiscation order.

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<sup>78</sup> Asset recovery under the Proceeds of Crime Act 2002: the UK experience, Angela V.M. Leong

The standard of proof applied throughout the proceedings is the civil standard, balance of probabilities. Contrary to this conclusion held by the representatives of the Judicial Cooperation Unit of the Home Office and the Head of Asset Forfeiture,<sup>79</sup> GRECO<sup>80</sup> evaluators in the Annual Report concluded that in cases when the court establishes that the defendant has a criminal lifestyle, the burden of proof shifts onto the defendant to prove the legitimate source of his or her assets. Provision 17 of the POCA 2002 empowers the court, on receipt of the statement from the prosecutor, and the director to share the statement with the defendant, and authorizes the court to request that the defendant submit a statement accepting the allegation or offer other information on matters he or she proposes the court to consider. This does represent a reversal of burden of proof during the proceedings after the prosecution has shown that the defendant has a criminal lifestyle, whereby the defendant is offered an opportunity before the court to prove legitimacy of the concerned property.

#### *Non-conviction based forfeiture - Civil recovery*

Non-conviction based forfeiture or in English legislation known as civil recovery proceedings were introduced in the Proceeds of Crime Act 2002, with recommendations from the Home Office Working Group on Confiscation and the PIU report in 2000 permitting forfeiture of assets derived from unlawful conduct, without prior conviction. This regime is considered more intrusive and better suited to counter increasingly well organized and sophisticated criminal activity.

Part V of POCA 2002<sup>81</sup> authorizes the Serious Organized Crime Agency (SOCA, of which ARA is now a part)<sup>82</sup> to apply for the recovery of the property obtained through unlawful conduct, before the High Court for offenses committed in the U.K., Ireland, Wales, and Scotland. Cases are referred to ARA from the law enforcement agencies when: (a) there is no sufficient evidence to pursue criminal charges; (b) no criminal charges are made due to public interest; (c) confiscation proceedings have failed; and (d) the defendant is beyond reach because that person is dead or abroad and there is no reasonable prospect of securing his or her extradition. Before an investigation is initiated by the ARA, certain criteria must be met: (1) the case must normally be referred by a law enforcement agency or prosecution authority; (2) recoverable property must be identified and have an estimated value of at least £10,000; (3) recoverable property must be obtained within last 12 years; (4) there must be significant local impact on communities; and (5) there must be evidence of the criminal conduct supported on the civil standard balance of probabilities. A significant limitation on the investigative powers is the restriction of the ARA to investigate only the cases referred from law enforcement agencies, thus restricting ARA's power to initiate investigations independently. Significant investigative powers were granted to ARA under Part 8 of POCA, such as production orders, search and seizure warrants, disclosure orders, customer information orders, and account monitoring orders. The disclosure order is one of the most important orders because it enables SOCA staff or the Director to ask any person to produce documents, provide information, or answer questions related to an investigation.

The court may order the applicant to notify the respondent and any third party with interest in the property that is subject to the recovery order. The court will grant an interim order if it is satisfied that there is a good arguable cause, that the property is recoverable property, and that any of the recoverable property is associated property.<sup>83</sup> The burden of proof is on the ARA to prove on the balance of probabilities that the

<sup>79</sup> Tough on Criminal Wealth; Exploring the Practice of Proceeds from Crime Confiscation in the EU, Barbara Vettori

<sup>80</sup> GRECO Second Evaluation Round–Evaluation Report on the United Kingdom, 2004

<sup>81</sup> Civil recovery regime influenced by the RICO experience in the U.S., Criminal Asset Recovery in New South Wales, and the Proceeds of Crime Act 1996 of Ireland

<sup>82</sup> Asset Recovery Agency incorporated in the Serious Crime Agency

<sup>83</sup> Associated property is defined by Section 245 of POCA 2002 to be “any property held by the respondent which is not in itself the recoverable property but: (a) any interest in the recoverable property; (b) any other interest in the property in which the recoverable property subsists; (c) if the recoverable property is a tenancy in common, the tenancy of the other tenant; (e) if (in Scotland) the recoverable property is owned in common, the interest of the other owner; and (e) if the recoverable property is part of a larger property, but not a separate part, the remainder of that property.”



property is recoverable and was obtained through unlawful conduct. It is sufficient to prove that the property was obtained from unlawful conduct, whether or not the person received, money, goods, or services for commission of the conduct; the ARA does not have to prove that the conduct was of a particular type. Therefore, the property may be recoverable even if it is not possible to prove that the particular property derived from a particular type of crime. The respondent has the burden to prove the lawful source and to produce evidence that rebut the allegation that his or her property is recoverable.

The ARA may apply to the High Court *ex parte* to issue an interim receiving order. An interim receiving order can be an order for: (i) detention, custody, or preservation of property, and/or (ii) appointment of an interim receiver. The ARA may, per Civil Procedure Rules, apply for freezing injunctions to preserve assets for the purpose of meeting a recovery order when there is an imminent risk of dissipation of assets.

The court will grant an interim receiving order if it meets the following two standards: (1) if there is an arguable cause that the property is recoverable, and that if part of the property, which is not recoverable, is associated property, and (2) the identity of the person who holds the associated property could not be established.<sup>84</sup> The court appoints a receiver to manage the property with wide powers and responsibilities, including establishing the owner of the property, location and the extent of property, management of the property, including sale of perishable goods, carrying on the business or trade, as well as undertaking any other steps the court deems appropriate. The unique role of the receiver in U.K. legislation is that in addition to the roles outlined above the receiver is also responsible for taking and continuing the investigation from the ARA.

If the court decides that the property is recoverable, it must issue a recovery order vesting property in the trustee to undertake civil recovery. The trustee is appointed by the court and acts under the direction of the ARA director. The trustee is responsible for (i) securing the detention, custody, or preservation of the property vested on him, (ii) realizing the value of the property for the benefit of the ARA, and (iii) assuming any other function delegated to him.

In 2002 the decision was made to abolish the ARA and redistribute its functions to SOCA (under the Serious Crime Act 2007). The amendments of 2005 empower SOCA to sue anyone in the High Court if it suspects the person has gained or benefited in any way from unlawful conduct.

### *Cash forfeiture*

The third regime provided for by POCA 2002 extended the scope from what was originally provided under the Drug Trafficking Act of 1994. It extends cash forfeiture to cover the proceeds from all offenses, allows for search, seizure, and forfeiture of cash intercepted anywhere in the country suspected of being the proceeds of crime or intended to be used for commission of a crime, and the amount to be forfeited is not less than £5,000, recently reduced to £1,000.<sup>85</sup> Cash forfeiture<sup>86</sup> originally was applied only to the cash intercepted at the border crossings for the proceeds suspected to derive from or intended for commission of drug-trafficking offenses.

Cash forfeiture is a civil procedure and the civil standard of proof applies; thus, conviction is not required as a prerequisite to apply for forfeiture or enforce a forfeiture order. POCA authorizes police, customs, and excise officers to search, seize, and apply for forfeiture of cash if the following conditions are met: (1) there is a reasonable ground to believe that the person is carrying, transporting, or owning cash that is suspected to be the proceeds of crime, or intended for commission of a crime; (2) the cash is a recoverable property; and (3) the amount is no less than £1,000. If these conditions are met, the police and customs officers can detain the person if necessary to carry out search and seizure; however, although the law

<sup>84</sup> POCA 2002, section 246 (5) (a) (b)

<sup>85</sup> Ceiling for cash forfeiture initially set not to exceed £10,000; this amount later reduced to £5,000, while recently, in 2006, it was decided to reduce the ceiling to £1,000

<sup>86</sup> Cash is broadly defined as including notes or coins in any currency, postal orders, and checks of any kind including traveler's checks, banker's drafts, bearer bonds and bearer shares. Proceeds of Crime Act, s289 (6) U.K.

permits the search of premises, it does not allow intimate or strip search of the suspect. In most circumstances, for police or customs officers to carry out searches, approval from the Justice of Peace (in England, Wales, and Northern Ireland) and the sheriff (Scotland) is required. If it is not practicable to obtain an approval, the law provides for a senior officer, a police inspector, or equivalent to approve search and seizure<sup>87</sup>; in such circumstances, the officers conducting the search are required to submit a written report justifying their actions and justifying the necessity of immediate action. Cash seized during the search can be retained for no more than 48 hours; this time can be extended only with the decision of the Magistrate Court or Justice of Peace. While the cash is seized, the Commissioner of Customs can submit an application to the Magistrate Court for forfeiture of the seized cash in whole or in part.

Cash forfeiture is considered to be a successful tool in depriving criminals of the proceeds of crime, although success rates vary among different police services depending on the level of training received on the application of the cash forfeiture law. The number of seizures and forfeitures reported by the ARA indicate that expansion of the use of the cash forfeiture regime led to a peak in 2003, when there were 422 cash seizure totaling £16.7 million. In the years between 2006 and 2009, there has been a progressive increase in the amounts recovered in cash forfeitures, as seen in the table below.

**Table 1: 2008/09 Proceeds of Crime Compared with Earlier Years<sup>88</sup>**

	2006–2007	2007–2008	2008–2009	% increase from 2006 to 2009
Cash seizure	£3.3M	£8M	£9.2M	178%
Cash forfeiture	£2.3M	£2.9M	£4.5M	95%

#### *Taxation powers under PoCA*

The fourth power provided by POCA is taxation of the proceeds of crime. This measure is introduced as an alternative to civil recovery, granting revenue functions to the Director of the ARA to assess a suspect's income and taxes. The qualifying condition enabling the Director of the ARA to assess a suspect's income is that he or she should have reasonable grounds to believe that the income gained is a chargeable income or that the accrued profits are a result of a person's criminal conduct. Further, POCA authorized the director to assess a company's chargeable profits resulting from the company's or another person's criminal conduct (POCA 317). To enforce taxation there is no need for the ARA to provide evidence that the profit was derived from a specific crime and it is immaterial if the source of an income cannot be identified (POCA 319). Inland Revenue has the power to assess a person's income tax; however, it cannot act in cases when the source of income cannot be identified. Similar provisions are provided for inheritance tax, authorizing the director to assess the inheritance if there are reasonable grounds to suspect that the transfer made is attributable to criminal property. In applying internal revenue provisions the director must apply interpretations published by the Board of Inland Revenue.

The power to tax the proceeds of crime was introduced in the U.K. because it was estimated that criminal organizations have generated somewhere between £.6.5M and £11B in 1996<sup>89</sup> alone, and some of these revenues were untaxed and thus considered to destabilize the U.K. financial system. Inland Revenue has lent staff to SOCA to enhance the sharing of information and experience.

**Effectiveness** The civil recovery procedure has yielded fewer results than expected. The procedures are lengthy and encounter many legal challenges, and only a small percentage of seized assets are actually recovered and collected by the agency. For example, for years 2004–2005, out of £15 million seized, only

<sup>87</sup> The rules defining this authority are provided for in the Code of Practice issued by the Secretary of State (292 POCA 2002)

<sup>88</sup> Serious Organized Crime Agency (SOCA) Annual Report 2008/09, p.32

<sup>89</sup> "Asset Recovery Under the Proceeds of Crime Act 2002; the UK experience," Angela V.M. Leong

£5.6 million was recovered. Similarly, in 2005–2006, out of £85.7 million seized, only a small portion of the total £4.6 million was recovered.<sup>90</sup>

The decision to establish the ARA was made based on the experience of other agencies dealing with criminal confiscation; therefore, setting too high an expectation and targets. Operational and financial costs also were estimated based on the experience of other agencies, without taking into consideration the complexity of the cases with which the ARA would be dealing, the legal challenges it would face, and the length of the civil proceedings. Another criticism was ARA's failure to cover its costs; it used £60M to cover operational costs over the three years of its existence, but it recovered only £8M. Thus, targets set for the ARA were often too high and difficult to achieve. It was noted that at the best case, between 2003 when the ARA was established and 2009 (last report) the ARA was able to achieve only three of its five targets.<sup>91</sup>

In addition, legal challenges caused significant delays in the civil recovery proceedings. Fundamental concerns regarding civil proceedings were raised, such as concerns related to lack of proportionality, lack of presumption of innocence, and the double jeopardy rule. Some respondents argued that the civil recovery procedure should be criminal and not civil, which would trigger the safeguards guaranteed by Articles 6 and 8 of the European Convention on Human Rights (ECHR). However, the High Court dismissed these concerns, holding in *Walsh v. The Director of the ARA; R (the Director of the ARA) v. He & Cheng*, and *R v. Belton* (N. Ireland), that civil recovery is not a criminal but a civil proceeding in nature, and is intended to recover property obtained through unlawful conduct and not to penalize any person and as such it does not trigger protections built into the criminal proceedings such as presumption of innocence or the double jeopardy rule.

Further, it was noted that when considering POCA 2002, the Home Office was careful to consider and incorporate human rights safeguards in the legislation, ensuring that provisions in POCA are in agreement with the standards of the ECHR, striking the right balance between the rights of the individual to enjoy property and the right of society to reclaim illegally gained assets. Some of the safeguards incorporated are: setting the minimum threshold of £10,000, ensuring that the burden of proof remains with the state, and ensuring that all respondents have legal representation during the proceedings and, therefore, providing legal aid and incorporating provisions that provide for compensation in cases of wrongful judgments. The intention of the legislature was to make confiscation the primary tool to deprive criminals of their profits, with the civil recovery remaining an alternative, and the taxation regime to be used as a last resort. However, this was later modified with the Revised Guidance issued by the Secretary of State to the Director of ARA in February 2005, indicating that criminal investigations, civil recovery, and taxation investigations and proceedings can be instituted at the same time, thereby modifying the alternative role of the civil recovery and taxation regime, and placing them at the forefront of the forfeiture regimes.

### 3.1.3 Countries that have some form of unexplained wealth provisions that apply to all offenses, providing for reversal of the burden of proof in a *criminal* proceeding

#### Austria

Austrian legislation has recognized forfeiture and confiscation as additional penalties for committed crimes since 1987. However, these provisions were not applicable in many cases when attempting to confiscate gains derived from serious crimes. To remedy this situation and enhance confiscation of criminal proceeds, the legislature revised and re-enacted the provisions on conviction based confiscation in 1996. The amended Austrian Criminal Code provides for confiscation in both civil and criminal proceedings.

<sup>90</sup> Evaluation of the Civil Recovery Regime, Angela V.M. Leong

<sup>91</sup> See ARA and SOCA Annual Reports

*Conviction based confiscation in criminal proceeding.* The rationale for introducing the new confiscation rules is that “crime must not pay” and the profit should be taken away from the offender, with the aim of deterring them from doing wrong again. These rules are applicable to all punishable offenses for which the offender has gained or received any kind of financial benefit.

These provisions are widely known as skimming-off profit rules, which is different from previous legislation where they do not provide an additional penalty but are a standalone sanction. They are non-conviction based, whereby the prosecution does not need to establish a linkage between the proceeds to be confiscated and a commission of a specific crime or offense. The procedure can be initiated in parallel with the judgment of conviction, independently, or even without instigating a conviction procedure at all.

Section 20 of the Penal Code provides for a reversal of the burden of certification of origin, avoiding full reversal of the burden of proof, and focusing on the burden of the defender to present the facts. It is sufficient for the prosecution to prove that the defendant has continuously and repeatedly committed criminal offenses and that he has obtained economic benefit from it, or has received economic benefit from committing an offense, and he will be condemned to pay an amount of money equivalent to the gained illegal profits. Similarly, members of criminal organizations who have gained pecuniary benefits during the time they were members can be stripped of their assets. The court has only to establish that the perpetrator was a member of criminal organizations during a period of time and the burden of proof shifts onto the offender. However, the implementation of the reversed burden of proof provided by section 20, paragraph 2, can be solely used in specific and restricted circumstances and, second, at least in certain cases, the provisions relative to such reversal are substantially purposeless because they are not understood and interpreted by judges.<sup>92</sup>

Confiscation rules in Austria are subject to limitations; for example, if gained profit is less than €21,802, the confiscation procedure will be renounced; however, the law allows the court to add up profits gained from several offenses. Similarly, it is left to judges not to apply confiscation measures in cases where the costs of the proceedings would be disproportionately higher than the amount of money to be confiscated or if confiscation would cause an undue hardship for the person. However, an interesting feature of the confiscation procedure in Austria is the application of the net principle, which targets only the net profits of the offender, excluding expenses incurred when committing the crime. However, payments made to accomplices are not taken into account.

The Council of Europe Group of States Against Corruption (GRECO) criticized the Austrian confiscation rules in its 2008 Annual Report,<sup>93</sup> ascertaining that payment of an equivalent sum of money does not target the actual proceeds derived from offenses, but rather imposes a financial measure that would amount to illegal benefit, and this system would face difficulties when attempting to apply it to certain types of gains (e.g., immaterial advantages such as honorary distinction, assets that have a particular value of the offender notwithstanding their real market value). Furthermore, the report found that the provisions are silent as to the kinds of assets to which they can be applied (e.g., movable, immovable property, initial or converted proceeds, assets convoluted with legal income, transferred to third persons or relatives). The Austrian authorities hold that this value confiscation system is ultimately equivalent to a system of direct confiscation.

In addition, if the assets derived from criminal activity were not seized and are not available for confiscation, an equivalent sum of money can be paid to the state by the offender to fulfill the imposed sanction. However, different from other countries, the imposition of imprisonment in case of default of payment is not allowed.

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<sup>92</sup>*Tough on Criminal Wealth: Exploring the Confiscation of Proceeds of Crime*, Barbara Vettori, p. 43

<sup>93</sup> GRECO; Joint First and Second Evaluation Round; Evaluation Report on Austria available at: [http://www.coe.int/t/dgh/monitoring/greco/evaluations/round2/GrecoEval1-2\(2007\)2\\_Austria\\_EN.pdf](http://www.coe.int/t/dgh/monitoring/greco/evaluations/round2/GrecoEval1-2(2007)2_Austria_EN.pdf)

*Non-conviction based asset forfeiture.* Contrary to skimming off assets, forfeiture is stipulated as *in rem* and applies the gross principle, disregarding the expenses incurred while committing the offense, and allowing forfeiture of the total value considered to be derived from the offense. Forfeiture is applied to—

- Assets at the disposal of the criminal organizations
- Assets secured in Austria for offenses committed abroad, for offenses not under Austrian jurisdiction but being punishable under the law of the scene of the crime.

To impose the forfeiture of assets belonging to criminal organizations, two facts must be established: (i) evidence of the existence of a criminal organization; and (ii) economic power of disposal, the latter being the most important.

According to the forfeiture rules, the forfeiture is not allowed if there are legitimate third-party claims by persons who have not participated in the offense or who are not members of the criminal organization. In such instances the court will not proceed with the forfeiture. Forfeiture is ordered simultaneously with the judgment of conviction, but it also can be initiated independently of the conviction proceeding.

Investigations are carried out by the Financial Investigation Unit, which was created as part of the Ministry of Interior and has and uses common investigation techniques. Sometimes investigations are carried out during the trial phase. The prosecution, through the investigative judge, issues a provisional injunction. As pointed out earlier, the prosecution needs only to establish sufficient facts that the person is or was a member of a criminal or terrorist organization and the burden to present facts shifts to the offender to prove the origin of the property.

**Effectiveness** Austria has no reliable data on confiscation. Since the reform of the national confiscation system in 1996, public prosecutors are required to complete a form on collected data on the quantity of the seized and confiscated assets. This data collection system does not work because the information provided to the Ministry of Justice is incomplete.<sup>94</sup>

## France

France is a country with a civil legal tradition, and has recognized confiscation as an instrument to combat serious crime since 1810. The old French law had at its disposal two models of confiscation: General Confiscation, whereby all of the offender's property and assets could be forfeited to the government, and Special Confiscation, forfeiting only parts of the offender's assets. General forfeiture was applied only in rare occasions for specific crimes during World War II, such as treason, espionage, and the like. The new Criminal Code of 1994 does not differentiate between general and special confiscation, but distinguishes between obligatory (mandatory) and discretionary (optional) confiscation. Mandatory confiscation is ordered as a preventive measure for instrumentalities, hazardous or dangerous materials used or intended for use or derived from criminal offenses. Discretionary confiscation may be ordered for all serious and misdemeanor offenses punishable by imprisonment.

The Criminal Code and the national confiscation systems were subject to amendments in 1996<sup>95</sup>, 1999, 2000, and 2005; the most recent amendments were approved in July 2010,<sup>96</sup> are yet to be implemented.

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<sup>94</sup> Tough on criminal wealth: Exploring the practice of proceeds from crime, Barbara Vettori

<sup>95</sup>(Act no. 1998-468 of 17 June 1998 Article 5 Official Journal of 18 June 1998)

Where the law so provides, a felony or a misdemeanor may be punished by one or more additional penalties sanctioning natural persons which entail prohibition, forfeiture, incapacity or withdrawal of a right, an obligation to seek treatment or a duty to act, the impounding or confiscation of a thing, the compulsory closure of an establishment, the posting a public notice of the decision or the dissemination the decision in the press, or its communication to the public by any means of electronic communication.

### ARTICLE 131-11

Where a misdemeanor is punishable by one or more of the additional penalties enumerated under article 131-10, the court may decide to impose as a main sentence one or more of the additional penalties. The court may fix the maximum period of imprisonment or monetary penalty which the penalty enforcement judge may order to be wholly or completely enforced, under the conditions set out under article 712-6 of the Code of Criminal Procedure, if the convicted person fails to respect any

France recognizes only conviction-based confiscation, whereby confiscation of assets or property can be ordered only if the person is convicted for commission of an offense. Confiscation is characterized as an additional optional measure; that is, the judge has the option to impose confiscation as complementary or as a standalone sanction, and thus can even replace the primary issued prison sanction. Confiscation is mandatory for objects classified as dangerous or harmful, instrumentalities, and things used or intended for the commission of the offense or its proceeds, except for articles subject to restitution. The law also authorizes confiscation of equivalent value if the goods ordered for confiscation are no longer available.

For a number of offenses, including crimes against humanity, drug trafficking, money laundering, trafficking inhuman beings, prostitution, terrorism, begging, and criminal associations, the Criminal Code foresees general confiscation of part or all of the offender's property, whether private individual or legal person, whatever its nature, movable or immovable, and whether it is jointly or separately owned. In addition, Article 433-22 allows for the confiscation of unlawfully received gifts, which is related to corruption of public officials. The provision of this article focuses on confiscation of the proceeds of corruption attained by civil servants, publicly exposed people, and members of the judiciary.

France not only has introduced complete reversal of the burden of proof onto the defendant, but also has made it the central element of the criminal offense. Until 1996, the prosecution had the burden of proof in the proceeding to establish that the proceeds were of illegal origin; only one exception was permitted, under Article 222-39-2, for those convicted of carrying on a habitual relationship with a drug trafficker or user. The amendments of 2003 and 2004 of the French Criminal Code expanded the exception to cover all types of crimes, stipulating that all persons who are not able to account for the lawful origin of their income and who are associated, in close contact, or living with persons engaged in human trafficking, prostitution, begging, extortion, and persons committing misdemeanors or felonies against the properties of others, acts of terrorism, and all persons who participate in criminal associations,<sup>97</sup> will be charged with criminal offenses. If convicted, they can be imprisoned and ordered to pay a significant fee. In addition, for certain criminal offenses, an additional penalty of confiscation of all or part of their assets can be imposed against the defendant. This represents a radical move in French criminal law because it not only reverses the full burden of proof onto the defendant but also makes it a central element of a crime. The charged crime in such cases is the inability of the person to justify the legal origin of his or her income. Contrary to the laws in Ireland and Australia, which imposes confiscation of assets, the French criminal justice system not only imposes confiscation and payment of a fee, which are financial measures, but also imposes imprisonment, thus targeting the personal freedom of the defendant. The law does not require the existence of a predicate offense to impose these measures. It is interesting to note that when interviewed,

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obligations or prohibitions arising from the penalty or penalties imposed under the provisions of this article. The president of the court gives the convicted person notice of this after pronouncing his decision. The prison sentence or the fine which the court fixes may not exceed the penalties incurred for the misdemeanor for which the judgment has been pronounced, nor those provided for by article 434-41 of the present code. Where the provisions of the first paragraph are applied, the provisions of article 434-41 are thus not applicable.

<sup>96</sup> Extension of the possibilities of searches to seize assets subject to confiscation under article 131-21 of the Criminal Code;

Possibility of investigation for certain offenses to order security measures on assets (movable and immovable) as a guarantee for the payment of fines and the compensation of victims;

Determination of rules applicable to seizures when these relate to all or part of the assets of a person, immovable assets, movable assets or non-physical rights on movable assets, or seizures which do not lead to dispossession.

Creation of the *Agence de gestion et de recouvrement des avoirs saisis et confisqués* (Agency for the Management and Recovery of Seized and Confiscated Assets). It will manage all assets, regardless of their nature, which have been seized, confiscated or are subject to conservatory measures during a criminal procedure, as well as with transferring or destroying such assets.

Authorizes the court to order the seizure of assets which it has confiscated and have not yet been subject to seizure. When confiscation is final the immediate sale of movables whose value may depreciate quickly may be ordered and finally the Criminal Procedure Code of provisions on international cooperation to execute decisions on confiscation.

<sup>97</sup> Article 222-39-1, Article 225-6, Article 225-12-5, Article 321, Article 222-39-1 and Article 450-2-1 of the French Criminal Code. English translation of the French Criminal Code available at <http://195.83.177.9/code/index.phtml?lang=uk>

despite the radical character of these legal measures, French authorities stated that this option is used in judicial practice without causing any difficulties.<sup>98</sup>

French law also allows for confiscation pursuant to administrative procedures by the customs code, whereby customs officials are authorized to confiscate contraband materials, proceeds of crime, sums of money, and other items.

The law foresees seizure of all objects that could serve as evidence, instruments that have been used or intended for the commission of the offense, and objects that appear to be the proceeds. Seizure can be applied as early as during preliminary inquiries or judicial investigation with a warrant issued by the judge. Seized objects then are listed and placed under seal of proof of origin under court custody, except bank and post office accounts. The Financial Intelligence Unit TRACFIN also can block, for up to 12 hours, suspect bank transactions. The 12-hour time period can be extended only by the president of the Paris Regional Court. There is no department or body dedicated to managing seized assets; movable assets are stored in court registries, while immovable property is overseen by court-appointed receivers. When the subject of seizure is money or securities they are deposited in a bank account.

Financial investigation and confiscation of proceeds is undertaken by two different agencies operating under the auspices of two different ministries. TRACFIN<sup>99</sup> operates under the Ministry of Finance, Economy and Industry, and OCRGDF<sup>100</sup> under the Ministry of Interior. Although their areas of operation are similar and may even overlap, coordination between the two agencies is lacking because of a well-known rivalry between the police and the customs authorities. Financial investigations are carried out in almost all cases whereby the TRACFIN follows the trail of the money, tracking bank accounts through which funds were channeled and identifying holders and beneficiaries. Banking secrecy and confidentiality regulations do not represent grounds for opposing such judicial actions. To facilitate such investigations, France has established automated filing of all open bank accounts in France. Another route available to financial investigators is the use of the simplified tax procedure, which enables them to process national information on all individuals and legal persons under the jurisdiction of the tax directorate.

Because confiscation is conviction based it usually is ordered by the trial court and the prosecution does not need to submit a special application. All confiscated assets and materials become state property.

**Effectiveness** There are no statistical data on the seizure or confiscation of the instrumentalities and proceeds of corruption or equivalent assets to these proceeds, but bank accounts are seized in nearly all corruption cases.

## Italy

Italy is one of the first countries in Europe, perhaps the world, to enforce UWO measures as a tool to attack the financial base of organized crime and go after the profit acquired from criminal enterprises. Italy adopted this approach in its attempt to fight mafia-organized groups in southern Italy originating in the late 1950s after the World War II. These measures were not officially known as UWOs, but they contain key elements constituting UWOs; for example, they shift the burden of proof to the property owner to justify the legitimacy of the property; they are non-conviction based; and all or part of the assets and/or property for which lawful origin cannot be justified can be seized and subsequently forfeited.

Confiscation and forfeiture, according to Italian legislation, can be imposed in two different procedures,<sup>101</sup> the first being part of the patrimonial or preventive measures, also known as “extra judicial”, and is non-conviction based, and the second being the punitive or judicial measures, whereby

<sup>98</sup> GRECO Annual Evaluation report on France, 2006, p. 4

<sup>99</sup> Traitement du renseignement et action contre les circuits financiers clandestins (TRACFIN)

<sup>100</sup> Office Central pour la Repression de la Grande Delinquance Financiere (OCRGDF)

<sup>101</sup> Letizia Paoli, “Seizure and Confiscation Measures in Italy: An evaluation of their effectiveness and constitutionality, 1997, *European Journal of Crime, Criminal Law and Criminal Justice*

the confiscation order is issued in the course of criminal proceedings is conviction based (Article 240 of the Italian Penal Code).

***Preventive (administrative) measures-non-conviction based***

Although controversial and heavily criticized for violating personal rights, such measures have been upheld by the Constitutional Court and supported by the parliament and judicial authorities. They are constituted as preventive measures and are enforceable on five categories<sup>102</sup> of subjects considered socially dangerous, regardless of the commission of the offense, to which five preventive measures can be applied. They are non-conviction based, administrative in nature and are enforced outside criminal proceedings by law enforcement authorities under judicial supervision and under looser rules of evidence.

These measures were introduced for the first time in 1956 as personal preventive measures or *Misure di prevenzione personale*, and were modified in 1965 (Law No. 575) and in 1982 (Law No. 646<sup>103</sup>) to reflect the evolution of crime. The 1965 amendment (Law No. 575) extended the law to apply to preventive measures, including special and personal supervision of those “suspected of belonging to Mafia organizations.” The 1982 amendment, known also as the Rodogno-La Torre Act,<sup>104</sup> extended the scope to include “the suspects belonging to mafia type associations, or to the Camorra mafia type associations, known locally as pursuing goals or acting in ways that correspond to those of mafia type associations,” thus extending the application to other types of criminal behavior that use the methods and ways of mafia organizations, such as drug or human trafficking, prostitution, and so on. The most important innovation introduced by the 1982 amendment was the property or financial measure, which authorized seizure and confiscation of property and assets of the suspects belonging to mafia organizations. If a suspect was unable to justify the lawful origin of his or her assets or property, the court was authorized to order confiscation in whole or in part of his or her personal assets. The mere suspicion that a person is a member of a mafia-type organization was sufficient to impose preventive measures. According to Article 2-bis of the 1965 amendment, the source of income of those suspected of belonging to a mafia organization is assessed in terms of their lifestyles, financial means, property, and economic activities. However, with later development of the legislation, these requirements have been made more stringent and the evidentiary requirements to instigate the imposition of preventive measures must be beyond the stage of mere suspicion. However, the latter has been criticized by some legal scholars who believe that preventive measures were progressively taking on a more penal and judicial character.

Before enforcing preventive measures, police and the prosecution are required to investigate the suspect. Investigation is extended to cover his or her family members, including spouse, children if they have lived with the suspect over the past five years, and any other legal entity, company, syndicate, association, or organization in which he or she could have disposed of part or all of his or her assets. Seizure and confiscation are regulated by the 2-ter of the 1965 amendment (Law No. 575). The prosecutor must make an application for preventive measures and the court has the authority to order seizure or confiscation of assets. Two conditions are required for seizure: (i) assets must be directly or indirectly at the disposal of the suspect; and (ii) there must be a discrepancy between the suspect’s wealth and his or her income or there must be sufficient evidence that the assets are the proceeds of crime or the use thereof. Imposition of a confiscation order against the suspect is followed by the application of personal measures.

Although this is an extra judicial proceeding, there is a reversal of the burden of proof, which requires the suspect to present sufficient evidence and to justify that his or her assets are not the proceeds of crime. If the defendant cannot prove lawful origin of his or her assets, the court can issue a confiscation order

<sup>102</sup> At the time of its entry into force, the law provided for five categories of criminal behavior: vagabonds, those involved in trafficking, prostitution, drug trafficking, illegal betting and gambling.

<sup>103</sup> Preventive measures among others include, formal notice, return to their place of residence (repatriation) or prohibition of residence in one or more municipalities or provinces, withdrawal of licenses, concessions or applications of register, linked with the exercise of economic activities in which the person put under personal preventive measures takes part.

<sup>104</sup>



depriving the suspect of the proceeds. The prosecution does not need to prove commission of an offense or link assets or proceeds to a specific crime.

### *Conviction based confiscation*

Confiscation of assets considered to be instruments of crime and proceeds of crime is conviction based, governed by Article 240 of the Criminal Code. The first paragraph of Article 240 stipulates that “in the case of conviction the judge may order forfeiture if the things that were used or were intended to accomplish the crime or of the things that were the product or the profit.” For confiscation to be ordered the first prerequisite is imposition of a conviction on the defendant for an offense. The standards of evidence are those of regular criminal proceedings “beyond reasonable doubt”; thus, the prosecutor is required to provide proof under the rigorous requirements of the rules of criminal proceedings that the defendant has committed an offense. Confiscation per Italian criminal law can be optional or mandatory. Optional confiscation is for all criminal offenses whereby the judge has the discretion to decide whether or not to impose confiscation. Mandatory confiscation, which represents a supplementary sanction, is for a number of criminal offenses enumerated under Article 416-bis, such as those associated with mafia-type extortion, kidnapping, loan sharking, and various types of money laundering as well as drug trafficking.

Per Article 321 of the Criminal Code, seizure of a part or all assets is allowed in all cases where there is a probable cause that there may be a future confiscation that may occur at the end of the trial. Further, the Article *12quinqies* enacted in 1992 (Law No. 356) stipulates that those convicted of committing offenses associated with the mafia, including drug offenses, organized crime, and money laundering, are required to demonstrate the lawful source of their income and property. If they are unable to do so, they may be imprisoned for up to five years and forfeiture of part or all of their assets is compulsory. The second paragraph of this disposition provides for the reversal of the burden of proof, shifting the burden from the prosecutor to the defendant to justify the origin of his or her assets. This paragraph was declared unconstitutional in 1994 by the Constitutional Court, on the grounds that it was contrary to the principle of the presumption of innocence of the criminal proceeding and violated Article 27 of the Italian Constitution. To cover the legal vacuum created by the striking of the law, the government enacted *12sexies* the same year. The new law retained the compulsory character of the confiscation for those convicted of crimes stipulated under 416-bis. The text makes forfeiture compulsory in the case of a conviction for crimes prescribed by Articles 416-bis (delinquent mafia-type association), 629 (extortion), 630 (kidnapping for ransom), 644, 644-bis (loan sharking), 648, 648-bis, 648-ter (various types of money laundering) of the Penal Code,<sup>105</sup> and foresees that if a person convicted of crimes associated with mafia cannot justify the origin of the assets and if these appear to be disproportionate to his or her income, as declared in the tax declaration. The new law carries more stringent conditions for its application: the first limit being to those convicted of mafia-type crimes; the second requiring that the property be disproportionate to the assets stated in the tax declaration and the income made from economic activities; and the third that there is no need to establish a causal link between the assets to be confiscated and a specific offense.<sup>106</sup>

There also are doubts about the constitutionality of the new law as well; however, the Constitutional Court has not yet challenged its application. Some legal scholars consider that this law is unconstitutional because it does not allow the judge to verify and establish whether or not the convicted person is associated with or is a member of a mafia-type organization.

Reversal of the burden of proof was introduced initially with the *12quinqies* law in 1992 and amended with law *12sexies*, which were introduced to overcome the limited impact of Article 240 of the Criminal Code, which was considered ineffective in fighting organized crime. These provisions allow for

<sup>105</sup>LetiziaPaoli; “Seizure and Confiscation Measures in Italy,” *European Journal of Crime, Criminal law and Criminal Justice*, vol.5/3, 256–272, 1997

<sup>106</sup>GuilianoTurone “Legal frameworks and investigative tools for combating organized transnational crime in the Italian experience.” GiulianoTurone is Judge of the Supreme Court of Italy, Rome.

compulsory confiscation of criminal assets derived from criminal activities that are well established and for which the prosecution does not have the possibility of collecting sufficient evidence under strict rules of criminal proceedings to prove their illegal origin. After the law *12quinqies* was declared unconstitutional, the new law *12sexies* retains the inversion of the burden of proof, but under a number of stringent conditions. Because the inversion of proof is limited to certain criminal offenses, some serious crimes that endanger society cannot be covered by this law.

**Effectiveness** In regard to the efficiency of the application of rules ordering confiscation of illegal proceeds, there is a general consensus among scholars and practitioners that the effect is meager. According to available statistical data, which are not abundant, lack accuracy, and are duplicative, only a small number of seized assets is actually confiscated. For example, the data that exists for the years 1982–1995 show that out of 19,125 seized assets, only 5,333 were subject to confiscation orders, which is only 30% of the total seized assets. Moreover, the value of the confiscated assets is less than their value when they were seized. This is believed to be the result of a number of factors, such as depreciation in the value of the assets due to the long judicial proceedings, asset mismanagement, and inaccurate assessment of the original value of the assets. However, despite the correlating outside factors, it can be concluded with a high degree of certainty that the total value of the assets confiscated is significantly less than the value of the assets seized, based on the low number of confiscation orders issued.

The efficiency of applying confiscation measures has varied from year to year, reaching peaks between the years 1982 and 1985 and between 1992 and 1994. Legal scholars attribute this improved implementation and enforcement of confiscation orders to social developments. For example, following enactment of Law No. 646 in 1982, which introduced property measures, there was widespread use of confiscation orders, resulting in seized assets with a value of more than 300 billion lira and about 250 billion lira worth of property being removed from convicted Mafiosi or their front men.<sup>107</sup> After the first three years of progressive and effective application, there was a steady decline over the next years. Similarly, another peak was noted in 1992 after the murder of two judges—Falcone and Borsellino—and subsequent introduction of the *12quinqies* law criminalizing “unjustified possession of values,” which authorized confiscation of the assets of those convicted of mafia-type crimes. For 18 months after the law was enacted, the courts used it to confiscate considerable assets, until it was declared unconstitutional by the Constitutional Court. In 1993, the year the law was enacted, from August to the end of the year, 778 items were seized, with an estimated value of 338 billion lira, representing 42 percent of the total value of the assets seized in 1992.<sup>108</sup> The law *12sexies*, enacted to fill the legal vacuum created by the *12quinqies*, was used sparingly by the courts, resulting in much smaller amounts of seized and confiscated assets, reaching only three percent of the total value of the assets seized and confiscated in 1995.

### Netherlands

Conviction based confiscation of illegal proceeds has been possible in the Netherlands since 1983; however, it has been used infrequently due to a number of factors; for example, the requirement to establish a direct link between the assets to be confiscated and an offense, little time devoted to financial investigations, and the inclusion of confiscation proceedings as part of the main trial. Most of these factors were remedied with enactment of the “Strip Them” Act of 1993, which expanded offenses for which confiscation could be imposed, allowed for the separation of confiscation proceedings from the main trial, and provided for confiscation of assets without the requirement to establish a link between the proceeds and an offense in certain circumstances. In the majority of cases, however, the link between the proceeds and a particular offense is required following criminal prosecution. In cases when the causal linkage is not required, prior conviction is still a prerequisite. Furthermore, although the law does not permit in general terms a reversal of the burden of proof, an exception is provided for in Article 36e, paragraph 3, whereby the court can order the defendant to prove legal origin of his or her income. Unique

<sup>107</sup>Letizia Paoli, “Seizure and Confiscation in Italy,” p. 259

<sup>108</sup>Letizia Paoli, “Seizure and Confiscation in Italy,” p. 262

to the Dutch confiscation regime is the incorporation of civil forfeiture regime features in certain circumstances, including reversal of the burden of proof and confiscation of the proceeds without the need to link them directly to an offense.

*Conviction based confiscation in criminal proceedings*

As stated previously, application of the confiscation regime was enhanced with the 1993 Act. The main objective of the law is “to provide an efficient way to prevent the increased number of organized and lucrative forms of international crime, such as drug trafficking, fraud and environmental offenses.”<sup>109</sup> the legislature’s intent was to deprive those involved in committing criminal offenses of the economic advantage or financial benefits, by taking away from them, all or part of the gained profits. Confiscation laws were further enhanced with amendments in 2003 and 2005, improving asset seizure and management and introducing special financial investigations.

The main provision on confiscation is Article 36e of the Dutch Criminal Code, providing for two types of confiscation: Ordinary Confiscation and Special Confiscation. Ordinary confiscation (governed by Articles 33 and 33a of the Criminal Code) stipulates that confiscation as a sanction can be imposed when a defendant has been convicted of any criminal offense, and the items derived from the offense or used for commission or preparation of the offense can be confiscated. Special confiscation (Article 36e<sup>110</sup>) provides that the public prosecution can request the court to impose a measure requiring the defendant to pay a sum of money to the state in relation to the illegally obtained profits acquired from: (i) the offense for which the defendant was convicted (Article 36e, paragraph 1); (ii) similar offenses other than those for which the defendant was convicted, when there is “sufficient evidence” to assume that they also were committed by the defendant (Article 36, paragraph 2); and (iii) profits from offenses for which a fifth category fine can be imposed (fifth category fine is imposed for a number of offenses and is more than €45,000). This measure also can be imposed if a criminal financial investigation suggests that it is likely that illicit profits were obtained by committing other criminal offenses.

To impose confiscation per Dutch law, a prior criminal conviction is always required. Thus both the first and the second variant referenced above require presentation of sufficient evidence to establish a direct link between the proceeds and the offense. The third variant, however, pertains to a situation where a person has been convicted of an offense punishable by a fifth category fine and against whom financial investigation has been conducted and its results suggest that he or she may have acquired illegal profits from other similar offenses. This suggests that the prosecution does not need to establish commission of another offense and prove a direct link between the profits and the offense. The question arises: How does the court assess and determine the advantage of the profits acquired by the defendant from other similar offenses? The literature<sup>111</sup> shows that court uses an abstract method of calculation to identify illegally

<sup>109</sup> “Measures Concerning Confiscation of Illegally Obtained Profit,” Claire Daams and Ingrid van de Ryet, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 5/3, 308–313, 1997

<sup>110</sup> Section 36e of the Criminal Code

1. At the request of the Public Prosecutions Department, the person who is sentenced for a criminal offense may, by separate decision of the court, be obliged to pay a sum of money to the State in confiscation of illegally obtained profits or advantages.
2. This obligation may be imposed on the person as referred to in subsection one who gained profits or advantages by means of or from the proceeds from the criminal offense as referred to in that subsection or from similar offenses, or from offenses that are punishable with a fine of the fifth category, and of which there is sufficient evidence that they have been committed by him.
3. At the request of the Public Prosecutions Department, a person who is sentenced for a criminal offense punishable with a fine of fifth category and against whom, as a suspect of that criminal offense, a criminal investigation is conducted, may, by separate decision of the court, be obliged to pay a sum of money to the state in confiscation of illegally obtained profits or advantages, if, in view of that investigation, it is likely that offenses or other criminal offenses have in any way resulted in the convicted person having obtained illegal profits or advantages as well.

<sup>111</sup> “The burden of proof in confiscation cases; A comparison between the Netherlands and the United Kingdom in the light of the European Convention of Human Rights,” Tijs Kooijmans, *European Journal of Crime, Criminal law and Criminal Justice*, vol. 18 (2010) 225–236

obtained profits, calculating the assets derived from the defendant during a certain period of time, and determining how much of the acquired profits can be justified on the basis of legal income. If the increase in property cannot be fully explained on the basis of legal sources of income, the defendant is invited to justify that the increase of assets is derived from legitimate resources. If the defendant cannot provide satisfactory evidence to prove legal origin of the assets, the court will assume that the unexplained part of the assets was derived from illegal activities. This represents a reversal of the burden of proof, shifting the responsibility to justify the origin of his or her assets onto the defendant, even though Dutch law does not in general provide for reversal of the burden of proof.

Confiscation in Dutch law is discretionary and is imposed on the request of the public prosecutor. It can be requested at the beginning of the main trial or at any time up to two years after the verdict in the main trial has been reached. A confiscation request also can be issued based on an earlier verdict. A confiscation procedure can be part of the main trial, but more often is conducted in a separate proceeding. The reason for a separate proceeding is to prevent delays in the main case by the thorough financial investigations that are necessary to carry out the confiscation proceedings. However, when financial investigations are not complex, it is possible to have a confiscation request considered during the main trial. The confiscation measure is imposed with a verdict separate from the verdict of the main trial.

If the original assets derived from the proceeds of crime are no longer available, the law allows for value confiscation, whereby the defendant can be ordered to pay a sum of money equivalent to the proceeds or objects acquired. Further, confiscation can be enforced against third parties, if they knew or should have reasonably suspected that the goods had been obtained by means of the criminal offense or represent the proceeds of crime. The value confiscation principle also can be applied to third parties.

The law grants the prosecutor the authority to reach a settlement with the defendant regarding confiscation. Settlement can be reached at any time during the investigation, during the trial, and even after the verdict in the main trial has been read. If a settlement is reached, the defendant is obliged to pay a certain amount of money to the government or to turn over certain objects considered illegally acquired. A settlement agreement does not have any legal effect on the main trial. After a settlement is reached, the criminal financial investigation is closed. A settlement can be made in regard to the whole amount or part of the profit obtained. If it becomes clear later that the profits were larger than assumed, it is not possible to start another confiscation procedure to confiscate the surplus. If, however, the settlement is reached before the final verdict acquitting the defendant is made, the defendant can request reimbursement of the sum of money paid. Such reimbursement is not automatic; the charged person must make a request to have the money or the goods returned.

**Financial investigation** Two types of investigations are carried out in the course of criminal investigations: a regular financial investigation and a special criminal financial investigation. A regular financial investigation is carried out in all criminal cases; a special criminal financial investigation is initiated when the results of preliminary investigations indicate a likelihood of illicitly obtained benefits that may total at least €12,000. This threshold amount was introduced by the Directives on Special Confiscation. Special investigations are authorized by a judge at the request of the prosecutor and are carried out by the Financial Support Bureaus (FSB) whose sole purpose is to apply confiscation provisions. The FSBs' role is also to coordinate the information among other institutions involved in implementing the confiscation legislation, such as tax authorities, public prosecutors, and others. The law grants application of special investigative means such as electronic surveillance, undercover operations, house searches, phone taps, and others.

**Seizure and asset management** Freezing and seizure of instrumentalities of crime is regulated by Articles 94–126 of the Criminal Procedure Code. The law allows for seizure and freezing of assets to secure the return of the objects or items derived from the crime or to ensure execution of a future confiscation order or payment of a fine. The seizure order is issued by a judge acting either *ex officio* or

on the request of the public prosecutor; in the case of special financial criminal investigations, authorization of the public prosecutors is required. The seizure is carried out by the police.

Management of seized and confiscated assets is entrusted to the Prosecution Service Criminal Asset Deprivation Bureau (BOOM). The agency has the authority to make all decisions pertaining to management of seized assets: (i) to appoint an administrator; (ii) pay the seizure costs from the state coffers; or (iii) authorize delineation, destruction, abandonment, or use for a purpose other than the investigation. Assets ordered for confiscation are transferred to the state unless there are claims of damage from victims.

**Effectiveness** To facilitate implementation of the confiscation law, BOOM is set up to assist public prosecutors with investigations. Most courts have specialized chambers for confiscation matters and there are four specialized prosecutors at the BOOM who assist local prosecutors in the most serious criminal cases. Further, the Board of the Procurator General drafted “Directives on Special Confiscation” providing guidance to prosecutors to ensure efficient and uniform application of the confiscation provisions.

Given that confiscation is conviction based, prosecutors have no difficulties in confiscating the proceeds considered to be derived from illicit activities. The existence of the extended confiscation regime has made it possible to widen the application of confiscation to proceeds derived from other offenses, other than the one for which the defendant was convicted. Although measures are discretionary, they always are applied in organized crime cases.<sup>112</sup> Seizure of assets is extensively applied and has proved effective in obtaining evidence for proceedings, including confiscation and the main offense.

However, despite the progress made in applying confiscation provisions, there are considerable difficulties. One of the main issues raised is the quota of ten cases per year, which every public prosecutor must fulfill. Introducing this quota as a performance standard has enticed some prosecutors to pursue minor and less important cases rather than important and more time-intensive cases.

### Switzerland

Switzerland is a federal state, made up of 26 cantons, whereby criminal law is a matter of federal law. Switzerland has a civil legal tradition and the criminal law is codified in the Penal Code and the Penal Procedure Code, which are based on the principle of legality, meaning that no one can be charged for an offense that is not classified as such in the criminal code. The principle is introduced in the Criminal Code to protect defendants from arbitrary judicial decisions. The legislative body of the country has the power to determine which actions are classified and legislated in the criminal code as criminal offenses, for commission of which any person can be accused, prosecuted, and convicted.

Swiss law provides for both conviction and non-conviction based forfeiture laws. Both proceedings are governed by the same provision in the Criminal Code and the same procedures of the Criminal Procedure Code. Both confiscation proceedings *in rem* and *in personam* are conducted in criminal proceedings. Swiss criminal law does not provide for forfeiture of criminal assets in civil proceedings.

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<sup>112</sup> Barbara Vettori, “Tough on Criminal Wealth; Exploring the Practice of Proceeds from Crime Confiscation in the EU,” Netherland, 89–94

### *Conviction based confiscation*

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Conviction based confiscation of the proceeds of criminal law is governed by Articles 69–72 of the Swiss Criminal Code, and is mandatory. Article 69 of the Criminal Code governs conviction-based confiscation, authorizing the judge to confiscate the proceeds resulting from the commission of an offense as well as the instrumentalities of the crime, and objects used or intended to be used for the commission of the offense. Confiscation following conviction is mandatory and is deemed a supplementary measure to the prime penalty imposed by the court.

Alternatively, the Swiss Criminal Code provides for independent criminal confiscation proceedings to be initiated against the property *in rem* in cases when the defendant cannot be identified or has absconded. Article 70, paragraph 1 states “the judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender, provided that they do not have to be returned to the injured party to restore his or her rights.” Forfeiture is ordered against absent defendants, because this is an *in rem* forfeiture, it is not important who the owner is as long as these assets are known to be proceeds of crime. Swiss Criminal Code has adopted a broad concept of assets to include all valuable objects, items, economic advantages, and indirect benefits. The code sets forth provisions whereby the assets will not be confiscated if they were acquired by a third party not knowing of their criminal origin and if the measure is considered excessively harsh. The right to order confiscation of assets is subject to statutory limitation of seven years, unless the offense of which the defendant is accused has a longer prescriptive period, in which case the later applies. After the confiscation order is issued, the court is obliged to officially announce it, whereby interested third parties are given an opportunity to claim their interest in the property, which rights expire five years after the official announcement is made.

The burden of proof is on the prosecution, which is required to establish the link between the offense and the proceeds, under criminal standard of proof. The prosecution must establish that an offense was committed and that the property or assets were derived from commission of a particular offense, or have resulted from or were intended for commission of an offense. Although the standard of proof is criminal, it represents a lower standard of proof, called “intimate conviction,” meaning that the judge must be intimately convinced that the assets are the proceeds of an offense. For intimate conviction to exist, it is not necessary for there to be proof; rather, an “accumulation of clues” is deemed sufficient to convince the judge of the offense. However, when it concerns criminal organizations, Swiss law provides for reversal of the burden of proof; therefore, when a person is suspected to be a member of or to have supported a criminal organization, he or she will have the burden to prove the lawful origin of his or her assets (Article 260 of the Criminal Code). This legal statutory presumption comes into play and the burden of proof passes to the suspect only in cases when the person is liable for prosecution for membership in or support of a criminal organization.

To order the confiscation of assets considered to be the proceeds of crime, the criminal offense must be classified as such in the Criminal Code or other criminal laws in Switzerland (principle of legality), and must be within the jurisdiction of Swiss authorities. An exception is provided for proceeds derived from narcotics offenses, in which circumstances the Federal Law on Narcotics applies. This law provides that assets can be forfeited even in cases when the Swiss criminal justice authorities have no jurisdiction to prosecute the offenses, but the proceeds have been derived from drug-trafficking offenses.

The court also can order compensatory claims, or payment of an equivalent value assessed by the judge to have derived from the crime, if the actual proceeds are no longer available, if they have been spent, or if they have been otherwise disposed of by the defendant. The defendant is obliged to pay the amount set forth by the judge. From the amount received, the court may fulfill the claims of injured or third interested parties (Article 71 of the Criminal Code).

Article 305-bis of the Criminal Code sets forth the provisions incriminating money laundering offenses with respect to the confiscation of the proceeds of crime. The law provides that persons who obstruct the

discovery or the confiscation of assets that they knew or should have known to be derived from an offense are liable for up to three years of imprisonment.

To prevent dissipation, loss, or transfer of assets to third parties, Swiss Criminal Procedure Code sets forth provisions governing the seizure of assets (Article 65 of the Criminal Code). The investigative judge and the federal prosecutor have the power to ask the court to issue an order to seize or freeze assets. For the court to issue a seizure order there must be serious circumstantial evidence of a direct or indirect link between the assets for seizure and an offense. Seizure can be applied to movable and immovable property or property purchased with the proceeds derived from criminal activity, even if only part of the purchase was made with the proceeds of unlawful origin. The seizure order will remain in effect until the court makes a final decision regarding the property subject to seizure.

The amount of information available to evaluate the effectiveness of the implementation of the law is insufficient on which to base relevant informed conclusions. According to the GRECO Second Round Evaluation Report,<sup>113</sup> there have been six court confiscation orders in the past 3 years, two of which are corruption cases.

### 3.1.4 Countries that have illicit enrichment targeting PEPs, reversing the burden of proof to the defendant in a criminal proceeding

A considerable number of countries worldwide have developed legislation known as illicit enrichment that targets politically exposed people including public officials of all levels that may have acquired assets as a result of corruption or abuse of official position. We have chosen to depict only a couple of countries implementing illicit enrichment law. For a more exhaustive and comprehensive review, the World Bank is conducting a study on Illicit Enrichment laws worldwide.<sup>114</sup>

#### Hong Kong

The legal system of Hong Kong, as described by the Hong Kong Department of Justice, is “one country two systems.” The Basic Law of the Hong Kong Special Administrative Region (HKSAR) was enacted in 1990 and came into effect in 1997. It was enacted in accordance with the Constitution of the People’s Republic of China and contains a feature whereby the socialist system and policies of China shall not be practiced in HKSAR; thus, the previous capitalist system remains unchanged for another 50 years. This provides an avenue for continuation of all previous laws and ordinances of the former system, including those related to confiscation and forfeiture regimes.

Legislation governing confiscation and forfeiture regimes in Hong Kong was enacted during the British rule and little has been done to amend or upgrade them. Provisions targeting proceeds derived from drug trafficking and other serious offenses were passed in two different legislations; in 1989 the Drug Trafficking (Recovery of Proceeds) Ordinance (DTROP) and in 1990 the Organized and Serious Crime Ordinance (OSCO). In addition, in 1997 Hong Kong enacted the Prevention of Bribery Ordinance to combat and eradicate corruption, which has a provision on the Possession of Unexplained Property. Although the Hong Kong confiscation regime is considered advanced and moderate, it has seen very little development in this area since it became a special administrative region of China, with the exception of the anti-terrorist financing legislation enacted in 2002–2004. A recent evaluation conducted by FATF concluded that Hong Kong has a good legal structure to combat money laundering and the terrorist financing system, fully meeting FATF requirements, with more work to be done in the area of terrorist financing.

#### *Confiscation of proceeds derived from drug trafficking and serious offenses*

Both DTROP and OSCO provide powers for confiscation of property following conviction for drug trafficking, serious offenses, and *inter alia* for corruption cases. Although the offenses listed in Schedules

<sup>113</sup> GRECO Joint First and Second Evaluation Round 2007, Evaluation Report on Switzerland

<sup>114</sup> World Bank is in the process of publishing a report on effectiveness of Illicit Enrichment.

1 and 2 include many serious offenses, they do not include all indictable offenses; for example, tax evasion is not included in the specified offenses. Although it is held that the proceeds of many offenses not listed in Schedules 1 and 2 can still be captured through the money-laundering provisions, with the requisite *mens rea*, whereby one deals with the proceeds of any indictable offense, the person also commits money laundering; therefore, proceeds of an offense can come under the scope of the confiscation provisions in OSCO.<sup>115</sup> Both laws apply to properties in Hong Kong and are retroactive, including offenses committed before the Act came into effect.

**Restraining orders** Both DTROP and OSCO contain powers for the restraint and charging of property to satisfy a confiscation order. A restraining order prevents the defendant from dealing with the property; the charging order imposes a charge on the property to secure a payment of money to the government equivalent to the value of the property. Restrained property can be seized by an authorized officer to prevent the property from being disposed of or otherwise transferred from Hong Kong. The court issues a restraining order if proceedings against the defendant were commenced and if it is satisfied that there are reasonable grounds to believe that the defendant has benefited from a drug-trafficking or other serious offense. This has been recently amended to allow a restraining order to be issued earlier in the process so that there is less time for the defendant to dispose of his or her assets. A restraining order can cover all of the property owned or in possession of the defendant, including property acquired through legitimate means, to ensure that if a confiscation order is issued the property can be used to satisfy the confiscation order. After the restraining order is issued, the court appoints an interim receiver to manage and control the property.

**Confiscation orders** After the defendant has been convicted of a drug-trafficking or other serious offense, on the prosecutors application, the District Court or High Court must order confiscation if it is satisfied that the defendant has benefited from the committed offense of which he was convicted. If the defendant fails to pay the amount specified in the conviction order, the court will impose a term of imprisonment. The length of the term, similar to that of the Singapore confiscation regime, will vary depending on the amount specified in the confiscation order and set to be paid to the government. If the prosecution applies for an organized crime offense, the scope of the confiscation order will be wider. When filing the application for a confiscation order the prosecutor must file a statement providing the facts to support the application. This statement is considered by the court as conclusive except for the facts that the accused has not accepted. The accused also is required to submit a statement on the amount that might be realized at the time the confiscation order is issued. The rights of third parties are not taken into account when the confiscation order is issued, and there are no opportunities for them during the proceedings to make an application to protect their interests.

#### *Confiscating proceeds of corruption*

The Proceeds of Bribery Ordinance (PBO)<sup>116</sup> has specified that the corruption occurs when an individual abuses his or her authority for personal gain at the expense of other people. The PBO does not incriminate only the person receiving the benefit, but also the person bribing the public official. The statute also covers or is applicable to all public and private companies. Public bodies include the government, executive council, legislative council, any district council, any board, commission, committee, or other body, whether paid or unpaid appointed by or on behalf of the chief executive. The Independent Commission against Corruption (ICAC), established by the Independent Commission Against Corruption Ordinance, has the powers to investigate corruption offenses, to arrest, and to detain those suspected of being engaged in corruption offenses, and is permitted to search and seize property.

<sup>115</sup> “Civil Forfeiture for Hong Kong: issues and prospect,” Simon N.M. Young

<sup>116</sup> Available at:

[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/\\$FILE/CAP\\_201\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf), accessed March 17, 2011



The PBO empowers the ICAC to apply *ex parte* to a First Instance Court for a restraining order. A restraining order may cover all of the property of the suspect, whether it is held by the suspect or a third party. The court can revoke or vary the restraining order on the request of the suspect or a third party. Even though the Act provides for a restraining order, once the suspect has been convicted of a corruption offense, the PBO does not provide for the forfeiture or confiscation of the property. At this stage, to enforce confiscation, the prosecution must rely on OSCO, which also applies only to a limited number of corruption offenses, including bribery, bribery for giving assistance in regard to contracts, bribery for procuring withdrawal of tenders, and corrupt transactions with agents. However, the PBO confers a confiscation power only for the purpose of confiscating assets of a government servant who has been convicted of possession of unexplained property. This provision (s.10) provides that any person who is a chief executive officer or a prescribed officer is guilty of an offense if he or she (a) maintains a standard of living above that which is commensurate with present or past emoluments or (b) is in control of pecuniary resources or property disproportionate to his or her present or past emolument, unless he or she gives a satisfactory explanation to the court as to how he or she was able to maintain such a standard or how such pecuniary resources or property came under his or her control. If the suspect is the chief executive officer, the court will evaluate the truthfulness of his or her statement by taking into account the assets that the suspect had declared to the chief justice. The court will presume, if satisfied that a third party has close relationship with the suspect, that any pecuniary resources or property held by him or her, unless the contrary is established, are in control of the suspect.

Section 10 of the statute shifts the burden of proof to the suspect/defendant to explain the legitimacy of his or her property. The court also will use prior disclosure of property documents filed by the suspect holding the public office. If a suspect is convicted of an offense under section 10, he or she will be fined up to \$1,000,000 and subject to imprisonment of 10 years. Section 24 of the statute stipulates that in all proceedings against a person suspected or accused of having committed an offense under the statute, the burden is with the suspect or the accused.

On conviction of the defendant for possession of unexplained property, the court may, in addition to any penalty, order the confiscation of any pecuniary resources or property up to an amount not exceeding the amount or value of the pecuniary resources or property, the acquisition of which was not explained to the satisfaction of the court. The Secretary of Justice is authorized to make an application for confiscation within 28 days after conviction. The statute provides safeguards for property held or controlled by other persons, holding that his or her property will not be confiscated unless sufficient notice is given to the owner or if a third party was able to satisfy the court that he had acted in good faith when holding or controlling property or pecuniary resources for another person.

Section 10 of the PBO, on unexplained property, has been subject to criticism by many scholars. The main criticism is related to the way the offense is structured. It was held that unexplained wealth as it is drafted becomes an offense only if the person subject to an investigation is not able to satisfy the court of the origin of his or her property. The problem lies in that the provision does not connect unexplained wealth to a corruption offense:

Any person who, being or having been a Crown servant – (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offense.<sup>117</sup>

Further, it was held that it is uncertain whether the statement “satisfactory explanation” relates to satisfying the court that the wealth is not derived from a corruption offense or does it investigate the

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<sup>117</sup> Section 10, Proceeds of Bribery Ordinance 1980

acquisition of the official's wealth. Two cases have examined the unexplained property section of the PBO. In *Privy Council in Mok Wei Tak and another v. The Queen*,<sup>118</sup> the court gave section 10 a broad meaning, stating that section 10 will be breached if an official has a standard of living or wealth disproportionate to his or her official emoluments, and that the offense consists of two ingredients: (1) control of resources or standard of living disproportionate to official income and (2) the defendant knows that he or she will be unable to give a satisfactory explanation as to the source of the funds sufficient to persuade a court at trial. It was held that the prosecution needs only to prove excess wealth for the burden to shift to the defendant. The Privy Council did not consider the impact of the reversed burden of proof on human rights, but this was later reviewed by the Hong Kong Court of Appeal in *Attorney General v. Hui Kin-hong*.<sup>119</sup> The court upheld section 10, stating that it has proved its effectiveness in the fight against corruption. The court concluded that section 10 is dictated by necessity and goes no further than necessary. Wilsher considers that court analysis is perfunctory and is focused on effective law enforcement with no consideration of alternative means of prosecuting corruption.<sup>120</sup>

Any person convicted of the corruption offense will be ordered by the court to pay a specified amount or value or any advantage benefited as a result of the offense to a public body. The order will be enforced in the same way the civil judgments of the High Court are enforced. The statute differentiates between enforcement of confiscation orders for corruption cases in the public sector and the private sector. In the private sector, law enforcement and the prosecutor's sole responsibility is to inform the principal of issuing the order, and the principal will decide whether to enforce it or not. In public sector corruption cases, law enforcement and the prosecution will be involved to enforce the civil order.

The statute permits a third party holding or having control over property or resources to appeal the decision to the Court of Appeal. The defendant has a right to appeal against the sentence as provided for in Part IV of the Criminal Procedure Ordinance.

**Investigative powers** The statute provides broad investigative powers to the ICAC commissioners and its investigating officers when investigating alleged corruption offenses. The statute empowers the commissioner or an investigating officer to apply *ex parte* to the Court of First Instance to issue an authorization order in writing, permitting the investigating officer to investigate any account, books, documents, or other materials related to the person who is suspected of committing an offense. The authorization also may empower the commissioner or the investigator to require any person to produce books, documents, or other articles related to the suspect. Any person failing to comply with the orders without a reasonable excuse shall be guilty of an offense and shall be fined up to \$20,000 and subject to imprisonment for one year.

Further, the commissioner or investigating officer may apply, and the Court of First Instance may issue, an order requesting the Commissioner of Inland Revenue or any other officers to produce material for the commissioner or to give them access to it. Similarly, an order can be issued by the Court of First Instance authorizing the commissioner to request any person to provide information related to the suspect, if the court is satisfied that there are reasonable grounds to believe the person has information that may be relevant to the investigation. However, the statute provides for the protection of privileged information obtained in the course of conducting business, and such protections will be extended to clerks or servants employed by the legal advisor.

Finally, it is important to add that all three ordinances create a duty for all citizens to report suspicion or knowledge of any of the offenses to an authorized officer. Persons providing information to law enforcement are protected by the virtue of section 26 of the statute, based on which no witness is required to appear in court unless ordered by a court itself; their identity is protected and must not be revealed.

<sup>118</sup> (1990) 2 AC 333

<sup>119</sup> (1995) 1HKLR 227

<sup>120</sup> "Inexplicable wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases," Dan Wilsher, *Crime, Law & Social Change* (2006) 45:27–53

## Singapore

Singapore's legal system is based on the English common law system. A unique characteristic of Singapore's legal system is that it has evolved into a distinctive jurisprudence, continuing to absorb practices from common law as well as best practices from other mature legal systems. These developments in Singapore law reflect an acute awareness of the need to recognize and accommodate current international business and commercial practices.

In July 1989, the Corruption (Confiscation of Benefits) Act was enacted to provide for a more effective mechanism in the confiscation and recovery of corruption benefits, especially in relation to unexplained benefits and benefits of persons who die or abscond while under investigation. The Confiscation of Benefits Act was later strengthened, and in 1999 was renamed the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA), as the primary instrument for criminalizing the laundering of benefits derived from corruption, drug trafficking, and other serious crimes, as well as allowing for the investigation and confiscation of such benefits. Before the CDSA was passed, the money-laundering regime was governed primarily by two separate acts: the Corruption (Confiscation of Benefits) Act and the Drug Trafficking (Confiscation of Benefits) Act.

The CDSA is conviction-based asset forfeiture, providing for forfeiture of proceeds of benefits derived from criminal conduct following conviction of the defendant for drug-trafficking and other serious offenses. The CDSA does not address confiscation of any property that constitutes instrumentalities used in or intended for use in commission of drug-trafficking or other serious offenses. The purpose of the CDSA is to take out the profit from the crime by depriving the criminal of ill-gotten gains. The CDSA covers two main categories of predicate offenses—"drug trafficking offense"<sup>121</sup> as well as foreign drug-trafficking offenses," and "serious offense"<sup>122</sup> and foreign serious offenses, whether committed before or after the CDSA came into force. The CDSA applies to any property, whether is located in Singapore or elsewhere, demonstrating the cross-border effects intended by the CDSA.

**Restraining powers** The CDSA enables the High Court to issue a restraining or charging order. A charging order imposes on any property a charge for securing the payment of money to the government. Similarly, the restraining order prohibits anyone from dealing with the property subject to the restraining order. The High Court will issue a charging or restraining order on application by the prosecutor, if it is satisfied that there are reasonable grounds to believe that the defendant has derived benefit from a drug offense or from criminal conduct, if proceedings have been instituted against him or her, and if the proceedings have not been concluded. The High Court also can issue an order restraining the property if the defendant has been officially notified that he or she is under investigation for a drug offense or criminal conduct before charges are made or the defendant has been convicted of an offense. If the defendant acquires additional property the court may increase the confiscation order by that amount. If proceedings are not instituted within three months the court will discharge the restraining order. A restraining order can be issued *ex parte*. Police are authorized to seize property if there is a risk that the property may be removed from Singapore. Seized or restrained property is entrusted to the public trustee or a receiver who manages, takes possession of the property, and realizes any realizable property.

**Confiscation powers** Part II of the CDSA empowers the court, on application by the public prosecutor, when a defendant has been convicted of one or more drug or serious offenses, to issue a confiscation order against the defendant in related to the benefits derived from drug trafficking or criminal conduct, if the court is satisfied that such benefits have been so derived. The court will make a determination of the amount to be recovered from the defendant and, if necessary, will consider the evidence reviewed in the main proceedings against the defendant. In cases where the court is unable to do so, the registrar will

<sup>121</sup>Offenses included under the First Schedule, including offenses from the Section 5,6,7,10,43,46 of the Misuse of Drug Act.

<sup>122</sup>Offenses included as serious offenses under the Second Schedule, including conspiracy, incitement, attempt and abetment of these offenses. Offenses from the Penal Code (Cap. 224) as well as offenses under other specific legislation relating to bribery, hijacking, kidnapping, vandalism, prostitution, etc.

make the determination. The court will confiscate the property of a person considered to have absconded if it is satisfied on balance of probabilities that the person has absconded and that investigations for a drug-trafficking or other serious offense have been commenced against him or her.

Sections 4 and 4A shift the burden of proof to the defendant. Sections 4 and 6 provide that a court will presume that if the defendant has at any time held property or an interest disproportionate to his or her known sources of income, it was derived from drug-trafficking offenses, unless the defendant is able to adduce evidence to justify the legitimacy of his or her assets. Similarly, per sections 4A and 7, any expenditure incurred by the defendant will be presumed to have been met out of proceeds unless the defendant is able to establish the contrary. Statutory presumptions pursuant to section 4 apply to the property of a deceased defendant (s.28), and proceedings will be instituted against his or her personal representative and his or her estate may be confiscated, although no imprisonment would be imposed against the personal representative or any beneficiary. Any question of fact to be decided by a court in proceedings under the CDSA is decided on the balance of probabilities, except when the prosecution is required to prove in any proceeding the commission of an offense. When issuing the order, the court will accept conviction as conclusive unless it is subject to review, it was quashed or set aside, or the issuing of an order is not in the interest of justice or the public interest. In addition to the provisions shifting the burden to the defendant, section 9 of the CDSA provides an opportunity for the defendant to rebut the prosecutor's tendered statement. If the defendant fails to respond, the court will consider his or her silence as acceptance of the allegations. Alternatively, the defendant can accept or challenge orally or in writing the allegations made by the prosecution and the statement will be considered admissible evidence.

The CDSA empowers the court to determine the amount to be recovered from the defendant based on the court's assessment of the value of the benefits, issued in writing in a certificate. Benefits are defined in the CDSA to be any property or interest, including income accrued from such property or interest held by the person at any time before or after enactment of the CDSA, that is disproportionate to known sources of income. The amount to be recovered can be reduced or increased, either on prosecutors' or receivers' application. The defendant is required to pay the recoverable amount; if he or she fails to do so, the defendant will be liable for interest on that sum. The CDSA prioritizes fulfillment of debts and obligations from the confiscated property.

The CDSA also provides for the protection of rights of third parties. Any third party with an interest in the property may apply before or during the proceedings to protect his or her interest. The court will issue an order declaring the nature, extent, and interest in the property if satisfied that the person with an interest in the property was not involved in the defendant's illegal activities and that he or she acquired interest without knowing and in circumstances that do not arouse suspicion that the property was involved in or derived from drug trafficking or criminal conduct. Part III of the CDSA allows the court to impose imprisonment on the defendant if he or she fails to pay an amount ordered in the confiscation order; the term of imprisonment can be ordered as follows: if the amount does not exceed \$20,000, imprisonment not exceeding two years; if the amount exceeds \$20,000 (SGD), imprisonment up to five years; for an amount exceeding \$50,000(SGD), but no more than \$100,000(SGD), imprisonment of seven years; and for an amount exceeding \$100,000(SGD), imprisonment of ten years.

**Information-gathering powers** The CDSA gives broad powers to the court to collect information and materials that may be useful for the investigation. The police officer conducting the investigation is required to apply to a court to access material evidence that may be in possession of a third party or the defendant. The court will issue an order directing a person to produce material or give access to those materials to the authorized officer only if the court is satisfied that there are reasonable grounds to believe that a specified person (defendant) had carried on or has benefited from a drug-trafficking offense or criminal conduct and that there are reasonable grounds to believe that the material subject to application are of substantial value for the investigation and do not include items subject to legal privilege. Further, the court must be satisfied that there are reasonable grounds to believe that obtaining these materials is in the public interest, will benefit the investigation, and will help in explaining the circumstances under

which the person came into possession of these materials. Provisions under this section protect items subject to legal privilege. However, no one will be precluded from a production order under the justification that it might incriminate or make the person liable to a penalty. If a person fails to comply with a court order or provides false information, he or she will be liable to a fine not exceeding \$10,000(SGD) or to imprisonment not exceeding two years or both.

In addition, the High Court may, on application by the Attorney General, issue an order directing a financial institution to produce the materials to the Attorney General or to the authorized officer. This also requires that it be satisfied that there are reasonable grounds to suspect that a person has carried out or has benefited from a drug-trafficking offense or criminal conduct and that there are reasonable grounds to believe that the materials that are the subject of the application are of substantial value for the investigation. Cooperation of the financial institution with the court order will not be considered a breach of any restrictions on information disclosure imposed by law and the institution will not face any action for material produced in good faith.

**Search powers** On application by an authorized officer, the court may issue a search or warrant authorizing the officer to enter and search premises if the court is satisfied that a person has committed or benefited from offenses (provided for by the CDSA) and there are reasonable grounds to believe that on the premises are materials of substantial value to the investigation. The officer conducting the search is authorized to seize and retain any material, other than items subject to legal privilege. Persons obstructing the officer are subject to a fine of up to \$10,000(SGD) or imprisonment of up to two years.

The CDSA contains provisions specifying the obligations of financial institutions in retaining records and their obligations to disclose them to an authorized officer. The CDSA also imposes a responsibility on anyone who has reasonable grounds to suspect that a property represents proceeds of or was used or is intended to be used in connection with drug trafficking or criminal conduct, and the information came to his or her attention in the course of his or her profession, business, or employment, requiring him or her to disclose the knowledge to an authorized officer. Failure to do so can result in conviction and a fine not exceeding \$10,000(SGD). Advocates and solicitors and their clerks and interpreters are excluded from this duty.

Finally the CDSA provides for compensation of a person against whom an investigation for drug trafficking or criminal conduct is initiated, but where the person was never convicted of or the conviction was quashed or the person is granted a pardon. The court will order compensation to be paid by the government if the person makes an application and if the court is satisfied that there was some serious default on the part of the prosecution and the applicant has suffered serious loss.

### 3.2 Comprehensive Analysis of the UWO in Two Selected Countries

This section of the report describes the process of seizure and forfeiture of property under UWOs in two selected countries: Australia and Ireland. For each country, it provides a brief overview of the policy debate surrounding introduction of UWOs, assesses their effectiveness, and identifies key bottlenecks and key challenges faced in the implementation of the statutes.

After considering a large number of countries that provide for reversal of burden of proof in conviction and non-conviction based forfeiture proceedings, the study team identified three countries that met the criteria determined by the research team, key of which are; i) that it is a non-conviction based asset forfeiture proceeding; ii) there is no requirement for a predicate offense; and, iii) the burden of proof shifts to the respondent to show lawful source of property. These three countries are Australia, Colombia, and Ireland. Because the study called for a comprehensive analysis in two countries, the team has focused on Australia and Ireland, primarily because they are both common law countries and are well-established democracies with effective and impartial law enforcement and judiciary, which, based on the team's findings, are key preconditions for application and effective use of UWOs. Moreover, Australia was the first country to identify its legislation specifically as UWO. Nevertheless, with some minor nuances, each of the three countries contained all three the elements of UWOs described above. The nuances include a varying degree between different statutes regarding the predicate offense. While some statutes had no requirement to show a connection between the property and any criminal activity (e.g., Western Australia and Ireland), the Criminal Asset Bureau in Ireland, in most of the cases, established, on a lower standard of proof, reasonable suspicion that the respondent was engaged in some criminal activity. And the Australian federal UWO contains a clear provision requiring that a connection between the property and an offense is shown. Some of these differences are incorporated in the statute while others arose during the practical application of the laws. In either case, we assume these nuances still reach the threshold of a pure UWO for the purposes of this study

UWOs while widely embraced and promoted by law enforcement officials are awaited with skepticism and criticism by human rights groups, academics and private attorneys. European countries, except for Ireland and Italy, have in large part stayed away from introducing non-conviction based asset forfeitures and have been critical of Irish legislation considering it a drastic response to organized crime with a potential to erode fundamental human rights. The Supreme Courts in both Australia and Ireland have upheld the constitutionality of these laws but have characterized them as draconian. Moreover, the courts have justified them as a measured and proportionate response to the crime and the threat organized and serious crime poses to society. In contrast, some academics believe the law if not carefully and appropriately targeted can violate basic rights of the individual. Similarly, members of the defense bar believe that powers vested in the state are too far reaching and create a gross imbalance of power between the respondent and the state.

In most cases, the main concern expressed by legislators, legal professionals, and others is the possibility for abuse of power under the Act. In the study's review of a considerable amount of case law, and during the team's interviews with representatives of various agencies engaged in implementing the law, this issue was addressed by cautiously and vigilantly choosing cases. In Ireland there was not a single case that was criticized or flagged by attorneys, media or public as a case that should not have been brought under the UWO proceedings. Western Australia, on the other hand, did have one such case when the public and media negatively reacted to the application of UWO in respect of an elderly couple whose house was confiscated after their son concealed drugs on their property.<sup>123</sup>

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<sup>123</sup> Clarke 2004, "Elderly drug dealers lose their appeal" *Sydney Morning Herald* 15 March 2005

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Finally, it is important to identify the areas of criminal activity in which the Act is being used. The major areas of criminal activity against which the Act has been used are drug-trafficking offenses, financial fraud, tax fraud, and corporation offenses.

Although it was stated in the beginning of this study that it is difficult to evaluate the effectiveness of the civil forfeiture regime, conclusions can be drawn on the basis of indicators that show the impact of the Act. In Ireland, both the anecdotal and statistical evidence lead us to believe that the PoCA and the CAB, with its extensive powers, have had a positive impact in reducing criminal activities in Ireland. Statistics show that the CAB has used these powers extensively. And the available data on the number of cases commenced by the CAB and the number of orders made, as well as the successful application of the cases, show that the CAB has continued to work consistently in attacking proceeds of crime and that it is doing it successfully.

### 3.2.1 Australia

This section of the report reviews the history and background of the confiscation and forfeiture laws in Australia that led to the introduction of UWOs, and reviews the confiscation and forfeiture statutes of Western Australia (WA), Northern Territory (NT), and the recently enacted federal (Commonwealth) law. The final section focuses on the effectiveness and the use of such laws in WA and in the Commonwealth, challenges and obstacles faced in the course of implementation, and lessons learned.

Australia was one of the first countries to enact unexplained wealth provisions as part of its non-conviction-based forfeiture regime as a mechanism to fight serious and organized crime by depriving those who have engaged in unlawful activities of their illegally gained profits. Beginning first at the State or territory level, they have been in existence for more than ten years in WA and since 2003 in NT. Victoria, Queensland, and South Australia have comprehensive forfeiture statutes including conviction and non-conviction processes that contain many aspects of UWOs. Only within the past year have similar laws been enacted at the federal level, and also in the state of New South Wales (NSW).

#### The History of UWOs in Australia

The legal basis for confiscation laws in Australia was founded in ancient principles of common law known as *deodant* and *attainder*,<sup>124</sup> which permitted confiscation of property if a person committed a serious offense of treason or other felony. All the ancient forms of forfeiture had been abolished by the beginning of the 20th century, initially in England and later in other common law countries, including Australia. *In rem* forfeiture is a recent development, introduced in the Australian Customs Act of 1901 and in the Fisheries Management Act of 1991. In 1997, the Australian government introduced Section 229A in the Customs Act, enabling the state to require forfeiture of contraband and conveyances related to contraband, if, on the balance of probabilities, it was established that the goods were derived from dealing with prohibited narcotic imports. Because this regime did not yield the expected results, the Act was amended, introducing Division III, which empowered the state to require forfeiture of contraband and conveyances, introducing *in personam* civil forfeiture. Under these provisions, the government was able to recover pecuniary penalties, in a civil proceeding, equal to the benefit derived from dealing with narcotics. Note that this regime represented the first *in personam* forfeiture regime in a civil proceeding without a prerequisite requirement for conviction or charge of an offense, or the need to establish that specific property derived directly or indirectly from an offense. This regime was the foundation of future forfeiture laws in Australia.

The initiative for comprehensive confiscation and forfeiture laws can be traced to the early 1980s when the Australian Police Ministers Council (APMC) extended an invitation to the Standing Committee of Attorney General (SCAG) to draft comprehensive and uniform legislation that provided for confiscation of criminally derived property and prevention of unjust enrichment. A number of Royal Commissioners and Justices advocated for enactment of non-conviction-based confiscation laws as the most appropriate response to crime. They argued that the existing approach, whereby confiscation was considered as a measure imposed against the individual for his or her wrongdoing, should be altered to a broader approach and be focused on unjust enrichment. Unjust enrichment, as a concept, is not focused on wrongdoing of the individual but on the property acquired through illegal activities.<sup>125</sup> As such, the

<sup>124</sup>*Deodant* involved the confiscation of instruments or objects used in the commission of an offense. *Attainder* is forfeiture of both real and personal property. Under the doctrine of “corruption of blood”, on conviction of a person for a felony or treason, his or her entire property was confiscated to the King or Feudal Lord. Source: Ben Clarke “Confiscation of “unexplained wealth” Western Australia’s response to organized crime gangs,” *South African Journal of Criminal Justice*, vol. 15, 2002, p. 61–87.

<sup>125</sup> The concept of unjust enrichment was for the first time mentioned by the Australian Law Reform Commission in the report “*Confiscation that Counts*”, Knotting. That is that the development of the common law in this area is driven by a public policy recognition of the notion that persons ought not, as a matter of principle, be permitted to become unjustly enriched at the expense of others. This is seen by the Commission as a significant broadening of the common law which formerly recognized the concept of unjust enrichment (albeit not in those precise terms) in a more limited way through particular rules such as that denying a person who has unlawfully caused the death of another person from benefitting from the estate of that person”.



property should be forfeited unless the property owner is able to prove the legal origin. The concept of unjust enrichment laid the foundation for future UWOs. Accordingly, Justice Moffitt called for civil forfeiture laws to be modeled on existing tax laws. He stated that, “tax authorities can call on taxpayers to account for assets which appear to exceed their income.... It is difficult to see why in the face of serious organized crime a statute could not be drawn to provide that in prescribed circumstances.”<sup>126</sup> However, these suggestions were not incorporated in the SCAG sponsored legislation, conviction-based confiscation model in 1985, which was enacted in 1987 as the Proceeds of Crime Act (PoCA). It has been argued by Lusty<sup>127</sup> that this was done partly because the government wanted to enact uniform laws across Australia and partly because the United Kingdom had previously enacted similar legislation. Following enactment of the PoCA, all of the states adopted statutes mirroring the provisions of the federal statute, enacting conviction-based confiscation laws.

The PoCA of 1987 provided for confiscation following a defendant’s conviction of an offense, whereby in a civil proceeding the court would determine whether or not the defendant had benefited from the commission of an offense and the value of the benefit. However, an important feature was incorporated into the statute, the so-called statutory forfeiture, whereby *all* of the property belonging to a person convicted of a serious offense would be confiscated within six months, unless the respondent was able to show that that property or parts of it were lawfully acquired. Thus, the concept of the reversal of the burden of proof in specific circumstances can be traced to the PoCA of 1987, showing its long history in Australia and justifying its acceptability by society and the courts. Further, here we first see the presumption that all of the property is the product of unjust enrichment.

At the outset, conviction-based confiscation law was not meeting expectations of depriving criminals of illegal assets. At the time of its enactment, it was estimated that organized crime in Australia in one year would generate between AUD\$1B-4.5B, with an average annual confiscated amount of at most AUD\$7.5M.<sup>128</sup> Based on statistical data from 1995 to 1998, however, the total amount of confiscated assets under the conviction-based regime was AUD\$14.39M (US\$15.6M), averaging AUD\$3.6M (US\$3.8M) per year. In 1999, these figures decreased to AUD\$2.7M (US\$2.9M) in Queensland and AUD \$2.4M (US\$2.56M) in WA.<sup>129</sup> It was clear that conviction-based confiscation regimes were recovering only a minor portion of the billions derived or acquired through criminal activities. This situation sparked debate about the efficiency of the confiscation regime and the advantages of non-conviction-based confiscation regimes. Similarly, the Australian Law Reform Commission, in its report “*Confiscation that Counts; A Review of the Proceeds of Crime Act 1987*”<sup>130</sup> (1999), found that conviction-based confiscation systems were not producing the intended results, that very little was being confiscated, and more importantly, that the existing regime was having little or no impact on deterring and fighting crime. The report recommended enacting a non-conviction-based regime. As a result of these debates, in 2000, the Criminal Property Confiscation Act was enacted in WA, the first state within the federation to introduce a non-conviction-based *in personam* forfeiture regime, providing for two forfeiture streams: UWOs and the criminal benefits declaration (CBD) (including crime-used and crime-derived property). NT followed suit and adopted a similar statute mirroring the provisions of the WA in 2003.

In 2002 the Commonwealth responded to the criticism of conviction-based regimes and enacted a non-conviction-based regime with the Proceeds of Crime (PoCA) 2002. This law was also influenced by international trends that marked a new era in fighting transnational and global crime by pursuing the proceeds of criminal activities. Specific international initiatives included the UN Convention against

<sup>126</sup> Cited by David Lusty in “Civil Forfeiture of Crime in Australia,” *Journal of Money Laundering Control*, 2002, vol. 5, p. 348

<sup>127</sup> *Ibid.* at 2.

<sup>128</sup> Includes the Australian Crime Commission Report; Confiscation that counts, and Ben Clarke, “Confiscation of ‘unexplained wealth’; Western Australia’s response to organized crime gangs,” *Afr. J. Crim. Just.* 15, 2002, p. 61–87

<sup>129</sup> David Lusty, “Civil Forfeiture of Proceeds of Crime in Australia,” *J. of Money Laundering*, vol. 5, p. 345–350

<sup>130</sup> Australian Law Reform Commission, *Confiscation that Counts; A Review of the Proceeds of Crime Act 1987*, 1996, available at: <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc87.pdf>.

Transnational Organized Crime (2000) which is referred to also as Palermo Convention, and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) also referred to as the Vienna Convention, and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. All the above-referenced conventions contained specific provisions that targeted the proceeds<sup>131</sup> and instrumentalities<sup>132</sup> of crime.

Although the Commonwealth entertained the possibility of introducing UWOs when the PoCA of 2002 was drafted and enacted, the regime was regarded as a step too far and a decision was made to not include UWOs in the bill. However, the PoCA is still a comprehensive statute providing for both conviction and non-conviction-based asset confiscation.<sup>133</sup> The forfeiture provisions provide for both *in rem* and *in personam* forfeiture of property considered to have derived from criminal activities. Both schemes are non-conviction based, meaning that there is no requirement for a predicate offense to impose forfeiture of property. The *in rem* forfeiture is a proceeding instituted against the property; the *in personam* proceeding is instituted against the person if it is established that he or she owns property derived from a criminal offense. *In personam* forfeiture proceedings are applied in cases when there is insufficient evidence to convict a person for commission of an offense however, there is sufficient evidence to show, on balance of probabilities, that the person has committed an offense and has acquired benefits from it<sup>134</sup>. In both proceedings, the burden is on the property owner to show that the property was acquired through legitimate means to avoid forfeiture. The Act confers broad investigative powers on the state and on law enforcement to identify and trace the proceeds of crime, including examination orders (a court order summoning any person for an obligatory examination), notices to financial institutions, and production and monitoring orders. Proceedings under the PoCA are conducted as a civil hearing under the civil standard of proof—balance of probabilities—and, after the government establishes that the property has been acquired through commission of an unlawful activity, the burden of proof is shifted to the respondent to show that the property subject to any of the proceedings under the Act is lawfully acquired. The law also included a clause to assess the impact of the Act soon after its enactment and the progress made in achieving its objectives.

As a result, the Commonwealth commissioned an independent party to review the Act in 2006, four years after its enactment. The objective of the review was to assess the impact of the Act, identify factors that limited the achievement of the objectives of the Act, and make recommendations to improve the operations of the Act. The report, commonly known as the Sherman report,<sup>135</sup> found that, in general, the PoCA of 2002 was having a greater impact than its predecessor, the PoCA of 1987, because significantly more assets were being seized and forfeited. On the other hand, it found that it was not meeting its objectives of deterring and preventing crime, although the report noted that measuring the impact on crime deterrence was subjective. It is important to note, however, that while confiscated assets increased in 2002, the amounts seized and forfeited under the non-conviction schemes were lower. As noted in the

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<sup>131</sup> See PoCA of 2002, s 329(1), defining proceeds of an offense to be: (a) property wholly derived or realized, whether directly or indirectly from the commission of the offense; or (b) partly derived or realized, whether directly or indirectly from the commission of the offense.

<sup>132</sup> See PoCA of 2002, s. 329(2), defining an instrument of an offense to be: (a) the property used in, or in connection with, the commission of an offense; or (b) the property is intended to be used in, or in connection with, the commission of an offense.

<sup>133</sup> Confiscation schemes under the Act provide for: restraining orders that prohibit the disposal or dealing with property; forfeiture orders that forfeit the property to the Commonwealth; pecuniary penalty orders that require a payment of a certain amount; and literary proceeds orders that also require payment of amounts based on the literary proceeds of crime.

<sup>134</sup> See PoCA, s.47(1)(c) and (2), stating that a “court must make a forfeiture order .... If the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting... serious offense” and under (2) further defining that” a finding of the court.....need not be based on a finding as to the commission of a particular offense and can be based on the finding that some serious offense or other was committed”.

<sup>135</sup> Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act (2002)*, July 2006, available at:

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002\(Cth\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002(Cth)).

CDPP Annual Report 2003<sup>136</sup> the PoCA of 2002 came into operation on 1 January 2003 and it took CDPP substantial time to recruit and train additional staff to support the implementation of forfeiture schemes (See Table below illustrating the slow uptake in recovered assets). Furthermore, although Sherman described the operation of UWOs in WA and NT, he did not make recommendations to introduce them at the federal level. He stated that “Unexplained wealth orders are no doubt effective, the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community.”<sup>137</sup> He added that it would be inappropriate to recommend their introduction at that time, but that the issue should be kept under review. In 2008, however, the Parliamentary Joint Committee of the Australian Crime Commission (PJC-ACC) initiated an inquiry into legislative strategies to combat organized and serious crime. Based on the results of the inquiry and the lengthy debates on the effectiveness of UWOs and other strategies to combat crime, the Commonwealth amended<sup>138</sup> PoCA in 2010, introducing, among other additions, UWOs. Soon after, in December 2010, NSW moved ahead and introduced UWOs. Shortly before this, Queensland had adopted the Criminal Proceeds Confiscation Act and Other Acts Amendment in 2009 containing provisions similar to UWO. Although the statute does not have specific unexplained wealth provisions, its provisions are very similar. South Australia also introduced an unexplained wealth bill in 2009, which passed the Parliament, but it is not clear when it will go into effect.

**Table 2: Criminal Assets Recoveries under the PoCA of 2002**

POCA 2002 (\$AUD)						
	Conviction PPO	Civil PPO	Conviction FO's	Civil FO's	Other	TOTALS
1 Jul 02 - 30 Jun 03	\$0	\$87,962	\$59,263	\$17,000	\$0	\$164,225
1 Jul 03 - 30 Jun 04	\$0	\$185,488	\$758,634	\$2,296,473	\$220,845	\$3,461,440
1 Jul 04 - 30 Jun 05	\$599,431	\$634,678	\$3,040,891	\$1,316,153	\$953,308	\$6,544,461
1 Jul 05 - 30 Jun 06	\$1,137,846	\$6,924,168	\$4,971,537	\$1,435,078	\$25,918	\$14,494,547
<b>TOTAL</b>						\$24,664,673

Source; Sherman report, April 2006

<sup>136</sup> See CDPP Annual Reports 2003, at; [www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2002-2003.pdf](http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2002-2003.pdf)

<sup>137</sup> Sherman report, 2006

<sup>138</sup> See *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth)

### 3.2.1.2 Western Australia (WA)

#### The History of UWOs in Western Australia

After ten years of implementation of conviction-based confiscation legislation, WA moved ahead and enacted non-conviction-based legislation in 2000, and with it, unexplained wealth provisions. It was the first jurisdiction in Australia to do so. Under the unexplained wealth forfeiture stream the courts are required to grant a UWO if it is more likely than not that the property is of unlawful origin. The law contains a statutory presumption that the respondent's wealth has not been lawfully acquired unless the respondent is able to establish the contrary. The burden of proof shifts to the property owner to produce sufficient evidence to satisfy the court of the lawful origin of his property to avoid forfeiture. The Director of Public Prosecutions (DPP) need only satisfy the court, on a balance of probabilities, that it is more likely than not that the property constitutes unexplained wealth and that a person owns or controls property that is beyond his or her reasonable means of living. Provisions of the Criminal Property Confiscation Act (2000)<sup>139</sup> are considered far-reaching compared with other forfeiture regimes in force in Australia and elsewhere. Critics claim they encroach on the fundamental civil rights of the respondents while proponents others argue that they are a reasonable tool to use against criminals who are otherwise untouchable. The law has been heavily criticized by the defense bar on the grounds that it contravenes the principles of common law and infringes on basic human rights. However, despite the criticism the law received when introduced, its practical application has caused little public dissent. On the contrary, the WA DPP was criticized by the media inquiring as to why these laws are not being applied more frequently.

The unexplained wealth provisions in WA were introduced before the local elections of 2000 as part of the WA government's strategy to enact a tough-on-crime campaign to fight and deter serious and organized crime with a particular emphasis on drug trafficking. Introduction of the bill was propelled by an inquiry initiated by the Legislative Assembly of the Parliament of WA in 1997 in response to increased drug trafficking and an increased number of drug-caused or drug-related deaths in WA and other Australian states and territories. The Parliament established a *Select Committee into the Misuse of Drug Act 1981* to examine mechanisms to prevent and amend drug problems including effective legal sanctioning of drug dealers. . In its report "*Taking the Profit out of Drug Trafficking*",<sup>140</sup> the committee found that the conviction-based confiscation regime was not producing the intended results and was not having an impact on reducing and preventing crime. Consequently, the committee recommended urgent introduction of a non-conviction-based forfeiture regime. This included a rebuttable presumption that all property owned or controlled by a person reasonably suspected on the balance of probabilities by the state of having been derived by trafficking, be deemed to have been obtained from the proceeds of drug dealing. Although the committee's recommendations initially were intended solely for use against drug traffickers, lawmakers expanded its application to cover property or wealth derived from any illegal activity. The priorities of the WA government shifted from the regular notion of reactive prosecution to focusing on developing an effective legislative framework to combat, deter, and prevent crime and within that drug trafficking. Coincidentally, the Australian Law Commission advocated a similar strategy in its 1999 report, *Confiscation That Counts*, stating that confiscation schemes should aim not only to punish wrongdoings but also to prevent unjust enrichment of individuals through illicit activities.

The WA Provisions of the Criminal Property Confiscation Act (CPCA) of 2000 was a result of extensive research on national and international confiscation and forfeiture legislation conducted by the federal WA

<sup>139</sup>Criminal Property Confiscation Act 2000, as of 18 Oct. 2010.

<sup>140</sup>Select Committee into the Misuse of Drugs Act 1981: "Taking the Profit out of Drug Trafficking: An Agenda for Legal and Administrative Reforms in Western Australia to Protect the Community from Illicit Drugs," Interim Report November 1997, available at:

[http://parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/357E57A3B1C156B648257831003E9513/\\$file/InterimCover.pdf](http://parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/357E57A3B1C156B648257831003E9513/$file/InterimCover.pdf).

Office of Attorney General in seeking to develop an effective law that would enable the state to deprive criminals of their illegal gains, without a prior conviction, and reversing the burden of proof onto them to show the legality of their property. Key model laws that inspired the development of UWOs include the NSW Criminal Asset Recovery Act (CARA) of 1990, which provides for the reversal of the burden of proof onto the respondent and confers broad investigative powers to law enforcement agencies. The U.S. RICO<sup>141</sup> Act inspired the authors to move toward enactment of a law that would target the proceeds of crime without a need to show or establish a nexus between the property and an offense, which is considered the largest impediment to tackling the principals of criminal organizations who organize and coordinate criminal activities but keep themselves at a safe distance from those activities. However, provisions on unexplained wealth of WA represented a new and innovative approach to attacking property that is derived from unlawful activities. The unexplained wealth law was specifically enacted by the WA parliament to target individuals who live beyond their legitimate means of support. It contains a statutory presumption in favor of forfeiture, deeming all or parts of property to have been derived from unlawful activities, and reversing the burden of proof onto the respondent to justify the source of his or her property. Further, the burden of proof on the state was eased and the prosecution does not need to show a connection between an offense and the property; it is sufficient to show that the person owns or possesses property that is beyond his or her reasonable means of living. This made it substantially easier for the WA prosecutors to forfeit property that is suspected of being derived from or used in criminal activities.

The bill received broad support in the Parliament, with only minor dissent from a few opposition members. Those opposing the law expressed reservation on the grounds that it violated the principles of common law—presumption of innocence - by reversing the burden of proof onto the property owner to establish that the property was acquired through lawful means. The bill also was criticized for its retrospective effect when applied against offenses and property acquired before the Act came into effect on the grounds that it created uncertainty for citizens, as they may be subject to a court proceeding for acts that were not against the law at the time they were committed. Although the first argument carries with it some weight because the burden of proof reverses onto the respondent during the proceeding, the second argument does not have value because the statute of WA does not require establishing a connection between any offense and the property subject to UWOs. The respondent is not charged or asked about commission of an offense.

Additional criticism came from the Law Society of WA on the grounds that the Act failed to provide sufficient protections for innocent parties and that it did not grant the court discretionary power in making a forfeiture order. The letter submitted by the Law Society to the Parliament stated “We are talking about the nature of mandatory confiscation under this legislation...application is made...the court is not given the usual discretion to decide whether to confiscate. As soon as the conditions are met, the property is confiscated and that is it; there is no discretion or jurisdiction left to the court to do otherwise”.<sup>142</sup> Despite the dissent, the WA Criminal Property Confiscation Act (CPCA) was enacted in the proposed form with only minor changes that did not alter the substance of the law.

### **Criminal Property Confiscation Act (CPCA)**

The main objective of the CPCA, in which WA’s UWO law and two other forfeiture mechanisms are found, as stated in its preamble, is to:

...provide for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.

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<sup>141</sup> Racketeer Influenced And Corrupt Organizations (RICO)

<sup>142</sup> Introduction and First Reading, 29 June 2000, Criminal Property Confiscation Bill 2000.

The key features distinguishing confiscation regimes provided by the Act from the earlier regime are as follows: (i) it is non-conviction based and there is no requirement on the DPP to show that an offense was committed; (ii) the burden shifts to the respondent to produce evidence to establish lawfulness of property subject to an unexplained wealth application; (iii) it provides for forfeiture of all or parts of the property belonging to the respondents, irrespective if the property was acquired before or after the commencement of the Act; (iv) it provides for automatic confiscation of property within 28 days if the respondent does not object the seizure and forfeiture; and (v) the statute does not grant the court the discretion to refuse making of a forfeiture order. These points illustrate the legislature's intent to draft a far-reaching law that enables the state to seize property merely on the suspicion on reasonable grounds of an authorized officer or prosecutor that a person possesses unexplained wealth or that a person may have been engaged in criminal activities. However, as will be detailed later, the Australian High Court has, through the few cases that have come before it, limited the effect of the Act.

In addition to the UWO, the CPCA provides for two more forfeiture streams under a CBD: crime-used property and crime-derived property, which can be either conviction or non-conviction based. In addition, the CPCA allows the state to forfeit "substitute property" in cases where the property used in the crime cannot be located. The crime-used property provision targets property that is used in commission of an offense, an instrumentality of a crime, while the crime-derived CBD deals with the profits and benefits directly or indirectly derived or acquired as a result of the commission of a criminal offense. As highlighted above, the UWO differs from the CBD in that the former does not contain a requirement to establish a nexus between an offense and the property, whereas under the CBD scheme, the property owner must either have been convicted of an offense, or the DPP has to show on balance of probabilities that the respondent committed an offense and the property derived is directly or indirectly as a result of the respondent's involvement in that offense. Another conviction-based forfeiture feature under the CPCA is that it can be applied where there has been the commission of a "confiscable offense"<sup>143</sup> which is defined as any offense that is punishable by two years of imprisonment. This is a very low threshold for application of forfeiture and confiscation schemes, especially because there are very few offenses in Australian legislation for which punishment is less than two years of imprisonment. The threshold set in the federal legislation for involving forfeiture proceedings against a person is three years. From this, it can be concluded that the primary objective of the legislation is to deter crime by taking away the profit and imposing radical measures as a deterrent to engagement in criminal activities.

It is also important to highlight that under the CPCA the conviction-based confiscation of property belonging to declared drug traffickers is considered one of the most radical confiscation schemes.

On declaration of a person as a drug trafficker<sup>144</sup>, the state also automatically confiscates all of the property owned or effectively controlled or given away at any time by the defendant, whether or not it is was acquired through lawful or unlawful means. This is one of the most-used confiscation schemes<sup>145</sup> by the DPP in WA whereby a large proportion of confiscated property results from conviction and subsequent declaration of a person as a drug dealer. Use of this legal provision is far simpler for the government than use of UWOs or the two CBD tools.

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<sup>143</sup>See CPCA 2000, Part 12, S142.

<sup>144</sup>Declared Drug trafficker means a person who is declared to be a drug trafficker under Section 32A of the *Misuse of Drugs Act 1981*, if he or she was charged and convicted with a serious drug offense and the offense that was committed, or it is more likely than not to have been committed after the commencement of this Act. Under the *Misuse of Drug Act*, a person is declared a drug trafficker, if he or she has been convicted of one drug-trafficking offense involving over 28 grams of heroin, or similarly prescribed quantities of other drugs, or three trafficking offenses involving any lesser quantities of any of the prescribed drugs.

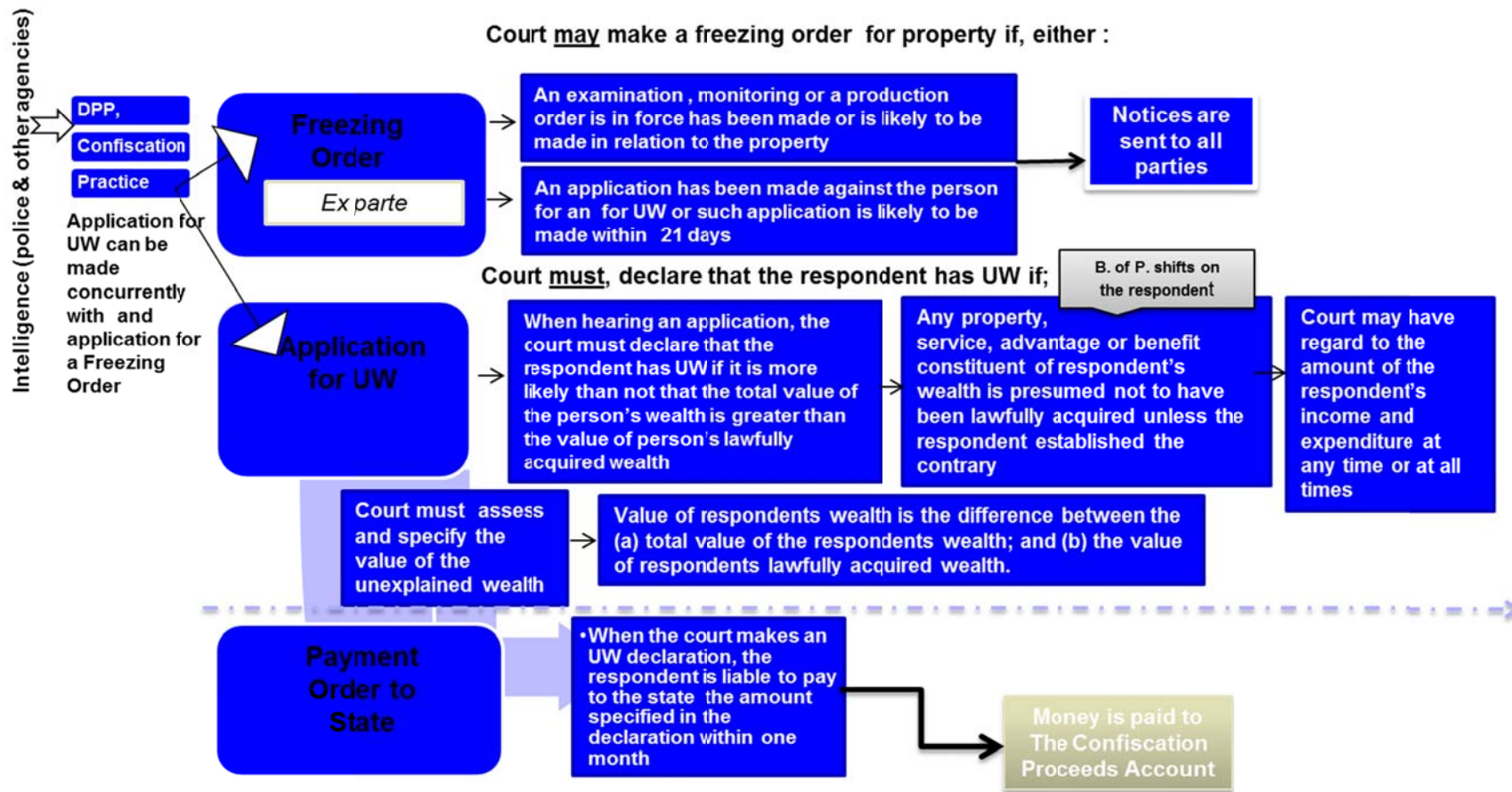
<sup>145</sup>See CDPP Annual Report 2009-2010, "A significant proportion of confiscated property arises from the conviction of an accused person and the subsequent declaration that the person is a drug trafficker".

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### Proceedings under UWOs (Freezing Orders)

The proceedings under UWOs, pursuant to Section 11 of the CPCA, may commence either with an application for a freezing order or an application for unexplained wealth made in conjunction with an application for a freezing order. These can be made either in the proceedings for the hearing of an objection or at any other time. The DPP makes the final determination, based on the facts of the case, whether or not to initiate a proceeding with a freezing or a UWO. If there is an immediate risk that the property will be dissipated or lost (e.g., car or cash in a bank account), the proceeding will commence with a freezing order; in all other cases, the proceeding will commence with an application for UWO. The DPP receives and evaluates information from law enforcement and determines the best action for each case. The figure below describes the flow of the UWO proceeding in WA.

## Proceedings under Unexplained Wealth Order provisions in Western Australia



Filename/RPS Number



Most of the cases are referred to the DPP by the WA state police and, to a lesser extent, by the Australian Crime Commission (ACC). However, there is no restriction as to whom might refer cases to the DPP. Cases have also been referred from the Australian Securities and Investment Commission and other agencies. Law enforcement bodies refer cases based on information they obtain when conducting criminal investigations. Police are responsible for carrying out investigations, collecting evidence, and preparing affidavits stating reasonable grounds on which they base their suspicion that the person possesses or controls unexplained wealth. Examples of such documents include, depending on the case, forensic accounting analysis, bank statements, property tracking documents, tax records, and any other document that can be obtained and would verify the origin of respondent's property.<sup>146</sup> After the police gather sufficient satisfactory evidence to show that a person possesses or controls unexplained wealth, the case is referred to the DPP, which then reviews the case and determines the best course of action. The police and the DPP may continue to work on the investigation, gathering additional evidence to strengthen the case before making an application to a court.

The examination order imparts to the DPP the power to require a respondent, or any other person who has knowledge or information related to the property subject to an order, to appear for examination.<sup>147</sup> This power is somewhat similar to, but broader in scope, than grand juries in the U.S. Under the statute, anyone summoned for examination is required to answer questions and is prohibited from disclosing to anyone that an examination was conducted or that he or she was the subject of an examination order. If the person refuses to answer questions during the examination or provides false information he or she may be held in contempt of court and/or charged with a felony. The examination order is a powerful tool available to law enforcement to further investigations and to gather sufficient evidence to satisfy the court that the person owns or effectively controls property that is considered unexplained wealth.

The state also can use examination orders when applying for a crime-derived or crime-used declaration, or for confiscation of a declared drug trafficker's property. However, the statute limits the use of information obtained during an examination process to only civil forfeiture or confiscation proceedings. It cannot be used in an on-going or subsequent criminal proceeding. Therefore, no criminal charges can be pressed against an individual based on the information obtained during examination. Legislators understand the power of examination orders and in response have imposed additional limitations on the examination powers of the state by authorizing the court to define the scope of the examination order. The scope of the questions is limited strictly to the property, its nature, and its location, subject to a UWO or any other civil forfeiture order and no other questions can be asked.

It is important to note that the ACC also has been granted similar powers; however, the examination powers of the ACC are broader and more far-reaching, with fewer limitations. The ACC is empowered to summon anyone for an examination, and relatively quickly, if required even within a workday. The scope of the examination may cover any subject that is of interest to the ACC. Concurrently, use of the information obtained is limited only to civil forfeiture proceedings, with a caveat that derivative information can be used to initiate criminal proceedings. In other words, if an examinee admits that he or she has committed a murder and discloses the location of the murder weapon, the ACC cannot disclose the person's admission but it can point the police to the location of the murder weapon. Examination orders can be an important tool for gathering evidence under unexplained wealth provisions but they are not widely used under the CPCA in WA.

Further, the WA legislators incorporated provisions in the statute to ensure the protection of innocent owners and the adverse impact that an application for a UWO can have on them. These provisions empower the court to determine if a hearing will be held in a closed court or permit only a specific class

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<sup>146</sup>For example, police have obtained records from casinos or horse racing to show that a person has not acquired his or her funds through gambling or horse racing.

<sup>147</sup>CPCA 2002 – Division 2 – Examination

of persons to be present during the proceedings. Similarly, the court also may prohibit publication of the report of the proceeding or of any information related to the proceeding.

The DPP can, and in most cases will, apply *ex parte* for a freezing order to prevent property from being dissipated. Freezing the property that is suspected of being subject to a UWO is provided for under the confiscable property provisions of the CPCA (Section 43). Upon application by the DPP, the court may make a freezing order prohibiting anyone from disposing of the property if the court is satisfied that either (i) an examination, monitoring, or suspension order has or will be made against a person in relation to the property, or (ii) an application for an unexplained wealth declaration has been or will be made within 21 days after the freezing order is made. Freezing orders obtained on the grounds that an examination order has been made usually are done to enable the DPP to determine whether or not an unexplained wealth declaration can be served.

Pursuant to the statute, when a freezing order is made *ex parte*, any person with an interest in the property must be notified of the order as soon as practicable. In addition to notifying the person that his or her property is subject to a freezing order, it must advise the person that if he or she does not file an objection to the confiscation within 28 days from the day the notice is received the property will be automatically confiscated. However, the courts have determined that the automatic confiscation is applicable only for crime-used and crime-derived streams and is not applicable for the unexplained wealth forfeiture stream. To identify any person who has an interest in property the Act requires that any person receiving a notification of a freezing order make a statutory declaration at the court and identify any other person that may have an interest in the property. The courts recognize that the statutory declaration is a mechanism to identify all persons who may be affected by the order. If the person fails to make a statutory declaration, he or she may be fined up to AUD\$5,000.

The scope of a freezing order varies from case to case. It can cover all property owned or effectively controlled by the respondent at the time when the order is made as well as the property acquired after the order is made. Frozen property will be in the care of the DPP, Public Trustee, or the Commissioner of Police. Although the general idea is to retain the property pending judicial determination, the court can order that the property be sold or destroyed in certain circumstances. The order freezing real property becomes valid once it is registered in the Registrar of Titles of the State of Western Australia; for other tangible properties, the order is valid from the moment it is made by the court. Any person dealing with the property in any way while it is frozen commits a serious offense, and may be fined up to AUD\$100,000 or the value of the property or subject to imprisonment for five years, or both.

A freezing order remains in effect as long as the grounds on which it was made are valid. If a freezing order is made on the grounds that an application for an unexplained wealth declaration will be made within 21 days, the order will stop being in effect if an application is not made or if the court set the freezing order aside.

#### Proceedings Under UWOs (Forfeiture Orders)

Section 11 of the CPCA provides that on application by the DPP to a court for an unexplained wealth declaration against a person, the court must make an order if it is more likely than not that the person owns or effectively controls unexplained wealth. The statute does not grant the court discretionary power to determine whether to make an order once it is shown on the balance of probability that a person owns unexplained wealth. The statute states that a person has unexplained wealth if the value of the person's wealth is greater than the value of the person's lawfully acquired wealth. Property bought or paid for with unlawful consideration is unlawful, even if the property itself was obtained legally.

Under the statute, the DPP bears the initial burden of proof and must establish on the civil standard of proof that it is more likely than not that the respondent owns unexplained wealth. It is not necessary to show that the property was derived or acquired as a result of a specific offense or to show that the respondent has been involved in or has committed an offense. This provision was upheld by the District

Court of Western Australia in a recent case,<sup>148</sup> where the court held that “mere unexplained wealth may trigger confiscation in certain circumstances and that it is no longer a requirement to show that an offense was committed.” This lack of a requirement of a predicate offense eased the burden of proof on the prosecution to institute cases under unexplained wealth provisions, merely on the grounds that there is a reasonable suspicion that a person owns unexplained wealth. However, overly prescriptive provisions on assessment and valuation of unexplained wealth have raised the threshold of the burden of proof the prosecution has to meet to institute a successful UWO case. The prosecution is required to produce evidence detailing all the property that the respondent owns, or effectively controls including property that has been consumed or disposed of and its origin. Only then does the burden shift to the respondent to show lawful origin of the whole or parts of the property the prosecution suspect constitutes unexplained wealth.

CPCA Section 13 determines that “the value of the respondent’s unexplained wealth is the difference between the total value of the respondent’s wealth and the value of the respondent’s lawfully acquired wealth”. The statute specifies, in Section 144(2), that the value of a person’s wealth is the amount equal to the sum of the values of all items of property, and all the services, advantages, and benefits that together constitute the person’s wealth, including property the person owns or effectively controls<sup>149</sup> when an application is made, property that is acquired after an application is made, or property that is consumed or given away at any time. This implies that for the court to determine if the respondent owns or controls unexplained wealth it will need a full inventory of his/ her wealth, including the wealth consumed. The DPP considers these statutory requirements cumbersome, demanding, and time consuming because they impose a heavy burden to identify, trace, value, and determine the origin of each item of the property that constitutes the respondent’s wealth. Thus, it is considered that the burden of proof on the prosecution in reality has a higher threshold than inferred or contemplated by the legislature, whereby it was considered that it would be sufficient to merely show that a person owns more than he or she has lawfully acquired before the burden shifts to the respondent to show the lawful origin of the property. Thus, the prosecution must conduct a thorough investigation, employ highly skilled forensic accountants, and have access to considerable resources to gather the evidence necessary to establish in front of a court that the value of a person’s wealth is greater than their lawfully acquired wealth.

After the prosecution establishes that it is more likely than not that the person owns or effectively controls property that is unexplained wealth, the court will presume, pursuant to Subsection 12(2), that “any property, service, advantage or benefit that is a constituent of the respondent’s wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.” The statute has a presumption in favor of forfeiture and the court will presume that the respondent owns or possesses unexplained wealth unless the respondent rebuts the claims of the prosecution. If the respondent is unable to prove the legality of the property he or she bears the risk of losing it all.

In practice, however, the threshold the respondent is expected to meet is much lower when compared with the threshold of the prosecution. The civil standard of proof applicable in civil forfeiture cases is the one applied in *Briginshaw*,<sup>150</sup> “reasonable satisfaction,” which is a higher standard of proof than that implied by the civil standard of proof on the balance of probabilities. The High Court of Australia stated that for the court to be reasonably satisfied on an issue it must be convinced, depending on the gravity of the issue, “clearly,” unequivocally, strictly, or with certainty”. Courts have embraced the argument that it should be easier for the state with its enormous apparatus and resources to bear a higher standard of proof compared to the individual who has access to limited resources to counter the allegations made by the

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<sup>148</sup>Unreported case of the District Court of WA (2008).

<sup>149</sup>The definition of effective control is provided for under the Act (Section 156), which states that a person has effective control of property if he or she does not have the legal estate in the property but the property is directly or indirectly subject to the control of the person, or is held for his or her benefit.

<sup>150</sup>*Briginshaw v. Briginshaw*, (1938) 60 CLR 336.

state. In practice, this has set a higher threshold of proof for the state and lowered the standard of proof for the respondent. In reality the respondent can discharge the burden of proof if he or she gives a statement under oath simply declaring that the property is lawful and it was not acquired through unlawful means. Courts have considered it sufficient if the respondent claims that the property or money was inherited or a gift from a relative overseas, or were acquired through gambling or horse racing. This has been made possible, in particular, because the Australian revenue code does not require gifts, inheritance, or funds acquired through gambling to be reported for tax purposes. Therefore, the statements cannot be verified with the tax records and the statement must be accepted as accurate unless the prosecution is able to establish the source of the funds.

In determining whether or not the respondent owns or possesses unexplained wealth the court will, among other issues, take into account the respondent's income and expenditures at any or at all times (Section 12(4)). There is no limit as to how far back in time the court can go in evaluating the lawfulness of a respondent's property. However, as a matter of practicality, for accounting purposes law enforcement officials and the prosecution have determined that a cutoff date is necessary to facilitate financial analysis of a person's property.

The statute provides, and the courts have upheld, that hearsay evidence is admissible in court, providing that an affidavit of an authorized officer stating his or her belief that the person owns unexplained wealth is sufficient evidence to satisfy the court that an order should be made. This was confirmed by the Supreme Court of Western Australia in *Director of Public Prosecution for Western Australia v. Hafner*.<sup>151</sup> The statute also provides that the court may hear evidence or the opinion of people experienced in the investigation of illegal activities involving prohibited plants or drugs, such as officers of the Australian Federal Police, police officer of WA, customs officers, and DPP, to help determine the value of the property. Transcripts of other proceedings also can be used as evidence against a person in a proceeding under the Act.

After the UWO is issued, pursuant to Section 14 of the Act, the respondent whose property is subject to the order is required to pay to the state an amount equal to the amount specified in the declaration as the assessed value of the unexplained wealth. The payable amount is paid into the Confiscation Proceeds Account.<sup>152</sup> If the person fails to pay the amount within one month the debt will be recovered from the frozen property unless the court has granted an extension.

Successfully obtaining a UWO is resource intensive because it requires specific sets of skills such as forensic accounting and investigators, to identify respondents' wealth and determine which parts of the property cannot be justified as being unexplained wealth. The WA police recently have employed additional staff with financial qualification with the intent of increasing applications for unexplained wealth.

### Proceedings under Criminal Benefits

As described in Section 3.2. (ii), in addition to UWO provisions, the Act contains two other forfeiture schemes: crime-used property and crime-derived property of a declared drug trafficker. Proceedings for crime-derived and crime-used property commence with seizure and a freezing order. A police officer is authorized to seize, retain, or guard property for 72 hours or longer if a freezing order is made after the property was seized. A justice of the peace may make a freezing order if he or she is satisfied that there are reasonable grounds to believe that the property is crime-used or crime-derived or if a person has been charged or will be charged for commission of an offense within 21 days or if the person can be declared a drug trafficker. The law requires that a freezing notice must be sent to the owner and any other third party who may have an interest in the property summarizing the effects of the notice and advising him or her that if an objection to confiscation of the property is not filed within the time prescribed by law the

<sup>151</sup>*Director of Public Prosecution for Western Australia v. Hafner*, [2004] WASC 32.

<sup>152</sup> See CPCA of 2002, s. 130

property will be automatically confiscated within 28 days. Any person receiving a freezing order is obliged to give a statutory declaration to the police officer within seven days of receiving it stating the names of other persons who may have an interest in the property. A penalty is applicable for those who do not comply with the order.

***Making a Declaration*** The DPP initiates criminal benefits proceedings by applying to a court for a criminal benefits declaration (CBD). The court must make a declaration if it is more likely than not that the respondent was involved in the commission of a confiscation offense<sup>153</sup> and that he or she has derived direct or indirect benefits, services, advantages, or property as a result of his or her involvement in the commission of an offense. If the person was convicted of the confiscation offense the court presumes that the respondent has derived benefits from the property. However, the court may make a CBD even if the person has not been charged or convicted of an offense if there are grounds to believe that he or she has committed an offense. The court presumes that property, services, and advantages have derived from crime unless the respondent establishes otherwise.

The court will not make a CBD if one already has been made in relation to the property, if the property has been confiscated, or is the subject of a UWO. When the court makes a CBD the respondent is required to pay to the state an amount equal to the assessed value specified in the CBD. The value of the property, services, advantages, and benefits is considered to be the value at the time it was acquired or on the day the application was made, whichever is greater.

Crime-derived property remains crime-derived even if it is disposed of, used to acquire other property, or otherwise dealt with. If crime-derived property is used to purchase lawful property, the lawful property becomes crime-derived because of the origin of the original property. The statute provides that property ceases to be crime-derived property when it is acquired by an innocent party, if the court orders its release, if forfeited money has been paid to the Public Trustee, or if the property is disposed of in accordance with the CBD.

#### **Substitution of Crime-used property in Criminal Benefits**

Substitution of crime-used property is another novelty introduced under the CPCA to ensure that when property used for the commission of crime is no longer available, then other property can be confiscated to satisfy the claim. Before a court makes a substitute of crime-used property order, the DPP is required to establish, on civil standard of proof, that it is more likely than not that the respondent has used the property in the commission of an offense. The court considers that the property is no longer available if the respondent does not own or have effective control over it, or if a freezing order has been made that was set aside in favor of the spouse or partner or a dependent.

For a court to declare property as a substitution of crime-used property, it does not need to base its finding on the commission of a specific confiscation offense, but only on whether or not a confiscation offense was committed, regardless of whether anyone was charged or convicted of the offense. A declaration may be made even if no one owns or effectively controls the identified property. The burden of proof is on the DPP, except in two situations. First, if the respondent has been convicted of the crime, the court will presume that the property was used for commission of an offense, and the respondent bears the burden to establish the contrary. Second, if the respondent is not convicted for commission of the offense, and it was established that the crime-used property was in the respondent's possession at the time the offense was committed or soon thereafter, and that the property was used in commission of the offense, the respondent bears the burden of proof to establish the contrary.

Thus, it can be concluded that the respondent bears the burden of proof in the majority of the cases because the statute places the burden on the respondent, whether the person is convicted of an offense or not convicted of an offense but there are grounds to believe that some offense was committed.

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<sup>153</sup>In the Act, confiscation offense means an offense against a law in force, anywhere in Australia, that is punishable by imprisonment of 2 years or more.

When the court makes a crime-used property substitution declaration, the respondent is required to pay to the state an amount equal to the amount specified in the declaration. The value of the property is assessed based on the value of the property at the time the relevant offense was committed or is likely to have been committed. A declaration also can be made against two or more respondents, in which case they are jointly liable to pay to the state the amount specified in the declaration.

#### **Recovery and Release of Confiscable Property in Unexplained Wealth Orders and Criminal Benefits**

***Recovery of Confiscable Property*** When the court makes the declaration for unexplained wealth the respondent must pay the state the amount specified in the declaration within one month. The court may extend this period for an unrestricted period of time. However, if the respondent fails to meet his or her debt within the given time period the DPP can apply for a confiscable property declaration, asking the court to allow satisfaction of the debt from the frozen property owned or in effective control of the respondent.

***Release of Confiscated Property*** After property has been confiscated the owner may apply for release of the confiscated property. The owner must make such an application within 28 days from the date the person became aware, or can reasonably expected to have become aware, that the property was confiscated. The person making the application for release must establish that he or she owned the property and that it is not controlled by the person benefiting from the offense and that the person was not aware or could have not been aware that the property was liable for confiscation.

#### **Investigation and Search**

***Investigation and search*** - For the purpose of collecting relevant information the court may make examination, monitoring, and production orders. When making a decision whether or not to apply for a freezing order or a declaration order, the DPP or a police officer may conduct preliminary inquiries. During the preliminary inquiries, they may request information from a financial institution on financial transactions and other activities related to the respondent's account. The financial institution must comply with the order. If it fails to do so, a significant penalty can be imposed.

***Examination, Production, and Monitoring Orders*** As discussed in 3.2.1.2 (iii) the District Court may order a person to submit to an examination. The court also may make a production order, ordering a person to produce property tracking documents if the court suspects that the person has the documents in his or her possession. Anyone contravening the production order is considered to have committed an offense. A person is not excused from complying with an examination or production order under the pretext that the information given might incriminate him or her or that by complying with the order, he or she would breach an obligation. This feature was held to violate well-known principles of professional privilege, posing ethical and professional dilemmas for many professionals. It especially will affect defense lawyers of those suspected of committing organized crime offense or other criminal activities.

Information disclosed during examination is admissible evidence in a proceeding under the CPCA as well as in any other civil proceedings. However, any information obtained during the examination order cannot be used in a criminal proceeding against the person. The statute grants the authority to the District Court to make an examination order on an application by the DPP. However, the court determines the type and the nature of questions that can be asked by the DPP during an examination order. The questions are limited to the property subject to an order and any other property, income, or expenditure the respondent may own or effectively control. Examinations are conducted *in camera* and the respondent or the person to be examined may be represented by a legal representative. The examination powers granted to the DPP under the CPCA are narrower than the examination powers granted to the ACC under the Act establishing the ACC. The ACC not only has broader powers, but also can exercise them independently of a court and within a much shorter period of time. Further, under the Act, if the respondent fails to answer the questions he or she is not entitled to file an objection to the confiscation of property, or, if such an objection is filed, it has no effect. If the respondent fails to answer the questions, he or she may be fined

up to AUD\$100,000 or an amount equal to the value of the property or may be subject to imprisonment for five years or both. Any other person failing to respond to an examination order or contravening such an order may be fined up to AUD\$50,000 or be subject to maximum imprisonment of up to two years.

The DPP also may apply *ex parte* for monitoring and suspension orders, ordering a financial institution to monitor an account of a person suspected of having benefited or of being about to benefit from an offense. The financial institution is obliged to comply with the order and give information to the DPP or a police officer about all transactions carried out through an account held with the institution by that person. The monitoring order can be in force for up to three months. These provisions help law enforcement agencies establish the extent of a respondent's wealth and its sources.

**Secrecy Requirement** One of the key features of the CPCA that is not provided for in the Commonwealth's PoCA of 2002 is the secrecy requirement, whereby any person who is the subject of a preliminary inquiry, examination, monitoring, or production order should not disclose or share with anyone information about the examination, monitoring, or production order, the requirements of the order, or the information given in compliance with the order. One exception is for a corporate officer, enabling him or her to disclose restricted information to the DPP or police, an officer of the corporation, and a legal practitioner for the purposes of obtaining legal advice.

**Detention, Search, and Warrant** A Justice of Peace may issue a search warrant to a police officer for the search of premises if satisfied that there are reasonable grounds to suspect that there will be confiscable property or any property tracking documents at the premises within 72 hours. The search warrant may be executed at any time and will continue to be in force for 30 days. If the applicant has reasonable grounds to suspect that firearms may be used, he or she must state the grounds for that suspicion.

#### Management of Seized, Frozen, and Confiscated Property

The Commissioner of Police is responsible for managing seized property and the DPP is responsible for managing and controlling frozen and confiscated property until a decision is made whether to return it to the owner, to sell it, to destroy it, or to dispose of it. The DPP may appoint a Public Trustee, the Commissioner of Police, or the person who owns the property to manage the property while the freezing order is in effect. The person controlling the property while the freezing order is in effect may arrange for the property to be valued by a qualified evaluator and send a copy of the inventory to all persons who received a copy of the freezing order. The Public Trustee is entitled to receive any fees for performing its functions.

All funds forfeited or confiscated under the CPCA are transferred to the Confiscation Proceeds Account. On direction of the Attorney General funds from this account can be used to provide support services and other assistance to victims of crime, to support activities of the police against crime, and to cover the costs incurred from storing, seizing, or managing frozen or confiscated property. In 2009, the AG and DPP made a decision to allocate to the police approximately 15 percent of all funds derived as a result of confiscation or forfeiture. These funds have been used to hire new staff, provide training, and develop skills in areas critical for implementation of the CPCA. Additional resources have motivated the police to ramp up the efforts in identifying, tracing, and forfeiting proceeds acquired as a result of unlawful activities.

### 3.2.1.3 Australia Commonwealth (Serious and Organized Crime Act 2010)

#### Background

The Commonwealth of Australia enacted the Proceeds of Crime Act in 2002. It is a comprehensive forfeiture and confiscation regime introducing non-conviction based forfeiture of proceeds and instrumentalities of crime. The Commonwealth PoCA is a complex and comprehensive legislation containing a range of conviction-based and non-conviction-based forfeiture schemes including literary proceeds, pecuniary penalties, and *in rem* forfeiture proceedings. The law was amended in 2010 to introduce UWOs with the Crimes Legislation Amendment (serious and Organized Crime) Act.

#### Proceeds of Crime Act 2002

As noted in the preamble of the PoCA, its principal objectives are to “deprive persons of the proceeds and instruments of the offenses including derived benefits, against the laws of Commonwealth or the governing Territories and to deprive persons of literary proceeds derived from commercial exploitation of their notoriety from having committed offenses”. In 2010, the following section was added, incorporating UWOs into the PoCA “to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offenses and to punish and deter persons from breaching laws of the Commonwealth or the non-governing territories and prevent reinvestment of proceeds”.<sup>154</sup> Inclusion of UWOs in the PoCA permitted the courts to forfeit unlawfully acquired property across the country in all states and territories if the Commonwealth laws are violated. One of the deficiencies of the adoption of UWOs at the state level was that it created the undesired consequence of those engaged in illegal activities merely moving their activities to another state. Adoption of UWO laws by the Commonwealth is aimed to remedy that situation by ensuring that there are no weak points. However, one limitation remains: application of unexplained wealth laws is limited to confiscating property derived from offenses against a federal law or a state offense with a federal aspect.

As with the WA unexplained wealth law, a key feature of the Commonwealth UWOs is that it places the burden of proof on the person whose property is the subject of the order. He or she is required to appear before a court and show evidence to satisfy the court that the property was lawfully acquired. If the person fails to satisfy the court, the court will make an order asking the person to pay an amount of money equivalent to the unexplained wealth to the Commonwealth. All proceedings are civil in nature and the civil standard of proof—balance of probabilities—applies.

PoCA is a complex law providing an array of forfeiture and confiscation schemes for indictable offenses that range from non-serious to serious and terrorism offenses. It is interesting to note that the PoCA of 2002 contained provisions reversing the burden of proof to the property owner when an application for forfeiture had been made and in this regard the unexplained wealth orders do not represent an innovation or novelty in the Act, as the PoCA of 2002 already provided for the reversal of the burden of proof to the respondent. The intention of the Australian Federal Police, who took the lead in promoting the law at the federal level, was to enact legislation similar to that in existence in WA and NT without a requirement to establish a nexus between specific assets and criminal wrongdoing and to reverse the burden of proof to the respondent. However, their efforts were thwarted during the legislative drafting process. The Office of Attorney General incorporated provisions that required the government to show a nexus between the property and an offense. Including the requirement of showing a tight link with an offense significantly weakened the powers of the UWOs because mere ownership of unexplained wealth no longer is sufficient to apply the order. The state must establish, on balance of probabilities, that a person has committed an indictable offense, whether a foreign offense, a Commonwealth offense, or a state offense with a federal aspect. However an actual conviction is not required for a UWO.

<sup>154</sup>PoCA 2002 Section 5, Part 1-2 Objects.



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### Proceedings under Unexplained Wealth Orders

**Freezing Orders** Most of the proceedings under the Commonwealth PoCA commence with a freezing order or a restraining order to prevent dissipation and loss of the property. In most cases, the first phase in forfeiture and confiscation proceedings is an application for a freezing order.

Freezing orders are made on financial accounts if there are grounds to suspect that the account balance reflects proceeds or an instrument of an offense, and the magistrate is satisfied that unless the order is made the owner will not be deprived of all or parts of the proceeds or instrument of an offense. The proceeds do not have to be related to the commission of a specific offense. Authorized officers<sup>155</sup> are empowered to apply for a freezing order by submitting an affidavit with detailed information suggesting that the balance in the account is the proceeds of an offense or an instrument of a serious offense. With the freezing order a magistrate can order a financial institution not to allow a withdrawal from an account. For urgent cases, freezing orders also can be issued by telephone, facsimile, or other electronic means if the delay would impede the effectiveness of the order. However, this order does not prohibit the financial institution from withdrawing funds from an account that is under a freezing order to meet its liabilities. The financial institution and the authorized officer enjoy immunity and cannot be sued for requesting or complying with a freezing order. The statute also contains provisions permitting the account holder to withdraw funds to meet his or his dependent's reasonable living expenses, but not to cover legal costs to be incurred in connection with the proceedings under the Commonwealth PoCA. The law also provides for revocation of a freezing order.

**Restraining and Forfeiture Orders** Restraining orders can be made against property on application by the DPP on the grounds that the property may be the object of forfeiture or confiscation in relation to certain offenses. Property is forfeited to the Commonwealth if certain offenses have been committed, although conviction for an offense is not always a requirement to order forfeiture. Alternatively, penalty orders can be made, ordering payments to the Commonwealth of a specified amount of money.

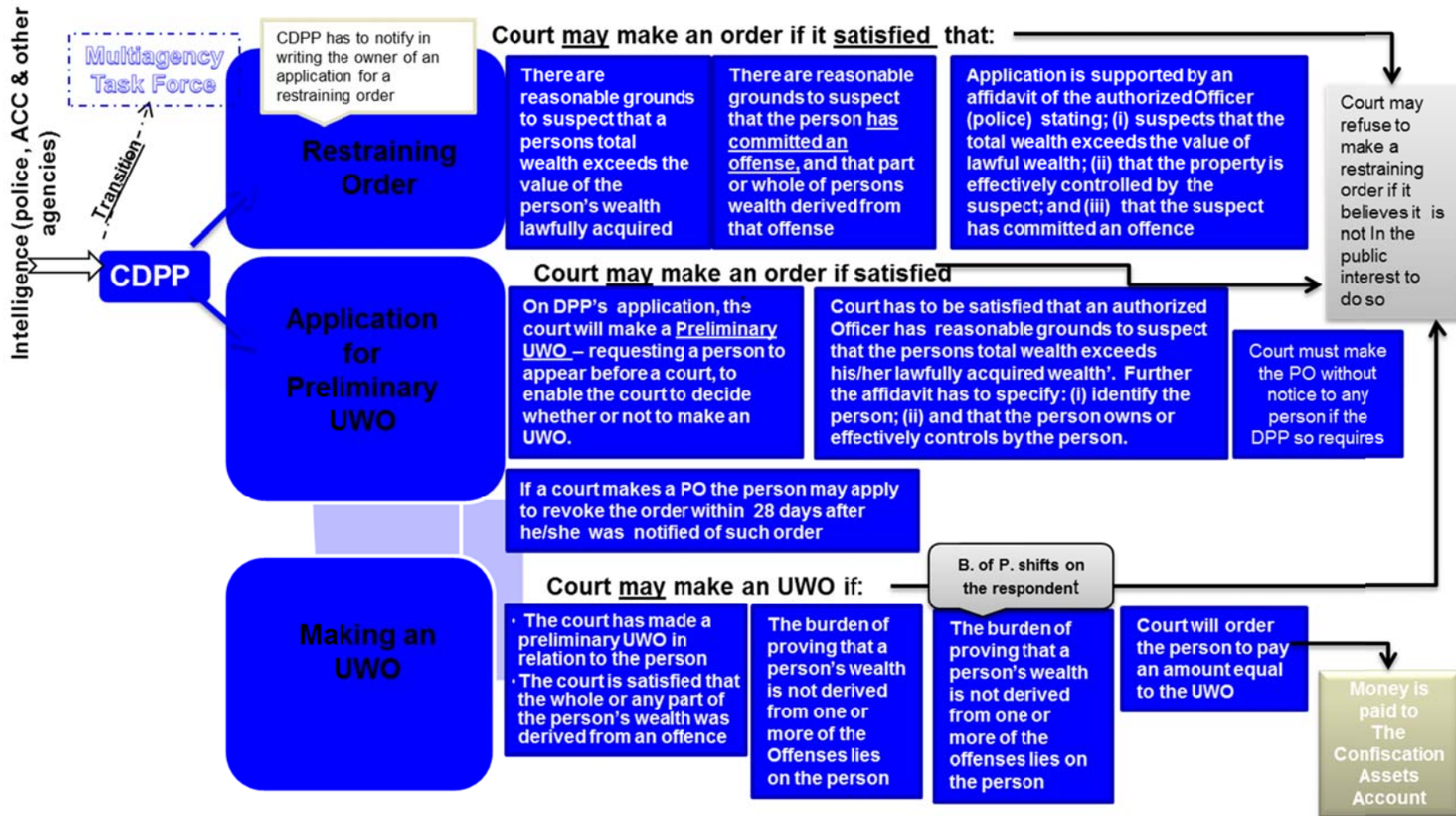
Restraining, forfeiture, and pecuniary penalty orders are made by a competent court on application by the DPP.

Similar to WA unexplained wealth provisions, a proceeding for a UWO (see figure on next page) can commence with an application for a restraining order or an application for a preliminary UWO. However, differing from the WA and NT UWO laws, the Commonwealth PoCA has introduced another phase in the proceedings, the preliminary UWO, which requires a respondent to appear before a court to enable the court to determine whether or not to make a UWO. This phase is the trial of the case whereby the court hears all the evidence and submissions of the parties and determines whether or not the person owns or controls the property that is considered unexplained wealth. The final phase of the proceeding is when the court makes the order, requiring a person to pay an amount specified in the declaration to the state.

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<sup>155</sup> Authorized officers are certain members of the Australian Federal Police (AFP), Australian Commission for Law Enforcement (ACLE), and Australian Crime Commission (ACC).

## Proceedings under Unexplained Wealth Order provisions in Commonwealth



Filename/RPS Number

***Restraining Orders*** Pursuant to Commonwealth PoCA Section 20A, the court may, on application by the DPP, issue a restraining order prohibiting anyone from disposing of or otherwise dealing with the property specified in the application. Differing from the WA PoCA, the unexplained wealth provisions under the Commonwealth PoCA require the DPP to notify, in writing, the property owner and any other third person with an interest in the property of its intent to make an application for a restraining order, unless the court permits the DPP to make an application without notifying the owners if there are reasonable grounds to believe that the property may be disposed of. The DPP may make an application for a restraining order supported by an affidavit of an authorized officer stating reasonable grounds on which he or she bases the suspicion that: (i) the person owns or effectively controls the property subject to the application, (ii) the person has committed an offense,<sup>156</sup> or (iii) all or part of the person's wealth was derived from an offense. While the property is under a restraining order, the court may order that some of the property be used to meet the owner's reasonable legal expenses arising from application of the Commonwealth PoCA. However, before any payment is made, the court will direct a court assessor to certify that legal expenses have been properly incurred. In addition, the court may make an order allowing recovery of reasonable living and business costs of the respondent and his dependents from the restrained property. Finally, the court is granted discretion to refuse to make a restraining order if it is satisfied that it is not in the public interest to do so or if the Commonwealth refuses to make an undertaking with respect to the payment of damages or costs. If the court refuses to make a restraining order on the grounds that it is not in the interest of justice it may make an order regarding costs it considers appropriate, including costs on an indemnity basis.

restraining order related to unexplained wealth ceases to be in effect if one of the following occurs: (1) days pass from the day the order was made and an application for a UWO was not made; (2) the application is made, but the court refused to make the order; and (3) the time for an appeal has expired and the appeal has lapsed or was dismissed.

***Issuance of Unexplained Wealth Order*** Pursuant to Section 179B, a court will, on application by the DPP, make a preliminary UWO ordering a person to appear before the court to enable the court to decide whether or not to make a UWO. The application by the DPP must be supported by an affidavit of an authorized officer stating reasonable grounds on which she bases his/her suspicion that the person's total wealth exceeds the value of the person's lawfully acquired wealth. It also must identify the person who is the owner of the property and show that the property is owned or in effective control of that person. Section 179G of the Commonwealth PoCA defines the respondent's wealth as consisting of all of the property owned or controlled by the respondent at any time, before or after law came into effect, including the property that the person has disposed of or consumed at any time. The total wealth of a person is the sum of the value of all property that constitutes the person's wealth. On DPP's request, the court may make a preliminary UWO without notifying any person. In such a case, pursuant to Section 179N, the DPP is required to notify the property owner or any third party with an interest in property within seven days from the day the order is made.

Preliminary UWOs may be revoked, pursuant to Section 179C, on application by the property owner within 28 days from the day he or she was notified of the order. This period can be extended for up to three months by the court on application by the owner. The court will revoke the order only if it is satisfied that there are no reasonable grounds on which the order could be made or if it considers that it is not in the interest of justice or the public to do so.

If the court subsequently issues a UWO (Section 179E), it directs the respondent to pay a specified amount of money to the Commonwealth that is equal to the difference between the respondent's total wealth and the value of lawfully acquired wealth. The court will make an order if a preliminary UWO was in place and if there are reasonable grounds to believe that all or part of the person's wealth derives

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<sup>156</sup> An offense is the offense against a law of Commonwealth, a foreign indictable offense, or a state offense that has a federal aspect.

from commission of an indictable offense. The provision on predicate offense, requiring the state to show that respondent's wealth is derived from a specific offense, is unique to the federal unexplained wealth laws. The burden of proof, however, is on the owner to show lawful source of the property. Section 179E(3) states: "In proceedings under this section, the burden of proving that a person's wealth is not derived from one or more of the offenses . . . . lies on the person".<sup>157</sup> The court has the discretion to make an order unless it considers it is not in the interest of justice to do so. If the government fails to give undertaking of damages the court may refuse to make a preliminary UWO.

The court has the authority to vary UWOs on application by the DPP and to increase the unexplained wealth amount if facts or evidence become available after the UWO was already made, or if it was impossible to identify the property at the time the order was made.

If making a UWO will cause undue hardship to a person's dependents, the court may order the Commonwealth to pay a sum of money to relieve the hardship, if the dependent is at least 18 years old. The court also may decide to cover legal expenses of the person who is the subject of a UWO arising from application of this Act. Legal expenses will be paid from the property declared unexplained wealth.

The Act contains a provision based on the operation of Part 20A (Unexplained Wealth Order) that is overseen by the Parliamentary Joint Committee on Law Enforcement (the Committee) and it may require the Australian Federal Police, Australian Crime Commission, the DPP, and any other federal agency receiving any material disclosed related to this part of the Act, to appear before it from time to time to give evidence.

Since the entry into force of the Act, the power to implement a UWO has rested with the DPP; however, with the Crimes Legislation Amendment Bill of 2011,<sup>158</sup> there have been amendments to various Acts related to the enforcement of criminal law and proceeds of crime. Specifically, the Commonwealth PoCA provides for sharing of power between the DPP and the Commissioner of the Australian Federal Police (AFP) to perform functions and duties related to orders under the Commonwealth PoCA of 2002. This means that the AFP has the power to initiate any of the proceedings for forfeiture or confiscation of the proceeds of crime provided under the Commonwealth PoCA. This has subsequently been amended to include the Commissioner of the AFP, together with the DPP, as the "responsible authority" to initiate any proceedings under the Commonwealth PoCA and to appear before a court hearing an application for a proceeding. These provisions came into effect in January 2011 but the AFP has not used these powers.<sup>159</sup>

However, there is tension between the AFP and the DPP regarding the role each will play and the division of responsibilities. And this tension has increased in the context of the newly proposed initiative by AFP to establish a separate independent task force that will act as a responsible authority to initiate proceedings under the Commonwealth PoCA. The initiative is under way and may come into effect as early as fall 2011. The idea is to create an independent task force similar to the Irish model, composed of the AFP, ACC, the Revenue Services, and the Customs Office. The source of contention is the role of the DPP in the task force, or if it will play any role. Although the Commonwealth DPP expressed reservations toward unexplained wealth laws, it believes it has an important role to play in terms of acting as the filter between the police conducting the investigatory work and the courts reviewing and deciding the cases. However, others consider that the role of the DPP is yet to be defined and that it potentially may not have a role. At the time of writing the report, negotiations are underway between AFP, ACC and CDPP to determine the future roles as well as the inner workings and modalities of the practical operation of the proposed task force.

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<sup>157</sup> Re-enforcing the reversal of the burden of proof in unexplained wealth order proceedings, S.179E(5) reiterates that despite S.317 of the Act, that states that the burden of proof in any proceeding under PoCA is on the applicant (DPP or AFP), subsection 3 placing the burden on the respondent has effect.

<sup>158</sup> Crimes Legislation Amendment (No. 2) 2001, the Parliament of the Commonwealth of Australia.

<sup>159</sup> No case has been initiated by the AFP as of June 2011 but Booz Allen learned that at least one case was being considered.

### Proceedings under Convictions for Indictable Offenses<sup>160</sup>

**Restraining Orders** The proceedings for forfeiture of assets for an indictable offense<sup>161</sup> commences with either a freezing or a restraining order prohibiting the person convicted or charged for an offense from disposing of or dealing with the property. A court is obliged to make a restraining order on application by the DPP supported by an affidavit of an authorized officer if the person has been convicted or charged with an indictable offense or if it is proposed that he or she be charged with an indictable offense. The affidavit must include the grounds on which the authorized officer bases his or her suspicion and if the suspect has not been convicted that he or she is suspected to have committed an offense. If the application is to restrain the property of a person, other than the suspect himself, an affidavit must state the officer's suspicion that the property is under the effective control<sup>162</sup> of the suspect and that it is proceeds from or an instrument of the offense.<sup>163</sup> The competent court has the authority to refuse to make a restraining order if it is satisfied that it is not in the public interest to do so or if the Commonwealth refuses to give undertaking of damages to a court.

The court may make provisions to allow for certain expenses of the person whose property is subject to the restraining order to be met by the restrained property including reasonable living expenses of the owner or his or her dependents, reasonable business expenses, and a debt incurred in good faith. However, the Act does not permit the court to make an allowance for legal costs. Requirements for notifying the property owner of a restraining order are strict to the degree that a court will not hear an application unless it is satisfied that the respondent has been properly notified.

The PoCA provides opportunities for third parties to apply for revoking or an exclusion of property within 28 days. If the person was not notified of the restraining order he can apply at any time to exclude property from the restraining order. The restraining order will cease if one of the following events occurs: (a) charges are withdrawn, (b) the suspect is acquitted, or (c) the suspect's conviction for the offense is quashed, unless there is a confiscation order in process or an application for confiscation has been made. The restraining order ceases to be in force if, within 28 days after the order was made, the suspect is neither convicted nor charged for commission of an offense and a forfeiture order has been made. Applications for restraining orders, revocation orders, and exclusion from restraints are interlocutory proceedings.

**Forfeiture Orders**<sup>164</sup> While the restraining order can be made against the property if there is reasonable ground to suspect that the person has committed an offense, forfeiture orders will be made only after the person has been convicted of an indictable offense. A property will be forfeited to the Commonwealth by a competent court on application by the DPP if the court is satisfied that (1) a person has been convicted of one or more indictable offenses not more than six months earlier and (2) the property specified in the order is proceeds or an instrument of one or more offenses. The court also has the option of making a pecuniary order that requires the person to pay a specified amount to the Commonwealth which is derived

<sup>160</sup> See federal PoCA of 2002 S.17 Restraining Orders – people convicted of or charged with indictable offenses

<sup>161</sup> Throughout the text of the Act, whenever referring to an indictable offense, it includes an indictable offense, an indictable foreign offense, and an indictable offense of the Commonwealth. Indictable offense as defined in the Chapter 6 “interpreting this Act” of PoCA” means an offense against a law of the Commonwealth or a non-governing Territory”. Indictable offense of the Commonwealth “means an offense against a law of a state or a self-governing Territory that may be dealt on indictment and the proceeds of which were dealt with in contravention of the law”, which may include import and export of goods into or from Australia, communication and transactions in the course of banking. Foreign indictable offense means a conduct that constitutes an offense against a law in a foreign country, or if it occurred in Australia, it would have constituted an offense against a law of Commonwealth, a state, or territory. See PoCA 337A.

<sup>162</sup> See PoCA 2002 (337). Property may be subject to the effective control of a person even if the person has legal interest, a right, power, or privilege in connection with the property, this includes property held in trust, and property disposed of within 6 years before or after application for a restraining or confiscation order.

<sup>163</sup> Proceeds are defined in PoCA 2002, Section 329 (1), to include property wholly or partly derived, directly or indirectly, from the commission of offenses and property indirectly derived to include property sold or disposed<sup>163</sup>. An instrument of an offense is a property used in, or in connection with or is intended to be used in the commission of an offense.

<sup>164</sup> See PoCA of 2002, s.48 – Convictions for indictable offenses

from the commission of the offense. In some cases (e.g., terrorism offenses and conviction-based forfeiture) where property is suspected to be an instrument of an offense, the court will presume that the property was used in, or in connection with, the offense, even if no evidence is submitted to show that the property was used for commission of an offense. For the court to make such an order it is sufficient to show that the property was in the possession of the person convicted of an indictable offense at the time of, or immediately after, the offense was committed. Presumption that the property is an instrument of an offense places the burden of proof on the person whose property is the subject of the forfeiture order to rebut the court's presumption and demonstrate the lawful origin of his or her property to avoid forfeiture. This shows that Australia has accepted the reversal of the burden of proof in conviction-based *and* civil forfeiture cases prior to introducing the unexplained wealth orders shifting the burden onto the property owner or a third party.

When making the order, the court considers whether the order will cause hardship on a person other than the owner of the property, the gravity of the offense, and the intended use of the property. The court will make an order to forfeit property even if the person has absconded, if it is satisfied that the person has fled and that if tried, he or she would have been charged and convicted for commission of an offense.

If the DPP applies for a forfeiture order, it is required to notify in writing the person convicted for commission of an offense whose property is subject to that forfeiture order and any third party and others whom DPP believes may have an interest. Alternatively, before making the decision to issue the order, the court may order the DPP to give or publish notice of the application. Further, the forfeiture application may be amended, either at the request of the DPP or with its consent, to include additional property. The court will amend the application only if it is satisfied that the necessary evidence became available after the application was made and it was not reasonable to identify the property at the time when the application was made. If a forfeiture order will cause undue hardship on the person's dependents and the court is satisfied that the person's dependents had no knowledge of the person's conduct and are at least 18 years old, it will order the Commonwealth to pay a specified amount to his or her dependents to relieve the hardship.

Persons claiming any interest in a property are allowed to appear before the court and present evidence at the hearing of the application. The court appoints an Official Trustee to deal with the property on the Commonwealth's behalf, dispose it, and from any amount received, cover his or her charges and costs and credit the remainder of the money to the Confiscated Assets Account established by the Commonwealth PoCA of 2002. This provides that if someone else disposes of, or otherwise deals with the property knowing that a forfeiture order has been made in relation to that property, he will be charged with an offense, for which the penalty is five years of imprisonment.

The court also may make an exclusion or compensation order, on application by a person who claims to have an interest in the property, if it is satisfied that the property or the interest of third parties in the property are not proceeds or an instrument of one or more offenses. The person making the application is required to notify the DPP of an application enabling him or her to produce further evidence in relation to the property.

If a person's conviction is quashed the forfeiture order also is quashed if, within 14 days, the DPP does not apply to the court to confirm the forfeiture order.

#### **Civil Proceeding Forfeiture (In Rem Forfeiture)**

Pursuant to Section 49 the property suspected of being the proceeds or an instrument of an indictable offense (e.g., terrorism, foreign, or offense of Commonwealth) can be restrained by a court. An application is submitted by the DPP stating reasonable grounds for its suspicion supported by an affidavit of an authorized officer. The court will make the order if it is satisfied that an authorized officer stated reasonable grounds to believe that an offense was committed. There is no requirement to establish a link between the proceeds and the commission of a specific offense. The identity of the property owner is not

relevant for making the order; however, the DPP is obligated to notify the owner and third parties with an interest in the property of the application who then can apply for an exclusion order. If such an application is not made the court will make a restraining order. The court has the discretion to refuse to make such an order if the two following conditions are met: (i) the offense is not a serious offense, and (ii) the court is satisfied that making such an order is not in the public interest.

At least six months after a restraining order has been in force, the DPP can apply to forfeit the property to the Commonwealth. The DPP must apply to a court to establish that the property is the proceeds and/or an instrument of one or more indictable offenses. The DPP does not need to prove commission of a specific offense. Findings can be based on the belief that some type of indictable offense was committed. On application for a forfeiture order the DPP is required to notify, in writing, persons with an interest in the property.

The court may refuse to make a forfeiture order if an application has been made to exclude the property from the restraining order or if it considers that doing so would not be in the public interest.

#### Proceedings related to people suspected of committing Serious Offense

**Restraining Orders**<sup>165</sup> If a person is suspected of committing a serious offense<sup>166</sup> the court must make a restraining order prohibiting a person from dealing or disposing of the property as long as the DPP applies for an order and is able to show that there are reasonable grounds to suspect that a person has committed a serious offense. The application for a restraining order is supported by an affidavit of an authorized officer in which he lays reasonable grounds on which he /she basis the suspicions that the respondent has committed a serious offense. Reasonable grounds do not need to be based that a particular serious offense was committed. Since this is a civil proceeding the officer needs to only show on balance of probability that the person has committed some serious offense.

**Forfeiture Order (s. 47)** On an application of the DPP, the court must make a forfeiture or a pecuniary order if the property was subject to a restraining order for at least six months and the court is satisfied that there are reasonable grounds to suspect that the persons has been engaged in serious offenses. For the court to be satisfied that a person has been engaged in serious offenses it does not need to be based on the finding that the person committed a particular serious offense but only that some serious offense or other was committed. The order can be made before the end of six month period if it is made with parties consent. Hearsay is admissible on the application of the restraining order but is not admissible on an application for a forfeiture order unless it includes one of the exemptions in the Evidence Act, which applies to civil proceedings in the jurisdiction in which the application is brought. Moreover, the court does not have the discretion not to make the order even in cases when there is no risk of property being disposed of or otherwise dealt with.

All rights and remedies available to third parties under the section above, in relation to making an application for an exclusion or compensation order, are available to third parties with an interest in the property. For a court to make an exclusion or compensation order a third party must demonstrate to the court that his or her interests in the property are not proceeds or an instrument of unlawful activities. This does not apply to an already-forfeited property. Application for an exclusion or compensation order will not be heard until the DPP has had sufficient time to conduct a thorough examination in relation to the applications.

It is important to note that the PoCA also contains a scheme that allows forfeiture of property following conviction of a person of a serious offense, which is different from forfeiture of property of a person

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<sup>165</sup> See PoCA of 2002, s.18 Restraining Orders

<sup>166</sup> Serious offense is an indictable offense for which punishment is imprisonment of 3 or more years, involving unlawful conduct related to narcotic substances, serious drug offenses, money laundering, people smuggling, offenses against the Financial Transaction Reports Act of 1988, and offenses against the Anti-Money Laundering and Counter-Terrorism Financing Act of 2006.

whose conduct constitutes serious offense (non-conviction based). In these cases forfeiture is automatic and does not require institution of a separate proceeding.<sup>167</sup> In addition, the court may make a pecuniary penalty order following conviction of a person of a serious offense, after six months, from the day the person was convicted.

### Proceedings under Literary Proceeds Orders

Literary proceeds are defined as a benefit that a person derives from the commercial exploitation of the person's notoriety resulting, directly or indirectly, from commission of an offense or the notoriety of another person involved in the commission of that offense. Commercial exploitation may include publishing any material in written or electronic form, use of media and visual images, words and sound, and live entertainment.

A restraining order can be made on a suspect's property if the court is satisfied that there are reasonable grounds to suspect that the person has committed an indictable offense or a foreign indictable offense and that the suspect has derived literary proceeds. There is no requirement to prove commission of a specific offense for the court to be satisfied; it is sufficient to demonstrate that the person committed an offense. The court has the discretion to decide whether or not to make a literary proceeds order.

Courts authorized to deal with forfeiture and restraining orders include all courts that have jurisdiction to deal with criminal matters (e.g., the District Court or the County Court). The Supreme Court also has jurisdiction.

On application by the DPP, the court may make an order directing a person to pay an amount to the Commonwealth, if it is satisfied that the person has committed an indictable or foreign indictable offense, regardless of whether he or she has been convicted of the offense, and that the person has derived literary proceeds related to the offense. A literary proceeds order can even include future literary proceeds if the DPP applies and the court is satisfied that the person will continue to benefit in the future.

When making an application, the DPP is required to give a written notice of the application to the person subject to the literary proceeds order, including a copy of the application.

In deciding whether or not to make a literary proceeds order the court will consider the nature and purpose of the product or activity; whether it was in the public interest and/or has social, cultural, and educational value; and the seriousness of the offense and when the offense was committed. In ascertaining whether or not the person has derived literary proceeds and determining the value of the proceeds, the court will treat any property in a person's effective control as well as any property transferred to him or her by another person, to be his or her property.

Before the literary proceeds order is enforced, the DPP will apply for a confirmation order to a court. The person whose property is subject to such an order may appear at the hearing and present additional evidence. A confirmed literary proceeds order made in relation to an offense is considered a civil debt owed by the person to the Commonwealth.

### Investigation and Search

**Investigation and Examination** To obtain relevant information the court may make an order to examine the person whose property is restrained, his or her spouse, and any third party with an interest in the property. The examinee cannot refuse to answer questions on the basis of self-incrimination. An examinee's lawyer may be present at the examination and may participate in conducting the examination. Facts and documents disclosed by the examinee cannot be used as evidence in any civil or criminal proceeding against the defendant, except in proceedings for giving false information, proceedings in an application under the Commonwealth PoCA, or ancillary proceedings.

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<sup>167</sup> See PoCA of 2002, Part 2-3 Forfeiture on Conviction of a Serious Offense



**Production Orders** A magistrate may make a production order requiring a person to produce or make available one or more property tracking documents to an authorized officer for inspection. The magistrate can make such an order only if he or she is satisfied that there is a reasonable suspicion that the person possesses or is in control of such documents. This excludes documents used in the ordinary business of financial institutions. The authorized officer can inspect, examine, take extracts from, or make copies of the documents. The person is not excluded from producing a document on the basis of self-incrimination, breach of an obligation, or breach of legal professional privilege. If a person required to produce documents makes false statements or omits important facts, he or she will be guilty of an offense. Similar to production orders are notices to financial institutions, whereby an officer may give a written notice to a financial institution to provide information or documents to an authorized officer if the officer believes that the information would help determine whether any proceeding under this Act will be initiated against a person.

**Monitoring Orders** A judge may issue a Monitoring Order requiring a financial institution to provide information about transactions conducted during a specified period of not more than three months. The judge making the order must have reasonable grounds to believe that the person has committed or is about to commit a serious offense, was or will be involved in the commission of an offense, and has or will benefit from an offense. Those complying with the order enjoy immunity in regard to their actions.

**Search Warrants** A magistrate may issue a search warrant to an authorized officer for the search of premises if satisfied that there are reasonable grounds for suspecting that there is or will be evidentiary materials or tainted property within 72 hours. A search warrant can be obtained by telephone or other electronic means but the circumstances must be serious and urgent. If the applicant has reasonable grounds to suspect that firearms may be used, he or she must state the grounds for that suspicion. Things seized during a search will be in the custody of the head of the enforcement agency executing the search and is responsible to preserve its value and form.

**Access to Tax Information** The Commissioner of Taxation may disclose information acquired under the provisions of taxation law to an authorized officer of a law enforcement agency if satisfied that the information is relevant to making or proposed making of a proceeds of crime order. In addition, the DPP and the police have access to databases maintained by the Australian Transaction Reports and Analysis Centre (AUSTRAC) containing data on significant cash transactions by cash dealers in Australia, reports by travelers where more than AUD \$10,000 is carried in or out of Australia, and reports of international funds transfer instructions.

### Management of Seized Property

**Preservation of restrained property—Official Trustee** Custody and control of restrained property is given to the Official Trustee by the court. He or she is able to recover the costs incurred after forfeiture. Orders can be varied to enable property to be sold or leased, with the proceeds of sale being restrained or rent being applied to make mortgage repayments. Property losing its value can be sold.

Although the Official Trustee is protected from any damage claims related to managing the property, the Commonwealth may be liable to pay compensation pursuant to the undertaking if the property suffered a loss while under a restraining order. Net proceeds from sale of forfeited property and money paid in satisfaction of pecuniary penalties are paid into the Confiscated Assets Account. Money can be used to pay foreign governments and states in recognition of the contribution they made to a recovery in a particular case or to satisfy the Commonwealth's obligation with respect to a registered foreign property; payments also are made to the Legal Aid Commission. The Commonwealth PoCA does not contain any provision paying compensation to victims.

The Proceeds of Crime Act of 2002 is a comprehensive and complex legislation providing for a number of conviction and non-conviction based legislation, including literary proceeds, pecuniary penalties, and *in rem* forfeiture proceedings. The law was amended in 2010 with the Crimes Legislation Amendment,

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introducing unexplained wealth orders. The law came into effect in late December 2010. Inclusion of UWOs in the PoCA permitted the courts to forfeit unlawfully acquired property across the country, in all states and territories if the Commonwealth laws are violated. Although the PoCA '02 already contained provisions reversing the burden of proof to the respondent in confiscation proceedings, introduction of unexplained wealth orders authorized the government to target property solely on the grounds that it constituted unexplained wealth. Unexplained wealth orders further enhanced the powers of the state in the fight against organized crime. UWO combined with the powers of the Australian Crime Commission (broad powers to use examination orders without a court order) present a formidable tool in the hands of the government. The only deficiency or the weakness of the law is the requirement that the state has to show on preponderance of evidence that the respondent has committed a specific federal offense. Since no cases have been instituted to date under unexplained wealth laws, its efficiency and operation is yet to be assessed.

### 3.2.1.4 Northern Territory –Criminal Property Confiscation Act 2003

#### Background

NT introduced unexplained wealth laws in 2003 under the Criminal Property Forfeiture Act (CPFA), mirroring the provisions of the CPCA of WA. However, it seems that there are differences between the two that led the Parliamentary Joint Committee for Australian Crime Commission (ACC) to evaluate the NT Act as more successful in using its unexplained wealth laws. Similar to the WA Act, the NT Act provides for conviction- and non-conviction-based forfeitures regimes, including unexplained wealth, criminal benefit, and crime-used property declarations. Criminal benefit and crime-used property can be handled under both conviction- and non-conviction based sections. If a person has been convicted of an offense a court will make an order depriving the respondent of his/her assets or property in a civil proceeding separate from the criminal proceeding in which the respondent was tried. However, such an order can be made even if the person is not convicted of an offense, but there are grounds to believe that an offense was committed. The prosecution does not have to establish a causal link between an offense and the property. Further, these forfeiture schemes can be directed against the property (*in rem*) if the owner of the property cannot be identified and against a person (*in personam*) if the owner of the property is identified. Unexplained wealth declarations are always *in personam*.

#### Criminal Property Forfeiture Act

The objective of the Act, as defined in the preliminary section of the statute, is to target the proceeds of crime in general and drug-related crime in particular to prevent unjust enrichment of persons involved in criminal activities.<sup>168</sup> For the purpose of the statute, a person is taken to be involved in criminal activities if he/she is declared a drug trafficker in accordance with the Misuse of Drug Act of 1981, or if an unexplained wealth or criminal benefit declaration is made against him or her, or if the person is or was found guilty of a forfeiture offense. However, declaration enabling the state to require forfeiture of property is made even if no one is charged with, or found guilty of, an offense. It is sufficient to establish that some offense was committed. The court will forfeit a property regardless if it is owned or effectively controlled by the person involved or considered to be involved in criminal activities. NT uses the funds from the forfeited property to cover costs of the state to fight criminal activities. The competent court to hear and make unexplained wealth orders is the Supreme Court of NT.

#### Proceedings under Unexplained Wealth Orders

Police and the DPP can apply to a local or a supreme court for a restraining order *ex parte*. The competent court will make a restraining order applying to all or parts of the property, prohibiting any person of disposing or otherwise dealing with the property as specified in section 55 of the Act if the respondent has been charged with an offense or is declared a drug trafficker or if an application is made or will be made within 21 days for an unexplained wealth, criminal benefit, or crime-used property declaration. In hearing the application, the court must consider each ground showed by the prosecution and specify in the order the grounds on which it bases the order. A notice will be sent to the respondent as soon as practicable notifying him/her of the restraining order. However, if the court considers that the affidavit contains information that may prejudice an ongoing investigation the information will be limited to a notice. The respondent can object within 28 days to the restraint of the property and is obliged to give a statutory declaration within seven days after receiving the notice, giving information on other known owners or people with an interest in the property. The restraining order can be in force for an unlimited period of time or as specified in the order made by a court.

The court may set aside the restraining order if the respondent is not convicted of an offense or the reasons for which the order was made cease to exist. Notice of setting aside the order is sent immediately

<sup>168</sup>See Section 3 of the Criminal Property Forfeiture Act 2000, Northern Territory of Australia

to the respondent. A court may specify in a restraining order whether the property will be moved or not, appoint a public trustee to manage and control the property, as well as determine whether the living expenses of the respondent or his/her dependents will be covered by the profits derived from the restrained property.

A restraining order of immovable property takes effect when it is registered under the Land Title Act and the Registers - enters a statutory restrictions notice in the land register (section 53).

The respondent whose property is the subject of the restraining order may file an objection with a competent court within 28 days disputing the grounds on which the order was made. The court may set aside a restraining order if it is satisfied that the respondent charged with an offense or against whom an unexplained wealth, crime-derived or crime-used declaration is made does not own or control the property or he/she has given it away.

***Issuance of Unexplained Wealth Declaration*** The DPP may apply to the Supreme Court<sup>169</sup> for an unexplained wealth declaration against a person (*in personam*) under section 67 of Act. Unexplained wealth is defined as the difference between the respondent's total wealth and the respondent's lawfully acquired wealth. The respondent's total wealth consists of all items, services, advantages, and benefits that a person owns or effectively controls or has given away, while the respondent's lawfully acquired wealth consists of all items, property, and services, advantages lawfully acquired.

For a court to make an unexplained wealth declaration it is sufficient to establish that it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth. When deciding whether the person has unexplained wealth, the court presumes that all the property, services, benefits, and advantages are acquired unlawfully unless the respondent is able to establish the contrary. The court also considers the respondent's income and expenses at any time or at all times, assesses the difference between the respondent's total wealth and lawfully acquired wealth, and specifies its value. If a court issues a unexplained wealth order the respondent is obliged to pay to the NT the amount specified by the court or the debt will be satisfied by forfeiture of the property under restraining order.

#### **Criminal Benefit Declaration**

A police officer may seize, retain, or guard for up to 72 hours the property suspected of being crime used or crime derived or owned or controlled by a drug trafficker. A local court may make an interim restraining order prohibiting anyone from dealing with the property if it is satisfied that an application for a restraining order will be made against a person or the specified property. Application for a restraining order can be made by telephone or other electronic means. Such order is in force for only three days. Following the interim restraining order a member of the police or the DPP, depending on the court jurisdiction, can apply for a restraining order to a Local or Supreme Court. A restraining order can be made against property or against property (*in rem*) for crime-used or crime-derived property or against property owned by a specified person (*in personam*) if the person is or will be charged with commission of an offense or will be declared a drug trafficker. Hearings for the application of the restraining order can be held in closed sessions and the court may allow only certain individuals to attend the session. Proceedings for making a restraining order for crime-derived and crime-used property are the same as for unexplained wealth orders described above.

A court may, on the application of the DPP, declare that property of equivalent value owned or controlled by the respondent be substituted for the crime-used property if it is more likely than not that the respondent has made criminal use of property and the crime-used property is not available for forfeiture. Crime-used property substitutions can be made against two or more respondents in regard to the same property.

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<sup>169</sup> The Supreme Court is the only court with jurisdiction in proceedings for an unexplained wealth declaration. The Local Court has no jurisdiction over these proceedings.

Regardless of whether the respondent has been convicted or not for an offense, and if the prosecution is able to establish that the property is more likely than not crime-used property, it is presumed that the respondent made criminal use of the property unless the respondent is able to establish the contrary. The burden of proof lies with the respondent to present evidence and fact to satisfy the court that the property is not crime-used property. Property is considered crime used if it is used or intended to be used, by the respondent alone or with anyone else, for commission of an offense. The court making the crime-used property substitution declaration will order the respondent to pay to the NT the amount specified in the order.

Criminal benefits are considered property wholly or partly derived, directly or indirectly, from an offense and considered crime derived regardless of whether anyone has been charged or convicted of an offense or whether a person who directly or indirectly derived benefit from an offense is identified and was involved in the commission of an offense. Crime-derived property can be stolen property, property acquired lawfully but with unlawful sources, and any monetary value acquired in Australia or elsewhere from commercial exploitation of any product of public broadcast. Once property becomes crime derived, it remains crime derived even if it is disposed of unless it is acquired by an innocent person or disposed of in accordance with a court order.

The Supreme Court must declare that the respondent has acquired a criminal benefit if it is more likely than not that the respondent was involved in the commission of an offense and that the property, services, advantages, or benefits were wholly or partly derived, indirectly or directly, as a result of the respondent's involvement in the offense whether or not the property was lawfully acquired.

The court will presume that all the property is acquired as a result of the respondent's involvement in the commission of a forfeiture offense unless the respondent is able to establish the contrary. The respondent has the burden to present facts and evidence to convince the court that his/her property has been lawfully acquired. Property is lawfully acquired only if it was acquired through lawful means. When the court makes a criminal benefit declaration it specifies the value of the benefit in the order and obliges the respondent to pay an amount equal to the value to the NT.

**Forfeiture** If the person under any of the forfeiture schemes described above fails to pay an amount specified in the order to the NT the DPP may apply to the Supreme Court for a forfeitable property order enabling the prosecution to require forfeiture of property subject to the restraining order or property not owned by the respondent if it is more likely than not that the respondent effectively controls it and it satisfies the respondent's obligation to the NT.

If a person is declared a drug trafficker all property subject to restraining order owned or controlled by the person will be forfeited to the NT. Further, a member of the police or DPP may apply and a court may make a forfeiture order if it is more likely than not that the property is crime used or crime derived. For the court to make such an order the property must be under restraining order and the period for filing an objection of the restraining order has expired or the objection has been heard and determined. The court must make a forfeiture order even if no one has been identified as the property owner. The court may also order forfeiture to NT of property subject to a restraining order if an unexplained wealth, criminal benefits, and crime-used substituted declaration has been made against the person who owns or effectively controls the property.

After the court makes the forfeiture order in relation to property the DPP must inform the Registrar of the order and provide a copy of the declaration order and particulars of forfeiture.

**Investigation and Search** The process and requirement of investigation and search are unique for all forfeiture regimes provided for in the Criminal Forfeiture Act of NT. A financial institution can volunteer or can be required by the DPP or police force to provide relevant information if there are reasonable grounds to believe that information may be important to an investigation or is necessary in making a decision whether to apply for an unexplained wealth or a criminal benefit or crime-used declaration. The

DPP can require a financial institution to provide information on a person, his/her account, and transactions of the account within seven days after the receiving the notice. If the institution fails to comply with the order or provides false or inaccurate information it is considered that the financial institution has committed an offense. Otherwise, no lawsuit can be instituted against a financial institution for information provided to the police or prosecution.

**Examinations, Production, and Monitoring Orders** The DPP may apply *ex parte* and the Supreme Court may order a person to submit to an examination about any of the matters related to the wealth, liabilities income, and expenditure of a person who has been convicted of a forfeiture offense or is suspected of having unexplained wealth, or is a declared drug trafficker. The examinee is required to give the court any documents including property tracking documents and information in his/her possession or control. The examinee may be represented by his/her legal representative and is not allowed to contravene the examination. A person who does not comply with the order can be imprisoned for up to five years, and corporations can be sanctioned to pay an amount that is equal to the value of the property. No one is excused from complying with the order under the pretext that doing so could lead to self-incrimination or breach of professional obligation. Statements given by the examined person can be used in a proceeding under this Act or any other civil proceeding, but not in a criminal proceeding, unless the person gives false or misleading information. Subsequently, a court must order a person to produce the property tracking documents<sup>170</sup> if the court suspects that the person has the documents in his/her possession or control. Anyone contravening the production order commits an offense. Further, the DPP may also apply *ex parte* for monitoring and suspension orders that order a financial institution to monitor an account of a person suspected to have benefited or is about to benefit from an offense. The financial institution is obliged to comply with the order and give information to the DPP or a police officer about all transactions carried out through an account held with the institution by a person. The monitoring order can be in force for up to three months.

**Secrecy requirement** The statute prohibits any person who has been the subject of a production, monitoring, or examination order to disclose to any other person the fact that a notice was served on him/her, that he/she was the subject of such order or the information given in compliance with the order. One exception is for a corporate officer enabling him/her to disclose restricted information to the DPP or police, an officer of the corporation, and a legal practitioner for the purpose of obtaining legal advice or ensuring compliance with the order.

**Detention, Search, and Seizure** A member of the police force is authorized to stop and detain a person who is suspected to own or control property liable for forfeiture or possesses property tracking documents. Similarly police can detain a person holding property liable for forfeiture for another. To search premises, baggage, packages, or any person, a member of the police must obtain a search warrant from the Justice of Peace. Application can be made by telephone or other electronic means stating under oath grounds on which he/she bases the suspicions that there are or will be property tracking documents or property liable for forfeiture within the next 72 hours. If the applicant has reasonable grounds to suspect that firearms may be used he/she needs to state the grounds for that suspicion. A member of police may also detain and seize documents found in the course of the search, take extracts, make copies, download or print out any documents containing relevant information, as well as require any person to give them information in their possession or control. The search warrant may be executed at any time and will continue to be in force in 30 days.

### Management of Seized Property

Control and management of seized property is the responsibility of the Commissioner of Police, while for the restrained and forfeited property is the responsibility of the Public Trustee or a person appointed by the Trustee or the owner of the restrained property. The Public Trustee may manage and control the

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<sup>170</sup>A document is a property tracking document if it helps identify or locate crime-used property or crime-derived property, determine the value of the property and identify or locate any or all of person's wealth.

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property or any funds held in an account of a financial institution which may be transferred to him/her on his/her request and take all reasonable steps to ensure that the property is appropriately stored or managed and maintained until it is returned to the owner, sold, destroyed or otherwise disposed of. The statute provides for destruction of property if it is in the public interest or its sale if the property is or will deteriorate substantially if retained. The Public Trustee is entitled to receive fees for its services and it is liable for taxes only to the extent that those can be reimbursed from rents and profits derived by the property.

### 3.2.1.5 New South Wales—Criminal Asset Recovery Act 1990

#### Background

A conviction-based confiscation law was adopted in New South Wales in 1989 with the Confiscation of Proceeds of Crime Act (1989). Under this law, the court can make an order for the confiscation of assets from a person who has been convicted of a criminal offense. In 1990, the Criminal Asset Recovery Act (CARA) of 1990 was adopted by NSW. This was the first jurisdiction in Australia to introduce non-conviction-based civil asset forfeiture laws. In 2010, NSW followed the lead of other jurisdictions and amended CARA by adopting provisions on unexplained wealth. The amendment bill was adopted in September 2010.

The purpose of the NSW PoCA is to provide for the confiscation of interest in property of a person engaged in serious crime related activities in order to enable proceeds of serious crime related activities to be recovered as a debt to the Crown.

#### Criminal Asset Recovery Act 1990

The principal objectives of the NSW CARA of 1990 are to: (a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and (b) to enable the current and past wealth of a person to be recovered as a debt due to the state if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired; (c) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous six years or acquired proceeds of the illegal activities of such a person, and (c1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings; and (d) to enable law enforcement authorities effectively to identify and recover property.<sup>171</sup> Proceedings under Unexplained Wealth Orders in NSW

The first asset forfeiture step is an order whereby the property of a person who has engaged in serious criminal offenses can be forfeited to the state.

**Restraining Orders** The Supreme Court will make a restraining order on the application of the Commission<sup>172</sup> supported by an affidavit of an authorized officer stating grounds based on which he/she suspects that the person whose property is the subject of the order has engaged in a serious criminal activity and has derived property from it. The Commission may make an application *ex parte* to the Supreme Court which may require that the parties be notified of such order if it considers it reasonable. Interested parties, upon receiving the notification, may appear at the hearing and produce evidence with respect to the property in question. A provision permits urgent applications to be submitted by telephone or other means of communication, e.g., radio, facsimile, or email, if the application is supported by a statement of the officer that the order is required urgently because of the risk that funds may be withdrawn or it is not practical for an officer to appear in person. A restraining order cannot apply to an interest in property acquired after the order has been made unless it is specified in the order. The NSW Trustee and Guardian are responsible for management of some or all interests in the property. The court can order that reasonable living and legal expenses of any person who has an interest in property or his/her dependents be covered by the restrained property. The NSW Act provides that a maximum

<sup>171</sup>Criminal Asset Recovery Act 1990, last accessed February 22, 2011, available at: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cara1990272.txt](http://www.austlii.edu.au/au/legis/nsw/consol_act/cara1990272.txt)

<sup>172</sup>“Commission” means the New South Wales Crime Commission constituted under the New South Wales Crime Commission Act 1985.



allowable cost will be set by a regulation in order to limit the amount of legal expenses to be met out of the property.

The Supreme Court, on the application of the property owner within 28 days from the day the order was made, can set aside the order if the Commission has not satisfied the court that there are reasonable grounds for suspicion that the person was engaged in serious crime or has derived property from it.

In addition, when the court makes a restraining order it can also make other ancillary orders such as an order varying the interests in property, an order for the examination on oath of the property owner and any other person before the court or an officer of the court, and/or an order authorizing seizure of property or assigning a trustee or a guardian over the property. The person being examined is not exempt from answering any question or producing any document on the grounds that he/she breaches legal or professional privilege, personal obligation, or that it may lead to incrimination. However, answers given under examination cannot be used in criminal proceedings except if the person objects to answering the questions or producing documents during the examination.

***Issuance of an unexplained wealth order*** The Commission may apply, and the Supreme Court must issue, a unexplained wealth order requiring a person to pay to the Treasurer an amount assessed by the court as the value of the unexplained wealth if the court finds that there is a reasonable suspicion that the person against whom the order is sought was involved in (a) serious crime related activity or serious crime related activities, or (b) acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities)(s. 28A). The court does not need to base its findings on the grounds that a specific offense was committed.

The court is empowered to refuse to issue a UWO, or may reduce the amount that would otherwise be payable as assessed under section 28B, if it thinks it is in the public interest to do so. Section 28B defines “unexplained wealth” to be the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied, on the balance of probabilities, is not or was not illegally acquired property or the proceeds of an illegal activity. “Current or previous health” is considered to be the sum of the values of all interest in property of the person that is under his/her effective control or that he/she has at any time expended, consumed, or disposed of and any service, advantage, or benefit provided at any time to the person or at the person’s request, including property acquired or disposed of before or after the commencement of the NSW Act. Considering the far-reaching powers of this legislation, one limitation was incorporated that empowers the court to consider only the current and previous wealth of the person on which the Commission has provided evidence.

In determining the amount the person is required to pay to the state as a result of proceeds assessment or unexplained wealth order, the court will deduct any amount paid or property already forfeited under another confiscation of forfeiture order, proceeds assessment order, and pecuniary penalty orders.

The burden of proof is on the respondent to prove that the person’s current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.

If conviction of a defendant is set aside or quashed, it does not affect the validity of the proceeds assessment and unexplained wealth order. Further, if any of the above referred orders is made against a person it will not prevent the making of a forfeiture order based on the serious crime related activity. The person whose property is subject of a forfeiture order will be notified of such order. However, his/her absence will not prevent the court from making the order.

The NSW Act provides that if an order will cause undue hardship to a dependent of the person subject to the order, the court will order to pay a specified amount to the dependent, if the dependent had no knowledge of the conduct that led to the order or the dependent is younger than 18 years old and in which case the former does not apply.

The amount defined in the proceeds assessment or UWO is considered to be a debt payable to the Crown which is paid to the Treasurer and credited to the Confiscated Proceeds Account. From the Proceeds Account, the following costs are permitted to be reimbursed: the Treasurer's, NSW Trustee and Guardian costs and fee for performance of his or her duties, any other amount as required by a Supreme Court order, and to the Victims Compensation Funds. Moneys to this account will be paid after any payments resulting from a court order have been paid as well as other amounts paid to law enforcement, victims' support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation, or drug education.

The court will assign a NSW Trustee and Guardian to take care of the property or of an interest in property until forfeiture order is made. Once the court has made the forfeiture order, the court will, upon application by the NSW Trustee and Guardian, make an order directing the Trustee to sell or otherwise dispose of property or specified interest in property and execute any deed or instrument. From the proceeds the Trustee will pay fees and expenses incurred by him/her in performance of the duties.

### **Proceedings under a Proceeds Assessment Order**

On application by the Commission the Supreme Court must make a proceeds assessment order requiring a person to pay to the Treasury an amount assessed by the courts to be the value of the proceeds derived from unlawful activities. The Supreme Court must make a proceeds assessment order if it finds that it is more probable than not that the person who is above 18 years, was engaged over the past six years in serious crime related activity involving indictable quantity or in offenses punishable by five years of imprisonment (section 27) and the person has derived proceeds from illegal activities and knew or ought reasonably to have known that the proceeds were derived from illegal activity. The court does not have to base its decision on findings that a particular offense was committed. It is sufficient to find that some sort of offense was committed.

In assessing the proceeds derived from illegal activity the court will consider the following:

- the money and value of an interest acquired by the defendant or another person as a result of illegal activity;
- the value of any service, benefit, or advantage provided for the defendant (or another person) because of the illegal activity;
- the market value of a plant or drug similar to any involved in the illegal activity, and the amounts that were ordinarily paid for an act similar to the illegal activity;
- the value of the defendant's property before and after the illegal activity; and
- the defendant's income and expenditure before and after the illegal activity.

If the evidence provided at the hearing shows that the value of defendant's property after an illegal activity exceeds the value of his/her property before the activity the court will treat the excess as having derived from illegal activities except if the court is satisfied the excess was due to causes unrelated to an illegal activity. Similarly, if evidence is provided at the hearing of the defendant's expenditure during the period of six years, the court is to treat any such amount as proceeds derived from an illegal activity except to the extent that the court is satisfied the expenditure was funded from income or money from other sources unrelated to an illegal activity. The court will not subtract expenses incurred by the defendant in relation to the illegal activities or any proceeds derived as an agent on behalf of another person from the proceeds assessment order.

From the above, although not directly stipulated, it can easily be concluded that the burden of proof is on the defendant to give evidence to the court of the legal origin of his/her property.

***Investigation and Search - Search Warrants*** The law provides that an authorized officer may apply to an authorized official for a search warrant if he/she has reasonable grounds under suspicion that there is or will be evidentiary materials or tainted property within 72 hours. The authorized officer, if satisfied that there are reasonable grounds for doing so, may issue a search warrant to enter the premises and search for

any or all of the property or evidence. Authorized officers conducting the search may seize anything that they may suspect is evidentiary material or tainted property and have the power to remove it from the property or guard it on those premises for seven days unless a restraining order is made.

***Production Orders*** The Supreme Court may make a production order requiring a person to produce or make available one or more property tracking documents to an authorized officer for inspection. An authorized officer applies for a production order on oath setting the grounds based on which the officer suspects that a person has possession or control of a property-tracking document(s). This excludes banker's books, meaning any accounting records of a bank used in its ordinary business of banking. The authorized officer can inspect, examine, take extracts from, or make copies of the documents. The person is not excluded from producing a document on the basis of self-incrimination, breach of an obligation, or disclosure of legal professional privilege. The person subject to a production order has been given the right to apply to the Supreme Court for a variation order to make the document available to an authorized officer in the place where they are usually held. If a person fails to comply with the order or provides incorrect information, the person can be imprisoned for up to two years. The person is also prohibited from sharing the information that he/she was a subject of a production order.

***Monitoring Orders*** The Supreme Court may make a monitoring order, on the application of an authorized officer, requiring a financial institution to provide information about transactions conducted during a particular period if the court is satisfied that there are reasonable grounds for suspecting that the person against whom the order is made has been or is about to commit a serious crime related activity or has acquired or is about to acquire, directly or indirectly, any serious crime-derived property or any fraudulently acquired property. The monitoring order applies to transactions conducted during the period specified in the order but not later than three months after the date of the order. Those complying with order enjoy immunity in regard to their actions taken. However, if the financial institution fails to comply with the order it will face a penalty.

NSW had in place a broad range of conviction and non-conviction forfeiture laws targeting property that has derived from, or used, in criminal activity. It was the first state in Australia to introduce a non-conviction forfeiture law in the 1990s allowing the state to target assets of a person even if he has not been convicted of an offence. However, in 2010 it introduced UWOs furthering expanding the powers of the existing regime allowing the state for the first time to target assets without a prior finding that a person has been engaged in serious crime. Distinct from other Australian states, NSW has entrusted the powers to pursue forfeiture cases not to the DPP but to a separate entity NSW Crime Commission. The NSW Crime Commission will be also authorized to pursue UWO cases. Since the law has been recently amended no cases have been yet made and its application and effectiveness is yet to be determines.

### 3.2.1.6 Evaluating the Effectiveness of Australia's UWOs

Evaluating the effectiveness of any law, especially the effectiveness of unexplained wealth laws, is a complex and difficult task. UWOs were introduced as a new and powerful weapon against any form of crime, given that the expectations of their impact on fighting and deterring crime were very high. In reality, however, their practical application has proven complex, time and resource consuming, and highly unpredictable. Their controversial nature, accused of breaching civil rights and the principles of common law, brought them under public and media scrutiny. There continues to be tension between those who ask why these laws are not applied more often and those who think these laws should not be used at all because they grossly violate basic rights and are a disproportionate response to crime. The truth lies somewhere in between—these laws have the potential to affect and reduce crime, but they cannot be viewed as a cure-all for everything. It has been said that UWOs are effective in cases when progress against crime cannot be made through the normal course of criminal law, but they should be applied as a last resort.

To gain an overall perception of the impact of unexplained wealth orders on fighting and deterring crime, the study team solicited the opinions and views of agencies and individuals who were directly involved in unexplained wealth (e.g., prosecutors, police, intelligence agencies, defense bar, academics, and civil society) activities. Although this approach has limitations, in that it surveys the opinion of only a small group of people it does express an informed opinion of the impact of the law. In this regard, it must be noted that the Commonwealth of Australia has only recently enacted unexplained wealth orders (May 2010) and no cases have been brought under this scheme; a few cases are under consideration and are expected to commence soon. However, given the sensitive nature of ongoing investigations, no information was available on these. Thus, the quantitative evaluation of the effectiveness of unexplained wealth orders is focused on WA since that is the only jurisdiction with available data.<sup>173</sup>

Australian academics, lawyers, and civil right groups have been critical of the Criminal Confiscation Act of WA, describing it as the most far-reaching confiscation regime compared to other forfeiture regimes in the world. They contend that unexplained wealth provisions have the potential of violating civil rights and the principles of common law, including the sanctity of private property, the right to privacy, the right to secrecy, and the right to silence.

Although the NT Forfeiture Act was modeled after the WA Criminal Property Confiscation Act (CPCA), it is widely believed that it has improved and advanced it. A statement to that effect was given by the Parliamentary Joint Committee of the Australian Crime Commissions (PJC-ACC) when reviewing legislative strategies to combat crime. Representatives of the PJC-ACC believe that the NT Forfeiture Act contains a number of differences that are considered essential in mitigating the effect the Act has on people's lives and rights. Comparatively, the UWO law adopted at the Commonwealth level has fundamental differences from the WA and NT statutes, some of them heavily influenced by the Commonwealth constitution.

The differences between the WA and NT Acts result primarily from the influences from other Acts in effect in the state and in the NT Constitution. Because the NT is a territory, its constitution stipulates that property cannot be forfeited unless it is done on "just terms"; as a result, the NT statute provides that property will not be automatically forfeited after the court has made an unexplained wealth declaration until the DPP has made an application for forfeiture to a competent court. Making a forfeiture order is an additional safeguard built into the statute, requiring judicial review of the forfeiture order and providing an opportunity for amendment or revocation of an order if new evidence or facts come into existence. This provision does not exist in the WA statute whereby after the court has made an unexplained wealth declaration the property subject to an order is forfeited automatically.

<sup>173</sup> Two other states/territories have UWOs. However, we selected WA as the focus for our study for several reasons: limited resources; it was the first state to introduce UWOs; it is one of the largest jurisdictions that have enacted UWOs; and it is one of the states that has most frequently used UWOs.

Similarly, the NT's Sentencing Act of 1995 allows the court reviewing the application for unexplained wealth to take into account the offender's cooperation as a mitigating factor when imposing a sentence. The respondent's cooperation is not considered by the court when imposing forfeiture in WA courts.

Finally, the NT has set a higher threshold for declaring a person convicted of a drug-trafficking offense, a declared drug trafficker. The threshold in WA is set to one offense meaning that a drug trafficker can be convicted of only one offense before he or she is declared a drug trafficker and has all of his or her property forfeited. The threshold of the amount of drugs trafficked is also very low in WA. It is sufficient that a person be found guilty of trafficking more than 24 grams of drugs to be declared a drug trafficker. This threshold is higher in NT where a person must be convicted of three related drug offenses before he or she can be declared a drug trafficker. In addition, the PJC-ACC notes that NT uses "an investigative and prosecutorial model that has a much greater level of interaction between prosecutors, police, and the Department of Justice."<sup>174</sup>

Unexplained wealth provisions of the Commonwealth reflect lessons learned from WA and NT, international experience as well as a rich and in-depth public debate held in Australia. As a result, the PJC-ACC decided that unexplained wealth laws are a significant and effective tool that can be used to prevent and deter crime, disrupt criminal enterprises, target the profit motive of organized criminal groups, and ensure that those benefiting from organized crime are captured. However, the UWO law introduced by the Commonwealth differs from the UWO laws of NT and WA providing for more legal remedies for the respondent and his or her dependents, limiting arbitrary application of the law and incorporating safeguards to protect civil rights and limit potential arbitrary application of the order.

First, the Commonwealth restraining order provisions are narrower than those in the NT and WA. The language of the Commonwealth statute empowers the court to consider whether a restraining order should be made or not. Second, the standard of proof the Commonwealth needs to put a restraining order in place is considerably higher than that required under the WA and NT statutes. For a court to make a restraining order under the federal statute, the Commonwealth must show that there are reasonable grounds to suspect that the respondent owns or possesses unexplained wealth and to establish a nexus between the property and a federal offense or a state offense with a federal aspect. Including the requirement to show a nexus between the property and an offense has raised the threshold of evidence the state must meet to obtain a successful application under unexplained wealth. Although this was not contemplated when the law was drafted, the federal constitution dictated that there must be a nexus between the property and an offense. The requirement for making a preliminary UWO is not as strict because it does not require a link between the property subject to the application and an offense. For a court to make an unexplained wealth declaration it is required that a preliminary forfeiture order be in place. Another key difference is the requirement for the prosecution to show that the respondent has committed an offense or that there are reasonable grounds to suspect that the person was involved in or has committed an indictable offense which can be an indictable offense violating the laws of the Commonwealth, a foreign offense, or a state offense. Such a requirement does not exist under the WA and NT laws. The federal law also does not provide for automatic forfeiture as do the two other laws, whereby property under a freezing order will be automatically forfeited, vesting it to the government if the owner does not file an objection within 28 days.

With the intent of protecting the rights of dependents and innocent third parties, the Commonwealth law also allows the forfeited or frozen property to be used to cover legal fees of the respondent if the respondent does not have any other means to cover such costs. The court also can allow reasonable living and business costs to be drawn from the property subject to a freezing order if the dependent is under age 18 and has shown that he or she could not have reasonably been aware that the property was derived or used in or in connection with an offense. Significant changes have been made to the UWO

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<sup>174</sup> PJC – ACC “*Inquiry into the legislative arrangement to outlaw serious and organized crime groups*”, August 2009, p.116

Commonwealth law in an effort to make its provisions more effective and to bring the law in line with the principles of the common law and respect of basic rights.

A number of academics<sup>175</sup> contend that it was considerably easier to introduce and implement unexplained wealth provisions in Australia in the absence of a written Bill of Rights entrenched in the constitution. It was held that the courts have been reluctant to interpret provisions to abrogate important common law rights, privileges, and immunities in the absence of clear words or a necessary implication to that effect (Grono, 2009).

**Figure 2: Key features of different Unexplained Wealth Orders in Australia**

Western Australia	Northern Territory	Commonwealth	New South Wales
<ul style="list-style-type: none"> <li>➤ Enacted in 2000</li> <li>➤ <i>in Personam</i> – action brought against the person</li> <li>➤ The burden of proof shifts is reversed to the property owner</li> <li>➤ No requirement to show a nexus between an offense and property</li> <li>➤ No court discretion</li> </ul>	<ul style="list-style-type: none"> <li>➤ Enacted in 2002</li> <li>➤ <i>in Personam</i> – action brought against the person</li> <li>➤ The burden of proof shifts to the property owner</li> <li>➤ No requirement to show a nexus between an offense and property</li> <li>➤ Court has discretion to decide if making of an order is done on “just terms:</li> </ul>	<ul style="list-style-type: none"> <li>➤ Enacted in 2010</li> <li>➤ <i>in Personam</i> – action brought against the person</li> <li>➤ The burden of proof shifts to the property owner</li> <li>➤ The state has to show a nexus between an offense and the property</li> <li>➤ Court has broad discretion when making an order</li> </ul>	<ul style="list-style-type: none"> <li>➤ 2010</li> <li>➤ <i>in Personam</i> – action brought</li> <li>➤ proceeding</li> <li>➤ The burden shifts to the respondent</li> <li>➤ The burden of proof shifts to the property owner</li> <li>➤ The state has to show a nexus between an offense and the property</li> <li>➤ Court has broad discretion when making an order</li> </ul>

**Public Debate**

Initiatives to introduce measures to fight organized crime by attacking profit came as early as the 1970s and 1980s when royal commissioners conducted inquiries that revealed high levels of organized crime. Each of these commissioners recommended adopting measures to attack the primary motive of criminal activities—profit.<sup>176</sup> However, the Australian government was reluctant to proceed and adopt non conviction based forfeiture laws fearing that they might be opposed by various political and civic groups. Ultimately, in early nineties NSW went ahead and adopted non conviction based laws and later in the decade the WA adopted a non-conviction based forfeiture law including UWO. Years later, similar, if not stronger, support came from law enforcement agencies such as the AFP, ACC, the police of most jurisdictions, and the Tax Office. Evidence of the effectiveness of UWOs also was provided to the Australian Joint Parliamentary Committee by international law enforcement agencies from Italy and the United Kingdom. The representative of the Italian National Police, talking about the importance of depriving criminal of their assets, noted that “*mafia members are prepared to spend time in prison, but to take their assets is to really harm these individuals.*” In contrast, other groups, such as the Law Council of Australia and Civil Liberties of Australia expressed grave concerns over the provisions of the Commonwealth PoCA especially in regard to the impact that UWOs would have on the basic rights of individuals and the public interest. Although they in essence supported the objectives of the bill, they were concerned with the operations of the legislation.

Tom Sherman, in his report on evaluation of the PoCA of 2002, also expressed reservations regarding unexplained wealth laws. He stated that although unexplained wealth orders are undoubtedly effective

<sup>175</sup>Ben Clarke, David Lusty, Grono.

<sup>176</sup>David Lusty, “Civil Forfeiture of proceeds of crime in Australia,” *Journal of Money Laundering Control*, 5, 2002, p. 345–359.

they should not be introduced by the Commonwealth at this stage; rather, they should continue to be reviewed.<sup>177</sup>

The debate about unexplained wealth laws has taken place largely in the context of two recent committee inquiries at the Commonwealth level: the PJC-ACC in August 2009 and the Senate Legal and Constitutional Affairs Committee (SLCALC) in September 2009. In 2008, the PJC-ACC initiated an inquiry into legislative initiatives to outlaw serious and organized crime including forfeiture of the proceeds of crime as one of the mechanisms to fight, prevent, and deter serious and organized crime. The PJC-ACC conducted the inquiry<sup>178</sup> by examining the effectiveness of legislative initiatives, internationally and in Australia and evaluating the impact and consequences of those initiatives on society, criminal groups, and their networks and law enforcement agencies.<sup>179</sup> Internationally, the PJC-ACC sent a delegation to the United States, Canada, Italy, Ireland, and the United Kingdom to examine international trends in dismantling and disrupting serious and organized crime and the legislative and administrative approaches. In addition, the committee solicited input from the public at large, by holding public hearings in large cities and soliciting input from different organizations and individuals regarding effective strategies that had an impact on combating crime. Subsequently, based on the results of the inquiry, the Commonwealth of Australia adopted the Serious and Organized Crime bill in November 2009 which went into effect May 2010. Among other amendments, the bill introduced unexplained wealth, amending the PoCA of 2002.

The Australian Parliament's approach led to transparent and inclusive debate on the introduction of unexplained wealth orders. Different strata of society were able to present their views, either supporting or dissenting, about the bill. AFP President, Jon Hunt, in its submission to the PJC-ACC, stated the following:

This has been a long time coming. It is imperative that we have strong, tailored and effective laws in place to combat serious organized crime. Our members in the AFP & ACC have been working with antiquated laws that have been grossly inadequate for dealing with sophisticated organized and transnational crime syndicates.<sup>180</sup>

Further, he held that this law will strengthen the existing legislation by defining new criminal offenses that target those engaged in organized crime, strengthening asset confiscation and anti-money laundering regimes, and requiring individuals suspected of owning unexplained wealth to demonstrate its legitimacy and enhance search and seizure powers and the ability to access electronic data.

The objectives of the unexplained wealth laws support and reinforce those of confiscation and forfeiture laws, as follows:

- Deter those contemplating criminal activity by reducing the possibilities to retain profit
- Reduce the capacity to reinvest the proceeds in future unlawful activities by taking away the proceeds
- Remedy the unjust enrichment.

<sup>177</sup>Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002*, (Cth), July 2006.

Available at:

[http://www.ag.gov.au/www/agd/agd\\_nsf/Page/Publications\\_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002\(Cth\)](http://www.ag.gov.au/www/agd/agd_nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002(Cth)), accessed January 23, 2011. Commonly referred to as The Sherman Report.

<sup>178</sup>Parliamentary Joint Committee of the Australian Crime Commission (PJC-ACC), "*Legislative Arrangement to outlaw serious and organized crime groups*," available at: [http://www.aph.gov.au/senate/committee/acc\\_ctte/laoscg/report/index.htm](http://www.aph.gov.au/senate/committee/acc_ctte/laoscg/report/index.htm), accessed January 21, 2011.

<sup>179</sup>Terms of Reference of the PJC-ACC, available at:

[http://www.aph.gov.au/senate/committee/acc\\_ctte/laoscg/report/c01.htm#anc1](http://www.aph.gov.au/senate/committee/acc_ctte/laoscg/report/c01.htm#anc1), accessed January 21, 2011.

<sup>180</sup>Police Federation of Australia, "*Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Serious Organized Crime) bill 2009*."

In addition, one of the key arguments presented by the law enforcement agencies is the power of unexplained wealth laws to deprive principals of criminal organizations, or as they were referred to, “Mr. Bigs” of their unlawful property. The main challenge law enforcement agencies and prosecution face is the ability to gather sufficient evidence to prosecute heads of criminal organizations. In most cases, lower level criminals are prosecuted and convicted of offenses but there is never sufficient evidence to prosecute those who orchestrate these activities. This was explained by the Police Federation of Australia in a note sent to the PJC-ACC:

Do Australian police know who is involved in organized and serious crime in Australia? The answer is yes. Can we prove beyond reasonable doubts that these criminals are involved directly in those crimes? The answer is no....Unexplained wealth is the easiest way as a crime prevention method to stop further crime.

In similar terms, the explanatory memorandum for the Commonwealth bill notes that:

[T]he existing confiscation scheme under POCA are not always effective in relation to those who remain at arm’s length from the commission of offenses, as most of the other confiscation mechanisms require a link to the commission of an offense. Senior organized crime figures who fund and support organized crime but seldom carry out the physical elements of crime, are not always able to be directly linked to specific offenses.

Therefore, unexplained wealth provisions allow the prosecution and the court to attack the profit of these highly profitable criminal networks without the need to prove a causal connection between the offenses and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offense was committed has enabled law enforcement to deprive those benefiting from criminal activities of their profits.

The Australian Tax Office also supported the law, arguing that UWOs would assist it in enforcing tax legislation. The key argument for adoption of unexplained wealth provisions was that it makes it possible to attack and take away the profit from those who have obtained it in an unlawful way by following the money trail. Through these provisions the enforcement agencies target primarily the financial incentive to become involved in the commission of criminal offenses. Many believed that if the incentive were removed many criminal organizations will cease to exist and dismantle. This strategy was proved successful in Ireland, Italy, and other jurisdictions within Australia, where local officials believe (albeit anecdotally) many criminal organizations have ceased to exist and many criminals have relocated their operations elsewhere when the civil forfeiture provisions with reversed burden of proof were adopted. Further, professor Rod Broadhurst, in his submission to the SLCAC in August 2009, observed that “tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in organized crime is usually indirect in terms of actual commission.”<sup>181</sup>

A representative of the Office of the Commonwealth Ombudsman supported adoption of UWOs as a means to fight and deter crime. However, given the wide reach of the powers and the nature of such orders the authorized officers making an application must have reasonable grounds to believe that an offense was committed. Further, in his statement regarding the erosion of privacy rights, he stressed that such measures should be undertaken only when they are necessary and proportional to address the immediate need and are subject to appropriate and ongoing accountability measures and review.

Although law enforcement agencies and some academics strongly supported the law, civil rights organizations, law societies, and other academics strongly opposed it calling it a draconian measure that violates basic rights such as the right to private property, freedom of citizens from unnecessary intervention from the government, and the right to privacy. Clarke holds that “seizure of assets by organs

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<sup>181</sup> *Inquiry into the legislative arrangements to outlaw serious and organized crime groups*, Parliamentary Joint Committee on the Australian Crime Commission, August 2009



of the state is coercive exercise of power which should not be undertaken lightly.”<sup>182</sup> He also notes that the WA CPCA “represents the most significant encroachment upon citizen’s property rights in Western Australia and possibly Australian legislative history.”<sup>183</sup>

A key argument against unexplained wealth provisions from civil rights organization is the reversed burden of proof on the property owner and the risk that it could lead to confiscation of property of innocent people. A member of the motorcycling community told the PJC-ACC “the only problem I have with unexplained wealth law is I do not believe most people could actually explain everything they own<sup>184</sup>.” In the same report, the Law Council of Australia called these laws obnoxious and stated that they were offenses against common law and human rights principles. The Law Council presented its arguments against the unexplained wealth provisions as follows:

- The reverse onus of proof undermines the presumption of innocence.
- Provisions infringe on the right to silence and exclude legal professional privilege. The WA and the NT provisions allow the DPP to use information obtained during examination for criminal prosecution.
- Appeal processes are inadequate.
- The potential for arbitrary application of the laws, with the use of the laws, can be politically motivated.<sup>185</sup>

In a hearing in front of the SLCAC, the representative of the Law Council of Australia also, held that the central problem of UWOs is the lack of the need to show any evidence related to any offense, pleading to include reasonable suspicion that some offense was committed. The laws of the NT and WA do not require showing that an offense was committed.

From the Explanatory Notes on the Criminal Proceeds Confiscation (Serious and Organized Crime Unexplained Wealth) Amendment Bill 2010, it is evident that the government seriously pondered the introduction of reversed burden of proof and its consequences, and has decided to enact them despite the fact that they do breach fundamental legislative principles as a tool to fight the increasing threat from serious and organized crime.

Some believe that the WA and NT provisions erode the right to silence and the right to privacy because they require the respondent or any person knowing anything about the respondent’s affairs or property to disclose that information to the DPP.

Tim Gate of the Law Council argued that:

...absence of requirement to present evidence that shows there are reasonable grounds to suspect that the respondent has committed an offense, or that his wealth is derived from an offense, when combined with the reversed onus of proof, puts the person in a position where the suspicion in relation to the wealth is the sole thing that has triggered forfeiture.

This relates more to the WA and NT forfeiture regimes because the Commonwealth unexplained wealth laws contain provisions that require the prosecution to show reasonable grounds that the respondent has or was involved in commission of an offense. Moreover, the law has specific provisions setting out specific requirements for the affidavit to be considered by a court.

<sup>182</sup>Ben Clarke, *A man’s home is his castle—or is it? How to take houses from people without convicting them of anything: The Criminal Property Confiscation Act 2000 (WA)*, Electronic copy available at: <http://ssrn.com/abstract=1718863>, accessed February 8, 2010.

<sup>183</sup>Ben Clarke *Confiscation of unexplained wealth; Western Australia’s response to organized crime gangs*, *Afr. J. Crim. Just* 15 (2002) p. 61–85.

<sup>184</sup> Report of the Parliamentary Joint Committee –Australian Crime Committee- *Inquiry into the legislative arrangement to outlaw serious and organized crime*, August 2009 pg.121(point5.59).

<sup>185</sup>*Ibid.* at 40.

Concerns have been raised that unexplained wealth provisions could be easily misused for political or other purposes because the requirements to commence unexplained wealth proceedings are meager and light on the prosecution. It is sufficient that it is brought to the attention of the police that a person owns wealth that could be unexplained wealth to commence a proceeding against a person, which may represent a significant infringement of the person's civil liberties.

#### Effectiveness of UWO - Commonwealth

As stated previously, the Commonwealth only recently introduced UWOs, and no cases have yet been instituted under these provisions. When the Commonwealth PoCA was conceived, the powers to institute UWOs were vested on the Commonwealth DPP (CDPP); however, with an initiative undertaken by the Australian Federal Police, the law was amended in 2011<sup>186</sup> to include the AFP. As it now stands, both the DPP and the AFP share the powers under the PoCA, including UWOs. The AFP has the same powers and responsibilities to institute any of the proceedings under the Commonwealth PoCA; the decision as to who will pursue the cases will be made by the AFP.

Following the initiative of the AFP to get involved in the forfeiture of proceeds of crime, a new initiative was originated to establish a Criminal Asset Confiscation Task Force (CACTF) modeled after the Irish Criminal Asset Bureau. The idea came about after the AFP representatives visited Ireland to familiarize themselves with Irish forfeiture system. At the time of this writing, the legislation is being drafted and negotiations are ongoing among different agencies about the modalities of the operation and the task force is expected to be established by January 2012. The concept, on which the agency is to be built, is that co-location leads to coordination with staff being shared among different agencies (e.g., AFP, ACC, customs, DPP, and tax administration). This should mitigate a tense relationship between the DPP and the AFP regarding the usage of UWOs as well as the role the DPP should play in the future CACTF. While the DPP believes it must be engaged and act as a filter between the police and the judiciary, the AFP believes that it must lead and is in a good position to deal with the courts independently of the DPP. The AFP expressed concerns that the DPP tends to take a conservative approach and set a higher threshold for evidence than required by the law, and, thus, fewer UWO applications will be brought. On the other hand the DPP is concerned about requirements on undertaking of damages, requesting the DPP to compensate the respondents if unexplained wealth application was not successful, which could lead to bankruptcy of the DPP if cases are not carefully selected and pursued. The AFP, on the other hand, does not view this as an issue and considers the DPP as being too conservative. Although there are tensions regarding their future roles, the DPP perceives a need for future involvement in the task force and the modality of their involvement has yet to be determined.

As stated, no UWO cases have yet been brought on the Commonwealth level, but there are a few cases that the AFP is working with the ACC to prepare. It is important for the United States to continue to monitor the application of UWOs by the Commonwealth of Australia, and track the progress of the application of UWO at the federal level in contemplating introduction of unexplained wealth in the U.S.

In summary, the UWOs of the Commonwealth have higher requirements. They do not have a presumption that the respondent's property is unlawful unless the respondent is able to establish the contrary and there is a requirement to show on balance of probability that an offense has been committed. Furthermore, the Commonwealth PoCA sets out a three stage process: (1) a freezing order (not mandatory); (2) preliminary UWO; and (3) unexplained wealth declaration. Other differences are that the respondent is eligible for reasonable living and legal expenses and the court has the discretionary power to determine whether making an order will cause undue hardship or injustice.

The shortcomings of the legislation, as viewed by the DPP, are the requirement that an examination order be made before the property is frozen, which may lead to disposition or loss of property. In addition, gifts,

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<sup>186</sup> Crimes Legislation Amendment Bill, (No.2), 2011, The Parliament of the Commonwealth of Australia.

inheritances, and proceeds from gambling cannot be verified easily and that may lead to unsuccessful applications.

Based on the analysis of the law and on earlier experience of the CDPP asset forfeiture manager, the evidentiary requirements imposed by the law make for a high threshold. The type of evidence required and expected to be provided by the CDPP may be tax records, employment records, inheritance, gifts, and the difference between the total wealth versus specific property.

The DPP considers that the law parallels money-laundering work, and that UWOs will be pursued when there are no other options or when all other options have been exhausted.

#### Effectiveness of UWOs – Western Australia

Statistical information on the application of UWOs is available through the DPP Annual Reports but there are a number of limitations. For example, funds paid into the Confiscation Proceeds Account from 2001 to 2009 reflect funds recovered from all forfeiture and confiscation schemes available under the Criminal Confiscation Act of 2000. These funds include UWOs, crime-used and crime-derived, as well as declared drug trafficker. Table 3 shows the total amount of funds paid into the Confiscation Proceeds Account. There is a steady increase in funds paid to the CPA, with the largest amount paid in 2007–2008 and 2009–2010. The WA DPP Annual Report 2009–2010 notes that the most significant proportion of confiscated property arises from conviction of an accused drug trafficker and the subsequent declaration that the person is a drug trafficker. The table also shows that the proportion of funds arising from declaration as a drug trafficker make up between 50 and 90 percent of the funds paid into the CPA. As of September 2009, a total of AUD\$43,581,117 (US\$46M) were paid into the CPA, AUD\$6.1M (US\$6.4M) of which came from UW unexplained wealth matters indicating that they do not appear to have been used extensively.<sup>187</sup>

**Table 3: Amounts Paid into CPA (WA) and Portion of Funds from Drug Trafficker’s**

Period	Amount (\$AUD)	Amount (\$US)	Declared Drug Trafficker (\$US)	Funds Recovered from Other Schemes(\$US)
2000/01	\$417,074.00	\$447,020	N/A	N/A
2001/02	\$779,533.00	\$835,503	N/A	N/A
2002/03	\$1,388,500.00	\$1,488,194	N/A	N/A
2003/04	\$1,170,275.00	\$1,254,301	N/A	N/A
2004/05	\$2,091,774.00	\$2,241,963	\$1,964,410.05	\$277,553.33
2005/06	\$2,524,362.00	\$2,705,611	\$1,312,627.03	\$1,392,984.16
2006/07	\$5,070,596.00	\$5,434,665	\$2,903,255.40	\$2,531,409.39
2007/08	\$12,618,686.00	\$13,524,708	\$8,650,773.25	\$4,873,934.40
2008/09	\$7,837,418.00	\$8,400,145	\$6,510,863.46	\$1,889,281.15
2009/10	\$13,438,281.00	\$14,403,150	\$10,768,793.67	\$3,634,355.90

Source: WA DPP Annual Report (2009/10)

**Table 4: Amounts recovered from the UWO January 2001 to January 2010**

No.	Type of a case	Amount (\$Australian)	Amount (\$US)
1	Suspected drug dealer	\$2,620,000.00	\$2,813,880
2	Suspected drug dealer	\$1,540,000.00	\$1,653,960

<sup>187</sup>Conversion rates from Oanda Currency Converter- July 3rd, 2011: AUD \$1 - US \$ 1.074

3	Suspected drug dealer	\$52,000.00	\$ 55,848
4	Suspected drug dealer	\$200,000.00	\$214,800
5	"Bikie" - motorcycle gangs	\$250,000.00	\$268,500
6	Suspected drug dealer	\$40,000.00	\$42,960
7	Suspected drug dealer	\$126,000.00	\$135,324
8	Suspected drug dealer	\$330,000.00	\$354,420
9	Spouse of a suspected drug dealer	\$200,000.00	\$214,800
10	Cash seizure/case dismissed		\$0
11	Cash seizure	\$35,000.00	\$ 37,590
12	Suspected drug dealer	Active Case	\$ 0
13	Case related to corruption	\$100,000.00	\$ 107,400
14	Theft	\$150,000.00	\$161,100
15	Suspected drug dealer	Active Case	\$0
16	Seized large amount of cash	\$63,000.00	\$67,662
17	UNEXPLAINED WEALTHHUNEXPLAINED WEALTHHO	\$315,000.00	\$ 338,310
	<b>TOTAL</b>	<b>\$6,021,000.00</b>	<b>\$6,466,554</b>

Source: WA DPP, July 2011

Based on the data obtained from the WA DPP, as of June 2009, 27 unexplained wealth applications were made since 2000–2001 (see Table 5), of which 21 led to forfeiture of assets. This indicates a high success rate of more than 70 percent. Of all the applications for unexplained wealth, only three were set aside by the court; three others are pending resolution. Of 24 unexplained wealth matters finalized, 22 were settled and only two were litigated (only one led to forfeiture). A high number of cases settled indicate that the WA DPP is inclined to settlement outside of the courtroom. Note that the amount recovered from settlement is generally less than the amount of unexplained wealth identified by law enforcement authorities. However, settlement is favored because it ensures successful and rapid resolution of cases avoiding lengthy and costly proceedings with an unpredictable outcome. Of the two cases litigated only one led to forfeiture. None of the cases reached the High Court of Australia (HCA); all were resolved by the Appellate Section of the Supreme Court of WA.

DPP's willingness to settle might have been influenced by unsympathetic courts. WA courts, in particular the High Court of Australia, have not looked favorably on the civil forfeiture regimes because they consider them too radical and too infringing on fundamental civil rights. Although no case under the unexplained wealth provisions reached the HCA, other cases under the CPCA were not reviewed favorably and the court has in many instances favored the respondent, thus curbing the powers of the state in forfeiture proceedings.

It is evident that unexplained wealth provisions have not been used extensively in Australia, and in cases when they have been used only a relatively small amount of funds were recovered totaling only AU\$6.0M over a period of 10 years in Western Australia. As shown in Table 5, no unexplained wealth applications were brought for 3 years (2004–2007). It is believed that this is due to public criticism of the DPP over

the application of the law to an elderly couple who were convicted of possessing cannabis after their son concealed drugs in their roof.<sup>188</sup>

However, over the past three years, there has been an increase in applications for UWOs which is justified with an increased allocation of resources into this area in particular into the police (WA DPP). Since 2008, it was decided that 25 percent of funds paid into the Confiscation Proceeds Account will be transferred to the police where they have used the additional funding to hire forensic accountants. In 2001, when the Act was enacted, the Proceeds of Crime Squad (division of the WA police) had one forensic accountant but since then the number of forensic accountants has risen to six. In addition, this is also attributed to the fact that the Confiscation Team of the DPP has expanded over the years, from three to 18, thus increasing the capacity of the Confiscation Team to pursue forfeiture cases.<sup>189</sup>

Another reason for a rather low number of applications for unexplained wealth declarations is because it is much easier to carry out a confiscation of all property under the provisions of a declared drug trafficker. In a number of cases related to declared drug traffickers, there was unexplained wealth. However because of the provision on automatic confiscation of all property, lawful and unlawful, belonging to a drug trafficker, there was no need to invoke UWO provisions.

**Table 5: Wealth Declarations in Western Australia (source WA DPP)**

Year	UWO Applications	UW Applications Set Aside	UWO Declaration That Led to Forfeiture	No. of Cases Pending Resolution	No. of Cases Settled	No. of Cases Litigated
2000/01	8	1	7		8	
2001/02	4		4		4	
2002/03	3	1	2		3	
2003/04	2		2		2	
2004/05						
2005/06						
2006/07						2
2007/08	2	1	1			
2008/09	5		3	2	3	
2009/10	3		2	1	2	
<b>Total</b>	<b>27</b>	<b>3</b>	<b>21</b>	<b>3</b>	<b>22</b>	<b>2</b>

As noted previously, the CPCA of WA, providing a broad range of conviction and non-conviction based forfeiture regimes, is far-reaching legislation that empowers the state to attack the proceeds of crime as well as the property belonging to a criminal/drug trafficker. Given the broad range of forfeiture regimes and the ease of forfeiture of property under the drug trafficker confiscation provisions, UWOs were more time consuming and unpredictable.

Although we have heard repeatedly that unexplained wealth laws are an effective tool in fighting and deterring crime, we found little quantifiable evidence to substantiate those claims in Australia. These laws were introduced with great enthusiasm by legislators as an effective tool in the war against organized and serious crime, raising the expectations that they will be a cure for all problems in the community. It also

<sup>188</sup> Lorana Bartels, "Unexplained Wealth laws in Australia," *Trend and Issues in Crime and Criminal Justice*, No.395, July 2010, Published by the Australian Institute of Criminology.

<sup>189</sup> Ian Jones, Confiscation Practice Manager, WA DPP.

seems that the support required to enforce and apply these laws have been downplayed, resulting with a low application of this law. The biggest criticism of the WA unexplained wealth regime was that did not meet the expectations that it raised when introduced, targeting “Mr. Bigs,” who is out of the reach of justice and lives well beyond his lawful means. Some of our interviewees who have played a significant role in introduction of unexplained wealth stated that they were disenchanted with the law as it failed to achieve the results it intended to. Others however believed that UWOs have had an impact on reducing crime rates but there is no significant reported impact that made a noticeable change. However, most of the interviewees agreed that UWO had little impact in thwarting crime, criticizing the DPP for not making greater use of its UWO powers. Although many consider that UWOs have the potential to be powerful weapons against crime, they remain a largely untested weapon.

Factors affecting application of UWOs are multiple and complex. One of the leading factors is the existence of automatic confiscation provisions of property belonging to a declared drug trafficker. The requirements imposed on the prosecution are not high and a conviction leads to automatic confiscation. Nonetheless, some argue that because UWOs are a non-conviction-based forfeiture regime, there are situations other than those related to drug traffickers when a UWO could be used. The amount of funds recovered under Declared Drug Traffickers provisions are substantial and may largely use resources that otherwise could have been used for UWO work. As we were told, resources go where there is a need, and in this case, investigative resources are being focused on recovering property through Declared Drug Traffickers provisions.

Another reason there have been only a small number of UWO investigations is that they are resource intensive. To undertake successful UWO applications, a professional forensic accountant is critical along with computer technicians and well-trained investigators. Efforts are being made in this regard in that both the DPP and the police are expanding, hiring forensic accountants and other specialized personnel to escalate their activities. All of the investigative work is performed by the WA state police, who conduct the investigation, gather the intelligence, monitor financial transactions, prepare all the necessary affidavits for applications, and submit them to the DPP for review and final determination on whether or not to pursue with a UWO. This is viewed as a client relationship creating considerable tension between the two agencies, although they continue to work together effectively. The police believe that more could be done and they had high expectations when the law was enacted believing that it would prove to be a powerful tool that enabled them to pursue a broad range of cases. Some police believe the DPP is overly conservative and not aggressive enough in pursuing these cases. The DPP, on the other hand, believes that the police are overly aggressive and that the requirements in the CPCA set a high threshold for the state to show that the person owns or possesses unexplained wealth. It seems that the police are eager to bring cases faster but the DPP is focused on pursuing only feasible cases that are well prepared. The police believe that because the DPP is overly conservative they settle easily and for far less than could be obtained. The DPP, on the other hand, believes that it recovers the optimal amount from each case.

Tensions between the police and the DPP as well as DPP’s reluctance to take a proactive approach in instituting UWOs may be why the WA Attorney General’s Office initiated an inquiry into establishment of a separate entity or a transfer of forfeiture powers to the Corruption and Crime Commission (CCC) of WA. The idea is being discussed but no decisions have been made as to which parts of the Confiscation Practice of the DPP will be transferred to the CCC, only those related to UWO or also crime-used and crime-derived and declared drug dealers. If they follow the model designed by the Commonwealth, they will move toward the Irish Criminal Asset Bureau multiagency model (described supra) bringing the powers of various agencies together under one umbrella agency to facilitate and improve coordination and ensure effective implementation of the law. Thus, there is a temporary moratorium on the review of UWOs until a final decision is made to determine the future use of UWOs.

The DPP stated that one of the main reasons for so few unexplained wealth applications is the standard of evidence imposed on the prosecution. As discussed earlier, although the CPCA provides for reversal of the burden of proof onto the respondent to justify the lawfulness of the property subject to a proceeding,

the threshold for the burden of proof the state must meet in reality is much higher than the burden on the respondent. According to the DPP and the specific requirements in the CPCA the DPP and the police must identify, trace, and value each item of the property of the respondent, show the totality of the respondent's wealth, and the unexplained portion of the wealth. In a case, this means that if the DPP were to go after a person who does not have a predicate offense they must identify and trace any property, transactions, gifts, purchases, and sales and show that they have reasonable grounds to believe that the person owns unexplained wealth. This requires access to tax and other records and skillful forensic accountants who can compile clear and concise affidavits for the court. Also as noted that Australian tax law differs from U.S. tax law (and as will be discussed later, Ireland as well) gifts, inheritance, and income acquired through gambling is not taxed and need not be reported for tax purposes. This has enabled respondents to discharge their burden of proof by simply stating that the money is a result of gambling or a gift from overseas. Furthermore, the *Brigenshaw* standard, mentioned previously, sets a standard of proof higher than the balance of probabilities to show that the person owns unexplained wealth. In contrast, the courts have accepted a lower burden of proof for the respondent, whereas a credible denial on oath would be considered sufficient to discharge the burden. A defense attorney corroborated the statement of the DPP that the standard of proof is higher for the state based on the *Brigenshaw* principle, while the standard of proof for the respondent is much lower. The unpredictable judicial process and the courts leaning or favoring the respondent has caused the DPP to shy away from bringing UWOs.

Although the law does not require a predicate offense, in general, the DPP believes that it must show evidence that the person has been engaged in some sort of criminal activity. In this regard, hearsay evidence is admissible in the court. Defense attorneys believe that the DPP so far has done a good job in showing that the person has been engaged in criminal activity and/or associated with criminals. The key challenges identified by the DPP and police in applying UWOs are lack of resources and skills to effectively perform investigatory work and prepare affidavits that could lead to successful finalization of cases. One approach was to send DPP lawyers to the police to work together in preparing cases, gathering evidence, and setting standards for preparation of evidence. This idea may be workable under the new entity responsible in the future for implementation of UWO.

The key bottleneck of UWO and other asset forfeiture schemes are the delays in hearing cases by the courts. It takes up to three months before a case is heard by the District or a Supreme Court in WA. Similarly when an application for examination order is made it takes up to three months before an order is served onto the respondent and the examination takes place. Because many countries do not contain similar statutes that provide for forfeiture of unexplained wealth it is difficult to successfully forfeit property outside of Australia. Further calculation of UWO is time consuming, labor intensive as it is hard to identify, trace and value property, with an unpredictable outcome.

The most common approach to commencing a UWO order is via an application for an examination order to gather information on properties of the respondent. An example was used by the DPP where a drug dealer known to DPP had transferred all of his property to his mother, through the use of an examination order the DPP was able to gather sufficient evidence to show that the property was in actual control of the respondent). One of the issues that impede the investigation is the intertwined finances or joined ownerships of property by more than one person. However, use of information obtained under an examination order is limited to the forfeiture proceeding and could not be used to press criminal charges. A further limitation imposed by the CPCA is the judicial overview, with the powers vested to a judge to delineate the scope of questions the examinee can be asked and those are frequently around sources and the origin of the property.

From the data available we can discern that most of the cases pursued by the DPP are cases of suspected drug dealers, bikers groups dealing with drug trafficking and cash seizure. Forfeited funds go to a Criminal Proceeds Account, mainly to support crime fighting activities, 25% is given to the police and parts of it goes to support victims of crime.

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The team heard that the Act has some deficiencies and that amendments could lead to a more frequent use of UWO. However no legislative proposal has been put forward to amend the CPCA and make it more workable. The next step in WA is determination of where the powers for UWO will lay and how will the new institutional framework look like and the powers attributed to it.

Although relatively few UWO cases have been litigated, Western Australian and the federal courts have played an important role in interpreting provisions of CPCA, narrowing the scope of some of the provisions under the CPCA, raising the threshold the government has to prove and significantly reducing it for the respondents (property owners). In the next section we discuss some of the key cases under CPCA reviewed by the Supreme Court of Western Australia and the High Court of federal government (and equivalent of the Supreme Court in the United States).



### Australian Case Law

Forfeiture provisions of the Commonwealth PoCA of 1987 were challenged early on by the respondents and defendants affected by them, challenging the proportionality of measures, their unjust nature, and, in particular, the reversal of the burden of proof onto the respondent. However, the courts have upheld the reversed burden of proof acknowledging the need for it in confiscation laws, recognizing the difficulty the prosecution would face in identifying or assessing proceeds of crime in determining the lawfulness of the property or a specific part of the property. An authoritative decision was issued by the High Court of Australia on the topic, justifying the need for reversed burden of proof as follows:

The broad primary principles guiding a Court in the administration of justice are that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be frustrated and the very rules intended for the maintenance of the law would defeat their own objective. The usual path leading to justice if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct vindication of the law... the primary rule should be relaxed when the subject matter of the allegation lies peculiarly within the knowledge of one of the parties<sup>190</sup>

The necessity of shifting the burden of proof onto the defendant to show the lawfulness of his or her benefit and determine the value derived from criminal activities was acknowledged by the state and federal courts.

The reversed burden of proof was also upheld by courts in WA; although it still continued to be challenged by the respondents. Courts in WA have affirmed the reversed burden of proof to the respondent in two applications for UWOs and other CBD applications. In *Dung v. DPP*<sup>191</sup> the respondent was stopped by the police, and, during search, a sum of AUD\$213,852.40 was found in his car. A UWO application was made by the DPP, and subsequently, a sum of AUD\$200,000, the lawful source of which the respondent was unable to justify, was declared unexplained wealth and the rest was returned to the respondent. In reviewing the facts of the case, the court cited McKechnie in the matter of *Permanent Trustee Co LTD v. The State of Western Australia*<sup>192</sup> that explains the background of the legislation where it was stated that “it is no longer necessary for the state to establish proof of an offense beyond reasonable doubt before a person’s property may be confiscated. Mere unexplained wealth may, in certain circumstances trigger confiscation”.

Similarly, in *Director of Public Prosecution (WA) v. Morris*,<sup>193</sup> the respondent was stopped by the police, and a sum of AUD\$108,390 was found. The DPP, by an *ex parte* notice, made an application for a freezing order with respect to the money and an application for an unexplained wealth declaration. The respondent applied to set aside the freezing order and objected to the automatic confiscation of his property. Prior to the hearing, the respondent submitted an affidavit tendering evidence that he had a quantity of lawfully acquired wealth. Because there are so few defended applications for unexplained wealth, the court relied on the explanatory memorandum of the Criminal Property Confiscation Bill and the second reading of the Bill, which held that:

the most significant of these proposed reforms is the confiscation of unexplained wealth as provided by part 3 of the Bill. These provisions target those people who apparently live beyond their legitimate means of support....More importantly it is not relevant whether or not the person has committed any offense. The clear intention of the bill is to deprive people of wealth which has been unlawfully acquired. In this regard, the bill requires a person to establish that the ultimate source of his or her wealth was lawful.

<sup>190</sup>*Williamson v. Ah On* (1926) 39 LR 95 at 113–114.

<sup>191</sup>*DPP v. Dung* [2006] WADC.

<sup>192</sup>*Permanent Trustee Co LTD v. The State of Western Australia*, [2002] WASC 22.

<sup>193</sup>*Director of Public Prosecution v. Morris* [2010] WADC 148(District Court).

Reversed burden of proof was also upheld in *Director of Public Prosecution (WA) v. Gypsy Jokers Motorcycle Club Inc.*<sup>194</sup> where the court held that any person who has acquired substantial wealth by legitimate means ought reasonably to be expected to prove on balance of probabilities the source of his or her wealth.

Although the Act does not specify the type of proof required to satisfy the courts that the property subject to a UWO application, the two cases on UWO (*Morris* and *Deng*) show that courts are prone to accept as admissible evidence witness statements and any other related documents that will justify the origin of property if direct transaction records are not available. In *Morris*, the respondent was able to produce sufficient evidence through witnesses to satisfy the court, on balance of probabilities, that it was more likely than not that his property was derived from lawful sources. Subsequently, the court did not make a declaration for unexplained wealth. Conversely, in *Deng*, the respondent's failure to disclose the names of witnesses and to tender evidence to justify the origin of the frozen property resulted in its subsequent forfeiture.

Most of the existing case law under the CPCA (2000) in WA comes from court decisions concerning cases instituted under the Criminal Benefit Declarations (CBD). Although these cases are not directly related to unexplained wealth provisions, the study team ascertained from their review the approach courts have taken to interpreting and applying CPCA provisions. In addition, general provisions related to freezing orders, scope of the powers of the court, and reversed burden of proof apply for both forfeiture schemes under the CBD and the UWOs.

Although the courts have repeatedly recognized the sweeping nature of the legislation, they have in general upheld the provisions of the CPCA even though only one case challenging its constitutionality was brought to the courts. In *DPP for WA v. Hafner*<sup>195</sup>, the respondent challenged the constitutionality on the grounds that the law had an extra-territorial effect and as such violated Chapter III of the Constitution that vests the power to enact extra-territorial legislation with the Australian federal Parliament. The case was brought by the DPP for a CBD pursuant to Section 30 of the Act, following the conviction of the defendant for a drug offense under the Misuse of Drug Act 1981 (WA), and who was liable to be declared a drug trafficker. When a person is declared a drug trafficker pursuant to Section 32(A) of the Misuse of Drug Act, all of his or her property, whether owned or effectively controlled or given away at any time before the declaration was made, is liable for confiscation. Section 30 of the Act also enables the DPP to apply for a confiscation order for any property owned or effectively controlled by the defendant, regardless of whether the property is located in WA or elsewhere. The court upheld the constitutionality of the Act relying on the authority of the decision in *Broken Hill South Ltd v. Deputy Commissioner of Taxation*,<sup>196</sup> where the court held that: "a state may legislate extra territorially if there is a connection between the subject matter of the legislation and the state. Once there is sufficient connection, it is for the legislature to decide how far it will go." The legislation clearly intended for the WA CPCA to have an extra-territorial effect, and in the present case, there was a sufficient connection because the respondent was convicted of a serious offense and was declared a drug trafficker by the District Court of WA. This decision is also important because it presents an opinion on the admissibility of hearsay evidence in the court. Hearsay evidence is admissible evidence in court unless the respondent challenges the evidence submitted by the applicant. The respondent's failure to object means that this evidence may be used as proof to the extent of whatever rational persuasive power it may have. The evidence so received is to be treated as if it were admissible evidence.

From a review of decisions by the courts of the state of WA and the High Court of Australia, although it must be noted that only one case under the CPCA was reviewed and decided by the High Court it can be concluded that the courts of WA interpret the provisions of the WA CPCA more narrowly, rigorously

<sup>194</sup>*Director of Public Prosecution (WA) v. Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61.

<sup>195</sup>*Director of Public Prosecution for Western Australia v. Hafner* [2004] WASC 32.

<sup>196</sup>*Broken Hill South Ltd v. Deputy Commissioner of Taxation*, [NSW] (1937) 56 CLR 337 at 375.

following the intent of the legislators expressed in the Act and the Second Reading of the Bill. For example, provisions in the WA CPCA stipulate that the courts must issue UWOs, CBDs, or freezing orders if requirements of the Act are to be met. On this matter, the High Court of Australia, in the only case brought before it under the CPCA, *Mansfield v. DPP of WA*<sup>197</sup> construed the provisions of the statute more broadly, relying on the inherent power of the courts to exercise their judicial authority. The court held that the powers conferred to the court pursuant to Section 48 of the statute are permissive and not mandatory which means that the court has the discretionary power to decide whether to issue a freezing order or not and is not compelled by the statute to issue such an order. In making its decision, the court relied on the arguments in *Bennett & Co v. Director of Public Prosecutions (WA)*<sup>198</sup> where the court held that it was not the intent of the legislature to compel the court to issue an order merely on the advice of the DPP and that an application for an examination order might be sought. The court will decide whether to issue such an order by considering whether or not the application was based on reasonable grounds and if it was a bona fide application.

The *Bennet* case was an appeal brought by the respondent challenging the decision of the Supreme Court of WA, Appellate Division, on two grounds: (i) that the Appellate Court found that under the WA CPCA, the DPP was not required to make any undertakings as to the damages caused by the freezing order; and (ii) the court erred in denying the power of the Supreme Court in a freezing order to allow for a payment of reasonable legal costs for the defense of related civil or criminal proceedings. The court upheld both appeals and held that the Supreme Court has been conferred the power, by Section 45 of the WA CPCA to issue varying orders in regard to the frozen property and to attach conditions or require the provisions of undertakings to diminish the possibility of oppression and injustice. The debate concentrated on the scope of the powers of the Supreme Court conferred by the WA CPCA, citing remarks of Gaudron J in *Knight v. FP Special Assets Ltd.*<sup>199</sup>

...[A] grant of power should be construed in accordance with ordinary principles and thus the words used should be given their full meaning unless there is something to indicate the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. The necessity for the power to be exercised judicially tends in favor of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse.

With this decision, the court set a higher standard of proof for the prosecution, specifying the burden of proof the DPP must meet to be granted a freezing order. Similar contentions were made in *DPP v. Gypsy Jokers Motorcycle Club Inc.*,<sup>200</sup> stating that the WA CPCA does not intend to prevent the court from exercising its powers in dealing with potential abuses of its processes.

The appellant sought relief requiring the DPP to provide an undertaking as to damages as a condition for the continuation of the freezing order and to release funds to fund his defense proceedings. The release of funds was refused by the Court of Appeal on the grounds that there was no power under the statute to allow release of funds for that purpose. The appeal brought by the respondent was allowed on the grounds that the WA CPCA is draconian in its operation and complex in several of its provisions and therefore there is no implicit denial of the powers of the Supreme Court to issue any order under the Act. The court, in reviewing the general impact of the WA CPCA held that the release of funds for the payment of legal expenses not only assists the respondent but also improves the efficiency of the Act.

<sup>197</sup>*Mansfield v. DPP for WA*, [2006] HCA 38 (2006).

<sup>198</sup>*Bennett & Co v. Director of Public Prosecutions (WA)*, [2005] A Crim R 279.

<sup>199</sup>*Gaudron J in Knight v. FP Special Assets Ltd*, [1992] 174 CLR at 205.

<sup>200</sup>*DPP (WA) v. Gypsy Jokers Motorcycle Club Inc.*, [2005] WASC 61.

Conversely, from the decision of the High Court, the Supreme Court of WA, in *DPP (WA) v. Mansfield*,<sup>201</sup> decided that the Act did not grant powers to the court to vary a freezing order to allow for the release of funds to cover legal expenses. In its reasoning, the court relied on the Second Reading Speech of Mr. Barron-Sullivan, in which he stated: "...property frozen under a freezing order can be released by a court only for payment of living or business expenses. No frozen property can be released for payment of legal expenses". Similarly, in regard to the undertaking as to damages, the court held that it was the intent of the legislators not to confer powers on the court to impose the giving of an undertaking as to damages.

The Supreme Court of WA, the Final Court of Appeal took under review whether or not payment of a mortgage could be categorized as a reasonable living cost and what constitutes a criminal benefit under Section 16 of the Act in *Mansfield v. Director of Public Prosecution & Anor.*<sup>202</sup> The first instance court refused the respondent's request to release frozen funds to allow for the mortgage payment for the property, which also was subject to a freezing order. On appeal, the higher court reversed the decision of the first instance court holding that there is nothing in the WA CPCA that prevents the court from regarding mortgage payments as reasonable living expenses. In this case, the WA Supreme Court also considered the construction of the WA CPCA regarding the making of CBDs and what constitutes criminal benefit for the purpose of the Act. The state construed the WA Act in a way that CBD should encompass the entirety of the proceeds of the sale of the shares (traded with inside information, including the value of the shares themselves). The court disagreed with the state, holding that it doubted that the legislature intended to confiscate or take away the entirety of the property, including part of the property that was lawfully acquired. The court, relying on the explanatory memorandum of the Bill, which stated that the WA Act is aimed at removing ill-gotten gains and that Section 16 is directed to wealth acquired as a result of the crime, interpreted that the intent of the legislators was to ensure that criminals did not benefit from their criminal activities and not to impose penalties over and above those that might be imposed in a court of criminal jurisdiction. Therefore, the court specified that a CBD would cover only the actual benefits derived from the commission of the offense and not the net profits specifying that the assessed value of the benefit should be not more than what was acquired.

In *DPP (WA) v. Gypsy Jokers Motorcycle Club Inc.* (an application for CBD), the prosecution refused to disclose one of the affidavits to the respondent, relying on Section 70 of the Act (Secrecy Requirements) that imposes an obligation on a person not to disclose to anyone except, as permitted, information related to an application. Although the court accepted that there might be a situation in which disclosure of information might not be in the public interest it rejected the prosecutors' contentions relying on the decision in *Re Smith; Ex parte Director of Public Prosecution for Western Australia*,<sup>203</sup> which held that there was nothing in Section 70 of the WA Act prohibiting the disclosure of evidence filed in support of an application for a freezing order and there was nothing in this affidavit that would justify its non-disclosure. This decision is also important because it affirms the absence of a requirement to establish a nexus between an offense and the property subject to an application. The court held that Section 43(8) enables the state to issue a freezing order over specific property if there are reasonable grounds to suspect that the property has been used in, or derived from, an offense punishable by at least two years of imprisonment; however, Section 106 makes it unnecessary to link it to a specific offense. For the purpose of issuing a freezing order it is sufficient to show that any confiscable offense was committed.

The DPP's contention that the respondent can seek leave of appeal, but that no appeal can be brought against an interlocutory order or a judgment without the leave of the judge or the Court of Appeal, was dismissed by the court. Judge Templeman held that if there was no right for appeal when dealing with

<sup>201</sup>*DPP (WA v. Mansfield)*, [2005] WASC 79.

<sup>202</sup>*Mansfield v. Director of Public Prosecution & Anor.*, [2007] WASCA 39.

<sup>203</sup>*Re Smith; Ex parte Director of Public Prosecution for Western Australia*, (No. 1) [2004] WASC 145.

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freezing orders. The court would be acting in an administrative capacity and the legislative intent of the Parliament could not have been to undermine the judicial role of the court.

Finally, in *Director of Public Prosecutions for Western Australia v. Bridge & Ors*,<sup>204</sup> the court dealt with the issues of retroactivity of the WA Act whereby the respondent challenged a criminal benefit declaration on the grounds that the offense is not an offense because it was committed before the Act came into effect. The court dismissed the respondent's contention and held that the WA PoCA clearly stipulates that a person has acquired criminal benefit whether or not the property was acquired or the confiscation offense was committed before or after the Act came into effect.

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<sup>204</sup>*Director of Public Prosecutions for Western Australia v. Bridge & Ors*, [2005] WASC 36.

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### Australia Conclusions

At the core of the UWO provisions of the Commonwealth PoCA 2010 is the reversal of the burden of proof to the respondent to justify that his or her wealth was acquired by lawful means and is not the proceeds of any illegal activity. The second element is the lack of requirement for the state to show that an offense has been committed or that the property owner is suspected of having committed an offense. However, the Commonwealth UWOs impose a requirement on the state to show that an offense was committed when a restraining order is sought. Any person can be the subject of UWO proceedings if there are reasonable grounds to suspect that he or she owns or possesses wealth that is not lawful. This approach expands the concept of attacking the proceeds of crime in that it attacks any property that is not acquired lawfully, whether it was acquired through a commission of one offense or a series of offenses, what type of offense was committed, and over what time period. The burden of proof on the prosecution is lower, because it must show only that a person has a lifestyle beyond his or her means. This is sufficient to satisfy the court to direct a person to produce evidence and establish the lawful origin of the property. The prosecution is not required to show that any offense was committed, further easing the burden on the prosecution in initiating proceedings.

Although UWOs were introduced for the first time as an innovative and powerful tool against crime in WA, we can conclude that their impact on fighting crime is moderate with a rather small amount of assets recovered to the state. Automatic confiscation of the declared drug trafficker, limited forensic accounting resources, tensions between the DPP and the police and lack of sympathy from the courts toward the statute, were some of the factors that dissuaded from more frequent application of UWO. However, establishment of the Task Force at the federal level seems a concerted effort of the government to ensure effective and frequent use of powers under the Commonwealth PoCA. Thus it is important for future evaluations of the UWO to monitor the application and the use of the UWO at the federal level, by the U.S. and other countries contemplating introduction of UWO. Successes or failure of application of UWOs and their successful completion rate will indicate their effectiveness.

### 3.2.2 Ireland

#### Background

In Ireland, civil forfeiture laws reversing the burden of proof onto the respondent to justify lawful origin of property were introduced in two laws: the Proceeds of Crime Act (PoCA<sup>205</sup>) and the Criminal Asset Bureau (CAB) Act, both of 1996. PoCA sets out the legislative framework that enables the state to attack proceeds of crime while the CAB Act establishes the institutional framework to support its implementation. By enacting PoCA, Ireland became one of the first countries in Europe to adopt a civil forfeiture regime that reverses the burden of proof onto the respondent. At the time of enactment of the law, Irish academics pointed out that the legislation marked a new approach to crime, transitioning it from a reactive conviction-based confiscation of assets to a proactive crime control strategy.<sup>206</sup> Although there was little opposition to the law when it was enacted, its broad nature has been recognized by academics, practitioners, and courts. The defense bar has gone so far as to label it “radical” and “Kafkaesque”.<sup>207</sup> Prosecutors justified its enactment on the grounds that it was a necessary response to the serious threat that organized crime posed to society. The constitutionality of PoCA has been challenged on many grounds by respondents but to date it has been upheld by the courts.

Introduction of civil asset forfeiture, in itself, does not mark a new chapter in the Irish common law tradition. It has been a longstanding principle of common law that *nemo dat quod non habet* i.e., a thief cannot convey a lawful title to stolen property nor can any person into whose hands it comes resist a claim by the true owner for its return. A number of seizure and forfeiture schemes existed through various Revenue and Customs Acts<sup>208</sup> and other statutory regimes. More recent conviction-based confiscation schemes are found in the Misuse of Drug Act of 1997,<sup>209</sup> which provides for the confiscation of property following conviction of a drug offense if it was established that it was related to the offense. In 1994, the Irish Parliament introduced the Criminal Justice Act<sup>210</sup> which provides for a broader confiscation regime targeting proceeds of crime derived from commission of any offense, not only proceeds associated with drug-related offenses. However, the prerequisite for confiscation remained prior conviction of an offense. Under this regime, the standard for conviction of a person for commission of an offense is the criminal standard of proof—beyond reasonable doubt—the confiscation of assets is conducted in a subsequent civil proceeding with a lower standard of proof—balance of probabilities. The lower standard of proof was justified on the grounds that it was inherently difficult for the prosecution to prove a direct link between a specific offense and specific property derived from it. Forfeiture of property also was provided for under the Offenses against the State Act of 1985 which introduced a rapid confiscation scheme that granted authority to the Minister of Justice to issue an order freezing assets within a very short period of time if he or she had reasonable grounds to believe those assets belonged to an unlawful organization. There was no prerequisite requirement of the existence of a predicate offense. The minister was authorized to issue an order directing financial institutions to pay the money held in a related bank account to the Minister of Finance. In addition, the Act provided for reversal of the burden of proof, requiring the asset owner to demonstrate the legitimacy of his or her assets. According to many, key provisions of the PoCA of 1996 were modeled after the PoCA of 1985.

The PoCA of 1996 was enacted following two tragic events in Ireland. In summer 1996 two people, journalist Veronica Guerin and a detective of the An Garda Síochána (Irish police, hereinafter “Garda”)

<sup>205</sup>Proceeds of Crime Act (1996), available at: <http://www.irishstatutebook.ie/1996/en/act/pub/0030/index.html>.

<sup>206</sup>Felix J. McKeena and Kate Egan, “Ireland: A multi-disciplinary approach to proceeds of crime,” In *Civil Forfeiture of Criminal Property—Legal Measures for Targeting the Proceeds of Crime*,” Simon N.M. Young, 2009. Published by Edward Elgar Publishing, Inc. (citing the work of Walsh and McCutcheon).

<sup>207</sup>Counselor for the respondent in *Gilligan*, p.5.

<sup>208</sup>*Revenue and Customs Act (NEED TO ADD HERE)*

<sup>209</sup>*Misuse of Drug Act of 1997*, available at: <http://www.irishstatutebook.ie/1977/en/act/pub/0012/sec0001.html>

<sup>210</sup>*Criminal Justice Act of 1994*, available at <http://www.irishstatutebook.ie/1994/en/act/pub/0015/index.html>

Gerry McCabe<sup>211</sup>, were murdered, shocking and outraging the public. In addition, the crime rate over the previous ten years had spiked, and organized crime groups involved in drug trafficking had committed what were known as “gangland murders” to protect their markets. According to statistics introduced by the Deputy Commissioner of the Garda, between 1987 and 1995, recorded indictable crime had increased by 20 percent, and serious crime had increased by almost 50 percent.<sup>212</sup> In this context, with the public outraged at the blatant and violent murdering of prominent figures and the drastic increase in the crime rate, it was relatively easy to introduce and gain popular support for tough-on-crime laws. It is reported that it took less than five weeks to draft and enact two laws that constitute the foundation of the civil forfeiture proceedings, PoCA and CAB Acts. It is relevant that there was no major legal opposition to PoCA, either from the private bar or civil liberties organizations. However, a number of academics expressed dissent, holding that PoCA was draconian because it infringed on the fundamental and procedural rights of respondents.

Law enforcement proponents argued that it was necessary to introduce non-conviction-based asset forfeiture because the conviction-based confiscation regimes were yielding poor results. In fact by the time of the enactment of PoCA no post-conviction confiscation order has been made or ever applied for. The laws in place required that a person be prosecuted and convicted of an offense to justify confiscation of proceeds and benefits derived from illegal activities. Members of serious and organized crime groups, especially their leaders, were becoming increasingly skilled in distancing themselves from the actual crimes. Their foot soldiers were caught and convicted, while they remained safe and out of reach of the legal system. Further, law enforcement agencies claimed that the existing law adversely affected society as a whole. The fact that very few criminals were caught and indicted served as an enticement to others to engage in criminal activities while disappointed and disillusioned citizens lost their trust in the justice system discouraging them from cooperating with law enforcement. At the same time the principals of criminal organizations assembled wealth and commanded respect which motivated others to engage in unlawful activities. Therefore, PoCA and the activities of the CAB were designed specifically to enable the state to identify and target indirectly the economic base of the principals of criminal organizations so that they no longer would be able to benefit freely from their unlawful activities.<sup>213</sup>

Note that not long before the law was enacted, there was a general consensus that Ireland had no need to introduce civil asset forfeiture and that the conviction-based confiscation fit the country’s needs, despite its lack of results. This popular belief was further supported by the Law Reform Commission of Ireland in 1991, which, after considering the possibility of introducing civil asset forfeiture, concluded that conviction-based asset forfeiture was sufficient and corresponded to the circumstances in the country.<sup>214</sup> Thus, it could be stated that the public outrage in response to the Veronica Guerin and Gerry McCabe murders shifted the general approach to fighting crime and increased support for enactment of tough-on-crime laws.

Since its enactment in 1996, PoCA has been labeled a radical and disproportionate response to crime by the respondents and their attorneys, and has been challenged on the grounds that it is a de facto criminal law, thus violating basic constitutional principles and depriving respondents of the protections guaranteed by criminal law and the constitution. One of the defense attorneys in *Gilligan* stated that the Act “carves out uncharted terrain...at a great cost to civil liberties and constitutional rights, and seeks to transplant the draconian legislation of emergency powers into a different set of legal relationships”.<sup>215</sup> Although the courts have recognized repeatedly the broad nature of PoCA and the impact it has had on fundamental civil rights, they have upheld the Act as constitutional and as a balanced measure to address crime. PoCA

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<sup>211</sup> Gerry McCabe, detective of the Garda Síochána, was murdered June 6, 1996; Veronica Guerin, investigative reporter with the *Sunday Independent* in Dublin, was killed June 26, 1996.

<sup>212</sup> Statement of Deputy Commissioner Conroy in *Gilligan v. Criminal Asset Bureau*, [1997] IEHC 106 (HC), p.9.

<sup>213</sup> *Ibid.* at 4.

<sup>214</sup> The Law Reform Commission, “The Confiscation of the Proceeds of Crime” Ireland, 1991.

<sup>215</sup> *Gilligan v. CAB*, [1997] 1 IR 526 (HC).



has, to date, survived many constitutional challenges, and continues to be implemented successfully. It also has served as a model for many other countries in designing and drafting forfeiture regimes.<sup>216</sup> The Council of Europe Group for Evaluation of Corruption (GRECO)<sup>217</sup> concluded in its annual report that Ireland had a solid legislative framework with regard to the proceeds of crime. It said, in regard to the civil forfeiture scheme, that it “was impressed by the civil forfeiture scheme which has provided the Criminal Asset Bureau with effective tools to identify and seize proceeds of crime.” In addition, the CAB, the agency established to implement the PoCA, played a major role in leading the development of the Camden Asset Recovery Inter-agency Network (CARIN<sup>218</sup>). The CAB held the presidency of the CARIN network for several years and assisted in developing its professional and administrative capabilities.

In addition to the events of the summer of 1996, asset forfeiture and confiscation regimes in Ireland have evolved as a result of international conventions and treaties, such as the United Nations Conventions against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the Basel Statement of Principles, the Financial Action Task Force (FATF), the Strasbourg Convention on money laundering (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime), and the UN Convention against Transnational Organized Crime (2000). For the past 14 years, the length of time the law has been in existence, it has been considered moderately to very successful and there is a general consensus that it has had an impact on reducing and deterring crime. Representatives of CAB believe that during the first five years of the PoCA’s implementation, many individuals involved in unlawful activities moved their activities to other regions outside of Ireland, thus significantly reducing crime rates in Ireland.

Before discussing the PoCA in detail, it is useful to examine the Criminal Justice Act (CJA) passed two years before PoCA, which provides for conviction-based confiscation. It is relevant because the Irish legal system incorporates the principle that always favors or prioritizes conviction-based confiscation over civil forfeiture. A civil forfeiture proceeding would be instituted against a person only if there was insufficient evidence to prosecute that person. If, during the investigation, more information became available and a prosecution could be initiated, civil forfeiture proceedings would cease and all the materials would be passed to the prosecutor. All investigations, for both civil and criminal proceedings, are carried out by the Irish police and the CAB.

### **Conviction based forfeiture**

Conviction based forfeiture is governed by the CJA, providing for forfeiture of proceeds derived from drug-trafficking offenses and terrorism (Sections 4 and 8B) and all other offenses (Section 9). The CJA allows for both direct and indirect forfeiture of the proceeds of crime; that is, assets can be directly removed from the defendants or indirectly removed if assets or benefits are transferred to a third party to avoid seizure and confiscation. The court in such a case can consider it a money-laundering offense and order forfeiture. Asset forfeiture following conviction is conducted as part of the sentencing process by the trial judge. A lower standard of proof applies—balance of probabilities. Application of the lower standard of proof is justified by the difficulty of establishing the link between the offense and the proceeds because of the way the crimes are committed and the steps often taken by the convicted persons to conceal the proceeds of crime.

The Director of Public Prosecutions (DPP) applies to the High Court with a request to investigate whether or not the defendant has gained any benefit from the crime of which he has been convicted. If the court is

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<sup>216</sup> CAB annual reports identify numerous countries that have visited the CAB to familiarize themselves with the workings of the Act. Other countries include Australia, countries in Africa, and others.

<sup>217</sup> Groups of States Against Corruption, “Second Evaluation Round, Evaluation Report on Ireland,” 2005.

<sup>218</sup> CARIN was initiated in 2002 and officially launched in Hague in September. The aim of CARIN is to enhance the effectiveness of efforts in depriving criminals of their illicit profits, with particular reference to financial deprivation. Europol is the secretariat of the CARIN network.

satisfied, based on the civil standard of proof, that the defendant has gained profit, the court may make a confiscation order. A great deal of confusion has arisen by reason of the use of the word “confiscation.” In fact the court assesses the amount of the benefit and then orders the convicted person to pay that sum to the prosecution. The Order is stated to be the equivalent of an order of the High Court for the payment of a monetary sum. If the defendant is convicted of a drug trafficking offense then the court embarks on an enquiry as to the benefit of the Defendant from drug trafficking (not confined to the benefit from the offense of which he has been convicted). There is a statutory presumption that all property received by the convict within six years from the day the proceedings were initiated against him are the proceeds of drug trafficking. This is a rebuttable presumption and can be countered by evidence led by the convict. For any other offense the confiscation order may cover only the benefit derived from commission of the specific criminal offense. The legislative amendments of 1999 require that the trial court always consider whether or not it is appropriate to impose a confiscation order, no longer requiring an application by the DPP. If he or she fails to make the payment ordered by the court, he or she can be imprisoned for a period of up to ten years which if imposed must be consecutive to the sentence imposed in respect of the primary offense. If a convict refuses to pay the amount of confiscation order there is power to appoint a receivership to sell any property that can be located.

The defendant’s assets and property can be restrained (frozen) pending a criminal trial to ensure that the property will be available if a confiscation order is made following the criminal conviction. The restraining order can be issued in anticipation of the conviction on an application made by the DPP. The law does not impose any statutory requirements of proof to order freezing of property. It is left to the discretion of the court to make the final decision.

### Proceeds of Crime Act 1996

Just as the CJA formed the basis of conviction-based forfeiture in Ireland, the foundation of the non-conviction forfeiture of the proceeds of crime is set out in the PoCA of 1996.<sup>219</sup> This continues to be considered the most sweeping effort to attack the proceeds of crime in Europe. The objective of the Act as set out in the preamble is defined to be “a measure aimed at depriving the respondent of property suspected of being the proceeds of crime.” As such, it aims to deprive wrongdoers of their profit as well as to diminish their capacity to finance future criminal activities. There are several elements that make the Irish PoCA unique. First, it can be applied to any property acquired before or after PoCA came into effect. Second, the state is not required to establish a nexus between a specific offense and the property, i.e., there is no predicate offense requirement. Third, what in Ireland is known as “belief evidence” or reasonable grounds to suspect that a person owns or possesses property that is directly or indirectly the proceeds of crime, is admissible evidence in PoCA proceedings. And, finally, the burden of proof at a certain stage of the proceeding shifts to the respondent to show the legitimacy of the property sought to be frozen under PoCA. Although the PoCA of 1996 contains some of the features similar to Australian UWOs, the UWO term is not used. The proceedings under the Act are commonly referred to as proceeds of crime.

#### Key elements of Irish PoCA:

- It is applied to any property constituting proceeds of crime
- No need to show a nexus between an offense and the property
- Hearsay evidence is admissible evidence at court
- The burden of proof shifts to the respondent

To gain a full understanding of the operation of the PoCA, it is also important to understand the CAB Act.<sup>220</sup> The CAB is a multidisciplinary agency whose members are from the Garda, Revenue Services, and Social Welfare, and whose primary responsibility is to implement the PoCA. The CAB carries out

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<sup>220</sup> Criminal Asset Bureau Act (1996), available at: <http://www.irishstatutebook.ie/1996/en/act/pub/0031/index.html>.

investigations of the suspected proceeds of crime and works closely with the Irish police as well as with the aforementioned Revenue Services and Social Welfare Ministry. The head of CAB, known as the Chief Bureau Officer, comes from the Irish police and must hold the rank of Chief Superintendent; the Bureau Legal Officer is appointed by the Minister of Justice, Equality, and Law Reform. Revenue Service staff are appointed by the Revenue Commissioner, and Social Welfare officers are appointed by the Minister for Social Community and Family Affairs. Members of the CAB continue to perform the duties of and remain employees of their originating offices while also performing their tasks as members of CAB. However, they must exercise their powers and functions under the direction and control of the Chief Bureau Officer. They bring to CAB the powers of and access to the body of information of their respective agencies; for example, the police have access to the police databases and the revenue officers have full access to tax records and they use their respective information for CAB needs. Further, each has the power of the other when working together, e.g., the Social Welfare officer would have the full arrest authority of the Garda officer. The concentration and assemblage of all of these powers and information at the CAB has made it a powerful and effective institution in dealing with crime. It has been repeatedly stated that the CAB has played a key role in the success of PoCA.

The preamble of the CAB Act defines its objective “to identify assets, wherever situated, or persons who derive or are suspected to derive, directly or indirectly, from criminal conduct, to take appropriate action to deprive those persons of such assets in whole or in part and to carry out any investigation or preparatory work in relation to any proceedings under the Act.”<sup>221</sup> The CAB Act provides that all CAB officers operate under anonymity,<sup>222</sup> except for the Chief Bureau Officer and the Bureau’s Legal Officer and that all measures should be taken to not reveal the identity of the officers. Even in situations when an officer of the CAB is exercising his or her duties under the Act, he or she will not disclose his or her identity but will be accompanied by a member of the police. In addition, whenever a task is performed in writing documentation is signed on behalf of the CAB.

As part of the legislative package Parliament enacted the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996, which, among others, enabled the Revenue Services to share internal tax information with CAB officers.

The PoCA and CAB Acts contain definitions of key concepts that clarify the objectives of the Acts as well as interpret the intent of the legislature. The “proceeds of crime” under the PoCA is defined to “include any property obtained or received at any time, whether before or after the passing of the legislation, by or as a result of or in connection with criminal conduct.”<sup>223</sup> This is linked to the concept of criminal conduct, which is defined to include any offense that has taken place inside the state, or any offense that would constitute an offense if it occurred in the state, or an offense against the law of that state or if the property resulting from that offense is situated within the state. The inclusion of proceeds from offenses committed outside the jurisdiction of the court was rejected by the Irish courts which stated that there was no legislative intent expressed in the PoCA to target proceeds derived from offenses in other states. However, the PoCA was amended in 2005 to include the proceeds of foreign offenses that were held at any time in Ireland.

Another important concept in the PoCA is the mandatory requirement to identify a person who is in control or possession of property. However, proceedings under the PoCA are considered *in rem* proceedings instituted against property and not *in personam* proceedings. The process under the act was designed to ensure a *legitimus contradictor* as well as to identify for the public in suitable cases the person being deprived of the benefits of his criminal conduct. This issue was challenged by a respondent, who argued that the PoCA was a sanction and a penalty. The Supreme Court dismissed the argument and

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<sup>221</sup> Ibid., s. 4.

<sup>222</sup> Ibid., s. 10.

<sup>223</sup> Proceeds of Crime Act (amendment) of 2005, Part 2, Section 3.a, available at: <http://www.irishstatutebook.ie/2005/en/act/pub/0001/print.html>, accessed April 3, 2011.

held that forfeiture proceedings operate *in rem* because there is no threat of imprisonment or conviction when these measures are imposed.

The amendment of 2005 was important in remedying a number of deficiencies of the original PoCA. For example, it enabled the CAB to bring cases in the corporate name as an alternative to the personal name of the Garda Chief Superintendent or an authorized Revenue Officer. The amendment of 2005 also provided for a consensual disposition of assets before the expiration of a seven-year period<sup>224</sup> pursuant to a Section 3 order. In addition, it introduced provisions that enabled the CAB to institute proceedings for damages against persons or companies enriched by corrupt conduct.

### Proceedings Under PoCA

**Freezing Order** The first stage of the asset forfeiture in civil proceedings is an interim order, which is considered one of the most difficult stages for the applicant. It is governed by Section 2 of the PoCA. However, application may be made by Garda Bureau Officer to a District Court for a search warrant of a place or a production order sought in relation to a solicitor or a financial institution. A Chief Bureau Officer can make an interim order application to the High Court on an *ex parte* basis. Given the 2005 amendments to the PoCA, applications no longer are brought in the name of the Chief Bureau Officer but rather in the name of the CAB. The applicant bears the initial *evidentiary* burden of proof and must show by the civil standard of proof—balance of probabilities – the following: (i) that a person is in possession or control of property, (ii) that that property constitutes directly or indirectly the proceeds of crime, and (iii) that its value is greater than £10,000 or €13,000 (\$18,000). The applicant files an affidavit stating the requisite belief and the court may ask him to state his belief in oral evidence. If the court is satisfied that there are reasonable grounds to believe that the property in question is the proceeds of crime it will issue an interim order prohibiting the person named as the respondent, and any other person having notice of the making of the order from disposing of or otherwise dealing with all, or if appropriate, a specified part of the property or from diminishing its value during a period of 21 days from the date the order was issued. The interim order will notify parties, or any other person who may be affected by it, of the freezing of property for a period of 21 days, as well as any other conditions or restrictions considered necessary.

To prevent abuse of power and the commission of serious injustice, each phase of the PoCA contains safeguards prohibiting the court from issuing any order to freeze assets when there is a possibility for “serious risk of injustice”, and enables the respondent or any other person claiming ownership of the property to seek a varying or discharging order. The court will issue a discharging order if the respondent is successful in proving that the property subject to the order is not the proceeds of crime or that its value is less than €13,000. The interim order lapses 21 days from the issuance date unless an application for an interlocutory order is brought by the CAB during that period. The Supreme Court, in *McKv. F and other*<sup>225</sup>, held that the application must be brought within 21 days, but it does not have to be actually heard in courts during that period.

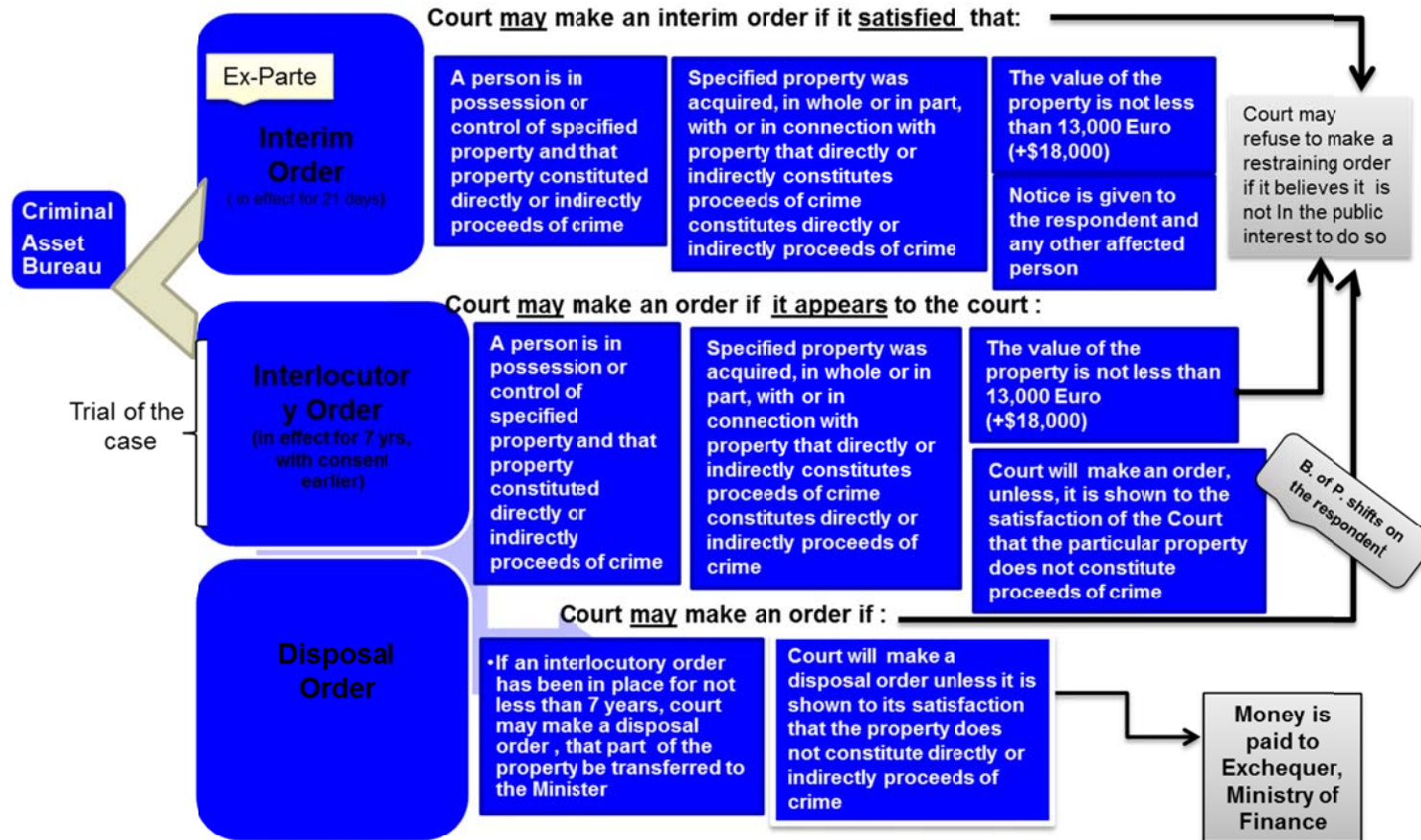
In addition an essential safeguard is contained in Section 16 of the PoCA whereby if an interim or an interlocutory order is improperly made; the Court can order the stat to pay compensation. To date no such order has been made

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<sup>224</sup> Pursuant to Section 3 of the PoCA, the interlocutory order has to be in effect for 7 years, before an applicant can make an application for a disposal order pursuant to Section 4

<sup>225</sup> *McK v F and another*, [2005] IESC 5 (SC)

## Proceedings under Proceeds of Crime Act, Ireland



Filename/RPS Number

***Interlocutory-Restraining Order*** The second phase is the interlocutory order for which the same conditions apply as for an interim order. The applicant is required to tender evidence to the High Court that a person owns or controls property, that the property constitutes the proceeds of crime and that the property value exceeds £10,000 (€13,000). If the court is satisfied that there are reasonable grounds to believe that the property is proceeds of crime as defined it grants an interlocutory order unless the respondent provides evidence proving that the property does not constitute the proceeds of crime or is of lesser value than as required by the PoCA. It also is provided that the court shall not issue the order if it is satisfied that there would be a risk of serious injustice. At any time during an application for a Section 2 or Section 3 order, the court may issue an order, pursuant to Section 9, compelling the respondent to file an affidavit with the High Court specifying the source of the property and any income acquired during the previous ten years (later limited to six years) from the day the proceedings were initiated.

The interlocutory order remains in place until: (1) an application for a disposal order is made; (2) the time has expired for bringing an appeal from that determination; or (3) an appeal is brought and is determined or the appeal is abandoned. Otherwise, the interlocutory order remains in effect for seven years before an applicant can make an application for a disposal order pursuant to Section 4. Under the amendments of 2005, the interlocutory order also can expire before seven years if the parties agree to dispose of the property at an earlier stage, but not earlier than four years. Given that the seven-year requirement is one of the major difficulties CAB officers face, work is in process to propose an amendment to this section to reduce the period of seven years to a more reasonable timeframe.

The Irish Supreme Court, in *McK (F) v. F (A)*,<sup>226</sup> held that the name “interlocutory order” caused confusion, creating an impression that it was a provisional intermediary measure aimed at maintaining the just equilibrium between parties until their rights were substantively determined, implying that the court would determine the substantive issues as soon as reasonably possible, and that at a later stage the entire substance of the material could be reopened. The court went further to say that, while it is true that the court is empowered to issue an order of the type of the Mareva injunction<sup>227</sup>, it is designed to restrain and freeze property without disposing of it. The court outlined five reasons the interlocutory order of Section 3 of the PoCA that did not have the traditional meaning of an interlocutory injunction. First, it is a free-standing substantive remedy imposing a complete embargo on any dealing with property. Second, it is not ancillary to an order to be issued under Section 4. Third, the substantive allegation is that the subject property represents the proceeds of crime and the court must be satisfied of this essential fact at the time it issues an interlocutory order. Fourth, an order is in force indefinitely unless applicants apply for it to be discharged or varied. Finally, given the length of time it must be in effect it is impossible to regard it as interlocutory in the traditional sense. The court held that this was a substantive remedy and not an ancillary order to a Section 4 order. The court also held that it is a final order that completed the Section 3 proceeding. In another case, *Mckv. F and another*,<sup>228</sup> the court clarified that the purpose of the Section 3 order was to freeze the property, not to deprive the owner of it.

As a safeguard, the Irish PoCA empowers the respondent or any other third person claiming ownership of the property or the respondent’s dependents to apply to the High Court to discharge or vary the interlocutory order. If satisfactory evidence is tendered to the court, it may discharge or vary the order as appropriate.

At any time after the court has issued an interim order or interlocutory order the court may, on application by the applicant pursuant to Section 7 of the Act, appoint a receiver giving him or her powers to possess the property and in accordance with the court’s decision to manage, keep possession, or dispose of the property. This was done to avoid potential problems arising from the issuing of an interim or interlocutory

<sup>226</sup>*McK (F) v. F (A)*, [2002] IESC 4 (SC).

<sup>227</sup> Mareva injunction is a court order which freezes assets so that a respondent cannot dissipate their assets until a final disposition order is made.

<sup>228</sup>*Mck v. F and another*, [2005] IESC 5 (SC).

order and to prevent the owner from transferring the property to another jurisdiction dissipating or diminishing its value. The court may give the receiver powers as appropriate in individual cases including the power to take possession of the property to which the order relates and, according to the court's direction, manage, possess, or dispose of or otherwise deal with the property. In the majority of cases, the duty of the receiver is assigned to CAB legal officers.

While an interim or interlocutory order is in force the court may make ancillary or varying orders with regard to the property subject to an order. The court may, on application by the respondent or any of his or her dependents, pursuant to Section 6, issue an order enabling the respondent to cover reasonable living expenses or incurred legal expenses from the restrained property. In addition, the court can issue an order enabling the respondent to carry on a business or a profession involving the restrained property. The applications of these provisions have led to difficulties in a number of cases which prompted the Irish Department of Justice to implement an ad hoc legal aid scheme for the respondents.

**Disposal Order** The final phase is the disposal order or forfeiture phase governed by Section 4 of the PoCA. The interim and interlocutory phases present a transition to the final confiscation of property which is materialized with the disposal order. For the court to issue a disposal order, the interlocutory order must be in place for no less than seven years, and, in accordance with the amendment of 2005, it can be completed earlier if there is consent of all parties concerned (Section 4a of the Act). The law provides two safeguards to protect the property and assets of innocent individuals: (1) the court must give an opportunity to every person claiming that he or she owns parts of the property and who tenders sufficient evidence to satisfy the court that the property should not be confiscated, and (2) the court has the discretion not to issue a disposal order if there is a risk of serious injustice. If the respondent cannot be located, the court may adjourn the hearing of an application for a disposal order for a period not exceeding two years or as the court considers reasonable. The final decision will deprive the respondent of his or her property and transfer the title to the Ministry of Finance or to the exchequer.

Section 8 of the Act contains provisions in relation to evidence and proceedings under PoCA and provides for the admissibility into evidence of the belief of a member of Garda or an authorized officer that the assets in possession or control of the respondent constitute proceeds of crime, provided that the court is satisfied that there are reasonable grounds for the belief. Section 8 provides that a statement made by an authorized officer shall be considered as evidence if the court is satisfied that the officer had reasonable grounds. Subsection 2 of Section 8 provides that the standard of proof required to determine any questions arising under the Act is the civil standard of proof—balance of probabilities. Courts have continually accepted hearsay evidence tendered by the CAB. Further, the PoCA specifies that hearings for an interim order are heard otherwise than in public, and that the respondent can request that any hearing be heard otherwise than in public or *in camera*. Similarly, the court may, if it considers it appropriate, prohibit publication of information under the proceeding, including information related to the application and the persons to whom the application relates.

Further, Section 9 on Disclosure of Information, can be invoked at any time during the application for a an Interim or a Restraining order, which de facto shifts the burden of proof to the respondent to justify the legitimacy of his or her property or assets. The applicant can apply to a court for a Section 9 order, requesting the respondent to file an affidavit with a court specifying: (1) the property of which the respondent is in possession or control, or (2) the income and the sources of the income during such a period (not exceeding ten years) ending on the date of the application for the order, as the court concerned may specify. This order compels the respondent to produce evidence and facts that satisfy the court that the property subject to any of the orders does not constitute the proceeds of crime. The constitutionality of Section 9 has been challenged by respondents, but was upheld by the Supreme Court. Although the court recognized PoCA's far reaching character, it went further to consider it an appropriate measure against the sophisticated methods of operation adopted by criminals.

Sections 10 through 14 of PoCA deal with matters such as the registration of interim and interlocutory orders, the situation where a respondent is bankrupt and the winding up of a company in possession or control of property subject to any of the orders. Section 15 empowers a member of Garda or a Customs and Excise Officer to seize property that is the subject of the order. Section 16 provides for the granting of compensation to a respondent or any third party with an interest in the property if an interim or interlocutory order was wrongfully issued. The party making an application for compensation must satisfy the court that he or she is the owner of the property (or part of the property) and that the property does not constitute proceeds of crime.

Under the amendments of 2005, a new remedy for corrupt enrichment was introduced, empowering the court to issue an order, on application by an authorized officer, directing the respondent suspected of committing a corruption offense to pay to the Minister of Finance or another entity an amount of money equivalent to the suspected value of the enriched corruption. The court will issue such an order if it is satisfied that the respondent has benefited from his or her position or has, by virtue of exercise of his or her position, benefited some other person and if he or she does not account satisfactorily for the source of his or her income and property. In such a case, the court will presume that the property is derived from a corrupt enrichment unless the contrary is established.

### Investigations and Search

Unlike Australia and many other jurisdictions (e.g., Canada, New Zealand), Ireland does not have coercive investigative powers incorporated in the PoCA of 1996; but these powers are granted to the CAB. Section 14 of the CAB Act authorized it to search, seize, and detain any property if there are reasonable grounds to suspect that the property may constitute proceeds of crime. Pursuant to Section 14 of the Act, a district court judge, or in urgent cases, a bureau officer who is a member of Garda not below the rank of superintendent, may issue a warrant for the search of that place and any person found at that place on hearing evidence by police under oath and being satisfied that there are reasonable grounds to suspect that evidence related to assets or proceeds derived from criminal activities are to be found here. In addition, the officer also is authorized to retain any materials found at the place or in possession of a person found at that place which the officer believes to be evidence related to the assets in question. A search warrant expires after seven days from the moment it is issued. In addition, the CAB can issue examination and production orders requesting any person to respond to that order. According to CAB officers, monitoring orders have not been used so far although there is nothing in the legislation preventing their use. If any person fails to respect the order, or obstructs the officer in carrying out his professional duties, he or she can be fined or imprisoned for a period not exceeding six months or both. In addition, the CAB is authorized to arrest any person if they have reasonable cause to suspect that person is committing or has committed an offense under the Finance Act.

CAB officers conduct investigatory work on all civil confiscation cases. Cases are referred to them by the regular police. On completion of an investigation the results are submitted to the DPP which makes a determination based on the evidence whether or not to initiate a criminal proceeding. A decision to bring PoCA proceedings or tax action is a responsibility of the CAB.

An important feature of the 1996 PoCA is the authorization of the CAB to apply the powers of the Tax Act and the Ministry of Social Welfare, ensuring that the proceeds of criminal activity or suspected criminal activity are subject to tax and that the Revenue Acts are applied fully to such proceeds. The provisions of the Disclosure of Certain Information for Taxation and Other Purposes Act of 1996 have been used extensively in the exchange of information between the Revenue Commission and the CAB. The CAB has initiated financial investigations based on information received from the Revenue authorities and the Revenue authorities have used information resulting from financial investigations conducted by the CAB. The implementation of the tax action on suspected proceeds of crime was forecast to be an extremely effective weapon in the process of taking the benefit from crime. Tax action was usually the third option after criminal prosecution/confiscation and PoCA action. Taxation powers were



used in cases in which even under the PoCA proceedings were not successful. Some of the largest criminals were successfully targeted under the taxation powers<sup>229</sup>. Again on the social welfare side the public greatly appreciated the fresh approach in depriving obviously wealthy criminals of social welfare benefit which they were claiming wholesale.

### 3.2.2.1 Evaluating the Effectiveness of Ireland's UWOs

#### Effectiveness of the Proceeds of Crime Act

After 14 years of implementation of the PoCA in Ireland, there are ample data on the cases instituted under it and the body of jurisprudence developed by the Irish courts. This section evaluates the impact of the PoCA and its effectiveness in combating organized crime in Ireland. Recognizing the difficulty of evaluating the effectiveness of the law in a precise way, the study team took a two-prong approach: (1) assess the effectiveness of the Act from the available statistics by reviewing the number of applications made under the Act, the number of successful applications that led to forfeiture, the number of decisions overturned by higher courts, and the total value of assets forfeited to the state. In addition (2), being aware of the difficulty in assessing the impact of the Act in fighting and preventing crime, the team interviewed people and agencies directly involved with the PoCA and the CAB Act who were well able to express informed opinions on the impact of the Act. In this regard, the team interviewed former and current representatives of the CAB, the DPP, defense bar, academics, and police and reviewed media coverage of activities of the CAB and cases brought under the PoCA.

All interviewees expressed certainty that the PoCA has had a significant impact on dismantling and disrupting criminal activities in Ireland. It is widely believed (and anecdotally reported) that during the first five years of implementation of the Act, those engaged in criminal activities experienced a significant setback, whereby many criminals and principals of criminal organizations were deprived of their illegal profits and properties. It is important to highlight that the success of the Act often is attributed to the CAB which played a major role in making the PoCA a success. The Irish approach to attacking proceeds of crime has served as a model for other countries; indeed, during the site-visit to Australia, the research team learned that the Australian federal government is using the Irish CAB as a model to design a multiagency task force to implement its PoCA. In addition, other countries—South Africa, United Kingdom, Seychelles, Bulgaria, and others—have used the Irish PoCA as a model to develop non-conviction based forfeiture legislation in their countries as an approach to attack proceeds derived from criminal conduct.

The initial strategy of the CAB was to target well-known criminals and the principals of criminal organizations who were engaged in criminal activities and had accumulated large amounts of property with no apparent legitimate sources of income. These were criminals who had been on the radar screen of law enforcement for a long time, but on whom there was insufficient evidence to lead to a criminal conviction. Early CAB actions led to seizure and restraining of sizable property considered to constitute proceeds of crime. The immediate success was ascribed to the fact that those engaged in criminal activities were not skilled and did not see a need to hide the proceeds of their criminal conduct. The only remedy available to the state before the PoCA was to confiscate proceeds deriving from a specific offense following conviction of the defendant for that offense. Because the principals of criminal gangs distanced themselves from criminal activities the risk of potential prosecution and confiscation was nonexistent. This situation enabled them to freely enjoy their illegally acquired wealth. This situation changed noticeably with introduction of the PoCA and the CAB Act. The subsequent response of criminal groups was to relocate their operations in neighboring countries (e.g., Holland, Spain). In its 2004 annual report, the CAB noted that there was an increasing trend of criminals moving large amounts of cash to other jurisdictions to avoid seizure. One of the academics interviewed<sup>230</sup>, although expressing dissatisfaction

<sup>229</sup> Well known criminal Gerry Hutch alias “The Monk” was successfully targeted.

<sup>230</sup> Interview: Dr. Colin King, University of Leeds (May 5<sup>th</sup>, 2011)

concerning the lack of an assessment of the impact of the PoCA on combating organized crime and its current focus on numbers, still stated that “it is safe to say that the establishment of CAB and the enactment of PoCA has had significant impact, particularly in driving many criminal figures out of Ireland, but there is also the issue of that vacuum being subsequently filled by other crime gangs, or indeed whether the criminals in exile are simply running their operations from the likes of Spain and Holland”.

The relocation of criminals to other countries has not had as much effect as initially contemplated because most of the criminals have maintained their illegal operations in Ireland, but at the same time are out of reach of the justice system. However, there are examples where the CAB has instituted proceedings for forfeiture of assets in Ireland in absence of a person. An example of such a case is *M v. D*, where a procedure was instituted against an alleged drug dealer to forfeit the person’s property in Ireland. The overall opinion is that the PoCA has had an impact on decreasing crime rates in Ireland and, in particular, on disrupting drug trafficking operations.

After the initial operations of targeting the principals of criminal organizations, partly because of the jurisdiction issue, the CAB shifted its strategy to pursuing small and middle ranking criminals. CAB adopted a strategy to pursue cases that have a large impact in community, regardless of the size and the value of the recovered property. They targeted drug dealers living easy lives, driving expensive cars without legitimate employment. In this regard the CAB forfeited numerous properties including high end vehicle owned by drug dealers. This approach according to the CAB has had a significant impact in the community as one of the interviewees stated “mothers would be able to point to their growing children and say that crime does not pay.”

Finally, the team heard that the significant impact the CAB had at the beginning is starting to diminish. Fourteen years of operation had led to successful disruption of criminal organizations and activities and there is less for the CAB to do. Also, criminals are becoming more skilled and better at concealing their operations and their proceeds through money-laundering activities. However, the conclusion of the team is that the PoCA has been effective in combating organized crime and to some degree acting as a deterrent to future engagement in criminal activities.

An advantage of assessing the statistical data of the PoCA is that all of the information on forfeiture of assets is collected and published by the CAB on annual basis and most of it is easily accessible.<sup>231</sup> However, there are a number of problems related to data that make it difficult to give precise figures on monies forfeited to the state. One difficulty is that the information on monies recovered before 2001, when Ireland entered the Euro zone, replacing the Irish Punt with the Euro, makes it difficult to give an accurate overall figure of funds forfeited to the state over the past 14 years.<sup>232</sup> Further, because most of the cases instituted by the CAB are settled, the available data are not disaggregated by number of cases settled versus those tried. Therefore, readers must bear in mind these limitations when reading the report.

The conclusion that was drawn from the information presented in Table 6 is that over the 14 years of PoCA implementation, the CAB has used the PoCA extensively to attack the proceeds of crime. From 1998 through 2009 (date of the last annual report), the CAB has made 107 applications for an interim order and 110 applications for an interlocutory order, which have resulted in 68 disposal orders. As shown by the numbers available, the CAB initiated each year an average of ten cases (except in 1999, when it made only one application for an interim order and three applications for interlocutory orders). The data

<sup>231</sup> Note: CAB Annual Reports from 2002 to 2009 are available online. Annual Reports from 1998 to 2001 are not available online, data were collected during team’s trip to Ireland.

<sup>232</sup> Because we do not have the exchange rate of the Irish Punt to the US dollar during those years, we converted all numbers from both Irish Punts and Euros to Dollars based on current rates. Thus, the numbers given for the earlier years are not to be considered as precise amounts forfeited to the state. The decision to use the conversion was made to give general and approximate numbers for the funds forfeited to the state.

show that out of 110 restraining orders, 68<sup>233</sup> have led to successful forfeiture of assets to the state. It is important to note that one element that affects the CAB's efficiency is that an interlocutory order must be in effect for seven years before the property can be forfeited to the state, unless the parties agree to dispose of it earlier, as provided for by the 2005 amendments of the PoCA. Therefore, there is not a direct correlation between the number of restraining orders and the number of disposal orders because the numbers of final dispositions include only the cases finally disposed. Also, the number of interlocutory orders includes cases that may have been disposed of through the tax powers as well as active cases (i.e., still on trial). Furthermore, in looking at the earlier years of the PoCA (1998–2003), no assets were forfeited to the state. The first forfeiture took place in 2004, seven years after the Act was implemented. Thus, there is a trend from 2004 onward that the number of disposal orders is higher than the number of interlocutory orders or even.

**Table 6: Number of Applications Made Under the Proceeds of Crime Act**

	Total Number of Orders											
Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>Interim Orders</b>	7	1	5	4	12	11	10	10	7	16	24	17
<b>Interlocutory Orders</b>	6	3	7	13	7	6	10	11	9	8	14	16
<b>Variation Orders</b>						NA				2	2	2
<b>Disposal Order (S4)</b>						NA	2	13	3	3	2	7
<b>Disposal Order (S4 A)</b>									14	4	11	9
<b>Receivership</b>		2	6	12	7	9	15	13	8	11	25	20
<b>2007</b>												
<b>Total Forfeiture Orders</b>	0		0		0		2	13	17	7	13	16

The total amount of assets forfeited to the state (converted to \$US) since 2004, when the first forfeiture took place, is \$15,744,100. On average, as shown in Table 7, each year the CAB forfeited from €1.5 million (approx. \$US2M) to €3 million (approx. \$US4M) to the state, with the largest amount of funds forfeited to the state in 2006 and the smallest amount in 2004. From the numbers of applications (Table 7), it can be concluded that CAB activities were consistent, with approximately the same number of applications being made each year (except for 1999).

One of the CAB's most effective weapons is its tax powers, the ability to tax property derived from crime. The largest amounts of funds collected by the CAB are under its revenue powers. Since 1998 (period of 14 years), the CAB has forfeited to the state a total of US\$160M.

<sup>233</sup> The number of 68 orders include only number of the Proceeds of Crime orders made by the court. In this number are not included tax and social welfare orders that are also used to target proceeds of crime. The reason why these orders are not included is because such data do not exist, the only information available is the lump sum of monies recovered through these schemes.

**Table 7: Amount of Funds Forfeited to the State from 1998 to 2009**

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>Disposal Order (S4)</b>	€	€	€	€	€	€	€276K	€2,003K	€685K	€907K	€785K	€870K
<b>Disposal Order (S4 A)</b>	€	€	€	€	€	€	€	€	€2,537K	€28K	€2,017K	€393K
<b>Total Forfeited</b>	€	€	€	€	€	€	€276	€2,003K	€3,222K	€1,435K	€2,802K	€1,263K

Recovered funds using the tax powers include tax and interest collected on income, capital gains, value added tax (VAT), and corporation tax. The largest amount collected is under the income tax, followed by the VAT and the corporate tax. It is important to note that a number of proceedings instituted under the PoCA could also have resulted in taxation of those proceeds in addition to forfeiture of the property, or, if unable to forfeit property, unpaid taxes would be collected. Smaller amounts of funds were recovered through the powers of social welfare, totaling about \$9 million overall.

As noted in Table 6 and Table 7, monies recovered under the PoCA are not large. However, if they are looked at in combination with the money recovered from the tax powers available to the CAB, it substantially increases the total amount of funds forfeited to the state. On average as it can be seen from the Table 8, the CAB received €-7 million. In 2007 for example, the CAB received from the state an annual budget of €1M (US\$7.2M<sup>234</sup>) and they forfeited to the exchequer €10M (UA\$ 14M), of which €1.4M (US\$1.9M) were from the PoCA. However, it is important to note that there is not a direct correlation between the CAB's budget and the funds recovered under the Proceeds of Crime Act, as the funds are used to investigate and pursue cases under revenue and social welfare powers attributed to the CAB. In general it could be concluded that the CAB has recovered substantially more assets than it has received from the Parliament, with largest amounts of funds are recovered from the revenue powers. Substantial amounts of tax, running to many millions of Euros, were paid in by individuals with a greater or lesser connection with crime voluntarily. This was perceived to have motivated the CAB's involvement in targeting proceeds of crime through revenue provisions. And finally it is important to note that the success rate of the implementation of civil forfeiture to date is almost 100 percent, with two cases not leading to forfeiture.

<sup>234</sup>Conversion rate: €=US \$1.41, on July 12<sup>th</sup>, 2011

**Table 8: Annual budget of the CAB and funds recovered**<sup>235</sup>

Year	CAB Annual Budget €	US \$	Forfeited to the Exchequer	US\$
2004	€5,675,000	\$8,014,746	N/A	\$0
2005	€5,246,000	\$7,408,873	€18,500,000	\$26,127,365
2006	€5,205,000	\$7,350,969	N/A	\$0
2007	€5,108,688	\$7,214,949	€10,000,000	\$14,122,900
2008	€7,509,000	\$10,604,886	€12,000,000	\$16,947,480
2009	€6,877,000	\$9,712,318	€6,600,000	\$9,321,114

As stated previously, the success of PoCA is attributed to the excellent multidisciplinary teams of the CAB, composed of members of Garda, Revenue Commissioners (including tax and customs officers), and employees of the Department of Social, Community and Family Affairs, who operate under the guidance of the Chief Bureau Officer (CBO) selected from the ranks of senior Garda. In addition, the CAB has a Legal Officer who reports directly to the CBO as well as administrative and technical staff who support CAB operations.

The CBO is appointed by the Commissioner of the Irish police; the CAB Legal Officer is appointed by the Minister for Justice, Equality and Law Reform, with the consent of the Attorney General. Similarly, representatives of the Revenue, Social Welfare, and Police are nominated by their respective organizations and appointed by the Ministry of Justice. There was a substantial effort made to attract and retain highly motivated, qualified, and skilled members for the CAB, using such incentives as danger pay and anonymity provisions to safeguard the identity of CAB members and their families.

What makes the CAB unique is that it brings together the powers of, and personnel from, three different agencies under the umbrella of an independent agency who work together to combat organized crime. That is, the members of the CAB—police, revenue, and social welfare officers—retain the powers and duties vested in them within their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime from three different aspects, forfeiting property constituting proceeds of crime, taxing it, and denying social welfare payments to the respondents who own or control such property. In this regard, the CAB has access to the police database PULSE<sup>236</sup> (containing comprehensive information on any individual on purchases, misdemeanor offenses, and other activities), tax, and customs and social welfare records, which enables the CAB to gather large and comprehensive amounts of information on any individual targeted by the CAB. The CAB's access to such a large body and variety of information is considered one of its most formidable powers, and it is said that it creates an uneven playing field for respondents and their attorneys. In addition, when bringing a tax assessment application against a person the CAB, it is permitted by the statute not to share the sources of information with the respondent making it difficult for the respondent to challenge the allegations of the CAB and to discharge the burden of proof. However, the CAB's reputation according to our interviewees is stellar, and it is considered a highly professional, skilled, and serious organization.

The CAB has a total staff of 60–80 employees that has been maintained for a number of years since the CAB was established, although the number of employees at the earlier days was around 40. Within the CAB are four teams, each of which includes Bureau's investigation representatives from customs, the police, and tax and social welfare. Each team has a team leader, who usually is a member of the police.

<sup>235</sup>Funds received and recovered from 2004 to date. Only figures since 2004 have been selected since the first property under the PoCA was forfeited in in 2004, seven years after enactment of the PoCA.

<sup>236</sup> Police Using Leading Systems Effectively (PULSE) is a database of the police force of the Republic of Ireland.

The CAB also engages highly skilled computer technicians and forensic accountants to assist with the case work and has trained asset profilers throughout the ranks of the Irish police who are the primary source of information for new cases. In addition, the CAB can draw on specific expertise when needed by calling lawyers, bankers, and other professionals. Resources, financial and human, did not seem to be an issue for the CAB.

The High Court appoints a judge to work on civil forfeiture cases for a period of at least two years, assisted by a special registrar. This is considered one of the major factors contributing to the high success rate of civil forfeiture proceedings. However, it is important to note that some cases have dragged on for a long time delaying confiscation indefinitely.

As stated previously, the CAB has a stellar reputation, and often, when problems arise in other areas outside the purview of the CAB, there are references made to engaging the Bureau to resolve arising problems, i.e., citizens ask, “Where is the CAB” even though the problem is outside of the area of its operation. In this regard, with the 2005 amendments to the PoCA, the CAB’s powers were extended to deal with politicians who profited from corruption (e.g., bribery for land rezoning, allocation of specific licenses to individuals or corporations). It is difficult to determine from the available statistics if any cases of corruption have been instituted to date.

The CAB worked hard to establish its reputation and continues to work hard to maintain it. There are several factors that play a part in this reputation. One, it selects highly skilled and committed team members. Two, it carefully screens and selects the cases it will pursue, scrutinizing each case against three criteria: (1) feasibility; (2) assets, and (3) criminality. That means that for the CAB to pursue a case there must be sufficient evidence to raise a reasonable suspicion that the person has been engaged in criminal activity. This does not impose a requirement of a predicate offense. It means only that there must be sufficient grounds to lead the CAB to believe that the person is engaged in criminal activity. The other two criteria are related to assets the person owns or possesses and the feasibility of the case. The first scrutiny of the case is performed by one of the teams and the team leader; the second filter is the team leader and the Bureau’s Legal Officer; and the third filter is the Chief Bureau Officer. The CBO makes the final decision on each case. This deliberate and careful selection of cases has had a positive impact on the efficiency of the CAB’s work as well as its reputation. This has resulted with more than 90% success rate of concluded cases. Only two decisions have been overturned by the Supreme Court.

Although the CAB has played a large part in making civil asset forfeiture a success, the PoCA itself also has merit. The law is well drafted and is broad enough that it vests sufficiently broad powers on the CAB that enable it to attack the proceeds of crime from many angles. The team was told that the way PoCA is structured there is not much what the Bureau could not do. Obviously, although this has been an advantage for the CAB, it has been considered abuse of power by the state<sup>237</sup>, as a result causing inequality of arms whereby the respondent must face a powerful organization with unlimited resources and access to any information available.

The strengths of the PoCA are: (i) it is a comprehensive forfeiture law that enables the CAB to forfeit proceeds derived from any criminal conduct; (ii) it does not have a requirement of a predicate offense, it is sufficient for the state to show that there are reasonable grounds to believe that the respondent has been engaged in unlawful activity; (iii) it reverses the burden of proof onto the respondent to show the legitimacy of his or her assets; and (iv) it provides for a discovery order, whereby a court can order the respondent to disclose any assets he or she owns or controls and their source.

*In rem* civil forfeiture is not new to Ireland, but civil forfeiture of proceeds of crime has introduced a new approach to attacking tainted property derived from criminal conduct. With the introduction of the PoCA, Ireland created comprehensive forfeiture legislation that enabled the state to forfeit property or assets constituting proceeds of crime derived from any type of offense. A large majority of civil asset forfeiture

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<sup>237</sup> Interview with Dara Robinson, Dublin, June 10<sup>th</sup>, 2011.

provisions in the U.S. are found in numerous laws and statutes and are subject of different rules. In Ireland, this has been resolved with an all-inclusive forfeiture scheme and creation of a statutory entity solely responsible for implementing the PoCA.

There is an ongoing debate whether the PoCA is an *in rem* or an *in personam* forfeiture scheme. The Act has a requirement that to commence any proceeding, a person who is in control or possession of property must be identified. An exception is provided when the owner cannot be identified or has absconded. In all other cases, applications for any of the orders can be brought against the person/property owner and any property that the person owns or controls if he or she cannot show that the property was lawfully obtained. However, the Irish courts have held that the proceedings are *in rem* because they target the property and not the person, so no action is taken against the person and no sanction is imposed. Further, the absence of a requirement to establish a nexus between an offense and the property leads to the conclusion that the PoCA targets criminal conduct of a person and the property related to criminal conduct. Thus, the CAB does not have to prove that specific funds were derived from a specific offense and were transferred or used in acquiring a specific property. It requires only that it be shown that a person has been engaged in criminal conduct and that he or she has lived beyond his lawful means. These two elements are the key elements that make a proceeding an *in personam* proceeding, as the Act is not construed to deal with instruments of crime and the proceeds derived from commission of a specific offense. The Act is construed more broadly to target the property of the person engaged in criminal conduct. Although the argument of the courts that this is not a sanction imposed against the person is true, it is nonetheless a measure that is imposed against an individual.

The reversal of the burden of proof onto the respondent is controversial and highly challenged around the world. Many other countries have contemplated introducing the reversal of the burden of proof onto the respondent, who is in the best position to justify the legitimacy of the property. However, because the controversy and the belief that it violates fundamental principles of human rights—presumption of innocence—many countries have withdrawn it, and the PoCA was often criticized by the European Union as too far reaching and radical. However, in reality and in practice, the reversal of the burden of proof is less controversial and not as harsh as it is thought to be. First, for the burden of proof to shift onto the respondent the state must meet its burden, known in Ireland as the evidentiary burden of proof.

As the team witnessed, both in Ireland and in Australia, the evidentiary burden of proof the state must meet has a higher threshold than that of the respondents. Whether this is a result of the work of the CAB or the Australian DPP, it is difficult to ascertain, but we have repeatedly heard that the courts have played an important role in raising the bar. The CAB is careful to prepare high-quality and convincing evidence for each case because CAB personnel know that the courts will judiciously scrutinize and demand convincing and persuasive evidence. The quality of the affidavits and the evidence put together by the CAB for each case is of exceptional quality. Members of the defense bar (barristers) recognized this, stating that although they had issues with the way the statute was construed regarding the powers of the CAB, the work of the CAB was highly professional.

An application for an interim order or an interlocutory order prepared by the CAB presents a comprehensive overview of the respondent's lifestyle, presenting reasonable grounds to suspect that a person has been engaged in criminal conduct. These statements can be supported by the statements of the Chief Bureau Officer, police officers, and any other person. Further, the affidavits are supported by evidence prepared by forensic accountants on the basis of lifestyle analysis (income and expenditure), banks and other financial institution records, revenue records and social welfare, as well as criminal activity. All the evidence is presented to the court when an application is made. However, this is not sufficient to shift the burden of proof onto the respondent. During the hearing, the court must determine the credibility of the evidence according to the standard set by Justice McCracken in *McK v. D*,<sup>238</sup> where it was held that Section 8 of the Act envisages a two-stage process for evaluating the evidence; initially,

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<sup>238</sup>*McK v. D*, [May 2004], Unreported case (transcript of hearing).

the court hears the evidence and invites the applicant as well as the respondent to cross-examine the witnesses, and then the judge determines the weight he or she will attach to the testimony. Only when a judge determines that the evidence is credible does the burden shift onto the respondent. Thus, the respondent is given an opportunity to cross-examine the witnesses and to challenge the allegations made by the CAB before he or she bears the burden to establish the legitimacy of the property subject to a proceeding. Thus, the state must meet a higher threshold of the burden of proof before it shifts the burden onto the respondent to rebut the state's allegations. However, opponents of the reversed burden of proof hold that the state, with its powers and access to considerable resources, has far greater possibilities to present evidence against an individual who may lack the knowledge, information, and resources to counter the state's allegations. On the other hand, the reversal of the burden of proof in a civil proceeding does not violate the presumption of innocence because no one is pronounced guilty, or tried for commission of a specific offense. This is a civil proceeding and the principles of the criminal law such as presumption of innocence are not applicable. Furthermore, in practice, the burden shifts onto the respondent only after the court is satisfied that the person has acquired property through illegal activities, regardless what those activities are or when they occurred.

Finally, one of the distinctive features that makes the PoCA unique is Section 9, or disclosure orders. This provision provides that a court, on an application by the CBO, can direct the respondent to disclose all properties and incomes that he or she owns or possesses, and their sources. The statute does not foresee any sanction if the respondent does not comply. However, the inherent powers of the court apply, whereby a person can be held in contempt of the court, or, if he or she provides false information, can be charged with an offense. The severe nature of the disclosure order, otherwise known as discovery, has been recognized by both the CAB and the courts. The CAB has rarely invoked this power, and only a few applications for a discovery order have been made. The courts have ruled that when a discovery order is made use of the information must be limited to civil forfeiture proceedings; it cannot be used to make criminal charges against a person. The DPP is required to give an undertaking that the material will not be used in a criminal prosecution of the person in this regard.

Assets forfeited by the CAB are transferred to the Exchequer. Part of the funds can be used to cover the reasonable legal expenses of the respondent as well as to cover the receiver's costs for managing and maintaining the property, as well as payments to other countries party to a proceeding or paying the victims of offenses. Unlike many state forfeiture programs in the U.S., none of the funds forfeited are transferred to the CAB because of a perceived conflict of interest.

The general sentiment of the public is that the CAB has not abused the powers available to it, and has always, with exceptions, targeted those known for their criminal activities. Our search of media reports found little criticism in regard to cases instituted by the CAB that have led to forfeiture of assets.

The PoCA legislation is perceived as being well construed but it does have flaws and the CAB has taken actions to amend it. First, the PoCA was amended in 2005 allowing for the forfeiture of proceeds deriving from crimes committed outside of Ireland. Although it was considered that this was provided for in the original Act, the court ruled that proceeds of foreign offenses could not be the subject of a proceeding in Ireland.

The second perceived weakness of the PoCA is the requirement for a restraining order to be in place for a period of seven years before the property can be forfeited. An attempt to remedy the situation was made in 2007, when the Act was amended to allow for forfeiture of property with mutual consent of the parties, before expiration of the seven-year period. However, problems continue. Having a property under a restraining order for a long period of time may result in possible depreciation and devaluation of the property and it also requires resources and assets to be monitored and managed. In particular, property under a restraining order may continue being used by the respondent or his or her dependents. In addition, the global financial crisis has depreciated the value of non-fungible property under restraining orders. Therefore, the CAB is in the process of preparing a draft proposal to reduce the time period required for



an interlocutory order to be in effect from seven years to two years, and to maintain the provision that provides for disposition of property with the parties' consent.

The CAB identified an issue that requires attention: its ability or lack of ability to dispose of property while the interlocutory order is in effect. That is, maintaining and controlling the property often has become strenuous and expensive for the CAB because resources are used to maintain a property that may not be worth it. Thus, the CAB seeks to amend the Act and incorporate a provision that enables the CAB to dispose of certain properties and deposit funds in an account until final disposition of the case.

An impediment the CAB faced at the onset was coordination and access to tax records. The revenue code limited the use of tax records for purposes of tax administration, preventing revenue officers from sharing them with CAB officers. However, the situation was remedied with the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996, which amended the code to facilitate the assessment and collection of taxes by a body like the CAB. The most important amendment is the provision to the 1994 Act that permits the exchange of information between the Revenue Commissioners and the Irish police in appropriate circumstances.<sup>239</sup>

Other challenges faced on the course of implementation of the PoCA were: (i) delays in final disposition, (ii) delays at the court due to a large backlog of cases at the Supreme Court, and (iii) difficulty in obtaining sufficient admissible evidence that would lead to asset forfeiture and lawyers have used the process to avoid confiscation. Provisions have been made to ensure sufficient protection for the respondent and any innocent owner, but this feature has and is being abused by respondents and their attorneys. There are a number of cases that have been in the courts for more than 14 years; for example, Gilligan, which is one of the earlier cases brought under the PoCA. The most recent decision was made in January 2011, to which there is an appeal in the process. However, the abilities to remedy the situation are limited.

The PoCA was and continues to be subject to criticism by academics, the defense bar, and others, including European countries that consider civil forfeiture to be a drastic response to crime. The broad nature of the Act has been recognized by the Irish Supreme Court as well as by other courts, but they have justified it as a measured and proportionate response to the crime and the threat it poses to society. On the other hand, academics believe that it is a fundamental breach of traditional justice violating the right to due process and is open to abuse.<sup>240</sup> Similarly, members of the defense bar believe that powers vested in the CAB are too far reaching and create a gross imbalance of power between the respondent and the state.<sup>241</sup> It has been especially criticized for the investigative power of the CAB. This power derives from the combination of revenue, police, and social welfare, and access to a large amount of information, a powerful weapon in the hands of the CAB. Critics state that this power discriminates against the individual party to a proceeding. Although it was stated that there is not a sentiment that the CAB has abused these powers, it is believed that the CAB uses them extensively to investigate and pursue proceeds of crime cases.

Defense bar members also criticize features of the PoCA that the CAB considers critical to successful application of the Act. These features include the admissibility of "belief evidence" or a statement by an authorized officer that there are reasonable grounds to believe that the respondent owns or controls property that is proceeds of crime. They further criticize the provisions safeguarding the anonymity of the CAB members as well as that of witnesses on whose information the CAB relies, and the use of the PULSE database for information. The defense bar also claims that the PoCA breaches fundamental property rights.

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<sup>239</sup> Felix J. McKenna and Kate Egan, "Ireland: A multi-disciplinary approach to proceeds of crime," p. 52–92, in Simon N.M. Young, *Civil Forfeiture of Criminal Property*, 2009, Edward Elgar Publishing, Inc.

<sup>240</sup> Interview: Demot Walsh, Professor of Law, University of Limerick (March 4<sup>th</sup>, 2011)

<sup>241</sup> Interview: Dara Robinson, Barrister, Ireland (May, 10<sup>th</sup>, 2011)

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In most cases, the main concern expressed by legislators, legal professionals, and others is the potential for abuse of power under the PoCA. In the study's review of a considerable amount of case law, and during the team's interviews with representatives of various agencies, this concern was never expressed, nor were there cases in which there was a potential for abuse. Further, during the past 14 years of implementation there have never been accusations or media reports of potential abuses of the Act. This speaks highly of the professionalism of the CAB officers and the cases they chose to pursue.

Finally, the PoCA has been highly targeted on and limited to specific areas of criminal activity. The major areas of criminal activities against which the Act has been used are drug-trafficking offenses, financial fraud, VAT fraud, corruption, and corporation offenses.

In Ireland, both the anecdotal and statistical evidence lead us to believe that the PoCA and the CAB, with its extensive powers, have had an impact in reducing criminal activities in Ireland. Statistics show that the CAB has used these powers extensively and quite effectively. The available data on the number of cases commenced by the CAB and the number of orders made, as well as the successful application of the cases, show that the CAB has continued to work consistently in attacking proceeds of crime and that it is doing so successfully.

## Irish Case Law

Since enactment of the PoCA in 1996, Irish courts have developed significant jurisprudence on it, clarifying and interpreting provisions of the Act, delineating timelines, and providing future guidance for the CAB and the respondents. The courts have on many occasions recognized the broad nature of the legislation permitting a person to be deprived of his or her property based on allegations supported by hearsay evidence. Nevertheless, they continue to uphold its constitutionality holding that the PoCA is a proportional response to the risk society faces from serious and organized crime. The structure and the workings of PoCA have been justified on the grounds that professional criminals have adopted sophisticated means to conceal the proceeds of their criminal activities from authorities and the state should respond proportionately.

PoCA also has been challenged by respondents on the basis that it does not uphold the fundamental rights guaranteed under the European Convention of Human Rights (ECHR). Irish courts have contended that the decisions of the ECHR cannot present grounds on which local legislation can be declared unconstitutional. The Judge of the High Court, in *Murphy v. GM PB PC Ltd*,<sup>242</sup> held that, “I am bound by the repeated decisions of the Supreme Court that the European Convention of Human Rights is not part of the domestic law of this jurisdiction.” He added that most of the protections afforded by it were already enshrined in the Irish constitution.

The constitutionality of PoCA was challenged on the grounds that it was ersatz de facto civil law and that it violated the constitution because it did not uphold the rights guaranteed by it such as the presumption of innocence, privilege not to self-incriminate, and the right to private property. Whenever reviewing the constitutionality of PoCA of 1996, as well as other Acts passed by the Oireachtas (the Irish parliament), Irish courts have followed a number of principles stipulated in *East Donegal Co-operative Limited v. Attorney General*<sup>243</sup>, cited in *Gilligan v. CAB*,<sup>244</sup> where it was stated that the court would consider the challenged provisions constitutional until the contrary was clearly established by the respondent. The court would always favor the provisions in case of doubt and would not declare them unconstitutional if they could be construed to be in accordance with the constitution. It would be presumed that it was the intention of the legislators for the proceedings to be in accordance with the principles of constitutional justice. However, in *Murphy* the court held that because of the circumstances in which the Act was passed, the presumption of constitutionality in this case was less strong than in other cases. However, the court added that the presumption of constitutionality arises from the obligation the courts have toward the Oireachtas legislators.

Another challenge was that in substance, it was a criminal law without the protections afforded by the criminal law, such as presumption of innocence and application of the standard of proof—beyond reasonable doubt—required in criminal cases. The High Court, in *Murphy v. GM PB PC Ltd*,<sup>245</sup> upheld the civil nature of the Act and reasoned that the proceedings under the Act do not contain the “indicia of crime” as prescribed by Justice Kingsmill Moore J., in *Melling v. O’Mathghamhna*<sup>246</sup> where it ruled that no one is charged with a criminal offense, there are no prosecutors, no offense is created, no sanctions are imposed, and there is no *mens rea*. The court further held that forfeiture under the PoCA is an *in rem* proceeding and that forfeiture does not constitute a penalty or a punishment but that it is a measure imposed on the respondent whose aim is to restore or remedy the situation. This conclusion was further supported in *Goodman v. Hamilton*,<sup>247</sup> stating that there is nothing in the Irish constitution requiring that charges be brought only in one of the proceedings. Similar contentions were made by the respondent in

<sup>242</sup>*Murphy v. GM PB PC Ltd*, [1999] IEHC 5 (HC).

<sup>243</sup>*East Donegal Co-operative Limited v. Attorney General* [1970] IR 317

<sup>244</sup>*Gilligan v. CAB*, [1997] 1 IR 526 (HC).

<sup>245</sup>*Ibid.* at 26.

<sup>246</sup>*Melling v. O’Mathghamhna*, [1962] IR 1 at pp 24/25.

<sup>247</sup>*Goodman v. Hamilton* (No. 1), [1992] 2 IR 542.

*Gilligan v. CAB*<sup>248</sup> but the court dismissed the claims, relying on the authority of the decision of the Supreme Court in the *Southern Industrial Trust*<sup>249</sup> case which established that forfeiture proceedings are not necessarily criminal in nature. It was further held in *Gilligan* that there is no constitutional bar on the determination in civil or other proceedings of matters that may constitute elements of criminal offenses and affirmed that the proceedings under the PoCA are civil in nature. The court, in *Murphy v. M(G)*<sup>250</sup> even relied on several U.S. Supreme Court decisions<sup>251</sup> contending that proceedings under Sections 3 and 4 are civil proceedings.

In reviewing whether or not enactment of the PoCA was a proportionate response to the threat posed to society, the High Court, in *Gilligan*, held that the legislature was justified in enacting the PoCA of 1996 restricting certain rights through the Act. The court held that the Supreme Court and the High Court “have accepted the principles that rights, even constitutional rights, are not absolute, but may be restricted where required by the common good or the need to protect society.”<sup>252</sup> This ruling cited a number of landmark cases where the court stated that citizens’ rights are not unlimited and that the state is entitled to encroach on those rights by imposing forfeiture to prevent and deter future crime. In determining the proportionality of PoCA, the court relied on the judgment in *Heaney and McGuinness v. Ireland*<sup>253</sup> which laid out authoritatively the test of proportionality, attempting to maintain the balance between the notion of minimal restraints of rights and the necessity of the common good. The court there cited a recent formulation of the Supreme Court of Canada which held that:

The objective of the impugned provisions must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test, they must; a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; b) impair the right as little as possible; and c) be such that their effects on rights are proportional to the objective.<sup>254</sup>

This test also is frequently adopted in the ECHR.<sup>255</sup> The court reasoned that restraining some rights was justifiable but went further and added that it was essential to limit any restriction of those rights as much as possible and that those rights must be balanced with various safeguards included in the Act. Grounds for justifying the limitation of rights included the sophisticated criminal operations carried out by criminals who were able to make themselves immune to the ordinary procedures of criminal investigation and prosecution, and who, through fear and threat, prevent others from passing information to the police. Finally, the court held that it was particularly concerned about Section 9 of the Act and the manner in which it may affect the privilege against self-incrimination, and about Section 8, which permits admissibility of hearsay evidence. The court emphasized that courts must be careful when issuing an order under Section 9 limiting the use of the information obtained under this section and not allowing the use of this information for any future criminal prosecution.

The burden of proof under the PoCA shifts to the respondent in two situations. First, Section 9 of the Act authorizes a court to issue an order compelling the respondent to disclose and specify property in his or her possession or control and sources of income. Second, under Sections 2 and 3 of the Act, after the CAB establishes and satisfies the court that the concerned property constitutes proceeds of crime, the

<sup>248</sup> *Gilligan v. CAB*, [1997] 1 IR 526 (HC).

<sup>249</sup> *Attorney General v. Southern Industrial Trust Limited and Simons*, [1960] 94 I.L.T.R. 161.

<sup>250</sup> *Murphy v. M(G)*, [2001] IESC82 (SC).

<sup>251</sup> Including *United States v. Ursery*, (1996) 135 L Ed 2D549, citing Rehnquist C.J., that the U.S. Congress has authorized the government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based on the same underlying events. *Various Items of Personal Property v. United States*, 282 US 577, ... forfeiture proceedings are instituted against the property, while a criminal prosecution is instituted against a person, and forfeiture is no part of the punishment for the criminal offense.

<sup>252</sup> *Gilligan v Criminal Asset Bureau and Others* (Transcript) 1997

<sup>253</sup> *Heaney and McGuinness v. Ireland*, [1994] 3 IR 593.

<sup>254</sup> *Chaulk v R* [1990] 3 SCR 1303 pp 1335 and 1336

<sup>255</sup> *Keams Newspapers Limited v. United Kingdom*, [1979] 2 EHRR 245.

respondent must tender evidence to establish the contrary and refute the state's claims. The provisions that shift the burden of proof to the respondent have been challenged frequently by respondents on the grounds that they violate the privilege against self-incrimination, the right to silence, and the presumption of innocence. In *Murphy v. M (G)*, the respondent held that there was no equality of arms between the parties because evidence of opinion was permitted in the case of the applicant but not in the case of the respondent. The court disagreed, stating that the respondents, as property owners, should be able to submit evidence regarding the origin of the property without calling on opinion evidence. In support of the decision, the court referred to a decision of the Privy Council, in *McIntosh v Lord Advocate*<sup>256</sup> in which it was stated that:

Direct proof of the proceeds is often difficult, if not impossible... assumptions that property held by the accused could in certain circumstances be assumed to have been received in connection with drug trafficking... They related to matter that ought to be within the accuser's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.

The court further referred to the decision of the ECHR, in *Phillips v. United Kingdom*<sup>257</sup>, in which the court disagreed with the appellant's contentions that assumptions under the Act of 1994 violated the right to be presumed innocent holding that the court had carried out judicial procedure including holding public hearing, requiring advance disclosure of the prosecution case, and enabling the applicant to submit further evidence. The court held that the appellant could have rebutted assumptions under the Act, on balance of probabilities, and showed lawful origin of his property. The court held that it was a matter for the court, in considering hearsay evidence, to decide what weight should be given to the evidence.

Respondents in *Gilligan v. CAB [1997]*<sup>258</sup> (same parties but different appeal) contended that the reversal of the burden of proof was unfair and impermissible and that it violated Article 38.1 of the Constitution, breaching the natural justice and constitutional justice. Counsel for the respondent also claimed that Sections 2 and 3 of PoCA were in breach of Article 38.1 of the Constitution because they required the plaintiff to establish that the property that was frozen under those sections was not the proceeds of crime, failing to protect the presumption of innocence. In earlier debates, it was considered that the legislation did not foresee the reversal of the burden of proof but merely a reduced standard of proof. However, the Supreme Court, in recent cases, has concluded that the burden of proof was in fact reversed but that it occurred only after the court was satisfied on the evidence produced by the appellant. It also added that extra examination is allowed in the procedure and there is no prohibition to placing the burden on the person and seeking to have him or her negate the inferences from evidence adduced that a criminal offense has been committed. Further, in *Felix J. McKenna v. H and another*,<sup>259</sup> the courts held that the respondent would be in possession or control of the property and should be in the best position to give evidence to the court. In essence, respondents are in the best position to counter any evidence, including hearsay evidence, which could be tendered by the applicants in relation to such property.

In *Gilligan*<sup>260</sup>, the courts held that the state bore the evidentiary burden of proof because the state must satisfy the court, on the balance of probabilities that the respondents were in possession or control of property that was proceeds of crime. In other words, the property was directly or indirectly, in whole or in part, derived through unlawful activities and that the property exceeded a defined threshold. A court held that then and only then did the burden of proof shift to the respondent to furnish any evidence to the court. The court also held that the respondent was free to challenge and discredit evidence tendered by the applicant, via cross examination, on an affidavit or by introducing new evidence and/or witnesses. With regard to the presumption of innocence, the court added that once it was established that the proceedings

<sup>256</sup> *McIntosh v Lord Advocate* (2001) 2 All ER 638

<sup>257</sup> *Phillips v. United Kingdom*, (U/R. Judgment delivered 5 July 2001)

<sup>258</sup> *Gilligan v. Criminal Assets Bureau*, [1997] IEHC 106 (HC).

<sup>259</sup> *Felix J. McKenna v. H and another*, [2006] IESC (November 2006).

<sup>260</sup> *Gilligan V CAB [ 1997]* (Transcript) p. 18

under the PoCA were civil in nature, there was no constitutional impediment in reversing the burden onto the respondent and the presumption of innocence principle did not apply.

The constitutionality of the PoCA also was recently challenged in *CAB v. O'Brien & Anor*<sup>261</sup> and the court relying on the authoritative decision of McKracken in *M v. D*,<sup>262</sup> defined the standards of evidence required to establish that a property constituted proceeds of crime. The court held that “evidence adduced on behalf of the applicant constitutes a prima facie case under both s.2 and 3, the burden thereafter shifts on the respondents.” The court went further to find that the applicant had satisfied the court that the property subject to the proceeding constituted proceeds of crime by producing evidence to prove that the respondent had been involved in criminal activities, had no continuous employment, and had no regular sources of income yet there were a number of uncorroborated transfers to his bank accounts. Cross-examination of the applicant further reinforced the evidence. Thus, the court held that the funds available to the respondents from unexplained, unknown and uncorroborated sources could rationally be explained as funds derived from criminal activities. The court held that the inability of the respondents to present evidence or witnesses that would explain the sources of the funds or property available was sufficient to show that the funds were derived from criminal activities.

The provisions that shift the burden of proof also were challenged on the basis that they breach the respondent’s privilege not to self-incriminate and the right to silence. Justice Moriarty, in *M v. D*,<sup>263</sup> expressed reservations about the statement “innocents have nothing to fear,” stating that it does not hold up in this case because of the closeness between the applicant and the DPP, and requested that the DPP make an undertaking to prevent use of information in any future criminal proceedings. This was further affirmed in *Gilligan* where the court required that the type of undertakings required by *Moriarty* were essential in every case in which orders under Section 9 were sought.

The court attempted to strike a balance in protecting the fundamental rights guaranteed by the prosecution and enable the working of orders under Section 9. The court affirmed that respondents’ right to silence and the privilege not to self-incriminate were not absolute and could be curtailed in the public interest, validating the respondent’s obligation to respond to an order of the court otherwise he or she would invoke the court’s contempt. However, the court decided to limit the use of information secured under PoCA to the proceedings for which the disclosure was made, relying on the authority of the decision in *Re O*,<sup>264</sup> too. The court stated that the state should be careful to protect a respondent’s privilege in releasing information that could later be used in a criminal prosecution.

Respondents also have argued that the use of hearsay evidence in a proceeding under PoCA is unconstitutional because it is based on evidence of belief tendered by the applicant and that there is no direct evidence that the property represents proceeds of crime. In *Murphy v. G.M.*, the court held that the evidence of belief under Section 8 did not have to be direct. Similarly, *Moriarty* held, in *M v. D*, that although PoCA was silent on the nature of proof sufficient to persuade a court to issue a Section 3 order, it was widely accepted that courts would accept hearsay evidence in affidavits filed on behalf of the parties but that the conclusiveness of the evidence would be corroborated by either facts or cross examination by the respondent. He added that the courts must remain vigilant in safeguarding the liberty of citizens, particularly in cases where hearsay evidence is admissible mainly by ensuring that the respondents were provided with an opportunity to cross examine the witnesses. Arguing that PoCA was designed to deprive those engaged in unlawful activities, Moriarty added:

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<sup>261</sup>*CAB v. O'Brien & Anor*, [2010] IEHC 12 (HC).

<sup>262</sup>*M v. D*, IR 175 (unreported judgment)—Moriarty J. (HC) (December 1996).

<sup>263</sup>*Ibid.* at 38

<sup>264</sup>*In Re O* [1991] 2 QB 520. In this case an order restraining assets under Section 77 of the Criminal Justice Act, and subsequently requiring that the defendant disclose his or her assets by affidavit. The request was appealed by the defendant, claiming that the court had no jurisdiction to make such an order. Court held that in absence of any express jurisdiction there was an ancillary power to make a disclosure.

I am clearly entitled to take notice of the international phenomenon, when significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries..... thus the Act is designed ..... not to achieve penal sanctions but to deprive such persons of illicit financial fruits of their labor.

The respondent also contested the use by the applicant of the transcript from an earlier trial as a proof, a contention the court dismissed, holding that there are no grounds for objection because the transcript was used only to account for what was stated in the course of the trial. Further, in *McKv. D*, the court held that Section 8 envisioned a two-stage process in evaluating the evidence. First, the court heard evidence of an authorized officer but this was not sufficient to make it evidence. The applicant also was invited to call as witnesses persons on whose information he relied. Although the court reasoned this was not necessary it helped in establishing the reasonableness of the applicant's belief. It then was up to the judge to evaluate the weight attached to the testimony. A distinction must always be made between the existence of evidence and its persuasive value.

In the same case, Justice McCracken, dissenting with Justice Fenelly, laid out a seven-step process for a trial judge when reviewing evidence tendered pursuant to Section 8:

- (1) He should firstly consider the position under section 8. He should consider the evidence given by the member or authorized officer of his belief, and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief.
- (2) If he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorized officer is evidence.
- (3) Only then should he go on to consider the position under section 3. He should consider the evidence tendered by the applicant, which in the present case would be both the evidence of the member or authorized officer under section 8 and indeed the evidence of the other police officers.
- (4) He should make a finding whether this evidence constitutes a prima facie case under section 3, and if he does so find, the onus shifts to the respondent or other specified person.
- (5) He should then consider the evidence furnished by the respondent or other specified person and determine whether he is satisfied that the onus undertaken by the respondent or other specified person has been fulfilled.
- (6) If he is satisfied that the respondent or other specified person has satisfied his onus of proof then the proceedings should be dismissed.
- (7) If he is not so satisfied he should then consider whether there would a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case.

This decision has, according to CAB legal officer, guided the work of the CAB in filing applications and in preparing evidence to satisfy the court that the property subject to a proceeding constitutes proceeds of crime. The decision is also important because it specifies the moment at which the burden of proof shifts to the respondent to adduce new evidence and prove the legitimate source of the property.

Another important element of the Irish PoCA that makes it unique in its approach is that there is no requirement that the applicant (i.e., the state), when initiating a proceeding, show that an offense was committed or that the property in question was derived from commission of a specific offense. It was held by the Supreme Court, in *McKv. F and H*,<sup>265</sup> that Parliament designed the Act in a way that it is applicable

<sup>265</sup>*McKv. F and McKv. H*[2005] 2 IR 163 (SC)

in circumstances in which the applicant is not able to show a relationship between the property alleged to be proceeds of crime and a specific crime or crimes. The court went further to add that PoCA would be useless and unworkable if specific assets had to be related to a specific crime and this was not the intention of the Act. To support its decision, the court cited a statement made in an unreported judgment of the High Court, where the judge held that:

I am satisfied that it is unnecessary for the plaintiff to rely upon specific crimes or to relate items of property sought to be attached by an order under s. 3 of the Proceeds of Crime Act, 1996 to the commission of a specific crime and the plaintiff can make a sufficient case by relying on opinion of evidence that the property in question constituted directly or indirectly the proceeds of crime or that the property was acquired in whole or in part with or in connection with the property that directly or indirectly constitutes the proceeds of crime.

This decision was further affirmed in *F & F*<sup>266</sup> where the court held that it was unnecessary for the applicant to rely on specific crimes or to relate to the commission of specific crime the specific property sought to be restrained by the order.

PoCA also was challenged on the basis that it violated Article 40.3 of the Constitution because it does not protect private property from an unjust attack. In *Gilligan v. CAB* it was held that, while forfeiture provisions of the Act admittedly affect the property rights of the respondent, the effect involved does not rise to the level of an unjust attack, which is necessary for constitutional protection, considering that the applicant must first show that the property at issue constituted the proceeds of crime. The judge also added that the right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired. Finally, the court dismissed the respondent's contention that the PoCA violated the right to private property, referring to *Clancy v. Ireland*, where Barrington J stated that "abridgment of property rights provided for under the Act was a permissible delimitation of property rights... and was not a breach of fair procedures", citing also the decision of the U.S. Supreme Court, in *Calero-Toledo v. Pearson Yacht Leasing Company*, (1974) 416 US 66. In *M v. D*, the court held that although it could be argued that the Act did not provide sufficient protection for private property, "this erosion must be balanced against the public interest inherent in the section, so that the unjust attack on property rights is in fact disclosed.

The issue of jurisdiction was often debated by the courts, although initially, in *F. Mck. v A.F.*, the Supreme Court held that the 1996 PoCA did not apply to the proceeds of crime committed in another jurisdiction. A similar challenge was brought in *Gilligan*. The court later concluded, in *Murphy*, that the operation of the standard canons of construction determined that the words "proceeds of crime" included criminal offenses committed abroad. However, this contention was overturned by the Supreme Court. This prompted the government to amend the 1996 Act in 2005, and to include the proceeds of extra-territorial criminality within the statute. In relation to the statute of limitations, the court held that it did not apply at any stage of proceedings under PoCA.

On the retroactivity point, it was held that the acquisition of assets derived from crime was not an illegal activity before the passage of the 1996 Act and so did not become illegal because of the 1996 Act. Therefore, no law was imposed retroactively.

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<sup>266</sup>*McKv. A.F. and J.F*[2002] IESC (30 January 2002)



## Ireland Conclusions

It can be concluded that the Proceeds of Crime Act 1996 has had an impact in fighting and deterring crime in Ireland. The majority of our interviewees were explicit in their assertions that during the first five years of the implementation of the Act it had a remarkable impact, as those engaged in criminal activities were not experienced and prepared in hiding proceeds derived from unlawful activities. During the first few years, the CAB was successful in tracing, identifying, freezing and subsequently forfeiting assets or property considered to be proceeds of crime. It is reported that the Bureau had forfeited and transferred to the Irish Exchequer in excess of €105M, or US\$140M in revenues and had over €5M or US\$76M, of assets frozen. As a consequence, it is widely believed that many engaged in criminal activities moved their activities and assets outside Ireland and resulting in a noticeable reduction of crime in the country, although no quantifiable and statistically sound evidence exists. The reduction of crime rates in Ireland may be also a result of criminals adjusting to the new circumstances created after the enactment of the law and being better skilled in hiding their assets. The success rate of the implementation of civil confiscation to date is considered to be 100%.

## Conclusions drawn from experience of Ireland and Australia

As found in both Australia and Ireland, UWOs have the potential to be a powerful weapon in the fight against organized and serious crime. If used appropriately they can deprive criminals of their ill-gotten gains, they are especially effective in forfeiting assets that are difficult to be connected to an offense. However it is important to emphasize that their effectiveness is limited. While powerful, expectations about their impact should be moderate and realistic.

Active and judicious enforcement is critical for any law including UWOs. As discussed earlier in the report, the Irish CAB has actively and successfully applied the Proceeds of Crime Act and other forfeiture powers available to it. In Ireland a number of UWOs were brought against high profile cases, including John Gilligan, one of the biggest drug lords in Ireland at that time, who was also suspected of being involved in the murder of the Journalist Veronica Guerin. Other high profile cases include a soccer player involved in drug dealing, VAT tax fraud, insurance fraud and a high profile corruption case. On the other hand, UWOs have not been extensively used and their potential was not exploited in full in Western Australia, thus failing to meet the expectations and the objectives it was set out to achieve. However some cases have been instituted, for example against people who had no apparent source of income and lived lavished lifestyles, including a motorbike gang and unemployed but rich individuals. However, no so-called “big fish” have been targeted until recently.

Although there is a lack of data gathered in Ireland to evaluate the impact the UWO has had on crime, the authors of the report, based on a series of interviews with relevant Irish stakeholders, have come to a conclusion that the law has had a positive impact in fighting crime. Our interviewees, representing various powerful institutions and agencies in Ireland, including academics and civil society groups, were unanimous in their belief that the CAB has played a significant role in reducing crime, in particular drug trafficking, forcing a number of criminals out of the country or at least out of sight. A large portion of the success of the Irish forfeiture regime is attributed to the CAB and the way the Irish government planned and executed introduction of the new forfeiture regime.

The success of the Irish forfeiture regime is also attributed to the excellent multidisciplinary teams of the CAB. Personnel from police, customs, tax and social welfare are brought to work together collectively. While working for CAB they retain the powers and duties vested in them within their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime from three different aspects, forfeiting property constituting proceeds of crime, taxing it, and denying social welfare payments to the respondents who own or control such property. From the outset the agency was given adequate financial and human resources, including highly skilled legal officers, computer technicians, forensic

accountants, and a well-trained law enforcement officer. Further they have continuously provided training to CAB officers, as well as complete anonymity, and attractive compensation packages. The CAB leaders have been reluctant to grow and expand, holding that a small group of highly trained and committed professionals is more likely to be effective and efficient.

In contrast, the study team was told that the state of Western Australia had not allocated sufficient human and financial resources to the DPP, which was given the authority to institute UWOs and other forfeiture schemes available under the Criminal Property Confiscation Act of 2002. This has resulted with a small number of UWO applications. The DPP partly explains the small number of UWO applications because of the availability of other forfeiture schemes, including powerful automatic confiscation of both lawful and unlawful property owned by a declared drug trafficker, which has overshadowed and drawn resources from UWOs. Still, the DPP recognized that it has not given the attention to asset forfeiture they should, as they were more focused on prosecuting criminals rather than targeting assets. Initially, when the CPCA was introduced, the DPP has allocated only one confiscation lawyer to deal with all asset forfeiture schemes (later increased to three) available under the Act; it was only over the past couple of years that more resources have been allocated. Now the confiscation team numbers a total of 18 confiscation lawyers and the police, and now have six forensic accountants (up from one). This expansion correlates with a high number of UWO applications being made over the past three years. Moreover, the state of WA is also considering of delegating the UWO powers to a Corruption Commission that will be focused solely on targeting tainted assets.

As new and untested legislation, the original UWO laws have had a number of weaknesses and deficiencies that have hindered efficient and successful operation of the Act. The Irish CAB proposed and succeeded to amend the Proceeds of Crime Act several times, improving its efficiency and scope. In this regard, the scope has now been extended to cover proceeds of foreign offenses, shortened the seven years waiting period to four before the property is forfeited to the state with mutual consent of the parties. Additional amendments are being debated such as including the proposal to reduce the waiting period further, allowing for disposal of property while the interlocutory (restraining) order is in effect enabling the CAB to preserve the value of the property.

Similarly, Western Australia has noted that the law contains deficiencies that make application of the Act more difficult and burdensome for the DPP. One of the key weaknesses of the legislation highlighted is the overly prescriptive valuation of assets method provided in the law. The provisions as interpreted by the DPP and the courts implying that for the court to determine that the respondent owns or controls unexplained wealth, it will need a full inventory of his/ her wealth, including the wealth consumed. These valuation methods are considered cumbersome and demanding imposing a heavy burden on the DPP to identify, trace, value, and determine the origin of each item of the property including those consumed and discarded. However, unlike in Ireland, no legislative proposal has been made to date to amend these deficiencies.

It is also notable that both Ireland and Australia apply a higher standard of proof in UWO cases than that inferred by the law. Both laws provide that the standard of proof in an unexplained wealth forfeiture proceeding is the preponderance of evidence (balance of probabilities), however in practice both Ireland and WA prosecutors have used a higher standard - - clear and convincing evidence - that the property constitutes unexplained or tainted property. Ireland's CAB self-imposed this higher burden of proof and with that has gained the trust and sympathy of the court and wider public. In WA a higher standard of proof was imposed by the High Court of Australia.

The ability to pursue forfeiture of property without tying it to a predicate offense has been one of the plus points of legislation in both countries. Lack of a predicate offense requirement has been upheld by the courts in Australia and Ireland, recognizing the importance of seizing assets without having to prove a connection with an offense. Moreover, the courts of both countries have held that if such a requirement

were to be included in the law it would make the law unworkable and defeat its purpose. However, both the DPP and the CAB have been pressed to show some form of criminal conduct. In reality and in many cases, the state has tendered sufficient evidence that there are reasonable grounds to believe that the respondent has been engaged in criminal activity, without having to show that the person has actually committed an offense.

The Australian UWO forfeiture scheme is *in personam*, an action is brought against the person, on whom a penalty is imposed and not a sanction. In this regard, the courts have been careful to differentiate that the forfeiture of property is not a sanction imposed on the individual but rather a penalty imposed on the property. Similarly, although Ireland holds that its O is an *in rem* proceeding, the law requires that a property owner be identified in the application. Exceptions are only allowed if the owner has absconded or has died, in all other cases the property owner has to be identified.

Allocating specialized judges to forfeiture cases has affected successful application of the law in Ireland. Because of the complex nature of the law and the cases that are heard, the CAB requested early on that judges be allocated to hear forfeiture cases, creating a bench well-versed in UWO and non-conviction forfeiture regimes. In addition, this ensured that cases are heard more quickly. Without this provision, backlogs have been cited in Australia to be one of the reasons affecting the efficiency of the application.

Further, careful and appropriate selection of cases, as well as highly professional preparation of cases, has resulted in successful applications leading to forfeiture of property in Ireland. The CAB has a complex and judicious screening process in place ensuring that only meritorious cases are pursued. Cases are prepared and presented in a comprehensive and professional manner using charts and diagrams to portray complex information understandable to non-financial experts. Exceptional work quality helped CAB establish and maintain a good reputation and earn the trust of public opinion. Although CAB has operated for over 14 years, no concerns have been raised by the media regarding inappropriate targeting of cases or abuse of powers by the CAB. WA has also been careful in selecting and targeting its cases. Their carefulness however is seen as overly conservative, failing to make unexplained wealth applications when they should. This may have increased after 2004 after DPP was publicly criticized for making an unexplained wealth application for an elderly couple's house, after they were convicted of having cannabis that their son concealed drugs on their property. It is believed that because of this criticism the DPP did not make any unexplained wealth application between 2004 and 2007.

Ireland has avoided criticism by not adopting equitable sharing. All assets and monies recovered from the forfeiture schemes under PoCA are transferred to the Irish budget and no funds are directed or transferred to support activities of the CAB. Although equitable sharing is a practice used in the US the Irish have refused to do so. However, it is important to note that resources have never been an issue for the CAB. The Irish government continues to regard the work of the CAB as a priority and they have never faced budget cuts. While Australia has in place an equitable sharing system, whereby 20 percent of forfeited assets are transferred to the police to support asset forfeiture squad, this has never been raised as an issue of concern by the public or opponents of the Act. It may as well be that this is due to relatively low amount being forfeited to date.

UWO laws have been in place for over ten years and Ireland has made significant progress in improving the legislation and addressing the weakness in the implementation policies and operations of the Act.

## IV. REVIEW OF THE U.S. SYSTEM

### 4.1 General Overview of Asset Forfeiture in the U.S.

Much has been written on U.S. asset forfeiture both by its supporters and critics.<sup>267</sup> Therefore for this report, we provide only a brief overview of federal statutes containing civil asset forfeiture provisions, focusing on the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, which is the only statute that attempts to provide for uniform forfeiture proceedings for a broad variety of offenses. The bulk of this section of the report focuses on transferability of UWO laws to the U.S., should the government contemplate enactment of a similar statute.

#### *History of Civil Asset Forfeiture in the United States*

Civil asset forfeiture has existed in the United States since the English colonies applied it in enforcing forfeiture statutes. The concept of *in rem* forfeiture proceedings can be traced to the Biblical era and ancient English common law. In these laws, an object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a *deodand*<sup>268</sup> to support funeral costs of the deceased. In addition, English common law allowed forfeiture of estates as a consequence of criminal conviction and treason.<sup>269</sup> English common law also provided for seizure and forfeiture of vessels and cargos violating customs laws.

Forfeiture laws in the United States, however, did not originate from the law on *deodand* or other forfeiture laws following conviction of the defendant of an offense. They were based on the 17th century British Navigation Act that provided for forfeiture of vessels and contraband goods. In 1789, the first Congress of the United States introduced civil asset forfeiture, authorizing seizure and forfeiture of ships and cargos involved in customs offenses.<sup>270</sup> Since then, civil asset forfeiture laws have expanded significantly, as noted by Justice Douglas in *Calero-Toledo*<sup>271</sup> stating, “the enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.”

Civil forfeiture is an *in rem* civil proceeding instituted against the property itself, attaching guilt to the property, and thus resorting to the legal fiction that the property itself is guilty of an offense. Moreover, the standard of proof is a civil standard—probable cause or preponderance of evidence, which is a much lower standard of proof than the beyond a reasonable doubt standard required in criminal proceedings. Because it is a civil proceeding, many of the constitutional protections afforded to the defendant in a criminal proceeding are not applicable. Early cases of *in rem* forfeiture were upheld by the Supreme Court of the United States,<sup>272</sup> allowing the government to seize and subsequently declare property

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<sup>267</sup> See Stefan D. Casella, Overview of Asset Forfeiture Law in the United States, January 2004; Casella, *The Development of Asset Forfeiture Law in the United States*, available at [http://works.bepress.com/stefan\\_cassella/9](http://works.bepress.com/stefan_cassella/9).

Marc B. Stahl, Asset Forfeiture, Burdens of Proof and the War on Drugs, 83 J. Crim. L. & Criminology 274, 1992–1993, Christine M. Durkin *Civil Forfeiture under Federal Narcotics Law; The Impact of the Shifting Burden of Proof upon the Fifth Amendment Privilege Against Self Incrimination*, etc.

<sup>268</sup> “given to God”

<sup>269</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)—Justice Douglas gave a brief historical overview of the development of asset forfeiture in English common law and in the United States.

<sup>270</sup> Stefan D. Casella *The Development of Asset Forfeiture Law in the United States*, available at [http://works.bepress.com/stefan\\_cassella/20](http://works.bepress.com/stefan_cassella/20)

<sup>271</sup> *Ibid.* at 2

<sup>272</sup> See *Austin v. United States*, 509 U.S. 618, *Bennis*, 516 U.S. 472 (1996)

forfeited, regardless of the owner's guilt or innocence.<sup>273</sup> It further enabled the courts to overcome jurisdictional issues; often in smuggling cases, the property was found within the jurisdiction of the United States but the property owner was in another country or could not be located at all. In this regard, the Supreme Court held that civil forfeiture was closely tied to the practical necessities of enforcing admiralty, piracy, and customs laws.<sup>274</sup> Therefore, only an *in rem* forfeiture proceeding, instituted against the property, would enable the government to seize and declare forfeited property that was involved in the commission of an offense. It enabled the government to remove the property from circulation and subsequently prevent and deter the wrongdoers from using it again to commit an offense. It also enabled the government to collect customs duties owed to it on the imported goods.<sup>275</sup> In this regard, the Supreme Court held in *Austin*<sup>276</sup> that—

Forfeiture of property used for illegal activity serves a deterrent purpose, distinct from any punitive purpose, both by preventing further illegal use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable; by providing for the forfeiture of an innocent owner's interest in the property.

As indicated above, initially, the concept of *in rem* forfeiture was applied to the property as an “offender,” attaching guilt to the property itself. It was only much later that the concept of the instrumentality of crime evolved; the property itself is not guilty of wrongdoing but as stated in *Austin*, it is an instrumentality of an offense—“the actual means by which an offense was committed.”

Although civil forfeiture laws were greatly expanded during the 20<sup>th</sup> century to cover forfeiture of property derived from other offenses, including counterfeiting, gambling, alien smuggling, and drug trafficking,<sup>277</sup> they in essence were limited to directing forfeiture of the property considered an instrument of an offense. It was only after the Congress amended drug forfeiture statutes between 1978 and 1984, that the *proceeds* of an offense and later property used to facilitate commission of an offense could be subject of a forfeiture proceeding.<sup>278</sup> Further in the 1970s, Congress introduced *in personam* criminal forfeiture following conviction of the defendant of a criminal offense. Although criminal forfeiture was widely applied in English common law, the U.S. Congress refused to enact *in personam* forfeiture as punishment for federal crimes,<sup>279</sup> and reenacted this ban several times over the course of two centuries

<sup>273</sup>Historically the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See *Origet v. United States*, 125 U.S. 240, 246 (1888), “The merchandise is to be forfeited irrespective of any criminal prosecution...”

<sup>274</sup>“Policing for Profit; The Abuse of Civil Asset Forfeiture”—Miriam Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., Scott Bullock—Published by Institute for Justice, March 2010, citing *The Palmyra*, 25 U.S.

<sup>275</sup> See *Bajakjian*, 524 U.S.—stating that *in rem* forfeiture of smuggled goods served to vindicate the government's underlying property right in customs duties.

<sup>276</sup> See *Ibid.* at 5.

<sup>277</sup>Stefan D. Cassella. "The Development of Asset Forfeiture Law in the United States" *ActaJuridica*. Ed. J. Burchell and A. Erasmus. Cape Town, South Africa: JUTA & Company, LTD, 2003. 314-359.

Available at: [http://works.bepress.com/stefan\\_cassella/15](http://works.bepress.com/stefan_cassella/15)

<sup>278</sup> See Drug Abuse Prevention and Control Act 21 U.S.C 881—provides for forfeiture of controlled substances, materials and equipment, containers, conveyances, and records involved in unlawful drug related activity. Section 21 U.S.C. 881 (a)(6) 1978—provides for forfeiture of the proceeds of illegal drug transaction if a traceable connection between the property and the illegal activity exists; 21 U.S.C. 881(a)(7) 1984—provides for forfeiture of real property used or intended to be used to commit or to facilitate the commission of a drug offense.

<sup>279</sup> As cited in *United States v. Bajakajian* No. 96-1487 (1998): “Act of April, 30, 1790 ch. 9, §24, 1 Stat, 117 (“No conviction or judgment ...shall work corruption of blood, or any forfeiture of estate”).and reenacted this ban several times over the course of two centuries. See Rev. Stat §5826 (1875), Act of March. 4 1909, ch. 321, §341, 35 Stat, 1159; Act of June 25, 1948, ch. 645, §3563, 62 Stat. 837, codified at 18 U.S.C. §3563 (1982 ed.); repealed effective Nov. 1,1987, Pub. L. 98-473, 98 Stat.1987”.

until 1970 when Congress resurrected English Common law of punitive forfeiture as a tool to combat organized crime and drug trafficking as part of Organized Crime Control Act of 1970, and Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>280</sup>

It is important to note that the courts have continuously held that *in rem* proceedings have a remedial and non-punitive character. They do not constitute a punishment against an individual for an offense; its remedial purpose is to compensate the government for lost revenue.<sup>281</sup>

Forfeiture laws today have expanded to cover proceeds and instrumentalities of most federal criminal offenses, although the U.S. does not have a comprehensive forfeiture statute that covers proceeds and instrumentalities used or derived from any type of offense. Quite to the contrary, forfeiture provisions are scattered throughout numerous federal and state statutes. However, *in rem* forfeiture continues to be the primary forfeiture proceeding with an action instituted against the property and the innocence or guilt of the property owner remaining unimportant.

#### *Asset Forfeiture Laws in the United States*

Contrary to the existing practices in other countries, including the two that are the focus of this report—Australia and Ireland—the U.S. does not have a comprehensive forfeiture statute providing for forfeiture of property for all type of offenses. The closest the U.S. has come to enacting a comprehensive federal forfeiture statute is CAFRA of 2000, although other federal statutes continue to operate in parallel that provide for seizure and forfeiture of property constituting proceeds or instrumentalities of a crime. As Casella<sup>282</sup> noted, “because the asset forfeiture laws in the United States developed piecemeal over a long period of time, they were not written in generic terms....Congress enacted different forfeiture provisions at different times for different offenses.” Civil asset forfeiture provisions are found in more than one hundred federal statutes including the: (a) Racketeering and Influenced and Corrupt Organizations Act (RICO)<sup>283</sup> which authorizes the government to “forfeit any property and any interest the person has acquired or maintained in violation of section 1962, including interest in security, claims or property or contractual right of any kind”; (b) Comprehensive Drug Abuse Prevention and Control Act (1970)<sup>284</sup> and subsequent amendments in 1978 and 1984, which broadened the reach of forfeiture, authorizing the government to forfeit all property used to commit a drug offense, to facilitate trade of narcotics, and facilitating property and proceeds derived from drug trade; (c) PATRIOT Act<sup>285</sup> which authorizes the government to confiscate everything the wrongdoer owns, i.e., forfeiture of all assets of a person engaged in terrorism; (d) the Customs Act<sup>286</sup> which orders

<sup>280</sup>See Organized Crime Control Act of 1970, 18 U.S.C. §1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §848(a). In providing for this mode of punishment, which had long been used in this country, the Senate Judiciary Committee acknowledged that “criminal forfeiture....Represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.” Senate Report Np. 91–617, p. 79 (1969).

<sup>281</sup>See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 91972)—noting that remedial action is action brought to obtain compensation or indemnity.

<sup>282</sup>Stefan D. Casella Overview of Asset Forfeiture Law in the United States, January 2004 available at:

[http://works.bepress.com/stefan\\_cassella](http://works.bepress.com/stefan_cassella)

<sup>283</sup>18 U.S.C. 1963 (a)

<sup>284</sup>Comprehensive Drug Abuse Prevention and Control Act of 1970, amended in 1984. 21 U.S.C § 881 authorized the government to demand forfeit of all controlled substances, raw materials, and equipment used to manufacture controlled substances, and all vehicles used to distribute controlled substances. In 1978, the reach of forfeiture provisions was expanded to cover all profits from the drug trade and all assets purchased with such proceeds. §881(a)(6), further in 1984 Congress added §881 (a)(7) authorizing forfeiture of all property used in any manner to facilitate a violation of drug laws.

<sup>285</sup>18 U.S.C. § 981(a)(1)(G)

<sup>286</sup>19 U.S.C

forfeiture of contraband goods and conveyances; and (e) CAFRA, which is described in more detail below.

#### *Types of non-conviction based forfeiture*

*Summary forfeiture* authorizes law enforcement to summarily make on-the-spot seizures of property to which no one claims ownership, without a requirement for a legal proceeding. Summary forfeiture is applied in cases of seizure of contraband goods where the ownership is vested with the law enforcement because no legal ownership can be claimed of property that is not legal, e.g., illegal narcotics.

*Administrative forfeiture* authorizes law enforcement to seize property during an investigation if there is probable cause to believe that the property is subject to forfeiture. Once the property is seized, law enforcement commences an administrative forfeiture and notices are sent to any person with an interest in the property and interested in contesting forfeiture within a prescribed period of time. If forfeiture of the property is not contested within the period prescribed by law, law enforcement can require forfeiture of the property by making a declaration of forfeiture that has the same force and effect as a judicial order. Under the CAFRA, the seizing agency must begin the forfeiture proceeding within a fixed period of time (60 days) and must give the owner sufficient time to file a claim. If the owner files a claim, law enforcement is required to refer the case to prosecution to institute a forfeiture proceeding. Administrative forfeitures are controversial because they begin with a summary seizure of property and any type of movable property that can be carried can be seized. To reclaim the property, the property owner is required to file a claim. However, these proceedings can be expensive in the case where a property owner is not legally educated and able to defend himself/herself in court and may or may not be able to afford a lawyer, shifting additional costs to the state. Administrative forfeitures constitute the vast majority of federal forfeitures because most forfeiters (85 percent) in drug cases are not contested.<sup>287</sup>

*Civil Judicial Proceedings* are used to institute forfeiture proceedings against real estate, i.e., immovable property. The government institutes *in rem* proceedings against the property itself and bears the burden to establish the civil standard of proof - preponderance of evidence - that the property is tainted. The government must successfully establish a substantial connection between the property subject to forfeiture and a specific offense.

#### **Civil Asset Reform Forfeiture Act**

The CAFRA<sup>288</sup> of 2000 is a federal statute designed to provide a uniform procedure for federal civil forfeiture. It is the only comprehensive civil asset forfeiture law that has been enacted by Congress. It provides for seizure and subsequent forfeiture of the proceeds of a large number of federal offenses, including fraud, bribery, embezzlement, and theft. Further, it authorizes the government to seize and declare forfeited proceeds and instrumentalities of state offenses, including murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking. The CAFRA does not

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<sup>287</sup>Cited by Stefan D. Cassella in *Overview of Asset Forfeiture Law in the United States*, January 2004. "Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. Since CAFRA which made it easier to contest a forfeiture action, the number of uncontested DEA cases may have dropped to 80 percent. Other seizing agencies report similar figures".

<sup>288</sup>18 U.S.C. A. § 981

apply to forfeitures handled by the U.S. Customs Service or to forfeiture statutes enforced by the Internal Revenue Service.<sup>289</sup>

Before enactment of CAFRA, federal forfeiture statutes enabled the government and law enforcement to obtain forfeiture of property by showing probable cause that the property was used either to commit or facilitate a crime. Once the government was able to show probable cause, the burden shifted to the property owner, appearing at a hearing as a claimant, to show that the property was not used to commit an offense or it did not constitute the proceeds of crime. For example, 21 U.S.C. § 881(d) provides that the customs laws govern the procedure for forfeitures under § 881. 19. U.S.C. § 1615 (1992) establishes the burden of proof in such forfeiture actions:

In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court.

In addition, federal statutes did not contain provisions for protecting the interests of innocent owners. The Supreme Court held in *Dobbins's Distillery v. United States*,<sup>290</sup> “that the Acts of Congress in question made no exception whatsoever whether the alleged aggression was with or without the co-operation of the owners.” In this case the distillery owner leased the property to the distillery operator. It was the distillery operator who allegedly acted to defraud the U.S. of its public revenue in violation of 15. Stat. 132. The U.S. sought the civil forfeiture of the distillery and all related real and personal property, which the circuit court ordered following a jury verdict in the U.S.’s favor. The distillery owner argued that he was unaware of the alleged fraud, and therefore, he should not have had to forfeit his property. Affirming the judgment, the Court held that it was not necessary that the distillery owner knew that the distillery operator was committing fraud on the public revenue in order to maintain the information of forfeiture. Thus, court ordered forfeiture of property stating that the action was not brought against the owner, but against the property.

Further, forfeiture statutes pre-CAFRA required that a claimant or a property owner file a bond of 10 percent of the total value of the property to protect the property from forfeiture. Meaning, that any property owner whose property was subject to forfeiture in order to file a claim to protect his property from forfeiture was required to file a bond. This request has been repealed by CAFRA and the claimants are no longer required to file any bonds. Finally, the statutes had no provisions for compensation for damages to the property while held in seizure and there were no provisions allowing recovery of legal costs and attorney’s fees. CAFRA also contains provisions that allow the respondent to file a petition for the release of property pending trial to avoid hardship, among other things the property owner will have to show that the property may be destroyed, damaged or lost if not returned to the owner.

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<sup>289</sup> Other exemptions include Tariff Act 1930, Federal Food, Drug, and Cosmetic Act, and Trading with the Enemy Act (18 U.S.C. Section 983(I)).

<sup>290</sup> 96 U.S. 395 (1878)-



CAFRA was the result of a seven-year effort to reform the civil asset forfeiture laws<sup>291</sup> to create a comprehensive and more just civil forfeiture procedure. The initiative to reform civil asset forfeiture was spearheaded by Rep. Henry J. Hyde, who proposed his bill in 1996–1997 with the Department of Justice presenting its counter-proposal. Hearings before the House of Representatives and the House Judicial Committee lasted four years until the CAFRA was enacted.<sup>292</sup> The initiative to reform forfeiture statutes came from the public protest regarding what was considered harsh and unjust forfeiture statutes, depriving citizens of private property without due process. Although the criminal defense bar had been voicing concerns about forfeiture statutes, a new statute was not enacted until an increasing number of middle class citizens had become the target of forfeiture statutes<sup>293</sup> and began voicing complaints to their representatives. Courts, including the Supreme Court, continued to uphold the constitutionality of the forfeiture statutes in numerous cases.<sup>294</sup> These outcomes were harshly criticized by the media and wider public.<sup>295</sup>

Many of the more controversial features of the earlier laws were removed by the CAFRA, which placed the burden on the government to show that the property was an instrument or proceeds of an offense and no longer required the property owner to show that the property was not used or derived from an unlawful activity. Hearsay evidence is no longer admissible evidence in court; the CAFRA introduced a uniform “innocent owner” provision, which provides for recovery of attorney’s fees, provides for compensation of damages or loss of property, imposes new time limits on the government, and requires proof of substantial connection between the forfeited property and the underlying crime. Although the CAFRA has introduced other changes to the civil asset forfeiture statutes, we have highlighted the ones that are relevant to this report.<sup>296</sup>

#### 4.2. Transferability Analysis—Implications of Adopting UWO in the United States

A number of features make UWOs a unique form of non-conviction based civil asset forfeiture. As shown throughout this report, the main features distinguishing UWOs from other non-conviction based asset forfeiture statutes are: (1) they can be instituted against any person if there are reasonable grounds to believe that the person owns or controls unexplained wealth; (2) they do not require establishment of the nexus between the property subject of the proceeding and a specific offense, or only require a minimal connection;<sup>297</sup> (3) once the state establishes that the respondent owns or possesses unexplained wealth or property constituting proceeds of crime, the burden shifts to the property owner to establish the contrary;

<sup>291</sup> 146 Cong. Rec. H@)S^ (daily ex. April 11, 2000) Statement of Rep. Hyde).

<sup>292</sup> Stefan D. Casella The Civil Asset Forfeiture Reform Act of 2000, available at: [http://works.bepress.com/stefan\\_casella](http://works.bepress.com/stefan_casella)

<sup>293</sup> ABA Journal/October 1993, *A Law Run Wild*—identifying cases against whom forfeiture proceedings were instituted: 1) the owner of a landscaping service who paid cash for an airline ticket. The purchase led Nashville police to search his luggage and confiscate nearly \$10,000 in cash. He could not post the bond and challenge the seizure, and as a result, was nearly driven out of business; 2) the owners of an air charter business were driven into bankruptcy when their plane was seized flying a man from Arkansas to California who allegedly carried drug money.

<sup>294</sup> United States v. Pearson Yacht Leasing Co.; Austin v. United States, Dobbins’s Distillery; Bennis v. United States, etc.

<sup>295</sup> ABA Journal December/1995 and ABA Journal November/1993

<sup>296</sup> For more detailed information on the history of the Civil Asset Reform Forfeiture Act of 2000, see Civil Asset Reform Act of 2000 Stefan D. Casella.

<sup>297</sup> UWO of WA and NT do not contain the requirement to show a nexus between an offense and the property, while the UWO of the Commonwealth requires that there is a nexus between the property and a specific indictable offense. Similarly, the Irish Proceeds of Crime Act does not have a requirement that the connection between the property and specific offense be established.

and (4) the proceedings are *in personam* proceedings, instituted against the property owner, or in the case of Ireland have *in personam* features.<sup>298</sup>

As noted earlier, the U.S. has had *in rem* non-conviction based forfeiture statutes since its inception, with the first forfeiture statute being enacted soon after the Constitution was adopted. Forfeiture statutes have evolved over time, their application broadened to cover proceeds and instrumentalities of a broad range of offenses, and their application increased. However, the U.S. civil asset forfeiture statutes differ from UWOs in that they do not contain some of these key UWO features 1) reversal of the burden of proof to the respondent to justify lawful origin of property; 2) *in personam* proceedings, whereby an action is brought against the person not the property; and 3) there is no requirement to show a substantial connection between an offense and property subject of forfeiture. Below we attempt to provide insight on where the U.S. stands on the key issues that U.S. would have to consider if it were to adopt a similar type of law.

***In personam* versus *in rem* forfeiture proceeding**— One of the differentiating features of the UWO of Australia is that it is an *in personam* proceeding. A proceeding is instituted against the property owner or the person who is considered to be in effective control of the property. As noted earlier, the Irish UWO (Proceeds of Crime Act) is deemed to be an *in rem* proceeding, or against the property; however, the statute requires that to commence a forfeiture proceeding, the owner of the property must be identified making it an *in personam* proceeding in practice. Also, differing from the U.S. *in rem* proceedings, the key respondent in the case is the property owner and not the property itself, e.g., *Criminal Asset Bureau v. Gilligan*, or *Mck. V. D.*

Bringing an action against the respondent in accordance with Australian and Irish legislation enables the government to require forfeiture to the state of any part of the property that is allegedly unlawful or constitutes proceeds of crime, rather than targeting a specific piece of property. For example, if a person owns more wealth than he/she can lawfully explain, or it is believed that the person owns property constituting the proceeds of crime, the government, if successful, is able to obtain forfeiture to the state of the value of unlawful property, regardless of whether the person owns or controls the tainted property.

*In personam* non-conviction proceedings have long been accepted in Australia and no case has been brought to a court challenging the constitutionality of *in personam* proceedings or labeling them as punitive. In Ireland, although it is held that the PoCA is an *in rem* proceeding, the state has to identify the property owner, whose property is subject to forfeiture. The state can make an application for forfeiture without identifying the owner only in cases when the property owner has absconded or has died. This provision was challenged at the Supreme Court by the respondents, stating that it violates presumption of innocence. The High Court in *Murphy v GM PB PC Ltd*<sup>299</sup> upheld the *in rem* character of forfeiture proceedings under PoCA, stating that

No one is charged with a criminal offense, there is no prosecutor, no offense is created, no sanctions are imposed and there is no *mens rea*. Court further held that forfeiture under the Proceeds of Crime Act is an *in rem* proceeding and held that forfeiture does not constitute a

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<sup>298</sup>The O provisions of the WA, NT, and Commonwealth are *in personam* proceedings identified as such in the statute. The Irish PoCA, however, uses an *in rem* proceedings but the statute requires that the property owner be identified in the proceedings and the action is brought against him/her as the owner.

<sup>299</sup> [1999] IEHC 5 (HC)

penalty or a punishment and that it is a measure imposed on the respondent, which aim is to restore or remedy the situation.

While the U.S. has an *in personam* criminal forfeiture scheme imposed against a defendant following conviction of an offense, it does not have an *in personam* non-conviction forfeiture proceeding at the federal level. However, at the state level *in personam* forfeiture does exist. New York State has an *in personam* non-conviction forfeiture statute whereby an action is brought against a person to forfeit property in a civil proceeding. NY State law is considered to be a hybrid system comprised of elements of both civil and criminal forfeiture. Because of its *in personam* character, the statute has a higher burden of proof that rests with the state, provides for limitations on damages, a requirement for proportionality and statutory authorizations for interest of justice dismissals. The Civil Law Practice and Rules 13-A<sup>300</sup> provides more protections for the respondent than other *in rem* forfeiture statutes. The statute has been construed to reinforce the notion that forfeitures, even if *in personam*, are not punishment for double jeopardy purposes. Article 13-A states “forfeiture action shall be civil, remedial... and shall not be deemed to be a penalty or criminal forfeiture for any purpose....an action under this article is not a criminal proceeding.” These specific provisions have been incorporated into the statute to show that the statute is not punitive in nature. The New York state legislature specifically resorted to defining the statute as civil in nature because this definition has an implication in determining its constitutionality.

The U.S. Supreme Court has in numerous cases upheld the constitutionality of forfeiture statutes stating that civil forfeiture proceedings do not violate the Double Jeopardy Clause because they are *in rem*, directed against the property, rather than the person. In *Helvering v. Mitchell*,<sup>301</sup> the U.S. Supreme Court held that civil forfeiture does not violate the Double Jeopardy Clause ruling that the criminal charge of tax evasion does not exclude civil assessment of a fine. Similarly, in *U.S. v. Ursery*, the court stated that forfeiture is not a punishment for the criminal offense. The Court continued to state that—

We do not rest our conclusion in these cases upon the long-recognized fiction that forfeiture *in rem* punishes only malfeasant property rather than a particular person. That forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy.

The Court resorted to the two-part test applied in *89 Firearms*<sup>302</sup> to determine whether forfeiture would be deemed punitive for double jeopardy purposes. Nevertheless, where the “clearest proof” indicates that an *in rem* civil forfeiture is “so punitive either in purpose or effect” as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause. Thus the New York statute has clearly identified the proceedings, although *in personam*, as civil in nature to avoid the Double jeopardy Clause.

Another successful argument invoking constitutional protection in non-conviction forfeiture laws is that property owners can be adversely affected by what happens to their property. However an argument countering this is that it has long established legal doctrine that if the property is of unlawful origin the owner does not have legitimate rights to it and therefore, the property is subject to forfeiture.

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<sup>300</sup>2006 New York Code - Laws: Civil Practice Law and Rules: (1310 - 1352) Proceeds Of a Crime-forfeiture

<sup>301</sup>303 U.S. 391, 58 S. Ct. 630, 82 L.Ed.

<sup>302</sup>465 U.S. at 363

### Reversed Burden of Proof

The Reversed burden of proof is not a new concept in U.S. legal doctrine or within the civil asset forfeiture statutes. As noted, before enactment of the CAFRA, forfeiture statutes contained provisions that reversed the burden of proof to fall on the claimant, the property owner, to show that the property was not used or derived from an unlawful offense. The government was required to make an initial showing of probable cause that the property was subject to forfeiture and then the burden shifted to the property owner to establish the property's innocence and prove, by a preponderance of evidence, that the property was not subject to forfeiture. The reversed burden of proof in the U.S. has been uniformly upheld by U.S. courts for more than 200 years in a long stream of cases<sup>303</sup>, e.g., in *U.S. v Ursery*, the court recognized that the statute shifts the burden of proof to the claimant, stating that:

19 U.S.C. §1615, which governs the burden of proof in forfeiture proceedings under §881 and §981 provides that once the Government has shown probable cause that the property is subject to forfeiture, then the “burden of proof shall lie upon the claimant.

Similarly, in *United States v. 3639 2nd St*<sup>304</sup> the 8th Circuit Court held that:

It was incumbent upon the government to establish presence of probable cause. Probable cause in a forfeiture proceeding is a reasonable ground for belief of guilt, supported by less than *prima facie* evidence but more than mere suspicion....Once the initial showing has been made, the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that is not subject to forfeiture or that a defense to forfeiture is applicable.

Further, the constitutionality of the reversed burden of proof was challenged on the grounds that it violated the Fifth Amendment privilege against self-incrimination. The Supreme Court has held that the Fifth Amendment privilege may apply in some civil forfeiture proceedings but because of the civil character of such proceedings, it is difficult to determine the reach of constitutional protections.<sup>305</sup> In *Boyd v. United States*, 116 U.S. 616, 634 (1886), the Supreme Court held that the forfeitures were of a quasi-criminal nature and within the privilege against self-incrimination. In this case, the Supreme Court reviewed whether the lower court erred in awarding judgment in favor of the federal government in a customs action for forfeiture where the appellant, an importer, was ordered to give incriminating evidence against himself pursuant to 18 Stat. 186, § 12 (1874). The appellant alleged that the law was an unconstitutional violation of the Fifth Amendment. The Supreme Court held that the lower court erred, granting a new trial to the appellant. However, in *United States v. Riverband Farms Inc.* 847 f.2d 553, 558 (9th Cir. 1988) the Court held that not all constitutional protections apply to civil forfeiture. Courts have held that while the Fourth Amendment applies to civil forfeiture proceedings, the Fifth Amendment

<sup>303</sup> *United States v. Brock*, 747 F.2d 761 (D.C. Cir. 1984), *United States v. 4492 Livonia Rd.* 889 Fd. 1258, 1267 (2d Cir. 1989)—in a forfeiture proceeding brought under §881, the burden is initially on the government to establish its right to forfeiture by probable cause, 906 F.2d 110, 111 (4th Cir. 1990)—“in a civil forfeiture proceeding....once the government has showed by probable cause that the property is subject to forfeiture, the burden shifts to the claimant to prove by a preponderance of evidence that the factual predicates for forfeiture have not been met.”

<sup>304</sup> 869 F.2d 1093, 1095 (8th Cir. 1989)

<sup>305</sup> Christine Durkin ; Civil Forfeiture under Federal Narcotics Law, 24 Suffolk U. L. Rev. 705 1990 citing *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971)

Double Jeopardy Clause does not apply because forfeiture is a civil proceeding and is not subject to the procedural rules of criminal sanction.<sup>306</sup>

This led to situations in which the government could force forfeiture of property if it had probable cause following a lawful arrest or search, and simply wait for the property owner to contest the proposed forfeiture. It was considered that the filing of a verified complaint was enough for the government to meet the burden in a forfeiture proceeding. The CAFRA, as stated earlier, revoked the reversed burden of proof, and under the new regime, the government is now required to show, by a preponderance of evidence, that the property is the proceeds, instrumentality, or facilitating property of an offense. It is important to note that the courts have upheld the constitutionality of the reversed burden of proof; however, it was public dissatisfaction with the operation of the reverse burden of proof that led to the legislative decision to revoke it.<sup>307</sup>

Interestingly, Title 19 of the U.S.C §1615 (customs laws) has and continues to contain a provision reversing the burden of proof to the property owner or the claimant to establish the “innocence” of the property. The §1615 provisions states:

In all suits or actions...brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant; Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court....

Even proceedings that are clearly criminal in nature, the constitutionality of the reversed burden of proof in, in limited circumstances, has been upheld by the U.S. Supreme Court, noting that it is not unconstitutional to shift the burden of proving an affirmative defense to the defendant in a criminal case.<sup>308</sup> In this case, the defendant was charged with second-degree murder under New York Penal Law § 125.25 for killing his wife’s friend. After the defendant was convicted of murder, he appealed the verdict on the basis that the need to prove the affirmative defense of extreme emotional disturbance was a violation of the Fourteenth Amendment. The Court held that there was no violation of defendant’s due process rights because the defendant had the burden to prove the affirmative defense of extreme emotional disturbance by a preponderance of evidence after the state had to establish beyond reasonable doubt that the defendant had committed the crime of which he was charged before the burden shifted on him.<sup>309</sup> This decision upholds the constitutionality of the reversal of the burden of proof to the defendant

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<sup>306</sup> See *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235-37 (1972)—court held that forfeiture is not barred by double jeopardy clause because it is civil and remedial.

<sup>307</sup> ABA Journal /October 1993—“...government need show to justify a seizure is probable cause that the property is subject to forfeiture. Probable cause can be provided by hearsay evidence.... Then you must prove that the property is “innocent”. In essence, the standard is guilty until proven innocent” citing Henry Hyde (R-III); National Review, February 20 (1995)—Property can be seized on mere suspicion, and the burden is then on the owner to get it back.

<sup>308</sup> *Patterson v. New York*, 432 U.S. 197 (1977).

<sup>309</sup> See *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975); in *Re Winship*, 397 U.S. 357, 364 (1970) noting that the government needs to prove beyond reasonable doubt every fact necessary to constitute a crime required to convict; *Leland v. Oregon*, 343, U.S. 790, 794 (1952) noting that the prosecution is required to prove beyond a reasonable doubt every element of crime charged. The court confirmed that it remained constitutional to burden the defendant with proving his insanity defense. In *Morrison v. California*, 288 U.S. 591 (1933), the court held that it did not violate the due process clause for the State to place on the defendant the

for elements that are not necessary for conviction, such as the affirmative defense, and based on a lower standard of proof—preponderance of evidence.

The reversal of the burden of proof is also permissible under the Revenue Code 26 U.S.C. The U.S. Supreme Court, in *Raleigh v. Illinois Department of Revenue*,<sup>310</sup> held that the burden of proof on tax claims remained on the respondent, where the substantive tax law puts it. In this case, the Illinois Department of Revenue discovered that a corporation had

#### Standard of Proof, UWOs – Ireland

- Under the Statute – Balance of Probabilities
- In Practice – A higher standard of proof than balance of probabilities standard as clearly outlined in *Mck v. D*

#### Standard of Proof in UWOs - Australia

- Under the Statute - Balance of probabilities
- In Practice — Clear and convincing evidence (a.k.a the Briginshaw principle)

unpaid taxes after it was defunct and issued both a notice of tax liability against the corporation and a notice of penalty liability against the debtor. The Illinois tax law shifted the burden of proof both on production and persuasion to the responsible officer once a notice of penalty liability was issued. The appellate court held that the burden of proof for the tax claim in bankruptcy court remained on the petitioner, the debtor’s trustee, and ruled in favor of the Department of Revenue. The Appellate Court held that bankruptcy did not alter the burden imposed by the substantive law, and the Supreme Court affirmed.<sup>311</sup>

Of note for the reversed burden of proof is the *standard* of proof the government must meet before the burden shifts to the property owner, as well as the standard imposed on the respondent. Before enactment of the CAFRA, federal forfeiture statutes required that the government meet the lower standard of a criminal proceeding, probable cause, which was slightly higher than a mere suspicion that the property constituted proceeds or instrumentality of an offense, before the burden shifted to the

respondent. But under CAFRA the government not only bears the burden of proof throughout the entire proceeding but has to show by a preponderance of evidence that the property subject to forfeiture is either an instrument or proceeds of a crime.

Although the statutory requirement in both Australia and Ireland for the standard of proof is based on a preponderance of the evidence (balance of probabilities), in practice the standard of proof the government must meet is much higher, corresponding more closely to the U.S. standard of “clear and convincing evidence.” standard In Ireland, according to the representatives of the Criminal Asset Bureau, recognizing the far-reaching and serious effects forfeiture can have on the property owners, the CAB self-imposed a

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“burden of proving citizenship as a defense.” In *Cooper v. Oklahoma* 116 S. Ct, 1373 \*1996), the U.S. Supreme Court held that an Oklahoma law that presumed a criminal defendant competent to stand trial unless he proved his incompetence by clear and convincing evidence violated the defendant’s Fourteenth Amendment right to due process, while a statute that requires of the defendant to prove his competence by a preponderance of evidence is constitutional.

<sup>310</sup> 528 U.S. 1151 (2000)

<sup>311</sup> In this civil case, the Illinois tax law places the burden of proof on the responsible officer, in this case the trustee overseeing bankruptcy. Several compelling rationales for this shift were listed by the court—the government’s vital interest in acquiring its revenue, the taxpayer’s readier access to the relevant information, and the importance of encouraging voluntary compliance—are powerful justifications not to be disregarded lightly. The Bankruptcy Code makes no provision for altering the burden of proof on a tax claim, and its silence indicates that no change was intended. Pp. 4-6. In *United States v. Reach* F.2d 10(1st Cir. P.R. 1073)—the Supreme Court held that the burden should have been on the taxpayer.

higher standard of proof than the one required by law. However, the High Court, in *Mck v. D* set a detailed seven-step process for evaluation of evidence brought by the CAB. Similarly, in Australia, the High Court has imposed a higher standard of proof on the government than that stated in the statute. This higher standard is known as the *Briginshaw*<sup>312</sup> principle, whereby a standard of proof higher than preponderance of evidence is required of the government before the burden shifts to the property owner. The standard of proof the respondent bears is lower than the preponderance of evidence, with the justification that the state, with its large apparatus and resources, is better equipped to meet a higher standard compared with an individual whose access to resources may be limited. Thus the fact that the government must meet a higher standard of proof, and must show clear and convincing evidence that the person or property owner possesses property that constitutes unexplained wealth or proceeds of crime, may make the notion of the reverse burden of proof more acceptable. Both Irish and Australian courts have, in a long stream of cases, accepted that the reverse burden of proof is necessary in cases when the respondent is in the best position to explain lawfulness of his/her property.<sup>313</sup>

### Nexus between an Offense and Property

As highlighted previously UWOs are a specific type of non-conviction asset forfeiture and therefore can be introduced separately from any other action. The UWOs in Australia and Ireland do not have a requirement to show a connection between the property subject to forfeiture and an offense. Conversely, under the U.S. forfeiture statutes, including CAFRA, there is a requirement to show a substantial connection between a specific offense and the property.

As discussed in sections 3.2.1.2 (WA) and 3.2.2 (Ireland) under the UWOs in both Australia and Ireland, the government is only required to show, on preponderance of evidence, that the property constitutes proceeds of crime or unexplained wealth, before the burden shifts to the respondent. Evidence supporting the affidavits must show that there are reasonable grounds to conclude the respondent has been engaged in criminal conduct. However the government is not required to show that the respondent has been engaged in the commission of a specific offense or show that the property subject to forfeiture is connected to a crime. This is substantially different from the civil forfeiture statutes of the U.S. because these set forth *in rem* proceedings; property is the subject of forfeiture because “guilt” is attached to it, it is an instrumentality of an offense, or property facilitating commission of an offense, or proceeds of a specific offense. Forfeiture is limited to the specific property involved in the crime; the government can only demand forfeiture of the actual property derived from or used to commit the offense (see *United States v \$ 8,221.877.16 in U.S. Currency*<sup>314</sup>). The government is required to trace the seized property directly to the offense giving rise to the forfeiture. In most of the cases, the connection between the offense and the property is substantial and easy to prove. Therefore, applying UWOs to the U.S. would require a significant change in this doctrine, shifting the proceeding such that the government is no longer required to show that the respondent has been engaged in the commission of a specific offense or show that the property subject to forfeiture is connected to a crime.

<sup>312</sup>*Briginshaw v. Briginshaw* (1938) 60 CLR 336. See also Section 3.2.1.7, Australian Case Law

<sup>313</sup>See Section 3.2.2.2, Irish Case Law; *Giligan v. CAB* [1997], *Felix J. McKenna v. H and another*; Australia, see Section 3.2.1.7 Australian Case Law and cases *Dung v. DPP*, *DPP v. Morris*.

<sup>314</sup>330 F3d 141 (3rd Cir. 2003)

## Equitable Sharing

One of the biggest criticisms of the U.S. forfeiture laws is equitable sharing, raising concerns regarding the motives of law enforcement concerning forfeiture. Questions have been continuously raised regarding whether the primary motive of forfeiture actions is revenue generation or crime reduction. The most controversial state and federal laws have empowered law enforcement authorities not only to seize and forfeit assets but also to receive proceeds from such activities. Critics of asset forfeiture laws have argued that forfeiture laws encourage seizure of assets and not suppression of crime and that policing for profit has taken predominance over policing to fight crime, particularly on the state level.

The Psychotropic Substance Act of 1984 was amended to authorize law enforcement to keep the rewards of civil asset forfeiture. Before this 1984 amendment, assets were deposited with the U.S. Treasury, but thereafter, proceeds have been deposited directly into the Department of Justice Asset Forfeiture Fund and the Department of the Treasury's Forfeiture Fund. State law enforcement agencies benefit from this arrangement as well. If the state laws are strict in that they do not allow law enforcement to reap the benefits of the forfeited assets, state and local officials can pursue so-called "adaptive" forfeitures in which case they ask federal officials to handle the forfeiture action. If such a forfeiture action succeeds, state and local entities can receive up to 80 percent of what is ultimately forfeited.

Irish and Australian UWOs do not contain provisions on equitable sharing; proceeds resulting from forfeiture are transferred to the Exchequer in Ireland and to the Confiscation Crime Account in WA. Only recently, in 2008, has a decision been made in WA to transfer to law enforcement 15 percent of the proceeds recovered to support crime fighting objectives. Since this change is recent and UWOs are not that widely used in WA, it has not been raised as a concern or an issue by the wider public. Conversely, Ireland transfers all the funds to the Exchequer and no funds are received by law enforcement from the recovered funds. This in effect, is another point of departure relative to U.S. law. It appears that the public's negative perception of OWOs (in the case of Australia and Ireland) is mitigated when statutes limit the amount of proceeds entitled to local law officials.

## Other Issues to Be Considered

**Information sharing**—Cooperation and information sharing between law enforcement and revenue services is one of the key accomplishments of PoCA in Ireland. It is this multiagency approach that brought powers of several agencies under an umbrella of one agency, enabling cooperation, coordination, and exchange of information. This approach is not entirely alien to the U.S. The Organized Crime Strike Forces established under Attorney General Kennedy, and which operated separately from U.S. Attorney's Offices until the late 1980's, are a close analogy to the CAB. Therefore, were the U.S. to apply UWOs, there is precedent of a CAB type agency. This is quite notable considering that the CAB is attributed as the primary reason for the success of the Irish UWO, even held as a model and objective to attain in Australia. However, in the U.S. a controversial issue would be the sharing of information between the law enforcement agencies and the revenue services.

## **Property/asset substitution or payment of an amount equivalent to the value of unexplained wealth.**

The Australian and Irish statutes also provide for property asset/property substitution. When a court concludes that the person owns or possesses unexplained wealth, the owner can make a payment to the government equivalent to the amount of unexplained wealth. Thus in cases when the constituting the proceeds of crime has been consumed or discarded and is no longer available for forfeiture, in those cases



the court can either order the respondent to pay an equivalent to the amount of the original property or forfeit another property. No such provision exists in the U.S. civil forfeiture statute because the action is brought against the property, and if the property is no longer available, if it is disposed or dissipated, the prosecution cannot bring any case. This tends to happen in cases where the proceeds of crime are cash or money derived from a fraud or drug offense. The only solution in these cases is that cash and electronic funds are considered fungible for one year after the offense is committed (*United States v. U.S. Currency Deposited in Account No 1115000763247 For Active Trade Company*, 176 F3d 941 (7th Cir. 1999)). Once the government has established a probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under S 20984. In some cases where the statute stipulates, it is unnecessary for the government to comply with the strict tracing requirements that otherwise govern civil forfeiture cases. In *United States v Douglas*, 55 F3d 584 (11th Cir. 1995), the government's position in obtaining a preliminary order of forfeiture was not substantially justified where the government failed to take notice that property had been awarded to third party in an action enforcing civil judgment. If the U.S. was to enact UWOs it is of ultimate importance to consider provisions providing for forfeiture of substitute property or payment of an equivalent amount of money to the amount of unexplained wealth.

### Notice Requirements

In *United States v James Daniel Good Real Property*,<sup>315</sup> the court held “the seizure of real property...is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.” Prior to *James Daniel Good*, the Supreme Court held that the government could seize property without giving notice to property owners that such action was imminent (*Colero-Toledo v Pearson Yacht Leasing Co.*, 1974). This does not mean that notice has to be given in all cases. When it is a matter of cash, the state can seize cash without notifying a person that his or her assets will be seized, if such notification would cause money to dissipate or disappear. However, courts have held that the government cannot always seize cash without proper notification. In *United States v. \$506,231 in U.S. Currency* (1997, p. 442), the 7<sup>th</sup> Circuit severely criticized the Chicago police and the U.S. government officials' attempt to forfeit half a million dollars in cash, based on the assumption that most people do not carry such large amounts of cash. In the court's words:

As has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process that is buried in those statutes.

Under UWOs in Australia and Ireland, cash and any other property can be seized within a short period of time (48-72 hours) until an application for a freezing order is made. Application for a freezing order is made *ex parte* and the statute requires that a notice be sent to the parties as soon as practicable. In addition, only movable property such as cash, cars, etc. are seized while for other property an application for a freezing order and a subsequent notice is required. If U.S. is to enact UWOs it has to include provisions on timely notification of all parties of seizure and restraint of property.

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<sup>315</sup> *United States v. James Daniel Good Real Property*, (1993) p.62

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### **Admissibility of Hearsay Evidence**

It is also relevant to note that Ireland and Australia statutes provide that hearsay evidence is admissible evidence in court. Frequently, UWOs cases are initiated on the grounds of hearsay evidence stated in an affidavit by an authorized officer and further supported by witnesses. Admissibility of hearsay evidence has been upheld by both the Australian and the Irish Supreme Courts. Prior to CAFRA this was also true in the U.S., however the CAFRA makes hearsay evidence no longer acceptable.

### **Applicability of the lessons learned in Australia and Ireland to the U.S.**

The need for UWO-type laws that enable the state to deprive criminals of their ill-gotten assets has been long recognized. Yet, few countries have ventured in that direction, while many more expressed increased caution, fearing the response of the courts, legislators and the wider public. As relatively new laws, very little data has been collected to date to prove their effectiveness and substantiate claims of their power and effectiveness in fighting and deterring crime. However, the study team concluded that they can be effective if they are used appropriately and judiciously. In other words the government has to carefully target the UWO. In addition, the establishment of a task force similar to the CAB with broad powers allowing share of information between different agencies is a crucial element to successful UWOs. They can bolster the state's ability to combat organized and serious crime.

In contrast with Ireland and Australia that have comprehensive and unified conviction and non-conviction based forfeiture regimes in place, U.S forfeiture laws are many, target all sorts of property used in, or derived from various offenses, can be applied to different offenses, and are scattered through different federal statutes and state laws. Ireland and Australia had an advantage when they enacted UWOs as they did not have a multitude of other laws in place and were able to build a non-conviction based legislation applicable to all offenses. In considering whether to enact UWOs, the U.S. would have to demonstrate more caution as it already has a multitude of non-conviction forfeiture schemes in place, and introducing a UWO applicable to all offenses would be overambitious and ineffective. In this regard, U.S. policy makers have to identify the specific type of organized or serious crime offenses that they could be applied to, for example money laundering offenses, as the existing laws require a predicate offense before laundered proceeds can be forfeited. However, crucial to this effort is identifying a specific type of serious and organized crime offense which would justify adoption of such radical legislation.

The forfeiture laws the U.S. has in place have essential differences from UWOs, notably they do not provide for the reversal of the burden of proof (except in the revenue and customs offenses), they do have the requirement to show a substantial connection between the property and a predicate offense, and lastly a forfeiture proceeding is brought against the property, not the property owner.

Fundamental elements that make UWOs powerful and compelling are the ability to forfeit property without the need to identify a particular crime and to reverse the burden of proof to the respondent to justify the legitimacy of the property. Both these features have proved to be crucial in bringing and successfully concluding UWO application. For example even in the case of the infamous John Gilligan who has been convicted of numerous offenses, including drug dealing, without the Irish UWOs (PoCA) it would have been difficult to forfeit his property due to his ability to launder the proceeds and re-invest them in other businesses. This UWO law has allowed the state to target all of his property proving on balance of probability that it has derived from some criminal activity and not from specific offenses. Reversing the burden of proof on the respondent has in this case eased government's burden to show a

connection between each property and offense, shifting the burden to the respondent to show that the property was acquired lawfully. In this case he failed to show any legitimate source of income and as a result lost most of his property. This is only to illustrate that without these elements the UWOs are unworkable and will not produce the intended results.

Another crucial element that has made Irish PoCA successful is the CAB and the excellent coordination it has achieved to establish between various agencies involved in the implementation of the law such as tax, revenue, customs and law enforcement. While co-location is important, it is not necessary to have effective coordination in place. Agreements between different agencies on share of information and intelligence are essential to make the Act workable and successful. The Irish model is being followed by the Australian federal government, who is in the process of convening a task force with similar powers. This concept is also not new to the U.S as there are numerous task forces that have been created to fight specific types of crime and would be key for successful implementation of UWOs.

If the UWO laws are to be enacted in the U.S., legislators will need to determine the level of evidence that will be required to show that a person owns or possesses unexplained wealth. As discussed earlier while the unexplained wealth laws do not have a requirement to show that any offense was committed, both Australia and Ireland have opted to show that there are reasonable suspicions to believe that the person has been engaged in some criminal activity. In this regard, acceptance of hearsay evidence is essential. Thus instead of showing a predicate offense they show a predicate criminal conduct. If the U.S. contemplates enactment of a similar law, the legislation must ensure that the linkage between property and specifically, individual crime is not required to be proved. However, it would be sensible to include a requirement to show that there are reasonable suspicions that the person has been engaged in criminal conduct. This would be a substantially lower burden of proof than showing a predicate offense. Yet this will assist in thwarting possible criticism that the law can be used against innocent citizens and silence the voices about the potential abuse by law enforcement. For UWOs to be effective, they must also be capable of also dealing with the proceeds of crime which have been co-mingled with other lawful assets, or transferred to other people, or have changed form. The Australian model provides that property owned or effectively controlled by the respondent is subject to forfeiture, enabling the state to forfeit property that effectively owned by the respondent, but whose legal ownership has been transferred to a third party, including family members.

Similarly, the burden of proof required to show that the person owns or possess unexplained wealth can be set to a higher threshold of a civil standard of proof of clear and convincing evidence. This may satisfy critics of the law by showing that only those clearly engaged in criminal activities will be targeted with this legislation. The downside is that it will raise the burden on the government to show that a person has engaged in some criminal activity to the extent it may make cases unworkable. However, the Irish, and to some extent the Australian UWOs, have shown that using a higher threshold of proof have helped in concluding more cases and establishing a trustworthy reputation with the courts and the public.

Although the issues of the reversal of the burden of proof is an issue that has been widely criticized in the U.S., to the point that it was revoked with the CAFRA in 2002, if it used only for specific type of serious and organized crime cases which are selected appropriately, it might be acceptable to the wider public. Safeguards need to be built in the law, including a judicious screening process of cases in order to convince law-makers and critics that it will be used only in meritorious cases, where there is convincing

evidence that wealth has been acquired illegally. This, coupled with a higher burden of proof on the side of the state, create sufficient safeguards to prevent potential abuse of the law in the future and provide sufficient protection for innocent citizens and third parties. Also, the practice in Ireland and Australia has shown that the reversal of the burden of proof is less controversial and not as harsh as it is thought to be. First, for the burden of proof to shift onto the respondent the state must meet its initial burden, known in Ireland as the evidentiary burden of proof. As the team has witnessed, both in Ireland and in Australia, the effective or practiced evidentiary burden of proof the state must meet is higher than the statutes require. Reversed burden of proof has been also upheld by the courts on the grounds that the property owner is in the best position and is the only person with access to information to show legitimacy and origin of the property.

A general lesson learned applicable to the U.S. and for that matter to any other country, is careful selection of cases. The CAB has established a stellar reputation with the Irish public and gained the trust of the judiciary and the broader government by only going after those individuals that have been engaged in criminal activities.

In summary, the reversed burden of proof in civil forfeiture proceedings has existed for two centuries in the U.S., *in personam* proceedings have been applied in the state of New York with no major controversy, and instrumentalities and proceeds of crime have been the subject of forfeiture proceedings for a long time, surviving constitutional challenges. However, two concepts are novel and would be innovations to the U.S. statutes—the unexplained wealth concept and the lack of a requirement to show a nexus between an offense and the property. If the U.S. were to consider enactment of a similar statute, it would have to resolve these issues to the satisfaction of reviewing courts. Also, modeling the law after a statute that is less controversial and far-reaching such as the Australian Commonwealth UWO, that provides greater forfeiture protections to the respondents and innocent property owners, has a requirement to show a nexus between an offense and the property and gives courts the authority to dismiss cases on the grounds that they are unjust.

Unexplained wealth laws, authorizing forfeiture of property acquired through unlawful activities, were introduced as a result of extraordinary events, the increase in crime and drug trafficking in the Irish and Australian societies. Additionally, in Ireland, the law was introduced following the murder of two public personas that outraged the entire society. Collective shock created a unified and conducive environment to enact a far reaching law that would have otherwise been unacceptable, without generating massive dissatisfaction and major opposition. On the contrary, the Australian and Irish citizenry as a whole are supportive and in favor of the law. Thus when enacting UWOs, one of the most important objectives should be its justification and linkage to solving real or perceived needs in society.

We have attempted to highlight some of the main issues which have arisen during our study, draw on the lessons learned from Australia and Ireland as possible options for the U.S. policymakers considering introduction of UWO legislation. With the federal government of Australia beginning the application of its new UWO law, these options may either expand in number or, alternatively, become more refined. Continuous evaluation of the various models can be anticipated. As Freiberg noted, forfeiture laws have been “introduced, amended, adjusted, reviewed, reinforced, enhanced and, in some cases, repealed and then re-legislated.”<sup>316</sup> Unexplained Wealth Order laws are likely to follow the same winding road.

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<sup>316</sup> *Antho Kennedy* “Designing a civil forfeiture system; an issues list for policymakers and legislators”, *J. of Fin. Crime*; 2006: 13, 2; p.132

# Appendix A

## Table of Countries with UWOs

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			

**a) Countries that have implemented true UWO and apply them to all offences and reverse the burden of proof**

<b>Australia</b>	Self standing legislation Western Australia (WA) 2000 <sup>1</sup> , Northern Territory (NT) <sup>2</sup> and Commonwealth <sup>4</sup> . New South Wales <sup>5</sup> recently enacted Unexplained Wealth provisions in 2010.	Common Law	Civil	Primary target is organized crime, but covers all types of offences	On the respondent			<ul style="list-style-type: none"> <li>Prosecutor applies to the court for an order</li> <li>Courts have minimal discretion when deciding on orders (WT, NT) while Commonwealth legislation and NSW give courts more discretion to refuse making the orders</li> <li>Settlement is permitted</li> <li>WA and NT statutes do not require to show that any offence was committed, while the Cth and NSW require the prosecution to show on balance of probabilities that an offence was committed</li> <li>The burden of proof is on the respondent to justify legitimacy of his property</li> <li>Unexplained wealth is defined to be the difference between the total value of the wealth of a person and the value of his lawfully acquired wealth</li> <li>Provisions apply retroactively</li> <li>Coercive powers use is provided by law such as examination, production and monitoring orders. Persons subject of these order are prohibited in sharing with anyone that they have been examined or asked to produce such orders</li> <li>Legal and professional obligation to confidentiality are not applicable under these Acts</li> <li>Property can be seized or restrained ex officio for 48 hours. Search warrants can be obtained for so –called emergency cases via means of electronic communications.</li> </ul>	WA from 2000-09) 27 declarations of UWO, of which 18 lead to forfeiture decisions. The NT statute is considered as more effective. Commonwealth of Australia amended its civil asset forfeiture Act POCA 2002 to include UWO. Na cases have been filed to date under this Act.	Australia does not have a bill of rights, and this vacuum has provided Australian parliaments with the opportunity to enact laws that supersede common law liberties and restrict basic rights. In addition the reversed burden of proof has been applied in Australia for some time now in criminal proceedings.
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<sup>1</sup> Criminal Property Confiscation Act (2000)

<sup>2</sup> Criminal Property Forfeiture Act (2002)

<sup>3</sup> Criminal Asset Recovery Act 1990, amended in 2010 to include UWO

<sup>4</sup> Proceeds of Crime Act enacted in 2001, amended in 2010 to include Unexplained Wealth provisions

<sup>5</sup> Criminal Asset Recovery Act enacted in 1990, amended in 2010 to include provisions on Unexplained Wealth

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
Colombia	Asset Recovery Law (Law 793), 2002 Illicit enrichment targeting PEP's <sup>6</sup>		Civil	Organized crime, public officials	The respondent		The defendant for corruption offences	<ul style="list-style-type: none"> <li>• Law enforcement is responsible to collect information and evidence and send it to the Office of Attorney General (OAG), customs officials, and army.</li> <li>• Investigations are conducted by OAG establishing facts, upon which the request for forfeiture order is submitted to a court</li> <li>• The court makes a decision on forfeiture in a civil proceeding</li> <li>• The respondent bears the burden to justify the source of property</li> <li>• Property can be forfeited during the inheritance procedure if it is considered and if it can be shown on civil standard of proof that it is derived from unlawful activities.</li> <li>• Special Administrative Unit is established to manage seized assets until the court makes the decision on forfeiture. This seems to be the most problematic procedure of the Colombian forfeiture law</li> </ul>	Reversal of the burden of proof was challenged by respondent, and it was upheld by the Constitutional Court of Colombia.	Colombia has adopted a number of laws that target unexplained wealth laws. While the law are comprehensive and well written, the practical application is less effective. Proceedings are lengthy and are slowed down by administrative procedures. It is also alleged that corruption and abuse of power has affected the implementation process.
Ireland	The Proceeds of Crime Act 1996 and The Proceeds of Crime Act 2005 (Amendment)	Common Law	Civil	Organized Crime	State has initial evidentiary burden of proof, and then the burden shifts to the respondent	(Act of '94) Conviction based, state bears the burden of proof (Balance of probabilities)	Respondent Act of 1996	<ul style="list-style-type: none"> <li>• Civil Asset Forfeiture</li> <li>• Multi agency approach (Irish National Police, Revenue Service &amp; Department for Social Welfare) work under the umbrella of the Criminal Asset Bureau (CAB)</li> <li>• Proceedings are developed in three phases::</li> <li>• <i>Interim Stage</i> –High Court decides ex parte to freeze the property for 21 days on CAB request, based on belief that the property is a proceed of crime and it exceeds € 13,000</li> <li>• <i>Interlocutory stage</i> – request should be made within 21 days by the applicant, full trial takes place, until final disposal of the property. This stage is 7 years</li> </ul>	Implementation of The Act 1996 is evaluated as effective by Irish legal scholars, stating it has helped enormously in fight against organized crime causing “mass exodus” of criminals. Also CAB has	Transferability in this early stage of evaluation to the US probable, considering the Irish criminal justice system was built on US code RICO

<sup>6</sup> Article 148 of the Criminal Code

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target (Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>• <i>Third and final phase</i> –disposal phase, the final decision on the confiscation of assets/property is made</li> <li>• Criminal confiscation</li> <li>• Confiscation is completed following conviction</li> <li>• The civil standard of proof balance of probabilities is applied</li> <li>• Once the court is satisfied the property is the proceeds of crime, the burden shifts to the defendant to prove otherwise</li> </ul>	forfeited more than 105 million Euros in revenues, with more than 55 million still frozen. 2007 - €254,651 were paid to MoF <sup>7</sup>	

**b) Countries with civil asset forfeiture that apply to all offences with a presumption in favor of forfeiture**

Antigua & Barbuda	Proceeds of Crime Act (POCA) -1993 and Money Laundering and Forfeiture Act (MLFA) of 1996	Common Law	Civil	Organized Crime,	Civil			<p>Proceeds of Crime Act</p> <ul style="list-style-type: none"> <li>• Provides two tracks for forfeiture; a) in rem forfeiture and b) conviction based forfeiture</li> <li>• Proceedings are instituted by the DPP, following the conviction of the defendant of a scheduled offence, no later than 12 months from the day the conviction was made</li> <li>• The defendant will be order to pay a certain amount of money equivalent to the property or sum derived from the offence</li> <li>• Status has in place a number of safeguards, enabling third parties or the defendant to exclude whole or parts of property from an order</li> <li>• The statute is unique in that it provides that forfeiture orders can be changed after they have been made if new evidence became available, or new property is identified Money Laundry Forfeiture Act</li> <li>• Provides for both conviction and non conviction based forfeiture</li> <li>• Non conviction based forfeiture provisions empower the court to forfeit property subject to a freezing order issued on the grounds that a</li> </ul>		
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<sup>7</sup> 12<sup>th</sup> Annual Report of CAB for 2007



Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>person will be charged for an offence.</li> <li>DPP bears the initial burden of proof to show that the property in question is tainted property</li> <li>The burden than shifts on the defendant to establish legitimacy of the property</li> <li>Court will order forfeiture 90 after the forfeiture order has been made.</li> <li>The respondent can seek an exclusion of part or whole property form a forfeiture order</li> </ul>		
Canada	Civil Law, Ontario <sup>8</sup> , Manitoba <sup>9</sup> , Saskatchewan <sup>10</sup> British Colombia <sup>11</sup> , Nova Scotia <sup>12</sup> and Quebec <sup>13</sup>	Common Law	Civil	Civil Asset Forfeiture	Except for the Ontario statute, all others contain statutory presumption favoring forfeiture			<ul style="list-style-type: none"> <li>Provides for forfeiture of assets by reversing the burden of proof on the respondent</li> <li>The prosecution (chief of police/ Attorney General) or another entity established by law for this purpose can apply to a court for a forfeiture, or freezing/restraining order of proceeds and instruments of unlawful activities</li> <li>The standard of evidence is on civil standard of proof. Court will make the order if it is satisfied that there are reasonable grounds to believe property is proceeds or an instrument.</li> <li>The statutes contain a presumption that the property that is subject of an order is an instrument or derived from, unless the contrary is established</li> <li>The state bears the initial burden of proof to show that a person was engaged frequently in unlawful activities, was associated with criminal organizations, or charged but acquitted of an offence.</li> </ul>	Civil forfeiture statutes have been considered effective in reducing crime. However, it appears from the case law that vast majority of cases fall in the category of cash seizure and growing narcotics.	

<sup>8</sup> Civil Remedies Act of 2001

<sup>9</sup> Criminal Property Forfeiture Act in 2004

<sup>10</sup> Seizure of Criminal Property Act of 2005

<sup>11</sup> Civil Forfeiture Act 2006

<sup>12</sup> Civil Forfeiture Act 2007

<sup>13</sup> Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity Act, 2007

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>The constitutionality of the Ontario Act was challenged at the Supreme Court of Canada in 2007 and it was upheld by the court.</li> </ul>		
New Zealand	Civil Recovery of Proceeds Act 2009	Common Law	Civil	Unlawful activities, including serious and minor offences	Provides for the reversal of the burden of proof			<ul style="list-style-type: none"> <li>The Act provides for conviction-based asset forfeiture of instruments of crime, identified as qualifying instrument of crime</li> <li>And non-conviction-based asset forfeiture of property considered to be tainted property or profit derived from significant criminal activity</li> <li>Restraining orders are made on an application of the Commissioner of Police, for up to 1 year</li> <li>Court will make a forfeiture order if it satisfied on the balance of probabilities that the property is “tainted” meaning that it has derived from unlawful activities. Profit derived from significant criminal activity will be forfeited; if the Commissioner shows that the respondent was engaged over the past 7 years in significant unlawful activities and that the person has derived profit from those activities. Significant unlawful activity is an activity for which a punishment of 5 yrs imprisonment can be imposed</li> <li>The burden of proof than shifts on the respondent in the form of an opportunity to rebut the presumptions made by the Commissioner</li> <li>Law is applied retroactively</li> <li>Official Assignee is responsible for management of restrained assets</li> </ul>	The law was adopted recently and there is no significant case law available to evaluate the effectiveness of the legislation. The law itself is relatively comprehensive, but is not consistent in setting forth the standards for the prosecution to establish that a property is tainted property, while clearly outlining the standard for profit of unlawful activities	
South Africa	Prevention of Organized Crime (chapter 5So-called criminal forfeiture following conviction-Chapter 6-	Common Law	Civil	Organized Crime	On prosecution. Standard: balance of probabilities			<ul style="list-style-type: none"> <li>Provisions of chapter 6 provide for forfeiture of assets without prior conviction or initiation of criminal proceedings against an individual</li> <li>Established the Asset Forfeiture Unit (AFU), under National Prosecutorial Authority (NDPP)</li> <li>AFU/NDPP applies to the court for preservation order, standard of proof is reasonable grounds</li> </ul>	Significant development of case law and jurisprudence	pp

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					Civil	Criminal	Anti - Corruption			
	Civil forfeiture – non conviction based) 1998							<ul style="list-style-type: none"> <li>• AFU applies to the court for a forfeiture order. Standard of proof; Balance of Probabilities</li> <li>• Assets obtained up to seven years ago can be object of forfeiture</li> </ul>		
UK	Proceeds of Crime Act 2002	Common Law	Criminal and civil	Organized crime, drug & human trafficking	The prosecution establishes illegal origin of assets, than the burden shifts on the defendant <sup>14</sup>  Standard: Balance of probabilities	Government		<ul style="list-style-type: none"> <li>• Criminal Confiscation Confiscation procedure can be initiated following conviction of the defendant. Two types of confiscation; 1) criminal lifestyle is established – all assets obtained over 6 yrs can be confiscated and civil standard of proof applies. 2) if the criminal lifestyle is not established – only assets derived from a specific crime can be taken; standard of proof-beyond reasonable doubt</li> <li>• Civil Recovery: it is a non conviction based forfeiture; the proceedings can be initiated against any person suspected to have in ownership proceeds resulting from unlawful conduct.</li> <li>• ARA (SOCA) has to prove on the civil standard balance of probabilities, that respondent has benefited from unlawful conduct.</li> <li>• The burden than shifts on the defendant to prove the legal origin of his assets. Statute of limitation is 12 yrs for civil forfeiture proceedings.</li> <li>• Court can issue interim freezing and restraining order to prevent the respondent from dissipating or transferring the property.</li> <li>• Cash recovery – seizure and forfeiture of cash intercepted anywhere which is suspected to derive from crime</li> <li>• Taxation – SOCA (ARA) can initiate assessment of taxable income of those suspected to have benefited from unlawful conduct. Enhanced cooperation and information sharing between</li> </ul>	Civil recovery is considered to have had e some impact on crime reduction, mainly due to lengthy proceedings.	ppp

<sup>14</sup> For offences related to drug trafficking

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								the Agency and Internal Revenue.		

**c) Countries that have some form of illicit enrichment provisions that are applicable to all offences, reversing the burden of proof to the defendant in a criminal proceeding**

<b>Austria</b>	Criminal Code, 1996	Civil	Criminal and civil	Organized crime/Terrorist organizations	Civil <i>in rem</i>	Burden of certification of origin is on the defendant		<ul style="list-style-type: none"> <li>Austria has both a criminal and civil forfeiture system</li> <li>Confiscation proceedings are non conviction based, standalone procedure and sanction</li> <li>Burden of proof is short of a complete reversal of burden of proof recognizing the reversal of the burden of certification of origin on the defendant, representing defendants obligation to present facts concerning the origin of assets/property</li> <li>Prosecution/investigative judge can issue an injunction to seize assets.</li> <li>Prosecution needs to establish for all defendants i) that proceeds derive from illegal activities and for organized criminal organizations, that the defendant ii) was a member of a criminal organization.</li> </ul>	Austria	Criminal Code, 1996
<b>France</b>	Criminal Code of 1994 (as amended in '96, '99, '03 & '04)	Civil Law	Criminal	Organized Crime (Money Laundering, Drug Trafficking)		Provides for reversal of burden of proof	Includes corruption offences	<ul style="list-style-type: none"> <li>French criminal law allows confiscation only upon conviction. There are two types of confiscation; 1)Obligatory confiscation – covering all goods defined to be dangerous, materials and proceeds used or resulting from some offences, drug and human trafficking, criminal organization, terrorism, etc. and 2)Discretionary – for all custodial penalties targeting property of individuals, authorizing the judge to decide its imposition</li> <li>France has over the last decade introduced a number of criminal offences, whereby the central element is a reversed burden of proof, stating that if a person cannot justify his</li> </ul>		

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								lifestyle will be punished with imprisonment and a fine <sup>15</sup> and confiscation of his assets.		
Italy	Provisions incorporated in the Criminal Code	Civil Law Patrimonial preventive measures introduced in 1956, amended in 1982 & 1994 introducing property measures; 2.Judicial penal measures 1965 (Note: Declared unconstitutional, in part, in 1994)	Criminal	Mafia type associations and organized crime		Burden of proof is on the defendant <sup>16</sup>		<ol style="list-style-type: none"> <li>Preventive (administrative) personal and property measures, are non conviction based and provides for reversal of burden of proof. These are considered extra-judicial measures, though they are subject to judicial review.</li> <li>Penal judicial type - conviction based. Reversal of burden of proof is provided for upon conviction of the defendant for offences associated to mafia type crimes. Confiscation is a compulsory measure for crimes associated to mafia. The reversal of the burden of proof in criminal proceedings was declared unconstitutional by the CC of Italy. The legislators approved an amended law within the same year, including the reversal of the burden of proof with more stringent conditions.</li> </ol>	Effectiveness of preventive measures varies from year to year; influenced by enactment of new legislation, constitutional court decisions and raise of crime <sup>17</sup>	
Netherlands	Criminal Code "Strip them" Act	Civil Law	Criminal	Organized Crime			On the prosecutor to establish existence of	<ul style="list-style-type: none"> <li>Dutch law foresees four cases where confiscation is possible: 1) upon conviction; 2) on the basis of similar offence of which the person is convicted; 3) for cases in which the</li> </ul>	The enactment of the legislation has increased the use of	

<sup>15</sup> Articles; 225-6, 225-12-5, 225-4-8, 312-7-1, 421-2-3, 450-2-1 of the Criminal Code of France. English translation is available at <http://195.83.177.9/code/index.phtml?lang=uk>

<sup>16</sup> Second paragraph of the **12 quinquies** shifted the burden of proof on the defendant. This was declared unconstitutional by the CC, on the grounds that it conflicted with the principle of the presumption of innocence guaranteed by the Italian Constitution (article 27). Article 12sexies restricted the compulsory requirement of confiscation to those condemned of mafia crimes. No direct link is required between goods to be confiscated and accomplishment of a crime.

<sup>17</sup> Murder of a judge and a prosecutor in Italy has affected an increased usage of preventive measures and particularly confiscation as a measure to fight organized crime. Generally, there is a lack of data gathered by different institutions to evaluate the effectiveness of the property (preventive) measures.

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					Civil	Criminal	Anti - Corruption			
							criminal lifestyle, then the burden shifts to the respondent (partial reversal)	person has been imposed a fine of over €45,000 and 4) for profit generated by an offence committed by anyone in whatever way; for which a fine of over €45,000 can be imposed’ and criminal financial investigation are conducted. <ul style="list-style-type: none"> <li>• If during financial investigation the origin of property cannot be justified, the burden shifts on the defendant.</li> <li>• Court calculates the extent of the illegally obtained profit by using property analysis method and cash position method</li> <li>• The law allows for settlement Request for confiscation can be made in a separate procedure</li> </ul>	confiscation	
Switzerland	Criminal Code and Criminal Procedure Code	Civil Law	Criminal	Organized Crime		Burden of proof on prosecution Standard of proof “Intimate conviction”  Reversed burden of proof for organized crime suspects		<ul style="list-style-type: none"> <li>• In rem forfeiture is governed by the Swiss Criminal Code Article 69 to 72.</li> <li>• Standard of proof is a lower criminal standard of proof called “Intimate conviction”.</li> <li>• Burden of proof is on the prosecution.</li> <li>• Prosecution needs to prove commission of the offense and prove that the concerned assets have derived from the commission of that particular offence.</li> <li>• In specific circumstances as provide for by the Article 260 of the Criminal Code, the burden of proof can shift, when the suspect is a member or has supported criminal organizations. In these instances the prosecution must prove that the person was a member of a criminal organization.</li> </ul>		

**d) Countries that have illicit enrichment targeting PEP’s, reversing the burden of proof to the defendant in a criminal proceeding**

Argentina	Criminal Code (Article 268 (2)), 1999	Civil Law System	Criminal	Official Corruption (PEPs)		Reversed burden of proof		<ul style="list-style-type: none"> <li>• The criminal offence of illicit enrichment as a result of corruption was introduced in 1964 and amended in 1999. This provision stipulates the duty of the Public Officials or third parties to account for their income and assets</li> </ul>	From 1999 to 2003, 76 cases were opened on illicit enrichment, 19 were reported to the	
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					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>acquired while holding public office, for up to two years after leaving the public office.</li> <li>Anti-corruption Agency is established as an administrative agency with investigatory powers which has developed a system of public financial disclosure forms for all public officials, used to monitor public officials.</li> </ul>	judiciary, 22 were dismissed and 35 were still under investigation, Between 2004 and 2006, 136 additional cases were under investigation. <sup>18</sup>	
<b>Botswana</b>	Corruption and Economic Crime 1994	Botswana has a dual legal system with elements of the Roman-Dutch and common law	Criminal	Economic crime and corruption			The burden is on the defendant to justify the origin of his wealth	<ul style="list-style-type: none"> <li>The Corruption and Economic Crime Act '94, created a new corruption offence, including possession or control of disproportionate assets or maintaining an unexplained high standard of living. In 2009 money laundering was also added to the duties the DCEC</li> <li>Act created a new Body Directorate on Corruption and Economic Crime (DCEC) with powers of investigation, arrest, search and seizure</li> <li>The Director may inquire or investigate any alleged or suspected offences, demand records from public or private agencies, arrest any person if the Director reasonably believes the person has committed an offence<sup>19</sup>.</li> <li>If the person fails to give a satisfactory explanation to the Director or the officer as to how he was able to maintain such a standard of living or</li> </ul>	DCEC was modeled after Hong Kong's ICAC. By the end of 1999 the DCEC had received 5250 report. Reports are received from public. Of reports received, 1565 investigations were conducted of which 1018 were completed. 197 persons have been prosecuted with a conviction rate of 84% <sup>20</sup>	

<sup>18</sup> Anticorruption Office Annual Reports at <http://www.anticorruption.gov.ar/gestion.asp>

<sup>19</sup> The most important offences defined in the Act of '94 are: bribery, conflict of interest, diversion of public revenue, possession of unexplained property (living beyond visible income)

<sup>20</sup> Independent Commission Against Corruption (ICAC) available at: <http://www.icac.org.hk/news/issue1/content.asp?chapter=4>, accessed march 7<sup>th</sup>, 2011

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					Civil	Criminal	Anti - Corruption			
								<p>how such resources or property came under his control or possession, he will be considered guilty of corruption offence</p> <ul style="list-style-type: none"> <li>If a court is satisfied in any proceedings for an offence if there is reason to believe that any person was holding pecuniary resources or property in trust for or on behalf of the accused, or acquired such resources or property as a gift, or loan without adequate consideration, from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.</li> </ul>	No	
Brunei Darussalam	Prevention of Corruption Act 1982 <sup>21</sup>	Common Law	Criminal	Corruption offences (PEPs)			Presumption of corruption	<ul style="list-style-type: none"> <li>Act establishes the Anti-Corruption Bureau (ABC) with powers to investigate complaints against corruption.</li> <li>Article 12 of the act includes “<i>offences for possession of unexplained property or maintaining a standard of living above that which is commensurate with his past or present emoluments</i>”.</li> <li>The Act foresees punishment of individuals up to \$500 if they fail to report a received gratification.</li> <li>Article 25 – provides for presumption of corruption in certain cases</li> <li>The defendant is presumed to be guilty unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living. Penalty, a fine of \$30,000 and imprisonment for 7 years.</li> </ul>		

<sup>21</sup> Available at: [www.anti-corruption.gov.bn/prevention.htm](http://www.anti-corruption.gov.bn/prevention.htm), accessed March 8<sup>th</sup>, 2011



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					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>In addition to the above penalties the court may order a person convicted of an offence to pay to the Government a sum not exceeding the amount of the pecuniary resources; or (a) a sum not exceeding the value of the property, the acquisition of which by him was not explained to the satisfaction of the court and any such sum ordered to be paid shall be recoverable as a fine.</li> </ul>		
Egypt	Illicit Enrichment Law No. 62 1975 (Articles 2 and 18 of the Law)	Civil Law	Criminal	Corruption Offences		Reverses the burden of proof on the defendant		<ul style="list-style-type: none"> <li>Article 2 of the Law 62 provides that all assets acquired by any person subject to the provisions of this law, due to position and job abuse or due to a behavior contradictory to the criminal law or public morals are considered illicit enrichment.</li> <li>The law also includes any increases in wealth that take place abruptly after holding the post or assuming the title by the person, as a result of job abuse or misconduct, whenever such increase is not consistent with their resources and she/he fails to prove the legitimate source for it.</li> <li>Further Article 18 stipulates that whoever acquires illicit wealth, for himself or others, shall be sentenced to imprisonment (3-15 years as stipulated in article 16 of the penal code) and a fine equal to the value of the illicit wealth and the return of such gain.</li> </ul>		
Ethiopia	The Criminal Code of the Federal Democratic Republic of Ethiopia	Dual legal system with elements of the civil and	Criminal					<ul style="list-style-type: none"> <li>Provisions of the CC provide that any public servant having been in a public office and maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means, and is</li> </ul>		

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Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
	Proclamation No. 414/2004	common law						<p>in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.</p> <ul style="list-style-type: none"> <li>If a court during proceeding, is satisfied that there is reason to believe that a third party has in his possession or control resources for the defendant, court will in the absence of evidence to the contrary, presume that these resources are under the control of the accused.</li> </ul>		
India	The Prevention of Corruption Act, 1988	Common law	Criminal and Civil	Official Corruption			Defendant	<ul style="list-style-type: none"> <li>The Law Commission of India in its 166th Report recommended for enactment of a separate law providing for forfeiture of property acquired by the holders of public office through corrupt means.</li> <li>The recommendations confiscations of illegally acquired property could be achieved by incorporating the provision of the Criminal Law (Amendment) Ordinance, 1944 in the Prevention of Corruption Act, 1988 itself with suitable modifications.</li> <li>Therefore, it is proposed to insert a new Chapter IVA in the Prevention of</li> </ul>	In 1964, India established the Central Vigilance Commission (CVC) which is an independent watchdog agency to undertake inquiries or investigations of transactions involving certain Categories of public servants. However,	

Table of Countries with UWOs

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								Corruption Act which empowers the special judge to exercise the powers of attachment before judgment. The procedure provided will be more effective and speedy.	corruption remains widespread in the country and there have been many instances of political and bureaucratic corruption, public funds embezzlement, fraudulent procurement practices, and judicial corruption.	
Indonesia	Anti Corruption Law <sup>22</sup> 1999	Based on civil law of Holland and <i>adat</i> (cultural law of Indonesia)	Criminal	Corruption			Reversal of burden of proof	<ul style="list-style-type: none"> <li>Article 27 provides that in the event a corrupt act is detected and is hard to prove, a joint team shall set up under the coordination of the Attorney General</li> <li>Article 28 provides for reversal of burden of proof requesting from the defendant to provide information on all his assets, assets of spouse, children, and the assets of anyone who are alleged to be proceeds of an offence</li> <li>The Anti-Corruption Law 31/1999, Articles 18-19 permits forfeiture of any property which is the subject-matter of a corruption offence, or has been used in the commission of such an offence.</li> </ul>	In Indonesia, A number of reforms have tackled the problem of corruption head-on. As in the case of legal reform, their failings are evident, but they do show what has been attempted. Corruption remains a very significant issue	

<sup>22</sup> The regime to seize, freeze and confiscate criminal property is generally limited. The AML Law provides for provisional measures related to the ML offence, while the Criminal Code and Criminal Procedure Code provide for limited forfeiture, freezing and seizing of criminal proceeds

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								<ul style="list-style-type: none"> <li>'Property' under the Corruption Law is not defined but Article18 (1)(a) allows confiscation of mobile goods and immobile goods or immobile goods used for or obtained from the criminal act of corruption.</li> </ul>	for all aspects of Indonesian society and a challenge for AML/CFT implementation. <sup>23</sup>	
Malaysia	ACT 575 Anti-Corruption Act , 1997		Criminal and Civil	Official Corruption			Defendant	<ul style="list-style-type: none"> <li>Section 36 of the ACT 575 provides that for any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject-matter of the offence or to have been used in the commission of the offence where- the offence is proved against the accused; or the offence is not proved against the accused but the court is satisfied- that the accused is not the true and lawful owner of such property; and that no other person is entitled to the property as a purchaser in good faith for valuable consideration.</li> <li>Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.</li> </ul>	According to a minister in the Prime Minister's office, The 1997 Anti-Corruption Act was an improvement on previous anti-corruption laws but unfortunately, it has remained a dead letter as its new and stronger provisions were never invoked and enforced to fight corruption.	
Pakistan	Prevention of Corruption Act, 1947 And 1999	Based on English common law with	Criminal and Civil	Official Corruption			Defendant	<ul style="list-style-type: none"> <li>When a public officer or employee during his incumbency has acquired property that is manifestly</li> </ul>	Although Pakistan inherited the Prevention of	

<sup>23</sup> [http://www.apgml.org/documents/docs/17/Indonesia%20MER2\\_FINAL.pdf](http://www.apgml.org/documents/docs/17/Indonesia%20MER2_FINAL.pdf)

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
	National Accountability Bureau Ordinance (Art. 9, Corruption and Corrupt Practices)	some provisions of Islamic Law						disproportionate to his or her salary level and other lawfully earned income, such assets are presumed <i>prima facie</i> to have been unlawfully acquired, unless the official can justify their legitimacy. Such assets may be frozen during investigation and confiscated after conviction.	Corruption Act (PCA) at Independence in 1947, the initiatives, did not bring about a meaningful improvement in the situation where corruption kept consistently rising and the legislations in place kept failing.	
Philippines	Anti-Corruption Law Article XI of the 1987 Constitution, entitled "Accountability of Public Officers"			Official Corruption			Defendant	<ul style="list-style-type: none"> <li>• One of the biggest challenges in fighting corruption is the recovery of public properties or moneys acquired unlawfully.</li> <li>• <i>Philippine National Police</i> authorities are having a difficult time retrieving properties or moneys which were obtained through corruption.</li> <li>• In relation to this concern, it is important to note that the anti-corruption law provides for confiscation of unexplained wealth.</li> </ul>	Despite some impressive world-class anti-corruption safeguards, the Philippines government still faces a major problem of corruption. This can be attributed to the following factors: 1. The Filipino culture of gift giving justifies bribery and extortion thereby making it hard for law enforcement and anti-corruption agencies to	

Table of Countries with UWOs

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
									<p>arrest the problem</p> <p>2. Agencies deputized to fight corruption are not well funded by the government. Also, Despite the passage of numerous anti-corruption laws in the Philippines and ratification of the <i>UN Convention Against Corruption</i>,<sup>116</sup> the perception that cases filed against corrupt officials and employees do not succeed still persists.</p>	
Singapore	<a href="#">Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, Chapter 65A, 1999</a>	Common Law	Criminal and Civil	Organized Crime, Drug Trafficking and Corruption			Defendant	<ul style="list-style-type: none"> <li>Allows the Court to confiscate properties from convicted and corrupt offenders, if the said properties are found to be benefits of corruption offences, drug trafficking and criminal conduct.</li> <li>Proceedings are civil in nature and the civil standard of proof applies</li> <li>The statute provides for the reversal of the burden of proof to the defendant to justify legitimacy of his assets</li> <li>Act provides for production and examination orders, and search</li> </ul>	<p>Prior to the introduction of the Corruption and Drug Trafficking law, syndicated corruption and greasing the palms of public officers in return for the services was common. After</p>	

Table of Countries with UWOs

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								warrants <ul style="list-style-type: none"> <li>The Act imposes a responsibility on anyone to disclose information related to property that is considered to be proceeds or an instrument of a drug offence or a criminal conduct, excluding solicitors and lawyers due to legal privilege.</li> <li>Singaporean authorities can use the domestic asset recovery mechanisms to confiscate the assets of an offender convicted of laundering funds generated by corruption offences in Indonesia.</li> <li>Implemented by the Corrupt Practices investigation Bureau, Police Force and the Minister of Home Affairs</li> </ul>	independence from the British the law was introduced and later revamped to give more powers to officers and punishments for corruption offences were enhanced. No notable increase in confiscation since the introduction of the law. The law is supposedly reviewed regularly to ensure that offenders do not escape from legal punishment.	
<b>Hong Kong Conviction based</b>	Prevention of Bribery Ordinance (PBO) 1971 , Drug Trafficking Recovery of Proceeds Ordinance (DTROPO), 1989, and Organized and Serious Crime	Common Law		Drug trafficking, serious crime and corruption			The defendant	<ul style="list-style-type: none"> <li>PBO contains provisions on Possession of Unexplained Wealth, which provide that any person who, being or having been the Chief Executive or a prescribed officer (Amended 14 of 2003 s. 17; 22 of 2008 s. 4): (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control,</li> </ul>		

Table of Countries with UWOs

Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
	Ordinance (OSCO), 1994.							be guilty of an offence. <ul style="list-style-type: none"> <li>• ICAC<sup>24</sup> can freeze all of the property of a suspected person, whether tainted or not. However, on the conviction of the suspect the PBO does not provide for forfeiture or confiscation of the restrained property. Prosecution relies on the provisions of OSCO to confiscate restrained property.</li> <li>• On the other hand DTROPO and OSCO provide for confiscation of proceeds of crime, following conviction of the defendant.</li> <li>• Further DTROPO also provides for civil forfeiture of money imported or exported from Hong Kong, considered to be proceeds of or is intended for use in drug trafficking.</li> </ul>		

<sup>24</sup> Independent Commission Against Corruption



## Appendix B

### Copies of Legal Statutes

B(i) - Criminal Property Confiscation Act 2000/Western Australia

B(ii) - Proceeds of Crime Act 2002/ Australia

B(iii) - Proceeds of Crime Act 1996/Australia

B(iv) - Criminal Assets Bureau Act 1996/Ireland

B(v) - Proceeds of Crime (Amendment) Act 2005/Ireland

B(vi) - Disclosure of Certain Information For Taxation and Other Purposes Act, 1996/Ireland

Appendix B(i)  
Criminal Property Confiscation Act 2000  
Western Australia



Western Australia

# **Criminal Property Confiscation Act 2000**

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As at 18 Oct 2010

Version 02-i0-00

Extract from [www.slp.wa.gov.au](http://www.slp.wa.gov.au), see that website for further information

# Criminal Property Confiscation Act 2000

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### **Defined Terms**

Western Australia

## **Criminal Property Confiscation Act 2000**

**An Act to provide for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.**

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## Part 1 — Preliminary

### 1. Short title

This Act may be cited as the *Criminal Property Confiscation Act 2000*<sup>1</sup>.

### 2. Commencement

This Act comes into operation on a day fixed by proclamation<sup>1</sup>.

### 3. Meaning of terms used in this Act

The Glossary at the end of this Act defines or affects the meaning of some of the words and expressions used in this Act.

### 4. Confiscable property — synopsis

Property of the following kinds is confiscable to the extent provided by this Act —

- (a) property equal in value to any amount by which the total value of a person's wealth exceeds the value of the person's lawfully acquired wealth (*unexplained wealth* — see section 144);
- (b) certain property, services, advantages and benefits obtained by a person who has been involved in the commission of a confiscation offence (*criminal benefits* — see section 145);
- (c) property used in or in connection with the commission of a confiscation offence, or property of equal value (*crime-used property* — see section 146);
- (d) property derived directly or indirectly from the commission of a confiscation offence (*crime-derived property* — see section 148);
- (e) property owned, effectively controlled or given away by a person who is declared to be a drug trafficker under

section 32A(1) of the *Misuse of Drugs Act 1981*, or who absconds before a declaration can be made (*declared drug trafficker* — see section 159).

**5. Application of Act to confiscable property**

- (1) This Act applies to a person's unexplained wealth whether any property, service, advantage or benefit that is a constituent of the person's wealth was acquired before or after the commencement of this Act.
- (2) This Act applies to criminal benefits, crime-used property and crime-derived property —
  - (a) whether the relevant confiscation offence was committed in Western Australia or elsewhere;
  - (b) whether the relevant confiscation offence was committed before or after the commencement of this Act;
  - (c) whether or not anyone has been charged with, or convicted of, the relevant confiscation offence; and
  - (d) if someone has been convicted of the relevant confiscation offence — whether the conviction took place before or after the commencement of this Act.
- (3) This Act applies —
  - (a) to property in Western Australia; and
  - (b) to the fullest extent of the capacity of the Parliament to make laws with respect to property outside the State, to property outside Western Australia.

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## Part 2 — Confiscation of property

### 6. When property is confiscated

Property is confiscated when it is given or taken in satisfaction of a person's liability under section 14, 20 or 24 to pay the amount specified in an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration.

### 7. When frozen property is confiscated automatically

- (1) Frozen property is confiscated if an objection to the confiscation of the property is not filed on or before the 28<sup>th</sup> day after the service cut off date for the property.
- (2) If an objection to the confiscation of frozen property is filed on or before the 28<sup>th</sup> day after the service cut off date for the property, the property is confiscated if —
  - (a) the objection, or each objection if there are more than one, is finally determined;
  - (b) where the property is subject to a freezing notice — the freezing notice is not cancelled or set aside; and
  - (c) where the property is subject to a freezing order — the freezing order is not set aside.
- (3) However, property frozen under a freezing notice is not confiscated under subsection (1) or (2) until the freezing notice is filed in accordance with section 36(6)(a).

### 8. Drug trafficker's property

- (1) When a person is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of a confiscation offence that was committed after the commencement of this Act, the following property is confiscated —

- (a) all the property that the person owns or effectively controls at the time the declaration is made;
  - (b) all property that the person gave away at any time before the declaration was made, whether the gift was made before or after the commencement of this Act.
- (2) When a person is taken to be a declared drug trafficker under section 159(2), the following property is confiscated —
- (a) all the property that the person owned or effectively controlled at the time that the person absconded;
  - (b) all property that the person gave away at any time before the person absconded, whether the gift was made before or after the commencement of this Act.
- (3) Nothing in subsection (1) or (2) prevents the confiscation of crime-derived property or crime-used property owned, effectively controlled or given away by a person, whether the relevant confiscation offence was committed, or is likely to have been committed, before or after the commencement of this Act.
- (4) Nothing in subsection (1) or (2) prevents a criminal benefits declaration from being made against a person, whether the relevant confiscation offence was committed, or is likely to have been committed, before or after the commencement of this Act.
- (5) Nothing in subsection (1) or (2) prevents an unexplained wealth declaration from being made against a declared drug trafficker or a person who has been charged with an offence that may lead to his or her being declared a drug trafficker.

**9. Time and effect of confiscation of registrable real property**

- (1) Registrable real property that is confiscated under section 6, 7 or 8 vests absolutely in the State when —
- (a) the court declares under section 30 that the property has been confiscated; and



- (b) a memorial of the making of the declaration is registered under section 113(1).
- (2) When registrable real property vests in the State under subsection (1) —
  - (a) the property vests free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants);
  - (b) any caveat in force in relation to the property is taken to have been withdrawn; and
  - (c) the title in the property passes to the State.
- (3) If registrable real property has been confiscated under section 6, 7 or 8, but has not vested in the State under subsection (1), sections 50 and 51 and Part 7 apply to the property as if it were subject to a freezing order.

**10. Time and effect of confiscation of other property**

- (1) Property (except registrable real property) that is confiscated under section 6, 7 or 8 vests absolutely in the State when the section takes effect in relation to the property.
- (2) When property (except registrable real property) that is registrable under an enactment is confiscated, the DPP must notify the registrar of the confiscation.

## **Part 3 — Identifying and recovering confiscable property**

### **Division 1 — Unexplained wealth**

#### **11. Applying for unexplained wealth declarations**

- (1) The DPP may apply to the court for an unexplained wealth declaration against a person.
- (2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to confiscation, or at any other time.

#### **12. Making unexplained wealth declarations**

- (1) On hearing an application under section 11(1), the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth.
- (2) Any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.
- (3) Without limiting the matters to which the court may have regard, for the purpose of deciding whether the respondent has unexplained wealth, the court may have regard to the amount of the respondent's income and expenditure at any time or at all times.
- (4) When making a declaration, the court is to —
  - (a) assess the value of the respondent's unexplained wealth in accordance with section 13; and
  - (b) specify the assessed value of the unexplained wealth in the declaration.

- (5) The court may make any necessary or convenient ancillary orders.

**13. Assessing the value of unexplained wealth**

- (1) The value of the respondent's unexplained wealth is the amount equal to the difference between —
- (a) the total value of the respondent's wealth; and
  - (b) the value of the respondent's lawfully acquired wealth.
- (2) For the purposes of subsection (1), the value of any property, service, advantage or benefit that has been given away, used, consumed or discarded, or that is for any other reason no longer available, is the greater of —
- (a) its value at the time that it was acquired; and
  - (b) its value immediately before it was given away, or was used, consumed or discarded, or stopped being available.
- (3) The value of any other property, service, advantage or benefit is the greater of —
- (a) its value at the time that it was acquired; and
  - (b) its value on the day that the application for the unexplained wealth declaration was made.
- (4) However, when assessing the value of the respondent's unexplained wealth, the court is not to take account of —
- (a) any property that has been confiscated under this Act or any other enactment;
  - (b) any property, service, advantage or benefit that was taken into account for the purpose of making an earlier unexplained wealth declaration against the respondent; or
  - (c) any property, service, advantage or benefit in relation to which a criminal benefits declaration has been made.

**14. Unexplained wealth payable to State**

When the court makes an unexplained wealth declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the respondent's unexplained wealth.

**Division 2 — Criminal benefits**

**15. Applying for criminal benefits declarations**

- (1) The DPP may apply to the court for a criminal benefits declaration.
- (2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to confiscation, or at any other time.

**16. Making criminal benefits declarations for crime-derived property**

- (1) On hearing an application under section 15(1), the court must declare that the respondent has acquired a criminal benefit if it is more likely than not that —
  - (a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth;
  - (b) the respondent is or was involved in the commission of a confiscation offence; and
  - (c) the property, service, advantage or benefit was wholly or partly derived or realised, directly or indirectly, as a result of the respondent's involvement in the commission of the confiscation offence, whether or not it was lawfully acquired.
- (2) For the purposes of subsection (1)(b), if the respondent has been convicted of the confiscation offence, the respondent is

conclusively presumed to have been involved in the commission of the offence.

- (3) The property, service, advantage or benefit is presumed to have been directly or indirectly acquired as a result of the respondent's involvement in a confiscation offence unless the respondent establishes otherwise.

**17. Making criminal benefits declarations for unlawfully acquired property**

- (1) On hearing an application under section 15(1), the court must declare that the respondent has acquired a criminal benefit if it is more likely than not that —
  - (a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and
  - (b) the property, service, advantage or benefit was not lawfully acquired.
- (2) If the respondent has been convicted of a confiscation offence, or it is more likely than not that the respondent is or has been involved in the commission of a confiscation offence, then it is presumed that the property, service, advantage or benefit was not lawfully acquired unless the respondent establishes the contrary.

**18. Limitations and ancillary orders**

- (1) The court is not to make a criminal benefits declaration in relation to any property, service, advantage or benefit if —
  - (a) a criminal benefits declaration has already been made in relation to the property, service, advantage or benefit;
  - (b) the property, service, advantage or benefit has been confiscated under this Act or any other enactment; or
  - (c) the property, service, advantage or benefit, or its value, has been taken into account for the purpose of making

an unexplained wealth declaration against the respondent.

- (2) When making a criminal benefits declaration, the court is to —
  - (a) assess the value of the criminal benefit acquired by the respondent in accordance with section 19; and
  - (b) specify the assessed value of the criminal benefit in the declaration.
- (3) When making a criminal benefits declaration, the court may make any necessary or convenient ancillary orders.

**19. Assessing the value of criminal benefits**

- (1) The value of any property, service, advantage or benefit that has been given away, used, consumed or discarded, or that is for any other reason no longer available, is the greater of —
  - (a) its value at the time that it was acquired; and
  - (b) its value at the time that it was given away, or was used, consumed or discarded, or stopped being available.
- (2) The value of any other property, service, advantage or benefit is the greater of —
  - (a) its value at the time that it was acquired; and
  - (b) its value on the day that the application for the criminal benefits declaration was made.

**20. Criminal benefits payable to State**

When the court makes a criminal benefits declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the criminal benefit acquired by the respondent.

### **Division 3 — Crime-used property substitution**

#### **21. Applying for crime-used property substitution declaration**

- (1) The DPP may apply to the court for a crime-used property substitution declaration against a person.
- (2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to the confiscation of property, or at any other time.

#### **22. Making crime-used property substitution declarations**

- (1) On hearing an application under section 21, the court must declare that property owned by the respondent is available for confiscation instead of crime-used property if —
  - (a) the crime-used property is not available for confiscation as mentioned in subsection (2); and
  - (b) it is more likely than not that the respondent made criminal use of the crime-used property.
- (2) For the purposes of subsection (1)(a), the crime-used property is not available for confiscation if —
  - (a) the respondent does not own, and does not have effective control of, the property;
  - (b) where the property was or is owned or effectively controlled by the respondent, and was or is frozen — the freezing notice or freezing order has been or is to be set aside under section 82(3) in favour of the spouse, a de facto partner or a dependant of the respondent; or
  - (c) in any other case — the property has been sold or otherwise disposed of, or cannot be found for any other reason.

- (3) If the respondent has been convicted of the relevant confiscation offence, it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.
- (4) If the respondent has not been convicted of the relevant confiscation offence, but the applicant establishes that it is more likely than not that the crime-used property was in the respondent's possession at the time that the offence was committed or immediately afterwards, then it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.
- (5) In any circumstances except those set out in subsection (3) or (4), the applicant bears the onus of establishing that the respondent made criminal use of the property.
- (6) When making a declaration, the court is to —
  - (a) assess the value of the crime-used property in accordance with section 23; and
  - (b) specify the assessed value of the crime-used property in the declaration.
- (7) The court may make any necessary or convenient ancillary orders.

*[Section 22 amended by No. 28 of 2003 s. 40.]*

**23. Assessing the value of crime-used property**

- (1) The value of crime-used property is the amount equal to the value of the property at the time that the relevant confiscation offence was or is likely to have been committed.
- (2) The value of the crime-used property is taken to be its full value even if the respondent did not outlay any amount for the purpose of obtaining or making criminal use of the property, or did not outlay an amount equal to its full value for that purpose.



- (3) The court may make a crime-used property substitution declaration against 2 or more respondents in respect of the same crime-used property, whether or not the applications for the respective declarations are heard in the same proceedings.

**24. Substituted property payable to State**

- (1) When a court makes a crime-used property substitution declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the crime-used property.
- (2) If a crime-used property substitution declaration is made against 2 or more respondents in respect of the same crime-used property, the respondents are jointly and severally liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the property.

**Division 4 — Recovery of confiscable property**

**25. Recovery of unexplained wealth, criminal benefits or substituted property**

- (1) The amount payable by a respondent under section 14, 20 or 24 is payable —
  - (a) within one month after the date on which the respective unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration was made; or
  - (b) within any further time allowed by the court.
- (2) The court may allow further time even if the due date has passed.
- (3) If part or all of the amount is not paid within the time allowed, the unpaid amount is recoverable from the respondent by the

State in a court of competent jurisdiction as a debt due to the State.

**26. Use of frozen property to meet liability**

- (1) Frozen property owned by a respondent may be taken, with the respondent's consent, in payment or part-payment of an amount payable by the respondent under section 14, 20 or 24.
- (2) However, if part or all of the amount payable by the respondent is not paid within the time allowed under section 25(1), then despite any other provision of this Act, any frozen property that is owned by the respondent is available for the purpose of satisfying the respondent's liability as if the property had been taken from the respondent's possession under a writ, warrant or other process of execution.
- (3) Nothing in subsection (1) or (2) limits any other means of satisfying a debt due to the State under section 25(3).

**27. Applying for confiscable property declarations**

- (1) The DPP may apply to the court for a confiscable property declaration.
- (2) An application may be made in the course of proceedings for an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration, or at any other time.

**28. Making confiscable property declarations**

- (1) On hearing an application under section 27 the court may declare that property that is not owned by the respondent is available to satisfy the respondent's liability under section 14, 20 or 24 if it is more likely than not that —
  - (a) if the property is frozen — the respondent effectively controlled the property at the time that the freezing

notice was issued or the freezing order was made for the property;

- (b) if the property is not frozen — the respondent effectively controlled the property at the time that the application for the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration was made; or
  - (c) the respondent gave the property away at any earlier time.
- (2) It is presumed that the respondent effectively controlled the property at the material time, or gave the property away, unless the respondent establishes the contrary.
  - (3) The court may make any necessary or convenient ancillary orders.

**29. Restrictions on confiscation of declared confiscable property**

- (1) Property that is effectively controlled, or was given away, by a respondent is not available to satisfy the respondent's liability under section 14, 20 or 24 unless the property is specified in a confiscable property declaration against the respondent.
- (2) The property specified in a confiscable property declaration is only available to satisfy the respondent's liability —
  - (a) in accordance with the declaration; and
  - (b) to the extent that property owned by the respondent is not available or is insufficient to satisfy the liability.

**30. Applying for and making declarations of confiscation**

- (1) The DPP may apply to the court for a declaration that property has been confiscated.
- (2) On considering an application, if the court finds that the property described in the application has been confiscated under

section 6, 7 or 8, the court must make a declaration to that effect.

**31. Notice of confiscation of registrable property**

- (1) When the court declares under section 30 that registrable real property has been confiscated, the DPP must lodge a memorial of the confiscation with the Registrar of Titles.
- (2) When the court declares under section 30 that property that is registrable under any enactment except the *Transfer of Land Act 1893* has been confiscated, the DPP must lodge with the registrar —
  - (a) a copy of the declaration; and
  - (b) a notice giving particulars of the confiscation.

**32. Varying declarations**

If the court has made a declaration under this Part, the DPP may at any time apply to the court for a variation of the declaration, or for a further declaration, to give effect, or better to give effect, to the previous declaration.

## **Part 4 — Preventing dealings in confiscable property**

### **Division 1 — Seizure of crime-used and crime-derived property**

#### **33. Seizure of crime-used or crime-derived property**

- (1) A police officer may seize any property if there are reasonable grounds for suspecting that the property —
  - (a) is crime-used property;
  - (b) is crime-derived property; or
  - (c) is owned or effectively controlled by a person who has been charged with an offence, and who could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.
- (2) A police officer may —
  - (a) at any time remove the seized property from the place in which it was found and retain it; or
  - (b) guard the property in the place in which it was found.
- (3) A police officer may retain or guard the property —
  - (a) if a freezing notice is issued for the property within 72 hours after it was seized — while the freezing notice is in force; or
  - (b) if not — for not more than 72 hours after the property was seized.
- (4) Any income or other property derived from seized property while it is being retained or guarded is taken for all purposes to be part of the seized property.

**Division 2 — Freezing notices for crime-used and crime-derived property**

**34. Issue of freezing notices**

- (1) The DPP or a police officer may apply to a Justice of the Peace for the issue of a freezing notice.
- (2) A Justice of the Peace may issue a freezing notice for any property if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.
- (3) A Justice of the Peace may issue a freezing notice for all or any property that is owned or effectively controlled by a person, or that the person has at any time given away if —
  - (a) the person has been charged with an offence, or the applicant for the notice advises the Justice of the Peace that the person is likely to be charged with an offence within 21 days after the day on which the freezing notice is issued; and
  - (b) the person could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.
- (4) A freezing notice may be issued under subsection (3) for all or any property that is owned or effectively controlled by the person, whether or not any of the property is described or identified in the application.
- (5) A freezing notice may be issued under subsection (3) for all property acquired after the order is made —
  - (a) by the person; or
  - (b) by another person at the request or direction of the first-mentioned person.

- (6) When considering an application for a freezing notice, a Justice of the Peace must —
- (a) consider each matter that is alleged by the applicant as a ground for issuing the freezing notice; and
  - (b) if the justice decides to issue the freezing notice — set out in the notice each ground that the justice finds is a ground on which the notice may be issued.
- (7) Any income or other property derived from the property while the freezing notice is in force is taken to be part of the property.

**35. Form of freezing notices**

- (1) A freezing notice must —
- (a) describe the property covered by the notice;
  - (b) include an estimate of the value of the property;
  - (c) if the property has been removed from the place in which it was found — indicate where, when and from whom it was taken;
  - (d) summarise the effect of the notice;
  - (e) advise the recipient to the effect that the property described in the order may be confiscated automatically under this Act unless an objection to the confiscation of the property is filed in the court specified in the notice within 28 days after the date of service of the notice;
  - (f) tell the recipient that he or she may be eligible to file an objection to the confiscation of the property;
  - (g) give details of the recipient's obligations under section 37; and
  - (h) give any directions necessary for the security and management of the property while the notice is in force.

- (2) For the purposes of subsection (1)(b), a police officer may estimate the value of the property, or may have the property valued by an appropriately qualified valuer.
- (3) For the purposes of subsection (1)(h), a police officer or the DPP may arrange for an inventory to be taken of any fittings, fixtures or moveable goods in or on the property.

**36. Service and filing of freezing notices**

- (1) As soon as practicable after a freezing notice is issued, the applicant for the notice must arrange for a copy of it to be served personally on each of the following persons —
  - (a) if the property covered by the notice was taken from a person — that person;
  - (b) if, at the time that the freezing notice is issued, the applicant is aware of any other person who is, or may be, or claims to be, an interested party — that person.
- (2) If the property is registrable real property, the applicant must lodge a memorial of the issue of the notice with the Registrar of Titles.
- (3) If the property is registrable under any enactment except the *Transfer of Land Act 1893*, the applicant must notify the registrar of the issue of the notice.
- (4) If, as a result of information in a statutory declaration given, in accordance with section 37, by a person who was served with a copy of the freezing notice under subsection (1), the applicant becomes aware that any other person is or may be or claims to be an interested party, then the applicant must arrange for a copy of the notice to be served on the person personally, as soon as practicable.
- (5) Nothing in subsection (1) or (4) prevents the applicant from serving a copy of the notice at any time on any other person whom the applicant becomes aware is, or may be or claims to be



an interested party, but the service cut off date for the property is not affected by any service outside the requirements of subsection (1) or (4).

- (6) The applicant must ensure that —
- (a) the freezing notice is filed in the court specified in the notice;
  - (b) an affidavit of service is endorsed on a copy of each copy of the freezing notice that is served on a person; and
  - (c) each endorsed copy is filed in the court.

**37. Persons served with freezing notices to declare any other interested parties**

- (1) A person who is served with a copy of a freezing notice under section 36 must give a statutory declaration to the officer in charge of the police station specified in the notice.
- (2) The statutory declaration must be given within 7 days after the day on which the copy of the freezing notice was served on the person.
- (3) In the statutory declaration, the declarant must —
  - (a) state the name and, if known, the address of any other person whom the declarant is aware is or may be, or claims to be, an interested party; or
  - (b) if the declarant is not aware of any other person who is or may be, or claims to be, an interested party — make a statement to that effect.

Penalty: \$5 000.

**38. Duration of freezing notices for registrable real property**

- (1) A freezing notice for registrable real property comes into force when a memorial of the issue of the freezing notice is registered under section 113(1).
- (2) A freezing notice for registrable real property stops being in force when a memorial under subsection (4) or (5) in relation to the property is registered under section 113(1).
- (3) However, if the freezing notice was issued on 2 or more grounds, but a memorial has not been lodged under subsection (4) or (5) in relation to each of those grounds, the freezing notice continues in force as if it had been made on each remaining ground.
- (4) If a freezing notice under section 34(2) is in force for registrable real property, the applicant for the freezing notice must lodge a memorial with the Registrar of Titles if —
  - (a) the freezing notice is cancelled under section 40;
  - (b) the freezing notice is set aside under Part 6; or
  - (c) the property is confiscated under section 6, 7 or 8.
- (5) If a freezing notice for registrable real property was issued under section 34(3) on the basis that a person has been or is likely to be charged with an offence, the applicant for the freezing notice must lodge a memorial with the Registrar of Titles if —
  - (a) when the notice was issued on the basis of advice given under section 34(3)(a) — the person is not charged with the offence within 21 days after the date of the freezing notice;
  - (b) the charge against the person is disposed of;
  - (c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

- (d) the freezing notice is cancelled under section 40;
- (e) the freezing notice is set aside under Part 6; or
- (f) the property is confiscated under section 6, 7 or 8.

**39. Duration of freezing notices for other property**

- (1) A freezing notice for any property except registrable real property comes into force when the notice is issued.
- (2) A freezing notice issued under section 34(2) for any property except registrable real property stops being in force as soon as any of the following happens —
  - (a) the property is confiscated under section 6, 7 or 8;
  - (b) the freezing notice is cancelled under section 40;
  - (c) the freezing notice is set aside under Part 6.
- (3) A freezing notice for property (except registrable real property) issued under section 34(3) on the basis that a person has been or is likely to be charged with an offence stops being in force as soon as one of the following happens —
  - (a) where the notice was issued on the basis of advice given under section 34(3)(a) — the person is not charged with the offence within 21 days after the date of the freezing notice;
  - (b) the charge against the person is disposed of;
  - (c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;
  - (d) the freezing notice is cancelled under section 40;
  - (e) the freezing notice is set aside under Part 6; or
  - (f) the property is confiscated under section 6, 7 or 8.
- (4) However, if the freezing notice was issued on 2 or more grounds, but the notice has not ceased to be in force under

subsection (3) or (4) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.

- (5) When a freezing notice stops being in force for property (except registrable real property) that is registrable under an enactment, the applicant for the notice must notify the registrar to that effect.

**40. Cancellation of freezing notices**

- (1) A police officer or the DPP must cancel a freezing notice issued under section 34(2) for property if the grounds for suspecting that the property is crime-used or crime-derived no longer exist.
- (2) A police officer or the DPP must ensure that —
  - (a) notice of the cancellation is served personally, as soon as practicable, on each person on whom a copy of the notice was served under section 36;
  - (b) if the notice has been filed in a court — a notice of the cancellation is filed in the court;
  - (c) any property covered by the notice that is being guarded under section 33(2)(b) is released from guard;
  - (d) any property covered by the notice that is being retained under section 33(3) is returned to the person from whom it was seized unless it is to be otherwise dealt with under this Act or another enactment; and
  - (e) if the police officer or the DPP is aware that the person to whom the property is to be returned under paragraph (d) is not the owner of the property — the owner is notified, where practicable, of the cancellation and return.

**Division 3 — Freezing orders for confiscable property**

**41. Applying for freezing orders**

- (1) The DPP may apply to the court for a freezing order for property.

- (2) An application may be made ex parte.

**42. Proceedings for freezing orders, court's powers in**

In proceedings for a freezing order, the court may do any or all of the following —

- (a) order that the whole or any part of the proceedings is to be heard in closed court;
- (b) order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings;
- (c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.

**43. Making freezing orders**

- (1) The court may make a freezing order for property if —
  - (a) an examination order, a monitoring order or a suspension order is in force in relation to the property; or
  - (b) the DPP advises the court that an application for an examination order, a monitoring order or a suspension order has been made in relation to the property, or is likely to be made in relation to the property within 21 days after the freezing order is made.
- (2) The court may make a freezing order under subsection (1) whether or not the person against whom the examination order, monitoring order or suspension order is made, or is to be sought, owns or effectively controls the property.
- (3) The court may make a freezing order for all or any property that is owned or effectively controlled by the person or that the person has at any time given away if —
  - (a) a production order has been made against the person;

- (b) an application has been made against the person for an unexplained wealth declaration, criminal benefits declaration, crime-used property substitution declaration or production order; or
  - (c) the DPP advises the court that such an application is likely to be made within 21 days after the freezing order is made.
- (4) The court is not to refuse to make a freezing order for property under subsection (3) only because the value of the property exceeds, or could exceed, the amount that a person could be liable to pay under section 14, 20 or 24 if the declaration is made.
- (5) The court may make a freezing order for all or any property that is owned or effectively controlled by a person, or that the person has at any time given away if —
  - (a) the person has been charged with an offence, or the DPP advises the court that a person is likely to be charged with an offence within 21 days after the day on which the freezing order is made; and
  - (b) the person could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.
- (6) A freezing order may be made under subsection (3) or (5) for all property owned or effectively controlled by the person, whether or not any of the property is described or identified in the application.
- (7) A freezing order may be made under subsection (3) or (5) for all property acquired after the order is made —
  - (a) by the person; or
  - (b) by another person at the request or direction of the first-mentioned person.

- (8) The court may make a freezing order for property if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.

**44. Grounds for freezing orders to be considered and specified by court**

When considering an application for a freezing order, the court must —

- (a) consider each matter that is alleged by the applicant, either in the application or in the course of the proceedings, as a ground for making the order; and
- (b) set out in the order each ground that the court finds is a ground on which the order may be made.

**45. Scope of freezing orders**

In a freezing order, the court may do any or all of the following —

- (a) direct that any income or other property derived from the property while the order is in force is to be treated as part of the property;
- (b) if the property is moveable — direct that the property is not to be moved except in accordance with the order;
- (c) appoint the DPP, the Public Trustee or the Commissioner of Police to manage the property while the order is in force;
- (d) give any other directions necessary to provide for the security and management of the property while the order is in force;
- (e) provide for meeting the reasonable living and business expenses of the owner of the property.

**46. Service of freezing orders**

- (1) As soon as practicable after a freezing order is made, the applicant for the order must arrange for a copy of the order and a notice that complies with subsection (6) to be served personally on each of the following persons —
  - (a) if the frozen property was taken from a person, or is in the custody of a person — that person;
  - (b) if, at the time that the freezing order is made, the applicant is aware of any other person who is, or may be, or claims to be, an interested party — that person.
- (2) If the property is registrable real property, the applicant must lodge a memorial of the making of the order with the Registrar of Titles.
- (3) If the property is registrable under any enactment except the *Transfer of Land Act 1893*, the applicant must notify the registrar of the making of the order.
- (4) If, as a result of information in a statutory declaration given, in accordance with section 47, by a person who was served with a copy of the freezing order under subsection (1), the applicant becomes aware that any other person is or may be or claims to be an interested party, then the applicant must arrange for a copy of the freezing order and a notice that complies with subsection (6) to be served on the person personally, as soon as practicable.
- (5) Nothing in subsection (1) or (4) prevents the applicant from serving a copy of the freezing order and a notice at any time on any other person whom the applicant becomes aware is, or may be or claims to be an interested party, but the service cut off date for the property is not affected by any service outside the requirements of subsection (1) or (4).
- (6) The notice must —



- (a) summarise the effect of the order;
  - (b) advise the recipient to the effect that the property described in the order may be confiscated automatically under this Act unless an objection to the confiscation of the property is filed in the court specified in the notice within 28 days after the date of service of the notice;
  - (c) tell the recipient that he or she may be eligible to file an objection to the confiscation of the property; and
  - (d) give details of the recipient's obligations under section 47.
- (7) When service is effected on a person under this section, the server must file an affidavit to that effect stating the name and address of the person served.

**47. Persons served with freezing orders to declare any other interested parties**

- (1) A person who is served under section 46 with a copy of a freezing order and a notice must give a statutory declaration to the DPP.
- (2) The statutory declaration must be given within 7 days after the day on which the notice was served on the person.
- (3) In the statutory declaration, the declarant must —
  - (a) state the name and, if known, the address of any other person whom the declarant is aware is or may be, or claims to be, an interested party; or
  - (b) if the declarant is not aware of any other person who is or may be, or claims to be, an interested party — make a statement to that effect.

Penalty: \$5 000.

**48. Duration of freezing orders for registrable real property**

- (1) A freezing order for registrable real property comes into force when a memorial of the making of the order is registered under section 113(1).
- (2) A freezing order for registrable real property stops being in force when a memorial under subsection (4), (5), (6) or (7) in relation to the property is registered under section 113(1).
- (3) However, if the freezing order was made on 2 or more grounds, but a memorial has not been lodged under subsection (4) or (5) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.
- (4) If a freezing order for registrable real property was made under section 43(1) on the basis that an application for another order has been or is likely to be made, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —
  - (a) where the freezing order was made on the basis of advice given to the court under section 43(1)(b) — an application for the other order is not made within 21 days after the date of the freezing order;
  - (b) the application for the other order is withdrawn;
  - (c) the application for the other order is finally determined but the court does not make the other order;
  - (d) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection; or
  - (e) the property is confiscated under section 6, 7 or 8.
- (5) If a freezing order for registrable real property was made under section 43(3) on the basis that an application for a declaration or another order has been or is likely to be made, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —
  - (a) where the freezing order was made on the basis of advice given to the court under section 43(3)(c) — an

- application for the declaration or other order is not made within 21 days after the date of the freezing order;
- (b) the application for the declaration or other order is withdrawn;
  - (c) the application for the declaration or other order is finally determined, but the court does not make the declaration or other order;
  - (d) in the case of a declaration — the declaration is made, and the respondent's liability to pay an amount under section 14, 20 or 24 is satisfied, whether or not any or all of the frozen property is given or taken in satisfaction of the liability;
  - (e) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection; or
  - (f) the property is confiscated under section 6, 7 or 8.
- (6) If a freezing order for registrable real property was made under section 43(5) on the basis that a person has been or is likely to be charged with an offence, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —
- (a) where the freezing order was made on the basis of advice given to the court under section 43(5)(a) — the person is not charged with the offence within 21 days after the date of the freezing order;
  - (b) the charge against the person is disposed of;
  - (c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;
  - (d) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection; or
  - (e) the property is confiscated under section 6, 7 or 8.

- (7) If a freezing order was made under section 43(8) for registrable real property on the basis that the property was suspected of being crime-used or crime-derived, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —
- (a) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection; or
  - (b) the property is confiscated under section 6, 7 or 8.

**49. Duration of freezing orders for other property**

- (1) A freezing order for property (except registrable real property) comes into force when the freezing order is made.
- (2) If a freezing order for property (except registrable real property) was made under section 43(1) on the basis that an application for another order has been or is likely to be made, the freezing order stops being in force as soon as one of the following happens —
- (a) if the freezing order was made on the basis of advice given to the court under section 43(1)(b) — an application for the other order is not made within 21 days after the date of the order;
  - (b) the application for the other order is withdrawn;
  - (c) the application for the other order is finally determined but the court does not make the other order;
  - (d) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection;
  - (e) the property is confiscated under section 6, 7 or 8.
- (3) A freezing order for property (except registrable real property) made under section 43(3) on the basis that an application for a declaration or another order has been or is likely to be made stops being in force as soon as one of the following happens —

- (a) if the freezing order was made on the basis of advice given to the court under section 43(3)(c) — an application for the declaration or other order is not made within 21 days after the date of the freezing order;
  - (b) the application for the declaration or other order is withdrawn;
  - (c) the application for the declaration or other order is finally determined, but the court does not make the declaration or other order;
  - (d) in the case of a declaration — the declaration is made, and the respondent's liability to pay an amount under section 14, 20 or 24 is satisfied, whether or not any or all of the frozen property is given or taken in satisfaction of the liability;
  - (e) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;
  - (f) the property is confiscated under section 6, 7 or 8.
- (4) A freezing order for property (except registrable real property) made under section 43(5) on the basis that a person has been or is likely to be charged with an offence stops being in force as soon as one of the following happens —
- (a) if the freezing order was made on the basis of advice given to the court under section 43(5)(a) — the person is not charged with the offence within 21 days after the date of the order;
  - (b) the charge against the person is disposed of;
  - (c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

- (d) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;
  - (e) the property is confiscated under section 6, 7 or 8.
- (5) A freezing order made under section 43(8) for property (except registrable real property) on the basis that it was suspected of being crime-used or crime-derived stops being in force as soon as one of the following happens —
- (a) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;
  - (b) the property is confiscated under section 6, 7 or 8.
- (6) However, if the freezing order was made on 2 or more grounds, but the order has not stopped being in force under subsection (2), (3), (4) or (5) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.

#### **Division 4 — Dealing with seized or frozen property**

##### **50. Prohibited dealings**

- (1) A person must not deal with seized or frozen property in any way.
- Penalty: \$100 000 or the value of the property, whichever is greater, or imprisonment for 5 years, or both.
- (2) Subsection (1) does not apply to —
- (a) a person acting in accordance with an order under section 45(c), 91(2) or 93(2);
  - (b) in the case of seized property — a police officer acting under section 33, or a person acting under the direction of a police officer who is acting in accordance with this Act; or

- (c) in the case of frozen property — a person acting in accordance with the freezing notice or freezing order.
- (3) It is a defence to a prosecution for an offence under subsection (1) in relation to seized property if the accused establishes that he or she did not know, and can not reasonably be expected to have known, that the property was being retained or guarded under section 33(2) at the relevant time.
- (4) It is a defence to a prosecution for an offence under subsection (1) in relation to frozen property if the respondent establishes that he or she did not know, and can not reasonably be expected to have known, that the freezing notice or freezing order was in force at the material time.
- (5) Subsection (1) does not prevent a person from being dealt with for a contempt of the court for a contravention of a freezing order, but the person is not punishable for both a contempt and an offence under subsection (1) arising from the same contravention.

*[Section 50 amended by No. 84 of 2004 s. 82.]*

**51. Effect of prohibited dealings in frozen property**

Despite any other enactment, any dealing with property that contravenes section 50 has no effect, whether at law, in equity or otherwise, on the rights of the State under this Act.

**52. Permitted dealings in mortgaged property**

If mortgaged property is frozen, nothing in this Act —

- (a) prevents the mortgagor from making payments to the mortgagee in accordance with the mortgage if the payments are made with money that has not been seized or frozen; or
- (b) prevent the mortgagee from accepting payments from the mortgagor in accordance with the mortgage.

## **Part 5 — Investigation and search**

### **Division 1 — Preliminary inquiries**

#### **53. Financial institutions may volunteer information**

A financial institution that has information about a transaction with the institution may give the information to the DPP or a police officer if there are reasonable grounds for suspecting that the information —

- (a) may be relevant to the investigation of a confiscation offence;
- (b) may assist a court in deciding whether or not to make an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration; or
- (c) may otherwise facilitate the operation of this Act or the regulations.

#### **54. Financial institutions may be required to give information**

- (1) For the purposes of any proceedings under this Act, or for the purposes of deciding whether to apply for a freezing notice, or for any order, declaration or warrant under this Act, the DPP or a police officer may require a financial institution to do any or all of the following —
  - (a) give information about whether a person described in the requirement holds an account with the institution;
  - (b) give information about whether or not an account described in the requirement is held with the institution;
  - (c) identify an account held with the institution;
  - (d) identify the holder of an account held with the institution;



- (e) give information about the existence of any other kind of transaction between the institution and a person described in the requirement;
  - (f) if a transaction referred to in paragraph (e) has taken place, is taking place or is to take place — give prescribed particulars of the transaction.
- (2) A requirement must —
    - (a) be in writing served on the institution; and
    - (b) specify the information required.
  - (3) Service of the requirement on the institution may be effected by properly addressed email or fax, or by any other means provided by section 76 of the *Interpretation Act 1984*.
  - (4) The financial institution must comply with the requirement.  
Penalty: \$500 000.

**55. Protection for financial institutions**

- (1) An action, suit or proceeding in relation to the giving of information under section 53 does not lie against —
  - (a) the financial institution that gives the information; or
  - (b) an officer of the institution acting within his or her authority.
- (2) An action, suit or proceeding in relation to a financial institution's response to a requirement under section 54 does not lie against —
  - (a) the financial institution; or
  - (b) an officer of the financial institution who is acting within his or her authority.

**56. Financial institutions giving false or misleading information**

A financial institution commits an offence if the institution knowingly —

- (a) provides false or misleading information under section 53; or
- (b) provides false or misleading information in purported compliance with a requirement under section 54.

Penalty: \$500 000.

### **Division 2 — Examinations**

#### **57. Applying for orders for examination**

- (1) The DPP may apply to the District Court for an order for the examination of a person.
- (2) An application may be made ex parte.

#### **58. Making orders for examination**

- (1) The court may order a person to submit to an examination about any or all of the following —
  - (a) the nature, location and source of frozen property;
  - (b) the nature, location and source of property that is not frozen, but is suspected on reasonable grounds of being confiscable;
  - (c) the wealth, liabilities, income and expenditure of a person who has been convicted of a confiscation offence;
  - (d) the wealth, liabilities, income and expenditure of a person who is suspected on reasonable grounds of being involved or of having been involved in the commission of a confiscation offence;
  - (e) the wealth, liabilities, income and expenditure of a person who has, or is suspected on reasonable grounds of having, unexplained wealth;

- (f) the wealth, liabilities, income and expenditure of a declared drug trafficker;
  - (g) the nature, location and source of any property-tracking documents.
- (2) The examination order may do any or all of the following —
- (a) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about the property described in the order;
  - (b) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about the person's wealth, liabilities, expenditure or income;
  - (c) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about another person's wealth, liabilities, expenditure or income;
  - (d) require the person to give to the court any information in the person's possession or control that could help to locate, identify or quantify any property, property-tracking documents, other documents or information referred to in subsection (1);
  - (e) require the person to give any required information by affidavit, or require the person to attend the court for examination, or both;
  - (f) give any directions, or make any ancillary orders, that are necessary or convenient for giving effect to the examination order or for ensuring that the person complies with the order.

**59. Service of orders for examination**

- (1) The applicant for an examination order must arrange for a copy of the order to be served personally on the person to be examined.
- (2) A copy of the order is not to be served on anyone except the person to be examined.

**60. Conduct of examinations**

- (1) An examination is to be held in camera.
- (2) The person to be examined may be represented by his or her legal representative.

**61. Examination orders, contravening, admissibility of information given under**

- (1) If an owner of frozen property, who is to be examined in connection with the property under an examination order, contravenes the order or the examiner's requirements under the order —
  - (a) the owner is not entitled to file an objection to the confiscation of the property;
  - (b) if the owner has already filed an objection — the objection is of no effect; and
  - (c) the owner commits an offence.
- (2) A person convicted of an offence under subsection (1)(c) is liable to a fine of \$100 000 or an amount equal to the value of the property, whichever is greater, or imprisonment for 5 years, or both.
- (3) If a person examined under an examination order in connection with another person's wealth, liabilities, income or expenditure

contravenes the order, or the examiner's requirements under the order, the person commits an offence and is liable —

- (a) to a maximum fine of an amount equal to the value of the frozen property or of \$50 000, whichever is greater;
  - (b) to imprisonment for a maximum of 2 years; or
  - (c) to both a fine under paragraph (a) and imprisonment under paragraph (b).
- (4) Without limiting subsection (1), (2) or (3), a person who is examined under an examination order contravenes the order for the purposes of the respective subsection if —
- (a) the person fails to disclose material information, or gives false information or a false document, in purported compliance with the order; and
  - (b) the person was aware, or could reasonably have been expected to have been aware, that the information was material, or that the information or document was false.
- (5) A person is not entitled to contravene an examination order or the examiner's requirements under the order on the grounds that complying with the order —
- (a) might incriminate the person or might render him or her liable to a penalty; or
  - (b) could result in the confiscation of property.
- (6) A person is not excused from complying with an examination order on the grounds that complying with the order would be in breach of an obligation of the person not to disclose information, or not to disclose the existence or contents of a document, whether the obligation arose under an enactment or otherwise.
- (7) A statement or disclosure made by a person in the course of complying with an examination order is admissible as evidence against the person —

- (a) in a proceeding against the person for an offence under this section;
- (b) in any civil proceeding; and
- (c) in any proceeding under this Act that could lead to the confiscation of property owned, effectively controlled or given away by the person, but only for the purpose of facilitating the identification of such property.

### **Division 3 — Production of documents**

#### **62. Applying for production orders**

- (1) The DPP may apply to the District Court for a production order for a property-tracking document.
- (2) An application may be made ex parte.

#### **63. Making production orders**

- (1) On hearing an application under section 62, the court must order a person identified in the application to produce the property-tracking document described in the application if there are reasonable grounds for suspecting that the person has the document in his or her possession or control.
- (2) The order may direct the person —
  - (a) to give the property-tracking document to the DPP or a police officer; or
  - (b) to make it available to the DPP or a police officer for inspection.
- (3) The order must specify the time and place for the document to be given or made available.

**64. Inspection of property-tracking documents**

- (1) When a property-tracking document is given to the DPP or a police officer in accordance with a direction under section 63(2)(a), the DPP or police officer may do any or all of the following —
  - (a) inspect the document;
  - (b) take extracts from the document;
  - (c) make copies of the document;
  - (d) retain the document for as long as its retention is reasonably required for the purposes of this Act.
- (2) If the DPP or police officer retains the property-tracking document, the DPP or police officer must, on the request of the person required by the order to produce the document —
  - (a) permit the person to inspect the document, take extracts from it or make copies of it; or
  - (b) give the person a copy of the document certified by the DPP or police officer in writing to be a true copy of the document.
- (3) When a property-tracking document is made available to the DPP or a police officer for inspection in accordance with a direction under section 63(2)(b), the DPP or police officer may do any one or more of the following —
  - (a) inspect the document;
  - (b) take extracts from the document;
  - (c) make copies of the document.

**65. Production orders, contravening, admissibility of information given under**

- (1) A person who contravenes a production order without reasonable excuse commits an offence.

- (2) A person commits an offence if the person, in purported compliance with a production order, produces or makes available to the DPP or a police officer a document that the person knows, or could reasonably be expected to know, is false or misleading in a material particular.
- (3) However, the person does not commit an offence under subsection (2) if, as soon as practicable after becoming aware that the document is false or misleading, the person —
  - (a) tells the DPP or a police officer that the document is false or misleading;
  - (b) indicates the respects in which it is false or misleading; and
  - (c) gives the DPP or a police officer any correct information which is in the person's possession or control.
- (4) A person convicted of an offence under subsection (1) or (2) is liable to a fine of \$100 000 or imprisonment for 5 years, or both.
- (5) A person is not excused from complying with a production order on the grounds that complying with the order would tend to incriminate the person or render him or her liable to a penalty.
- (6) A person is not excused from complying with a production order on the grounds that complying with the order would be in breach of an obligation of the person not to disclose the existence or contents of the document, whether the obligation arose under an enactment or otherwise.
- (7) Any information contained in a property-tracking document produced under a production order, or any statement or disclosure made by a person in the course of complying with a production order, is admissible in evidence against the person —
  - (a) in a proceeding against the person for an offence under this section;
  - (b) in any civil proceeding; and



- (c) in any proceeding under this Act that could lead to the confiscation of property owned, effectively controlled or given away by the person, but only for the purpose of facilitating the identification of such property.

**66. Varying production orders**

- (1) If a production order requires a person to give a property-tracking document to the DPP or a police officer, the person may apply to the court that made the order to vary it so that it requires the person to make the document available to the DPP or a police officer for inspection.
- (2) The court may vary the order accordingly if it finds that the document is essential to the business activities of the person.

**Division 4 — Monitoring financial transactions**

**67. Applying for monitoring orders and suspension orders**

- (1) The DPP may apply to the District Court for a monitoring order.
- (2) The DPP may apply to the District Court for a suspension order.
- (3) An application may be made ex parte.

**68. Making monitoring orders and suspension orders**

- (1) The court may order a financial institution to give information to the DPP or a police officer about all transactions carried out through an account held with the institution by a person named in the order.
- (2) The court may order a financial institution —
  - (a) to notify the DPP or a police officer immediately of any transaction that has been initiated in connection with an account held with the institution by a person named in the order;

- (b) to notify the DPP or a police officer immediately if there are reasonable grounds for suspecting that a transaction is about to be initiated in connection with the account; and
  - (c) to refrain from completing or effecting the transaction for 48 hours.
- (3) The court may make a monitoring order or suspension order if there are reasonable grounds for suspecting that the named person —
  - (a) has been, or is about to be, involved in the commission of a confiscation offence;
  - (b) has acquired, or is about to acquire, directly or indirectly, any crime-derived property; or
  - (c) has benefited, or is about to benefit, directly or indirectly, from the commission of a confiscation offence.
- (4) A monitoring order or suspension order applies to all transactions carried out or to be carried out through the bank account during the monitoring period or suspension period specified in the order.
- (5) The monitoring order or suspension order must specify —
  - (a) the financial institution to which the order applies;
  - (b) the name or names in which the account is believed to be held;
  - (c) the class of information that the institution is required to give;
  - (d) the manner in which the information is to be given; and
  - (e) the monitoring period, or suspension period, in accordance with subsection (6).

- (6) The monitoring period or suspension period —
- (a) is not to commence earlier than the day on which notice of the order is served on the financial institution; and
  - (b) is not to end more than 3 months after the date of the order.

**69. Contravening monitoring orders or suspension orders**

A person commits an offence if the person knowingly —

- (a) contravenes a monitoring order or suspension order; or
- (b) provides false or misleading information in purported compliance with the order.

Penalty: \$100 000.

**Division 5 — Secrecy requirements**

**70. Restricted disclosures**

- (1) A person must not make a disclosure to anyone, except as permitted under section 71, about —
- (a) the fact that a financial institution, or an officer of a financial institution, intends to give or has given information to the DPP under section 53;
  - (b) the nature of any information given under section 53;
  - (c) the fact that a requirement or a response to it has been or is to be made under section 54;
  - (d) the content of a requirement or response made under section 54;
  - (e) the fact that the person or anyone else is or has been subject to a production order, an examination order, a monitoring order or a suspension order; or

- (f) the contents of any examination order, production order, monitoring order or suspension order.

Penalty: \$100 000, or imprisonment for 5 years, or both.

- (2) Without limiting subsection (1), a person makes a disclosure for the purposes of the subsection if the person —
  - (a) discloses information to a person from which the person could reasonably be expected to infer that a requirement or response under section 54 has been or is to be made;
  - (b) discloses information to a person from which the person could reasonably be expected to infer anything about the nature or contents of a requirement or response under section 54;
  - (c) makes or keeps a record of any information about a requirement or response under section 54;
  - (d) discloses anything about the existence or operation of an examination order, a production order, a monitoring order or a suspension order;
  - (e) discloses information to a person from which the person could reasonably be expected to infer anything about the existence or operation of an examination order, a production order, a monitoring order or a suspension order; or
  - (f) makes or keeps a record of any information about the existence or operation of an examination order, a production order, a monitoring order or a suspension order.

**71. Who restricted disclosures may be made to**

- (1) A corporation, or an officer of a corporation, may make a restricted disclosure to any one or more of the following —
  - (a) the DPP or a police officer;

- (b) an officer of the corporation, for the purpose of giving information under section 53;
  - (c) an officer of the corporation, for the purpose of ensuring that a requirement under section 54 is complied with;
  - (d) an officer of the corporation, for the purpose of ensuring that an examination order, a production order, a monitoring order or a suspension order is complied with;
  - (e) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to giving information under section 53 or complying with a requirement under section 54;
  - (f) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to an examination order, a production order, a monitoring order or a suspension order.
- (2) An individual who is not acting in the capacity of an officer of a corporation or of a legal practitioner may make a restricted disclosure to either or both of the following —
- (a) the DPP or a police officer; or
  - (b) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to an examination order.
- (3) A legal practitioner to whom a restricted disclosure is made under subsection (1) or (2) may make a restricted disclosure to a person to whom the disclosure could have been made under the respective subsection for the purpose of giving legal advice or representing a person in relation to the matter disclosed.
- (4) A person (except a legal practitioner) to whom a restricted disclosure is made under subsection (1) or (2) may make a restricted disclosure to a person to whom the disclosure could have been made under the respective subsection.

- (5) However, if a restricted disclosure about a particular matter may only be made under subsection (1) or (2) in particular circumstances or for a particular purpose, then a person must not make a restricted disclosure under subsection (4) about the matter except in those circumstances or for that purpose.
- (6) If a person to whom a restricted disclosure about a particular matter is made under this section stops being a person of a kind to whom the disclosure may be made, the person must not, in any circumstances, make a restricted disclosure about the matter to anyone.

**72. Disclosure to court**

A person is not required to make a restricted disclosure to any court for any purpose.

**Division 6 — Detention, search and seizure**

**73. Power to detain and search persons for property or documents**

- (1) A police officer may, at any time, stop and detain a person if there are reasonable grounds for suspecting that the person has confiscable property, or property-tracking documents, in his or her possession.
- (2) A police officer may, at any time, stop and detain a person if there are reasonable grounds for suspecting that another person is holding confiscable property, or property-tracking documents, on behalf of the person to be detained.
- (3) For the purpose of exercising his or her powers under subsection (1) or (2), a police officer may stop and detain a vehicle.
- (4) When a police officer detains a person under subsection (1) or (2), the officer may —
  - (a) search the person in accordance with section 75; and

- (b) search any baggage, package, vehicle or anything else apparently in the possession or under the control of the person.
- (5) When exercising his or her powers under this section, a police officer may use any necessary force and any assistance the officer thinks necessary.

**74. Search warrants**

- (1) A police officer may apply to a Justice of the Peace for a search warrant.
- (2) A Justice of the Peace may issue a warrant to search any vehicle, premises or place if satisfied, by information on oath, that there are reasonable grounds for suspecting that any confiscable property, or any property-tracking documents —
  - (a) is or are in or on the vehicle, premises or place; or
  - (b) will be in or on the vehicle, premises or place within the next 72 hours.
- (3) The search warrant may authorise a police officer to do any or all of the following, using any necessary force and with any assistance the officer thinks necessary —
  - (a) enter the vehicle, premises or place described in the warrant;
  - (b) search the vehicle, premises or place;
  - (c) search any baggage, package or anything else found in or on the vehicle, premises or place;
  - (d) detain any person in or on the vehicle, premises or place and search the person in accordance with section 75.
- (4) A warrant —
  - (a) may be executed at any time of night or day; and

- (b) continues in force for 30 days after the day on which it was issued.

**75. Searching detained persons**

- (1) When a police officer exercises his or her power to search a person under section 73 or under a warrant under section 74, the officer must ensure that the person is searched by a person of the same sex or a medical practitioner.
- (2) If a suitable person is not available to search the detained person as required by subsection (1), the police officer may —
  - (a) continue to detain the person for as long as is reasonably necessary for a suitable person to become available; and
  - (b) if appropriate, convey the person to a place where a suitable person is available.

**76. Additional powers for powers under s. 73 and 74**

- (1) When a police officer exercises any of his or her powers under section 73 or under a warrant under section 74, the officer may do any or all of the following —
  - (a) seize and detain any documents found in the course of exercising those powers if there are reasonable grounds for suspecting that they are property-tracking documents;
  - (b) take extracts from or make copies of, or download or print out, any property-tracking documents found in the course of exercising those powers;
  - (c) require a person who has control of any property-tracking documents found in the course of exercising those powers to make copies of, or download or print out, any property-tracking documents found in the course of exercising those powers;



- (d) require a person to give to the officer any information within the person's knowledge or control that is relevant to locating property that is reasonably suspected of being confiscable;
  - (e) require a person to give to the officer any information within the person's knowledge or control that is relevant to determining whether or not property is confiscable;
  - (f) require a person to give the officer, or arrange for the officer to be given, any translation, codes, passwords or other information necessary to gain access to or to interpret and understand any property-tracking documents or information located or obtained in the course of exercising the officer's powers under the warrant.
- (2) A person who, without lawful excuse, contravenes a requirement commits an offence.  
Penalty: \$100 000 or imprisonment for 5 years, or both.
- (3) Without limiting subsection (2), a person contravenes a requirement if the person —
- (a) does not disclose material information of which the person had knowledge, or gives false information or a false document, in purported compliance with the requirement; and
  - (b) was aware, or could reasonably have been expected to have been aware, that the information was material, or that the information or document was false.
- (4) A person is not excused from complying with a requirement on the grounds that complying with it would tend to incriminate the person or render him or her liable to a penalty, but any information given in compliance with the requirement is not admissible in evidence in proceedings against the person for any offence except an offence under subsection (2).

**77.      Warrant under s. 74 extends to documents produced later**

If a warrant under section 74 authorises any action to be taken in relation to a document that was in existence at the time that the warrant was issued, but at the time that the warrant was executed it was physically impossible for the document to be produced, then a police officer may take the action when the document becomes available.

**78.      Other laws on search warrants not affected**

Nothing in this Act affects the operation of any other enactment requiring or authorising a police officer to obtain a warrant to enter or search property.

## **Part 6 — Objections to confiscation**

### **79. Objecting to confiscation of frozen property**

- (1) A person may file an objection to the confiscation of frozen property.
- (2) If a copy of the freezing notice or freezing order was served on the objector, the objection must be filed —
  - (a) within 28 days after the day on which the copy of the notice or order was served on the objector; or
  - (b) within any further time allowed by the court.
- (3) If a copy of the freezing notice or freezing order was not served on the objector, the objection must be filed —
  - (a) within 28 days after the day on which the objector becomes aware, or could reasonably be expected to have become aware, that the property has been frozen; or
  - (b) within any further time allowed by the court.
- (4) The court may allow further time under subsection (2) or (3) even if the time for filing the objection has expired.

### **80. Parties to objection proceedings**

The State is a party to proceedings on an objection.

### **81. Court may release frozen property under s. 82, 83 or 84**

- (1) On hearing an objection to the confiscation of frozen property, the court may set aside the freezing notice or freezing order to the extent permitted under section 82, 83 or 84.
- (2) However, if the property was frozen on 2 or more grounds, but the court does not set aside the freezing notice or freezing order in relation to both or all the grounds, the freezing notice or freezing order continues in force as if it had been made on each remaining ground.

**82. Release of crime-used property**

- (1) The court may set aside a freezing notice or freezing order for property that was frozen on the ground that it is crime-used if the objector establishes that it is more likely than not that the property is not crime-used.
- (2) If the court finds that the property is crime-used, or is not required to decide whether the property is crime-used, the court may make an order under subsection (3) or (4).
- (3) The court may set aside the freezing notice or freezing order for the property if the objector establishes that it is more likely than not that —
  - (a) the objector is the spouse, a de facto partner or a dependant of an owner of the property;
  - (b) the objector is an innocent party, or is less than 18 years old;
  - (c) the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed;
  - (d) the objector was usually resident on the property at the time the objection was filed;
  - (e) the objector has no other residence at the time of hearing the objection;
  - (f) the objector would suffer undue hardship if the property is confiscated; and
  - (g) it is not practicable to make adequate provision for the objector by some other means.
- (4) The court may set aside the freezing notice or freezing order if the objector establishes that it is more likely than not that —
  - (a) the objector is the owner of the property, or is one of 2 or more owners of the property;

- (b) the property is not effectively controlled by a person who made criminal use of the property;
  - (c) the objector is an innocent party in relation to the property; and
  - (d) each other owner (if there are more than one) is an innocent party in relation to the property.
- (5) If the objector establishes the matters set out in subsection (4)(a), (b) and (c), but fails to establish the matter set out in subsection (4)(d), the court may order that, when the property is sold after confiscation, the objector is to be paid an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.
- (6) In an order under subsection (5), the court is to specify the proportion that it finds to be the objector's share of the property.
- (7) On the application of the DPP or an owner of the property, the court may set aside the freezing notice or freezing order for the property if it also orders the objector to pay to the State an amount equal to the value of the property.
- (8) Sections 22(6), 22(7), 23, 24, 25 and 26 apply in relation to making an order under subsection (7) and to the objector as if the order was a crime-used property substitution declaration and the objector was the respondent in relation to the declaration.

*[Section 82 amended by No. 28 of 2003 s. 41.]*

**83. Release of crime-derived property**

- (1) The court may set aside a freezing notice or freezing order for property that was frozen on the ground that it is crime-derived if the objector establishes that it is more likely than not that the property is not crime-derived.
- (2) If the court finds that the property is crime-derived, or is not required to decide whether the property is crime-derived, the

court may set aside the freezing notice or freezing order if the objector establishes that it is more likely than not that —

- (a) the objector is the owner of the property, or is one of 2 or more owners of the property;
  - (b) the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence;
  - (c) the objector is an innocent party in relation to the property; and
  - (d) each other owner (if there are more than one) is an innocent party in relation to the property.
- (3) If the objector establishes the matters set out in subsection (2)(a), (b) and (c), but fails to establish the matter set out in subsection (2)(d), the court may order that, when the property is sold after confiscation, the objector is to be paid an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.
- (4) In an order under subsection (3), the court is to specify the proportion that it finds to be the objector's share of the property.
- (5) On the application of the DPP or an owner of the property, the court may set aside the freezing notice or freezing order for the property if it also orders the objector to pay to the State the amount assessed by the court as the amount equal to the value of the property at the time of the application.
- (6) Sections 20, 25 and 26 apply in relation to making an order under subsection (5) and to the objector as if the order was a criminal benefits declaration and the objector was the respondent in relation to the declaration.

- (7) When making an order under this section, the court may make any necessary or convenient ancillary orders.

**84. Release of other frozen property**

- (1) The court may set aside a freezing order for property that was frozen under section 43(3) if the court finds that it is more likely than not that the person who is or will be the respondent to the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration does not own or effectively control the property, and has not at any time given it away.
- (2) The court may set aside a freezing notice issued for property under section 34(3) or a freezing order for property that was frozen under section 43(5) if the court finds that it is more likely than not that the person who is or will be charged with the offence does not own or effectively control the property, and has not at any time given it away.
- (3) The court may make any necessary or convenient ancillary orders.

**85. Applying for release of confiscated property**

- (1) A person may apply to the court for the release of property that has been confiscated under section 6 or 7.
- (2) The application must be made within 28 days after the person became aware, or can reasonably be expected to have become aware, that the property has been confiscated.

**86. Parties to proceedings**

The State is a party to proceedings on an application under section 85.

**87. Release of confiscated property**

- (1) On hearing an application under section 85, the court may order the release of any property if it is more likely than not that —
  - (a) immediately before the confiscation of the property, the applicant owned the property, or was one of 2 or more owners of the property;
  - (b) the property is not effectively controlled by a person who made criminal use of the property, or by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence;
  - (c) the applicant did not become aware, and can not reasonably be expected to have become aware, until after the property was confiscated, that the property was liable to confiscation under section 6 or 7;
  - (d) the applicant is or was an innocent party in relation to the property; and
  - (e) each other owner (if there are more than one) is or was an innocent party in relation to the property.
- (2) If the court orders the release of the property —
  - (a) if the property is money — an amount equal to the amount of the money is to be paid to the objector from the Confiscation Proceeds Account;
  - (b) if the property is not money, and has not been disposed of — the property is to be given to the objector; and
  - (c) if the property is not money, and has been sold — an amount equal to the value of the property is to be paid to the objector from the Confiscation Proceeds Account.
- (3) If the objector establishes the matters set out in subsection (1)(a), (b), (c) and (d), but fails to establish the matter set out in subsection (1)(e), the court may order the release of the objector's share of the property.



- (4) In an order under subsection (3) the court is to specify the proportion that it finds to be the objector's share of the property.
- (5) If the court makes an order under subsection (3), the objector is to be paid out of the Confiscation Proceeds Account —
  - (a) if the property is money — an amount equal to the objector's share of the money; and
  - (b) if the property is not money — an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.
- (6) The court may make any necessary or convenient ancillary orders.

## **Part 7 — Management of seized, frozen and confiscated property**

### **Division 1 — Control and management of property**

#### **88. Management of seized property**

- (1) The Commissioner of Police has responsibility for the control and management of property seized under section 33(1) or under a warrant under section 74.
- (2) The power conferred by section 9 of the *Police Act 1892* is taken to include power to make orders as to the performance by members of the Police Force on behalf of the Commissioner of Police of functions conferred on the Commissioner of Police by this Act.

#### **89. Management of frozen or confiscated property**

- (1) The DPP has responsibility for the control and management of frozen property unless the court otherwise orders under section 45(c) or 91(2).
- (2) The DPP has responsibility for the control and management of confiscated property until it is disposed of.
- (3) The DPP may appoint any of the following persons to manage property for which the DPP has responsibility under subsection (1) or (2) —
  - (a) the Public Trustee;
  - (b) the Commissioner of Police;
  - (c) in the case of frozen property — a person who owns the property.

**90. DPP's capacity to carry out transactions**

To facilitate the destruction, sale or other disposal of property under this Act, the DPP may enter into a contract, and may execute a transfer or other instrument.

**91. Applications by owner for control and management**

- (1) An owner of frozen property may apply to the court for an order under subsection (2) in relation to the property.
- (2) On hearing an application, the court may, if it thinks fit, by order appoint the person —
  - (a) to control and manage the property while the freezing notice or freezing order is in force; or
  - (b) to sell or destroy the property.

**92. Duties of person responsible for property**

A person who has responsibility for the control or management of property under this Act or under an order under this Act, must take reasonable steps to ensure that the property is appropriately stored or appropriately managed, and that it is appropriately maintained, until one of the following happens in accordance with this Act —

- (a) the property is returned to the person from whom it was seized or to a person who owns it;
- (b) another person becomes responsible for the control and management of the property;
- (c) the property is sold or destroyed; or
- (d) the property is otherwise disposed of.

**Division 2 — Disposal of deteriorating or undesirable property**

**93. Destruction of property on grounds of public interest**

- (1) A person who has responsibility for the control or management of seized, frozen or confiscated property may apply to the court for an order under subsection (2).
- (2) On hearing an application, the court may order that the property is to be destroyed if it would not be in the public interest to preserve the property.

**94. Sale of deteriorating property**

- (1) A person who has responsibility for the control or management of frozen property may apply to the court for an order under subsection (2).
- (2) The court may order that the property is to be sold if it is more likely than not that —
  - (a) the property is or will be subject to substantial waste or loss of value if it is retained until it is dealt with under another provision of this Act; or
  - (b) the cost of managing or protecting the property will exceed the value of the property if it is retained until it is dealt with under another provision of this Act.
- (3) If the Public Trustee has the control or management of frozen property under this Act, the Public Trustee may sell the property in the circumstances referred to in subsection (2), without obtaining an order under that subsection, if —
  - (a) the Public Trustee gives adequate notice of the proposed sale to the owner of the property; and
  - (b) the owner does not file an objection to the sale in the court that made the freezing order.

- (4) When frozen property is sold under an order under subsection (1), or under subsection (2), the net proceeds of the sale are taken to be frozen property that is subject to the freezing notice or freezing order made in respect of the sold property.

**95. Valuation and inventory of frozen property**

- (1) A person who has the control or management of frozen property under this Act may do either or both of the following —
- (a) arrange for the property to be valued by an appropriately qualified valuer;
  - (b) arrange for an inventory to be taken of any fittings, fixtures or moveable goods in or on the property.
- (2) The person must arrange for a copy of the inventory to be served on each person on whom a copy of the freezing notice or freezing order was served under section 36 or 46.

**Division 3 — Management of property by Public Trustee**

**96. Public Trustee's power to appoint a manager**

If the Public Trustee has the control or management of property under this Act, the Public Trustee may appoint a person to perform all or any of the Public Trustee's functions in relation to the property.

**97. Public Trustee's liability for charges on frozen property**

- (1) If State taxes imposed on frozen or confiscated property fall due while the property is under the control or management of the Public Trustee, the Public Trustee is liable for the taxes only to the extent of any rents and profits received by the Public Trustee in respect of the property.

- (2) If the property is a business, the Public Trustee is not liable for —
- (a) any payment in respect of long service leave for which the business or the owner of the business is liable; or
  - (b) any payment in respect of long service leave to which a person employed by the Public Trustee to manage the business, or the legal personal representative of such a person, becomes entitled as a result of managing the business, after the date of the freezing order.

**98. Managing interstate property**

- (1) The Public Trustee may make an agreement for the management of property frozen under a registered interstate freezing order with an official who is required under the order to take control of the property.
- (2) The Public Trustee may perform, in accordance with the agreement, the same functions in relation to the property as the official would be able to perform under the order if the property were in the State in which the order was made.

**99. Fees payable to Public Trustee**

The Public Trustee is entitled to receive the fees prescribed by or under the *Public Trustee Act 1941* for performing its functions under this Act in relation to frozen or confiscated property.

**100. Obstructing Public Trustee**

A person must not hinder or obstruct the Public Trustee, or a Deputy Public Trustee, or an officer, servant or agent of the Public Trustee, in exercising the functions of the Public Trustee under this Act.

Penalty: \$100 000 or imprisonment for 5 years, or both.

## **Part 8 — Court jurisdiction and evidentiary matters**

### **101. Courts' jurisdiction**

- (1) The Supreme Court has jurisdiction in any proceedings under this Act.
- (2) The District Court has jurisdiction in any proceedings under this Act in connection with property if —
  - (a) the property is not registrable real property; and
  - (b) the value of the property is not more than the jurisdictional limit (within the meaning of section 6 of the *District Court of Western Australia Act 1969*).
- (3) The Magistrates Court has jurisdiction in proceedings under this Act in connection with property if —
  - (a) the property is not registrable real property; and
  - (b) the value of the property is not more than the jurisdictional limit (within the meaning of section 4 of the *Magistrates Court (Civil Proceedings) Act 2004*).
- (4) Despite subsection (3), the Magistrates Court has no jurisdiction in proceedings for an unexplained wealth declaration or an examination order.
- (5) Despite subsections (3) and (4), if both the applicant and the respondent consent, the Magistrates Court may hear and determine —
  - (a) an objection; or
  - (b) an application for —
    - (i) an unexplained wealth declaration;
    - (ii) a criminal benefits declaration; or
    - (iii) a crime-used property substitution declaration.

- (6) A declaration, order, finding or decision of a court under this Act in relation to property is not invalid only because the value of the property exceeds the maximum permitted to be dealt with by the court under this section.
- (7) Part VI of the *District Court of Western Australia Act 1969* applies to proceedings on an application under this Act as if a reference in the first-mentioned Act to an action were a reference to an application under this Act.
- (8) Nothing in this section affects the jurisdiction of a court in criminal proceedings under this Act.

*[Section 101 amended by No. 59 of 2004 s. 141; No. 2 of 2008 s. 61(2).]*

**102. Proceedings, general provisions about**

- (1) Proceedings on an application under this Act are taken to be civil proceedings for all purposes.
- (2) Except in relation to an offence under this Act —
  - (a) a rule of construction that is applicable only in relation to the criminal law does not apply in the interpretation of this Act;
  - (b) the rules of evidence applicable in civil proceedings apply in proceedings under this Act;
  - (c) the rules of evidence applicable only in criminal proceedings do not apply in proceedings under this Act; and
  - (d) a question of fact to be decided by a court in proceedings on an application under this Act is to be decided on the balance of probabilities.



**103. Attorney General entitled to appear in proceedings**

The Attorney General may appear in any proceedings under this Act in which the State has an interest, whether or not the DPP is also a party to the proceedings.

**104. Stays of proceedings**

The fact that criminal proceedings under this Act or any other enactment have been instituted or have commenced is not a ground on which the court may stay proceedings under this Act that are not criminal proceedings.

**105. Opinion evidence**

- (1) For the purposes of making an unexplained wealth declaration or a criminal benefits declaration, the court may receive evidence of the opinion of a person of a kind listed in subsection (2) who is experienced in the investigation of illegal activities involving prohibited plants or prohibited drugs, about the following matters —
  - (a) the amount that was the market value at a particular time of a particular kind of prohibited plant or prohibited drug;
  - (b) the amount, or range of amounts, ordinarily paid at a particular time for doing anything in relation to a particular kind of prohibited plant or prohibited drug.
- (2) For the purposes of subsection (1), the following persons are listed —
  - (a) a police officer of Western Australia;
  - (b) a member of the Australian Federal Police;
  - (c) an officer of Customs within the meaning of the *Customs Act 1901* of the Commonwealth;
  - (d) the DPP.

- (3) Subsections (1) and (2) have effect despite any other enactment, or any practice, relating to hearsay evidence.

**106. Grounds for finding property is crime-used or crime-derived**

A finding that particular property is crime-used or crime-derived, or that there are reasonable grounds for suspecting that it is crime-used or crime-derived, and any decision, declaration or order based on such a finding —

- (a) need not be based on a finding as to the commission of a particular confiscation offence, but may be based on a finding that some confiscation offence or other has been committed;
- (b) may be made whether or not anyone has been charged with or convicted of the relevant confiscation offence; and
- (c) may be made whether or not anyone who owns or effectively controls the property has been identified.

**107. Evidence relating to confiscation offence may be used in confiscation proceedings**

In any proceedings under this Act in relation to property, if a person has been convicted of the relevant confiscation offence, the court may have regard to any or all of the following —

- (a) a transcript of the evidence given in any proceedings for the offence;
- (b) the sentencing transcript;
- (c) any statement, deposition, exhibit or other material before a court in any proceedings for the offence;
- (d) a copy of any statement that was served on the person, or that would have been served on the person if the person had not absconded.

**108. Transcripts of proceedings on examination orders**

For the purposes of section 61(7), the transcript of an examination of a person under an examination order is admissible in any proceedings under this Act or under any other law in force in Western Australia as evidence of a statement or disclosure made by the person in the course of complying with the examination order.

**109. Hearsay evidence**

A decision under this Act, except under Part 6, about the existence of grounds for doing or suspecting anything may be based on hearsay evidence or hearsay information.

**110. Evidence of compliance with production orders**

When a person produces a document, or makes a document available, under a production order, the production or making available of the document, or any information, document or anything else acquired as a direct or indirect consequence of complying with the order, is not admissible against the person in evidence in any criminal proceedings except proceedings for an offence under section 65.

**111. Certificates under *Misuse of Drugs Act 1981***

In any proceedings under this Act, a certificate referred to in section 38(2) of the *Misuse of Drugs Act 1981* is sufficient evidence of the facts stated in the certificate.

**112. Enforcing compliance with Act or court order**

- (1) If a person fails to take any action necessary to comply with or give effect to this Act or an order under this Act —
  - (a) at the direction of the Supreme Court or a judge, the Registrar of the Supreme Court may take the necessary action; and

- (b) the action of the Registrar has effect for all purposes as if it had been done by the person.
- (2) The person is liable to pay any costs incurred as a result of taking the action.

## **Part 9 — Interests in registrable property**

### **113. Registration of interests in registrable real property**

- (1) When a memorial is lodged under this Act with the Registrar of Titles, the Registrar is to register the memorial.
- (2) When a memorial of the confiscation of registrable real property is lodged under section 31(1) then, in addition to registering the memorial, the Registrar of Titles is to —
  - (a) register the State of Western Australia as the proprietor of the property; and
  - (b) endorse the certificate of title of the property to the effect that, when the memorial was registered, the property ceased to be subject to or affected by any interests recorded on the certificate of title, including caveats, mortgages, charges, obligations and estates (except rights-of-way, easements and restrictive covenants) to which it was subject immediately before the registration of the memorial, or by which it was affected immediately before the registration of the memorial.
- (3) The Registrar of Titles may dispense with the production of any duplicate certificate of title or any duplicate instrument for the purposes of entering on the duplicate certificate or duplicate instrument any memorandum that would, but for this subsection, be required to be entered under the *Transfer of Land Act 1893* as a result of registering a memorial under this Act or of doing anything else required or permitted by this Act.
- (4) If, under subsection (3), the Registrar of Titles dispenses with the production of a duplicate certificate of title or duplicate instrument —
  - (a) the Registrar must endorse the certificate of title to the effect that the memorandum concerned has not been

- entered on the duplicate certificate of title or the duplicate instrument; and
- (b) any subsequent dealing in the property has effect as if the memorandum had been entered on the duplicate certificate of title or the duplicate instrument.
- (5) If, under subsection (3), the Registrar of Titles dispenses with the production of a duplicate certificate of title, then, on the application of the registered proprietor, the Registrar may cancel the certificate of title for which the duplicate was issued, and create and register a new certificate of title for the property.
  - (6) The Registrar of Titles is not required to obtain the consent or direction of the Commissioner of Titles to perform a function conferred on the Registrar under this Act.
  - (7) To the extent that a provision of this Act relating to registrable real property is inconsistent with the *Transfer of Land Act 1893*, the provision of this Act prevails, but this Act does not otherwise affect the operation of the *Transfer of Land Act 1893* in relation to registrable real property dealt with under this Act.
  - (8) Nothing in this Act prevents a person from lodging with the Registrar of Titles —
    - (a) a caveat relating to frozen registrable real property;
    - (b) an instrument relating to a dealing or purported dealing in registrable real property that is frozen at the time that the instrument is lodged; or
    - (c) an instrument relating to a dealing or purported dealing in registrable real property that was frozen at the time that the dealing or purported dealing was carried out.
  - (9) Nothing in this Act prevents the Registrar of Titles from —
    - (a) giving notice to a person that a caveat has been lodged in relation to frozen registrable real property;

- (b) accepting an instrument relating to a dealing or purported dealing in registrable real property that is frozen at the time that the instrument is lodged; or
  - (c) accepting a memorial of a dealing or purported dealing in registrable real property that was frozen at the time that the dealing or purported dealing was carried out.
- (10) However, despite any other law in force in Western Australia, if an instrument (other than a memorial lodged under this Act) is lodged or registered in relation to frozen registrable real property —
- (a) the instrument and its lodgement or registration have no effect, at law, in equity or otherwise, while the freezing notice or freezing order is in force; and
  - (b) if the freezing notice or freezing order ceases to be in force, and the property is not confiscated, then the memorial, and its lodgement or registration (if any), have effect as if the property had not been frozen at the time that the instrument was lodged or registered, or at the time that the dealing or purported dealing to which the instrument relates was carried out.

**114. Registration of interests in other property**

If a registrar of property registered under any enactment except the *Transfer of Land Act 1893* is notified under this Act that a freezing notice or freezing order for the property has been issued or made, or has ceased to be in force, or that the property has been confiscated, the registrar is to note the relevant particulars in the register.

**115. Imputation of knowledge that property is frozen**

- (1) If a memorial of the issue of a freezing notice or the making of a freezing order for registrable real property has been registered under section 113(1), any person who deals with the property

while the freezing notice or freezing order is in force is taken to have notice, for all purposes, that the freezing notice or freezing order is in force.

- (2) If particulars of a freezing notice or freezing order for any property (except registrable real property) have been noted in the register under section 114, any person who deals with the property while the freezing notice or freezing order is in force is taken to have notice, for all purposes, that it is in force.

**116. Form of documents lodged with the Registrar of Titles**

- (1) The Registrar of Titles may approve the form of memorials or any other instruments lodged with the Registrar under or for the purposes of this Act.
- (2) A memorial or other instrument lodged with the Registrar under or for the purposes of this Act must be in a form approved under subsection (1).



## **Part 10 — Mutual recognition of freezing orders and confiscation of property**

### **Division 1 — Registration of WA orders in other jurisdictions**

#### **117. Interstate registration of freezing notices and orders**

- (1) For the purpose of enabling a freezing notice or freezing order to be registered under a corresponding law of another State or a Territory, the notice or order may be expressed to apply to property in the State or Territory.
- (2) The notice or order does not apply to property in another State or a Territory except to the extent that —
  - (a) a corresponding law of the State or Territory provides that the notice or order has effect in the State or Territory when it is registered under that law; or
  - (b) if the property is moveable — when the order took effect, the property was not located in a State or Territory in which a corresponding law is in force.

### **Division 2 — Recognition of orders of other jurisdictions**

#### **118. Registration of interstate orders**

- (1) If an interstate freezing order, or an interstate confiscation declaration, expressly applies to property that is in this State, the order may be registered under this Act.
- (2) An order is registered under this Act when a copy of the order, sealed by the court that made the order, is registered in accordance with the rules of the Supreme Court.
- (3) Any amendments made to an interstate freezing order or an interstate confiscation declaration may be registered in the same way, whether the amendments were made before or after the

registration of the original declaration, but the amendments are of no effect until they are registered.

- (4) An application for registration may be made by the applicant for the interstate order or declaration or amendments, by the DPP, or by any person affected by the order or amendments.

**119. Effect of registration of interstate freezing orders**

- (1) A registered interstate freezing order may be enforced in this State as if the order had been made under section 43.
- (2) This Act (except sections 41 and 46) applies to a registered interstate freezing order as if the order had been made under section 43.

**120. Effect of registration of interstate confiscation declarations**

- (1) A registered interstate confiscation declaration may be enforced in this State as if the property to which it relates had been confiscated under section 6, 7 or 8.
- (2) A registered interstate confiscation declaration does not operate so as to vest property in any person or entity except this State.
- (3) A registered interstate confiscation declaration does not operate so as to vest property in this State if the order has already operated to vest the property in the Commonwealth, a Territory or another State, or in some other person or entity.

**121. Duration of registration of interstate orders**

A registered interstate freezing order or registered interstate confiscation declaration is enforceable in this State under this Act until its registration is cancelled under section 122, even if the order has already ceased to be in force under the law of the Commonwealth, or of the State or Territory, under which the order was made.

**122. Cancellation of registration of interstate orders**

- (1) The Supreme Court may cancel the registration of an interstate freezing order or interstate confiscation declaration if —
  - (a) registration was improperly obtained; or
  - (b) the order ceases to be in force under the law of the Commonwealth, or of the State or Territory, under which the order was made.
- (2) An application for the cancellation of the registration may be made by the person who applied for its registration, by the DPP, or by a person affected by the order.

**Division 3 — Charges on interstate property**

**123. Creation of charge**

- (1) A charge is created on property that is frozen under a registered interstate freezing order if —
  - (a) the order was made in connection with a confiscation offence committed interstate by the owner of the property;
  - (b) an interstate criminal benefits declaration is made against the person in connection with the confiscation offence; and
  - (c) the interstate criminal benefits declaration is registered in a court of this State under the *Service and Execution of Process Act 1992* of the Commonwealth.
- (2) The charge is created as soon as both the interstate freezing order and the interstate criminal benefits declaration are registered in a court of this State.
- (3) The charge is created to the extent necessary to secure the payment of the amount due under the interstate criminal benefits declaration.

**124. Cessation of charge**

- (1) A charge created on property under section 123(1) ceases to have effect as soon as any one of the following happens —
  - (a) the interstate criminal benefits declaration that gave rise to the charge ceases to have effect;
  - (b) the declaration is set aside by a court;
  - (c) the amount due under or as a result of the declaration is paid;
  - (d) the owner of the property becomes, according to the *Interpretation Act 1984* section 13D, a bankrupt;
  - (e) the property is sold to a purchaser in good faith for value who, at the time of purchase, had no notice of the charge;
  - (f) the property is sold or otherwise disposed of in accordance with subsection (2).
- (2) For the purposes of subsection (1)(f), property may be sold or otherwise disposed of —
  - (a) under an order made by a court under the corresponding law of the Commonwealth, or of the State or Territory, under which the interstate criminal benefits declaration was made;
  - (b) by the owner of the property with the consent of the court that made the interstate criminal benefits declaration; or
  - (c) where an order of a court directs a person to take control of the property — by the owner of the property with the consent of the person.

*[Section 124 amended by No. 18 of 2009 s. 27.]*

**125. Priority of charge**

A charge created on property under section 123(1) —

- (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge;
- (b) has priority over all other encumbrances; and
- (c) subject to section 124, is not affected by any change of ownership of the property.

**126. Registration of charge on land**

- (1) If a charge is created on land under section 123, the DPP or the Public Trustee may lodge a memorial of a charge on an interest in land under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* and the memorial may be registered in accordance with the respective Act.
- (2) Anyone who purchases or otherwise acquires an interest in the property after the memorial is lodged is taken to have notice of the charge, for the purposes of section 124(1)(e), at the time of the purchase or acquisition.
- (3) If the charge ceases to have effect, the DPP or the Public Trustee may withdraw the memorial in accordance with the Act under which it was registered, and the registration may be cancelled in accordance with that Act.

**127. Registration of charge on property other than land**

- (1) The DPP or the Public Trustee may lodge a memorial of a charge on property of a kind other than land under any enactment that provides for the registration of interests in property of that kind, and the memorial may be registered in accordance with the enactment.
- (2) Anyone who purchases or otherwise acquires an interest in the property after the memorial is lodged is taken to have notice of the charge, for the purposes of section 124(1)(e), at the time of the purchase or acquisition.

- (3) If the charge ceases to have effect, the DPP or the Public Trustee may withdraw the memorial in accordance with the enactment, and the registration of the memorial may be cancelled in accordance with the enactment.

## Part 11 — Miscellaneous

### 128. Act binds States, Territories and Commonwealth

- (1) This Act binds this State, the Commonwealth, each other State, the Australian Capital Territory and the Northern Territory, to the extent that the legislative power of Parliament permits.
- (2) Nothing in this Act renders this State, the Commonwealth, another State or a Territory liable to prosecution for an offence.

### 129. Property protected from seizure and confiscation

- (1) Property of any of the following kinds is protected from confiscation if it is not crime-used property —
  - (a) family photographs;
  - (b) family portraits;
  - (c) necessary clothing.
- (2) Property of any of the following kinds is protected from confiscation if it is not crime-used property or crime-derived property —
  - (a) ordinary tools of trade;
  - (b) professional instruments;
  - (c) reference books.
- (3) However, ordinary tools of trade, professional instruments and reference books that are owned or effectively controlled by the same person are protected from confiscation only to the extent that the combined value of the tools, instruments and books does not exceed the amount prescribed for the purposes of section 75(1)(c) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.
- (4) Property that is protected from confiscation —
  - (a) is not confiscated under section 6, 7 or 8;

- (b) is not to be frozen;
- (c) is not to be taken, under a warrant of execution or otherwise, for the purpose of satisfying a person's liability under section 14, 20 or 24; and
- (d) is not to be seized under this Act or under a warrant under this Act.

**130. Confiscation Proceeds Account**

- (1) An agency special purpose account called the Confiscation Proceeds Account is established under section 16 of the *Financial Management Act 2006*.
- (2) The provisions of the *Financial Management Act 2006* and the *Auditor General Act 2006* regulating the financial administration, audit and reporting of departments apply to the Confiscation Proceeds Account.
- (3) For the purposes of section 52 of the *Financial Management Act 2006*, the administration of the Confiscation Proceeds Account is to be regarded as a service of the department principally assisting the Minister in the administration of this Act.

*[Section 130 amended by No. 77 of 2006 s. 17.]*

**131. Payments into and out of the Confiscation Proceeds Account**

- (1) The following are to be paid into the Confiscation Proceeds Account —
  - (a) money that, under this Act, is paid to the State, recovered by the State or confiscated;
  - (b) proceeds of the disposal of other confiscated property;
  - (c) money paid to the State under the *Proceeds of Crime Act 1987* of the Commonwealth from the Confiscated Assets Reserve established under that Act or any other



fund established for a similar purpose under a law of the Commonwealth;

- (d) money that the *Road Traffic Act 1974* section 80J(7)(j)(ii) requires to be paid to the credit of the account.
- (2) Money may be paid out of the Confiscation Proceeds Account at the direction of the Attorney General, as reimbursement or otherwise —
- (a) for a purpose associated with the administration of this Act;
  - (b) for the development and administration of programmes or activities designed to prevent or reduce drug-related criminal activity and the abuse of prohibited drugs;
  - (c) to provide support services and other assistance to victims of crime;
  - (d) to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating persons involved in the commission of a confiscation offence;
  - (e) to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating confiscable property;
  - (f) to cover any costs of storing, seizing or managing frozen or confiscated property that are incurred by the Police Force, the DPP or a person appointed under this Act to manage the property; and
  - (g) for any other purposes in aid of law enforcement.

*[Section 131 amended by No. 4 of 2007 s. 26.]*

**132. Obstructing police officers**

- (1) A person commits an offence if the person wilfully delays or obstructs a police officer in the performance of the functions of a police officer under this Act, or a person assisting a police officer in the performance of those functions.

Penalty: \$100 000 or imprisonment for 5 years, or both.

- (2) A person commits an offence if the person wilfully does not produce any property to, or wilfully conceals or attempts to conceal any property from, a police officer in the performance of the police officer's functions under this Act, or a person assisting a police officer in the performance of those functions.

Penalty: \$100 000 or imprisonment for 5 years, or both.

**133. Later applications, notices, orders or findings**

The fact that a freezing notice has been issued for property or that an application, order or finding has been made under this Act in relation to any property, person or confiscation offence does not prevent another freezing notice from being issued for the property, or prevent another application, order or finding, or a different application, order or finding, from being made under this Act in relation to the property, the person or the offence.

**134. DPP's power to delegate**

- (1) The DPP may delegate the performance of any of the functions of the DPP under this Act, except this power of delegation, to an officer referred to in section 30 of the *Director of Public Prosecutions Act 1991*.

- (2) A delegation —

- (a) must be made by written instrument;
- (b) is made on behalf of and subject to the direction and control of the DPP; and

- (c) may be made generally or as otherwise provided by the instrument.

**135. Orders relating to sham transactions**

- (1) The DPP may apply to the court for an order under subsection (2).
- (2) On hearing an application, if the court is satisfied that a person is carrying out, or has carried out, a sham transaction, the court may, to defeat the purpose of the transaction, by order —
  - (a) declare that the transaction is void in whole or in part; or
  - (b) vary the operation of the transaction in whole or in part.
- (3) The court may make any ancillary orders that are just in the circumstances for or with respect to any consequential or related matter, including orders relating to —
  - (a) dealing with property;
  - (b) the disposition of any proceeds from the sale of property;
  - (c) making payments of money; and
  - (d) creating a charge on property in favour of any person and the enforcement of the charge.
- (4) The court may rescind or vary an order made under this section.

**136. Proceedings against body corporate**

- (1) If a body corporate commits an offence under this Act and it is proved that the offence occurred with the consent or connivance of an officer of the body corporate, or a person purporting to act as an officer of the body corporate, that person, as well as the body corporate, commits the offence.
- (2) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member's functions of

management as if the member were a director of the body corporate.

- (3) If, in proceedings under this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —
  - (a) the conduct was engaged in by an officer of the body corporate within the scope of his or her actual or apparent authority; and
  - (b) the officer had that state of mind.
- (4) If an officer of a body corporate engages in conduct on behalf of the body corporate within the scope of his or her actual authority then, for the purposes of proceedings under this Act, the body corporate is taken also to have engaged in the conduct unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

**137. Liability for carrying out functions under this Act**

A person on whom this Act confers a function is not personally liable in civil proceedings, and the State is not liable, for anything done or default made by the person in good faith for the purpose of carrying this Act into effect.

**138. Effect of owner's death**

- (1) A reference in this Act to property of a person who is dead is to be read as a reference to property owned or effectively controlled by the person immediately before his or her death, or given away by the person at any time before his or her death.
- (2) An order may be applied for and made under this Act —
  - (a) in respect of property that is or was owned or effectively controlled or given away by a person even if the person is dead; and
  - (b) on the basis of the activities of a person who is dead.

- (3) If a person who owns frozen property dies, this Act continues to apply to the property in all respects as if the person had not died, regardless of whether the administrator of the person's estate or any other person in whom the property vests as a result of the death is an innocent party in relation to the property.
- (4) Without limiting the remainder of this section, if a person who is a joint tenant of frozen property dies —
  - (a) the person's death does not operate to vest the property in the surviving joint tenant or tenants; and
  - (b) the freezing notice or freezing order continues to apply to the property as if the person had not died.

**139. Legal professional privilege withdrawn**

- (1) A person is not entitled to contravene an order or requirement under this Act in relation to any information or any property-tracking document or other document, on the basis that the information, property-tracking document or other document is subject to legal professional privilege, or contains or is likely to contain information that would, apart from this subsection, be subject to legal professional privilege.
- (2) A warrant under section 74 may be issued and executed in relation to a property-tracking document whether or not the document would, apart from this subsection, be subject to legal professional privilege, or contains or is likely to contain information that would, apart from this subsection, be subject to legal professional privilege.
- (3) Any information or property-tracking document or other document produced or obtained under or for the purposes of this Act, or any information in a property-tracking document or other document produced or obtained under or for the purposes of this Act is not inadmissible in any proceedings under this Act only because the information, property-tracking document or

other document would, apart from this subsection, be subject to legal professional privilege.

**140. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to this Act.
- (2) Without limiting subsection (1), the regulations may —
  - (a) provide for carrying out the destruction of property under an order under section 93;
  - (b) provide for carrying out the sale of deteriorating property under an order under section 94;
  - (c) provide for obtaining possession of confiscated property;
  - (d) provide for the storage and management of confiscated property;
  - (e) provide for the disposal of confiscated property that has vested in the State; and
  - (f) authorise persons or persons in a class of persons to carry out any or all of the functions of a police officer under this Act.

## **Part 12 — Interpretation**

**141. Term used: confiscation offence**

- (1) In this Act, *confiscation offence* means —
  - (a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or
  - (b) any other offence that is prescribed for the purposes of this definition.
- (2) An offence of a kind referred to in subsection (1)(a) is a confiscation offence even if a charge against a person for the offence is dealt with by a court whose jurisdiction is limited to the imposition of sentences of imprisonment of less than 2 years.

**142. Term used: confiscable**

Property is confiscable for the purposes of this Act if the property is —

- (a) owned or effectively controlled, or has at any time been given away, by a person who has unexplained wealth;
- (b) owned or effectively controlled, or has at any time been given away, by a person who has acquired a criminal benefit;
- (c) crime-used property;
- (d) crime-derived property; or
- (e) owned or effectively controlled, or has at any time been given away, by a declared drug trafficker.

**143. Term used: wealth**

- (1) The following property, services, advantages and benefits together constitute a person's wealth —

- (a) all property that the person owns, whether the property was acquired before or after the commencement of this Act;
  - (b) all property that the person effectively controls, whether the person acquired effective control of the property before or after the commencement of this Act;
  - (c) all property that the person has given away at any time, whether before or after the commencement of this Act;
  - (d) all other property acquired by the person at any time, whether before or after the commencement of this Act, including consumer goods and consumer durables that have been consumed or discarded;
  - (e) all services, advantages and benefits that the person has acquired at any time, whether before or after the commencement of this Act; and
  - (f) all property, services, advantages and benefits acquired, at the request or direction of the person, by another person at any time, whether before or after the commencement of this Act, including consumer goods and consumer durables that have been consumed or discarded.
- (2) Without limiting subsection (1), a reference in that subsection to property, services, advantages or benefits acquired by a person or by another person at the request or direction of the first-mentioned person is to be read as including a reference to any thing of monetary value acquired, in Australia or elsewhere, from the commercial exploitation of any product, or of any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the first-mentioned person's involvement in the commission of a confiscation offence, whether or not the thing was lawfully acquired and whether or not the first-mentioned person has been charged with or convicted of the offence.



**144. Term used: unexplained wealth**

- (1) For the purposes of this Act, a person has unexplained wealth if the value of the person's wealth under subsection (2) is greater than the value of the person's lawfully acquired wealth under subsection (3).
- (2) The value of the person's wealth is the amount equal to the sum of the values of all the items of property, and all the services, advantages and benefits, that together constitute the person's wealth.
- (3) The value of the person's lawfully acquired wealth is the amount equal to the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired.

**145. Term used: criminal benefit**

- (1) For the purposes of this Act, a person has acquired a criminal benefit if —
  - (a) any property, service, advantage or benefit that is a constituent of the person's wealth was directly or indirectly acquired as a result of the person's involvement in the commission of a confiscation offence, whether or not the property, service, advantage or benefit was lawfully acquired; or
  - (b) the person has been involved in the commission of a confiscation offence, and any property, service, advantage or benefit that is a constituent of the person's wealth was not lawfully acquired, whether or not the property, service, advantage or benefit was acquired as a result of the person's involvement in the commission of the offence.
- (2) Without limiting subsection (1), the person has acquired a criminal benefit —

- (a) whether the property, service, advantage or benefit was acquired before, during or after the confiscation offence was or is likely to have been committed;
- (b) whether or not the property, service, advantage or benefit was acquired before or after the commencement of this Act; and
- (c) whether or not the confiscation offence was committed before or after the commencement of this Act.

**146. Term used: crime-used**

- (1) For the purposes of this Act, property is crime-used if —
  - (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;
  - (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or
  - (c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.
- (2) Without limiting subsection (1), property described in that subsection is crime-used whether or not —
  - (a) the property is also used, or intended or able to be used, for another purpose;
  - (b) anyone who used or intended to use the property as mentioned in subsection (1) has been identified;
  - (c) anyone who did or omitted to do anything that constitutes all or part of the relevant confiscation offence has been identified; or
  - (d) anybody has been charged with or convicted of the relevant confiscation offence.

- (3) Without limiting subsection (1) or (2), any property in or on which an offence under Chapter XXII or XXXI of *The Criminal Code* is committed is crime-used property.

**147. Term used: criminal use**

For the purposes of this Act, a person makes criminal use of property if the person, alone or with anyone else (who need not be identified) uses or intends to use the property in a way that brings the property within the definition of crime-used property.

**148. Term used: crime-derived**

- (1) Property that is wholly or partly derived or realised, directly or indirectly, from the commission of a confiscation offence is crime-derived, whether or not —
- (a) anyone has been charged with or convicted of the offence;
  - (b) anyone who directly or indirectly derived or realised the property from the commission of the offence has been identified; or
  - (c) anyone who directly or indirectly derived or realised the property from the commission of the offence was involved in the commission of the offence.
- (2) Without limiting subsection (1), property of the following kinds is crime-derived —
- (a) stolen property;
  - (b) property bought with or exchanged for crime-derived property;
  - (c) property acquired by legitimate means that could not have been acquired if crime-derived property had not been used for other purposes;
  - (d) any thing of monetary value acquired, in Australia or elsewhere, from the commercial exploitation of any

product, or of any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from a person's involvement in the commission of a confiscation offence, whether or not the thing was lawfully acquired and whether or not anyone has been charged with or convicted of the offence.

- (3) The reference in subsection (2)(b) to crime-derived property is not limited to crime-derived property described in subsection (1) or in subsection (2)(a), (c) or (d), but also includes a reference to property that is crime-derived property because of a previous operation or previous operations of subsection (2)(b).
- (4) Once property becomes crime-derived property it remains crime-derived property even if it is disposed of, used to acquire other property or otherwise dealt with, unless it stops being crime-derived property under subsection (8).
- (5) Property owned by 2 or more people, whether jointly or as tenants in common, is crime-derived if any part of the share of any of the owners is crime-derived, whether or not any of the owners is an innocent party in relation to the share or part-share that is crime-derived.
- (6) If a person once owned crime-derived property, but was divested of the property in such a way that it stopped being crime-derived property under subsection (8), then, if the person acquires the property again, it becomes crime-derived property again.
- (7) For the purposes of deciding whether property is crime-derived, the proceeds of a sale or other dealing do not lose their identity as those proceeds only as a result of being credited to an account.
- (8) Crime-derived property stops being crime-derived property —
  - (a) when it is acquired by an innocent party;

- (b) if it is frozen property — when the freezing order is set aside under section 83;
- (c) if it has been confiscated — when the court orders its release under section 87;
- (d) if it is money to be paid into the Confiscation Proceeds Account under section 131(1) — when it is paid into the Confiscation Proceeds Account;
- (e) if it has been confiscated, but is not money — when the property is disposed of in accordance with regulations under section 140(2)(e); or
- (f) in any other circumstances prescribed by the regulations.

**149. Term used: lawfully acquired**

Any property, service, advantage or benefit is lawfully acquired only if —

- (a) the property, service, advantage or benefit was lawfully acquired; and
- (b) any consideration given for the property, service, advantage or benefit was lawfully acquired.

**150. Term used: service cut off date**

For the purpose of determining when frozen property is confiscated under section 7, the service cut off date is —

- (a) for property frozen under a freezing notice — the date of the last day on which a copy of the freezing notice was served on anyone under section 36(4); and
- (b) for property frozen under a freezing order — the date of the last day on which a copy of the freezing order was served on anyone under section 46(4).

**151. Term used: deal (in relation to property)**

A reference in this Act to dealing with property includes a reference to doing or attempting to do any of the following —

- (a) sell the property or give it away;
- (b) dispose of the property in any other way;
- (c) move or use the property;
- (d) accept the property as a gift;
- (e) take any profit, benefit or proceeds from the property;
- (f) create, increase or alter any legal or equitable right or obligation in relation to the property;
- (g) effect a change in the effective control of the property.

**152. Term used: value (in relation to property sold by or for the State)**

- (1) If property is sold by or for the State under this Act, the value of the property is taken to be equal to the proceeds of the sale after taking account of the following —
  - (a) costs, charges and expenses arising from the sale;
  - (b) if a freezing notice or freezing order is or was in force for the property — expenses incurred by the State or a person appointed to manage the property while the notice or order was in force;
  - (c) if the property has been confiscated — any expenses incurred by the State or a person appointed to manage the property after it was confiscated;
  - (d) any charges on the property.
- (2) If the property is subject to a mortgage which is also security against other property then, despite any other enactment and any inconsistent term of the mortgage, the extent of the security over the sold property is the proportion that the value of the sold

property bore to the total value of all the secured property at the time that the security over the sold property was given.

**153. Term used: innocent party**

- (1) A person is an innocent party in relation to crime-used property if the person —
  - (a) was not in any way involved in the commission of the relevant confiscation offence; and
  - (b) did not know, and had no reasonable grounds for suspecting, that the relevant confiscation offence was being or would be committed, or took all reasonable steps to prevent its commission.
  
- (2) A person is an innocent party in relation to crime-used property if the person —
  - (a) did not know, and had no reasonable grounds for suspecting, that the property was being or would be used in or in connection with the commission of the relevant confiscation offence; or
  - (b) took all reasonable steps to prevent its use.
  
- (3) A person who owns or effectively controls crime-used property is an innocent party in relation to the property if —
  - (a) the person did not acquire the property or its effective control before the time that the relevant confiscation offence was committed or is likely to have been committed;
  - (b) at the time of acquiring the property or its effective control, the person did not know and had no reasonable grounds for suspecting that the property was crime-used;
  - (c) if the person acquired the property for valuable consideration — the consideration was lawfully acquired; and

- (d) the person did not acquire the property or its effective control, either as a gift or for valuable consideration, with the intention of avoiding the operation of this Act.
- (4) A person is an innocent party in relation to crime-derived property if —
- (a) the person acquired the property, or the person's share of it (if it is owned by more than one person), for valuable consideration;
  - (b) the consideration was lawfully acquired;
  - (c) before acquiring the property or share, the person made reasonable inquiries, and took all other action reasonable in the circumstances, to ascertain whether or not the property was crime-derived;
  - (d) despite the inquiries made under paragraph (c), at the time of acquiring the property or share, the person did not know and had no reasonable grounds for suspecting that the property was crime-derived; and
  - (e) the person did not acquire the property or share with the intention of avoiding the operation of this Act.

**154. Term used: value (in relation to transfer of property)**

For the purposes of this Act —

- (a) property transferred under a will or administration of an intestate estate is not taken to be transferred for value; and
- (b) property transferred in the course of proceedings in the Family Court of Western Australia or the Family Court of Australia is taken to be transferred for value.

**155. Term used: property-tracking document**

For the purposes of this Act, a document is a property-tracking document if the document is relevant to —



- (a) identifying or locating crime-used property or crime-derived property;
- (b) determining the value of any crime-used property or crime-derived property;
- (c) identifying or locating any or all constituents of a person's wealth;
- (d) determining the value of any or all constituents of a person's wealth; or
- (e) identifying or locating any document relating to the transfer of frozen or confiscated property.

**156. Term used: effective control (in relation to property)**

- (1) For the purposes of this Act, a person has effective control of property if the person does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person.
- (2) Without limiting subsection (1), when determining whether a person has effective control of any property, the following matters may be taken into account —
  - (a) any shareholdings in, debentures over or directorships of any corporation that has a direct or indirect interest in the property;
  - (b) any trust that has a relationship to the property;
  - (c) family, domestic and business relationships between persons having an interest in the property;
  - (d) family, domestic and business relationships between persons having an interest in or in a corporation that has a direct or indirect interest in the property;
  - (e) family, domestic and business relationships between persons having an interest in a trust that has a relationship to the property;
  - (f) any other relevant matters.

**157. Term used: conviction (in relation to confiscation offence)**

- (1) For the purposes of this Act, a person is taken to have been convicted of a confiscation offence if —
  - (a) the person has been convicted of the confiscation offence, whether or not —
    - (i) a spent conviction order is made under section 39 of the *Sentencing Act 1995* in respect of the conviction; or
    - (ii) the conviction was deemed not to be a conviction by section 20 of the *Offenders Community Corrections Act 1963*<sup>2</sup>;
  - (b) the person has been charged with and found guilty of a confiscation offence, but is discharged without conviction;
  - (c) the confiscation offence was taken into account by a court in sentencing the person for another confiscation offence; or
  - (d) the person was charged with a confiscation offence but absconded before the charge is finally determined.
- (2) For the purposes of this Act, a person's conviction is taken to have been quashed —
  - (a) if the person is taken under subsection (1)(a) to have been convicted — if the conviction is quashed or set aside;
  - (b) if the person is taken under subsection (1)(b) to have been convicted — if the finding of guilt is quashed or set aside;
  - (c) if the person is taken under subsection (1)(c) to have been convicted — if the decision of the court to take the confiscation offence into account is quashed or set aside; or
  - (d) if the person is taken under subsection (1)(d) to have been convicted — if the person is brought before a court

to answer the charge, and the person is discharged in respect of the confiscation offence.

**158. Term used: charge (in relation to an offence)**

For the purposes of this Act, a person is taken to have been charged with an offence if a prosecution of the person for the offence has been commenced, whether or not —

- (a) a summons requiring the attendance of the person in relation to the prosecution has been issued;
- (aa) a court hearing notice has been issued to the person in respect of the prosecution; or
- (b) a warrant for the arrest of the person has been issued.

*[Section 158 amended by No. 84 of 2004 s. 80.]*

**159. Term used: declared drug trafficker**

- (1) In this Act, unless the contrary intention appears —

***declared drug trafficker*** means —

- (a) a person who is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of an offence that was committed, or is more likely than not to have been committed, after the commencement of this Act; or
- (b) a person who is taken to be a declared drug trafficker under subsection (2).

- (2) For the purposes of this Act, a person is taken to be a declared drug trafficker if —

- (a) the person is charged with a serious drug offence within the meaning of section 32A(3) of the *Misuse of Drugs Act 1981*;
- (b) the offence was committed, or is more likely than not to have been committed, after the commencement of this Act;

- (c) the person could be declared to be a drug trafficker under section 32A(1) of that Act if he or she is convicted of the offence;
- (d) the charge is not disposed of or finally determined; and
- (e) the person absconds in connection with the offence.

**160. Term used: abscond (in relation to an offence)**

- (1) A person charged with an offence absconds in connection with the offence if —
  - (a) a warrant for the person's arrest for the offence is in force, or the person was arrested without warrant either before or after the person was charged with the offence;
  - (b) the charge has neither been disposed of nor finally determined;
  - (c) at least 6 months have passed since the warrant was issued; and
  - (d) the person cannot be found.
- (2) A person charged with an offence absconds in connection with the offence if —
  - (a) a warrant for the person's arrest for the offence is in force, or the person is arrested for the offence without warrant (whether before or after being charged with the offence);
  - (b) the charge has neither been disposed of nor finally determined; and
  - (c) the person dies.

**161. Term used: sham transaction**

- (1) For the purposes of this Act, a person carries out a sham transaction if —

- (a) the person carries out a transaction within the meaning of subsection (2); and
  - (b) the transaction was carried out for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of this Act in any respect.
- (2) For the purposes of subsection (1), the person carries out a transaction if the person carries out, makes, gives or designs —
- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or
  - (b) any scheme, plan, proposal, action, course of action, or course of conduct.

## Glossary

[s. 3]

### 1. Terms used

In this Act —

***abscond***, in connection with an offence, has the meaning given in section 160;

***account*** means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for fixed term deposit and a safety deposit box;

***agent*** includes, if the agent is a corporation, an officer of the corporation;

***charge***, in relation to an offence, has the meaning given in section 158;

***confiscated***, in relation to property, means confiscated under section 6, 7 or 8;

***confiscable***, in relation to property, has the meaning given in section 142;

***Confiscation Proceeds Account*** means the account established under section 130;

***confiscable property declaration*** means a declaration made under section 28;

***confiscation offence*** has the meaning given in section 141;

***conviction***, in relation to a confiscation offence, has the meaning given in section 157;

***corporation*** means —

- (a) a financial institution; or
- (b) a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth, other than an exempt body within the meaning of section 66A of that Act;

**corresponding law**, in relation to the Commonwealth, another State or a Territory, means a law of the Commonwealth, State or Territory that is prescribed in the regulations as a law that corresponds to this Act;

**court** means —

- (a) in relation to making an application under this Act — a court having jurisdiction under section 101 to hear and determine the application;
- (b) in relation to proceedings on an application under this Act — the court in which the application was filed, or another court having jurisdiction, whether under this Act or another enactment, in the proceedings;
- (c) in relation to a freezing notice — the court in which the notice was filed; or
- (d) in relation to a declaration or order under this Act — the court that made the declaration or order;

**crime-derived**, in relation to property, has the definition given in section 148;

**crime-used**, in relation to property, has the meaning given in section 146;

**crime-used property substitution declaration** means a declaration under section 22;

**criminal benefit** has the definition given in section 145;

**criminal benefits declaration** means a declaration under section 16 or 17;

**criminal use**, in relation to a person and property, has the meaning given in section 147;

**deal**, in relation to property, has the meaning given in section 151;

**declared drug trafficker** has the meaning given in section 159;

**director**, in relation to a financial institution or a corporation, means —

- (a) if the institution or corporation is a body corporate incorporated for a public purpose under a law of the Commonwealth or of a State or Territory — a constituent member of the body corporate;

- (b) a person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; or
- (c) a person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;

**dispose of**, in relation to a charge, means —

- (a) withdraw;
- (b) dismiss; or
- (c) file a nolle prosequi in relation to the charge or discontinue the prosecution of it;

**document** includes —

- (a) any publication and any matter written, expressed, or described, electronically or otherwise, upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter; and
- (b) a computer disk, computer or any other substance or equipment, whether electronic or not, used to create or store any publication or matter referred to in paragraph (a);

**DPP** means the holder of the office of Director of Public Prosecutions created by section 4 of the *Director of Public Prosecutions Act 1991*;

**effective control**, in relation to property, has the definition given in section 156;

**encumbrance**, in relation to property, includes any interest, mortgage, charge, right, claim or demand in respect of the property;

**examination** means examination under an order under section 58(1);

**examination order** means an order under section 58(1);

**executive officer**, in relation to a financial institution or a corporation, means any person, by whatever name called, and whether or not he or she is a director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation;



***financial institution*** means —

- (a) an ADI within the meaning of section 5 of the *Banking Act 1959* of the Commonwealth;
- (b) the Reserve Bank of Australia;
- (c) a person who carries on State banking within the meaning of section 51(xiii) of the Commonwealth Constitution;

[(d) *deleted*]

- (e) a registered society within the meaning of the *Co-operative and Provident Societies Act 1903*;
- (f) a financial corporation within the meaning of section 51(xx) of the Constitution of the Commonwealth; or
- (g) a body corporate that would be a financial corporation within the meaning of section 51(xx) of the Constitution of the Commonwealth if the body had been incorporated in Australia;

***freezing notice*** means a freezing notice issued under section 34;

***freezing order*** means an order under section 43;

***frozen***, in relation to property and in relation to a freezing notice or freezing order, means subject to the freezing notice or the freezing order;

***give***, in relation to property, includes transfer for consideration that is significantly less than the greater of —

- (a) the market value of the property at the time of transfer; and
- (b) the consideration paid by the transferee;

***innocent party*** has the meaning given in section 153;

***interested party***, in relation to frozen property, means a person who has an interest in the property that would enable the person to succeed on an objection to the confiscation of the property;

***interstate confiscation offence*** means an offence (including a common law offence) against a law in force in another State or a Territory, being an offence in relation to which an interstate confiscation declaration or an interstate criminal benefits declaration may be made under a corresponding law of the State or Territory;

***interstate confiscation declaration*** means a declaration or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

***interstate criminal benefits declaration*** means a declaration or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

***interstate freezing order*** means a notice or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

***instrument***, in relation to a dealing with registrable real property, means —

- (a) a memorial under this Act; or
- (b) an instrument as defined in the *Transfer of Land Act 1893*;

***lawfully acquired***, in relation to any property, service, advantage or benefit, has the meaning given in section 149;

***medical practitioner*** means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

***monitoring order*** means an order under section 68(1);

***objection*** means an objection filed under section 79 to the confiscation of property;

***officer***, in relation to a corporation, means a director, secretary, executive officer, employee or agent of the corporation;

***owner***, in relation to property, means a person who has a legal or equitable interest in the property;

***police officer***, in relation to a function, includes a person authorised to carry out the function under regulations made under section 140(2)(f);

***premises*** includes vessel, aircraft, vehicle, structure, building and any land or place whether built on or not;

***production order*** means an order under section 63;

**prohibited drug** has the same meaning as in the *Misuse of Drugs Act 1981*;

**prohibited plant** has the same meaning as in the *Misuse of Drugs Act 1981*;

**property** means —

- (a) real or personal property of any description, wherever situated, whether tangible or intangible; or
- (b) a legal or equitable interest in any property referred to in paragraph (a);

**property-tracking document** has the meaning given in section 155;

**recipient**, in relation to a freezing notice or freezing order, means a person on whom a copy of the notice or order is served under section 36 or 46;

**registered**, in relation to an interstate freezing order or an interstate confiscation declaration, means registered under section 118;

**registrable real property** means property to which the *Transfer of Land Act 1893* applies;

**registration**, in relation to an instrument relating to a dealing in registrable real property, has the same meaning as in section 52 of the *Transfer of Land Act 1893*;

**relevant confiscation offence**, in relation to confiscable property, means the confiscation offence or suspected confiscation offence that is relevant to bringing the property within the scope of this Act;

**respondent** means —

- (a) in relation to an application for an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is sought; or
- (b) in relation to an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is made;

**restricted disclosure** means a disclosure about a matter of a kind referred to in a paragraph of section 70(1);

**seized**, in relation to property, means seized under section 33(1);

**service cut off date**, in relation to frozen property, has the meaning given in section 150;

**sham transaction** has the meaning given in section 161;

**State taxes**, in relation to frozen property, means any rates, land tax, local government or other statutory charges imposed on the property under a law of this State;

**suspension order** means an order under section 68(2);

**transaction**, in relation to an account with a financial institution, includes —

- (a) the making of a fixed term deposit;
- (b) the transferring of the amount of a fixed term deposit, or any part of it, at the end of the term;

**unexplained wealth** has the meaning given in section 144;

**unexplained wealth declaration** means a declaration under section 12;

**valuable consideration**, in relation to the transfer of property, does not include —

- (a) any consideration for the transfer arising from the fact of a family relationship between the transferor and transferee;
- (b) if the transferor is the spouse or de facto partner of the transferee — the making by the transferor of a deed in favour of the transferee;
- (c) a promise by the transferee to become the spouse or de facto partner of the transferor;
- (d) any consideration arising from the transferor's love or affection for the transferee;
- (e) the transfer of the property as a result of the distribution of a deceased estate;
- (f) the transfer of the property by way of gift; or
- (g) consideration that is significantly less than the greater of —
  - (i) the market value of the property at the time of transfer; and

(ii) the consideration paid by the transferee;

**value**, in relation to —

- (a) a person's unexplained wealth — means the amount calculated in accordance with section 13;
- (b) a person's wealth — has the meaning given in section 144(2);
- (c) a person's lawfully acquired wealth — has the meaning given in section 144(3);
- (d) property sold by or for the State — has the meaning given in section 152; and
- (e) the transfer of property — has the meaning given in section 154;

**wealth** has the meaning given in section 143.

*[Glossary amended by No. 12 of 2001 s. 51; No. 20 of 2003 s. 19; No. 28 of 2003 s. 42; No. 17 of 2005 s. 25; No. 2 of 2008 s. 61(3); No. 22 of 2008 Sch. 3 cl. 17; No. 19 of 2010 s. 51; No. 35 of 2010 s. 60.]*

### Notes

<sup>1</sup> This is a compilation of the *Criminal Property Confiscation Act 2000* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

#### Compilation table

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Criminal Property Confiscation Act 2000</i>	68 of 2000	6 Dec 2000	s. 1 and 2: 6 Dec 2000; Act other than s. 1 and 2: 1 Jan 2001 (see s. 2 and <i>Gazette</i> 29 Dec 2000 p. 7903)
<i>Building Societies Amendment Act 2001</i> s. 51	12 of 2001	13 Jul 2001	13 Jul 2001 (see s. 2)
<i>Corporations (Consequential Amendments) Act (No. 2) 2003</i> Pt. 7	20 of 2003	23 Apr 2003	15 Jul 2001 (see s. 2(1) and Cwlth <i>Gazette</i> 13 Jul 2001 No. S285)
<i>Acts Amendment (Equality of Status) Act 2003</i> Pt. 15	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
<i>Courts Legislation Amendment and Repeal Act 2004</i> s. 141	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004</i> s. 80 and 82	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
<i>Housing Societies Repeal Act 2005</i> s. 25	17 of 2005	5 Oct 2005	10 Jul 2010 (see s. 2(3) and <i>Gazette</i> 9 Jul 2010 p. 3239)
<b>Reprint 1: The Criminal Property Confiscation Act 2000 as at 9 Dec 2005</b> (includes amendments listed above except those in the <i>Housing Societies Repeal Act 2005</i> s. 25)			
<i>Financial Legislation Amendment and Repeal Act 2006</i> s. 17	77 of 2006	21 Dec 2006	1 Feb 2007 (see s. 2(1) and <i>Gazette</i> 19 Jan 2007 p. 137)
<i>Road Traffic Amendment Act 2007</i> s. 26	4 of 2007	11 Apr 2007	1 May 2007 (see s. 2 and <i>Gazette</i> 27 Apr 2007 p. 1831)
<i>Criminal Law and Evidence Amendment Act 2008</i> s. 61	2 of 2008	12 Mar 2008	27 Apr 2008 (see s. 2 and <i>Gazette</i> 24 Apr 2008 p. 1559)
<i>Medical Practitioners</i>	22 of 2008	27 May 2008	1 Dec 2008 (see s. 2 and

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Act 2008</i> Sch. 3 cl. 17			<i>Gazette</i> 25 Nov 2008 p. 4989)
<b>Reprint 2: The Criminal Property Confiscation Act 2000 as at 20 Mar 2009</b> (includes amendments listed above except those in the <i>Housing Societies Repeal Act 2005</i> s. 25)			
<i>Acts Amendment (Bankruptcy) Act 2009</i> s. 27	18 of 2009	16 Sep 2009	17 Sep 2009 (see s. 2(b))
<i>Co-operatives Act 2009</i> s. 508	24 of 2009	22 Oct 2009	1 Sep 2010 (see s. 2(b) and <i>Gazette</i> 13 Aug 2010 p. 3975)
<i>Standardisation of Formatting Act 2010</i> s. 51	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and <i>Gazette</i> 10 Sep 2010 p. 4341)
<i>Health Practitioner Regulation National Law (WA) Act 2010</i> Pt. 5 Div. 18	35 of 2010	30 Aug 2010	18 Oct 2010 (see s. 2(b) and <i>Gazette</i> 1 Oct 2010 p. 5075-6)

<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

### Provisions that have not come into operation

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Co-operatives Act 2009</i> s. 508 and 513 <sup>4</sup>	24 of 2009	22 Oct 2009	1 Sep 2012 (see s. 2(c) and <i>Gazette</i> 13 Aug 2010 p. 3975)

<sup>2</sup> Repealed by the *Sentencing (Consequential Provisions) Act 1995* s. 77.

<sup>3</sup> Footnote no longer applicable.

<sup>4</sup> On the date as at which this compilation was prepared, the *Co-operatives Act 2009* s. 513 had not come into operation. It reads as follows:

**513. Criminal Property Confiscation Act 2000 amended**

- (1) This section amends the *Criminal Property Confiscation Act 2000*.
- (2) In the Glossary in paragraph (e) of the definition of **financial institution** delete “a registered society within the meaning of the *Co-operative and Provident Societies Act 1903*, or”.





## Defined Terms

*[This is a list of terms defined and the provisions where they are defined.  
The list is not part of the law.]*

Defined Term	Provision(s)
abscond .....	Gl.
account .....	Gl.
agent.....	Gl.
charge.....	Gl.
confiscable .....	Gl.
confiscable property declaration .....	Gl.
confiscated .....	Gl.
confiscation offence .....	141(1), Gl.
Confiscation Proceeds Account .....	Gl.
conviction.....	Gl.
corporation .....	Gl.
corresponding law .....	Gl.
court .....	Gl.
crime-derived .....	Gl.
crime-derived property.....	4(d)
crime-used.....	Gl.
crime-used property .....	4(c)
crime-used property substitution declaration .....	Gl.
criminal benefit .....	Gl.
criminal benefits.....	4(b)
criminal benefits declaration .....	Gl.
criminal use.....	Gl.
deal.....	Gl.
declared drug trafficker.....	4(e), 159(1), Gl.
director .....	Gl.
dispose of .....	Gl.
document.....	Gl.
DPP .....	Gl.
effective control .....	Gl.
encumbrance .....	Gl.
examination.....	Gl.
examination order .....	Gl.
executive officer.....	Gl.
financial institution .....	Gl.

Defined Terms

freezing notice.....	Gl.
freezing order.....	Gl.
frozen.....	Gl.
give.....	Gl.
innocent party.....	Gl.
instrument.....	Gl.
interested party.....	Gl.
interstate confiscation declaration.....	Gl.
interstate confiscation offence.....	Gl.
interstate criminal benefits declaration.....	Gl.
interstate freezing order.....	Gl.
lawfully acquired.....	Gl.
medical practitioner.....	Gl.
monitoring order.....	Gl.
objection.....	Gl.
officer.....	Gl.
owner.....	Gl.
police officer.....	Gl.
premises.....	Gl.
production order.....	Gl.
prohibited drug.....	Gl.
prohibited plant.....	Gl.
property.....	Gl.
property-tracking document.....	Gl.
recipient.....	Gl.
registered.....	Gl.
registrable real property.....	Gl.
registration.....	Gl.
relevant confiscation offence.....	Gl.
respondent.....	Gl.
restricted disclosure.....	Gl.
seized.....	Gl.
service cut off date.....	Gl.
sham transaction.....	Gl.
State taxes.....	Gl.
suspension order.....	Gl.
transaction.....	Gl.
unexplained wealth.....	4(a), Gl.
unexplained wealth declaration.....	Gl.
valuable consideration.....	Gl.
value.....	Gl.
wealth.....	Gl.



Appendix B(ii)  
Proceeds of Crime Act 2002  
Australia



# Proceeds of Crime Act 2002

## Act No. 85 of 2002 as amended

This compilation was prepared on 26 November 2010  
taking into account amendments up to Act No. 127 of 2010

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,  
Attorney-General's Department, Canberra

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# An Act to provide for confiscation of the proceeds of crime, and for other purposes

## Chapter 1—Introduction

### Part 1-1—Preliminary

#### 1 Short title [see Note 1]

This Act may be cited as the *Proceeds of Crime Act 2002*.

#### 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	11 October 2002
2. Sections 3 to 338	A single day to be fixed by Proclamation, subject to subsection (3)	1 January 2003 ( <i>Gazette</i> 2002, No. GN44)

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 3

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Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.
- (3) If a provision covered by item 2 of the table does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

### **3 Identifying defined terms**

- (1) Many of the terms in this Act are defined in the Dictionary in Chapter 6.
- (2) Most of the terms that are defined in the Dictionary in Chapter 6 are identified by an asterisk appearing at the start of the term: as in “\*proceeds”. The footnote with the asterisk contains a signpost to the Dictionary.
- (3) An asterisk usually identifies the first occurrence of a term in a section (if not divided into subsections), subsection or definition. Later occurrences of the term in the same provision are not usually asterisked.
- (4) Terms are not asterisked in headings, notes, examples, explanatory tables, guides, outline provisions or diagrams.
- (5) If a term is not identified by an asterisk, disregard that fact in deciding whether or not to apply to that term a definition or other interpretation provision.
- (6) The following basic terms used throughout the Act are not identified with an asterisk:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

---



<b>Terms that are not identified</b>		
<b>Item</b>	<b>This term:</b>	<b>is defined in:</b>
1	charged	section 338
2	convicted	section 331
3	deal	section 338
4	derived	section 336
5	property	section 338

#### **4 Application of the *Criminal Code***

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 1-2—Objects

### 5 Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the \*proceeds of offences, the \*instruments of offences, and \*benefits derived from offences, against the laws of the Commonwealth or the \*non-governing Territories; and
- (b) to deprive persons of \*literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (ba) to deprive persons of \*unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the \*self-governing Territories to be enforced in the other Territories.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 1-3—Outline of this Act**

### **6 General**

This Act establishes a scheme to confiscate the proceeds of crime. It does this by:

- (a) setting out in Chapter 2 processes by which confiscation can occur; and
- (b) setting out in Chapter 3 ways in which Commonwealth law enforcement agencies can obtain information relevant to these processes; and
- (c) setting out in Chapter 4 related administrative matters.

It concludes with miscellaneous provisions and with definitions and other interpretive material.

Note: See also Part IAE of the *Crimes Act 1914* (video link evidence).

### **7 The confiscation scheme (Chapter 2)**

Chapter 2 sets out a number of processes relating to confiscation:

- (aa) freezing orders limiting withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts (see Part 2-1A); and
- (a) restraining orders prohibiting disposal of or dealing with property (see Part 2-1); and
- (b) forfeiture orders under which property is forfeited to the Commonwealth (see Part 2-2); and
- (c) forfeiture of property to the Commonwealth on conviction of a serious offence (see Part 2-3); and
- (d) pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences (see Part 2-4); and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences (see Part 2-5); and
- (f) unexplained wealth orders requiring payment of unexplained wealth amounts (see Part 2-6).

## **8 Information gathering (Chapter 3)**

- (1) Chapter 3 sets out 5 ways to obtain information:
  - (a) examining any person about the affairs of people covered by examination orders (see Part 3-1); and
  - (b) requiring people, under production orders, to produce property-tracking documents or make them available for inspection (see Part 3-2); and
  - (c) requiring financial institutions to provide information and documents relating to accounts and transactions (see Part 3-3); and
  - (d) requiring financial institutions, under monitoring orders, to provide information about transactions over particular periods (see Part 3-4); and
  - (e) searching for and seizing tainted property or evidential material, either under search warrants or in relation to conveyances (see Part 3-5).
- (2) Chapter 3 also authorises the disclosure, to certain authorities for certain purposes, of information obtained under that Chapter or certain other provisions (see Part 3-6).

## **9 Administration (Chapter 4)**

Chapter 4 sets out the following administrative matters:

- (a) the powers and duties of the Official Trustee, which largely relate to property that is subject to restraining orders (see Part 4-1);

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the provision of legal assistance (see Part 4-2);
- (c) the Confiscated Assets Account (see Part 4-3);
- (d) charges over restrained property for payment of certain amounts (see Part 4-4);
- (e) enforcement of interstate orders in certain Territories (see Part 4-5).

## **10 Miscellaneous (Chapter 5)**

Chapter 5 deals with miscellaneous matters.

## **11 Interpreting this Act (Chapter 6)**

Chapter 6 contains the Dictionary, which sets out a list of all the terms that are defined in this Act. It also sets out the meanings of some important concepts.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 1-4—Application**

### **12 Act to bind Crown**

- (1) This Act binds the Crown in right of the Commonwealth, each of the States and each of the \*self-governing Territories.
- (2) This Act does not make the Crown liable to be prosecuted for an offence.

### **13 Act to apply both within and outside Australia**

This Act extends, except so far as the contrary intention appears:

- (a) to acts, matters and things outside \*Australia, whether or not in or over a foreign country; and
- (b) to all persons, irrespective of their nationality or citizenship.

### **14 Application**

This Act applies in relation to:

- (a) an offence committed at any time (whether or not any person is convicted of the offence); and
- (b) a person's conviction of an offence at any time;

whether the offence or conviction occurred before or after the commencement of this Act.

### **15 Concurrent operation of State/Territory laws**

It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Chapter 2—The confiscation scheme

### Part 2-1A—Freezing orders

#### 15A Simplified outline of this Part

A freezing order can be made against an account with a financial institution if:

- (a) there are grounds to suspect the account balance reflects proceeds or an instrument of certain offences; and
- (b) a magistrate is satisfied that, unless the order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of the proceeds or instrument.

#### Division 1—Making freezing orders

##### 15B Making freezing orders

- (1) A magistrate must order that a \*financial institution not allow a withdrawal from an \*account with the institution, except in the manner and circumstances specified in the order, if:
  - (a) an \*authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of *authorised officer* in section 338 applies for the order in accordance with Division 2; and
  - (b) there are reasonable grounds to suspect that the balance of the account:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

(i) is \*proceeds of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) is wholly or partly an \*instrument of a \*serious offence; and

(c) the magistrate is satisfied that, unless an order is made under this section, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument.

Note 1: Paragraphs (a), (aa), (b) and (c) of the definition of *authorised officer* in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

Note 2: The balance of the account may be proceeds of an offence even though the balance is only partly derived from the offence: see section 329.

(2) An order made under subsection (1) covers the balance of the \*account from time to time.

*Order need not be based on commission of particular offence*

(3) The reasonable grounds referred to in paragraph (1)(b), and the satisfaction referred to in paragraph (1)(c), need not be based on a finding as to the commission of a particular offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—How freezing orders are obtained**

### **15C Affidavit supporting application made in person**

If an \*authorised officer applies in person to a magistrate for a \*freezing order relating to an \*account with a \*financial institution, the application must be supported by an affidavit of an authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of *authorised officer* in section 338:

- (a) setting out sufficient information to identify the account (for example, the account number); and
- (b) identifying the financial institution; and
- (c) setting out the grounds to suspect that the balance of the account:
  - (i) is \*proceeds of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; or
  - (ii) is wholly or partly an \*instrument of a \*serious offence; and
- (d) setting out the grounds on which a person could be satisfied that, unless the order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or of such an instrument.

Note: Paragraphs (a), (aa), (b) and (c) of the definition of *authorised officer* in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**15D Applying for freezing orders by telephone or other electronic means**

- (1) An \*authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of *authorised officer* in section 338 may apply to a magistrate for a \*freezing order by telephone, fax or other electronic means:
- (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effectiveness of the order.

Note: Paragraphs (a), (aa), (b) and (c) of the definition of *authorised officer* in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

- (2) An application under subsection (1):
- (a) must include all information that would be required in an ordinary application for a \*freezing order and supporting affidavit; and
  - (b) if necessary, may be made before the affidavit is sworn.
- (3) The magistrate may require:
- (a) communication by voice to the extent that it is practicable in the circumstances; and
  - (b) any further information.

**15E Making order by telephone etc.**

- (1) The magistrate may complete and sign the same form of \*freezing order that would be made under section 15B if satisfied that:
- (a) a freezing order should be issued urgently; or
  - (b) the delay that would occur if an application were made in person would frustrate the effectiveness of the order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (2) If the magistrate makes the \*freezing order, he or she must inform the applicant, by telephone, fax or other electronic means, of the terms of the order and the day on which and the time at which it was signed.
- (3) The applicant must then:
  - (a) complete a form of \*freezing order in terms substantially corresponding to those given by the magistrate; and
  - (b) state on the form:
    - (i) the name of the magistrate; and
    - (ii) the day on which the order was signed; and
    - (iii) the time at which the order was signed.
- (4) The applicant must give the magistrate the form of \*freezing order completed by the applicant by the end of:
  - (a) the second \*working day after the magistrate makes the order; or
  - (b) the first working day after the magistrate makes the order, if it is served on the \*financial institution concerned before the first working day after the magistrate makes the order.
- (5) If, before the magistrate made the \*freezing order, the applicant did not give the magistrate an affidavit supporting the application and meeting the description in section 15C, the applicant must do so by the time by which the applicant must give the magistrate the form of freezing order completed by the applicant.
- (6) If the applicant does not comply with subsection (5), the \*freezing order is taken never to have had effect.
- (7) The magistrate must attach the form of \*freezing order completed by the magistrate to the documents provided under subsection (4) and (if relevant) subsection (5).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **15F Unsigned freezing orders in court proceedings**

If:

- (a) it is material, in any proceedings, for a court to be satisfied that a \*freezing order applied for under section 15D was duly made; and
- (b) the form of freezing order signed by the magistrate is not produced in evidence;

the court must assume that the order was not duly made unless the contrary is proved.

### **15G Offence for making false statements in applications**

A person commits an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a \*freezing order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### **15H Offences relating to orders made under section 15E**

*Offence for stating incorrect names in telephone orders*

- (1) A person commits an offence if:
  - (a) the person states a name of a magistrate in a document; and
  - (b) the document purports to be a form of \*freezing order under section 15E; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) the name is not the name of the magistrate who made the order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

*Offence for unauthorised form of order*

- (2) A person commits an offence if:
  - (a) the person states a matter in a form of \*freezing order under section 15E; and
  - (b) the matter departs in a material particular from the order made by the magistrate.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

*Offence for service of unauthorised form of order*

- (3) A person commits an offence if:
  - (a) the person presents a document to a person; and
  - (b) the document purports to be a form of \*freezing order under section 15E; and
  - (c) the document:
    - (i) has not been approved by a magistrate under that section; or
    - (ii) departs in a material particular from the terms given by the magistrate under that section.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

*Offence for giving form of order different from that served*

- (4) A person commits an offence if:
  - (a) the person gives a magistrate a form of \*freezing order under section 15E relating to a \*financial institution; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Section 15H

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- (b) the person does so after presenting to the financial institution a document purporting to be a form of the freezing order; and
- (c) the form given to the magistrate is not in the same form as the document presented to the financial institution.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—Giving effect to freezing orders**

### **15J Service of freezing order etc. on financial institution and account-holder**

- (1) If a magistrate makes a \*freezing order relating to an \*account with a \*financial institution, the applicant for the order must cause the things described in subsection (2) to be given to:
  - (a) the financial institution; and
  - (b) each person in whose name the account is held.
- (2) The things are as follows:
  - (a) a copy of the order (or of a form of the order under section 15E);
  - (b) a written statement of the name and contact details of the \*enforcement agency mentioned in the paragraph of the definition of *authorised officer* in section 338 that describes the applicant.

Note: If the copy of the order is given to the financial institution after the end of the first working day after the order is made, the order does not come into force: see subsection 15N(1).

### **15K Freezing order does not prevent withdrawal to enable financial institution to meet its liabilities**

A \*freezing order relating to an \*account with a \*financial institution does not prevent the institution from allowing a withdrawal from the account to enable the institution to meet a liability imposed on the institution by or under a written law of the Commonwealth, a State or a Territory.

### **15L Offence for contravening freezing orders**

A \*financial institution commits an offence if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the institution allows a withdrawal from an \*account with the institution; and
- (b) there is a \*freezing order relating to the account; and
- (c) allowing the withdrawal contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units or both.

### **15M Protection from suits etc. for those complying with orders**

No action, suit or proceeding lies against:

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

in relation to any action taken by the institution or person in complying with a \*freezing order or in the mistaken belief that action was required under a freezing order.

Note: This section does not affect any action that may lie against anyone else for the making or operation of a freezing order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Duration of freezing orders**

### **15N When a freezing order is in force**

- (1) A \*freezing order relating to an \*account with a \*financial institution comes into force when a copy of the order (or of a form of the order under section 15E) is given to the institution. However, the order does not come into force if the copy is given to the institution after the end of the first \*working day after the order is made.
- (2) The \*freezing order remains in force until:
  - (a) the end of the period specified in the order (as affected by section 15P if relevant) from when the copy of the order was given to the institution; or
  - (b) if, before the end of that period, a court makes a decision on an application for a \*restraining order to cover the \*account—the time the court makes that decision.
- (3) The \*freezing order, as originally made, must not specify a period of more than 3 \*working days.

### **15P Order extending a freezing order**

- (1) A magistrate may make an order extending the period specified in a \*freezing order made in relation to an \*account with a \*financial institution if:
  - (a) an \*authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of *authorised officer* in section 338 applies for the extension; and
  - (b) the magistrate is satisfied that an application has been made to a court (but not decided by the court) for a \*restraining order to cover the account (whether or not the restraining order is also to cover other property).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (2) The extension may be for:
  - (a) a specified number of \*working days; or
  - (b) the period ending when the court decides the application for the \*restraining order.
- (3) The extension does not have effect unless a copy of the order for the extension is given to the \*financial institution before the time the \*freezing order would cease to be in force apart from the extension.
- (4) The following provisions apply in relation to an order extending a \*freezing order in a way corresponding to the way in which they apply in relation to a freezing order:
  - (a) Division 2 (except paragraphs 15C(c) and (d));
  - (b) section 15J (except the note to that section).
- (5) Division 2 applies because of subsection (4) as if:
  - (a) section 15C also required that an affidavit supporting an application:
    - (i) identify the \*freezing order; and
    - (ii) state that an application has been made for a \*restraining order to cover the \*account; and
  - (b) the reference in subsection 15E(1) to section 15B were a reference to subsection (1) of this section.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—Varying scope of freezing orders**

### **15Q Magistrate may vary freezing order to allow withdrawal to meet reasonable expenses**

- (1) A magistrate may vary a \*freezing order relating to an \*account with a \*financial institution so that the institution may allow a withdrawal from the account to meet one or more of the following relating to a person in whose name the account is held:
  - (a) the reasonable living expenses of the person;
  - (b) the reasonable living expenses of any of the \*dependants of the person;
  - (c) the reasonable business expenses of the person;
  - (d) a specified debt incurred in good faith by the person.
- (2) The magistrate may vary the \*freezing order only if:
  - (a) a person in whose name the \*account is held has applied for the variation; and
  - (b) the person has notified the \*DPP in writing of the application and the grounds for the application; and
  - (c) the magistrate is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:
    - (i) proceedings under this Act; or
    - (ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and
  - (d) the magistrate is satisfied that the person cannot meet the expense or debt out of property that is not covered by:
    - (i) a freezing order; or
    - (ii) a \*restraining order; or
    - (iii) an \*interstate restraining order; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (iv) a <sup>\*</sup>foreign restraining order that is registered under the <sup>\*</sup>Mutual Assistance Act.
- (3) The variation does not take effect until written notice of it is given to the <sup>\*</sup>financial institution.

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<sup>\*</sup>To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 6—Revoking freezing orders**

### **15R Application to revoke a freezing order**

- (1) A person may apply to a magistrate to revoke a \*freezing order.
- (2) The applicant for the revocation must give written notice of the application and the grounds on which the revocation is sought to the \*enforcement agency mentioned in the paragraph of the definition of *authorised officer* in section 338 that describes the \*authorised officer who applied for the \*freezing order.
- (3) One or more of the following may adduce additional material to the magistrate relating to the application to revoke the \*freezing order:
  - (a) the \*authorised officer who applied for the freezing order;
  - (b) the authorised officer whose affidavit supported the application for the freezing order;
  - (c) another authorised officer described in the paragraph of the definition of *authorised officer* in section 338 that describes the authorised officer mentioned in paragraph (a) or (b) of this subsection.
- (4) The magistrate may revoke the \*freezing order if satisfied that it is in the interests of justice to do so.

### **15S Notice of revocation of a freezing order**

- (1) If a \*freezing order relating to an \*account with a \*financial institution is revoked under section 15R, an \*authorised officer (the *notifying officer*) described in the paragraph of the definition of *authorised officer* in section 338 that describes the authorised officer who applied for the freezing order must cause written notice of the revocation to be given to:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Section 15S

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- (a) the financial institution; and
  - (b) each person in whose name the account is held.
- (2) However, the notifying officer need not give notice to the applicant for the revocation.
- (3) Subsection (1) does not require more than one \*authorised officer to cause notice of the revocation to be given.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 2-1—Restraining orders**

### **16 Simplified outline of this Part**

Restraining orders can be made against property, in relation to certain offences, on grounds that relate to possible forfeiture or confiscation orders relating to those offences. (There is not always a requirement that a person has been convicted of such an offence.)

### **Division 1—Making restraining orders**

#### **17 Restraining orders—people convicted of or charged with indictable offences**

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
  - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
- if:
- (c) the \*DPP applies for the order; and
  - (d) a person has been convicted of, or has been charged with, an \*indictable offence, or it is proposed that he or she be charged with an indictable offence; and
  - (e) any affidavit requirements in subsection (3) for the application have been met; and
  - (f) (unless there are no such requirements) the court is satisfied that the \* authorised officer who made the affidavit holds the

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

suspicion or suspicions stated in the affidavit on reasonable grounds.

*Property that a restraining order may cover*

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
- (a) all or specified property of the \*suspect;
  - (aa) all or specified \*bankruptcy property of the suspect;
  - (b) all property of the suspect other than specified property;
  - (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
  - (c) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect;
  - (d) specified property of another person (whether or not that other person's identity is known) that is \*proceeds of the offence or an \*instrument of the offence.

*Affidavit requirements*

- (3) The application for the order must be supported by an affidavit of an \*authorised officer stating:
- (a) if the \*suspect has not been convicted of an indictable offence—that the authorised officer suspects that the suspect committed the offence; and
  - (b) if the application is to restrain property of a person other than the suspect but not to restrain \*bankruptcy property of the suspect—that the authorised officer suspects that:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) the property is subject to the \*effective control of the suspect; or
- (ii) the property is \*proceeds of the offence or an \*instrument of the offence.

The affidavit must include the grounds on which the \*authorised officer holds those suspicions.

*Refusal to make a restraining order*

- (4) Despite subsection (1), the court may refuse to make a \*restraining order in relation to an \*indictable offence that is not a \*serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

*Risk of property being disposed of etc.*

- (5) The court must make a \*restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

*Later acquisitions of property*

- (6) The court may specify that a \*restraining order covers property that is acquired by the \*suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

## **18 Restraining orders—people suspected of committing serious offences**

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction must order that:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) property must not be disposed of or otherwise dealt with by any person; or
- (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

- (c) the \*DPP applies for the order; and
- (d) there are reasonable grounds to suspect that a person has committed a \*serious offence; and
- (e) any affidavit requirements in subsection (3) for the application have been met; and
- (f) the court is satisfied that the \*authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Note: A court can refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

*Property that a restraining order may cover*

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
  - (a) all or specified property of the \*suspect;
  - (aa) all or specified \*bankruptcy property of the suspect;
  - (b) all property of the suspect other than specified property;
  - (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
  - (c) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (d) specified property of another person (whether or not that other person's identity is known) that is:
  - (i) in any case—\*proceeds of the offence; or
  - (ii) if the offence to which the order relates is a \*serious offence—an \*instrument of the offence.

*Affidavit requirements*

- (3) The application for the order must be supported by an affidavit of an \*authorised officer stating:
  - (a) that the authorised officer suspects that the \*suspect committed the offence; and
  - (b) if the application is to restrain property of a person other than the suspect but not to restrain \*bankruptcy property of the suspect—that the authorised officer suspects that:
    - (i) the property is subject to the \*effective control of the suspect; or
    - (ii) in any case—the property is \*proceeds of the offence; or
    - (iii) if the offence to which the order relates is a \*serious offence—the property is an \*instrument of the offence.

The affidavit must include the grounds on which the \*authorised officer holds those suspicions.

*Restraining order need not be based on commission of a particular offence*

- (4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular \*serious offence.

*Risk of property being disposed of etc.*

- (5) The court must make a \*restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Later acquisitions of property*

- (6) The court may specify that a \*restraining order covers property that is acquired by the \*suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

**19 Restraining orders—property suspected of being proceeds of indictable offences etc.**

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
  - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
- if:
- (c) the \*DPP applies for the order; and
  - (d) there are reasonable grounds to suspect that the property is:
    - (i) the \*proceeds of a \*terrorism offence or any other \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or
    - (ii) an \*instrument of a \*serious offence; and
  - (e) the application for the order is supported by an affidavit of an \*authorised officer stating that the authorised officer suspects that:
    - (i) in any case—the property is proceeds of the offence; or
    - (ii) if the offence to which the order relates is a serious offence—the property is an \*instrument of the offence;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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and including the grounds on which the authorised officer holds the suspicion; and

- (f) the court is satisfied that the \*authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

*Property that a restraining order may cover*

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:
- (a) in any case—\*proceeds of the offence; or
  - (b) if the offence to which the order relates is a \*serious offence—an \*instrument of the offence.

*Refusal to make a restraining order*

- (3) Despite subsection (1), the court may refuse to make a \*restraining order in relation to an \*indictable offence that is not a \*serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

*Restraining order need not be based on commission of a particular offence*

- (4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular offence.

*Risk of property being disposed of etc.*

- (5) The court must make a \*restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**20 Restraining orders—people suspected of deriving literary proceeds from indictable offences etc.**

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
  - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
- if:
- (c) the \*DPP applies for the order; and
  - (d) there are reasonable grounds to suspect that a person has committed an \*indictable offence or a \*foreign indictable offence, and that the person has derived \*literary proceeds in relation to the offence; and
  - (e) any affidavit requirements in subsection (3) for the application have been met; and
  - (f) (unless there are no such requirements) the court is satisfied that the \*authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

*Property that a restraining order may cover*

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
- (a) all or specified property of the \*suspect;
  - (aa) all or specified \*bankruptcy property of the suspect;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (b) all property of the suspect other than specified property;
- (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
- (c) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect.

*Affidavit requirements*

- (3) The application for the order must be supported by an affidavit of an \*authorised officer stating:
  - (a) if the \*suspect has not been convicted of the offence—that the authorised officer suspects that the suspect committed the offence; and
  - (c) that the authorised officer suspects that the suspect derived \*literary proceeds in relation to the offence; and
  - (d) if the application is to restrain property of a person other than the suspect but not to restrain \*bankruptcy property of the suspect—that the authorised officer suspects that the property is subject to the \*effective control of the suspect.

The affidavit must include the grounds on which the \*authorised officer holds those suspicions.

*Refusal to make a restraining order*

- (4) Despite subsection (1), the court may refuse to make a \*restraining order in relation to an \*indictable offence that is not a \*serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Restraining order need not be based on commission of a particular offence*

- (5) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular \*indictable offence or \*foreign indictable offence (as the case requires).

*Risk of property being disposed of etc.*

- (6) The court must make a \*restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

*Later acquisitions of property*

- (7) The court may specify that a \*restraining order covers property that is acquired by the \*suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

## **20A Restraining orders—unexplained wealth**

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction may order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
  - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
- if:
- (c) the \*DPP applies for the order; and
  - (d) there are reasonable grounds to suspect that a person's \*total wealth exceeds the value of the person's \*wealth that was \*lawfully acquired; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) any affidavit requirements in subsection (3) for the application have been met; and
- (f) the court is satisfied that the \*authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds; and
- (g) there are reasonable grounds to suspect either or both of the following:
  - (i) that the person has committed an offence against a law of the Commonwealth, a \*foreign indictable offence or a \*State offence that has a federal aspect;
  - (ii) that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

*Property that a restraining order may cover*

- (2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
  - (a) all or specified property of the \*suspect;
  - (b) all or specified \*bankruptcy property of the suspect;
  - (c) all property of the suspect other than specified property;
  - (d) all bankruptcy property of the suspect other than specified bankruptcy property;
  - (e) specified property of another person (whether or not that other person's identity is known) that is subject to the \*effective control of the suspect.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Affidavit requirements*

- (3) The application for the order must be supported by an affidavit of an \*authorised officer stating:
- (a) that the authorised officer suspects that the \*total wealth of the \*suspect exceeds the value of the suspect's \*wealth that was \*lawfully acquired; and
  - (b) if the application is to restrain property of a person other than the suspect but not to restrain \*bankruptcy property of the \*suspect—that the authorised officer suspects that the property is subject to the \*effective control of the suspect; and
  - (c) that the authorised officer suspects either or both of the following:
    - (i) that the suspect has committed an offence against a law of the Commonwealth, a \*foreign indictable offence or a \*State offence that has a federal aspect;
    - (ii) that the whole or any part of the suspect's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

The affidavit must include the grounds on which the authorised officer holds those suspicions.

*Legal expenses*

- (3A) Without limiting the manner and circumstances that may be specified in an order under paragraph (1)(b), the court may order that specified property may be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.
- (3B) The court may make an order under subsection (3A) despite anything in section 24.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (3C) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property covered by an order under subsection (3A) and may make any further or ancillary orders it considers appropriate.

*Refusal to make a restraining order*

- (4) Despite subsection (1), the court may refuse to make a \*restraining order if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

- (4A) If the court refuses to make a \*restraining order under subsection (1), it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

*Risk of property being disposed of etc.*

- (5) The court may make a \*restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

*Later acquisitions of property*

- (6) The court may specify that a \*restraining order covers property that is acquired by the \*suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

## **21 Refusal to make an order for failure to give undertaking**

- (1) The court may refuse to make a \*restraining order if the Commonwealth refuses or fails to give the court an appropriate

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.

- (2) The \*DPP may give such an undertaking on behalf of the Commonwealth.

## **22 Restraining orders must only relate to one suspect**

- (1) A \*restraining order must only relate to one \*suspect.

Note: A restraining order might not relate to any suspect if the person who is suspected of committing the offence is not known and the restraining order only restrains proceeds of the offence. The restraining order may also cover the property of one or more other persons who are not the suspect.

- (2) A \*restraining order may relate to more than one offence in relation to that \*suspect.

## **23 Conditions on restraining orders**

A \*restraining order may be made subject to conditions.

## **24 Allowance for expenses**

- (1) The court may allow any one or more of the following to be met out of property, or a specified part of property, covered by a \*restraining order:
- (a) the reasonable living expenses of the person whose property is restrained;
  - (b) the reasonable living expenses of any of the \*dependants of that person;
  - (c) the reasonable business expenses of that person;
  - (d) a specified debt incurred in good faith by that person.
- (2) The court may only make an order under subsection (1) if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the person whose property is restrained has applied for the order; and
  - (b) the person has notified the \*DPP in writing of the application and the grounds for the application; and
  - (c) the person has disclosed all of his or her \*interests in property, and his or her liabilities, in a statement on oath that has been filed in the court; and
  - (ca) the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:
    - (i) proceedings under this Act; or
    - (ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and
  - (d) the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by:
    - (i) a \*restraining order; or
    - (ii) an \*interstate restraining order; or
    - (iii) a \*foreign restraining order that is registered under the \*Mutual Assistance Act.
- (3) Property that is covered by:
- (a) a \*restraining order; or
  - (b) an \*interstate restraining order; or
  - (c) a \*foreign restraining order that is registered under the \*Mutual Assistance Act;

is taken, for the purposes of paragraph (2)(d), not to be covered by the order if it would not be reasonably practicable for the \*Official Trustee to take custody and control of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**24A Excluding property from or revoking restraining orders in certain cases when expenses are not allowed**

- (1) If:
- (a) because of the operation of subsection 24(3), property that is covered by a \*restraining order is taken, for the purposes of paragraph 24(2)(d), not to be covered by the order; and
  - (b) as a result, and for no other reason, the court refuses an application to make an order under subsection 24(1);
- the court may:
- (c) exclude the property from the restraining order; or
  - (d) if the property is the only property covered by the restraining order—revoke the restraining order.
- (2) The court must not exclude the property or revoke the order unless the court is satisfied that the property is needed to meet any one or more of the following:
- (a) the reasonable living expenses of the person whose property is restrained;
  - (b) the reasonable living expenses of any of the \*dependants of that person;
  - (c) the reasonable business expenses of that person;
  - (d) a specified debt incurred in good faith by that person.
- (3) If the court excludes the property from the \*restraining order, the \*DPP must give written notice of the exclusion to:
- (a) the owner of the property (if the owner is known); and
  - (b) any other person the DPP reasonably believes may have an \*interest in the property.

However, the DPP need not give notice to the applicant for the order under subsection 24(1).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (4) If the court revokes the \*restraining order, the \*DPP must give written notice of the revocation to:
- (a) the owner of any property covered by the restraining order (if the owner is known); and
  - (b) any other person the DPP reasonably believes may have an \*interest in the property.

However, the DPP need not give notice to the applicant for the order under subsection 24(1).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—How restraining orders are obtained**

### **25 DPP may apply for a restraining order**

The \*DPP may apply for a \*restraining order.

### **26 Notice of application**

- (1) Subject to subsection (4), the \*DPP must:
  - (a) give written notice of an application for a \*restraining order covering property to the owner of the property (if the owner is known); and
  - (b) include with the notice a copy of the application and any affidavit supporting the application.
- (2) Subject to subsection (4), the \*DPP must also:
  - (a) give written notice of an application for a \*restraining order covering property to any other person the DPP reasonably believes may have an \*interest in the property; and
  - (b) include with the notice:
    - (i) a copy of the application; and
    - (ii) a further notice that the person may request that the DPP give the person a copy of any affidavit supporting the application.

The DPP must comply with any such request as soon as practicable.
- (3) The court must not (unless subsection (4) applies) hear the application unless it is satisfied that the owner of the property to which the application relates has received reasonable notice of the application.
- (4) The court must consider the application without notice having been given if the \*DPP requests the court to do so.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.



- (5) The court may, at any time before finally determining the application, direct the \*DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.
- (6) A person who claims an \*interest in property may appear and adduce evidence at the hearing of the application.

### **27 DPP may choose under which section it applies for a restraining order**

To avoid doubt, the fact that the \*DPP may apply for a \*restraining order under a section of Division 1 against property in relation to an offence does not prevent the DPP from applying for a \*restraining order under a different section of Division 1 against that property in relation to that offence.

### **28 Prejudice to investigations**

A witness who is giving evidence relating to an application for a \*restraining order is not required to answer a question or produce a document if the court is satisfied that the answer or document may prejudice the investigation of, or the prosecution of a person for, an offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **Division 3—Excluding property from restraining orders**

**Note:** In addition to this Division, section 44 provides for property to be excluded from a restraining order on the giving of satisfactory security.

#### **29 Excluding property from certain restraining orders**

- (1) The court to which an application for a \*restraining order under section 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified \*interest in property from the order if:
  - (a) an application is made under section 30 or 31; and
  - (b) the court is satisfied that the relevant reason under subsection (2) or (3) for excluding the interest from the order exists.

**Note:** Section 32 may prevent the court from hearing the application until the DPP has had a reasonable opportunity to conduct an examination of the applicant.

- (2) The reasons for excluding a specified \*interest in property from a \*restraining order are:
  - (a) for a restraining order under section 17 if the offence, or any of the offences, to which the order relates is a \*serious offence—the interest is neither \*proceeds nor an \*instrument of \*unlawful activity; or
  - (b) for a restraining order under section 17 if paragraph (a) does not apply—the interest is neither proceeds nor an instrument of the offence, or any offence, to which the order relates; or
  - (c) for a restraining order under section 18—the interest is neither:
    - (i) in any case—proceeds of unlawful activity; nor
    - (ii) if an offence to which the order relates is a serious offence—an \*instrument of any serious offence; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (d) for a restraining order under section 19—the interest is neither:
- (i) in any case—proceeds of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; nor
  - (ii) if an offence to which the order relates is a serious offence—an \*instrument of any serious offence.

Note: One of the circumstances in which property ceases to be proceeds of an offence or unlawful activity involves acquisition of the property by an innocent third party for sufficient consideration: see paragraph 330(4)(a).

- (3) If the offence, or each offence, to which a \*restraining order relates is a \*serious offence that is an offence against section 15, 24, 29 or 31 of the *Financial Transaction Reports Act 1988* or section 53, 59, 136, 137, 139, 140, 141, 142 or 143 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, a further reason for excluding a specified \*interest in property from the order is that each of the following requirements is met:
- (a) there are no reasonable grounds to suspect that the interest is \*proceeds of the offence, or any of the offences;
  - (b) there is a \*suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;
  - (c) the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other \*indictable offence, any \*State indictable offence or any \*foreign indictable offence;
  - (d) the interest could not have been covered by a restraining order if none of the offences had been serious offences.
- (4) However, the court must not exclude a specified \*interest in property from a \*restraining order under section 17 or 18 unless it

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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is also satisfied that neither a \*pecuniary penalty order nor a \*literary proceeds order could be made against:

- (a) the person who has the interest; or
- (b) if the interest is not held by the \*suspect but is under his or her \*effective control—the suspect.

### **29A Excluding property from a restraining order made under section 20A**

The court to which an application for a \*restraining order under section 20A was made must, when the order is made or at a later time, exclude a specified \*interest in property from the order if:

- (a) an application is made under section 30 or 31; and
- (b) the court is satisfied that the interest is held by a person other than the \*suspect and is not subject to the \*effective control of the suspect.

Note: Section 32 may prevent the court from hearing the application until the DPP has had a reasonable opportunity to conduct examinations in relation to the restraining order.

### **30 Application to exclude property from a restraining order before restraining order has been made**

- (1) A person may apply for an order under section 29 or 29A if a \*restraining order that could cover property in which the person claims an \*interest has been applied for, but is yet to be made.
- (2) The person must give written notice to the \*DPP of both the application and the grounds on which the exclusion is sought.
- (3) The \*DPP may appear and adduce evidence at the hearing of the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) The \*DPP must give the person notice of any grounds on which it proposes to contest the application.

**31 Application to exclude property from a restraining order after restraining order has been made**

- (1) A person may apply for an order under section 29 or 29A if a \*restraining order that covers property in which the person claims an \*interest has been made.
- (1A) An application under subsection (1):
- (a) must be made to the court that made the \*restraining order; and
  - (b) may be made at any time after the restraining order is made.
- (2) However, unless the court gives leave, the person cannot apply if he or she:
- (a) was notified of the application for the \*restraining order, but did not appear at the hearing of that application; or
  - (b) appeared at the hearing of that application.
- (3) The court may give the person leave to apply if the court is satisfied that:
- (a) if paragraph (2)(a) applies—the person had a good reason for not appearing; or
  - (b) if paragraph (2)(b) applies—the person now has evidence relevant to the person’s application that was not available to the person at the time of the hearing; or
  - (c) in either case—there are other special grounds for granting the leave.
- (4) The person must give written notice to the \*DPP of both the application and the grounds on which the exclusion is sought.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (5) The \*DPP may appear and adduce evidence at the hearing of the application.
- (6) The \*DPP must give the person notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.

### **32 Application not to be heard unless DPP has had reasonable opportunity to conduct an examination**

The court must not hear an application to exclude specified property from the \*restraining order if:

- (a) the restraining order is in force; and
- (b) the \*DPP has not been given a reasonable opportunity to conduct \*examinations in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Giving effect to restraining orders**

### **33 Notice of a restraining order**

- (1) If a court makes a \*restraining order covering property that a person owns, the \*DPP must give written notice of the order to the person.

Note: A person who was not notified of the application for a restraining order may apply to revoke the restraining order within 28 days of being notified of the order: see section 42.

- (2) The \*DPP must include a copy of the application and any affidavit supporting the application with the notice (if those documents have not already been given to the person).
- (3) However, the court may order that:
  - (a) all or part of the application or affidavit is not to be given to the person; or
  - (b) the \*DPP delay giving the notice (and the documents included with the notice) for a specified period; if the DPP requests the court to do so and the court considers that this is appropriate in order to protect the integrity of any investigation or prosecution.
- (4) If the court orders the \*DPP to delay giving the notice (and the documents included with the notice) for a specified period, the DPP must give the notice as soon as practicable after the end of that period.

### **34 Registering restraining orders**

- (1) A \*registration authority that keeps a register of property of a particular kind may record in the register particulars of a \*restraining order covering property of that kind.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The \*registration authority can only do so on the application of the \*DPP.
- (3) Each person who subsequently deals with the property:
  - (a) is taken not to be acting in good faith for the purposes of section 36; and
  - (b) is taken to have notice of the \*restraining order for the purposes of section 37.

### **35 Notifying registration authorities of exclusions from or variations to restraining orders**

- (1) If the \*DPP has previously applied to a \*registration authority under section 34 for the recording in a register of particulars of a \*restraining order covering particular property, the DPP must notify the registration authority if:
  - (a) the property is no longer covered by the order because it is excluded from the order under section 29 or 29A or because the property covered by the order is varied under section 39; or
  - (b) a condition to which a restraining order is subject is varied under section 39.
- (2) The notice must be given within a reasonable time after the order under section 39 is made.

### **36 Court may set aside a disposition contravening a restraining order**

- (1) The \*DPP may apply to the court to set aside a disposition or dealing with property that contravenes a \*restraining order if that disposition or dealing was:
  - (a) not for \*sufficient consideration; or
  - (b) not in favour of a person who acted in good faith.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The \*DPP must give, to each party to the disposition or dealing, written notice of both the application and the grounds on which it seeks the setting aside of the disposition or dealing.
- (3) The court may:
  - (a) set aside the disposition or dealing from the day it occurred; or
  - (b) set aside the disposition or dealing from the day on which the order is made and declare the rights of any persons who acquired \*interests in the property on or after the day of the disposition or dealing and before the day on which the order is made.

### **37 Contravening restraining orders**

- (1) A person is guilty of an offence if:
  - (a) the person disposes of, or otherwise deals with, property; and
  - (b) the person knows that, or is reckless as to the fact that, the property is covered by a \*restraining order; and
  - (c) the disposition or dealing contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

- (2) A person is guilty of an offence if:
  - (a) the person disposes of, or otherwise deals with, property; and
  - (b) the property is covered by a \*restraining order; and
  - (c) the disposition or dealing contravenes the order; and
  - (d) either:
    - (i) particulars of the order were recorded in a register under subsection 34(1); or
    - (ii) the person was given notice of the order under section 33.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (3) **Strict liability** applies to paragraphs (2)(b) and (c) and subparagraph (2)(d)(i).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—Further orders**

### **38 Court may order Official Trustee to take custody and control of property**

The court may order the \*Official Trustee to take custody and control of property, or specified property, covered by a \*restraining order if the court is satisfied that this is required.

Note: Part 4-1 sets out the Official Trustee's powers over the property.

### **39 Ancillary orders**

- (1) The court that made a \*restraining order, or any other court that could have made the restraining order, may make any ancillary orders that the court considers appropriate and, without limiting the generality of this, the court may make any one or more of the following orders:
  - (a) an order varying the property covered by the \*restraining order;
  - (b) an order varying a condition to which the restraining order is subject;
  - (c) an order relating to an undertaking required under section 21;
  - (ca) an order directing the \*suspect in relation to the restraining order to give a sworn statement to a specified person, within a specified period, setting out all of his or her \*interests in property, and his or her liabilities;
  - (d) an order directing the owner or a previous owner of the property (including, if the owner or previous owner is a body corporate, a specified \*director of the body corporate) to give a sworn statement to a specified person, within a specified period, setting out particulars of, or dealings with, the property;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (da) if the court is satisfied that there are reasonable grounds to suspect that a person (other than the owner or a previous owner) has information relevant to identifying, locating or quantifying the property—an order directing the person to give a sworn statement to a specified person, within a specified period, setting out particulars of, or dealings with, the property;
- (e) if the \*Official Trustee is ordered under section 38 to take custody and control of property:
  - (i) an order regulating the manner in which the Official Trustee may exercise its powers or perform its duties under the restraining order; or
  - (ii) an order determining any question relating to the property, including a question relating to the liabilities of the owner or the exercise of powers or the performance of duties of the Official Trustee; or
  - (iii) an order directing any person to do anything necessary or convenient to enable the Official Trustee to take custody and control of the property;
- (f) an order giving directions about the operation of the restraining order and any one or more of the following:
  - (i) a \*forfeiture order that covers the same property as the restraining order;
  - (ii) a \*pecuniary penalty order or a \*literary proceeds order that relates to the same offence as the restraining order;
- (g) an order requiring a person whose property is covered by a restraining order, or who has \*effective control of property covered by a restraining order, to do anything necessary or convenient to bring the property within the jurisdiction.

Note 1: If there is a pecuniary penalty order that relates to the same offence as a restraining order, the court may also order the Official Trustee to pay an amount equal to the relevant pecuniary penalty out of property covered by the restraining order: see section 282.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note 2: If there is an unexplained wealth order that relates to a restraining order under section 20A, the court may also order the Official Trustee to pay an amount equal to the unexplained wealth amount out of property covered by the restraining order: see section 282A.

- (2) The court can only make an ancillary order on the application of:
  - (a) the \*DPP; or
  - (b) the owner of the property covered by the order; or
  - (c) if the \*Official Trustee was ordered to take custody and control of the property—the Official Trustee; or
  - (d) any other person who has the leave of the court.
- (3) A person who applies for an ancillary order must give written notice of the application to all other persons entitled to make such an application.
- (3A) Despite subsection (3), the court must consider an application for an ancillary order without notice having been given under that subsection if:
  - (a) the \*DPP requests the court to do so; and
  - (b) the \*restraining order to which the application relates was considered, in accordance with subsection 26(4), without notice having been given.
- (4) An ancillary order may be made:
  - (a) if it is made by the court that made the \*restraining order—when making the restraining order; or
  - (b) in any case—at any time after the restraining order is made.
- (4A) The court may, at any time before finally determining the application, direct the \*DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(4B) If the court makes the ancillary order after a request under subsection (3A), the \*DPP must give written notice to any person whom the DPP reasonably believes may be affected by the order.

(5) An order that is ancillary to a \*restraining order does not cease to have effect merely because the restraining order, or part of it, ceases to be in force under subsection 45(4) or (5).

Note: A restraining order ceases to be in force under those subsections if a confiscation order covering the same property or relating to the same offence is satisfied.

### **39A Privilege against self incrimination etc. does not apply**

- (1) A person is not excused from giving a sworn statement under paragraph 39(1)(ca), (d) or (da) on the grounds that to do so would tend to incriminate the person or expose the person to a penalty.
- (2) However, in the case of a natural person, a sworn statement is not admissible in civil or criminal proceedings against the person who made the statement except:
  - (a) in criminal proceedings for giving false or misleading information; or
  - (b) in proceedings on an application under this Act; or
  - (c) in proceedings ancillary to an application under this Act; or
  - (d) in proceedings for enforcement of a \*confiscation order.

### **39B Application to revoke ancillary order**

- (1) A person may apply to the court that made an ancillary order under section 39 to revoke the order if:
  - (a) the person is affected by the order; and
  - (b) the application for the ancillary order was heard without notice having been given under subsection 39(3) following a request under subsection 39(3A).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The application must be made within 14 days after the person was notified of the ancillary order.
- (3) The applicant must give written notice of the application, and the grounds on which the revocation is sought, to any person who was entitled to make the application for the ancillary order (see subsection 39(2)).
- (4) The effect of the ancillary order is stayed until the court determines the application.
- (5) The court may revoke the ancillary order on application under subsection (1) if it considers it appropriate to do so.
- (6) The court may have regard to any matter it considers appropriate in determining the application.
- (7) If:
  - (a) the ancillary order directed a person to do a thing within a particular period; and
  - (b) an application is made to revoke the order under this section; the court may, if it considers it appropriate to do so, vary the order to extend that period by a specified period.

#### **40 Contravening ancillary orders relating to foreign property**

A person is guilty of an offence if:

- (a) the court makes an order under paragraph 39(1)(g); and
- (b) the person contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

Note: An order under paragraph 39(1)(g) requires a person whose property is covered by a restraining order, or who has effective control of property covered by a restraining order, to do anything necessary or convenient to bring the property within the jurisdiction.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 6—Duration of restraining orders**

### **41 When a restraining order is in force**

A \*restraining order is in force from the time at which it is made.

### **42 Application to revoke a restraining order**

- (1) A person who was not notified of the application for a \*restraining order may apply to the court to revoke the order.
  - (1A) The application must be made:
    - (a) within 28 days after the person is notified of the order; or
    - (b) if the person applies to the court, within that period of 28 days, for an extension of the time for applying for revocation—within such longer period, not exceeding 3 months, as the court allows.
- (2) The applicant must give written notice to the \*DPP and the \*Official Trustee of both the application and the grounds on which the revocation is sought.
- (3) However, the \*restraining order remains in force until the court revokes the order.
- (4) The \*DPP may adduce additional material to the court relating to the application to revoke the \*restraining order.
- (5) The court may revoke the \*restraining order if satisfied that:
  - (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
  - (b) it is otherwise in the interests of justice to do so.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **43 Notice of revocation of a restraining order**

If a \*restraining order is revoked under section 42, the \*DPP must give written notice of the revocation to:

- (a) the owner of any property covered by the restraining order (if the owner is known); and
- (b) any other person the DPP reasonably believes may have an \*interest in the property.

However, the DPP need not give notice to the applicant for the revocation.

### **44 Giving security etc. to revoke etc. a restraining order**

(1) A court may:

- (a) revoke a \*restraining order that covers a \*suspect's property; or

- (b) exclude specified property from such a restraining order;

if:

- (c) the suspect applies to the court to revoke the order or exclude the property; and
- (d) the suspect gives written notice of the application to the \*DPP; and
- (e) the suspect gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under this Act.

(2) A court may:

- (a) revoke a \*restraining order that covers the property of a person who is not a \*suspect; or

- (b) exclude specified property from such a restraining order;

if:

- (c) the person applies to the court to revoke the order or exclude the property; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (d) the person gives written notice of the application to the \*DPP; and
- (e) the person gives an undertaking concerning the person's property that is satisfactory to the court.

#### **45 Cessation of certain restraining orders**

*Effect on restraining orders of withdrawal of charges, acquittals etc.*

- (1) A \*restraining order that relates to one or more offences ceases to be in force 28 days after one of the following occurs:
  - (a) the charge, or all of the charges, that relate to the restraining order are withdrawn;
  - (b) the \*suspect is acquitted of the offence, or all of the offences, with which he or she was charged;
  - (c) the suspect's conviction for the offence, or all of the offences, of which he or she was convicted are \*quashed;unless:
  - (d) there is a \*confiscation order that relates to the offence; or
  - (e) there is an application for such a confiscation order before the court; or
  - (f) there is an application under:
    - (i) Division 6 of Part 2-2; or
    - (ii) Division 4 of Part 2-3; or
    - (iii) Division 5 of Part 2-4 or 2-5;for confirmation of a forfeiture, or a confiscation order, that relates to the offence; or
  - (g) the suspect is charged with a \*related offence; or
  - (h) a new trial is ordered in relation to the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Restraining orders if there is no conviction etc.*

- (2) A \*restraining order ceases to be in force if, within 28 days after the order was made:
- (a) the \*suspect has not been convicted of, or charged with, the offence, or at least one offence, to which the restraining order relates; and
  - (b) there is no \*confiscation order or application for a confiscation order that relates to the offence.

*Restraining orders and forfeiture orders etc.*

- (3) A \*restraining order ceases to be in force in respect of property covered by the restraining order if:
- (a) either:
    - (i) the court refuses an application for a \*forfeiture order that would have covered the property; or
    - (ii) the court excludes the property from a forfeiture order; or
    - (iii) a forfeiture order that covers the property is discharged or ceases to have effect; or
    - (iv) the court excludes the property under section 94 from forfeiture under Part 2-3; and
  - (b) in the case of a refusal of an application for a \*forfeiture order:
    - (i) the time for an appeal against the refusal has expired without an appeal being lodged; or
    - (ii) an appeal against the refusal has lapsed; or
    - (iii) an appeal against the refusal has been dismissed and finally disposed of; and
  - (c) no application for another \*confiscation order relating to:
    - (i) an offence to which the restraining order relates; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) a \*related offence;  
is yet to be determined; and
  - (d) no other confiscation order relating to such an offence is in force.
- (4) A \*restraining order ceases to be in force to the extent that property that it covers vests absolutely in the Commonwealth under Division 4 of Part 2-2 or Division 1 of Part 2-3.

*Restraining orders, pecuniary penalty orders and literary proceeds orders*

- (5) A \*restraining order that relates to one or more offences ceases to be in force in respect of property covered by the restraining order if:
- (a) a \*pecuniary penalty order or a \*literary proceeds order relates to that offence or those offences; and
  - (b) one or more of the following occurs:
    - (i) the pecuniary penalty order or the literary proceeds order is satisfied;
    - (ii) the property is sold or disposed of to satisfy the pecuniary penalty order or literary proceeds order;
    - (iii) the pecuniary penalty order or the literary proceeds order is discharged or ceases to have effect.

*Restraining orders and instruments owned by third parties*

- (6) Despite subsection (1), if:
- (a) a \*restraining order covers property of a person who is not a \*suspect; and
  - (b) the property is an \*instrument of an offence to which the order relates; and
  - (c) the property is not \*proceeds of such an offence; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(ca) the property is not an instrument of a \*serious offence to which the order relates; and

(d) the property is not subject to the \*effective control of another person who is a suspect in relation to the order;

the restraining order ceases to be in force in respect of that property if the suspect has not been charged with the offence or a \*related offence within 28 days after the restraining order is made.

(7) To avoid doubt, this section does not apply to a \*restraining order made under section 20A.

#### **45A Cessation of restraining orders relating to unexplained wealth**

(1) A \*restraining order made under section 20A ceases to be in force if, within 28 days after the order was made, no application for an \*unexplained wealth order has been made in relation to the \*suspect to whom the restraining order relates.

(2) A \*restraining order made under section 20A ceases to be in force if:

(a) an application for an \*unexplained wealth order is made in relation to the \*suspect to whom the restraining order relates; and

(b) the application is made within 28 days after the making of the restraining order; and

(c) the court refuses to make the unexplained wealth order; and

(d) one of the following applies:

(i) the time for an appeal against the refusal has expired without an appeal being lodged;

(ii) an appeal against the refusal has lapsed;

(iii) an appeal against the refusal has been dismissed and finally disposed of.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (3) A \*restraining order made under section 20A ceases to be in force if:
- (a) an application for an \*unexplained wealth order is made in relation to the \*suspect to whom the restraining order relates; and
  - (b) the application is made within 28 days after the making of the restraining order; and
  - (c) the court makes the unexplained wealth order; and
  - (d) either:
    - (i) the unexplained wealth order is complied with; or
    - (ii) an appeal against the unexplained wealth order has been upheld and finally disposed of.
- (4) If a \*restraining order ceases under subsection (1) or (2), the court may, on application by a person with an \*interest in the property covered by the restraining order, make any order as to costs it considers appropriate, including costs on an indemnity basis.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 2-2—Forfeiture orders**

### **46 Simplified outline of this Part**

Forfeiture orders can be made, forfeiting property to the Commonwealth, if certain offences have been committed. (It is not always a requirement that a person has been convicted of such an offence.)

Orders are made on the application of the DPP. Other orders can be made to reduce the effect of forfeiture orders on grounds such as hardship to the person's dependants.

Note: If a person is convicted of a serious offence, forfeiture can be automatic under Part 2-3. There is no need for a forfeiture order.

## **Division 1—Making forfeiture orders**

### **47 Forfeiture orders—conduct constituting serious offences**

- (1) A court with \*proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
- (a) the \*DPP applies for the order; and
  - (b) the property to be specified in the order is covered by a \*restraining order under section 18 that has been in force for at least 6 months; and
  - (c) the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more \*serious offences.

Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some \*serious offence or other was committed.
- (3) The raising of a doubt as to whether a person engaged in conduct constituting a \*serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).

*Refusal to make a forfeiture order*

- (4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
  - (a) is an \*instrument of a \*serious offence other than a \*terrorism offence; and
  - (b) is not \*proceeds of an offence;if the court is satisfied that it is not in the public interest to make the order.

**48 Forfeiture orders—convictions for indictable offences**

- (1) A court with \*proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
  - (a) the \*DPP applies for the order; and
  - (b) a person has been convicted of one or more \*indictable offences; and
  - (c) the court is satisfied that the property to be specified in the order is \*proceeds of one or more of the offences.
- (2) A court with \*proceeds jurisdiction may make an order that property specified in the order is forfeited to the Commonwealth if:
  - (a) the \*DPP applies for the order; and
  - (b) a person has been convicted of one or more \*indictable offences; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) subsection (1) does not apply; and
  - (d) the court is satisfied that the property to be specified in the order is an \*instrument of one or more of the offences.
- (3) In considering whether it is appropriate to make an order under subsection (2) in respect of particular property, the court may have regard to:
- (a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and
  - (b) the use that is ordinarily made, or was intended to be made, of the property to be specified in the order; and
  - (c) the gravity of the offence or offences concerned.

Note: Section 52 limits the court's power to make a forfeiture order if one or more of the person's convictions were due to the person absconding.

#### **49 Forfeiture orders—property suspected of being proceeds of indictable offences etc.**

- (1) A court with \*proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
- (a) the \*DPP applies for the order; and
  - (b) the property to be specified in the order is covered by a \*restraining order under section 19 that has been in force for at least 6 months; and
  - (c) the court is satisfied that one or more of the following applies:
    - (i) the property is \*proceeds of one or more \*indictable offences;
    - (ii) the property is proceeds of one or more \*foreign indictable offences;
    - (iii) the property is proceeds of one or more \*indictable offences of Commonwealth concern;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (iv) the property is an instrument of one or more \*serious offences; and
  - (e) the court is satisfied that the DPP has taken reasonable steps to identify and notify persons with an \*interest in the property.
- (2) A finding of the court for the purposes of paragraph (1)(c):
- (a) need not be based on a finding that a particular person committed any offence; and
  - (b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.
- (3) Paragraph (1)(c) does not apply if the court is satisfied that:
- (a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the \*restraining order; or
  - (b) any such application that has been made has been withdrawn.

*Refusal to make a forfeiture order*

- (4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
- (a) is an \*instrument of a \*serious offence other than a \*terrorism offence; and
  - (b) is not \*proceeds of an offence;
- if the court is satisfied that it is not in the public interest to make the order.

## **50 Existence of other confiscation orders**

The court's power to make a \*forfeiture order in relation to an offence is not affected by the existence of another \*confiscation order in relation to that offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: There are restrictions on the DPP applying for forfeiture orders if previous applications for forfeiture etc. have already been made: see section 60.

### **51 Acquittals do not affect forfeiture orders under section 47 or 49**

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a \*forfeiture order under section 47 or 49 in relation to the offence.

### **52 Making of forfeiture order if person has absconded**

If, because of paragraph 331(1)(d), a person is taken to have been convicted of an \*indictable offence, a court must not make a \*forfeiture order relating to the person's conviction unless:

- (a) the court is satisfied, on the balance of probabilities, that the person has \*absconded; and
- (b) either:
  - (i) the person has been committed for trial for the offence; or
  - (ii) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

### **53 Jurisdictional issues concerning forfeiture orders**

- (1) A court cannot make a \*forfeiture order in respect of property if the court does not have jurisdiction with respect to the recovery of property of that kind.
- (2) A court may make a \*forfeiture order in respect of property even though, apart from section 314, the court does not have jurisdiction

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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with respect to property whose value equals the value of that property.

- (3) A reference in subsection (1) to a court having jurisdiction with respect to the recovery of property includes a reference to the court having jurisdiction, under a \*corresponding law, to make an \*interstate forfeiture order in respect of property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 2—Other relevant matters when a court is considering whether to make forfeiture orders**

**54 Presumption in certain cases that property is an instrument of an offence**

If:

- (a) the \*DPP applies for:
  - (i) a \*forfeiture order under section 47 or 49 against particular property in relation to a person's commission of a \*terrorism offence; or
  - (ii) a forfeiture order under section 48 against particular property in relation to a person's conviction of an \*indictable offence; and
- (b) evidence is given, at the hearing of the application, that the property was in the person's possession at the time of, or immediately after, the person committed the offence;

then:

- (c) if no evidence is given that tends to show that the property was not used in, or in connection with, the commission of the offence—the court must presume that the property was used in, or in connection with, the commission of the offence; or
- (d) in any other case—the court must not make a forfeiture order against the property unless it is satisfied that the property was used or intended to be used in, or in connection with, the commission of the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **55 Forfeiture orders can extend to other interests in property**

- (1) In specifying an \*interest in property in a \*forfeiture order, the court may also specify other interests in the property (regardless of whose they are) if:
  - (a) the amount received from disposing of the combined interests would be likely to be greater than the amount received from disposing of each of the interests separately; or
  - (b) disposing of the interests separately would be impracticable or significantly more difficult than disposing of the combined interests.
- (2) If the court so specifies other \*interests in the \*forfeiture order, the court may make such ancillary orders as it thinks fit for the protection of a person having one or more of those other interests. These ancillary orders may include:
  - (a) an order directing the Commonwealth to pay the person a specified amount as the value of the person's interest in the property; or
  - (b) an order directing that specified other interests in the property be transferred to the person.
- (3) In deciding whether to make an ancillary order, the court must have regard to:
  - (a) the nature, extent and value of the person's \*interest in the property concerned; and
  - (b) if the court is aware that any other person claims an interest in the property—the nature, extent and value of the interest claimed; and
  - (c) any other matter that the court considers relevant.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) For the purposes of an order described in paragraph (2)(a), an amount may be specified wholly or partly by reference to a specified proportion of the difference between:
- (a) the amount received from disposing of the combined interests specified in the \*forfeiture order; and
  - (b) the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the forfeiture order.

### **56 Forfeiture orders must specify the value of forfeited property**

The court must specify, in any \*forfeiture order it makes, the amount it considers to be the value, at the time the order is made, of the property (other than money) specified in the order.

### **57 A person may buy back forfeited property**

A court that makes a \*forfeiture order against property may, if it is satisfied that:

- (a) it would not be contrary to the public interest for a person's \*interest in the property to be transferred to the person; and
- (b) there is no other reason why the person's interest in the property should not be transferred to that person;

by order:

- (c) declare the nature, extent and value (as at the time when the order is made) of the interest; and
- (d) declare that the interest may be excluded, under section 89, from the operation of the forfeiture order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**58 The court may also make supporting directions**

- (1) If a court makes a \*forfeiture order, the court has power to give all directions that are necessary or convenient for giving effect to the order.
- (2) This includes, for a \*forfeiture order specifying \*registrable property, a direction to an officer of the court to do anything necessary and reasonable to obtain possession of any document necessary for the transfer of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—How forfeiture orders are obtained**

### **59 DPP may apply for a forfeiture order**

- (1) The \*DPP may apply for a \*forfeiture order.
- (2) If the application relates to a person's conviction of an \*indictable offence, the application must be made before the end of the period of 6 months after the \*conviction day.

### **60 Additional application for a forfeiture order**

- (1) The \*DPP cannot, unless the court gives leave, apply for a \*forfeiture order under a section of Division 1 in relation to an offence if:
  - (a) an application has previously been made:
    - (i) under this Division for an order under the same section of Division 1; or
    - (ii) under another law of the Commonwealth (other than Division 1); or
    - (iii) under a law of a \*non-governing Territory; for the forfeiture or condemnation of the property in relation to the offence; and
  - (b) the application has been finally determined on the merits.
- (2) The court must not give leave unless it is satisfied that:
  - (a) the property to which the new application relates was identified only after the first application was determined; or
  - (b) necessary evidence became available only after the first application was determined; or
  - (c) it is in the interests of justice to grant the leave.
- (3) To avoid doubt:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the \*DPP may apply for a \*forfeiture order under a section of Division 1 against property in relation to an offence even though an application has previously been made under a different section of Division 1 for forfeiture of that property in relation to that offence; and
- (b) the DPP may apply for a forfeiture order against property in relation to an offence even though an application has previously been made for a \*pecuniary penalty order or a \*literary proceeds order in relation to that offence.

### **61 Notice of application**

- (1) The \*DPP must give written notice of an application for a \*forfeiture order to:
  - (a) if the order is sought relating to a person's conviction of an offence—the person; and
  - (b) any person who claims an \*interest in property covered by the application; and
  - (c) any person whom the DPP reasonably believes may have an interest in that property.
- (2) The court hearing the application may, at any time before finally determining the application, direct the \*DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

### **62 Amending an application**

- (1) The court hearing an application for a \*forfeiture order may amend the application:
  - (a) on application by the \*DPP; or
  - (b) with the consent of the DPP.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) However, the court must not amend the application to include additional property in the application unless:
- (a) the court is satisfied that:
    - (i) the property was not reasonably capable of identification when the application was originally made; or
    - (ii) necessary evidence became available only after the application was originally made; or
  - (b) the \*forfeiture order applied for is an order under section 47 or 49 and the court is satisfied that:
    - (i) including the additional property in the application for the order might have prejudiced the investigation of, or the prosecution of a person for, an offence; or
    - (ii) it is for any other reason appropriate to grant the application to amend.
- (3) On applying for an amendment to include additional property in the application, the \*DPP must give written notice of the application to amend to any person whom the DPP reasonably believes may have an \*interest in that additional property.
- (4) If the \*forfeiture order applied for is an order under section 48, any person who claims an \*interest in that additional property may appear and adduce evidence at the hearing of the application to amend.

### **63 Court may dispense with notice requirements if person has absconded**

The court to which an application for a \*forfeiture order is made in relation to an offence may, on application by the \*DPP, dispense with the requirements to give notice to a person under subsections 61(1) and 62(3) if the court is satisfied that the person has \*absconded in connection with the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **64 Procedure on application**

- (1) Any person who claims an \*interest in property covered by an application for a \*forfeiture order may appear and adduce evidence at the hearing of the application.
- (2) The court may, in determining the application, have regard to:
  - (a) the transcript of any proceeding against the person for an offence that constitutes \*unlawful activity; and
  - (b) the evidence given in any such proceeding.
- (3) The court may still make a \*forfeiture order if a person entitled to be given notice of the relevant application fails to appear at the hearing of the application.

## **65 Applications to courts before which persons are convicted**

If an application for a \*forfeiture order is made to a court before which a person was convicted of an \*indictable offence:

- (a) the application may be dealt with by the court; and
- (b) any power in relation to the relevant order may be exercised by the court;

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

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Effect of forfeiture orders**

### **66 What property is forfeited and when—general rule**

Property specified in a \*forfeiture order vests absolutely in the Commonwealth at the time the order is made.

### **67 First exception—registrable property**

- (1) Despite section 66, if property specified in the \*forfeiture order is \*registrable property:
  - (a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and
  - (b) the \*DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable interest in that property; and
  - (c) the Commonwealth is entitled to be registered as the owner of that property; and
  - (d) the \*Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.
- (2) Any action by the \*DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 69(1).
- (3) The \*Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an \*interest in property of that kind.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**68 Second exception—if a joint owner dies before the order was made**

- (1) Despite section 66, if a person:
  - (a) was, immediately before his or her death, the joint owner of property specified in the \*forfeiture order; but
  - (b) died before the order was made, but:
    - (i) after the \*DPP applied for the order; or
    - (ii) while a \*restraining order covering the property was in force;that property is taken to have vested in the Commonwealth immediately before the person's death.
- (2) Any such \*restraining order is also taken to have continued to apply to the property as if the person had not died.

**69 When can the Commonwealth begin dealing with forfeited property?**

- (1) The Commonwealth, and persons acting on its behalf, can only dispose of, or otherwise deal with, property specified in a \*forfeiture order after, and only if the order is still in force at, the later of the following times:
  - (a) when:
    - (i) if the period provided for lodging an appeal against the order has ended without such an appeal having been lodged—that period ends; or
    - (ii) if an appeal against the order has been lodged—the appeal lapses or is finally determined;
  - (b) if the order was made in relation to a person's conviction of an offence—when:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) if the period provided for lodging an appeal against the conviction has ended without such an appeal having been lodged—that period ends; or
  - (ii) if an appeal against the conviction has been lodged—the appeal lapses or is finally determined.
- (2) However, such disposals and dealings may occur earlier with the leave of the court and in accordance with any directions of the court.
- (3) For the purposes of paragraph (1)(b):
- (a) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(b)—an appeal against the finding of the person guilty of the offence is taken to be an appeal against the conviction; and
  - (b) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(c)—an appeal against the person’s conviction of the other offence referred to in that paragraph is taken to be an appeal against the conviction.

## **70 How must the Commonwealth deal with forfeited property?**

- (1) If the \*forfeiture order is still in force at the later time mentioned in subsection 69(1), the \*Official Trustee must, on the Commonwealth’s behalf and as soon as practicable:
- (a) dispose of any property specified in the order that is not money; and
  - (b) apply:
    - (i) any amounts received from that disposal; and
    - (ii) any property specified in the order that is money; to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the \*restraining order that covered the property; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) credit the remainder of the money and amounts received to the \*Confiscated Assets Account as required by section 296.
- (2) However, if the \*Official Trustee is required to deal with property specified in a \*forfeiture order but has not yet begun:
- (a) the Minister; or
  - (b) a \*senior Departmental officer authorised by the Minister for the purposes of this subsection;
- may direct that the property be alternatively disposed of, or otherwise dealt with, as specified in the direction.
- (3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.

Note: The quashing of a conviction of an offence relating to a forfeiture may prevent things being done under this section: see section 86.

## **71 Dealings with forfeited property**

A person is guilty of an offence if:

- (a) the person knows that a \*forfeiture order has been made in respect of \*registrable property; and
- (b) the person disposes of, or otherwise deals with, the property before the Commonwealth's interest has been registered on the appropriate register; and
- (c) the forfeiture order has not been discharged.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—Reducing the effect of forfeiture orders**

### **Subdivision A—Relieving hardship**

#### **72 Relieving certain dependants from hardship**

- (1) The court making a \*forfeiture order specifying a \*person's property must make another order directing the Commonwealth to pay a specified amount to a \*dependant of the person if:
  - (a) the forfeiture order is not to be made under section 48; and
  - (b) the court is satisfied that:
    - (i) the forfeiture order would cause hardship to the dependant; and
    - (ii) the specified amount would relieve that hardship; and
    - (iii) if the dependant is aged at least 18 years—the dependant had no knowledge of the person's conduct that is the subject of the forfeiture order.
- (2) The specified amount must not exceed the difference between:
  - (a) what the court considers is likely to be the amount received from disposing of the \*person's property under the \*forfeiture order; and
  - (b) what the court considers is likely to be the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the forfeiture order.
- (3) An order under this section may relate to more than one of the person's \*dependants.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Subdivision B—Excluding property from a forfeiture order**

### **73 Making exclusion orders**

- (1) A court that made a \*forfeiture order, or that is hearing, or is to hear, an application (a *forfeiture application*) for a forfeiture order, must make an order excluding a specified \*interest in property from forfeiture (an *exclusion order*) if:
  - (a) a person applies for the exclusion order; and
  - (b) the forfeiture order, or the forfeiture application, specifies property in which the applicant has an interest; and
  - (c) if the forfeiture order was (or the forfeiture order applied for would be) made under section 47 or 49—the court is satisfied that the applicant’s interest in the property is neither of the following:
    - (i) \*proceeds of \*unlawful activity;
    - (ii) if an offence on which the order was (or would be) based is a \*serious offence—an instrument of any serious offence; and
  - (d) if the forfeiture order was (or the forfeiture order applied for would be) made under section 48—the court is satisfied that the applicant’s interest in the property is neither proceeds nor an instrument of any of the offences to which the forfeiture order or forfeiture application relates.
- (2) An \*exclusion order must:
  - (a) specify the nature, extent and value (at the time of making the order) of the \*interest concerned; and
  - (b) direct that the interest be excluded from the operation of the relevant \*forfeiture order; and
  - (c) if the interest has vested (in law or equity) in the Commonwealth under this Part and is yet to be disposed of—

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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direct the Commonwealth to transfer the interest to the applicant; and

- (d) if the interest has vested (in law or equity) in the Commonwealth under this Part and has been disposed of—direct the Commonwealth to pay the applicant an amount equal to the value specified under paragraph (a).

#### **74 Applying for exclusion orders**

##### *Before a forfeiture order has been made*

- (1) A person may apply for an \*exclusion order if a \*forfeiture order that could specify property in which the person claims an \*interest has been applied for, but is yet to be made.

##### *After a forfeiture order has been made*

- (2) A person who claims an \*interest in property specified in a \*forfeiture order may, at any time after the forfeiture order is made, apply to the court that made the forfeiture order for an \*exclusion order.
- (3) However, unless the court gives leave, the person cannot apply for an \*exclusion order if he or she:
- (a) was notified of the application for the \*forfeiture order, but did not appear at the hearing of that application; or
  - (b) appeared at the hearing of that application.
- (4) The court may give the person leave to apply if the court is satisfied that:
- (a) if paragraph (3)(a) applies—the person had a good reason for not appearing; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) if paragraph (3)(b) applies—the person now has evidence relevant to the person’s application that was not available to the person at the time of the hearing; or
- (c) in either case—there are other special grounds for granting the leave.

### **75 Giving notice of matters relevant to an application**

- (1) An applicant for an \*exclusion order must give written notice to the \*DPP of both the application and the grounds on which the order is sought.
- (2) The \*DPP may appear and adduce evidence at the hearing of the application.
- (3) The \*DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.

### **76 When an application can be heard**

An application for an \*exclusion order must not be heard until the \*DPP has had a reasonable opportunity to conduct \*examinations in relation to the application.

### **Subdivision C—Compensating for proportion of property not derived or realised from commission of any offence**

### **77 Making compensation orders**

- (1) A court that made a \*forfeiture order, or that is hearing, or is to hear, an application for a forfeiture order, must make an order under subsection (2) (a *compensation order*) if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) a person (the *applicant*) has applied for a compensation order; and
  - (b) the court is satisfied that the applicant has an \*interest in property specified in the forfeiture order or in the application for the forfeiture order; and
  - (c) the court is satisfied that a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and
  - (d) the court is satisfied that the applicant's interest is not an instrument of any offence; and
  - (e) in the case of a court that is hearing or is to hear an application for a forfeiture order—the court makes the forfeiture order.
- (2) A \*compensation order must:
- (a) specify the proportion found by the court under paragraph (1)(c); and
  - (b) direct the Commonwealth, once the property has vested absolutely in it, to:
    - (i) if the property has not been disposed of—dispose of the property; and
    - (ii) pay the applicant an amount equal to that proportion of the difference between the amount received from disposing of the property and the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the \*forfeiture order.

## **78 Application for compensation orders**

### *Before a forfeiture order has been made*

- (1) A person may apply to a court for a \*compensation order if an application for a \*forfeiture order that could specify property in

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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which the person claims an \*interest has been made to the court, but the forfeiture order is yet to be made.

*After a forfeiture order has been made*

- (2) A person who claims an \*interest in property specified in a \*forfeiture order may, at any time after the forfeiture order is made, apply to the court that made the forfeiture order for a \*compensation order.
- (3) However, unless the court gives leave, the person cannot apply under subsection (2) if he or she:
  - (a) was notified of the application for the \*forfeiture order, but did not make an application under subsection (1) before the forfeiture order was made; or
  - (b) appeared at the hearing of the application for the forfeiture order.
- (4) The court may give the person leave to apply under subsection (2) if the court is satisfied that:
  - (a) if paragraph (3)(a) applies—the person had a good reason for not making an application under subsection (1) before the \*forfeiture order was made; or
  - (b) in either case:
    - (i) the person now has evidence relevant to the making of the \*compensation order that was not available to the person at the time the forfeiture order was made; or
    - (ii) there are other special grounds for granting the leave.

## **79 Giving notice of matters relevant to an application**

- (1) An applicant for a \*compensation order must give written notice to the \*DPP of both the application and the grounds on which the order is sought.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The \*DPP may appear and adduce evidence at the hearing of the application.
- (3) The \*DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.

### **79A When an application can be heard**

An application for a \*compensation order must not be heard until the \*DPP has had a reasonable opportunity to conduct \*examinations in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 6—The effect on forfeiture orders of acquittals and quashing of convictions**

### **80 Forfeiture order made under section 47 or 49 unaffected by acquittal or quashing of conviction**

A \*forfeiture order made under section 47 or 49 against a person in relation to an offence is not affected if:

- (a) having been charged with the offence, the person is acquitted; or
- (b) the person is convicted of the offence and the conviction is subsequently \*quashed.

### **81 Discharge of forfeiture order made under section 48 on quashing of conviction**

- (1) A \*forfeiture order made under section 48 in relation to a person's conviction of an offence is discharged if:
  - (a) the person's conviction of the offence is subsequently \*quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and
  - (b) the \*DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.
- (2) However, unless and until a court decides otherwise on such an application, the \*quashing of the conviction does not affect the \*forfeiture order:
  - (a) for 14 days after the conviction is quashed; and
  - (b) if the \*DPP makes such an application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **82 Notice of application for confirmation of forfeiture order**

- (1) The \*DPP must give written notice of an application for confirmation of the \*forfeiture order to:
  - (a) the person whose conviction was \*quashed; and
  - (b) any person who claims, or prior to the forfeiture claimed, an \*interest in property covered by the order; and
  - (c) any person whom the DPP reasonably believes may have had an interest in that property before the forfeiture.

Note: If the DPP applies for confirmation of a forfeiture order, it can also apply for an examination order under Part 3-1.

- (2) The court hearing the application may, at any time before finally determining the application, direct the \*DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

## **83 Procedure on application for confirmation of forfeiture order**

- (1) Any person who claims an \*interest in property covered by the \*forfeiture order may appear and adduce evidence at the hearing of the application for confirmation of the order.
- (2) The court may, in determining the application, have regard to:
  - (a) the transcript of any proceeding against the person for:
    - (i) the offence of which the person was convicted; or
    - (ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;including any appeals relating to the conviction; and
  - (b) the evidence given in any such proceeding.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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#### **84 Court may confirm forfeiture order**

- (1) The court may confirm the \*forfeiture order if the court is satisfied that:
  - (a) it could have made a forfeiture order under section 47 in relation to the offence in relation to which the person's conviction was \*quashed if, when the \*DPP applied for an order under section 48, it had instead applied for an order under section 47; or
  - (b) it could have made a forfeiture order under section 49 in relation to the offence in relation to which the person's conviction was quashed if, when the DPP applied for an order under section 48, it had instead applied for an order under section 49.
- (2) For the purposes of paragraphs (1)(a) and (b), the requirement in paragraph 47(1)(b) or 49(1)(b) (as the case requires) is taken to be satisfied.

#### **85 Effect of court's decision on confirmation of forfeiture order**

- (1) If the court confirms the \*forfeiture order under paragraph 84(1)(a), the order is taken not to be affected by the \*quashing of the person's conviction of the offence.
- (2) If the court confirms the \*forfeiture order under paragraph 84(1)(b):
  - (a) to the extent that the order covers property that is:
    - (i) in any case—\*proceeds of the offence; or
    - (ii) if the offence is a \*serious offence—an \*instrument of the offence;the order is taken not to be affected by the \*quashing of the person's conviction of the offence; but
  - (b) to the extent that the order covers property that is:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) in any case—not proceeds of the offence; and
  - (ii) if the offence is a serious offence—not an instrument of the offence;
- the order is discharged.
- (3) If the court decides not to confirm the \*forfeiture order, the order is discharged.

**86 Official Trustee must not deal with forfeited property before the court decides on confirmation of forfeiture order**

During the period:

- (a) starting on the day after the person’s conviction of the offence was \*quashed; and
- (b) ending when the court decides whether to confirm the \*forfeiture order;

the \*Official Trustee must not do any of the things required under section 70 in relation to property covered by the order or amounts received from disposing of such property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 7—Miscellaneous**

### **87 Giving notice if a forfeiture order is discharged on appeal or by quashing of a conviction**

- (1) This section applies in relation to particular property if:
  - (a) a \*forfeiture order that covered that property is discharged by a court hearing an appeal against the making of the order; or
  - (b) a forfeiture order that covered that property is discharged under section 81 or subsection 85(3); or
  - (c) a forfeiture order that covered the property is discharged under subsection 85(2) in relation to that property.
- (2) The \*DPP must, as soon as practicable, give written notice of the discharge to any person the DPP reasonably believes may have had an \*interest in that property immediately before the order was made.
- (3) The \*DPP must, if required by a court, give or publish notice of the discharge to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.
- (4) A notice given under this section must include a statement to the effect that a person claiming to have had an \*interest in that property may apply under section 88 for the transfer of the interest, or its value, to the person.

### **88 Returning property etc. following the discharge of a forfeiture order**

- (1) The Minister must arrange for:
  - (a) if property specified in a \*forfeiture order is vested in the Commonwealth—an \*interest in the property to be

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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transferred to a person claiming to have had the interest in the property immediately before the order was made; or

- (b) if property specified in a forfeiture order is no longer vested in the Commonwealth—an amount equal to the value of the interest in the property to be paid to the person;

if:

- (c) the forfeiture order has been discharged in relation to the property:
    - (i) by a court hearing an appeal against the making of the order; or
    - (ii) under section 81 or 85; and
  - (d) the person applies to the Minister, in writing, for the transfer of the interest to the person; and
  - (e) the person had that interest in the property immediately before the order was made.
- (2) If the Minister must arrange for the property to be transferred, the Minister may also, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to give effect to the transfer.
- (3) Without limiting subsection (2), things that may be done or authorised under that subsection include:
- (a) executing any instrument; and
  - (b) applying for registration of an \*interest in the property on any appropriate register.

### **89 Person with interest in forfeited property may buy back the interest**

- (1) If a court:
  - (a) makes a \*forfeiture order against property; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) makes an order under section 57 in respect of an \*interest in the property;

then:

(c) the payment to the Commonwealth, while the interest is still vested in the Commonwealth, of the amount specified in the order under section 57 as the value of the interest discharges the forfeiture order to the extent to which it relates to the interest; and

(d) the Minister:

- (i) must arrange for the interest to be transferred to the person in whom it was vested immediately before the property was forfeited to the Commonwealth; and
- (ii) may, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to effect the transfer.

(2) Without limiting subparagraph (1)(d)(ii), things that may be done or authorised under that subparagraph include:

- (a) executing any instrument; and
- (b) making an application for registration of an \*interest in the property on any appropriate register.

## **90 Buying out other interests in forfeited property**

The Minister must arrange for an \*interest in property to be transferred to a person (the *purchaser*) if:

- (a) the property is forfeited to the Commonwealth under this Part; and
- (b) the interest is required to be transferred to the purchaser under subsection 88(1) or 89(1), or under a direction under paragraph 73(2)(c); and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) the purchaser's interest in the property, immediately before the forfeiture took place, was not the only interest in the property; and
- (d) the purchaser gives written notice to each other person who had an interest in the property immediately before the forfeiture took place that:
  - (i) the purchaser intends to purchase that other interest from the Commonwealth; and
  - (ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that interest with the Minister; and
- (e) no person served with notice under paragraph (d) in relation to that interest lodges a written objection to the purchase of that interest with the Minister within the period referred to in that paragraph; and
- (f) the purchaser pays to the Commonwealth, while that interest is still vested in the Commonwealth, an amount equal to the value of that interest.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 2-3—Forfeiture on conviction of a serious offence**

### **91 Simplified outline of this Part**

If a person is convicted of a serious offence, property that is subject to a restraining order relating to the offence is forfeited to the Commonwealth unless the property is excluded from forfeiture.

There are cases in which compensation is payable by the Commonwealth.

There are cases in which forfeited property can be recovered from the Commonwealth.

Note: Property can be forfeited in relation to a serious offence, without a conviction, under a forfeiture order under Part 2-2.

### **Division 1—Forfeiture on conviction of a serious offence**

#### **92 Forfeiting restrained property without a forfeiture order if a person has been convicted of a serious offence**

- (1) Property is forfeited to the Commonwealth at the end of the period applying under subsection (3) if:
  - (a) a person is convicted of a \*serious offence; and
  - (b) either:
    - (i) at the end of that period, the property is covered by a \*restraining order under section 17 or 18 against the person that relates to the offence; or
    - (ii) the property was covered by such a restraining order against the person, but the order was revoked under

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.



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section 44 or the property was excluded from the order under that section; and

- (c) the property is not subject to an order under section 94 excluding the property from forfeiture under this Part.
- (2) It does not matter whether:
- (a) the \*restraining order was made before or after the person's conviction of the \*serious offence; or
  - (b) immediately before forfeiture, the property is the \*person's property or another person's property.
- (3) The period at the end of which the property is forfeited is:
- (a) the 6 month period starting on the \*conviction day; or
  - (b) if an \*extension order is in force at the end of that period—the extended period relating to that extension order.
- (4) This section does not apply if the person is taken to have been convicted of the offence because the person \*absconded in connection with the offence.
- (5) A \*restraining order in relation to a \*related offence with which the person has been charged, or is proposed to be charged, is taken, for the purposes of this section, to be a restraining order in relation to the offence of which the person was convicted.
- (6) If:
- (a) under section 44, a \*restraining order that covered particular property is revoked, or particular property is excluded from a restraining order; and
  - (b) the security referred to in paragraph 44(1)(e), or the undertaking referred to in paragraph 44(2)(e), in connection with the revocation or exclusion is still in force;
- the property is taken, for the purposes of this section, to be covered by the restraining order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

### **92A Notice of date of forfeiture under this Part, etc.**

- (1) The \*DPP must, before property is forfeited under this Part, take reasonable steps to give any person who has or claims, or whom the DPP reasonably believes may have, an \*interest in the property a written notice stating:
  - (a) the date on which the property will be forfeited under this Part unless it is excluded from forfeiture; and
  - (b) the effect of section 93 (which deals with \*extension orders); and
  - (c) that the person may be able to apply for an order under one of the following sections in relation to the property:
    - (i) section 29 (which deals with the exclusion of property from \*restraining orders);
    - (ii) section 94 (which deals with the exclusion of property from forfeiture);
    - (iii) section 94A (which deals with compensation).
- (2) However, the \*DPP need not give a notice to a person under subsection (1) if the person has made:
  - (a) an application for an \*extension order in relation to the property; and
  - (b) an application under section 30, 31 or 94 in relation to the property.

### **93 Making an extension order extending the period before property is forfeited**

- (1) The court that made the \*restraining order referred to in paragraph 92(1)(b) may make an order (an *extension order*) specifying an extended period for the purposes of subsection 92(3) if:
  - (a) an application for the order is made within 6 months after the start of the \*conviction day for the relevant conviction; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the applicant has also applied to the court under:
  - (i) section 30 or 31 to exclude property from the restraining order; or
  - (ii) section 94 to exclude the property that is covered by the restraining order from forfeiture under this Part; and
- (c) the court is satisfied that the applicant made the application under section 30, 31 or 94 without undue delay, and has since diligently followed up that application.

The extended period specified must end no later than 15 months from the start of the conviction day for the relevant conviction.

- (2) The \*extension order stops being in force if the application under section 30, 31 or 94 is finally determined before the end of the 6 month period starting on the \*conviction day for the relevant conviction.
- (3) The extended period ends if the application under section 30, 31 or 94 is finally determined before the end of that period.
- (4) If the court makes the \*extension order, the \*DPP must take reasonable steps to give any person who has or claims, or whom the DPP reasonably believes may have, an \*interest in the property to which the order relates a written notice stating:
  - (a) the date on which the property will be forfeited under this Part, in accordance with the extension order, unless it is excluded from forfeiture; and
  - (b) the effect of subsections (2) and (3).

#### **94 Excluding property from forfeiture under this Part**

- (1) The court that made a \*restraining order referred to in paragraph 92(1)(b) must make an order excluding particular property from forfeiture under this Part if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) a person (the *applicant*) has applied for an order under this section; and
  - (b) the court is satisfied that the applicant has an \*interest in property covered by the restraining order; and
  - (d) a person has been convicted of a \*serious offence to which the restraining order relates; and
  - (e) the court is satisfied that the applicant's interest in the property is neither \*proceeds of \*unlawful activity nor an \*instrument of unlawful activity; and
  - (f) the court is satisfied that the applicant's interest in the property was lawfully acquired.
- (2) To avoid doubt, an order under this section cannot be made in relation to property if the property has already been forfeited under this Part.
- (3) The person must give written notice to the \*DPP of both the application and the grounds on which the order is sought.
- (4) The \*DPP may appear and adduce evidence at the hearing of the application.
- (5) The \*DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.
- (6) The application must not be heard until the \*DPP has had a reasonable opportunity to conduct \*examinations in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**94A Compensating for proportion of property not derived or realised from commission of any offence**

- (1) The court that made a \*restraining order referred to in paragraph 92(1)(b) must make an order that complies with subsection (2) if:
  - (a) a person (the *applicant*) has applied for an order under this section; and
  - (b) the court is satisfied that the applicant has an \*interest in property covered, or that was at any time covered, by the restraining order; and
  - (c) a person has been convicted of a \*serious offence to which the restraining order relates; and
  - (d) the court is satisfied that a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and
  - (e) the court is satisfied that the applicant's interest is not an \*instrument of any offence.
- (2) An order under this section must:
  - (a) specify the proportion found by the court under paragraph (1)(d); and
  - (b) direct the Commonwealth, once the property has vested absolutely in it, to:
    - (i) if the property has not been disposed of—dispose of the property; and
    - (ii) pay the applicant an amount equal to that proportion of the difference between the amount received from disposing of the property and the sum of any payments of the kind referred to in paragraph 100(1)(b) in connection with the forfeiture.
- (3) A person who claims an \*interest in property covered by a \*restraining order referred to in paragraph 92(1)(b) may apply to

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

the court that made the restraining order for an order under this section at any time.

- (4) However, if the property has already been forfeited under this Part, the person cannot, unless the court gives leave, apply under subsection (3) if he or she:
- (a) either:
    - (i) was given a notice under subsection 92A(1) in relation to the property; or
    - (ii) was not given such a notice because of subsection 92A(2); and
  - (b) did not make the application under subsection (3) before that forfeiture.
- (5) The court may give the person leave to apply if the court is satisfied that:
- (a) the person had a good reason for not making the application before the forfeiture; or
  - (b) the person now has evidence relevant to the application that was not available before the forfeiture; or
  - (c) there are special grounds for granting the leave.
- (6) The person must give written notice to the \*DPP of both the application and the grounds on which the order is sought.
- (7) The \*DPP may appear and adduce evidence at the hearing of the application.
- (8) The \*DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (9) The application must not be heard until the \*DPP has had a reasonable opportunity to conduct \*examinations in relation to the application.

**95 Court may declare that property has been forfeited under this Part**

The court that made the \*restraining order referred to in paragraph 92(1)(b) may declare that particular property has been forfeited under this Part if:

- (a) the \*DPP applies to the court for the declaration; and
- (b) the court is satisfied that that property is forfeited under this Part.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—Effect of forfeiture on conviction of a serious offence**

### **96 When is property forfeited—general rule**

Property forfeited under section 92 vests absolutely in the Commonwealth at the time of the forfeiture.

### **97 First exception—registrable property**

- (1) Despite section 96, if property forfeited under section 92 is \*registrable property:
  - (a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and
  - (b) the \*DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable interest in that property; and
  - (c) the Commonwealth is entitled to be registered as the owner of that property; and
  - (d) the \*Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.
- (2) Any action by the \*DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 99(1).
- (3) The \*Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an \*interest in property of that kind.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**98 Second exception—if a joint owner dies**

Despite section 96, if:

- (a) a person who is convicted of a \*serious offence was, immediately before his or her death, the joint owner of property; and
- (b) the period that would apply under subsection 92(3) if the property were subject to forfeiture under section 92 in relation to the conviction had not ended before his or her death; and
- (c) if that period had ended immediately before his or her death—the property would have been forfeited under section 92;

the property is taken to have vested in the Commonwealth immediately before his or her death.

**99 When can the Commonwealth begin dealing with forfeited property?**

- (1) The Commonwealth, and persons acting on its behalf, can dispose of, or otherwise deal with, property forfeited under section 92 in relation to a person's conviction of a \*serious offence if and only if:
  - (a) the period applying under subsection (3) has come to an end; and
  - (b) the conviction has not been \*quashed by that time.
- (2) However, such disposals and dealings may occur earlier with the leave of the court and in accordance with any directions of the court.
- (3) The period at the end of which the Commonwealth, and persons acting on its behalf, can dispose of or otherwise deal with the property is:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (a) if the conviction is one in relation to which neither paragraph 331(1)(b) nor (c) applies, the period ending:
  - (i) if the period provided for lodging an appeal against the conviction has ended without such an appeal having been lodged—at the end of that period; or
  - (ii) if an appeal against the conviction has been lodged—when the appeal lapses or is finally determined; or
- (b) if the person is taken to have been convicted because of paragraph 331(1)(b), the period ending:
  - (i) if the period provided for lodging an appeal against the finding of the person guilty of the offence has ended without such an appeal having been lodged—at the end of that period; or
  - (ii) if an appeal against the finding of the person guilty of the offence has been lodged—when the appeal lapses or is finally determined; or
- (c) if the person is taken to have been convicted because of paragraph 331(1)(c), the period ending:
  - (i) if the period provided for lodging an appeal against the person’s conviction of the other offence referred to in that paragraph has ended without such an appeal having been lodged—at the end of that period; or
  - (ii) if an appeal against the person’s conviction of the other offence referred to in that paragraph has been lodged—when the appeal lapses or is finally determined.

### **100 How must forfeited property be dealt with?**

- (1) If subsection 99(1) no longer prevents disposal of or dealing with particular property forfeited under section 92, the \*Official Trustee must, on the Commonwealth’s behalf and as soon as practicable:
  - (a) dispose of any of the forfeited property that is not money;  
and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) apply:
    - (i) any amounts received from that disposal; and
    - (ii) any of the forfeited property that is money;  
to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the \*restraining order that covered the property; and
  - (c) credit the remainder of the money and amounts received to the \*Confiscated Assets Account as required by section 296.
- (2) However, if the \*Official Trustee has not yet begun to deal with property forfeited under section 92, as required by this section:
- (a) the Minister; or
  - (b) a \*senior Departmental officer authorised by the Minister for the purposes of this subsection;
- may direct that the property be disposed of, or otherwise dealt with, as specified in the direction.
- (3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.

Note: The quashing of a conviction of an offence relating to the forfeiture will prevent things being done under this section: see section 112.

### **101 Minister may give supporting directions**

- (1) The Minister may give all directions that are necessary or convenient to realise the Commonwealth's \*interest in property forfeited under section 92.
- (2) This includes, for \*registrable property forfeited under section 92, directing an officer of the Department or a \*police officer to do anything necessary and reasonable to obtain possession of any document necessary for the transfer of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—Recovery of forfeited property**

### **102 Court may make orders relating to transfer of forfeited property etc.**

If property is forfeited to the Commonwealth under section 92, the court that made the \*restraining order referred to in paragraph 92(1)(b) must, if:

- (a) a person who claims an \*interest in the property applies under section 104 for an order under this section; and
- (b) the court is satisfied that:
  - (i) the applicant had an interest in the property before the forfeiture of the property; and
  - (ii) the applicant's interest in the property is neither \*proceeds of unlawful activity nor an \*instrument of unlawful activity; and
  - (iii) the applicant's interest in the property was lawfully acquired;

make an order:

- (c) declaring the nature, extent and value of the applicant's interest in the property; and
- (d) either:
  - (i) if the interest is still vested in the Commonwealth—directing the Commonwealth to transfer the interest to the applicant; or
  - (ii) directing the Commonwealth to pay to the applicant an amount equal to the value declared under paragraph (c).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **103 Court may make orders relating to buying back forfeited property**

If property is forfeited to the Commonwealth under section 92, the court that made the \*restraining order referred to in paragraph 92(1)(b) may, if:

- (a) a person who claims an \*interest in the property applies under section 104 for an order under this section; and
- (b) the court is satisfied that:
  - (i) it would not be contrary to the public interest for the interest to be transferred to the person; and
  - (ii) there is no other reason why the interest should not be transferred to the person;

make an order:

- (c) declaring the nature, extent and value (as at the time when the order is made) of the interest; and
- (d) declaring that the forfeiture ceases to operate in relation to the interest if payment is made under section 105.

### **104 Applying for orders under section 102 or 103**

- (1) A person who claims an \*interest in property that has been forfeited to the Commonwealth under section 92 may, at any time after the forfeiture, apply to the court that made the \*restraining order referred to in paragraph 92(1)(b) for an order under section 102 or 103.
- (2) However, unless the court gives leave, the person cannot make an application for an order under section 102 if he or she:
  - (a) either:
    - (i) was given a notice under subsection 92A(1) in relation to the property; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) was not given such a notice because of subsection 92A(2); and
- (b) either:
  - (i) did not make an application under section 29 or 94 in relation to the property; or
  - (ii) made such an application and appeared at the hearing of the application.
- (3) The court may give the person leave to apply if the court is satisfied that:
  - (a) if subparagraph (2)(b)(i) applies—the person had a good reason for not making an application under section 29 or 94; or
  - (b) if subparagraph (2)(b)(ii) applies—the person now has evidence relevant to the person’s application under this section that was not available at the time of the hearing; or
  - (c) in either case—there are other special grounds for granting the leave.
- (4) The applicant must give written notice to the \*DPP of both the application and the grounds on which the order is sought.
- (5) The \*DPP may appear and adduce evidence at the hearing of the application.
- (6) The \*DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct \*examinations in relation to the application.
- (7) The application must not be heard until the \*DPP has had a reasonable opportunity to conduct \*examinations in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **105 Person with interest in forfeited property may buy back the interest**

- (1) If:
- (a) property is forfeited to the Commonwealth under section 92; and
  - (b) a court makes an order under section 103 in respect of an \*interest in the property; and
  - (c) the amount specified in the order as the value of the interest is paid to the Commonwealth, while the interest is still vested in the Commonwealth;
- section 92 ceases to apply in relation to the interest, and the Minister:
- (d) must arrange for the interest to be transferred to the person in whom it was vested immediately before the property was forfeited to the Commonwealth; and
  - (e) may, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to effect the transfer.
- (2) Without limiting paragraph (1)(e), things that may be done or authorised under that paragraph include:
- (a) executing any instrument; and
  - (b) applying for registration of an \*interest in the property on any appropriate register.

### **106 Buying out other interests in forfeited property**

The Minister must arrange for an \*interest in property to be transferred to a person (the *purchaser*) if:

- (a) the property is forfeited to the Commonwealth under section 92; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the interest is required to be transferred to the purchaser under section 105, or under a direction under subparagraph 102(d)(i); and
- (c) the purchaser's interest in the property, immediately before the forfeiture took place, was not the only interest in the property; and
- (d) the purchaser gives written notice to each other person who had an interest in the property immediately before the forfeiture took place that:
  - (i) the purchaser intends to purchase that other interest from the Commonwealth; and
  - (ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that interest with the Minister; and
- (e) no person served with the notice under paragraph (d) in relation to that interest lodges a written objection to the purchase of that interest with the Minister within the period referred to in that paragraph; and
- (f) the purchaser pays to the Commonwealth, while that interest is still vested in the Commonwealth, an amount equal to the value of that interest.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—The effect on forfeiture of convictions being quashed**

### **107 The effect on forfeiture of convictions being quashed**

- (1) A forfeiture of property to the Commonwealth under section 92 in relation to a person's conviction of an offence ceases to have effect if:
  - (a) the person's conviction of the offence is subsequently \*quashed; and
  - (b) the forfeiture does not also relate to the person's conviction of other offences that have not been quashed; and
  - (c) the \*DPP does not, within 14 days after the conviction is quashed, apply to the court that made the \*restraining order referred to in paragraph 92(1)(b) for the forfeiture to be confirmed.
- (2) However, unless and until a court decides otherwise on such an application, the \*quashing of the conviction does not affect the forfeiture:
  - (a) for 14 days after the conviction is quashed; and
  - (b) if the \*DPP makes such an application.

### **108 Notice of application for confirmation of forfeiture**

- (1) The \*DPP must give written notice of an application for confirmation of the forfeiture to:
  - (a) the person whose conviction was \*quashed; and
  - (b) any person who claims, or prior to the forfeiture claimed, an \*interest in property covered by the forfeiture; and
  - (c) any person whom the DPP reasonably believes may have had an interest in that property before the forfeiture.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: If the DPP applies for confirmation of a forfeiture, it can also apply for an examination order under Part 3-1.

- (2) The court hearing the application may, at any time before finally determining the application, direct the \*DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

### **109 Procedure on application for confirmation of forfeiture**

- (1) Any person who claims an \*interest in property covered by the forfeiture may appear and adduce evidence at the hearing of the application for confirmation of the forfeiture.
- (2) The court may, in determining the application, have regard to:
- (a) the transcript of any proceeding against the person for:
    - (i) the offence of which the person was convicted; or
    - (ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;including any appeals relating to the conviction; and
  - (b) the evidence given in any such proceeding.

### **110 Court may confirm forfeiture**

- (1) The court may confirm the forfeiture if the court is satisfied that:
- (a) it could make a \*forfeiture order under section 47 in relation to the offence in relation to which the person's conviction was \*quashed if the \*DPP were to apply for an order under that section; or
  - (b) it could make a forfeiture order under section 49 in relation to the offence in relation to which the person's conviction

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

was quashed if the DPP were to apply for an order under that section.

- (2) For the purposes of paragraphs (1)(a) and (b), the requirement in paragraph 47(1)(b) or 49(1)(b) (as the case requires) is taken to be satisfied.

### **111 Effect of court's decision on confirmation of forfeiture**

- (1) If the court confirms the forfeiture under paragraph 110(1)(a), the forfeiture is taken not to be affected by the \*quashing of the person's conviction of the offence.
- (2) If the court confirms the forfeiture under paragraph 110(1)(b):
- (a) to the extent that the property covered by the forfeiture is:
- (i) in any case—\*proceeds of the offence; or
  - (ii) if the offence is a \*serious offence—an \*instrument of the offence;
- the forfeiture is taken not to be affected by the \*quashing of the person's conviction of the offence; but
- (b) to the extent that the property covered by the forfeiture is:
- (i) in any case—not proceeds of the offence; and
  - (ii) if the offence is a serious offence—not an instrument of the offence;
- the forfeiture ceases to have effect.
- (3) If the court decides not to confirm the forfeiture, the forfeiture ceases to have effect.

### **112 Official Trustee must not deal with forfeited property before the court decides on confirmation of forfeiture**

During the period:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) starting on the day after the person's conviction of the offence was \*quashed; and
- (b) ending when the court decides whether to confirm the forfeiture;

the \*Official Trustee must not do any of the things required under section 100 in relation to property covered by the forfeiture or amounts received from disposing of such property.

### **113 Giving notice if forfeiture ceases to have effect on quashing of a conviction**

- (1) This section applies in relation to particular property if:
  - (a) the property was forfeited to the Commonwealth under section 92 but the forfeiture ceases to have effect under section 107 or subsection 111(3); or
  - (b) the property was forfeited to the Commonwealth under section 92 but the forfeiture ceases to have effect in relation to that property under subsection 111(2).
- (2) The \*DPP must, as soon as practicable after the forfeiture ceases to have effect, give written notice of the cessation to any person the DPP reasonably believes may have had an \*interest in that property immediately before the forfeiture.
- (3) The \*DPP must, if required by a court, give or publish notice of the cessation to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.
- (4) A notice given under this section must include a statement to the effect that a person claiming to have had an \*interest in that property may apply under section 114 for the transfer of the interest, or its value, to the person.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**114 Returning property etc. following forfeiture ceasing to have effect**

- (1) The Minister must arrange for:
  - (a) if property forfeited to the Commonwealth under section 92 is vested in the Commonwealth—an \*interest in the property to be transferred to a person claiming to have had the interest in the property immediately before the forfeiture; or
  - (b) if property forfeited to the Commonwealth under section 92 is no longer vested in the Commonwealth—an amount equal to the value of the interest in the property to be paid to the person;if:
  - (c) the forfeiture has ceased to have effect under section 107 or 111; and
  - (d) the person applies to the Minister, in writing, for the transfer of the interest to the person; and
  - (e) the person had that interest in the property at that time.
- (2) If the Minister must arrange for the property to be transferred, the Minister may also, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to give effect to the transfer.
- (3) Without limiting subsection (2), things that may be done or authorised under that subsection include:
  - (a) executing any instrument; and
  - (b) applying for registration of an \*interest in the property on any appropriate register.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 2-4—Pecuniary penalty orders**

### **115 Simplified outline of this Part**

If certain offences have been committed, pecuniary penalty orders can be made, ordering payments to the Commonwealth of amounts based on:

- (a) the benefits that a person has derived from such an offence; and
- (b) (in some cases) the benefits that the person has derived from other unlawful activity.

(It is not always a requirement that a person has been convicted of the offence.)

### **Division 1—Making pecuniary penalty orders**

#### **116 Making pecuniary penalty orders**

- (1) A court with \*proceeds jurisdiction must make an order requiring a person to pay an amount to the Commonwealth if:
- (a) the \*DPP applies for the order; and
  - (b) the court is satisfied of either or both of the following:
    - (i) the person has been convicted of an \*indictable offence, and has derived \*benefits from the commission of the offence;
    - (ii) the person has committed a \*serious offence.

Note: The conviction for, or reasonable grounds for suspecting commission of, an indictable offence could be used as grounds for a restraining order under Part 2-1 covering all or some of the person's property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (3) In determining whether a person has derived a \*benefit, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's \*effective control.
- (4) The court's power to make a \*pecuniary penalty order in relation to an offence is not affected by the existence of another \*confiscation order in relation to that offence.

Note: There are restrictions on the DPP applying for pecuniary penalty orders if previous applications for pecuniary penalty orders have already been made: see section 135.

### **117 Pecuniary penalty orders made in relation to serious offence convictions**

- (1) A court must not make a \*pecuniary penalty order in relation to a person's conviction of a \*serious offence until after the end of the period of 6 months commencing on the \*conviction day.
- (2) However, if the court before which the person was convicted has \*proceeds jurisdiction, the court may make a \*pecuniary penalty order in relation to the person's conviction when it passes sentence on the person.

Note: Pecuniary penalty orders made under this subsection cannot be enforced within 6 months: see subsection 140(3).

- (3) Subsection (1) does not apply if the person is taken to have been convicted of the \*serious offence because of paragraph 331(1)(d).

### **118 Making of pecuniary penalty order if person has absconded**

If, because of paragraph 331(1)(d), a person is taken to have been convicted of an \*indictable offence, a court must not make a \*pecuniary penalty order in relation to the person's conviction unless:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the court is satisfied, on the balance of probabilities, that the person has \*absconded; and
- (b) either:
  - (i) the person has been committed for trial for the offence; or
  - (ii) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

### **119 Ancillary orders**

The court that made a \*pecuniary penalty order, or any other court that could have made the pecuniary penalty order, may make orders ancillary to the pecuniary penalty order, either when it makes the pecuniary penalty order or at a later time.

### **120 Acquittals do not affect pecuniary penalty orders**

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a \*pecuniary penalty order in relation to the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—Penalty amounts**

### **Subdivision A—General**

#### **121 Determining penalty amounts**

- (1) The amount that a person is ordered to pay to the Commonwealth under a \*pecuniary penalty order (the *penalty amount*) is the amount the court determines under this Division.
  - (2) If the offence to which the order relates is not a \*serious offence, the \*penalty amount is determined by:
    - (a) assessing under Subdivision B the value of the \*benefits the person derived from the commission of the offence; and
    - (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.
  - (3) If the offence to which the order relates is a \*serious offence, the \*penalty amount is determined by:
    - (a) assessing under Subdivision B the value of the \*benefits the person derived from:
      - (i) the commission of that offence; and
      - (ii) subject to subsection (4), the commission of any other offence that constitutes \*unlawful activity; and
    - (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.
- Note: Pecuniary penalty orders can be varied under Subdivision D to increase penalty amounts in some cases.
- (4) Subparagraph (3)(a)(ii) does not apply in relation to an offence that is not a \*terrorism offence unless the offence was committed:
    - (a) within:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) if some or all of the person's property, or property suspected of being subject to the \*effective control of the person, is covered by a \*restraining order—the period of 6 years preceding the application for the restraining order; or
  - (ii) otherwise—the period of 6 years preceding the application for the \*pecuniary penalty order; or
- (b) during the period since that application for the restraining order or the pecuniary penalty order was made

**Subdivision B—The value of benefits derived from the commission of an offence**

**122 Evidence the court is to consider**

- (1) In assessing the value of \*benefits that a person has derived from the commission of an offence or offences (the *illegal activity*), the court is to have regard to the evidence before it concerning all or any of the following:
- (a) the money, or the value of the property other than money, that, because of the illegal activity, came into the possession or under the control of the person or another person;
  - (b) the value of any other benefit that, because of the illegal activity, was provided to the person or another person;
  - (c) if any of the illegal activity consisted of doing an act or thing in relation to a \*narcotic substance:
    - (i) the market value, at the time of the offence, of similar or substantially similar narcotic substances; and
    - (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar or substantially similar act or thing;
  - (d) the value of the \*person's property before, during and after the illegal activity;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) the person's income and expenditure before, during and after the illegal activity.
- (2) At the hearing of an application for a \*pecuniary penalty order, a \*police officer, or a \*Customs officer, who is experienced in the investigation of narcotics offences may testify, to the best of the officer's information, knowledge and belief:
  - (a) with respect to the amount that was the market value of a \*narcotic substance at a particular time or during a particular period; or
  - (b) with respect to the amount, or the range of amounts, ordinarily paid at a particular time, or during a particular period, for the doing of an act or thing in relation to a narcotic substance.
- (3) The officer's testimony under subsection (2):
  - (a) is admissible at the hearing despite any rule of law or practice relating to hearsay evidence; and
  - (b) is prima facie evidence of the matters testified.

### **123 Value of benefits derived—non-serious offences**

- (1) If:
  - (a) an application is made for a \*pecuniary penalty order against a person in relation to an offence or offences (the *illegal activity*); and
  - (b) the offence is not a \*serious offence, or none of the offences are serious offences; and
  - (c) at the hearing of the application, evidence is given that the value of the \*person's property during or after the illegal activity exceeded the value of the person's property before the illegal activity;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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the court is to treat the value of the \*benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

- (2) The amount treated as the value of the \*benefits under this section is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to the illegal activity.

### **124 Value of benefits derived—serious offences**

(1) If:

- (a) an application is made for a \*pecuniary penalty order against a person in relation to an offence or offences (the *illegal activity*); and
- (b) the offence is a \*serious offence, or one or more of the offences are serious offences; and
- (c) at the hearing of the application, evidence is given that the value of the \*person's property during or after:
  - (i) the illegal activity; or
  - (ii) any other \*unlawful activity that the person has engaged in that constitutes a \*terrorism offence; or
  - (iii) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;

exceeded the value of the person's property before the illegal activity and the other unlawful activity;

the court is to treat the value of the \*benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

- (2) The amount treated as the value of the \*benefits under subsection (1) is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the illegal activity; or
  - (b) any other \*unlawful activity that the person has engaged in that constitutes a \*terrorism offence; or
  - (c) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;
- (3) If evidence is given, at the hearing of the application, of the person's expenditure during the period referred to in subsection (5), the amount of the expenditure is presumed, unless the contrary is proved, to be the value of a \*benefit that, because of the illegal activity, was provided to the person.
- (4) Subsection (3) does not apply to expenditure to the extent that it resulted in acquisition of property that is taken into account under subsection (1).
- (5) The period for the purposes of subparagraph (1)(c)(iii), paragraph (2)(c) and subsection (3) is:
- (a) if some or all of the person's property, or property that is suspected of being subject to the \*effective control of the person, is covered by a \*restraining order—the period of 6 years preceding the application for the restraining order;
  - (b) otherwise—the period of 6 years preceding the application for the \*pecuniary penalty order;
- and includes the period since that application for the restraining order or the pecuniary penalty order was made.

### **125 Value of benefits may be as at time of assessment**

- (1) In quantifying the value of a \*benefit for the purposes of this Subdivision, the court may treat as the value of the benefit the value that the benefit would have had if derived at the time the court makes its assessment of the value of benefits.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) Without limiting subsection (1), the court may have regard to any decline in the purchasing power of money between the time when the \*benefit was derived and the time the court makes its assessment.

### **126 Matters that do not reduce the value of benefits**

In assessing the value of \*benefits that a person has derived from the commission of an offence or offences (the *illegal activity*), none of the following are to be subtracted:

- (a) expenses or outgoings the person incurred in relation to the illegal activity;
- (b) the value of any benefits that the person derives as \*agent for, or otherwise on behalf of, another person (whether or not the other person receives any of the benefits).

### **127 Benefits already the subject of pecuniary penalty**

- (1) A \*benefit is not to be taken into account for the purposes of this Subdivision if a pecuniary penalty has been imposed in respect of the benefit under:
- (a) this Act; or
  - (b) Division 3 of Part XIII of the *Customs Act 1901*; or
  - (c) a law of a Territory; or
  - (d) a law of a State.
- (2) To avoid doubt, an amount payable under a \*literary proceeds order is a pecuniary penalty for the purposes of this section.

### **128 Property under a person's effective control**

In assessing the value of \*benefits that a person has derived, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's \*effective control.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **129 Effect of property vesting in an insolvency trustee**

In assessing the value of \*benefits that a person has derived, the \*person's property is taken to continue to be the person's property if it vests in any of the following:

- (a) in relation to a bankruptcy—the trustee of the estate of the bankrupt; or
- (b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement; or
- (c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement; or
- (d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.

### **Subdivision C—Reducing penalty amounts**

#### **130 Reducing penalty amounts to take account of forfeiture and proposed forfeiture**

The \*penalty amount under a \*pecuniary penalty order against a person is reduced by an amount equal to the value, as at the time of the making of the order, of any property that is \*proceeds of the \*unlawful activity to which the order relates if:

- (a) the property has been forfeited, under this Act or another law of the Commonwealth or under a law of a \*non-governing Territory, in relation to the unlawful activity to which the order relates; or
- (b) an application has been made for a \*forfeiture order that would cover the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **131 Reducing penalty amounts to take account of tax paid**

- (1) The court must reduce the \*penalty amount under a \*pecuniary penalty order against a person by an amount that, in the court's opinion, represents the extent to which tax that the person has paid is attributable to the \*benefits to which the order relates.
- (2) The tax may be tax payable under a law of the Commonwealth, a State, a Territory or a foreign country.

### **132 Reducing penalty amounts to take account of fines etc.**

The court may, if it considers it appropriate to do so, reduce the \*penalty amount under a \*pecuniary penalty order against a person by an amount equal to the amount payable by the person by way of fine, restitution, compensation or damages in relation to an offence to which the order relates.

### **Subdivision D—Varying pecuniary penalty orders to increase penalty amounts**

#### **133 Varying pecuniary penalty orders to increase penalty amounts**

- (1) The court may, on the application of the \*DPP, vary a \*pecuniary penalty order against a person by increasing the \*penalty amount if one or more of subsections (2), (2A) or (3) apply. The amount of each increase is as specified in the relevant subsection.
- (2) The \*penalty amount may be increased if:
  - (a) the penalty amount was reduced under section 130 to take account of a forfeiture of property or a proposed \*forfeiture order against property; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) an appeal against the forfeiture or forfeiture order is allowed, or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made.

The amount of the increase is equal to the value of the property.

- (2A) The \*penalty amount may be increased if:
  - (a) the penalty amount was reduced under section 130 to take account of a forfeiture of property or a proposed \*forfeiture order against property; and
  - (b) one of the following orders has been made:
    - (i) an order under section 73 or 94 excluding an \*interest in the property from forfeiture;
    - (ii) an order under section 77 or 94A (which deal with compensation) directing the Commonwealth to pay an amount to a person in relation to a proportion of an interest in the property that was not derived or realised from the commission of any offence;
    - (iii) an order under section 102 (which deals with the recovery of property) in relation to an interest in the property.

The amount of the increase is such amount as the court considers appropriate.

- (2B) In determining the amount of the increase for the purposes of subsection (2A), the court may have regard to:
  - (a) if subparagraph (2A)(b)(i) or (iii) applies—the value of the interest, as at the time the order was made; and
  - (b) if subparagraph (2A)(b)(ii) applies—the amount that the Commonwealth was required to pay; and
  - (c) any other matter the court considers relevant.

- (3) The \*penalty amount may be increased if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the penalty amount was reduced under section 131 to take account of an amount of tax the person paid; and
- (b) an amount is repaid or refunded to the person in respect of that tax.

The amount of the increase is equal to the amount repaid or refunded.

- (4) The \*DPP's application may deal with more than one increase to the same \*penalty amount.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—How pecuniary penalty orders are obtained**

### **134 DPP may apply for a pecuniary penalty order**

- (1) The \*DPP may apply for a \*pecuniary penalty order.
- (2) If the application relates to a person's conviction of a \*serious offence, the application must be made before:
  - (a) the end of the period of 9 months after the \*conviction day;  
or
  - (b) if an \*extension order is in force at the end of that period—the end of the period of 3 months after the end of the extended period relating to that extension order.
- (3) If the application relates to a person's conviction of an \*indictable offence that is not a \*serious offence, the application must be made before the end of the period of 6 months after the \*conviction day.
- (4) An application may be made in relation to one or more offences.
- (5) An application may be made for a \*pecuniary penalty order in relation to an offence even if:
  - (a) a \*forfeiture order in relation to the offence, or an application for such a forfeiture order, has been made; or
  - (b) Part 2-3 (forfeiture on conviction of a serious offence) applies to the offence.
- (6) Despite subsections (2) and (3), the court hearing the application may give leave for the application to be made after the time before which an application would otherwise need to be made under those subsections if it is satisfied that it would be in the interests of justice to allow the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **135 Additional application for a pecuniary penalty order**

- (1) The \*DPP cannot, unless the court gives leave, apply for a \*pecuniary penalty order against a person in respect of \*benefits the person derived from the commission of an offence if:
  - (a) an application has previously been made:
    - (i) under this Division; or
    - (ii) under another law of the Commonwealth; or
    - (iii) under a law of a \*non-governing Territory;  
for a pecuniary penalty in respect of those benefits the person derived from the commission of the offence; and
  - (b) the application has been finally determined on the merits.
- (2) The court must not give leave unless it is satisfied that:
  - (a) the \*benefit to which the new application relates was identified only after the first application was determined; or
  - (b) necessary evidence became available only after the first application was determined; or
  - (c) it is in the interests of justice to give the leave.
- (3) An application for a \*literary proceeds order is not, for the purposes of this section, an application for a pecuniary penalty.

### **136 Notice of application**

- (1) The \*DPP must give written notice of the application to a person who would be subject to the \*pecuniary penalty order if it were made.
- (2) The \*DPP must include a copy of the application with the notice.
- (3) The \*DPP must give a copy of any affidavit supporting the application to a person who would be subject to the \*pecuniary

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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penalty order (if it were made) within a reasonable time before the hearing of the application.

### **137 Amendment of application**

- (1) The court hearing the application may amend the application:
  - (a) on application by the \*DPP; or
  - (b) with the consent of the DPP.
- (2) However, the court must not amend the application so as to include an additional \*benefit in the application unless the court is satisfied that:
  - (a) the benefit was not reasonably capable of identification when the application was originally made; or
  - (b) necessary evidence became available only after the application was originally made.
- (3) On applying for an amendment to include an additional \*benefit in the application, the \*DPP must give to the person against whom the \*pecuniary penalty order would be made a written notice of the application to amend.

### **138 Procedure on application**

- (1) The person who would be subject to the \*pecuniary penalty order if it were made may appear and adduce evidence at the hearing of the application.
- (2) The court may, in determining the application, have regard to:
  - (a) the transcript of any proceeding against the person for an offence that constitutes \*unlawful activity; and
  - (b) the evidence given in any such proceeding.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **139 Applications to courts before which persons are convicted**

If an application for a \*pecuniary penalty order is made to a court before which a person was convicted of an \*indictable offence:

- (a) the application may be dealt with by the court; and
- (b) any power in relation to the relevant order may be exercised by the court;

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

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Enforcement of pecuniary penalty orders**

### **140 Enforcement of pecuniary penalty orders**

- (1) An amount payable by a person to the Commonwealth under a \*pecuniary penalty order is a civil debt due by the person to the Commonwealth.
- (2) A \*pecuniary penalty order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.
- (3) However, if the order was made under subsection 117(2) when sentence was being passed on the person for the offence to which the order relates, the order cannot be enforced against the person within the period of 6 months after the order was made.
- (4) The debt arising from the order is taken to be a judgment debt.
- (5) If a \*pecuniary penalty order is made against a person after the person's death, this section has effect as if the person had died on the day after the order was made.

### **141 Property subject to a person's effective control**

- (1) If:
  - (a) a person is subject to a \*pecuniary penalty order; and
  - (b) the \*DPP applies to the court for an order under this section; and
  - (c) the court is satisfied that particular property is subject to the \*effective control of the person;the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (2) The order under subsection (1) may be enforced against the property as if the property were the \*person's property.
- (3) A \*restraining order may be made in respect of the property as if:
  - (a) the property were the \*person's property; and
  - (b) the person had committed a \*serious offence.
- (4) If the \*DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:
  - (a) the person who is subject to the \*pecuniary penalty order; and
  - (b) any person whom the DPP has reason to believe may have an \*interest in the property.
- (5) The person who is subject to the \*pecuniary penalty order, and any person who claims an \*interest in the property, may appear and adduce evidence at the hearing of the application.

#### **142 Charge on property subject to restraining order**

- (1) If:
  - (a) a \*pecuniary penalty order is made against a person in relation to an \*indictable offence; and
  - (b) a \*restraining order is, or has been, made against:
    - (i) the \*person's property; or
    - (ii) another person's property in relation to which an order under subsection 141(1) is, or has been, made; and
  - (c) the restraining order relates to that offence or a \*related offence;then, upon the making of the later of the orders, there is created, by force of this section, a charge on the property to secure the payment to the Commonwealth of the \*penalty amount.
- (2) The charge ceases to have effect in respect of the property:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) if the \*pecuniary penalty order was made in relation to the person's conviction of the \*indictable offence and that conviction is \*quashed—upon the order being discharged under Division 5; or
- (b) upon the discharge of the pecuniary penalty order or the \*restraining order by a court hearing an appeal against the making of the order; or
- (c) upon payment to the Commonwealth of the \*penalty amount in satisfaction of the pecuniary penalty order; or
- (d) upon the sale or other disposition of the property:
  - (i) under an order under Division 4 of Part 4-1; or
  - (ii) by the owner of the property with the consent of the court that made the pecuniary penalty order; or
  - (iii) if the restraining order directed the \*Official Trustee to take custody and control of the property—by the owner of the property with the consent of the Official Trustee; or
- (e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

(3) The charge:

- (a) is subject to every \*encumbrance on the property (other than an encumbrance in which the person referred to paragraph (1)(a) has an \*interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and
- (b) has priority over all other encumbrances; and
- (c) subject to subsection (2), is not affected by any change of ownership of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **143 Charges may be registered**

- (1) If:
  - (a) a charge is created by section 142 on property of a particular kind; and
  - (b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind;the \*Official Trustee or the \*DPP may cause the charge so created to be registered under the provisions of that law.
- (2) A person who purchases or otherwise acquires an \*interest in the property after the registration of the charge is, for the purposes of paragraph 142(2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

### **144 Penalty amounts exceeding the court's jurisdiction**

- (1) If:
  - (a) a court makes a \*pecuniary penalty order of a particular amount; and
  - (b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount;the registrar of the court must issue a certificate containing the particulars specified in the regulations.
- (2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.
- (3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—The effect on pecuniary penalty orders of convictions being quashed**

### **145 Pecuniary penalty order unaffected if not made in relation to a conviction**

A \*pecuniary penalty order made in relation to an offence but not made in relation to a person's conviction of the offence is not affected if the person is convicted of the offence and the conviction is subsequently \*quashed.

### **146 Discharge of pecuniary penalty order if made in relation to a conviction**

- (1) Subject to subsections (2) and (3), a \*pecuniary penalty order made in relation to a person's conviction of an offence is discharged if:
  - (a) the person's conviction of any of the offences to which the order relates is subsequently \*quashed; and
  - (b) the \*DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed or varied.
- (2) Unless and until a court decides otherwise on such an application, the \*quashing of the conviction does not affect the \*pecuniary penalty order:
  - (a) for 14 days after the conviction is quashed; and
  - (b) if the \*DPP makes such an application.
- (2A) To avoid doubt, the \*DPP may make an application to confirm the order and an application to vary the order, and the court may hear both applications at the same time.
- (3) A \*pecuniary penalty order made in relation to a person's conviction of an offence is discharged if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the person's conviction of the offence is subsequently \*quashed; and
- (b) the order does not relate to any other offence; and
- (c) the offence is not a \*serious offence.

#### **147 Notice of application for confirmation or variation of pecuniary penalty order**

The \*DPP must give to the person written notice of an application for confirmation or variation of the \*pecuniary penalty order.

Note: If the DPP applies for confirmation or variation of a pecuniary penalty order, it can also apply for an examination order under Part 3-1.

#### **148 Procedure on application for confirmation or variation of pecuniary penalty order**

- (1) The person may appear and adduce evidence at the hearing of the application for confirmation or variation of the order.
- (2) The court may, in determining the application, have regard to:
  - (a) the transcript of any proceeding against the person for:
    - (i) any of the offences to which the order relates of which the person was convicted; or
    - (ii) if the person was taken to be convicted of any of those offences because of paragraph 331(1)(c)—the other offence referred to in that paragraph;  
including any appeals relating to such a conviction; and
  - (b) the evidence given in any such proceeding.

#### **149 Court may confirm pecuniary penalty order**

The court may confirm the \*pecuniary penalty order if the court is satisfied that, when the \*DPP applied for the order, the court could

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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have made the order without relying on the person's conviction that was \*quashed.

### **149A Court may vary pecuniary penalty order**

- (1) The court may vary the \*pecuniary penalty order by reducing the \*penalty amount by an amount worked out under subsection (2) if the court is satisfied that:
  - (a) the order relates to more than one offence; and
  - (b) when the \*DPP applied for the order, the court could have made the order in relation to at least one of the offences that has not been \*quashed.
- (2) The amount is an amount equal to so much of the \*penalty amount as the court reasonably believes to be attributable to a person's conviction of an offence:
  - (a) to which the \*pecuniary penalty order relates; and
  - (b) that was \*quashed.
- (3) In determining the amount by which the \*penalty amount should be reduced under subsection (2), the court may have regard to:
  - (a) the transcripts and evidence referred to in subsection 148(2); and
  - (b) the transcript of, and the evidence given in, any proceedings relating to the application for the \*pecuniary penalty order or any application to vary the order; and
  - (c) any other matter that the court considers relevant.

### **150 Effect of court's decision on confirmation or variation of pecuniary penalty order**

- (1) If the court confirms the \*pecuniary penalty order under section 149, or varies the order under section 149A, the order is

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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taken not to be affected by the \*quashing of the person's conviction of the offence.

- (2) If the court decides not to confirm or vary the \*pecuniary penalty order, the order is discharged.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 2-5—Literary proceeds orders**

### **151 Simplified outline of this Part**

If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. (There is no requirement that a person has been convicted of the offence.)

### **Division 1—Making literary proceeds orders**

#### **152 Making literary proceeds orders**

- (1) A court with \*proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
  - (a) the \*DPP applies for the order; and
  - (b) the court is satisfied that the person has committed an \*indictable offence (whether or not the person has been convicted of the offence); and
  - (c) the court is satisfied that the person has derived \*literary proceeds in relation to the offence.
  
- (2) A court with \*proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
  - (a) the \*DPP applies for the order; and
  - (b) the court is satisfied that the person has committed a \*foreign indictable offence (whether or not the person has been convicted of the offence); and
  - (c) the court is satisfied that the person has derived \*literary proceeds in relation to the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (3) However, the \*literary proceeds must have been derived after the commencement of this Act.

Note: Because of section 14, it does not matter whether the offence to which the order relates was committed before or after the commencement of this Act.

- (4) The court's power to make a \*literary proceeds order in relation to an offence is not affected by the existence of another \*confiscation order in relation to that offence.

### **153 Meaning of *literary proceeds***

- (1) *Literary proceeds* are any \*benefit that a person derives from the commercial exploitation of:
- (a) the person's notoriety resulting, directly or indirectly, from the person committing an \*indictable offence or a \*foreign indictable offence; or
  - (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.
- (2) The commercial exploitation may be by any means, including:
- (a) publishing any material in written or electronic form; or
  - (b) any use of media from which visual images, words or sounds can be produced; or
  - (c) any live entertainment, representation or interview.
- (3) If the offence is an \*indictable offence, it does not matter whether the \*benefits are derived within or outside \*Australia.
- (3A) If the offence is a \*foreign indictable offence, then a \*benefit is not treated as \*literary proceeds unless the benefit is derived in \*Australia or transferred to Australia.
- (4) In determining:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) whether a person has derived \*literary proceeds; or
- (b) the value of literary proceeds that a person has derived; the court may treat as property of the person any property that, in the court's opinion:
- (c) is subject to the person's \*effective control; or
- (d) was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person's direction.

### **154 Matters taken into account in deciding whether to make literary proceeds orders**

In deciding whether to make a \*literary proceeds order, the court:

- (a) must take into account:
  - (i) the nature and purpose of the product or activity from which the \*literary proceeds were derived; and
  - (ii) whether supplying the product or carrying out the activity was in the public interest; and
  - (iii) the social, cultural or educational value of the product or activity; and
  - (iv) the seriousness of the offence to which the product or activity relates; and
  - (v) how long ago the offence was committed; and
- (b) may take into account such other matters as it thinks fit.

### **155 Additional literary proceeds orders**

More than one \*literary proceeds order may be made against a person in relation to the same offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **156 Ancillary orders**

The court that made a \*literary proceeds order, or any other court that could have made the literary proceeds order, may make orders ancillary to the literary proceeds order, either when it makes the literary proceeds order or at a later time.

### **157 Acquittals do not affect literary proceeds orders**

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a \*literary proceeds order in relation to the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—Literary proceeds amounts**

### **158 Determining literary proceeds amounts**

- (1) The amount that a person is ordered to pay to the Commonwealth under a \*literary proceeds order (the *literary proceeds amount*) is the amount that the court thinks appropriate.
- (2) However, the amount:
  - (a) must not exceed the amount of the \*literary proceeds relating to the offence to which the order relates, less any deductions arising under section 159; and
  - (b) may be further reduced under section 160.
- (3) In determining the \*literary proceeds amount, the court is to have regard to such matters as it thinks fit, including any of the following:
  - (a) the amount of the \*literary proceeds relating to the offence;
  - (b) if the person stood trial for the offence—the evidence adduced in the proceedings for the offence;
  - (c) if the person was convicted of the offence—the transcript of the sentencing proceedings.

### **159 Deductions from literary proceeds amounts**

In determining the \*literary proceeds amount under a \*literary proceeds order against a person, the court must deduct the following:

- (a) any expenses and outgoings that the person incurred in deriving the \*literary proceeds;
- (b) the value of any property of the person forfeited under:
  - (i) a \*forfeiture order; or
  - (ii) an \*interstate forfeiture order; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (iii) a \*foreign forfeiture order;  
relating to the offence to which the literary proceeds order relates, to the extent that the property is literary proceeds;
- (c) any amount payable by the person under:
  - (i) a \*pecuniary penalty order; or
  - (ii) an order under section 243B of the *Customs Act 1901*;  
or
  - (iii) an \*interstate pecuniary penalty order; or
  - (iv) a \*foreign pecuniary penalty order;  
relating to the offence to which the literary proceeds order relates, to the extent that the amount is literary proceeds;
- (d) the amount of any previous literary proceeds order made against the person in relation to the same exploitation of the person's notoriety resulting from the person committing the offence in question.

### **160 Reducing literary proceeds amounts to take account of tax paid**

- (1) The court may reduce the \*literary proceeds amount under a \*literary proceeds order against a person by an amount that, in the court's opinion, represents the extent to which tax that the person has paid is attributable to the \*literary proceeds to which the order relates.
- (2) The tax may be tax payable under a law of the Commonwealth, a State, a Territory or a foreign country.

### **161 Varying literary proceeds orders to increase literary proceeds amounts**

- (1) The court may, on the application of the \*DPP, vary a \*literary proceeds order against a person by increasing the \*literary proceeds

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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amount if one or more of subsections (2), (3) and (4) apply. The amount of each increase is as specified in the relevant subsection.

- (2) The \*literary proceeds amount may be increased if:
- (a) the value of property of the person forfeited under a \*forfeiture order, an \*interstate forfeiture order or a \*foreign forfeiture order was deducted from the literary proceeds amount under paragraph 159(b); and
  - (b) an appeal against the forfeiture, or against the order, is allowed.

The amount of the increase is equal to the value of the property.

- (3) The \*literary proceeds amount may be increased if:
- (a) an amount payable under a \*pecuniary penalty order, an order under section 243B of the *Customs Act 1901*, an \*interstate pecuniary penalty order or a \*foreign pecuniary penalty order was deducted from the \*literary proceeds amount under paragraph 159(c); and
  - (b) an appeal against the amount payable, or against the order, is allowed.

The amount of the increase is equal to the amount that was payable.

- (4) The \*literary proceeds amount may be increased if:
- (a) in determining a \*literary proceeds amount, the court took into account, under section 160, an amount of tax paid by the person who is the subject of the order; and
  - (b) an amount is repaid or refunded to the person in respect of that tax.

The amount of the increase is equal to the amount repaid or refunded.

- (5) The \*DPP's application may deal with more than one increase to the same \*literary proceeds amount.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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The confiscation scheme **Chapter 2**

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Section 161

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—How literary proceeds orders are obtained**

### **162 DPP may apply for a literary proceeds order**

- (1) The \*DPP may apply for a \*literary proceeds order.
- (2) An application may be made in relation to one or more offences.

### **163 Notice of application**

- (1) The \*DPP must give written notice of the application to the person who would be subject to the \*literary proceeds order if it were made.
- (2) The \*DPP must include a copy of the application, and any affidavit supporting the application, with the notice.

### **164 Amendment of application**

- (1) The court hearing the application may amend the application:
  - (a) on application by the \*DPP; or
  - (b) with the consent of the DPP.
- (2) However, the court must not amend the application so as to include additional \*literary proceeds in the application unless the court is satisfied that:
  - (a) the literary proceeds were not reasonably capable of identification when the application was originally made; or
  - (b) necessary evidence became available only after the application was originally made.
- (3) If:
  - (a) the \*DPP applies to amend the application for a \*literary proceeds order against a person; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the effect of the amendment would be to include additional \*literary proceeds in the application;  
the DPP must give the person written notice of the application to amend.

### **165 Procedure on application**

The person who would be subject to the \*literary proceeds order if it were made may appear and adduce evidence at the hearing of the application.

### **166 Applications to courts before which persons are convicted**

If an application for a \*literary proceeds order is made to a court before which a person was convicted of an \*indictable offence:

- (a) the application may be dealt with by the court; and
- (b) any power in relation to the relevant order may be exercised by the court;

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

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Enforcement of literary proceeds orders**

### **167 Enforcement of literary proceeds orders**

- (1) An amount payable by a person to the Commonwealth under a \*literary proceeds order is a civil debt due by the person to the Commonwealth.
- (2) A \*literary proceeds order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.
- (3) The debt arising from the order is taken to be a judgment debt.

### **168 Property subject to a person's effective control**

- (1) If:
  - (a) a person is subject to a \*literary proceeds order; and
  - (b) the \*DPP applies to the court for an order under this section; and
  - (c) the court is satisfied that particular property is subject to the \*effective control of the person;the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the literary proceeds order.
- (2) The order under subsection (1) may be enforced against the property as if the property were the \*person's property.
- (3) A \*restraining order may be made in respect of the property as if:
  - (a) the property were the \*person's property; and
  - (b) the person had committed a \*serious offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) If the \*DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:
- (a) the person who is subject to the \*literary proceeds order; and
  - (b) any person whom the DPP reasonably believes may have an \*interest in the property.
- (5) The person who is subject to the \*literary proceeds order, and any person who claims an \*interest in the property, may appear and adduce evidence at the hearing of the application.

### **169 Charge on property subject to restraining order**

- (1) If:
- (a) a \*literary proceeds order is made against a person in relation to an \*indictable offence; and
  - (b) a \*restraining order is, or has been, made against:
    - (i) the \*person's property; or
    - (ii) another person's property in relation to which an order under subsection 168(1) is, or has been, made; and
  - (c) the restraining order relates to that offence or a \*related offence;
- then, upon the making of the later of the orders, there is created, by force of this section, a charge on the property to secure the payment to the Commonwealth of the \*literary proceeds amount.
- (2) The charge ceases to have effect in respect of the property:
- (a) if the \*literary proceeds order was made in relation to the person's conviction of the \*indictable offence and that conviction is \*quashed—upon the order being discharged under Division 5; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) upon the discharge of the literary proceeds order or the \*restraining order by a court hearing an appeal against the making of the order; or
- (c) upon payment to the Commonwealth of the \*literary proceeds amount in satisfaction of the literary proceeds order; or
- (d) upon the sale or other disposition of the property:
  - (i) under an order under Division 4 of Part 4-1; or
  - (ii) by the owner of the property with the consent of the court that made the literary proceeds order; or
  - (iii) where the restraining order directed the \*Official Trustee to take custody and control of the property—by the owner of the property with the consent of the Official Trustee; or
- (e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

(3) The charge:

- (a) is subject to every \*encumbrance on the property (other than an encumbrance in which the person referred to in paragraph (1)(a) has an \*interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and
- (b) has priority over all other encumbrances; and
- (c) subject to subsection (2), is not affected by any change of ownership of the property.

### **170 Charges may be registered**

(1) If:

- (a) a charge is created by section 169 on property of a particular kind; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind;

the \*Official Trustee or the \*DPP may cause the charge so created to be registered under the provisions of that law.

- (2) A person who purchases or otherwise acquires an \*interest in the property after the registration of the charge is, for the purposes of paragraph 169(2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

### **171 Literary proceeds amounts exceeding the court's jurisdiction**

- (1) If:
- (a) a court makes a \*literary proceeds order; and
  - (b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to the \*literary proceeds amount under the order;
- the registrar of the court must issue a certificate containing the particulars specified in the regulations.
- (2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the \*literary proceeds amount.
- (3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—The effect on literary proceeds orders of convictions being quashed**

### **172 Literary proceeds order unaffected if not made in relation to a conviction**

A \*literary proceeds order made in relation to an offence but not made in relation to a person's conviction of the offence is not affected if the person is convicted of the offence and the conviction is subsequently \*quashed.

### **173 Discharge of literary proceeds order if made in relation to a conviction**

- (1) A \*literary proceeds order made in relation to a person's conviction of an offence is discharged if:
  - (a) the person's conviction of the offence is subsequently \*quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and
  - (b) the \*DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.
- (2) However, unless and until a court decides otherwise on such an application, the \*quashing of the conviction does not affect the \*literary proceeds order:
  - (a) for 14 days after the conviction is quashed; and
  - (b) if the \*DPP makes such an application.

### **174 Notice of application for confirmation of literary proceeds order**

The \*DPP must give to the person written notice of an application for confirmation of the \*literary proceeds order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: If the DPP applies for confirmation of a forfeiture order, it can also apply for an examination order under Part 3-1.

### **175 Procedure on application for confirmation of literary proceeds order**

- (1) The person may appear and adduce evidence at the hearing of the application for confirmation of the order.
- (2) The court may, in determining the application, have regard to:
  - (a) the transcript of any proceeding against the person for:
    - (i) the offence of which the person was convicted; or
    - (ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;including any appeals relating to the conviction; and
  - (b) the evidence given in any such proceeding.

### **176 Court may confirm literary proceeds order**

The court may confirm the \*literary proceeds order if the court is satisfied that, when the \*DPP applied for the order, the court could have made the order:

- (a) on the ground that the person had committed the offence in relation to which the person's conviction was \*quashed; and
- (b) without relying on the person's conviction of the offence.

### **177 Effect of court's decision on confirmation of literary proceeds order**

- (1) If the court confirms the \*literary proceeds order under section 176, the order is taken not to be affected by the \*quashing of the person's conviction of the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (2) If the court decides not to confirm the \*literary proceeds order, the order is discharged.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 6—Literary proceeds orders covering future literary proceeds**

### **178 Literary proceeds orders can cover future literary proceeds**

- (1) The court may include in a \*literary proceeds order one or more amounts in relation to \*benefits that the person who is the subject of the order may derive in the future if the court is satisfied that:
  - (a) the person will derive the benefits; and
  - (b) if the person derives the benefits, they will be \*literary proceeds in relation to the offence to which the order relates.
- (2) However, the court must not include an amount in the order unless the \*DPP, in its application for the order, requested the inclusion in the order of one or more amounts in relation to \*benefits that the person who would be the subject of the order may derive in the future.
- (3) Each amount included in the order is to be an amount that the court considers would be a \*literary proceeds amount in relation to a \*benefit that the person may derive in the future, if the court were to make a \*literary proceeds order after the person derived the benefit.

Note: Division 2 describes how literary proceeds amounts are determined.

### **179 Enforcement of literary proceeds orders in relation to future literary proceeds**

If:

- (a) an amount is included in a \*literary proceeds order in relation to \*benefits that the person who is the subject of the order may derive in the future; and
- (b) the person subsequently derives those benefits;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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immediately the benefits are derived, Division 4 applies to the amount as if it were a \*literary proceeds amount under a literary proceeds order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 2-6—Unexplained wealth orders

### 179A Simplified outline of this Part

This Part provides for the making of certain orders relating to unexplained wealth.

A preliminary unexplained wealth order requires a person to attend court for the purpose of enabling the court to decide whether to make an unexplained wealth order against the person.

An unexplained wealth order is an order requiring the person to pay an amount equal to so much of the person's total wealth as the person cannot satisfy the court is not derived from certain offences.

### Division 1—Making unexplained wealth orders

#### 179B Making an order requiring a person to appear

- (1) A court with \*proceeds jurisdiction may make an order (a *preliminary unexplained wealth order*) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an \*unexplained wealth order in relation to the person if:
  - (a) the \*DPP applies for an unexplained wealth order in relation to the person; and
  - (b) the court is satisfied that an \*authorised officer has reasonable grounds to suspect that the person's \*total wealth exceeds the value of the person's \*wealth that was \*lawfully acquired; and
  - (c) any affidavit requirements in subsection (2) for the application have been met.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

*Affidavit requirements*

- (2) An application for an \*unexplained wealth order in relation to a person must be supported by an affidavit of an \*authorised officer stating:
- (a) the identity of the person; and
  - (b) that the authorised officer suspects that the person's \*total wealth exceeds the value of the person's \*wealth that was \*lawfully acquired; and
  - (c) the following:
    - (i) the property the authorised officer knows or reasonably suspects was lawfully acquired by the person;
    - (ii) the property the authorised officer knows or reasonably suspects is owned by the person or is under the \*effective control of the person.

The affidavit must include the grounds on which the authorised officer holds the suspicions referred to in paragraphs (b) and (c).

- (3) The court must make the order under subsection (1) without notice having been given to any person if the \*DPP requests the court to do so.

**179C Application to revoke a preliminary unexplained wealth order**

- (1) If a court makes a \*preliminary unexplained wealth order requiring a person to appear before the court, the person may apply to the court to revoke the order.
- (2) The application must be made:
- (a) within 28 days after the person is notified of the \*preliminary unexplained wealth order; or
  - (b) if the person applies to the court, within that period of 28 days, for an extension of the time for applying for

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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revocation—within such longer period, not exceeding 3 months, as the court allows.

- (4) However, the \*preliminary unexplained wealth order remains in force until the court revokes the order.
- (5) The court may revoke the \*preliminary unexplained wealth order on application under subsection (1) if satisfied that:
  - (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
  - (b) it is in the public interest to do so; or
  - (c) it is otherwise in the interests of justice to do so.

**179CA Notice and procedure on application to revoke preliminary unexplained wealth order**

- (1) This section applies if a person applies under section 179C for revocation of a \*preliminary unexplained wealth order.
- (2) The applicant may appear and adduce material at the hearing of the application.
- (3) The applicant must give the \*DPP:
  - (a) written notice of the application; and
  - (b) a copy of any affidavit supporting the application.
- (4) The \*DPP may appear and adduce additional material at the hearing of the application.
- (5) The \*DPP must give the applicant a copy of any affidavit it proposes to rely on to contest the application.
- (6) The notice and copies of affidavits must be given under subsections (3) and (5) within a reasonable time before the hearing of the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **179D Notice of revocation of a preliminary unexplained wealth order**

If a \*preliminary unexplained wealth order is revoked under section 179C, the \*DPP must give written notice of the revocation to the applicant for the revocation.

### **179E Making an unexplained wealth order**

- (1) A court with \*proceeds jurisdiction may make an order (an *unexplained wealth order*) requiring a person to pay an amount to the Commonwealth if:
  - (a) the court has made a \*preliminary unexplained wealth order in relation to the person; and
  - (b) the court is not satisfied that the whole or any part of the person's \*wealth was not derived from one or more of the following:
    - (i) an offence against a law of the Commonwealth;
    - (ii) a \*foreign indictable offence;
    - (iii) a \*State offence that has a federal aspect.
- (2) The court must specify in the order that the person is liable to pay to the Commonwealth an amount (the person's *unexplained wealth amount*) equal to the amount that, in the opinion of the court, is the difference between:
  - (a) the person's \*total wealth; and
  - (b) the sum of the values of the property that the court is satisfied was not derived from one or more of the following:
    - (i) an offence against a law of the Commonwealth;
    - (ii) a \*foreign indictable offence;
    - (iii) a \*State offence that has a federal aspect;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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reduced by any amount deducted under section 179J (reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.).

- (3) In proceedings under this section, the burden of proving that a person's \*wealth is not derived from one or more of the offences referred to in paragraph (1)(b) lies on the person.
- (4) To avoid doubt, when considering whether to make an order under subsection (1), the court may have regard to information not included in the application.
- (5) To avoid doubt, subsection (3) has effect despite section 317.
- (6) Despite subsection (1), the court may refuse to make an order under that subsection if the court is satisfied that it is not in the public interest to make the order.

#### **179EA Refusal to make an order for failure to give undertaking**

- (1) The court may refuse to make a \*preliminary unexplained wealth order or an \*unexplained wealth order if the Commonwealth refuses or fails to give the court an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.
- (2) The \*DPP may give such an undertaking on behalf of the Commonwealth.

#### **179EB Costs**

If the court refuses to make a \*preliminary unexplained wealth order or an \*unexplained wealth order, it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **179F Ancillary orders**

- (1) A court that makes an \*unexplained wealth order, or any other court that could have made the unexplained wealth order, may make orders ancillary to the order, either when the order is made or at a later time.
- (2) A court that makes a \*preliminary unexplained wealth order, or any other court that could have made the order, may make orders ancillary to the order, either when the order is made or at a later time.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—Unexplained wealth amounts**

### **179G Determining unexplained wealth amounts**

#### *Meaning of wealth*

- (1) The property of a person that, taken together, constitutes the **wealth** of a person for the purposes of this Part is:
  - (a) property owned by the person at any time;
  - (b) property that has been under the \*effective control of the person at any time;
  - (c) property that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time;including property owned, effectively controlled, disposed of or consumed before the commencement of this Part.

#### *Meaning of total wealth*

- (2) The **total wealth** of a person is the sum of all of the values of the property that constitutes the person's wealth.

#### *Value of property*

- (3) The value of any property that has been disposed of or consumed, or that is for any other reason no longer available, is the greater of:
  - (a) the value of the property at the time it was acquired; and
  - (b) the value of the property immediately before it was disposed of, consumed or stopped being available.
- (4) The value of any other property is the greater of:
  - (a) the value of the property at the time it was acquired; and
  - (b) the value of the property on the day that the application for the \*unexplained wealth order was made.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.



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**179H Effect of property vesting in an insolvency trustee**

In assessing the value of property of a person, property is taken to continue to be the \*person's property if it vests in any of the following:

- (a) in relation to a bankruptcy—the trustee of the estate of the bankrupt;
- (b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement;
- (c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement;
- (d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.

**179J Reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.**

In determining the \*unexplained wealth amount specified in an \*unexplained wealth order in relation to a person, the court must deduct an amount equal to the following:

- (a) the value, at the time of making the order, of any property of the person forfeited under:
  - (i) a \*forfeiture order; or
  - (ii) an \*interstate forfeiture order; or
  - (iii) a \*foreign forfeiture order;
- (b) the sum of any amounts payable by the person under:
  - (i) a \*pecuniary penalty order; or
  - (ii) a \*literary proceeds order; or
  - (iii) an order under section 243B of the *Customs Act 1901*;  
or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (iv) an \*interstate pecuniary penalty order; or
- (v) a \*foreign pecuniary penalty order.

### **179K Varying unexplained wealth orders to increase amounts**

(1) The court may, on the application of the \*DPP, vary an \*unexplained wealth order against a person by increasing the \*unexplained wealth amount if subsection (2) or (3) applies. The amount of the increase is as specified in subsection (2) or (3).

- (2) The \*unexplained wealth amount may be increased if:
- (a) the value of property of the person forfeited under a \*forfeiture order, an \*interstate forfeiture order or a \*foreign forfeiture order was deducted from the unexplained wealth amount under paragraph 179J(a); and
  - (b) an appeal against the forfeiture, or against the order, is allowed.

The amount of the increase is equal to the value of the property.

- (3) The \*unexplained wealth amount may be increased if:
- (a) an amount payable under a \*pecuniary penalty order, a \*literary proceeds order, an order under section 243B of the *Customs Act 1901*, an \*interstate pecuniary penalty order or a \*foreign pecuniary penalty order was deducted from the \*unexplained wealth amount under paragraph 179J(b); and
  - (b) an appeal against the amount payable, or against the order, is allowed.

The amount of the increase is equal to the amount that was payable.

- (4) The \*DPP's application may deal with more than one increase to the same \*unexplained wealth amount.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **179L Relieving certain dependants from hardship**

- (1) The court making an \*unexplained wealth order in relation to a person must make another order directing the Commonwealth, once the unexplained wealth order is satisfied, to pay a specified amount to a \*dependant of the person if the court is satisfied that:
  - (a) the unexplained wealth order would cause hardship to the dependant; and
  - (b) the specified amount would relieve that hardship; and
  - (c) if the dependant is aged at least 18 years—the dependant had no knowledge of the person’s conduct that is the subject of the unexplained wealth order.
- (2) The specified amount must not exceed the person’s \*unexplained wealth amount.
- (3) An order under this section may relate to more than one of the person’s \*dependants.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—How unexplained wealth orders are obtained**

### **179M DPP may apply for an unexplained wealth order**

The \*DPP may apply for an \*unexplained wealth order.

### **179N Notice of application**

- (1) This section sets out the notice requirements if the \*DPP has made an application for an \*unexplained wealth order.
- (2) If a court with \*proceeds jurisdiction makes a \*preliminary unexplained wealth order in relation to the person, the \*DPP must, within 7 days of the making of the order:
  - (a) give written notice of the order to the person who would be subject to the \*unexplained wealth order if it were made; and
  - (b) provide to the person a copy of the application for the unexplained wealth order, and the affidavit referred to in subsection 179B(2).
- (3) The \*DPP must also give a copy of any other affidavit supporting the application to the person who would be subject to the \*unexplained wealth order if it were made.
- (4) The copies must be given under subsection (3) within a reasonable time before the hearing in relation to whether the order is to be made.

### **179P Additional application for an unexplained wealth order**

- (1) The \*DPP cannot, unless the court gives leave, apply for an \*unexplained wealth order against a person if:
  - (a) an application has previously been made for an unexplained wealth order in relation to the person; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (b) the application has been finally determined on the merits.
- (2) The court must not give leave unless it is satisfied that:
  - (a) the \*wealth to which the new application relates was identified only after the first application was determined; or
  - (b) necessary evidence became available only after the first application was determined; or
  - (c) it is in the interests of justice to give the leave.

### **179Q Procedure on application and other notice requirements**

- (1) The person who would be subject to an \*unexplained wealth order if it were made may appear and adduce evidence at the hearing in relation to whether the order is to be made.
- (2) The person must give the \*DPP written notice of any grounds on which he or she proposes to contest the making of the order.
- (3) The \*DPP may appear and adduce evidence at the hearing in relation to whether an \*unexplained wealth order is to be made.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Enforcement of unexplained wealth orders**

### **179R Enforcement of an unexplained wealth order**

- (1) An amount payable by a person to the Commonwealth under an \*unexplained wealth order is a civil debt due by the person to the Commonwealth.
- (2) An \*unexplained wealth order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.
- (3) The debt arising from the order is taken to be a judgment debt.
- (4) If an \*unexplained wealth order is made against a person after the person's death, this section has effect as if the person had died on the day after the order was made.

### **179S Property subject to a person's effective control**

- (1) If:
  - (a) a person is subject to an \*unexplained wealth order; and
  - (b) the \*DPP applies to the court for an order under this section; and
  - (c) the court is satisfied that particular property is subject to the \*effective control of the person;the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the unexplained wealth order.
- (2) The order under subsection (1) may be enforced against the property as if the property were the \*person's property.
- (3) A \*restraining order may be made in respect of the property as if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the property were the \*person's property; and
- (b) there were reasonable grounds to suspect that:
  - (i) the person had committed an offence against a law of the Commonwealth, a \*foreign indictable offence or a \*State offence that has a federal aspect;
  - (ii) the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.
- (4) If the \*DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:
  - (a) the person who is subject to the \*unexplained wealth order; and
  - (b) any person whom the DPP has reason to believe may have an \*interest in the property.
- (5) The person who is subject to the \*unexplained wealth order, and any person who claims an \*interest in the property, may appear and adduce evidence at the hearing of the application.

### **179SA Legal expenses**

- (1) If the court considers that it is appropriate to do so, it may order that the whole, or a specified part, of specified property covered by an order under subsection 179S(1) is not available to satisfy the \*unexplained wealth order and may instead be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.
- (2) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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payment of expenses from the disposal of any property covered by an order under subsection (1) and may make any further or ancillary orders it considers appropriate.

**179T Amounts exceeding the court's jurisdiction**

- (1) If:
  - (a) a court makes an \*unexplained wealth order of a particular amount; and
  - (b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount;the registrar of the court must issue a certificate containing the particulars specified in the regulations.
- (2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.
- (3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 5—Oversight**

### **179U Parliamentary supervision**

- (1) The operation of this Part and section 20A is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement (the *Committee*).
- (2) The Committee may require the Australian Crime Commission, the Australian Federal Police, the \*DPP or any other federal agency or authority that is the recipient of any material disclosed as the result of the operation of this Part to appear before it from time to time to give evidence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Chapter 3—Information gathering**

### **Part 3-1—Examinations**

#### **Division 1—Examination orders**

##### **180 Examination orders relating to restraining orders**

- (1) If a \*restraining order is in force, the court that made the restraining order, or any other court that could have made the restraining order, may make an order (an *examination order*) for the \*examination of any person, including:
  - (a) a person whose property is, or a person who has or claims an \*interest in property that is, the subject of the restraining order; or
  - (b) a person who is a \*suspect in relation to the restraining order; or
  - (c) the spouse or \*de facto partner of a person referred to in paragraph (a) or (b);about the \*affairs of a person referred to in paragraph (a), (b) or (c).
- (2) The \*examination order ceases to have effect if the \*restraining order to which it relates ceases to have effect.

##### **180A Examination orders relating to applications for exclusion from forfeiture**

- (1) If an application for an order under section 73 or 94 for an \*interest in property to be excluded from forfeiture is made, the court to which the application is made may make an order (an *examination order*) for the \*examination of any person including:
  - (a) a person who has or claims an interest in the property; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

- (b) the spouse or \*de facto partner of a person referred to in paragraph (a);  
about the \*affairs of a person referred to in paragraph (a) or (b).
- (2) The \*examination order ceases to have effect when:
  - (a) the application is withdrawn; or
  - (b) the court makes a decision on the application.

**180B Examination orders relating to applications for compensation**

- (1) If an application for an order under section 77 or 94A (which deal with compensation) is made in relation to an \*interest in property that has been or may be forfeited, the court to which the application is made may make an order (an *examination order*) for the \*examination of any person including:
  - (a) a person who has or claims an \*interest in the property; or
  - (b) the spouse or \*de facto partner of a person referred to in paragraph (a);  
about the \*affairs of a person referred to in paragraph (a) or (b).
- (2) The \*examination order ceases to have effect when:
  - (a) the application is withdrawn; or
  - (b) the court makes a decision on the application.

**180C Examination orders relating to applications under section 102**

- (1) If an application for an order under section 102 (which deals with the recovery of property) is made under section 104 in relation to forfeited property, the court to which the application is made may make an order (an *examination order*) for the \*examination of any person including:
  - (a) a person who has or claims an \*interest in the property; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the spouse or \*de facto partner of a person referred to in paragraph (a);  
about the \*affairs of a person referred to in paragraph (a) or (b).
- (2) The \*examination order ceases to have effect when:
  - (a) the application is withdrawn; or
  - (b) the court makes a decision on the application.

**180D Examination orders relating to enforcement of confiscation orders**

- (1) If a \*confiscation order has been made but not satisfied, the court that made the confiscation order may make an order (an *examination order*) for the \*examination of any person including:
  - (a) a person against whom the confiscation order was made; or
  - (b) the spouse or \*de facto partner of a person referred to in paragraph (a);  
about the \*affairs of a person referred to in paragraph (a) or (b).
- (2) The \*examination order ceases to have effect when proceedings relating to the enforcement of the \*confiscation order are finally determined, withdrawn or otherwise disposed of.

**180E Examination orders relating to restraining orders revoked under section 44**

- (1) If a \*restraining order is revoked under section 44 (which deals with giving security to revoke etc. a restraining order), the court that revoked the restraining order may make an order (an *examination order*) for the \*examination of any person including:
  - (a) a person whose property was, or a person who had an \*interest in property that was, the subject of the restraining order; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the spouse or \*de facto partner of a person referred to in paragraph (a);  
about the \*affairs of a person referred to in paragraph (a) or (b).
- (2) The \*examination order ceases to have effect when the \*restraining order would have ceased to have effect, assuming it had not been revoked under section 44.

### **181 Examination orders relating to applications relating to quashing of convictions**

- (1) If an application relating to the \*quashing of a person's conviction of an offence is made, as mentioned in section 81, 107, 146 or 173, the court to which the application is made may make an order (an *examination order*) for the \*examination of any person, including:
  - (a) the person whose conviction is quashed; or
  - (b) a person whose property is, or a person who has an \*interest in property that is, the subject of the forfeiture, \*pecuniary penalty order or \*literary proceeds order to which the application relates; or
  - (c) the spouse or \*de facto partner of a person referred to in paragraph (a) or (b);  
about the \*affairs of a person referred to in paragraph (a), (b) or (c).
- (2) The \*examination order ceases to have effect:
  - (a) if the application is withdrawn; or
  - (b) when the court makes a decision on the application.

### **182 Applications for examination orders**

- (1) An \*examination order can only be made on application by the \*DPP.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The court must consider an application for an \*examination order without notice having been given to any person if the \*DPP requests the court to do so.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Division 2—Examination notices

### 183 Examination notices

- (1) An \*approved examiner may, on application by the \*DPP, give to a person who is the subject of an \*examination order a written notice (an *examination notice*) for the \*examination of the person.
- (2) However, the \*approved examiner must not give the \*examination notice if:
  - (a) an application has been made under section 42 for the \*restraining order to which the notice relates to be revoked; and
  - (b) the court to which the application is made orders that \*examinations are not to proceed.
- (3) The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the \*approved examiner giving the \*examination notice.
- (4) An *approved examiner* is a person who:
  - (a) holds an office, or is included in a class of people, specified in the regulations; or
  - (b) is appointed by the Minister under this section.

### 184 Additional examination notices

A person who is the subject of an \*examination order may be given more than one \*examination notice.

### 185 Form and content of examination notices

- (1) The \*examination notice:
  - (a) must be in the prescribed form; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) must require the person to attend the \*examination; and
  - (c) must specify the time and place of the examination; and
  - (d) must specify such further information as the regulations require.
- (2) The \*examination notice may require the person to produce at the \*examination the documents specified in the notice.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 3—Conducting examinations****186 Time and place of examination**

- (1) The \*examination of a person must be conducted:
  - (a) at the time and place specified in the \*examination notice; or
  - (b) at such other time and place as the \*approved examiner decides on the request of a person referred to in paragraph 188(3)(b), (c) or (d).
- (2) However, the \*approved examiner must:
  - (a) give the person a written notice withdrawing the \*examination notice; and
  - (b) if the \*examination of the person has started (but not finished)—stop the examination;if, after the examination notice is given:
  - (c) an application has been made under section 42 for the \*restraining order to which the notice relates to be revoked; and
  - (d) the court to which the application is made orders that examinations are not to proceed.
- (3) This section does not prevent the \*approved examiner giving the person a further \*examination notice if the application for revocation of the \*restraining order is unsuccessful.
- (4) The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the \*examination of a person.

**187 Requirements made of person examined**

- (1) The person may be examined on oath or affirmation by:
  - (a) the \*approved examiner; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the \*DPP.
- (2) The \*approved examiner may, for that purpose:
- (a) require the person either to take an oath or to make an affirmation; and
  - (b) administer an oath or affirmation to the person.
- (3) The oath or affirmation to be taken or made by the person for the purposes of the \*examination is an oath or affirmation that the statements that the person will make will be true.
- (4) The \*examination must not relate to a person's \*affairs:
- (a) if the \*examination relates to a \*restraining order and the person is no longer a person whose affairs can, under section 180, be subject to the examination; or
  - (aa) if the examination relates to an application for exclusion from forfeiture and the person is no longer a person whose affairs can, under section 180A, be subject to the examination; or
  - (ab) if the examination relates to an application for an order under section 77 or 94A and the person is no longer a person whose affairs can, under section 180B, be subject to the examination; or
  - (ac) if the examination relates to an application for an order under section 102 and the person is no longer a person whose affairs can, under section 180C, be subject to the examination; or
  - (ad) if the examination relates to a \*confiscation order that has not been satisfied and the person is no longer a person whose affairs can, under section 180D, be subject to the examination; or
  - (ae) if the examination relates to a \*restraining order that has been revoked and the person is no longer a person whose affairs can, under section 180E, be subject to the examination; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) if the examination relates to the \*quashing of a conviction for an offence and the person is no longer a person whose affairs can, under section 181, be subject to the examination.
- (5) The \*approved examiner may require the person to answer a question that:
  - (a) is put to the person at the \*examination; and
  - (b) is relevant to the \*affairs of a person whose affairs can, under section 180, 180A, 180B, 180C, 180D, 180E or 181, be subject to the examination.

### **188 Examination to take place in private**

- (1) The \*examination is to take place in private.
- (2) The \*approved examiner may give directions about who may be present during the \*examination, or during a part of it.
- (3) These people are entitled to be present at the \*examination:
  - (a) the \*approved examiner;
  - (b) the person being examined, and the person's \*lawyer;
  - (c) the \*DPP;
  - (d) any person who is entitled to be present because of a direction under subsection (2).

### **189 Role of the examinee's lawyer**

- (1) The \*lawyer of the person being examined may, at such times during the \*examination as the \*approved examiner determines:
  - (a) address the approved examiner; and
  - (b) examine the person;about matters about which the approved examiner, or the \*DPP, has examined the person.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The \*approved examiner may require a \*lawyer who, in the approved examiner's opinion, is trying to obstruct the \*examination by exercising rights under subsection (1), to stop addressing the approved examiner, or stop his or her examination, as the case requires.

### **190 Examination by video link or telephone**

- (1) The \*approved examiner may, on the request of a person referred to in paragraph 188(3)(b), (c) or (d), direct that a person be examined by video link if:
- (a) the facilities required by subsection (2) are available or can reasonably be made available; and
  - (b) the approved examiner is satisfied that attendance of the person at the place of the \*examination would cause unreasonable expense or inconvenience; and
  - (c) the approved examiner is satisfied that it is consistent with the interests of justice that the person be examined by video link.
- (2) The person can be examined under the direction only if the place where the person is to attend for the purposes of the \*examination is equipped with video facilities that enable the people referred to in subsection 188(3) to see and hear the person be examined.
- (3) An oath or affirmation to be sworn or made by a person who is to be examined under such a direction may be administered either:
- (a) by means of video link, in as nearly as practicable the same way as if the person were to be examined at the place of the \*examination; or
  - (b) on behalf of the \*approved examiner, by a person authorised by the approved examiner, at the place where the person to be examined attends for the purposes of the examination.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) The \*approved examiner may, on the request of a person referred to in paragraph 188(3)(b), (c) or (d), direct that a person be examined by telephone if:
- (a) the approved examiner is satisfied that attendance of the person at the place of the \*examination would cause unreasonable expense or inconvenience; and
  - (b) the approved examiner is satisfied that it is consistent with the interests of justice that the person be examined by telephone.

### **191 Record of examination**

- (1) The \*approved examiner:
- (a) may cause a record to be made of statements made at the \*examination; and
  - (b) must make such a record if the person being examined, or the \*DPP, so requests; and
  - (c) if the record is not a written record—must cause the record to be reduced to writing if the person being examined, or the DPP, so requests.
- (2) If a record made under subsection (1) is in writing or is reduced to writing:
- (a) the \*approved examiner may require the person being examined to read it, or to have it read to him or her, and may require him or her to sign it; and
  - (b) if the person being examined requests in writing that the approved examiner give to the person a copy of the written record—the approved examiner must comply with the request without charge.
- (3) The \*approved examiner may, in complying with the request under paragraph (2)(b), impose on the person being examined such

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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conditions (if any) as the approved examiner reasonably considers to be necessary to prevent improper disclosure of the record.

- (4) The fact that a person being \*examined signs a record as required under paragraph (2)(a) does not of itself constitute an acknowledgment that the record is accurate.

### **192 Questions of law**

The \*approved examiner may:

- (a) on his or her own initiative; or
  - (b) at the request of the person being examined, or the \*DPP;
- refer a question of law arising at the \*examination to the court that made the \*examination order.

### **193 Approved examiner may restrict publication of certain material**

- (1) The \*approved examiner may:
- (a) on his or her own initiative; or
  - (b) at the request of the person being examined, or the \*DPP;
- give directions preventing or restricting disclosure to the public of matters contained in answers given or documents produced in the course of the \*examination.
- (2) In deciding whether or not to give a direction, the \*approved examiner is to have regard to:
- (a) whether:
    - (i) an answer that has been or may be given; or
    - (ii) a document that has been or may be produced; or
    - (iii) a matter that has arisen or may arise;during the \*examination is of a confidential nature or relates to the commission, or to the alleged or suspected

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- commission, of an offence against a law of the Commonwealth or a State or Territory; and
- (b) any unfair prejudice to a person's reputation that would be likely to be caused unless the approved examiner gives the direction; and
  - (c) whether giving the direction is in the public interest; and
  - (d) any other relevant matter.

### **194 Protection of approved examiner etc.**

- (1) The \*approved examiner has, in the performance of his or her duties as an approved examiner, the same protection and immunity as a Justice of the High Court.
- (2) A \*lawyer appearing at the \*examination:
  - (a) on behalf of the person being examined; or
  - (b) as or on behalf of the \*DPP;has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (3) Subject to this Act, the person being \*examined:
  - (a) has the same protection; and
  - (b) in addition to the penalties provided by this Act, is subject to the same liabilities;as a witness in proceedings in the High Court.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—Offences**

Note: In addition to the offences in this Division, there are other offences that may be relevant to examinations, such as sections 137.1 (false or misleading information) and 137.2 (false or misleading documents) of the *Criminal Code*.

### **195 Failing to attend an examination**

A person is guilty of an offence if the person:

- (a) is required by an \*examination notice to attend an \*examination; and
- (b) refuses or fails to attend the examination at the time and place specified in the notice.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### **196 Offences relating to appearance at an examination**

- (1) A person attending an \*examination to answer questions or produce documents must not:
  - (a) refuse or fail to be sworn or to make an affirmation; or
  - (b) refuse or fail to answer a question that the \*approved examiner requires the person to answer; or
  - (c) refuse or fail to produce at the examination a document specified in the \*examination notice that required the person's attendance; or
  - (d) leave the examination before being excused by the approved examiner.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (2) Paragraph (1)(c) does not apply if the person complied with the notice in relation to production of the document to the extent that it was practicable to do so.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

### **197 Privileged information**

(1) Paragraph 196(1)(b) or (c) does not apply if, under:

- (a) a law of the Commonwealth; or
- (b) a law of the State or Territory in which the \*examination takes place;

the person could not, in proceedings before a court, be compelled to answer the question or produce the document.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

(2) However, paragraph 196(1)(b) or (c) applies if the only reason or reasons why the person could not be so compelled are one or more of the following:

- (a) answering the question or producing the document would tend to incriminate the person or to expose the person to a penalty;
- (b) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of \*legal professional privilege;
- (ba) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of \*professional confidential relationship privilege;
- (c) the answer or document would, under a law of the Commonwealth, a State or a Territory relating to the law of evidence, be inadmissible in legal proceedings for a reason other than because:
  - (i) the answer would be privileged from being disclosed; or
  - (ii) the document would be privileged from being produced.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (3) To avoid doubt, the following are not reasons why a person cannot, in proceedings before a court, be compelled to answer a question or produce a document:
- (a) the person is contractually obliged not to disclose information, and answering the question or producing the document would disclose that information;
  - (b) the person is obliged under a law of a foreign country not to disclose information, and answering the question or producing the document would disclose that information.

**197A Giving false or misleading answers or documents**

A person commits an offence if:

- (a) the person is attending an \*examination; and
- (b) the person gives an answer or produces a document in the examination; and
- (c) the answer or document:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which it is misleading.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

**198 Admissibility of answers and documents**

An answer given or document produced in an \*examination is not admissible in evidence in civil or criminal proceedings against the person who gave the answer or produced the document except:

- (a) in criminal proceedings for giving false or misleading information; or
- (b) in proceedings on an application under this Act; or
- (c) in proceedings ancillary to an application under this Act; or
- (d) in proceedings for enforcement of a \*confiscation order; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) in the case of a document—in civil proceedings for or in respect of a right or liability it confers or imposes.

### **199 Unauthorised presence at an examination**

A person is guilty of an offence if the person:

- (a) is present at an \*examination; and
- (b) is not entitled under subsection 188(3) to be present.

Penalty: 30 penalty units.

### **200 Breaching conditions on which records of statements are provided**

A person is guilty of an offence if the person breaches a condition imposed under subsection 191(3) relating to a record given to the person under that subsection.

Penalty: 30 penalty units.

### **201 Breaching directions preventing or restricting publication**

- (1) A person is guilty of an offence if:
- (a) the person publishes a matter contained in answers given or documents produced in the course of an \*examination; and
  - (b) the publication is in contravention of a direction given under section 193 by the \*approved examiner who conducted the examination.

Penalty: 30 penalty units.

- (2) This section does not apply to disclosure of a matter:
- (a) to obtain legal advice or legal representation in relation to the order; or
  - (b) for the purposes of, or in the course of, legal proceedings.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: A defendant bears an evidential burden in relation to the matters in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 3-2—Production orders

### 202 Making production orders

- (1) A magistrate may make an order (a *production order*) requiring a person to:
  - (a) produce one or more \*property-tracking documents to an \*authorised officer; or
  - (b) make one or more property-tracking documents available to an authorised officer for inspection.
- (2) However:
  - (a) the magistrate must not make a \*production order unless the magistrate is satisfied by information on oath that the person is reasonably suspected of having possession or control of such documents; and
  - (b) a production order cannot require documents that are not:
    - (i) in the possession or under the control of a body corporate; or
    - (ii) used or intended to be used in the carrying on of a business;to be produced or made available to an \*authorised officer; and
  - (c) a production order cannot require any accounting records used in the ordinary business of a \*financial institution (including ledgers, day-books, cash-books and account books) to be produced to an \*authorised officer.
- (3) The \*production order can only be made on application by an \*authorised officer of an \*enforcement agency.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) The \*authorised officer need not give notice of the application to any person.
- (5) Each of the following is a ***property-tracking document***:
- (a) a document relevant to identifying, locating or quantifying property of any person:
    - (i) who has been convicted of, charged with, or whom it is proposed to charge with, an \*indictable offence; or
    - (ii) whom there are reasonable grounds to suspect of having engaged in conduct constituting a \*serious offence;
  - (b) a document relevant to identifying or locating any document necessary for the transfer of property of such a person;
  - (c) a document relevant to identifying, locating or quantifying:
    - (i) \*proceeds of an indictable offence, or an \*instrument of an indictable offence, of which a person has been convicted or with which a person has been charged or is proposed to be charged; or
    - (ii) proceeds of a serious offence, or an instrument of a serious offence, that a person is reasonably suspected of having committed;
  - (ca) a document relevant to identifying, locating or quantifying property suspected of being:
    - (i) proceeds of an indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; or
    - (ii) an instrument of a serious offence;whether or not the identity of the person who committed the offence is known;
  - (d) a document relevant to identifying or locating any document necessary for the transfer of property referred to in paragraph (c) or (ca);

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) a document relevant to identifying, locating or quantifying \*literary proceeds in relation to an indictable offence or a \*foreign indictable offence of which a person has been convicted or which a person is reasonably suspected of having committed;
  - (ea) a document relevant to identifying, locating or quantifying the property of a person, if it is reasonable to suspect that the total value of the person's \*wealth exceeds the value of the person's wealth that was \*lawfully acquired;
  - (eb) a document relevant to identifying or locating any document necessary for the transfer of property of such a person;
  - (f) a document that would assist in the reading or interpretation of a document referred to in paragraph (a), (b), (c), (ca), (d) (e), (ea) or (eb).
- (6) It is sufficient for the purposes of subparagraph (5)(c)(ii) or paragraph (5)(ca) that the document is relevant to identifying, locating or quantifying \*proceeds of some offence or other of a kind referred to in that provision. It does not need to be relevant to identifying, locating or quantifying proceeds of a particular offence.

### **203 Contents of production orders**

- (1) A \*production order must:
- (a) specify the nature of the documents required; and
  - (b) specify the place at which the person must produce the documents or make the documents available; and
  - (c) specify the time at which, or the times between which, this must be done; and
  - (ca) specify the form and manner in which those documents are to be produced; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (d) specify the name of the \*authorised officer who, unless he or she inserts the name of another authorised officer in the order, is to be responsible for giving the order to the person; and
  - (e) if the order specifies that information about the order must not be disclosed—set out the effect of section 210 (disclosing existence or nature of production orders); and
  - (f) set out the effect of section 211 (failing to comply with an order).
- (2) The time or times specified under paragraph (1)(c) must be:
- (a) at least 14 days after the day on which the \*production order is made; or
  - (b) if the magistrate who makes the production order is satisfied that it is appropriate, having regard to the matters specified in subsection (3), to specify an earlier time—at least 3 days after the day on which the production order is made.
- (3) The matters to which the magistrate must have regard for the purposes of deciding whether an earlier time is appropriate under paragraph (2)(b) are:
- (a) the urgency of the situation; and
  - (b) any hardship that may be caused to the person required by the \*production order to produce documents or make documents available.

## **204 Powers under production orders**

The \*authorised officer may inspect, take extracts from, or make copies of, a document produced or made available under a \*production order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**205 Retaining produced documents**

- (1) The \*authorised officer may also retain a document produced under a \*production order for as long as is necessary for the purposes of this Act.
- (2) The person to whom a \*production order is given may require the \*authorised officer to:
  - (a) certify in writing a copy of the document retained to be a true copy and give the person the copy; or
  - (b) allow the person to do one or more of the following:
    - (i) inspect the document;
    - (ii) take extracts from the document;
    - (iii) make copies of the document.

**206 Privilege against self-incrimination etc. does not apply**

- (1) A person is not excused from producing a document or making a document available under a \*production order on the ground that:
  - (a) to do so would tend to incriminate the person or expose the person to a penalty; or
  - (b) producing the document or making it available would breach an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document; or
  - (c) producing the document or making it available would disclose information that is the subject of \*legal professional privilege.
- (2) However, in the case of a natural person, the document is not admissible in evidence in a \*criminal proceeding against the person, except in proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false or misleading

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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information or documents) in relation to producing the document or making it available.

### **207 Varying production orders**

- (1) A person who is required to produce a document to an \*authorised officer under a \*production order may apply to:
  - (a) the magistrate who made the order; or
  - (b) if that magistrate is unavailable—any other magistrate;to vary the order so that it instead requires the person to make the document available for inspection.
- (2) The magistrate may vary the \*production order if satisfied that the document is essential to the person's business activities.

### **208 Jurisdiction of magistrates**

A magistrate in a State or a \*self-governing Territory may issue a \*production order relating to one or more documents that are located in:

- (a) that State or Territory; or
- (b) another State or self-governing Territory if he or she is satisfied that there are special circumstances that make the issue of the order appropriate; or
- (c) a \*non-governing Territory.

### **209 Making false statements in applications**

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
  - (i) is false or misleading; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a \*production order.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

### **210 Disclosing existence or nature of production orders**

- (1) A person is guilty of an offence if:
  - (a) the person is given a \*production order; and
  - (b) the order specifies that information about the order must not be disclosed; and
  - (c) the person discloses the existence or nature of the order to another person.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (2) A person is guilty of an offence if:
  - (a) the person is given a \*production order; and
  - (b) the order specifies that information about the order must not be disclosed; and
  - (c) the person discloses information to another person; and
  - (d) that other person could infer the existence or nature of the order from that information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (3) Subsections (1) and (2) do not apply if:
  - (a) the person discloses the information to an employee, \*agent or other person in order to obtain a document that is required by the order in order to comply with it, and that other person is directed not to inform the person to whom the document relates about the matter; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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

Note: A defendant bears an evidential burden in relation to the matters in subsection (3); see subsection 13.3(3) of the *Criminal Code*.

**211 Failing to comply with a production order**

- (1) A person is guilty of an offence if:
  - (a) the person is given a \*production order in relation to a \*property-tracking document; and
  - (b) the person fails to comply with the order; and
  - (c) the person has not been notified of sufficient compliance under subsection (2).

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

- (2) A person is notified of sufficient compliance under this subsection if:
  - (a) the person gives an \*authorised officer a statutory declaration stating that the person does not have possession or control of the document; and
  - (b) the officer notifies the person in writing that the statutory declaration is sufficient compliance with the \*production order.
- (3) It is a defence to an offence against subsection (1) if:
  - (a) the person fails to comply with the \*production order only because the person does not produce one or more documents specified in the order within the time specified in the order; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the person took all reasonable steps to produce the document or documents within that time; and
- (c) the person produces the document or documents as soon as practicable after that time.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

**212 Destroying etc. a document subject to a production order**

A person is guilty of an offence if:

- (a) the person destroys, defaces or otherwise interferes with a \*property-tracking document; and
- (b) a \*production order is in force requiring the document to be produced or made available.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 3-3—Notices to financial institutions**

### **213 Giving notices to financial institutions**

- (1) An officer specified in subsection (3) may give a written notice to a \*financial institution requiring the institution to provide to an \*authorised officer any information or documents relevant to any one or more of the following:
  - (a) determining whether an \*account is or was held by a specified person with the financial institution;
  - (b) determining whether a particular person is or was a signatory to an account;
  - (c) if a person holds an account with the institution, the current balance of the account;
  - (d) details of transactions on an account over a specified period of up to 6 months;
  - (e) details of any related accounts (including names of those who hold or held those accounts);
  - (ea) determining whether a \*stored value card was issued to a specified person by a financial institution;
  - (eb) details of transactions made using such a card over a specified period of up to 6 months;
  - (f) a transaction conducted by the financial institution on behalf of a specified person.
- (2) The officer must not issue the notice unless the officer reasonably believes that giving the notice is required:
  - (a) to determine whether to take any action under this Act; or
  - (b) in relation to proceedings under this Act.
- (3) The officers who may give a notice to a \*financial institution are:
  - (a) the Commissioner of the Australian Federal Police; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) a Deputy Commissioner of the Australian Federal Police; or
- (c) a senior executive AFP employee (within the meaning of the *Australian Federal Police Act 1979*) who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this section; or
- (ca) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*); or
- (d) the Chief Executive Officer of the Australian Crime Commission; or
- (e) an examiner (within the meaning of the *Australian Crime Commission Act 2002*); or
- (f) the Commissioner of Taxation; or
- (g) the Chief Executive Officer of Customs; or
- (h) the Chairperson of the Australian Securities and Investments Commission.

## **214 Contents of notices to financial institutions**

- (1) The notice must:
  - (a) state that the officer giving the notice believes that the notice is required:
    - (i) to determine whether to take any action under this Act; or
    - (ii) in relation to proceedings under this Act; (as the case requires); and
  - (b) specify the name of the \*financial institution; and
  - (c) specify the kind of information or documents required to be provided; and
  - (d) specify the form and manner in which that information or those documents are to be provided, having regard to the record-keeping capabilities of the financial institution (to the extent known to the officer); and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (e) specify that the information or documents must be provided no later than:
    - (i) 14 days after the giving of the notice; or
    - (ii) if the officer giving the notice believes that it is appropriate, having regard to the matters specified in subsection (2), to specify an earlier day that is at least 3 days after the giving of the notice—that earlier day; and
  - (f) if the notice specifies that information about the notice must not be disclosed—set out the effect of section 217 (disclosing existence or nature of a notice); and
  - (g) set out the effect of section 218 (failing to comply with a notice).
- (2) The matters to which the officer giving the notice must have regard in deciding whether to specify an earlier day under subparagraph (1)(e)(ii) are:
- (a) the urgency of the situation; and
  - (b) any hardship that may be caused to the \*financial institution required by the notice to provide the information or documents.

### **215 Protection from suits etc. for those complying with notices**

- (1) No action, suit or proceeding lies against:
- (a) a \*financial institution; or
  - (b) an \*officer, employee or \*agent of the institution acting in the course of that person's employment or agency;
- in relation to any action taken by the institution or person under a notice under section 213 or in the mistaken belief that action was required under the notice.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) A \*financial institution, or person who is an \*officer, employee or \*agent of a financial institution, who provides information under a notice under section 213 is taken, for the purposes of Part 10.2 of the *Criminal Code* (offences relating to money-laundering), not to have been in possession of that information at any time.

### **216 Making false statements in notices**

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, a notice under section 213.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

### **217 Disclosing existence or nature of notice**

A person is guilty of an offence if:

- (a) the person is given a notice under section 213; and
- (b) the notice specifies that information about the notice must not be disclosed; and
- (c) the person discloses the existence or nature of the notice.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### **218 Failing to comply with a notice**

(1) A person is guilty of an offence if:

- (a) the person is given a notice under section 213; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the person fails to comply with the notice:

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

(2) It is a defence to an offence against subsection (1) if:

(a) the person fails to comply with the notice only because the person does not provide the information or a document within the period specified in the notice; and

(b) the person took all reasonable steps to provide the information or document within that period; and

(c) the person provides the information or document as soon as practicable after the end of that period.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 3-4—Monitoring orders

### 219 Making monitoring orders

- (1) A judge of a court of a State or Territory that has jurisdiction to deal with criminal matters on indictment may make an order (a *monitoring order*) that a \*financial institution provide information about transactions:
  - (a) conducted during a particular period through an \*account held by a particular person with the institution; or
  - (b) made using a \*stored value card issued to a particular person by a financial institution.
- (2) The judge must not make a \*monitoring order unless the judge is satisfied that there are reasonable grounds for suspecting that:
  - (a) the person who holds the \*account or to whom the \*stored value card was issued:
    - (i) has committed, or is about to commit, a \*serious offence; or
    - (ii) was involved in the commission, or is about to be involved in the commission, of a serious offence; or
    - (iii) has \*benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious offence; or
  - (b) the account or card is being used to commit an offence against Part 10.2 of the *Criminal Code* (money laundering).
- (3) It does not matter, for the purposes of paragraph (2)(b), whether the person holding the account or to whom the card was issued commits or is involved in the offence against Part 10.2 of the *Criminal Code*.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) The \*monitoring order can only be made on application by an \*authorised officer of an \*enforcement agency.

## **220 Contents of monitoring orders**

- (1) A \*monitoring order must:
- (a) specify the name or names:
    - (i) in which the \*account is believed to be held; or
    - (ii) of the person to whom the \*stored value card was issued; and
  - (b) specify the kind of information that the \*financial institution is required to provide; and
  - (c) specify the period during which the transactions must have occurred; and
  - (d) specify to which \*enforcement agency the information is to be provided; and
  - (e) specify the form and manner in which the information is to be given; and
  - (f) if the order specifies that information about the order must not be disclosed—set out the effect of section 223 (disclosing existence or operation of an order); and
  - (g) set out the effect of section 224 (failing to comply with an order).
- (2) The period mentioned in paragraph (1)(c) must:
- (a) begin no earlier than the day on which notice of the \*monitoring order is given to the \*financial institution; and
  - (b) end no later than 3 months after the date of the order.

## **221 Protection from suits etc. for those complying with orders**

- (1) No action, suit or proceeding lies against:
- (a) a \*financial institution; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) an \*officer, employee or \*agent of the institution acting in the course of that person's employment or agency; in relation to any action taken by the institution or person in complying with a \*monitoring order or in the mistaken belief that action was required under the order.
- (2) A \*financial institution, or person who is an \*officer, employee or \*agent of a financial institution, who provides information under a \*monitoring order is taken, for the purposes of Part 10.2 of the *Criminal Code* (offences relating to money-laundering), not to have been in possession of that information at any time.

## **222 Making false statements in applications**

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
- (i) is false or misleading; or
  - (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a \*monitoring order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

## **223 Disclosing existence or operation of monitoring order**

- (1) A person is guilty of an offence if:
- (a) the person discloses the existence or the operation of a \*monitoring order to another person; and
- (b) the disclosure is not to a person specified in subsection (4); and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 223

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(c) the disclosure is not for a purpose specified in subsection (4).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(2) A person is guilty of an offence if:

- (a) the person discloses information to another person; and
- (b) the other person could infer the existence or operation of a \*monitoring order from that information; and
- (c) the disclosure is not to a person specified in subsection (4); and
- (d) the disclosure is not for a purpose specified in subsection (4).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(3) A person is guilty of an offence if:

- (a) the person receives information relating to a \*monitoring order in accordance with subsection (4); and
- (b) the person ceases to be a person to whom information could be disclosed in accordance with subsection (4); and
- (c) the person makes a record of, or discloses, the existence or the operation of the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(4) A person may disclose the existence or the operation of a \*monitoring order to the following persons for the following purposes:

- (a) the head of the \*enforcement agency specified under paragraph 220(1)(d) or an \*authorised officer of that agency:
  - (i) for the purpose of performing that person's duties; or
  - (ii) for the purpose of, or for purposes connected with, legal proceedings; or
  - (iii) for purposes arising in the course of proceedings before a court;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the Chief Executive Officer of \*AUSTRAC, or a member of the staff of AUSTRAC who is authorised by the Chief Executive Officer of AUSTRAC as a person who may be advised of the existence of a monitoring order:
  - (i) for the purpose of performing that person's duties; or
  - (ii) for the purpose of, or for purposes connected with, legal proceedings; or
  - (iii) for purposes arising in the course of proceedings before a court;
- (c) an \*officer or \*agent of the \*financial institution for the purpose of ensuring that the order is complied with;
- (d) a barrister or solicitor for the purpose of obtaining legal advice or representation in relation to the order;
- (e) a person who is or forms part of an authority with one or more functions under this Act for the purpose of facilitating the authority's performance of its functions under this Act;
- (f) a person who is or forms part of an authority of the Commonwealth, or of a State, Territory or foreign country, that has a function of investigating or prosecuting crimes against a law of the Commonwealth, State, Territory or country for the purpose of assisting in the prevention, investigation or prosecution of a crime against that law;
- (g) a person in the Australian Taxation Office for the purpose of protecting public revenue.

## **224 Failing to comply with monitoring order**

A person is guilty of an offence if:

- (a) the person is given a \*monitoring order; and
- (b) the person fails to comply with the order.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Section 224

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Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 3-5—Search and seizure**

### **Division 1—Search warrants**

#### **Subdivision A—Issuing search warrants**

##### **225 Issuing a search warrant**

- (1) A magistrate may issue a warrant to search \*premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, \*tainted property or \*evidential material.
- (2) If an application for a \*search warrant is made under section 229 (applying for warrants by telephone or other electronic means), this section applies as if subsection (1) referred to 48 hours rather than 72 hours.
- (3) The \*search warrant can only be issued on application by an \*authorised officer of an \*enforcement agency.

##### **226 Additional contents of the information**

- (1) If the person applying for a warrant to search \*premises suspects that it will be necessary to use firearms in executing the warrant, the person must state that suspicion, and the grounds for that suspicion, in the information.
- (2) A person applying for a warrant to search \*premises who has previously applied for a warrant relating to the same premises, must include particulars of the application and its outcome in the information.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**227 Contents of warrants**

- (1) A \*search warrant must state:
- (a) the nature of the property in respect of which action has been or could be taken under this Act; and
  - (b) the nature of that action; and
  - (c) a description of the \*premises to which the warrant relates; and
  - (d) the kinds of \*tainted property or \*evidential material that is to be searched for under the warrant; and
  - (e) the name of the \*authorised officer who is responsible for executing the warrant, unless he or she inserts the name of another authorised officer in the warrant; and
  - (f) the time at which the warrant expires (see subsection (2)); and
  - (g) whether the warrant may be executed at any time or only during particular hours; and
  - (h) that the warrant authorises the seizure of other things found at the premises in the course of the search that the \*executing officer or a \*person assisting believes on reasonable grounds to be:
    - (i) tainted property to which the warrant relates; or
    - (ii) evidential material in relation to property to which the warrant relates; or
    - (iii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an \*indictable offence; if he or she believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and
  - (i) whether the warrant authorises an \*ordinary search or a \*frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or a person

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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assisting reasonably suspects that the person has any tainted property or evidential material in his or her possession.

- (2) The time stated in the \*search warrant under paragraph (1)(f) as the time at which the warrant expires must be a time that is not later than:
- (a) if the application for the warrant is made under section 229 (telephone warrants)—48 hours after the warrant is issued; or
  - (b) otherwise, a time that is not later than the end of the seventh day after the day on which the warrant is issued.
- Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.
- (3) Paragraph (1)(f) does not prevent the issue of successive \*search warrants in relation to the same \*premises.

## **228 The things that are authorised by a search warrant**

- (1) A \*search warrant authorises the \*executing officer or a \*person assisting:
- (a) to enter the \*premises and, if the premises are a \*conveyance, to enter the conveyance, wherever it is; and
  - (b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and
  - (c) to search the premises for the kinds of \*tainted property or \*evidential material specified in the warrant, and to seize things of that kind found at the premises; and
  - (d) to seize other things found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be:
    - (i) tainted property to which the warrant relates; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) evidential material in relation to property to which the warrant relates; or
  - (iii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an \*indictable offence; if he or she believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and
  - (e) if the warrant so allows—to conduct an \*ordinary search or a \*frisk search of a person at or near the premises if the executing officer or a person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.
- (2) A \*search warrant authorises the \*executing officer to make things seized under the warrant available to officers of other \*enforcement agencies if it is necessary to do so for the purpose of:
- (a) investigating or prosecuting an offence to which the things relate; or
  - (b) recovering \*proceeds of an offence or an \*instrument of an offence.

### **Subdivision B—Applying for search warrants by telephone or other electronic means**

#### **229 Applying for search warrants by telephone or other electronic means**

- (1) An \*authorised officer may apply to a magistrate for a \*search warrant by telephone, fax or other electronic means:
- (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) An application under subsection (1):
  - (a) must include all information that would be required in an ordinary application for a \*search warrant; and
  - (b) if necessary, may be made before the information is sworn.
- (3) The magistrate may require:
  - (a) communication by voice to the extent that it is practicable in the circumstances; and
  - (b) any further information.

### **230 Issuing warrants by telephone etc.**

- (1) The magistrate may complete and sign the same form of \*search warrant that would be issued under section 225 if satisfied that:
  - (a) a search warrant in the terms of the application should be issued urgently; or
  - (b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) If the magistrate issues the \*search warrant, he or she must inform the applicant, by telephone, fax or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.
- (3) The applicant must then:
  - (a) complete a form of \*search warrant in terms substantially corresponding to those given by the magistrate; and
  - (b) state on the form:
    - (i) the name of the magistrate; and
    - (ii) the day on which the warrant was signed; and
    - (iii) the time at which the warrant was signed.
- (4) The applicant must give the magistrate:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the form of \*search warrant completed by the applicant; and
  - (b) if the information was unsworn under paragraph 229(2)(b)—the sworn information;
- by the end of the day after whichever first occurs:
- (c) the warrant expires; or
  - (d) the warrant is executed.
- (5) The magistrate must attach the form of \*search warrant completed by the magistrate to the documents provided under subsection (4).

### **231 Unsigned telephone warrants in court proceedings**

If:

- (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a \*search warrant issued under this Subdivision was duly authorised; and
- (b) the form of search warrant signed by the magistrate is not produced in evidence;

the court must assume that the exercise of the power was not duly authorised unless the contrary is proved.

### **232 Offence for stating incorrect names in telephone warrants**

A person is guilty of an offence if:

- (a) the person states a name of a magistrate in a document; and
- (b) the document purports to be a form of \*search warrant under section 230; and
- (c) the name is not the name of the magistrate that issued the warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **233 Offence for unauthorised form of warrant**

A person is guilty of an offence if:

- (a) the person states a matter in a form of \*search warrant under section 230; and
- (b) the matter departs in a material particular from the form authorised by the magistrate.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### **234 Offence for execution etc. of unauthorised form of warrant**

A person is guilty of an offence if:

- (a) the person executes a document or presents a document to a person; and
- (b) the document purports to be a form of \*search warrant under section 230; and
- (c) the document:
  - (i) has not been approved by a magistrate under that section; or
  - (ii) departs in a material particular from the terms authorised by the magistrate under that section.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

### **235 Offence for giving unexecuted form of warrant**

A person is guilty of an offence if:

- (a) the person gives a magistrate a form of \*search warrant under section 230; and
- (b) the document is not the form of \*search warrant that the person executed.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Subdivision C—Executing search warrants****236 Warrants that must be executed only during particular hours**

A \*search warrant that states that it may be executed only during particular hours must not be executed outside those hours.

**237 Restrictions on personal searches**

- (1) A \*search warrant cannot authorise a \*strip search or a search of a person's body cavities.
- (2) If a \*search warrant authorises an \*ordinary search or a \*frisk search of a person:
  - (a) a different search from the one authorised must not be done under the warrant; and
  - (b) the search must, if practicable, be conducted by a person of the same sex as the person being searched.
- (3) A person who is not an \*authorised officer but who has been authorised by the relevant \*executing officer to assist in executing a \*search warrant must not take part in searching a person.

**238 Availability of assistance and use of force in executing a warrant***Executing officers*

- (1) In executing a \*search warrant, an \*executing officer may obtain such assistance and use such force against persons and things as is necessary and reasonable in the circumstances.

*Authorised officers*

- (2) In executing a \*search warrant, an \*authorised officer who is assisting in executing the warrant may use such force against

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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persons and things as is necessary and reasonable in the circumstances.

*Persons who are not authorised officers*

- (3) In executing a \*search warrant, a person who is not an \*authorised officer but who has been authorised to assist in executing the warrant may use such force against things as is necessary and reasonable in the circumstances.

### **239 Announcement before entry**

- (1) An \*executing officer must, before any person enters \*premises under a \*search warrant:
- (a) announce that he or she is authorised to enter the premises; and
  - (b) give any person at the premises an opportunity to allow entry to the premises; and
  - (c) if the occupier of the premises, or another person who apparently represents the occupier, is present at the premises—identify himself or herself to that person.
- (2) The \*executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the \*premises is required to ensure:
- (a) the safety of a person (including an \*authorised officer); or
  - (b) that the effective execution of the warrant is not frustrated.

### **240 Details of warrant to be given to occupier etc.**

- (1) If the occupier of the \*premises, or another person who apparently represents the occupier, is present at premises when a \*search warrant is being executed, the \*executing officer or a \*person assisting must make available to the person:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) a copy of the warrant; and
  - (b) a document setting out the rights and obligations of the person.
- (2) If a person is searched under a \*search warrant, the \*executing officer or a \*person assisting must show the person a copy of the warrant.
- (3) The copy of the warrant need not include the signature of the magistrate or the seal of the relevant court.

#### **241 Occupier entitled to be present during search**

- (1) If an occupier of \*premises, or another person who apparently represents the occupier, is present at the premises while a \*search warrant is being executed, the occupier or person has the right to observe the search being conducted.
- (2) However, the right ceases if:
- (a) the person impedes the search; or
  - (b) the person is under arrest, and allowing the person to observe the search being conducted would interfere with the objectives of the search.
- (3) This section does not prevent 2 or more areas of the \*premises being searched at the same time.

#### **242 Specific powers available to officers executing the warrant**

- (1) In executing a \*search warrant, the \*executing officer or a \*person assisting may take photographs (including video recordings) of the \*premises or of things at the premises:
- (a) for a purpose incidental to the execution of the warrant; or
  - (b) if the occupier of the premises consents in writing.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The \*executing officer and a \*person assisting may complete the execution of a \*search warrant, provided that the warrant is still in force, after all of them temporarily leave the \*premises:
  - (a) for not more than one hour; or
  - (b) for a longer period if the occupier of the premises consents in writing.
- (3) The execution of a \*search warrant may be completed if:
  - (a) the execution is stopped by an order of a court; and
  - (b) the order is later revoked or reversed on appeal; and
  - (c) the warrant is still in force.

#### **243 Use of equipment to examine or process things**

- (1) The \*executing officer or \*person assisting may bring to the \*premises any equipment reasonably necessary to examine or process a thing found at the premises in order to determine whether it may be seized under the \*search warrant in question.
- (2) The \*executing officer or a \*person assisting may operate equipment already at the \*premises to carry out such an examination or processing if he or she believes on reasonable grounds that:
  - (a) the equipment is suitable for this purpose; and
  - (b) the examination or processing can be carried out without damaging the equipment or thing.

#### **244 Moving things to another place for examination or processing**

- (1) A thing found at the \*premises may be moved to another place for examination or processing in order to determine whether it may be seized under a \*search warrant if:
  - (a) both of the following apply:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) there are reasonable grounds to believe that the thing contains or constitutes \*tainted property or \*evidential material;
  - (ii) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance; or
- (b) the occupier of the premises consents in writing.
- (2) The thing may be moved to another place for examination or processing for no longer than 72 hours.
- (3) An \*executing officer may apply to a magistrate for an extension of that time if the officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours.
- (4) The \*executing officer must give notice of the application to the occupier of \*premises, and the occupier is entitled to be heard in relation to the application.
- (5) If a thing is moved to another place under subsection (1), the \*executing officer must, if it is practicable to do so:
- (a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and
  - (b) allow the occupier or his or her representative to be present during the examination or processing.

### **245 Use of electronic equipment at premises**

- (1) The \*executing officer or a \*person assisting may operate electronic equipment at the \*premises to access \*data (including data not held at the premises) if he or she believes on reasonable grounds that:
- (a) the data might constitute \*evidential material; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the equipment can be operated without damaging it.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 246.

- (2) If the \*executing officer or \*person assisting believes that any \*data accessed by operating the electronic equipment might constitute \*evidential material, he or she may:
- (a) copy the data to a disk, tape or other similar device brought to the \*premises; or
  - (b) if the occupier of the premises agrees in writing—copy the data to a disk, tape or other similar device at the premises; and take the device from the premises.
- (3) The \*executing officer or a \*person assisting may do the following things if he or she finds that any \*evidential material is accessible using the equipment:
- (a) seize the equipment and any disk, tape or other similar device;
  - (b) if the material can, by using facilities at the \*premises, be put in documentary form—operate the facilities to put the material in that form and seize the documents so produced.
- (4) An \*authorised officer may seize equipment under paragraph (3)(a) only if:
- (a) it is not practicable to copy the \*data as mentioned in subsection (2) or to put the material in documentary form as mentioned in paragraph (3)(b); or
  - (b) possession of the equipment by the occupier could constitute an offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**246 Person with knowledge of a computer or a computer system to assist access etc.**

- (1) An \*executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable or necessary to allow the officer to do one or more of the following:
  - (a) access \*data held in or accessible from a computer that is on the \*premises;
  - (b) copy the data to a \*data storage device;
  - (c) convert the data into documentary form.
- (2) The magistrate may make an order if satisfied that:
  - (a) there are reasonable grounds for suspecting that \*evidential material is accessible from the computer; and
  - (b) the specified person is:
    - (i) reasonably suspected of possessing, or having under his or her control, \*tainted property or evidential material; or
    - (ii) the owner or lessee of the computer; or
    - (iii) an employee of the owner or lessee of the computer; and
  - (c) the specified person has knowledge of:
    - (i) the computer or a computer network of which the computer forms a part; or
    - (ii) measures applied to protect \*data held in or accessible from the computer.
- (3) A person is guilty of an offence if the person fails to comply with the order.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**247 Securing electronic equipment**

- (1) If the \*executing officer or a \*person assisting believes on reasonable grounds that:
  - (a) \*evidential material may be accessible by operating electronic equipment at the \*premises; and
  - (b) expert assistance is required to operate the equipment; and
  - (c) if he or she does not take action, the material may be destroyed, altered or otherwise interfered with;he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.
- (2) The \*executing officer or a \*person assisting must give notice to the occupier of the \*premises of:
  - (a) his or her intention to secure equipment; and
  - (b) the fact that the equipment may be secured for up to 24 hours.
- (3) The equipment may be secured:
  - (a) for a period not exceeding 24 hours; or
  - (b) until the equipment has been operated by the expert;whichever happens first.
- (4) If the \*executing officer or a \*person assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to the magistrate to extend the period.
- (5) The \*executing officer or a \*person assisting must notify the occupier of the \*premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (6) The provisions of this Division relating to the issue of \*search warrants apply, with such modifications as are necessary, to the issuing of an extension.

## **248 Compensation for damage to electronic equipment**

- (1) This section applies if:
- (a) damage is caused to equipment as a result of it being operated as mentioned in section 243 or 245; or
  - (b) the \*data recorded on the equipment is damaged or programs associated with its use are damaged or corrupted;
- because:
- (c) insufficient care was exercised in selecting the person who was to operate the equipment; or
  - (d) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the \*data or programs, such reasonable compensation for the damage or corruption as they agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the \*premises and his or her employees and \*agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (6) For the purposes of subsection (1), damage to \*data includes damage by erasure of data or addition of other data.

#### **249 Copies of seized things to be provided**

- (1) The occupier of the \*premises, or another person who apparently represents the occupier and who is present when a \*search warrant is executed, may request an \*authorised officer who seizes:
- (a) a document, film, computer file or other thing that can be readily copied; or
  - (b) a storage device the information in which can be readily copied;
- to give the occupier or other person a copy of the thing or the information.
- (2) The officer must do so as soon as practicable after the seizure.
- (3) However, the officer is not required to do so if:
- (a) the thing was seized under subsection 245(2) or paragraph 245(3)(b) (use of electronic equipment at premises); or
  - (b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

#### **250 Providing documents after execution of a search warrant**

If:

- (a) documents were on, or accessible from, the \*premises of a \*financial institution at the time when a \*search warrant relating to those premises was executed; and
- (b) those documents were not able to be located at that time; and
- (c) the financial institution provides them to the \*executing officer as soon as practicable after the execution of the warrant;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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then the documents are taken to have been seized under the warrant.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 2—Stopping and searching conveyances**

### **251 Searches without warrant in emergency situations**

- (1) This section applies if an \*authorised officer suspects, on reasonable grounds, that:
  - (a) a thing constituting \*tainted property or \*evidential material is in or on a \*conveyance; and
  - (b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being concealed, lost or destroyed; and
  - (c) it is necessary to exercise the power without the authority of a \*search warrant because the circumstances are serious and urgent.
- (2) The officer may:
  - (a) stop and detain the \*conveyance; and
  - (b) search the conveyance and any container in or on the conveyance, for the thing; and
  - (c) seize the thing if he or she finds it there.
- (3) If, in the course of searching for the thing, the officer finds another thing constituting \*tainted property or \*evidential material, the officer may seize that thing if he or she suspects, on reasonable grounds, that:
  - (a) it is necessary to seize it in order to prevent its concealment, loss or destruction; and
  - (b) it is necessary to seize it without the authority of a \*search warrant because the circumstances are serious and urgent.
- (4) The officer must exercise his or her powers subject to section 252.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **252 How an authorised officer exercises a power under section 251**

When an \*authorised officer exercises a power under section 251 in relation to a \*conveyance, he or she:

- (a) may use such assistance as is necessary; and
- (b) must search the conveyance in a public place or in some other place to which members of the public have ready access; and
- (c) must not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and
- (d) may use such force as is necessary and reasonable in the circumstances, but must not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless:
  - (i) the person (if any) apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or
  - (ii) it is not possible to give that person such an opportunity.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—Dealing with things seized**

### **Subdivision A—General requirements**

#### **253 Receipts for things seized under warrant**

- (1) The \*executing officer or a \*person assisting must provide a receipt for:
  - (a) a thing seized under a warrant; or
  - (b) a thing moved under subsection 244(1) (moving things to another place for examination or processing); or
  - (c) a thing seized under section 251 (searches without warrant in emergency situations).
- (2) One receipt may cover 2 or more things.

#### **254 Responsibility for things seized**

- (1) If a thing is seized under a \*search warrant or under section 251, the \*responsible custodian of the thing must:
  - (a) arrange for the thing to be kept until it is dealt with in accordance with another provision of this Act; and
  - (b) ensure that all reasonable steps are taken to preserve the thing while it is so kept.
- (2) The *responsible custodian* of a thing that is seized under a \*search warrant or under section 251 is the head of the \*enforcement agency of the \*authorised officer who is responsible for executing the warrant, or who seized the thing under section 251.

#### **255 Effect of obtaining forfeiture orders**

If:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) a thing is seized under a \*search warrant or under section 251; and
- (b) while the thing is in the possession of the responsible custodian, a \*forfeiture order is made covering the thing; the \*responsible custodian must deal with the thing as required by the order.

### **Subdivision B—Things seized as evidence**

#### **256 Returning seized things**

- (1) If:
  - (a) a thing is seized under a \*search warrant or under section 251; and
  - (b) it is seized on the ground that a person believes on reasonable grounds that it is:
    - (i) \*evidential material; or
    - (ii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an \*indictable offence; and
  - (c) either:
    - (i) the reason for the thing's seizure no longer exists or it is decided that the thing is not to be used in evidence; or
    - (ii) if the thing was seized under section 251—the period of 60 days after the thing's seizure ends;the \*authorised officer responsible for executing the warrant, or who seized the thing under section 251, must take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it.
- (2) However, the \*authorised officer does not have to take those steps if:
  - (a) in a subparagraph (1)(c)(ii) case:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) proceedings in respect of which the thing might afford evidence have been instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or
- (ii) there is an order in force under section 258 (retaining things for a further period); or
- (b) in any case—the authorised officer is otherwise authorised (by a law, or an order of a court, of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory) to retain, destroy or dispose of the thing; or
- (c) in any case—the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

### **257 Authorised officer may apply for a thing to be retained for a further period**

- (1) This section applies if an \*authorised officer has seized a thing under this Part and proceedings in respect of which the thing might afford evidence have not commenced before the end of:
  - (a) 60 days after the seizure; or
  - (b) a period previously specified in an order of a magistrate under this section.
- (2) The \*authorised officer may apply to a magistrate for an order that the officer may retain the thing for a further period.
- (3) Before making the application, the \*authorised officer must:
  - (a) take reasonable steps to discover whose interests would be affected by the retention of the thing; and
  - (b) if it is practicable to do so, notify each person whom the officer believes to be such a person of the proposed application.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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### **258 Magistrate may order that the thing be retained**

- (1) The magistrate may order that the \*authorised officer who made an application under section 257 may retain the thing if the magistrate is satisfied that it is necessary for the officer to do so for the purpose of initiating or conducting proceedings under this Act.
- (2) The order must specify the period for which the officer may retain the thing.

### **Subdivision C—Things seized on other grounds**

#### **259 Return of seized property to third parties**

- (1) A person who claims an \*interest in a thing that has been seized under a \*search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is \*tainted property may apply to a court for an order that the thing be returned to the person.
- (2) The court must be:
  - (a) if the thing was seized under a \*search warrant—a court of the State or Territory in which the warrant was issued that has \*proceeds jurisdiction; or
  - (b) if the thing was seized under section 251—a court of the State or Territory in which the thing was seized that has proceeds jurisdiction.
- (3) The court must order the \*responsible custodian of the thing to return the thing to the applicant if the court is satisfied that:
  - (a) the applicant is entitled to possession of the thing; and
  - (b) the thing is not \*tainted property in relation to the relevant offence; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) the person in respect of whose suspected commission of, or conviction for, an offence the thing was seized has no \*interest in the thing.
- (4) If the court makes such an order, the \*responsible custodian of the thing must arrange for the thing to be returned to the applicant.

### **260 Return of seized property if applications are not made for restraining orders or forfeiture orders**

- (1) If:
  - (a) a thing has been seized under a \*search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is \*tainted property; and
  - (b) at the time when the thing was seized, an application had not been made for a \*restraining order or a \*forfeiture order that would cover the thing; and
  - (c) such an application is not made during the period of 14 days after the day on which the thing was seized;the \*responsible custodian of the thing must arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after the end of that period.
- (2) However, this section does not apply to a thing to which section 261 applies.

### **261 Effect of obtaining restraining orders**

- (1) If:
  - (a) a thing has been seized under a \*search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is \*tainted property; and
  - (b) but for this subsection, the \*responsible custodian of the thing would be required to arrange for the thing to be returned to a

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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person as soon as practicable after the end of a particular period; and

- (c) before the end of that period, a \*restraining order is made covering the thing;

then:

- (d) if the restraining order directs the \*Official Trustee to take custody and control of the thing—the responsible custodian must arrange for the thing to be given to the Official Trustee in accordance with the restraining order; or
- (e) if the court that made the restraining order has made an order under subsection (3) in relation to the thing—the responsible custodian must arrange for the thing to be kept until it is dealt with in accordance with another provision of this Act.

(2) If:

- (a) a thing has been seized under a \*search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is \*tainted property; and
- (b) a \*restraining order is made in relation to the thing; and
- (c) at the time when the restraining order is made, the thing is in the possession of the responsible custodian;

the \*responsible custodian of the thing may apply to the court that made the restraining order for an order that the responsible custodian retain possession of the property.

(3) The court may, if satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence, make an order that the responsible custodian may retain the property for so long as the property is required as evidence as to the commission of that offence.

(4) A witness who is giving evidence relating to an application for an order under subsection (2) is not required to answer a question or produce a document if the court is satisfied that the answer or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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document may prejudice the investigation of, or the prosecution of a person for, an offence.

**262 Effect of refusing applications for restraining orders or forfeiture orders**

If:

- (a) a thing has been seized under a \*search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is \*tainted property; and
- (b) an application is made for a \*restraining order or a \*forfeiture order that would cover the thing; and
- (c) the application is refused; and
- (d) at the time when the application is refused, the thing is in the possession of the \*responsible custodian;

the \*responsible custodian must arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after the refusal.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 4—General**

### **263 Application of Part**

This Part is not intended to limit or exclude the operation of another law of the Commonwealth, a State or a Territory relating to:

- (a) the search of persons or \*premises; or
- (b) the stopping, detaining or searching of \*conveyances; or
- (c) the seizure of things.

### **264 Law relating to legal professional privilege not affected**

This Part does not affect the law relating to \*legal professional privilege.

### **265 Jurisdiction of magistrates**

A magistrate in a State or a \*self-governing Territory may issue a \*search warrant in:

- (a) that State or Territory; or
- (b) another State or self-governing Territory if he or she is satisfied that there are special circumstances that make the issue of the warrant appropriate; or
- (c) a \*non-governing Territory.

### **266 Offence for making false statements in applications**

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
  - (i) is false or misleading; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a \*search warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 3-6—Disclosure of information

### 266A Disclosure

- (1) This section applies if a person obtains information:
- (a) as a direct result of:
    - (i) the person being given a sworn statement under an order made under paragraph 39(1)(ca), (d) or (da); or
    - (ii) the exercise of a power (by the person or someone else), or performance (by the person) of a function, under Part 3-1, 3-2, 3-3, 3-4 or 3-5; or
  - (b) as a result of a disclosure, or a series of disclosures, under this section.
- (2) The person may disclose the information to an authority described in an item of the following table for a purpose described in that item if the person believes on reasonable grounds that the disclosure will serve that purpose:

<b>Recipients and purposes of disclosure</b>		
<b>Item</b>	<b>Authority to which disclosure may be made</b>	<b>Purpose for which disclosure may be made</b>
1	Authority with one or more functions under this Act	Facilitating the authority's performance of its functions under this Act
2	Authority of the Commonwealth, or of a State or Territory, that has a function of investigating or prosecuting offences against a law of the Commonwealth, State or Territory	Assisting in the prevention, investigation or prosecution of an offence against that law that is punishable on conviction by imprisonment for at least 3 years or for life

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 266A

**Recipients and purposes of disclosure**

<b>Item</b>	<b>Authority to which disclosure may be made</b>	<b>Purpose for which disclosure may be made</b>
2A	Authority of a foreign country that has a function of investigating or prosecuting offences against a law of the country	Assisting in the prevention, investigation or prosecution of an offence against that law constituted by conduct that, if it occurred in Australia, would constitute an offence against a law of the Commonwealth, or of a State or Territory, punishable on conviction by imprisonment for at least 3 years or for life
3	Australian Taxation Office	Protecting public revenue

*Limits on use of information disclosed*

- (3) In civil or \*criminal proceedings against a person who gave an answer or produced a document in an \*examination, none of the following that is disclosed under this section is admissible in evidence against the person:
- (a) the answer or document;
  - (b) information contained in the answer or document.
- (4) Subsection (3) does not apply in:
- (a) \*criminal proceedings for giving false or misleading information; or
  - (b) proceedings on an application under this Act; or
  - (c) proceedings ancillary to an application under this Act; or
  - (d) proceedings for enforcement of a \*confiscation order; or
  - (e) civil proceedings for or in respect of a right or liability the document confers or imposes.

Note: Subsections (3) and (4) reflect section 198.

\*To find definitions of asterisked terms, see the Dictionary, at section 338.

Section 266A

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- (5) In a \*criminal proceeding against a person who produced or made available a document under a \*production order, none of the following that is disclosed under this section is admissible in evidence against the person:
- (a) the document;
  - (b) information contained in the document.
- (6) Subsection (5) does not apply in a proceeding under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to producing the document or making it available.
- Note: Subsections (5) and (6) reflect subsection 206(2).
- (7) To avoid doubt, this section does not affect the admissibility in evidence of any information, document or thing obtained as an indirect consequence of a disclosure under this section.

*Relationship with subsection 228(2)*

- (8) To avoid doubt:
- (a) this section does not limit subsection 228(2) (about a \*search warrant authorising the \*executing officer to make things seized under the warrant available to officers of other \*enforcement agencies); and
  - (b) subsection 228(2) does not limit this section.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Chapter 4—Administration**

### **Part 4-1—Powers and duties of the Official Trustee**

#### **Division 1—Preliminary**

##### **267 Property to which the Official Trustee’s powers and duties under this Part apply**

- (1) The powers conferred on the \*Official Trustee under this Part may be exercised, and the duties imposed on the Official Trustee under this Part are to be performed, in relation to property if a court orders the Official Trustee to take custody and control of the property under section 38.
- (2) This property is *controlled property*.
- (3) However, powers conferred on the \*Official Trustee under Division 4 may be exercised, and the duties imposed on the Official Trustee under Division 4 are to be performed, in relation to any property that is the subject of a \*restraining order, whether or not the property is \*controlled property.

##### **267A Additional property to which the Official Trustee’s powers and duties under Division 3 apply**

- (1) The powers conferred on the \*Official Trustee under Division 3 may be exercised, and the duties imposed on the Official Trustee under Division 3 are to be performed, in relation to property that, under paragraph 278(2)(d), may be disposed of to pay, under Part 4-2, a \*legal aid commission’s costs.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) Without limiting the definition of *controlled property* in section 267, for the purposes of Division 3 this property is *controlled property*.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 2—Obtaining information about controlled property****268 Access to books**

- (1) The \*Official Trustee, or another person authorised in writing by the Official Trustee to exercise powers under this section, may, for the purpose of:
  - (a) ensuring that all the \*controlled property is under the Official Trustee's custody and control; or
  - (b) ensuring the effective exercise of the Official Trustee's powers or the performance of the Official Trustee's duties, under this Part in relation to the controlled property;require:
  - (c) the \*suspect in relation to the \*restraining order covering the controlled property; or
  - (d) any other person entitled to, or claiming an \*interest in, the controlled property;to produce specified \*books in accordance with this section.
- (2) The requirement must be by written notice.
- (3) The requirement must be to produce the \*books:
  - (a) to a specified person; and
  - (b) at a specified place, and within a specified period or at a specified time on a specified day, being a place, and a period or a time and day, that are reasonable in the circumstances.
- (4) The \*books must be:
  - (a) in the possession of the person of whom the requirement is made; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) in the opinion of the \*Official Trustee or other person making the requirement, relevant for the purpose for which they are required.
- (5) If the \*books are so produced, the \*Official Trustee or other person making the requirement, or the specified person:
  - (a) may make copies of, or take extracts from, the books; and
  - (b) may require:
    - (i) the person required under this section to produce the books; or
    - (ii) any other person who was a party to the compilation of the books;  
to explain to the best of his or her knowledge and belief any matter about the compilation of the books or to which the books relate.
- (6) If the \*books are not so produced, the \*Official Trustee or other person making the requirement, or the specified person, may require the person required under this section to produce the books to state, to the best of his or her knowledge or belief:
  - (a) where the books may be found; and
  - (b) who last had possession, custody or control of the books and where that person may be found.
- (7) The production of \*books under this section does not prejudice a lien that a person has on the books.

### **269 Suspect to assist Official Trustee**

The \*suspect in relation to the \*restraining order covering the \*controlled property must, unless excused by the \*Official Trustee or prevented by illness or other sufficient cause:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) give to the Official Trustee such \*books (including books of an associated entity (within the meaning of the *Bankruptcy Act 1966*) of the person) that:
  - (i) are in the person's possession; and
  - (ii) relate to any of the person's \*affairs;as the Official Trustee requires; and
- (b) attend the Official Trustee whenever the Official Trustee reasonably requires; and
- (c) give to the Official Trustee such information about any of the person's conduct and examinable affairs as the Official Trustee requires; and
- (d) give to the Official Trustee such assistance as the Official Trustee reasonably requires, in connection with the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part in relation to the controlled property.

### **270 Power to obtain information and evidence**

- (1) The \*Official Trustee, by written notice given to any person, may require the person:
  - (a) to give to the Official Trustee such information as the Official Trustee requires for the purposes of the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part; and
  - (b) to attend before the Official Trustee, or person authorised in writing by the Official Trustee to exercise powers under this paragraph, and:
    - (i) give evidence; and
    - (ii) produce all \*books in the possession of the person notified;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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relating to any matters connected with the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part.

- (2) The \*Official Trustee or person authorised under paragraph (1)(b):
- (a) may require the information or evidence to be given on oath, and either orally or in writing; and
  - (b) for that purpose may administer an oath.

### **271 Privilege against self-incrimination**

- (1) A person is not excused from giving information or producing a document under this Part on the ground that to do so would tend to incriminate the person or expose the person to a penalty.
- (2) However, in the case of a natural person:
- (a) the information given; or
  - (b) the giving of the document; or
  - (c) any information, document or thing obtained as a direct or indirect consequence of giving the information or document;
- is not admissible in evidence in \*criminal proceedings against the natural person, except proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code 1995* (false and misleading information and documents) in relation to giving the information or document.

### **272 Offences relating to exercise of powers under section 268 or 269**

- (1) A person is guilty of an offence if the person refuses or fails to comply with a requirement under section 268 or 269.
- Penalty: Imprisonment for 6 months or 30 penalty units, or both.
- (2) A person is guilty of an offence if the person obstructs or hinders a person in the exercise of a power under section 268 or 269.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Penalty: Imprisonment for 6 months or 30 penalty units, or both.

### **273 Failure to provide information**

A person is guilty of an offence if the person refuses or fails to comply with a notice given to the person under paragraph 270(1)(a).

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

### **274 Failure of person to attend**

A person is guilty of an offence if:

- (a) the person is required by a notice under paragraph 270(1)(b) to attend before the \*Official Trustee or a person authorised under that paragraph; and
- (b) the person:
  - (i) fails to attend as required by the notice; or
  - (ii) fails to appear and report from day to day, without being excused or released from further attendance by the Official Trustee or person authorised under that paragraph, as the case may be.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

### **275 Refusal to be sworn or give evidence etc.**

A person is guilty of an offence if:

- (a) the person attends before the \*Official Trustee, or a person authorised under paragraph 270(1)(b), as required by a notice under that paragraph; and
- (b) the person refuses or fails:
  - (i) to be sworn or to make an affirmation; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) to answer a question that the person is required to answer by the Official Trustee or a person authorised under that paragraph, as the case may be; or
- (iii) to produce any books that the person is required by the notice to produce.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 3—Dealings relating to controlled property****276 Preserving controlled property**

The \*Official Trustee may do anything that is reasonably necessary for the purpose of preserving the \*controlled property, including the following:

- (a) becoming a party to any civil proceedings affecting the property;
- (b) ensuring that the property is insured;
- (c) realising or otherwise dealing with any of the property that is securities or investments;
- (d) if any of the property is a business:
  - (i) employing, or terminating the employment of, persons in the business; or
  - (ii) doing anything necessary or convenient to carry on the business on a sound commercial basis.

**277 Rights attaching to shares**

The \*Official Trustee may exercise the rights attaching to any of the \*controlled property that is shares as if the Official Trustee were the registered holder of the shares, to the exclusion of the registered holder.

**278 Destroying or disposing of property**

- (1) The \*Official Trustee may destroy the \*controlled property if:
  - (a) it is in the public interest to do so; or
  - (b) it is required for the health or safety of the public.
- (2) The \*Official Trustee may dispose of the \*controlled property, by sale or other means:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) with the agreement of all parties with an \*interest in the property; or
- (b) if the property is likely to lose value in the opinion of the Official Trustee; or
- (c) if, in the Official Trustee's opinion, the cost of controlling the property until the Official Trustee finally deals with it is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with; or
- (d) if, in the opinion of the Official Trustee, the disposal of the property or part of the property is necessary to pay, under Part 4-2, a \*legal aid commission's costs.

**279 Notice of proposed destruction or disposal**

- (1) The \*Official Trustee must give written notice of the proposed destruction or disposal to:
  - (a) the owner of the \*controlled property; and
  - (b) any other person whom the Official Trustee has reason to believe may have an \*interest in the property.
- (2) A person who has been so notified may object in writing to the \*Official Trustee within 14 days of receiving the notice.
- (3) However, the person may object to the disposal of the \*controlled property for the reason set out in paragraph 278(2)(d) only if:
  - (a) the value of the controlled property exceeds the total amount of the money payable to the \*legal aid commission in question; and
  - (b) the person and the \*Official Trustee have failed to agree on which item or items of, or which portion of, the controlled property should be disposed of.
- (4) An objection to which subsection (3) applies must:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) relate only to which item or items of, or which portion of, the \*controlled property should be disposed of; and
- (b) specify the item or items of, or the portion of, the controlled property that the person does not object to the \*Official Trustee disposing of.

**280 Procedure if person objects to proposed destruction or disposal**

- (1) If the \*Official Trustee wishes to continue with a proposed destruction or disposal that has been objected to, the Official Trustee must apply to the court that made the \*restraining order covering the \*controlled property for an order that the Official Trustee may destroy or dispose of the property.
- (2) The court must make an order to destroy the \*controlled property if:
  - (a) it is in the public interest to do so; or
  - (b) it is required for the health or safety of the public.
- (3) The court may take into account any matters it sees fit in determining whether it is in the public interest to destroy the \*controlled property, including:
  - (a) the use to which the property would be put if it were sold; and
  - (b) whether the cost of restoring the property to a saleable condition would exceed its realisable value; and
  - (c) whether the cost of sale would exceed its realisable value; and
  - (d) whether the sale of the property would otherwise be legal.
- (4) The court may make an order to dispose of the \*controlled property if, in the court's opinion:
  - (a) the property is likely to lose value; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the cost of controlling the property until it is finally dealt with by the \*Official Trustee is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with.
- (4A) The court must make an order to dispose of the \*controlled property, or a specified item or items of or a specified portion of the property, if in the court's opinion the disposal is necessary to pay, under Part 4-2, a \*legal aid commission's costs.
- (5) The court may also:
  - (a) order that a specified person bear the costs of controlling the \*controlled property until it is finally dealt with by the \*Official Trustee; or
  - (b) order that a specified person bear the costs of an objection to a proposed destruction or disposal of the property.

### **281 Proceeds from sale of property**

Amounts realised from any sale of the \*controlled property under section 278:

- (a) are taken to be covered by the \*restraining order that covered the property; and
- (b) if the restraining order covered the property on the basis that the property was \*proceeds of an offence or an \*instrument of an offence to which the order relates—continue to be proceeds of that offence or an instrument of that offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 4—Discharging pecuniary penalty orders and literary proceeds orders****282 Direction by a court to the Official Trustee in relation to certain restraining orders**

- (1) A court may, if subsection (2), (3) or (4) applies, direct the \*Official Trustee to pay the Commonwealth, out of property that is subject to a \*restraining order, an amount equal to:
  - (a) the \*penalty amount under a \*pecuniary penalty order; or
  - (b) the \*literary proceeds amount under a \*literary proceeds order.
- (2) The court that makes the \*pecuniary penalty order or \*literary proceeds order may include such a direction in the order if:
  - (a) the order is made against a person in relation to one or more offences; and
  - (b) the \*restraining order has already been made against that person in relation to that offence or one or more of those offences, or in relation to one or more \*related offences.
- (3) The court that makes the \*restraining order may include such a direction in the order if:
  - (a) the \*pecuniary penalty order or \*literary proceeds order has been made against a person in relation to one or more offences; and
  - (b) the restraining order is subsequently made:
    - (i) against that person in relation to that offence or one or more of those offences; or
    - (ii) against property of another person in relation to which an order is in force under subsection 141(1) in relation to the pecuniary penalty order, or under subsection 168(1) in relation to the literary proceeds order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) The court that made the \*pecuniary penalty order, the \*literary proceeds order or the \*restraining order may, on application by the \*DPP, make the direction if:
- (a) the pecuniary penalty order or literary proceeds order has been made against a person in relation to one or more offences; and
  - (b) the restraining order has been made:
    - (i) against that person in relation to that offence or one or more of those offences; or
    - (ii) against property of another person in relation to which an order is in force under subsection 141(1) in relation to the pecuniary penalty order, or under subsection 168(1) in relation to the literary proceeds order.

**282A Direction by a court to the Official Trustee in relation to unexplained wealth orders**

- (1) A court may, if subsection (2), (3) or (4) applies, direct the \*Official Trustee to pay the Commonwealth, out of property that is subject to a \*restraining order under section 20A, an amount equal to the \*unexplained wealth amount made under an \*unexplained wealth order in relation to a person.
- (2) The court that makes the \*unexplained wealth order may include such a direction in the order if the \*restraining order:
- (a) has already been made against the person; and
  - (b) relates to property that constitutes part of the person's \*total wealth.
- (3) The court that makes the \*restraining order may include such a direction in the order if:
- (a) the \*unexplained wealth order has been made against the person; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) the restraining order is subsequently made:
  - (i) against the person under section 20A; or
  - (ii) against property of another person in relation to which an order is in force under section 179S in relation to the unexplained wealth order.
- (4) The court that made the \*unexplained wealth order or the \*restraining order may, on application by the \*DPP, make the direction if:
  - (a) the unexplained wealth order has been made against the person; and
  - (b) the restraining order has been made:
    - (i) against the person under section 20A; or
    - (ii) against property of another person in relation to which an order is in force under section 179S in relation to the unexplained wealth order.

**283 Court may include further directions etc.**

- (1) For the purposes of enabling the \*Official Trustee to comply with a direction given by a court under section 282 or 282A, the court may, in the order in which the direction is given or by a subsequent order:
  - (a) direct the Official Trustee to sell or otherwise dispose of such of the property that is subject to the \*restraining order as the court specifies; and
  - (b) appoint an officer of the court or any other person:
    - (i) to execute any deed or instrument in the name of a person who owns or has an \*interest in the property; and
    - (ii) to do any act or thing necessary to give validity and operation to the deed or instrument.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The execution of the deed or instrument by the person appointed by an order under this section has the same force and validity as if the deed or instrument had been executed by the person who owned or had the \*interest in the property.

### **284 Official Trustee to carry out directions**

- (1) If the \*Official Trustee is given a direction under section 282 or 282A in relation to property, the Official Trustee must, as soon as practicable after the end of the appeal period under section 285:
- (a) to the extent that the property is not money—sell or otherwise dispose of the property; and
  - (b) apply:
    - (i) to the extent that the property is money—that money; and
    - (ii) the amounts received from the sale or disposition of the other property;
- in payment of the costs, charges, expenses and remuneration, of the kind referred to in subsection 288(1), incurred or payable in connection with the \*restraining order and payable to the Official Trustee under the regulations; and
- (c) credit the remainder of the money and amounts received to the \*Confiscated Assets Account as required by section 296.
- (2) However, if the remainder referred to in paragraph (1)(c) exceeds the \*penalty amount, \*literary proceeds amount or \*unexplained wealth amount (as the case requires), the \*Official Trustee must:
- (a) credit to the \*Confiscated Assets Account as required by section 296 an amount equal to the penalty amount, literary proceeds amount or unexplained wealth amount; and
  - (b) pay the balance to the person whose property was subject to the \*restraining order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**285 Official Trustee not to carry out directions during appeal periods**

- (1) If the \*Official Trustee is given a direction under section 282 or 282A in relation to property, the Official Trustee must not:
  - (a) if the property is money—apply the money under section 284 until the end of the appeal period under this section; and
  - (b) if the property is not money—sell or otherwise dispose of the property until the end of that period.
- (2) The appeal period under this section is the period ending:
  - (a) if the period provided for lodging an appeal against the \*pecuniary penalty order, \*literary proceeds order or \*unexplained wealth order to which the direction relates has ended without such an appeal having been lodged—at the end of that period; or
  - (b) if an appeal against the pecuniary penalty order, literary proceeds order or unexplained wealth order has been lodged—when the appeal lapses or is finally determined.
- (3) However, if the person is convicted of the offence, or any of the offences, to which the \*pecuniary penalty order or \*literary proceeds order relates, the appeal period is:
  - (a) the period ending:
    - (i) if the period provided for lodging an appeal against the conviction or convictions to which the direction relates has ended without such an appeal having been lodged—at the end of that period; or
    - (ii) if an appeal against the conviction or convictions has been lodged—when the appeal lapses or is finally determined; or
  - (b) the appeal period under subsection (2);whichever ends last.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) For the purposes of subsection (3):
- (a) if the person is to be taken to have been convicted of an offence because of paragraph 331(1)(b)—references in that subsection to lodging of an appeal against the conviction are references to lodging of an appeal against the finding that the person is guilty of the offence; and
  - (b) if the person is to be taken to have been convicted of an offence because of paragraph 331(1)(c)—references in that subsection to lodging of an appeal against the conviction are references to lodging of an appeal against the person's conviction of the other offence referred to in that paragraph.

**286 Discharge of pecuniary penalty orders and literary proceeds orders by credits to the Confiscated Assets Account**

- (1) If the \*Official Trustee credits, under this Division, money to the \*Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under a \*pecuniary penalty order, the person's liability under the pecuniary penalty order is, to the extent of the credit, discharged.
- (2) If the \*Official Trustee credits, under this Division, money to the \*Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under a \*literary proceeds order, the person's liability under the literary proceeds order is, to the extent of the credit, discharged.
- (3) If the \*Official Trustee credits, under this Division, money to the \*Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under an \*unexplained wealth order, the person's liability under the unexplained wealth order is, to the extent of the credit, discharged.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 5—Miscellaneous****287 Money not to be paid into the Common Investment Fund**

Money that is in the custody or control of the \*Official Trustee because of a \*restraining order must not be paid into the Common Investment Fund under section 20B of the *Bankruptcy Act 1966* (despite anything in that Act).

**288 Official Trustee's costs etc.**

- (1) The regulations may make provision relating to:
  - (a) the costs, charges and expenses incurred in connection with the \*Official Trustee's exercise of powers and performance of functions or duties under this Act or under Part VI of the \*Mutual Assistance Act; and
  - (b) the Official Trustee's remuneration in respect of those activities.
- (2) An amount equal to each amount of remuneration that the \*Official Trustee receives under the regulations is to be paid to the Commonwealth.

**289 Income generated from controlled property**

- (1) The \*Official Trustee may apply any income generated from \*controlled property to the payment of amounts payable to the Official Trustee, in relation to the property, under regulations made for the purposes of section 288.
- (2) However, if the \*restraining order relating to the \*controlled property ceases to be in force and the property is returned to its owner, the \*Official Trustee must arrange for an amount to be paid to the owner that is equal to the difference between:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the sum of all the amounts applied under this section in relation to the property; and
  - (b) the sum of all the amounts of expenditure by the \*Official Trustee that were necessary for maintaining the property or generating the income from property.
- (3) This section does not affect other ways in which the \*Official Trustee may recover amounts payable to the Official Trustee under regulations made for the purposes of section 288.

**290 Official Trustee is not personally liable**

- (1) The \*Official Trustee is not personally liable for:
- (a) any loss or damage, sustained by a person claiming an \*interest in all or part of the \*controlled property, arising from the Official Trustee taking custody and control of the property; or
  - (b) the cost of proceedings taken to establish an interest in the property;
- unless the court is satisfied that the Official Trustee is guilty of negligence in respect of taking custody and control of the property.
- (2) The \*Official Trustee is not personally liable for:
- (a) any rates, land tax or municipal or statutory charges imposed under a law of the Commonwealth, a State or a Territory in respect of the \*controlled property, except out of any rents or profits that the Official Trustee receives from the property; and
  - (b) if, in taking custody and control of the property, the Official Trustee carries on a business—any payment in respect of long service leave or extended leave:
    - (i) for which the person who carried on the business before the Official Trustee was liable; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ii) to which an employee of the Official Trustee in its capacity as custodian and controller of the business, or a legal representative of such an employee, becomes entitled after the \*restraining order covering the property was made; and
- (c) any other expenses in respect of the property.

### **291 Indemnification of Official Trustee**

- (1) The Commonwealth must indemnify the \*Official Trustee against any personal liability (including any personal liability as to costs) incurred by it for any act done, or omitted to be done, by it in the exercise, or purported exercise, of its powers and duties under this Act.
- (2) The Commonwealth has the same right of reimbursement in respect of a payment made under this indemnity as the \*Official Trustee would have if the Official Trustee had made the payment.
- (3) This same right of reimbursement includes reimbursement under another indemnity given to the \*Official Trustee.
- (4) Nothing in subsection (1) affects:
  - (a) any other right the \*Official Trustee has to be indemnified in respect of any personal liability referred to in that subsection; or
  - (b) any other indemnity given to the Official Trustee in respect of any such personal liability.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 4-2—Legal assistance

### 293 Payments to legal aid commissions for representing suspects and other persons

- (1) This section applies if:
  - (a) a \*legal aid commission incurred (before, on or after the commencement of this subsection) legal costs for:
    - (i) representing a person whose property was, at the time of the representation, covered by a \*restraining order in proceedings under this Act; or
    - (ii) representing a person, who was a \*suspect at the time of the representation and whose property was at that time covered by a restraining order, in proceedings for defending any criminal charge against the person; and
  - (b) the commission has given (before, on or after the commencement of this subsection) the \*Official Trustee a bill for the costs; and
  - (c) the Official Trustee is satisfied that the bill is true and correct.
- (2) The \*Official Trustee must pay the legal costs (according to the bill) to the \*legal aid commission out of the \*Confiscated Assets Account, subject to subsection (2A).
- (2A) If the \*Official Trustee is satisfied that:
  - (a) the balance of the \*Confiscated Assets Account is insufficient to pay the legal costs; and
  - (b) property of the person is covered by the \*restraining order; the Official Trustee must pay the legal costs (according to the bill) to the \*legal aid commission out of that property covered by the order, to the extent possible.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (3) If the \*Official Trustee pays an amount to the \*legal aid commission under this section and property of the person is covered by a \*restraining order, the person must pay the Commonwealth an amount equal to the lesser of the following (or either of them if they are the same):
- (a) the amount paid to the legal aid commission;
  - (b) the value of the person's property covered by the restraining order.
- (4) The person's obligation to pay the amount is discharged if there is forfeited to the Commonwealth under this Act:
- (a) all of the property that is covered by the \*restraining order; or
  - (b) some of the property that is so covered, being property of a value that equals or exceeds the amount.

#### **294 Disclosure of information to legal aid commissions**

The \*DPP or the \*Official Trustee may, for the purpose of a \*legal aid commission determining whether a person should receive legal assistance under this Part, disclose to the commission information obtained under this Act that is relevant to making that determination.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 4-3—Confiscated Assets Account

### 295 Establishment of Account

- (1) There is hereby established the Confiscated Assets Account.
- (2) The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

### 296 Credits to the Account

- (1) There must be credited to the \*Confiscated Assets Account amounts equal to:
  - (a) \*proceeds of confiscated assets; and
  - (b) money paid to the Commonwealth by a foreign country, within the meaning of the \*Mutual Assistance Act, under a treaty or arrangement providing for mutual assistance in criminal matters; and
  - (c) money paid to the Commonwealth under a \*foreign pecuniary penalty order registered under section 34 of the Mutual Assistance Act; and
  - (d) money deriving from the enforcement of an \*interstate forfeiture order registered in a \*non-governing Territory, other than money covered by a direction under subsection 70(2) or 100(2); and
  - (e) the Commonwealth's share, under the \*equitable sharing program, of proceeds resulting from a breach of the criminal law of a State or a \*self-governing Territory; and
  - (f) money, other than money referred to in paragraph (b), paid to the Commonwealth by a foreign country in connection with assistance provided by the Commonwealth in relation to the

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- recovery by that country of the proceeds of \*unlawful activity or the investigation or prosecution of unlawful activity; and
- (g) money paid to the Commonwealth under subsection 293(3), and any amounts recovered by the Commonwealth as a result of executing a charge created under section 302A; and
  - (h) amounts paid to the Commonwealth in settlement of proceedings connected with this Act.
- (3) The following are *proceeds of confiscated assets*:
- (a) the remainder of the money and amounts referred to in paragraph 70(1)(c);
  - (b) the amount referred to in paragraph 89(1)(c) or 90(f);
  - (c) the remainder of the money and amounts referred to in paragraph 100(1)(c);
  - (d) the amount referred to in paragraph 105(1)(c) or 106(f);
  - (e) the amount referred to in subsection 140(1);
  - (f) the amount referred to in subsection 167(1);
  - (fa) the amount referred to in subsection 179R(1);
  - (g) the remainder of the money and amounts referred to in paragraph 284(1)(c);
  - (h) the amount referred to in paragraph 284(2)(a);
  - (i) the remainder of the money referred to in paragraph 35G(1)(b) of the \*Mutual Assistance Act;
  - (j) the remainder of the proceeds referred to in paragraph 35G(2)(c) of the \*Mutual Assistance Act;
  - (k) the remainder of the proceeds referred to in paragraph 9A(c) of the *Crimes Act 1914*;
  - (l) the money referred to in paragraph 208DA(3)(a) of the *Customs Act 1901*;
  - (m) the remainder of the proceeds referred to in paragraph 208DA(3)(b) of the *Customs Act 1901*;

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (n) the amount referred to in subsection 243B(4) of the *Customs Act 1901*;
  - (o) the remainder of the money referred to in paragraph 243G(6)(a) of the *Customs Act 1901*;
  - (p) the remainder of the proceeds referred to in paragraph 243G(6)(b) of the *Customs Act 1901*.
- (4) The ***equitable sharing program*** is an arrangement under which any or all of the following happen:
- (a) the Commonwealth shares with a participating State or \*self-governing Territory a proportion of any \*proceeds of any \*unlawful activity recovered under a Commonwealth law, if, in the Minister's opinion, that State or Territory has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the relevant unlawful activity;
  - (b) each participating State or Territory shares with the Commonwealth any proceeds resulting from a breach of the criminal law of that State or Territory if, in the opinion of the appropriate Minister of that State or Territory, officers of an \*enforcement agency have made a significant contribution to the recovery of those proceeds;
  - (c) the Commonwealth shares with a foreign country a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister's opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

## 297 Payments out of the Account

The following are purposes of the \*Confiscated Assets Account:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 298

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- (a) making any payments to the States, to \*self-governing Territories or to foreign countries that the Minister considers are appropriate under the \*equitable sharing program;
  - (b) making any payments under a program approved by the Minister under section 298;
  - (c) making any payments that the Minister considers necessary to satisfy the Commonwealth's obligations in respect of:
    - (i) a registered \*foreign forfeiture order; or
    - (ii) an order registered under section 45 of the *International War Crimes Tribunals Act 1995*; or
    - (iii) a registered \*foreign pecuniary penalty order;
  - (d) making any payments to a State or to a self-governing Territory that the Attorney-General considers necessary following a crediting to the Account under paragraph 296(1)(b) of money received from a foreign country;
  - (e) paying the \*Official Trustee amounts that were payable to the Official Trustee under regulations made for the purposes of paragraph 288(1)(a) but that the Official Trustee has been unable to recover;
  - (f) paying the annual management fee for the Official Trustee as specified in the regulations;
  - (fa) making any payments the Commonwealth is directed to make by an order under paragraph 55(2)(a), section 72, paragraph 73(2)(d), section 77 or 94A, subparagraph 102(d)(ii) or section 179L;
  - (g) making any payments under an arrangement under paragraph 88(1)(b) or subsection 289(2);
  - (ga) making any payments in relation to the conduct of an \*examination, so long as the payments have been approved by the \*DPP;
  - (h) making any payments to a \*legal aid commission under Part 4-2.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**298 Programs for expenditure on law enforcement, drug treatment etc.**

- (1) The Minister may, in writing, approve a program for the expenditure of money standing to the credit of the \*Confiscated Assets Account.
- (2) The expenditure is to be approved for one or more of the following purposes:
  - (a) crime prevention measures;
  - (b) law enforcement measures;
  - (c) measures relating to treatment of drug addiction;
  - (d) diversionary measures relating to illegal use of drugs.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Part 4-4—Charges over restrained property to  
secure certain amounts payable to the  
Commonwealth****302A Charges to secure amounts payable under subsection 293(3)**

If:

- (a) a person whose property is covered by a \*restraining order is liable to pay an amount to the Commonwealth under subsection 293(3); and
- (b) either:
  - (i) the court revokes the restraining order; or
  - (ii) the order ceases to be in force under section 45;

there is created by force of this section a charge on the property to secure the payment of the amount to the Commonwealth.

**302B When the charge ceases to have effect**

A charge created under section 302A ceases to have effect on a \*person's property on the earliest of the following events:

- (a) the amount owing under subsection 293(3) is paid to the Commonwealth;
- (b) there is forfeited to the Commonwealth under this Act:
  - (i) all of the property that is covered by the charge; or
  - (ii) some of the property that is so covered, being property of a value that equals or exceeds the amount owing under subsection 293(3);
- (c) the person sells or disposes of the property with the consent of the \*Official Trustee.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**302C Priority of charge**

If a charge is created under section 302A in favour of the Commonwealth, the Commonwealth's charge:

- (a) is subject to every \*encumbrance on the property (other than an encumbrance in which the person who is liable to pay the amount owing under subsection 293(3) has an \*interest) that came into existence before it and that would otherwise have priority; and
- (b) has priority over all other encumbrances; and
- (c) subject to section 302B, is not affected by any change of ownership of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Part 4-5—Enforcement of interstate orders in certain Territories**

### **Division 1—Interstate restraining orders**

#### **303 Registration of interstate restraining orders**

- (1) If an \*interstate restraining order expressly applies to:
  - (a) specified property in a \*non-governing Territory; or
  - (b) all property in such a Territory of a specified person; or
  - (c) all property (other than specified property) in such a Territory of a specified person;a copy of the order, sealed by the court making the order, may be registered in the Supreme Court of the Territory by:
  - (d) the person on whose application the order was made; or
  - (e) an \*appropriate officer.
- (2) A copy of any amendments made to an \*interstate restraining order (before or after registration), sealed by the court making the amendments, may be registered in the same way. The amendments do not, for the purposes of this Act, have effect until they are registered.
- (3) Registration of an \*interstate restraining order may be refused to the extent that the order would not, on registration, be capable of enforcement in the Territory.
- (4) Registration is to be effected in accordance with the rules of the Supreme Court of the Territory.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**304 Effect of registration**

- (1) An \*interstate restraining order registered in the Supreme Court of a Territory under this Division may be enforced in the Territory as if it were a \*restraining order made at the time of registration.
- (2) This Act (other than sections 33, 42 to 45, 142 and 169, Division 5 of Part 2-1, Part 2-3 and Division 4 of Part 4-1) applies in relation to an \*interstate restraining order registered in the Supreme Court of a Territory under this Division as it applies in relation to a \*restraining order.

**305 Duration of registration**

An \*interstate restraining order ceases to be registered under this Act if:

- (a) the court in which it is registered receives notice that it has ceased to be in force in the jurisdiction in which it was made;  
or
- (b) the registration is cancelled under section 306.

**306 Cancellation of registration**

- (1) The registration of an \*interstate restraining order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court or a prescribed officer of the Supreme Court if:
  - (a) the registration was improperly obtained; or
  - (b) particulars of any amendments made to:
    - (i) the interstate restraining order; or
    - (ii) any ancillary orders or directions made by a court; are not communicated to the Supreme Court in accordance with the requirements of the rules of the Supreme Court.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) The registration of an \*interstate restraining order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court to the extent that the order is not capable of enforcement in the Territory.

**307 Charge on property subject to registered interstate restraining order**

- (1) If:
- (a) an \*interstate restraining order is made against property in relation to a person's conviction of an \*interstate indictable offence or in relation to the charging, or proposed charging, of a person with an interstate indictable offence; and
  - (b) an \*interstate pecuniary penalty order is made against the person in relation to the person's conviction of that offence or an interstate indictable offence that is a \*related offence; and
  - (c) the interstate restraining order is registered under this Division in the Supreme Court of a Territory; and
  - (d) the interstate pecuniary penalty order is registered in a court of the Territory under the *Service and Execution of Process Act 1992*;
- then, upon the registration referred to in paragraph (c) or the registration referred to in paragraph (d) (whichever last occurs), a charge is created on the property to secure payment of the amount due under the interstate pecuniary penalty order.
- (2) If a charge is created by subsection (1) on property of a person to secure payment of the amount due under an \*interstate pecuniary penalty order, the charge ceases to have effect in respect of the property:
- (a) upon the \*quashing of the conviction in relation to which the interstate pecuniary penalty order was made; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) upon the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order; or
  - (c) upon payment of the amount due under the interstate pecuniary penalty order; or
  - (d) upon the sale or other disposition of the property:
    - (i) under an order made by a court under the \*corresponding law of the State or Territory in which the interstate pecuniary penalty order was made; or
    - (ii) by the owner of the property with the consent of the court that made the interstate pecuniary penalty order; or
    - (iii) where the \*interstate restraining order directed a person to take control of the property—by the owner of the property with the consent of that person; or
  - (e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

- (3) A charge created on property by subsection (1):
  - (a) is subject to every \*encumbrance on the property (other than an encumbrance in which the person convicted of the offence has an \*interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and
  - (b) has priority over all other encumbrances; and
  - (c) subject to subsection (2), is not affected by any change of ownership of the property.
- (4) If:
  - (a) a charge is created by subsection (1) on property of a particular kind; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind:

then:

- (c) the \*Official Trustee or the \*DPP may cause the charge so created to be registered under the provisions of that law; and
- (d) if the charge is so registered—a person who purchases or otherwise acquires an \*interest in the property after the registration of the charge is, for the purposes of paragraph (2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

### **308 Powers of Official Trustee in relation to interstate restraining orders**

If:

- (a) an \*interstate restraining order is registered in the Supreme Court of a Territory under this Division; and
  - (b) the interstate restraining order directs an official of a State or a \*self-governing Territory to take control of property;
- the \*Official Trustee may, with the agreement of the official, exercise the same powers in relation to the property that the official would have been able to exercise if the property were located in that State or self-governing Territory.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 2—Interstate forfeiture orders****309 Registration of interstate forfeiture orders**

- (1) If an \*interstate forfeiture order expressly applies to property in a \*non-governing Territory, a copy of the order, sealed by the court making the order, may be registered in the Supreme Court of the Territory by:
  - (a) the person on whose application the order was made; or
  - (b) an \*appropriate officer.
- (2) A copy of any amendments made to an \*interstate forfeiture order (before or after registration), sealed by the court making the amendments, may be registered in the same way. The amendments do not, for the purposes of this Act, have effect until they are registered.
- (3) Registration of an \*interstate forfeiture order may be refused to the extent that the order would not, on registration, be capable of enforcement in the Territory.
- (4) Registration is to be effected in accordance with the rules of the Supreme Court of the Territory.

**310 Effect of registration**

- (1) An \*interstate forfeiture order registered in the Supreme Court of a Territory under this Division may be enforced in the Territory as if it were a \*forfeiture order made at the time of registration.
- (2) This Act (other than Divisions 5 and 6 of Part 2-2 and section 322) applies to an \*interstate forfeiture order registered in the Supreme Court of a Territory under this Division as it applies to a \*forfeiture order.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**311 Duration of registration**

An \*interstate forfeiture order ceases to be registered under this Act if:

- (a) the order ceases to be in force in the jurisdiction in which it was made; or
- (b) the registration is cancelled under section 312.

**312 Cancellation of registration**

- (1) The registration of an \*interstate forfeiture order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court or a prescribed officer of the Supreme Court if:
  - (a) the registration was improperly obtained; or
  - (b) particulars of any amendments made to:
    - (i) the interstate forfeiture order; or
    - (ii) any ancillary orders or directions made by a court; are not communicated to the Supreme Court in accordance with the requirements of the rules of the Supreme Court.
- (2) The registration of an \*interstate forfeiture order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court to the extent that the order is not capable of enforcement in the Territory.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Division 3—Miscellaneous**

### **313 Interim registration of faxed copies**

- (1) A faxed copy of a sealed copy of:
  - (a) an \*interstate restraining order; or
  - (b) an \*interstate forfeiture order; or
  - (c) any amendments made to such an order;is, for the purposes of this Act, taken to be the same as the sealed copy if the faxed copy is itself certified in accordance with the rules of the Supreme Court.
- (2) Registration effected by means of a faxed copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a faxed copy has been filed in the Supreme Court by that time.
- (3) Filing of the sealed copy before the end of the period referred to in subsection (2) has effect, as if it were registration of the sealed copy, from the day of registration of the faxed copy.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Chapter 5—Miscellaneous

### 314 State and Territory courts to have jurisdiction

- (1) Jurisdiction is vested in the several courts of the States and Territories with respect to matters arising under this Act.
- (2) Subject to section 53, the jurisdiction vested in a court by virtue of subsection (1) is not limited by any limits to which any other jurisdiction of the court may be subject.
- (3) Jurisdiction is vested in a court of a Territory by virtue of subsection (1) so far only as the Constitution permits.

### 315 Proceedings are civil, not criminal

- (1) Proceedings on an application for a \*restraining order or a \*confiscation order are not criminal proceedings.
- (2) Except in relation to an offence under this Act:
  - (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and
  - (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

### 315A Court may hear multiple applications at same time

A court may hear and determine 2 or more applications under this Act at the same time.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**316 Consent orders**

- (1) A court may make an order in a proceeding under Chapter 2 with the consent of:
  - (a) the applicant in the proceeding; and
  - (b) everyone whom the court has reason to believe would be affected by the order.
- (2) The order may be made:
  - (a) without consideration of the matters that the court would otherwise consider in the proceeding; and
  - (b) if the order is an order under section 47 (forfeiture orders relating to conduct constituting serious offences) or 49 (forfeiture orders relating to property suspected of proceeds of indictable offences etc.)—before the end of the period of 6 months referred to in paragraph 47(1)(b) or 49(1)(b) (as the case requires).

**317 Onus and standard of proof**

- (1) The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.
- (2) Subject to sections 52 and 118, any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities.

**318 Proof of certain matters**

- (1) A certificate of conviction of an offence, that is a certificate of a kind referred to in section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*:
  - (a) is admissible in any civil proceedings under this Act; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 318A

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- (b) is evidence of the commission of the offence by the person to whom it relates.
- (2) In any proceedings:
- (a) on an application for an order under this Act; or
  - (b) ancillary to such an application; or
  - (c) for the enforcement of an order made under this Act;
- the transcript of any \*examination is evidence of the answers given by a person to a question put to the person in the course of the examination.

### **318A Admissibility in proceedings of statements made at examination by absent witness**

#### *Scope*

- (1) This section applies if direct evidence by a person (the **absent witness**) of a matter would be admissible in a proceeding before a court:
- (a) on an application for an order under this Act; or
  - (b) ancillary to such an application; or
  - (c) for the enforcement of an order made under this Act.

#### *Admissibility of statements made at examination*

- (2) A statement that the absent witness made at an \*examination of the absent witness and that tends to establish the matter is admissible in the proceeding as evidence of the matter:
- (a) if it appears to the court that:
    - (i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or
    - (ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 318A

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- reasonably practicable to secure his or her attendance;  
or
- (iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or
  - (b) if it does not so appear to the court—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

*Rules that apply if statement admitted*

- (3) The rules in subsections (4) to (6) apply if evidence of a statement is admitted under subsection (2).
- (4) In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:
  - (a) how long after the matters to which it related occurred the statement was made; and
  - (b) any reason the absent witness may have had for concealing or misrepresenting a material matter; and
  - (c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is.
- (5) If the absent witness is not called as a witness in the proceeding:
  - (a) evidence that would, if the absent witness had been so called, have been admissible in the proceeding for the purpose of destroying or supporting his or her credibility is so admissible; and
  - (b) evidence is admissible to show that the statement is inconsistent with another statement that the absent witness has made at any time.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (6) However, evidence of a matter is not admissible under this section if, had the absent witness been called as a witness in the proceeding and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

### **318B Objection to admission of statements made at examination**

#### *Adducing party to give notice*

- (1) A party (the ***adducing party***) to a proceeding referred to in subsection 318A(1) may, not less than 14 days before the first day of the hearing of the proceeding, give another party to the proceeding written notice that the adducing party:
- (a) will apply to have admitted in evidence in the proceeding specified statements made at an \*examination; and
  - (b) for that purpose, will apply to have evidence of those statements admitted in the proceeding.
- (2) The notice must set out, or be accompanied by a written record of, the specified statements.

#### *Other party may object to admission of specified statements*

- (3) The other party may, within 14 days after a notice is given under subsection (1), give the adducing party a written notice (an ***objection notice***):
- (a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and
  - (b) specifying, in relation to each of those statements, the grounds of objection.
- (4) The period referred to in subsection (3) may be extended by the court before which the proceeding is to be heard or by agreement between the parties concerned.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Effect of giving objection notice*

- (5) On receiving an objection notice, the adducing party must give to the court a copy of:
- (a) the notice under subsection (1) and any record under subsection (2); and
  - (b) the objection notice.
- (6) If subsection (5) is complied with, the court may either:
- (a) determine the objections as a preliminary point before the hearing of the proceeding begins; or
  - (b) defer determination of the objections until the hearing.

*Effect of not giving objection notice*

- (7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceeding, unless:
- (a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or
  - (b) the court gives the other party leave to object to the statement being so admitted.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**319 Stay of proceedings**

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings.

**320 Effect of the confiscation scheme on sentencing**

A court passing sentence on a person in respect of the person's conviction of an \*indictable offence:

- (a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
- (b) must not have regard to any \*forfeiture order that relates to the offence, to the extent that the order forfeits \*proceeds of the offence; and
- (c) must have regard to the forfeiture order to the extent that the order forfeits any other property; and
- (d) must not have regard to any \*pecuniary penalty order, or any \*literary proceeds order, that relates to the offence.

**321 Deferral of sentencing pending determination of confiscation order**

If:

- (a) an application is made for a \*confiscation order in respect of a person's conviction of an \*indictable offence; and
- (b) the application is made to the court before which the person was convicted; and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(c) the court has not, when the application is made, passed sentence on the person for the offence;  
 the court may, if satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined the application for the confiscation order.

### 322 Appeals

(1) A person:

- (a) against whom a \*confiscation order is made; or
- (b) who has an \*interest in property against which a \*forfeiture order is made; or
- (c) who has an interest in property that is declared in an order under section 141, 168 or 179S to satisfy a \*pecuniary penalty order, a \*literary proceeds order or an \*unexplained wealth order;

may appeal against the confiscation order, forfeiture order or order under section 141, 168 or 179S (the *targeted order*) in the manner set out in this section.

(2) If:

- (a) the \*confiscation order; or
- (b) the \*forfeiture order; or
- (c) the \*pecuniary penalty order or \*literary proceeds order to which the order under section 141 or 168 relates;

(the *primary order*) was made in relation to a conviction of an offence, the person may appeal against the targeted order in the same manner as if the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.

(3) In any other case, the person may appeal against the targeted order in the same manner as if:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the person had been convicted of the offence to which the primary order relates; and
  - (b) the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.
- (4) However, despite subsection (2) or (3), if the primary order related to a \*foreign indictable offence, the person may appeal against the targeted order in the same manner as if:
- (a) the person had been convicted of the offence in the State or Territory in which the targeted order was made; and
  - (b) the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.
- (4A) Despite subsections (2) and (3), in the case of an \*unexplained wealth order, or an order under section 179S that relates to an unexplained wealth order, the person may appeal against the targeted order in the same manner as if:
- (a) the person had been convicted of one of the following:
    - (i) an offence against a law of the Commonwealth;
    - (ii) a \*foreign indictable offence;
    - (iii) a \*State offence that has a federal aspect; and
  - (b) the targeted order were, or were part of, the sentence imposed on the person in respect of the offence.
- (5) The \*DPP:
- (a) has the same right of appeal against a targeted order as the person referred to in subsection (1) has under this section; and
  - (b) may appeal against a refusal by a court to make a targeted order in the same manner as if such an order were made and the DPP were appealing against that order.
- (6) On an appeal against a targeted order, the order may be confirmed, discharged or varied.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(7) This section does not affect any other right of appeal.

### **323 Costs**

(1) If:

- (a) a person brings, or appears at, proceedings under this Act before a court in order:
  - (i) to prevent a \*forfeiture order or \*restraining order from being made against property of the person; or
  - (ii) to have property of the person excluded from a forfeiture order or restraining order; and
- (b) the person is successful in those proceedings; and
- (c) the court is satisfied that the person was not involved in any way in the commission of the offence in respect of which the forfeiture order or restraining order was sought or made;

the court may order the Commonwealth to pay all costs incurred by the person in connection with the proceedings or such part of those costs as is determined by the court.

(2) The costs referred to in subsection (1) are not limited to costs of a kind that are normally recoverable by the successful party to civil proceedings.

### **324 Powers conferred on judicial officers in their personal capacity**

(1) A power:

- (a) that is conferred by this Act on a State or Territory judge or on a magistrate; and
- (b) that is neither judicial nor incidental to a judicial function or power;

is conferred on that person in a personal capacity and not as a court or a member of a court.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 325

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Note: *Magistrate* is defined in section 16C of the *Acts Interpretation Act 1901*.

- (2) The State or Territory judge, or the magistrate, need not accept the power conferred.
- (3) A State or Territory judge, or magistrate, exercising a conferred power has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the judge or magistrate is a member.

### 325 Effect of a person's death

- (1) Any notice authorised or required to be given to a person under this Act is, if the person has died, sufficiently given if given to the person's legal personal representative.
- (2) A reference in this Act to a person's \*interest in property or a thing is, if the person has died, a reference to an interest in the property or thing that the person had immediately before his or her death.
- (3) An order can be applied for and made under this Act:
  - (a) in respect of a person's \*interest in property or a thing even if the person has died, and
  - (b) on the basis of the activities of a person who has died.

### 326 Operation of other laws not affected

Nothing in this Act limits or restricts:

- (a) the operation of any other law of the Commonwealth or of a \*non-governing Territory providing for the forfeiture of property or the imposition of pecuniary penalties; or
- (b) the remedies available to the Commonwealth, apart from this Act, for the enforcement of its rights and the protection of its interests.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**327 Review of operation of Act**

- (1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after the third anniversary of the commencement of this Act.
- (2) The persons who undertake such a review must give the Minister a written report of the review.
- (3) The Minister must cause a copy of each report to be tabled in each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.
- (4) However, this section does not apply if a committee of one or both Houses of the Parliament has reviewed the operation of this Act, or started such a review, before the third anniversary of the commencement of this Act.

**328 Regulations**

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## **Chapter 6—Interpreting this Act**

### **Part 6-1—Meaning of some important concepts**

#### **Division 1—Proceeds and instrument of an offence**

##### **329 Meaning of *proceeds* and *instrument***

- (1) Property is *proceeds* of an offence if:
  - (a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or
  - (b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;whether the property is situated within or outside \*Australia.
- (2) Property is an *instrument* of an offence if:
  - (a) the property is used in, or in connection with, the commission of an offence; or
  - (b) the property is intended to be used in, or in connection with, the commission of an offence;whether the property is situated within or outside \*Australia.
- (3) Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.
- (4) *Proceeds* or an *instrument* of an \*unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

##### **330 When property becomes, remains and ceases to be proceeds or an instrument**

- (1) Property becomes \*proceeds of an offence if it is:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence; or
  - (b) wholly or partly acquired using proceeds of the offence; including because of a previous application of this section.
- (2) Property becomes an \*instrument of an offence if it is:
- (a) wholly or partly derived or realised from the disposal or other dealing with an instrument of the offence; or
  - (b) wholly or partly acquired using an instrument of the offence; including because of a previous application of this section.
- (3) Property remains \*proceeds of an offence or an \*instrument of an offence even if:
- (a) it is credited to an \*account; or
  - (b) it is disposed of or otherwise dealt with.
- (4) Property only ceases to be \*proceeds of an offence or an \*instrument of an offence:
- (a) if it is acquired by a third party for \*sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires); or
  - (b) if the property vests in a person from the distribution of the estate of a deceased person, having been previously vested in a person from the distribution of the estate of another deceased person while the property was still proceeds of an offence or an instrument of an offence (as the case requires); or
  - (ba) if the property has been distributed in accordance with:
    - (i) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a marriage or either of them; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (ia) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a de facto relationship (within the meaning of that Act) or either of them; or
  - (ii) a financial agreement, or Part VIIIAB financial agreement, within the meaning of that Act; and 6 years have elapsed since that distribution; or
  - (c) if the property is acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal \*charge; or
  - (d) if a \*forfeiture order in respect of the property is satisfied; or
  - (e) if an \*interstate restraining order or an \*interstate forfeiture order is satisfied in respect of the property; or
  - (f) if the property is otherwise sold or disposed of under this Act; or
  - (g) in any other circumstances specified in the regulations.
- (5) However, if:
- (a) a person once owned property that was \*proceeds of an offence or an \*instrument of an offence; and
  - (b) the person ceased to be the owner of the property and (at that time or a later time) the property stopped being proceeds of an offence or an instrument of the offence under subsection (4) (other than under paragraph (4)(d)); and
  - (c) the person acquires the property again;
- then the property becomes proceeds of an offence or an instrument of the offence again (as the case requires).
- (5A) Paragraph (4)(ba) does not apply if, despite the distribution referred to in that paragraph, the property is still subject to the \*effective control of a person who:
- (a) has been convicted of; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (b) has been charged with, or who is proposed to be charged with; or
  - (c) has committed, or is suspected of having committed; the offence in question.
- (6) Property becomes, remains or ceases to be \*proceeds of an \*unlawful activity, or an \*instrument of an unlawful activity, if the property becomes, remains or ceases to be proceeds of the offence, or an instrument of the offence, constituted by the act or omission that constitutes the unlawful activity.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 2—Convicted and related concepts****331 Meaning of *convicted* of an offence**

- (1) For the purposes of this Act, a person is taken to be *convicted* of an offence if:
  - (a) the person is convicted, whether summarily or on indictment, of the offence; or
  - (b) the person is charged with, and found guilty of, the offence but is discharged without conviction; or
  - (c) a court, with the consent of the person, takes the offence, of which the person has not been found guilty, into account in passing sentence on the person for another offence; or
  - (d) the person \*absconds in connection with the offence.
- (2) Such a person is taken to have been convicted of the offence in the following State or Territory:
  - (a) if paragraph (1)(a) applies—the State or Territory in which the person was convicted;
  - (b) if paragraph (1)(b) applies—the State or Territory in which the person was discharged without conviction;
  - (c) if paragraph (1)(c) applies—the State or Territory in which the court took the offence into account in passing sentence on the person for the other offence;
  - (d) if paragraph (1)(d) applies—the State or Territory in which the information was laid alleging the person’s commission of the offence.
- (3) If paragraph (2)(d) applies to a person:
  - (a) the person is taken to have been convicted of the offence before the Supreme Court of that State or Territory; and
  - (b) the person is taken to have committed the offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(4) This section does not apply to a \*foreign serious offence.

**332 Meaning of *quashing* a conviction of an offence**

(1) For the purposes of this Act, a person's conviction of an offence is taken to be *quashed* if:

- (a) if the person is taken to have been convicted of the offence because of paragraph 331(1)(a)—the conviction is quashed or set aside; or
- (b) if the person is taken to have been convicted of the offence because of paragraph 331(1)(b)—the finding of guilt is quashed or set aside; or
- (c) if the person is taken to have been convicted of the offence because of paragraph 331(1)(c)—either of the following events occur:
  - (i) the person's conviction of the other offence referred to in that paragraph is quashed or set aside;
  - (ii) the decision of the court to take the offence into account in passing sentence for that other offence is quashed or set aside; or
- (d) if the person is taken to have been convicted of the offence because of paragraph 331(1)(d)—after the person is brought before a court in respect of the offence, the person is discharged in respect of the offence or a conviction of the person for the offence is quashed or set aside.

(2) This section does not apply to a \*foreign serious offence.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**333 Meaning of *conviction day***

- (1) For the purposes of this Act, the *conviction day*, in relation to a person's conviction of an \*indictable offence, is:
- (a) if the person is taken to have been convicted of the offence because of paragraph 331(1)(a)—the day on which a court passes sentence for the offence; or
  - (b) if the person is taken to have been convicted of the offence because of paragraph 331(1)(b)—the day on which the person was discharged without conviction; or
  - (c) if the person is taken to have been convicted of the offence because of paragraph 331(1)(c)—the day on which the court took the offence into account in passing sentence for the other offence referred to in that paragraph; or
  - (d) if the person is taken to have been convicted of the offence because of paragraph 331(1)(d)—the day on which the person is taken to have \*absconded in connection with the offence.
- (2) For the purposes of paragraph (1)(a), the day on which the person was convicted of the offence is taken to be the first day on which the court acted on the finding that the offence was proved against the person (whether or not the court passed sentence on that day in relation to the offence).

**334 Meaning of *abscond***

- (1) For the purposes of this Act, a person is taken to *abscond* in connection with an offence if and only if:
- (a) an information is laid alleging the person committed the offence; and
  - (b) a warrant for the person's arrest is issued in relation to that information; and
  - (c) subsection (2) applies to the person and the warrant.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (2) This subsection applies to a person and a warrant if either of the following occurs:
- (a) at the end of the period of 6 months commencing on the day on which the warrant is issued:
    - (i) the person cannot be found; or
    - (ii) the person is, for any other reason, not amenable to justice and, if the person is outside \*Australia, extradition proceedings are not on foot;
  - (b) at the end of the period of 6 months commencing on the day on which the warrant is issued:
    - (i) the person is, because he or she is outside Australia, not amenable to justice; and
    - (ii) extradition proceedings are on foot;and subsequently those proceedings terminate without an order for the person's extradition being made.
- (3) Extradition proceedings taking place in a jurisdiction in relation to a person are not taken, for the purposes of subsection (2), to be on foot unless the person is in custody, or is on bail, in that jurisdiction.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Division 3—Other concepts****335 Proceeds jurisdiction**

- (1) Whether a court has *proceeds jurisdiction* for an order, other than a \*preliminary unexplained wealth order or an \*unexplained wealth order, depends on the circumstances of the offence or offences to which the order would relate.

*General rules*

- (2) If all or part of the conduct constituting an offence to which the order would relate:
- (a) occurred in a particular State or Territory; or
  - (b) is reasonably suspected of having occurred in that State or Territory;

the courts that have *proceeds jurisdiction* for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory.

- (3) If all of the conduct constituting an offence to which the order would relate:
- (a) occurred outside \*Australia; or
  - (b) is reasonably suspected of having occurred outside \*Australia;

the courts that have *proceeds jurisdiction* for the order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

*Offender not identified*

- (4) If:
- (a) the order would, if made, be:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (i) a \*restraining order under section 19 that relates to an offence committed by a person whose identity is not known and that is not based on a finding as to the commission of a particular offence; or
  - (ii) a \*forfeiture order under section 49 that is not based on a finding that a particular person committed any offence and that is not based on a finding as to the commission of a particular offence; and

(b) the property to which the order would relate is located in a particular State or Territory;

despite subsections (2) and (3), the courts that have *proceeds jurisdiction* for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory.

(5) If:

(a) the order would, if made, be:

- (i) a \*restraining order under section 19 that relates to an offence committed by a person whose identity is not known and that is not based on a finding as to the commission of a particular offence; or
- (ii) a \*forfeiture order under section 49 that is not based on a finding that a particular person committed any offence and that is not based on a finding as to the commission of a particular offence; and

(b) the property to which the order would relate is located outside \*Australia;

despite subsections (2) and (3), the courts that have *proceeds jurisdiction* for the order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

*Magistrates may have proceeds jurisdiction in some cases*

(6) If:

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (a) the order would, if made, be one of the following orders relating to an offence of which a person has been convicted:
  - (i) a \*restraining order under section 17;
  - (ii) a \*forfeiture order under section 48;
  - (iii) a \*pecuniary penalty order under subparagraph 116(1)(b)(i); and
- (b) the person was convicted before a magistrate (the ***convicting magistrate***);

a magistrate of the same court as the convicting magistrate has ***proceeds jurisdiction*** for the order. However, this does not prevent other courts having proceeds jurisdiction for the order under subsection (2) or (3) (whichever is applicable).

Note: Although this Act is only concerned with indictable offences, these offences can often be tried summarily. For example, see section 4J of the *Crimes Act 1914*.

*Proceeds jurisdiction of Federal Court of Australia*

- (7) If the Federal Court of Australia has jurisdiction to try a person (whether on indictment or summarily) for an \*indictable offence, the Court has ***proceeds jurisdiction*** for an order if the order would, if made, be an order made on the basis of:
  - (a) a proposal that the person be charged with the offence; or
  - (b) the person having been charged with the offence; or
  - (c) the person's conviction of the offence.
- (8) Subsection (7):
  - (a) has effect despite subsections (2) and (3); and
  - (b) does not prevent other courts having \*proceeds jurisdiction for the order under another subsection of this section.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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*Preliminary unexplained wealth orders and unexplained wealth orders*

- (7) The courts that have *proceeds jurisdiction* for a \*preliminary unexplained wealth order or an \*unexplained wealth order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

**336 Meaning of *derived***

A reference to a person having *derived* \*proceeds, a \*benefit, \*literary proceeds or \*wealth includes a reference to:

- (a) the person; or
- (b) another person at the request or direction of the first person; having derived the proceeds, benefit, literary proceeds or wealth directly or indirectly.

**336A Meaning of property or wealth being *lawfully acquired***

For the purposes of this Act, property or \*wealth is *lawfully acquired* only if:

- (a) the property or wealth was lawfully acquired; and
- (b) the consideration given for the property or wealth was lawfully acquired.

**337 Meaning of *effective control***

- (1) Property may be subject to the *effective control* of a person whether or not the person has:
  - (a) a legal or equitable estate or \*interest in the property; or
  - (b) a right, power or privilege in connection with the property.
- (2) Property that is held on trust for the ultimate \*benefit of a person is taken to be under the *effective control* of the person.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (4) If property is initially owned by a person and, within 6 years either before or after an application for a \*restraining order or a \*confiscation order is made, disposed of to another person without \*sufficient consideration, then the property is taken still to be under the effective control of the first person.
- (4A) In determining whether or not property is subject to the *effective control* of a person, the effect of any order made in relation to the property under this Act is to be disregarded.
- (5) In determining whether or not property is subject to the effective control of a person, regard may be had to:
- (a) shareholdings in, debentures over or \*directorships of a company that has an \*interest (whether direct or indirect) in the property; and
  - (b) a trust that has a relationship to the property; and
  - (c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and other persons.
- (6) For the purposes of this section, family relationships are taken to include the following (without limitation):
- (a) relationships between \*de facto partners;
  - (b) relationships of child and parent that arise if someone is the child of a person because of the definition of *child* in section 338;
  - (c) relationships traced through relationships mentioned in paragraphs (a) and (b).
- (7) To avoid doubt, property may be subject to the *effective control* of more than one person.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**337A Meaning of *foreign indictable offence***

(1) If:

- (a) an application (the *current application*) is made for a \*freezing order, \*production order, \*search warrant, \*restraining order or \*confiscation order in relation to conduct that constituted an offence against a law of a foreign country; and
- (b) if the conduct had occurred in Australia at the testing time referred to in subsection (2), the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment;

then, for the purposes of the current application, the conduct is treated as having constituted a *foreign indictable offence* at all relevant times.

Example: X commits an offence against a law of a foreign country at a time when the conduct is not an offence against Australian law. X then derives literary proceeds in relation to the offence and transfers the proceeds to Australia. After the proceeds are transferred, a new Commonwealth offence is created that applies to the type of conduct concerned. An application is then made for a literary proceeds order. For the purposes of the proceedings for that order, the original conduct is treated as having constituted a foreign indictable offence at all relevant times and accordingly an order can be made in respect of those proceeds.

(2) The *testing time* for the current application is:

- (a) if the current application is an application for a \*freezing order, \*production order, \*search warrant or \*restraining order—the time when the current application was made; or
- (b) if the current application is an application for a \*confiscation order (other than a \*literary proceeds order) in relation to a restraining order—the time when the application for the restraining order was made; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) if:
  - (i) the current application is an application for a literary proceeds order; and
  - (ii) an earlier restraining order has been made in respect of the same offence;  
the time when the application was made for that earlier restraining order; or
- (d) if the current application is an application for a literary proceeds order but paragraph (c) does not apply—the time when the current application was made.

**337B Definition of *serious offence*—valuation rules**

In determining the value of a transaction or transactions for the purposes of paragraph (ea), (eb) or (ec) of the definition of *serious offence* in section 338 of this Act, apply the following provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:

- (a) the definition of *value* in section 5;
- (b) section 18;
- (c) section 19.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Part 6-2—Dictionary

### 338 Dictionary *[see Note 2]*

In this Act, unless the contrary intention appears:

***abscond*** has the meaning given by section 334.

***account*** means any facility or arrangement through which a \*financial institution accepts deposits or allows withdrawals and includes:

- (a) a facility or arrangement for:
  - (i) a \*fixed term deposit; or
  - (ii) a safety deposit box; and
- (b) a credit card account; and
- (c) a loan account (other than a credit card account); and
- (d) an account held in the form of units in:
  - (i) a cash management trust; or
  - (ii) a trust of a kind prescribed by the regulations; and
- (e) a closed account.

To avoid doubt, it is immaterial whether:

- (f) an account has a nil balance; or
- (g) any transactions have been allowed in relation to an account.

***affairs*** of a person includes, but is not limited to:

- (a) the nature and location of property of the person or property in which the person has an interest; and
- (b) any activities of the person that are, or may be, relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order under this Act.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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**AFP member** means a member, or special member, (within the meaning of the *Australian Federal Police Act 1979*) of the Australian Federal Police.

**agent** includes, if the agent is a corporation, the \*officers and agents of the corporation.

**appropriate officer** means the \*DPP or a person included in a class of persons declared by the regulations to be within this definition.

**approved examiner** has the meaning given by subsection 183(4).

**AUSTRAC** means the Australian Transaction Reports and Analysis Centre continued in existence by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

**Australia**, when used in a geographical sense, includes the external Territories.

**authorised officer** means:

- (a) an \*AFP member who is authorised by the Commissioner of the Australian Federal Police; or
- (aa) any of the following:
  - (i) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*);
  - (ii) an Assistant Integrity Commissioner (within the meaning of that Act);
  - (iii) a staff member of ACLEI (within the meaning of that Act) who is authorised in writing by the Integrity Commissioner for the purposes of this paragraph; or
- (b) any of the following:
  - (i) the Chief Executive Officer of the Australian Crime Commission;
  - (ii) an examiner (within the meaning of the *Australian Crime Commission Act 2002*) who is authorised by the

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Chief Executive Officer of the Australian Crime Commission;

- (iii) a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*) who is authorised by the Chief Executive Officer of the Australian Crime Commission; or
- (c) an officer of Customs (within the meaning of the *Customs Act 1901*) who is authorised by the CEO of Customs; or
- (d) a member, or staff member, (within the meaning of the *Australian Securities and Investments Commission Act 2001*) of the Australian Securities and Investments Commission who is authorised by the Chairperson of the Australian Securities and Investments Commission; or
- (e) a member, officer or employee of any other agency specified in the regulations who is authorised by the head of that agency.

***bankruptcy court*** means a court having jurisdiction in bankruptcy under the *Bankruptcy Act 1966*.

***bankruptcy property*** of a person means property that:

- (a) is vested in another person under subsection 58(1) of the *Bankruptcy Act 1966* but immediately before being so vested was:
  - (i) property of the person; or
  - (ii) subject to the \*effective control of the person; or
- (b) is vested in another person under subsection 249(1) of the *Bankruptcy Act 1966* but immediately before being so vested was:
  - (i) property of the person's estate; or
  - (ii) subject to the effective control of the executors of the person's estate.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Section 338

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**benefit** includes service or advantage.

**books** includes any account, deed, paper, writing or document and any record of information however compiled, recorded or stored, whether in writing, on microfilm, by electronic process or otherwise.

**charged**: a person is charged with an offence if an information is laid against the person for the offence whether or not:

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

**child**: without limiting who is a child of a person for the purposes of this Act, someone is the **child** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

**compensation order** means an order made under subsection 77(1).

**Confiscated Assets Account** means the account established under section 295.

**confiscation order** means a \*forfeiture order, a \*pecuniary penalty order, a \*literary proceeds order or an \*unexplained wealth order.

**controlled property** has the meaning given by section 267.

Note: Section 267A alters the meaning of this term for the purposes of Division 3 of Part 4-1.

**conveyance** includes an aircraft, vehicle or vessel.

**convicted** has the meaning given by section 331.

**conviction day** has the meaning given by section 333.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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**corresponding law** means a law of a State or of a \*self-governing Territory that is declared by the regulations to be a law that corresponds to this Act.

**criminal proceeding**, in relation to a \*foreign serious offence, has the same meaning as in the \*Mutual Assistance Act.

**Customs officer** means an officer of Customs within the meaning of the *Customs Act 1901*.

**data** includes:

- (a) information in any form; or
- (b) any program (or part of a program).

**data held in a computer** includes:

- (a) \*data held in any removable \*data storage device for the time being held in a computer; or
- (b) data held in a data storage device on a computer network of which the computer forms a part.

**data storage device** means a thing containing, or designed to contain, \*data for use by a computer.

**deal**: dealing with a person's property includes:

- (a) if a debt is owed to that person—making a payment to any person in reduction of the amount of the debt; and
- (b) removing the property from \*Australia; and
- (c) receiving or making a gift of the property; and
- (d) if the property is covered by a \*restraining order—engaging in a transaction that has the direct or indirect effect of reducing the value of the person's interest in the property.

**de facto partner** has the meaning given by the *Acts Interpretation Act 1901*.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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***dependant***: each of the following is a dependant of a person:

- (a) the person's spouse or \*de facto partner;
- (b) the person's \*child, or member of the person's household, who depends on the person for support.

***derived*** has the meaning given by section 336.

***director***, in relation to a \*financial institution or a corporation, means:

- (a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory—a constituent member of the body corporate; and
- (b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and
- (c) any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act, other than when those directors only do so:
  - (i) in the proper performance of the functions attaching to the person's professional capacity; or
  - (ii) in their business relationship with the person.

***DPP*** means the Director of Public Prosecutions.

***effective control*** has a meaning affected by section 337.

***encumbrance***, in relation to property, includes any \*interest, mortgage, charge, right, claim or demand in respect of the property.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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***enforcement agency*** means:

- (a) an agency mentioned in paragraphs (a) to (d) of the definition of \*authorised officer; or
- (b) an agency specified in the regulations to be a law enforcement, revenue or regulatory agency for the purposes of this Act.

***equitable sharing program*** has the meaning given by subsection 296(4).

***evidential material*** means evidence relating to:

- (a) property in respect of which action has been or could be taken under this Act; or
- (b) \*benefits derived from the commission of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; or
- (c) \*literary proceeds.

***examination*** means an examination under Part 3-1.

***examination notice*** means a notice given under section 183.

***examination order*** means an order made under section 180, 180A, 180B, 180C, 180D, 180E or 181 that is in force.

***exclusion order*** means an order made under subsection 73(1).

***executing officer***, in relation to a warrant, means:

- (a) the \*authorised officer named in the warrant by the magistrate as being responsible for executing the warrant; or
- (b) if that authorised officer does not intend to be present at the execution of the warrant—another authorised officer whose name has been written in the warrant by the first authorised officer; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (c) another authorised officer whose name has been written in the warrant by the officer last named in the warrant.

***executive officer***, in relation to a \*financial institution or a corporation, means any person, by whatever name called and whether or not he or she is a \*director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation.

***extension order*** means an order made under section 93.

***financial institution*** means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a society registered or incorporated as a co-operative housing society or similar society under a law of a State or Territory; or
- (d) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution; or
- (e) a body corporate that is a financial corporation within the meaning of paragraph 51(xx) of the Constitution; or
- (f) a body corporate that, if it had been incorporated in \*Australia, would be a financial corporation within the meaning of paragraph 51(xx) of the Constitution; or
- (g) a trading corporation (within the meaning of paragraph 51(xx) of the Constitution) that carries on a business of operating a casino; or
- (h) a trading corporation (within the meaning of paragraph 51(xx) of the Constitution) that is a \*totalisator agency board.

***fixed term deposit*** means an interest bearing deposit lodged for a fixed period.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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***foreign forfeiture order*** has the same meaning as in the \*Mutual Assistance Act.

***foreign indictable offence*** has the meaning given by section 337A.

***foreign pecuniary penalty order*** has the same meaning as in the \*Mutual Assistance Act.

***foreign restraining order*** has the same meaning as in the \*Mutual Assistance Act.

***foreign serious offence*** has the same meaning as in the \*Mutual Assistance Act.

***forfeiture order*** means an order made under Division 1 of Part 2-2 that is in force.

***freezing order*** means an order under section 15B, with any variations under section 15Q.

***frisk search*** means:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

***indictable offence*** means an offence against a law of the Commonwealth, or a \*non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances).

***indictable offence of Commonwealth concern*** means an offence against a law of a State or a \*self-governing Territory:

- (a) that may be dealt on indictment (even if it may also be dealt with as a summary offence in some circumstances); and

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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- (b) the \*proceeds of which were (or were attempted to have been) dealt with in contravention of a law of the Commonwealth on:
- (i) importation of goods into, or exportation of goods from, \*Australia; or
  - (ii) a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution; or
  - (iii) a transaction in the course of banking (other than State banking that does not extend beyond the limits of the State concerned).

**instrument** has the meaning given by sections 329 and 330.

**interest**, in relation to property or a thing, means:

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

whether present or future and whether vested or contingent.

Note: For references to an **interest** in property of a person who has died, see subsection 325(2).

**interstate forfeiture order** means an order that is made under a \*corresponding law and is of a kind declared by the regulations to be within this definition.

**interstate indictable offence** means an offence against a law of a State or a \*self-governing Territory, being an offence in relation to which an \*interstate forfeiture order or an \*interstate pecuniary penalty order may be made under a \*corresponding law of that State or Territory.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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***interstate pecuniary penalty order*** means an order that is made under a \*corresponding law and is of a kind declared by the regulations to be within this definition.

***interstate restraining order*** means an order that is made under a \*corresponding law and is of a kind declared by the regulations to be within this definition.

***lawfully acquired*** has a meaning affected by section 336A.

***lawyer*** means a duly qualified legal practitioner.

***legal aid commission*** means an authority established by or under a law of a State or a \*self-governing Territory for the purpose of providing legal assistance.

***legal professional privilege*** includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

***literary proceeds*** has the meaning given by section 153.

***literary proceeds amount*** has the meaning given by subsection 158(1).

***literary proceeds order*** means an order made under section 152 that is in force.

***monitoring order*** means an order made under section 219 that is in force.

***Mutual Assistance Act*** means the *Mutual Assistance in Criminal Matters Act 1987*.

***narcotic substance*** means:

- (a) a narcotic substance within the meaning of the *Customs Act 1901*; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) a substance specified in the regulations for the purposes of this definition.

***non-governing Territory*** means a Territory that is not a \*self-governing Territory.

***officer***, in relation to a \*financial institution or a corporation, means a \*director, secretary, \*executive officer or employee.

***Official Trustee*** means the Official Trustee in Bankruptcy.

***ordinary search*** means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items.

***parent***: without limiting who is a parent of a person for the purposes of this Act, someone is the ***parent*** of a person if the person is his or her child because of the definition of ***child*** in this section.

***pecuniary penalty order*** means an order made under section 116 that is in force.

***penalty amount*** has the meaning given by subsection 121(1).

***person assisting***, in relation to a \*search warrant, means:

- (a) a person who is an \*authorised officer and who is assisting in executing the warrant; or
- (b) a person who is not an authorised officer and who has been authorised by the relevant \*executing officer to assist in executing the warrant.

***person's property***: a person's property includes property in respect of which the person has the beneficial interest.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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***petition*** means a petition under the *Bankruptcy Act 1966*.

***police officer*** means:

- (a) an \*AFP member; or
- (b) a member of the police force of a State or Territory.

***preliminary unexplained wealth order***, in relation to a person, means an order under section 179B requiring the person to appear before a court.

***premises*** includes:

- (a) any land; and
- (b) any structure, building, aircraft, vehicle, vessel or place (whether built on or not); and
- (c) any part of such a structure, building, aircraft, vehicle, vessel or place.

***proceeds*** has the meaning given by sections 329 and 330.

***proceeds jurisdiction*** has the meaning given by section 335.

***proceeds of confiscated assets*** has the meaning given by subsection 296(3).

***production order*** means an order made under subsection 202(1) that is in force.

***professional confidential relationship privilege*** means privilege under:

- (a) Division 1A of Part 3.10 of the *Evidence Act 1995*; or
- (b) Division 1A of Part 3.10 of the *Evidence Act 1995* of New South Wales or a similar law of a State or Territory.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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**property** means real or personal property of every description, whether situated in \*Australia or elsewhere and whether tangible or intangible, and includes an \*interest in any such real or personal property.

**property-tracking document** has the meaning given in subsection 202(5).

**quashed** has the meaning given by section 332.

**registrable property** means property title to which is passed by registration on a register kept pursuant to a provision of any law of the Commonwealth or of a State or Territory.

**registration authority** means an authority responsible for administering a law of the Commonwealth, a State or a Territory providing for registration of title to, or charges over, property of a particular kind.

**related offence:** an offence is related to another offence if the physical elements of the 2 offences are substantially the same acts or omissions.

**responsible custodian** has the meaning given by subsection 254(2).

**restraining order** means an order under section 17, 18, 19 20 or 20A that is in force.

**search warrant** means a warrant issued under section 225 that is in force.

**self-governing Territory** means:

- (a) the Australian Capital Territory; or
- (b) the Northern Territory; or
- (c) Norfolk Island.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**senior Departmental officer** means an SES employee or acting SES employee in the Attorney-General's Department.

**serious offence** means:

- (a) an \*indictable offence punishable by imprisonment for 3 or more years, involving:
  - (i) unlawful conduct relating to a \*narcotic substance; or
  - (ia) unlawful conduct constituted by or relating to a breach of Part 9.1 of the *Criminal Code* (serious drug offences); or
  - (ii) unlawful conduct constituted by or relating to a breach of section 81 of the *Proceeds of Crime Act 1987* or Part 10.2 of the *Criminal Code* (money-laundering); or
  - (iii) unlawful conduct by a person that causes, or is intended to cause, a \*benefit to the value of at least \$10,000 for that person or another person; or
  - (iv) unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least \$10,000; or
- (aa) unlawful conduct by a person that consists of an indictable offence (the **3 year offence**) punishable by imprisonment for 3 or more years and one or more other indictable offences that, taken together with the 3 year offence, constitute a series of offences:
  - (i) that are founded on the same facts or are of a similar character; and
  - (ii) that cause, or are intended to cause, a benefit to the value of at least \$10,000 for that person or another person, or a loss to the Commonwealth or another person of at least \$10,000; or
- (b) an offence against any of the following provisions of the *Migration Act 1958*:
  - (i) section 233A (offence of people smuggling);

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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## Section 338

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- (ii) section 233B (people smuggling involving exploitation, or danger of death or serious harm etc.);
  - (iii) section 233C (people smuggling at least 5 people);
  - (iv) section 233D (supporting the offence of people smuggling);
  - (v) subsection 233E(1) or (2) (concealing non-citizens etc.);
  - (vi) section 234A (false documents etc. relating to at least 5 non-citizens);
- (c) an offence against any of the following provisions of the *Financial Transaction Reports Act 1988* involving a transaction of at least \$50,000 in value:
- (i) section 15 (reports about transfers of currency into or out of Australia); or
  - (ii) section 29 (false or misleading information); or
- (d) an offence against section 24 (opening accounts etc. in false names) of the *Financial Transaction Reports Act 1988* if transactions on the relevant account total at least \$50,000 in value during any 6 month period; or
- (e) an offence against section 31 (conducting transactions to avoid reporting requirements) of the *Financial Transaction Reports Act 1988* if transactions in breach of that section by the person committing the offence total at least \$50,000 in value during any 6 month period; or
- (ea) an offence against any of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* involving a transaction of at least \$50,000 in value:
- (i) section 53 (reports about movements of physical currency into or out of Australia);
  - (ii) section 59 (reports about movements of bearer negotiable instruments into or out of Australia);
  - (iii) section 136 (false or misleading information);
  - (iv) section 137 (false or misleading documents); or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (eb) an offence against any of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:
- (i) section 139 (providing a designated service using a false customer name or customer anonymity);
  - (ii) section 140 (receiving a designated service using a false customer name or customer anonymity);
  - (iii) section 141 (non-disclosure of other name by which customer is commonly known);
- if:
- (iv) the customer concerned had an account in relation to the provision of the designated service concerned; and
  - (v) transactions on the account total at least \$50,000 in value during any 6 month period beginning after the commencement of Part 12 of that Act; or
- (ec) an offence against either of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:
- (i) section 142 (conducting transactions so as to avoid reporting requirements relating to threshold transactions);
  - (ii) section 143 (conducting transfers so as to avoid reporting requirements relating to cross-border movements of physical currency);
- if transactions in breach of that section by the person committing the offence total at least \$50,000 in value during any 6 month period; or
- (ed) an offence against either of the following sections of the *Trade Practices Act 1974*:
- (i) section 44ZZRF (making a contract etc. containing a cartel provision);
  - (ii) section 44ZZRG (giving effect to a cartel provision); or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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- (f) a \*terrorism offence; or
- (g) an offence against section 11.1, 11.2, 11.2A, 11.4 or 11.5 of the *Criminal Code* or former section 5, 7, 7A or 86 of the *Crimes Act 1914* (extensions of criminal responsibility) in relation to an offence referred to in this definition; or
- (h) an indictable offence specified in the regulations.

***State indictable offence*** means an offence against a law of a State or a \*self-governing Territory that may be dealt with on indictment (even if it may also be dealt with as a summary offence in some circumstances).

***State offence that has a federal aspect*** has the same meaning as in the *Crimes Act 1914*.

Note: Section 3AA of the *Crimes Act 1914* sets out when a State offence has a federal aspect.

***stored value card*** means a portable device that is capable of storing monetary value in a form other than physical currency, or as otherwise prescribed by the regulations.

***strip search*** means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her garments; and
- (b) an examination of the person's body (but not of the person's body cavities) and of those garments.

***sufficient consideration***: an acquisition or disposal of property is for sufficient consideration if it is for a consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations.

***suspect***, in relation to a \*restraining order or a \*confiscation order, means the person who:

- (a) has been convicted of; or

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

## Section 338

- (b) has been \*charged with, or is proposed to be charged with; or
  - (c) if the order is a restraining order—is suspected of having committed; or
  - (d) if the order is a confiscation order—committed;
- the offence or offences to which the order relates.

**suspect** means:

- (a) in relation to a \*restraining order (other than a restraining order made under section 20A) or a \*confiscation order (other than an \*unexplained wealth order)—the person who:
  - (i) has been convicted of; or
  - (ii) has been \*charged with, or is proposed to be charged with; or
  - (iii) if the order is a restraining order—is suspected of having committed; or
  - (iv) if the order is a confiscation order—committed; the offence or offences to which the order relates; or
- (b) in relation to a restraining order made under section 20A or an unexplained wealth order—the person whose \*total wealth is suspected of exceeding the value of \*wealth that was \*lawfully acquired.

**tainted property** means:

- (a) \*proceeds of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; or
- (b) an \*instrument of an indictable offence.

**terrorism offence** means an offence against Part 5-3 of the *Criminal Code*.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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***totalisator agency board*** means a board or authority established by or under a law of a State or Territory for purposes that include the purpose of operating a betting service.

***total wealth***, of a person, has the meaning given by subsection 179G(2).

***unexplained wealth amount***, of a person, has the meaning given by subsection 179E(2).

***unexplained wealth order*** means an order made under subsection 179E(1) that is in force.

***unlawful activity*** means an act or omission that constitutes:

- (a) an offence against a law of the Commonwealth; or
- (b) an offence against a law of a State or Territory that may be dealt with on indictment (even if it may also be dealt with as a summary offence in some circumstances); or
- (c) an offence against a law of a foreign country.

***wealth***, of a person, has the meaning given by subsection 179G(1).

***working day*** means a day that is not a Saturday, Sunday, public holiday or bank holiday in the place concerned.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

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**Table of Acts****Notes to the *Proceeds of Crime Act 2002*****Note 1**

The *Proceeds of Crime Act 2002* as shown in this compilation comprises Act No. 85, 2002 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions *see* Table A.

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Proceeds of Crime Act 2002</i>	85, 2002	11 Oct 2002	Ss. 3–338: 1 Jan 2003 ( <i>see Gazette</i> 2002, No. GN44) Remainder: Royal Assent	
<i>Australian Crime Commission Establishment Act 2002</i>	125, 2002	10 Dec 2002	Schedule 2 (items 116, 117): (a)	—
<i>Crimes Legislation Enhancement Act 2003</i>	41, 2003	3 June 2003	Schedule 2 (items 16A–16E): 1 Jan 2003	—
<i>Bankruptcy Legislation Amendment Act 2004</i>	80, 2004	23 June 2004	Schedule 1 (items 200, 212, 213, 215): 1 Dec 2004 ( <i>see Gazette</i> 2004, No. GN34)	Sch. 1 (items 212, 213, 215)
<i>Anti-terrorism Act 2004</i>	104, 2004	30 June 2004	1 July 2004	S. 4(1)
<i>Financial Framework Legislation Amendment Act 2005</i>	8, 2005	22 Feb 2005	S. 4 and Schedule 1 (items 309–312, 496): Royal Assent	S. 4 and Sch. 1 (item 496)
<i>Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005</i>	129, 2005	8 Nov 2005	Schedule 1 (items 67, 75, 76): 6 Dec 2005 Schedule 3: Royal Assent	Sch. 1 (items 75, 76) and Sch. 3 (Item 11)
<i>Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005</i>	136, 2005	15 Nov 2005	16 Nov 2005	Sch. 1 (item 28)

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Anti-Terrorism Act (No. 2) 2005</i>	144, 2005	14 Dec 2005	Schedule 9 (items 22, 23): (b)	S. 2(1) (item 19) (am. by 170, 2006, Sch. 1 [item 11])
<b>as amended by</b>				
<i>Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006</i>	170, 2006	12 Dec 2006	Schedule 1 (item 11): (c)	—
<i>Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006</i>	86, 2006	30 June 2006	Schedule 1: (items 54, 55): 30 Dec 2006 (see s. 2(1))	—
<i>Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006</i>	170, 2006	12 Dec 2006	Schedule 1 (items 153–157): 13 Dec 2006 (see s. 2(1))	—
<i>Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007</i>	57, 2007	15 Apr 2007	Schedule 2 (items 11–19): 16 Apr 2007	Sch. 2 (item 19)
<i>Evidence Amendment (Journalists' Privilege) Act 2007</i>	116, 2007	28 June 2007	Schedule 1: 26 July 2007 Remainder: Royal Assent	—
<i>Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008</i>	115, 2008	21 Nov 2008	Schedule 2 (items 42, 43): 1 Mar 2009 Schedule 4 (item 2): (d)	—
<i>Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008</i>	144, 2008	9 Dec 2008	Schedule 2 (items 65–72): 10 Dec 2008	Sch. 2 (item 72)
<i>Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009</i>	59, 2009	26 June 2009	Schedule 1 (item 1): 24 July 2009	—



**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009</i>	106, 2009	6 Nov 2009	Schedule 1 (item 111): 4 Dec 2009	—
<i>Crimes Legislation Amendment (Serious and Organised Crime) Act 2010</i>	3, 2010	19 Feb 2010	Schedule 1 (items 1–42): Royal Assent Schedule 2 (items 1–8, 11–67, 72–107): 20 Feb 2010 Schedule 2 (items 68–71): 19 May 2010	Sch. 2 (items 8, 15, 18, 29, 31, 35, 42, 48, 50, 52, 54, 60, 63, 71, 107)
<i>Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010</i>	4, 2010	19 Feb 2010	Schedule 1 (items 1–209, 212, 213, 215, 217–221) and Schedule 10 (item 24): 20 Feb 2010 Schedule 1 (items 214, 216): (e)	Sch. 1 (items 19, 35, 65, 67, 77, 81, 94, 98, 102, 104, 107, 113, 128, 140, 146, 158, 161, 164, 166, 168, 175, 178, 181, 184, 187, 192, 197, 205, 209, 219, 221)
<i>Anti-People Smuggling and Other Measures Act 2010</i>	50, 2010	31 May 2010	Schedule 1 (item 13): 1 June 2010	—
<i>Personal Property Securities (Corporations and Other Amendments) Act 2010</i>	96, 2010	6 July 2010	Schedule 3 (items 18–21, 24–28): [see Note 3] Schedule 3 (items 22, 23): (f)	—
<i>Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010</i>	103, 2010	13 July 2010	Schedule 6 (items 1, 86): [see Note 4]	—
<i>National Security Legislation Amendment Act 2010</i>	127, 2010	24 Nov 2010	Schedule 10 (item 10): 25 Nov 2010	—

**Act Notes**

(a) Subsection 2(1) (item 4) of the *Australian Crime Commission Establishment Act 2002* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
4. Schedule 2, items 116 and 117	The later of: (a) the start of the day on which Schedule 1 to this Act commences; and (b) immediately after the commencement of section 213 of the <i>Proceeds of Crime Act 2002</i>	1 January 2003 (paragraph (b) applies)

(b) Subsection 2(1) (item 19) of the *Anti-Terrorism Act (No. 2) 2005* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
19. Schedule 9, items 18 to 24	14 December 2006. However, if section 3 of the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> commences before 14 December 2006, the provision(s) do not commence at all.	Do not commence

(c) Subsection 2(1) (item 3) of the *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
3. Schedule 1, items 2 to 11	Immediately after the commencement of section 2 of the <i>Anti-Terrorism Act (No. 2) 2005</i> .	14 December 2005

(d) Subsection 2(1) (item 8) of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Act Notes**

<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
8. Schedule 4, item 2	Immediately after the commencement of section 330 of the <i>Proceeds of Crime Act 2002</i> .	1 January 2003

(e) Subsection 2(1) (items 3 and 5) of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
3. Schedule 1, item 214	The later of: (a) the day after this Act receives the Royal Assent; and (b) immediately after the commencement of Part 5 of Schedule 2 to the <i>Crimes Legislation Amendment (Serious and Organised Crime) Act 2010</i> .  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	19 May 2010 (paragraph (b) applies)

5. Schedule 1, item 216	The later of: (a) the day after this Act receives the Royal Assent; and (b) immediately after the commencement of Part 5 of Schedule 2 to the <i>Crimes Legislation Amendment (Serious and Organised Crime) Act 2010</i> .  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	19 May 2010 (paragraph (b) applies)
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(f) Subsection 2(1) (item 16) of the *Personal Property Securities (Corporations and Other Amendments) Act 2010* provides as follows:

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Act Notes**

<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
16. Schedule 3, items 22 and 23	<p>The registration commencement time within the meaning of section 306 of the <i>Personal Property Securities Act 2009</i>.</p> <p>However, if the <i>Crimes Legislation Amendment (Serious and Organised Crime) Act 2010</i> receives the Royal Assent before the registration commencement time within the meaning of section 306 of the <i>Personal Property Securities Act 2009</i>, the provision(s) do not commence at all.</p>	Do not commence

**Table of Amendments****Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
<b>Chapter 1</b>	
<b>Part 1-2</b>	
S. 5.....	am. No. 3, 2010
<b>Part 1-3</b>	
Note to s. 6.....	ad. No. 136, 2005
Ss. 7, 8.....	am. No. 3, 2010
<b>Chapter 2</b>	
<b>Part 2-1A</b>	
Part 2-1A.....	ad. No. 3, 2010
S. 15A.....	ad. No. 3, 2010
<b>Division 1</b>	
S. 15B.....	ad. No. 3, 2010
<b>Division 2</b>	
Ss. 15C–15H.....	ad. No. 3, 2010
<b>Division 3</b>	
Ss. 15J–15M.....	ad. No. 3, 2010
<b>Division 4</b>	
S. 15N.....	ad. No. 3, 2010
S. 15P.....	ad. No. 3, 2010
<b>Division 5</b>	
S. 15Q.....	ad. No. 3, 2010
<b>Division 6</b>	
Ss. 15R, 15S.....	ad. No. 3, 2010
<b>Part 2-1</b>	
<b>Division 1</b>	
S. 17.....	am. No. 129, 2005
S. 18.....	am. No. 129, 2005; No. 3, 2010
Heading to s. 19.....	am. No. 4, 2010
S. 19.....	am. Nos. 3 and 4, 2010
S. 20.....	am. No. 104, 2004; No. 129, 2005
S. 20A.....	ad. No. 3, 2010
<b>Division 3</b>	
Heading to s. 29.....	am. Nos. 3 and 4, 2010
S. 29.....	am. No. 170, 2006; Nos. 3 and 4, 2010

**Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
Note to s. 29(1) .....	am. No. 3, 2010
Heading to s. 29A.....	am. No. 4, 2010
S. 29A .....	ad. No. 3, 2010 am. No. 4, 2010
Note to s. 29A .....	am. No. 4, 2010
Heading to s. 30 .....	am. No. 4, 2010
S. 30 .....	am. No. 4, 2010
Heading to s. 31 .....	am. No. 4, 2010
Ss. 31, 32 .....	am. No. 4, 2010
<b>Division 4</b>	
S. 35.....	am. No. 3, 2010
S. 37 .....	am. No. 3, 2010
<b>Division 5</b>	
S. 39.....	am. No. 4, 2010
Note to s. 39(1) Renumbered Note 1 .....	No. 3, 2010
Note 2 to s. 39(1) .....	ad. No. 3, 2010
Ss. 39A, 39B .....	ad. No. 4, 2010
S. 40 .....	am. No. 3, 2010
Note to s. 40 .....	am. No. 4, 2010
<b>Division 6</b>	
S. 42.....	am. No. 3, 2010
Heading to s. 45 .....	am. No. 3, 2010
S. 45.....	am. Nos. 3 and 4, 2010
S. 45A .....	ad. No. 3, 2010
<b>Part 2-2</b>	
<b>Division 1</b>	
S. 47 .....	am. No. 3, 2010
Heading to s. 49 .....	am. No. 4, 2010
S. 49.....	am. No. 3, 2010
<b>Division 2</b>	
S. 55.....	am. No. 4, 2010
<b>Division 3</b>	
S. 64.....	am. No. 4, 2010
<b>Division 4</b>	
S. 71.....	am. No. 3, 2010

**Table of Amendments**


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Provision affected	How affected
ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted	
<b>Division 5</b>	
<b>Subdivision B</b>	
S. 73.....	am. Nos. 3 and 4, 2010
Ss. 74–76.....	am. No. 4, 2010
<b>Subdivision C</b>	
Heading to Subdiv. C of Div. 5 of Part 2-2 .....	rs. No. 4, 2010
S. 77.....	am. No. 4, 2010
S. 78.....	rs. No. 4, 2010
S. 79.....	am. No. 4, 2010
S. 79A.....	ad. No. 4, 2010
<b>Division 6</b>	
Ss. 84, 85.....	am. Nos. 3 and 4, 2010
<b>Part 2-3</b>	
S. 91.....	am. No. 4, 2010
<b>Division 1</b>	
S. 92.....	am. No. 4, 2010
S. 92A.....	ad. No. 4, 2010
Ss. 93, 94.....	am. No. 4, 2010
S. 94A.....	ad. No. 4, 2010
<b>Division 3</b>	
S. 102.....	am. No. 4, 2010
S. 104.....	rs. No. 4, 2010
S. 106.....	am. No. 4, 2010
<b>Division 4</b>	
Ss. 110, 111.....	am. Nos. 3 and 4, 2010
<b>Part 2-4</b>	
<b>Division 1</b>	
S. 116.....	am. No. 3, 2010
<b>Division 2</b>	
<b>Subdivision A</b>	
S. 121.....	am. No. 4, 2010
<b>Subdivision B</b>	
S. 122.....	am. No. 4, 2010
S. 124.....	am. No. 4, 2010

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**Table of Amendments**


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ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
S. 129.....	am. No. 80, 2004
<b>Subdivision C</b>	
S. 130.....	am. No. 4, 2010
<b>Subdivision D</b>	
S. 133.....	am. No. 4, 2010
<b>Division 3</b>	
S. 134.....	am. No. 4, 2010
S. 136.....	am. No. 4, 2010
S. 138.....	am. No. 4, 2010
<b>Division 4</b>	
S. 142.....	am. No. 4, 2010
<b>Division 5</b>	
S. 146.....	am. No. 4, 2010
Heading to s. 147.....	am. No. 4, 2010
S. 147.....	am. No. 4, 2010
Note to s. 147.....	am. No. 4, 2010
Heading to s. 148.....	am. No. 4, 2010
S. 148.....	am. No. 4, 2010
S. 149.....	rs. No. 3, 2010
S. 149A.....	ad. No. 4, 2010
Heading to s. 150.....	am. No. 4, 2010
S. 150.....	am. No. 4, 2010
<b>Part 2-5</b>	
<b>Division 1</b>	
Ss. 152, 153.....	am. No. 104, 2004
<b>Division 4</b>	
S. 169.....	am. No. 4, 2010
<b>Part 2-6</b>	
Part 2-6.....	ad. No. 3, 2010
S. 179A.....	ad. No. 3, 2010
<b>Division 1</b>	
Ss. 179B, 179C.....	ad. No. 3, 2010
S. 179CA.....	ad. No. 3, 2010
Ss. 179D, 179E.....	ad. No. 3, 2010
Ss. 179EA, 179EB.....	ad. No. 3, 2010

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**Table of Amendments**


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ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
S. 179F.....	ad. No. 3, 2010
<b>Division 2</b>	
Ss. 179G, 179H.....	ad. No. 3, 2010
Ss. 179J–179L.....	ad. No. 3, 2010
<b>Division 3</b>	
Ss. 179M, 179N.....	ad. No. 3, 2010
Ss. 179P, 179Q.....	ad. No. 3, 2010
<b>Division 4</b>	
Ss. 179R, 179S.....	ad. No. 3, 2010
S. 179SA.....	ad. No. 3, 2010
S. 179T.....	ad. No. 3, 2010
<b>Division 5</b>	
S. 179U.....	ad. No. 3, 2010 am. No. 127, 2010
<b>Chapter 3</b>	
<b>Part 3-1</b>	
<b>Division 1</b>	
S. 180.....	am. No. 144, 2008; No. 4, 2010
Ss. 180A–180E.....	ad. No. 4, 2010
Heading to s. 181.....	am. No. 4, 2010
S. 181.....	am. No. 144, 2008; No. 4, 2010
S. 182.....	am. No. 4, 2010
<b>Division 3</b>	
S. 187.....	am. No. 4, 2010
<b>Division 4</b>	
Ss. 195, 196.....	am. Nos. 3 and 4, 2010
S. 197.....	am. No. 116, 2007
S. 197A.....	ad. No. 4, 2010
Ss. 199–201.....	am. No. 3, 2010
<b>Part 3-2</b>	
S. 202.....	am. Nos. 3 and 4, 2010
S. 203.....	am. No. 4, 2010
Ss. 209, 210.....	am. No. 3, 2010
S. 211.....	am. Nos. 3 and 4, 2010
S. 212.....	am. No. 3, 2010

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**Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
<b>Part 3-3</b>	
S. 213.....	am. No. 125, 2002; No. 86, 2006; No. 4, 2010
S. 214.....	am. No. 4, 2010
Ss. 216, 217 .....	am. No. 3, 2010
S. 218.....	am. Nos. 3 and 4, 2010
<b>Part 3-4</b>	
Ss. 219, 220 .....	am. No. 4, 2010
S. 222.....	am. No. 3, 2010
S. 223.....	am. No. 170, 2006; No. 3, 2010
S. 224.....	am. No. 3, 2010
<b>Part 3-5</b>	
<b>Division 1</b>	
<b>Subdivision B</b>	
Ss. 232–235 .....	am. No. 3, 2010
<b>Subdivision C</b>	
S. 246.....	am. No. 3, 2010
<b>Division 4</b>	
S. 266.....	am. No. 3, 2010
<b>Part 3-6</b>	
Part 3-6 .....	ad. No. 3, 2010
S. 266A .....	ad. No. 3, 2010 am. No. 4, 2010
<b>Chapter 4</b>	
<b>Part 4-1</b>	
<b>Division 1</b>	
S. 267A .....	ad. No. 41, 2003
<b>Division 2</b>	
S. 269.....	am. No. 4, 2010
Ss. 272–275 .....	am. No. 3, 2010
<b>Division 3</b>	
Ss. 278–280 .....	am. No. 41, 2003
<b>Division 4</b>	
Heading to s. 282 .....	am. No. 3, 2010
S. 282A .....	ad. No. 3, 2010
Ss. 283–286 .....	am. No. 3, 2010

**Table of Amendments**


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ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
<b>Division 5</b>	
S. 288.....	am. No. 8, 2005
<b>Part 4-2</b>	
S. 292.....	rep. No. 3, 2010
Heading to s. 293.....	rs. No. 3, 2010
S. 293.....	am. No. 3, 2010
<b>Part 4-3</b>	
S. 296.....	am. Nos. 3 and 4, 2010
S. 297.....	am. Nos. 8 and 136, 2005; No. 4, 2010
S. 298.....	am. No. 4, 2010
Heading to s. 299.....	am. No. 57, 2007 rep. No. 4, 2010
S. 299.....	am. No. 8, 2005; No. 57, 2007 rep. No. 4, 2010
<b>Part 4-4</b>	
Heading to Part 4-4.....	rs. No. 4, 2010
Div. 1 of Part 4-4.....	rep. No. 3, 2010
Ss. 300, 301.....	rep. No. 3, 2010
S. 302.....	am. No. 4, 2010 rep. No. 3, 2010
Heading to Div. 2 of Part 4-4.....	rep. No. 4, 2010
S. 302C.....	am. No. 4, 2010
<b>Part 4-5</b>	
<b>Division 1</b>	
S. 307.....	am. No. 4, 2010
<b>Chapter 5</b>	
S. 315A.....	ad. No. 4, 2010
S. 316.....	am. No. 4, 2010
Ss. 318A, 318B.....	ad. No. 4, 2010
S. 322.....	am. No. 3, 2010
<b>Chapter 6</b>	
<b>Part 6-1</b>	
<b>Division 1</b>	
S. 330.....	am. No. 115, 2008
<b>Division 2</b>	
S. 333.....	am. No. 4, 2010

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**Table of Amendments**


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ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
<b>Division 3</b>	
S. 335.....	am. No. 106, 2009; Nos. 3 and 4, 2010
S. 336.....	am. No. 3, 2010
S. 336A.....	ad. No. 3, 2010
S. 337.....	am. No. 144, 2008; No. 4, 2010
S. 337A.....	ad. No. 104, 2004 am. Nos. 3 and 4, 2010
S. 337B.....	ad. No. 170, 2006
<b>Part 6-2</b>	
S. 338.....	am. No. 125, 2002; No. 41, 2003; No. 104, 2004; No. 129, 2005; Nos. 86 and 170, 2006; No. 116, 2007; No. 144, 2008; No. 59, 2009; Nos. 3, 4 and 50, 2010

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**Note 2**

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**Note 2**

Section 338—Schedule 1 (item 182) of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (No. 4, 2010) provides as follows:

**Schedule 1**

**182 Section 338 (paragraph (b) of the definition of *unlawful activity*)**

Omit “that may be dealt with on indictment (even if it may be dealt with as a summary offence in some circumstances)”.

The proposed amendment was misdescribed and is not incorporated in this compilation.

**Note 3**

*Personal Property Securities (Corporations and Other Amendments) Act 2010*  
(No. 96, 2010)

The following amendments commence on 1 February 2012 or an earlier time determined by the Minister (*see* section 306 of the *Personal Property Securities Act 2009*):

**Schedule 3**

**18 At the end of section 142**

Add:

- (4) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

**Note 3**

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Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by this section after the commencement of subsection (4) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

**19 At the end of section 143**

Add:

(3) In this section:

*registration* of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data only if regulations are made for the purposes of paragraph 148(c) of that Act.

**20 At the end of section 169**

Add:

(4) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by this section after the commencement of subsection (4) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

**21 At the end of section 170**

Add:

(3) In this section:

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**Note 3**

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*registration* of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data only if regulations are made for the purposes of paragraph 148(c) of that Act.

**24 Section 302C**

Before “If a charge”, insert “(1)”.

**25 At the end of section 302C**

Add:

(2) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the Commonwealth’s charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the Commonwealth’s charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to Commonwealth charges created by section 302A after the commencement of subsection (2) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

**26 After subsection 307(3)**

Insert:

(3A) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to a charge created by subsection (1) (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

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**Note 4**

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Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by subsection (1) after the commencement of subsection (3A) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

**27 At the end of section 307**

Add:

(5) In this section:

*registration* of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data if regulations are made for the purposes of paragraph 148(c) of that Act.

**28 Section 338 (definition of *registration authority*)**

Repeal the definition, substitute:

*registration authority*, in relation to property of a particular kind, means:

- (a) an authority responsible for administering a law of the Commonwealth, a State or a Territory providing for registration of title to, or charges over, property of that kind; or
- (b) the Registrar of Personal Property Securities, if the *Personal Property Securities Act 2009* provides for the registration of data in relation to that kind of personal property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data if regulations are made for the purposes of paragraph 148(c) of that Act.

As at 26 November 2010 the amendments are not incorporated in this compilation.

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**Note 4**

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**Note 4**

*Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*  
(No. 103, 2010)

The following amendment commences on the start of 1 January 2011:

**Schedule 6**

**1 Amendment of Acts**

The specified provisions of the Acts listed in this Part are amended by omitting “*Trade Practices Act 1974*” and substituting “*Competition and Consumer Act 2010*”.

***Proceeds of Crime Act 2002***

**86 Section 338 (paragraph (ed) of the definition of *serious offence*)**

As at 26 November 2010 the amendment is not incorporated in the compilation.

**Table A**

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**Table A**

**Application, saving or transitional provisions**

*Bankruptcy Legislation Amendment Act 2004* (No. 80, 2004)

**Schedule 1**

**212 Transitional—pre-commencement deeds and compositions**

- (1) For the purposes of this item, if a deed of assignment or a deed of arrangement was executed by a debtor and a trustee under Part X of the *Bankruptcy Act 1966* before the commencement of this item, the deed is a ***pre-commencement deed***.
- (2) For the purposes of this item, if a composition was accepted before the commencement of this item by a special resolution of a meeting of creditors under section 204 of the *Bankruptcy Act 1966*, the composition is a ***pre-commencement composition***.
- (3) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:
  - (a) the *Bankruptcy Act 1966* and regulations under that Act; and
  - (b) the Acts amended by Part 2 of this Schedule;continue to apply, in relation to:
  - (c) a pre-commencement deed; and
  - (d) a pre-commencement composition; and
  - (e) any matter connected with, or arising out of:
    - (i) a pre-commencement deed; or
    - (ii) a pre-commencement composition;as if those repeals had not happened and those amendments had not been made.

Table A

**213 Transitional—pre-commencement authorities**

- 
- (1) For the purposes of this item, if:
- (a) an authority given by a debtor under section 188 of the *Bankruptcy Act 1966* became effective before the commencement of this item; and
  - (b) as at the commencement of this item, none of the following had happened:
    - (i) the execution by the debtor and the trustee of a deed of assignment under Part X of the *Bankruptcy Act 1966*;
    - (ii) the execution by the debtor and the trustee of a deed of arrangement under Part X of the *Bankruptcy Act 1966*;
    - (iii) the acceptance of a composition by a special resolution of a meeting of the debtor's creditors under section 204 of the *Bankruptcy Act 1966*;
- the authority is a *pre-commencement authority*.
- (2) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:
- (a) the *Bankruptcy Act 1966* and regulations under that Act; and
  - (b) the Acts amended by Part 2 of this Schedule;
- continue to apply, in relation to:
- (c) a pre-commencement authority; and
  - (d) the control of the debtor's property following a pre-commencement authority becoming effective; and
  - (e) a meeting of the debtor's creditors called under a pre-commencement authority; and
  - (f) whichever of the following is applicable:
    - (i) a deed of assignment executed after the commencement of this item by the debtor and the trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;
    - (ii) a deed of arrangement executed after the commencement of this item by the debtor and the
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**Table A**

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trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;

(iii) a composition accepted after the commencement of this item by a special resolution of such a meeting; and

(g) any other matter connected with, or arising out of:

(i) a pre-commencement authority; or

(ii) a deed of assignment mentioned in subparagraph (f)(i); or

(iii) a deed of arrangement mentioned in subparagraph (f)(ii); or

(iv) a composition mentioned in subparagraph (f)(iii);

as if those repeals had not happened and those amendments had not been made.

#### **215 Transitional—regulations**

- (1) The regulations may make provision for matters of a transitional nature arising from the amendments made by Parts 1 and 2 of this Schedule.
- (2) The Governor-General may make regulations for the purposes of subitem (1).

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*Anti-terrorism Act 2004* (No. 104, 2004)

#### **4 Application of amendments**

- (1) The amendments of the *Proceeds of Crime Act 2002* apply to any application made under that Act after the commencement of this Act, including an application in relation to:
- (a) conduct that occurred before the commencement of this Act; or
- (b) proceeds derived or realised before the commencement of this Act; or

**Table A**

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- (c) literary proceeds derived or transferred to Australia before the commencement of this Act.
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*Financial Framework Legislation Amendment Act 2005* (No. 8, 2005)

**4 Saving of matters in Part 2 of Schedule 1**

(1) If:

- (a) a decision or action is taken or another thing is made, given or done; and
- (b) the thing is taken, made, given or done under a provision of a Part 2 Act that had effect immediately before the commencement of this Act;

then the thing has the corresponding effect, for the purposes of the Part 2 Act as amended by this Act, as if it had been taken, made, given or done under the Part 2 Act as so amended.

(2) In this section:

**Part 2 Act** means an Act that is amended by an item in Part 2 of Schedule 1.

**Schedule 1**

**496 Saving provision—Finance Minister’s determinations**

If a determination under subsection 20(1) of the *Financial Management and Accountability Act 1997* is in force immediately before the commencement of this item, the determination continues in force as if it were made under subsection 20(1) of that Act as amended by this Act.

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*Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (No. 129, 2005)

**Schedule 1**

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**Table A**

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**75 Application of amendments to conduct before and after commencement**

- (1) In this item:
- earlier conduct* means conduct engaged in before the commencement of this Schedule.
- engage in conduct* has the same meaning as in the *Criminal Code*.
- later conduct* means conduct engaged in after the commencement of this Schedule.
- new law* means Part 9.1 of the *Criminal Code* as in force from time to time.
- old law* means:
- (a) the provisions of Division 2 of Part XIII of the *Customs Act 1901* as in force from time to time before the commencement of this Schedule to the extent to which those provisions related to narcotic substances; and
  - (b) any law related to those provisions.
- (2) The amendments made by this Schedule do not apply in relation to earlier conduct.
- (3) Despite the amendments made by this Schedule, the old law continues to apply in relation to later conduct if:
- (a) the later conduct is related to earlier conduct; and
  - (b) because of that relationship, the later conduct would have constituted a physical element (or a part of a physical element) of an offence against the old law, had the old law remained in force.
- (4) If later conduct is alleged against a person in a prosecution for an offence against the old law, that conduct must not be alleged against the person in a prosecution for:
- (a) an offence against the new law; or
  - (b) an offence related to an offence against the new law.
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**Table A**

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**76 Transitional regulations**

- (1) The regulations may make provision for matters of a transitional nature (including any saving or application provisions) arising from the amendments or repeals made by this Schedule.
- (2) The Governor-General may make regulations for the purposes of subitem (1).

**Schedule 3**

**11 Application**

The amendments made by this Part apply in relation to bankruptcy property whether vested in a person under the *Bankruptcy Act 1966* before, on or after the commencement of this item.

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*Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* (No. 136, 2005)

**Schedule 1**

**28 Transitional—validation of certain examinations etc.**

- (1) This item applies to each of the following:
    - (a) a purported examination conducted under the *Proceeds of Crime Act 2002* during the interim period by a designated AAT member in the purported capacity of approved examiner;
    - (b) the purported giving of a notice or direction under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner;
    - (c) the purported doing of any other act or thing under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner.
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**Table A**

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- (2) The examination, notice, direction, act or thing is as valid, and is taken always to have been as valid, as it would have been if the designated AAT member had been an eligible legal practitioner during the interim period.
- (3) The designated AAT member has, and is taken always to have had, the same protection and immunity under section 194 of the *Proceeds of Crime Act 2002* that the member would have, or would have had, if the member had been an eligible legal practitioner during the interim period.
- (4) In this item:
- designated AAT member** means a non-presidential member of the Administrative Appeals Tribunal who is not an eligible legal practitioner.
- eligible legal practitioner** means person who is enrolled as a legal practitioner of:
- (a) the High Court; or
  - (b) another federal court; or
  - (c) the Supreme Court of a State or Territory;
- and has been so enrolled for at least 5 years.
- interim period** means the period:
- (a) beginning at the start of 7 September 2004; and
  - (b) ending at the end of 19 August 2005.

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*Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007*  
(No. 57, 2007)

## **Schedule 2**

### **19 Transitional—section 299 of the *Proceeds of Crime Act 2002***

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**Table A**

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- (1) This item applies to anything done by the Official Trustee under section 299 of the *Proceeds of Crime Act 2002* before the commencement of this item.
- (2) The thing has effect, after the commencement of this item, as if it had been done under that section by the Inspector-General in Bankruptcy.

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*Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (No. 144, 2008)

**Schedule 2**

**72 Application**

The amendments of the *Proceeds of Crime Act 2002* made by this Part apply in relation to a proceeding under that Act instituted on or after the commencement of this item.

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*Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*  
(No. 3, 2010)

**Schedule 2**

**8 Application**

Part 2-1A of the *Proceeds of Crime Act 2002* applies in relation to an account if there are reasonable grounds to suspect that the balance of the account:

- (a) is proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern;  
or
- (b) is wholly or partly an instrument of a serious offence;

whether the conduct constituting the offence occurs before, on or after the commencement of that Part.

**Table A**

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**15 Application of amendments of sections 18 and 19**

The amendments of sections 18 and 19 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a restraining order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**18 Application of amendments of sections 47 and 49**

The amendments of sections 47 and 49 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a forfeiture order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**29 Application of amendments of section 116**

The amendments of section 116 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a pecuniary penalty order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**31 Application of new section 149**

Section 149 of the *Proceeds of Crime Act 2002* as amended by this Part applies in relation to pecuniary penalty orders applied for after the commencement of that section, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**35 Application of amendments of section 202**

The amendments of section 202 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to production orders applied for on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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**Table A**

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**42 Application of amendments of sections 18 and 19**

The amendments of sections 18 and 19 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a restraining order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**48 Application of amendments of sections 29 and 45**

The amendments of sections 29 and 45 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to restraining orders made as a result of an application made on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**50 Application of new subsection 47(4)**

Subsection 47(4) of the *Proceeds of Crime Act 2002* applies in relation to the making of an order on or after the commencement of that subsection, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**52 Application of amendment of subparagraph 49(1)(c)(iv)**

The amendment of subparagraph 49(1)(c)(iv) of the *Proceeds of Crime Act 2002* made by this Part applies in relation to applications made on or after the commencement of the amendment for a forfeiture order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**54 Application of new subsection 49(4)**

Subsection 49(4) of the *Proceeds of Crime Act 2002* applies in relation to the making of an order on or after the commencement of that subsection, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**60 Application of amendments of sections 73 and 85**

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**Table A**

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The amendments of sections 73 and 85 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to forfeiture orders applied for on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**63 Application of amendments of section 111**

The amendments of section 111 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to the quashing, on or after the commencement of the amendments, of a conviction of an offence, whether the conviction occurred before, on or after that commencement.

**71 Application of amendments of Chapter 4**

The amendments of Chapter 4 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to costs that:

- (a) were incurred by legal aid commissions before, on or after the commencement of the amendments; and
- (b) if they were incurred before that commencement, had not been paid to the commissions before that commencement.

**107 Application and transitional**

- (1) The amendment of section 42 of the *Proceeds of Crime Act 2002* made by this Part applies in relation to the revocation of a restraining order on or after commencement, whether the application for that revocation was made before, on or after commencement.
  - (2) If an application under section 42 of the *Proceeds of Crime Act 2002* for the revocation of a restraining order has been made but not determined as at commencement:
    - (a) the applicant may vary the application to take account of paragraph 42(5)(b) of the *Proceeds of Crime Act 2002* as in force at commencement; and
    - (b) if the application is varied under paragraph (a) of this subitem—the applicant must give a copy of the application as varied, and written notice of any additional grounds that he
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**Table A**

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- or she proposes to rely on in seeking that revocation, to the DPP and the Official Trustee; and
- (c) the DPP may adduce additional material to the court relating to those additional grounds.

- (3) In this item:  
*commencement* means the commencement of this item.

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*Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (No. 4, 2010)

## **Schedule 1**

### **19 Application**

Division 3 of Part 2-1 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

### **35 Application**

- (1) Subdivisions B and C of Division 5 of Part 2-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to forfeiture orders under section 47 or 49 of that Act that relate to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.
- (2) Subdivisions B and C of Division 5 of Part 2-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to forfeiture orders under section 48 of that Act applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.
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**Table A**

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**65 Application**

Part 2-3 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to property covered by restraining orders made on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**67 Application**

Paragraph 333(1)(a) of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to a person in relation to whom a court passes sentence on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**77 Application**

Division 2 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to pecuniary penalty orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**81 Application**

Division 3 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made on or after the commencement of this item for pecuniary penalty orders, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**94 Application**

Division 5 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to convictions quashed on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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**Table A**

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**98 Application**

Subsection 335(6) of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to persons convicted before a magistrate on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**102 Application**

Section 180 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**104 Application**

- (1) Sections 180A and 180B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to applications for orders under section 73 or 77 of that Act:
- (a) if the forfeiture order to which the application relates was or would be made under section 47 or 49 of that Act—that relate to restraining orders applied for on or after the commencement of this item; and
  - (b) if the forfeiture order to which the application relates was or would be made under section 48 of that Act—that relate to forfeiture orders applied for on or after the commencement of this item;
- whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.
- (2) Sections 180A and 180B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to applications for orders under section 94 or 94A of that Act that relate to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.
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**Table A**

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- (3) Sections 180C and 180E of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.
- (4) Section 180D of the *Proceeds of Crime Act 2002*, as inserted by this Part, applies in relation to confiscation orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**107 Application**

Section 181 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to convictions quashed on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**113 Application**

Sections 182 and 187 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to examination orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**128 Application**

Part 3-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to production orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**140 Application**

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**Table A**

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Part 3-3 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to notices given under section 213 of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**146 Application**

Part 3-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to monitoring orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**158 Application**

Division 5 of Part 2-1 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**161 Application**

Section 64 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to forfeiture orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**164 Application**

Section 138 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to pecuniary penalty orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**166 Application**

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**Table A**

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Sections 318A and 318B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to statements made at an examination on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**168 Application**

Section 19 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**175 Application**

Section 337A of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications referred to in paragraph 337A(1)(a) of that Act made on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**178 Application**

The amendment made by item 177 applies in relation to search warrants applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**181 Application**

The amendment made by item 180 applies in relation to search warrants applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**184 Application**

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**Table A**

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Section 45 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**187 Application**

Section 84 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made as referred to in paragraph 81(1)(b) of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**192 Application**

Section 110 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made as referred to in paragraph 107(1)(c) of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

**197 Application**

Section 316 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to proceedings under Chapter 2 of that Act, whether commenced before, on or after the commencement of this item.

**205 Application**

Paragraph 296(1)(h) of the *Proceeds of Crime Act 2002* (as amended by this Division) applies to amounts paid to the Commonwealth on or after the commencement of this Division in settlement of proceedings connected with this Act, whether the settlements occurred before, on or after that commencement.

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**Table A**

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**209 Application**

Paragraphs 297(1)(fa) and (g) of the *Proceeds of Crime Act 2002* (as amended by this Division) apply in relation to orders and arrangements made on or after the commencement of this Division.

**219 Application**

Sections 142, 169, 302, 302C and 307 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to charges created on or after the commencement of this item.

**221 Application**

Section 315A of the *Proceeds of Crime Act 2002*, as inserted by this Part, applies in relation to applications made on or after the commencement of this item.

Appendix B(iii)  
Proceeds of Crime Act 1996  
Australia

# Proceeds of Crime Act, 1996



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*Number 30 of 1996*

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## **PROCEEDS OF CRIME ACT, 1996**

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### ARRANGEMENT OF SECTIONS

#### Section

- [1. Interpretation.](#)
- [2. Interim order.](#)
- [3. Interlocutory order.](#)
- [4. Disposal order.](#)
- [5. Ancillary orders and provision in relation to certain profits or gains, etc.](#)
- [6. Order in relation to property the subject of interim order or interlocutory order.](#)
- [7. Receiver.](#)
- [8. Provisions in relation to evidence and proceedings under Act.](#)
- [9. Affidavit specifying property and income of respondent.](#)
- [10. Registration of interim orders and interlocutory orders.](#)
- [11. Bankruptcy of respondent, etc.](#)
- [12. Property subject to interim order, interlocutory order or disposal order dealt with by Official Assignee.](#)
- [13. Winding up of company in possession or control of property the subject of interim order, interlocutory order or disposal order.](#)
- [14. Immunity from proceedings.](#)

[15. Seizure of certain property.](#)

[16. Compensation.](#)

[17. Expenses.](#)

[18. Short title.](#)



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*Number 30 of 1996*

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**PROCEEDS OF CRIME ACT, 1996**

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AN ACT TO ENABLE THE HIGH COURT, AS RESPECTS THE PROCEEDS OF CRIME, TO MAKE ORDERS FOR THE PRESERVATION AND, WHERE APPROPRIATE, THE DISPOSAL OF THE PROPERTY CONCERNED AND TO PROVIDE FOR RELATED MATTERS. [4th August, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation.

1.—(1) In this Act, save where the context otherwise requires—

“*the applicant*” means a member or an authorised officer who has applied to the Court for the making of an interim order or an interlocutory order and, in relation to such an order that is in force, means any member or, as appropriate, any authorised officer;

“*authorised officer*” means an officer of the Revenue Commissioners authorised in writing by the Revenue Commissioners to perform the functions conferred by this Act on authorised officers;

“*the Court*” means the High Court;

“*dealing*”, in relation to property in the possession or control of a person, includes—

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt,

(b) removing the property from the State, and

(c) in the case of money or other property held for the person by another person, paying or releasing or transferring it to the person or to any other person;

“*disposal order*” means an order under [section 4](#) ;

“*interest*”, in relation to property, includes right;

“*interim order*” means an order under [section 2](#) ;

“*interlocutory order*” means an order under [section 3](#) ;

“*member*” means a member of the Garda Síochána not below the rank of Chief Superintendent;

“*the Minister*” means the Minister for Finance;

“*proceeds of crime*” means any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the commission of an offence;

“*property*” includes money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property and references to property shall be construed as including references to any interest in property;

“*the respondent*” means a person in respect of whom an application for an interim order or an interlocutory order has been made or in respect of whom such an order has been made and includes any person who, but for this Act, would become entitled, on the death of the first-mentioned person, to any property to which such an order relates (being an order that is in force and is in respect of that person).

(2) In this Act—

(a) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other provision is intended, and

(b) a reference to a subsection, paragraph or subparagraph is a reference to a subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and

(c) a reference to any enactment shall be construed as a reference to that enactment as amended, adapted or extended by or under any subsequent enactment.

Interim order.

**2.—(1)** Where it is shown to the satisfaction of the Court on application to it *ex parte* in that behalf by a member or an authorised officer—

(a) that a person is in possession or control of—



- (i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or
- (ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

- (b) that the value of the property or, as the case may be, the total value of the property referred to in both *subparagraphs (i) and (ii)*, of *paragraph (a)* is not less than £10,000,

the Court may make an order (“an interim order”) prohibiting the person or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value during the period of 21 days from the date of the making of the order.

(2) An interim order—

- (a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

- (b) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interim order is in force, the Court, on application to it in that behalf by the respondent or any other person claiming ownership of any of the property concerned may, if it is shown to the satisfaction of the Court that—

- (a) the property concerned or a part of it is not property to which *subparagraph (i) or (ii) of subsection (1)(a)* applies, or

- (b) the value of the property to which those subparagraphs apply is less than £10,000,

discharge or, as may be appropriate, vary the order.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interim order.

(5) Subject to *subsections (3) and (4)*, an interim order shall continue in force until the expiration of the period of 21 days from the date of its making and shall then lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period and, if such an application is

brought, the interim order shall lapse upon—

- (a) the determination of the application,
- (b) the expiration of the ordinary time for bringing an appeal from the determination,
- (c) if such an appeal is brought, the determination or abandonment of it or of any further appeal or the expiration of the ordinary time for bringing any further appeal,

whichever is the latest.

(6) Notice of an application under this section shall be given—

- (a) in case the application is under *subsection (3)*, by the respondent or other person making the application to the applicant,
- (b) in case the application is under *subsection (4)*, by the applicant to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,

and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

Interlocutory order.

**3.—(1)** Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of [section 8](#)

(a) that a person is in possession or control of—

- (i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or
- (ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both *subparagraphs (i)* and *(ii)* of *paragraph (a)* is not less than £10,000,

the Court shall make an order (“an interlocutory order”) prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing

with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person—

(I) that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, or

(II) that the value of all the property to which the order would relate is less than £10,000:

Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice.

(2) An interlocutory order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(b) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming ownership of any of the property concerned, may, if it is shown to the satisfaction of the Court that the property or a specified part of it is property to which *paragraph (I) of subsection (1)* applies, or that the order causes any other injustice, discharge or, as may be appropriate, vary the order.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interlocutory order.

(5) Subject to *subsections (3) and (4)*, an interlocutory order shall continue in force until—

(a) the determination of an application for a disposal order in relation to the property concerned,

(b) the expiration of the ordinary time for bringing an appeal from that determination,

(c) if such an appeal is brought, it or any further appeal is determined or abandoned or the ordinary time for bringing any further appeal has expired,

whichever is the latest, and shall then lapse.

(6) Notice of an application under this section shall be given—

- (a) in case the application is under *subsection (1)* or *(4)*, by the applicant to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,
- (b) in case the application is under *subsection (3)*, by the respondent or other person making the application to the applicant,

and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

(7) Where a forfeiture order, or a confiscation order, under the [Criminal Justice Act, 1994](#) , or a forfeiture order under the [Misuse of Drugs Act, 1977](#) , relates to any property that is the subject of an interim order, or an interlocutory order, that is in force, (“the specified property”), the interim order or, as the case may be, the interlocutory order shall—

- (a) if it relates only to the specified property, stand discharged, and
- (b) if it relates also to other property, stand varied by the exclusion from it of the specified property.

Disposal order.

**4.—**(1) Subject to *subsection (2)*, where an interlocutory order has been in force for not less than 7 years in relation to specified property, the Court, on application to it in that behalf by the applicant, may make an order (“a disposal order”) directing that the whole or, if appropriate, a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Minister or to such other person as the Court may determine.

(2) Subject to *subsections (6)* and *(8)*, the Court shall make a disposal order in relation to any property the subject of an application under *subsection (1)* unless it is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.

(3) The applicant shall give notice to the respondent (unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts), and to such other (if any) persons as the Court may

direct of an application under this section.

(4) A disposal order shall operate to deprive the respondent of his or her rights (if any) in or to the property to which it relates and, upon the making of the order, the property shall stand transferred to the Minister or other person to whom it relates.

(5) The Minister may sell or otherwise dispose of any property transferred to him or her under this section, and any proceeds of such a disposition and any moneys transferred to him or her under this section shall be paid into or disposed of for the benefit of the Exchequer by the Minister.

(6) In proceedings under *subsection (1)*, before deciding whether to make a disposal order, the Court shall give an opportunity to be heard by the Court and to show cause why the order should not be made to any person claiming ownership of any of the property concerned.

(7) The Court, if it considers it appropriate to do so in the interests of justice, on the application of the respondent or, if the whereabouts of the respondent cannot be ascertained, on its own initiative, may adjourn the hearing of an application under *subsection (1)* for such period not exceeding 2 years as it considers reasonable.

(8) The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice.

Ancillary orders and provision in relation to certain profits or gains, etc.

**5.—**(1) At any time while an interim order or an interlocutory order is in force, the Court may, on application to it in that behalf by the applicant, make such orders as it considers necessary or expedient to enable the order aforesaid to have full effect.

(2) Notice of an application under this section shall be given by the applicant to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts and to any other person in relation to whom the Court directs that notice of the application be given to him or her.

(3) An interim order, an interlocutory order or a disposal order may be expressed to apply to any profit or gain or interest, dividend or other payment or any other property payable or arising, after the making of the order, in connection with any other property to which the order relates.

Order in relation to property the subject of interim order or interlocutory order.

**6.—**(1) At any time while an interim order or an interlocutory order is in force, the Court may, on application to it in that behalf by the respondent or any other person affected by the order, make such orders as it considers appropriate in relation to any of the property

concerned if it considers it essential to do so for the purpose of enabling—

(a) the respondent to discharge the reasonable living and other necessary expenses (including legal expenses in or in relation to proceedings under this Act) incurred or to be incurred by or in respect of the respondent and his or her dependants, or

(b) the respondent or that other person to carry on a business, trade, profession or other occupation to which any of that property relates.

(2) An order under this section may contain such conditions and restrictions as the Court considers necessary or expedient for the purpose of protecting the value of the property concerned and avoiding any unnecessary diminution thereof.

(3) Notice of an application under this section shall be given by the person making the application to the applicant and any other person in relation to whom the Court directs that notice of the application be given to him or her.

Receiver.

7.—(1) Where an interim order or an interlocutory order is in force, the Court may at any time appoint a receiver—

(a) to take possession of any property to which the order relates,

(b) in accordance with the Court's directions, to manage, keep possession or dispose of or otherwise deal with any property in respect of which he or she is appointed,

subject to such exceptions and conditions (if any) as may be specified by the Court, and may require any person having possession or control of property in respect of which the receiver is appointed to give possession of it to the receiver.

(2) Where a receiver takes any action under this section—

(a) in relation to property which is not property the subject of an interim order or an interlocutory order, being action which he or she would be entitled to take if it were such property, and

(b) believing, and having reasonable grounds for believing, that he or she is entitled to take that action in relation to that property,

he or she shall not be liable to any person in respect of any loss or damage resulting from such action except in so far as the loss or

Provisions in relation to evidence and proceedings under Act.

damage is caused by his or her negligence.

8.—(1) Where a member or an authorised officer states—

(a) in proceedings under [section 2](#), on affidavit or, if the Court so directs, in oral evidence, or

(b) in proceedings under [section 3](#), in oral evidence,

that he or she believes either or both of the following, that is to say:

(i) that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime,

(ii) that the respondent is in possession of or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and that the value of the property or, as the case may be, the total value of the property referred to in both *paragraphs (i) and (ii)* is not less than £10,000, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matter referred to in *paragraph (i)* or in *paragraph (ii)* or in both, as may be appropriate, and of the value of the property.

(2) The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings.

(3) Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this Act may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the Court considers it proper, be heard otherwise than in public.

(4) The Court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this Act, including information in relation to applications for, the making or refusal of and the contents of orders under this Act and the persons to whom they relate.

(5) Production to the Court in proceedings under this Act of a document purporting to authorise a person, who is described therein as an officer of the Revenue Commissioners, to perform the functions conferred on authorised officers by this Act and to be signed by a Revenue Commissioner shall be evidence that the person is an

authorised officer.

Affidavit specifying property and income of respondent.

**9.**—At any time during proceedings under [section 2](#) or [3](#) or while an interim order or an interlocutory order is in force, the Court or, as appropriate, in the case of an appeal in such proceedings, the Supreme Court may by order direct the respondent to file an affidavit in the Central Office of the High Court specifying—

(a) the property of which the respondent is in possession or control, or

(b) the income, and the sources of the income, of the respondent during such period (not exceeding 10 years) ending on the date of the application for the order as the court concerned may specify,

or both.

Registration of interim orders and interlocutory orders.

**10.**—(1) Where an interim order or an interlocutory order is made, the registrar of the Court shall, in the case of registered land, furnish the Registrar of Titles with notice of the order and the Registrar of Titles shall thereupon cause an entry to be made in the appropriate register under the [Registration of Title Act, 1964](#), inhibiting, until such time as the order lapses, is discharged or is varied so as to exclude the registered land or any charge thereon from the application of the order, any dealing with any registered land or charge which appears to be affected by the order.

(2) Where notice of an order has been given under *subsection (1)* and the order is varied in relation to registered land, the registrar of the Court shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall thereupon cause the entry made under *subsection (1)* of this section to be varied to that effect.

(3) Where notice of an order has been given under *subsection (1)* and the order is discharged or lapses, the registrar of the High Court shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall cancel the entry made under *subsection (1)*.

(4) Where an interim order or an interlocutory order is made, the registrar of the Court shall, in the case of unregistered land, furnish the Registrar of Deeds with notice of the order and the Registrar of Deeds shall thereupon cause the notice to be registered in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707.

(5) Where notice of an order has been given under *subsection (4)* and the order is varied, the registrar of the Court shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cause the notice registered under *subsection*



(4) to be varied to that effect.

(6) Where notice of an order has been given under *subsection (4)* and the order is discharged or lapses, the registrar of the Court shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cancel the registration made under *subsection (4)*.

(7) Where an interim order or an interlocutory order is made which applies to an interest in a company or to the property of a company, the registrar of the Court shall furnish the Registrar of Companies with notice of the order and the Registrar of Companies shall thereupon cause the notice to be entered in the Register of Companies maintained under the Companies Acts, 1963 to 1990.

(8) Where notice of an order has been given under *subsection (7)* and the order is varied, the registrar of the Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cause the notice entered under *subsection (7)* to be varied to that effect.

(9) Where notice of an order has been given under *subsection (7)* and the order is discharged or lapses, the registrar of the Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cancel the entry made under *subsection (7)*.

Bankruptcy of respondent, etc.

**11.**—(1) Where a person who is in possession or control of property is adjudicated bankrupt, property subject to an interim order, an interlocutory order, or a disposal order, made before the order adjudicating the person bankrupt, is excluded from the property of the bankrupt for the purposes of the [Bankruptcy Act, 1988](#) .

(2) Where a person has been adjudicated bankrupt, the powers conferred on the Court by [section 2](#) or [3](#) shall not be exercised in relation to property of the bankrupt for the purposes of the said Act of 1988.

(3) In any case in which a petition in bankruptcy was presented, or an adjudication in bankruptcy was made, before the 1st day of January, 1989, this section shall have effect with the modification that, for the references in *subsections (1)* and *(2)* to the property of the bankrupt for the purposes of the Act aforesaid, there shall be substituted references to the property of the bankrupt vesting in the assignees for the purposes of the law of bankruptcy existing before that date.

Property subject to interim order, interlocutory order or disposal order dealt with by

**12.**—(1) Without prejudice to the generality of any provision of any other enactment, where—

Official Assignee.

(a) the Official Assignee or a trustee appointed under the provisions of Part V of the [Bankruptcy Act, 1988](#) , seizes or disposes of any property in relation to which his or her functions are not exercisable because it is subject to an interim order, an interlocutory order or a disposal order, and

(b) at the time of the seizure or disposal he or she believes, and has reasonable grounds for believing, that he or she is entitled (whether in pursuance of an order of a court or otherwise) to seize or dispose of that property,

he or she shall not be liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by his or her negligence in so acting, and he or she shall have a lien on the property, or the proceeds of its sale, for such of his or her expenses as were incurred in connection with the bankruptcy or other proceedings in relation to which the seizure or disposal purported to take place and for so much of his or her remuneration as may reasonably be assigned for his or her acting in connection with those proceedings.

(2) Where the Official Assignee or a trustee appointed as aforesaid incurs expenses in respect of such property as is mentioned in *subsection (1)(a)* and in so doing does not know and has no reasonable grounds to believe that the property is for the time being subject to an order under this Act, he or she shall be entitled (whether or not he or she has seized or disposed of that property so as to have a lien) to payment of those expenses.

Winding up of company in possession or control of property the subject of interim order, interlocutory order or disposal order.

**13.—**(1) Where property the subject of an interim order, an interlocutory order or a disposal order made before the relevant time is in the possession or control of a company and an order for the winding up of the company has been made or a resolution has been passed by the company for a voluntary winding up, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to the property.

(2) Where, in the case of a company, an order for its winding up has been made or such a resolution has been passed, the powers conferred by [section 2](#) or [3](#) on the Court shall not be exercised in relation to any property held by the company in relation to which the functions of the liquidator are exercisable—

(a) so as to inhibit him or her from exercising those functions for the purpose of distributing any property held by the company to the company's creditors, or

(b) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) In this section—

“*company*” means any company which may be wound up under the Companies Acts, 1963 to 1990;

“*relevant time*” means—

(a) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up,

(b) where such an order has been made and, before the presentation of the petition for the winding up of the company by the court, such a resolution had been passed by the company, the time of the passing of the resolution, and

(c) in any other case where such an order has been made, the time of the making of the order.

Immunity from proceedings.

**14.**—No action or proceedings of any kind shall lie against a bank, building society or other financial institution or any other person in any court in respect of any act or omission done or made in compliance with an order under this Act.

Seizure of certain property.

**15.**—(1) Where an order under this Act is in force, a member of the Garda Síochána or an officer of customs and excise may, for the purpose of preventing any property the subject of the order being removed from the State, seize the property.

(2) Property seized under this section shall be dealt with in accordance with the directions of the Court.

Compensation.

**16.**—(1) Where—

(a) an interim order is discharged or lapses and an interlocutory order in relation to the matter is not made or, if made, is discharged (otherwise than pursuant to [section 3 \(7\)](#)),

(b) an interlocutory order is discharged (otherwise than pursuant to [section 3 \(7\)](#)) or lapses and a disposal order in relation to the matter is not made or, if made, is discharged,

(c) an interim order or an interlocutory order is varied (otherwise than pursuant to [section 3 \(7\)](#)) or a disposal

order is varied on appeal,

the Court may, on application to it in that behalf by a person who shows to the satisfaction of the Court that—

(i) he or she is the owner of any property to which—

(I) an order referred to in *paragraph (a)* or *(b)* related,  
or

(II) an order referred to in *paragraph (c)* had related  
but, by reason of its being varied by a court, has  
ceased to relate,

and

(ii) the property does not constitute, directly or indirectly,  
proceeds of crime or was not acquired, in whole or in  
part, with or in connection with property that, directly  
or indirectly, constitutes proceeds of crime, award to  
the person such (if any) compensation payable by the  
Minister as it considers just in the circumstances in  
respect of any loss incurred by the person by reason of  
the order concerned.

(2) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under this section.

Expenses.

**17.**—The expenses incurred by the Minister and (to such extent as may be sanctioned by the Minister) by the Garda Síochána and the Revenue Commissioners in the administration of this Act shall be paid out of moneys provided by the Oireachtas.

Short title.

**18.**—This Act may be cited as the Proceeds of Crime Act, 1996.

Acts Referred to

<a href="#">Bankruptcy Act, 1988</a>	1988, No. 27
Companies Acts, 1963 to 1990	
<a href="#">Criminal Justice Act, 1994</a>	1994, No. 15
<a href="#">Misuse of Drugs Act, 1977</a>	1977, No. 12
Registration of Deeds Act, 1707	6. Anne c. 2
<a href="#">Registration of Title Act, 1964</a>	1964, No. 16

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Appendix B(iv)  
Criminal Assets Bureau Act 1996  
Ireland

# Criminal Assets Bureau Act, 1996



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*Number 31 of 1996*

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## CRIMINAL ASSETS BUREAU ACT, 1996

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### ARRANGEMENT OF SECTIONS

#### Section

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Bureau by Comptroller and Auditor General.

20. Accounting for tax.
21. Reports and information to Minister.
22. Expenses.
23. Amendment of section 19A (anonymity) of Finance Act, 1983.
24. Amendment of certain taxation provisions.
25. Amendment of section 5 (enquiries or action by inspector or other officer) of the Waiver of Certain Tax, Interest and Penalties Act, 1993.
26. Short title.



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Number 31 of 1996

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**CRIMINAL ASSETS BUREAU ACT, 1996**

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AN ACT TO MAKE PROVISION FOR THE ESTABLISHMENT OF A BODY TO BE KNOWN AS THE CRIMINAL ASSETS BUREAU AND TO DEFINE ITS FUNCTIONS AND TO AMEND THE [FINANCE ACT, 1983](#) , AND THE [WAIVER OF CERTAIN TAX, INTEREST AND PENALTIES ACT, 1993](#) , AND TO PROVIDE FOR RELATED MATTERS. [11<sup>th</sup> October, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation.

1.—(1) In this Act—

“*the Bureau*” means the Criminal Assets Bureau established by [section 3](#) ;

“*the bureau legal officer*” means the legal officer of the Bureau;

“*bureau officer*” means a person appointed as a bureau officer under [section 8](#) ;

“*the Chief Bureau Officer*” means the chief officer of the Bureau;

“*the Commissioner*” means the Commissioner of the Garda Síochána;

“*the establishment day*” means the day appointed by the Minister under [section 2](#) ;

“*Garda functions*” means any power or duty conferred on any member of the Garda Síochána by or under any enactment (including an enactment passed after the passing of this Act) or the common law;

“*member of the family*”, in relation to an individual who is a bureau officer or a member of the staff of the Bureau, means the spouse, parent, grandparent, step-parent, child (including a step-child or an adopted child), grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the individual or of the individual's spouse, or any person who is cohabiting or residing with the individual;

“*the Minister*” means the Minister for Justice;

“*proceedings*” includes any hearing before the Appeal Commissioners (within the meaning of the Revenue Acts) or before an appeals officer or the Social Welfare Tribunal under the Social Welfare Acts or a hearing before any committee of the Houses of the Oireachtas;

“*Revenue Acts*” means—

- (a) the Customs Acts,
- (b) the statutes relating to the duties of excise and to the management of those duties,
- (c) the Tax Acts,
- (d) the Capital Gains Tax Acts,
- (e) the [Value-Added Tax Act, 1972](#) ,
- (f) the [Capital Acquisitions Tax Act, 1976](#) ,
- (g) the statutes relating to stamp duty and to the management of that duty,
- (h) Part VI of the [Finance Act, 1983](#) ,
- (i) Chapter IV of Part II of the [Finance Act, 1992](#) ,

and any instruments made thereunder and any instruments made under any other enactment and relating to tax;



“*tax*” means any tax, duty, levy or charge under the care and management of the Revenue Commissioners.

(2) In this Act—

- (a) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended,
- (b) a reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended, and
- (c) a reference to an enactment shall be construed as a reference to that enactment as amended or extended by any other enactment.

Establishment day.

**2.**—The Minister may, after consultation with the Minister for Finance, by order appoint a day to be the establishment day for the purposes of this Act.

Establishment of Bureau.

**3.**—(1) On the establishment day there shall stand established a body to be known as the Criminal Assets Bureau, and in this Act referred to as “*the Bureau*”, to perform the functions conferred on it by or under this Act.

(2) The Bureau shall be a body corporate with perpetual succession and an official seal and power to sue and be sued in its corporate name and to acquire, hold and dispose of land or an interest in land and to acquire, hold and dispose of any other property.

Objectives of Bureau.

**4.**—Subject to the provisions of this Act, the objectives of the Bureau shall be—

- (a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,
- (b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and
- (c) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *paragraphs (a) and (b)*.

Functions of Bureau.

**5.**—(1) Without prejudice to the generality of [section 4](#), the

functions of the Bureau, operating through its bureau officers, shall be the taking of all necessary actions—

- (a) in accordance with Garda functions, for the purposes of, the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal activity,
- (b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be,
- (c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of [section 204](#) of the [Social Welfare \(Consolidation\) Act, 1993](#) ) by any person engaged in criminal activity, and
- (d) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of [section 204](#) of the [Social Welfare \(Consolidation\) Act, 1993](#) , where the Minister for Social Welfare certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of the Minister for Social Welfare may be subject to threats or other forms of intimidation,

and such actions include, where appropriate, subject to any international agreement, cooperation with any police force, or any authority, being a tax authority or social security authority, of a territory or state other than the State.

(2) In relation to the matters referred to in *subsection (1)*, nothing in this Act shall be construed as affecting or restricting in any way—

- (a) the powers or duties of the Garda Síochána, the Revenue Commissioners or the Minister for Social Welfare, or
- (b) the functions of the Attorney General, the Director of Public Prosecutions or the Chief State Solicitor.

Conferral of additional functions on Bureau.

**6.—(1)** The Minister may, if the Minister so thinks fit, and after consultation with the Minister for Finance, by order—

- (a) confer on the Bureau or its bureau officers such additional

functions connected with the objectives and functions for the time being of the Bureau, and

(b) make such provision as the Minister considers necessary or expedient in relation to matters ancillary to or arising out of the conferral on the Bureau or its bureau officers of functions under this section or the performance by the Bureau or its bureau officers of functions so conferred.

(2) The Minister may by order amend or revoke an order under this section (including an order under this subsection).

(3) Every order made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(4) In this section “*functions*” includes powers and duties.

Chief Bureau Officer.

7.—(1) There shall be a chief officer of the Bureau who shall be known, and is referred to in this Act, as the Chief Bureau Officer.

(2) The Commissioner shall, from time to time, appoint to the Bureau the Chief Bureau Officer and may, at any time, remove the Chief Bureau Officer from his or her appointment with the Bureau.

(3) The Chief Bureau Officer shall carry on and manage and control generally the administration and business of the Bureau.

(4) The Chief Bureau Officer shall be responsible to the Commissioner for the performance of the functions of the Bureau.

(5) (a) In the event of incapacity through illness, or absence otherwise, of the Chief Bureau Officer, the Commissioner may appoint to the Bureau a person, who shall be known, and is referred to in this section, as the Acting Chief Bureau Officer, to perform the functions of the Chief Bureau Officer.

(b) The Commissioner may, at any time, remove the Acting Chief Bureau Officer from his or her appointment with the Bureau and shall, in any event, remove the Acting Chief Bureau Officer from that appointment upon being satisfied that the incapacity or absence of the Chief Bureau Officer has ceased and that the Chief Bureau Officer has resumed the performance of the functions of

Chief Bureau Officer.

(c) *Subsections (3) and (4) and paragraph (a)* shall apply to the Acting Chief Bureau Officer as they apply to the Chief Bureau Officer.

(6) The Chief Bureau Officer shall be appointed from amongst the members of the Garda Síochána of the rank of Chief Superintendent.

(7) For the purposes of this Act other than *subsections (1), (3) and (9)* of [section 8](#), the Chief Bureau Officer or Acting Chief Bureau Officer, as the case may be, shall be a bureau officer.

Bureau officers.

(1) (a) The Minister may appoint, with the consent of the Minister for Finance, such and so many—

(i) members of the Garda Síochána nominated for the purposes of this Act by the Commissioner,

(ii) officers of the Revenue Commissioners nominated for the purposes of this Act by the Revenue Commissioners, and

(iii) officers of the Minister for Social Welfare nominated for the purposes of this Act by that Minister,

to be bureau officers for the purposes of this Act.

(b) An appointment under this subsection shall be confirmed in writing, at the time of the appointment or as soon as may be thereafter, specifying the date of the appointment.

(2) The powers and duties vested in a bureau officer for the purposes of this Act, shall, subject to *subsections (5), (6) and (7)*, be the powers and duties vested in the bureau officer, as the case may be, by virtue of—

(a) being a member of the Garda Síochána,

(b) the Revenue Acts or, any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, including any authorisation or nomination made thereunder, or

(c) the Social Welfare Acts, including any appointment made thereunder,

and such exercise or performance of any power or duty for the purposes of this Act shall be exercised or performed in the name of the Bureau.

(3) A bureau officer, when exercising or performing any powers or duties for the purposes of this Act, shall be under the direction and control of the Chief Bureau Officer.

(4) Where in any case a bureau officer (other than the Chief Bureau Officer) who, prior to being appointed a bureau officer, was required to exercise or perform any power or duty on the direction of any other person, it shall be lawful for the bureau officer to exercise or perform such power or duty for the purposes of this Act on the direction of the Chief Bureau Officer.

(5) A bureau officer may exercise or perform his or her powers or duties on foot of any information received by him or her from another bureau officer or on foot of any action taken by that other bureau officer in the exercise or performance of that other bureau officer's powers or duties for the purposes of this Act, and any information, documents or other material obtained by bureau officers under this subsection shall be admitted in evidence in any subsequent proceedings.

(6) (a) A bureau officer may be accompanied or assisted in the exercise or performance of that bureau officer's powers or duties by such other persons (including bureau officers) as the first-mentioned bureau officer considers necessary.

(b) A bureau officer may take with him or her, to assist him or her in the exercise or performance of his or her powers or duties, any equipment or materials as that bureau officer considers necessary.

(c) A bureau officer who assists another bureau officer under *paragraph (a)* shall have and be conferred with the powers and duties of the first-mentioned bureau officer for the purposes of that assistance only.

(d) Information, documents or other material obtained by any bureau officer under *paragraph (a)* or (c) may be admitted in evidence in any subsequent proceedings.

(7) Any information or material obtained by a bureau officer for the purposes of this Act may only be disclosed by the bureau officer to—

(a) another bureau officer or a member of the staff of the Bureau,

(b) any member of the Garda Síochána for the purposes of Garda functions,

(c) any officer of the Revenue Commissioners for the purposes

of the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue,

- (d) any officer of the Minister for Social Welfare for the purposes of the Social Welfare Acts, or
- (e) with the consent of the Chief Bureau Officer, any other officer of another Minister of the Government or of a local authority (within the meaning of the [Local Government Act, 1941](#) ) for the purposes of that other officer exercising or performing his or her powers or duties,

and information, documents or other material obtained by a bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings.

(8) A member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, who is a bureau officer, notwithstanding his or her appointment as such, shall continue to be vested with and may exercise or perform the powers or duties of a member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, as the case may be, for purposes other than the purposes of this Act, as well as for the purposes of this Act.

(9) The Chief Bureau Officer may, at his or her absolute discretion, at any time, with the consent of the Commissioner, remove any bureau officer from the Bureau whereupon his or her appointment as a bureau officer shall cease.

(10) Nothing in this section shall affect the powers and duties of a member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, who is not a bureau officer.

Staff of Bureau.

- 1.—(1) (a) The Minister may, with the consent of the Attorney General and of the Minister for Finance, appoint a person to be the bureau legal officer, who shall be a member of the staff of the Bureau and who shall report directly to the Chief Bureau Officer, to assist the Bureau in the pursuit of its objectives and functions.
- (b) The Minister may, with the consent of the Minister for Finance and after such consultation as may be appropriate with the Commissioner, appoint such, and such number of persons to be professional or technical members of the staff of the Bureau, other than the bureau legal officer,

and any such member will assist the bureau officers in the exercise and performance of their powers and duties.

(2) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall perform his or her functions at the direction of the Chief Bureau Officer.

(3) The Minister may, with the consent of the Attorney General and of the Minister for Finance, at any time remove the bureau legal officer from being a member of the staff of the Bureau whereupon his or her appointment as bureau legal officer shall cease.

(4) The Commissioner may, with the consent of the Minister, at any time remove any professional or technical member of the staff of the Bureau, other than the bureau legal officer, from being a member of the staff of the Bureau whereupon his or her appointment as a member of the staff shall cease.

(5) (a) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall hold his or her office or employment on such terms and conditions (including terms and conditions relating to remuneration and superannuation) as the Minister may, with the consent of the Minister for Finance, and in the case of the bureau legal officer with the consent also of the Attorney General, determine.

(b) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall be paid, out of the moneys at the disposal of the Bureau, such remuneration and allowances for expenses incurred by him or her as the Minister may, with the consent of the Minister for Finance, determine.

Anonymity.

**10.**—(1) Notwithstanding any requirement made by or under any enactment or any other requirement in administrative and operational procedures, including internal procedures, all reasonable care shall be taken to ensure that the identity of a bureau officer, who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or the identity of any member of the staff of the Bureau, shall not be revealed.

(2) Where a bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare may, apart from this section, be required under the Revenue Acts or the Social Welfare Acts, as the case may be, for the purposes of exercising or performing his or her powers or duties under those Acts, to produce or show any written authority or warrant of appointment under those Acts or otherwise to identify himself or

herself, the bureau officer shall—

- (a) not be required to produce or show any such authority or warrant of appointment or to so identify himself or herself, for the purposes of exercising or performing his or her powers or duties under those Acts, and
- (b) be accompanied by a bureau officer who is a member of the Garda Síochána and the bureau officer who is a member of the Garda Síochána shall on request by a person affected identify himself or herself as a member of the Garda Síochána, and shall state that he or she is accompanied by a bureau officer.

(3) Where, in pursuance of the functions of the Bureau, a member of the staff of the Bureau accompanies or assists a bureau officer in the exercise or performance of the bureau officer's powers or duties, the member of the staff shall be accompanied by a bureau officer who is a member of the Garda Síochána and the bureau officer who is a member of the Garda Síochána shall on request by a person affected identify himself or herself as a member of the Garda Síochána, and shall state that he or she is accompanied by a member of the staff of the Bureau.

(4) Where a bureau officer—

- (a) who is an officer of the Revenue Commissioners exercises or performs any of his or her powers or duties under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, in writing, or
- (b) who is an officer of the Minister for Social Welfare exercises or performs any of his or her powers or duties under the Social Welfare Acts in writing,

such exercise or performance of his or her powers or duties shall be done in the name of the Bureau and not in the name of the individual bureau officer involved, notwithstanding any provision to the contrary in any of those enactments.

(5) Any document relating to proceedings arising out of the exercise or performance by a bureau officer of his or her powers or duties shall not reveal the identity of any bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or of any member of the staff of the Bureau, provided that where such document is adduced in evidence, *subsection (7)* shall apply.



(6) In any proceedings the identity of any bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or of any member of the staff of the Bureau other than that he or she is a bureau officer or the member of such staff, shall not be revealed other than, in the case of a hearing before a court, to the judge hearing the case, or in any other case the person in charge of the hearing, provided that, where the identity of such a bureau officer or member of the staff of the Bureau is relevant to the evidence adduced in the proceedings, *subsection (7)* shall apply.

(7) In any proceedings where a bureau officer or a member of the staff of the Bureau may be required to give evidence, whether by affidavit or certificate, or oral evidence—

(a) the judge, in the case of proceedings before a court, or

(b) the person in charge of the proceedings, in any other case,

may, on the application of the Chief Bureau Officer, if satisfied that there are reasonable grounds in the public interest to do so, give such directions for the preservation of the anonymity of the bureau officer or member of the staff of the Bureau as he or she thinks fit, including directions as to—

(i) the restriction of the circulation of affidavits or certificates,

(ii) the deletion from affidavits or certificates of the name and address of any bureau officer or member of the staff of the Bureau, including the deponent and certifier, or

(iii) the giving of evidence in the hearing but not the sight of any person.

(8) In this section “*member of the staff of the Bureau*” means a member of the staff of the Bureau appointed under [section 9](#).

Identification.

**11.—**(1) A person who publishes or causes to be published—

(a) the fact that an individual—

(i) being or having been an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, is or was a bureau officer, or

(ii) is or was a member of the staff of the Bureau,

(b) the fact that an individual is a member of the family of—

(i) a bureau officer,

(ii) a former bureau officer,

- (iii) a member of the staff of the Bureau, or
  - (iv) a former member of the staff of the Bureau,
  - or
  - (c) the address of any place as being the address where any—
    - (i) bureau officer,
    - (ii) former bureau officer,
    - (iii) member of the staff of the Bureau,
    - (iv) former member of the staff of the Bureau, or
    - (v) member of the family of any bureau officer, former bureau officer, member of the staff of the Bureau or former member of the staff of the Bureau,
- resides,

shall be guilty of an offence under this section.

(2) A person guilty of an offence under this section shall be liable—

- (a) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or
- (b) on conviction on indictment, to a fine not exceeding £50,000, or to imprisonment for a term not exceeding 3 years, or to both.

(3) In this section references to bureau officer, former bureau officer, member of the staff of the Bureau and former member of the staff of the Bureau do not include references to the Chief Bureau Officer, the Acting Chief Bureau Officer or the bureau legal officer.

Obstruction.

**12.—**(1) A person who delays, obstructs, impedes, interferes with or resists a bureau officer in the exercise or performance of his or her powers or duties under Garda functions, the Revenue Acts or the Social Welfare Acts or a member of the staff of the Bureau in accompanying or assisting a bureau officer shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—

- (a) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to

both, or

(b) on conviction on indictment, to a fine not exceeding £10,000, or to imprisonment for a term not exceeding 3 years, or to both.

Intimidation.

**13.**—(1) A person who utters or sends threats to or, in any way, intimidates or menaces a bureau officer or a member of the staff of the Bureau or any member of the family of a bureau officer or of a member of the staff of the Bureau shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or

(b) on conviction on indictment, to a fine not exceeding £100,000, or to imprisonment for a term not exceeding 10 years, or to both.

Search warrants.

**14.**—(1) A judge of the District Court, on hearing evidence on oath given by a bureau officer who is a member of the Garda Síochána, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place, issue a warrant for the search of that place and any person found at that place.

(2) A bureau officer who is a member of the Garda Síochána not below the rank of superintendent may, subject to *subsection (3)*, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place, issue a warrant for the search of that place and any person found at that place.

(3) A bureau officer who is a member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under this section unless he or she is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for a search warrant.

(4) Subject to *subsection (5)*, a warrant under this section shall be expressed to and shall operate to authorise a named bureau officer who is a member of the Garda Síochána, accompanied by such other persons as the bureau officer thinks necessary, to enter, within one

week of the date of issuing of the warrant (if necessary by the use of reasonable force), the place named in the warrant, and to search it and any person found at that place and seize and retain any material found at that place, or any material found in the possession of a person found present at that place at the time of the search, which the officer believes to be evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts.

(5) Notwithstanding *subsection (4)*, a search warrant issued under *subsection (3)* shall cease to have effect after a period of 24 hours has elapsed from the time of the issue of the warrant.

(6) A bureau officer who is a member of the Garda Síochána acting under the authority of a warrant under this section may—

(a) require any person present at the place where the search is carried out to give to the officer the person's name and address, and

(b) arrest without warrant any person who—

(i) obstructs or attempts to obstruct that officer or any person accompanying that officer in the carrying out of his or her duties,

(ii) fails to comply with a requirement under *paragraph (a)*, or

(iii) gives a name or address which the officer has reasonable cause for believing is false or misleading.

(7) A person who obstructs or attempts to obstruct a person acting under the authority of a warrant under this section, who fails to comply with a requirement under *subsection (6) (a)* or who gives a false or misleading name or address to a bureau officer who is a member of the Garda Síochána, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500, or to imprisonment for a period not exceeding 6 months, or to both.

(8) The power to issue a warrant under this section is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.

(9) In this section, “*place*” includes a dwelling.

Assault.

**15.—**(1) A person who assaults or attempts to assault a bureau officer or a member of the staff of the Bureau or any member of the family of a bureau officer or of a member of the staff of the Bureau shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or

(b) on conviction on indictment, to a fine not exceeding £100,000, or to imprisonment for a term not exceeding 10 years, or to both.

Arrest.

**16.**—(1) Where a bureau officer who is a member of the Garda Síochána has reasonable cause to suspect that a person is committing or has committed an offence under [section 12](#), [13](#) or [15](#) or under [section 94](#) of the [Finance Act, 1983](#), the bureau officer may—

(a) arrest that person without warrant, or

(b) require the person to give his or her name and address, and if the person fails or refuses to do so or gives a name or address which the bureau officer reasonably suspects to be false or misleading, the bureau officer may arrest that person without warrant.

(2) A person who fails or refuses to give his or her name or address when required under this section or gives a name or address which is false or misleading, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500.

Prosecution of offences under [section 13](#) or [15](#).

**17.**—Where a person is charged with an offence under [section 13](#) or [15](#), no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.

Special leave and compensation, etc.

**18.**—(1) Any person appointed to the Bureau as a bureau officer or appointed under [section 9](#) or seconded to the Bureau as a member of the staff of the Bureau from the civil service (within the meaning of the [Civil Service Regulation Act, 1956](#)) shall, on being so appointed or seconded, be granted special leave with pay from any office or employment exercised by the person at the time.

(2) The Bureau shall, out of the moneys at its disposal, reimburse any Minister of the Government, the Revenue Commissioners or other person paid out of moneys provided by the Oireachtas for the full cost of the expenditure incurred by such Minister of the Government, the Revenue Commissioners or other person paid out of moneys provided by the Oireachtas, in respect of any person appointed or seconded to the Bureau for the full duration of that appointment.

(3) The provisions of the [Garda Síochána \(Compensation\) Act, 1941](#) , and the [Garda Síochána \(Compensation\) \(Amendment\) Act, 1945](#) , shall, with any necessary modifications, apply to—

(a) bureau officers and members of the staff of the Bureau, and

(b) the Chief State Solicitor and solicitors employed in the Office of the Chief State Solicitor, in respect of injuries maliciously inflicted on them because of anything done or to be done by any of them in a professional capacity for or on behalf of the Bureau,

as they apply to members of the Garda Síochána.

Advances by Minister to Bureau and audit of accounts of Bureau by Comptroller and Auditor General.

**19.**—(1) The Minister may, from time to time, with the consent of the Minister for Finance, make advances to the Bureau, out of moneys provided by the Oireachtas, in such manner and such sums as the Minister may determine for the purposes of expenditure by the Bureau in the performance of its functions.

(2) The First Schedule to the [Comptroller and Auditor General \(Amendment\) Act, 1993](#) , is hereby amended by the insertion before “Criminal Injuries Compensation Tribunal” of “Criminal Assets Bureau”.

(3) The person who from time to time has been appointed by the Minister for Finance under the Exchequer and Audit Departments Act, 1866, as the Accounting Officer for the Vote for the Office of the Minister shall prepare in a format prescribed by the Minister for Finance an account of the moneys provided to the Bureau by the Oireachtas in any financial year and submit it for examination to the Comptroller and Auditor General not later than 90 days after the end of that financial year.

(4) All of the duties specified in [section 19](#) of the [Comptroller and Auditor General \(Amendment\) Act, 1993](#) , shall apply to the Accounting Officer for the Vote for the Office of the Minister in regard to the income, expenditure and assets of the Bureau.

Accounting for tax.

**20.**—On payment to the Bureau of tax in accordance with the provisions of [section 5 \(1\) \(b\)](#), the Bureau shall forthwith—

(a) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and

(b) transmit to the Collector-General particulars of the tax assessed and payment received in respect thereof.

Reports and information to Minister.

**21.**—(1) As soon as may be, but not later than 6 months, after the end of each year, the Bureau shall through the Commissioner present

a report to the Minister of its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.

(2) Each report under *subsection (1)* shall include information in such form and regarding such matters as the Minister may direct.

(3) The Bureau shall, whenever so requested by the Minister through the Commissioner, furnish to the Minister through the Commissioner information as to the general operations of the Bureau.

Expenses.

**22.**—The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Amendment of section 19A (anonymity) of Finance Act, 1983.

**23.**—Section 19A (inserted by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#)) of the [Finance Act, 1983](#), is hereby amended in subsection (3), by the substitution of the following for paragraph (a):

“(a) where, for the purposes of exercising or performing his or her powers or duties under the Revenue Acts in pursuance of the functions of the body, an authorised officer may, apart from this section, be required to produce or show any written authority or warrant of appointment under those Acts or otherwise to identify himself or herself, the authorised officer shall—

- (i) not be required to produce or show any such authority or warrant of appointment or to so identify himself or herself, for the purposes of exercising or performing his or her powers or duties under those Acts, and
- (ii) be accompanied by a member of the Garda Síochána who shall, on request, by a person affected identify himself or herself as a member of the Garda Síochána and shall state that he or she is accompanied by an authorised officer.”.

Amendment of certain taxation provisions.

**24.**—(1) [Section 184](#) of the [Income Tax Act, 1967](#), is hereby amended by the substitution of the following subsection for subsection (3) (inserted by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#)) of that section:

“(3) In this section, ‘*information*’ includes information received from a member of the Garda Síochána.”.

(2) Subsection (4) (as amended by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#)) of [section](#)

[144](#) of the [Corporation Tax Act, 1976](#) , is hereby amended by the substitution of the following paragraph for paragraph (b) of that subsection:

“(b) In this section, ‘*information*’ includes information received from a member of the Garda Síochána.”.

(3) Paragraph (d) (inserted by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#) ) of subsection (6) of section 12 of the Stamp Act, 1891, is hereby deleted.

(4) The proviso to subsection (7) (as amended by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#) ) of [section 39](#) of the [Capital Acquisitions Tax Act, 1976](#) , is hereby deleted.

(5) Subsection (2) (as amended by the [Disclosure of Certain Information for Taxation and Other Purposes Act, 1996](#) ) of [section 104](#) of the [Finance Act, 1983](#) , is hereby amended by the substitution of the following proviso for the proviso to that subsection:

“Provided that the Commissioners may withdraw an assessment made under this subsection and make an assessment of the amount of tax payable on the basis of a return which, in their opinion, represents reasonable compliance with their requirements and which is delivered to the Commissioners within 30 days after the date of the assessment made by the Commissioners pursuant to this subsection.”.

Amendment of section 5 (enquiries or action by inspector or other officer) of the Waiver of Certain Tax, Interest and Penalties Act, 1993.

**25.**— [Section 5](#) of the [Waiver of Certain Tax, Interest and Penalties Act, 1993](#) , is hereby amended in subsection (1), by the substitution for “arrears of tax, as the case may be” of “arrears of tax, as the case may be, or that the declaration made by the individual under [section 2 \(3\) \(a\) \(iv\)](#) is false”.

Short title.

**26.**—This Act may be cited as the Criminal Assets Bureau Act, 1996.

#### Acts Referred to

<a href="#">Capital Acquisitions Tax Act, 1976</a>	1976, No. 8
<a href="#">Civil Service Regulation Act, 1956</a>	1956, No. 46
<a href="#">Comptroller and Auditor General (Amendment) Act, 1993</a>	1993, No. 8
<a href="#">Corporation Tax Act, 1976</a>	1976, No. 7



<a href="#"><u>Disclosure of Certain Information for Taxation and Other Purposes Act, 1996</u></a>	1996, No. 25
Exchequer and Audit Departments Acts, 1866 and 1921	
<a href="#"><u>Finance Act, 1983</u></a>	1983, No. 15
<a href="#"><u>Finance Act, 1992</u></a>	1992, No. 9
<a href="#"><u>Garda Síochána (Compensation) Act, 1941</u></a>	1941, No. 19
<a href="#"><u>Garda Síochána (Compensation) (Amendment) Act, 1945</u></a>	1945, No. 1
<a href="#"><u>Income Tax Act, 1967</u></a>	1967, No. 6
<a href="#"><u>Local Government Act, 1941</u></a>	1941, No. 23
<a href="#"><u>Social Welfare (Consolidation) Act, 1993</u></a>	1993, No. 27
Stamp Act, 1891	1891, c. 39
<a href="#"><u>Value-Added Tax Act, 1972</u></a>	1972, No. 22
<a href="#"><u>Waiver of Certain Tax, Interest and Penalties Act, 1993</u></a>	1993, No. 24

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Appendix B(v)  
Proceeds of Crime (Amendment) Act 2005  
Ireland

# Proceeds of Crime (Amendment) Act 2005



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*Number 1 of 2005*

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## PROCEEDS OF CRIME (AMENDMENT) ACT 2005

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### ARRANGEMENT OF SECTIONS

#### PART 1

##### Preliminary and General

##### Section

1. [Short title, collective citation and construction.](#)
2. [Interpretation.](#)

#### PART 2

##### Amendments to Principal Act

3. [Amendment of section 1 \(interpretation\) of Principal Act.](#)
4. [Amendment of section 2 \(interim order\) of Principal Act.](#)
5. [Amendment of section 3 \(interlocutory order\) of Principal Act.](#)
6. [Amendment of section 4 \(disposal order\) of Principal Act.](#)
7. [New section 4A in Principal Act.](#)
8. [Amendment of section 6 \(order in relation to property the subject of interim order or interlocutory order\) of Principal Act.](#)
9. [Amendment of section 8 \(evidence and proceedings under Act\) of Principal Act.](#)
10. [Non-application to Principal Act of section 11\(7\) of Statute of Limitations 1957.](#)
11. [Amendment of section 9 \(affidavit specifying property and income of respondent\) of Principal Act.](#)
12. [New sections 16A and 16B in Principal Act.](#)

### PART 3

#### Amendments to Act of 1996

13. [Amendment of section 1 \(interpretation\) of Act of 1996.](#)
14. [Amendment of section 4 \(objectives of Bureau\) of Act of 1996.](#)
15. [Amendment of section 5 \(functions of Bureau\) of Act of 1996.](#)
16. [Amendment of section 14 \(search warrants\) of Act of 1996.](#)
17. [Amendment of maximum amount of certain fines in Act of 1996.](#)
18. [New sections 14A, 14B and 14C in Act of 1996.](#)

### PART 4

#### Amendments to Act of 1994

19. [Amendment of Title to Part VI of Act of 1994.](#)
20. [Amendment of section 38 \(seizure and detention\) of Act of 1994.](#)
21. [Amendment of section 39 \(forfeiture of seized cash\) of Act of 1994.](#)
22. [Amendment of section 43 \(interpretation of Part VI\) of Act of 1994.](#)

### PART 5

#### Amendments to Act of 2001

23. [New sections 2A, 2B and 2C in Act of 2001.](#)

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#### Acts Referred to

<a href="#"><u>Criminal Assets Bureau Act 1996</u></a>	1996, No. 31
<a href="#"><u>Criminal Justice Act 1994</u></a>	1994, No. 15
<a href="#"><u>Ethics in Public Office Act 1995</u></a>	1995, No. 22
<a href="#"><u>Local Government Act 2001</u></a>	2001, No. 37
<a href="#"><u>Official Secrets Act 1963</u></a>	1963, No. 1
Prevention of Corruption Act 1906	6 Edw. 7. c. 34
Prevention of Corruption Acts 1889 to 2001	
<a href="#"><u>Prevention of Corruption (Amendment) Act 2001</u></a>	2001, No. 27
<a href="#"><u>Proceeds of Crime Act 1996</u></a>	1996, No. 30
<a href="#"><u>Statute of Limitations 1957</u></a>	1957, No. 6
<a href="#"><u>Taxes Consolidation Act 1997</u></a>	1997, No. 39



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Number 1 of 2005

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## PROCEEDS OF CRIME (AMENDMENT) ACT 2005

AN ACT TO MAKE FURTHER PROVISION IN RELATION TO THE RECOVERY AND DISPOSAL OF PROCEEDS OF CRIME AND FOR THAT PURPOSE TO AMEND THE PROCEEDS OF CRIME ACT 1996, THE CRIMINAL ASSETS BUREAU ACT 1996, THE CRIMINAL JUSTICE ACT 1994 AND THE PREVENTION OF CORRUPTION (AMENDMENT) ACT 2001. [12th February, 2005]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

### PART 1

#### PRELIMINARY AND GENERAL

Short title, collective citation and construction.

**1.**—(1) This Act may be cited as the [Proceeds of Crime \(Amendment\) Act 2005](#) .

(2) The Principal Act and *Part 2* of this Act may be cited together as the Proceeds of Crime Acts 1996 and 2005.

(3) The Act of 1996 and *Part 3* of this Act may be cited together as the Criminal Assets Bureau Acts 1996 and 2005.

(4) The Prevention of Corruption Acts 1889 to 2001 and *Part 5* of this Act may be cited together as the Prevention of Corruption Acts 1889 to 2005.

Interpretation.

**2.**—In this Act—

“Act of 1994” means the [Criminal Justice Act 1994](#) ;

“Act of 1996” means the [Criminal Assets Bureau Act 1996](#) ;

“Act of 2001” means the [Prevention of Corruption \(Amendment\) Act 2001](#) ;

“Principal Act” means the [Proceeds of Crime Act 1996](#) .

### PART 2

#### Amendments to Principal Act

Amendment of section 1 (interpretation) of Principal Act.

**3.**—Section 1 of the Principal Act is hereby amended—

(a) in subsection (1)—

(i) by the substitution of the following definitions for those of “the applicant”, “proceeds of crime”, “property” and “the respondent”:

“ ‘the applicant’ means a person, being a member, an authorised officer or the Criminal Assets Bureau, who has applied to the Court for the making of an interim order or an interlocutory order and, in relation to such an order that is in force, means, as appropriate, any member, any authorised officer or the Criminal Assets Bureau;

‘proceeds of crime’ means any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct;

‘property’, in relation to proceeds of crime, includes—

(a) money and all other property, real or personal, heritable or moveable,

(b) choses in action and other intangible or incorporeal property, and

(c) property situated outside the State where—

(i) the respondent is domiciled, resident or present in the State, and

(ii) all or any part of the criminal conduct concerned occurs therein,

and references to property shall be construed as including references to any interest in property;

‘the respondent’ means a person, wherever domiciled, resident or present, in respect of whom an interim order or interlocutory order, or an application for such an order, has been made and includes any person who, but for this Act, would become entitled, on the death of the first-mentioned person, to any property to which such an order relates (being an order that is in force and is in respect of that person);”

and

(ii) by the insertion of the following definitions:

“ ‘consent disposal order’ means an order under section 3(1A) or 4A(1);

‘criminal conduct’ means any conduct—

- (a) which constitutes an offence or more than one offence, or
- (b) which occurs outside the State and which would constitute an offence or more than one offence—
  - (i) if it occurred within the State,
  - (ii) if it constituted an offence under the law of the state or territory concerned, and
  - (iii) if, at the time when an application is being made for an interim order or interlocutory order, any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the conduct is situated within the State;”

and

(b) by the insertion, after subsection (1), of the following:

“(1A) (a) For the avoidance of doubt, a person shall be deemed for the purposes of this Act to be in possession or control of property notwithstanding that it (or any part of it)—

- (i) is lawfully in the possession of any member of the Garda Síochána, any officer of the Revenue Commissioners or any other person, having been lawfully seized or otherwise taken by any such member, officer or person,
- (ii) is subject to an interim order or interlocutory order or any other order of a court which—
  - (I) prohibits any person from disposing of or otherwise dealing with it or diminishing its value, or
  - (II) contains any conditions or restrictions in that regard,or is to the like effect,

or

(iii) is subject to a letting agreement, the subject of a

trust or otherwise occupied by another person or is inaccessible,

and references in this Act to the possession or control of property shall be construed accordingly.

(b) Paragraph (a)(ii) is without prejudice to sections 11(2) and 13(2).”.

Amendment of section 2 (interim order) of Principal Act.

4.—Section 2 of the Principal Act is hereby amended—

(a) in subsection (1) by the substitution, for the opening words up to and including “officer”, of the following:

“Where it is shown to the satisfaction of the Court on application to it *ex parte* in that behalf by a member, an authorised officer or the Criminal Assets Bureau”,

(b) by the insertion, after subsection (3), of the following:

“(3A) Without prejudice to sections 3(7) and 6, where an interim order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under [section 962](#) of the [Taxes Consolidation Act 1997](#), together with the fees and expenses provided for in that section, or

(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.’,

(c) in subsection (6) by the substitution of the following for paragraph (b):

“(b) in case the application is under subsection (3A) or (4), by the applicant or other person making the application to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts,”,

and

(d) by the addition of the following subsection:



“(7) An application under subsection (1) may be made by originating motion.”.

Amendment of section 3  
(interlocutory order) of  
Principal Act.

5.—Section 3 of the Principal Act is hereby amended—

(a) in subsection (1)—

(i) by the substitution, for the opening words up to and including “section 8”, of the following:

“Where, on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court on evidence tendered by the applicant, which may consist of or include evidence admissible by virtue of section 8”,

and

(ii) by the substitution, for “the Court shall make”, of “the Court shall, subject to subsection (1A), make”,

(b) by the insertion of the following subsection after subsection (1):

“(1A) On such an application the Court, with the consent of all the parties concerned, may make a consent disposal order, and section 4A shall apply and have effect accordingly.”,

(c) by the insertion, after subsection (3), of the following:

“(3A) Without prejudice to subsection (7) and section 6, where an interlocutory order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under [section 962](#) of the [Taxes Consolidation Act 1997](#), together with the fees and expenses provided for in that section, or

(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.”,

(d) in subsection (6) by the substitution of the following for paragraph (a):

“(a) in case the application is under subsection (1), (3A) or (4), by the applicant or other person making the application to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts,”

and

(e) by the addition of the following subsection:

“(8) An application under subsection (1) may be made by originating motion.”.

Amendment of section 4 (disposal order) of Principal Act.

**6.**—Section 4 of the Principal Act is hereby amended by the addition of the following subsection:

“(9) An application under subsection (1) may be made by originating motion.”.

New section 4A in Principal Act.

**7.**—The Principal Act is hereby amended by the insertion of the following section after section 4:

“Consent disposal order.

**4A.**—(1) Where in relation to any property—

(a) an interlocutory order has been in force for a period of less than 7 years, and

(b) an application is made to the Court with the consent of all the parties concerned,

the Court may make an order (a ‘consent disposal order’) directing that the whole or a specified part of the property be transferred to the Minister or to such other person as the Court may determine, subject to such terms and conditions as it may specify.

(2) A consent disposal order operates to deprive the respondent of his or her rights (if any) in or to the property to which the order relates and, on its being made, the property stands transferred to the Minister or that other person.

(3) The Minister—

(a) may sell or otherwise dispose of any property transferred to him or her under this section, and

(b) shall pay into or dispose of for the benefit of the Exchequer the proceeds of any such disposition as well as any moneys so transferred.

(4) Before deciding whether to make a consent disposal order, the Court shall give to any person claiming ownership of any of the property concerned an opportunity to show cause why such an order should not be made.

(5) The Court shall not make a consent disposal order if it is satisfied that there would be a serious risk of injustice if it did so.

(6) Sections 3(7) and 16 apply, with any necessary modifications, in relation to a consent disposal order as they apply in relation to an interlocutory order.

(7) This section is without prejudice to section 3(1A).”.

Amendment of section 6 (order in relation to property the subject of interim order or interlocutory order) of Principal Act.

**8.**—Section 6 of the Principal Act is hereby amended by the substitution of the following for paragraph (a) of subsection (1):

“(a) the respondent or that other person to discharge the reasonable living and other necessary expenses (including legal expenses in or in relation to proceedings under this Act) incurred or to be incurred by or in respect of the respondent and his or her dependants or that other person, or”.

Amendment of section 8 (evidence and proceedings under Act) of Principal Act.

**9.**—Section 8 of the Principal Act is hereby amended—

(a) in subsection (1) by the substitution of the following for paragraph (b):

“(b) in proceedings under section 3, on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the court so directs, in oral evidence,”,

and

(b) by the insertion, after subsection (5), of the following:

“(6) In any proceedings under this Act a document purporting to be a document issued by the Criminal Assets Bureau and to be signed on its behalf shall be deemed, unless the contrary is shown, to be such a document and to be so signed.”.

Non-application to Principal Act of section 11(7) of Statute of Limitations 1957.

**10.**—For the avoidance of doubt, it is hereby declared that section 11(7) of the Statute of Limitations 1957 does not apply in relation to proceedings under the Principal Act.

Amendment of section 9 (affidavit specifying property and income of respondent) of Principal Act.

**11.**—Section 9 of the Principal Act is amended by renumbering it as subsection (1) and inserting the following subsection:

“(2) Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except any such proceedings for perjury arising from statements in the affidavit.”.

New sections 16A and 16B in Principal Act.

**12.**—The Principal Act is hereby amended by the insertion of the following sections after section 16:

“Admissibility of certain documents.

**16A.**—(1) The following documents are admissible in any proceedings under this Act, without further proof, as evidence of any fact therein of which direct oral evidence would be admissible:

(a) a document constituting part of the records of a business or a copy of such a document;

(b) a deed;

(c) a document purporting to be signed by a person on behalf of a business and stating—

(i) either—

(I) that a designated document or documents constitutes or constitute part of the records of the business or is or are a copy or copies of such a document or documents, or

(II) that there is no entry or other reference in those records in

relation to a specified matter, and

- (ii) that the person has personal knowledge of the matters referred to in subparagraph (i).

(2) Evidence that is admissible by virtue of subsection (1) shall not be admitted if the Court is of the opinion that in the interests of justice it ought not to be admitted.

(3) This section is without prejudice to any other enactment or any rule of law authorising the admission of documentary evidence.

(4) In this section—

‘business’ includes—

(a) an undertaking not carried on for profit, and

(b) a public authority;

‘deed’ means any document by which an estate or interest in land is created, transferred, charged or otherwise affected and includes a contract for the sale of land;

‘document’ includes a reproduction in legible form of a record in non-legible form;

‘public authority’ has the meaning given to it by [section 2](#) (1) of the [Local Government Act 2001](#) and includes a local authority within the meaning of that section;

‘records’ includes records in non-legible form and any reproduction thereof in legible form.

Corrupt  
enrichment  
order.

16B.—(1) For the purposes of this section—

- (a) a person is corruptly enriched if he or she derives a pecuniary or other advantage or benefit as a result of or in connection with corrupt conduct, wherever the

conduct occurred;

(b) ‘corrupt conduct’ is any conduct which at the time it occurred was an offence under the Prevention of Corruption Acts 1889 to 2001, the [Official Secrets Act 1963](#) or the [Ethics in Public Office Act 1995](#) ;

(c) ‘property’ includes—

(i) money and all other property, real or personal, heritable or moveable,

(ii) choses in action and other intangible or incorporeal property, and

(iii) property situated outside the State,

and references to property shall be construed as including references to any interest in property.

(2) Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of subsection (5), that a person (a ‘defendant’) has been corruptly enriched, the Court may make an order (a ‘corrupt enrichment order’) directing the defendant to pay to the Minister or such other person as the Court may specify an amount equivalent to the amount by which it determines that the defendant has been so enriched.

(3) Where—

(a) the defendant is in a position to benefit others in the exercise of his or her official functions,

(b) another person has benefited from the exercise, and

(c) the defendant does not account satisfactorily for his or her property or for the resources, income or source of

income from which it was acquired,

it shall be presumed, until the contrary is shown, that the defendant has engaged in corrupt conduct.

(4) In any proceedings under this section the Court may, on application to it *ex parte* in that behalf by the applicant, make an order prohibiting the defendant or any other person having notice of the order from disposing of or otherwise dealing with specified property of the defendant or diminishing its value during a period specified by the Court.

(5) Where in any such proceedings a member or an authorised officer states on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the Court so directs, in oral evidence that he or she believes that the defendant—

(a) has derived a specified pecuniary or other advantage or benefit as a result of or in connection with corrupt conduct,

(b) is in possession or control of specified property and that the property or a part of it was acquired, directly or indirectly, as a result of or in connection with corrupt conduct, or

(c) is in possession or control of specified property and that the property or a part of it was acquired, directly or indirectly, with or in connection with the property referred to in paragraph (b),

then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in any or all of paragraphs (a) to (c), as may be appropriate.

(6) (a) In any such proceedings, on an application to it in that behalf by the applicant, the Court may make an order directing the defendant to file an affidavit specifying—

(i) the property owned by the defendant,  
or

(ii) the income and sources of income of  
the defendant, or

(iii) both such property and such income  
or sources.

(b) Such an affidavit is not admissible in  
evidence in any criminal proceedings  
against the defendant or his or her  
spouse, except any such proceedings for  
perjury arising from statements in the  
affidavit.

(7) Sections 14 to 14C shall apply, with the  
necessary modifications, in relation to assets or  
proceeds deriving from unjust enrichment as they  
apply to assets or proceeds deriving from criminal  
conduct.

(8) The standard of proof required to determine any  
question arising in proceedings under this section as to  
whether a person has been corruptly enriched and, if  
so, as to the amount of such enrichment shall be that  
applicable in civil proceedings.

(9) The rules of court applicable in civil proceedings  
shall apply in relation to proceedings under this  
section.”.

### PART 3

#### Amendments to Act of 1996

Amendment of section 1  
(interpretation) of Act of  
1996.

**13.**—Section 1(1) of the Act of 1996 is hereby amended by the addition  
of the following definitions:

“ ‘criminal conduct’ means any conduct which—

(a) constitutes an offence or more than one offence, or

(b) where the conduct occurs outside the State, constitutes an  
offence under the law of the state or territory concerned  
and would constitute an offence or more than one offence  
if it occurred within the State;



‘place’ includes a dwelling;”.

Amendment of section 4  
(objectives of Bureau) of  
Act of 1996.

**14.**—Section 4 of the Act of 1996 is hereby amended by the substitution of references to “criminal conduct” for the references to “criminal activity”.

Amendment of section 5  
(functions of Bureau) of  
Act of 1996.

**15.**—Section 5(1) of the Act of 1996 is hereby amended—

(a) by the substitution of references to “criminal conduct” for the references to “criminal activity”, and

(b) by the insertion of “an authority with functions related to the recovery of proceeds of crime,” after “being”.

Amendment of section  
14 (search warrants) of  
Act of 1996.

**16.**—Section 14 of the Act of 1996 is hereby amended—

(a) in subsections (1), (2) and (4), by the substitution of references to “criminal conduct” for the references in those subsections to “criminal activities”,

(b) in subsection (4)—

(i) by the deletion of “within one week of the date of issuing of the warrant” and the insertion of “within a period to be specified in the warrant”, and

(ii) by the deletion of “any material found at that place, or any material” and the insertion of “any material (other than material subject to legal privilege) found at that place, or any such material”,

(c) by the insertion of the following subsection after subsection (4):

“(4A) The period to be specified in the warrant shall be one week, unless it appears to the judge that another period, not exceeding 14 days, would be appropriate in the particular circumstances of the case.”,

(d) in subsection (5), by substituting “subsection (2)” for “subsection (3)”,

(e) by the insertion of the following subsection after subsection (5):

“(5A) The authority conferred by subsection (4) to seize and retain any material includes, in the case of a document or record, authority—

(a) to make and retain a copy of the document or record,  
and

(b) where necessary, to seize and retain any computer or other storage medium in which any record is kept.”,

(f) by the insertion of the following subsection after subsection (6):

“(6A) A bureau officer who is a member of the Garda Síochána acting under the authority of a warrant under this section may—

(a) operate any computer at the place which is being searched or cause it to be operated by a person accompanying the member for that purpose, and

(b) require any person at that place who appears to the member to have lawful access to the information in the computer—

(i) to give to the member any password necessary to operate it,

(ii) otherwise to enable the member to examine the information accessible by the computer in a form in which it is visible and legible, or

(iii) to produce the information to the member in a form in which it can be removed and in which it is, or can be made, visible and legible.”,

and

(g) by the substitution of the following subsection for subsection (9):

“(9) In this section—

‘computer at the place which is being searched’ includes any other computer, whether at that place or at any other place, which is lawfully accessible by means of that computer, and

‘material’ includes a copy of the material and a document or record.”.

Amendment of maximum amount of certain fines in Act of 1996.

**17.**—Sections 11(2)(a), 12(2)(a), 13(2)(a), 14(7), 15(2)(a) and 16(2) of the Act of 1996 are hereby amended by the substitution of “€3,000” for “£1,500” in each case.

New sections 14A, 14B and 14C in Act of 1996.

**18.**—The Act of 1996 is hereby amended by the insertion of the following sections after section 14:

“Order to make material available.

14A.—(1) For the purposes of an investigation into whether a person has benefited from assets or proceeds

deriving from criminal conduct or is in receipt of or controls such assets or proceeds a bureau officer who is a member of the Garda Síochána may apply to a judge of the District Court for an order under this section in relation to making available any particular material or material of a particular description.

(2) On such an application the judge, if satisfied—

- (a) that there are reasonable grounds for suspecting that the person has benefited from such assets or proceeds or is in receipt of or controls such assets or proceeds, and
- (b) that the material concerned is required for the purposes of such an investigation,

may order that any person who appears to him or her to be in possession of the material shall—

- (i) produce the material to the member so that he or she may take it away, or
- (ii) give the member access to it within a period to be specified in the order.

(3) The period to be so specified shall be one week, unless it appears to the judge that another period would be appropriate in the particular circumstances of the case.

(4) (a) An order under this section in relation to material in any place may, on the application of the member concerned, require any person who appears to the judge to be entitled to grant entry to the place to allow the member to enter it to obtain access to the material.

(b) Where a person required under paragraph (a) to allow the member to enter a place does not allow him or her to do so, section 14 shall have effect, with any necessary modifications, as if a warrant had been issued under that section authorising him

or her to search the place and any person found there.

(5) Where such material consists of information contained in a computer, the order shall have effect as an order to produce the material, or to give access to it, in a form in which it is visible and legible and in which it can be taken away.

(6) The order—

(a) in so far as it may empower a member of the Garda Síochána to take away a document or to be given access to it, shall authorise him or her to make a copy of it and to take the copy away,

(b) shall not confer any right to production of, or access to, any material subject to legal privilege, and

(c) shall have effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

(7) Any material taken away by a member of the Garda Síochána under this section may be retained by him or her for use as evidence in any proceedings.

(8) A judge of the District Court may vary or discharge an order under this section on the application of any person to whom an order under this section relates or a member of the Garda Síochána.

(9) A person who without reasonable excuse fails or refuses to comply with any requirement of an order under this section is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5

years or to both.

Disclosure prejudicial to making available of material under section 14A.

14B.—(1) A person who, knowing or suspecting that an application is to be made, or has been made, under section 14A for an order in relation to making available any particular material or material of a particular description, makes any disclosure which is likely to prejudice the making available of the material in accordance with the order is guilty of an offence.

(2) In proceedings against a person for an offence under this section it is a defence to prove that the person—

(a) did not know or suspect that the disclosure to which the proceedings relate was likely to prejudice the making available of the material concerned, or

(b) had lawful authority or reasonable excuse for making the disclosure.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5 years or to both.

Property held in trust.

14C.—(1) For the purposes of an investigation into whether a person has benefited from assets or proceeds deriving from criminal conduct or is in receipt of or controls such assets or proceeds the Chief Bureau Officer or an authorised officer may apply to a judge of the High Court for an order under this section in relation to obtaining information regarding any trust in which the person may have an interest or with which he or she may be otherwise connected.

(2) On such an application the judge, if satisfied—

- (a) that there are reasonable grounds for suspecting that a person—
  - (i) has benefited from assets or proceeds deriving from criminal conduct or is in receipt of or controls such assets or proceeds, and
  - (ii) has some interest in or other connection with the trust,
- (b) that the information concerned is required for the purposes of such an investigation, and
- (c) that there are reasonable grounds for believing that it is in the public interest that the information should be disclosed for the purposes of the investigation, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances,

may order the trustees of the trust and any other persons (including the suspected person) to disclose to the Chief Bureau Officer or an authorised officer such information as he or she may require in relation to the trust, including the identity of the settlor and any or all of the trustees and beneficiaries.

(3) An order under this section—

- (a) shall not confer any right to production of, or access to, any information subject to legal privilege, and
- (b) shall have effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

(4) A judge of the High Court may vary or discharge an order under this section on the application of any person to whom it relates or a member of the Garda Síochána.

(5) A trustee or other person who without reasonable excuse fails or refuses to comply with an order under this section or gives information which is false or misleading is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5 years or to both.

(6) Any information given by a person in compliance with an order under this section is not admissible in evidence in any criminal proceedings against the person or his or her spouse, except in any proceedings for an offence under subsection (5).

(7) In this section ‘information’ includes—

(a) a document or record, and

(b) information in non-legible form.”.

#### PART 4

#### AMENDMENTS TO ACT OF 1994

Amendment of Title to Part VI of Act of 1994.

**19.**—The Title to Part VI of the Act of 1994 is hereby amended by the substitution of “SEARCH FOR, SEIZURE AND DISPOSAL OF MONEY GAINED FROM, OR FOR USE IN, CRIMINAL CONDUCT” for “DRUG TRAFFICKING MONEY IMPORTED OR EXPORTED IN CASH”.

Amendment of section 38 (seizure and detention) of Act of 1994.

**20.**—Section 38 of the Act of 1994 is hereby amended—

(a) by the substitution of the following subsections for subsection (1):

“(1) A member of the Garda Síochána or an officer of customs and excise may search a person if the member or officer has reasonable grounds for suspecting that—

(a) the person is importing or exporting, or intends or is

about to import or export, an amount of cash which is not less than the prescribed sum, and

(b) the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.

(1A) A member of the Garda Síochána or an officer of the Revenue Commissioners may seize and in accordance with this section detain any cash (including cash found during a search under subsection (1)) if—

(a) its amount is not less than the prescribed sum, and

(b) he or she has reasonable grounds for suspecting that it directly or indirectly represents the proceeds of crime or is intended by any person for use in any criminal conduct.”,

and

(b) by the insertion of the following subsection after subsection (3):

“(3A) Where an application is made under section 39(1) for an order for the forfeiture of cash detained under this section, the cash shall, notwithstanding subsection (3), continue to be so detained until the application is finally determined.”.

Amendment of section 39 (forfeiture of seized cash) of Act of 1994.

**21.**—Section 39(1) of Act 1994 is hereby amended by the substitution of “the proceeds of crime or is intended by any person for use in connection with any criminal conduct” for “any person's proceeds of, or is intended by any person for use in, drug trafficking”.

Amendment of section 43 (interpretation of Part VI) of Act of 1994.

**22.**—Section 43 of the Act of 1994 is hereby amended by the substitution of the following subsection for subsection (1):

“(1) In this Part of the Act—

‘cash’ includes notes and coins in any currency, postal orders, cheques of any kind (including travellers’ cheques), bank drafts, bearer bonds and bearer shares;

‘criminal conduct’ means any conduct which—

(a) constitutes an offence or more than one offence, or

(b) where the conduct occurs outside the State, constitutes an offence under the law of the state or territory concerned and would constitute an offence or more than one offence if it occurred within the State;



‘exported’, in relation to any cash, includes its being brought to any place in the State for the purpose of being exported;

‘proceeds of crime’ has the meaning given to that expression by section 1(1) (as amended by [section 3](#) of the *Proceeds of Crime (Amendment) Act 2005*) of the [Proceeds of Crime Act 1996](#) .”.

## PART 5

### Amendments to Act of 2001

New sections 2A, 2B and 2C in Act of 2001.

**23.**—The Act of 2001 is hereby amended by the insertion of the following sections after section 2:

“Seizure of suspected bribe.

2A.—(1) A member of the Garda Síochána may seize any gift or consideration which the member suspects to be a gift or consideration within the meaning of section 1 of the Prevention of Corruption Act 1906, as amended by section 2 of this Act.

(2) The seized property may not be detained for more than 48 hours unless its detention for a further period is authorised by order of a judge of the Circuit Court.

(3) Such an order—

(a) shall not be made unless the judge is satisfied—

(i) that there are reasonable grounds for suspecting that the seized property is a gift or consideration within the meaning of the said section 1,

(ii) that either its origin or derivation is being further investigated or consideration is being given to instituting proceedings, whether in the State or elsewhere, against a person for an offence with which the gift or consideration is connected, and

(iii) that it is accordingly necessary that the property be detained for a further period,

and

(b) shall authorise the detention of the seized property for a further specified period or periods, not exceeding 3 months in any case or 2 years in aggregate.

(4) An application for an order under subsection (3) of this section may be made by a member of the Garda Síochána.

(5) Property detained under this section shall continue to be so detained until the final determination of—

(a) any proceedings, whether in the State or elsewhere, against any person for an offence with which the property is connected, or

(b) any application under section 2B for its forfeiture,

whichever later occurs.

(6) Subject to subsection (5), a judge of the Circuit Court may cancel an order under subsection (3) of this section if satisfied, on application by the person from whom the property was seized or any other person, that its further detention is no longer justified.

Forfeiture of  
bribe.

2B.—(1) A judge of the Circuit Court may order any gift or consideration which is detained under section 2A of this Act to be forfeited if satisfied, on application made by or on behalf of the Director of Public Prosecutions, that it is a gift or consideration referred to in section 1 of the Prevention of Corruption Act 1906, as amended by section 2 of this Act.

(2) An order may be made under this section whether or not proceedings are brought against any person for an offence with which the gift or consideration in question is connected.

(3) The standard of proof in proceedings under this

section is that applicable in civil proceedings.

Application of sections 40, 41, 42 and 45 of Act of 1994 to certain property.

2C.—Sections 40 (appeal against forfeiture order), 41 (interest on cash detained), 42 (procedure) and 45 (disposal of forfeited cash) of the Act of 1994 shall apply in relation to cash and, as appropriate, to any other gift or consideration detained under section 2A, or forfeited under section 2B, of this Act as they apply in relation to cash detained or forfeited under section 38 or 39 of that Act.”.

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## Appendix B(vi)

# Disclosure of Certain Information For Taxation and Other Purposes Act, 1996 Ireland



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*Number 25 of 1996*

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**DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION AND OTHER  
PURPOSES ACT, 1996**

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ARRANGEMENT OF SECTIONS

Section

1. [Furnishing of certain information by Revenue Commissioners, etc.](#)
2. [Amendment of section 32 of Criminal Justice Act, 1994.](#)
3. [Amendment of section 57 of Criminal Justice Act, 1994.](#)
4. [Amendment of section 64 of Criminal Justice Act, 1994.](#)
5. [Amendment of section 184 \(assessment in absence of return\) of Income Tax Act, 1967.](#)
6. [Amendment of section 144 \(assessment of corporation tax\) of Corporation Tax Act, 1976.](#)
7. [Amendment of section 12 \(assessment of duty by Commissioners\) of Stamp Act, 1891.](#)
8. [Amendment of section 39 \(assessment of tax\) of Capital Acquisitions Tax Act, 1976.](#)
9. [Amendment of section 104 \(assessment and payment of tax\) of Finance Act, 1983.](#)
10. [Amendment of section 18 \(information to be furnished by financial institutions\) of Finance Act, 1983.](#)
11. [Amendment of section 19 \(chargeability of certain profits or gains\) of Finance Act, 1983.](#)
12. [Anonymity.](#)
13. [Meaning of “bank” and “banker” in Bankers' Books Evidence Act, 1879.](#)
14. [Amendment of section 7A of Bankers' Books Evidence Act, 1879.](#)
15. [Short title.](#)



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Number 25 of 1996

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**DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION  
AND OTHER PURPOSES ACT, 1996**

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AN ACT TO PROVIDE FOR THE DISCLOSURE IN CERTAIN CIRCUMSTANCES OF INFORMATION BY THE REVENUE COMMISSIONERS TO EITHER OR BOTH THE GARDA SÍOCHÁNA AND CERTAIN OTHER PERSONS, TO PROVIDE FOR THE RECEIPT BY THE REVENUE COMMISSIONERS OF INFORMATION FROM THE GARDA SÍOCHÁNA, TO AMEND [SECTIONS 32](#) , [57](#) AND [64](#) OF THE [CRIMINAL JUSTICE ACT, 1994](#) , TO AMEND [SECTIONS 18](#) AND [19](#) OF THE [FINANCE ACT, 1983](#) , TO AMEND THE BANKERS' BOOKS EVIDENCE ACT, 1879, TO PROVIDE FOR THE ANONYMITY OF AN OFFICER OF THE REVENUE COMMISSIONERS IN CERTAIN CIRCUMSTANCES AND TO PROVIDE FOR CONNECTED MATTERS. [30th July, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Furnishing of certain information by Revenue Commissioners, etc.

**1.**—The [Criminal Justice Act, 1994](#) , is hereby amended by the insertion of the following section after [section 63](#) :

“63A.—(1) In this section—

‘*relevant investigation*’ means an investigation of a kind referred to in subsection (1) of section 63 of this Act;

‘*relevant person*’ means—

- (a) a member of the Garda Síochána not below the rank of Chief Superintendent, or
- (b) the head of any body, or any member of that body nominated by the head of the body, being a body established by or under statute or by the Government, the purpose or one of the principal purposes of which is—
  - (i) the identification of the assets of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

- (ii) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and
  - (iii) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *subparagraphs (i) and (ii)*.
- (2) If, having regard to information obtained from a relevant person or otherwise, the Revenue Commissioners have reasonable grounds—
  - (a) for suspecting that a person may have derived profits or gains from an unlawful source or activity, and
  - (b) for forming the opinion that—
    - (i) information in their possession is likely to be of value to a relevant investigation which may be, or may have been, initiated, and
    - (ii) it is in the public interest that the information should be produced or that access to it should be given,then, the Revenue Commissioners shall, subject to subsection (4) of this section and notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under any statute or otherwise, produce, or provide access to, such information to a relevant person.
- (3) (a) The Revenue Commissioners may authorise any officer of the Revenue Commissioners serving in a grade not lower than that of Principal Officer or its equivalent to perform any acts and discharge any functions authorised by this section to be performed or discharged by the Revenue Commissioners and references in this section, other than in this subsection, to the Revenue Commissioners shall, with any necessary modifications, be construed as including references to an officer so authorised.
- (b) The Revenue Commissioners may by notice in writing revoke an authorisation given by them under this section, without prejudice to the validity of anything previously done thereunder.
- (c) In any proceedings arising out of a relevant investigation, a certificate signed by a Revenue Commissioner or an

officer authorised under paragraph (a) of this subsection, as the case may be, certifying that information specified in the certificate has been produced to or access to such information has been provided to a relevant person shall, unless the contrary is proved, be evidence without further proof of the matters stated therein or of the signature thereon.

(4) Where information has been supplied to the Revenue Commissioners by or on behalf of the government of another state in accordance with an undertaking (express or implied) on the part of the Revenue Commissioners that the material will be used only for a particular purpose or purposes, no action under this section shall have the effect of requiring or permitting the production of, or the provision of access to, the information for a purpose other than one permitted in accordance with the undertaking and the information shall not, without the consent of the other state, be further disclosed or used otherwise than in accordance with the undertaking.”.

Amendment of section 32 of Criminal Justice Act, 1994.

**2.**— [Section 32](#) of the [Criminal Justice Act, 1994](#) , is hereby amended—

(a) by the insertion, in subsection (9), after “money laundering” of “or any other offence”, and

(b) by the insertion after subsection (10) of the following subsection:

“(10A) In any regulations made under subsection (10) (a) prescribing a person or body to be a designated body, the Minister may, notwithstanding any other provision of this Act, apply to that person or body such exceptions in relation to the obligations of designated bodies under this Act as the Minister considers appropriate.”.

Amendment of section 57 of Criminal Justice Act, 1994.

**3.**— [Section 57](#) of the [Criminal Justice Act, 1994](#) , is hereby amended by the insertion after subsection (1) of the following subsection:

“(1A) Information reported to the Garda Síochána under this section may be used in an investigation into an offence under section 31 or 32 of this Act or any other offence.”.

Amendment of section 64 of Criminal Justice Act, 1994.

**4.**— [Section 64](#) of the [Criminal Justice Act, 1994](#) , is hereby amended by the substitution in subsection (2) of “persons” for “members of the Garda Síochána”.

Amendment of section 184 (assessment in absence of

**5.**— [Section 184](#) of the [Income Tax Act, 1967](#) , is hereby amended by



return) of Income Tax Act, the insertion of the following subsection after subsection (2):  
1967.

“(3) In this section, ‘*information*’ includes information received from a member of the Garda Síochána:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.”.

Amendment of section 144 (assessment of corporation tax) of Corporation Tax Act, 1976.

6.— [Section 144](#) of the [Corporation Tax Act, 1976](#), is hereby amended by the substitution of the following subsection for subsection (4):

“(4) (a) If—

- (i) a company makes default in the delivery of a statement in respect of corporation tax, or
- (ii) the inspector is not satisfied with a statement which has been delivered, or has received any information as to its insufficiency,

the inspector shall make an assessment on the company concerned in such sum as, according to the best of the inspector's judgment, ought to be charged on that company.

(b) In this subsection, ‘*information*’ includes information received from a member of the Garda Síochána:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.”.

Amendment of section 12 (assessment of duty by Commissioners) of Stamp Act, 1891.

7.—Section 12 of the Stamp Act, 1891, is hereby amended—

(a) in subsection (1A) (inserted by the [Finance Act, 1991](#)), by the

insertion of “(including information received from a member of the Garda Síochána)” after “information”, and

(b) in subsection (6), by the insertion of the following:

“(d) Where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.”.

Amendment of section 39  
(assessment of tax) of  
Capital Acquisitions Tax  
Act, 1976.

8.— [Section 39](#) of the [Capital Acquisitions Tax Act, 1976](#) , is hereby amended by the substitution of the following subsection for subsection (7):

“(7) The Commissioners, in making any assessment, correcting assessment or additional assessment, otherwise than from a return or an additional return which is satisfactory to them, shall make an assessment of such amount of tax as, to the best of their knowledge, information (including information received from a member of the Garda Síochána) and belief, ought to be charged, levied and paid:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.”.

Amendment of section 104  
(assessment and payment  
of tax) of Finance Act,  
1983.

9.— [Section 104](#) of the [Finance Act, 1983](#) , is hereby amended by the substitution of the following subsection for subsection (2):

“(2) In any case in which—

(a) a return under section 103 (1) is not delivered by an assessable person to the Commissioners on or before the 1st day of October immediately following the relevant valuation date, or

- (b) a return under section 103 (2) is not delivered by a person within the time specified, or
- (c) the Commissioners are dissatisfied with any return made under section 103 (1) or section 103 (2),

the Commissioners may make an assessment of tax payable upon the net market value of the relevant residential property, or any part thereof, of the person on the relevant valuation date of such amount or such further amount, as, to the best of their knowledge, information (including information received from a member of the Garda Síochána) and belief, ought to be charged, levied and paid and for this purpose the Commissioners may make such estimate of the market value of any property on that valuation date as they consider necessary:

Provided that:

(i) the Commissioners may withdraw an assessment made under this subsection and make an assessment of the amount of tax payable on the basis of a return which, in their opinion, represents reasonable compliance with their requirements and which is delivered to the Commissioners within 30 days after the date of the assessment made by the Commissioners pursuant to this subsection;

(ii) where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.”.

Amendment of section 18 (information to be furnished by financial institutions) of Finance Act, 1983.

**10.**— [Section 18](#) of the [Finance Act, 1983](#) , is hereby amended by the insertion of the following subsection after subsection (4):

“(4A) (a) Where—

(i) a copy of any affidavit and exhibits grounding an application under subsection (2) or (4) and any order made under subsection (3) or (4) are to be made available to any of the persons referred to in subsection (2) or any of those persons' solicitor, or to the financial institution, as the case

may be, and

(ii) the judge is satisfied on the hearing of the application that there are reasonable grounds in the public interest that such copy of an affidavit, exhibits or order, as the case may be, should not include the name or address of the authorised officer,

such copy, copies or order shall not include the said name or address.

(b) If, upon any application to the judge to vary or discharge an order made under the provisions of this section, it is desired to cross-examine the deponent of any affidavit filed by or on behalf of the authorised officer and the judge is satisfied that there are reasonable grounds in the public interest to so order, the judge shall order either or both of the following:

(i) that the name and address of the authorised officer shall not be disclosed in court, and

(ii) that such cross-examination shall only take place in the sight and hearing of the judge and in the hearing only of all other persons present at such cross-examination.”

Amendment of section 19 (chargeability of certain profits or gains) of Finance Act, 1983.

**11.**— [Section 19](#) of the [Finance Act, 1983](#), is hereby amended by the substitution of the following subsection for subsection (2):

“(2) Notwithstanding anything in the Tax Acts, any profits or gains which are charged to tax by virtue of subsection (1) or which are charged to tax by virtue of or following any investigation by any body (hereafter in this subsection referred to as ‘*the body*’) established by or under statute or by the Government, the purpose or one of the principal purposes of which is—

(a) the identification of the assets of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

(b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(c) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *paragraphs (a) and (b)*,

shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as ‘*miscellaneous income*’, and in respect of such profits and gains so assessed—

(i) the assessment—

(I) may be made solely in the name of the body,

and

(II) shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should, apart from this section, have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity,

and

(ii) (I) the tax charged in the assessment may be demanded solely in the name of the body,

and

(II) on payment to it of the tax so demanded, the body shall issue a receipt in its name and shall forthwith—

(A) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and

(B) transmit to the Collector-General particulars of the tax assessed and payment received in respect thereof.”.

Anonymity.

**12.**—The [Finance Act, 1983](#), is hereby amended by the insertion of the following section after [section 19](#) :

“19A.—(1) In this section—

‘*authorised officer*’ means an officer of the Revenue Commissioners nominated by them to be a member of the staff of the body;

‘*the body*’ has the same meaning as in section 19;

‘*proceedings*’ includes any hearing before the Appeal Commissioners (within the meaning of the Revenue Acts);

‘*the Revenue Acts*’ means the Acts within the meaning of [section 94](#) of this Act together with Chapter IV of Part II of the [Finance Act, 1992](#), and any instruments made thereunder

and any instruments made under any other enactment and relating to tax;

'*tax*' means any tax, duty, levy or charge under the care and management of the Revenue Commissioners.

(2) Notwithstanding any requirement made by or under any enactment or any other requirement in administrative and operational procedures, including internal procedures, all reasonable care shall be taken to ensure that the identity of an authorised officer shall not be revealed.

(3) In particular and without prejudice to the generality of subsection (2)—

(a) when exercising or performing his or her powers or duties under the Revenue Acts in pursuance of the functions of the body, an authorised officer shall—

(i) not be required to produce or show any written authority or warrant of appointment under the Revenue Acts when exercising or performing his or her powers or duties under those Acts, notwithstanding any provision to the contrary in any of those Acts, and

(ii) be accompanied by a member of the Garda Síochána who shall, on request, by a person affected identify himself or herself as a member of the Garda Síochána and shall state that he or she is accompanied by an authorised officer,

(b) where, in pursuance of the functions of the body, an authorised officer exercises or performs in writing any of his or her powers or duties under the Revenue Acts or any provisions of any other enactment, whenever passed, which relate to Revenue, such exercise or performance of his or her powers or duties shall be done in the name of the body and not in the name of the individual authorised officer involved, notwithstanding any provision to the contrary in any of those enactments,

(c) in any proceedings arising out of the exercise or performance, in pursuance of the functions of the body, of powers or duties by an authorised officer, any documents relating to such proceedings shall not reveal the identity of any authorised officer, notwithstanding any requirements in any provision to the contrary, and in any proceedings the identity of such officer other than as an authorised officer shall not be revealed other than to the judge or the Appeal Commissioner, as the case may be, hearing the case,

(d) where, in pursuance of the functions of the body, an authorised officer is required, in any proceedings, to give evidence and the judge or the Appeal Commissioner, as the case may be, is satisfied that there are reasonable grounds in the public interest to direct that evidence to be given by such authorised officer should be given in the hearing and not in the sight of any person, he or she may so direct.”.

Meaning of “bank” and “banker” in Bankers' Books Evidence Act, 1879.

**13.**—For the purposes of the Bankers' Books Evidence Act, 1879, “bank” and “banker” in section 9 (1) (inserted by [section 2](#) of the [Bankers' Books Evidence \(Amendment\) Act, 1959](#) ) of the said Bankers' Books Evidence Act, 1879, shall include the following:

- (a) any credit institution not being a credit institution authorised by the Central Bank of Ireland which provides services in the State pursuant to Council Directive 89/646/EEC<sup>(1)</sup> ) of 15.12.1989;
- (b) a society which is registered as a credit union under the Industrial and Provident Societies Acts, 1893 to 1978, by virtue of the [Credit Union Act, 1966](#) ;
- (c) a member firm for the purposes of the [Stock Exchange Act, 1995](#) ;
- (d) an investment business firm for the purposes of the [Investment Intermediaries Act, 1995](#) ;
- (e) a person authorised to carry on moneybroking business under [section 110](#) of the [Central Bank Act, 1989](#) ;
- (f) a person providing foreign currency exchange services;
- (g) a life assurance undertaking which is the holder of an authorisation under the Insurance Acts, 1909 to 1990, or under regulations made under the [European Communities Act, 1972](#) , or which is the holder of an authorisation from another Member State of the European Communities and operating on an establishment basis in the State;
- (h) a person providing a service in financial futures and options exchanges within the meaning of [section 97](#) of the [Central Bank Act, 1989](#) ; and
- (i) any person or body prescribed by the Minister for Finance, following consultation with the Minister for Justice, by order under this section.

Amendment of section 7A of Bankers' Books Evidence Act, 1879.

**14.**—Section 7A (inserted by [section 131](#) of the [Central Bank Act, 1989](#) ) of the Bankers' Books Evidence Act, 1879, is hereby amended—

- (a) by renumbering that provision as subsection (1) of section 7A,
- (b) in the said subsection (1), by the insertion after “banker's book” of “, or inspect and take copies of any documentation associated with or relating to an entry in such book,” and
- (c) by the insertion of the following subsection after subsection (1):
- “(2) (a) Notwithstanding section 10, references to a judge in subsection (1) of this section shall include a reference to a judge of the Circuit Court or of the District Court.
- (b) In subsection (1) of this section “*documentation*” includes information kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form.”.

Short title.

**15.**—This Act may be cited as the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996.

Acts Referred to

Bankers' Books Evidence Act, 1879	42 & 43 Vict., c. 11
<a href="#">Bankers' Books Evidence (Amendment) Act, 1959</a>	1959, No. 21
<a href="#">Capital Acquisitions Tax Act, 1976</a>	1976, No. 8
<a href="#">Central Bank Act, 1989</a>	1989, No. 16
<a href="#">Corporation Tax Act, 1976</a>	1976, No. 7
<a href="#">Credit Union Act, 1966</a>	1966, No. 19
<a href="#">Criminal Justice Act, 1994</a>	1994, No. 15
<a href="#">European Communities Act, 1972</a>	1972, No. 27
<a href="#">Finance Act, 1983</a>	1983, No. 15
<a href="#">Finance Act, 1991</a>	1991, No. 13
<a href="#">Finance Act, 1992</a>	1992, No. 9
<a href="#">Income Tax Act, 1967</a>	1967, No. 6
Industrial and Provident Societies Acts, 1893 to 1978	
Insurance Acts, 1909 to 1990	
<a href="#">Investment Intermediaries Act, 1995</a>	1995, No. 11
Stamp Act, 1891	54 & 55 Vict., c. 39
<a href="#">Stock Exchange Act, 1995</a>	1995, No. 9



<sup>(1)</sup>OJ No. L 386 of 30.12.1989. p.1.

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# Appendix C

## Copies of Affidavits

IN THE SUPREME COURT OF WESTERN AUSTRALIA

CPCA 43 of 2006

IN THE MATTER of Sections 57, 58, 41 & 43(1)(a) of the *Criminal Property Confiscation Act 2000*

and

IN THE MATTER of the Director of Public Prosecutions for Western Australia against AB and CD Pty Ltd (ACN 009 405 396)

DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA

Applicant

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APPLICANT'S OUTLINE OF SUBMISSIONS IN SUPPORT OF  
EX PARTE NOTICE OF ORIGINATING MOTION  
FOR EXAMINATION ORDER, FREEZING ORDER AND RELATED ORDERS  
-----

Date of Document: 26 May 2006  
Filed on behalf of: The Applicant  
Date of Filing: 26 May 2006

Prepared by:  
Director of Public Prosecutions  
for Western Australia  
Level 7, Westgate Square  
141 St George's Terrace  
PERTH W.A. 6000

Telephone: 9254 1608  
Facsimile: 9264 1574  
Contact: DPP  
Tel: 08/1311

-----  
**EXAMINATION ORDER**

1. The Director of Public Prosecutions ("DPP") may apply *ex parte* to the Court for an order for the examination of a person.  
*Sections 57 and 43 Criminal Property Confiscation Act 2000 ("CPCA")*.
2. Section 58(1) of the CPCA sets out the matters about which the Court may order a person to submit to an examination and, by necessary inference, the basis or grounds upon which an examination order may be made.

**Section 58(1)(e) – AB/CD – reasonable suspicion of unexplained wealth**

8. For the purposes of the CPCA a person has unexplained wealth if the value of the person's wealth is greater than the value of the person's lawfully acquired wealth: *Sections 12, 13(1), and 144 CPCA*
9. There is a very wide definition of what constitutes a person's wealth for the purposes of the CPCA. It includes all property acquired by the person at any time whether before or after the commencement of the CPCA and all property owned or effectively controlled by a person.  
*Section 143 and, particularly sections 143(1)(b) and (d) CPCA*  
*Director of Public Prosecutions for Western Australia v Bridge & Another* (2005) 152 A Crim R 226, [24]
10. Property is lawfully acquired only if:
  - (a) the property was lawfully acquired; and
  - (b) any consideration given for the property was lawfully acquired.*Section 149 CPCA*
11. The CPCA applies to a person's unexplained wealth whether or not his or her wealth was acquired before or after the commencement of the Act.  
*Section 5(1) CPCA*
12. Mr Accountant, a forensic accountant with the Proceeds of Crime Squad, WA Police has prepared a preliminary report which analyses the financial affairs of AB ("AB"), CD Pty Ltd ("CD") and the business operated by CD, namely the EF Gentlemen's Club ("the EF") over the period 1 July 1997 to 30 June 2000.  
*Affidavit of Accountant sworn 11<sup>th</sup> May 2006 ("Accountant Affidavit")*
13. The investigation of AB and CD arose out of an earlier investigation of the unexplained wealth of GH ("GH") in 2001.  
*Affidavit of Police sworn 10 May 2006 ("Police Affidavit"), para 3, p.4*

19. While there is some material which suggests that KL may have provided more than \$86,860, the balance of the retention funds has been treated as unexplained because:-
- (a) the financial records of CD do not record any loan from KL;  
*Accountant Affidavit, Para 56, p66.*
  - (b) the financial records of CD do not record any loan repayments;
  - (c) the material relating to the quantum of the alleged loan is contradictory and unclear.  
*Accountant Affidavit, pp.9-10.*
20. If the cost of the renovations of the EI premises were less than assessed by Accountant, or if it were accepted that more than \$86,800 of the retention funds originated from a legitimate loan from KL, the value of unexplained wealth would be reduced commensurately.

**Section 58C(4)(d) – AB – reasonable suspicion of commission confiscation offence**

21. The jurisdiction under section 58C(4)(d) of the CPCA is enlivened once there are reasonable grounds to suspect that one or more confiscation offences of a broadly defined kind or type are open on the evidence. In other words, the CPCA does not require the level of particularity required by section 85 of the *Criminal Procedure Act 2004 (WA)*.

*New South Wales Crime Commission v Deiganis* [2002] NSWSC 116, [2], [11], [6], [7]

*New South Wales Crime Commission v Kelly and Ors* (No. 2) [2005] NSWSC 154, [4], [6], [22]

*The Queen on the application of the Director of Assets Recovery Agency v Ors v Green* [2005] EWHC 3168 (Admin), [17], [38], [41], [50], [51]

*Walsh v Director of the Assets Recovery Agency* [2005] NICA 6, [26]

- (ii) monies coming into the business are recorded as sales when, in fact, the business was closed (note also the correlation between the purported sales and payment of expenses);
- (iii) the accounts do not disclose any loan or advancement of funds from KL to anyone else other than AB;
- (iv) repayments of the purported loan from KL are disguised as general expenses payments rather than loan repayments and those payments are made to MN;
- (c) the payments from CD in purported repayment of the alleged KL loan are:-
- (i) disguised in the books of MN as receipts for rent and/or sales of radiators;
- (ii) paid into an account into which is also paid the proceeds from drug sales;
- (d) both the source of some of the remuneration funds (KL) and the person to whom the loan repayments are made (GH) have very significant, high level involvement in the drug trade in Western Australia including during the period 1997 to 2000 which suggests that if funds were provided by KL and/or GH those funds were the proceeds of drug offences. In particular:-
- (i) KL's criminal history reveals he has drug convictions dating back to 1981 through to 1992.  
*Police Affidavit, para 17, p 6*
- (ii) In February 2000 KL was convicted of possession of 609.7 grams of amphetamine, 35.5 us of trips, 60.9 grams of heroin and 5.5 grams of cocaine and in November 2001 he was declared a drug trafficker.  
*Police Affidavit, paras 18 & 19, p.7*
- (iii) KL was arrested on 22 July 2001 for possession of 2,378 grams of MDMA, 2,013 grams of amphetamine, 7.7 grams of MDMA powder, 22 grams of cannabis and 13 grams of cocaine. In September 2001, he was convicted of these charges.  
*Police Affidavit, para 24, p.8*

30. All of the property to which reference is made in paragraph 23 above, is property that is apparently owned or effectively controlled by AB and/or CD who is/are suspected on reasonable grounds of having unexplained wealth (see paragraphs 8 to 20 above).
31. In relation to the application of section 142(a), it is submitted that there are reasonable grounds to suspect that AB has committed a confiscation offence, namely property laundering (see paragraphs 22 to 26 above).
32. Sections 16, 17, 145 and 149 of the CPCA are relevant to determining whether a person has acquired a criminal benefit.
33. The property that is a constituent of AB's wealth and which would be the property the subject of a criminal benefits declaration application, are the monies AB has apparently laundered through CD. Such monies give rise to a criminal benefit in that they are a constituent of AB's wealth and:-
- (a) pursuant to section 16 of the CPCA, have been wholly or partly derived or realised, directly or indirectly, as a result of his involvement in the commission of a confiscation offence (whether or not the monies were lawfully acquired); or
  - (b) pursuant to section 17 of the CPCA have not been lawfully acquired;
- Pardon v Dittmer* [1972] 1 NSWLR 94, 99
34. All of the property to which reference is made in paragraph 33 above, is property that is therefore owned or effectively controlled by AB, who is suspected on reasonable grounds of having committed a confiscation offence, and who has thereby acquired a criminal benefit.

**Section 58(1)(g) - the nature, location and source of property-tracking documents**

35. Section 155 of the CPCA sets out the definition of "property-tracking documents". Relevant to these proceedings are sections 155(e) and (f) which provide that documents that are relevant to identifying or locating any or all constituents of a person's wealth, or determining the value of any or all constituents of a person's wealth, are property-tracking documents.

42. An application for a freezing order under the CPCA may be made *ex parte*.  
*Section 48(2) CPCA.*
43. For the purposes of the CPCA, "property" includes "real or personal property of any description, wherever situated, whether tangible or intangible".  
*History in the CPCA.*
44. A freezing order may be made by a court if *inter alia*, an examination order is in force in relation to the property.  
*Section 48(1)(a) CPCA.*
45. The CPCA clearly contemplates the making of a freezing order during the investigation phase of a matter in order, to ensure that property is not disposed of prior to any eventual substantive application which could lead to confiscation of the property.
46. The Court has a discretion whether to grant a freezing order.  
  
*Barnitt & Co (Firm) v Director of Public Prosecutions for Western Australia*  
(2005) 31 WAR 217, [78] [50]  
*Interpretation Act 1984 (WA) s56(1)*
47. In the circumstances of this case, the following matters support the exercise of the discretion to grant the freezing order sought by the applicant:
- (a) the questions raised by the affidavit material before the Court about the financial affairs of AB and CD are not of a trivial nature and have a real potential to lead to further confiscation action after the examinations have been completed;
  - (b) there is a risk that the property sought to be frozen could be disposed of by AB or CD prior to the hearing and determination of any substantive application;  
*Affidavit of Public Sworn 12" May 2006*
  - (c) the proposed freezing order does not freeze all of the property of AB or CD, nor after-acquired property, but is limited to 3 items of property only;



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b) The impact of corruption on civil and political rights

*Corruption leads to violation of civil and political rights by causing discrimination in favour of the powerful and against the poor and the marginalized, thereby leading to impunity. Freedom of expression is threatened when corruption causes intimidation and harassment of its critics. This section should include examples on the impact of corruption on the following rights with special focus on specific groups (women, children, persons with disabilities, indigenous peoples, minorities, migrant workers, the poor):*

*The impact of corruption on the rights to a fair trial and to an effective remedy  
The impact of corruption on the rights of political participation, and the right to vote*

c) The impact of corruption on economic, social and cultural rights and the right to development

*Basic human rights cannot be realized because of corruption that results in the diversion of development funds into private pockets, which impedes access to basic services by all, as well as the delivery of services of standard quality thus affecting the full enjoyment of the rights to health, education and water. Corruption includes the use of public resources for conspicuous consumption by public officials, which has implications for the progressive realization of economic, social and cultural rights since such acts divert funds from meeting population's needs. This section should include examples on the impact of corruption on human rights with special focus on specific groups (women, children, persons with disabilities, indigenous peoples, minorities, migrant workers, the poor).*

d) The impact of corruption on human rights from a gender perspective

*An empirical fact that cannot be omitted in any social analysis is the greater reliance of women in public services. Because of its gender role, women are assigned the role of providing health care and education of children, and usually also have to take care of elderly relatives. Women also need special care and public hospital visits during pregnancy. And more recently, women have been selected as recipients of conditional cash transfers programs. In addition, in special situations corruption, stigma and discrimination are connected and can have a devastating effect on the health and lives of women. Examples of these cases can be found in issues such as trafficking by women for prostitution, access to sexual and reproductive health, and treatment of HIV/AIDS.*

**3. Human rights and good governance as a framework to strengthen anti-corruption programmes:**

*This chapter will address the following issues:*

*Good governance and human rights are mutually reinforcing and share common principles, such as participation, accountability and transparency. The realization of human rights require a conducive and enabling environment, particularly appropriate legislation, institutions and procedures guiding and regulating the actions of the State. While human rights empower people and provide standards against which Governments*

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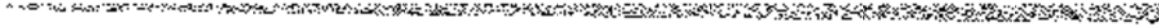
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*Recommendations on what can and should be done to protect the human rights of anti corruption advocates, whistle blowers, victims of corruption and human rights defenders active in the fight against corruption.*

**6. Conclusion:**

*This section will wrap up issues dealt with under previous chapters, bearing in mind the outcome of the Warsaw Conference.*

**A glossary of terms:** *The glossary will include definitions of corruption, taking into consideration the UN Convention against Corruption, a table or list of various forms of corruption such as embezzlement of funds, misappropriation of assets etc. and other specialized terminology*

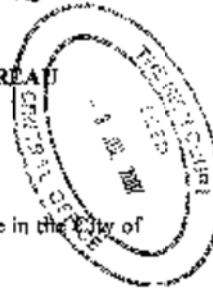


THE HIGH COURT  
PROCEEDS OF CRIME

[REDACTED]  
IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996 AND IN THE  
MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO BE  
IN THE POSSESSION OR CONTROL OF [REDACTED]  
[REDACTED]  
[REDACTED]

ON THE APPLICATION OF THE CRIMINAL ASSETS BUREAU

AFFIDAVIT OF JOHN O'MAHONEY



I, **JOHN O'MAHONEY** of the Criminal Assets Bureau, Harcourt Square in the City of Dublin aged 18 years and upwards **MAKE OATH** and say as follows:

1. I am a Detective Chief Superintendent of An Garda Síochána. I am also the Chief Bureau Officer of the Criminal Assets Bureau duly appointed pursuant to Section 7 of the Criminal Assets Bureau Act, 1996. I am a "member" as that phrase is used in the Proceeds of Crime Act, 1996. I make this Affidavit from facts within my own knowledge save where otherwise appears and where so appears I believe the same to be true and accurate.
2. I also make this Affidavit on the basis of:
  - (i) Information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control
  - (ii) Information supplied to me by other members of An Garda Síochána;

particular those conclusions made in relation to the financing of each of the separate properties. My belief is also based on a personal knowledge of [REDACTED] and his criminal activities gained from many years both as an investigating Detective and as a senior member of An Garda Síochána.

5. There is a significant body of evidence linking [REDACTED] to serious crime over a considerable period of time and in this regard I refer to the affidavits of Detective Garda Anthony Brady, Detective Garda Jim McGovern and Garda Karl Murray. I have read these affidavits prior to the swearing hereof and I am satisfied that the contents therein are true and adopt the averments made therein as my own.
6. In addition to what is already deposed to in the affidavit of Detective Garda Anthony Brady I say that in 1995 [REDACTED] and his associates began a campaign of intimidation against members of An Garda Síochána based in Cebra Garda Station Dublin 7. This intimidation began following an incident whereby a number of horses were impounded that belonged to [REDACTED]. This intimidation involved the slashing of tyres of member's cars parked at Cebra Garda Station, the issuing of direct verbal threats, the identifying of member's houses through following them from their stations, the watching of those homes, the preparation of plans to burn down the home of a member of An Garda Síochána. My source for this knowledge is based on intelligence reports which I have examined in relation to the above incidents and I am satisfied that there are good grounds for same.
7. I believe that [REDACTED] was the head of a criminal gang involved in the large scale importation and distribution of cocaine and cannabis and robberies with firearms from which substantial profits were generated. I am also satisfied that [REDACTED] was careful not to have any assets in his own name and utilised a close family inner circle to conceal the true identity of his assets. The family circle included [REDACTED] who lived

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murders in the Dublin Area. I also say and believe that [REDACTED] forged close links with one of the families involved in the continuing Limerick feud.

10. The above agencies within An Garda Síochána were brought together as a direct result of the serious and widespread criminal activities being carried out by [REDACTED] and his criminal associates. As previously stated I believe that [REDACTED] was the head of a criminal gang involved in the illegal importation, sale and distribution of cannabis and cocaine and armed robberies using firearms. It is my belief, based on the Garda investigations that [REDACTED] status within his criminal gang allowed him to remain a step removed from handling the actual drugs. However I believe that he was directing and controlling the operations and making substantial profits from same. As a result of investigations carried out by Operation [REDACTED] since November 2005 the following has been seized from [REDACTED] s gang by members from the National Bureau of Investigation - 30kg of heroin valued at 8 million euro, 35kg of cocaine valued at 2.5 million euro, 1427 kg of cannabis valued 10 million euro, 4 stolen vehicles, firearms and ammunition and €161,750.00 in cash. A total of 41 persons have been arrested and 26 are before the Courts on charges including S.15A of the Misuse of Drugs Act 1977 as amended, Attempted Robbery and the Unlawful Possession of Firearms.

11. The Criminal Assets Bureau was primarily involved in identifying any assets that were the proceeds of [REDACTED] s Criminal Conduct. During the initial months of the investigation the Criminal Assets Bureau analysed a total of eighty one properties that were in some way associated with [REDACTED]. An examination of bank accounts belonging to [REDACTED] in the [REDACTED] branch of the Permanent TSB uncovered lodgements in excess of €800,000 between 2000-2006. On the death of [REDACTED], the sum of €37,000 was the balance recorded in his account. It soon became clear to the

without the benefit of an Order under Section 2 of the Proceeds of Crime Act 1996 - 2005. I am aware that active efforts are being made to dispose of the BMW X5 Jeep Registration Number [REDACTED] and may disappear with alacrity and would not be available to meet any orders which this Honourable Court may make in relation to it. I say this from experience of other occasions where easily disposable assets have been dissipated. I am also aware that steps have been taken to dispose one of the dwellings which has been advertised for sale and requests have been received in the Criminal Assets Bureau for the return of seized documents of title in respect of same.

**Request for Anonymity**

19. I make application to this Court for directions for the preservation of the anonymity of Officers of the Minister for Social and Family Affairs, of the Office of the Revenue Commissioners and of the Forensic Accountant, who have sworn affidavits in these proceedings on the following grounds.
20. The Officers of the Minister for Social and Family Affairs, and Officers of the Revenue Commissioners are also Bureau Officers of the Criminal Assets Bureau duly appointed under Section 8 of the Criminal Assets Bureau Act 1996 and the Forensic Accountant is a member of staff of the Bureau duly appointed pursuant to Section 9 of the Criminal Assets Bureau Act 1996, accordingly are all persons for whom all reasonable care should be taken to ensure that their identity as Bureau Officers shall not be revealed pursuant to the provisions of Section 10(1) of the Criminal Assets Bureau Act 1996.
21. I say that the Bureau Officers and member of staff of the Criminal Assets Bureau were and are engaged in assisting the investigation of serious crime within the remit of the Criminal Assets Bureau and that should the identity of the Officers be revealed in these proceedings that they could be at risk to intimidation or threat in other cases in which the Officers are involved.

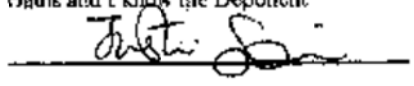
and for such further and other order as the Court may deem proper in the circumstances.

I therefore pray that the Court grants the relief sought.

SWORN by John O'Mahoney

this 22 day of June, 2007  
at 16-18 Harcourt St. Dublin 2  
in the City of Dublin before me a  
Practising Solicitor/Commissioner for  
Oaths and I know the Deponent

  
JOHN O'MAHONEY

  
PRACTISING SOLICITOR/  
COMMISSIONER FOR OATHS

This Affidavit is filed on behalf of the Applicant this 3rd day of July, 2007 by  
David J. O'Hagan, Chief State Solicitor, Harcourt Square, Dublin 2.



THE HIGH COURT

THE PROCEEDS OF CRIME

IN THE MATTER OF THE PROCEEDS OF CRIME ACT, 1996 AND IN THE  
MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO  
BE IN THE POSSESSION OR CONTROL OF [REDACTED]

ON THE APPLICATION OF THE CRIMINAL ASSETS BUREAU

AFFIDAVIT OF JOHN O'MAHONEY

I, John O'Mahoney, of the Criminal Assets Bureau, Harcourt Square in the City of Dublin aged 18 years and upwards hereby MAKE OATH and say as follows:-

1. I am a Detective Chief Superintendent of An Garda Síochána and I am also the Chief Bureau Officer of the Criminal Assets Bureau duly appointed pursuant to Section 7 of the Criminal Assets Bureau Act, 1996. I am a "Member" as that phrase is used in the Proceeds of Crime Act, 1996 as amended. I swear this affidavit on behalf of the Applicant and with it's authority and I do so from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe same to be true.
2. I make this Affidavit from information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control; other members of An Garda Síochána; on the basis of interviews carried out by me personally in relation to the investigation; my personal knowledge of the criminal activities of the First Named Respondent and also from personal knowledge of investigating criminal conduct as

- v) The First named respondent was arrested and charged with evasion of Excise Duty in Northern Ireland in relation to the smuggling of cigarettes from Northern Ireland. A Warrant for his arrest has issued and remains outstanding.
- vi) The First Named Respondent was arrested and detained pursuant to Section 30 of the Offences against the State Act in respect of the murder of David McGuinness in 2003.
- vii) The First Named Respondent was arrested for breach of bail. At the time of his arrest members of An Garda Síochána searched his car and seized one cheque, later identified to be one of 400 drafts stolen from the ACC Bank in Cavan Town in September 2005.
- viii) The First Named Respondent was arrested in relation to a robbery at the Value Centre in Dundalk involving the use of firearms. An estimated €389,000 in cash and cigarettes was stolen.
- ix) Two handguns were found in a vehicle belonging to and in which the First Named Respondent was travelling when it was searched in relation to a threat of extortion, intimidation and aggravated burglary.
- x) The First Named Respondent was arrested in relation to the theft of €4,000 worth of power tools in November 2005.
- xi) The Respondents have no legitimate source of income which would explain the level of assets acquired by them and their general level of expenditure.
- xii) A number of the mortgages obtained by the Respondents contain factual mis-statements.
- xiii) Repayments made on the several mortgages exceed both Respondents' declared level of income. This cannot be explained. This clearly indicates that there are other significant, unexplained funds available to the Respondents. I believe these monies were, in part, sourced from the proceeds of crime.
- xiv) The pattern of lodgements and withdrawals on their bank accounts is consistent with involvement in criminal conduct.
- xv) The various transactions (namely purchases, remortgages, sale) entered into by the Respondents represent money laundering exercises.

9. Accordingly, for the preservation of the anonymity of the said Bureau Officers of the Criminal Assets Bureau, I request:
- a) a direction that the names of the said Bureau Officers of the Criminal Assets Bureau not be revealed in these proceedings, and,
  - b) a direction that the Affidavits if any sworn by the Bureau Officers of the Criminal Assets Bureau be filed and furnished, in a redacted format,
  - c) a direction that any evidence to be given by the said Bureau Officers of the Criminal Assets Bureau, shall be given in a manner which does not reveal his or her identity, and
  - d) such other directions as shall be necessary for the preservation of the anonymity of the said Bureau Officers of the Criminal Assets Bureau.
10. I respectfully submit that the foregoing are reasonable grounds in the public interest, having regard to the statutory provisions referred to above, that the directions sought be given, pursuant to Section 10(7) of the Criminal Assets Bureau Act 1996
11. The property in the Schedule to the Originating Notice of Motion is at risk of being dissipated by the Respondents without the benefit of an Order under Section 2 of the Proceeds of Crime Act 1996 – 2005.
12. Although I do not believe that the Second Named Respondent has made any material contribution to the acquisition of the properties in respect of which orders under Section 2 of the Proceeds of Crime Act are sought, other than to assist the First Named respondent in masking the criminal provenance of monies invested in the said properties, I believe that it is appropriate to join her as a Respondent since her name is on the title, to give her an opportunity of joining in the within

**THE HIGH COURT**

[REDACTED]

**THE PROCEEDS OF CRIME**

**IN THE MATTER OF THE PROCEEDS OF  
CRIME ACT, 1996 AND IN THE MATTER  
OF AN APPLICATION AFFECTING  
PROPERTY ALLEGED TO BE IN THE  
POSSESSION OR CONTROL OF**

[REDACTED]

**ON THE APPLICATION OF THE  
CRIMINAL ASSETS BUREAU**

**AFFIDAVIT OF JOHN O'MARONEY**

**DAVID J. O'RAGAN,  
CHIEF STATE SOLICITOR,  
HARCOURT SQUARE,  
DUBLIN 2.**



THE HIGH COURT  
PROCEEDS OF CRIME

[REDACTED]

IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACT  
1996

Between

CRIMINAL ASSETS BUREAU

APPLICANT

AND

[REDACTED]

RESPONDENTS

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I, **JOHN O'MAHONEY** of the Criminal Assets Bureau, Harcourt Square in the City of Dublin, aged eighteen years and upwards MAKE OATH and say as follows:

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2. This affidavit is sworn by me in support of an application under the Proceeds of Crime Act for certain orders in respect of the property identified in the Schedule to the originating notice of motion. I make this affidavit on behalf of the applicant and with its authority and I do so from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe same to be true.
3. I make this affidavit from information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control and also from my personal knowledge of investigating criminal conduct as a senior member of An Garda Síochána involved in the investigation of serious crime over the last 20 years.



- (a) Over a number of years, ██████████ operated a number of bank accounts and in particular, accounts with permanent tsb (formerly, Irish Permanent Building Society). The transactions on those bank accounts and in particular, lodgements and withdrawals are inconsistent with the means of a person on social welfare as ██████████ was during the relevant period.
- (b) The lack of any explanation for the source of the monies lodged to the bank accounts. The respondent's attitude has been to deny any knowledge of the bank accounts despite the extensive evidence linking ██████████ to the accounts, which evidence is outlined in detail in the affidavit of D/Sgt. Fergal Harrington affirmed herein and was accepted by the Appeal Commissioners and the judge of the Circuit Court on appeal from the Appeal Commissioners.
- (c) Cash seized in a search on the premises at ██████████ ██████████ on April 21<sup>st</sup> 2006 in the sum of €19,400 and Stg£390 is inconsistent with the known means of ██████████.
- (d) The fact that ██████████ is a violent criminal, with 32 convictions dating back to 1980. Those convictions include a conviction for Rape, Burglary, Robbery with a Firearm, Possession of a Firearm, and Aggravated Burglary with a Firearm.
- (e) The fact that the Store Street Drugs Unit Investigation has identified the ██████████ family as being central to the importation and distribution of Cocaine in Dublin's North Inner City, with ██████████ being the leader and responsible for directing the operations of the gang.
- (f) The fact that there is no record of legitimate earnings either by his tax returns or social welfare payments which would explain the transactions on the bank accounts, his ability to purchase the house the subject of these proceedings, ██████████ or the cash sum seized.

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- (d) The fact that ██████████ is a violent criminal, with 32 convictions dating back to 1980. Those convictions include a conviction for Rape, Burglary, Robbery with a Firearm, Possession of a Firearm, and Aggravated Burglary with a Firearm.
- (e) The fact that the Store Street Drugs Unit Investigation has identified the ██████████ family as being central to the importation and distribution of Cocaine in Dublin's North Inner City, with ██████████ being the leader and responsible for directing the operations of the gang.
- (f) The fact that there is no record of legitimate earnings either by his tax returns or social welfare payments which would explain the transactions on the bank accounts, his ability to purchase the house the subject of these proceedings, ██████████ or the cash sum seized.

THE HIGH COURT



IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996

BETWEEN:

FELIX J. MCKENNA

PLAINTIFF/APPLICANT

- and -

[Redacted Name]

DEFENDANTS/RESPONDENTS

AFFIDAVIT OF FELIX J. MCKENNA

*Investigation of Financial Assets of the Defendant*

I, FELIX J. MCKENNA of the Criminal Assets Bureau, Garda Síochána, Harcourt Square, Dublin 2, Detective Chief Superintendent of An Garda Síochána aged eighteen years and upwards make oath and say as follows:-

I am a member of An Garda Síochána holding the rank of Detective Chief Superintendent. I am the Chief Bureau Officer of the Criminal Assets Bureau. I act the Applicant to the above entitled proceedings. I am a "member" as that phrase is used in the Proceeds of Crime Act, 1996. I make this Affidavit from facts and information supplied to me by Bureau Officers of the Criminal Assets Bureau who were involved in the investigations in this case and also from information supplied to me by investigators and enquiries carried out by the Royal Ulster Constabulary and members of the Garda Bureau of Fraud Investigation. I also make this Affidavit from facts within my own knowledge and where otherwise appears and where so appearing I depose to the same believing them to be true.

- (iii) An Order pursuant to Section 3 of the said Act requiring the full named Defendant/Respondent to swear and deliver an Affidavit specifying all property of which the said Defendant/Respondent is in possession or control or the location or source of income of the Defendant/Respondent during the relevant period;
- (iv) An Order pursuant to Section 4 of the said Act transferring the said properties in such portions thereof to the Minister for Finance or to such other persons as the Court might direct;
- (v) Such further or other Order as this Court shall deem meet.

*Julia M. Hanna*

SWORN the <sup>21<sup>st</sup></sup> day of July, 2000  
 by *Paul Hanna*  
 at *22 Hercules Road*  
 in the City of Dublin before me a  
 Practising Solicitor/Commissioner for  
 Oaths and I know the Deponent.  
*Paul Hanna*  
 PRACTISING SOLICITOR/  
 COMMISSIONER FOR OATHS

This Affidavit is filed on behalf of <sup>the Plaintiff by</sup> *Lawrence A. Farrell*, Chief State Solicitor, Harcourt Square  
 Dublin 7 on the <sup>21<sup>st</sup></sup> day of July, 2000

# Appendix D

## Newspaper Coverage of UWOs

THE WEST AUSTRALIAN WEDNESDAY MAY 8 2002 19

THE DRUG MENACE

# \$70,000 assets seized daily

### New confiscations powers put heat on drug dealers, conference told

By Ben Martin

SUSPECTED drug dealers are having an average of \$70,000 in assets frozen or taken from them every working day through tough but controversial criminal confiscation laws.

The laws, introduced to take the profit out of drugs, have been applied to dealers and crime figures who have built up massive wealth from drug networks.

The Australian Conference on Drugs Strategy 2002 held yesterday said the laws were the toughest in the world and the outcome of 18 years' effort on drug dealers.

Since they were introduced on January 1, 2001, asset investigation detectives have frozen \$21 million in assets from accused drug dealers.

Cars, boats, houses, bank accounts, shares, properties and cash have been frozen.

The asset investigation boss, Det. Sen. Sgt. Dudley Congdon, told the conference in Perth that the unit had also targeted two users using the laws' unexplained wealth provision.

Police apply to the courts to freeze all the assets of a person they believe cannot properly explain how they acquired the wealth.



By the book: Robert Cook QC reads from the 1765 British legal volume. FORUM STEVE HARRIS

In a legal tiff, the onus is on the person to prove they are the legitimate owner of the property or it can be confiscated by courts.

The property can be sold and proceeds are put in a fund used to support victim-of-crime programs, anti-drug abuse programs and police operations.

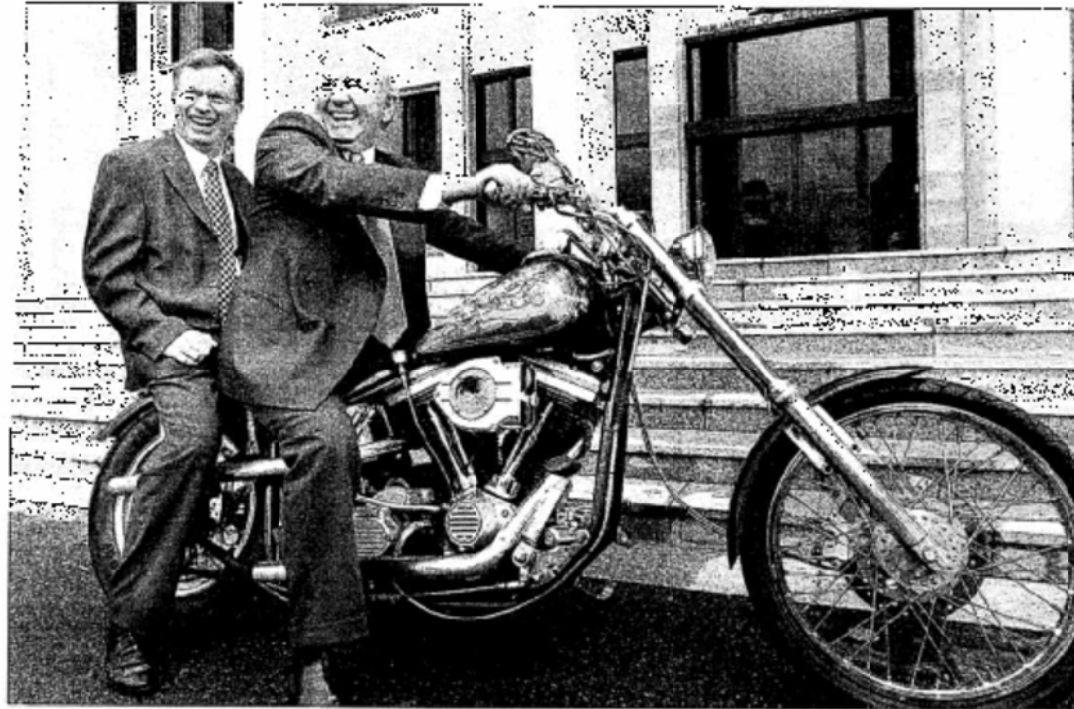
Police can also apply to finance specific organised crime or drug operations with the money, effectively using a drug dealer's ill-gotten gains to target other crime figures.

But Sen. Sgt. Congdon said he expected legal challenges to the laws by organised crime outfits. It is believed bribes and other crime associates last year began studying for contributors to a fund to challenge the laws.

Director of Public Prosecutions Robert Cook QC told the conference that *The West Australian's* page-one picture on April 18 of him on a Harley-Davidson motorcycle with Attorney General Jim McGirr demonstrated the State's commitment to fighting organised crime.

He said the bike was an icon to bike gangs who were legitimate targets of the laws and State Parliament in the background showed the laws had the support of the politicians elected by the people.

He referred to an English legal book published in 1763 which told how people who committed offences lost their rights to own property. "Here, almost 200 years later, we have a State Government which is implementing an almost identical law in respect of drug traffickers," Mr Cook said.



Easy ride: Director of FBI & Prosecutions Robert Corkin and Attorney-General Jim McGinty on the confiscated Harley Davidson motorcycle.

## Crime fighters get their Harley

By Liz Tichner

THE State Government has its own Harley-Davidson.

Attorney-General Jim McGinty and Director of Public Prosecutions Robert Corkin are among other state officials who own the motorcycle — an Italian-made bike valued at millions of dollars.

The \$70,000 machine was confiscated from a convicted drug trafficker under tough laws to deprive criminals of the proceeds of their crime. It will be auctioned and the money used to help crime victims and pay for the DPP's four-member confidential unit.

Another six Harleys have been seized from people associated with motorcycle gangs and are "being" pending court approval for confiscation.

The total property frozen is valued at almost \$23 million. It includes cash, shares, houses, land, cars, boats, paintings and furniture.

► More, page 4

## Drug dealer loses Harley

Unexplained assets and cash were the targets of four of the freezing orders, worth more than \$6 million.

The Criminal Property Confiscation Act came into force in January last year and property valued at almost \$2.3 million has been seized, including two houses, a truck and the Harley.

"This is tough legislation aimed at drug traffickers or organised crime," Mr McGinty said. "Only luxury lifestyles will simply be suppressed."

Confiscation money goes into a special account restricted to specific purposes, including programs to stamp out drug-related crime.

Mr Corkin said that, compared with the value of the drug trade, the confis-

FROM PAGE ONE

cautions will have only scratched the surface. "But I assure people in WA that we are doing our damndest to get on there as fast as we possibly can," he said.

The drug trafficker also has lost all his other assets, whether they were earned from criminal activity or not.

"That is extremely tough, but it is the way the law was designed to operate and it is the way it's going to be enforced," he said. "In my view, that would be a tremendous deterrent for anyone even getting involved in the drug trade."

12/04/02

# Freeze and seize law adds clout

By BRUCE BUTLER

**TOUGH** new criminal property confiscation laws could reap up to \$4 million a year for WA crime-fighters.

Director of Public Prosecutions, Robert Cook QC, who will put the laws into practice, said he expected a return of three or four times what was confiscated under existing laws.

He conceded there were concerns among lawyers about the severity of the laws — branded the toughest in Australia.

But he made no apologies for the fact that drug dealers and criminals who live outside the law — and their families — could lose everything.

Key law enforcers — the police, the DPP and Attorney-General Peter Kos — are excited about the "unexplained wealth" provision, which enables the DPP to freeze and then seize any wealth which cannot be legally explained.

The law has been criticised because it reverses the onus of proof. Suspects have to prove their wealth is legitimate rather than the Crown having to prove guilt.

It has been blamed with drug dealers and outlaw bike gangs — suspected of involvement in multiple homicide victims — in mind.

The Attorney-General said it will be a particularly potent weapon against bike gangs, whose string "code of silence" had beaten the law in several recent cases.

"It is a pretty savage law," Mr Cook admitted.

"We are targeting people right at the top echelon of every criminal activity."

"This is the most complete and aggressive of its type of legislation in Australia."

Mr Cook said his office seized between \$500,000 and \$500,000 in confiscated assets each year under the old laws.



Robert Cook

"Realistically, we would be expecting to seize between \$2 million and \$4 million, but we could get lots more," he said.

"In NSW the history shows that the seizures increased and they could go up by a factor of three to four times."

"There is not much point going after \$1000. Anyone can have \$1000 of unexplained wealth."

"I am targeting people with a lot more than their legitimate source of income can sustain."

"I don't mind what sort of crime, anyone who doesn't have a legitimate source of income and who is living the high life. We are looking at serious wealth, six figures, hundreds of thousands of dollars."

The law will target corporate crime, theft and drug money, he said.

"This legislation is designed to stop criminals who are successful in making real money," he said.

■ No place to hide, Page 33





## **Socialite arrested after pyramid scheme probe**

*By Conor Ryan, Investigative Correspondent*

Friday, July 08, 2011

SOCIALITE Breifne O'Brien has been arrested by gardai investigating one of the country's most high-profile pyramid schemes.

The Garda fraud unit picked him up in south Dublin yesterday morning and followed this up with a search of a house in Monkstown, Co Dublin.

It is more than two-and-a-half years since the Commercial Court referred Mr O'Brien's activities to the Garda following a number of cases taken by disgruntled investors.

At the time Mr Justice Peter Kelly said papers submitted to his court suggested these creditors had been the victims of a confidence trick, but not a particularly elaborate one.

Mr O'Brien, who is originally from Cork, is in his mid-40s and is the son of businessman Leo O'Brien. He has been accused of operating the pyramid scheme for more than 15 years.

His friends, business partners and some family members have all been named among the victims.

Until he was exposed, Mr O'Brien and his wife, Fiona Nagle, were prominent figures in a social scene with powerful businessmen, bankers and politicians. When Mr O'Brien's assets were frozen in December 2008, it was also claimed he misappropriated funds given to him by investors, who were demanding the return of €18 million.

In early 2009 the sheriff seized a number of his assets including his Aston Martin car. Later that year Anglo Irish Bank secured a court order allowing it to sell some of his belongings to repay a €13m debt.

The Garda Bureau of Fraud Investigation arrested Mr O'Brien after what a spokesman said was a "major investigation into allegations of deception by a number of investors".

He was held under a section of the Criminal Justice Act which allows gardai to question for serious offence which can carry more than five years in jail.



## CAB combs rich traveller tax affairs

Sunday April 18 2004

NICOLA TALLANT and JIM CUSACK

THE Criminal Assets Bureau (CAB) has launched investigations into a number of millionaire travellers who have amassed huge fortunes but have never paid tax.

The Bureau has opened files on a list of prominent families and want to know how they made the fortunes which afford them ostentatious properties, high-powered cars and endless supplies of liquid cash.

The probe comes as English police continue their investigation into a number of travellers who they suspect are connected with the murder of a village postman in a Cambridgeshire village last December following a dispute with Irish travellers.

Investigations by the murder team have uncovered how travellers from Ireland have business interests stretching into Germany and Eastern Europe.

CAB believes some are involved in manufacture and tarmac among other things and have set up in Eastern Europe prior to new EU entries.

A senior CAB source admitted the inquiries are slow as the finances are complex and difficult to track due to cash deals and a lot of travellers having the same or similar names. "We are looking at some of them," the officer confirmed. "We are examining bank accounts, cash deals and assets they have acquired. We cannot say yet if we will be taking any cases but we are very much investigating some of these people.

Several visibly rich travelling families are being investigated. They are famed for their palatial homes, most of which are bedecked with chandeliers and expensive antique furniture.

While their homes are fit for royalty most live in plush caravans in the back gardens and only use the houses for Christmas celebrations.

Of the 1,700 population - a whopping 50 per cent are made up of wealthy travellers who often spend months out of the country.

In one town in Munster, a graveyard has been dubbed Marble City because of the massive stones erected in memory of travellers' loved ones.

Mercedes and top-of-the-range jeeps are parked in their driveways, despite the fact that many of the community cannot read or write.

CAB investigations have found that a lot have accumulated their wealth from years of wily antique dealing across Ireland, the UK and Europe.

As part of the investigation gardai are also expected to examine details of social welfare and unemployment claims made by people who are actually millionaires.

A very large proportion of travellers - sources say as many as 90 per cent of families - are in receipt of some form of social entitlements.

While there are many poor travellers, gardai have uncovered information that some of the wealthiest are still making claims for welfare or unemployment.

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Gardai have already carried out investigations into dealing in period furniture, jewellery and fine art which is bought from householders, then sold on at a profit.

A senior Garda source said: "They would be extremely clever and we have found cases where items have been purchased for a couple of thousand and sold within days for ?25,000 or ?30,000.

"They know exactly what they are buying and where to sell it and of course that business is largely a cash one.

"Our investigations haven't been easy as a lot wouldn't have bank accounts, although some have numerous. Those who don't, pay for everything in cash, even large building projects.

"In the end of the day it appears that little tax has been paid from the community over the years to the revenue commissioners and it is our job to find out if any is due. We will be continuing our investigations until we are satisfied."

From [The Sunday Times](#)

November 9, 2003

## Comment: John Burns: One failed criminal case doesn't constitute a crisis

Did you see the Whale on television last Monday? It wasn't billed as a wildlife programme, but there was no shortage of exotic species on *The Underworld*, RTE's documentary on Irish crime. The Viper hissed when a journalist strayed onto its territory. No sign of the Penguin, but we did get a virtuoso performance from the Whale.

James Gantley, to give the former gangland figure his real name, described how he'd once stopped assassins' bullets with his bare hands. Did he know the gunmen? Indeed he did; Gantley often saw them around. Didn't he bear a grudge? Not at all. Why, he laughed, he was even thinking of buying a pint for the pair who tried to blow his head off, so that he could slag them off about what "brutal shots" they were. Chuckling, Gantley carried on with a weight-lifting workout, presumably preparing himself for the next time killers come calling.

Why doesn't Gantley go to the gardai and identify the gangsters who shot him? Wouldn't he like to put them behind bars? Doesn't he worry they might kill someone else? Silly questions. The Irish underworld is another country, they do things differently there.

A few hours before the Whale's appearance on primetime television, a suspected killer walked free from a Dublin court and flashed a two-fingered salute. Six witnesses had identified Liam Keane, 19, as the killer of another Limerick man. Several had told gardai they saw Keane stick a knife in the victim. But as soon as the trial started, all six withdrew their statements and the case collapsed. We presume the witnesses were intimidated. One appears to have been assaulted on his way to court.

Immediately the country was convulsed by one of its periodic panics about crime. Enda Kenny, the Fine Gael leader, told the Dail "there is now a crisis in the administration of justice across the land". Sounds more like a crisis in Fine Gael script-writing — one collapsed trial and already Kenny has run out of superlatives.

Monday's events encapsulated Irish people's ambivalent attitude towards gangland crime. When underworld figures intimidate witnesses and cause a trial to collapse, there is outrage. But a few hours later everyone is guffawing with laughter as a criminal appears on television telling gags about the day he was shot.

There is an enormous and inexplicable fascination with gangsters and their exploits. Books detailing the doings of the Psycho or the Penguin by crime journalists such as Paul Williams positively walk out of the shops. A few years ago I was having a drink with Williams in a city-centre pub. Every few minutes we were interrupted by the barman who plied Williams with questions about Dublin's low-life. How was the Monk getting on? Had he seen the Boxer recently? Why had the Hitman fallen out with the Builder? Who did Williams reckon had shot the Snake? No sooner had he finished serving a customer but the barman was rushing back for more. He was like an owl who had missed Coronation Street, or the village gossip catching up after the holidays.

Treating criminals as cartoon characters in a fascinating soap opera is unwise. Usually they kill each other, and we don't need to worry. It's just one man "known to gardai" killing another. But every now and again a gangster with a wildlife nickname turns on the audience. Accustomed to a lack of response when they kill each other, they think they can get away with shooting a garda or a journalist, or intimidating a jury. Immediately it's a crisis.

Certain rituals are observed when a crime crisis is declared. The gardai ask for more resources and sweeping new powers. Last week the Garda Representative Association (GRA) called on Michael McDowell, the justice minister, to allow organised crime to be dealt with by the juryless Special Criminal Court. The GRA wanted membership of an organised crime gang to be an offence. Of course they demanded lots more money, too — the €m extra McDowell allocated was "inadequate".

The opposition also has a well-defined role: lambast the government and propose lots of simplistic solutions. Fine Gael really hammed it up last week. Kenny said we were facing "the biggest threat to the central core of our democracy since the murder of Veronica Guerin". He reproduced a claim from *The Underworld* programme that

there are “40 criminal gangs” operating in Dublin and the price of a “hit” is €5,000. (The justice department reckons there are only 17 gangs nationwide, and €5,000 in rip-off Ireland would just about get you a getaway car.)

Sorry to disappoint, but there is no crime crisis in Ireland. Every day the criminal justice system deals efficiently with dozens of cases, locking up murderers, rapists and racketeers. The idea that the whole system is undermined because one case collapsed is nonsense. Particularly as the prosecution tactics in the Keane trial seem so suspect. Why did the gardai go to court without any forensic evidence? Why were they relying exclusively on the testimony of six people? Why, when the witnesses recanted, was there no legal effort to make their original statements stick? Justice Paul Carney could have been tougher on the Forgetful Five — the sixth just refused to testify. A few weeks of prison food and exercise yards might have improved their memories.

Acting on such a hard case would inevitably make bad law. Trial by jury is a basic right throughout the world. It is already curtailed in Ireland by the operation of the Special Criminal Court, established as an emergency measure in response to the IRA. It should have been abolished as part of the peace process.

Anything is preferable to abolishing jury trials. Because organised crime really would be a threat to democracy, as Kenny said, if our freedoms and basic rights are reduced in response to their two-fingered salutes.

Giving gardai more power is also unwise; they already have more than enough. The Criminal Assets Bureau can snatch houses and freeze bank accounts, no questions asked. The word of a senior garda is enough to have a paramilitary convicted. And McDowell is already giving them greater powers of detention, and the right to take DNA samples by force. All this and an annual budget of €1 billion at a time when serious crime is in decline.

Yes, reported crime fell by 7% in the first six months of this year compared to the same period last year. Serious assaults down by almost a third. Crisis? What crisis?

The lessons from last week’s episode of the crime soap opera are straightforward. There’s no need for panic measures; the government simply needs to tweak the rules of evidence to ensure that witnesses cannot resile from statements they freely make. McDowell needs to concentrate on the longer term. Ireland’s population is growing and diversifying, with greater concentration in cities and big towns. Increased wealth and the dissolution of old values and religious beliefs has led to a certain amorality and loss of respect for human life. In response we need a more professional, technologically proficient and focused force of gardai, who neither push pens nor direct traffic. They could start by paying a visit to the Whale.

# Appendix E

## Interview Protocol

<b>Project Overview</b>	
<b>Introduction</b>	Booz Allen is conducting a comparative evaluation study of Unexplained Wealth Order (UWO) laws for the research branch of US DOJ, the National Institute of Justice. These laws have two main characteristics: (1) they shift the burden to the property owner to show the legal origin of the property; and (2) they do not require that there be any evidence that a crime was committed by the property owner – merely lacking an explanation for the unexplained wealth is sufficient for the state to seize the property. We have surveyed the legislation of a large number of countries around the world to identify countries that have enacted UWO legislation, or some features of it. Countries that we have shortlisted are Australia, Canada, Ireland, New Zealand, Italy, U.K. and South Africa.
<b>Project Goals:</b>	The purpose of the study is to evaluate the effectiveness of UWOs and look at the possible transferability of these laws to the U.S.
<b>Final Product:</b>	A final report will be submitted to DOJ/NIJ and it will be available for your review.

Interviews will be semi-structured around a list of concerns. The questions listed below are representative of the ones we will ask, but we expect other questions to emerge during the course of the interviews.

### **Process for seizure and forfeiture of property**

- Can you describe the organizational structure and operations of your Civil Asset Forfeiture Office?
- Can you explain to us the exchange of information and cooperation between the various agencies?
- How is information shared on various cases? To what extent?
- Can you describe the process of seizure and forfeiture of assets?
  - Criminal forfeiture?
  - Civil forfeiture?
  - Enhanced civil forfeiture, i.e., Unexplained Wealth Orders?

#### **Criminal Forfeiture**

- Is the criminal forfeiture post conviction, conducted in a civil or criminal proceeding?
- Does it target only proceeds derived from corruption offences or is it more inclusive?
- Is there a reversal of burden of proof?
- When does the burden shift to the defendant?

#### **Civil Forfeiture**

- Who has the burden of proof? Is there in your view a reversal of the burden of proof to the respondent?
  - If so, at what stage does the burden of proof shift to the respondent?
- Do you consider this an *in rem* or an *in personam* proceeding?
- Does the prosecution need to show that the property is the instrumentality or fruit of an offence before it can be seized or forfeited?

- If so, must this be a specific offence or any offence?
- Does the law cover all of the property in questions or only property related to a specific offence?

### **Forfeiture via Unexplained Wealth Order Laws**

- Can you further detail the shifting burden of proof?
- Can you further detail any requirements for a connection, or lack thereof, between the property and a crime?
- In what type of cases are UWOs most often pursued?
- Do you still have traditional civil asset forfeiture in addition to UWOs?
  - How have the two legal mechanisms worked together?
- Does the court have discretion to refuse to make an order under your UWO law?
  - Under what circumstances might a court refuse to do so?
- How are cases identified, are they referred by the wider public, police?
- What are the requirements for private citizens, government officials or others to report the source of their wealth?
- Can you tell us about the investigative mechanisms available under the Act?
- Is the UWO law being utilized?
- Do you think the objectives set out by the law are being met? To what extent? How?
- How many cases have been filed to date? What types of cases are mostly filed?
- Are cases settled? If, so, what percentage?
- What are the provisions for property owners to be allowed use of some assets to pay defense attorneys?
- How do you measure the impact and the success of the Act? Do you set targets annually?
- What are the success rates in seizing property? In forfeiting property? How many cases are filed and from those how many result with forfeiture of property?
- What are the main challenges or difficulties faced in the implementation of the law?
- Have difficulties been encountered by having multiple states with their own UWO laws (applicable to Canada and Australia )
- What are the lessons you have learned in implementing the law?
- Background on the enactment of the law - the purpose the law was enacted?
- What was and is the level of public support for the law? What are the arguments of the opponents and supporters?
- What does the government wish to achieve with the law?



# Appendix F

## Contact List of People Interviewed

Name and Surname	Agency/Organization	Contact Info
<b>Dublin</b>		
James Hamilton	Director of Public Prosecution Office of the Director of Public Prosecution	Tel: 00353 1 678 9222 E: directors.office@dppireland.ie
Michael Brady	Office of Public Prosecution Head of the Asset Recovery Unit	E: Michael.Brady@dppireland.ie
Frank Cassidy	Lead Bureau Legal Advisor Criminal Asset Bureau	Tel: 00353 1 666 3202 E: blo@cab.ie
Denis O'Leary	Detective Superintendent Criminal Asset Bureau	Tel: 00 3535 1 6663266 E: acbo@cab.ie
Detective Sergeant	Kieran Goulding Criminal Asset Bureau	Tel: 00 3535 1 6663257 E: bureau@eircom.net
Barry Galvin	State Solicitor Former Bureau Legal Advisor	Tel: + 353 87 2488173 E: barry.galvin@bcgalvin.ie
Richard Barrett	Barrister	
John Mahoney	Assistant Commissioner Former Chief of the Criminal Asset Bureau	Tel: + 00353 086-8282043. E: Commissioner_CS@garda.ie
Fachtna Murphy	Former Chief of the Criminal Asset Bureau	Tel: +353 1 0481999 E: murphymf@iol.ie
Morris Collins	Barrister, Dublin	
Dermot Walsh	Academic Law Professor at the University of Limerick	
Colin King	Academic Professor at Oxford University	
Dara Roberts	Solicitor, Dublin	
<b>Canberra, ACT</b>		
Lani Gibbins	Director, Anti Money Laundering Assistance Team International Legal Assistance Unit	Tel: + 61 2 6241 2776 E; <a href="mailto:lani.gibbins@ag.gov.au">lani.gibbins@ag.gov.au</a> <a href="http://www.ag.gov.au">www.ag.gov.au</a>
Kate McMullan	Senior Legal Officer Anti-Money Laundering Assistance Team International Legal Assistance Unit	Tel; + 61 2 6141 5457 E: <a href="mailto:kate.mcmullan@ag.gov.au">kate.mcmullan@ag.gov.au</a>
Graeme Davidson	Deputy Director Commonwealth Director of Public Prosecution	Tel: 02 6206 5666 E: <a href="mailto:Graeme.davidson@cdpp.gov.au">Graeme.davidson@cdpp.gov.au</a>
Rebecca Ashcroft	Prosecutor Commonwealth Director of Public Prosecution	Tel: 02 6206 5605 E: Rebecca.ashcroft@cdpp.gov.au

Brooke Hartigan	Criminal Law Policy Division Office of Attorney General	<a href="mailto:brooke.hartigan@ag.gov.au">brooke.hartigan@ag.gov.au</a>
Simon Claire	Criminal Law Policy Divisions Office of Attorney General	
Ian McCartney	Australian Federal Police Manager Criminal Assets Serious & Organized Crime	Tel: + 61 2 6231 5789 E: <a href="mailto:ian.mccartney@afp.gov.au">ian.mccartney@afp.gov.au</a>
Dr Adam M Tomison	Australian Institute of Criminology Director	Tel: + 61 2 6260 9205 E: <a href="mailto:adam.tomison@aic.gov.au">adam.tomison@aic.gov.au</a>
Lorana Bartels	Australian Institute of Criminology Senior Researcher	E: <a href="mailto:Lorana.Bartels@aic.gov.au">Lorana.Bartels@aic.gov.au</a>
Dr. Russell Smith	Australian Institute of Criminology Principal Criminologist	E: <a href="mailto:Russell.Smith@aic.gov.au">Russell.Smith@aic.gov.au</a>
Richard Grant	Australian Crime Commission National Manager Target Development & Intervention	Tel: + 61 2 6243 6835 E: <a href="mailto:Richard.grant@crimecommission.gov.au">Richard.grant@crimecommission.gov.au</a>
<b>PERTH</b>		
Joseph McGrath	Director of Public Prosecution Director	Tel: + 62 8 9425 3999 E: <a href="mailto:joe.mcgrath@dpp.wa.gov.au">joe.mcgrath@dpp.wa.gov.au</a>
Ian Jones	Office of the Director of Public Prosecution Practice Manager, Confiscations	Tel: + 62 8 9425 3877 E: <a href="mailto:ian.jones@dpp.wa.gov.au">ian.jones@dpp.wa.gov.au</a>
Michael Seaman	Office of the Director of Public Prosecution Confiscation Lawyer	Tel: + 62 8 9425 3779 E: <a href="mailto:Michael.seaman@dpp.gov.au">Michael.seaman@dpp.gov.au</a>
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Robert Cock	Public Sector Commission Special Counsel to the Premier (former Director of the Office of Public Prosecution)	Tel: + 62 8 9219 6113 E: <a href="mailto:Robert.cock@psc.wa.gov.au">Robert.cock@psc.wa.gov.au</a>
Colin Chenu	Bennet + Co Private Attorney	Tel: + 62 8 6316 2229 E: <a href="mailto:CChenu@bennettandco.com.au">CChenu@bennettandco.com.au</a>
Hamish McKenzie	Western Australia Police Detective Senior Sergeant Proceeds of Crime Squad, Serious and Organized Crime	Tel: +62 8 922 33 494 E: <a href="mailto:Hamish.mckenzie@police.wa.gov.au">Hamish.mckenzie@police.wa.gov.au</a>
Kevin	Western Australia Police Solicitor for the Proceeds of Crime Squad	Tel:
Gavin J Morrow	Western Australia Police Financial Investigator	Tel: + 08 9223 3667 E: <a href="mailto:gavin.morrow@police.wa.gov.au">gavin.morrow@police.wa.gov.au</a>
James Woodford	Private Attorney, Perth, Australia	<a href="mailto:jwoodford@bennettandco.com.au">jwoodford@bennettandco.com.au</a>

# Appendix G

## Evaluation Criteria

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Evaluation Criteria

1. Common law country with a legal system similar to the US
2. Non conviction civil based asset forfeiture
3. Reversed onus of proof (full or partial)
  - a. Full reversal of onus of proof is in countries in which the burden of proof is fully transferred on the respondent from the onset of the court proceedings
  - b. Partial reversal of the burden of proof is when the burden shifts to the defendant after the prosecution establish on balance of probabilities that concerned property is of illegal origin, to establish the contrary. Burden shifts during the court proceeding.
4. Can it be applied to recover proceeds derived from any unlawful activity or is its application restricted to proceeds derived from specific offences?
5. Is it an in rem or *in personam* proceeding?
6. Is there a requirement for a predicate offence?
7. How long has the law been in existence?
8. Is the law being applied? Is it used frequently? (metrics to be used in assessing the effectiveness of the application of unexplained wealth orders)
  - a. Number of cases brought by independent agencies or prosecution
  - b. Number of cases for which a freezing order was granted
  - c. Value of assets under a freezing order
  - d. Number of cases for which a unexplained wealth or forfeiture order was granted
  - e. Value of forfeited assets