



New South Wales

Confiscation of Proceeds of Crime Regulation 2021

under the

Confiscation of Proceeds of Crime Act 1989

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Confiscation of Proceeds of Crime Act 1989*.

MARK SPEAKMAN, MP

Attorney General, and Minister for Prevention of Domestic and Sexual Violence

Explanatory note

The object of this Regulation is to repeal and remake, without substantial changes, the provisions of the *Confiscation of Proceeds of Crime Regulation 2015*, which would otherwise be repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following—

- (a) the declaration of laws of other jurisdictions to be corresponding laws under the *Confiscation of Proceeds of Crime Act 1989* (the *Act*),
- (b) the declaration of orders or declarations in force under those corresponding laws to be orders under the Act,
- (c) the giving of notices, including the making of records relating to certain notices issued,
- (d) the prescription of certain persons as appropriate officers in relation to prescribed functions,
- (e) the prescription of certain offences as serious offences,
- (f) the calculation of interest payable on property to be returned,
- (g) the prescription of fees payable to the NSW Trustee and Guardian or Commissioner of Police,
- (h) filing fees not to be charged for applications and other process,
- (i) savings and formal matters.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely matters of a machinery nature and matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or of another State or Territory.

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Confiscation of Proceeds of Crime Regulation 2021

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Confiscation of Proceeds of Crime Act 1989

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Confiscation of Proceeds of Crime Regulation 2021*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Note— This Regulation repeals and replaces the *Confiscation of Proceeds of Crime Regulation 2015*, which would otherwise be repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

3 Interpretation

(1) In this Regulation—

the Act means the *Confiscation of Proceeds of Crime Act 1989*.

the Australian Capital Territory Act means the *Confiscation of Criminal Assets Act 2003* of the Australian Capital Territory.

the Northern Territory Act means the *Criminal Property Forfeiture Act 2002* of the Northern Territory.

the Queensland Act means the *Criminal Proceeds Confiscation Act 2002* of Queensland.

the South Australian Act means the *Criminal Assets Confiscation Act 2005* of South Australia.

the Tasmanian Act means the *Crime (Confiscation of Profits) Act 1993* of Tasmania.

the Victorian Act means the *Confiscation Act 1997* of Victoria.

the Western Australian Act means the *Criminal Property Confiscation Act 2000* of Western Australia.

Note— The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

(2) In this Regulation, a reference to a Form is a reference to a Form set out in Schedule 1.

Part 2 Corresponding laws

4 Corresponding laws

For the purposes of the Act, section 4(1), definition of *corresponding law*, the following laws of other States are declared to be laws that correspond to the Act—

- (a) the Australian Capital Territory Act,
- (b) the Northern Territory Act,
- (c) the Queensland Act,
- (d) the South Australian Act,
- (e) the Tasmanian Act,
- (f) the Victorian Act,
- (g) the Western Australian Act.

5 Interstate forfeiture orders

For the purposes of the Act, section 4(1), definition of *interstate forfeiture order*, an order or declaration in force under the following provisions is declared to be within that definition—

- (a) the Australian Capital Territory Act, section 54, 59 or 67,
- (b) the Northern Territory Act, section 94, 96, 97, 99, 100 or 101,
- (c) the Queensland Act, section 151 or 202,
- (d) the South Australian Act, section 47, 56A or 77,
- (e) the Tasmanian Act, section 16,
- (f) the Victorian Act, section 33, 34C, 36, 36F, 38 or 39,
- (g) the Western Australian Act, section 30.

6 Interstate pecuniary penalty orders

For the purposes of the Act, section 4(1), definition of *interstate pecuniary penalty order*, an order or declaration in force under the following provisions is declared to be within that definition—

- (a) the Australian Capital Territory Act, section 84 or 85,
- (b) the Northern Territory Act, section 71, 75, 76 or 81,
- (c) the Queensland Act, section 184,
- (d) the South Australian Act, section 95,
- (e) the Tasmanian Act, section 21,
- (f) the Victorian Act, section 59 or 60,
- (g) the Western Australian Act, section 12, 16, 17 or 22.

7 Interstate restraining orders

For the purposes of the Act, section 4(1), definition of *interstate restraining order*, an order or notice in force under the following provisions is declared to be within that definition—

- (a) the Australian Capital Territory Act, section 30 or 31,
- (b) the Northern Territory Act, section 40, 43 or 44,
- (c) the Queensland Act, section 122,
- (d) the South Australian Act, section 24,

- (e) the Tasmanian Act, section 26,
- (f) the Victorian Act, section 18,
- (g) the Western Australian Act, section 34 or 43.

Part 3 Notices and records

8 Notice of application for recovery of interest in forfeited property—Form 1

For the purposes of the Act, section 20(4), a notice must be given in Form 1 and served on the following persons—

- (a) the Director of Public Prosecutions,
- (b) in relation to an application made to the Local Court—the Commissioner of Police,
- (c) in relation to property forfeited following an application made by the New South Wales Crime Commission under the Act, section 13(2)—the Commission,

Note— For the purposes of the Act, section 4(1), definition of **appropriate officer**, paragraph (d), this Regulation, section 13, prescribes the New South Wales Crime Commission as an appropriate officer in relation to the function of applying for a forfeiture order under the Act, section 13(2)(a).

- (d) in relation to property controlled by the NSW Trustee and Guardian under an order under the Act, section 43(2)(d)—the NSW Trustee and Guardian,
- (e) another person as the court may direct.

9 Notice of application for return of, or access to, seized property—Form 2

For the purposes of the Act, section 41(6), a notice must be given in Form 2 and served on the following persons—

- (a) the Director of Public Prosecutions,
- (b) the Commissioner of Police,
- (c) another person as the court may direct.

10 Freezing notices—Forms 3, 4 and 5

- (1) For the purposes of the Act, section 42B(3), an application for a freezing notice, other than a telephone freezing notice, must be made in Form 3.
- (2) For the purposes of the Act, section 42D(2), a freezing notice must be issued in Form 4.
- (3) For the purposes of the Act, section 42F(2), notice of the issue of a freezing notice must be given in Form 5 as follows—

- (a) personally, or
- (b) by facsimile, or

Note— The Act, section 4(1) defines **facsimile** to include references to an electronic communication device that transmits information in a form from which written material may be reproduced with or without the aid of another device or article.

- (c) by leaving the notice with a person over the age of 16 years at the last known place of residence or business of the person to whom notice is being given.

11 Records relating to issue and execution of freezing notices

- (1) For the purposes of the Act, section 42H(2), the record made under the Act, section 42H(1) must be as follows—
 - (a) made in Form 6,
 - (b) kept by the appropriate Local Court registrar for not less than 6 years after the freezing notice is issued,
 - (c) made available for inspection by a person who receives notice of the notice during ordinary business hours.

- (2) An authorised justice must cause a record to be made of an unsuccessful application for a freezing notice and the record must be kept by the appropriate Local Court registrar for not less than 6 years after the refusal.
- (3) A Local Court registrar may, at any time, issue a certificate to the effect that the registrar is satisfied that a document or part of a document referred to in this section contains matter that—
 - (a) may disclose a person’s identity that, if disclosed, is likely to jeopardise the safety of the person or another person, or
 - (b) if disclosed, may seriously compromise the investigation of a matter.
- (4) The document or part of the document to which the certificate relates must not be made available for inspection under this section.
- (5) The certificate must be kept with the document to which it relates.
- (6) A Local Court registrar, whether or not the registrar who issued the certificate, may revoke the certificate if satisfied, after considering submissions from an interested party, that disclosure of the matter to which it relates—
 - (a) is no longer likely to jeopardise a person’s safety, or
 - (b) may no longer seriously compromise the investigation of a matter.

12 Giving of notices

For the purposes of the Act, section 94(1)—

- (a) a notice required to be given in proceedings under the Act must be served personally or otherwise as the court may direct, and
- (b) except as provided by this Regulation, section 10(3), personal service of a notice must be effected in accordance with the *Uniform Civil Procedure Rules 2005*, Part 10.

Part 4 Miscellaneous

13 Meaning of “appropriate officer”

For the purposes of the Act, section 4(1), definition of *appropriate officer*, paragraph (d), the following persons are prescribed as appropriate officers in relation to the functions specified, and each of those functions is prescribed for the purposes of that paragraph—

- (a) the Commonwealth Director of Public Prosecutions in relation to all functions of an appropriate officer under the Act,
- (b) the Commissioner of Police in relation to all functions of an appropriate officer under the Act for which the Commissioner is not already an appropriate officer,
- (c) the New South Wales Crime Commission in relation to the following functions of an appropriate officer under the Act—
 - (i) applying for a forfeiture order under section 13(2)(a),
 - (ii) applying for a drug proceeds order under section 13(2)(b),
 - (iii) applying for an order under section 22(1) pending an application for a forfeiture order being made,
 - (iv) applying for a restraining order under section 43(1) in relation to the property of a person who has been, or is about to be, charged with a drug trafficking offence,
 - (v) applying under section 45(3) for an order that is ancillary to a restraining order made by the Supreme Court,
 - (vi) applying for an order under section 45A(2) to set aside a disposition of, or dealing with, property in contravention of a restraining order made in relation to the property of a person who has been, or is about to be, charged with a drug trafficking offence,
 - (vii) applying for the particulars of a restraining order to be recorded under section 49(1).

14 Meaning of “serious offence”

For the purposes of the Act, section 7, definition of *serious offence*, paragraph (c), the following offences are prescribed—

- (a) an offence under the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, section 6, 7, 9, 17, 18, 27, 28, 30 or 37 in relation to which the maximum penalty that may be imposed on an individual is 100 penalty units or more,
- (b) an offence under the *Crimes Act 1900*, section 578C.

15 Return of property—calculation of interest payable on property value

For the purposes of the Act, section 42S(1)—

- (a) the date from which interest is payable is the date on which the property was sold or otherwise disposed of, and
- (b) the rate at which interest is payable is the standard rate or, if there is no longer a standard rate, the rate applicable from time to time in relation to money invested for trust matters in a common fund established under the *NSW Trustee and Guardian Act 2009*, section 104.

16 Fees payable to NSW Trustee and Guardian or Commissioner of Police

For the purposes of the Act, section 53, the fees that the NSW Trustee and Guardian or Commissioner of Police is entitled to receive are those set out in Schedule 2.

17 Forms generally

The forms prescribed by this Regulation are to be adapted so as to comply with the requirements as to format and formal matters as are provided for by the rules of court or regulations applicable to the respective courts in connection with which the forms are used.

18 Filing fees not payable

A filing fee must not be charged for applications or other process under the Act.

19 Repeal and saving

- (1) The *Confiscation of Proceeds of Crime Regulation 2015* is repealed.
- (2) Any act, matter or thing that, immediately before the repeal of the *Confiscation of Proceeds of Crime Regulation 2015*, had effect under that Regulation continues to have effect under this Regulation.
- (3) A reference in this Regulation to a Form includes a reference to the corresponding Form in the *Confiscation of Proceeds of Crime Regulation 2015*.

Schedule 1 Forms

section 3(2)

Form 1 Notice of application for recovery of interest in forfeited property

Confiscation of Proceeds of Crime Regulation 2021, section 8

To: [name], [address]

[Name and address of applicant] claims an interest in the property specified in the Schedule below which was forfeited to the State by Order of the [name of Court] on [date of Order] following the conviction of [name of convicted person] for [description of offence(s)].

The applicant claims not to have been in any way involved in the commission of the offence(s) and has applied to the Court for an Order under the *Confiscation of Proceeds of Crime Act 1989*, section 20, declaring the nature, extent and value of the applicant's interest in the property.

The application has been fixed for hearing on [date] at [time] at [address of Court].

Schedule

[Description of property]

Filed: [name of applicant or applicant's solicitor]

Form 2 Notice of application for return of, or access to, property

Confiscation of Proceeds of Crime Regulation 2021, section 9

To: [name], [address]

[Name and address of applicant] has applied to the [name of Court] for an Order under the *Confiscation of Proceeds of Crime Act 1989*, section 41(5), relating to the property specified in the Schedule below, directing:

- * that the property be returned to the applicant
- * that the applicant be allowed access to the property.

[*Delete whichever is not applicable]

The property was seized on [date of seizure] under a warrant issued under that Act, Part 3.

The application has been fixed for hearing on [date] at [time] at [address of Court].

Schedule

[Description of property]

Filed: [name of applicant or applicant's solicitor]

Form 3 Application for freezing notice

Confiscation of Proceeds of Crime Regulation 2021, section 10(1)

On [date] I [name/rank/position], of [place of work] apply for a freezing notice in relation to the following specified property [description of property]:

I swear/solemnly, sincerely and truly declare and affirm that:

- 1 I am an authorised officer under the *Confiscation of Proceeds of Crime Act 1989* because I am a [list rank] of the NSW Police Force OR authorised in writing by the Minister for Police and Emergency Services to act as an authorised officer.
- 2* I have reasonable grounds for believing that [name of defendant] has been charged with the following serious offence(s) [list offence(s)]:
- 3* I have reasonable grounds for believing that [name of defendant] is about to be charged with the following serious offence(s) [list offence(s)]:
- 4* I have reasonable grounds for believing that [name of defendant] has been convicted of the following serious offence(s) [list offence(s)]:

- 5* I have reasonable grounds for believing that [*name of defendant*] has not been convicted of, but has committed, the following serious offence(s) [*list offence(s)*]:
- 6* I have reasonable grounds for believing that the specified property is tainted property or substitutable tainted property in relation to the serious offence(s) [*list specified property*]:
- 7* I have reasonable grounds for believing that [*name of defendant*] has derived benefits because of having committed the serious offence.
- 8* I have reasonable grounds for believing that the specified property is the defendant's proceeds of drug trafficking.
- 9* I have reasonable grounds for believing that the specified property is subject to the effective control of [*name of defendant*] and he/she has derived a benefit, directly or indirectly, from the commission of the following serious offence(s) [*list offence(s)*]:

Sworn/declared and affirmed before me on [*date*] at [*place*] in the State of New South Wales.

[*Signature*]

Justice of the Peace

[**Delete if not applicable*]

Note. For an application by telephone (but not by facsimile), this form of application should be completed by the authorised justice for record purposes as if it were made in person by the applicant but not on oath.

Certificate under the Oaths Act 1900, section 34(1)(c)

**Please cross out any text that does not apply*

I [*insert name of authorised witness*], a [*insert qualification to be authorised witness*], certify the following matters concerning the making of this statutory declaration by the person who made it:

- 1 *I saw the face of the person *or* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.
- 2 *I have known the person for at least 12 months *or* *I have confirmed the person's identity using an identification document and the document I relied on was [*describe identification document relied on*].

[*Insert signature of witness*]

Date:

Note. An authorised witness includes a Justice of the Peace, Australian lawyer or other person authorised to receive a statutory declaration or affidavit in NSW.

Form 4 Freezing notice

Confiscation of Proceeds of Crime Regulation 2021, section 10(2)

An application to confirm this notice is to be made to the appropriate court by an authorised officer no later than 14 days after today.

On [*date*], I [*name of authorised justice*], direct that the following specified property [*description of property*]:

- 1 not be disposed of, or otherwise dealt with by the defendant or any other person, except in the following ways and circumstances [*list the ways and circumstances*]: and
- 2 be held in the custody of the following person pending the determination of an application for confirmation of the freezing notice [*Commissioner of Police*] or [*list person*]:

[*Signature*]

Authorised justice

[*Print name*]

[*Date*]

[*Time, if telephone application*]

Form 5 Notice of issue of freezing notice

Confiscation of Proceeds of Crime Regulation 2021, section 10(3)

To *[name and address of defendant/owner of property affected by the notice/other person subject to the notice]*:

I hereby notify you of the issue of the attached freezing notice.

[Signature]

[Name/rank/position]

[Place of work]

[Date]

Form 6 Authorised justice's record of issue of freezing notice

Confiscation of Proceeds of Crime Regulation 2021, section 11(1)(a)

On *[date]* at *[time]* I, the undersigned authorised justice, received this application for a freezing notice.

1 The application was made in person.

OR

The application was made by facsimile transmission/telephone and I was/was not satisfied that the freezing notice was required urgently and it was/was not practicable for the application to be made in person.

2 On considering the application I found/did not find* that there were reasonable grounds for issuing the freezing notice.

* If freezing notice is issued—continue

3 The relevant particulars of the grounds on which I relied to justify the issue of the freezing notice are as follows *[list particulars]*:

4 The freezing notice was issued at *[time]* on *[date]*.

[Signature]

[Print name]

Authorised justice

[Date]

Return this Form, together with a copy of the freezing notice, to the Local Court named in the notice.

Schedule 2 Fees payable to NSW Trustee and Guardian or Commissioner of Police

section 16

- 1** Fees of the following amounts are payable to the NSW Trustee and Guardian or Commissioner of Police in relation to all property under the control of the NSW Trustee and Guardian or Commissioner of Police—

 - (a) for each calendar year during which the NSW Trustee and Guardian or Commissioner of Police has control of the property, whether or not the property is controlled for the whole of the year, whichever of the following amounts is greater—

 - (i) an amount equal to 0.22% of the value of the property, as fixed by the NSW Trustee and Guardian or Commissioner of Police,
 - (ii) \$220,
 - (b) an amount equal to the actual costs incurred and disbursements made in relation to the property by the NSW Trustee and Guardian or Commissioner of Police while in control of the property, including the following—

 - (i) the costs of legal representation,
 - (ii) the costs of obtaining legal advice and other legal costs,
 - (iii) agents' fees,
 - (iv) valuation fees,
 - (v) the costs incurred in relation to the operation of a business associated with the property.
- 2** Fees of the following amounts are also payable to the NSW Trustee and Guardian or Commissioner of Police in relation to property from which income is derived—

 - (a) an amount equal to 5.775% of the gross income, excluding income referred to in paragraph (b), derived from the property,
 - (b) if the income is received as rent and a cost has been incurred in relation to the income by the NSW Trustee and Guardian or Commissioner of Police for agency charges—an amount equal to 2.75% of the income.
- 3** A fee is also payable to the NSW Trustee and Guardian or Commissioner of Police, in relation to property that the NSW Trustee and Guardian or Commissioner of Police is directed by a court to sell or dispose of, of an amount equal to 2.75% of the gross amount realised by the sale or disposition of the property.