

[Act 1997 No 68]



New South Wales

Drug Trafficking (Civil Proceedings) Amendment Bill 1997

Explanatory note

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

Overview of Bill

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

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

Outline of provisions

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

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

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

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

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

Extension of Act to serious crime related activities

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

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

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

Removal of jurisdictional boundaries

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

Proceeds assessment orders

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

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

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

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

Legal expenses

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

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

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

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

Restraining orders

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

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

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

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

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

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

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

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

Production orders

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

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

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

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

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

Monitoring orders

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

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

Evidentiary matters

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

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

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

Assets forfeiture orders

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

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

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

Search warrants

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

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

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

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

Miscellaneous

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

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

Schedule 2 Amendment of Supreme Court Rules 1970

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