

[Act 1995 No 65]



New South Wales

## Forfeiture Bill 1995

### Explanatory note

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

#### Overview of Bill

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

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

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## Outline of provisions

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

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

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

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

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

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

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

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

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

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

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

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