

Act No. 90 of 1989

CONFISCATION OF PROCEEDS OF CRIME BILL 1989

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to replace the present Crimes (Confiscation of Profits) Act 1985 ("the 1985 Act") with legislation which increases the existing powers relating to the confiscation of the profits of crime and which provides for the confiscation of proceeds of drug trafficking. The proposed Act will re-enact the 1985 Act with modifications for the following purposes:

- (a) to facilitate the identification, location and quantification of property associated with, or derived from, crime;
- (b) to provide for the making of penalty orders (to be known as drug proceeds orders) against persons convicted of drug trafficking offences;
- (c) to create a new offence of money laundering;
- (d) to extend the ambit, and enhance the effectiveness, of the restraining orders which could be made under the 1985 Act;
- (e) to provide for the registration in New South Wales courts of orders for the freezing and confiscation of property made under corresponding State and Territory laws and which relate to property located in New South Wales.

The provisions additional to the 1985 Act are primarily found in proposed Division 4 of Part 2 (drug proceeds orders), proposed Division 2 of Part 3 (restraining orders) and Parts 4 (information gathering powers) and 6 (interstate orders). Extensive changes are also made to facilitate the following of the money trail. These include an extended definition of the term "tainted property" as used in the 1985 Act and development of the concept of "effective control of property".

To facilitate enforcement throughout Australia of legislation relating to the confiscation of the profits of crime, the proposed Act uses concepts and language reflecting provisions of similar Australian legislation.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

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

Clause 3 states the principal objects of the proposed Act.

Clause 4 contains definitions for the purposes of the proposed Act. In addition to definitions equivalent to those contained in the 1985 Act, definitions are included for the purposes of the new provisions relating to drug proceeds orders (Division 4 of Part 2), information gathering powers (Part 4), interstate orders (Part 6) and the following of the money trail.

An important definition relating to drug proceeds orders is that of "drug trafficking offence". A drug trafficking offence is an indictable offence under section 23, 24, 25, 26, 27 or 28 of the Drug Misuse and Trafficking Act 1985.

Important definitions relating to information gathering powers include the following:

"financial institution" defines the bodies which may be directed by a monitoring order made under proposed Part 4 to give information concerning certain accounts to a member, or member of the staff, of a prescribed authority (which is defined to include the Commissioner of Police, the State Drug Crime Commission, the Independent Commission Against Corruption, the Corporate Affairs Commission and certain other prescribed bodies).

"property-tracking document" defines the documents (for example, bank passbooks) that may be the subject of a production order. These are documents relevant to identifying, locating or quantifying property associated with crime or relating to the transfer of such property.

Important definitions relating to interstate orders include definitions of "corresponding law" (that is, a law of another State or Territory that is for the time being declared by the regulations to be a law that corresponds to the proposed Act), "interstate forfeiture order", "interstate pecuniary penalty order", "interstate restraining order" and "interstate serious offence".

Other important definitions include a revised definition of "tainted property" and a new definition of "authorised officer".

The definition of "tainted property" (which is defined in section 3 of the 1985 Act to mean property used in, or in connection with, the commission of a serious offence or derived or realised, directly or indirectly, by any person as a result of the commission of a serious offence) is extended to include property derived or realised from property used in the commission of a serious offence. The extended definition will enable forfeiture orders and restraining orders to be made, and search warrants to be issued, in respect of such property.

"Authorised officers" are defined as persons authorised by the Minister to carry out functions under section 43 (restraining orders) and Part 4 (information gathering powers).

Clause 4 also provides, as does section 3 (4) of the 1985 Act, that a person shall be taken to have been charged with an offence if an information has been laid, and contains some machinery provisions.

Clause 5 provides, as does section 3 (3) of the 1985 Act, that a person shall be taken to have been convicted of an offence where a section 556A order under the Crimes Act 1900 has been made, where the offence has been taken into account in passing sentence in respect of another offence, or where the person has absconded.

Clause 6 specifies, as does section 3 (5) of the 1985 Act, the circumstances in which and time at which a person is taken to have absconded.

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Clause 7 contains the same definition of "serious offence" as that contained in section 3 of the 1985 Act.

Clause 7 also contains a new definition, that of "serious drug offence". The definition is based on the definition of "serious drug offence" in section 3 of the State Drug Crime Commission Act 1985. The provisions relating to monitoring orders in proposed Part 4 relate to actions that can be taken concerning serious drug offences.

Clause 8 defines related offences for the purposes of the proposed Act. Related offences are those where the elements of the offences are substantially the same acts or omissions.

Clause 9 defines the expression "dealing with property" for the purposes of the proposed Act. The proposed section will make it clear that making a payment to a person in reduction of a debt owed to the person, removing property from New South Wales and receiving or making a gift of property amount to dealing with property.

Clause 10 clarifies the meaning of "effective control of property" for the purposes of the proposed Act. Provisions of the proposed Act will enable drug proceeds orders, restraining orders, pecuniary penalty orders and production orders to be made against property in the effective control of a person convicted of a serious offence, believed to have committed an offence or who derived a benefit, directly or indirectly, from the commission of an offence. The proposed section will make it clear that a person can have effective control over property whether or not the person has a legal or equitable estate or interest in the property or a right, power or privilege in connection with the property. The section will provide that, in determining whether a person has effective control, regard may be had to such matters as shareholdings in the property, a trust that has a relationship to the property and family and domestic and business relationships of the persons with an interest in the property.

Clause 11 states, as does section 4 of the 1985 Act, that the proposed Act will bind the Crown.

Clause 12 delineates the application of the proposed Act and contains provisions of a transitional nature.

PART 2—CONFISCATION

Division 1—Applications for confiscation orders

Clauses 13–16 provide for applications for confiscation orders (that is, forfeiture orders and pecuniary penalty orders) under the proposed Act. As under Parts 2 and 3 of the 1985 Act, applications may be made to the court where the offender was convicted or to the Supreme Court. Provision is made for giving interested parties notice of application proceedings and a right to appear in them.

Clause 17 provides that when an application is made to a court for a confiscation order in respect of a person's conviction of an offence the court may have regard to the transcript of any proceeding against the person for the offence. The provision will expedite confiscation proceedings and avoid the need to rehear evidence adduced in the criminal proceedings.

Division 2—Forfeiture orders

Clauses 18–21 make provision, as does Part 2 of the 1985 Act, for orders for the forfeiture of tainted property, the effect of those orders and the manner in which they may be discharged.

The provisions basically follow the provisions of sections 5–8 of the 1985 Act.

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Clauses 18 and 21, which are equivalent to sections 5 (forfeiture orders) and 8 (discharge of forfeiture order), respectively, of the 1985 Act, make it readily apparent that a court must specify the amount of the value of the property subject to a forfeiture order at the time the order is made. Proposed section 18 (3) also makes it clear that the requirement to specify the value applies only to property other than money.

Proposed clause 18 (2) makes it clear that the sentence imposed on a person is not to be taken into account in determining whether hardship could arise from the making of a forfeiture order.

Clause 22 provides for the making by a Local Court or the District Court of an order similar to a restraining order pending the making of a forfeiture order in respect of property. The order may direct that the property may not be disposed of except in a specified manner or specified circumstances.

Division 3—Pecuniary penalty orders

Clauses 23–26 make provision, as does Part 3 of the 1985 Act, for the issue of orders for the payment of pecuniary penalties equal to the assessed value of the benefits derived from the commission of offences. A pecuniary penalty order will not be able to be made in relation to a conviction for a drug trafficking offence. Orders in relation to drug trafficking offences may instead be made under proposed Division 4 of the Part.

The provisions basically follow the provisions of sections 10 and 11 of the 1985 Act.

Clause 25, which is equivalent to section 11 of the 1985 Act, includes within the matters to which a court must have regard in assessing the amount of a pecuniary penalty evidence of a member of the Police Force, a member of the Australian Federal Police or a Customs officer as to the market value of prohibited substances.

Clause 26 provides that a pecuniary penalty order will be discharged if the conviction in reliance on which the order is made is subsequently quashed or discharged by the court hearing an appeal against it under proposed section 92 (appeals).

Clause 27 enables a court to treat as property of the defendant (for the purposes of assessing benefit derived by the person from the commission of an offence) any property which it is satisfied is subject to the effective control of the defendant. Under the proposed section the court will be able to order that property that has been the subject of a sham transaction designed to conceal the origin of the property or put the property outside the ambit of the proposed Act is available to satisfy a pecuniary penalty order.

Division 4—Drug proceeds orders

The proposed Division provides for the making of a new form of order (to be known as a drug proceeds order) to confiscate the proceeds of drug trafficking. The Division is based on certain provisions contained in the Drug Trafficking Offences Act 1986 of the United Kingdom.

Clause 28 makes it clear that the Division will apply to proceeds of a drug trafficking offence that came into a person's possession before or after the commencement of the proposed Division.

Clause 29 requires a court which has convicted a person for drug trafficking to take certain steps before sentencing the person. If the court is of the opinion that the convicted person has benefited from drug trafficking, it must assess the value of the benefit derived. After determining the amount that might be realised from the property concerned, the court will be required to order the person to pay that amount to the State.

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Clause 30 provides that in determining whether a person has benefited from drug trafficking and in assessing the value of any such benefit the court may make certain assumptions. These are that any property which appears to have been held by the defendant at any time since conviction or to have been transferred to the defendant at any time within the 6 years immediately preceding the institution of proceedings against the defendant was a payment or reward in connection with drug trafficking and that any expenditure in that period was met out of proceeds of drug trafficking.

Clause 31 provides that statements relevant to the determinations and assessments to be made under clause 30 may be tendered by the prosecution and in some cases may be treated as conclusive. The statements may contain evidence as to the market value of the substances in relation to which the drug trafficking offence occurred.

Clause 32 requires the court to determine the amount to be recovered under a drug proceeds order. The court is required to determine the value of proceeds derived from the defendant's drug trafficking and the amount that may be realised from the defendant. The amount of the drug proceeds order will be the value of the proceeds, or the amount that might be realised, whichever is less.

Clause 33 details the types of property that will be realisable under clause 32. The amount is the total value of all realisable property held at the time of the order less the total value of any obligations (for example, amounts due under orders of courts or sums payable to secured creditors in bankruptcy) together with certain gifts "caught by the Act". These are gifts either made within the 6 year period before the institution of proceedings, gifts or property received in connection with drug trafficking or property which represents property received by the defendant in drug trafficking.

Clause 34 provides for the variation of a drug proceeds order if realisable property is inadequate to meet an amount that remains unrecovered under the order.

PART 3—CONTROL OF PROPERTY LIABLE TO CONFISCATION

Division 1—Search powers

Clauses 35–42 make provision, as does Part 5 of the 1985 Act, for the issue of search warrants to members of the Police Force in respect of premises if there are grounds for believing there is tainted property of a particular kind in or on the premises.

The provisions basically follow the provisions of sections 26–33 of the 1985 Act. Some modifications have been made to complement the provisions of proposed Part 6 (interstate orders).

The modifications make provision for the application of the search and seizure provisions to property the subject of interstate forfeiture orders or that is tainted property in relation to interstate serious offences.

Division 2—Restraining orders

Clauses 43–57 make provision, as does Part 4 of the 1985 Act, for the making of applications to the Supreme Court for the issue of orders restraining the disposal of the property of persons who have been, or are about to be, charged with serious offences or directing the Public Trustee to take control of any such property.

The provisions basically follow sections 12–25 of the 1985 Act. However, the following modifications are made:

Clause 43, which is the equivalent of section 12 (restraining orders) of the 1985 Act, differs from that section in that it provides that a restraining order (under which property may not be disposed of or otherwise dealt with if a charge is pending in respect of an offence) may be made—

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- (a) against the property of a defendant acquired after the making of the order (proposed section 43 (1) (b)); and
- (b) against property of some other person if there are reasonable grounds to believe that the property is under the effective control of the defendant and is derived directly or indirectly from the commission of the offence (proposed section 43 (1) (e) and (4)).

Under the proposed section the court may make a composite order relating to all the property of the defendant including specified property. The orders listed in the section may be made either alone or in combination.

Provision is also made to enable authorised officers (see the proposed definition in clause 4) to make affidavits in support of applications for restraining orders.

Clause 45, which is the equivalent of section 14 (court may make further orders) of the 1985 Act, differs from that section in that it makes provision—

- (a) for a court to make ancillary orders in relation to the affairs of a defendant or other person whose property is subject to a restraining order to complement the restraining order (proposed section 45 (1) (c)); and
- (b) so that a person directed by an order under the section to furnish to the Public Trustee a statement of specified particulars of property of the person will not be excused from furnishing the statement on the ground that it might tend to incriminate the person and to provide that evidence obtained as a direct or indirect consequence of furnishing such a statement will not be admissible in civil or criminal proceedings other than those for the making of a pecuniary penalty order or drug proceeds order and then only to facilitate the assessment of the amount of the penalty or recoverable under the order (proposed section 45 (5), (6)).

Clause 46 provides for the making of an order for the taxation of legal expenses to be met out of restrained property.

Clause 49, which is equivalent to section 17 (registration of restraining orders) of the 1985 Act, differs from that section in that the particulars of restraining orders that are required to be recorded on the register under the proposed section need not be prescribed.

Clause 50, which is equivalent to section 18 (contravention of restraining orders) of the 1985 Act, differs from that section in that it—

- (a) provides for the imposition of a fine, of an amount equivalent to the value of the property, for disposing of, or dealing with, property in contravention of a restraining order (under that section the maximum fine that may be imposed is \$5,000) (proposed section 50 (1)); and
- (b) enables an appropriate officer to apply to the Supreme Court to set aside a disposition of, or dealing with, property in contravention of a restraining order if the disposition or dealing is not for sufficient consideration or not in favour of a person who acted in good faith (proposed section 50 (2)).

Clause 55, which is equivalent to section 23 (time when restraining order ceases to be in force) of the 1985 Act, differs from that section in that it omits the 6 month limitation in that section on the duration of a restraining order made in reliance on the charging or proposed charging of a person. The proposed section will eliminate the need to make an application, at the end of the 6 month period, for a further order. As under section 23, a restraining order made in reliance on the proposed charging of a person ceases to be in force if the person is not charged within 48 hours.

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PART 4—INFORMATION GATHERING POWERS

The proposed Part, which is based on Part 4 of the Proceeds of Crime Act 1987 of the Commonwealth, provides for the making of 2 new forms of orders. These are production orders in relation to property-tracking documents and monitoring orders to obtain information concerning the movement of funds through financial institutions.

Division 1—Production orders

Clauses 58–62 deal with the procedure for the making and granting of applications for production orders. An authorised officer will be able to apply to the Supreme Court for an order directing a person to produce, or make available for inspection, property-tracking documents in the possession of the person. If a document is required to be produced or made available for inspection the authorised officer may be empowered, subject to specified guidelines, to inspect, take extracts from and make copies of it and retain it if necessary.

Clause 63 enables the Supreme Court, when it is satisfied that documents required to be produced are essential to the business activities of the person to whom an order is directed, to vary the order to require the person to make the documents available for inspection instead.

Clause 64 creates offences in relation to breaches of production orders. These include contravention of an order without reasonable excuse and providing a document that is false or misleading in some respect without indicating that fact to the person to whom it is produced.

Division 2—Search powers

Clause 65 makes provision for entry, search and seizure as an alternative, or in addition to, production orders. The proposed section will enable an authorised officer to enter and search premises for a property-tracking document with the consent of the occupier of the premises or pursuant to a search warrant issued for the purpose. It enables the seizure of any document found in the course of a search if it is believed on reasonable grounds to be a property-tracking document.

Clauses 66 and 67 provide for the making of applications to, and the issue of search warrants by, the Supreme Court to authorised officers if there are reasonable grounds for suspecting that a person has been convicted of, or has committed, a serious offence and that there may be, in or on premises, property-tracking documents in relation to the offence.

The Supreme Court may treat a document as a property-tracking document if the applicant for the search warrant states that there are reasonable grounds for believing that the offender derived a benefit from the offence, that the property is under his or her effective control and that the document is relevant to identifying, locating or quantifying the property. The warrant may authorise the seizure of documents.

The proposed sections include guidelines for the issue of search warrants (for example, when the document cannot be identified for the purpose of obtaining a production order or when issue of a production order is unlikely to be effective because there are reasonable grounds to believe it would not be complied with).

Division 3—Monitoring orders

Clauses 68 and 69 create a new mechanism to enable a prescribed authority to gain information quickly about movements of funds in relation to bank accounts operated by particular persons. The provisions are directed particularly at drug related offences.

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Under the proposed sections the Supreme Court may grant a monitoring order directing a financial institution to give information obtained by the institution to an authorised officer about every transaction conducted through accounts held by a person with the institution over a specified period of less than 3 months. A monitoring order may be made only if the Court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose accounts the information is sought has committed, or is about to commit, a serious drug offence or is implicated in some other specified way.

A financial institution which is, or has been, the subject of a monitoring order is protected against prosecution for an offence against proposed section 73 (money laundering) by providing that the existence of the order can be disregarded for the purposes of that section.

Clause 70 prevents the disclosure of the existence or operation of a monitoring order other than to the prescribed authority to which the information is to be provided under the order itself, to the officers or agents of the institution to ensure compliance with the order or to a barrister or solicitor to obtain legal advice or representation in relation to the order.

Clause 71 protects financial institutions from legal action for making information available to prescribed authorities in respect of accounts that the institutions believe on reasonable grounds might be relevant to an investigation or prosecution of an offence or of assistance in the enforcement of the proposed Act.

Clause 72 protects financial institutions, and officers, employees or agents of financial institutions, who give information to prescribed authorities pursuant to proposed section 71 from the operation of proposed section 73 (money laundering).

PART 5—OFFENCES

Division 1—Money laundering

Clause 73 creates an offence of laundering money or other property that is the proceeds of crime committed in New South Wales.

A person engages in money laundering if the person engages, directly or indirectly, in a transaction that involves money or other property that the person knows is the proceeds of serious crime or receives, possesses, conceals, disposes of or brings into New South Wales such property.

Division 2—Miscellaneous

Clause 74, which is the equivalent of section 41 (proceedings for offences) of the 1985 Act, differs from that section in that it makes provision for certain new offences (relating to monitoring orders and money laundering) to be dealt with on indictment.

Clause 75 complements the proposed provisions relating to authorised officers by providing for certificate evidence of their authorisation in legal proceedings.

Clause 76 assists the establishment of the state of mind of a body corporate engaging in conduct affected by the proposed Act.

PART 6—INTERSTATE ORDERS

Proposed Part 6 enables the reciprocal enforcement of orders to freeze and confiscate profits made from criminal activities in Australian jurisdictions.

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The proposed Part provides a system under which forfeiture orders and restraining orders may be enforced interstate, and under which search warrants may be issued in the State in which a search is to be conducted.

Clause 77 deals with the registration in the State of a forfeiture order or restraining order made interstate which is expressed to apply to property in the State.

Clause 78 states that an interstate forfeiture order shall be enforced in the same manner, once registered, as a forfeiture order made under proposed section 18 (1).

Clause 79 states that an interstate restraining order may be enforced in the same manner, once registered, as a restraining order made under proposed section 43.

Clause 80 prevents a court of the State revoking or varying registered interstate orders.

Clause 81 provides for the continuation in force of a registered interstate order after it ceases to be in force in the State in which it was made until it is cancelled under proposed section 82.

Clause 82 provides for the cancellation of registration of an interstate order.

Clause 83 provides that, if an interstate pecuniary penalty order is made, and an interstate restraining order is made and registered before or after the interstate pecuniary penalty order is registered, then on registration of the later of the 2 orders a charge is created on the property to secure payment due under the interstate pecuniary penalty order.

Clause 84 provides that, when an interstate restraining order is registered and it directs an official of the State in which it was made to take control of property, the Public Trustee may enter into an agreement with the official and thereby exercise the same powers that the official would have been able to exercise if the property were in that State.

Clause 85 provides for the interim registration of facsimile copies of interstate restraining and forfeiture orders and amendments to such orders.

PART 7—MISCELLANEOUS

Proposed Part 7 contains basically the same provisions (with some modifications for changed style) found in Part 6 of the 1985 Act.

The main differences are:

Clause 87, which is the equivalent of section 35 (provisions relating to courts) of the 1985 Act, differs from that section in that it—

- (a) increases from \$5,000 to \$10,000 the value of property in relation to which a Local Court may make a forfeiture order (proposed section 87 (2)); and
- (b) increases from \$5,000 to \$10,000 the amount up to which a Local Court may make a pecuniary penalty order (proposed section 87 (3)).

Clause 89 provides for forfeiture or restraining orders to be registered under a corresponding law of another State.

Clause 90 provides that if such an order is varied on the application of a third party in relation to the party's interests in another State the costs may be paid to the third party.

Clause 92 provides for the making of appeals in respect of drug proceeds orders.

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Clause 95, which is the equivalent of section 44 (regulations) of the 1985 Act, differs from that section in that it also provides for the making of regulations necessary to give effect to proposed Part 6 (interstate orders).

Clause 96 repeals the 1985 Act and the regulations made under that Act.

Clause 97 gives effect to Schedule 1 which sets out savings, transitional and other provisions.

Schedule 1 contains savings, transitional and other provisions consequent on the proposed repeal of the 1985 Act. The provisions will operate so that, for example, a confiscation order or restraining order made, or a search warrant issued, under the 1985 Act will have effect as if made or issued under the proposed Act.
