

# Confiscation of Proceeds of Crime Act 1989 No 90

[1989-90]



New South Wales

## Status Information

### Currency of version

Historical version for 8 January 2010 to 18 February 2010 (accessed 28 May 2024 at 3:23)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Miscellaneous Acts \(Local Court\) Amendment Act 2007 No 94](#) (amended by [Courts and Crimes Legislation Further Amendment Act 2008 No 107](#)), so much of Sch 2 as amends sec 74 (5) and Sch 7 (the amendments are to sec 74 (5) which is to be inserted by the [Courts and Crimes Legislation Further Amendment Act 2008 No 107](#)) (not commenced)  
[Courts and Crimes Legislation Further Amendment Act 2008 No 107](#) (not commenced — to commence on 19.2.2010)  
[Crimes Amendment \(Fraud, Identity and Forgery Offences\) Act 2009 No 99](#) (not commenced)

### Authorisation

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File last modified 12 February 2010

# Confiscation of Proceeds of Crime Act 1989 No 90



New South Wales

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# Confiscation of Proceeds of Crime Act 1989 No 90



New South Wales

An Act to provide for the confiscation of the profits of crime and the forfeiture of property in certain circumstances; to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of the profits of crime and the forfeiture of property; to repeal the *Crimes (Confiscation of Profits) Act 1985*; and for connected purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Confiscation of Proceeds of Crime Act 1989*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State, and
- (b) to provide for the forfeiture of property used in or in connection with the commission of such offences, and
- (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property, and
- (d) to provide for the enforcement in the State of forfeiture orders, pecuniary penalty orders and restraining orders made in respect of offences against the laws of other States.

### 4 Definitions

(1) In this Act:

**account** means any facility or arrangement through which a financial institution



accepts deposits or allows withdrawals and includes a facility or arrangement for:

- (a) a fixed term deposit, and
- (b) a safety deposit box.

**agent** includes, if the agent is a corporation, the officers and agents of the corporation.

**appeal** includes a proceeding in the nature of an appeal.

**appropriate court** means:

- (a) in any case, the Supreme Court, or
- (b) in relation to:
  - (i) a forfeiture order made in reliance on the conviction of a person for a serious offence, or
  - (ii) a pecuniary penalty order against a person convicted of a serious offence, or
  - (iii) an application for such a forfeiture order or pecuniary penalty order, or
  - (iv) a drug proceeds order against a person convicted of a drug trafficking offence or an application for a drug proceeds order,the court before which the person was convicted of the offence, or
- (c) in relation to a freezing notice, the court or Magistrate in which or before whom proceedings (including committal proceedings) for a serious offence on which the freezing notice is based are held.

**appropriate officer** means:

- (a) in any case—the Director of Public Prosecutions or Commissioner for the Police Integrity Commission, or
- (b) in relation to restraining orders or freezing notices—the Commissioner for the Independent Commission Against Corruption, or
- (c) in relation to a function exercised before or in relation to the Local Court (other than a function under Division 2 of Part 3)—the Commissioner of Police, or
- (d) in relation to a function prescribed for the purposes of this paragraph by the regulations—a person so prescribed or a person of a class or description so prescribed.

**approved** means approved by the Minister in writing for the purposes of the provision in which the term occurs.

**authorised officer** means:

- (a) a member of the Police Force, or
- (b) a person authorised in writing by the Minister either generally or in a special case to act as an authorised officer for the purposes of section 43 (restraining orders), Division 1A of Part 3 or Part 4.

**benefit** includes service and advantage.

**confiscation order** means a forfeiture order, pecuniary penalty order or drug proceeds order.

**corresponding law** means a law of another State that is for the time being declared by the regulations to be a law that corresponds to this Act.

**Customs Act** means the [Customs Act 1901](#) of the Commonwealth.

**Customs officer** means an officer of Customs within the meaning of the Customs Act.

**director**, in relation to a financial institution or corporation, includes:

- (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.

**drug proceeds order** means an order made under section 29.

**drug trafficking** means any act constituting a drug trafficking offence.

**drug trafficking offence** means an offence under section 24A (possession of precursors for manufacture or production of prohibited drugs) or 25A (offence of supplying prohibited drugs on an ongoing basis) of the [Drug Misuse and Trafficking Act 1985](#) or an offence, involving more than a small quantity of a prohibited plant or prohibited drug within the meaning of that Act, under any of the following sections of that Act:

- (a) section 23 (offences with respect to prohibited plants),
- (a1) section 23A (offences with respect to enhanced indoor cultivation of prohibited plants in presence of children),

- (b) section 24 (manufacture and production of prohibited drugs),
- (c) section 25 (supply of prohibited drugs),
- (d) section 26 (conspiring),
- (e) section 27 (aiding, abetting etc commission of offence in New South Wales),
- (f) section 28 (conspiring to commit and aiding etc commission of offence outside New South Wales).

**encumbrance**, in relation to property, includes any interest, mortgage, charge, right, claim and demand in respect of the property.

**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.

**facsimile** includes a reference to any electronic communication device which transmits information in a form from which written material is capable of being reproduced with or without the aid of any other device or article.

**facsimile copy** means a copy obtained by facsimile transmission.

**financial institution** means:

- (a) an authorised deposit-taking institution, or
- (b) (Repealed)
- (c) (Repealed)
- (d) a body corporate that is, or that, if it had been incorporated in Australia, would be, a financial corporation within the meaning of section 51 (xx) of the [Constitution of the Commonwealth](#).

**fixed term deposit** means an interest bearing deposit lodged for a fixed period.

**forfeiture order** means an order made under section 18.

**freezing notice** means a notice issued under section 42C.

**interest**, in relation to property, means:

- (a) a legal or equitable estate or interest in the property, or
  - (b) a right, power or privilege in connection with the property,
- whether present or future and whether vested or contingent.

**interstate crime related property declaration** means a declaration or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

**interstate forfeiture order** means an order or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

**interstate pecuniary penalty order** means an order or other instrument 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 or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

**interstate serious offence** means an offence (including a common law offence, where relevant) against the laws of another State, being an offence in relation to which an interstate forfeiture order or interstate pecuniary penalty order may be made under a corresponding law of that State.

**monitoring order** means an order made under section 69.

**officer** means a director, secretary, executive officer or employee.

**pecuniary penalty order** means an order made under section 24.

**penalty amount** means:

- (a) in relation to a forfeiture order made against a person, the amount specified in relation to the forfeiture order under section 21 (2), or
- (b) in relation to a pecuniary penalty order made against a person, the amount that the person is, under the pecuniary penalty order, liable to pay to the State, or
- (c) in relation to a drug proceeds order made against a person, the amount that the person is, under the drug proceeds order, liable to pay to the State.

**premises** includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof.

**prescribed authority** means:

- (a) the Commissioner of Police, or
- (b) the New South Wales Crime Commission, or
- (c) the Independent Commission Against Corruption, or

- (d) the Corporate Affairs Commission, or
- (e) the Police Integrity Commission, or
- (f) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of a State or Territory prescribed for the purposes of this definition.

**proceeds**, in relation to a serious offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.

**production order** means an order made under section 59.

**property** includes real and personal property and any estate or interest in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest.

**property-tracking document**, in relation to a serious offence, means:

- (a) a document relevant to:
  - (i) identifying, locating or quantifying property of a person who committed the offence, or
  - (ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence, or
- (b) a document relevant to:
  - (i) identifying, locating or quantifying tainted property in relation to the offence, or
  - (ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence.

**public promotion** means any of the following:

- (a) a film, slide, video tape or any other form of recording from which a visual image can be produced,
- (b) a record, tape, compact disk or any other form of recording from which words or sounds can be produced,
- (c) a book, newspaper, magazine or other written or pictorial matter,
- (d) a radio or television production,
- (e) a publication of matter on the Internet,
- (f) a live entertainment of any kind.

**relevant offence**, in relation to tainted property, means an offence by reason of the commission of which the property is tainted property.

**relevant period**, in relation to the conviction of a person for a serious offence, means the period of 6 months after:

- (a) where the person is to be taken to have been convicted of the offence because of section 5 (1) (a)—the day on which the person was convicted of the offence, or
- (b) where the person is to be taken to have been convicted of the offence because of section 5 (1) (b)—the day on which the order in relation to the offence was made under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, or
- (c) where the person is to be taken to have been convicted of the offence because of section 5 (1) (c)—the day on which the court took the offence into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*, or
- (d) where the person is to be taken to have been convicted of the offence because of section 5 (1) (d)—the day on which the person is taken to have absconded under section 6.

**restraining order** means an order made under section 43.

**State**, when not used in a geographical sense, means the Crown in right of New South Wales, and (except in relation to the payment of money to the State) includes a State authority.

**State authority** means a Minister of the Crown, a statutory body representing the Crown, a member of the Police Force or a person or body prescribed by the regulations for the purposes of this definition or of a class or description so prescribed.

**tainted property** means property that:

- (a) was used in, or in connection with, the commission of a serious offence, or
- (b) was substantially derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence, or
- (c) was substantially derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence, or
- (d) was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender's thoughts, opinions or emotions regarding the offence, in any public promotion.

**telephone** includes radio, facsimile and any other communication device.

**unlawful activity** means an act or omission that constitutes an offence against a law

in force in the Commonwealth, a State or a Territory.

- (2) A reference in this Act to a person being charged with an offence is a reference to a person being issued with a court attendance notice or being a person against whom an information has been laid.
- (3) A reference in this Act to a benefit derived by a person includes a reference to:
  - (a) a benefit derived, directly or indirectly, by the person, and
  - (b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.
- (4) A reference in this Act to the property of a person includes a reference to property in respect of which the person has a beneficial interest.
- (5) A reference in this Act to acquiring property, or an interest in property, for sufficient consideration is a reference to acquiring the property, or the interest, for a consideration that is sufficient and that, having regard solely to commercial considerations, reflects the value of the property, or the interest.
- (6) For the purposes of this Act, a person shall not be regarded as being a director of a financial institution or corporation within the meaning of paragraph (c) of the definition of **director** in subsection (1) only because the directors act on advice given by that person in the proper performance of the functions attaching:
  - (a) to his or her professional capacity, or
  - (b) to his or her business relationship with the directors of the financial institution or corporation.
- (7) In this Act:
  - (a) a reference to a function includes a reference to a power, authority and duty, and
  - (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (8) For the purposes of this Act, the Northern Territory and the Australian Capital Territory are regarded as States.
- (9) For the purposes of this Act, the **value of property** (other than cash) in relation to any person holding the property:
  - (a) if any other person holds an interest in the property, is the market value of the first-mentioned person's beneficial interest in the property (less the amount required to discharge any encumbrance, other than a forfeiture order, on that interest), and

(b) in any other case, is its market value.

## **5 Meaning of “conviction of serious offence”**

- (1) For the purposes of this Act, a person shall be taken to have been convicted of a serious offence if:
  - (a) the person has been convicted, whether summarily or on indictment, of the offence by a court, or
  - (b) the person has been charged with the offence and the court hearing the charge has made an order in relation to the offence under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, or
  - (c) the person has been sentenced for another offence and the court has, in passing sentence on the person, taken the offence into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*, or
  - (d) the person has been charged with the offence and, at any time before the determination of the charge, the person has absconded.
- (2) If, by virtue of subsection (1), a person is to be taken to have been convicted of a serious offence, then, for the purposes of this Act:
  - (a) the person shall, in a case to which paragraph (a) or (b) of that subsection applies, be taken to have been so convicted by the court referred to in the relevant paragraph, and
  - (b) the conviction shall be taken to have been quashed:
    - (i) if the person is to be taken to have been convicted of the offence because of subsection (1) (a)—when the conviction is quashed or set aside, or
    - (ii) if the person is to be taken to have been convicted of the offence because of subsection (1) (b)—when the order made under section 10 of the *Crimes (Sentencing Procedure) Act 1999* is quashed or set aside, or
    - (iii) if the person is to be taken to have been convicted of the offence because of subsection (1) (c)—when the decision of the court under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* is quashed or set aside, or
    - (iv) if the person is to be taken to have been convicted of the offence because of subsection (1) (d)—when, after the person is subsequently brought before a court in respect of the offence with which the person was charged, the person is discharged in respect of the offence or the conviction for the offence is quashed or set aside.
- (3) For the purposes of this Act, where an information has been laid alleging the



commission of a serious offence by a person, the person shall be taken to have been charged with the offence (but nothing in this subsection limits any other way in which a person is to be taken to be charged with an offence).

## **6 Meaning of “absconding”**

- (1) For the purposes of this Act, a person shall be taken to have absconded if and only if:
- (a) a court attendance notice or information has been filed or laid alleging the commission of a serious offence by the person, and
  - (b) a warrant for the arrest of the person has been issued in relation to that information or notice, and
  - (c) reasonable attempts to locate the person pursuant to the warrant have been unsuccessful during the period of 6 months commencing on the day the warrant was issued,
- and the person shall be taken to have so absconded on the last day of that period of 6 months.
- (2) A reference in this Act, in relation to the conviction of a person for a serious offence, to the commission of the offence shall, where the person is to be taken to have been convicted of the offence because of section 5 (1) (d), be read as a reference to the alleged commission of the offence by the person.

## **7 Meaning of “serious offence” and “serious drug offence”**

In this Act:

***serious drug offence*** means:

- (a) an offence referred to (before the commencement of the [Drug Misuse and Trafficking Act 1985](#)) in section 45A of the [Poisons Act 1966](#):
  - (i) of supplying any drug of addiction or prohibited drug within the meaning of that Act, or
  - (ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act, or
  - (iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises, or
- (b) a drug trafficking offence, or
- (c) a prescribed offence involving drugs or an offence of a prescribed kind involving

drugs, or

- (d) an offence, which involves theft, fraud, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery, corruption or harbouring criminals, committed in connection with an offence referred to in paragraph (a), (b) or (c), or
- (e) an offence under section 193B (money laundering) or 193D (dealing with property that subsequently becomes an instrument of crime) of the [Crimes Act 1900](#) in relation to the proceeds of an offence, or an offence, referred to in paragraph (a), (b), (c) or (d), or
- (f) an offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e).

**serious offence** means:

- (a) an offence (including a common law offence) against the laws of New South Wales, being an offence that may be prosecuted on indictment, or
- (b) the offence of supplying any restricted substance prescribed for the purposes of section 16 of the [Poisons and Therapeutic Goods Act 1966](#) that arises under section 18A (1) of that Act, or
- (c) an offence prescribed for the purposes of this paragraph by the regulations or an offence of a kind so prescribed.

## **8 Related offences**

For the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences are substantially the same acts or omissions.

## **9 Meaning of “dealing with property”**

For the purposes of this Act, dealing with property of a person 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 New South Wales, and
- (c) receiving or making a gift of the property.

## **10 Effective control of property**

- (1) Property, or an interest in property, may be subject to the effective control of a person within the meaning of this Act 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) In determining:

(a) whether or not property, or an interest in property, is subject to the effective control of a person, or

(b) whether or not there are reasonable grounds to believe that property, or an interest in property, is subject to the effective control of a person,

regard may be had to:

(c) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property, and

(d) a trust that has a relationship to the property, and

(e) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (c) or trusts of the kind referred to in paragraph (d), and other persons.

## **11 Act to bind Crown**

(1) This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

(2) Nothing in this Act renders the Crown liable to be prosecuted for an offence.

## **12 Application**

(1) Parts 2 and 3 do not apply to a person's conviction of an offence if the person was convicted of the offence before the commencement of those Parts.

(2) Subsection (1) does not apply in relation to interstate forfeiture orders, interstate pecuniary penalty orders or interstate restraining orders.

(3) Subject to subsection (1), this Act applies to:

(a) an offence committed, or believed to have been committed, at any time (whether before or after the commencement of this section), and

(b) a person's conviction of an offence at any time (whether before or after the commencement of this section).

# **Part 2 Confiscation**

## **Division 1 Applications for confiscation orders**

### **13 Applications for confiscation orders**

(1) If a person is convicted of a serious offence other than a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following

orders:

- (a) a forfeiture order against property that is tainted property in respect of the offence,
  - (b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.
- (2) If a person is convicted of a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:
  - (a) a forfeiture order against property that is tainted property in respect of any drug trafficking offences,
  - (b) a drug proceeds order against the person in respect of benefits derived by the person from the commission of any drug trafficking offences.
- (3) An application must be made before the end of the relevant period in relation to the conviction, except with the leave of the Supreme Court.
- (3A) The Supreme Court must not grant leave under subsection (3) unless:
  - (a) the property or benefit to which the application relates is:
    - (i) property of the kind referred to in paragraph (d) of the definition of **tainted property** in section 4 (1), or
    - (ii) a benefit of the kind referred to in section 25 (2) (a1) or 30 (1) (b), and
  - (b) the Court is satisfied that:
    - (i) the property or benefit was derived, realised or identified only after the end of the relevant period, or
    - (ii) necessary evidence became available only after the end of that period, or
    - (iii) it is otherwise in the interests of justice to do so.
- (4) An application may be made under subsection (1) (b) in relation to one or more serious offences.
- (5) If an application under subsection (1) or subsection (2) has been finally determined, no further application may be made under that subsection in relation to the same conviction, except with the leave of the Supreme Court or in such circumstances as are prescribed.
- (6) The Supreme Court shall not grant leave unless satisfied that:
  - (a) the tainted property, or 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) the Court is otherwise satisfied that it is in the interests of justice to grant the leave.

#### **14 Notice of applications**

- (1) If an appropriate officer applies for a forfeiture order against property in respect of a person's conviction of a serious offence:
  - (a) the appropriate officer shall give written notice of the application to the person and to any other person the appropriate officer has reason to believe may have an interest in the property, and
  - (b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application, and
  - (c) the court may, at any time before the final determination of the application, direct the appropriate officer to give or publish notice of the application to a specified person or class of persons, in the manner and within the time that the court considers appropriate.
- (2) If an appropriate officer applies for a pecuniary penalty order or drug proceeds order against a person:
  - (a) the appropriate officer shall give the person written notice of the application, and
  - (b) the person may appear and adduce evidence at the hearing of the application.

#### **15 Amendment of applications**

- (1) A court may, at any time before the final determination of an application for a confiscation order made to it and whether or not the period for making such an application has expired, amend the application as it thinks fit, either at the request of the appropriate officer who made the application or with the approval of the appropriate officer.
- (2) The court shall not amend the application so as to:
  - (a) include additional property in an application for a forfeiture order, or
  - (b) include an additional benefit in an application for a pecuniary penalty order or drug proceeds order,unless the court is satisfied that:
  - (c) the property or benefit was not reasonably capable of identification when the application was originally made, or

(d) necessary evidence became available only after the application was originally made.

- (3) If the amendment of an application for a forfeiture order would have the effect of including additional property in the application for the forfeiture order, the applicant for the amendment shall give written notice of the application to amend to any person who the applicant has reason to believe may have an interest in the property to be included in the application for the forfeiture order.
- (4) Any person who claims an interest in the property to be included in the application for the forfeiture order may appear and adduce evidence at the hearing of the application to amend.
- (5) If the amendment of an application for a pecuniary penalty order or drug proceeds order against a person would have the effect of including an additional benefit in the application for the pecuniary penalty order or drug proceeds order, the applicant shall give the person written notice of the application to amend.

#### **16 Making of confiscation orders if person has absconded**

If a person is, because of section 5 (1) (d), to be taken to have been convicted of a serious offence, a court shall not make a confiscation order in reliance on the person's conviction of the offence unless the court is satisfied, on the balance of probabilities, that the person has absconded and:

- (a) the person has been committed for trial for the offence, or
- (b) 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.

#### **17 Procedure on applications**

- (1) If an application is made to a court for a confiscation order in respect of a person's conviction of a serious offence, the court may, in determining the application, have regard to the transcript of any proceedings against the person for the serious offence.
- (2) If:
  - (a) a person is to be taken to have been convicted of a serious offence because of section 5 (1) (c), and
  - (b) an application is made to a court for a confiscation order in respect of the conviction,the reference in subsection (1) to proceedings against the person for the serious offence includes a reference to proceedings against the person for the other offence referred to in section 5 (1) (c).

## Division 2 Forfeiture orders

### 18 Forfeiture orders

- (1) If a person has been convicted of a serious offence and an application is made to a court under section 13 (1) (a) or (2) (a) in relation to specified property and:
  - (a) the court is satisfied that the property is tainted property in relation to the offence, and
    - (a1) if the application relates to property of the kind referred to in paragraph (d) of the definition of **tainted property** in section 4 (1)—the court is satisfied that, having regard to subsection (1A), it is appropriate to treat the property as having been derived or realised by the defendant (or by a person at the request or by the direction of the defendant) because of the commission of a serious offence, and
  - (b) the court has taken into consideration (having regard to information before the court):
    - (i) the use that is ordinarily or had been intended to be made of the property, and
    - (ii) any hardship that may reasonably be likely to arise (whether on the part of that or any other person) following the making of the order,

the court may order that the property is forfeited to the State.
- (1A) In considering whether to treat property of the kind referred to in paragraph (d) of the definition of **tainted property** in section 4 (1) as property derived or realised by the defendant (or by a person at the request or by the direction of the defendant) because of the commission of a serious offence, a court may have regard to any matter that it thinks fit, including:
  - (a) whether or not it is in the public interest to treat it as such property, and
  - (b) whether or not the depiction of the offence, or the expression of the defendant's thoughts, opinions or emotions regarding the offence, in the public promotion for which the property was derived or realised has any general social or educational value, and
  - (c) the nature and purposes of the public promotion for which the property was derived or realised, including its use for research, educational or rehabilitative purposes.
- (2) In considering any hardship that may be likely to arise on the part of a person convicted of a serious offence, the court shall not take into account the sentence imposed in respect of the offence.
- (2A) In considering any hardship reasonably likely to arise on the part of an Aboriginal

person or a Torres Strait Islander convicted of a serious offence, the court must take into account responsibilities arising from the person's ties to extended family and kinship.

- (3) If the court orders that property (other than money) is forfeited to the State, the court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.
- (4) If, at the hearing of an application made under section 13 (1) (a) or (2) (a) in reliance on the conviction of a person for a serious offence, evidence is given that property to which the application relates was in the possession of the person at or immediately after the commission of the offence, then:
  - (a) if there is no evidence given tending to show that the property was not used in, or in connection with, the commission of the offence—the court shall presume that the property was used in, or in connection with, the commission of the offence, or
  - (b) in any other case—the court shall not make an order under this section in relation to the property unless it is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence.
- (5) A court making a forfeiture order in respect of property may specify in the order the extent of the estate, interest or rights in the property that are affected by the order and, where the order is to apply to land, the court shall do so.

## **19 Effects of forfeiture orders**

- (1) If a court makes a forfeiture order in respect of property:
  - (a) the property vests in the Crown in right of New South Wales (or in such State authority as is specified in the forfeiture order) to the extent of the estate, interest or rights (if any) specified in the forfeiture order, and
  - (b) the property so vests subject to every charge or encumbrance to which the property was subject immediately before the forfeiture order was made and, in the case of land under the provisions of the [Real Property Act 1900](#), is subject to every mortgage, lease or other interest recorded in the Register kept under that Act, and
  - (c) if the property is not already in the possession of the State, the State may take possession of the property.
- (2) Nothing in subsection (1) affects the operation of section 86 of the [Real Property Act 1900](#) in relation to a forfeiture order made in respect of land.
- (3) If a court makes a forfeiture order in respect of property:
  - (a) the property shall not, except with the leave of an appropriate court and in accordance with any directions of the court, be disposed of, or otherwise dealt



with, by or on behalf of the State, before the relevant time, and

(b) if, at the relevant time, the forfeiture order has not been discharged, the property may be disposed of, or otherwise dealt with:

- (i) in accordance with any direction of the Attorney General or of a person authorised by the Attorney General for the purposes of this subparagraph, or
- (ii) in accordance with any other applicable law.

(4) In subsection (3):

**relevant time**, in relation to property that is the subject of a forfeiture order, means:

(a) if:

- (i) the period provided for the lodging of an appeal against the forfeiture order has expired without such an appeal having been lodged—the expiration of that period, or
- (ii) an appeal against the forfeiture order has been lodged—the time when the appeal lapses or is finally determined, as the case requires, or

(b) if:

- (i) the period provided for the lodging of an appeal against the conviction for the relevant serious offence has expired without such an appeal having been lodged—the expiration of that period, or
- (ii) an appeal against the conviction has been lodged—the time when the appeal lapses or is finally determined, as the case requires,

whichever is the later.

## 20 Effects of forfeiture orders on third parties

- (1) If, in reliance on the conviction of a person for a serious offence, a court makes a forfeiture order in respect of property, any other person (in this section referred to as the **applicant**) who claims an interest in the property may, at any time within the period of 6 months after the day on which the forfeiture order was made, apply to the court for an order under this section in respect of that interest.
- (2) If the court to which the application is made is satisfied, on the balance of probabilities, that:
  - (a) the applicant was not, in any way, involved in the commission of the relevant serious offence, and
  - (b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant acquired the interest:

(i) for sufficient consideration, and

(ii) without knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property,

the court shall make an order declaring the nature, extent and value of the applicant's interest in the property and:

(c) if the property is still in the possession of the State—directing that the property be transferred to the applicant or declaring that there is payable to the applicant the amount specified in the order as the value of the applicant's interest in the property, or

(d) in any other case—declaring that there is payable to the applicant the amount specified in the order as the value of the applicant's interest in the property.

(3) In deciding, for the purpose of subsection (2) (c), whether to direct that property be transferred to an applicant or to declare that an amount is payable to an applicant, the court shall have regard to:

(a) the nature, extent and value of the applicant's interest in the property, and

(b) if the court is aware that any other person claims an interest in the property—the nature, extent and value of that claimed interest, and

(c) any other matter that seems to the court to be relevant.

(4) A person who applies to a court for an order under this section shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the hearing of the application.

(5) A court may not make an order under this section in respect of the interest of an applicant who:

(a) has been given notice under section 14 (1) (a) in relation to the application for the forfeiture order, or

(b) has appeared under section 14 (1) (b) at the hearing of the application for the forfeiture order,

unless the court is satisfied that the making of the order is justified on special grounds.

(6) Special grounds referred to in subsection (5) include any of the following that are relevant:

(a) that the applicant was unable to appear at the hearing of the application for the forfeiture order,

- (b) that the applicant did not appear at that hearing for a good reason,
  - (c) that particular evidence adduced by the applicant in connection with the application under subsection (1) was not available to the applicant at the time of the hearing of the application for the forfeiture order.
- (7) A reference in this section to the transfer of property includes, without limiting the meaning of that expression, the transfer of land or an estate or interest in land by a conveyance, transfer or other appropriate transaction.

## **21 Discharge of forfeiture orders**

- (1) A forfeiture order is discharged:
- (a) if the conviction in reliance on which the order is made is subsequently quashed, or
  - (b) if the forfeiture order is discharged by the court which hears an appeal against it under section 92 (appeals).
- (2) The payment to the State of the amount specified in a forfeiture order as the value of the property in respect of which the forfeiture order is made operates (except in so far as the court otherwise directs) to discharge the forfeiture order.
- (3) If a forfeiture order in respect of property is discharged (whether on an appeal against the making of the forfeiture order or as provided by this section) the person who had possession of the property before possession of it was taken by or on behalf of the State may, by application in writing to the Attorney General, request the return of the property and, on receipt of the application by the Attorney General:
- (a) if the property is still in the possession of the State—the Attorney General shall arrange for the property to be returned to the person, or
  - (b) in any other case—there is payable to the person the amount realised on disposal of the property by the State.
- (4) If:
- (a) a person applies to the Attorney General under subsection (3) for the return of property that is in the possession of the State, and
  - (b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), the Attorney General shall inform the first-mentioned person that the property will be returned to the first-mentioned person on payment to the State of an amount equal to the amount paid as mentioned in paragraph (b) and, if that amount is paid to the State, the Attorney General shall arrange for the property

to be so returned.

(5) If:

- (a) a person applies to the Attorney General under subsection (3) for the return of property that is not in the possession of the State, and
- (b) under section 20, an amount has been paid to another person in respect of that other person's interest in the property,

then, despite subsection (3), there is payable to the first-mentioned person the amount realised on disposal of the property by the State, reduced by an amount equal to the amount paid as mentioned in paragraph (b).

(6) In this section:

- (a) a reference to the return of property includes, without limiting the meaning of that expression, the return of land or an estate or interest in land by a conveyance, transfer or other appropriate transaction, and
- (b) a reference to a person who had possession of property includes a reference to any person who is entitled to the property.

## **22 Orders pending forfeiture**

- (1) If a person (in this section referred to as the **defendant**) has been convicted of a serious offence and an application is likely to be made to the Local Court or the District Court under section 13 for the making of a forfeiture order in relation to particular property, an appropriate officer may apply to the Local Court or District Court, ex parte, for an order under this section in respect of the property.
- (2) A court to which an application is made under subsection (1) may, if it is satisfied that a forfeiture order may be made in respect of the property, by order direct that the property (or such part of the property as is specified in the order) is not to be disposed of by the person convicted of the serious offence or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.
- (3) If, while an order under this section is in force:
  - (a) a court makes a forfeiture order in respect of property to which the order relates, or
  - (b) no application for a forfeiture order is made before the end of the relevant period in relation to the defendant's conviction,the court who made the order may:
  - (c) if it considers it appropriate, make an order setting aside the order in respect of the whole or a specified part of the property, and

- (d) make such other order or orders as it considers appropriate in relation to the operation of the order.

## **Division 3 Pecuniary penalty orders**

### **23 Application of Division**

This Division applies to:

- (a) property that comes into the possession, or under the control, of a person either within or outside the State and either before or after the commencement of this Division, and
- (b) benefits that are provided to a person either within or outside the State and either before or after the commencement of this Division.

### **24 Pecuniary penalty orders**

- (1) If a person has been convicted of a serious offence other than a drug trafficking offence and an application is made under section 13 (1) (b) for an order in respect of the offence, the court may:
  - (a) assess, in accordance with section 25, the value of the benefits derived by the person because of having committed the offence, and
  - (b) order the person to pay to the State a pecuniary penalty equal to the value so assessed.
- (2) If:
  - (a) property that is the proceeds of the offence has been forfeited under this Act or a law of the Commonwealth, a Territory or another State, or
  - (b) a forfeiture order is proposed to be made against property that is proceeds of the offence,

the pecuniary penalty to be paid shall be taken to be reduced by an amount equal to the value of the property as at the time of the making of the order under this section.
- (3) If:
  - (a) a court makes an order under this section in relation to an offence, and
  - (b) in calculating the penalty amount, the court took into account a proposed forfeiture order in respect of property, and
  - (c) an appeal against the forfeiture order is allowed or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made,

an appropriate officer may apply to the court for a variation of the order to increase the penalty amount by the value of the property and the court may, if it considers it appropriate to do so, vary the order accordingly.

- (4) An amount payable by a person to the State in accordance with an order made under this section shall, for all purposes, be taken to be a civil debt due by the person to the State.
- (5) An order made by a court under this section may be enforced as if it were an order made by the court in civil proceedings instituted by the State against the person to recover a debt due by the person to the State.

## **25 Assessment of pecuniary penalty**

- (1) In this section:

***offence period***, in relation to an application under section 13 (1) (b) made in reliance on the conviction of a person for 2 or more serious offences, means the period commencing when the earliest of those offences was committed and ending when the latest of those offences was committed.

- (2) For the purposes of an application for a pecuniary penalty order against a person (in this section called the ***defendant***), the value of the benefits derived by the defendant because of having committed a serious offence or serious offences shall be assessed by a court having regard to information before the court concerning all or any of the following matters:

- (a) the money, or the value of the property other than money, that came into the possession or under the control of:

- (i) the defendant, or

- (ii) another person at the request or by the direction of the defendant,

because of the defendant's having committed the offence or any of the offences,

- (a1) subject to subsection (2A), the value of any benefit that was provided for the defendant (or for another person at the request or direction of the defendant) for the depiction of the offence or offences, or the expression of the defendant's thoughts, opinions or emotions regarding the offence or offences, in any public promotion,

- (b) the value of any benefit, other than a benefit of the kind referred to in paragraph (a) or (a1), that was provided for:

- (i) the defendant, or

- (ii) another person at the request or by the direction of the defendant,

because of the defendant's having committed the offence or any of the offences,

(c) if the offence or any of the offences consisted of the doing of an act or thing in relation to a prohibited drug or prohibited plant as respectively defined in the *Drug Misuse and Trafficking Act 1985*:

(i) the market value, at the time of the offence, of similar or substantially similar 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 defendant's property:

(i) if the application relates to a single serious offence—before and after the commission of the offence, or

(ii) if the application relates to 2 or more serious offences—before, during and after the offence period,

(e) the defendant's income and expenditure:

(i) if the application relates to a single offence—before and after the commission of the offence, or

(ii) if the application relates to 2 or more offences—before, during and after the offence period.

(2A) In considering whether to treat a benefit of the kind referred to in subsection (2) (a1) as a benefit derived by the defendant because of having committed a serious offence or serious offences, a court may have regard to any matter that it thinks fit, including:

(a) whether or not it is in the public interest to treat it as such a benefit, and

(b) whether or not the depiction of the offence or offences, or the expression of the defendant's thoughts, opinions or emotions regarding the offence or offences, has any general social or educational value, and

(c) the nature and purposes of the public promotion for which the benefit was provided, including its use for research, educational or rehabilitative purposes.

(2B) If a court is satisfied that part (but not all) of a public promotion relates to a depiction or an expression of the kind referred to in subsection (2) (a1), the court may, for the purposes of section 24, treat the value of the benefit derived by the defendant because of having committed an offence as being such proportion of the total value of any benefit derived by the defendant for the promotion as seems just and equitable to the court in the circumstances.

(3) If, at the hearing of an application for a pecuniary penalty order against a defendant

in relation to a serious offence or serious offences, evidence is given that the value of the defendant's property:

- (a) after the defendant committed the serious offence, or
- (b) during and after the end of the offence period,

exceeded the value of the defendant's property before the defendant committed the serious offence or before the commencement of the offence period then, for the purposes of section 24, the court shall, subject to subsection (4), treat the value of the benefits derived by the defendant because of having committed the offence or offences as being not less than the amount of the excess.

- (4) If, after evidence has been given at the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences that the value of the defendant's property:
  - (a) after the defendant committed the serious offence, exceeded the value before the serious offence was committed, or
  - (b) after the end of the offence period, exceeded the value before the commencement of the offence period,

the defendant satisfies the court that the whole or a part of the excess was due to causes unrelated to the commission of the offence or offences:

- (c) if the defendant so satisfies the court in respect of the whole of the excess—subsection (3) does not apply to the excess, or
  - (d) if the defendant so satisfies the court in respect of a part of the excess—subsection (3) applies to the excess as if it were reduced by the amount of that part.
- (5) In calculating, for the purposes of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences, the value of benefits derived by the defendant because of having committed the offence or offences, any expenses or outgoings of the defendant in connection with the commission of the offence or offences shall not be deducted.
- (6) This section applies to and in relation to property that comes into the possession or under the control of a person either within or outside New South Wales, and to benefits that are provided for a person either within or outside New South Wales.
- (7) At the hearing of an application for a pecuniary penalty order against a defendant in relation to a serious offence or serious offences:
  - (a) a member of the Police Force, or



(b) a member of the Australian Federal Police, or

(c) a Customs officer,

who is experienced in the investigation of indictable offences under, or similar to offences under, the [Drug Misuse and Trafficking Act 1985](#) may testify, to the best of his or her information, knowledge and belief:

(d) with respect to the amount that was the market value of a prohibited drug or prohibited plant as respectively defined in that Act at a particular time or during a particular period, or

(e) 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 such a prohibited drug or prohibited plant,

despite any rule of law or practice relating to hearsay evidence and the testimony shall, in the absence of evidence to the contrary, be evidence of the matter testified to.

## **26 Discharge of pecuniary penalty orders**

(1) A pecuniary penalty order is discharged:

(a) if the conviction in reliance on which the order is made is subsequently quashed, or

(b) the pecuniary penalty order is discharged by the court which hears an appeal against it under section 92 (appeals).

(2) If a pecuniary penalty order is registered under the [Service and Execution of Process Act 1901](#) of the Commonwealth, notice of the discharge of that order must be given as prescribed by the rules of the Supreme Court.

## **27 Court may lift corporate veil etc**

(1) In assessing the value of the benefits derived by a person because of having committed a serious offence or serious offences, a court may treat as property of the person any property that, in the opinion of the court, is subject to the effective control of the person.

(2) On application by an appropriate officer, a court may, if in its opinion particular property is subject to the effective control of a person against whom the court has made a pecuniary penalty order, make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.

(3) If a court declares that property is available to satisfy a pecuniary penalty order:

(a) the order may be enforced against the property as if the property were property of

the person against whom the order is made, and

(b) a restraining order or freezing notice may be made in respect of the property as if the property were property of the person against whom the order is made.

(4) If an appropriate officer makes an application for an order under subsection (2) that property is available to satisfy a pecuniary penalty order against a person:

(a) the appropriate officer shall give written notice for the application to the person and to any other person who the appropriate officer has reason to believe may have an interest in the property, and

(b) the person and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

## **Division 4 Drug proceeds orders**

### **28 Application of Division**

This Division applies to proceeds of a drug trafficking offence that come into the possession of a person either before or after the commencement of this Division.

### **29 Drug proceeds orders**

(1) If an application is made for a drug proceeds order against a person (in this Division called the **defendant**) convicted of a drug trafficking offence, the court must:

(a) determine whether the defendant has derived any benefit in connection with drug trafficking at any time, and

(b) if the court believes the defendant has so benefited, assess the value of any such benefit, and

(c) order the defendant to pay to the State a pecuniary penalty equal to the amount so assessed.

(2) If:

(a) property that is the proceeds of drug trafficking has been forfeited under this Act or a law of the Commonwealth, a Territory or another State, or

(b) a forfeiture order is proposed to be made against property that is proceeds of drug trafficking,

the pecuniary penalty to be made is taken to be reduced by an amount equal to the value of the property as at the time of the making of the forfeiture order.

(3) If:

(a) a court makes an order under this section in relation to an offence, and

- (b) in calculating the penalty amount, the court took into account a proposed forfeiture order in respect of property, and
- (c) an appeal against the forfeiture order is allowed or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made,

an appropriate officer may apply to the court for a variation of the order to increase the penalty amount by the value of the property and the court may, if it considers it appropriate to do so, vary the order accordingly.

- (4) An amount payable by a defendant to the State in accordance with an order made under this section is, for all purposes, taken to be a civil debt due by the defendant to the State.
- (5) An order made by a court under this section may be enforced as if it were an order made by the court in civil proceedings instituted by the State against the defendant to recover a debt due by the person to the State.

### **30 Assessment of proceeds of drug trafficking**

- (1) A court is to assess the benefits (if any) derived in connection with drug trafficking by having regard to information before the court concerning all or any of the following matters:
  - (a) the money, or the value of property other than money, that came into the possession or control of the defendant, or another person at the request or by the direction of the defendant, at any time in connection with drug trafficking by the defendant,
  - (b) the value of any benefit that was provided for the defendant, or for another person at the request or direction of the defendant, in respect of the defendant's involvement or participation in a public promotion relating to drug trafficking (or such part of the value of the benefit as is commensurate with the proportion of the defendant's involvement or participation that is concerned with drug trafficking),
  - (c) the value of any benefit, other than a benefit of a kind referred to in paragraph (a) or (b), that was provided for the defendant, or another person at the request or by the direction of the defendant, because of drug trafficking by the defendant,
  - (d) the market value, at the time of the drug trafficking, of substances similar or substantially similar to the prohibited drug or prohibited plant involved in the drug trafficking offence or offences,
  - (e) the amount that was, or the range of amounts that were, ordinarily paid for the doing of an act or thing similar or substantially similar to the doing of the act or thing constituting the drug trafficking,

- (f) the value of the defendant's property appearing to the court:
  - (i) to have been held by the defendant at any time since his or her conviction, or
  - (ii) to have been transferred to the defendant at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant,
- (g) the value of the defendant's income and expenditure:
  - (i) at any time since his or her conviction, or
  - (ii) at any time since the beginning of the period of 6 years that ended when the proceedings were instituted against the defendant.
- (2) In considering whether to treat a benefit of the kind referred to in subsection (1) (b) as a benefit derived in connection with drug trafficking, a court may have regard to any matter that it thinks fit, including the public interest and any research, educational or rehabilitative purpose of the public promotion concerned.
- (3) If evidence is given that the value of the defendant's property or the defendant's income or expenditure:
  - (a) after the defendant committed drug trafficking offences, or
  - (b) during and after the end of the period of 6 years that ended when proceedings for the drug trafficking offences were last instituted against the defendant,exceeded the value of the defendant's property or income or expenditure before the defendant committed the drug trafficking offences or before the commencement of that period then the court must treat the value of the benefits derived by the defendant because of drug trafficking by the defendant as being not less than the amount of the excess.
- (4) Subsection (3) does not apply to the whole or a part of the excess referred to in that subsection if the defendant satisfies the court that it was due to causes unrelated to drug trafficking or the commission of other serious offences.
- (5) For the purposes of assessing the value of the proceeds of drug trafficking in a case where a drug proceeds order has previously been made against the defendant, the court must leave out of account any of the defendant's proceeds of drug trafficking that are shown to the court:
  - (a) to have been taken into account in determining the amount to be recovered in respect of drug trafficking under a previous drug proceeds order or pecuniary penalty order, or
  - (b) to have been recovered under an order made under the [Criminal Assets Recovery](#)

*Act 1990.*

- (6) In assessing the value of the proceeds of drug trafficking of a defendant convicted of a drug trafficking offence or offences, any expenses or outgoings of the defendant in connection with the commission of the offence or offences must not be deducted.
- (7) This section applies to and in relation to property that comes into the possession or under the control of a person either within or outside New South Wales, and to benefits that are provided for a person either within or outside New South Wales.

**31 Statements relating to drug trafficking**

(1) If:

- (a) there is tendered to a court by the prosecution a statement as to any matters relevant to determining whether the defendant has benefited from drug trafficking or to the assessment of the value of the defendant's proceeds of drug trafficking, and

(b) the defendant accepts to any extent any allegation in the statement,

the court may, for the purposes of that determination and assessment, treat the defendant's acceptance as conclusive of the matters to which it relates.

(2) If:

(a) a statement is tendered under subsection (1) (a), and

(b) the court is satisfied that a copy of that statement has been served on the defendant,

the court may require the defendant to indicate to what extent the defendant accepts each allegation in the statement and, so far as the defendant does not accept any such allegation, to indicate any matters the defendant proposes to rely on.

(3) If the defendant fails in any respect to comply with a requirement under subsection (2), the defendant may be treated for the purposes of this section as accepting every allegation in the statement apart from:

(a) any allegation in respect of which the defendant has complied with the requirement, and

(b) any allegation that the defendant has benefited from drug trafficking or that any benefit was derived by the defendant in connection with drug trafficking carried on by the defendant or another.

(4) (Repealed)

(5) An allegation may be accepted or a matter indicated for the purposes of this section

either:

(a) orally before the court, or

(b) in writing in accordance with the rules of court.

(6) No acceptance by the defendant under this section that any benefit was derived by the defendant in connection with drug trafficking carried on by the defendant or another shall be admissible in evidence in any proceedings for an offence.

(7)–(9) (Repealed)

### **31A Evidence as to value of drugs and other matters**

(1) In proceedings for an application for a drug proceeds order, a member of the NSW Police Force, a member of the Australian Federal Police or a Customs officer may give evidence (whether in person or in a statement tendered to the court by the prosecution under this Division):

(a) as to the market value, at the time of a drug trafficking offence in relation to a substance, or substantially similar substances, and

(b) as to the amount, or the range of amounts, ordinarily paid for the doing of a similar or substantially similar act or thing to the offence.

(2) The evidence may be given by a person who is experienced in the investigation of indictable offences under (or similar to offences under) the *Drug Misuse and Trafficking Act 1985*.

(3) Any such person may give evidence, to the best of his or her information, knowledge and belief:

(a) as to the amount that was the market value of a prohibited drug or prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985* at a particular time or during a particular period, or

(b) as 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 any such prohibited drug or prohibited plant,

despite any rule of law or practice relating to hearsay evidence and the testimony is, in the absence of evidence to the contrary, evidence of the matter testified to.

### **32 Court may look at property subject to effective control of defendant**

(1) In assessing the value of benefits derived by a person because of drug trafficking, a court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant.

- (2) On application by an appropriate officer, a court may make an order declaring that specified property is available to satisfy a drug proceeds order, if it is of the opinion that the property is subject to the effective control of a defendant against whom the court has made a drug proceeds order.
- (3) If a court declares that property is available to satisfy a drug proceeds order:
  - (a) the order may be enforced against the property as if the property were property of the person against whom the order is made, and
  - (b) a freezing notice or restraining order may be made in respect of the property as if the property were property of the person against whom the order is made.
- (4) An appropriate officer must give written notice of an application under this section to the defendant and to any other person the appropriate officer has reason to believe may have an interest in the property.
- (5) The defendant and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

**33, 34 (Repealed)**

## **Part 3 Control of property liable to confiscation**

### **Division 1 Search powers**

#### **35 Definitions**

- (1) In this Part:

**forfeiture order** includes an interstate forfeiture order.

**relevant serious offence**, in relation to property that is tainted property, means the serious offence by reason of the commission of which the property is tainted property.

**serious offence** includes an interstate serious offence.

**tainted property** includes property that:

- (a) was used in, or in connection with, the commission of an interstate serious offence, or
- (b) was substantially derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of an interstate serious offence, or
- (c) was substantially derived or realised, directly or indirectly, by any person, as a result of the commission of an interstate serious offence, or

- (d) was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender's thoughts, opinions or emotions regarding the offence, in any public promotion.
- (2) The question of whether a person has been charged with or convicted of an interstate serious offence shall, for the purposes of this Part, be determined in accordance with the corresponding law of the State concerned.

### **36 Search warrants**

- (1) A member of the Police Force may apply to an authorised officer (within the meaning of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#)) for the issue of a search warrant under this Part if the member has reasonable grounds for believing that there is or, within 72 hours, there will be in or on any premises tainted property of a particular kind.
- (2) The authorised officer to whom the application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force:
  - (a) to enter the premises, and
  - (b) to search the premises for tainted property of the particular kind.
- (3) There shall be set out in a warrant issued under this Part:
  - (a) a statement of the purpose for which the warrant is issued, which shall include a reference to the nature of the relevant serious offence, and
  - (b) a description of the kind of property authorised to be seized.
- (4) Nothing in this Part limits the operation of Division 2 of Part 5 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).
- (5) Division 4 of Part 5 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) applies to a search warrant issued under this Part.

### **37 Seizure of property pursuant to warrants**

- (1) A member of the Police Force executing a search warrant issued under this Part may seize property of the kind specified in the warrant.
- (2) If, in the course of searching, in accordance with a warrant issued under this Part, for property that is tainted property in relation to a particular serious offence, being property of a kind specified in the warrant, a member of the Police Force finds any property that the member believes on reasonable grounds to be:
  - (a) tainted property in relation to the serious offence, although not of a kind specified in the warrant, or



(b) tainted property in relation to another serious offence,

and the member believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction or its use in committing, continuing or repeating the serious offence or the other serious offence, the warrant shall be taken to authorise the member to seize that property.

(3) The power conferred by this section to seize a thing includes:

(a) a power to remove the thing from the premises where it is found, and

(b) a power to guard the thing in or on those premises.

### **38 Search and arrest of persons pursuant to warrants**

A member of the Police Force executing a search warrant issued under this Part:

(a) may search a person found in or on the premises whom the member reasonably suspects of having property of the kind specified in the warrant, and

(b) may arrest and bring before a Magistrate or authorised officer within the meaning of the [Criminal Procedure Act 1986](#) any person found in or on the premises whom the member reasonably suspects of having committed an offence in respect of property seized pursuant to section 37.

### **39 Issue of warrants if charge not laid**

A warrant may be issued under this Part in relation to property whether or not a person has been charged with the relevant serious offence, but an authorised officer shall not issue a warrant under this Part in relation to property where a person has not been charged with the relevant serious offence unless the authorised officer is satisfied:

(a) that the property is tainted property, and

(b) that it is likely that a person will be charged within 48 hours with the relevant serious offence.

### **40 Commissioner of Police responsible for seized property**

If property is seized pursuant to a warrant issued under this Part, the Commissioner of Police shall arrange for the property to be kept until it is dealt with in accordance with this Act, and shall ensure that all reasonable steps are taken to preserve the property while it is so kept.

### **41 Return of seized property**

(1) If:

(a) property has been seized pursuant to a warrant issued under this Part, and

(b) at the time when the property was seized, a person has not been charged with the relevant serious offence, and

(c) before the expiration of 7 days after the property was seized, a person has not been charged with that offence,

then, unless an application for a forfeiture order is made in respect of the property, the Commissioner of Police shall arrange for the property to be returned, at the expiration of that period, to the person from whose possession it was seized.

(2) If:

(a) property has been seized pursuant to a warrant issued under this Part, and

(b) either before the property was seized, or after it was seized but before the expiration of 7 days after it was seized, criminal proceedings have been commenced in respect of the relevant serious offence,

then, unless an application for a forfeiture order is made in respect of the property, the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized:

(c) if the person is convicted of the offence—at the expiration of 6 months after the relevant time, or

(d) if the person is discharged or acquitted of the offence—as soon as possible after the relevant time.

(3) If:

(a) property has been seized pursuant to a warrant issued under this Part, and

(b) a court having jurisdiction to do so refuses to make a forfeiture order in respect of the property in relation to the relevant serious offence,

the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized as soon as possible after the relevant time.

(4) Where property has been seized pursuant to a warrant under this Part, a person from whose possession the property was seized may apply to an appropriate court for an order under subsection (5).

(5) If the court is satisfied that neither it nor any other court having jurisdiction to do so would make a forfeiture order in respect of the property, the court may make an order:

(a) directing that the property be returned to the person from whose possession it was seized, or

(b) directing that the person be allowed access to the property,

on such terms and conditions (if any) as the court thinks fit.

- (6) A person who applies to a court for an order under subsection (5) shall give notice, as prescribed by the regulations or by rules of court, of the making of the application and of the date, time and place fixed for the hearing of the application.
- (7) A reference in this section to a person from whose possession property was seized includes a reference to any person who is entitled to the property.
- (8) A reference in this section to the relevant time is a reference to:
  - (a) subject to paragraph (b), the date of the conviction, discharge or acquittal, or of the refusal to make the forfeiture order, as the case requires, or
  - (b) if there is a right of appeal:
    - (i) where the period provided for the lodging of the appeal has expired without such an appeal having been lodged—the expiration of that period, or
    - (ii) where an appeal has been lodged—the time when the appeal lapses or is finally determined.

#### **42 Obstruction etc of person executing warrant**

A person shall not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued under this Part.

Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

### **Division 1A Freezing notices**

#### **42A Definitions**

In this Division:

**authorised justice** means an authorised officer within the meaning of the [Criminal Procedure Act 1986](#).

**defendant** has the same meaning as in section 42B.

#### **42B Applications for freezing notices**

- (1) An authorised officer may apply to an authorised justice for a freezing notice in respect of specified property of a person if the person (the **defendant**) has been, or is about to be, charged with, or has been convicted of, a serious offence and the authorised officer has reasonable grounds for believing that:
  - (a) if the defendant has not been convicted of the offence, the defendant committed the offence, and

- (b) the property is tainted property in relation to that offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, the property is the defendant's proceeds of drug trafficking.
- (2) An authorised officer may apply to an authorised justice for a freezing notice in respect of the property of a person if another person (the **defendant**) has been, or is about to be, charged with, or has been convicted of, a serious offence and the authorised officer has reasonable grounds for believing that:
  - (a) the property is tainted property in relation to the offence with which the defendant has been or is about to be charged, or of which the defendant has been convicted, or is the defendant's proceeds of drug trafficking, or
  - (b) the property is subject to the effective control of the defendant and the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence.
- (3) An application for a freezing notice (other than a telephone freezing notice) must be in writing in the form prescribed by the regulations and must be made by the applicant in person.
- (4) The applicant must provide (either orally or in writing) any further information that the authorised justice requires concerning the grounds on which the freezing notice is sought.

#### **42C Issue of freezing notices**

- (1) An authorised justice may issue a freezing notice if satisfied that:
  - (a) the defendant is likely to be charged with the offence or a related offence within 48 hours or has been charged with or convicted of a serious offence, and
  - (b) there are reasonable grounds for the belief of the officer as to the matters set out in subsection (2) (c) and (d) (i) or (e) (i) or (ii) (if applicable).
- (2) An authorised justice must not issue a freezing notice unless:
  - (a) the application includes details of the authority of the applicant to make the application, and
  - (b) the application includes the grounds on which the notice is being sought, and
  - (c) the application is supported by a statement by the applicant that the applicant believes that the defendant has committed a serious offence, if the defendant has not been convicted of the offence, and
  - (d) in the case of property of the defendant, the application is supported by a

statement by the applicant:

- (i) that the applicant believes that the property to which the application relates is tainted property in relation to that offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, the property is the defendant's proceeds of drug trafficking, and
  - (ii) setting out the grounds on which the applicant holds those beliefs, and
- (e) in the case of property of a person other than the defendant, the application is supported by a statement by the applicant that the applicant believes that:
- (i) the property is tainted property in relation to the offence with which the defendant has been charged or convicted or is the defendant's proceeds of drug trafficking, or
  - (ii) the property is subject to the effective control of the defendant and the defendant has derived a benefit, directly or indirectly, from the commission of the offence,
- and setting out the grounds on which the applicant holds those beliefs, and
- (f) the statements and any other information given by the applicant in or in connection with the application are verified before the authorised justice on oath or affirmation or by affidavit.

- (3) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant, the authorised justice may have regard to the matters referred to in section 10.
- (4) A freezing notice may not be issued in respect of property affected by a restraining order or forfeiture order or the subject of an application for a restraining order or forfeiture order under this Act.
- (5) A freezing notice under this Act and a restraining order under the [Criminal Assets Recovery Act 1990](#) may not be made so as to be in force in respect of the same interest in property at the same time.
- (6) The issue of a freezing notice is a ministerial function and is not a judicial function.

#### **42D Form of freezing notice**

- (1) A freezing notice must direct that:
  - (a) specified property not be disposed of, or otherwise dealt with by the defendant or by any other person, except in the manner and circumstances (if any) specified in the notice, and
  - (b) the property be held in the custody of the Commissioner of Police or the

defendant or another person, pending the determination of an application for confirmation of the freezing notice.

- (2) A freezing notice is to be in the form prescribed by the regulations.

#### **42E Telephone freezing notices**

- (1) An authorised officer may make an application by telephone for a freezing notice.
- (2) An authorised justice must not issue a freezing notice on an application made by telephone unless the authorised justice is satisfied that the notice is required urgently and that it is not practicable for the application to be made in person.
- (3) An application under this section must be made by facsimile if the facilities to do so are readily available for that purpose.
- (4) If it is not practicable for an application for a freezing notice to be made by telephone directly to an authorised justice, the application may be transmitted to the authorised justice by another person on behalf of the applicant.
- (5) An authorised justice who issues a freezing notice on an application made by telephone must:
  - (a) complete and sign the notice, and
  - (b) furnish the notice to the person who made the application or inform that person of the terms of the notice and of the date and time when it was signed.
- (6) If a freezing notice is issued on an application made by telephone, the applicant is to complete a form of freezing notice in the terms indicated by the authorised justice under subsection (5) (b) and write on it the name of that authorised justice and the date and time when the notice was signed.
- (7) A form of freezing notice so completed is taken to be a freezing notice issued in accordance with this Act.
- (8) A freezing notice is to be furnished by an authorised justice by transmitting it by facsimile, if the facilities to do so are readily available, and the copy produced by that transmission is taken to be the original document.

#### **42F Notice of issue of freezing notice**

- (1) An applicant for a freezing notice must give notice of the issuing of the notice to the defendant, any owner of property affected by the notice and any other person subject to the notice.
- (2) Notice must be given in accordance with the regulations.

#### **42G False or misleading information in applications**

- (1) A person must not, in or in connection with an application for a freezing notice, give information to an authorised justice that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units, or imprisonment for 2 years, or both.

- (2) This section applies to an application by telephone as well as in person.
- (3) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

#### **42H Record of proceedings before authorised justice**

- (1) An authorised justice who issues a freezing notice must cause a record to be made of all relevant particulars of the grounds the authorised justice has relied on to justify the issue of the notice.
- (2) The regulations may make provision for or with respect to:
  - (a) the keeping of records in connection with the issue and execution of freezing notices, and
  - (b) the inspection of any such records, and
  - (c) any other matter in connection with any such records.
- (3) Any matter that might disclose the identity of a person must not be recorded pursuant to this section if the authorised justice is satisfied that the safety of any person might be jeopardised by doing so.

#### **42I Application to confirm freezing notice**

- (1) An application for confirmation of the notice is to be made to the appropriate court by an authorised officer, not later than 14 days after a freezing notice is issued.
- (2) The application is to be set down for hearing on the first date for committal or trial proceedings for the serious offence on which the freezing notice was based that occurs after the application is made, or as soon as practicable after the application is made.
- (3) An applicant for confirmation of a freezing notice must give notice of the application to the defendant, any owner of property affected by the notice and any other person subject to the notice.
- (4) A person given notice under this section is entitled to appear and to adduce evidence at the hearing of the application.

- (5) Notice must be given in accordance with rules of court.

**42J Notice to third parties**

If an application has been made to an appropriate court to confirm a freezing notice in respect of property:

- (a) the court may, if it thinks fit, require the officer making the application to give notice of the application to a person who the court has reason to believe has an interest in the property or part of the property, and
- (b) a person to whom the court requires notice to be given under this section is entitled to appear and to adduce evidence at the hearing of the application.

**42K Appeals against freezing notices issued by authorised justices**

- (1) A defendant, an authorised officer or another person claiming an interest in property affected by a freezing notice may, at any time before the notice is confirmed, apply to the appropriate court to have the freezing notice set aside or varied.
- (2) An application may be heard before the day set down for hearing the application to confirm the notice.
- (3) On an application, the appropriate court must proceed to deal with the matter under section 42L, whether or not an application has been made under section 42I.

**42L Confirmation of freezing notices**

- (1) An appropriate court may, on an application under section 42I or 42K:
  - (a) confirm the freezing notice (with or without variation), or
  - (b) set aside the freezing notice.
- (2) An appropriate court may confirm a freezing notice if it is satisfied that:
  - (a) the application is supported by an affidavit by an authorised officer that complies with this section, and
  - (b) having regard to the matters contained in the affidavit or other evidence given in the proceedings, there are reasonable grounds to believe the matters set out in the affidavit, and
  - (c) proceedings have been commenced against the defendant for a serious offence or the defendant has been convicted of a serious offence, and
  - (d) the property concerned is not affected by a restraining order, or an application for a restraining order under this Act or the [Criminal Assets Recovery Act 1990](#), and
  - (e) it is appropriate in the circumstances to confirm the notice.



- (3) The affidavit of the authorised officer supporting the application must set out the officer's belief, and the grounds for the belief, that the defendant committed the serious offence concerned (including details of any conviction) and as to one or more of the following in relation to property the subject of the freezing notice:
  - (a) in the case of property of the defendant, that the property is tainted property in relation to the offence or the defendant derived benefits because of having committed the offence or the property is the defendant's proceeds of drug trafficking,
  - (b) in the case of property of a person other than the defendant, that:
    - (i) the property is tainted property in relation to the offence or is the defendant's proceeds of drug trafficking, or
    - (ii) the property is subject to the effective control of the defendant and the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence.
- (4) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant, the appropriate court must have regard to the matters referred to in section 10.
- (5) The appropriate court must make orders of a kind referred to in section 42M in relation to property to which a freezing notice applies if it confirms the freezing notice. Any such order is taken, for the purposes of this Act, to be included in the terms of the freezing notice.
- (6) If evidence is given at the hearing that property to which the application relates was in the possession of the defendant at or immediately after the commission of the offence:
  - (a) if there is no evidence given tending 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
  - (b) in any other case—the court must not confirm a freezing notice in relation to the property unless it is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence.

#### **42M Orders for the management of property**

- (1) An appropriate court that confirms a freezing notice is to make an order directing the Commissioner of Police:
  - (a) to take control of the property (if it is not under the control of the Commissioner) and, in any case, dispose of the property or the part of the property specified in the order, in the manner specified in the order, and

- (b) to retain any proceeds until they are payable under this Act to another person or the State.
- (2) An appropriate court may, if it thinks it appropriate to do so in the circumstances of the case, make one or more of the following orders instead of the order referred to in subsection (1):
  - (a) an order directing that the property, or the part of the property specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or any other person, except in the manner and circumstances (if any) specified in the order,
  - (b) an order directing the NSW Trustee and Guardian or the Commissioner of Police to retain control or to take control of the property or the part of the property specified in the order,
  - (c) an order directing that the property or the part of the property specified in the order be returned to or retained by the defendant or another person,
  - (d) an order that the defendant or another person be allowed access to the property or the part of the property specified in the order.
- (3) In determining whether it is appropriate in the circumstances to make an order of a kind referred to in subsection (1) or (2), the appropriate court is to have regard to the following matters:
  - (a) whether a defendant who is in custody is likely to be granted bail,
  - (b) any hardship that is reasonably likely to be caused to the defendant or a third party,
  - (c) if the defendant is an Aboriginal person or a Torres Strait Islander, when considering any hardship that is reasonably likely to be caused to the defendant or a third party, the responsibilities arising from the defendant's ties to extended family and kinship,
  - (d) the nature of the property and whether it is unique in nature,
  - (e) the case against the defendant,
  - (f) the expenses relating to storage and maintenance of the property,
  - (g) the use that is ordinarily or had been intended to be made of the property.
- (4) In addition to any other order under this section, the appropriate court may make one or more of the following orders:
  - (a) an order providing for the provision, out of the property, of the defendant's reasonable living expenses, business expenses or reasonable expenses in

defending a criminal charge,

- (b) if the freezing notice directs the NSW Trustee and Guardian or the Commissioner of Police to take control (but not to dispose) of the property:
    - (i) an order regulating the manner in which the NSW Trustee and Guardian or Commissioner is to exercise his or her functions under the notice or order, or
    - (ii) an order determining any question relating to the property to which the notice relates, including any question relating to the liabilities of the owner or the exercise of the functions of the NSW Trustee and Guardian or Commissioner, or
    - (iii) an order directing the owner or a director of a body corporate that is the owner to give to the NSW Trustee and Guardian or Commissioner, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out the particulars of the property, or dealings with the property, that the court thinks proper,
  - (c) such other ancillary or consequential orders as the court thinks appropriate in the circumstances.
- (5) An order under this section directing the sale of property must require it to be sold for not less than its value at the time of the sale.

#### **42N Undertakings as to payment of damages or costs**

- (1) An appropriate court may refuse to confirm a freezing notice if the State refuses or fails to give the court such undertakings as the court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the notice.
- (2) For the purposes of an application to confirm a freezing notice, an appropriate officer may, on behalf of the State, give to the appropriate court such undertakings with respect to the payment of damages or costs, or both, as are required by the court.

#### **42O Contravention of freezing notices**

- (1) A person who knowingly contravenes a freezing notice is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property subject to the notice (as determined by the appropriate court) or by imprisonment for a period not exceeding 2 years, or both.
- (2) If:
  - (a) a freezing notice is made against property, and
  - (b) the property is disposed of, or otherwise dealt with, in contravention of the notice, and

- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

an appropriate officer may apply to the Supreme Court for an order that the disposition or dealing be set aside.

- (3) The Supreme Court may, on an application under subsection (2), make an order:
  - (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place, or
  - (b) setting aside the disposition or dealing as from the day of the order and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order.

#### **42P Duration of freezing notices**

A freezing notice ceases to be in force if any of the following occurs:

- (a) if the defendant has not been charged with a serious offence at the end of the period of 48 hours after the issuing of the notice,
- (b) on an appropriate court refusing to confirm the freezing notice or if an application for confirmation of the notice has not been made within 14 days after it is issued,
- (c) if the charge is withdrawn and the defendant is not charged with a related offence by the time of the withdrawal,
- (d) if the defendant is acquitted of the charge or the charge is dismissed and the defendant is not charged with a related offence by the time of the acquittal or dismissal,
- (e) if the appropriate court refuses to make a forfeiture order in relation to the property to which it relates and:
  - (i) an appeal against the refusal is finally determined, or
  - (ii) the time for making an appeal against the refusal expires and an appeal is not made before the time expires,
- (f) if a court makes an order setting aside the freezing notice in respect of the whole of the property to which it relates.

#### **42Q Effect of other orders on freezing notices**

- (1) If, while a freezing notice in respect of property is in force, a court makes a forfeiture order in respect of the property or makes a pecuniary penalty order or a drug proceeds order against the defendant subject to the notice, the court or an

appropriate court may:

- (a) if it considers it appropriate, make an order setting aside the freezing notice in respect of the whole or a specified part of the property, and
  - (b) make any other order or orders it considers appropriate in relation to the operation of the freezing notice.
- (2) If, while a freezing notice in respect of property is in force, a court refuses to make a forfeiture order in respect of the property or refuses to make a pecuniary penalty order or drug proceeds order against the defendant, the court or an appropriate court may:
- (a) if it considers it appropriate, make an order in relation to the period for which the freezing notice is to remain in force, and
  - (b) make any other order or orders it considers appropriate in relation to the operation of the freezing notice.
- (3) An order under this section may:
- (a) set aside the freezing notice wholly or in part, or
  - (b) take effect:
    - (i) on the making of the forfeiture order, pecuniary penalty order or drug proceeds order, or
    - (ii) at a specified time, or
    - (iii) if relevant, on the payment of a penalty amount to the State, or
    - (iv) on the happening of some other specified event.

#### **42R Purchase of property**

- (1) The payment to the State of an amount equal to the value of property subject to a freezing notice operates to discharge the freezing notice (except in so far as the court otherwise directs).
- (2) For the purposes of this section, the value of property is the value agreed between the Attorney General and the person seeking to discharge the freezing notice.
- (3) A payment may not be made under this section before a freezing notice is confirmed by a court.

#### **42S Return of property**

- (1) If a freezing notice ceases to be in force and the property concerned is not subject to any other order under this Act, the person who is lawfully entitled to it may apply to

the Attorney General for the return of the property or for payment of an amount equal to the value of the property together with interest calculated from the date, and at the rate, prescribed by the regulations.

- (2) The Attorney General must, if satisfied that the person is lawfully entitled to the property, return the property or pay the amount, as the case requires, not later than 6 months after receipt of the application.
- (3) If the person who is lawfully entitled to property or to be paid an amount under this section cannot be ascertained or an application is not made within 6 months of the freezing notice ceasing to be in force, the property is to be dealt with as if it had been forfeited under this Act.

#### **42T Arrangements for management of property**

The Commissioner of Police may enter into arrangements with the NSW Trustee and Guardian or any other person with respect to the management of property that is under the control of the Commissioner under a freezing notice.

#### **42U Appeals against refusal to confirm freezing notice**

- (1) The Attorney General, the Director of Public Prosecutions or the Commissioner of Police may appeal to the appeal court against a refusal by an appropriate court to confirm a freezing notice.
- (2) On an appeal, the appeal court may make any order that an appropriate court may make on an application for confirmation of a freezing notice.
- (3) An order made by the appeal court under this section is taken to have been made by the appropriate court, but is not on that account subject to further appeal.
- (4) In this section, the **appeal court** is:
  - (a) in relation to a Magistrate, Local Court, the Children's Court or District Court—the Supreme Court, and
  - (b) in relation to the Supreme Court—the Court of Criminal Appeal.

#### **42V Court may make further orders relating to freezing notices**

- (1) An appropriate court that confirms a freezing notice or a court that is dealing with proceedings for a serious offence in relation to which a freezing notice has been issued may, at any time, make any orders ancillary to the freezing notice that the court considers appropriate.
- (2) Without limiting the generality of subsection (1), the court may make any one or more of the following orders:
  - (a) an order varying the terms of the freezing notice, including the property to which

it relates and any conditions of the notice,

- (b) an order with respect to the carrying out of any undertaking with respect to the payment of costs or damages given by the State in connection with the confirmation of the freezing notice,
- (c) an order setting aside the freezing notice in respect of the whole or part of the property.

(3) An order under this section may be made on the application of any of the following persons:

- (a) an appropriate officer,
- (b) the owner,
- (c) a person directed by the freezing notice to take control of property subject to the notice,
- (d) any other person with the leave of the court.

(4) A person who makes an application under this section must give notice of the application, as prescribed by the regulations or rules of court, to each other person who is entitled, by virtue of subsection (3) (a)-(c), to make an application under this section.

## Division 2 Restraining orders

### 43 Restraining orders

- (1) If a person (in this section referred to as the **defendant**) has been, or is about to be, charged with, or has been convicted of, a serious offence, an appropriate officer may apply to the Supreme Court, ex parte, for an order in respect of:
  - (a) specified property of the defendant, or
  - (b) all the property of the defendant (including property acquired after the making of the order), or
  - (c) specified property of the defendant and all other property of the defendant (including property acquired after the making of the order), or
  - (d) all the property of the defendant (including property acquired after the making of the order) other than specified property, or
  - (e) specified property of a person other than the defendant.
- (2) If:
  - (a) an application made to the Supreme Court under subsection (1) in reliance on the

charging, or the proposed charging, of the defendant with a serious offence is supported by an affidavit of an authorised officer stating that the authorised officer believes that:

- (i) the defendant committed the offence, and
- (ii) the property to which the application relates is tainted property in relation to the offence or the defendant derived benefits because of having committed the offence or, if the offence is a drug trafficking offence, is the defendant's proceeds of drug trafficking, and

(iii) the property is the property of the defendant,

and setting out the grounds on which the authorised officer holds those beliefs, and

- (b) the Court considers that, having regard to the matters contained in the affidavit and any evidence adduced under section 44 (1) (b), there are reasonable grounds for holding those beliefs,

the Court may, by order:

- (c) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order, and
- (d) if the Court considers that the circumstances so require—direct the NSW Trustee and Guardian to take control of the property, or such part of the property as is specified in the order.

- (3) Where an application is made under subsection (1) in reliance on the proposed charging of a person with a serious offence, the Supreme Court shall not make a restraining order unless it is satisfied that the person is likely to be charged with the offence or a related offence within 48 hours.

- (4) If an application under this section seeks a restraining order against specified property of a person other than the defendant, the Supreme Court shall not make a restraining order against the property unless:

(a) the application is supported by an affidavit of an authorised officer stating that:

- (i) the authorised officer believes that the property is tainted property in relation to the serious offence with which the defendant has been, or is about to be, charged or has been convicted of or is the defendant's proceeds of drug trafficking, or

(ii) the authorised officer believes that:



- (A) the property is subject to the effective control of the defendant, and
  - (B) the defendant has derived a benefit, directly or indirectly, from the commission of the serious offence, and
- (b) the Court is satisfied, having regard to the matters contained in the affidavit and any evidence adduced under section 44 (1) (b), that there are reasonable grounds for holding that belief.
- (5) In determining whether there are reasonable grounds to believe that property is in the effective control of the defendant the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).
- (6) A restraining order may be made subject to such conditions as the Supreme Court thinks fit and, without limiting the generality of this, may make provision for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:
- (a) the defendant’s reasonable living expenses (including the reasonable living expenses of the defendant’s dependants (if any)) and reasonable business expenses,
  - (b) the defendant’s reasonable expenses in defending a criminal charge.
- (7) The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to the Court such undertakings as the Court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the order.
- (8) For the purposes of an application under subsection (1), an appropriate officer may, on behalf of the State, give to the Supreme Court such undertakings with respect to the payment of damages or costs, or both, as are required by the Court.
- (9) A restraining order may not be made in respect of property affected by a freezing notice or the subject of a current application for a freezing notice under this Act.

#### **44 Notice of applications and orders**

- (1) If an application has been made to the Supreme Court for a restraining order in respect of property:
- (a) the Court may, if it thinks fit, require the officer making the application to give notice of the application to a person who the Court has reason to believe has an interest in the property or part of the property, and
  - (b) a person to whom the Court requires notice to be given under paragraph (a) is entitled to appear and to adduce evidence at the hearing of the application.

(2) If:

- (a) a restraining order has been made in respect of property of a person, and
- (b) the person was not notified of the application for the making of the restraining order,

the officer who made the application shall give notice to the person, as prescribed by the regulations or by rules of court, of the making of the order.

#### **44A Powers of Supreme Court to set aside or vary restraining orders not affected**

Nothing in this Act prevents the application of the powers of the Supreme Court, whether conferred on the Court by rules of the Court or under any other law, to set aside or vary a restraining order or any other order under section 43 or 45.

#### **45 Supreme Court may make further orders relating to restraining orders**

(1) If the Supreme Court makes a restraining order, the Court may, at the time when it makes the restraining order or at any later time, 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 restraining order in respect of the property to which it relates,
- (b) an order varying any condition to which the restraining order was subject,
- (c) an order for the examination on oath of:

- (i) a person (in this section called the **owner**) whose property is subject to the restraining order, or
- (ii) another person,

before the Court, or an officer of the Court prescribed by the regulations or by rules of court, concerning the affairs of the owner, including the nature and location of any property of the owner,

- (d) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given by the State in connection with the making of the restraining order,
- (e) if the restraining order directs the NSW Trustee and Guardian to take control of property:
  - (i) an order regulating the manner in which the NSW Trustee and Guardian may exercise his or her functions under the restraining order, or
  - (ii) an order determining any question relating to the property to which the

restraining order relates, including any question relating to:

- (A) the liabilities of the owner, or
- (B) the exercise of the functions of the NSW Trustee and Guardian, with respect to the property, or

(iii) an order directing:

- (A) the owner, or
- (B) if the owner is a body corporate—a director of the body corporate specified by the Court,

to furnish to the NSW Trustee and Guardian, within a period specified in the order, a statement, verified by the oath or affirmation of the person making the statement, setting out such particulars of the property, or dealings with the property, of the owner as the Court thinks proper.

(2) Without affecting the generality of subsection (1), where the Supreme Court makes, or has made, a restraining order, the Court may, at the time it makes the restraining order or at any later time, whether on application made to it or on its own motion, make an order authorising another court:

- (a) to make an order setting aside the restraining order in respect of the whole or a part of the property, or
- (b) to make other orders in relation to the operation of the restraining order, to the extent and in the circumstances specified in the order of the Court.

(3) An order under subsection (1) or (2) may be made on application:

- (a) by an appropriate officer, or
- (b) by the owner, or
- (c) where the restraining order directed the NSW Trustee and Guardian to take control of property—by the NSW Trustee and Guardian, or
- (d) with the leave of the Supreme Court—by any other person.

(4) Where a person is examined before the Supreme Court or an officer of the Supreme Court pursuant to an order under subsection (1), the person is not excused from answering a question when required to do so by the Court or officer on the ground that the answer to the question might tend to incriminate the person or make the person liable to a forfeiture or penalty.

(5) Where a person is examined before the Supreme Court or an officer of the Supreme

Court pursuant to an order under subsection (1), a statement or disclosure made by the person in answer to a question put in the course of the examination, and any information, document or thing obtained as a direct or indirect consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except in:

- (a) a proceeding in respect of the giving of false testimony in the course of the examination, or
  - (b) a proceeding for the making of a forfeiture order, for the purpose only of facilitating the identification of the property to be subject to the forfeiture order, or
  - (c) a proceeding for the making of a pecuniary penalty order, for the purpose only of facilitating the assessment of the amount of the pecuniary penalty, or
  - (d) a proceeding for the making of a drug proceeds order, for the purpose only of facilitating the assessment of the amount to be recovered under the order.
- (6) A person who makes an application under this section in relation to a restraining order must give notice of the application, as prescribed by the regulations or rules of court, to each other person who is entitled, by virtue of subsection (3) (a)–(c), to make an application under this section in relation to the order.
- (7) (Repealed)

#### **45A Contravention of restraining orders**

- (1) A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both.
- (2) If:
  - (a) a restraining order is made against property, and
  - (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order, and
  - (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,an appropriate officer may apply to the Supreme Court for an order that the disposition or dealing be set aside.
- (3) If an application is made under subsection (2) in relation to a disposition or dealing, the Court may make an order:

- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place, or
- (b) setting aside the disposition or dealing as from the day of the order under this subsection and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order.

**45B Time when restraining order ceases to be in force**

- (1) If, at the end of the period of 48 hours after the making of a restraining order in reliance on the proposed charging of a person with a serious offence, the person has not been charged with the offence or a related offence, the order ceases to be in force at the end of that period.
- (2) If, when a restraining order was made in reliance on the charging of a person with a serious offence:
  - (a) the charge is withdrawn and the person is not charged with a related offence by the time of the withdrawal, the restraining order ceases to be in force when the charge is withdrawn, or
  - (b) the person is acquitted of the charge and the person is not charged with a related offence by the time of the acquittal, the restraining order ceases to be in force when the acquittal occurs.
- (3) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the Supreme Court may:
  - (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property, and
  - (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.
- (4) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court (other than the Supreme Court) makes a forfeiture order in respect of the property or makes a pecuniary penalty order or drug proceeds order against the person, the court may:
  - (a) if it considers it appropriate, make an order setting aside the restraining order in respect of the whole or a specified part of the property, and
  - (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order,

but the court may make an order under this subsection only if, and to the extent and in the circumstances, it is authorised to do so by an order of the Supreme Court under section 45 (2).

- (5) If, while a restraining order in respect of property made in reliance on the charging, or proposed charging, of a person with a serious offence is in force, a court refuses to make a forfeiture order in respect of the property or refuses to make a pecuniary penalty order against the person, the Supreme Court may:
- (a) if it considers it appropriate, make an order in relation to the period for which the restraining order is to remain in force, and
  - (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.
- (6) An order under subsection (3), (4) or (5) may be made so as:
- (a) to set aside the restraining order wholly or in part, and
  - (b) to take effect:
    - (i) on the making of the first-mentioned order, or
    - (ii) at a specified time, or
    - (iii) if relevant, on the payment of a penalty amount to the State, or
    - (iv) on the happening of some other specified event,
- and, when the first-mentioned order takes effect, the restraining order ceases to be in force to the extent to which it is set aside.

### **Division 3 General provisions applying to restraining orders and freezing notices**

#### **46 Order for taxation of legal expenses to be met out of restrained or frozen property**

- (1) If:
- (a) the Supreme Court makes a restraining order directing the NSW Trustee and Guardian to take control of property or an appropriate court makes a freezing notice directing the NSW Trustee and Guardian or Commissioner of Police to take control of property, and
  - (b) the order or notice makes provision for meeting, out of the property or part of it, a person's reasonable expenses in defending a criminal charge,
- the NSW Trustee and Guardian or Commissioner may apply to the court for an order under subsection (3).

- (2) The NSW Trustee and Guardian or Commissioner must give to the person written notice of an application under this section.
- (3) On an application, the court may order that the expenses be taxed as provided in the order or notice or may dismiss the application.
- (4) An applicant for an order need not, except as ordered by the court after the application is made, take any steps for the purpose of meeting the expenses as provided by the restraining order or freezing notice unless and until:
  - (a) an order under subsection (3) in relation to the expenses is complied with, or
  - (b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, otherwise than by the making of such an order.

#### **47 NSW Trustee and Guardian or Commissioner of Police to discharge confiscation order**

- (1) If:
  - (a) the NSW Trustee and Guardian or Commissioner of Police has, under a restraining order or freezing notice, taken control of particular property, or of all the property, of a person, and
  - (b) a confiscation order has been made in reliance on the conviction of the person,an appropriate court may, on application by the NSW Trustee and Guardian or Commissioner, make an order (in this section referred to as the **later order**) directing the NSW Trustee and Guardian or Commissioner to pay to the State, out of that property, an amount equal to the penalty amount.
- (2) For the purpose of enabling the NSW Trustee and Guardian or Commissioner to comply with the later order, the appropriate court may, by that order or by a subsequent order:
  - (a) direct the NSW Trustee and Guardian or Commissioner to sell or otherwise dispose of such of the property that is under the control of the NSW Trustee and Guardian or Commissioner as the court specifies, and
  - (b) appoint an officer of the court or any other person to execute any deed or instrument in the name of the person who owns or has an estate, interest or right in the property and to do all acts and things necessary to give validity and operation to the deed or instrument.
- (3) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person who owned or had an estate, interest or right in the property.
- (4) As soon as practicable after the making of the later order, the NSW Trustee and

Guardian or Commissioner:

(a) shall apply the money which has come into the NSW Trustee and Guardian's or Commissioner's possession or under the NSW Trustee and Guardian's or Commissioner's control because of the sale or disposition of any of the property specified in the later order, or the subsequent order, or otherwise in the course of performing the NSW Trustee and Guardian's or Commissioner's duties in respect of the property to which the restraining order or freezing notice relates, in payment of:

(i) the fees payable in connection with, and

(ii) the expenses incurred by the NSW Trustee and Guardian or Commissioner in or in connection with,

the performance of the duties imposed on the NSW Trustee and Guardian or Commissioner under the restraining order or freezing notice, including the expenses incurred by the NSW Trustee and Guardian or Commissioner in or in connection with the sale or disposition of any of the property to which the restraining order or freezing notice relates, and

(b) shall, subject to subsection (5), pay the remainder of the money referred to in paragraph (a), after the payments referred to in that paragraph have been made, to the State.

(5) If the money to which subsection (4) (b) applies exceeds the penalty amount, the NSW Trustee and Guardian or Commissioner shall:

(a) pay to the State, out of that money, an amount equal to the penalty amount, and

(b) pay the balance of that money to the person.

(6) Where the NSW Trustee and Guardian or Commissioner pays, in accordance with the later order, money to the State in respect of the liability of a person under a confiscation order, the liability of the person under the confiscation order shall, to the extent of the payment, be taken to be discharged.

#### **48 Charge on property subject to restraining order or freezing notice**

(1) If:

(a) in reliance on the charging, or the proposed charging, of a person with, or the conviction of a person of, a serious offence, a court has made a restraining order or confirmed a freezing notice in respect of property of a person, and

(b) in reliance on the conviction of the person for the offence, a court subsequently makes a pecuniary penalty order or drug proceeds order against the person,



then, on the making of the pecuniary penalty order or drug proceeds order, there is created, by force of this section, a charge on all the property to which the restraining order or freezing notice applies to secure the payment to the State of the penalty amount.

- (2) If a charge is created by subsection (1) on property of a person on the making of a pecuniary penalty order or drug proceeds order, the charge ceases to have effect in respect of the property:
- (a) on the discharge of the pecuniary penalty order or drug proceeds order on the hearing of an appeal against the making of the pecuniary penalty order or drug proceeds order, or
  - (b) on payment by the person to the State of the penalty amount, or
  - (c) on the sale or other disposition of the property:
    - (i) pursuant to an order made by the Supreme Court under section 47, or
    - (ii) by the owner of the property with the consent of the Supreme Court, or
    - (iii) if the restraining order or freezing notice directed the NSW Trustee and Guardian or the Commissioner of Police to take control of the property—by the owner of the property with the consent of the NSW Trustee and Guardian or the Commissioner, or
  - (d) on 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) on the making of a pecuniary penalty order or drug proceeds order:
- (a) is subject to every charge or encumbrance to which the property was subject immediately before the pecuniary penalty order or drug proceeds order was made and, in the case of land under the provisions of the [Real Property Act 1900](#), is subject to every mortgage, lease or other interest recorded in the Register kept under that Act, and
  - (b) has priority over all other encumbrances whatever, and
  - (c) subject to subsection (2), is not affected by any change of ownership of the property.
- (4) If a charge is created by subsection (1) on property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind:

- (a) the NSW Trustee and Guardian or Commissioner or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law, and
  - (b) if the charge is so registered, a person who purchases or otherwise acquires the property after the registration of the charge shall, for the purposes of subsection (2), be taken to have notice of the charge.
- (5) Where a charge under this section relates to land under the provisions of the *Real Property Act 1900*, the charge has no effect until it is registered under that Act.

#### **49 Registration of restraining orders and freezing notices**

- (1) If a restraining order or freezing notice applies to property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions shall, on application by an appropriate officer, record on the register kept under those provisions the particulars of the restraining order or freezing notice.
- (2) If the particulars of an order or notice are so recorded, a person who subsequently deals with the property shall, for the purposes of section 420 or 45A, be taken to have notice of the order or notice.
- (3) If a restraining order or freezing notice applies to land under the provisions of the *Real Property Act 1900*, a caveat may be lodged under that Act in relation to the order or notice.

#### **50** (Renumbered as sec 45A)

#### **51 Hindering or obstructing NSW Trustee and Guardian or Commissioner of Police**

- (1) A person must not hinder or obstruct the NSW Trustee and Guardian or the Commissioner of Police in the performance of their obligations under a restraining order or freezing notice.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

- (2) In this section:

**NSW Trustee and Guardian** includes staff and agents of the NSW Trustee and Guardian.

#### **51A Orders to furnish statements to NSW Trustee and Guardian or Commissioner of Police**

- (1) A person directed by an order under section 42M or 45 to furnish a statement to the NSW Trustee and Guardian or Commissioner of Police is not excused from:
  - (a) furnishing the statement, or

(b) setting out particulars in the statement,

on the ground that the statement or particulars might tend to incriminate the person or make the person liable to a forfeiture or penalty.

- (2) A statement furnished to the NSW Trustee and Guardian or Commissioner under any such order, and any information, document or thing obtained as a direct or indirect consequence of the statement, is not admissible against the person in any criminal proceedings except a proceeding in respect of the falsity of the statement.

## **52 Protection of NSW Trustee and Guardian and Commissioner of Police from liability in certain cases**

- (1) Section 121 of the [NSW Trustee and Guardian Act 2009](#) applies to and in respect of the functions of the NSW Trustee and Guardian under this Act in the same way as it applies to and in respect of the functions of the NSW Trustee and Guardian under that section, but nothing in this section shall be read as limiting the operation of that section.
- (2) The NSW Trustee and Guardian or Commissioner of Police is not personally liable for any rates, land tax or municipal or other statutory charges imposed by or under a law of the State on or in respect of property of which the NSW Trustee and Guardian or Commissioner of Police has been directed by a restraining order or freezing notice to take control, being rates, land tax or municipal or other statutory charges that fall due on or after the date of the restraining order or freezing notice, except to the extent (if any) of the rents and profits received by the NSW Trustee and Guardian or Commissioner of Police in respect of that property on or after the date of the restraining order or freezing notice.
- (3) If the NSW Trustee and Guardian or Commissioner of Police, having been directed by a restraining order or freezing notice to take control of a business carried on by a person, carries on that business, the NSW Trustee and Guardian or Commissioner of Police is not personally liable:
- (a) for any payment in respect of long service leave for which the person was liable, or
  - (b) for any payment in respect of long service leave to which a person employed by the NSW Trustee and Guardian or Commissioner of Police in his or her capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order or freezing notice.
- (4) In this section:

**NSW Trustee and Guardian** includes staff and agents of the NSW Trustee and Guardian.

### **53 Fees payable to NSW Trustee and Guardian or Commissioner of Police**

If the NSW Trustee and Guardian or Commissioner of Police takes control of property in accordance with a restraining order or freezing notice, the NSW Trustee and Guardian or Commissioner of Police is entitled to receive such fees, in respect of the exercise of his or her functions in relation to the property, as may be prescribed.

### **54 Court may revoke orders or notices**

- (1) If in reliance on the charging, or the proposed charging, of a person with a serious offence, a court has made a restraining order or confirmed a freezing notice, the court may, on application made to it by the person, revoke the order or notice if the person:
  - (a) gives security satisfactory to the court for the payment of any pecuniary penalty that may be imposed on the person under this Act in respect of the person's conviction for the offence, or
  - (b) gives undertakings satisfactory to the court concerning the person's property.
- (2) A person who makes an application under this section must give notice of the application, as prescribed by the regulations or rules of court.

### **55** (Renumbered as sec 45B)

### **56 (Repealed)**

### **57 Certificate by NSW Trustee and Guardian or Commissioner of Police**

- (1) If a restraining order or freezing notice is made directing the NSW Trustee and Guardian to take control of property, a certificate under the hand of the NSW Trustee and Guardian or an officer authorised by the Chief Executive Officer of the NSW Trustee and Guardian and sealed with the NSW Trustee and Guardian's seal:
  - (a) certifying that the restraining order or freezing notice has been made and is in force, and
  - (b) stating the terms of the restraining order or freezing notice,shall be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the NSW Trustee and Guardian's right to act under the restraining order or freezing notice, without production of any other proof.
- (2) If a freezing notice is in force directing the Commissioner of Police to take control of property, a certificate by the Commissioner:
  - (a) certifying that the freezing notice has been made and is in force, and
  - (b) stating the terms of the freezing notice,

is to be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the Commissioner's right to act under the notice, without production of any further proof.

## **Part 4 Information gathering powers**

### **Division 1 Production orders**

#### **58 Applications for production orders**

(1) If:

- (a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that that or some other person has possession or control of a property-tracking document or property-tracking documents in relation to the offence, or
- (b) an authorised officer has reasonable grounds for suspecting that:
  - (i) a person has committed a serious offence, and
  - (ii) a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence,

the authorised officer may:

- (c) lay before the Supreme Court an information on oath setting out those grounds, and
- (d) apply to the Court for a production order against the person suspected of having possession or control of the document or documents.

(2) If an authorised officer applying for a production order in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that:

- (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence, and
- (b) property specified in the information is subject to the effective control of the person,

the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence.

(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of "effective control of property").

## 59 Making of production orders

- (1) If an application is made under section 58 for a production order against a person, the Supreme Court may make an order that the person:
  - (a) produce to an authorised officer any property-tracking documents that are in the person's possession or control, or
  - (b) make available to the authorised officer, for inspection, any property-tracking documents that are in the person's possession or control.
- (2) An order under subsection (1) (a) shall not be made in respect of bankers' books.
- (3) The Supreme Court shall not make an order under this section unless:
  - (a) the informant or some other person has given the Court, either orally or by affidavit, such information (if any) as the Court requires concerning the grounds on which the order is sought, and
  - (b) the Court is satisfied that there are reasonable grounds for making the order.
- (4) In this section:

***bankers' books*** means any accounting records used in the ordinary business of banking, and includes ledgers, day-books, cash-books and account books.

## 60 Form of production orders

- (1) A production order that a person produce a document or documents to an authorised officer shall specify the time when and the place where the document is or documents are to be produced.
- (2) A production order that a person make a document available to an authorised officer for inspection shall specify the time or times when the document is or documents are to be made available.

## 61 Powers under production orders

- (1) If a document is produced to an authorised officer under a production order, the authorised 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,
  - (d) retain the document if, and for so long as, retention of the document is reasonably necessary for the purposes of this Act.

- (2) If a document is made available to an authorised officer for inspection under a production order, the authorised 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.
- (3) If an authorised officer retains a document under a production order, the authorised officer shall, on request by the person to whom the order was addressed:
  - (a) give the person a copy of the document certified by the authorised officer in writing to be a true copy of the document, and
  - (b) unless the person has been given a copy of the document under paragraph (a)—permit the person to do any one or more of the following:
    - (i) inspect the document,
    - (ii) take extracts from the document,
    - (iii) make copies of the document.

## **62 Effect of production orders on proceedings etc**

- (1) A person is not excused from producing or making available a document when required to do so by a production order on the ground that:
  - (a) the production or making available of the document might tend to incriminate the person or make the person liable to a penalty, or
  - (b) the production or making available of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.
- (2) If a person produces or makes available a document under a production order:
  - (a) the production or making available of the document, or
  - (b) any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document,is not admissible against the person in any criminal proceedings except proceedings for an offence against section 64.
- (3) For the purposes of subsection (2), proceedings on an application for a restraining order, a forfeiture order, a pecuniary penalty order or a drug proceeds order or to confirm a freezing notice are not criminal proceedings.

### **63 Variation of production orders**

Where the Supreme Court makes a production order requiring a person to produce a document to an authorised officer, the person may apply to the Court for a variation of the order and, if the Court is satisfied that the document is essential to the business activities of the person, the Court may vary the production order so that it requires the person to make the document available to an authorised officer for inspection.

### **64 Failure to comply with production orders**

Where a person is required by a production order to produce a document to an authorised officer or to make a document available to an authorised officer for inspection, the person is guilty of an offence if the person:

- (a) contravenes the order without reasonable excuse, or
- (b) in purported compliance with the order produces or makes available a document known to the person to be false or misleading in a material particular without:
  - (i) indicating to the authorised officer to whom the document is produced or made available that the document is false or misleading and the respect in which the document is false or misleading, and
  - (ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information.

Maximum penalty: If the offender is a natural person—100 penalty units or imprisonment for 2 years, or both, or if the offender is a body corporate—500 penalty units.

## **Division 2 Search powers**

### **65 Powers to search for, and seize, documents relevant to locating etc property**

An authorised officer may:

- (a) enter premises, and
- (b) search the premises for any property-tracking document in relation to a serious offence, and
- (c) seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a property-tracking document in relation to a serious offence,

but only if the entry, search or seizure is made:

- (d) with the consent of the occupier of the premises, or
- (e) under a warrant issued under section 67.



## **66 Application for search warrant for location etc of property**

(1) If:

- (a) a person has been convicted of a serious offence and an authorised officer has reasonable grounds for suspecting that there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence, or
- (b) an authorised officer has reasonable grounds for suspecting that:
  - (i) a person has committed a serious offence, and
  - (ii) there is, or may be within the next following 72 hours, in or on any premises, a property-tracking document in relation to the offence,

the authorised officer may:

- (c) lay before the Supreme Court an information on oath setting out those grounds, and
- (d) apply to the Court for a search warrant under section 67 in respect of the premises.

(2) If an authorised officer applying for a warrant under section 67 in respect of an offence includes in the information under subsection (1) a statement on oath that the authorised officer has reasonable grounds to believe that:

- (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence, and
- (b) property specified in the information is subject to the effective control of the person,

the Supreme Court may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

(3) In determining whether to treat a document as a property-tracking document in relation to an offence, the Supreme Court may have regard to the matters referred to in section 10 (meaning of “effective control of property”).

## **67 Search warrant for location etc of property**

(1) If an application is made under section 66 for a search warrant in respect of premises, the Supreme Court may issue a search warrant authorising an authorised officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable:

- (a) to enter in or on the premises, and
  - (b) to search the premises for documents of the kind referred to in section 66 (1), and
  - (c) to seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a document of that kind.
- (2) The Supreme Court shall not issue a search warrant under this section unless the Court is satisfied that:
- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document, or
  - (b) a production order has been given in respect of the document and has not been complied with, or
  - (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with, or
  - (d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without notice to any person.
- (3) The Supreme Court shall not issue a search warrant under this section unless:
- (a) the informant or some other person has given the Court, either orally or by affidavit, any further information that the Court requires concerning the grounds on which the search warrant is sought, and
  - (b) the Court is satisfied that there are reasonable grounds for issuing the search warrant.
- (4) There shall be stated in a search warrant issued under this section:
- (a) the purpose for which the warrant is issued, including a reference to the nature of the serious offence that has been or is believed to have been committed, and
  - (b) whether entry is authorised to be made at any time of the day or night or only during specified hours of the day or night, and
  - (c) a description of the kind of documents authorised to be seized, and
  - (d) a date, not being later than one month after the day of issue of the warrant, on which the warrant ceases to have effect.
- (5) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, an authorised officer

finds:

- (a) any document that the authorised officer believes, on reasonable grounds, to be:
  - (i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant, or
  - (ii) a property-tracking document in relation to another serious offence, or
- (b) any thing that the authorised officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence,

and the authorised officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be taken to authorise the authorised officer to seize that document or thing.

## **Division 3 Monitoring orders**

### **68 Monitoring orders**

- (1) On application made by an authorised officer the Supreme Court may make an order directing a financial institution to give information of the kind referred to in subsection (2) to a specified prescribed authority.
- (2) A monitoring order shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.
- (3) A monitoring order shall apply in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).
- (4) A reference in this section to a transaction conducted through an account includes a reference to:
  - (a) the making of a fixed term deposit, and
  - (b) in relation to a fixed term deposit—the transfer of the amount deposited, or any part of it, at the end of the term.

### **69 Making of monitoring orders**

- (1) The Supreme Court shall not make a monitoring order unless satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought:
  - (a) has committed, or is about to commit, a serious drug offence, or

- (b) was involved in the commission, or is about to be involved in the commission, of such an offence, or
- (c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

(2) A monitoring order shall specify:

- (a) the name or names in which the account is believed to be held, and
- (b) the kind of information that the institution is required to give, and
- (c) the prescribed authority to which the information is to be given, and
- (d) the manner in which the information is to be given.

(3) If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made shall be disregarded for the purposes of the application of Division 1A of Part 4 of the *Crimes Act 1900* in relation to the institution.

(4) A financial institution that has been given notice of a monitoring order shall not knowingly:

- (a) contravene the order, or
- (b) provide false or misleading information in purported compliance with the order.

Maximum penalty: 1,000 penalty units.

## **70 Existence and operation of monitoring order not to be disclosed**

(1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person (including the person to whom the order relates) except:

- (a) if the order specifies the Commissioner of Police as the prescribed authority to which information is to be given—the Commissioner of Police or a member of the Police Force, or
- (b) if the order specifies some other prescribed authority as the authority to which information is to be given—a member, or member of staff, of the authority, or
- (c) an officer or agent of the institution, for the purpose of ensuring that the order is complied with, or
- (d) an Australian legal practitioner, for the purpose of obtaining legal advice or representation in relation to the order.

Maximum penalty: 1,000 penalty units.

- (2) A person of a kind referred to in subsection (1) (a), (b), (c) or (d) to whom the existence or operation of a monitoring order has been disclosed (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) shall not:
- (a) while he or she is such a person—disclose the existence or operation of the order, except to another person of a kind referred to in subsection (1) (a), (b), (c) or (d) for the purpose of:
    - (i) if the disclosure is made by a person referred to in subsection (1) (a) or (b)—the performance of that person’s duties, or
    - (ii) if the disclosure is made by an officer or agent of the institution—ensuring that the order is complied with or obtaining legal advice or representation in relation to the order, or
    - (iii) if the disclosure is made by an Australian legal practitioner—giving legal advice, or making representations, in relation to the order, or
  - (b) when he or she is no longer such a person—make a record of, or disclose, the existence or the operation of the order in any circumstances.

Maximum penalty: 10 penalty units or imprisonment for 2 years, or both.

- (3) Nothing in subsection (2) prevents the disclosure by a person of a kind referred to in subsection (1) (a) or (b) of the existence or operation of a monitoring order:
- (a) for the purposes of, or in connection with, legal proceedings, or
  - (b) in the course of proceedings before a court.
- (4) A person of a kind referred to in subsection (1) (a) or (b) shall not be required to disclose to any court the existence or operation of a monitoring order.
- (5) A reference in this section to disclosing the existence or operation of a monitoring order to a person includes a reference to disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

## **71 Communication of information by financial institutions to prescribed authorities**

- (1) If a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that:
- (a) the information may be relevant to an investigation of, or the prosecution of a person for, a serious offence, or
  - (b) the information would otherwise be of assistance in the enforcement of this Act or the regulations,

the institution may give the information to a prescribed authority.

(2) An action, suit or proceeding does not lie against:

- (a) a financial institution, or
- (b) an officer, employee or agent of the institution acting in the course of the person's employment or agency,

in relation to any action taken by that institution or person pursuant to subsection (1).

## **72 Protection where financial information given**

If a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to section 71 (1) as soon as practicable after forming the belief referred to in that subsection, the institution or person shall be taken, for the purposes of Division 1A of Part 4 of the *Crimes Act 1900* not to have been in possession of that information at any time.

## **Part 5 Offences**

### **73 (Repealed)**

### **74 Proceedings for offences**

- (1) Except as otherwise provided by this section, proceedings for an offence against this Act shall be dealt with summarily before the Local Court.
- (2) The Local Court may not deal with an offence under section 420 or 45A unless it is satisfied that the value of the property concerned does not exceed \$10,000.
- (3) Proceedings for an offence under section 420 or 45A must, if the value of the property concerned is more than \$10,000, be dealt with before the Supreme Court in its summary jurisdiction.
- (4) Proceedings for an offence under section 69 (making of monitoring orders) shall be dealt with on indictment.

### **75 Proof of certain matters not required**

In any legal proceedings, a certificate signed by the Secretary of the Attorney General's Department certifying that a specified person was or was not an authorised officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts so certified.

### **76 Conduct by directors, servants or agents**

- (1) If it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or taken by subsection (2) to have been

engaged in, by the body corporate, it is sufficient to show that a director, servant or agent of the body corporate (being a director, servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

- (a) by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority, or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent,

shall be taken, for the purposes of this Act, to have been engaged in by the body corporate.

(3) If it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct taken by subsection (4) to have been engaged in by the person, it is sufficient to show that a servant or agent of the person (being a servant or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

(4) Conduct engaged in on behalf of a person other than a body corporate:

- (a) by a servant or agent of the person within the scope of his or her actual or apparent authority, or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

shall be taken, for the purposes of this Act, to have been engaged in by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that knowledge, intention, opinion, belief or purpose.

(6) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, a State or a Territory.

## **Part 6 Interstate orders**

### **77 Registration of interstate instruments**

- (1) If an interstate forfeiture order, interstate crime related property declaration or interstate restraining order expressly applies to property in New South Wales, the order or declaration may be registered under this Act.
- (2) An interstate forfeiture order, interstate crime related property declaration or interstate restraining order is to be regarded as registered under this Act when a copy of the order or declaration (being a copy sealed by the court or person that made the order or declaration) is registered in accordance with the rules of the Supreme Court.
- (2A) A sealed copy of an interstate forfeiture order, interstate crime related property declaration or interstate restraining order is not required for the purposes of registration if it is not the practice of the court or body that issued the order or declaration to seal copies of the order or declaration.
- (3) Any amendments made to an interstate forfeiture order, interstate crime related property declaration or interstate restraining order (before or after registration) may be registered in the same way, and any such amendments do not, for the purposes of this Act, have effect until they are registered.
- (4) An application for registration may be made by the person on whose application the order or declaration or amendments were made, by an appropriate officer or by a person affected by the order or declaration or amendments.

### **78 Effect of registration of interstate forfeiture orders**

- (1) A registered interstate forfeiture order may be enforced in New South Wales as if it were a forfeiture order made under section 18 (1) at the time of registration.
- (2) This Act (other than section 92 (appeals)) applies to a registered interstate forfeiture order as it applies to a forfeiture order made under section 18 (1).
- (3) A registered interstate forfeiture order does not operate so as to vest property (or any estate, interest or right in property) otherwise than in the Crown in right of New South Wales.
- (4) A registered interstate forfeiture order does not operate so as to vest property in the Crown in right of New South Wales if the order has already operated to vest the property in the Crown in some other capacity or in some other person or entity.

### **78A Effect of registration of interstate crime related property declarations**

- (1) A registered interstate crime related property declaration is, subject to the regulations, to be enforced as if it were a registered interstate forfeiture order and this Part applies accordingly.



- (2) Regulations may be made for or with respect to the circumstances in which a registered interstate crime related property declaration is to be treated as a registered interstate forfeiture order.

#### **79 Effect of registration of interstate restraining orders**

- (1) A registered interstate restraining order may be enforced in New South Wales as if it were a restraining order made under section 43 (2) at the time of registration.
- (2) This Act (other than sections 43, 44 (1), 45B, 48, 54 and 56 (2)) applies to a registered interstate restraining order as it applies to a restraining order made under section 43 (2).

#### **80 Revocation or variation of registered orders or declarations**

A court of the State may not revoke or vary a registered interstate forfeiture order, registered interstate crime related property declaration or registered interstate restraining order or limit the manner in which such an order or declaration applies.

#### **81 Duration of registration**

If:

- (a) an interstate forfeiture order, interstate crime related property declaration or interstate restraining order is registered under this Act, and
- (b) the order or declaration ceases to be in force in the State in which it was made,

the registered order or declaration continues to be enforceable in New South Wales (as if the order or declaration were still in force in the State in which it was made) until the registration is cancelled under section 82.

#### **82 Cancellation of registration**

- (1) The registration of an interstate forfeiture order, interstate crime related property declaration or interstate restraining order may be cancelled by the Supreme Court if:
  - (a) the registration was improperly obtained, or
  - (b) the order or declaration ceases to be in force in the State in which it was made.
- (2) An application for cancellation of the registration of an order or declaration may be made by the person on whose application the order or declaration was made, by an appropriate officer or by a person affected by the order or declaration.

#### **83 Charge on property subject to registered interstate restraining orders**

- (1) If:
  - (a) an interstate restraining order is made against property of a person in connection

with an interstate serious offence committed or alleged to be committed by the person, and

- (b) an interstate pecuniary penalty order is made against the person in connection with that offence, and
- (c) the interstate restraining order is registered under this Act, and
- (d) the interstate pecuniary penalty order is registered in a court of New South Wales under the *Service and Execution of Process Act 1901* of the Commonwealth,

then, on 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) Where 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) on the interstate pecuniary penalty order ceasing to have effect (because the conviction, if any, in reliance on which the order was made has been quashed or for any other reason), or
  - (b) on the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order, or
  - (c) on payment of the amount due under the interstate pecuniary penalty order, or
  - (d) on the person becoming bankrupt, or
  - (e) on the sale or other disposition of the property:
    - (i) under an order made by a court under the corresponding law of the State 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
  - (f) on 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 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) Where a charge is created by subsection (1) on property of a particular kind and the provisions of any law of New South Wales provide for the registration of title to, or charges over, property of that kind:

(a) the NSW Trustee and Guardian or an appropriate officer may or, in the case of land, shall cause the charge so created to be registered under the provisions of that law, and

(b) if the charge is so registered, a person who purchases or otherwise acquires an interest in the property after the registration of the charge shall, for the purposes of subsection (2) (f), be taken to have notice of the charge at the time of the purchase or acquisition.

(5) If a charge under this section relates to land under the provisions of the [Real Property Act 1900](#), the charge has no effect until it is registered under that Act.

#### **84 Powers of NSW Trustee and Guardian in relation to interstate restraining orders**

If:

(a) an interstate restraining order is registered under this Act, and

(b) the restraining order directs an official of the State in which it was made to take control of property,

the NSW Trustee and Guardian may, in accordance with an agreement between the NSW Trustee and Guardian and the official, exercise the same powers in relation to the property as the official would have been able to exercise if the property were located in that State.

#### **85 Interim registration of facsimile copies**

(1) A facsimile copy of:

(a) a sealed copy of an interstate forfeiture order, interstate crime related property declaration or interstate restraining order, or

(b) a sealed copy of any amendments made to such an order or declaration,

shall be regarded for the purposes of this Act as the same as the sealed copy, if the facsimile copy is itself certified in accordance with the requirements of the court or body that issued it.

- (2) Registration effected by means of a facsimile 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 facsimile copy has been registered by that time.
- (3) Registration of the sealed copy before the end of the period referred to in subsection (2) has effect as from the day of registration of the facsimile copy.
- (4) Although registration of a facsimile copy of an interstate forfeiture order or interstate crime related property declaration ceases to have effect in the circumstances mentioned in subsection (2), any forfeiture already made in relation to the order or declaration is not affected.

## **Part 7 Miscellaneous**

### **86 Restriction on making applications**

If an application for a confiscation order has been made to an appropriate court, no further application in relation to the same matter may be made to another court, except with the leave of the Supreme Court or in such circumstances as may be prescribed.

### **87 Provisions relating to courts**

- (1) If an application is made for a confiscation order to a court before which a person was convicted of a serious offence:
  - (a) the application may be dealt with by that court, and
  - (b) any function may be exercised by that court in relation to the confiscation order, whether or not that court is constituted in the same way as it was constituted when the person was convicted of the offence.
- (2) The Local Court may not, in relation to the conviction of a person for a particular offence, make a forfeiture order in respect of property unless it is satisfied that the value of the property (together with the value of any other property the subject of any other undischarged forfeiture order made by the Local Court in relation to the same conviction of that person) does not exceed the maximum amount that may be awarded by the Local Court when exercising its general civil jurisdiction.
- (3) The Local Court may not make a pecuniary penalty order against a person unless it is satisfied that the amount payable under the order (together with the amount payable under any other undischarged pecuniary penalty order made against the person by the Local Court) would not exceed the maximum amount that may be awarded by the Local Court when exercising its general civil jurisdiction.
- (3A) The Local Court may not make a drug proceeds order against a person for an amount that exceeds the jurisdictional limit of the Local Court when sitting in its General Division within the meaning of the [Local Court Act 2007](#).

- (4) The Local Court may not make a forfeiture order in respect of land, except in such circumstances as may be prescribed.
- (5) For the purposes of this section, the value of property shall be as determined by the Local Court.
- (6) Nothing in this section prevents the Local Court from exercising its jurisdiction in relation to a freezing notice issued in relation to land or in relation to property whose value exceeds the jurisdictional limit of the Local Court when sitting in its General Division within the meaning of the [Local Court Act 2007](#).
- (7) Proceedings before the Local Court on an application for a forfeiture order or drug proceeds order, or on an application for confirmation or setting aside of a freezing notice, are to be dealt with by the Court sitting in its General Division within the meaning of the [Local Court Act 2007](#).

## **88 Commissioner for the Independent Commission Against Corruption**

The Commissioner for the Independent Commission Against Corruption may exercise any functions under this Act only after consultation with the Director of Public Prosecutions, and shall consider whether any such function should instead be exercised by the Director.

## **88A Commissioner for the Police Integrity Commission**

- (1) The Commissioner for the Police Integrity Commission may exercise any function under this Act only:
  - (a) after consultation with the Director of Public Prosecutions, or
  - (b) in conformity with an arrangement referred to in section 84 of the [Police Integrity Commission Act 1996](#),and must consider whether any such function should instead be exercised by the Director.
- (2) It is intended that the Commissioner for the Police Integrity Commission will exercise a function under this Act only in connection with matters arising during or out of the Police Integrity Commission's own investigations. However, this subsection does not provide any grounds for an appeal against or any other challenge to the exercise by the Commissioner of any such function.

## **89 Interstate operation of New South Wales orders and notices**

- (1) For the purpose of enabling a forfeiture order, restraining order or freezing notice to be registered under the corresponding law of another State, the order or notice may be expressed to apply to property in that State.
- (2) For the purpose of enabling a forfeiture order, restraining order or freezing notice to

be registered under a law in force in a Territory, the order or notice may be expressed to apply to property in the Territory.

- (3) A forfeiture order, restraining order or freezing notice does not apply to property in a corresponding State or in a Territory, except in so far as:
- (a) a corresponding law of that State provides that the order or notice has effect in that State following registration under that law, or
  - (b) a law in force in that Territory provides that the order or notice has effect in the Territory following registration under that law, or
  - (c) the property was movable property and was located elsewhere than in a corresponding State or in a Territory when the order or notice took effect.
- (4) In this section:

**corresponding State** means a State for which a declaration of a corresponding law is in force under this Act.

## **90 Costs incurred on variation of orders or notices on application by third parties**

- (1) If:
- (a) a court makes an order under this Act varying a forfeiture order, restraining order or freezing notice that is registered under a corresponding law of another State, and
  - (b) the variation is made on the application of a third party and affects the interests of the third party in relation to property in that other State,
- the court may order that the actual costs incurred by the third party in applying for and obtaining the variation be paid to the third party.
- (2) The court may instead order that part only of those costs be paid, if it is satisfied that special circumstances warrant such an order.
- (3) The costs shall be paid by a person or authority specified by the court.
- (4) The court may direct in what manner the costs are to be ascertained.
- (5) Nothing in this section limits the powers of the court to award costs under any other law.
- (6) In this section:

**third party**, in relation to a forfeiture order, restraining order or freezing notice, means a person who is not the subject of the order or notice.

**vary** includes limit the manner in which an order or notice applies.

## **91 Duty not payable**

No duty is payable under the *Duties Act 1997* in respect of:

- (a) the transfer of any property under section 20 (effects of forfeiture orders on third parties), or
- (b) the return of any property under section 21 (discharge of forfeiture orders) or section 42S (return of property).

## **92 Appeals**

- (1) Without affecting any other right of appeal, a forfeiture order in relation to any property is appellable by any person who has an interest in the property:
  - (a) in the case of a person convicted of an offence in reliance on which the forfeiture order was made—as if the order were, or were part of, a sentence imposed in respect of the offence, or
  - (b) in any other case—as if the person had been convicted of a serious offence and the order were, or were part of, a sentence imposed in respect of the offence.
- (2) Without affecting any other right of appeal, a pecuniary penalty order or drug proceeds order is appellable as if it were, or were part of, a sentence imposed in respect of the offence in relation to which the order was made.
- (3) On appeal, a forfeiture order, pecuniary penalty order or drug proceeds order may be confirmed, discharged or varied.
- (4) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against a refusal by a court to make a drug proceeds order, forfeiture order, pecuniary penalty order or restraining order, and the Court of Criminal Appeal may in its discretion make such order as could have been made in the first instance.
- (5) A drug proceeds order, forfeiture order, pecuniary penalty order or restraining order made by the Court of Criminal Appeal under subsection (4) shall be taken to have been made by the Supreme Court under this Act, but is not on that account subject to further appeal.

## **93 Operation of other laws not affected**

Nothing in this Act limits or restricts the operation of any other law providing for the forfeiture of property.

## **94 Notices**

- (1) The regulations may make provision for or with respect to the giving of notices under this Act.

- (2) Rules of court may make provision for or with respect to the giving of notices under this Act.
- (3) If a notice is required to be given under this Act and the regulations or rules of court make provision for or with respect to the giving of the notice, the notice shall be given in accordance with the relevant provisions.
- (4) The regulations shall prevail to the extent of any inconsistency with the rules of court.
- (5) (Repealed)

## 95 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation declaring a kind of order to be within a definition may do so by reference to the interstate serious offences involved.
- (3) A regulation declaring a law to be a law that corresponds to this Act may provide that the declaration applies only for prescribed provisions of this Act.

## 96 Repeal of **Crimes (Confiscation of Profits) Act 1985 No 181** and **Crimes (Confiscation of Profits) Regulation 1986**

- (1) The *Crimes (Confiscation of Profits) Act 1985* is repealed.
- (2) The *Crimes (Confiscation of Profits) Regulation 1986* is repealed.

## 97 Savings, transitional and other provisions

Schedule 1 has effect.

## Schedule 1 Savings, transitional and other provisions

(Section 97)

## Part 1 Preliminary

### 1 Definition

In this Schedule:

**the 1985 Act** means the *Crimes (Confiscation of Profits) Act 1985*.

### 2 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any of the following Acts:



*Crimes Legislation Amendment Act 2002* (but only to the extent that it amends this Act)

*Confiscation of Proceeds of Crime Amendment Act 2005* (but only to the extent that it amends this Act)

*Criminal Assets Recovery Amendment Act 2009*

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **3 Effect of repeal on acts done or decisions made**

If this Act repeals and re-enacts (with or without modification) a provision of the 1985 Act, any act done or decision made under the provision repealed has effect after the repeal as if it had been done or made under the provision so re-enacted.

## **Part 2 Provisions consequential on *Confiscation of Proceeds of Crime Amendment Act 2005***

### **4 Definition**

In this Part:

**amending Act** means the *Confiscation of Proceeds of Crime Amendment Act 2005*.

### **5 Freezing notices**

Division 1A of Part 3, as inserted by the amending Act, applies to or in respect of:

- (a) property acquired or seized before or after the commencement of that Division, and
- (b) persons who committed serious offences (whether or not they were charged with those offences) before or after the commencement of that Division.

### **6 Interstate orders and other instruments**

This Act, as amended by the amending Act, applies to or in respect of interstate forfeiture orders, interstate crime related property declarations and interstate restraining orders in

force immediately before the commencement of this clause.