

CRIMES (CONFISCATION OF PROFITS) BILL 1985

EXPLANATORY NOTE

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

The objects of this Bill are to provide for—

- (a) the making of forfeiture orders, under which money and any other property used in or derived from the commission of serious offences (including any indictable offence, certain drug offences and other offences prescribed by regulation) may be confiscated, whether or not the money or property belongs to the person who committed the offence;
 - (b) the making of pecuniary penalty orders, under which offenders are to pay pecuniary penalties equivalent to the estimated profits derived from the commission of offences;
 - (c) the making of restraining orders, under which money or property may not be disposed of or otherwise dealt with, where charges are pending in respect of offences; and
 - (d) the enactment of ancillary provisions (including provisions for the issue of search warrants authorising the seizure of money or property).
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PART I—PRELIMINARY

Clause 1 specifies the short title to the proposed Act.

Clause 2 provides that the provisions of the proposed Act will, with minor exceptions, commence on a day to be appointed by the Governor-in-Council.

Clause 3 (1) defines certain expressions for the purposes of the proposed Act. Important definitions include the following:

“appropriate officer” generally defines the persons who may apply for orders under the proposed Act. The Solicitor for Public Prosecutions may apply for forfeiture orders, pecuniary penalty orders or restraining orders in any court. The Commissioner of Police may apply for forfeiture orders or pecuniary penalty orders in proceedings in Local Courts. Provision is also made for the

prescription of other officers in respect of prescribed functions;

“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;

“relevant period” defines the period in which applications for forfeiture orders or pecuniary penalty orders may be made. Generally this is within 6 months after conviction for the offence or, where a person has absconded before a charge is dealt with, 6 months after the issue of an unsuccessful warrant of arrest;

“serious offence” means—

- (a) an indictable offence;
- (b) the offence of supplying a restricted substance prescribed under section 16 of the Poisons Act 1966; or
- (c) an offence prescribed by regulations;

“tainted property” means property that—

- (a) was used in, or in connection with, the commission of a serious offence; or
- (b) was derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence.

Clause 3 (2) provides that a person shall be taken to have been convicted of an offence where a section 556A order under the Crimes Act 1900 has been made, where the offence has been taken into account in passing sentence in respect of another offence or where the person has absconded (that is, 6 months after the issue of an unsuccessful warrant of arrest).

Clause 3 (3) amplifies clause 3 (2).

Clause 3 (4) provides that a person shall be taken to have been charged with an offence if an information has been laid.

Clause 3 (5) specifies the time at which a person is taken to have absconded.

Clause 3 (6)–(8) are machinery provisions.

Clause 4 states that the proposed Act will bind the Crown.

PART II—FORFEITURE ORDERS

Clause 5 (1) provides for applications for, and the issue of, orders for the forfeiture of tainted property. Applications may be made to the court where the offender was convicted or to the Supreme Court. Before making an order the court must take into consideration the use that is ordinarily or had been intended to be made of the property and any hardship that may reasonably be likely to arise (on the part of any person) if the order were made.

Clause 5 (2) provides for the giving of notice to interested parties and gives interested parties a right of appearance in the application proceedings.

Clause 5 (3) requires a court to presume that (in the absence of evidence to the contrary) property in the possession of an offender at or immediately after the commission of the offence was used in, or in connection with, the commission of the offence. Where there is evidence that any such property was not so used the court shall not make an order unless it is satisfied, on the civil standard of proof, that the property was so used.

Clause 5 (4) provides for the specification by a court of the extent of the estate, interest, etc., in property to which an order is to apply.

Clause 6 vests in the Crown property which is subject to a forfeiture order and provides for the disposal of the property (after the hearing of any appeal).

Clause 7 makes provision for the recovery by an innocent third party of an interest (or its value) in property which is the subject of a forfeiture order where the third party, for special reasons, did not or was unable to claim the interest at the forfeiture proceedings.

Clause 8 operates to discharge a forfeiture order on the quashing of a conviction or on the payment to the State of the value of the forfeited property.

Clause 9 provides for the return of property where a forfeiture order is discharged.

PART III—PECUNIARY PENALTY ORDERS

Clause 10 provides for applications for, and the issue of, orders for the payment of pecuniary penalties equal to the assessed value of the benefits derived from the commission of offences. Applications may be made to the court where the offender was convicted or to the Supreme Court. In each case the court assesses the value of the benefits derived.

Clause 11 specifies the matters which a court shall have regard to in assessing the amount of a pecuniary penalty. Included is the relative value of offender's property before and after the commission of an offence or a series of offences. Except where evidence is given to the contrary, where the value of an offender's property after the commission of an offence or a series of offences exceeds the value of the property before that commission, the value of the benefits derived shall be treated as not being less than that excess. The extent of the offender's involvement in the commission of the offence may also be taken into account. Expenses or outgoings in connection with the commission of the offence shall be disregarded. Benefits derived outside the State may be taken into account.

PART IV—RESTRAINING ORDERS

Clause 12 provides for the making of applications to the Supreme Court for the issue of orders restraining the disposal of the property of persons who have been, or are about to be, charged with serious offences or directing the Public Trustee to take control of any such property. An application must be supported by an affidavit stating, amongst other things, that the property is tainted property or that the offender derived benefits

from the commission of the offence. Where a person has not been charged, the Court must be satisfied that the person is likely to be charged within 48 hours of the making of the order. In an order, the Court may make provision for meeting the reasonable living, etc., expenses of an offender out of the property. The Court may refuse to make an order unless the State undertakes to pay any damages or costs arising out of the making of the order.

Clause 13 provides for the giving of notices to interested parties and gives those parties a right of appearance in proceedings. An applicant is required to notify an offender of the making of a restraining order where the offender was not notified of the application for the order.

Clause 14 authorises the Court to make further orders varying restraining orders or in relation to matters ancillary to the making of restraining orders. Included is a power to order the examination of the offender or another person concerning the nature and location of the property of the offender.

Clause 15 authorises the Public Trustee to dispose of an offender's property for the purpose of complying with a court order to pay out of the property the amount due on any forfeiture order or pecuniary penalty order which is subsequently made.

Clause 16 imposes on property in respect of which a restraining order is in force a charge to secure the payment of the amount due under a pecuniary penalty order which is subsequently made.

Clause 17 requires restraining orders in respect of property to be registered in any register relevant to that property.

Clause 18 provides a penalty not exceeding \$5,000 or 2 years' imprisonment, or both, for contravention of a restraining order.

Clause 19 makes it an offence to hinder or obstruct the Public Trustee in the performance of the Public Trustee's obligations.

Clause 20 provides for the protection of the Public Trustee from liability in certain cases.

Clause 21 authorises the Public Trustee to charge fees in respect of functions exercised under the proposed Part.

Clause 22 authorises the Supreme Court to revoke restraining orders in certain circumstances.

Clause 23 provides that a restraining order ceases to be in force at the expiration of 48 hours after it is made if no charge is laid or, in any other case, at the expiration of 6 months after the order or a subsequent order is made. Provisions are also made for the extension, continuation or setting aside of restraining orders where the property is, or may be, affected by forfeiture orders or pecuniary penalty orders.

Clause 24 provides for the giving of notice of applications made under Part IV.

Clause 25 provides that a certificate by the Public Trustee is evidence of the Public Trustee's authority to act under the proposed Act.

PART V—SEARCH WARRANTS

Clause 26 defines certain expressions for the purposes of the proposed Part.

Clause 27 provides for the issue of search warrants to members of the Police Force in respect of premises where there are grounds for believing there is tainted property of a particular kind in or on the premises.

Clause 28 authorises a member of the Police Force, in the course of a search, to seize property of the kind specified in a search warrant and any other property which the member believes on reasonable grounds to be tainted property in relation to the offence in respect of which the warrant was obtained or another offence.

Clause 29 authorises a member of the Police Force executing a warrant to search persons and arrest persons reasonably suspected of committing offences in respect of seized property.

Clause 30 provides that a search warrant may be issued whether or not an information has been laid in respect of the relevant offence, but the justice must be satisfied that a charge is likely to be laid within 48 hours.

Clause 31 provides that the Commissioner of Police is responsible for the keeping of seized property.

Clause 32 requires the Commissioner of Police to return seized property in specified circumstances. Generally, property has to be returned at the expiration of 7 days if no charge is laid or, if charge is laid and a conviction ensues, at the expiration of 6 months of conviction if no forfeiture order is made. A court may, on application, order the return of property at any time if it is satisfied that it would refuse to make a forfeiture order.

Clause 33 makes it an offence to obstruct or hinder a person executing a search warrant.

PART VI—MISCELLANEOUS

Clause 34 bars the making, to different courts, of separate applications for forfeiture orders or pecuniary penalty orders in respect of the same matter.

Clause 35 contains machinery provisions relating to courts and imposes a monetary limit of \$5,000 on a Local Court's jurisdiction to make orders.

Clause 36 contains additional requirements to apply to courts when making orders in respect of persons who have absconded before being convicted.

Clause 37 provides that no stamp duty is payable in respect of the return of property on discharge of a forfeiture order.

Clause 38 provides rights of appeal against orders or the refusal to make orders.

Clause 39 saves other laws relating to forfeiture of property.

Clause 40 provides for the making of regulations and rules of court with respect to the giving of notices.

Clause 41 provides for offences to be dealt with summarily before a Local Court.

Clause 42 provides for the repeal of provisions of the Poisons Act 1966 which are replaced by provisions of the proposed Act and for the amendment of certain provisions of the proposed Act on the commencement of the Search Warrants Act 1985.

Clause 43 provides that the proposed Act applies to offences committed before its commencement where a charge has not yet been laid.

Clause 44 authorises the making of regulations for the purposes of the proposed Act.

SCHEDULE 1

Schedule 1 contains provisions relating to search warrants under the proposed Act. The Schedule will be repealed on the commencement of the Search Warrants Act 1985.

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NEW SOUTH WALES

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SCHEDULE 1—PROVISIONS RELATING TO SEARCH WARRANTS ISSUED UNDER THIS ACT
