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Proceeds of Crime Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 180 2001-02

Proceeds of Crime Bill 2002

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Law and Bills Digest Group
26 June 2002

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Proceeds of Crime Bill 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Justice and Customs

Commencement: On a date to be fixed by proclamation, or failing that, 6 months after Royal Assent.

Purpose

To broaden the Commonwealth regime for the confiscation of the proceeds of crime, including the introduction of provisions that will enable confiscation without the need for first obtaining a criminal conviction. Neither the Bill nor the consequential Bill actually repeals the existing *Proceeds of Crime Act 1987*, but the second reading speech indicates that the Act will be repealed at some later stage.

Background

The Rationale for confiscation schemes

The first Australian legislation-based proceeds confiscation scheme was introduced through an amendment to the *Customs Act 1901* in 1977.¹ The Customs Act was again amended in 1979 to allow for confiscation without the need for a (narcotics) conviction.² In the mid 1980s, the Standing Committee of Attorneys-General developed a legislative model for a more wide-ranging conviction based confiscation scheme. According to the recent report by the Australian Law Reform Commission (ALRC), this model was based on the premise that:

where a person had profited from criminal activity, those profits should be returned to the society whose laws were infringed. In addition, property otherwise lawfully obtained but used in the commission of the offence or offences could also be forfeited.³

This model was enacted in various forms by all Australian jurisdictions, including the territories. In the Commonwealth, the implementing legislation was the *Proceeds of Crime Act 1987* (POCA 1987). In 1990 NSW introduced a new law, the *Criminal Assets*

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Recovery Act 1990, which, other than the limited scope of the Customs Act referred to above, introduced the first non-conviction based confiscatory regime. More recently, Victoria and Western Australia have followed suit by introducing non-conviction based confiscation schemes (also called 'civil confiscation') through the *Confiscation Act 1997*⁴ and *Criminal Property Confiscation Act 2000* respectively.

How statutory confiscation schemes work

While the confiscation schemes in Australian jurisdictions vary in scope, necessary burdens of proof, investigatory powers, etc they all have some common elements or stages of restraint, information-gathering and finally confiscation. The following gives a very brief generic guide to these elements for illustrative purposes only.

Where persons are suspected of certain forms of unlawful activity, their assets and other property possibly connected with such activity can be frozen (restrained) by court order. This allows law enforcement agencies to investigate the alleged activity whilst minimising the possibility of evidence and assets being disposed of due to the suspects being alerted to the investigation. As the scope of assets that may be frozen in the initial period is very wide, the relevant legislation generally provides that some property may be unfrozen for living and (sometimes) legal expenses etc or that innocent third parties may get their property excluded from such orders under certain circumstances.

The information-gathering powers of enforcement agencies are generally extensive, including compelling persons to provide evidence, monitoring of financial records, as well as the usual search and seizure powers. Some jurisdictions provide that virtually any person, including those not suspected of being connected with any illegal activity, must submit to interrogation ('examination orders'). The degree to which the common law privilege against self-incrimination still applies under proceeds of crime legislation varies considerably.

The confiscation (ie forfeiture to the State) element can be divided into two main schemes. One where conviction is required for assets and other property to be forfeited, the other where a conviction is not required. In the former case, forfeiture can either be automatic on conviction of certain offences (generally more serious offences) or upon a court order for other offences.

The Australian Law Reform Commission report and the development of the Bill

In December 1997 the ALRC was tasked by the Attorney General to review the POCA 1987 and two related Acts and report by December 1998. According to the ALRC's report, which was published in June 1999

In commissioning the review, the Attorney-General pointed to the need for effective provision for forfeiture of the proceeds of crime in serving Australia's efforts to

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counter serious crime both inside and outside of Australia. With respect to the latter, he pointed to Australia's international obligations, particularly under

- the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and
- bilateral treaties dealing with mutual assistance in criminal matters.⁵

In terms of the complexity of the subject matter of the review and the consultation process, the ALRC report states:

1.16 By early September 1998, it was clear from both an analysis of such submissions as had been received and from the Commission's own research and analysis that the key issues were of greater depth and complexity than had been apparent at the commencement of the reference. In addition, the paucity of detailed information and analysis in some submissions coming to hand from key stakeholders was increasingly pointing to the probability that the Commission's own research and analysis would have to be greatly broadened and deepened beyond what had been anticipated....

1.20 In the light of the Attorney-General's letter of 5 January 1999, the Commission's work has been directed exclusively to seeking to complete a final report by 31 March 1999. This has necessarily involved decisions not to proceed with the projected discussion paper and thus dispense with the Commission's normal process of testing and refining reform options and proposals through a rigorous public consultative process...

1.22 The Terms of Reference clearly direct the Commission's enquiries to what needs to be done to significantly improve the effectiveness of the POC Act. The Commission was not asked to revisit the fundamental policy issues, and associated philosophical debate, regarding the need for, and desirability of, a federal proceeds regime.

1.23 That said, the Commission acknowledges that there exists within the Australian community a body of concerned opinion about the civil liberties aspects of proceeds legislation and whether proceeds legislation represents an effective policy response to the problems that it is intended to address. While some may be disappointed that these fundamental issues are not readdressed in this report, the Commission remains firmly of the view that such issues remain outside the scope of its inquiry. Of course, where options for reform considered by the Commission give rise to new such concerns they are addressed in the report.

The ALRC report concluded that the current conviction-based proceeds of crime legislation [was] 'largely ineffective'. Some of the main recommendations of the report were:

- a non-conviction based confiscation regime

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- confiscation of literary proceeds.
- amendments to ensure the profits of unlawful conduct are not consumed in legal expenses.
- measures to provide increased protection for the rights of innocent third parties, particularly the rights of secured creditors.
- increased powers for the Australian Federal Police and National Crime Authority to trace the profits of crime.
- new provisions to crack down on money laundering.⁶

A draft Proceeds of Crime Bill was released for public comment on 20 July 2001 and was subsequently introduced into Parliament on 20 September 2001. Following the November 2001 federal election, an amended version of the Bill was reintroduced on 13 March 2002.

The Senate Legal and Constitutional Committee held an inquiry into the Bill and held approximately seven hours of public hearings in Canberra and Sydney. Only one non-government representative gave evidence at these hearings. The Committee published its report in April 2002.⁷ The report recommended the Bill be passed, subject to review of the questions of availability of legal aid and use of telephones intercepts as evidence in proceedings under the Bill. Labor Senators also largely supported the Bill, but had additional concerns about the clarity of drafting in some of the important technical provisions of the Bill. A full list of recommendations from the report are in Appendix 1 to this Digest.

Structure of the Bill

The Bill has 6 Chapters

Chapter 1 deals with introductory matters such as objectives, territorial jurisdiction and the operation of State and Territory laws.

Chapter 2 sets out the confiscation scheme including the various orders that may be placed in relation to property and proceeds.

Chapter 3 deals with 'information gathering' including the examination of persons, production of documents relating to property and search and seizure provisions.

Chapter 4 deals with the administration of property that is subject to a court restraining order.

Chapters 5 and 6 deal with various miscellaneous and definitional matters.

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Main Provisions

Chapter 1 - Introductory

New section 12 provides that the Bill binds Commonwealth, States and Territory governments (including Norfolk Island) but these governments cannot be prosecuted for any offence under the Bill. This latter feature is a standard provision in Commonwealth legislation.

New section 13 applies the Bill to all 'acts, matters and things outside Australia, and to all persons' unless a contrary intention appears in the relevant part of the Bill. Thus potentially the Bill covers foreigners acting outside of Australia. While the equivalent provision in the POCA 1987 just refers to jurisdiction in terms of geographical scope, the explicit inclusion of foreigners in the Bill may be more a matter of clarification rather expansion of jurisdiction.

New section 14 provides that the Bill applies even when a relevant offence or conviction occurred before the Bill comes into force. In part, this is justified because Bill updates an existing Act and so this provision provides a seamless transition by preventing anything 'falling through the cracks'.⁸ *However, the Bill does contain new confiscatory provisions thus on the face of it new penalties are potentially applicable for some acts that took place before the commencement of the Bill.*

New section 15 provides that Bill is not intended to exclude the operation of State and Territory law as long as they are capable of concurrent operation. Thus similar or parallel legislation would continue to operate: only directly inconsistent law would be excluded by virtue of section 109 of the Constitution. The POCA 1987 is silent on the matter of operation of State and Territory law, although as previously mentioned all State and Territories have proceeds of crime legislation on their statute books.

Chapter 2 - Confiscation

Note that the term 'confiscation order' is a general term that includes forfeiture orders, pecuniary penalty orders and literary proceeds orders: **new section 338**.

Part 2-1 Restraining orders

New sections 16-45 deal with restraining orders. These orders are used to 'freeze' assets as a preliminary step to potential confiscation.

New section 17 deals with activity that constitutes an *indictable offence*.⁹ The Director of Public Prosecutions (DPP) may make an application to 'a court with proceeds jurisdiction'¹⁰ if a person has *been convicted, charged or it is proposed that they be charged* with an indictable offence. In the latter two cases, the court must be supplied with affidavits from an authorised officer stating the grounds on which it is suspected the

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person has committed a particular indictable offence. The court must then be satisfied that the grounds on which the suspicion is held are reasonable. Presumably this is a question of fact and thus the court must be satisfied that grounds must support a conclusion that it was more likely than not that the person in question committed the offence.¹¹

If the application includes property that belongs to someone other than the offender or suspected offender, the affidavit must state the grounds on which it is suspected the property is either under the effective control of the offender or suspected offender or is the proceeds or instrument of the offence.

If the various requirements mentioned above are met, the court *must* issue the order *except* in two cases.

The first is where the Commonwealth (usually this will be the DPP) declines to give an undertaking with respect to damages or costs in relation to the order: **new section 21**.¹² The second is where the offence in question is not a serious offence - the court may refuse to make the order if it is satisfied it is not in the public interest to do so: **new subsection 17(4)**. The concept of public interest is not defined in the Bill.¹³ Both the undertaking and public interest discretions are consistent with existing sections 44 of the POCA 1987.

Finally, the court has the discretion whether or not to make the restraining order applicable to property acquired *after* the order is made: **new subsection 17(6)**. If the order is silent on the issue, subsequently acquired property is not subject to the order. The Bill contains no guidance on the use of this discretion.

The content and effect of **new section 17** is essentially the same as the existing section 44 in the POCA 1987. However, under existing section 44, where a person has not been charged with an offence, the court can only issue a restraining order if it is satisfied that the person will be charged within 48 hours.¹⁴ Under **new subsection 17(1)**, there is no such time limit, although the order will cease to have effect if no charges are laid within 28 days unless an application for a confiscation order has been made: **new subsection 45(2)**.

New section 18 deals with activity that constitutes a *serious offence*¹⁵. The requirements for a restraining order are lower than for **new section 17** (and for the serious offence provisions in section 44 of the POCA 1987). *Notably, there does not even have to be a proposal to charge a person, nor do the grounds stated in the authorised officers affidavit have to relate to a particular offence* (ie a person could be suspected of drug smuggling over a period of time rather than be involved in a particular importation etc). Again, the court *must* make the order if the affidavit requirements are satisfied, subject to the undertaking for damages or costs discussed in **new section 21**. Unless the suspected offence is a terrorism offence¹⁶, it must have happened within 6 years before the application.

New section 19 deals with property that is suspected to be the proceeds of an indictable offence¹⁷. The major variation as compared to **new section 17** is that for the purposes of

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the required affidavit, the perpetrator of the offence doesn't have to be known, nor need the offence be a particular offence.

New section 20 deals with persons suspected of deriving literary proceeds 'in relation' to activity that constitutes an indictable offence. Literary proceeds are defined in **new section 153** and discussed later in this digest.

The DPP may make an application to the court if a person is suspected of committing an indictable offence, or a foreign indictable offence. In the case of a foreign indictable offence¹⁸, **new section 20** only applies if the proceeds are obtained in Australia. Affidavit requirements apply, including setting out the grounds why it is suspected the person has committed an indictable offence (note that, as for **new sections 18** and **19**, it need not be based on the committing of a particular identified offence) and as result has gained literary proceeds. Property subject of the order may include *all* property of the suspected offender - not just the literary proceeds flowing from the offence - or property that belongs to someone else¹⁹ if it is under the effective control of the suspected offender.

New section 24 provides that property that is the subject of a restraining order may be used to meet certain expenses²⁰ or debts, but *only* if the court is satisfied that the person²¹ making the application to the court cannot meet them from unrestrained assets. Legal expenses to defend confiscation proceedings or criminal charges that give rise to such proceedings are not included within the scope of **new section 24**, which is significantly different from POCA 1987 in that the current Act allows the court to make property available to meet a persons 'reasonable expenses in defending a criminal charge'²²: POCA 1987 existing paragraph 43(3)(b). There is no common policy in other Australian jurisdictions on this issue. For example, subsection 14(5) of the Victorian *Confiscation Act 1997* doesn't allow for legal expenses, but paragraphs 10(5)(b) and 16A(1)(b) of NSW *Criminal Assets Recovery Act 1990* does, albeit to a fairly limited degree. This issue is discussed at more length in the concluding comments section of this Digest.

New sections 25-28 deal with the basic procedures of how the DPP obtains the restraining orders mentioned above.

New section 26 provides that the DPP may apply for a restraining order by giving notice to the owner of the property. However, the DPP can also require the court to consider an application without such notice being given (an *ex parte* hearing): **new subsection 26(4)**. The *ex parte* provision exists under POCA 1987, although a restraining order made under such circumstances only applies for a maximum of 14 days, unless extended: existing sections 45-45A. There appears to be no time limit under the Bill.

Where the application is made by notice, a copy of the application and any affidavit must also be provided to property owner (if known). Where the DPP believes that other people may have an 'interest'²³ in the property, the DPP must also give them notice of application, although the affidavit does not have to be supplied unless requested - presumably after receipt of application. Except in *ex parte* situations, the court must not hear the application

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unless it is satisfied that the owner of the property has received 'reasonable' notice of the application.

A person who claims an interest in the property²⁴ has the right to provide written and oral evidence at the hearing. Obviously this depends on them being given notice of the application or otherwise being aware that the application has been made.

As stated earlier, if the DPP requests an *ex parte* hearing the court has no discretion to refuse it.²⁵ However, before making a final decision on the making or otherwise of the order, the court may direct the DPP to give or publish notice to any other person or class of persons. This provision is also found in existing subsection 45(5) of POCA 1987.

New section 28 allows a witness giving evidence at restraining order hearings to decline to answer questions or provide documents 'if the court is satisfied that [this] may prejudice the investigation of, or the prosecution of a person for, an offence'. This provision is also found in existing subsection 43(7) of POCA 1987.

New sections 29-32 deal with how property can be excluded from restraining orders.

New section 29 provides that any person whose property has been restrained by a court order under **new sections 17, 18** or **19** may apply to have particular specified property excluded from that order. Both the type of property, and grounds for exclusion vary according to the basis on which the restraining order was granted. However, in general an applicant must demonstrate to the court's satisfaction that the property is neither the proceeds²⁶ nor the instrument²⁷ of the offence: **new subsection 29(2)**.

New section 30 provides that a person who is given notice of an *application* for a restraining order may also seek to have specified property excluded from that order. The person must apply to the court within 14 days of being notified, and must give the DPP notice of the grounds on which the exclusion is being sought. The DPP must provide the person with notice of any grounds on which it proposes to contest the person's application, and may appear and adduce evidence at the hearing of the application.

In the case of a restraining order having already been made by the court, **new section 31** enables a person whose property is restrained by the order to apply to have some or all of the property excluded.

New subsection 31(1) provides that a person may apply to the court for such exclusion at any time after being notified of the order.²⁸ However, if a person was given a **new section 26** notice of the DPP's intention to apply for a restraining order, the court must give its consent before they can seek a **new section 31** exclusion order. The court may grant its consent if:

- the person failed to appear at the hearing, they had a good reason for not appearing, or
- the person did appear, if that person now has new evidence that was not available at the time of the hearing, or

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- the court decides there are 'special grounds'.

Where a restraining order is in force, **new section 32** provides that court must not hear a property exclusion application if the DPP has not been given a 'reasonable opportunity'²⁹ to conduct an examination of the applicant under **new Part 3-1** (see discussion on examinations later in this Digest).

New sections 33-37 deal with how restraining orders are given effect.

New section 33 requires the DPP to give a person whose property is restrained written notification of the order. The notice must normally include the application and affidavits, if these have not previously been supplied. However, the court may, on request of the DPP either delay the giving of the notification or omit part or all of the application and affidavits, if the court 'considers that this is appropriate in order to protect the integrity of any investigation or prosecution': **new subsection 33(3)**. This compares with the equivalent provision in existing subsection 47(2) of the POCA 1987 which states that the notice be delayed 'if the court is satisfied that it would be in the public interest'.

New sections 34-35 allows registration of restraining orders (including exclusions or variations to them) with relevant Commonwealth, State or Territory authorities.

If a person disposes of property in contravention of a restraining order, **new section 36** allows a court to reverse the disposition in certain circumstances. Typically, this might occur if property was gifted to someone or sold for an unreasonably low price, or where the person buying the property knew that the property was restrained (and was thus not acting in good faith). This is equivalent to existing subsection 52(2) of the POCA 1987.

New section 37 creates offences in relation to contravening restraining orders. Specifically, **new subsection 37(1)** makes it an offence to dispose of or otherwise deal with property in contravention of a restraining order where the person knows or is reckless³⁰ as to whether the property is covered by a restraining order. **New subsection 37(2)** makes it an offence to dispose or otherwise deal with property in contravention of a restraining order where the particulars of that order were recorded on a register under **new section 34** or where the person was notified of the order under **new section 33**. Breaches of **new section 37** may attract a maximum penalty of 5 years imprisonment, a fine of 300 penalty units (\$33 000), or both.

A significant difference between **new section 37** and the equivalent provision in POCA 1987 (existing subsection 52(1)) is the fault element. Under the POCA 1987, it is intention. Under the Bill it is recklessness³¹, or in relation to where the property is on a section 34 register, strict liability applies.³²

New section 39 allows a court to make any 'ancillary orders orders that [it] considers appropriate'. Examples given in the legislation are orders varying conditions placed on restraining orders, requiring the owner of property subject to give a sworn statement 'setting out the particulars of, or dealings with, the property', or requiring an owner to

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bring restrained property 'within the jurisdiction'. This last example (bring within the jurisdiction) does not exist in subsection 48(1) of POCA 1987, although the examples given in 48(1) are not exhaustive. A contravention of a 'bring within the jurisdiction' ancillary order is punishable by imprisonment for 5 years or a fine of 300 penalty units, or both.

In cases where a person did not receive notice of a restraining order application (and thus could not contest it) **new section 42** allows a person to apply to have the order *revoked*. However, the application must be submitted within 28 days of the person being notified that the order has been made. The DPP and the Official Trustee must be informed of the revocation application: **new subsection 42(2)**. The court *may* revoke the restraining order 'if satisfied' that there are no grounds on which to make the order at the time of its consideration of the revocation application - for example if applicant provides evidence that grounds for the suspicion of an offence contained in an affidavit are unreasonable. The 28 day limit in **new section 42** was criticised by NSW Bar Association as being too short.³³ This view was supported by ALP Senators in their comments in the Senate Report.³⁴ They recommended giving the court some discretion in the matter.

Restraining orders can also be revoked or property can be excluded from an order through a different procedure which is set out in **new section 44**. Essentially, certain securities or undertakings must be supplied to the court, but a **new section 44** applicant does not have to show the property is not proceeds or an instrument of an offence. This is equivalent to existing section 56 in POCA 1987.

New section 45 sets out the different circumstances under which restraining orders cease to be in force. The following discussion sets out some of these.

As a *general* rule, if a restraining order was made on the basis of a conviction, charge or proposal to charge (eg **new section 17**), it will cease after 28 days after the charge being withdrawn, or the suspect being acquitted of all relevant offences, or on the quashing of all relevant convictions. Similarly, the order will lapse after 28 days of being made if the suspect has still to be charged. *However*, if an application for confiscation order has been made or granted, or an application for confirmation³⁵ of a confiscation order has been made, or if the suspect is charged with a related offence, the restraining order remains in force.

A restraining order will also cease to have effect if a subsequent application for a forfeiture order over the same property is refused by a court and all avenues of appeal have been exhausted, or it otherwise ceases to have effect or the relevant property is excluded from a forfeiture order: **new subsection 45(3)**.

Part 2-2 Forfeiture orders

Part 2-2 of the Bill (**new sections 46-90**) deal with forfeiture orders *made* by the Court. This compares to Part 2-3 of the Bill (**new sections 91-114**) under which forfeiture happens *automatically* as a consequence of certain convictions for serious offences.

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Upon application by the DPP, a Court *must* make a forfeiture order if the property has been the subject of a **new section 18** restraining order for at least 6 months and the **court is satisfied (on the balance of probabilities)** that the person **committed a serious offence**³⁶ within the last 6 years³⁷: **new section 47**. The finding of the court need not be that a particular offence was committed: **new subsection 47(2)**. **New subsection 47(3)** provides that 'the raising of a doubt' as to whether a person committed a serious offence is *not* of itself a sufficient ground on which a court can find that a person did not engage in conduct constituting a serious offence.

New section 47 (along with **new section 49**) is a key section in the proposed non-conviction based scheme and has no equivalent in the POCA 1987.

Upon application by the DPP, a Court *must* make a forfeiture order if a person has been **convicted** of an **indictable offence(s)** and the Court is satisfied the property is proceeds from that offence(s): **new section 48**. If the property the subject of the application is an instrument³⁸ rather the proceeds of the such offence, the court has a *discretion* as to whether or not to make an order.

Note that a person can be 'convicted' of an offence for the purposes of the Bill even if no conviction is made in the literal sense of the word: see **new section 331**. One result of this is that **new section 48** may apply if a court is satisfied on the balance of probabilities that a person has absconded and *either* they have been committed for trial for the indictable offence or the court is satisfied that on the available evidence a reasonable jury could lawfully find the person guilty of the offence: see **new section 52**

New section 49 also forms a key part of the proposed non-conviction based scheme. Upon application by the DPP, a Court *must* make an order if the property has been the subject of a restraining order for at least 6 months and the court is satisfied (on the balance of probabilities) that the property is proceeds from **an indictable offence(s)**³⁹ committed within the last 6 years. The court is not required to find that the proceeds are from any particular offence or that a particular person has committed an offence. However, the court must both be satisfied that the DPP has taken reasonable steps to identify and notify any person with an interest in the property and that there is no existing application for the property to be excluded from the restraining order.

As previously noted, given **new sections 47** and **49** are non-conviction based schemes, they do not depend on a successful prosecution. **New section 51** explicitly states that the fact that a person has been acquitted of an offence been charged does not affect the court's power to make a **new section 47** or **49** forfeiture order. In part this may reflect the different standards of proofs - balance of probabilities for a **new sections 47** or **49** order as compared to beyond reasonable doubt for conviction of a criminal offence.

New section 55 allows the court to specify interests in property other than the interest of the person who is the subject of a forfeiture order and may make ancillary orders to protect such interests. The Explanatory Memorandum to the Bill⁴⁰ gives the example of where property is owned by joint tenants, the disposal of the entire property may be the only way

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to realise the value of that property. In such a situation the court could specify that the interest of the innocent joint tenant is to be included in the forfeiture order, but protect that person's rights by making an ancillary order that the Commonwealth pay that person half of the proceeds from the sale.

New section 57 effectively allows that a person who had an interest in forfeited property to buy back the interest⁴¹, if the court is satisfied that is not contrary to the public interest and that there is no other reason not to do so. The provision is based on existing section 33 of the POCA 1987.

New section 60 requires that the court must give its leave before the DPP can apply for forfeiture orders relating to property that has been the subject of a previous application⁴² that has already been decided on by the court. The Court may only grant leave if it finds that the property to which the new application relates was identified only after the first application was decided, necessary evidence became available only after the first application was determined, or it is in the interests of justice to grant the leave.

New section 61 requires the DPP to give written notice of an application for a forfeiture order to a person whose conviction of an offence has enabled the application. The DPP must also give notice to any person who claims an interest in property covered by an application and to any person who the DPP reasonably believes may have an interest in that property.⁴³ In addition, the court may direct the DPP to give or publish notice of an application to a specified person or class of persons at any time before the application is determined. Persons claiming an interest in property the subject of applications have the right to appear before the court and provide evidence regarding their interest.

Section 69 deals with when the Commonwealth can dispose or otherwise deal with property the subject of a forfeiture order. While the general rule is that the Commonwealth must wait until any relevant appeal or appeal periods have been determined or expired, the court may grant leave for any dealing to occur at an earlier date. There are no provisions that indicate the circumstances under which the court may grant leave.

New section 70 deals with how the Commonwealth must deal with property the subject of a forfeiture order. The general rule is that the amount released from the disposal of the property, less handling costs of the Official Trustee⁴⁴, must be credited to the 'Confiscated Assets Account'. However, if the Official Trustee has not yet begun 'to deal with property', the Minister or a duly authorised senior Departmental official may direct that the property be dealt with in another way. This presumably includes that the funds realised by the disposal be applied in another way. This is equivalent to existing subsection 20(3A) in the POCA 1987.

New section 71 creates an offence of dealing with registrable property that is subject to a forfeiture order before registration of the Commonwealth's interest, knowing it to be subject to a forfeiture order. This is equivalent to existing section 97 in POCA 1987. A contravention of **new section 71** is punishable by imprisonment for 5 years or a fine of 300 penalty units, or both

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New section 72 enables a court to make an order for the benefit of dependant(s) of a person whose property is the subject of a **new section 47** or **49** forfeiture order. However, the court must be satisfied that both the amount of the beneficial order would relieve the hardship that they would otherwise experience and, where the dependant is 18 years or over, that they had no knowledge of the person's conduct that has resulted in the forfeiture order.

New section 73 enables a court to exclude particular property from a forfeiture order. The court *must* make an exclusion order on application⁴⁵ by a person if the forfeiture order (or forfeiture application) is made under **new section 47** or **49**, and the court is satisfied that the property sought to be excluded is not the proceeds of 'unlawful activity'.⁴⁶ In the case of third party applications (ie persons who are not suspects) the court *must* exclude property if it is satisfied both that the person was not involved in the offence or offences to which the order relates and the property to be excluded is not the proceeds of unlawful activity.

In relation to **new section 48** forfeiture orders, the court *must* make an exclusion order if it is satisfied both that the applicant was not in any way involved in the commission of any of the offences to which the forfeiture order or forfeiture application relates and the property in question is neither proceeds nor an instrument of any of those offences.

Note that if the property the subject of a exclusion order has already been disposed of, the order must direct the Commonwealth to pay the applicant an amount equal to the value of the property specified in the order: **new subsection 73(2)**.

New section 77 deals with the situation where property forfeited as proceeds under a forfeiture order was acquired partly through legitimately obtained funds. In this case, after the property is disposed of by the Commonwealth, the proportion acquired through legitimate means would be 'given back' by way a compensation payment order. Such orders are not automatic - they must be applied for within six months after the forfeiture order was made, although a court may give leave if the period is greater than six months: **new section 78**.

Under section 80, where **new sections 47** or **49** (non-conviction based) forfeiture order are made against a person in respect of a particular offence, the subsequent acquittal or quashing of a conviction for that *does not* affect the forfeiture order. The acquittal or quashing of a conviction could be on the grounds, that although the evidence suggested on the balance of probabilities the accused was guilty, the evidence was not strong enough to prove the charge beyond reasonable doubt. The fact that a quashing based on these grounds does not affect a **new section 47** or **49** forfeiture order is entirely consistent with the policy intent of the Bill.⁴⁷

By comparison, where a conviction relating to a **new section 48** order is quashed, the order is discharged (ie ceases to have effect) unless the DPP has applied for an order confirming (ie it remains in force) the forfeiture within 14 days: **new section 81**. If the

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DPP makes such an application, the forfeiture order is not affected by the quashing of the conviction until that application is determined.⁴⁸

Under **new section 84** the court *may* confirm the section 48 forfeiture order relating to a conviction which has been quashed if it is satisfied that it could have made a forfeiture order at the time of the original forfeiture order application under either **new sections 47 or 49**⁴⁹, ie an order based on a lower standard of proof. *The provision for such confirmation orders in the Bill appear to be unique amongst Australian jurisdictions which have non-conviction based confiscation schemes.*

If a forfeiture order is discharged by a successful appeal or by the quashing of a conviction, the DPP must notify all persons they reasonably believe have an interest in the property: **new section 87**. **New section 88** requires the responsible Minister to arrange for the return of interests in the relevant property. If the property has been disposed of or otherwise no longer vested in the Commonwealth the Minister must arrange for a compensation payment.

Part 2-3 Forfeiture on conviction of a serious offence

This Division provides that property may be automatically forfeited (ie there is no need for a court order) upon a person's the conviction of a serious offence.

New section 92 sets out the circumstances in which automatic forfeiture can occur. Besides the requirement for a conviction for a serious offence⁵⁰, the property in question must be either the subject of a restraining order⁵¹, or the subject of a restraining order which was fully or partially revoked through the giving of security or an undertaking under **new section 44**. Property belonging to a third person may be forfeited.

Property will normally be automatically forfeited six months from the date of conviction, although this may be extended to up to 15 months by a court under **new section 93**. Extensions can only be granted where a person has already applied to have property excluded from a restraining order under **new section 31**.

Section 94 allows a person who has been convicted of a serious offence to apply for an exclusion order from **new section 92** forfeiture. The DPP may of course contest the application. The court may make such an order providing it is satisfied that the property is neither the proceeds or instrument of unlawful activity. This provision is based on subsection 48(4) of the *Proceeds of Crime Act 1987*.

Under **new section 99**, unless the court gives leave, the Commonwealth can only sell or otherwise deal with the **new section 92** forfeited property after a person has failed to lodge an appeal with the prescribed period or where the appeal fails.

New section 100 mirrors **new section 70** regarding proceeds of disposal of forfeited property in that normally, the proceeds, less the costs associated with the restraining order and final disposal, goes to the Confiscated Accounts Account (CAA)⁵² but the Minister or

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an authorised senior Departmental officer may direct the property be disposed of or dealt with in some other way: **new subsection 100(2)**. **New subsection 100(2)** is silent on where any funds from this will go. This is equivalent to existing subsections 30(4A)-(5) in POCA 1987.

New section 102 allows the court to restore, or otherwise compensate, **new section 92** forfeited property to a person with an interest in the property if the person obtained the property in good faith, is not in any way involved in a relevant offence and the property has no connection with the offence. A person with an interest in the property can also buy back the property under **new section 103**. There are less stringent conditions where this may happen as compared to **new section 102**, the main one being that the court must be satisfied that this would not be contrary to the public interest. There are time limits and other restrictions on **new sections 102 and 103** applications, although the court maintains a limited discretion to allow an application if the applicant is deemed to be not at fault for a delay: **new section 104**. **New sections 102-104** are equivalent to existing subsection 31(4)-(7) in the POCA 1987.

Where a conviction relating to a **new section 92** forfeiture order is quashed, the order is discharged⁵³ (ie ceases to have effect) unless the DPP has applied for an order confirming (ie it remains in force) the forfeiture within 14 days: **new section 107**. If the DPP makes such an application, the forfeiture order is not affected by the quashing of the conviction until that application is determined.⁵⁴

New section 110 enables a court to confirm the forfeiture if it is satisfied that it could make either a **new section 47 or 49**⁵⁵ forfeiture order in relation to either the person or the property under either clause. As discussed under **new section 84**, confirmation order provisions are not found in POCA 1987.

Where a forfeiture order ceases to apply, the DPP must provide notice to persons with an interest in the relevant property to advise them of their right to apply under **new section 113** for the transfer of the interest or its value. Where such a person applies, **new section 114** requires the Minister to arrange for the return of interests in property, or if the interest has been already been disposed of, to arrange for the payment to the person of an amount equal to the value of the person's interest. **New sections 113-114** are equivalent to existing section 32 in the POCA 1987.

Part 2-4 Pecuniary penalty orders

A pecuniary penalty order (PPO) is an order that requires a person to pay an amount of money to the Commonwealth. As with most other types of orders under the Bill, PPOs are made by a court on application by the DPP.

A court *must* order grant a PPO if is satisfied:

- that the person has been convicted of an indictable offence *and* has derived benefits from the commission of that offence; and / or

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- that the person has committed a serious offence.⁵⁶

PPOs can be made even if another order, such as a forfeiture order, has been made in relation to the relevant offence. A PPO may also be made even when a person has been acquitted of an offence: **new section 120**.

The amount of the PPO is to be determined by prescribed calculations, which are different depending on whether the offence is a serious or non-serious offence.

Essentially, if the offence to which the order relates is a *non-serious* indictable offence, the court must assess the value of the benefits the person derived from the commission of the offence in accordance with a wide variety of matters set out mainly in **new sections 122-124**. The court must then assess the value of any deductions available to the person pursuant to **new sections 130-132** (these include other forfeiture orders, tax and fines paid) and reduce the value of the benefits gained by the person by that amount.

The difference for a serious offence is that the benefits taken into account are not limited to those derived from the particular offence in question, but extend to *any* benefits the person has derived from any 'unlawful activity' within the period commencing six years⁵⁷ before either the application for the PPO or the application for a restraining order if one is in place, and the date of determining the penalty amount.

In assessing what benefit a person derived from an offence, **new section 122** requires the court to have regard to the whole range of property (including the value of narcotics where relevant) that came into the person's possession because of the illegal activity, any other benefits, and the value of property and of income and expenditure from and to any source over any time frame. In relation to non-serious offences, **new section 123** appears to say that court must calculate the net benefit being the difference between the value of the person's property before the offence and the whatever was the person's maximum level of property during or after the offence⁵⁸. However, this is reduced if the court is satisfied that some of the increase in property was unrelated to the illegal activity.⁵⁹ The formula is reasonable similar for a serious offence PPO.

Note that benefits may include property that is not a person's property but under their control or where it has vested in certain trustees under the *Bankruptcy Act 1966*: **new section 129**.

Subject to limited exceptions, applications for PPOs must generally be made by the DPP within six months of conviction (for non-serious offences) or nine months of conviction (for serious offences): **new section 134**. Notice requirements to property owners apply in the same way as to other types of confiscation orders.

Under **new section 141**, property belonging to another but under the effective control of the person against whom the PPO is made can be used in payment of the PPO. If the DPP makes an application to make such property available to the Commonwealth for the payment of the PPO, the DPP must give notice of the application to any other person who

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they have reason to believe has an interest in the property. Such persons may give evidence at the hearing of the application.

As previously mentioned, a PPO may be made with respect to a serious offence even if a person has not been convicted of that offence. In such cases, a subsequent quashing of a conviction does not affect the validity of the PPO: **new section 145**. If the PPO was in relation to a conviction, and this is quashed, the PPO is discharged *unless* the DPP applies for a confirmation in a similar manner to forfeiture orders. However, an application for a confirmation can *only* be made where the offence in question was a serious offence: **new section 146**. In this case, the court may confirm the PPO if it is satisfied that there were reasonable grounds to suspect the person had committed the offence on which the PPO was based: **new section 149**. On confirmation, any quashing of the conviction does not affect the PPO: **new section 150**.

Part 2-5 Literary proceeds orders

On application by the DPP, a court *may* make a literary proceeds order (LPO) against a person whom it is satisfied (on balance of probabilities) has committed an indictable offence⁶⁰ and has derived literary proceeds: **new section 152**. The proceeds must have been derived after the Bill commences.

If a person is acquitted of a relevant offence, the court may still make a LPO in relation to the offence: **new section 157**.

To paraphrase **new section 153**, literary proceeds are defined to be any benefit that a person derives from the commercial exploitation of their notoriety⁶¹, resulting from their involvement in the commission of an indictable offence. Such proceeds may include property belonging to third person but under the effective control of the target of the LPO, or property which has been paid or transferred to a third person at the request or direction of the 'target' person.

New section 154 specifies a number of matters a court may choose to take into account in deciding whether it is appropriate to make a LPO. These matters include the nature and purpose of the product or activity, whether it was in the public interest⁶², whether it had any social, cultural or educational value, the seriousness of the offence, and the time that has elapsed since the offence.

New section 155 provides that the DPP can apply for a literary proceeds order on each and every occasion on which it is considered that there has been a commercial exploitation of the person's involvement in an indictable offence.

Under **new section 158**, the amount of the LPO is at the discretion of the court, as long as it does not exceed the proceeds themselves after taking into account the expenses incurred in deriving the proceeds, tax paid and / or any other forfeiture order, PPO, previous LPO etc. Note the LPOs can also cover expected future benefits - for example where a person the subject of the order is entitled to royalties or progress payments: **new section 178**.

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LPOs are obtained in a similar way to other types of orders under the Bill. Although a conviction is not required for the court to make a LPO, if a LPO has been made 'in relation' to a conviction, a quashing of that conviction will discharge the LPO unless a confirmation order is applied for: **new section 173**. A court may make such a confirmation order if it is satisfied that at the time the LPO was originally applied for, it would have been satisfied on the balance of probabilities that the person committed the relevant offence: **new section 176**.

Chapter 3 Information gathering

Part 3-1 Examinations

Examination provisions exist in the POCA 1987 (existing paragraph 48(1)(c) and in NSW, Western Australian and Victorian legislation, although the provisions are generally not as detailed or wide ranging as is proposed in the Bill.

New section 180 provides that where a restraining order is in force, a court may make an order that *any* person be 'examined' (questioned) about the 'affairs' (for example, the nature and location of any property) of:

- a person who owns or claims an interest in relevant property, and /or their spouse⁶³, or
- a person named in a restraining order as a suspect, and /or their spouse.

Examination orders can also be made where the DPP makes an application for confirmation of a forfeiture order, PPO or LPO: **new section 181**.

If an examination order has been made by the court, the DPP then must apply to an approved examiner for that examiner to give a notice to a person the subject of the order: **new section 183**. The notice may require the person to produce at the examination any documents specified in the notice: **new section 185**.

An approved examiner is defined as a person who holds an office or who is included in a class of people specified in proposed regulations or who has been specifically appointed by the Attorney-General under **new section 183**. The Explanatory Memorandum to the Bill comments:

It is currently anticipated that those who may be appointed as approved examiners would include Members of the Administrative Appeals Tribunal above a certain rank, Members of the Administrative Appeals Tribunal with at least five years admission as a legal practitioner, persons who have held judicial office and have signified their willingness to be an approved examiner, former Magistrates who have signified their willingness to be an approved examiner, and persons with relevant qualifications including at least five years admission as a practitioner who have signified their willingness to be an approved examiner.⁶⁴

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New section 187 enables the DPP and the approved examiner to examine a person on oath or affirmation. The approved examiner may require the person (the examinee) to take the oath or make the affirmation. **New subsection 187(5)** allows the approved examiner to require the examinee to answer a question put to the person at the examination that is relevant to the affairs of a person referred to above in **new section 180**.

Under **new section 188**, the examination must take place in private. The approved examiner, the examinee and their lawyer, the DPP and any person whom the approved examiner has directed may be present are the only people entitled to be present at the examination. Examinations can be conducted by video link in certain cases, as long as the examiner is satisfied it is consistent with the interests of justice: **new section 190**.

The role of the examinee's lawyer is circumscribed by **new section 189** in that it is the examiner who decides when the lawyer may 'address' the examiner and ask the examinee questions relevant to matters on which they have been examined. The approved examiner can also stop the examinee's lawyer addressing the approved examiner or stop the examination by the lawyer if the approved examiner thinks the lawyer is 'trying to obstruct the examination'. This provision is based directly on subsection 23(2) of the *Australian Securities and Investments Commission Act 2001*.

The approved examiner must make a record of the statements made at the examination if requested by the examinee or by the DPP: **new section 191**. Where the record is in writing, the approved examiner may require the examinee to read and sign it. However, the fact that the examinee signs it *because* of that requirement 'does not of itself constitute an acknowledgment by that person that the record is accurate': **new subsection 191(4)**. **New subsection 191(4)** has no obvious precedent in Australian legislation and it is difficult to know what evidentiary weight will be placed on such a record if it is subsequently disputed by the examinee. If the person being examined requests in writing a written copy of the record, the approved examiner must provide it without charge.

New section 193 allows the examiner to give directions preventing or restricting public disclosure of any information arising from the examination. In deciding whether to give a direction, examiner must 'have regard' to:

- whether such information is of a confidential nature or relates to the commission or suspected commission of an offence; and
- any unfair prejudice to a person's reputation that could result from possible disclosure; and
- whether it is in the public interest to give the direction; and
- any other relevant matter

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Disclosure contrary to the direction is an offence attracting a maximum penalty of a fine of 30 penalty units: **new section 201**. Disclosure for the purpose of legal advice in or legal proceedings does not constitute an offence.⁶⁵

New sections 195 and 196 create various offences such as failing to attend an examination, refusing to take an oath or affirmation, refusing to answer a question or produce a required document etc. However a person cannot be compelled (ie they can refuse) to answer a question or produce a document if another law allows them to do so, *except* if the *only* reason why the person could not be so compelled is because of self incrimination, legal professional privilege, or because the answer or the document would be under statute inadmissible in legal proceedings for a reason other than being privileged from disclosure: **new section 197**. A contractual obligation not to disclose information or an obligation under a foreign law not to disclose information cannot excuse a person from refusing to answer a question or produce a document. Maximum penalties for breaches of **new sections 195 and 196** are 6 months imprisonment or a fine of 30 penalty units, or both.

New section 198 provides that an answer given or document produced in an examination *cannot* be used in civil or criminal proceedings against the person who gave the answer or produced the document, *except* in certain circumstances which directly relate to proceedings under the Act.⁶⁶ Note that **new section 198** *does not* confer 'derivative-use immunity' - thus information or things that are subsequently obtained by authorities acting on information from the examination are potentially admissible in civil or criminal proceedings. The Victorian and Western Australian legislation do not give *any* type of immunity for civil proceedings.⁶⁷ The Western legislation is ambiguous about whether any immunity is given for criminal proceedings.

Part 3-2 Production orders

New section 202 provides that, on application by an authorised officer of an enforcement agency, a magistrate⁶⁸ may make a production order requiring a person to produce, or make available for inspection, property-tracking documents. The definition of property-tracking document is extremely wide and would effectively include almost any financial document, although where the relevant offence is a non-serious indictable offence, the person to whom the property relates must be at least proposed to be charged with the offence. For serious offences, reasonable grounds to suspect the person of a relevant offence (although the specific offence need not be identified) is sufficient.

An order can only be made if the magistrate is satisfied that the person is reasonably suspected of having possession or control of property-tracking documents. Also, a production order can only cover documents that are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business. According to the Explanatory Memorandum to the Bill,

...this restriction on the type of documents that can be required has been made because the privilege against self-incrimination does not apply to production orders

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and only a use immunity is conferred preventing their admissibility in certain criminal proceedings. No derivative use immunity has been conferred and therefore no documents in the custody of an individual that relate to the affairs of an individual can be compelled to be produced. These must be sought under an examination order or seized under the search powers.⁶⁹

New subsection 206(2) provides that any document produced or made available is *not* admissible in evidence in criminal proceedings against a natural person (as opposed to a company) except for the standard provision of prosecution for giving false or misleading information or documents. By comparison, existing subsection 66(13) of the POCA 1987 goes further than **new subsection 206(2)** in that POCA 1987 also provides derivative use immunity in relation to documents.

New section 209 makes it an offence to make a false or misleading statement in, or in connection with, an application for a production order. The maximum penalty is 12 months' imprisonment and /or a fine of 60 penalty units, or both. **New section 210** also creates entirely new offences of disclosing the existence or nature of the production order (including information that could allow a person to infer its existence or nature) where the order prohibits this. Penalties are double that for **new section 209**. Disclosure for the purpose of obtaining legal advice or in legal proceedings of information covered by a direction does not constitute an offence, nor where the disclosure is made to an employee, agent or other person in particular circumstances. As for **new section 201**, the defendant bears an evidential onus in relation to those exceptions.

New section 211 provides that it is an offence to fail to comply with a production order where the order is given to the person and that person has not been notified of 'sufficient compliance' in relation to the order. Sufficient compliance occurs where that person gives any authorised officer a statutory declaration stating that the person does not have possession or control of the document, and the officer notifies the person that the declaration is sufficient compliance with the production order. The maximum penalty for breach of **new section 211** is 6 months' imprisonment and /or a fine of 30 penalty units, or both. Destroying or interfering with a document subject to a production order attracts the same penalty under **new section 212**.

Part 3-3 Notices to financial organisations

There are no equivalent provisions in the POCA 1987 nor does it appear there are any in other Australian jurisdictions.

The Explanatory Memorandum comments in relation to this element of the Bill:

This is a form of investigative power, and may be exercised to allow the investigator to make a decision on whether to take action under the Act eg to seek a warrant or production order, or for the purpose of proceedings under the Act. One of the reasons for the Notice is for AFP or NCA investigators to discover if a person holds an account with the particular institution: that is, there may be a known suspect, but the location of their funds is not known. The provisions are based on Recommendation 76

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of the 1999 ALRC Report *Confiscation that counts: A review of the Proceeds of Crime Act 1987*.⁷⁰

Under **new section 213**, certain senior members of the AFP or any member of the NCA may give a written notice to a financial institution requiring the production of any information or documents relevant to certain account and transaction information. There is no involvement of a court. The notice can only be given if the officer reasonably believes that giving the notice is required to determine whether to take action under the Act, or in relation to proceedings under the Act.

New section 215 provides that a financial institution or any of its officers, employees or agents are protected from any action, suit or proceeding in relation to any action taken by the institution or person in relation to its or their response to a notice under **new section 213**, or in the mistaken belief that action was required under the notice.

Similar offences and penalties as to production orders apply regarding unauthorised disclosure, failing to comply, making false statements etc: see **new sections 216-218**.

Part 3-5 Monitoring orders

Monitoring orders provisions are found in the POCA and most other Australian confiscation legislation.

New section 219 allows a judge of a State or Territory court⁷¹ to make a monitoring order that a financial institution provide information about transactions conducted during a particular period through an account held by a particular person with the institution. The judge must not make the order unless satisfied that there are reasonable grounds for suspecting that the person has committed, or is about to commit, a serious offence; was involved in the commission, or is about to be involved in the commission, of a serious offence; or has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious offence. An order may also be made if the judge is satisfied that there are reasonable grounds for suspecting that an account is being used, to commit a money laundering offence against Part 10.2 of the *Criminal Code Act 1995*. It is irrelevant whether the person who holds the account themselves commits or is involved in the money laundering in question.

The same type of protection from suits applies in **new section 221** as referred to earlier in **new section 215**. Also, similar offences, but substantially heavier penalties as compared to notices to financial institutions apply regarding unauthorised disclosure, failing to comply, making false statements etc: **new sections 222-224**.

Part 3-5 Search and Seizure

New section 225 enables a magistrate to issue a search warrant if satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be within the

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next 72 hours, tainted property⁷² or evidential material at the premises. This 72 hour limit is reduced to 48 hours if the application is made by telephone or other electronic means.

The Bill's search and seizure are all fairly standard provisions, and many are based on existing sections of the *Crimes Act 1914*. Documents and other information which are subject to legal professional privilege cannot be seized: **new section 264**.

New section 237 provides that a search warrant cannot authorise a strip search or a search of person's body cavities. Should a person be arrested, a person can be subject to strip searches under the circumstances outlined in existing section 3ZH of the *Crimes Act 1914*.⁷³ The taking of blood samples and the like are governed by existing Part 1D of the *Crimes Act 1914*.

Force may be used in executing a warrant if it is 'necessary and reasonable in the circumstances': **new section 238**. The provision is based on section 3G⁷⁴ of the *Crimes Act 1914*.

A copy of the warrant and a document setting out the rights of the person must be made available to the occupier of the premises (or another person who apparently represents the occupier) if they are on the premises at the time: **new section 240**. A copy of the warrant must also be made available to the person being searched under the warrant.

Occupiers of a place the subject of a warrant are entitled to remain and observe *except* if they impede the search, or if they are under arrest and allowing the person to observe the search 'would interfere with the objectives of the search': **new section 241**.

New section 244 enables a thing found at premises during the course of a search to be moved to another place for examination or processing in order to determine whether it may be seized. That may occur provided the occupier consents, or, if the occupier does not consent, provided that two other conditions are satisfied. Firstly, there must be reasonable grounds to believe that the thing contains or constitutes evidential material. And, secondly, it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance.

Things moved off premises under **new section 244** may be held for only 72 hours, unless a magistrate grants an extension.⁷⁵ The occupier of the premises from whence the thing was moved, or their representative, is entitled to be present during the examination or processing if 'it is practicable'.

Upon application, a magistrate may grant a search 'assistance' order in relation to data held in or accessible from a computer: **new section 246**. To grant the order, the magistrate would have to be satisfied that (i) there are reasonable grounds for suspecting that evidential material is accessible from the computer; (ii) the specified person falls within a certain category of persons (for example, the owner or lessee of the computer); and (iii) the specified person has certain knowledge concerning the computer.

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If damage is caused to equipment⁷⁶ when it is operated by persons involved in the search and seizure operations, compensation is payable, but *only* if the damage resulted from insufficient care being exercised either in selecting the person to operate the equipment or by the person operating it. This limited liability is contained other Commonwealth legislation such as the *Cybercrime Act 2001*.

Searches of vehicles, aircraft, ships etc may be made without warrant if an officer 'suspects on reasonable grounds' that they contain tainted property or evidential material, it is necessary to seize the thing to prevent concealment, loss or destruction and that it is necessary to act immediately 'because the circumstances are serious and urgent'; **new section 251**.

The effect of **new section 263** is that the provisions in **new sections 225-266** do not subtract from any powers or limitations contained in other relevant Commonwealth, State or Territory laws. The Explanatory Memorandum to the Bill comments:

This ensures that, despite references in Part 3-5 to the search of persons or premises etc, officers investigating offences under the Act will still be able to avail themselves of any relevant laws (for example, similar provisions in Part 1AA of the *Crimes Act 1914*).⁷⁷

New section 265 provides that a magistrate in a State, the Northern Territory, Norfolk Island or the Australian Capital Territory may issue a search warrant in that State or Territory; another State or Territory if he or she is satisfied that there are special circumstances that make the issue of the search warrant appropriate; or a non-governing Territory.

Chapter 4 - Administration

Part 4-2 Legal assistance

New section 292 requires that the Official Trustee reimburse legal aid commissions (LACs) from the suspect's restrained assets for the cost of representing the suspect in criminal proceedings and proceedings under the Act. Similarly the Official Trustee is required to reimburse legal aid commissions (LACs) from restrained property of other persons for the costs of representing those persons in proceedings under the Act.

If legal costs reimbursable under **new section 292** are greater than the value of restrained assets, the LAC can recover the difference from the Confiscated Assets Account (CAA): **new section 293**. A LAC can also be reimbursed from the CAA where the disposal by the Official Trustee of the restrained assets would take considerable time.

The issue of legal assistance is discussed in the concluding comments section to this Digest.

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Part 4-3 Confiscated Assets Account (CAA)

The proceeds of confiscated assets and various other moneys are to be placed in a special account established by **new section 295**. **New section 298** gives the responsible Minister power to approve the use of money in the CAA for one or more purposes relating to crime prevention, law enforcement, drug treatment and diversionary measures relating to the illegal use of drugs.

Part 4-4 Charges over restrained property

New section 300 enables the costs of LACs to be met prior to the restrained assets being released by creating a charge on the property for the payment of the LAC expenses.

Chapter 5 - Miscellaneous

New section 315 provides that all proceedings under the Act are civil proceedings and that *except* for the offence provisions contained in the Act, the rules of construction and evidence applicable in civil, rather than criminal, law apply.

New Section 317 provides that subject to **new sections 52** and **118**⁷⁸, all questions of fact determined by the court in relation to an application are to be determined according to a civil standard, ie the balance of probabilities, rather than a criminal standard, ie beyond reasonable doubt. It also states that it is the applicant for any order under the Act that bears the burden of proof in terms of establishing any grounds necessary for making the order.

Where any court is considering a sentence for a person convicted of an indictable offence on which a forfeiture order, LPO or PPO is based, **new section 320** sets out what matters the court may or must take into account. In particular, the court cannot reduce a person's sentence on the grounds that they forfeited the proceeds of the offence.

New section 322 enables a person against whom a forfeiture order, LPO or PPO is made, or whose interest in property is subject to such orders to appeal the orders. It is equivalent to existing section 100 in the POCA 1987.

Where the order was made in reliance of a *conviction* of an offence, **new subsection 322(2)** provides that the person may appeal against the order in the same manner as if it was part of the sentence imposed by a court in respect of the offence.

New subsection 322(3) provides that, in any other case (that is, where the relevant order was not made in reliance of a conviction), the person may appeal against the targeted order as if the person had been convicted of the offence to which the primary order relates and that order was, or was part of, a sentence imposed on the person in respect of the offence.

The DPP may appeal against both the making of an order by the court or the refusal by a court to make an order: **new subsection 322(5)**.

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New subsection 323(1) sets out the circumstances in which the court may order the Commonwealth to pay all costs incurred by a person involved in certain proceedings in relation to forfeiture or restraining orders. These are:

- the person must bring, or appear at, proceedings under the Act in order to prevent a forfeiture order or restraining order from being made against property of the person, or to have property excluded from such orders; and
- the person must be successful in the proceedings; and
- the court must be satisfied that the person is not involved in the commission of the offence relating to the orders.

New subsection 324(1) deals with the constitutional issue of separation of powers.⁷⁹ Specifically, it provides that powers conferred by the Bill on a State or Territory judge or on a magistrate that are neither judicial nor incidental to a judicial function or power, are powers conferred on that person in a personal capacity and not as a court or a member of a court. They not obliged to accept the power conferred. **New subsection 324(3)** provides that in exercising a conferred power, such judges or magistrates nonetheless have the same protection or immunity as if they were exercising judicial power as a member of their relevant court.

New section 327 requires the responsible Minister to cause an independent review of the Act to be undertaken as soon as practicable after the Act has been in operation for three years. The review report must be in writing, provided to the Minister and then tabled in both houses of Parliament within 15 days of its receipt by the Minister.

Concluding Comments

The need for non-conviction based confiscation

The centrepiece of the Bill is the power given to a court to confiscate property on the basis that it is satisfied on the balance of probabilities that property was acquired as a result of a serious offence being committed.

The arguments for and against such non-conviction based confiscation were extensively canvassed before the Senate Committee and are not repeated here in any length. However, the Committee was clearly of the view that the evidence suggested that non-conviction based confiscation was more effective than conviction-based schemes in 'locating and confiscating the proceeds of crime'. The Committee was not persuaded that the perceived ineffectiveness non-conviction based confiscation was more a function of a possible lack of resources given to law enforcement agencies. The Committee also seems to have given implicit acknowledgment that the Commonwealth law enforcement agencies

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would seek to work through State non-conviction based confiscation schemes if the Bill was not passed and accordingly:

in this view the debate has moved on from the implications of civil forfeiture to the need to ensure that the Commonwealth is as well equipped as the States to combat organised crime.⁸⁰

It is worthwhile to reproduce a small section of the ALRC report that considered the issue of confiscation without conviction:

2.64 If the conclusion is reached that the justification for confiscation of profits springs from conviction for a criminal offence, the establishment of a complementary civil regime under which confiscation would follow from a civil finding of unlawful conduct on the balance of probabilities could be seen to give rise to civil liberties concerns. Specifically, the question might be raised whether what was seen as in essence a remedy ancillary to a finding of proven criminality beyond a reasonable doubt could now be brought to bear on a defendant without such a finding, ie by the discharge of the lower civil burden of proof.

2.65 If, on the other hand, the better analysis is that the denial of profits is to be regarded as rooted in a broader concept that no person should be entitled to be unjustly enriched from any unlawful conduct, criminal or otherwise, conviction of a criminal offence could properly be seen as but one circumstance justifying forfeiture rather than as the single precipitating circumstance for recovery of unjust enrichment.

2.66 It is the Commission's considered opinion that the latter analysis is to be preferred. Its assessment is based on public policy considerations, taking into account a clear pattern of developing judicial and legislative recognition of a general principle that the law should not countenance the retention by any person, whether at the expense of another individual or society at large, of the profits of unlawful conduct.

Safeguarding third parties and legitimately acquired property

The range of property that is subject to restraining orders depends both on the basis of the order (eg whether a person is proposed to be charged or not, whether the suspected offence is a serious offence or not) and whether property is the suspect's or belongs to a third party. In general, third party property⁸¹ can only be restrained if the court is satisfied it is proceeds of the offence. Property is considered to be proceeds of the offence even if only part of it is 'derived or realised' from the offence - such as a house that was jointly acquired by a suspect and an (innocent) third party with each contributing 50%. Property that was formerly proceeds of the offence will cease to become so if a third party acquires it at its fair value and in entirely good faith.

In terms of safeguards, the court may require the Commonwealth to give an undertaking 'with respect to costs or damages' before restraining property. Should such an undertaking

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be given, presumably this allows a person who is subsequently successful in releasing property from restraining or other orders to be appropriately compensated.

Applications may be made by any person whose property is covered by either a restraining or forfeiture order to have it excluded from the order, generally on the basis it isn't proceeds of any offence. The applicant must show this on the balance of probabilities. Property may be excluded from a forfeiture order in a similar manner.

If the court does decide to make a forfeiture order over property such as the jointly owned house mentioned above, it can ensure that the innocent third party is paid an amount on disposal of the house that would equal their 50% share. Alternatively, the third party could buy out the suspect's share (proceeds going to the Commonwealth). Even persons who have been convicted of an offence and consequently had property forfeited as proceeds can be compensated if they can demonstrate some portion of the property was acquired with legitimate funds.

The court can make an order for the benefit of dependant(s) of a person whose property is the subject of a non-conviction based forfeiture order. To do so, the court must be satisfied that both the amount of the beneficial order would relieve the hardship that they would otherwise experience and, where the dependant is 18 years or over, that they had no knowledge of the relevant conduct of the person to whom the forfeiture order applies.

Legal Assistance

As mentioned in the main provisions section of this digest, POCA 1987 allows the court to make restrained property available to meet a persons 'reasonable expenses in defending a criminal charge'. In most instances, such a charge would be the one that gave rise to the restraining order itself. There is no common policy in other Australian jurisdictions on this issue. For example, the Victorian *Confiscation Act 1997* and Western Australia *Criminal Property Confiscation Act 2000* do not provide for the payment legal expenses from restrained property. However, the Queensland *Crimes (Confiscation) Act 1989* and NSW *Criminal Assets Recovery Act 1990* allow it, provided the court is satisfied that the funds being used for payment are not proceeds of the offence / proceeds from illegal activity.

The ALRC report recommended that the model contained in POCA 1987 - ie that restrained property could be made available for legal expenses - be discontinued. The report recommended that the defendant would have a primary obligation to fund legal expenses from unrestrained property but if they could not do so they would be entitled to apply for legal aid. The relevant legal aid commission would be *obliged by legislation* to provide such aid as to mount an 'adequate' defence. The defendant would be entitled to seek a review by a court if they considered the aid inadequate.⁸²

The Bill adopts the ALRC report as far as discontinuing the POCA 1987 model *but does not* oblige LACs to provide for an 'adequate' defence, nor is there a role for a court in

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reviewing the commission's decision on the matter. Rather, the Government intends to handle the matter through administrative guidelines. The second reading speech states:

Legal assistance in confiscation proceedings will be made a Commonwealth priority under the Commonwealth legal aid guidelines and priorities. Restrained assets are to be ignored for the purposes of the means test. The bill enables legal aid commissions to be reimbursed for the provision of such legal assistance from the restrained assets of the person and, to the extent of any deficiency, from the confiscated assets account. In this way all persons the subject of proceedings under the bill will be able to seek assistance from commissions without impacting adversely on other legal aid priorities.

The guidelines mentioned in the second reading speech do not appear to have been publicly released at the time of writing. It is also unclear from the above whether legal assistance will also be made available as a 'priority' for a person seeking to defend a criminal charge that *gives rise to* confiscation proceedings as well as the confiscation proceedings themselves. This ambiguity needs to be addressed.

One other legal assistance issue that was identified in the Senate Committee report was that relating to a the situation of a person's contribution to the cost of their legal aid. The relevant section of the report stated:

3.41 Where the restrained property is subsequently found not to have been illegally acquired and is returned to the owner then, the Attorney-General's Department advises:

...those assets would be taken into consideration in determining the amount of any final contribution that person may be required to make towards the cost of the legal assistance provided. Depending on the outcome of the means test assessment, a contribution covering the full cost of the grant may be imposed.

3.42 The Committee considers it unreasonable that a person found to have acquired property lawfully and not through criminal activity should be required to bear the costs of proving their innocence [and] **recommends** that consideration be given to amending the legal aid provisions of the Bill to address this issue.

However, a person who is successful in having property removed from a restraining / forfeiture order or in having a restraining / forfeiture order revoked would *not necessarily* end up bearing the burden of the 'final contribution' mentioned in the Attorney-General's Department statement above.

Using a purely hypothetical example, say it cost a Legal Aid Commission (LAC) \$50,000 to provide a successful defence of against an application for a forfeiture order. The LAC would apply its means test, and, taking into account the restrained property, might decide that the property owner must contribute \$10,000. This \$10,000 would be taken from the relevant property *before* it is returned to the owner, leaving the owner with only \$40,000 of property. The owner would then be able to ask the court to make an order for costs

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against the DPP under **new section 323**⁸³ for \$10,000 (plus any other costs, eg travel costs to attend hearings to give evidence). They would also be able to make a claim against any **new section 21** undertaking that is in place for damages that might have occurred due to the restraint of the property, eg business losses.

Endnotes

- 1 This provided for, upon conviction of an offence, for the forfeiture of money used in connection with, or resulting from, drug smuggling.
- 2 See Division 3 of Part XIII and in particular section 234D which establishes a presumption that the narcotics in question were illegally imported if the court is satisfied that they are 'reasonably suspected' of being so imported.
- 3 *Confiscation that counts: a review of the Proceeds of Crimes Act 1987*, Australian Law Reform Commission 1999 at <http://www.austlii.edu.au/au/other/alrc/publications/reports/87/>
- 4 Although for the Victorian Act the non conviction based elements of the Act only apply to certain narcotics activity.
- 5 Op cit, at paragraph 1.5.
- 6 'ALRC urges reform to proceeds of crime laws' *ALRC Media release* Wednesday 16 June 1999
- 7 http://www.aph.gov.au/senate/committee/legcon_ctte/proceedsofcrime/proceedsofcrime.pdf
- 8 Although the 1987 POCA is not repealed by the Bill.
- 9 Indictable offences are offences normally heard before a judge and jury, as opposed to a magistrate.
- 10 This would generally be a State district or county court. However, whether the application relates to an offence under which a person has been convicted by a particular magistrate, that magistrate may also hear an application and make orders. Under the equivalent provision in the 1987 POC (section 43), applications must be made to a Supreme Court.
- 11 This is because questions of fact are to be decided on the balance of probabilities: **new subsection 317(2)**.
- 12 The discretion of the court to refuse to make a restraining order on this ground applies to any of the orders covered by **new sections 17-20**.
- 13 However, by way of illustrating the concept of public interest in associated context, a excerpt from the prosecution policy of the of the Office of the Director of Public Prosecutions is at Appendix 2.
- 14 Other legislation, such as subsection 16(1) of the Victorian *Confiscation Act 1997* also has this 48 hour requirement.
- 15 See footnote 6 above.

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- 16 A terrorism offence is defined as an offence against (proposed) Part 5-3 of the Criminal Code. The proposed Part 5-3 is contained in Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]. An analysis of the Bill is in the relevant Bills Digest at <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd126.pdf>. Note that the Senate Legal and Constitutional committee report into the Bill has recommended changes to proposed Part 5-3: see especially Chapter 3 of the committee report, recommendations 2 and 3 at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/Security.pdf
- 17 Note that a serious offence would fall within the definition of an indictable offence.
- 18 This means an offence against the law of another country where the same conduct, had it occurred in Australia, would also constitute an offence in Australia punishable by at least 12 months imprisonment.
- 19 This person does not have to be identified.
- 20 Includes 'reasonable' living expenses of the person or their dependents or 'reasonable' business expenses.
- 21 This rule applies to all persons, including persons not suspected of being party to any offence.
- 22 Note that this would mean that property *could not* be used to fight restraining and forfeiture proceedings per se as these are not criminal proceedings.
- 23 An interest is defined in **new section 338**.
- 24 Neither POCA 1987 nor the Bill states whether, before allowing a person to give evidence, a court must be satisfied that a claim is reasonable one, but presumably this is the case.
- 25 The Explanatory Memorandum to the Bill comments that 'an application would usually be made *ex parte* where there is a risk that the assets would be dissipated, or that an investigation may be jeopardised by the provision of affidavit material': at p. 12.
- 26 Proceeds are defined in **new section 329**. Note that property is considered to be proceeds even if, for example, it is only partly acquired with the proceeds of an offence. For instance, if smuggled narcotics were sold in Australia for \$50,000 and that sum was used with \$150,000 of 'legitimate' funds to purchase a \$200,000 house, the entire house would be considered to be proceeds with the Bill. See **new section 330** for full details. There is no direct equivalent in POCA 1987 so this may represent an expansion.
- 27 That is, property used, or intended to be used, in connection with the relevant offence: see **new section 329**.
- 28 Assuming of course the property has not already been forfeited, either by court order or through 'automatic' forfeiture for serious offences.
- 29 This is not defined in the Bill.
- 30 Recklessness with respect to a circumstance is defined in the Criminal Code as 'he or she is aware of a substantial risk that the [circumstance] will occur and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.

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- 31 Reckless is the default (ie 'standard') fault element under the *Criminal Code 1995* in relation to a physical circumstance - in the case of paragraph 37(1)(b), the fact the property is covered by a restraining order.
- 32 Under the Criminal Code, a reasonable mistake of fact is a defence to a strict liability charge.
- 33 See evidence presented on 27 March in public hearings to the Senate Committee.
- 34 At page 47.
- 35 Confirmation orders are discussed later in this Digest.
- 36 Certain offences relating to the transfer of large sums of money, opening bank accounts under false names under the *Transaction Reports Act 1988* may be excluded from new section 45 depending on the circumstances.
- 37 However, there is no 6-year time limit on terrorism offences.
- 38 Under **new section 54**, where evidence is given that particular property was in a person's possession at the time of, or immediately after, the commission of an offence and no contrary evidence is given that tends to show the property was not used in, or in connection with, the offence, the court must presume that the property was so used, and thus is an instrument of the offence. If such contrary evidence is given, the court must be satisfied that the property was used or intended to be used in, or in connection with, the commission of the offence before it can make a forfeiture order on the basis that the property is an instrument of the offence.
- 39 Certain offences relating to the transfer of large sums of money, opening bank accounts under false names under the *Transaction Reports Act 1988* may be excluded from new **section 45** depending on the circumstances.
- 40 At p. 25.
- 41 Under **new section 57**, the court values the property, but the Bill does not seem to require the buyback price to be at that value.
- 42 Note that the DPP does not require court leave to apply for a different type of forfeiture order (for example a **new section 48** order if the order application was for a **new section 48** order).
- 43 There are also notice requirements where applications are amended to include additional property: **new section 62**.
- 44 The Official Trustee in Bankruptcy is the Commonwealth entity that handles and if necessary disposes of restrained and / or confiscated property.
- 45 There are restrictions on applying for an exclusion order. Under **new section 74**, if the person had notice of forfeiture application but did not appear at the hearing, or where they did appear (and thus their evidence taken into account), or where 6 months have elapsed from the making of the forfeiture orders, persons require the leave of the court to apply.
- 46 'Unlawful activity' is defined to include State, Northern Territory and ACT indictable offences, as well as indictable offences against the laws of the Commonwealth, external Territories and foreign countries. The property must also not be an instrument of any terrorism offence.

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- 47 In theory, if in the trial (in the case of an acquittal) or quashing (through an appeal process) demonstrates that the evidence does not even support a balance of probabilities verdict, we have an interesting situation of a court implicitly saying that **new section 47 or 49 forfeiture** order should not have been made had all facts been known at the time. In reality, however, a criminal court would only be concerned whether or not the evidence met the beyond reasonable standard rather than making any comment about the balance of probabilities standard.
- 48 There are various procedural elements regarding such an application, including giving affected persons notice of the application and the right to be heard on an application.
- 49 If the court confirms the forfeiture order on the ground that it could have made a **new section 47** order, the forfeiture order remains in force only to the extent that it covers the proceeds of a specified offence.
- 50 **New section 92** does not apply in situations where a person who deemed to have been convicted because they absconded within the meaning of **paragraph 331(1)(d)**.
- 51 The order does not have to be made pursuant to the actual offence that a person is subsequently convicted of: it is enough if it is made pursuant to a 'related offence'. The Explanatory Memorandum comments: 'This clause ensures that where a restraining order is made in the early stages of proceedings against a person in order to prevent dissipation of assets a new order does not have to be made if the offence with which the person is ultimately charged, or the charges which are ultimately proceeded with against the person, differ from those on which the restraining order was based, provided they relate to the same criminal activities or conduct'.
- 52 See **new Part 4-3**.
- 53 Providing there are no other remaining relevant convictions.
- 54 There are various procedural elements regarding such an application, including giving affected persons notice of the application and the right to be heard on an application.
- 55 However, if forfeiture is confirmed on **new section 49** grounds, the confirmation only applies to any property that is the proceeds of the offence in question: **new section 111**.
- 56 Except for terrorism offences, the offence must have occurred within 6 years before the application being made
- 57 Again, the time limit does not apply for terrorism offences.
- 58 For example, if the person had property worth \$1million just before the offence, which then grew to \$5 million shortly after the offence, but then dwindled to \$2 million at the time of PPO application, the value of the benefits potentially subject to a PPO would be \$4 million, not \$1 million.
- 59 The burden of proof lies on the person who is subject to the PPO.
- 60 Or a foreign indictable offence. In such cases, the proceeds must have been derived in Australia
- 61 Or the notoriety of an accomplice.

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- 62 The Explanatory Memorandum suggests public interest issues could include whether the product had any rehabilitative or deterrent value.
- 63 Including a de facto spouse.
- 64 At p. 64.
- 65 Note that subsection 13.3(3) of the Criminal Code says in part: 'A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter'.
- 66 They can also be used to bring prosecutions for giving false evidence.
- 67 See subsection 99(2) of the *Confiscation Act 1997* and section 61 of the *Criminal Property Confiscation Act 2000* respectively.
- 68 The POCA 1987 requires a Supreme Court Judge to decide production order applications.
- 69 At p. 69.
- 70 At p. 72.
- 71 The court must have jurisdiction to deal with criminal matters on indictment.
- 72 That is, proceeds of an indictable offence or the instrument of an indictable offence.
- 73 Body cavity searches for narcotic offences are dealt with in the *Customs Act 1901*.
- 74 Not 3H as stated in the Explanatory Memorandum.
- 75 The occupier of the premises from whence the thing was moved must be notified and is entitled to be heard before the magistrate to oppose the application.
- 76 Including where programs or data is corrupted.
- 77 At p. 87.
- 78 **New subparagraphs 58(b)(ii) and 118(b)(ii)** require the court to apply the criminal standard because those paragraphs deal with whether a jury could have lawfully found a person guilty of a criminal offence.
- 79 In this case, judicial and administrative-type powers.
- 80 Op cit paragraph 3.16.
- 81 Assuming that property is *not* under the effective control of the suspect.
- 82 See recommendation 66 of the report.
- 83 Under **new section 323**, costs are not confined to so-called 'party/party' costs and 'solicitor/client' costs but cover *all* costs incurred by the person in connection with proceedings under the Act. However, even if court awards costs, it is up to the court to decide whether to grant all costs or only a part of them.

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Appendix 1

Recommendations of the Senate Legal and Constitutional Legislation Committee

Main Committee Report

Recommendation 1

The Committee **recommends** that consideration be given to amending the legal aid provisions of the Bill to address this issue.

Recommendation 2

The Committee **recommends** that the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 be passed, subject to advice on the status of the review of the *Telecommunications (Interception) Act 1979* and adequate attention being given to the Committee's recommendation on legal assistance.

Additional recommendations from ALP Committee members

Recommendation 1

Opposition senators **recommend** that...clause 47 of the Bill should be amended to use the words of the NSW *Criminal Assets Recovery Act* in its equivalent provision. The clause would read as follows:

47(1)(c) it is more probable than not that:

- (i) a person engaged in conduct constituting one or more serious offences; and
- (ii) for each suspected offence that is not a terrorism offence ☉ the offence was committed within the 6 years preceding the application, or since the application was made.

Recommendation 2

Opposition senators **recommend** that clause 42 of the Bill be amended to allow a court to consider an extension under certain circumstances. The wording of such an amendment may be as follows:

42 (1) A person who was not notified of the application for a restraining order may, within 28 days after being notified of the order, apply to the court to revoke the order, unless granted an extension by the court on grounds being shown.

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Recommendation 3

Opposition senators **recommend** that in order to provide certainty, s.154 of the Bill should be amended by removing the word 'may' and inserting the word, 'should' as initially recommended by the ALRC.

Recommendation 4

Opposition senators **recommend** that the Bill be amended to insert a provision for formal review of the operation of the legislation within 3 years from commencement of the Bill. This provision should make particular reference to the operation of the provisions relating to the removal of derivative use immunity and the guidelines relating to legal assistance and examinations by the Director of Public Prosecutions.

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Appendix 2

Excerpt from the Prosecution Policy of the Office of the Director of Public Prosecutions

- (2.10) Factors which may arise for consideration in determining whether the public interest requires a prosecution include:
- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;
 - (b) any mitigating or aggravating circumstances;
 - (c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
 - (d) the alleged offender's antecedents and background;
 - (e) the staleness of the alleged offence;
 - (f) the degree of culpability of the alleged offender in connection with the offence;
 - (g) the effect on public order and morale;
 - (h) the obsolescence or obscurity of the law;
 - (i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
 - (j) the availability and efficacy of any alternatives to prosecution;
 - (k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
 - (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
 - (m) whether the alleged offence is of considerable public concern;
 - (n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
 - (o) the attitude of the victim of the alleged offence to a prosecution;
 - (p) the likely length and expense of a trial;

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- (q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (s) whether the alleged offence is triable only on indictment; and
- (t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.