

CRIMINAL PROPERTY CONFISCATION BILL 2000

Explanatory Notes

PART 1 – PRELIMINARY

Clause 1 Short Title

Short title of the Act

Clause 2 Commencement

The Act will come into operation on a date, or dates, to be specified by way of proclamation made by the Governor in Executive Council. This is because a number of new forms are required, and a number of Acts and Regulations need to be amended.

Clause 3 Meaning of Terms Used in this Act

In accordance with the modern style of drafting the definitions of words and expressions are included in the Glossary at the end of the Act.

Clause 4 Confiscable Property – Synopsis

By way of an overview, this Clause sets out the different types of property which is confiscable under the Act. The various classes of confiscable property are referred to and referenced to the relevant section of the Act.

Clause 5 Application of Act to Confiscable Property

Unless otherwise specifically provided, Acts operate from the date of commencement.

This Clause specifically provides that the Act applies prior to its commencement.

By subclause (2) very broad reach is given to the Act so as to ensure that the objective of ensuring that people do not benefit from crime can be achieved.

This Clause also provides that the Act has specific operation beyond Western Australia, to the fullest possible extent, otherwise achievement of the objectives of the Act could be readily defeated by those who have benefited, or stand to benefit, from involvement in criminal activity.

PART 2 – CONFISCATION OF PROPERTY

Clause 6 Unexplained Wealth, Criminal Benefits, Substituted Property

Clause 6 addresses the timing at which property is confiscated to satisfy a liability to pay an unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration. This Clause makes clear that when property, which includes money, is paid to the State to satisfy a declaration the property is confiscated. How that confiscated property is dealt with is provided for elsewhere in the Bill, namely Clause 131.

Clause 7 Automatic Confiscation of Certain Property

Subclause (1) provides that in the absence of an objection being filed, frozen property is confiscated without the need for the Court to determine any application.

For clarity, the date on which frozen property is confiscated in the absence of an objection being filed is fixed pursuant to the “service cut off date”, which is defined in Clause 149.

Subclause (2) specifies the circumstances in which property is confiscated where an objection has been filed within the time limit. The determination of objections is dealt with in Part 6.

As a freezing notice is not made by the Court, subclause (3) is required to bring the matter within the jurisdiction of the Court.

Clause 8 Drug Trafficker's Property

Contrary to other types of confiscable property, the confiscation of property on the basis that a person is declared a drug trafficker does not have retrospective operation. This is because the type of property which is confiscated is not limited to removing from a person illgotten gains but may extend to legitimate property, including property owned, effectively controlled or given away by the person who is declared a drug trafficker.

Subclause (1) deals with confiscation arising from the declaration that a person is a drug trafficker and provides the time at which relevant property is confiscated, namely the date on which the person is declared to be a drug trafficker. Property acquired by the person after that date is not confiscated as a result of that declaration.

Subclause (2) deals with confiscation arising in specified cases where a person hasn't been declared, but is taken to be, a drug trafficker. A person is taken to be a declared drug trafficker under Clause 158(2) in specified circumstances if he cannot be found or he dies prior to the relevant charge being finalised. Without these provisions the

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objectives of the Act would be defeated where the accused person has fled the jurisdiction or died.

Subclause (3) makes clear that the retrospective limitations in relation to confiscation of the property of a declared drug trafficker does not limit the confiscation of crime-used or crime-derived property whether or not such property is owned by a declared drug trafficker. That is, such property is dealt with in the same manner for convicted drug traffickers as it is for all persons caught in the net of the Act.

Likewise, subclauses (4) and (5) make clear that the retrospective limitations in relation to the confiscation of property of a declared drug trafficker do not limit the making of a criminal benefits declaration or an unexplained wealth declaration against such a person.

Essentially subclauses (3), (4) and (5) make it explicit that the confiscation of crime-derived or crime-used property, and the making of a criminal benefits and unexplained wealth declarations, is not dealt with by the Act in any different way simply because it may involve a declared drug trafficker.

Clause 9 Effective Confiscation – Registrable Real Property

Registrable real property is defined in the Glossary as property to which the *Transfer of Land Act* 1893 applies. This is distinguished from other types of land, for example, old title land.

Because of the principle of indefeasibility of title, subclause (1) provides that land vests in the State only when the relevant document is registered with the Registrar of Titles.

Subclause (3) is required to address the hiatus between the time at which registrable real property is confiscated under the Act and the time at which it vests in the State. During this time it is necessary to ensure that the restrictions on dealing with the property which applied prior to the land being vested in the State continue to apply, and that the powers in relation to management of frozen property apply.

Clause 10 Effective Confiscation – Other Property

Subclause (1) effectively operates to specify the date on which property, other than registrable real property, vests in the State.

In order to ensure persons are put on notice in relation to confiscation of property, which is registrable under an enactment other than registrable real property, subclause (2) requires the DPP to notify the relevant Registrar. Because the principle of indefeasibility of title applies only to registrable real property, subclause (1) provides that all other types of property vest absolutely in the State at a time which is not dependant on any document being registered under a Register, but rather at the time at which the relevant section takes effect. For example, motor vehicles are recorded on the Register of Encumbered Vehicles (REVS). When a car has been confiscated under the Act the DPP will notify the Registrar of REVS that the car has been confiscated to the State.

PART 3 – IDENTIFYING AND RECOVERING CONFISCABLE PROPERTY

Division 1 – Unexplained Wealth

Clause 11 Applications for Unexplained Wealth Declarations

Given the nature of the application only the DPP may apply to the Court for the same.

For the effective operation of the Act, subclause (2) provides that an application may be made at any time.

Clause 12 Unexplained Wealth Declarations

Subclause (1) provides that the Court does not have a discretion to make an unexplained wealth declaration if it is satisfied on the civil standard of proof that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. That is, in such circumstances it is mandatory for the Court to make the declaration. As such a declaration is aimed at removing illgotten gains it is not appropriate that there be any discretion.

Subclause (2) places an onus of proof onto the Respondent to establish that his wealth was lawfully acquired. This is because it is easier for a person to establish that his wealth was lawfully acquired rather than for the State to establish the contrary. This provision is central to the advancement of the objectives of the Act. Failure to include such a provision would place heavy resource obligations on the State in seeking to establish that a person's wealth was not lawfully acquired.

Subclause (3) provides the Court with a range of powers in deciding whether the Respondent has unexplained wealth. That is, the Court has a wide discretion in having regard to a Respondent's income and expenditure over time.

Subclause (4) sets out the requirements placed on the Court in making a declaration, in terms of the process to be followed in assessing unexplained wealth and in specifying the value of the unexplained wealth in the declaration.

Subclause (5) provides wide powers to ensure the Court may make orders to give effect to a declaration it has made.

Clause 13 Assessing the Value of Unexplained Wealth

Subclause (1) sets out the basis upon which unexplained wealth is calculated. In order to achieve an accurate assessment of a person's unexplained wealth the method of assessment of unexplained wealth must be flexible and subclauses (2) and (3) are directed at this. For example, property which is acquired (such as shares) may increase or decrease in value. In assessing the value of unexplained wealth it may be appropriate to value property as at the date it was acquired, for example in the case where the value of shares purchased has decreased. Alternatively, it may be appropriate to value property on the day the application was made, for example in the case where the value of shares purchased has increased.

It is not appropriate for an unexplained wealth declaration to take into account the value of property which has previously been confiscated. To this end, subclause (4)

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specifies the matters that the Court must not take into account when assessing the value of a person's unexplained wealth.

Clause 14 Unexplained Wealth Payable to State

It is necessary to specify to whom the unexplained wealth is payable. Clause 14 provides that it is payable to the State and the amount which is so payable.

Division 2 – Criminal Benefits

Clause 15 Applications for Criminal Benefits Declarations

As with an application for an unexplained wealth declaration, only the DPP may apply to the Court for a criminal benefits declaration.

For the effective operation of the Act, subclause (2) provides that a declaration may be made at any time.

Clause 16 Criminal Benefits Declarations – Crime-Derived Property

Subclause (1) provides that the Court does not have a discretion to make a declaration that a person has acquired a criminal benefit if it is satisfied on the civil standard of proof of specified matters. That is, in such circumstances it is mandatory for the Court to make the declaration. As such a declaration is aimed at removing illgotten gains (and benefits acquired legitimately via criminal activity), it is not appropriate that there be any discretion.

An example of a criminal benefit referred to in subclause (1)(c) is money received legitimately by a person who was involved in the commission of a confiscation offence, for example, from selling the story of his involvement to a magazine for publication.

Subclause (2) is needed to overcome the legal limitations which would otherwise arise in relation to proving that a person has been involved in the commission of an offence.

Subclause (3) places an onus of proof on to the Respondent because it is easier for the Respondent to establish that the relevant property, service, advantages or benefit was not acquired as a result of his involvement in a confiscation offence than for the State to prove the contrary. This provision is central to the achievement of the objectives of the Act. Failure to include such a provision would, as for unexplained wealth, place heavy resource obligations on the State to establish that a person's wealth came from crime.

Clause 16 is directed to wealth acquired as a result of a crime, whether lawfully acquired or not.

Clause 17 Criminal Benefits Declarations – Unlawfully Acquired Property

By contrast to Clause 16, Clause 17 is directed solely to wealth which has not been lawfully acquired, as defined in Clause 148.

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Subclause (1) provides that the Court does not have a discretion to make a declaration that a person has acquired a criminal benefit if it is satisfied on the civil standard of proof of specified matters. That is, in such circumstances it is mandatory for the Court to make the declaration. An example of a criminal benefit referred to in subclause (1) is the money received from the sale of drugs. Such a declaration is aimed at removing illgotten gains and therefore it is not appropriate that there be any discretion.

Subclause (2) places an onus of proof on the Respondent in specified cases because it is easier for the Respondent to establish that the relevant property, service, advantage or benefit was lawfully acquired than for the State to establish the contrary.

This provision is central to the achievement of the objectives of the Act. Failure to include such a provision would, as for unexplained wealth, place heavy resource obligations on the State to establish that a person's wealth came from crime.

Clause 18 Limitations and Ancillary Orders

It is not appropriate for a criminal benefits declaration to take into account any property, service, advantage or benefit which has previously been confiscated or taken into account in making a declaration. To this end subclause (1) specifies the matters which the Court must not take into account in making a criminal benefits declaration. Without such a provision a person may be liable to pay the State the value of property many times over.

Subclause (2) sets out the requirements of the Court in making a declaration.

Subclause (3) provides wide powers to ensure the Court may make orders to give effect to a declaration it has made.

Clause 19 Assessing the Value of Criminal Benefits

In order to achieve an accurate assessment of criminal benefits, the method of assessment must be flexible and subclauses (1) and (2) are directed at this. For example, property which is acquired (such as shares) may increase or decrease in value. In assessing the value of criminal benefits it may be appropriate to value property as at the date it was acquired, for example in the case where the value of shares purchased has decreased. Alternatively, it may be appropriate to value property on the day the application was made, for example in the case where the value of shares purchased has increased. Without such a provision a person may not have removed from him the full value of his illgotten gains.

Clause 20 Criminal Benefits Payable to State

It is necessary to specify to whom criminal benefits are payable. Clause 20 provides that criminal benefits are payable to the State.

Division 3 – Crime-Used Property Substitution

Clause 21 Applications for Crime-Used Property Substitution Declaration

Given the nature of the application only the DPP may apply to the Court for the same.

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For the effective operation of the Act subclause (2) provides that a declaration may be made at any time.

Clause 22 Crime-Used Property Substitution Declarations

Subclause (1) provides a crime-used property substitution declaration may be made to ensure that a person does not benefit from using someone else's property in a crime, or in disposing of his property prior to it being frozen. This is achieved by the Court declaring that the person must pay to the State an amount equal to the value of the property which he used in the crime. A crime-used property substitution declaration is relevant where the property used in a crime isn't available for confiscation.

There can be a number of reasons for this as provided in subclause (2). For example, where a person who committed the crime, used property which belonged to someone else. If he had used his own property it would be liable to confiscation. Therefore, in the absence of a power to make a crime-used property substitution declaration, a person is effectively encouraged to use property belonging to another person rather than his own property in the commission of a crime. The absence of such a provision would create an incentive to steal property for use in the commission of further offences.

Another circumstance in which a crime-used property substitution declaration is required is where a person has used his own property in a crime but has subsequently sold it. In this case, the inability of the Court to make a crime-used property substitution declaration will defeat the intention of the Act.

Subclause (3) and (4) places an onus of proof onto the Respondent to show he did not use the property in a crime in specified circumstances. This provision is necessary to achieve the objectives of the Act because it is easier for the Respondent to prove that he did not make criminal use of the property than for the State to prove the contrary.

Subclause (5) provides that in all other circumstances the State bears the onus of establishing that the Respondent made criminal use of the property.

Subclause (6) sets out the requirements of the Court in making a declaration.

Subclause (7) provides wide powers to the Court to ensure the effective operation of the Act.

Clause 23 Assessing the Value of Crime-Used Property

In order to ensure that the objectives of the Act are not defeated, subclause (1) provides that the amount payable under a crime-used property substitution declaration is the full value of the property, not just the value paid (if any) by the person in obtaining the use of the property. For example, a person may rent a house to manufacture drugs. He may do so because he does not want to make his own house liable to confiscation.

Subclause (2) makes it clear that the value of crime-used property is the full value of the property, whether or not the Respondent paid the full value of the property to acquire possession of the property. For example where he rented the property, for only 6 months, and thereby only paid a fraction of the value of the house.

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More than one person may make use of property in the same crime. For example, two or more people may be involved in manufacturing drugs in a rented house. Subclause (3) is required to make clear that a crime-used property substitution declaration may be made against more than one person. The issue of the quantum of recovery that can be made by the State is dealt with in Clause 24.

Clause 24 Substituted Property Payable to State

Clause 24 provides that the value of the property used in a crime is payable to the State and the amount which is so payable.

Subclause (2) is necessary so that the Court knows when more than one person has used property in a crime the amount for which each person is liable. It is not appropriate that each person only has to pay a share of the value of the property. However, nor is it appropriate that the State recovers the full value of the property from more than one person. Therefore, subclause (2) provides that each person must pay to the State the full value of the property, however only to the extent that the amount has not been paid by one or other of the Respondents who also used the property in the crime.

Division 4 – Recovery of Confiscable Property

Clause 25 Recovery of Unexplained Wealth, Criminal Benefits or Substituted Property

Clause 25, together with Clause 26, provides the scheme by which an amount payable pursuant to a declaration may be recovered.

Subclause (2) is necessary to provide the Court with power to allow to a person further time within which to pay the amount due, notwithstanding that the specified period has elapsed, otherwise the Court would not be able to do so.

Subclause (3) is necessary to enable the State to rely on the usual civil powers and procedures to recover unpaid amounts.

Clause 26 Use of Frozen Property to Meet Liability

It is necessary for the effective and efficient operation of the Act to provide wide powers for the State to recover amounts due to it.

In particular, subclause (2) is needed otherwise property which is frozen under the Act could not be executed against to satisfy the amount due to the State. This would be a severe restriction on the effective operation of the Act.

Clause 27 Use of Effectively Controlled Property or Gift to Meet Liability

Given the nature of the application only the DPP may apply to the Court for the same.

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For the effective operation of the Act subclause (2) provides that an application may be made at any time.

Clause 28 Confiscable Property Declaration

In order to achieve the objectives of the Act, subclause (1) extends the classes of property which can usually be used to satisfy a debt. Without the power to execute against property effectively controlled, or given away, by the person who owes the debt to the State, the ability of the State to recover may be severely restricted and the operation of the Act thereby defeated. For example, a person may seek to defeat the operation of the Act by giving all his property away. Subclause (1) is required to address this situation.

Subclause (2) places an onus of proof on to the Respondent in specified cases because it is easier for the Respondent to establish that he does not effectively control property, or did not give property away, than for the State to establish the contrary.

Subclause (3) provides wide powers to ensure the Court may give effect to the declaration it has made.

Clause 29 Restrictions on Confiscation of Declared Confiscable Property

For reasons of certainty, subclause (1) provides that property not owned by the Respondent must be specified in a confiscable property declaration before it is available to satisfy the Respondent's liability.

Because the usual method of satisfying a debt has been extended to property other than that owned by the person who is liable to pay the amount to the State, subclause (2) restricts the circumstances in which property specified in a confiscable property declaration is available to satisfy the Respondent's liability.

Clause 30 Declarations of Confiscation

For reasons of certainty, for example in relation to the sale of property, the DPP may seek a declaration that specific property has been confiscated. Subclause (1) is a power and not a duty.

Clause 31 Notice of Confiscation of Registrable Property

Because of the principle of indefeasibility of title in relation to land to which the *Transfer of Land Act 1893* applies, subclause (1) is necessary to provide the procedure by which land vests absolutely in the State.

In order that persons are put on notice of the confiscation of property other than such land, subclause (2) provides that it is necessary for the DPP to lodge specified material with the relevant Registrar.

Clause 32 Variation of Declarations

Where a Court has finally determined a matter it would, without Clause 32, have no further power in relation to that matter. This may cause practical difficulties. For example, after a declaration has been made a particular situation may arise which requires the Court to make a further declaration. Clause 32 is essential to ensure that the Court has power to take action necessary for the effective operation of the Act.

PART 4 – PREVENTING DEALINGS IN CONFISCABLE PROPERTY

Division 1 – Seizure of Crime-Used and Crime-Derived Property.

Clause 33 Seizure of Crime-Used or Crime-Derived Property

It is essential that property is frozen at the earliest opportunity to ensure that it is not disposed of prior to being dealt with under the Act. At the time police lay charges for confiscation offences, persons will be put on notice that property may be liable to confiscation under the Act. That person may then take action to divest himself of his property. It is therefore essential that Police Officers have power to seize particular types of property when they have reasonable grounds to suspect specified matters, as provided by subclause (1).

Crime-used property is defined in Clause 145 and crime-derived property is defined in Clause 147.

Depending on the factual situation it may not be practical for Police to remove seized property and therefore subclause (2) is necessary to provide power to the Police to guard, rather than remove, the seized property.

Whilst it is appropriate for Police Officers to have power to seize certain property to ensure it is not disposed of, it is not appropriate for such property to be retained indefinitely without the seizure being subject to independent review. Therefore subclause (3) provides that a Police Officer may only retain or guard property for 72 hours unless a freezing notice has been issued for the property within that period.

Subclause (4) is necessary otherwise income or property derived from seized property could be dealt with, thereby defeating the Act. An example of property derived from seized property is the progeny of seized livestock.

Division 2 – Freezing Notices for Crime-Used and Crime-Derived Property

Clause 34 Issue of Freezing Notices

Clause 34 ensures that property may be frozen without any requirement that it has, or can, be seized. An example of property which cannot be seized is monies credited to a bank account or land.

In order to ensure the effective operation of the Act it is essential that the DPP, as well as a Police Officer has power to apply for a freezing notice, and this is provided by subclause (1).

A person will be put on notice that property may be liable to confiscation under the Act when charges are laid by Police. It is therefore necessary for property to be frozen immediately. Therefore, subclause (1) provides that a freezing notice may be sought from a Justice of the Peace. This recognises that it would not be practical to require a freezing notice to be sought from a Magistrate. There are many towns in which there is no permanent Magistrate and many more towns in which a Magistrate does not attend at all. Having regard to the large numbers of items of property which will be the subject of freezing notices it would not be practical for the Act to require that a freezing notice be obtained from a Magistrate.

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As property must be frozen at an early stage in an investigation to ensure that it is available to be dealt with under the Act, a Police Officer may freeze specified property if he or she has reasonable grounds to suspect relevant matters. The test is necessarily not placed too high by virtue of subclause (2).

It is also necessary to freeze at an early stage all property of a person who may be declared a drug trafficker and subclause (3) provides this power.

Subclause (4) is necessary otherwise income or property derived from frozen property could be dealt with, thereby defeating the Act. An example of property derived from frozen property is the progeny of livestock the subject of the freezing notice.

Clause 35 Form of Freezing Notice

For reasons of consistency and certainty the contents of a freezing notice have been specified in subclause (1).

The estimate of the value of the property required in subclause (1)(b) is necessary to determine which Court has jurisdiction to hear an objection to the confiscation of property. Clause 101 provides the jurisdiction of the Courts.

It is necessary in some circumstances to record items of property which are in, or on, frozen property to ensure appropriate action can be taken if a person seeks to defeat the Act by removing or replacing items from frozen property. For example, if real

estate is frozen it will be appropriate to record details of the fittings, fixtures and chattels on the property. Subclause (3) provides the required power.

Clause 36 Service and Filing of Freezing Notices

Subclause (1) requires personal service of the freezing order not only because it is appropriate to ensure that a person has actual notification but also because of the consequences of a breach of the freezing notice. This includes the commission of an offence and the imposition of a penalty pursuant to Clause 50. Further, pursuant to Clause 51 a dealing in property in breach of a freezing notice has no force or effect on the rights of the State under the Act.

The usual civil rules in relation to personal service would apply under the Act and in appropriate cases an application may be made to the Court for an order that a person be served by way of substituted service, for example, by advertising in a newspaper.

The requirements of service are properly broad. They include the requirement to serve an interested party, namely “a person who has an interest in the property that would enable the person to succeed on an objection to the confiscation of the property”.

Due to the principle of indefeasibility of title, subclause (2) requires a memorial of the freezing notice to be lodged with the Registrar of Titles in relation to property to which the *Transfer of Land Act 1893* applies.

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To ensure that persons are put on notice of the freezing notice, subclause (3) requires notification to be given to the Registrar of a relevant register in specified cases.

The DPP and Police Officers will take appropriate action to identify all relevant people, for example, by searching registers in relation to the property and serve on them a copy of the freezing notice. However, the persons who are required to be served may be aware of further people who ought to be served. As a result of receiving information from a statutory declaration, pursuant to Clause 37, the DPP/Police may be made aware of further relevant people and subclause (4) requires that they also be served.

Because Clause 7 provides that property is automatically confiscated if no objection is filed within a specified period after service, there has to be some finality in relation to the service which is required under the Act. To this end, subclause (4) only requires the DPP or a Police Officer to embark on one second round of service on an interested party as a result of information provided in a statutory declaration.

However, subclause (5) makes it clear that there is no limitation on the ability of the person who obtained the freezing notice to serve any person they consider appropriate.

The requirements in subclause (6) are necessary to enable the Court to declare property has been automatically confiscated under the Act if no objection is filed within time.

Clause 37 Statutory Declarations Required Under Freezing Notice

The practical requirements in relation to a statutory declaration must be made clear and are specified in Clause 37.

Clause 38 Duration of Freezing Notice – Registrable Real Property

Due to the principle of indefeasibility of title, a freezing notice for land registered under the *Transfer of Land Act 1893* only takes effect, and only stops being in force, when the necessary document is registered.

Clause 39 Duration of Freezing Notice – Other Property

The principle of indefeasibility of title only applies to land registered under the *Transfer of Land Act 1893*. Therefore there is no necessity to require registration of the freezing notice or any other document in relation to other types of property before it comes into force or stops being in force.

However, to ensure that all relevant people are put on notice that a freezing notice has stopped being in force, the registrar of the relevant register must be advised.

Clause 40 Cancellation of Freezing Notices

In order to ensure that the Act operates efficiently, subclause (1) provides that the freezing notice must be cancelled if the basis upon which the notice was obtained no longer exists.

For reasons of consistency and certainty subclause (2) provides the requirements in relation to cancelling a freezing notice.

Division 3 – Freezing Orders for Confiscable Property

Clause 41 Applications for Freezing Orders

Having regard to the extended basis upon which a freezing order (rather than a freezing notice) may be made, subclause (1) provides that only the DPP, and not a Police Officer, may apply for a freezing order. It also provides that the application be made only to a Court, and not a Justice of the Peace.

In order to ensure that the Act is not defeated by a person disposing of property prior to it being frozen it is necessary to freeze property without notice being given to interested parties. Therefore subclause (2) provides that an application for a freezing order may be made ex parte.

Clause 42 Proceedings for Freezing Orders

Because it is essential that interested parties are not put on notice that an application is being made to freeze property prior to the order being obtained, Clause 42 necessarily provides the Court with a discretion to take specified action to ensure the application remains confidential to the extent the Court considers necessary.

Clause 43 Freezing Orders

Subclause (1) relates to a freezing order for a particular item of property. If an examination, monitoring or suspension order has been made or will be sought, in relation to a specified item of property, then a freezing order may be made to ensure

that the property is not disposed of pending determination of the application for the order.

A person who owns the particular item of property may not be the person against whom the examination order is sought and subclause (2) makes clear that a freezing order may be sought in these circumstances. For example, a freezing order may be made in relation to a boat where the owner's accountant has been ordered to be examined in relation to matters relevant to the boat.

In contrast to subclause (1) which relates to a freezing order over a particular item of property, subclause (3) provides that a freezing order may be made over all property owned, effectively controlled, or given away by a particular person. It is necessary to provide power to the Court to freeze all such property because if an unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration is made, then the property may be required to satisfy the person's liability to pay the relevant amount owing to the State.

A freezing order may also be made under subclause (3) if a production order has been made or will be sought in relation to a property-tracking document, which is defined in Clause 154.

Subclause (4) makes it clear that the value of the amount which a person may be ordered to pay under an unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration in comparison to the value of the

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property sought to be frozen is not a relevant matter for the Court to consider in an application for a freezing order.

It is necessary to freeze at an early stage all property of a person who may be declared a drug trafficker and subclause (5) provides this power.

At the time a freezing order is sought each of the items of property of the relevant person may not have been identified and therefore subclause (6) is necessary to ensure that the freezing order covers all relevant property, notwithstanding that any particular item of property may not have been specifically identified in the order.

Subclause (7) is required to provide that in specified cases a freezing order may be made in relation to property acquired after the making of the order. This is needed otherwise such property would not fall within the scope of the freezing order.

Clause 44 Grounds Specified in Freezing Orders

It is essential that the freezing order sets out each ground on which it was made. This is because in order to have property released a person must satisfy the requirements in relation to each basis upon which the property was frozen. The operation of the Act would be defeated if property was frozen on more than one ground yet it could be released by the objector satisfying the required matters in relation to only one ground.

Clause 45 Scope of Freezing Orders

Because of the wider scope of property which may be frozen under a freezing order (rather than a freezing notice) it is appropriate for the Court to have the power to

make directions in relation to income or other property derived from frozen property (subclause (a)) rather than it being an automatic consequence of the making of the freezing order, as in the case of a freezing notice (Clause 34(4)).

For the same reasons, Clause 45(e) gives powers to the Court to provide for meeting the reasonable living and business expenses of the owner of the property, whereas no similar power is given to a Justice of the Peace. A Justice of the Peace may only freeze items of property which are liable for confiscation solely on the basis of the nature of the property. In comparison, a freezing order may be made over property which is frozen to satisfy an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration. In the former case, it is not appropriate to release such property to meet living or business expenses whereas in the latter case it may be appropriate to do so.

There is no power in the Act for the Court (or a Justice of the Peace) to release money for payment or legal expenses.

Clause 46 Service of Freezing Orders

Subclause (1) requires personal service of the freezing order, not only because it is appropriate to ensure that a person has actual notification but also because of the consequences of a breach of the freezing order. This includes the commission of an offence and the imposition of a penalty pursuant to Clause 50. Further, pursuant to Clause 51 a dealing in property in breach of a freezing order has no force or effect on the rights of the State under the Act.

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The usual civil rules in relation to personal service would apply under the Act and in appropriate cases an application may be made to the Court for an order that a person be served by way of substituted service, for example, by advertising in a newspaper.

The requirements of service are properly broad. They include the requirement to serve an interested party, namely “a person who has an interest in the property that would enable the person to succeed on an objection to the confiscation of the property”.

Due to the principle of indefeasibility of title, subclause (2) requires a memorial of the freezing notice to be lodged with the Registrar of Titles in relation to property to which the *Transfer of Land Act* 1893 applies.

To ensure that persons are put on notice of the freezing notice, subclause (3) requires notification to be given to the Registrar of a relevant register in specified cases.

The DPP and Police Officers will take appropriate action to identify and serve all relevant people, for example, by searching registers in relation to the property. However, the person from whom the property was taken and any relevant person may be aware of another person who needs to be served and will provide a statutory declaration to that effect, pursuant to Clause 47. As a result of receipt of relevant information the DPP/Police may serve additional people.

Because Clause 7 provides that property is automatically confiscated if no objection is filed within a specified period after service, there has to be some finality in relation to

the service which is required under the Act. To this end, subclause (4) only requires the DPP or a Police Officer to embark on one second round of service on an interested party as a result of information provided in a statutory declaration.

However, subclause (5) makes it clear that there is no limitation on the ability of the person who obtained the freezing notice to serve any person they consider appropriate.

For certainty and consistency subclause (6) provides the requirements of the notice which must be served with the freezing order.

Because the Act provides for automatic confiscation in the absence of an objection being filed, it is necessary to prove service on relevant parties and subclause (7) provides the manner in which this is done.

Clause 47 Statutory Declarations about Frozen Property

The practical requirements in relation to a statutory declaration must be made clear and are specified in Clause 47.

Clause 48 Duration of Freezing Orders – Registrable Real Property

Due to the principle of indefeasibility of title, a freezing order for land registered under the *Transfer of Land Act 1893* only comes into force, and only stops being in force, when the necessary document is registered, and Clause 48 sets out the requirements in relation to the lodgement of such documents.

Clause 49 Duration of Freezing Orders – Other Property

The principle of indefeasibility of title only applies to land registered under the *Transfer of Land Act* 1893. Therefore there is no necessity to require registration of the freezing order or any other document in relation to other types of property before it comes into force or stops being in force.

Division 4 – Dealing with Seized or Frozen Property

Clause 50 Prohibited Dealings

The penalty provided by subclause (1) is significant to ensure that the Act is not defeated. It includes the power to impose a penalty being the value of the seized or frozen property. This penalty is needed to ensure that a person does not dispose of frozen property which is valued at (say) \$500,000.00 on the basis that they will be better off, because the fine which can be imposed will be a maximum of only \$100,000.00.

Subclause (2) makes clear the circumstances in which a person may deal with seized or frozen property and not be liable to a penalty.

Subclauses (3) and (4) provide that in specified circumstances a person has a defence to a prosecution under subclause (1). The freezing of property is fundamental to the success of the Act. Therefore the onus is on the person charged to prove he has a defence under the Act.

There may be circumstances in which the Court may consider the penalty provided by subclause (1) is not adequate and therefore subclause (5) specifically provides that the Court may deal with the relevant person for a contempt of court in contravention of the freezing order. A person cannot be dealt with for a contempt of court where the property was frozen pursuant to a freezing notice, or the property was subject to seizure by a Police Officer, because no court was involved. Subclause (5) makes it clear that a person cannot be punished both under subclause (1) and for a contempt of court for the same contravention.

Clause 51 Effect of Dealings in Frozen Property

Clause 51 makes it clear that a dealing in seized or frozen property has no effect on the rights of the State under the Act, but does affect the rights of any other party to the dealing. This is to ensure that the State is not prejudiced by any dealing, but that if the property is not ultimately confiscated under the Act then the dealing still has full force and effect. Further, it ensures that parties retain their rights in relation to each other with respect to dealings with property that is seized or frozen. For example, if the owner of frozen property purports to sell the property to a third person who has no notice of the property being the subject of a freezing order, and the property is confiscated to the State under the Act, then the purchaser retains his civil rights to sue the vendor for breach of contract.

Clause 52 Permitted Dealings in Mortgaged Property

Clause 52 enables mortgage payments to be paid on frozen property, as long as frozen property is not used to meet the payment. Without Clause 52, the effect of the Act would be that a mortgagee and a mortgagor would be in breach of a freezing notice or

freezing order if monies were accepted or paid in accordance with a mortgage. As long as the property which is being used to make mortgage payments is not frozen property then it is appropriate that the Act enable mortgage payments to continue to be made.

PART 5 INVESTIGATION AND SEARCH

Division 1 – Preliminary Inquiries

Clause 53 Information Volunteered by Financial Institutions

For the efficient and effective operation of the Act it is necessary for the DPP and Police to be able to obtain information from financial institutions without requiring a search warrant or a Court order. The ability of a financial institution to voluntarily provide information to the DPP and Police is restricted by its civil duty of care to its customers.

Clause 53 together with Clause 55, is essential to overcome these restrictions by providing that a financial institution may give information in specified circumstances and is protected if it does so.

Clause 54 Preliminary Enquiries from Financial Institutions

Currently there is no mechanism by which the DPP or the Police can require a financial institution to provide information to it, other than by obtaining a search warrant or a Court order. It is an inefficient use of State resources for Police to obtain a search warrant on a financial institution if that institution does not in fact hold a relevant account.

To overcome these problems subclause (1) provides that the DPP or a Police Officer may require a financial institution to provide specified information.

Once the financial institution has provided the information to the DPP and Police then, if necessary, a search warrant or Court order can be sought in order to obtain the relevant documents held by the financial institution. If the financial institution advises that it does not have relevant information then significant time and expense is saved, in that no unnecessary search warrant or Court order is sought.

It is necessary for reasons of certainty that subclause (2) specify the form and content of the requirement.

For reasons of efficiency it is necessary for subclause (3) to provide that the service on the financial institutions of the requirement to provide information may be effected by facsimile or e-mail.

Whereas Clause 53 relates to financial institutions volunteering relevant information, Clause 54 relates to financial institutions being required to give information and therefore subclause (4) provides a penalty for failure to do so. The significant penalty recognises the importance to the effective operation of the Act of obtaining information.

Clause 55 Protection for Financial Institutions

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Clause 55 is essential otherwise financial institutions are not protected from liability in providing information to the DPP or Police.

Clause 56 Giving False or Misleading Information

In recognition of the importance to the operation of the Act that the State is provided with accurate information, Clause 56 provides a substantial penalty for providing false or misleading information under Clauses 53 and 54.

Division 2 – Examinations

Clause 57 Applications for Orders for Examination

Having regard to the nature of the application only the DPP (and not a Police Officer) can apply for an examination order. The application is to the District Court. However, pursuant to Clause 101(1) the Supreme Court also has jurisdiction to hear and determine such an application.

Subclause (2) necessarily provides that an application for a freezing order may be made ex parte to ensure persons are not put on notice that proceedings are being taken under the Act which may result in the disposal of property prior to it being identified and frozen.

Clause 58 Orders for Examination

It is essential for the effective operation of the Act that the DPP has wide powers to obtain information, and in recognition of this necessity, subclause (1) makes clear that the scope of the power of examination is very wide.

For the efficient operation of the Act the Court needs to have power to make orders enhancing the effectiveness of an examination. To this end subclause (2) provides that the examination order may require that the person who is to be examined provide to the Court relevant documents or information.

Subclause (2)(e) enables information to be given in the most appropriate manner, namely by affidavit or by a person attending Court in person, or both. Further, it enhances the effectiveness of the order for examination by enabling the Court to order the person to provide information on affidavit prior to attending for examination. This would provide the DPP with an opportunity to investigate the information provided in the affidavit prior to the examination, so that further information could be elicited at the examination.

The Court needs wide power to make orders to ensure that the examination order is effective and that it is complied with, and this is provided by subclause (2)(f). For example, in some circumstances the Court may need the power to order that a person's passport be surrendered to the Court to ensure that the person does not leave the jurisdiction prior to being examined and thereby defeat operation of the Act.

Clause 59 Service of Orders for Examination

For reasons of security, and to ensure that persons are not put on notice that the State is taking action under the Act, subclause (2) restricts the persons on whom the order for examination is to be served.

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Clause 60 Conduct of Examination

This clause ensures that the operation of the Act is not defeated by persons other than the person being examined are present at the examination. However, the legal representative of the person to be examined is allowed to be present.

Clause 61 Complying with Examination Orders

In order to ensure that the operation of the Act is not defeated by a person failing to comply with an order for examination, there needs to be a penalty which is directly related to the ability of the person to have property released under the Act. This must be in addition to the imposition of a fine or a term of imprisonment. Otherwise a person may calculate that the penalty provided by the Act is less than the loss he would suffer if he complied with the Act and his property was consequently confiscated. Subclause (1) address this issue.

The significant penalty provided in subclause (2) is required to ensure the operation of Act is not defeated.

The amount of the fine and term of imprisonment provided by subclause (3) is lower than that provided by subclause (2) because the examination relates to another person's financial position.

Subclause (4) specifies the types of circumstances in which a person will have contravened an order.

Subclause (5) is necessary otherwise persons may avoid giving to the Court documents or information.

Subclause (6) is required to prevent a person from refusing to comply with an examination order on the grounds, for example, that he owes a civil duty of care to the person in respect of whom the examination is being conducted.

Subclause (7) is necessary to make clear the circumstances in which the information provided can and cannot be used.

Division 3 – Production of Documents

Clause 62 Application for Production Orders

Having regard to the nature of the application, only the DPP and (not a Police Officer) can apply for a production order. The application is to the District Court. However, pursuant to Clause 101(1) the Supreme Court also has jurisdiction to hear and determine such an application.

Clause 63 Production Orders

It is essential to the effective operation of the Act that property tracking documents be produced to the State at the earliest possible time. Therefore the matters the State must establish before obtaining such an order are necessarily not significant otherwise the effective operation of the Act would be defeated.

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For the efficient operation of the Act it is necessary for subclause (2) to provide that document may be given to, or made available to, a Police Officer as well as the DPP.

Subclause (3) is needed for reasons of certainty as failure to comply with the order renders the person liable to a penalty under Clause 65.

Clause 64 Inspection of Property-Tracking Documents

In order for the Act to operate effectively and efficiently, there needs to be the broad powers provided for in subclauses (1) and (3) in relation to what action can be taken with property tracking documents.

Subclause (1) specifies the powers which may be exercised when the document has been given to the DPP or Police Officer.

Subclause (2) recognises that if the DPP or Police Officer retains documents the person who provided the documents may need access to, or copies of, the document.

Subclause (3) specifies the powers which may be exercised when the document has only been made available to the DPP or a Police Officer.

Clause 65 Complying with Production Orders

In recognition of the importance to the operation of the Act that the State is provided with property tracking documents, subclause (1) provides that the contravention of a production order is an offence and subclause (4) provides a substantial penalty.

In order to ensure the effective operation of the Act, subclause (2) provides wide circumstances in which a person commits an offence. For the same reason, subclause (3) provides that a person does not commit an offence in specified circumstances if relevant information is provided to the DPP or a Police Officer.

It is essential to the successful operation of the Act that persons are required to comply with a production order. To this end subclauses (5) and (6) provide that a person is not excused from complying with the order in specified circumstances.

Subclause (7) is necessary to make clear the circumstances in which the information, statement or disclosure provided can and cannot be used.

Clause 66 Variation of Production Orders

The Act needs to provide specific power in the Court to vary a production order, otherwise once an order has been made the Court will not have power to vary it.

Division 4 – Monitoring Financial Transactions

Clause 67 Applications for Monitoring and Suspension Orders

Having regard to the nature of the application, only the DPP (and not a Police Officer) can apply for a monitoring order and a suspension order. The application is to the District Court. However, pursuant to Clause 101(1) the Supreme Court also has jurisdiction to hear and determine such an application.

Subclause (3) necessarily provides that the application may be made *ex parte* to ensure persons are not put on notice that proceedings are being taken under the Act which may result in the disposal of property prior to it being identified and frozen.

Clause 68 Monitoring Orders and Suspension Orders

A production order enables the DPP to obtain information about historical events. Pursuant to subclause (1), a monitoring order enables the DPP or a Police Officer to be informed about relevant matters at the time they are happening, so that a freezing order may be sought from the Court if required.

A suspension order provided by subclause (2) is a new legislative mechanism recommended by the Australian Law Reform Commission in its Report “Confiscation That Counts: A Review of the Proceeds of Crime Act 1987”, published on 16 June 1999. A suspension order directs a financial institution to notify the DPP or a Police Officer forthwith of any foreshadowed or initiated transaction in a relevant account and to refrain from effecting the relevant transaction for 48 hours. This is essential to enable the DPP to seek a freezing order in respect of the money the subject of the proposed transaction, and so ensure that the operation of the Act is not defeated.

To ensure the effective operation of the Act it is essential that a monitoring order and a suspension order can be obtained as soon as possible and to this end subclause (3) provides that the basis upon which such an order can be obtained is wide and not too onerous on the State.

For clarity subclauses (4), (5) and (6) provides the scope and requirements of the orders.

Clause 69 Compliance with Monitoring or Suspension Order

In order to ensure the effective operation of the Act a significant penalty is required for failure to comply with a monitoring or suspension order.

The penalty of \$100,000 is in relation to a natural person. A body corporate is liable to a penalty of \$500,000.00. This is the result of Section 40(5) of the *Sentencing Act* 1995, which provides that unless a statutory penalty is expressly provided for a body corporate, then the body corporate is liable to a fine of 5 times the maximum fine that could be imposed on a natural person for the relevant offence. This applies to all penalties provided under the Act.

Division 5 – Secrecy Requirements

Clause 70 Restricted Disclosures

In order to ensure that the operation of the Act is not defeated by disclosures being made about information volunteered by financial institutions, preliminary enquiries made from a financial institution, or a production order, examination order, monitoring order or suspension order, subclause (1) imposes a severe penalty for such disclosures and subclause (2) provides that the type of disclosure which are restricted is extensive.

Clause 71 Making Restricted Disclosures

Subclauses (1), (2), (3) and (4) provide that in specified cases it is appropriate to make a restricted disclosure and no penalty should be attached in these cases.

However, subclauses (5) and (6) are required to limit the circumstances in which a restricted disclosure may be made.

Clause 72 Disclosure to Court

Clause 72 is required to ensure that the Act is not defeated nor that it is used for improper purposes.

Division 6 – Detention, Search and Seizure

Clause 73 Power to Detain Persons

Subclauses (1) and (2) are essential to extend the general powers of detention of Police Officers to confiscable property and property tracking documents under the Act. In the absence of such powers, the effective operation of the Act would be defeated.

Subclauses (3), (4) and (5) are necessary to make clear the powers of a Police Officer when exercising their extended powers.

Clause 74 Search Warrants

For the effective operation of the Act it is essential that a search warrant can be obtained at the earliest opportunity. Subclause (1) recognises it would not be practical to require a search warrant to be sought from a Magistrate. There are many towns in

which there is no permanent Magistrate and many more towns in which a Magistrate does not attend at all.

Subclause (2) is essential to give authority to a Police Officer to seek, and to a Justice of the Peace to grant, a search warrant in relation to confiscable property and property tracking documents. Without subclause (2) a Police Officer does not have authority to seek a search warrant and a Justice of the Peace does not have authority to issue such a warrant in relation to confiscable property and property tracking documents. Further, the requirement in subclause (2) in relation to the basis upon which a search warrant may be granted recognises that a search warrant needs to be obtained at the earliest opportunity. In the absence subclause (2) the effective operation of the Act would be defeated.

Subclause (3) and (4) are necessary to extend the powers of a Police Officer in executing the search warrant.

Clause 75 Searching Detained Persons

While this Clause reflects the usual powers and obligations of a Police Officers, it is necessary to specifically provide them in relation to a search warrant under the Act.

Clause 76 Additional Powers

To ensure the effective operation of the Act Police Officers need wide powers in specified circumstances and these are necessarily provided in subclause (1).

In recognition of the importance of such powers, subclause (2) provides a severe penalty for a person who might act to defeat the operation of the Act by failing to comply with a requirement of a Police Officer.

Subclause (3) provides some, but not all of the circumstances in which a person may commit an offence and be liable to a penalty.

For the effective operation of the Act subclause (4) necessarily limits the circumstances in which a person is not required to comply with a requirement of a Police Officer. However it also provides protection to a person in relation to the use that may be made of the information.

Clause 77 Later-made Documents

Clause 77 is necessary to overcome the problem of a warrant expiring prior to all documents being able to be produced pursuant to the warrant. For example, in cases involving large numbers of documents it may take a financial institution a significant period of time to produce all the documents in accordance with the warrant and it may not be possible to do so within the period of 30 days in which the warrant is valid. Clause 77 therefore provides that if it is physically impossible for the documents to be provided within the relevant period, then a Police Officer is authorised to seize the documents when they become available. Without this power, unnecessary State resources would be expended in Police Officers being required to obtain further search warrants authorising them to seize the documents.

Clause 78 Warrants Under Other Enactments

The Act extends specific powers of Police Officers to matters under the Act because Police Officers would not otherwise be able to use those powers. The Act also provides specific additional powers to Police Officers.

The Act has not, however, set out all the powers a Police Officer has in relation to detention, search and seizure. Clause 78 is necessary to ensure that the detention, search and seizure powers provided under the Act are in addition to, and not instead of, any other relevant powers of Police Officers.

PART 6 – OBJECTIONS TO CONFISCATION

Clause 79 Objections to Confiscation of Frozen Property

For reasons of certainty, subclauses (2) and (3) provide the time limit within which an objection may be filed.

Subclause (4) is necessary otherwise the Court would not have power to extend the time within which an objection may be filed if the application was made outside that period.

Clause 80 Parties to Objection Proceedings

As property confiscated under the Act vests in the State, the State has an interest in proceedings on an objection. Clause 80 is required to ensure that the State will be notified of an objection and will have the ability to appear at the hearing.

Clause 81 Release of Frozen Property

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Subclause (1) is necessary to specify the circumstances in which the Court may set aside a freezing notice or freezing order, thereby releasing the property.

Where one item of property is frozen on more than one ground then in order to ensure that the operation of the Act is not defeated it is essential that frozen property is not released unless and until the requirements for release are satisfied in relation to each ground on which the property has been frozen. Without subclause (2) a person may successfully obtain the release of property on one ground only in circumstances where they could not have obtained the release on another ground.

Clause 82 Release of Crime-Used Property

It is essential for the effective operation of the Act that subclause (1) places an onus of proof onto the objector to establish that property frozen on the basis it was crime-used, was not in fact crime-used.

Subclause (2) provides that even if the objector hasn't satisfied the onus placed on him to establish that the property was not crime-used, the Court has a discretion to make orders in certain cases to ensure he is not prejudiced by the Act.

Subclause (3) is necessary to provide the Court with a discretion in specified circumstances to make orders to ensure that the dependant or spouse of the owner of crime-used real estate does not suffer undue hardship as a result of the property being confiscated. In such a case the property may be confiscated but the Court may grant the spouse a life tenancy in relation to the home, or the dependant child may be granted a tenancy will he or she becomes independent at, say, age 21 years.

It would be unjust for the crime-used property to be confiscated if all owners were innocent, as defined in Clause 152. For example, a person's may have been stolen and then used in the commission of a confiscation offence. Subclause (4) is necessary to ensure that innocent owners are not prejudiced by providing that in specified circumstances the Court may release frozen property.

Where, however, not all owners are innocent then the property will be confiscated. Subclause (5) is necessary to ensure that in this circumstance the co-owners of crime-used property who are innocent are not prejudiced by the property being confiscated to the State. To achieve this, subclause (5) necessarily provides that the Court may order that an innocent co-owner will be paid out of the net proceeds of sale of confiscated property his share of the property. Pursuant to the definition of owner in the Glossary, subclause (5) applies to anyone "who has a legal or equitable interest in the property" for example, a mortgagee.

As the true value of confiscated property is not known until after it has been sold, subclause (5) provides that the amount that the person receives is a proportion of the net proceeds of the sale. Without this provision, the innocent co-owner may unfairly either suffer a detriment or windfall.

Subclause (6) is required for reasons of certainty.

Subclauses (7) and (8) are necessary to facilitate the effective operation of the Act. For example, where the owner of property used it in a crime, the Court may release

the frozen property on the basis that the owner pays to the State the value of the property. The ability of the Court to make such an order enhances the operation of the Act.

Clause 83 Release of Crime-Derived Property

The only basis upon which a person can successfully object to the confiscation of property frozen on the basis that it is crime-derived property, as defined in Clause 147, is to establish to the Court that the property is not crime-derived.

The onus is placed on the objector because it is easier for a person to establish property is not crime-derived rather than for the State to expend resources to establish the contrary.

Contrary to the case in relation to crime-used property, the Act does not provide that an owner can be paid an amount equal to his share of the property if the property is confiscated. This distinction recognises that an owner may have little or no control over the use to which other owners put the property, whereas a person does have the ability to ensure that he does not obtain an interest in crime-derived property.

Clause 84 Setting Aside Orders: Other Frozen Property

A freezing order can be made not only in relation to property that is owned by a person who may ultimately be liable to pay an amount to the State but also, pursuant to Clause 43(3), against property effectively controlled, or given away, by such a person. Subclause (1) is necessary to enable property which has been frozen on any such basis to be released from the freezing order in specified cases.

A freezing order can be made, pursuant to Clause 43(5), against property not only owned by, but also effectively controlled, or given away, by a person who may be declared to be a drug trafficker. Subclause (2) is necessary to enable property which has been frozen on any such basis to be released from the freezing order in specified cases.

Subclause (3) is necessary to ensure the Court has power to make orders facilitating the effective operation of the Act.

Clause 85 Applications for Release of Confiscated Property

Clause 85 recognises that there may be circumstances in which property has been confiscated where it is appropriate for a person to be able to apply for the release of such property and subclause (1) enables this to be done.

It is necessary for the efficient operation of the Act for subclause (2) to limit the time within which such an application may be made. A further limitation is provided in relation to when such an application may be made by Clause 87(1)(b).

Clause 86 Parties to Proceedings

As property confiscated under the Act vests in the State, the State has an interest in proceedings to release confiscated property and Clause 86 ensures that the State will be notified of such an application and will have the ability to appear at the proceedings.

Clause 87 Orders to Release Confiscated Property

It is appropriate that subclause (1) provides that the test for the release of confiscated property is more strict than that for the release of frozen property.

Subclause (2) is necessary to specify how the order to release confiscated property is to be satisfied and authorise such confiscation.

Subclause (3) and (4) appropriately mirror the relevant requirements on an objector in relation to frozen property provided by Clause 82(5) and 82(6) respectively.

Subclause (5) is necessary to specify how an order made under subclause (3) is to be satisfied and authorise such satisfaction.

Subclause (6) is necessary to ensure the effective operation of the Act.

***PART 7 – MANAGEMENT OF SEIZED, FROZEN AND CONFISCATED
PROPERTY***

Division 1 – Control and Management of Property

Clause 88 Management of Seized Property

Subclause (1) provides that the Commissioner of Police has responsibility for seized property in specified circumstances as the seizure was effected by a Police Officer.

Subclause (2) is necessary to extend the power of the Commissioner of Police provided by Section 9 of the *Police Act* 1892 to make regulations for the general management and discipline of the Police Force and Cadets to the functions conferred on the Commissioner of Police by the Act.

Clause 89 Management of Frozen or Confiscated Property

For reasons of certainty, subclauses (1) and (2) provide who is responsible for the control and management of frozen and confiscated property.

For reasons of flexibility subclause (3) provides that the DPP, may appoint another person to manage property.

Clause 90 DPP's Capacity to Carry Out Transactions

For effective operation of the Act Clause 90 is necessary to ensure that the DPP has power and authority to take action required to deal with property under the Act.

Clause 91 Applications by Owner for Control and Management

Clause 91 is necessary to provide a procedure whereby owner of frozen property, namely a person who has a legal or equitable interest in the property, may be appointed to control and manage, or sell or destroy the property. For example, a mortgagee may wish to exercise its powers under a mortgage in relation to frozen property and the Court may grant power to sell the property.

Clause 92 Duties of Responsible Person

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In order to ensure that the frozen property is properly controlled and managed until otherwise dealt with, Clause 92 sets out the obligations of the responsible person and the time at which those obligations cease.

Division 2 – Disposal of Deteriorating or Undesirable Property

Clause 93 Destruction of Property on Grounds of Public Interest

For the efficient operation of the Act the Court needs to be given power to order the destruction of property in specified cases and Clause 93 sets out the circumstances in which such an application may be made and granted.

Clause 94 Sale of Deteriorating Property

For the successful operation of the Act Clause 94 provides power for the Court to order the sale of frozen property in circumstances where the value of that property is being lost. For example, land may have been frozen on which there is an orchard with fruit ready to be harvested. Substantial loss and waste would occur if the Act did not provide power for the Court to order the sale of the crop in specified circumstances.

For the efficient operation of the Act subclause (3) provides power to the Public Trustee to sell property in specified cases without obtaining an order from the Court.

Subclause (4) is necessary to ensure that the proceeds from the sale of property are dealt with under the Act as if they were the frozen property.

Clause 95 Valuation and Inventory of Frozen Property

It is necessary for the effective operation of the Act for subclause (1) to provide authority to value, and carry out an inventory of property in specified cases.

Subclause (2) requires a copy of the inventory to be provided to relevant people to give them the opportunity to dispute the contents of the inventory.

Division 3 – Management of Property by Public Trustee

Clause 96 Public Trustee's Power to Appoint a Manager

Clause 96 is necessary for the effective operation of the Act.

Clause 97 Public Trustee's Liability for Charges on Frozen Property

For the effective operation of the Act subclause (1) limits the liability of the Public Trustee to the extent of the monies that the Public Trustee receives in the course of managing of the property.

For the same reasons, subclause (2) provides that the Public Trustee is not liable for specified matters.

Clause 98 Managing Interstate Property

For the effective operation of confiscation legislation throughout Australia Clause 98 is required to extend the authority of the Public Trustee to land in Western Australia which has been frozen by a Court in another State or a Territory.

Clause 99 Fees Payable to Public Trustee

Clause 99 is required to authorise the Public Trustee to receive the prescribed fees to which the Public Trustee is entitled.

Clause 100 Obstructing Public Trustee

In order to protect the Public Trustee, Clause 100 provides a significant penalty if the Public Trustee is hindered or obstructed.

PART 8 – COURT JURISDICTION AND EVIDENTIARY MATTERS

Clause 101 Courts' Jurisdiction

The jurisdiction of the Supreme Court, District Court and Local Court is the jurisdiction each Court has in relation to civil matters reflected in subclauses (1), (2) and (3).

Subclause (4) limits the jurisdiction of the Local Court to specified declarations and orders in recognition of the more limited civil jurisdiction of the Local Court.

Subclause (5) is necessary to facilitate the efficient operation of the Act.

As the jurisdiction of the Local Court and District Court depends on the value of the relevant property, subclause (6) is necessary to ensure that if the value of the property is in fact greater than the jurisdiction of the Court the action taken by the Court is not

invalid. This subclause is necessary to ensure that orders are not invalid and proceedings do not have to be recommenced in another Court.

Part VI of the *District Court of Western Australia Act 1969* refers to remitting and transferring actions and matters to the Local Court or to the Supreme Court respectively. Subclause (7) facilitates the efficient transfer of proceedings between Courts where the value of the property or the amount sought alters from the time the application is commenced.

Subclause (8) is necessary to avoid uncertainty.

Clause 102 Proceedings

Clause 102 is necessary to make clear that the relevant rules of evidence and standard of proof under the Act are those relevant to civil proceedings and not the more onerous rules and standards which apply to criminal proceedings.

Clause 103 Appearance by Attorney General

Clause 103 is necessary otherwise the Attorney General would not have the ability to appear in proceedings.

Clause 104 Stays of Proceedings

For the efficient operation of the Act, Clause 104 provides that applications or proceedings are not to be delayed pending determination of any criminal proceedings.

Clause 105 Opinion Evidence

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Clause 105 is necessary to facilitate the presentation of evidence, by nominated classes of persons, in relation to the value of prohibited plants and prohibited drugs. In the absence of Clause 105 such evidence may not be admitted by the Court.

Clause 106 Evidence that Property is Crime-Used or Crime-Derived

Clause 106 is fundamental to the operation of the Act and ensures it has wide operation, by specifying that evidence that property is crime-used or crime-derived be independent of specified findings or outcomes.

Clause 107 Evidence of Offence Proceedings

Clause 107 is necessary to provide authority for the Court to have regard to relevant matters arising from a person's conviction. In the absence of Clause 107 significant resources would need to be incurred in putting the material before the Court, and other material would not be able to be considered by the Court.

Clause 108 Transcripts of Examinations

Clause 108 is necessary to facilitate the efficient method of proving what was said by a person during the course of an examination under the Act. In the absence of Clause 108 substantial resources would need to be incurred by the State in bringing that material before the Court.

Clause 109 Hearsay Evidence

Clause 109 is fundamental to the operation of the Act as it ensures that the State can take action at an early stage, and is not required to expend vast resources in strictly proving evidence before the Court.

Clause 109 necessarily excludes Part 6 from the extended method of proving matters before the Court, as Part 6 relates to a final determination of objections to confiscation and the release of frozen property.

Clause 110 Evidence of Compliance with Production Orders

Clause 110 provides specific protections to a person producing a document.

Clause 111 Certificates under Misuse of Drugs Act 1981

Section 38(2) of the *Misuse of Drugs Act 1981* provides that in specified cases a particular certificate of an analyst or botanist who is approved under the *Misuse of Drugs Act 1981* is sufficient proof of the facts in the certificate, for example that the relevant plant is cannabis. Clause 111 is necessary to facilitate the proof of specified matters without the State being required to expend substantial resources in doing so.

Clause 112 Enforcing Compliance with Act or Court Order

The authority provided by Clause 112 is necessary to ensure that effect can be given to the Act and any order made under the Act notwithstanding that a person fails to take specific action. This is achieved by giving authority in specified circumstances to the Registrar of the Supreme Court to take the necessary action.

PART 6 – INTERESTS IN REGISTRABLE PROPERTY

Clause 113 Registrations of Interests in Registrable Real Property

Subclause (1) is necessary to ensure that the Registrar of Titles takes the appropriate action which gives effect to the Act.

Because of the principle of indefeasibility of title it is necessary to ensure that no person is prejudiced by the freezing of property if the property is not ultimately confiscated and consequently subclause (2) and (3) are necessary to ensure that a person is not prevented from registering an interest in land under the *Transfer of Land Act 1893*.

Subclause (4) is necessary to make clear the effect of such documents.

Clause 114 Registration of Interests in Other Property

Clause 114 is necessary to direct the relevant Registrar to take the appropriate action consequential to notification that particular orders have, for example, been issued or have ceased to be in force.

Clause 115 Imputation of Knowledge that Property is Frozen

Clause 115 is required to avoid the Act being defeated, as Clause 51 provides that dealings in seized or frozen property have no effect on the rights of the State under the Act. Further, such dealings constitute an offence under Clause 50.

Clause 116 Instruments Lodged with the Registrar of Titles

Because documents are being lodged under the Act it is necessary for the Act to provide the form of those documents.

***PART 10 – MUTUAL RECOGNITION OF FREEZING ORDERS AND
CONFISCATION OF PROPERTY***

Division 1 – Registration of WA Orders in Other Jurisdictions

Clause 117 Interstate Registration of Freezing Notices and Orders

Clause 117 is necessary to ensure the Act has wide operations to the fullest extent possible to apply in relation to property in another State or Territory. A corresponding law is defined in the Glossary and is essentially a law prescribed by regulations to be a law of like kind to the Act.

Clause 117 is essentially in the same terms as Section 56 of the *Crimes (Confiscation of Profits) Act 1988* which Act will be repealed when this Act comes into operation.

Division 2 – Recognition of Orders of Other Jurisdictions

Clause 118 Registration of Interstate Orders

Clause 118 is necessary to ensure that relevant orders and declarations made in other States or Territories have force and effect in Western Australia to the fullest extent possible in relation to property in Western Australia

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Clause 118 is essentially in the same terms as Section 44 of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 119 Effect of Registration of Interstate Freezing Orders

Clause 119 is necessary to ensure that a registered interstate freezing order has wide operation.

Clause 119 is essentially in the same terms as Section 46 of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 120 Effect of Registration of Interstate Confiscation Declarations

Subclause (1) is necessary to ensure that the registered interstate confiscation declaration has a wide operation.

Subclauses (2) and (3) is necessary to clarify in whom property vests.

Clause 120 is essentially in the same terms as Section 45 of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 121 Duration of Registration of Interstate Orders

Clause 121 is necessary to give proper effect to matters registered in this State.

Clause 121 is essentially in the same terms as Section 48 of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 122 Cancellation of Registration of Interstate Orders

Clause 122 is necessary to provide authority to the Supreme Court to take appropriate action in specified circumstances.

Clause 122 is essentially in the same terms as Section 49 of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Division 3 – Charges on Interstate Property

Clause 123 Creation of Charge

Clause 123 is necessary for the effective and efficient operation of interstate orders and declarations.

Clause 123 is essentially in the same terms as Section 50(1) of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 124 Cessation of Charge

Clause 124 is required to provide the time at which a charge ceases to have effect.

Clause 124 is essentially in the same terms as Section 50(2) of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 125 Priority of Charge

Clause 125 is necessary to specify the effect of a charge under the Act.

Clause 125 is essentially in the same terms as Section 50(3) of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 126 Registration of Charge on Land

It is necessary to have a procedure by which people are placed on notice of the charge and the charge is registered on, and withdrawn from, the Certificate of Title for the relevant land and Clause 126 provides this.

Clause 126 is essentially in the same terms as Section 50(5), (6) and (7) of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

Clause 127 Registration of Charge on Property Except Land

It is necessary to have a procedure by which people are placed on notice in relation to a charge on property except land and Clause 127 provides this.

Clause 127 is essentially in the same terms as Section 50(4) of the *Crimes (Confiscation of Property) Act 1988* which Act will be repealed when this Act comes into operation.

PART 11 – MISCELLANEOUS

Clause 128 Act Binds State and Commonwealth

Clause 128 is necessary to extend the operation of the Act beyond that which it would otherwise have to ensure the Act is effective.

Clause 129 Property Protected From Seizure and Confiscation

It is necessary to specifically exclude items of property which cannot be confiscated under the Act in order to give appropriate protection to persons consistent with those provided by Section 75(1) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

The current amount which is currently prescribed for the purposes of Section 75(1)(c) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*, referred to in subclause (3), is \$1,000.00.

Clause 130 Confiscation Proceeds Account

Clause 130 is necessary to create a trust account with appropriate financial procedures, for confiscation proceeds to be paid into.

The Department known as the Office of the Director of Public Prosecutions is the Department referred to in subclause (3).

Clause 131 Payments Into and Out Of the Confiscation Proceeds Account

For reasons of accountability and authority, Clause 131 sets out the monies which may be paid into the Confiscation Proceeds Account and the monies which may be paid out of that account.

Subclause (2) gives wide powers to the Attorney General to authorise the use of monies recovered under the Act to further advance the successful operation of the Act and to assist in fighting crime and support victims generally.

Clause 132 Obstructing Police Officers

In recognition of the significant negative impact on the successful operation of the Act of actions taken to defeat the Act, Clause 132 provides a substantial penalty.

Clause 133 Later Applications, Notices, Orders or Findings

Clause 133 is necessary otherwise one application only could be made under the Act in relation to a particular item of property, person or offence. For example, in the absence of Clause 133 further action could not be taken if subsequent to a criminal benefits declaration being made the State identified further property of the Respondent. In these circumstances the absence of Clause 133 would mean that no further application could be made against the person and the intention of the Act would be defeated.

Clause 134 DPP's Power to Delegate

For the effective and efficient operation of the Act the DPP must have power to delegate.

Clause 135 Orders Relating to Sham Transactions

It is fundamental to the operation of the Act that persons cannot manage their affairs in such a way so as to defeat the Act. Therefore the Act must provide powers to the Court in specified circumstances to make the required orders to defeat such arrangements.

Clause 136 Proceedings Against Body Corporate

To ensure that the Act is not defeated, Clause 136 is necessary to extend the responsibility of a natural person involved in breaching the Act and to facilitate prosecutions against a body corporate.

Clause 137 Liability for Carrying out Functions Under this Act

In order to ensure that persons acting pursuant to the Act can do so without fear of personal liability or of causing liability to be incurred by the State it is necessary to provide a wide protection for people acting properly. In the absence of a wide protection persons may be reluctant to take action pursuant to the Act and its operation will be severely limited.

Clause 138 Effect of Owner's Death

The intention of the Act would be defeated if the death of an owner of property affected proceedings under the Act. The intention of the Act is to remove illgotten gains from people. No person should benefit from crime, whether directly or indirectly and this extends to beneficiaries of a deceased person. Clause 138 is necessary to make explicit the effect of the death of an owner of property.

An application made against a person prior to their death can be continued in accordance with the general civil rules of Court.

Clause 139 Regulations

The power to make regulations is required for the efficient and effective operation of the Act.

PART 12 – INTERPRETATION

Clause 140 Confiscation Offences

Subclause (1) is required to specifically extend the operation of the Act beyond offences which are committed in Western Australia.

Subclause (2) is essential to make explicit that an offence for which the penalty is imprisonment for two years or more is a confiscation offence notwithstanding that the penalty for the offence if dealt with summarily is less than two years.

Clause 141 Confiscable Property

The types of property which are confiscable under the Act are set out.

Crime-used property substitution declaration is not referred to in Clause 141 because it relates to crime-used property, which is referred in subclause (c).

Clause 142 The Constituents of a Person's Wealth

It is essential for the effective operation of the Act that the constituents of a person's wealth is interpreted in the widest possible manner and for there to be no limitation on the manner in which wealth can be assessed. Clause 142 is necessary to achieve this end.

Clause 143 Unexplained Wealth

The effective operation of the Act requires that the calculation of unexplained wealth is very broad.

Clause 144 Acquiring Criminal Benefits

In order to ensure that the Act has effective operation the definition of a criminal benefit needs to be very wide.

Subclause (1)(a) provides that a person may acquire a criminal benefit indirectly as a result of the commission of an offence. An example of this is where a person is able to meet mortgage repayments from legitimate income because he uses money from the proceeds of selling drugs for living expenses. The property in relation to which the mortgage payments were made has been indirectly acquired as a result of the commission of the offence. If subclause (1)(a) did not provide this wide definition of a criminal benefit the Act could easily be defeated.

Further, subclause (1)(a) provides that a person acquires a criminal benefit even if the particular benefit was lawfully acquired. An example of this is when a person commits an offence and then sells his story to a magazine. Whilst the payment from the magazine was lawfully acquired the money in fact was acquired indirectly from

the commission of the offence. The intention of the Act to deprive people of illgotten gains will be defeated if the Act does not have this wide operation.

Similarly, the intention of the Act that no person should gain from crime would be defeated if subclause (1)(b) did not provide that a criminal benefit has been derived notwithstanding that the person who derived the benefit was not involved in the offence.

Subclause (2) is needed to expand the operation which the Act would otherwise have.

Clause 145 Crime-Used Property

For the effective operation of the Act it is essential that property used in the commission of a crime is defined very broadly.

Clause 146 Criminal Use of Property

A crime-used property substitution declaration is essentially equivalent to the confiscation of crime-used property and is made against the person who made criminal use of the property in the crime. Therefore Clause 146 provides that the definition of “criminal use of property” is linked to the definition of “crime-used property”.

Clause 147 Crime-Derived Property

In order to achieve the intention of the Act to deprive people of illgotten gains, property tainted with proceeds from a crime to any extent and through any means

must be removed from a person. In order to ensure the wide operation of the Act it is essential that crime-derived property is defined in the broad terms of Clause 147.

Clause 148 Lawful Acquisition of Property

In order to ensure the effective operation of the Act the definition of lawful acquisition of property must be very broad. To this end Clause 148 makes clear that not only does the acquisition have to be lawful but also any and all consideration given for the acquisition must not have come from a crime.

Clause 149 Service Cut Off Date

For reasons of clarity Clause 149 is required to specify what date is the service cut off date in particular cases.

Clause 150 Dealing with Property

In order to ensure the wide operation of the Act and ensure that its operation cannot be defeated Clause 150 necessarily defines “dealing” very broadly.

Clause 151 Value of Property Sold by State

It is essential for the effective operation of the Act the calculation of the value of property sold by or for the State takes into account all relevant matters as provided in subclause (1).

Subclause (2) is necessary to ensure that a person cannot defeat the Act by having one mortgage over a number of properties and seek to have the mortgage totally satisfied out of the proceeds of sale of the one piece of property which has been confiscated.

Clause 152 Innocent Parties

In order to ensure the operation of the Act is not defeated the definition of “innocent party” is necessarily very broad.

Clause 153 Transfer of Property for Value

The intention of the Act would be defeated if property transferred under a will or administration was not specifically excluded from being a transfer for value.

It is appropriate that orders made in relation to Family Court proceedings are taken to be for value. However, if parties to such proceedings consent to orders to avoid the operation of the Act, action may be taken under Clause 135 to have the orders set aside on the basis that it is a sham transaction.

Clause 154 Property-Tracking Documents

It is absolutely critical to the successful operation of the Act that the State be able to obtain all relevant information in relation to particular property and a person’s wealth. To this end the definition of “property tracking documents” is necessarily very wide.

Clause 155 Effective Control of Property

In order to avoid the Act being defeated it is essential that property effectively controlled by a relevant person may be confiscated under the Act and that the definition of effective control is very wide.

Clause 156 Conviction of a Confiscation Offence

It is necessary to define broadly what “conviction” means to ensure the Act has wide operation. Clause 156 is in equivalent terms to Section 3(2) of *Crimes (Confiscation of Profits) Act 1988* which will be repealed on the commencement of this Act.

Clause 157 Charges for an Offence

To ensure the wide operation of the Act it is necessary to define broadly when a person is charged with an offence.

Clause 157 is in equivalent terms to Section 3(4) of the *Crimes (Confiscation of Profits) Act 1988* which will be repealed on the commencement of this Act.

Clause 158 Drug Traffickers and Declared Drug Traffickers

The confiscation provisions in relation to a declared drug trafficker are very broad. This is fundamental to the intention of the Act. The operation of the Act would be defeated if the provisions in relation to confiscation did not apply to a person solely on the basis that they did not stand trial on relevant outstanding charges. For example, a person may flee the jurisdiction to avoid outstanding charges in relation to which he would be declared to be a drug trafficker if he was convicted. Similarly, it is not appropriate for the relevant provisions not to apply solely on the basis that the accused person died prior to standing trial.

Clause 159 Absconding in Connection with an Offence

Subclause (1) ensures that a person is deemed to have absconded only after a sufficient period of time has elapsed which would, in the normal course, indicate that he did not intend to return to the jurisdiction and had in fact deliberately left the jurisdiction to avoid the outstanding charges.

Subclause (2) is required to provide the circumstances in which a person is taken to absconds as a result of dying.

Clause 160 Sham Transactions

In order to ensure the Act is not defeated the definition of “sham transaction” is necessarily very wide.

GLOSSARY

The definitions in the Glossary are consistent with the natural meaning of the terms defined or the terms specifically defined elsewhere in the Act, except in the case of “dispose of”, “document”, “give”, “interstate confiscation offence”, “interstate confiscation declaration”, “interstate criminal benefits declaration”, “interstate freezing order” and “valuable consideration”