

# **DRUG TRAFFICKING (CIVIL PROCEEDINGS) ACT 1990 No. 23**

NEW SOUTH WALES



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# **DRUG TRAFFICKING (CIVIL PROCEEDINGS) ACT 1990 No. 23**

NEW SOUTH WALES



**Act No. 23,1990**

An Act to provide for the confiscation of interests in property that are interests of a person engaged in drug-related activities; to enable proceeds of drug-related activities to be recovered as a debt due to the Crown; and for other purposes. [Assented to 14 June 1990]

**The Legislature of New South Wales enacts:**

**PART 1 - PRELIMINARY**

**Short title**

**1.** This Act may be cited as the Drug Trafficking (Civil Proceedings) Act 1990.

**Commencement and duration**

**2 (1)** This Act commences on a day or days to be appointed by proclamation.

**(2)** This Act is repealed 6 years after the day, or the earlier or earliest of the days, appointed under subsection (1) unless either House of Parliament earlier resolves to the contrary.

**Principal objects**

**3.** The principal objects of this Act are:

- (a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in drug-related activities; and
- (b) to enable the proceeds of drug-related activities to be recovered as a debt due to the Crown; and
- (c) to enable law enforcement authorities effectively to identify and recover property.

**Definitions**

**4. (1)** In this Act:

**"assets forfeiture order"** means an order made under section 22 and in force;

**"authorised officer"** means:

- (a) a full-time member of the Commission; or
- (b) a member of the Police Force; or
- (c) a person authorised in writing by the Commission either generally or in a special case to act as an authorised officer for the purposes of section 10 (Restraining orders) or Part 4 (Information gathering powers);

**"bank"** means:

- (a) the Reserve Bank of Australia; or
- (b) a bank within the meaning of the Banking Act 1959 of the Commonwealth; or
- (c) a person who carries on State banking within the meaning of section 51 (xiii) of the Constitution of the Commonwealth;

**"building society"** means a society registered or incorporated as a building society, permanent building society, co-operative housing society or similar society under a law that relates to that kind of society and is in force in New South Wales or in another State or in a Territory,

**"Commission"** means the State Drug Crime Commission constituted by the State Drug Crime Commission Act 1985;

**"confiscation order"** means an assets forfeiture order or a proceeds assessment order;

**"credit union"** means a society or other body of persons that under a law in force in New South Wales or in another State or in a Territory is registered or incorporated as a credit union or similar society;

**"dealing"**, in relation to an interest in property, includes:

- (a) if the interest is a debt - making a payment to any person in reduction of the amount of the debt; and
- (b) removing the property in which the interest is held from New South Wales; and
- (c) receiving or making a gift of the interest; and
- (d) vesting the interest in a person in the course of administering the estate of a deceased person;

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

- (a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory - a member of the body corporate; and
- (b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(c) except as provided by subsection (4), any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;

**"drug-derived property"** means an interest in property that is drug-derived property as provided by section 9;

**"drug-related activity"** means a drug-related activity referred to in section 6;

**"effective control"**, in relation to an interest in property, includes effective control of the interest as provided by section 8;

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

**"financial institution"** means:

- (a) a bank; or
- (b) a building society; or
- (c) a credit union; or
- (d) a body corporate that is, or if it had been incorporated in Australia would be, a financial corporation within the meaning of section 51 (xx) of the Constitution of the Commonwealth;

**"illegal activity"** means:

- (a) a drug-related activity; or
- (b) an act or omission that constitutes an offence (including a common law offence) against the laws of New South Wales or the Commonwealth; or
- (c) an act or omission that occurs outside New South Wales, is an offence against the law of the place where it occurs and is of a kind that, if it had occurred in New South Wales, would have been an offence referred to in paragraph (b);

**"illegally acquired property"** means an interest in property that is illegally acquired property as provided by section 9;

**"indictable quantity"** means a quantity of a prohibited plant or a prohibited drug that is an indictable quantity under the Drug Misuse and Trafficking Act 1985;

**"money"** means money in the form of cash;

**"monitoring order"** means an order made under section 48 and in force;

"**officer**" means a director, secretary, executive officer or employee;

"**owner**", in relation to an interest in property, includes a person who has effective control of the interest;

"**premises**" includes all or part of any structure, building, aircraft, vehicle, vessel and place (whether built on or not);

"**proceeds**", in relation to an activity, includes any interest in property, and any service, advantage or benefit, that is derived or realised, directly or indirectly, as a result of the activity;

(a) by the person engaged in the activity; or

(b) by another person at the direction or request (given or made directly or indirectly) of the person engaged in the activity;

"**Proceeds Account**" means the Confiscated Drug Proceeds Account established under section 32;

"**proceeds assessment order**" means an order made under section 27 and in force;

"**production order**" means an order made under section 33 and in force;

"**prohibited drug**" means a substance that is a prohibited drug under the Drug Misuse and Trafficking Act 1985;

"**prohibited plant**" means a plant that is a prohibited plant under the Drug Misuse and Trafficking Act 1985;

"**property-tracking document**" means:

(a) a document relevant to:

(i) identifying, locating or quantifying any interest in property of a person who might reasonably be suspected of being, or of having been, engaged in a drug-related activity; or

(ii) identifying or locating any document necessary for the transfer of an interest in property of a person who might reasonably be suspected of being, or of having been, engaged in a drug-related activity; or

(b) a document relevant to:

(i) identifying, locating or quantifying an interest in property that might reasonably be suspected of being an interest that is drug-derived property; or

(ii) identifying or locating any document necessary for the transfer of an interest in property that might

reasonably be suspected of being an interest that is drug-derived property;

**"restraining order"** means an order made under section 10 and in force;

**"rules of court"** means rules made under the Supreme Court Act 1970.

(2) A reference in this Act to acquiring an interest in property for sufficient consideration is a reference to acquiring the interest for a consideration that, having regard solely to commercial considerations, reflects the value of the interest.

(3) A reference in this Act to a transaction of any kind (including sale, disposition, dealing and acquisition) includes a reference to a transaction outside New South Wales.

(4) For the purposes of this Act, a person is not to be regarded as being a director of a financial institution or corporation within the meaning of paragraph (c) of the definition of "director" in subsection (1) just because the directors act on advice given by that person in the proper performance of the functions attaching to his or her professional capacity.

(5) If an expression used in this Act would ordinarily impose a duty, it is not to be construed in a particular case or particular cases as conferring a discretion.

(6) In this Act:

- (a) a reference to a function includes a reference to a power, authority and duty and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

### **Proceedings are civil, not criminal**

5. (1) For the purposes of this Act, proceedings on an application for a restraining order or a confiscation order are not criminal proceedings.

(2) Except in relation to an offence under this Act:

- (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of the provisions of this Act; and

- (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

**Meaning of "drug-related activity"**

**6. (1)** In this Act, a reference to a drug-related activity of a person is a reference to anything done by the person that was at the time a serious drug offence, whether or not the person has been charged with the offence or, if charged:

- (a) has been tried; or
- (b) has been tried and acquitted; or
- (c) has been convicted (even if the conviction has been quashed or set aside).

**(2)** In this section, a reference to a serious drug offence is a reference to:

- (a) an offence referred to (before the commencement of the Drug Misuse and Trafficking Act 1985) in section 45A of the Poisons Act 1966:
  - (i) of supplying any drug of addiction or prohibited drug within the meaning of the Poisons Act 1966; or
  - (ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act; or
  - (iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises; or
- (b) a drug trafficking offence; or
- (c) a prescribed indictable offence, or an indictable offence of a prescribed kind, that is of a similar nature to a drug trafficking offence, including in either case an offence under a law of the Commonwealth, another State or a Territory, or
- (d) an indictable offence committed in connection with an offence referred to in paragraph (a), (b) or (c) (whether or not the 2 offences are committed by the same person) and which involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or

- offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide; or
- (e) a prescribed indictable offence committed in connection with an offence referred to in paragraph (a), (b) or (c) (whether or not the 2 offences are committed by the same person) including an offence under a law of the Commonwealth, another State or a Territory, or
  - (f) an offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e).

(3) In subsection (2) (b):

**"drug trafficking offence"** means an offence under any of the following provisions of the Drug Misuse and Trafficking Act 1985:

- (a) section 23 (Offences with respect to prohibited plants);
- (b) section 24 (Manufacture and production of prohibited drugs);
- (c) section 25 (Supply of prohibited drugs);
- (d) section 26 in so far as it relates to conspiring to commit an offence referred to in paragraph (a), (b) or (c);
- (e) section 27 in so far as it relates to aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence referred to in paragraph (a), (b) or (c);
- (f) section 28 in so far as it relates to conspiring to commit, or aiding, abetting, counselling or procuring the commission of an offence, under a law in force outside New South Wales which corresponds to a provision referred to in paragraph (a), (b) or (c).

### **Meaning of "interest in property"**

7. (1) In this Act, a reference to an interest of a person in property is a reference to:

- (a) an interest the person has in real or personal property or
- (b) a chose in action enforceable at the suit of the person; or
- (c) an interest of the person that is within a class of interests prescribed as interests in property for the purposes of this Act.

(2) Without limiting the generality of subsection (1), a reference in this Act to an interest of a person in property includes a reference to:

- (a) the person's money, and
- (b) an interest that the person has in the goodwill of a business; and
- (c) an interest that the person has in a licence required to be held in order to carry on a business.

(3) For the purposes of this Act, if:

- (a) but for this subsection, a person would have an interest in property as provided by subsection (1); and
- (b) the interest is subject to the effective control of another person, the interest is an interest of the person who has effective control and is not an interest of the person referred to in paragraph (a).

(4) In this section:

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

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

#### **Meaning of "effective control of interest in property"**

**8. (1)** An interest in property may be subject to the effective control of a person within the meaning of this Act even if:

- (a) the person does not have a legal or equitable estate or interest in the property; or
- (b) the person has no direct or indirect right, power or privilege in connection with the interest.

(2) In determining whether or not an interest in property is subject to the effective control of a person, regard may be had to any relevant matter, including (without being limited to) the following matters:

- (a) shareholdings in, debentures of, or directorships of, a company that has the interest;
- (b) a trust that has a relationship to the interest;
- (c) family, domestic, business and other relationships between that person and other persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b).

**Meaning of "drug-derived property" and "illegally acquired property"**

**9. (1)** An interest in property is drug-derived property if:

- (a) it is all or part of the proceeds of a drug-related activity; or
- (b) it is all or part of the proceeds of the disposal of or other dealing in drug-derived property; or
- (c) it was wholly or partly acquired using drug-derived property.

**(2)** The references in subsection (1) (b) and (c) to drug-derived property are not limited to drug-derived property described in subsection (1) (a) but also include interests in property that are drug-derived property because of a previous operation or previous operations of subsection (1) (b) or (c) or their combined operation.

**(3)** Once an interest in property becomes drug-derived property it remains drug-derived property even if the interest is disposed of or otherwise dealt with (including by being used to acquire an interest in property), but this is qualified by subsection (5).

**(4)** The meaning of "illegally acquired property" is ascertained by substituting; in subsections (1)-(3), "illegally acquired property" for "drug-derived property" and "illegal activity" for "drug-related activity".

**(5)** An interest in property ceases to be drug-derived property or illegally acquired property:

- (a) when it is acquired by a person for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that the interest was, at the time of acquisition, drug-derived property or illegally acquired property; or
- (b) when it vests in a person as a result of the distribution of the estate of a deceased person; or
- (c) when the interest is sold or otherwise disposed of under the authority of this Act (including when discharging a proceeds assessment order); or
- (d) when it is the proceeds of the sale or other disposition of drug-derived property or illegally acquired property under the authority of this Act except a sale under section 10 (8) (b) or 14; or
- (e) when it is acquired by a person as payment of reasonable legal expenses incurred in connection with an application under this Act or incurred in defending a criminal charge; or

(f) in such other circumstances as may be prescribed.

(6) If an interest in property that is not drug-derived property or illegally acquired property was once owned by a person and was then drug-derived property or illegally acquired property, the property becomes drug-derived property or illegally acquired property, respectively, if and when it is again acquired by the person.

(7) The proceeds of a sale or other dealing do not lose their identity as such merely as a result of being credited to an account.

(8) It does not matter whether the drug-related activity, illegal activity, disposition or other dealing or acquisition by reason of which an interest in property becomes drug-derived property or illegally acquired property took place before or after the commencement of this section.

(9) The following are examples of the practical operation of this section showing the ways in which an interest in property can become drug-derived property and stop being drug-derived property:

- (a) if money that is the proceeds of a drug-related activity is used to buy land, the land becomes drug-derived property and the money used (which is now in the hands of some other person) continues to be drug-derived property;
- (b) if the land is then sold it continues to be drug-derived property and the money paid for it becomes drug-derived property;
- (c) if the money paid for the land is then used to buy a car, the car becomes drug-derived property and the money used to buy it (now in the hands of the car's former owner) continues to be drug-derived property unless the purchase was for sufficient consideration from an innocent person.

## **PART 2 - RESTRAINING ORDERS**

### **Restraining orders**

**10. (1)** A restraining order is an order that no interest in property that is an interest to which it applies is to be disposed of, or otherwise dealt with, by the person whose interest it is or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.

(2) The Commission may apply to the Supreme Court, *ex parte*, for a restraining order in respect of:

- (a) specified interests, a specified class of interests or all the interests, in property of a person suspected of having engaged in a drug-related activity or drug-related activities, including interests acquired after the making of the order and before the making of an assets forfeiture order affecting the interests that are subject to the restraining order; or
- (b) specified interests, or a specified class of interests, in property that are interests of any other person; or
- (c) interests referred to in both paragraph (a) and paragraph (b).

(3) The Supreme Court must make the order applied for if the application is supported by an affidavit of an authorised officer stating that:

- (a) in the case of an application in respect of an interest referred to in subsection (2) (a) - the authorised officer suspects that the person has engaged in a drug-related activity or drug-related activities and stating the grounds on which that suspicion is based; and
- (b) in the case of an application in respect of any other interest - the authorised officer suspects that the interest is drug-derived property because of a drug-related activity or drug-related activities of a person and stating the grounds on which that suspicion is based,

and the Court considers that having regard to the matters contained in any such affidavit there are reasonable grounds for any such suspicion.

(4) When the Supreme Court makes a restraining order, the Court may, if it considers that the circumstances so require, order the Public Trustee to take control of some or all of the interests in property that are interests to which the restraining order relates.

(5) A restraining order may, at the time it is made or at a later time, make provision for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:

- (a) the reasonable living expenses of any person whose interests in property are subject to the restraining order (including the reasonable living expenses of any dependants);
- (b) the reasonable legal expenses of any person whose interests in property are subject to the restraining order, being expenses

incurred in connection with the application for the restraining order or an application for a confiscation order, or incurred in defending a criminal charge.

(6) The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to the Court such undertakings as the Court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the order.

(7) For the purposes of an application for a restraining order, the Commission may, on behalf of the State, give to the Supreme Court such undertakings with respect to the payment of damages or costs, or both, as are required by the Court.

(8) If a restraining order is in force in respect of an interest of a person in property, the restraining order does not prevent:

- (a) the levying of execution against the property in satisfaction, or partial satisfaction, of the debt arising under a proceeds assessment order in force against the person; or
- (b) with the consent of the Supreme Court, the sale or other disposition of the interest to enable the proceeds to be applied in satisfaction or partial satisfaction of that debt; or
- (c) with the consent of the Supreme Court, the application of the interest in satisfaction or partial satisfaction of that debt.

(9) After the first 48 hours of its operation, a restraining order remains in force in respect of an interest in property only while:

- (a) there is an application for an assets forfeiture order pending before the Supreme Court in respect of the interest; or
- (b) there is an unsatisfied proceeds assessment order in force against the person whose suspected drug-related activities formed the basis of the restraining order; or
- (c) there is an application for such a proceeds assessment order pending before the Supreme Court; or
- (d) it is the subject of an order of the Supreme Court under section 20 (Effect on restraining order of refusal to make confiscation order).

### **Notice of restraining order**

**11. (1)** If the Supreme Court makes a restraining order, the Commission must give notice of the order and of any variation of the order to:

- (a) the Director of Public Prosecutions; and
- (b) the Commissioner of Police.

**(2) If:**

- (a) a restraining order is made in respect of an interest in property of a person; and
- (b) the person was not notified of the application for the making of the restraining order,

notice of the making or variation of the order is to be given by the Commission to the person.

**(3)** A restraining order does not cease to be in force just because proper efforts to give notice of its making have been unsuccessful.

**Supreme Court may make further orders**

**12. (1)** The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:

- (a) an order varying the interests in property to which the restraining order relates;
- (b) an order for the examination OR oath of:
  - (i) the owner of an interest in property that is subject to the restraining order; or
  - (ii) another person,before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest;
- (c) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given on behalf of the State in connection with the making of the restraining order;
- (d) if the restraining order requires the Public Trustee to take control of an interest in property:

- (i) an order regulating the manner in which the Public Trustee may exercise functions under the restraining order; or
  - (ii) an order determining any question relating to the interest, including any question affecting the liabilities of the owner of the interest or the functions of the Public Trustee; or
  - (iii) an order directing the owner of the interest or, if the owner is a body corporate, a director of the body corporate specified by the Court, to furnish to the Public Trustee, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the owner has an interest as the Court thinks proper;
- (e) an order requiring or authorising the seizure or taking possession of property.
- (2) An order under subsection (1) may be made on application:
- (a) by the Commission; or
  - (b) by the owner; or
  - (c) if the restraining order directed the Public Trustee to take control of an interest in property - by the Public Trustee; or
  - (d) with the leave of the Supreme Court - by any other person.
- (3) The applicant for an order under subsection (1) must give notice of the order.
- (a) if the applicant is a person referred to in subsection (2) (a), (b) or (C) - to the other persons referred to in those paragraphs; or
  - (b) if the applicant is a person referred to in subsection (2) (d) - to the persons referred to in subsection (2) (a)-(c).

### **Privilege**

**13. (1)** A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that:

- (a) the answer or production might incriminate, or tend to incriminate, the person or make the person liable to a forfeiture or penalty; or

(b) production of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document.

(2) A statement or disclosure made by a person in answer to a question put in the course of an examination under section 12, or any document or other thing obtained as a consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except proceedings that comprise:

- (a) proceedings in respect of the false or misleading nature of the statement or disclosure; or
- (b) the hearing of an application for a confiscation order; or
- (c) proceedings ancillary to an application for a confiscation order; or
- (d) proceedings for enforcement of a confiscation order; or
- (e) in the case of a document or other thing - civil proceedings for or in respect of a right or liability it confers or imposes.

(3) A person directed by an order under section 12 to furnish a statement to the Public Trustee is not excused from:

- (a) furnishing the statement; or
- (b) setting out particulars in the statement,

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

(4) If a person furnishes a statement to the Public Trustee in accordance with an order made under section 12, the statement is not admissible against the person in any criminal proceedings except proceedings in respect of the false or misleading nature of the statement.

### **Supreme Court may order sale**

**14. (1)** If an application is made for an assets forfeiture order, the Supreme Court may, when the application is made or at a later time, make an order directing the Public Trustee to sell an interest in property that is subject to the application for the assets forfeiture order if:

- (a) the property is subject to waste or substantial loss of value; or
- (b) in the opinion of the Public Trustee, the cost of controlling the interest would exceed the value of the interest if the assets forfeiture order were made.

(2) Notice of an application for an order under this section must be given to the owner of the interest in property to which the application relates.

(3) The proceeds of the sale under subsection (1) of an interest in property are subject to the restraining order to which the interest was subject.

### **Recording of restraining order**

**15. (1)** If a restraining order applies to an interest in property of a particular kind and the provisions of any law, whether or not a law of the State, provide for the registration of title to, an interest in or a charge over, property of that kind, the authority responsible for administering those provisions must, on application by the Commission, record in the register kept under those provisions the particulars of the restraining order.

(2) If the particulars of a restraining order are so recorded, a person who subsequently deals with the property is, for the purposes of section 16, to be taken to have had notice of the restraining order.

(3) If a restraining order applies to an interest in land under the provisions of the Real Property Act 1900, a caveat may be lodged under that Act in relation to the order.

(4) If a restraining order recorded under this section ceases to have effect in relation to an interest in property in respect of which it was made, the Commission must:

- (a) apply for cancellation of the recording, and
- (b) withdraw any caveat lodged in relation to the order.

### **Contravention of restraining order**

**16. (1)** A person who contravenes a restraining order, or any ancillary order under section 12, by disposing of, or otherwise dealing with, an interest in property that is an interest subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the interest (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both,

unless it is proved that the person had no notice that the interest was subject to the restraining order and no reason to suspect that it was.

(2) Subsection (1) does not prevent a person from being dealt with for a contempt of the Supreme Court, but a person may not, for the same contravention of a restraining order, be punished both for a contempt of the Court and under subsection (1).

(3) If:

- (a) a restraining order is made against an interest in property; and
- (b) the interest is disposed of, or otherwise dealt with, in contravention of the restraining order; and
- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

the disposition or dealing is void.

(4) It is not a contravention of a restraining order if an interest in property subject to the order is disposed of or dealt with under the authority of this Act.

### **Order for taxation of legal expenses**

17. (1) If a restraining order makes provision for meeting a person's reasonable legal expenses:

- (a) the Commission; or
- (b) the Public Trustee if the order provides for the Public Trustee to take control of an interest in the property,

may apply to the Supreme Court for an order under this section.

(2) The Public Trustee or the Commission must give to the person notice of an application under this section.

(3) On an application under this section, the Court must order that the expenses be taxed as provided in the order.

(4) After an application is made for an order under this section, the Public Trustee need not, except as ordered by the Court, take any steps for the purpose of meeting the expenses as provided by the restraining order unless and until:

- (a) an order under this section in relation to the expenses is complied with; or

- (b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, otherwise than by the making of such an order.

### **Protection of Public Trustee**

**18. (1)** A person who hinders or obstructs the Public Trustee in the performance of the Public Trustee's obligations under a restraining order is guilty of an offence.

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

**(2)** Section 45 of the Public Trustee Act 1913 applies to and in respect of the functions of the Public Trustee under this Act in the same way as it applies to and in respect of the functions of the Public Trustee under that section, but nothing in this section is to be read as limiting the operation of that section.

**(3)** The Public Trustee is not liable for any rates, land tax or other statutory charges imposed by or under a law of the State on or in respect of an interest in property of which the Public Trustee has been directed by a restraining order to take control, being rates, land tax or other statutory charges that fall due on or after the date of the restraining order, except to the extent, if any, of the rents and profits received by the Public Trustee in respect of that property on or after the date of the restraining order.

**(4)** If the Public Trustee, in accordance with a restraining order, takes control of a business carried on by a person, the Public Trustee is **not** liable:

- (a) for any payment in respect of long service leave for which the person was liable; or
- (b) for any payment in respect of long service leave to which a person employed by the Public Trustee in his or her capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order; or
- (c) to meet, otherwise than out of the income or assets of the business, any liabilities and expenses incurred in controlling the business.

(5) In this section:

"**Public Trustee**" includes the deputies of, officers and employees on the staff of, and agents of, the Public Trustee.

### **Fees payable to Public Trustee**

**19.** If the Public Trustee takes control of an interest in property in accordance with a restraining order, or if an interest in property is vested in the Public Trustee on an assets forfeiture order taking effect, the Public Trustee is entitled to deduct from the proceeds of disposition of the interest such fees, in respect of the exercise of functions in relation to the property, as may be prescribed.

### **Effect on restraining order of refusal to make confiscation order**

**20. (1)** If, while a restraining order is in force, the Supreme Court does not make an assets forfeiture order in respect of interests in property to which the restraining order relates or a proceeds assessment order in respect of any person whose interests in property are affected by the restraining order, the Court may:

- (a) if it considers it appropriate, make an order in relation to the period for which the restraining order is to remain in force; and
- (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.

**(2)** An order under subsection (1) may be made to take effect:

- (a) forthwith; or
- (b) at a specified time; or
- (c) on the happening of a specified event.

### **Certificate by Public Trustee**

**21.** If a restraining order is made directing the Public Trustee to take control of an interest in property, a certificate under the hand of the Public Trustee or an officer referred to in section 50 of the Public Trustee Act 1913 and sealed with the Public Trustee's seal:

- (a) certifying that the restraining order has been made and is in force; and
- (b) stating the terms of the restraining order,

is to be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and

stated and of the Public Trustee's right to act under the restraining order.

### **PART 3 - CONFISCATION**

#### **Division 1 - Assets forfeiture orders**

##### **Making of assets forfeiture order**

**22. (1)** If a restraining order is in force under Part 2, the Commission may apply to the Supreme Court for an order forfeiting to, and vesting in, the Crown all or any of the interests in property that are subject to the restraining order when the assets forfeiture order takes effect.

**(2)** The Supreme Court must make an assets forfeiture order if the Court finds it to be more probable than not that the person whose suspected drug-related activity, or drug-related activities, formed the basis of the restraining order:

- (a) was, at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in a drug-related activity involving an indictable quantity; or
  - (b) was, at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in an activity that is a drug-related activity because of section 6 (2) (d) or (e) where the offence referred to in section 6 (2) (a), (b) or (c) in connection with which it was committed involved an indictable quantity.
- (3)** A finding of the Court for the purposes of subsection (2):
- (a) need not be based on a finding as to the commission of a particular offence that constitutes a drug-related activity or a finding as to any particular quantity involved; and
  - (b) can be based on a finding that some offence or other constituting a drug-related activity was committed involving some quantity or other that was an indictable quantity.

**(4)** When an assets forfeiture order is made it must be made so as to apply to specified interests in property.

**(5)** The reference in subsection (2) to a period of 6 years includes a reference to a period that began before the commencement of this section.

(6) The raising of a doubt as to whether a person engaged in a drug-related activity or whether a quantity is an indictable quantity is not of itself sufficient to avoid a finding by the Supreme Court under subsection (2).

(7) The quashing or setting aside of a conviction for a drug-related activity does not affect the validity of an assets forfeiture order that was made before or after the conviction was quashed or set aside and was based on the drug-related activity.

(8) The making of an assets forfeiture order does not prevent the making of a proceeds assessment order under Division 2 which assesses the value of the proceeds of, or is based on, the drug-related activity on which the assets forfeiture order was based.

(9) Notice of an application under this section is to be given to a person to whom the application relates and the person may appear, and adduce evidence, at the hearing of the application.

(10) The absence of a person entitled to be given notice of an application for an assets forfeiture order does not prevent the Court from making the order.

### **Effect of assets forfeiture order**

**23. (1)** On an assets forfeiture order taking effect in relation to an interest in property:

- (a) the interest is forfeited to the Crown and vests in the Public Trustee on behalf of the Crown; and
- (b) if the person forfeiting the interest was in possession, or was entitled to possession, of the property, the Public Trustee may take possession of the property on behalf of the Crown.

(2) An interest forfeited under subsection (1) is to be disposed of by the Public Trustee in accordance with the directions of the Treasurer and the proceeds are to be paid to the Treasurer and credited to the Proceeds Account.

(3) The Treasurer may delegate the power to give directions for the purposes of subsection (2).

(4) The Supreme Court may make ancillary orders for and with respect to facilitating the transfer to the Crown of interests in property forfeited to the Crown under this section.

**Relief from hardship - spouses and dependants**

**24. (1)** If the Supreme Court is satisfied that an assets forfeiture order will operate to cause hardship to any dependant of the person who will forfeit an interest in property under the order, the Court:

- (a) may order that the dependant is entitled to be paid a specified amount out of the proceeds of sale of the interest, being an amount that the Court thinks is necessary to prevent hardship to the dependant; and
- (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who is under 18 years of age.

**(2)** The Court is not to make an order under this section in favour of the dependant of a person whose drug-related activity formed the basis for the assets forfeiture order concerned unless the Court is satisfied that the dependant had no knowledge of any drug-related activities of the person.

**(3)** Subsection (2) does not apply if the dependant concerned is under 18 years of age.

**(4)** In this section:

**"dependant"**, in relation to a person, means:

- (a) a spouse or a de facto partner (within the meaning of the De Facto Relationships Act 1984) of the person; or
- (b) a child of the person, or a member of the household of the person, dependent for support on the person.

**Exclusion of property from restraining order and assets forfeiture order**

**25. (1)** If an assets forfeiture order:

- (a) has been applied for but not made - a person whose interest in property might be subject to the order if made; or
- (b) has been made - a person whose interest in property was forfeited by the order,

may apply to the Supreme Court for an order (in this section called an **"exclusion order"**) excluding the interest from the operation of the assets forfeiture order or any relevant restraining order.

**(2)** The Supreme Court must not make the exclusion order applied for unless it is proved that it is more probable than not that the interest

in property to which the application relates is not illegally acquired property.

(3) An exclusion order must declare the nature and extent of the interest in property to which it relates and:

- (a) if the interest has been forfeited to the Crown, but not disposed of - must require the Crown to vest the interest in the claimant; or
- (b) if the interest has been disposed of - must require payment by the Crown to the claimant of an amount declared by the Supreme Court to be the value, as at the date of the order, of the former interest of the claimant.

(4) After an assets forfeiture order has been made, an application for an exclusion order may not be made by a person:

- (a) if the person was given notice of the proceedings that led to the relevant restraining order or assets forfeiture order - unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court; or
- (b) in any other case - unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.

(5) Notice of an application for an exclusion order is to be given to the Commission and any other person required by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.

(6) The applicant for an exclusion order must give the Commission notice of the grounds on which the exclusion order is sought.

(7) If the Commission proposes to contest an application for an exclusion order, it must give the applicant notice of the grounds on which the application is to be contested.

Exclusion of the value of innocent interests from assets forfeiture order

**26. (1)** If it is proved that it is more probable than not that a specified proportion of the value of an interest in property that has been forfeited under an assets forfeiture order is not attributable to the proceeds of an illegal activity, the Supreme Court may

- (a) make a declaration to that effect; and
- (b) order that the person who has forfeited the interest is entitled to be paid the proportion of the proceeds of sale of the interest that is specified in the declaration.

(2) Any such declaration is to be made on the basis of the extent to which the interest in property concerned was not, when it first became illegally acquired property, acquired using the proceeds of an illegal activity.

(3) The Supreme Court may make a declaration and order under this section in relation to an interest in property on the application of the person whose interest it was when forfeited under an assets forfeiture order.

(4) After an assets forfeiture order has been made, an application for an order under this section may not be made by a person:

- (a) if the person was given notice of the proceedings that led to the assets forfeiture order - unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court; or
- (b) in any other case - unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.

(5) Notice of an application for an order under this section is to be given to the Commission and any other person required by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.

(6) The applicant for an order under this section must give the Commission notice of the grounds on which the order is sought.

(7) If the Commission proposes to contest an application for an order under this section it must give the applicant notice of the grounds on which the application is to be contested.

## **Division 2 - Proceeds assessment orders**

### **Making of proceeds assessment order**

27. (1) The Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived

from a drug-related activity, or drug-related activities, of the person that took place not more than 6 years before the making of the application for the order, whether or not any such activity involved an indictable quantity or is an activity on which the application is based as required by subsection (2).

(2) The Supreme Court must make a proceeds assessment order if the Court finds it to be more probable than not that the person against whom the order is sought:

- (a) was, at any time not more than 6 years before the making of the application for the order, engaged in a drug-related activity involving an indictable quantity; or
- (b) was, at any time not more than 6 years before the making of the application for the order, engaged in an activity that is a drug-related activity because of section 6 (2) (d) or (e) where the offence referred to in section 6 (2) (a), (b) or (c) in connection with which it was committed involved an indictable quantity.

(3) A finding of the Court for the purposes of subsection (2):

- (a) need not be based on a finding as to the commission of a particular offence that constitutes a drug-related activity or a finding as to any particular quantity involved; and
- (b) can be based on a finding that some offence or other constituting a drug-related activity was committed involving some quantity or other that was an indictable quantity.

(4) The references in subsections (1) and (2) to a period of 6 years include a reference to a period that began before the commencement of this section.

(5) The quashing or setting aside of a conviction for a drug-related activity does not affect the validity of a proceeds assessment order.

(6) The making of a proceeds assessment order does not prevent the making under Division 1 of an assets forfeiture order based on the drug-related activity, or on all or any of the drug-related activities, in relation to which the proceeds assessment order is made.

(7) The amount a person is required to pay under a proceeds assessment order is a debt payable by the person to the Crown on the making of the order and is recoverable as such.

(8) If an order under this section is made against a dead person, subsection (7) has effect before final distribution of the estate as if the person had died the day after the making of the order.

(9) The net amount recovered under a proceeds assessment order is to be paid to the Treasurer and credited to the Proceeds Account.

(10) Notice of an application under this section is to be given to the person against whom the order is sought and any other person required by the regulations to be given notice.

(11) The absence of a person entitled to be given notice of a proceeds assessment order does not prevent the Court from making the order.

### **Assessment of proceeds from drug-related activity**

**28. (1)** For the purpose of making an assessment under section 27 in relation to a drug-related activity, or drug-related activities, of a person (in this section called "**the defendant**") the Supreme Court is to have regard to the following matters:

- (a) the money, or the value of any interest in property other than money, directly or indirectly acquired by:
  - (i) the defendant; or
  - (ii) another person at the request, or by the direction, of the defendant,because of the drug-related activity or activities;
- (b) the value of any service, benefit or advantage provided for:
  - (i) the defendant; or
  - (ii) another person at the request, or by the direction, of the defendant,because of the drug-related activity or activities;
- (c) the market value, at the time of the drug-related activity or of each drug-related activity, of a plant or a drug similar, or substantially similar, to that involved in the drug-related activity or each drug-related activity, and the amount that was, or the range of amounts that were, ordinarily paid for an act similar, or substantially similar, to the drug-related activity or each drug-related activity
- (d) the value of the defendant's property before and after the drug-related activity or each drug-related activity;

(e) the defendant's income and expenditure before and after the drug-related activity or activities.

(2) If, at the hearing of an application for a proceeds assessment order, evidence is given that the value of the defendant's property after the drug-related activity or activities exceeded the value of the defendant's property before the drug-related activity or activities, the Supreme Court is to treat the value of the proceeds derived by the defendant from the activity or activities as being not less than the amount of the excess unless subsection (3) applies.

(3) If, at a hearing referred to in subsection (2):

- (a) the Supreme Court is satisfied that the whole of the excess was due to causes unrelated to the drug-related activity or activities - subsection (2) does not apply to the excess; or
- (b) the Court is satisfied that a part of the excess was due to causes unrelated to the drug-related activity or activities - subsection (2) does not apply to so much of the excess as was due to those causes.

(4) In making an assessment as provided by this section, expenses or outgoings incurred by the defendant in relation to the drug-related activity or activities are not to be subtracted.

(5) This section applies to, and in relation to:

- (a) property that comes into the possession, or under the control, of a person either within or outside New South Wales; and
- (b) proceeds acquired either within or outside New South Wales in relation to a drug-related activity.

(6) Despite any rule of law, or any practice, relating to hearsay evidence, the Supreme Court may, for the purposes of this section, receive evidence of the opinion of:

- (a) a member of the Police Force; or
- (b) a member of the Australian Federal Police; or
- (c) an officer of Customs within the meaning of the Customs Act 1901 of the Commonwealth; or
- (d) a member or officer of the Commission,

who is experienced in the investigation of drug-related activities, being an opinion with respect to:

- (e) the amount that was the market value at a particular time of a particular kind of plant or drug; or

- (f) the amount, or range of amounts, ordinarily paid at a particular time for the doing of anything in relation to a particular kind of plant or drug.

**Enforcement of order against property under effective control**

**29. (1)** On the application of the Commission, the Supreme Court must, if of the opinion that an interest in property is subject to the effective control of a person in relation to whom the Court has made a proceeds assessment order, make an order declaring that the interest is available to satisfy the order to the extent that other property is not readily available for that purpose.

**(2)** If the Supreme Court declares that an interest in property is available to satisfy a proceeds assessment order, the proceeds assessment order may be enforced against the property to the extent specified in the declaration.

**(3)** If application is made for an order under this section:

- (a) the Commission must give notice of the application to the person against whose interest in property the order is sought and to any other person who the Commission has reason to believe may also have an interest in the property to which the application relates; and
- (b) each person to whom notice is given, and any other person who claims an interest in the property, may appear, and adduce evidence, at the hearing of the application.

**(4)** Despite section 7, an interest in property is not available to satisfy a proceeds assessment order made against a person who has effective control of the interest unless the Supreme Court makes a declaration under this section in relation to the interest.

**Public Trustee may discharge proceeds assessment order**

**30. (1)** If:

- (a) the Public Trustee has, under a restraining order, taken control of an interest in property, and
- (b) a proceeds assessment order has been made against the person entitled to the interest,

the Supreme Court may, on application by the Public Trustee, make an order (in this section referred to as "the later order") directing the Public Trustee to pay to the Treasurer an amount sufficient to

discharge the debt created by section 27 arising under the proceeds assessment order.

(2) For the purpose of enabling the Public Trustee to comply with the later order, the Supreme Court may, by that order or by a subsequent order:

- (a) direct the Public Trustee to sell or otherwise dispose of a specified interest in property under the control of the Public Trustee; and
- (b) appoint an officer of the Court or any other person to execute any deed or instrument in the name of the person entitled to the interest and to do all acts and things necessary to give validity and operation to the deed or instrument.

(3) The execution of the deed or instrument by the person so appointed has the same force and validity as it would have if it had been executed by the person who was entitled to the interest to which it relates.

(4) As soon as practicable after the making of the later order, the Public Trustee:

- (a) is to apply the money which has come into the Public Trustee's possession or under the Public Trustee's control because of the sale or other disposition specified in the later order, or the subsequent order, or otherwise in the course of the performance of the Public Trustee's duties in respect of the interests in property to which the restraining order relates, in payment of:

- (i) the fees payable in connection with; and
- (ii) the expenses incurred by the Public Trustee in or in connection with,

the performance of the duties imposed on the Public Trustee under the restraining order, including the expenses incurred by the Public Trustee in or in connection with the sale or other disposition of any of the interests in property to which the restraining order relates; and

- (b) is to pay the rest of the money as provided by subsection (5).

(5) If the money to which subsection (4) (b) applies exceeds the amount required to discharge the debt arising under the proceeds assessment order, the Public Trustee is to use the money to discharge

the debt by payment of the appropriate amount to the Treasurer and, if the property sold or disposed of:

- (a) was also the subject of an assets forfeiture order - is to pay the balance of the money to the Treasurer; or
- (b) was not the subject of an assets forfeiture order - is to pay the balance of the money to the person against whom the proceeds assessment order was made.

(6) Money paid to the Treasurer under subsection (5) is to be credited to the Proceeds Account.

(7) If the Public Trustee pays, in accordance with the later order, money to the Treasurer in respect of the liability of a person under a proceeds assessment order, the liability of the person under the proceeds assessment order is discharged to the extent of the payment.

### **Charge on property**

**31. (1)** If the Supreme Court makes a proceeds assessment order against a person, all the interests of the person in property are, while the assessed amount remains unpaid, charged in favour of the Crown to the extent necessary to secure payment of the assessed amount.

**(2)** A charge created by subsection (1) on the making of a proceeds assessment order ceases to have effect:

- (a) if the proceeds assessment order is discharged on the hearing of an appeal against the making of the order; or
- (b) on payment to the Treasurer of the assessed amount; or
- (c) on the bankruptcy of the person subject to the order; or
- (d) on the sale or other disposition of the interest charged under the authority of this Act except under section 10 (8) (b) or 14; or
- (e) on the sale of the interest charged to a purchaser for sufficient consideration who, at the time of purchase, had no notice of the charge,

whichever first occurs.

(3) A charge that, on the making of a proceeds assessment order, is created by subsection (1) over an interest in property

- (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this paragraph, have priority over the charge; and
- (b) has priority over all other encumbrances; and
- (c) subject to subsection (2), is not affected by any change of ownership of the interest charged.

(4) If a charge is created by subsection (1) on an interest in property of a particular kind and the provisions of any law, whether or not a law of the State, provide for the registration of title to, interests in, or charges over, property of that kind, the Public Trustee or an appropriate officer may cause the charge so created to be registered under the provisions of that law.

### **Division 3 - Confiscated Drug Proceeds Account**

#### **Establishment and use of Proceeds Account**

**32. (1)** The Treasurer is to establish in the Special Deposits Account at the Treasury an account called the Confiscated Drug Proceeds Account.

(2) To the credit of the Proceeds Account there is to be paid the money required by this or any other Act to be paid to the Proceeds Account.

(3) From the Proceeds Account there is to be paid:

- (a) to the Treasurer - the amounts from time to time determined by the Treasurer in consultation with the Minister as payable for the purpose of administering this Act; and
- (b) any amount required to be paid in accordance with an order of the Supreme Court under this Act; and
- (c) to the credit of the Victims Compensation Fund established under the Victims Compensation Act 1987 - such amounts as are determined by the Treasurer in consultation with the Minister; and
- (d) other amounts in aid of law enforcement, drug rehabilitation or drug education as directed by the Treasurer in consultation with the Minister.

## **PART 4 - INFORMATION GATHERING POWERS**

### **Division 1 - Production orders**

#### **Making of production order**

**33. (1)** If an authorised officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document, or property-tracking documents, the authorised officer may:

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

**(2)** The Supreme Court may order the person against whom an application for a production order is made under subsection (1):

- (a) except in the case of bankers' books, to produce to an authorised officer at a specified time and place any property-tracking documents that are in the person's possession or control; or
- (b) to make available to an authorised officer, for inspection at a specified time or times at the place at which they are kept, any property-tracking documents that are in the person's possession or control.

**(3)** In this section:

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

#### **Powers under production order**

**34. (1)** If a document is produced to an authorised officer under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- (c) make copies of the document;
- (d) retain the document if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(2) If a document is made available to an authorised officer for inspection under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document;
- (b) take extracts from the document;
- (c) make copies of the document.

(3) An authorised officer who retains a document under subsection (1) (d) must, on request by the person against whom the order is made:

(a) give the person a copy of the document certified by the authorised officer in writing to be a true copy of the document; and

(b) unless the person has received a copy of the document under paragraph (a) - permit the person to do any one or more of the following:

- (i) inspect the document;
- (ii) take extracts from the document;
- (iii) make copies of the document.

### **Effect of production order on proceedings etc.**

**35. (1)** A person is not excused from complying with a production order on the ground that:

- (a) the production or making available of the document might tend to incriminate the person or make the person liable to a forfeiture or penalty; or
- (b) the production or making available of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document.

(2) If a person objects to a production order:

- (a) the production or making available of the document; or
- (b) any document or thing obtained as a consequence of the production or making available of the document,

is not admissible against the person in any criminal proceedings except proceedings for an offence under section 37 (Failure to comply with production order).

### **Variation of production order**

**36.** If the Supreme Court makes an order under section 33 requiring a person to produce a document to an authorised officer, the person may apply to the Court for a variation of the order and the Court may, if satisfied that the document is essential to the business activities of the person, vary the production order so that it requires the person to make the document available under section 33 (2) (b) to an authorised officer for inspection.

### **Failure to comply with production order**

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

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

Maximum penalty 500 penalty units if the offender is a body corporate or, in any other case, 100 penalty units or imprisonment for 2 years, or both.

## **Division 2 - Search powers (general)**

### **Search warrants**

**38. (1)** A full-time member of the Commission or a member of the Police Force may apply to a Magistrate, or to a justice of the peace employed in the Attorney General's Department, for the issue of a search warrant under this Division if the member has reasonable grounds for believing that there is on any premises:

- (a) anything in which a person has an interest that constitutes drug-derived property; or
- (b) anything in which a person has an interest that constitutes illegally acquired property of a person reasonably suspected of having been engaged in drug-related activities; or
- (c) evidence of a drug-related activity or
- (d) evidence of illegal activity of a person reasonably suspected of having been engaged in drug-related activities; or
- (e) property an interest in which is subject to a restraining order.

(2) The Magistrate or justice to whom the application for a search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising:

- (a) any member of the Police Force; and
- (b) if the application was made by a member of the Commission - a person or persons specified by the member and named in the warrant,

to enter the premises and there search for any or all of the property or evidence referred to in subsection (1).

(3) Nothing in this Division limits the operation of Part 2 of the Search Warrants Act 1985.

(4) Part 3 of the Search Warrants Act 1985 applies to a search warrant issued under this Division.

### **Seizure of property and searching of person**

**39. (1)** The person or persons executing a search warrant under this Division may seize anything that might reasonably be suspected of being:

- (a) something in which a person has an interest that constitutes drug-derived property; or
- (b) something in which a person has an interest that constitutes illegally acquired property of a person reasonably suspected of having been engaged in drug-related activities; or
- (c) evidence of a drug-related activity or
- (d) evidence of illegal activity of a person reasonably suspected of having been engaged in drug-related activities; or

(e) property an interest in which is subject to a restraining order.

(2) The power conferred by this section to seize anything includes:

- (a) power to remove it from the premises where it is found; and
- (b) power to guard it on those premises.

(3) A person executing a search warrant issued under this Division may search a person found on the premises who might reasonably be suspected of being in possession of property or evidence that may be seized under this section.

(4) A person executing a search warrant issued under this Division may:

- (a) examine any property or evidence seized in executing the warrant; and
- (b) inspect and test any such property, and
- (c) in the case of evidence that is a document - make copies of, and take extracts from, the document.

#### **Responsibility for seized property**

**40. (1)** If property or evidence is seized when a search warrant issued under this Division is executed, reasonable measures for its preservation while in custody are to be taken:

- (a) by the Commission, if the warrant was issued on the application of a member of the Commission; or
- (b) by the Commissioner of Police, if the warrant was issued on the application of a member of the Police Force..

(2) A person authorised by the Commission for the purpose may:

- (a) examine any property or evidence seized when a search warrant issued under this Division is executed, including a warrant issued on the application of a member of the Police Force; and
- (b) inspect and test any such property; and
- (c) in the case of evidence that is a document - make copies of, and take extracts from, the document.

#### **Return of certain seized property**

**41. (1)** If:

- (a) property has been seized pursuant to a search warrant issued under this Division; and

- (b) at the time when the property was seized, a restraining order affecting an interest in the property had not been applied for or granted; and
- (c) before the expiration of 7 days after the property was seized, such a restraining order had not been applied for or granted or, if applied for, had been refused; and
- (d) the responsible person does not propose to use the property as evidence in any proceedings,

the responsible person is to arrange for the property to be returned, at the expiration of that period, to the person from whose possession it was seized.

**(2)** In this section:

**"responsible person"**, in relation to property, means:

- (a) if the property is in the custody, or under the control, of the Commission - the Commission; or
- (b) if the property is in the custody, or under the control, of a member of the Police Force - the Commissioner of Police.

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

**42.** A person who, without reasonable excuse, obstructs or hinders a person executing a search warrant issued under this Division is guilty of an offence.

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

### **Division 3 - Search powers (property tracking)**

#### **Consent to search for, and to seizure of, property-tracking document**

**43.** With the consent of the occupier of premises, an authorised officer may:

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

**Application for search warrant for location etc. of property-tracking document**

**44.** If a full-time member of the Commission, or a member of the Police Force, has reasonable grounds for suspecting that a property-tracking document is, or may be within the next following 72 hours, in or on any premises, the member may

- (a) lay before the Supreme Court an information on oath setting out those grounds; and
- (b) apply to the Court for the issue of a search warrant under section 45 in respect of the premises.

**Search warrant for location etc. of property**

**45. (1)** If an application is made under section 44 for a search warrant in respect of premises, the Supreme Court may issue a search warrant authorising an authorised officer (who, if a member of the Police Force, need not be named in the warrant), with such assistance, and by the use of such force, as is necessary and reasonable:

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

**(2)** The Supreme Court is not to issue a search warrant under this section unless the Court is satisfied that:

- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document; or
- (b) a production order has been made in respect of the document and has not been complied with; or
- (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with; or
- (d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without notice to any person.

**Requirements of search warrant**

- 46.** There must be stated in a search warrant issued under section 45:
- (a) whether entry is authorised to be made at any time of the day or night or only during specified hours of the day or night; and
  - (b) the date, not being later than one month after the day of issue of the warrant, on which the warrant ceases to have effect.

**Other documents and evidence may be seized**

**47.** If an authorised officer executing a search warrant issued under section 45:

- (a) finds any document or other thing that the authorised officer believes, on reasonable grounds, will afford evidence of a criminal offence; and
- (b) believes, on reasonable grounds, that it is necessary to seize the document or thing in order to prevent its concealment, loss or destruction,

the search warrant is to be taken to authorise seizure of the document or thing.

**Division 4 - Monitoring orders**

**Monitoring orders**

**48. (1)** On application made, *ex parte*, by an authorised officer, the Supreme Court may make an order directing a financial institution to give to the Commission, or to a person authorised by the Commission and named in the order, information obtained by the institution about transactions conducted by a particular person with the institution.

**(2)** The Supreme Court is not to make a monitoring order unless satisfied that there are reasonable grounds for suspecting that the person in respect of whose transactions the information is sought:

- (a) has been, or is about to be, involved in a drug-related activity; or
- (b) has acquired, or is about to acquire, directly or indirectly, any drug-derived property or, in the case of a person referred to in paragraph (a), any illegally acquired property.

- (3)** A monitoring order must specify
- (a) the nature of the transactions to be monitored; and
  - (b) the kind of information that the institution is required to give; and
  - (c) the manner in which the information is to be given.

**(4)** A monitoring order applies in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).

**Offences relating to monitoring order**

**49.** A financial institution that has been given notice of a monitoring order is guilty of an offence if it knowingly

- (a) contravenes the order; or
- (b) provides false or misleading information in purported compliance with the order.

Maximum penalty 1,000 penalty units.

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

**50. (1)** A financial institution that is, or has been, subject to a monitoring order is guilty of an offence if it discloses the existence or the operation of the order to any person (including the person to whom the order relates) except:

- (a) the Commission or the person authorised by the Commission and named in the order; or
- (b) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or
- (c) a barrister or solicitor, for the purpose of obtaining legal advice or representation in relation to the order.

Maximum penalty 1,000 penalty units.

**(2)** A person described in subsection (1) (a), (b) or (c) to whom the existence or operation of a monitoring order has been disclosed (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) is guilty of an offence if he or she:

- (a) while still a person so described - discloses the existence or operation of the order, otherwise than to another person described in subsection (1) (a), (b) or (c) for the purpose of:
  - (i) if the disclosure is made by a person described in subsection (1) (a) or (b) - the performance of that person's duties; or
  - (ii) if the disclosure is made by an officer or agent of the institution - ensuring that the order is complied with or obtaining legal advice or representation in relation to the order; or
  - (iii) if the disclosure is made by a barrister or solicitor - giving legal advice, or making representations, in relation to the order; or
- (b) while no longer a person so described - makes a record of, or discloses, the existence or operation of the order in any circumstances.

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

**(3)** Nothing in subsection (2) prevents the disclosure by a person described in subsection (1) (a) of the existence or operation of a monitoring order:

- (a) for the purposes of, or in connection with, legal proceedings; or
- (b) in the course of proceedings before a court.

**(4)** A person described in subsection (1) (a) is not to be required to disclose to any court the existence or operation of a monitoring order.

**(5)** A reference in this section to disclosing the existence or operation of a monitoring order to a person includes a reference to disclosing to the person information from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

Communication of information by financial institutions to prescribed authorities

**51. (1)** If a financial institution has reasonable grounds for believing that information it has about a transaction with the institution:

- (a) might be relevant to an investigation of a drug-related activity or the making of a confiscation order; or

(b) might otherwise be of assistance in the enforcement of this Act or the regulations,  
the institution may give the information to the Commission.

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

(a) a financial institution; or

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

in relation to the giving of the information by the institution or person under this section.

### **Protection for financial institution - money laundering**

**52. (1)** If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made is to be disregarded for the purposes of section 73 (Money laundering) of the Confiscation of Proceeds of Crime Act 1989 in relation to the institution.

(2) If a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to section 51 as soon as practicable after forming the belief referred to in that section, the institution or person is to be taken, for the purposes of section 73 of the Confiscation of Proceeds of Crime Act 1989 (Money laundering) not to have been in possession of the information at any time.

## **PART 5 - OFFENCES**

### **Proceedings for offences**

**53. (1)** Except as otherwise provided by this section, proceedings for an offence under this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(2) A Local Court may not deal with an offence under section 16 (Contravention of restraining order).

(3) Proceedings for an offence under section 16 are to be dealt with before the Supreme Court in its summary jurisdiction.

(4) Proceedings for an offence under section 49 (Offences relating to monitoring order) or 50 (1) (which relates to disclosure of the

existence of a monitoring order) are to be taken before the Supreme Court in its summary jurisdiction.

(5) If proceedings for an offence are dealt with before a Local Court, the maximum penalty that the Court may impose is 100 penalty units or the maximum penalty provided for the offence, whichever is less.

### **Proof of certain matters**

**54. (1)** A certificate that purports to have been signed by a full-time member or a delegate of the Commission and certifies that a specified person was or was not an authorised officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts certified.

(2) A certificate of conviction of an offence (being a certificate referred to in section 23 of the Evidence Act 1898) is admissible in any civil proceedings under this Act and is evidence of the commission of the offence by the person to whom it relates.

### **Conduct of directors, employees or agents**

**55. (1)** If it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or taken by subsection (2) to have been engaged in, by the body corporate, it is sufficient to show that a director, employee or agent of the body corporate (being a director, employee or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

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

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

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

(3) If it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct taken by subsection (4) to have been engaged in by the person, it is sufficient to show that an

employee or agent of the person (being an employee or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

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

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

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

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

## **PART 6 - MISCELLANEOUS**

### **Drug-related activity can form basis of a number of orders**

**56.** The fact that a restraining order or an assets forfeiture order has been made on the basis of a person's drug-related activity does not prevent the making of another or other restraining orders or assets forfeiture orders on the basis of that activity.

### **Orders can be extended to innocent interests**

**57. (1)** The purpose of this section is to provide for an order of the Supreme Court under this Act in relation to an interest of a person in property to be extended to other interests in the property (whether of that person or another person) if:

- (a) the proceeds of disposal of those interests combined would be likely to be greater than the proceeds of disposal of each of the interests separately, or

- (b) the disposal of the interests separately would be impracticable or significantly more difficult than disposal of the combined interests.

(2) When the Supreme Court makes an order under this Act in relation to an interest of a person in property, the Court may, if it is consistent with the purpose of this section to do so, by that order or a subsequent order direct that the order is also to apply to specified other interests in the property.

(3) When the Supreme Court extends the operation of an order to an interest in property that the order would not (but for this section) have applied to, the Court may make such ancillary orders as it thinks fit for the protection of the person whose interest it is, such as:

- (a) an order declaring that there is payable to the person a specified amount as the value of the person's interest in the property; or
- (b) an order directing that specified other interests in the property be transferred to the person.

(4) In deciding whether to declare that an amount is payable to a person or to direct that an interest in property be transferred to a person, the Supreme Court is to have regard to:

- (a) the nature, extent and value of the person's interest in the property concerned; and
- (b) if the Court is aware that any other person claims an interest in the property - the nature, extent and value of the interest claimed; and
- (c) any other matter that seem to the Court to be relevant.

(5) The rules of court may make provision for and with respect to the operation of this section.

### **Effect of death of person involved**

**58. (1)** Any notice authorised or required to be given to a person under this Act is, if the person is dead, sufficiently given if given to the person's legal personal representative.

(2) A reference in this Act to an interest in property of a person is, in the case of a person who is dead, a reference to an interest in the property that the person had immediately before death.

- (3) An order can be applied for and made under this Act:
- (a) in respect of a person's interest in property even if the person is dead; and
  - (b) on the basis of the activities of a person who is dead.

**Arrangements to avoid operation of Act**

**59. (1)** In this section:

"scheme" means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct.

(2) If the Supreme Court is satisfied on the application of the Commission that a scheme carried out by a person was carried out for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of this Act in any respect, the Court may for the purpose of defeating that purpose:

- (a) make an order declaring the scheme void in whole or in part; or
- (b) make an order varying the operation of the scheme in whole or in part.

(3) The Supreme Court may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter or for giving effect to any orders of the Court under this section, including any of the following orders:

- (a) the making of any disposition of property;
- (b) the payment of money;
- (c) the sale or other realisation of property and the disposition of the proceeds;
- (d) the creation of a charge on property in favour of any person and the enforcement of a charge so created.

(4) The Supreme Court may rescind or vary any order of the Court under this section.

### **Act binds Crown**

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

### **Restriction on functions**

**61, (1)** A proceeds assessment order under this Act and a drug proceeds order under the Confiscation of Proceeds of Crime Act 1989 may not both be made in relation to the same drug-related activity.

**(2)** A restraining order cannot be made under this Act and under the Confiscation of Proceeds of Crime Act 1989 so as to be in force in respect of the same interest in property at the same time.

**(3)** Except as provided by this section, this Act does not affect the exercise of a function under another Act and another Act does not affect the exercise of a function under this Act.

### **Publication of proceedings**

**62.** If:

- (a) a person has been charged with an offence in relation to a drug-related activity and proceedings on the charge have not commenced or, if the proceedings have commenced, they have not been completed; and
- (b) proceedings are instituted under this Act for a restraining order, or an assets forfeiture order, affecting an interest of the person in property, or for a proceeds assessment order against the person,

the Supreme Court may make such orders as it thinks fit with respect to the publication of any matter arising under this Act.

### **Stay of proceedings**

**63.** The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings.

### **Stamp duty**

**64.** No stamp duty is payable under the Stamp Duties Act 1920 in respect of the vesting of any property under section 25 (Exclusion of

property from restraining order and assets forfeiture order) or 57 (Orders can be extended to innocent interests).

### **Requirements to give notice**

**65. (1)** The regulations may make provision for and with respect to the manner in which a notice authorised or required by this Act to be given to a person is to be given.

(2) Any such provisions may include provision for substituted service.

(3) A person is to be considered to have been given notice if all reasonable efforts were made to give the notice whether or not the person actually received notice.

### **Transitional provision**

**66.** If section 45A of the Poisons Act 1966 was in force during a period of 6 years referred to in section 22 or 27 of this Act, a reference in section 22 or 27 of this Act to a drug-related activity involving an indictable quantity includes a reference to a drug-related activity to which section 45A of the Poisons Act 1966 applied during that period.

### **Regulations**

**67. (1)** The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units.

### **Amendment of Search Warrants Act 1985 No. 37, sec. 10 (Definitions)**

**68.** The Search Warrants Act 1985 is amended by inserting in the definition of "search warrant" in section 10, in alphabetical order of Acts, the matter "section 38 of the Drug Trafficking (Civil Proceedings) Act 1990;"

### **Amendment of State Drug Crime Commission Act 1985 No. 117, sec. 6 (Principal functions of the Commission)**

**69.** The State Drug Crime Commission Act 1985 is amended by inserting after section 6 (1) the following subsection:

(1A) The Commission may exercise a function conferred or imposed on it by the Drug Trafficking (Civil Proceedings) Act 1990, may carry out investigations in aid of the exercise of those functions and may, for the purposes of that Act, make such use as it thinks fit of any information obtained by it in the execution of this Act.

**Amendment of Victims Compensation Act 1987 No. 237, sec. 65G  
(Payments into the Compensation Fund)**

**40.** The Victims Compensation Act 1987 is amended by inserting after section 65G (a) the following paragraph:

- (a1) all money required by the Drug Trafficking (Civil Proceedings) Act 1990 to be credited to the Fund;
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*[Minister's second reading speech made in -  
Legislative Assembly on 8 May 1990  
Legislative Council on 23 May 1990]*