Expanding the Criminal Assets Forfeiture Regime - Criminal Proceeds Confiscation Bill 2002 (Qld)

The Criminal Proceeds Confiscation Bill 2002 (Qld) (the Bill) introduces a civil confiscation scheme for seizing property derived from serious criminal activity that a person has engaged in during the previous six years, even where the person has not been convicted of any offence. Property will be able to be forfeited if the Supreme Court is satisfied that it is more likely than not that it is derived from a serious crime related activity. Conviction of an offence will not be a prerequisite and it will not be necessary to show that the property was derived from a specific offence. The onus will then shift to the person to justify the sources of their unexplained wealth.

The civil-based regime will operate alongside, but separate from, an improved and strengthened conviction-based confiscation regime based on the existing Crimes (Confiscation) Act 1989 (Qld)) which will be repealed by the Bill.

The purpose of the new legislation is to remove financial gain and increase the financial loss associated with illegal activity. However, the Bill also seeks to ensure that property rights are affected only through proper legal processes and that the rights of innocent parties acquiring property are protected.

Nicolee Dixon

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1 INTRODUCTION

The Criminal Proceeds Confiscation Bill 2002 (Qld) (the Bill) introduces a civil confiscation scheme for seizing property derived from serious criminal activity that a person has engaged in during the previous six years, even where the person has not been convicted of any offence. Property will be able to be forfeited if the Supreme Court is satisfied that it is more likely than not that it is derived from a serious crime related activity. Conviction of an offence will not be a prerequisite and it will not be necessary to show that the property was derived from a specific offence. The onus will then shift to the person to justify the sources of their unexplained wealth. The civil-based regime will operate alongside, but separate from, an improved and strengthened conviction-based confiscation regime based on the existing Crimes (Confiscation) Act 1989 (Qld)).

It is intended that the Queensland Crime Misconduct Commission (CMC) will institute proceedings under the civil scheme on behalf of the State and the Director of Public Prosecutions (DPP) will be involved as solicitor on the record.

This Brief will consider the operation of confiscation orders and restraining orders in a civil-based scheme, with reference to the new Bill. Comparisons with other civil forfeiture jurisdictions will be made, where relevant, with particular reference to the New South Wales Criminal Assets Recovery Act 1990, upon which the Queensland Bill is modelled. Reference will be made to recommendations of the Australian Law Reform Commission in its Confiscation that Counts Report (2000) concerning aspects of the regime. While it is envisaged that the civil-based scheme will be favoured by Queensland law enforcement bodies in recovering assets, the Brief will also discuss the Bill’s conviction-based regime that will replace the Crimes (Confiscation) Act 1989 (Qld)). That Act will be repealed by the new Bill when it commences on 1 January 2003. Some issues are beyond the scope of this Brief but are comprehensively dealt with in the Explanatory Notes to the Bill.

2 BACKGROUND

The Crimes (Confiscation) Act 1989 (Qld) establishes a conviction-based regime. Under the Act, the Court can allow the State to seize any property of a person that has been acquired through certain criminal activities, or make an order requiring the person to

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1 Hon R J Welford MP, Attorney-General and Minister for Justice, Criminal Proceeds Confiscation Bill 2002 (Qld), Second Reading Speech, Queensland Parliamentary Debates, 22 October 2002, pp 3858-3860, p 3858.
pay the value of any benefits so acquired. However, the person must have been convicted of certain serious offences before the regime can operate. Even if the State can show that it is more likely than not that the assets are the proceeds of a crime, no confiscation order can be made.

In addition, the property sought to be recovered must be proceeds of, or property used in committing, the particular offence. For instance, a person may have been involved in drug trafficking for some years and there may be evidence to suggest that the proceeds of such have been transmitted off-shore. However, if an arrest is made involving seizure, the previously acquired assets are not confiscable under present Queensland confiscation laws because they were acquired prior to the commission of the offence in respect of which the person is prosecuted.

To ensure that property or proceeds of crime are not dissipated prior to the outcome of the hearing for recovery of assets, the Queensland DPP can make an application for a restraining order. The next step is an application (within six months of conviction) to the Supreme Court, or the court before which the person is convicted, for a forfeiture order against particular property and/or a pecuniary penalty order (which are both explained below).

It has been claimed that the efforts of Queensland’s law enforcement agencies have been frustrated by the requirement for conviction of a person as a prerequisite to recovery of assets, particularly in relation to drug trafficking. For example, the former Queensland Crime Commissioner stated that during the 1998-99 financial year, less than 0.5% of Queensland’s estimated $580m heroin market had been recovered.\(^2\)

The problem was highlighted in May 2001 when the Queensland DPP had to return restrained assets to a family which was found not guilty of heroin trafficking. The unemployed restaurateur and his wife were unable to explain where their assets - which included a Porsche, Honda Accord, jewellery, and property worth $180,000 - came from. There was also evidence of a trip to the United States and gambling of large sums at the Casino. While the Magistrate noted that the evidence did present a prima facie case of some wrongdoing, he said that there were other explanations of the acquisition other than heroin trafficking.\(^3\) The couple claimed that the assets were obtained as a result of good luck at the Casino and big catches with their fishing trawlers.

New South Wales, Victoria, Western Australia, the Northern Territory, the Australian Capital Territory, and the Commonwealth have adopted (or are considering adopting) a civil-based or ‘civil forfeiture’ regime. A civil forfeiture regime enables property to be

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seized without a person being convicted of a criminal offence once the Court is satisfied that it is more probable than not that the assets are derived from unlawful activity and the person is unable to prove to the Court that they were lawfully obtained. Restraining orders, forfeiture orders and pecuniary penalty orders (or orders of different names, such as proceeds assessment orders, but with the same effect) are equally obtainable under the civil scheme but require the lower standard of proof, explained above.

There is a growing belief among governments and law enforcement agencies that civil-based confiscation is more successful in preventing unjust enrichment from the fruits of crime and that the need, under conviction-based schemes, to prove a connection between the relevant offence and the property derived is a large stumbling block to recovery action. For example, it has been claimed that, under the NSW regime, $33m in assets has been confiscated over the past five years compared with $3m under Queensland’s conviction based forfeiture laws.\(^4\)

### 2.1 ALRC’S Confiscation that Counts Report

In December 1997, the Attorney-General asked the Australian Law Reform Commission (ALRC) to review the Commonwealth Proceeds of Crime Act 1987. The ALRC received a number of submissions from law enforcement bodies indicating the ways in which conviction-based systems hindered recovery of ill-gotten gains, and pointing to the possible advantages of a civil forfeiture regime such as that under the New South Wales Criminal Assets Recovery Act 1990.

The ALRC’s findings and recommendations were released in June 2000 in Confiscation that Counts: A review of the Proceeds of Crime Act 1987, Report No 87 (Confiscation that Counts Report).\(^5\) The main conclusion was that the current conviction-based approach of the Proceeds of Crime Act 1987 was ‘largely ineffective’ and the ALRC recommended the introduction of a civil-based confiscation regime, similar to that in NSW. It also proposed improved measures for protecting innocent third parties and increased powers for Commonwealth crime authorities to trace proceeds of crime.

The Confiscation that Counts Report pointed out that the common law has come to recognise the public policy considerations for the view that –

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... no person should be entitled to be unjustly enriched from any unlawful conduct, criminal or otherwise [and that] conviction of a criminal offence could properly be seen as but one circumstance justifying forfeiture rather than as the single precipitating circumstance for recovery of unjust enrichment.

[There is] a clear pattern of developing judicial and legislative recognition of a general principle that the law should not countenance the retention ... whether at the expense of another person or society at large, of the profits of unlawful conduct.6

Note that the ALRC’s recommendations encompassed profits of non-criminal unlawful activity (eg a tax offence that is not strictly criminal in nature) which, under current law, cannot be recovered even though a person may have received substantial material gains from such unlawful activity.7

2.2 CIVIL-BASED FORFEITURE REGIMES

Chapter 2 of the Criminal Proceeds Confiscation Bill 2002 (Qld), which introduces the civil-based forfeiture scheme, is modelled on the NSW Criminal Assets Recovery Act 1990 (CAR Act). It is in addition to, but independent of, the conviction based regime in Chapter 3.

In this Brief, the main comparative focus will be upon the NSW CAR Act, the new Commonwealth Proceeds of Crime Act 2002, and the new Western Australian Criminal Property Confiscation Act 2000. Like the new Queensland Bill, the Victorian Confiscation Act 1997 incorporates both a civil and conviction-based regime into the one comprehensive piece of legislation. However, the civil-based system applies only to offences related to commercial quantities of drugs (‘civil forfeiture offences’) and will, because of this limitation, be mentioned only where pertinent.

2.2.1 New South Wales

The NSW scheme of confiscation legislation is that the conventional conviction-based Confiscation of Proceeds of Crime Act 1989 (NSW) operates alongside the Criminal Assets Recovery Act 1990 (NSW) (CAR Act), a civil-based regime that was the first of its type in Australia.

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6 Confiscation that Counts Report, paras 2.65-2.66.
7 Confiscation that Counts Report, paras 4.175-4.176.
The CAR Act allows confiscation orders to be made on a finding on a balance of probabilities (ie if it is more likely than not) that the person engaged in a serious crime related activity and places a reverse onus on respondents to prove the lawful origin of their entire restrained assets. **Serious crime related activity** includes drug offences; and other offences punishable by at least 5 years imprisonment and involves activities such as theft, fraud, extortion, violence, forgery, tax evasion etc. It appears that criminal conduct is covered, not non-criminal unlawful activity.

When introducing the new Queensland Bill, the Attorney-General considered that the NSW scheme was similar to, but more limited in its range of offences triggering forfeiture, than the proposed Queensland approach, which would provide greater flexibility to law enforcement bodies while ensuring adequate safeguards.\(^8\)

Applications for restraining orders, assets forfeiture orders, and proceeds assessment orders are made by the NSW Crime Commission. The Commission considers that it has the advantage of being a single agency with resources (including almost one third of its staff) that are specially devoted to recovering proceeds of crime. Also, because of its good relations with the NSW Police Service, the Commission is able to access arrest details to assist in identifying possible cases where assets are suspect. It may also second officers to do financial analyses and it also has a Financial Investigation Team headed by a forensic accountant.\(^9\)

The Commission indicated that around 99% of proceeds of crime matters were settled (which is enabled by the civil confiscation regime) and considers that it is best to proceed from the outset with the aim of procuring a settlement that recovers the maximum possible net value of ill-gotten gains at the least cost to the State. The negotiation process may be assisted by the fact that the Commission is not the DPP or the police – bodies that may be involved in prosecuting the person with whom the negotiations are made. It is understood that during 1997-1998, the NSW Crime Commission recovered $11,025,605 in criminal proceeds.\(^10\)

### 2.2.2 Commonwealth

The Commonwealth Parliament passed the *Proceeds of Crime Act 2002 (Cth)* (POC Act) in September 2002. It is based on recommendations of the ALRC’s *Confiscation that Counts Report* and it appears that it will eventually repeal the *Proceeds of Crime Act 1987*.  

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The new POC Act enables proceeds of crime to be frozen and confiscated without the need to obtain a conviction and applies even if the offence occurred prior to its commencement. It is intended to operate in a similar way to the NSW CAR Act and will also contain an improved conviction-based confiscation scheme which will run alongside the new civil-based system.

The POC Act applies to indictable offences and serious offences. A serious offence is one that is generally serial in nature and includes indictable offences carrying three years or more imprisonment; drug trafficking; money laundering; fraud; people smuggling etc. It also includes a ‘terrorism offence’ which is an offence against provisions under the Criminal Code Act 1995 (Cth) which trigger broad forfeiture powers.

2.2.3 Private Member’s Bill – Civil Forfeiture of the Proceeds of Crime Bill 2002 (Qld)

On 16 May 2002, the Opposition Justice Spokesperson, Mr Lawrence Springborg MP, introduced the Civil Forfeiture of the Proceeds of Crime Bill 2002 (Qld) into the Queensland Parliament as a Private Member’s Bill. The Bill was defeated on 7 August 2002.

The object of the Bill was to enable the State to confiscate assets of a person without the need for a conviction if it is found to be more probable than not that the assets were derived from serious crime related activities (ie those involving drug offences or a serious crime attracting at least 5 years imprisonment). The Crime and Misconduct Commission (CMC) was empowered to make an ex parte application to the Court to seek a restraining order to prevent dealings with potentially tainted property. A wide range of information gathering powers were also proposed to assist in the confiscation of property.

3 HOW DOES THE PROCESS WORK?

This Brief will now outline the processes for recovering criminal assets to be implemented by the new Criminal Proceeds Confiscation Bill 2002 (Qld), compared with the current position under the Crimes (Confiscation) Act 1989. As noted above, many of the orders have the same effect, whether under civil or criminal based systems but the prerequisites and conditions pertaining to them may vary. Under both schemes, there are a range of examination and information gathering powers that will not be extensively covered in this Brief. A comparison will be made, where appropriate, with other civil

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forfeiture jurisdictions. Comments and recommendations made in the ALRC’s Confiscation that Counts Report are included where relevant.

3.1 CIVIL-BASED REGIME IN THE QUEENSLAND BILL – BRIEF OVERVIEW

Chapter 2 of the Bill introduces a new civil confiscation system into Queensland. The CMC will have the responsibility for bringing civil proceedings on behalf of the State and it can also authorise a police officer to do so. The DPP will be the solicitor on the record for providing legal advice. All civil-based proceedings will be in the Supreme Court.12

The civil forfeiture scheme will enable the State to obtain a restraining order to freeze assets and property and then a forfeiture order where the Court finds that it is more probable than not that a person has engaged in, or profited from, serious criminal activity during a six year period prior to the proceedings.

The State must commence proceedings for a forfeiture order or a proceeds assessment order within 28 days of the restraining order. A proceeds assessment order (similar to a pecuniary proceeds order) can also be made against a person who has engaged in a serious crime related activity requiring the person to pay an amount that is the value of proceeds derived from the person’s illegal activity over the past six years. The onus then shifts to the person to demonstrate that it is more probable than not that the proceeds were lawfully acquired. Lawfully acquired property is not amendable to either forfeiture or a criminal proceeds order and can be released from a restraining order.

3.2 CONVICTION-BASED REGIME IN THE QUEENSLAND BILL – BRIEF OVERVIEW

Chapter 3 incorporates a separate conviction-based regime into the Bill which is based on the current scheme under the Crimes (Confiscation) Act 1989 and will operate in a similar manner. It allows proceedings to be commenced against a person to recover property and benefits derived from, and anything used for or in the commission of, a confiscation offence (explained below) after charge or conviction. The Queensland DPP will bring the proceedings under this chapter.

The conviction-based regime under the new Bill will maintain the existing restraining orders and forfeiture and pecuniary penalty orders. It will expand the provisions regarding automatic forfeiture, which currently apply only to serious drug offences, to cover all serious offences attracting 5 or more years imprisonment.

12 Criminal Proceeds Confiscation Bill 2002 (Qld), Explanatory Notes, p 3.
The provisions will apply to convictions before or after the commencement of the new legislation, but not prior to 12 May 1989 (except for intestate orders) and to confiscation offences before or after the commencement of the new legislation.

3.3 PROPERTY AND OFFENCES UNDER THE BILL

The basis of the ALRC’s Confiscation that Counts Report recommendation for a civil forfeiture regime was the concept of preventing unjust enrichment through unlawful conduct. However, it noted that measures to address the principle that no person should be allowed to become unjustly enriched as a result of their unlawful conduct needed to be balanced against the rights of citizens. It considered that balance might be achieved by a regime that allowed the confiscation of the profits or proceeds of unlawful conduct on the basis of a civil onus of proof but that the lesser civil standard should not extend to allowing the confiscation of property used in, or in connection with (ie instrument), the unlawful conduct.¹³

The POC Act (Cth) adopts that philosophy. Property that is only an instrument of an offence is not able to be restrained under the civil regime as instruments are not amenable to civil-based confiscation, unless instruments in a terrorism offence.¹⁴

The ALRC noted that both the NSW and Victorian civil forfeiture schemes permits forfeiture of not just profits but, also, property used in connection with the unlawful activity (ie instruments). It appears that the civil-based provisions for forfeiture in the new Queensland Bill are similar to the NSW CAR Act provisions. However, (as will be explained below) a restraining order will be made only if it is reasonably suspected that proceeds have been derived from one or more of the serious crime related activities in which the respondent is suspected of being engaged. Derivation of proceeds is not necessary if the respondent was involved in one of the ‘proceeds oriented’ serious crime related activities in Schedule 2.

3.3.1 Criminal Proceeds Confiscation Bill - Civil-Based Regime

The civil confiscation system under the new Queensland Bill will focus upon two types of property-

(a) serious crime derived property – defined by cl 23 as all or part of the proceeds of ‘serious crime related activity’. Serious crime related activity

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¹³ Confiscation that Counts Report, paras 4.146 ff.

covers indictable offences punishable by at least 5 years imprisonment and also enables further offences to be prescribed by Regulation: cl 17;

(b) illegally acquired property – ie property that is all or part of the proceeds of an ‘illegal activity’: cl 22. An illegal activity covers not just serious crime related activity but also other offences against the law of Queensland or the Commonwealth: cl 15.

In both cases, also included is property that is all or part of the proceeds of dealing with illegally acquired property (or serious crime derived property); or all or part of it was acquired using illegally acquired property (or serious crime derived property).  

Clause 26 sets out when property stops having either character (which will be relevant to later discussions regarding other parties’ interests) and cl 27 provides when it can again assume those characters. Schedule 1 of the Bill gives some helpful illustrations in this regard.

3.3.2 Criminal Proceeds Confiscation Bill – Conviction-Based Regime

The present confiscation provisions in the Crimes (Confiscation) Act apply only to a serious offence. This is defined as a serious drug offence; an indictable offence; an offence for which the Act or equivalent in another jurisdiction provides for a jail term; or a prescribed offence:

Under the new Bill, the conviction-based system is predicated upon the commission of a confiscation offence’ which is defined in cl 99 as an offence which is a serious criminal offence (as defined under the civil regime ie serious crime related activity); another indictable offence; an offence where the offender is liable to imprisonment; or an offence against provisions set out in Schedule 2. Examples of a confiscation offence in Schedule 2 are a licence offence against the Liquor Act 1992; breach of trade practices provisions and other provisions of the Fair Trading Act 1989.

The Bill provides (cl 106) that a person is treated as being convicted even if they become unamenable to justice (the circumstances for which are also explained in the Bill eg absconds, dies, warrant not executed – see cls 109-115) or if the person is acquitted because of unsoundness of mind provided that the Court is satisfied that there is otherwise sufficient evidence to support conviction.

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15 Examples of ‘illegally acquired property’ are provided in Sch 1 of the Bill.
A forfeiture order will apply only to ‘tainted property’ as is currently the situation under the *Crimes (Confiscation) Act*. Property is **tainted property** if it is—

- property used, or intended to be used, by a person in, or in connection with, the commission of the serious offence; or is derived from such property; or
- property *derived* from the commission of the offence;
- property from money laundering (s 250(2)), or where property is suspected of being tainted, property under s 252(1).

It appears that there must be a real and substantial connection between use of the property and commission of the offence, not just a mere accidental connection.\(^{16}\) If a person stores drugs at his or her house and then uses their car to transport them, the car was used in, or in connection with, the relevant offence and it can be forfeited. It has been suggested that, under the *Crimes (Confiscation) Act 1989*, the house is not tainted property because it could not really be said that the commission of the offence was dependant upon, or could not have been committed without, or resulted directly from, the use of the house.\(^{17}\)

It will be sufficient if the property is *intended* to be used in or in connection with commission of the offence as opposed to it being *actually* so used.

### 3.4 Restraining Orders

The purpose of a restraining order is not only to freeze the property to ensure it is not dissipated before a confiscation order can be made, but also to deprive a person of the exercise of his or her property rights pending a decision about forfeiture of the property. The orders are interlocutory only and no rights to the property vest in the State. Generally, the Court grants the order only where there are reasonable grounds to believe that the later exercise of a power of forfeiture might be rendered nugatory.\(^{18}\) However, the new Bill makes it clear that for conviction-based orders, absence of risk is irrelevant (see cl 123).

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\(^{16}\) *Carter’s Criminal Law of Queensland*, para [110.060.5]. See examples in Schedule 1 of the Criminal Proceeds Confiscation Bill 2002 (Qld).


3.4.1 Criminal Proceeds Confiscation Bill - Civil–Based Regime

Restraining orders are covered under Chapter 2, Part 3. Applications must be supported by an affidavit of an authorised CMC officer or police officer. It will be possible for application to be made without notice to the person affected. The application can relate to all property or to stated property and has the effect that the person whose property is restrained must preserve the property. The Court can impose conditions such as for disposal of the property to satisfy a debt payable under a proceeds assessment order or about particular payments out of the property (see below): cl 32. It will operate for 28 days only unless, within that time, application for forfeiture or a proceeds assessment order is made (or unless it is extended in other limited circumstances): cl 36.

If the application is without notice (which may be important if alerting a possible suspect may mean loss of the assets), the Court must hear it only in the presence of the applicant and in the absence of the person whose property is to be restrained: cl 30. As soon as practicable after the order is made, the person and anyone else affected must be given a copy of the order.19

The tests that apply in the Supreme Court deciding whether it has reached the relevant level of satisfaction required to make restraining order will depend upon two matters. The first is whether it is the property of a person who is suspected of engaging in serious crime related activity or activities (the prescribed respondent’s property); or property of another person; or to property itself being suspected of being the proceeds of serious crime related activity, even if no offender can be identified. The second matter is the nature of the serious crime related activity. The tests are explained below.

Prescribed Respondent’s Property

The test to be applied (see cls 29, 31) by the Court depends upon the type of criminal activity involved, as follows –

- if the serious crime related activity is any of the 16 offences listed under Schedule 2, Part 1 the Court must be satisfied that the applicant reasonably suspects that the prescribed respondent has been involved in one or more of them within the last six years. The scheduled offences are similar to those set out in the CAR Act (NSW) and typically associated with ‘proceeds orientated’ organised crime (eg murder, corruption, piracy, money laundering, drug offences and trafficking in weapons); or

19 The notice provision applies to all situations where a restraining order is made: cl 45.
• in other cases, where the serious crime related activity (ie punishable by at least 5 years imprisonment) does not involve the schedule 2, part 1 offences, a stricter test applies. The Court must be satisfied that the applicant has reasonable grounds for suspecting not only that the prescribed respondent has engaged in the activity or activities during the last six years, but has also derived proceeds from so doing. The more stringent test applies because the offence may not be of a type that involves organised crime or is proceeds orientated (eg an assault).

Another Person’s Property

If the property subject to the application belongs to another person, the Court must be satisfied that there are reasonable grounds for the applicant suspecting that the property is serious crime derived property because of a serious crime related activity of the prescribed respondent.

Property Itself

Where property is itself suspected by the applicant as being serious crime derived property, the Court must be satisfied that there are reasonable grounds for that suspicion.

Making the Order

Once the above matters are made out to the Court’s satisfaction, it must make the restraining order unless it is satisfied in the particular circumstances it is not in the public interest to do so, or the State fails to provide appropriate undertakings regarding damages etc (to safeguard innocent interests): cl 31. Similarly, under the NSW CAR Act and the Commonwealth POC Act, the Court has no discretion and must make the order once satisfied of the various matters contained in the application and affidavit. The Commonwealth provisions also allow for restraint of property where there are reasonable grounds to suspect that a person has committed a terrorism offence at any time (not just within the past six years).

The Court can direct the public trustee to take control of the property in certain circumstances: cl 35.

Contravention of a restraining order (eg concealing property) will be a crime under the new Bill, unless the person had no notice that the property was subject to an order or reason to so suspect that it was. While a dealing in contravention is generally void, it will

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20 Hon R J Welford MP, Second Reading Speech, p 3858.
be saved if it was either for sufficient consideration or in favour of a person who acted in good faith: cl 52.

Some Other Points About Civil-Based Restraining Orders

The Court can also make any number of ancillary orders at the same time or later. Examples include, but are not confined to, an order varying the property covered (eg further property might later be revealed under an examination); an order enabling the seizure of restrained property by a CMC officer or police officer (see cls 43-44); an order for examination of a person about the financial, business or similar affairs of a person who owns restrained property; an order for examination of the spouse of the person whose property is restrained.

The examination powers in the Bill (for both the civil (cls 39-41) and conviction based schemes (cls 132-133)) are designed to be more effective than those under the current Crimes (Confiscation) Act 1989 and will enable investigators to ascertain more complete details about a person’s property/financial dealings to facilitate recovery or the release of honestly acquired property. Examinations are conducted by a judicial registrar.

Note also that search and seizure powers will enable CMC officers and police officers to obtain orders that will safeguard the property from use that may defeat later forfeiture orders.

The Court can direct the public trustee to sell frozen property in certain cases – eg where the property may deteriorate before the forfeiture order application is decided, or, where the cost of controlling it would exceed its value: cls 46 (civil-based), 138 (conviction-based). The Confiscation that Counts Report recommended wider management powers of the WA type, which include such provision for sale.

3.4.2 Criminal Proceeds Confiscation Bill – Conviction-Based Regime

Chapter 3, Part 3 covers restraining orders for the conviction-based scheme which will operate similarly to the current Crimes (Confiscation) Act 1989 (Qld) orders. The order can be sought against a person who is about to be, or has been, charged with a confiscation offence, or has been convicted of the confiscation offence. It appears that only the Supreme Court has power to make restraining orders.

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21 Criminal Proceeds Confiscation Bill 2002 (Qld), Explanatory Notes, p 5. Immunity from self-incrimination is removed but other protections are given.

22 See Confiscation that Counts Report, Ch 10, and Recommendations 44-49.
The tests that apply in the Court deciding whether or not to make a restraining order for property will depend upon whether it is the property of the person charged or convicted of the offence (the respondent), or property of another person; and the nature of the criminal activity.

**Respondent’s Property**

The applicant’s affidavit must include details of any conviction of the relevant serious offence or, if the respondent has been or is about to be charged with an offence, the grounds for the police officer’s belief that the respondent committed the offence. In the latter case, the Court may make the restraining order only if satisfied that the respondent will be charged within 48 hours.

Where the confiscation offence is not a serious drug offence, the affidavit must state the police officer’s reason for suspecting that the property is tainted property, or that the respondent derived a benefit (ie a service or advantage) from the commission of the offence: cl 118.

**Another Person’s Property**

If the property in issue belongs to someone else, cl 119 applies.

If a serious drug offence is involved, the affidavit must state the police officer’s reason for suspecting that the property is tainted property; or reason for suspecting that the property is under the respondent’s effective control.

A serious drug offence is defined to cover an offence under Part 2 of the Drug Misuse Act 1986 for which imprisonment for at least 20 years is possible; money laundering in relation to tainted property in relation to such drug offence; or an ancillary offence.

Property is under the effective control (see cl 20) of the respondent where, although the respondent has no interest or direct rights etc over the property, he or she retains the capacity to control its possession, use or deposition to such an extent as being able to treat the property as the respondent’s own. This might arise out of a family, domestic, business or other relationship; having shareholdings in a company with an interest in the property or a trust that has a relationship to the property. 23 The Court can also look behind the corporate veil. If the property was a gift given by the respondent to another person within the 6 year period prior to the application, it is under the respondent’s effective control: cl 20(4).

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23 See Carter’s Criminal Law of Queensland, para [110,045.5].
For offences other than a serious drug offence, the affidavit must contain the police officer’s grounds for suspecting that the property is tainted property or reason for suspecting that the property is under the respondent’s effective control and that the respondent derived a benefit from the commission of the offence.

**Applications Without Notice**

In an urgent case, such as where property is about to disappear, an order can be sought by application without notice (and without the presence at the hearing of the person whose property is to be restrained) to the Supreme Court. It lasts for seven days only and cannot be extended: cls 121, 128. Similar provisions exist under the NSW CAR Act. The new WA Criminal Property Confiscation Act 2000 and the new POC Act (Cth) allow for *ex parte* applications with no specified time limit.

**Making the Order**

Except where the matter involves a serious drug offence (see above), the Court will retain a discretion whether or not to make a restraining order once satisfied of the matters in the applicant’s affidavit. An order can be refused if it is not in the public interest or the State does not provide appropriate undertakings regarding damages or costs: cl 122.

The restraining order will inhibit the use that may be made of the property while it is in force (generally 12 months unless extended or set aside under cls 136-137). The same notice provisions apply as under the civil-based provisions. As with the civil-based restraining order, contravention of the restraining order is an offence.

Similarly to the position under the civil-based provisions, the Court can also make any number of *ancillary orders* at the same time or later. These also include examination orders, (see cls 131-134). As with civil-based restraining orders, the Court can direct the Public Trustee to sell restrained property: cl 138.

**Examination provisions** are similar to the civil-based provisions (see above).

**3.5 EXCLUSION OF PROPERTY FROM RESTRAINING ORDER**

Under both regimes, the property of a person, including the prescribed respondent (civil-based provisions: cls 47-50) or of the convicted or charged person (conviction-based provisions: cls 139-140) can, if an application is made, be excluded from the restraining order in certain situations.
### 3.5.1 Criminal Proceeds Confiscation Bill – Civil-Based Regime

Restrained property of a **prescribed respondent** will be able to be excluded if, on the balance of probabilities, it is not illegally acquired (ie not all or part of the proceeds of an illegal activity or associated with such) and is unlikely to be required to satisfy a proceeds assessment order. Note that the reference to ‘illegal activity’ indicates that the respondent will have to show that it was not connected with *any* illegal activity.

The Court may exclude another person’s restrained property if it is satisfied that the person –

- acquired the property in good faith and for sufficient consideration; and
- without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the property was illegally acquired property (ie **acquired bona fides and for value**).

However, the order can be made only to the extent to which the interest in the property was not, when it first became illegally acquired, acquired using the proceeds of illegal activity.

In relation to **both** the prescribed respondent and to another person, the Court may exclude property if it is satisfied that, in the circumstances, it is the public interest to do so.

### 3.5.2 Criminal Proceeds Confiscation Bill – Conviction-Based Regime

The proposed provisions for exclusion of restrained property are similar in substance to those in the present *Crimes (Confiscation) Act* but they are set out in a more detailed and less confusing manner.

Restrained property of the **respondent** (ie the person charged/convicted) may be excluded if the Court is satisfied that the property is not tainted property; and the relevant offence is not a serious criminal offence; and a pecuniary penalty order cannot be made against the person.

The Court may exclude another person’s restrained property if the Court is satisfied –

- if the restraining order is **not** in relation to a serious criminal offence, that the property is not tainted property in relation to the offence; and either that the interest or property is not under the respondent’s effective control, or a pecuniary penalty order cannot be made against the respondent. If a serious criminal offence is involved, the other person has to *also* show that they were in no way involved in the commission of the offence: **cl 140(2),(3)**; or
• that the other person was not involved in the commission of the offence; and the property was acquired *bona fides* and for value: cl 140(4). The *Confiscation that Counts Report* considered that provisions like those in the current *Criminal Confiscation Act* may work an injustice to innocent third parties by requiring them to prove or disprove something they could not possibly be expected to establish. The third party might have bought goods *bona fides* and for value but be unable to show that the property was not tainted.\(^{24}\) This provision (cl 140(4)) appears to cater for that problem.

In relation to **both** the respondent and to another person, the Court may exclude the property if it is in the public interest to do so having regard to all the circumstances, including any consequential financial hardship, the seriousness of the offence; and the likelihood of the property being needed for further confiscation orders: cl 140(5).

### 3.6 Expenses Out of Restrained Property

Confiscation legislation in most jurisdictions enables the court to provide for a range of expenses and debts to be met out of all or part of the restrained property. The new Queensland Bill enables the Court to do so under both the civil and conviction confiscation schemes. Note the lack of provision for meeting legal expenses – a departure from the *Crimes (Confiscation) Act 1989* provisions.

The Court may provide for the following payments out of restrained property –

• the person’s reasonable living and business expenses;
• the reasonable living expenses of the person's dependants;
• a stated debt incurred in good faith by the person.

However, the Court has to be satisfied that the expenses or debt cannot be met any other way and that the property to be released for such payment is not illegally acquired property (under the civil-based provisions) or tainted property (under the conviction-based provisions): **cls 34, 126.**

There appears to be no consistency among jurisdictions about what types of expenses may be met out of restrained property, particularly in relation to legal expenses. The *NSW CAR Act* provision states that restrained property can be released only to meet the person’s or their dependants’ reasonable living expenses or reasonable legal expenses of

\(^{24}\) *Confiscation that Counts Report*, paras 12.15-12.18.
any person whose interests in property are subject to the order. There is no mention of reasonable business expenses of the person.

### 3.6.1 Legal Expenses

A number of jurisdictions have moved away from allowing legal expenses to be met out of restrained property. That trend is in view of the possibility that respondents may consider that if the property could end up being forfeited to the State anyway, they may as well use it to obtain the most expensive defence available.\(^{25}\) In one example, 12 respondents paid solicitors over $1 million to plead guilty after having argued successfully for the release of that money held in an overseas bank account. The funds that had originally been recovered by the Commonwealth were dried up by legal fees.\(^{26}\)

A number of judges have commented that provision should not be made out of property to run hopeless or extravagant defences and that it might be appropriate to place limits on the amounts made available to what is reasonable in all the circumstances. The *Confiscation that Counts Report* made similar observations and recommended that the provision out of restrained property to meet legal expenses should be discontinued.\(^{27}\)

An observation has been made by a judge of the Victorian Supreme Court that where there is a strong *prima facie* case that the respondent has obtained ill-gotten gains, to allow him or her to use them to pay to his solicitor would be effectively giving back money to which he or she has no legal or moral right.\(^{28}\) On the other hand, in a NSW case, Kirby P indicated that it should not be readily inferred that Parliament intended to provide for forfeiture of property and to then strike at the person’s capacity to defend those proceedings.\(^{29}\)

The Queensland Bill makes it clear that payment out of restrained property for legal expenses incurred by a person defending a criminal charge or being a party to a proceeding under the Bill is not authorised: cls 34(4), 126(4). Note that while the Court may, under cls 38(1)(h), 130(1)(h), make an order for the payment out of restrained property to Legal Aid of expenses incurred by the person in such circumstances, it deals with that issue only. However, if a person whose property is restrained applies to Legal

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\(^{25}\) See *Carter’s Criminal Law of Queensland* para [110,250.55] and cases cited therein.

\(^{26}\) Example cited by the *Confiscation that Counts Report*, para 15.50.

\(^{27}\) *Confiscation that Counts Report*, paras 15.24-15.28.

\(^{28}\) *Commonwealth v Jansenberger* (unreported, Supreme Court of Victoria, 3249A of 1985, 3 October 1985) at 7 per Southwell J.

Aid for legal assistance, the restrained property must not be taken into account in applying the assessment criteria to decide the application. Legal Aid can also require a charge over that property as a condition on approval to provide assistance: cls 227-230.

The WA legislation does not provide for payment of legal expenses out of restrained assets and the Victorian Confiscation Act 1997 expressly prohibits the Court from doing so. However, in Victoria, the Court may order Legal Aid (Vic) to provide legal assistance to any person in respect of those proceedings and, also, that the costs be secured by a charge over property in which the person has an interest. It requires the Government, if Legal Aid cannot itself recover the money, to pay for the costs up to the value of any property forfeited or penalty paid to the State. Legal Aid is then obliged to provide legal assistance.\(^\text{30}\)

The POC Act (Cth) does not provide for legal expenses to be met out of the restrained property. There is no obligation on Legal Aid to provide assistance but it appears that the Government intends that assistance be given by reimbursing Legal Aid through restrained assets and, if any shortfall, from the confiscated assets account.\(^\text{31}\)

The Queensland Private Member’s Bill, discussed earlier, proposed placing restrictions on legal expenses, including a maximum value of expenses that may be incurred. That approach is similar to the NSW CAR Act that allows payment out of restrained property for legal expenses if the Court is satisfied that the interest is not illegally acquired property and places maximum limits on the amount of legal expenses that are authorised to be paid out.

### 3.6.2 Victims of Crime

Some jurisdictions, including Victoria and WA, enable restrained property to be used to compensate victims of crime, complementing provisions of the Criminal Injuries Compensation legislation. The latter legislation allows victims of crime to recover monetary compensation from the Government where the offender is unable to pay it. However, it is often the case that offenders go to great lengths to dissipate any assets against which a compensation order may be made.

The Confiscation that Counts Report considered that the confiscation regime should be available to enable recovery by victims of crime. It noted that that the Victorian

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Confiscation Act 1997 has as one of its objects the preservation of assets for the purpose of restitution or compensation to victims of crime.

### 3.7 FORFEITURE ORDERS

Forfeiture orders (although the terminology varies between jurisdictions) effectively vest relevant property in the State.

#### 3.7.1 Confiscation that Counts Report

In relation to forfeiture orders, the ALRC considered that consistent with the principle of the removal of unjust enrichment, the basis of any civil-based regime should be to deprive a person who has engaged in prescribed unlawful conduct of any profits that have accrued to them. Depriving a person of profits of crime is not punitive and merely prevents their being unjustly enriched. It considered that it was therefore inappropriate that courts should retain a discretion in relation to confiscating profits or proceeds of unlawful activity but that such residual discretion should remain in relation to property that is used in or in connection with the commission of the offence (ie instruments).\(^{32}\)

Under the new Commonwealth POC Act, the Court has no discretion and must make a forfeiture order if a person is convicted of an indictable offence and the property is proceeds from that offence. However, if the property is an instrument in the offence rather than proceeds of it, the Court retains a discretion and may make the order. Under the civil-based regime, a forfeiture order must be made if the property has been the subject of a restraining order for at least six months and the Court is satisfied, on the balance of probabilities, that the person committed a serious offence in the last 6 years. The Court must also make the order if satisfied that the property is proceeds from an indictable offence committed within the last 6 years.

#### 3.7.2 Proposed Queensland Provisions - Civil–Based Regime

Chapter 2, Part 4 of the new Bill will govern forfeiture orders under the civil forfeiture regime. Application is made for forfeiture to the State of particular restrained property and notice must be given to each person whose property is restrained or who has an interest therein. The Court must make the forfeiture order (ie there is no residual discretion unless it is not in the public interest to make the order) if it finds that it is more probable than not –

\(^{32}\) Confiscation that Counts Report, Ch 3, Recommendation 10.
• for restrained property of a prescribed respondent or of another person – that the
prescribed respondent was, within the last 6 years, engaged in a serious crime related
activity; or

• for restrained property suspected of being serious crime derived property – that it is
serious crime derived property because of a serious crime related activity that
happened within the last 6 years, even if an offender has not been identified after
reasonable steps to do so have been taken by the crime authority.

The Court’s finding need not be based on a finding about the commission of a particular
offence and may be based on a finding that some serious crime related activity was
committed: cl 58.

The onus is then on the person with the relevant interest in the property (including a
prescribed respondent) to show, on the balance of probabilities, that the property is not
illegally acquired property – which is broader than property that is proceeds of a serious
crime related activity. The person must show that it has no illegitimate origins. The
Court must and may only make an exclusion order if so satisfied: cl 68.

Application can be made for such an exclusion order to exclude the property from the
forfeiture application; or within six months after the order is made to exclude it from the
order (unless the Court gives leave otherwise). This cannot occur if the applicant was
given notice of the application for forfeiture or was a person who appeared at the hearing.
Innocent third party interests can also be excluded (see below).

It is an offence to conceal or deal with forfeited property but the same defences and
provisions regarding innocent dealings that apply in relation to restraining orders will
operate here: cl 60.

Some Other Points About Forfeiture Orders

The Court may make a release order for an interest in property upon payment to the
State of the value of the interest: cls 64, 75. The same applies for conviction-based
forfeiture: cl 154. In addition, ‘buy-back’ provisions (cl 76) will deal with the situation
where an exclusion order, innocent interest order, or release order is made but these are
not the only interests in the property. This also applies under the conviction-based
provisions in the circumstances stated in cl 173.

Note that Part 6 makes other provision regarding forfeiture, including what happens after
a forfeiture order is discharged.

33 See also, for example, Confiscation Act 1997 (Vic) ss 38(2).
3.7.3 Criminal Proceeds Confiscation Bill – Conviction-Based Regime

Chapter 3, Part 4, concerning forfeiture orders under the conviction based regime, is similar to those provisions under the Crimes (Confiscation) Act 1989. Again, it will be an offence to deal with forfeited property in contravention of the forfeiture provisions. The same defences and provisions about innocent dealings apply here also.  

Applications are made to the Supreme Court, or to the court before which the person is convicted for an order forfeiting particular property to the State. The application must usually be made within 6 months of conviction unless the Court gives leave (eg because other property has come to light). Notice must be given to the respondent or other persons who have an interest in the property sought to be forfeited.

The Court may (ie has a discretion to) make a forfeiture order (possibly reflecting the comments made in the Confiscation that Counts Report) if –

- a person is convicted of a confiscation offence; and
- the conviction is the basis of the forfeiture application; and
- it is satisfied that the property, or an interest therein, is tainted property in relation to a confiscation offence: cl 151.

Note that the Court must presume that property is tainted if evidence is presented at the hearing that the property was in the person’s possession at the time of, or immediately after the offence, unless the person can provide evidence to show otherwise: cl 151(3). The reversal of the onus of proof has been justified on the basis that the amount of the proceeds and size of the relevant assets are matters that tend to be peculiarly within the knowledge of the respondent.

The Court may have regard to a range of non-exhaustive considerations in exercising its residual discretion about making the order. Those include any hardship that may reasonably be expected to be caused to anyone as a result of the order; the use that is ordinarily made, or was intended to be made, of the property; and the gravity of the offence concerned: cl 151(2). For example, the property might be a vehicle which is also a work vehicle.

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34 See cl 171.

35 Note that cl 150 limits the forfeiture power of the Magistrates Court to the monetary limit of its civil jurisdiction.

36 See Carter’s Criminal Law of Queensland referring to a statement by Lord Lane CJ in R v Dickens [1990] 2 QB 102 at 105 in relation to similar provisions.
The Court might also consider matters such as proportionality between the gravity of the offence and the outcome of the forfeiture. In one matter, a man was sent to jail for two years for drug trafficking. He had cultivated cannabis in a commercial quantity on his land. A forfeiture order was made against money found in his house and against two blocks of land. He had built his home on one block. On appeal, it was held that the trial judge had not properly taken into account the grave personal hardship the order would cause to the man as the property was his only substantial asset and constituted the only feasible setting where he could base his rehabilitation after his release at nearly 50 years of age.37

### 3.8 AUTOMATIC FORFEITURE

Most jurisdictions provide for a system of ‘statutory’ or ‘automatic’ forfeiture of property (without the need for a court order) that remains subject to a restraining order for some period after it is made. It generally applies in relation to more serious offences. It is here that the conviction-based regime under the new Bill is substantially different to the *Crimes (Confiscation) Act*. The current automatic forfeiture provisions apply only where a person is convicted of a **serious drug offence** (as explained above, being basically a 20 year jail term offence under the *Drugs Misuse Act 1996*) and property is subject to a restraining order which is still in force at the end of the 6 months after the conviction. There is no judicial discretion involved.

**Chapter 3 Part 5** will allow property to be automatically forfeited to the State for a broader range of serious offences. It operates if –

- a restraining order is or was granted for property of the respondent or another person because of the respondent’s conviction of, charge, or proposed charge with a **serious criminal offence**; and
- the Court has not made an order declaring that property is not subject to an automatic forfeiture order (see cl 141); and
- the restraining order is still in force 6 months after the conviction: cl 162.

The property to which automatic forfeiture applies is restrained property of a respondent that was acquired within 6 years before the commission of the serious criminal offence. Property of another person that is under a restraining order is also forfeited when that forfeiture period ends. The 6 months forfeiture period may be extended: cl 163.

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3.8.1 Third Party Protection From Automatic Forfeiture

A person other than the respondent with an interest in the property may apply for a third party order or a buy-back order: cls 165-170.

A third party order may be made if the Court is satisfied that the applicant third party was not involved in the serious criminal offence in any way; and that the interest was acquired *bona fides* and for value; and that the interest was not under the respondent’s effective control. Such order can also be made if the Court is satisfied about the property’s innocent origins, and the applicant’s lawful acquisition of the interest in it.

The Court may make a buy-back order if it would not be against the public interest for transfer of the interest to the third party; and there is no other reason why it should not be made.

The new Commonwealth *POC Act* allows automatic forfeiture upon a person’s conviction of a serious offence. The new WA *Criminal Property Confiscation Act 2000* enables automatic confiscation of frozen (restrained) property where no objection is filed within the prescribed time. The implications of this are wide because property can be frozen if it is crime-used or crime-derived from a confiscation offence, the latter being an offence which is punishable by jail for two or more years, or another prescribed offence.

3.9 PROCEEDS ASSESSMENT ORDERS/PECUNIARY PENALTY ORDERS

Proceeds assessment orders (under civil-based schemes) and pecuniary penalty orders (under conviction-based schemes) both have the effect of forcing a person to pay to the State an amount that the Court decides is the value of proceeds derived from criminal activity. The *Confiscation that Counts Report* considered that, consistently with the concept of preventing unjust enrichment of persons, the order should be mandatory in respect of profits derived from the unlawful activity. This reflects the position in NSW, the Commonwealth, and Victoria.39

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38 A ‘serious offence’ being a limited number of offences generally serial in nature eg drug trafficking, money laundering, fraud. It also includes a terrorism offence.

39 *Confiscation that Counts Report*, paras 4.188-4.190.
3.9.1 Criminal Proceeds Confiscation Bill – Civil-Based Regime

Proceeds Assessment Orders are governed by Chapter 2, Part 5 of the Bill. The State may apply to the Supreme Court for a proceeds assessment order which requires a person to pay to the State the value of the proceeds derived from the person’s illegal activity that took place within 6 years before the application. The Court must (reflecting the Confiscation that Counts Report view regarding proceeds) make the order if it finds it more probable than not that, during the 6 years before the application, the person engaged in a serious crime related activity (unless it is not in the public interest to make the order). Note that the finding need not be based upon the commission of a particular offence and may be based on a finding that some offence that is a serious crime related activity has been committed.

Note that the order can apply to property in Queensland or elsewhere and proceeds of illegal activity wherever acquired.

The Court assesses the value of the proceeds derived from the illegal activity in accordance with provisions in Division 2. Matters to which the Court must have regard include the value of the person's property before, during, and after the illegal activity; the person’s income and expenditure before, during, and after the illegal activity. Any expenses or outgoings are to be disregarded – for example, the payment of a courier to deliver a stolen good or money to purchase drugs. Thus, the Court is considering the ‘gross’ benefit not the ‘net’ benefit.

If the value of the person's property at the time of the application exceeds the value before the illegal activities, the court must treat the excess as proceeds derived from the activities, unless the contrary can be shown. Note that in making the assessment, the Court is not limited to assessing the value of the serious crime related activity on which the application is based but must assess the value of other illegal activities of the person during the period to which the application relates. Note that the value of any property in respect of which a forfeiture order is made may be taken into account in making a proceeds assessment order.

In addition, if the Court is satisfied that the property is under the effective control (explained earlier) of the person against whom a proceeds assessment order is made, it can make that property available to satisfy the order to the extent to which the property of the controlling person is not readily available for that purpose.
3.9.2 Criminal Proceeds Confiscation Bill – Conviction-Based Regime

Chapter 3, Part 7 of the Bill provides for the making of pecuniary penalty orders (PPOs) under the conviction-based part of the Bill. The provisions are similar to the PPO provisions under the existing Crimes (Confiscation) Act 1989.

The State will be able to apply to the Supreme Court or court before which the person is convicted for an order requiring the person to pay to the State an amount of the benefits derived from the commission of the confiscation offence. The application should be made within 6 months of the conviction or equivalent to conviction, unless the Court gives leave.

The Court has a discretion in whether to make an assessment of the value of the benefits that have been derived by the respondent from the criminal activity (betterment) and to then make the order. However, if the offence involved is a serious drug offence, the assessment and order must be made: cl 184. Circumstances where the Court may decide not to make the assessment would be where the value of the property forfeited far exceeds the extent of any benefit derived. The likelihood that a PPO will never be satisfied, even in part, is a matter generally taken into account by a court in deciding whether or not to exercise its discretion. For example, it may be futile to make a PPO for $115,000 against an unemployed, physically disabled respondent who lives in rented premises and has no assets or money.

Assessment of benefit occurs pursuant to cls 187-194. The Court must have regard to evidence about a number of matters similar to those under the civil-based assessment provisions. The main difference is the way in which an assessment of value of property or income and expenditure is made where there has been more than one offence over the offence period.

The value of any property in respect of which a forfeiture order is made must be deducted. The Court also may choose to deduct amounts payable for restitution or compensation for the same conviction, or the value of any property that may have been

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40 Note that again, the amount of the order made by the Magistrates Court cannot exceed its civil monetary jurisdiction: cl 183.

41 Division 1 of Part 7 governs the application procedure which is virtually the same as that which attaches to the application for a forfeiture order.

42 Carter’s Criminal Law of Queensland, para [110,195.10].

43 DPP v Delaney (1998) 99 A Crim R 574 (CCA(Tas)).
forfeited under a civil forfeiture order. In addition, any pecuniary penalty that has already been imposed on a person under another law is not to be taken into account making an assessment. Expenses and outgoings connected with the offence are to be disregarded.

Note that all property of the person up to a period of 5 years immediately before the application can be presumed to be in the person’s possession because of the commission of the offence. The person must then prove otherwise. It appears that the presumption can be rebutted by the on the balance of probabilities – eg by evidence of gifts or legitimate income: cl 190.

Any property within the effective control of the person can not only be taken into account in assessing the value of the person’s property but, under cl 198, can be made available to satisfy the PPO.

Other provisions regarding these orders are made under cls 195-199 (eg charge on restrained property to secure amount payable under a PPO; discharge of the order).

Under the POC (Cth), the value of the order depends on whether the offence is a non-serious indictable offence or a serious offence. For a serious offence, the benefits taken into account are not limited to the particular offence but extend to any benefits from any unlawful activity over the past six years.

3.10 LITERARY PROCEEDS

Confiscation legislation of some jurisdictions, including Queensland, deals with proceeds derived from commercial exploitation of a person’s criminal activity. The Bill recasts the provisions of the Crimes (Confiscation) Act 1989 relating to literary proceeds as Special Forfeiture Orders under Chapter 4. It applies to situations like “Chopper” Reid appearing on television talk shows and writing a book about his exploits.

The State can apply to the Supreme Court at any time for a special forfeiture order (which is very similar in effect to a PPO). It requires the respondent to forfeit to the State an amount equal to all or part of the benefits derived, or to be derived, from a contract to sell the respondent’s story to the media or to write a book etc. The provisions reflect the Confiscation that Counts Report recommendation that they be broad enough to cover the electronic and print media as well as live entertainment.

44 Provision is made to enable discharge of a pecuniary penalty order to the extent automatically forfeited property is sold etc.: cl 185 or to allow for an increase in the amount of the order if the forfeiture ends: cl 186.

45 Carter’s Criminal Law of Queensland, para [110,210.75].
The contract must have been entered into on or after 12 May 1989. The order can be made even if the commercial exploitation of the story occurs outside Queensland or outside Australia. Thus, while the Act does not deem the contract to be illegal, it allows the State to get at any benefits derived from it by the respondent.

The assessment of benefits derived or to be derived depends on evidence about a number of matters which are virtually identical to those relevant to making a PPO or proceeds assessment order: see Chapter 4, Part 2.

Note that the Governor-General will be able to recommend that moneys paid to the Treasurer under the order may be applied to satisfy a restitution order or pay compensation or to compensate a victim of the offence.

### 3.10.1 Confiscation that Counts Report

The old Commonwealth legislation did not cover commercial exploitation of the respondent’s criminal activities, a matter which the Confiscation that Counts Report recommended be rectified. The new POC Act incorporates literary proceeds provisions. The ALRC considered that the discretion to make such an order should be exercised by reference to a number of considerations. Accordingly, the POC Act lists factors for the Court to take into account, including whether it is in the public interest to confiscate the profits (eg rehabilitation or deterrence value); whether the product has any general social, cultural, or educational value; and the seriousness of the offence.46

### 3.11 INNOCENT THIRD PARTIES AND DEPENDANTS

The Queensland Bill, as does legislation in some other jurisdictions, includes provisions to enable the Court to reduce the hardship to dependants of the person whose conduct is the basis of the forfeiture order as well as safeguards to protect innocent interests in property. The protections are similar to those under the NSW CAR Act and the Commonwealth POC Act.

### 3.11.1 Forfeiture – Relief From Hardship

Under the civil forfeiture scheme (where the Court must make the order once satisfied of certain matters), the Court will be able to reduce hardship to dependants of a person who will forfeit property. A dependant is a spouse or child or a household member dependent

46 Confiscation that Counts Report, Ch 18.
for support on the person. The Court does this by ordering the State to pay an amount to the dependant out of the proceeds of the sale of property that the Court considers necessary to prevent hardship. However, in the case of an adult dependant, the order must not be made unless the Court is satisfied that the adult dependant had no knowledge of any serious crime related activities of the person: cl 62.

The residual discretion retained by the Court under the conviction-based provisions (cl 151) would enable consideration of probable hardship to dependants when determining whether or not to make a forfeiture order.

3.11.2 Forfeiture – Innocent Interests

The innocent interest orders apply where, for example, an asset might be jointly owned with an innocent third party (eg where the third party owns half a house).

Subject to limitations about who may apply in cl 71, the Court must, and may only, make an innocent interest exclusion order (under the civil-based regime) if the applicant proves, on the balance of probabilities, that a stated proportion of the value of the interest in the forfeited property is not attributable to the proceeds of an illegal activity. The order may be made only to the extent to which the interest in the property was not, when it first became illegally acquired, acquired using the proceeds of an illegal activity: cl 73.

A person, other than the person whose conviction is the basis of the forfeiture under the conviction–based scheme, may apply for an innocent interest exclusion order (subject to time limits and restrictions on who can apply). The Court must, and may only, make the order if it is satisfied that the applicant was not, in any way, involved in the commission of a confiscation offence; and the interest was acquired bona fides and for value: cl 158.

Other safeguards to protect innocent parties include provision for the Court to require the State to give undertakings regarding costs or damages before property is restrained. Under Chapter 10, Part 2, a third party may be able to recover costs incurred by them in obtaining a variation of a restraining or forfeiture order; and the State may be ordered to pay the costs of a person who is successful in proceedings against it, other than in relation to the civil-based confiscation provisions.47

Encumbrances over property acquired bona fides and for value in the ordinary course of business can also be discharged by the State out of proceeds of disposing of the forfeited property: cls 63, 152.

47 But see the costs provisions for civil proceedings under the Uniform Civil Procedure Rules 1999.
3.12 OTHER MATTERS

While many other issues could be discussed, only some can be considered here.

3.12.1 Money Laundering and Property Suspected of Being Tainted

A number of jurisdictions have introduced money laundering provisions and/or provisions concerning possession etc. of property suspected of being proceeds of crime. Such provisions are currently found in ss 90-93 of the Crimes (Confiscation) Act and are now included in the new Bill in Chapter 9.

The money laundering provisions make it a crime for a person to engage in money laundering, as defined in cl 250, exposing the person to a maximum of 20 years imprisonment or a fine of $225,000. The person must know or ought to reasonably have known that the property is tainted property or derived from some form of unlawful activity. Note that the NSW criminal confiscation legislation requires proof that the person actually knew that the money or property were proceeds of unlawful activity.\(^{48}\)

It is an offence for a person to receive, possess, dispose of, bring into Queensland, conceal, or disguise property that may reasonably be suspected of being tainted property. Once the prosecution has satisfied the Court that there are reasonable grounds for suspecting that the property is tainted or was derived from any form of unlawful activity, the onus is then on the respondent to show the contrary: cl 252.\(^{49}\) The penalty for the offence is $7,500 fine or 2 years imprisonment.

It has been held that this provision operates where there is not enough evidence for the State to establish the commission of the relevant serious offence.\(^{50}\) The Confiscation that Counts Report favoured the adoption of a provision of this type that removed the need to identify a particular predicate offence.\(^{51}\) Similar provisions exist in Victoria but no such provision exists in NSW.

\(^{48}\) Confiscation of Proceeds of Crime Act 1989 (NSW) s 73. See Confiscation that Counts Report, para 7.10.

\(^{49}\) Clause 252 of the Bill replaces the existing s 92 of the Crimes (Confiscation) Act 1989 (Qld).


\(^{51}\) Confiscation that Counts Report, para 7.28.
3.12.2 Obligations of Financial Institutions

The Queensland *Crimes (Confiscation) Act* currently imposes obligations on financial institutions to assist in the detection and recovery of criminal proceeds. Those requirements are replicated, and in some cases, extended by the new Queensland Bill. Those include a requirement for retention of certain documents relating to customer accounts and financial transactions: *cls 247-248*.

In addition, if a financial institution has information about certain matters or transactions that may be relevant to an investigation or prosecution of an offence, or matters relating to the civil confiscation process, the institution may give the information to a police officer. The Bill extends the power to enable institutions to provide such information to a CMC officer if it relates to the investigation of a serious crime related activity or another civil confiscation matter: *cl 249*. Financial institutions are protected from civil liability in providing that information.

The foregoing powers are backed up by amendments to the *Crime and Misconduct Act 2001* which allows a CMC officer to apply to the Supreme Court for a *monitoring order* to direct a financial institution to provide the officer with information about transactions during a particular period. The Court can also make a *suspension order* which has the effect of directing a financial institution to refrain from effecting a transaction for 48 hours to allow the State to take effective action in relation to the transaction – eg freezing a transfer of money. Such orders are issued only if the Court is satisfied that there are reasonable grounds for suspecting that the person is, or is about to be, involved in a serious crime related activity or will be or has been involved in acquiring serious crime derived property.\(^\text{52}\)

Note that the *POC Act (Cth)* enables certain senior AFP members or members of the NCA to give a written notice requiring production of information or documents relevant to certain account and transaction information without the involvement of a court. However, the notice can be given only if the officer reasonably believes that such is needed to determine whether to take action, or in relation to proceedings under the Act. Similar power is provided under the WA legislation. Such power allows the officers to ascertain the location of funds of a known suspect without the expense of obtaining a search warrant in relation to many banks to find out. If the discovery is fruitful, the officers can then decide how to proceed (eg whether or not to seek a monitoring order).\(^\text{53}\)

\(^\text{52}\) Similar powers exist under the *Criminal Property Confiscation Act 2000* (WA).

3.12.3 Provisions About Particular Government Entities

Chapter 6 of the Bill confers powers on the public trustee in situations where the public trustee has control of restrained property and a confiscation order is made. This can include payments to consolidated revenue out of such property. As noted earlier, provision is made about Legal Aid regarding legal assistance and charges over restrained property.

3.12.4 Interstate Orders and Warrants

Chapter 7, Part 1 essentially reintroduces the existing provisions regarding interstate orders and warrants under Part 6 of the Crimes (Confiscation) Act. In substance, it deals with procedural matters about interstate forfeiture orders and restraining orders relating to property situated in Queensland and makes provision for the treatment of property seized in another jurisdiction.

4 NEW WESTERN AUSTRALIAN CIVIL FORFEITURE REGIME

It may be pertinent to consider the new Western Australian confiscation of proceeds of crime legislation as it has been regarded as the most far-reaching and toughest civil confiscation regime in Australia.\(^{54}\) In late 2000, the Parliament passed the Criminal Property Confiscation Act 2000, which replaced the previous confiscation legislation and some provisions of the Drugs Misuse Act 1981 with a civil confiscation regime. The Second Reading Speech noted that some of the recommendations made by the Confiscation that Counts Report had been included but that many others were truly innovative.\(^{55}\)

The State may seek a broad range of confiscation orders (or declarations, as they are known under the Act) from the court, often in circumstances where the court has no residual discretion once certain facts are established on the balance of probabilities. The Act is, however, restricted to activities that are unlawful in the criminal sense. The court’s powers are triggered by a confiscation offence, defined as an offence punishable by jail for two or more years or another prescribed offence. The offence can have been committed before the commencement of the Act.

The features of the legislation include –

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\(^{55}\) Mr Daniel Barron-Sullivan MLA, Second Reading Speech, p 8611.
• a Court making **crime-used property substitution declaration**. The provision prevents a person defeating the purpose of the legislation – e.g. by hiring or stealing or borrowing a car to rob a bank – to avoid forfeiture of their own property. The declaration requires payment of an amount equal to the assessed value of the crime-used property. If a house is rented for only one month to produce drugs, the person is liable to pay the full value of the house;

• a Court making an **unexplained wealth declaration** if it considers it is more likely than not that the total value of the person’s wealth is greater than the value of their lawfully acquired wealth, as assessed by the court, unless the person can show that their wealth was lawfully acquired. The effect is that the person must pay an amount equal to that unexplained wealth;

• **automatic confiscation** of all of all of a **drug trafficker’s property** (both lawfully or unlawfully acquired), even if given away. This aspect is not retrospective because it can potentially extend to legitimate property in the hands of third parties;

• a Court making a **criminal benefits declaration** (to require the person to pay a specified amount to the State) in two situations –
  • ‘**crime-derived property**’ ie property wholly or partly derived or realised, as a result of the person’s involvement in the commission of a confiscation offence, whether or not it was lawfully acquired. A conviction is not necessary provided the State can show that it is more likely than not that the person is, or was involved in, its commission. This covers a situation of commercial exploitation of criminal activities, i.e. literary proceeds of crime;
  • if the State can establish on the balance of probabilities that the property was **unlawfully acquired property**, the court will make the declaration unless the person can show (again on the balance of probabilities) that it was lawfully acquired;

• wide restraining powers known as **freezing notices** and **freezing orders**. Police officers can seize property for up to 72 hours to prevent the property being dissipated or moved. The police can obtain a **freezing notice** from a Justice of the Peace if the JP considers that there are reasonable grounds for suspecting that the property is crime-used or crime-derived and the person has been, or is likely to, be charged. A **freezing order** can be made by the Court to secure property that might be needed to satisfy a person’s liability under a confiscation declaration. Freezing orders are broader in scope and in application to property than freezing notices.

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56 See extensive definition of ‘crime-used property’ in s 146 of the **Criminal Property Confiscation Act 2000 (WA)**.
Protection for innocent third parties is built into the provisions, enabling them to apply for release of property;

- property may be released from a freezing order to meet the reasonable living and business expenses of the owner of the property. No provision is made for meeting legal expenses and no obligation is placed on Legal Aid to assist the respondent. No provision for any expenses can be made out of property subject to a freezing notice;

- frozen property is confiscated if there is no objection to the confiscation filed within 28 days of receiving the notice about freezing; or where there is an objection but the freezing notice or freezing order, as the case may be, is not set aside;

- frozen property may be used to meet the debt owed if a person fails to satisfy the forgoing declarations. Frozen property owned by somebody else can also be used to satisfy the debt if it is more likely than not that it is under the effective control of the person against whom the earlier declaration was made or it was given away earlier. It is for the person to prove that it was not so effectively controlled or given away;

- a spouse or a dependant of a person who used his or her real property (eg a house) to commit a crime can apply for release of the property which might otherwise be confiscated, if they can show non-involvement in the offence. The court might then release the property or make orders to avoid hardship (eg granting a life tenancy to the spouse). The Court will not unfreeze property if it is derived from the offence, only if it was used in committing it;

- provision is made for payment out of confiscated proceeds to assist victims of crime.

It has been reported that more than $23m in assets have been confiscated in the last two years, including $2m from a notorious bikie gang.\(^{57}\)

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\(^{57}\) Greg Stolz, ‘Asset law gangs up on bikies’. 
APPENDIX A – MINISTERIAL MEDIA STATEMENTS

Hon Peter Beattie MP, Premier and Minister for Trade
21 October 2002

Government Acts to Seize Criminal Assets

Law enforcement agencies will be given new powers to seize property and freeze bank accounts of people involved in serious criminal activities, without the need for a conviction, under laws to be introduced to Parliament this week by the Queensland Government.

Premier Peter Beattie said the new confiscation powers would target serious criminals who were living off the proceeds of crimes such as drug trafficking.

"These laws will make life more difficult for criminals who feed on the loss and misery of others," Mr Beattie said.

"Honest citizens have nothing to fear - but drug traffickers and crime bosses should be very afraid of losing the profits of their crimes.

"This new scheme will place the onus on the criminal to prove that cash and property have been obtained legally and are not the proceeds of crime.

"There are many checks and balances - only those people who have been involved in serious criminal activity will be in any danger of having assets seized.

"The Crime and Misconduct Commission (CMC) will oversee the scheme, and any applications to restrain or forfeit property will have to be argued by the DPP before the Supreme Court.

"This is part of my Government’s commitment to get tough on crime and make our communities safer and deter criminal behaviour."

The Criminal Proceeds Confiscation Bill 2002 will establish the civil confiscation scheme and strengthen the existing conviction-based confiscation scheme.

The civil scheme will target two classes of serious crime-related activities, each of which is punishable by at least 5 years’ imprisonment. These are:

1. A group of 15 serious offences typically associated with organised crime. For these offences, the court will have wider powers to issue restraining orders. The DPP will only need to demonstrate that there is a reasonable suspicion that the suspected criminal was involved in one of these offences within the last six years.

These offences include murder, piracy, kidnapping for ransom, extortion, bribery, corruption, loss of revenue to the state, stealing, receiving, fraud or other dishonesty, conspiracy to defeat justice, money laundering, prostitution, gambling, child pornography, drug offences and trafficking in weapons.
2. All other indictable offences punishable by 5 years imprisonment or more. For these offences, the court will apply a stricter test. The DPP will need to demonstrate that there is a reasonable suspicion that the suspected criminal was involved in one of these offences in the last six years, AND, derived proceeds from the offence.

Attorney-General and Minister for Justice, Rod Welford, said criminals convicted of serious crimes were now much more likely to lose their ill-gotten gains.

"While we expect law enforcement agencies to predominantly use the civil scheme, we are also strengthening the automatic forfeiture powers of the conviction-based scheme," Mr Welford said.

"This will mean that people convicted of all serious offences punishable by five years imprisonment or more can have the proceeds of their crime automatically forfeited six months after their conviction.

"This automatic forfeiture provision has previously only applied to serious drug offences."

Mr Welford said a new Criminal Assets Confiscation Unit was being established in the Office of the DPP as part of the new approach.

"Prosecutors from this unit will work with the CMC to bring applications for restraining, forfeiture and proceeds assessment orders before the Supreme Court," he said.

"One of the reasons for the Unit being established is to manage an expected significant increase in the volume of applications for civil confiscation orders."

Media Contact: Greg Milne on (07) 3239 3478
Hon Peter Beattie MP, Premier and Minister for Trade

18 June 2002

Budget Supports New Confiscation Laws

The State Government will spend an additional $2.1 million over the next four years to support new confiscation laws, giving law enforcement agencies powers to seize assets and freeze bank accounts of criminals.

Attorney-General and Minister for Justice, Rod Welford, said the funds, announced in the State Budget, would support comprehensive changes to confiscation regime.

"There will be a new civil confiscation scheme and the existing conviction-based scheme will be expanded and strengthened, providing major weapons in the fight against drug trafficking and organised crime," Mr Welford said.

"A key aspect will be a new Criminal Assets Confiscation Unit in the Office of the DPP, working with police to gather evidence and act against criminals.

"This is part of our comprehensive approach to take tough action against those involved in serious criminal activities, particularly drug trafficking.

"It will provide law enforcement agencies with an important new tool against the drug syndicates and organised crime bosses who live off the misery of others.

"These new civil confiscation laws will enable assets to be seized without a conviction if it can be proved that, on the balance of probabilities, they are the proceeds of drug trafficking or other serious crimes.

"All applications to seize assets will have to be based on solid evidence about serious criminal activity and be brought by the DPP before the Supreme Court.

Mr Welford said both of the schemes would target people committing criminal offences that carry a jail term of 5 years or more.

"Law enforcement agencies will be able to restrain any assets acquired in the six years prior to the criminal offence being committed," Mr Welford said.

“The onus will be on the criminal to prove the assets were acquired honestly."

Contact: Greg Milne on 32393478 or 0417 791336
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