

Western Australia

Crimes (Confiscation of Profits) Act 1988

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Crimes (Confiscation of Profits) Act 1988

CONTENTS

Part 1 — Preliminary

1.	Short title	2
2.	Commencement	2
3.	Interpretation	2
4.	Act to bind Crown	9
5.	Application	9

Part 2 — Confiscation

Division 1 — Application for confiscation order

6.	Application for confiscation order	10
7.	Notice of application	11
8.	Amendment of application	11
9.	Procedure on application	11

Division 2 — Forfeiture orders

10.	Forfeiture orders	13
11.	Effect of forfeiture order	15
12.	Effect of forfeiture order on third parties	16
13.	Discharge of forfeiture order	18
14.	Effect of discharge of forfeiture order	19

Division 3 — Pecuniary penalty orders

15.	Pecuniary penalty orders	20
16.	Assessment of benefits	21
18.	Discharge of pecuniary penalty order	23

Division 4 — Re-hearing		
19.	Re-hearing	24
Part 3 — Restraining orders		
20.	Restraining orders	25
21.	Notice of restraining order to be given to persons affected	28
22.	Further orders	28
23.	Duration of restraining order	31
24.	Contravention of restraining order	33
25.	Charge on property subject to restraining order	33
26.	Recording of restraining orders	35
Part 4 — Powers of Public Trustee		
27.	Liability under confiscation order to be satisfied by Public Trustee	37
28.	Provisions concerning the Public Trustee	39
Part 5 — Search warrants		
29.	Interpretation	41
30.	Search warrants	41
31.	Seizure of property pursuant to warrant	42
31A.	Embargo notices	43
32.	Search and arrest of persons pursuant to warrant	44
33.	Issue of warrant where charge not laid	44
34.	Commissioner of Police responsible for seized property	45
35.	Return of seized property and release of embargoed property	45
36.	Obstruction, etc., of person executing warrant	48
Part 6 — Information gathering powers		
Division 1 — Production orders		
37.	Production orders	49
38.	Variation of production order	52

39.	Failure to comply with production order	53
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Division 2 — Search powers

40.	Powers to search for, and seize, documents relevant to locating etc. property	53
41.	Search warrant for location etc. of property	54

Division 3 — Monitoring orders

42.	Monitoring orders	57
43.	Existence and operation of monitoring order not to be disclosed	59

Part 7 — Interstate orders

44.	Registration of interstate orders	62
45.	Effect of registration of interstate forfeiture order	62
46.	Effect of registration of interstate restraining order	63
47.	Revocation or variation of registered orders	63
48.	Duration of registration	63
49.	Cancellation of registration	63
50.	Charge on property subject to registered interstate restraining order	64
51.	Powers of Public Trustee in relation to interstate restraining orders	66
52.	Interim registration of facsimile copies	67

Part 8 — Miscellaneous

52A.	Court may take into account effective control of property	68
53.	Standard of proof	69
54.	Constitution of court	70
55.	Limitation on power of court of petty sessions	70
56.	Interstate operation of forfeiture or restraining orders	71
57.	Costs incurred on variation of forfeiture or restraining orders on application by third parties	71
58.	Appeals	72
59.	Operation of other laws not affected	73

60.	Costs	73
61.	Regulations	73

Schedule 1

Notes

Western Australia

Crimes (Confiscation of Profits) Act 1988

An Act to provide for the confiscation of the profits of crime and the forfeiture of property in certain circumstances, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of the profits of crime and the forfeiture of property, and for connected purposes.

[Assented to 28 November 1988.]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Crimes (Confiscation of Profits) Act 1988*.

2. Commencement

The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation.

3. Interpretation

(1) In this Act unless the contrary intention appears —

“account” means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for —

- (a) a fixed term deposit; and
- (b) a safety deposit box;

“appropriate officer” means —

- (a) in any case, a prosecutor acting on behalf of the Crown;
- (b) in relation to a function arising under Part 3 or exercised before or in relation to a Court of Petty Sessions, the Commissioner of Police or any member of the Police Force;

“bank” means —

- (a) the Reserve Bank of Australia;
- (b) an ADI (authorised deposit-taking institution) as defined in section 5 of the *Banking Act 1959* of the Commonwealth;
- (c) a person who carries on State banking within the meaning of section 51 (XIII) of the Constitution of the Commonwealth;

“**benefit**” includes service or advantage;

“**confiscation order**” means a forfeiture order or a pecuniary penalty order;

“**corresponding law**” means a law of another State or a Territory that is for the time being declared by the regulations to be a law that corresponds to this Act;

“**effective control**”, in relation to property to which an application for a confiscation order or a restraining order relates, has the meaning given by section 52A;

“**embargo notice**” means embargo notice served under section 31A (1);

“**encumbrance**” in relation to property, includes any interest, mortgage, charge, right, claim or demand in respect of the property;

“**facsimile copy**” means a copy obtained by facsimile transmission;

“**financial institution**” means —

(a) a bank;

(b) a society registered under the *Building Societies Act 1976*; or

[(c) deleted]

(d) a body corporate that is, or that 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;

“**forfeiture order**” means an order made under section 10;

“**interest**”, in relation to property, means —

(a) a legal or equitable estate or interest in the property;
or

(b) a right, power or privilege over, or in connection with, the property,

whether present or future and whether vested or contingent;

s. 3

“interstate forfeiture order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;

“interstate pecuniary penalty order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;

“interstate restraining order” means an order that is made under a corresponding law and is of a kind declared by the regulations to be within this definition;

“interstate serious offence” means an offence (including a common law offence, where relevant) against the laws of another State, being an offence in relation to which an interstate forfeiture order or interstate pecuniary penalty order may be made under a corresponding law of that State;

“magistrate” includes justice of the peace;

“monitoring order” means an order made under section 42;

“pecuniary penalty order” means an order made under section 15;

“possessor”, in relation to any property, means person having it in his or her possession, whether on his or her own behalf or on behalf of or for the benefit of another person;

“premises” includes vessel, aircraft, vehicle, structure, building and any place whether built on or not;

“production order” means an order made under section 37;

“property” means real or personal property of every description wherever situated, whether tangible or intangible, and includes any interest in any such real or personal property;

“property-tracking document”, in relation to an offence, means —

- (a) a document relevant to —
 - (i) identifying, locating or quantifying property of a person who committed the offence; or

- (ii) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or
- (b) a document relevant to —
 - (i) identifying, locating or quantifying tainted property in relation to the offence; or
 - (ii) identifying or locating any document necessary for the transfer of tainted property in relation to the offence;

“relevant period” in relation to the conviction of a person for a serious offence, means the period of 6 months after —

- (a) if the person is to be taken to have been convicted of the offence by reason of subsection (2) (a), the day on which the person was convicted of the offence;
- (b) if the person is to be taken to have been convicted of the offence by reason of subsection (2) (b), the day on which the person was discharged without conviction;
- (c) if the person is to be taken to have been convicted of the offence by reason of subsection (2) (c), the day on which the offence was taken into account;
- (d) if the person is to be taken to have been convicted of the offence by reason of subsection (2) (d), the day on which the person is to be taken to have absconded in connection with the offence;

“relevant serious offence” in relation to property that is tainted property, means the serious offence by reason of the commission of which the property is tainted property;

“restraining order” means an order under section 20;

“serious offence” means —

- (a) an indictable offence against the laws of Western Australia; or

s. 3

- (b) any other offence that is prescribed by the regulations as a serious offence for the purposes of this definition or is of a class of offences that is so prescribed;

“serious drug offence” means —

- (a) an offence against section 6 (1), 7 (1), or 33 (2) (a) of the *Misuse of Drugs Act 1981*; or
- (b) any other offence that is prescribed by the regulations as a serious drug offence for the purposes of this definition or is of a class of offences that is so prescribed;

“tainted property”, in relation to a serious offence, means —

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

“unlawful act” means act or omission that constitutes a serious offence, whether or not that act or omission is the subject of a conviction.

- (1a) For the purposes of the definition of **“possessor”** in subsection (1), **“possession”** includes control or having dominion over, and having the order or disposition of.
- (1b) A reference in this Act (except section 12) to **“reasonable grounds”** or **“grounds”** includes a reference to reasonable grounds or grounds, as the case requires, based on hearsay evidence or hearsay information.
- (2) For the purposes of this Act, a person is to be taken to have been convicted of a serious offence if —
 - (a) the person has been convicted of the offence, whether or not —
 - (i) a spent conviction order is made under section 39 of the *Sentencing Act 1995* in respect of the conviction; or

- (ii) the conviction was deemed not to be a conviction by section 20 of the *Offenders Community Corrections Act 1963*;
 - (b) the person has been charged with and found guilty of the offence but is discharged without conviction;
 - (c) the offence was taken into account by a court in sentencing the person for another offence; or
 - (d) the person has been charged with the offence but before the charge is finally determined, the person has absconded.
- (3) For the purposes of this Act, a person's conviction is to be taken to have been quashed —
- (a) where the person is to be taken to have been convicted by reason of subsection (2) (a), if the conviction is quashed or set aside;
 - (b) where the person is to be taken to have been convicted by reason of subsection (2) (b), if the finding of guilt is quashed or set aside;
 - (c) where the person is to be taken to have been convicted by reason of subsection (2) (c), if the decision of the court to take the offence into account is quashed or set aside;
 - (d) where the person is to be taken to have been convicted by reason of subsection (2) (d), if, after the person is brought before a court in respect of the offence, the person is discharged in respect of the offence or a conviction of the person for the offence is quashed or set aside.
- (4) For the purposes of this Act, a person is to be taken to have been charged with an offence if a complaint has been made against the person for the offence, whether or not —
- (a) a summons to require the attendance of the person to answer to the complaint; or

s. 3

- (b) a warrant for the arrest of the person,
has been issued.
- (5) For the purposes of this Act a person shall be taken to abscond in connection with an offence if, and only if, —
- (a) a complaint is made alleging the commission of the offence by the person;
- (b) a warrant for the arrest of the person is issued in relation to that complaint, or the person is arrested without warrant, whether before or after the making of that complaint; and
- (c) one of the following occurs —
- (i) the person dies without the warrant being executed or after the execution of the warrant or, in the case of a person arrested without warrant, after that arrest;
- (ii) at the end of the period of 6 months commencing on the day on which the warrant is issued —
- (A) the person cannot be found; or
- (B) the person is, for any other reason, not amenable to justice and if the person is outside Australia, extradition proceedings are not on foot;
- (iii) at the end of the period of 6 months commencing on the day on which the warrant is issued —
- (A) the person is, by reason of being outside Australia, not amenable to justice; and
- (B) extradition proceedings are on foot,
- and subsequently those proceedings terminate without an order for the person's extradition being made.

- (6) For the purposes of this Act, the Northern Territory shall be regarded as a State.
- (7) For the purposes of this Act, 2 offences are related to each other if the elements of the 2 offences are substantially the same acts or omissions.

[Section 3 amended by No. 49 of 1990 s.4; No. 15 of 1992 ss.4 and 8; No. 78 of 1995 s.21; No. 26 of 1999 s.72.]

4. Act to bind Crown

- (1) This Act binds the Crown not only in right of Western Australia but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.
- (2) Nothing in this Act renders the Crown in any of its capacities liable to be prosecuted for an offence.

5. Application

- (1) Subject to subsection (2), Parts 2 and 3 do not apply to a person's conviction of an offence if the person was convicted of the offence before the commencement of those Parts.
- (2) Subsection (1) does not apply in relation to interstate forfeiture orders, interstate pecuniary penalty orders, or interstate restraining orders.
- (3) Subject to subsection (1), this Act as amended by the *Crimes (Confiscation of Profits) Amendment Act 1990* and the *Acts Amendment (Confiscation of Criminal Profits) Act 1992* applies to —
 - (a) an offence committed or believed to have been committed at any time; and
 - (b) the conviction of a person at any time of an offence,whether before or after 28 November 1988.

[Section 5 amended by No. 49 of 1990 s.5; No. 15 of 1992 s.5.]

Part 2 — Confiscation

Division 1 — Application for confiscation order

6. Application for confiscation order

- (1) Where a person is convicted of a serious offence, an appropriate officer may, subject to subsections (2) and (3), apply to the Supreme Court or the court before which the person was convicted of the offence for one or both of the following orders —
 - (a) a forfeiture order in respect of particular property;
 - (b) a pecuniary penalty order.
- (2) An application under subsection (1) must be made before the end of the relevant period in relation to the conviction.
- (3) Subject to subsection (3a), if an application under paragraph (a) or (b) of subsection (1) has been finally determined, no further application may be made under that paragraph in relation to the same conviction, except with the leave of the Supreme Court or in such circumstances as are prescribed.
- (3a) If an application under paragraph (a) or (b) of subsection (1) has been refused in respect of property or benefits derived or realized by a person as a result of the commission of an unlawful act other than the serious offence in reliance on which the application was made and the person is subsequently convicted of a serious offence constituting the whole or any part of that unlawful act, another application may be made to a court under subsection (1) in respect of that property or those benefits and, if so made, shall be dealt with by the court in all respects as if the firstmentioned application had not been made.
- (4) An application may be made under this section in relation to one or more serious offences.

[Section 6 amended by No. 49 of 1990 s.6.]

7. Notice of application

- (1) Where an appropriate officer applies for a forfeiture order against property in respect of a person's conviction of an offence —
 - (a) the appropriate officer shall give written notice of the application to the person and to any other person the appropriate officer has reason to believe may have an interest in the property;
 - (b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application; and
 - (c) the court may, at any time before the final determination of the application, direct the appropriate officer to give or publish notice of the application to a specified person or class of persons in the manner and within the time that the court considers appropriate.
- (2) Where an appropriate officer applies for a pecuniary penalty order against a person —
 - (a) the appropriate officer shall give the person written notice of the application; and
 - (b) the person may appear and adduce evidence at the hearing of the application.

8. Amendment of application

The court may, at any time before the final determination of an application for a confiscation order and whether or not the period for making such an application has expired, amend the notice of application as it thinks fit, either at the request of the applicant or with the approval of the applicant.

9. Procedure on application

- (1) Where an application is made to a court for a confiscation order in respect of a person's conviction of an offence, the court may, in determining the application, have regard —

Crimes (Confiscation of Profits) Act 1988

Part 2 Confiscation

Division 1 Application for confiscation order

s. 9

- (a) in the case of an offence tried on indictment, to copies of written statements which have been served, or which would, had the person not absconded before the charge of that offence had been finally determined, have been served, on the person in accordance with a direction given under section 101A (1) (b) of the *Justices Act 1902* in respect of that offence, to any statements, depositions, exhibits or other material before the court in any proceeding against the person for the offence and to any transcript of any such proceeding; or
- (b) in the case of an offence not tried on indictment, to any statements, depositions, exhibits or other material before the court in any proceeding against the person for the offence and to any transcript of any such proceeding.

(2) Where —

- (a) an application is made for a confiscation order in respect of a person's conviction of an offence;
- (b) the application is made to the court before which the person was convicted; and
- (c) the court has not, when the application is made, passed sentence on the person for the offence,

the court may, if satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined the application for the confiscation order.

(3) Where —

- (a) a person is to be taken to have been convicted of an offence by reason of paragraph (c) of section 3 (2); and
- (b) an application is made to a court for a confiscation order in respect of the conviction,

the reference in subsection (1) to a proceeding against the person for the offence includes a reference to a proceeding against the person for the other offence referred to in that paragraph.

[Section 9 amended by No. 15 of 1992 s.6.]

Division 2 — Forfeiture orders

10. Forfeiture orders

- (1) Where an application is made to a court under section 6 (1) (a), the court may, if it considers it appropriate, order that the property be forfeited to the Crown if it is satisfied that the property —
 - (a) was used in, or in connection with, the commission of the offence; or
 - (b) was derived or realized, directly or indirectly, by the person convicted of the offence or another person, or is subject to the effective control of the person convicted of the offence, as a result of the commission of the offence or of any other unlawful act.
- (2) In considering whether to make an order under subsection (1) in respect of particular property, the court may have regard to —
 - (a) the use that is ordinarily made, or had been intended to be made, of the property; and
 - (b) any hardship that may reasonably be likely to be caused to any person by the order.
- (3) Where, at the hearing of an application referred to in subsection (1) in reliance on the conviction of a person for a serious offence, evidence is given that property to which the application relates was in the possession of the person at or immediately after the commission of the offence, then —
 - (a) if there is no evidence given tending to show that the property was not used in, or in connection with, the commission of the offence, the court shall presume that the property was used in, or in connection with, the commission of the offence; or

- (b) in any other case, the court shall not make an order under this section in relation to the property unless it is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence.
- (4) When an application is made to a court under section 6 (1) (a) against a person in reliance on a serious offence that is a serious drug offence in respect of which a declaration has been made under section 32A of the *Misuse of Drugs Act 1981*, all property acquired by, or brought under the effective control of, the person during the period commencing on the day 6 years before the day, or the first day, on which that serious offence was committed shall be presumed, unless the contrary is proved, to be property that was derived or realized by the person as a result of the commission of an unlawful act.
- (5) If, at the hearing of an application referred to in subsection (1), it is shown that property to which that application relates —
- (a) may have been derived or realized, directly or indirectly, as a result of the commission of an unlawful act; and
 - (b) was derived or realized during the period commencing on the day 6 years before the day, or the first day, on which the serious offence in reliance on which that application was made was committed,
- it shall be presumed, unless the contrary is proved, that that property was derived or realized within the meaning of paragraph (a).
- (6) If, on an application referred to in subsection (1), a court is satisfied that property to which that application relates was acquired partly with moneys derived or realized, directly or indirectly, as a result of the commission of an unlawful act and partly with moneys not so derived or realized, the court may, if it thinks fit, make an order directing the Attorney General to sell that property and pay to the person against whom that application is made an amount which bears the same proportion

to the proceeds of that sale as the moneys not so derived or realized bear to the total cost of that acquisition.

[Section 10 amended by No. 49 of 1990 s.7.]

11. Effect of forfeiture order

- (1) Subject to subsection (2), if a court makes a forfeiture order in respect of property, the property vests absolutely in the Crown immediately on the making of the order.
- (2) If the order relates to property under the operation of the *Transfer of Land Act 1893*, the property does not vest as set out in subsection (1) until a memorial of the forfeiture order, in the form prescribed under that Act, is lodged with the Registrar of Titles under that Act or effect is otherwise given to the order in accordance with that Act.
- (3) A court has power to give all directions that are necessary to give effect to a forfeiture order made by it.
- (4) Except with the leave of the court which made the forfeiture order, the Crown must not —
 - (a) dispose of, or otherwise deal with, the property; or
 - (b) authorize any other person or body to dispose of, or otherwise deal with, the property,before the end of the appeal period.
- (5) If at the end of the appeal period the forfeiture order has not been discharged, the property may be disposed of, or otherwise dealt with, in accordance with any directions of the Attorney General or of a person authorized by the Attorney General for the purposes of this subsection.
- (6) For the purposes of subsections (4) and (5) the appeal period ends when an appeal may no longer be lodged against either the forfeiture order or the conviction in reliance on which the order was made or, if such an appeal is lodged, when the appeal lapses or is finally determined.

12. Effect of forfeiture order on third parties

- (1) Any person who claims an interest in property in respect of which a forfeiture order has been made by a court may, subject to subsection (2), apply to that court for an order under subsection (4) or(5).
- (2) An application under subsection (1) must be made within the period of 6 months after the making of the forfeiture order.
- (3) Despite subsection (2), the court which made the forfeiture order may permit a person to apply under subsection (1) outside that period if satisfied that the failure to apply within that period was not due to any neglect or delay on the part of that person.
- (4) If on an application under subsection (1) the court is satisfied —
 - (a) that the applicant was not in any way involved in the commission of the unlawful act in reliance on which the forfeiture order was made; and
 - (b) that the applicant acquired the interest in the property in good faith and for value;
 - (c) that the applicant acquired the interest in the property without knowing, or in circumstances such as not to arouse a reasonable suspicion, that the property —
 - (i) was used in, or in connection with, the commission of a serious offence; or
 - (ii) was derived or realized, directly or indirectly, by any person as a result of the commission of an unlawful act;and
 - (d) that the property is not subject to the effective control of the person against whom the forfeiture order was made,

the court must make an order declaring the nature, extent and, if necessary for the purposes of the order, the value (as at the time of making the order) of the applicant's interest in the property

and directing the Crown to transfer or grant the property to the applicant or to pay to the applicant the declared value of the applicant's interest in the property, whichever the order directs.

(5) If on an application under subsection (1) the court is satisfied —

- (a) that the applicant was not in any way involved in the commission of the unlawful act in reliance on which the forfeiture order was made;
- (b) that the applicant acquired the interest in the property in good faith and for value before the commission of the unlawful act in reliance on which the forfeiture order was made; and
- (c) that the property is not subject to the effective control of the person against whom the forfeiture order was made,

the court must make an order declaring the nature, extent and, if necessary for the purposes of the order, the value (as at the time of making the order) of the applicant's interest in the property and directing the Crown to transfer or grant the property to the applicant or to pay to the applicant the declared value of the applicant's interest in the property, whichever the order directs.

(6) If the applicant had been given notice under section 7 of the application for the forfeiture order or had attended the hearing of the application for the forfeiture order, the court must not make an order under subsection (4) or (5) unless it is satisfied that the making of the order is justified on special grounds, such as —

- (a) the existence of a good reason why the applicant did not attend the hearing of the application for the forfeiture order;
- (b) that evidence now given by the applicant was not available to the applicant at the time of the hearing of the application for the forfeiture order.

- (7) A person who makes an application under subsection (1) in respect of property must give notice as prescribed to the Attorney General of the making of the application.
- (8) The Attorney General shall be a party to any proceedings upon an application under subsection (1).
- (9) No stamp duty is payable under the *Stamp Act 1921* in respect of the transfer of any property under this section.

[Section 12 amended by No. 49 of 1990 s.8.]

13. Discharge of forfeiture order

- (1) A forfeiture order is discharged if —
 - (a) the conviction in reliance on which the order was made is subsequently quashed; or
 - (b) it is discharged by the court which hears an appeal against it under section 58; or
 - (c) a payment is made to discharge it in accordance with this section.
- (2) If a court makes a forfeiture order in respect of property, the person who claims to be the person in whom the property was vested immediately before the making of the order may apply in writing to the Attorney General to have the Attorney General determine the value of the property.
- (3) If an application is made under subsection (2) the Attorney General may, if satisfied —
 - (a) that the property was vested in the applicant immediately before the making of the forfeiture order;
 - (b) that the property is still vested in the Crown; and
 - (c) that there is no reason why the property should not be returned to the applicant,

determine the value (as at the time of the determination) of the property and notify the applicant of the value so determined.

- (4) If the applicant, after being notified under subsection (3) and within the period prescribed, pays to the Crown the amount so notified, the forfeiture order is discharged.
- (5) On discharge of the order under subsection (4) the Attorney General must arrange for the property to be transferred or granted to the applicant and, for this purpose, the Attorney General has power to do, or authorize the doing of, anything necessary to carry out the transfer or grant.
- (6) A determination or purported determination of the Attorney General under subsection (3) is not liable to be challenged, appealed against, reviewed, quashed or called in question in any court on any account.

14. Effect of discharge of forfeiture order

- (1) If a forfeiture order is discharged in the manner referred to in section 13 (1) (a) or (b), the person who claims to be the person in whom the property was vested immediately before the making of the forfeiture order may —
 - (a) if the property is still vested in the Crown, by application in writing to the Attorney General, request the return of the property; or
 - (b) if the property is no longer so vested, apply to the court which made the forfeiture order for an order declaring the value (as at the time of making the order under this paragraph) of the property.
- (2) On receipt of an application under subsection (1) (a), the Attorney General must, subject to subsection (3), arrange for the property to be transferred or granted to the applicant or such other person or body as the Attorney General determines and, for this purpose, the Attorney General has power to do, or authorize the doing of, anything necessary to carry out the transfer or grant.
- (3) If a payment has been made to any person under an order made under section 12 (4) or (5), the Attorney General must not

arrange for the property to be transferred or granted as provided by subsection (2) until the proposed transferee pays to the Crown the total amount paid by it in respect of the property under an order or orders made under section 12 (4) or (5).

- (4) On an application under subsection (1) (b) the court must make an order declaring the value (as at the time of making the order) of the property.
- (5) After an order is made under subsection (4) the applicant for the order may, by application in writing to the Attorney General, request the payment of the amount declared by the order.
- (6) On receipt of an application under subsection (5), the Attorney General must direct the Crown to pay to the applicant or to such other person or body as the Attorney General determines the amount declared by the order made under subsection (4) less the total amount paid by the Crown in respect of the property under any order made under section 12 (4) or (5).
- (7) No stamp duty is payable under the *Stamp Act 1921* in respect of the transfer of any property under this section.

Division 3 — Pecuniary penalty orders

15. Pecuniary penalty orders

- (1) If an application is made to a court under section 6 (1) (b), the court may, if it considers it appropriate —
 - (a) assess the value of the benefits derived by the person against whom the application is made as a result of the commission of the serious offence in reliance on which the application is made or of any other unlawful act; and
 - (b) order the person referred to in paragraph (a) to pay to the Crown a pecuniary penalty equal to the value of those benefits as assessed under this subsection, less —
 - (i) the value as at the time of the making of that order of any property in respect of which a

forfeiture order has been made in reliance on;
and

- (ii) if the court thinks it desirable to take it into account, any amount payable by way of restitution or compensation in relation to, the unlawful act referred to in that paragraph.

- (1a) If, at the hearing of an application referred to in subsection (1), it is shown that the benefits to which that application relates —
- (a) may have been derived as a result of the commission of an unlawful act; and
 - (b) were derived during the period commencing on the day 6 years before the day, or the first day, on which the serious offence in reliance on which that application was made was committed,

it shall be presumed, unless the contrary is proved, that those benefits were derived within the meaning of paragraph (a).

- (2) An amount payable by a person to the Crown under a pecuniary penalty order is, for all purposes, to be taken to be a civil debt due by the person to the Crown.
- (3) A pecuniary penalty order made by a court may be enforced as if it were an order made by the court in civil proceedings instituted by the Crown against the person concerned to recover a debt due by that person to the Crown.

[Section 15 amended by No. 49 of 1990 s.9.]

16. Assessment of benefits

- (1) In assessing, on an application for a pecuniary penalty order, the value of the benefits derived by a person as the result of committing an unlawful act, the court may treat as benefits such things as it thinks fit, including —

- (a) any property (whether situated within or outside Western Australia) that was derived or realized, directly or indirectly, by that person or another person, at the request or by the direction of the first-mentioned person, as the result of the commission of the unlawful act;
 - (b) any property (whether situated within or outside Western Australia and however derived or realized) which was in the opinion of the court brought under the effective control of that person as a result of the commission of an unlawful act; and
 - (c) any benefit provided (whether within or outside Western Australia) for that person or another person, at the request or by the direction of the firstmentioned person, as a result of the commission of an unlawful act.
- (2) Where, at the hearing of an application under section 6 (1) (b) in relation to a serious offence other than a serious drug offence, evidence is given that the value of the defendant's property after the defendant committed the serious offence, or after the end of the offence period, as the case may be, exceeded the value of the defendant's property before the defendant committed the serious offence or before the commencement of the offence period, as the case may be, then, for the purposes of section 6 (1) (b), the court shall, subject to subsection (3), treat the value of the benefits derived by the defendant by reason of having committed the offence or offences as being not less than the amount of the excess.
- (3) Where, after evidence has been given at the hearing of an application under section 6 (1) (b) in relation to a serious offence other than a serious drug offence that the value of the defendant's property after the defendant committed the serious offence, or after the end of the offence period, as the case may be, exceeded the value of the defendant's property before the defendant committed the serious offence or before the commencement of the offence period, as the case may be, the defendant satisfies the court that the whole or a part of the

excess was due to causes unrelated to the commission of the offence or offences, as the case may be —

- (a) if the defendant so satisfies the court in respect of the whole of the excess, subsection (2) does not apply to the excess; or
 - (b) if the defendant so satisfies the court in respect of a part of the excess, subsection (2) applies to the excess as if it were reduced by the amount of that part.
- (4) Where an application is made for a pecuniary penalty order against a person in relation to a serious offence that is a serious drug offence in respect of which a declaration has been made under section 32A of the *Misuse of Drugs Act 1981*, all property acquired by, or brought under the effective control of, the person during the period commencing on the day 6 years before the day, or the first day, on which that serious offence was committed shall be presumed, unless the contrary is proved, to be property that was derived or realized by that person as a result of the commission of an unlawful act.

[Section 16 amended by No. 49 of 1990 s.10.]

[17. Repealed by No. 49 of 1990 s.11.]

18. Discharge of pecuniary penalty order

- (1) A pecuniary penalty order is discharged if the conviction in reliance on which the order was made —
 - (a) is subsequently quashed; or
 - (b) is discharged by the court which hears an appeal against it under section 58.
- (2) If a pecuniary penalty order is registered under the *Service and Execution of Process Act 1901* of the Commonwealth, notice of the discharge of that order must be given as prescribed by the rules of the Supreme Court.

Division 4 — Re-hearing

19. Re-hearing

- (1) If —
 - (a) a forfeiture order or a pecuniary penalty order has been made in respect of a person who was charged with a serious offence but before the charge was finally determined, the person absconded; and
 - (b) after the making of the order the person surrenders to or is apprehended by a police officer,that person may apply to the court which made the order to have the order set aside.
- (2) An applicant under subsection (1) must give notice of the application to the Attorney General who may appear to oppose the grant of the application.
- (3) On an application under subsection (1) the court may set aside the order subject to such terms and conditions with respect to costs or otherwise as it thinks fit.
- (4) If the court sets aside an order it must re-hear the application for the order and may confirm, revoke or vary the order.
- (5) If an order has been revoked under subsection (4), the revocation of the order does not prevent the making of another order in respect of the person under this Part.

Part 3 — Restraining orders

20. Restraining orders

- (1) If a person has been convicted of a serious offence or has been, or is about to be, charged with a serious offence, an appropriate officer may apply to the Supreme Court for an order under this section in respect of —
 - (a) specified property of that person;
 - (b) all the property of that person, including property acquired by that person after the making of the order;
 - (ba) specified property subject to the effective control of that person;
 - (bb) all property subject to the effective control of that person; or
 - (c) specified property of any other person that was used in, or in connection with, the commission of the offence or was derived or realized, directly or indirectly, by that other person or another person, as a result of the commission of the offence.
- (2) Where the person has not been convicted of the offence concerned, an application under subsection (1) must be supported by an affidavit of a police officer stating that the officer believes —
 - (a) that the person charged, or about to be charged, with the serious offence, committed the offence;
 - (b) in the case of an application in respect of specified property of the person or specified property subject to the effective control of the person —
 - (i) that a forfeiture order may be made in respect of the property if the person is convicted of the offence; or
 - (ii) that the property is the property of, or is subject to the effective control of, the person charged, or

s. 20

about to be charged, and that a pecuniary penalty order may be made if the person is convicted of the offence;

and

- (c) in the case of an application in respect of all the property of a person or all property subject to the effective control of a person, that a pecuniary penalty order may be made if the person is convicted of that offence, the property of a person, that a pecuniary penalty order may be made if the person is convicted of that offence,

and setting out the grounds on which the police officer holds those beliefs.

- (3) The applicant for an order under this section must give notice of the application in the manner prescribed by rules of court —
 - (a) to any person whose property is the subject of the application; and
 - (b) to any other person whom the applicant has reason to believe has an interest in any property that is the subject of the application.
- (4) The Supreme Court may, at any time before the final determination of the application, direct the applicant to give or publish notice of the application to such persons, in such manner and within such time as the Court thinks fit.
- (5) Any person whose property is the subject of the application, and any other person who claims an interest in any such property, are entitled to appear and to give evidence at the hearing of the application.
- (6) Subject to subsection (6a), in an urgent case, the Supreme Court may make an order under this section on an application made without notice but that order can only have effect for a maximum of 21 days.

- (6a) The Supreme Court may, within the period of 21 days referred to in subsection (6), on good cause shown extend that period for such additional period not exceeding 21 days as it thinks fit.
- (7) On an application under subsection (1), the Supreme Court may by order —
- (a) direct that the property specified in the order is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order; or
 - (b) direct the Public Trustee to take control of the property specified in the order.
- (8) If an application is made under subsection (1) in reliance on the proposed charging of a person with a serious offence, the Supreme Court must not make a restraining order unless it is satisfied that the person is likely to be charged within 48 hours.
- (9) Subject to subsection (9a), a restraining order may provide for meeting the reasonable living and business expenses of the person whose property the order applies to, and the reasonable costs and expenses of the person defending any criminal charge.
- (9a) A restraining order shall not make the provision referred to in subsection (9) unless the person against whom the restraining order is made satisfies the Supreme Court that he or she cannot meet the reasonable living and business expenses, and the reasonable costs and expenses, referred to in that subsection out of property to which the restraining order does not apply.
- (10) A restraining order may be made subject to such conditions as the Supreme Court thinks fit.

s. 21

- (11) The Supreme Court may refuse to make a restraining order if the Crown, or the applicant on behalf of the Crown, refuses or fails to give to the Court such undertakings as the Court thinks appropriate concerning the payment of damages or costs, or both, in relation to the making and operation of the order.

[Section 20 amended by No. 49 of 1990 s.12.]

21. Notice of restraining order to be given to persons affected

If —

- (a) a restraining order is made in respect of property of a person; and
- (b) notice had not been given to that person of the application for the order,

the applicant must give, in the manner prescribed by rules of court, notice of the making of the order to that person.

22. Further orders

- (1) The Supreme Court may, when it makes a restraining order or at any later time —

- (a) on application made to it, make such orders in relation to the property to which the restraining order relates as it considers just;
- (b) on application made to it or without any application, make an order authorizing another court —
 - (i) to make an order setting aside the restraining order; or
 - (ii) to make other orders in relation to the operation of the restraining order,

to the extent and in the circumstances specified in the order of the Supreme Court.

- (2) An order under subsection (1) may be made on the application of —

- (a) the applicant for the restraining order or any other person who could have applied for the restraining order;
 - (b) the person in reliance on whom being convicted of or charged or proposed to be charged with an offence the restraining order was made;
 - (c) a person whose property the restraining order relates to;
 - (d) the Public Trustee — if the restraining order directed the Public Trustee to take control of property; or
 - (e) any other person who obtains the leave of the Supreme Court to apply.
- (3) The applicant for an order under subsection (1) must give notice of the application in the manner prescribed by rules of court to each other person who could have applied for the order.
- (4) Examples of the kind of order that the Supreme Court may make under subsection (1) are —
- (a) an order varying the property to which the restraining order relates;
 - (b) an order varying any condition to which the restraining order is subject;
 - (c) an order for the examination before the Supreme Court, or such officer of the Supreme Court as is prescribed by rules of court, of any person whose property the restraining order relates to or any other person concerning the nature and location of —
 - (i) any property of any person whose property the restraining order relates to; or
 - (ii) any property which the applicant for the order believes, on reasonable grounds, was used in, or in connection with, the offence in reliance on the conviction of, or the charging or proposed charging with, which the restraining order was made or was derived or realized, directly or

s. 22

- indirectly, by any person, as a result of the
commission of that offence;
- (d) an order relating to the carrying out of any undertaking given under section 20 (11) in relation to the restraining order;
 - (e) if the restraining order directed the Public Trustee to take control of property —
 - (i) an order regulating the manner in which the Public Trustee may exercise its powers or perform its duties under the restraining order;
 - (ii) an order determining any question relating to the property;
 - (iii) an order directing the person whose property the Public Trustee has taken control of to furnish to the Public Trustee, within the period specified in the order, a statement, verified by the oath or affirmation of that person, setting out such particulars of the property of that person as the Court thinks proper;
 - (f) an order under section 110 (1) of the *Evidence Act 1906*.
- (5) A person is not required in an examination referred to in subsection (4) (c) to answer any question that might tend to incriminate that person.
- (6) A statement or disclosure made by a person in answer to a question put in the course of an examination referred to in subsection (4) (c) is admissible against that person in —
- (a) any civil proceeding;
 - (b) a proceeding for giving false testimony in the course of the examination;
 - (c) a proceeding for the making of a forfeiture order, for the purpose only of facilitating the identification of the property to be subject to the forfeiture order; or

- (d) a proceeding for the making of a pecuniary penalty order, for the purpose only of assessing the value of the benefits derived by the person as the result of committing the offence,

but is not otherwise admissible in evidence against that person.

- (7) A person who is ordered under subsection (1) to attend an examination referred to in subsection (4) (c) must not —
 - (a) without reasonable excuse, fail to attend as required by the order;
 - (b) without reasonable excuse, fail to attend from day to day until the conclusion of the examination;
 - (c) refuse or fail to take an oath or make an affirmation for the purpose of the examination;
 - (d) subject to subsection (5), refuse or fail to answer a question that the person is directed by the Supreme Court or the prescribed officer to answer; or
 - (e) make a statement in the course of the examination that is false or misleading in a material particular.

Penalty: \$5 000 or imprisonment for 2 years, or both.

[Section 22 amended by No. 49 of 1990 s.13.]

23. Duration of restraining order

- (1) Subject to this section, a restraining order remains in force for 12 months after it is made or for such other period as is specified in the order.
- (2) A restraining order made in reliance on the proposed charging of a person with a serious offence ceases to be in force 48 hours after it is made if the person has not by then been charged with the offence.
- (3) The Supreme Court, or any other court authorized to do so by an order of the Supreme Court under section 22 (1) (b), may, on application made to it, make an order —

s. 24

- (a) extending the period for which a restraining order is to remain in force; or
 - (b) setting aside a restraining order.
- (4) An order under subsection (3) may be made on the application of —
- (a) the applicant for the restraining order or any other person who could have applied for the restraining order;
 - (b) the person in reliance on whom being convicted, charged or proposed to be charged with an offence the restraining order was made; or
 - (c) any person whose property the restraining order relates to or who has an interest in that property.
- (5) The applicant for an order under subsection (3) must give notice of the application in the manner prescribed by rules of court to each other person whom the applicant has reason to believe could have applied for the order.
- (6) Any person given or entitled to be given notice, under subsection (5) is entitled to appear and to give evidence at the hearing of the application.
- (7) Without limiting the generality of subsection (3), a court referred to in that subsection may make an order setting aside a restraining order on the application of a person referred to in subsection (4) (b) if that person —
- (a) gives security satisfactory to the court for the payment of any pecuniary penalty that may be imposed on that person under section 15 (1) in relation to that person's conviction for that offence; or
 - (b) gives undertakings satisfactory to the court concerning that person's property.

24. Contravention of restraining order

A person shall not knowingly contravene a restraining order by disposing of, or otherwise dealing with, property to which the order relates.

Penalty: \$100 000 or imprisonment for 5 years, or both.

[Section 24 amended by No.49 of 1990 s.14.]

25. Charge on property subject to restraining order

(1) If —

- (a) in reliance on the conviction of a person of a serious offence or the charging or the proposed charging of a person with, a serious offence, the Supreme Court has made a restraining order in respect of all or some of the property of that person; and
- (b) in reliance on the conviction of that person for that offence a court subsequently makes a pecuniary penalty order against that person,

then there is created, on the making of the pecuniary penalty order, a charge on all the property to which the restraining order applies to secure the payment to the Crown of the pecuniary penalty.

(2) A charge created by subsection (1) on property ceases to have effect if any of the following occur —

- (a) the pecuniary penalty order is discharged;
- (b) the pecuniary penalty is paid;
- (c) the property is disposed of under an order made under section 27;
- (d) the property is disposed of with the consent of the Supreme Court or, if the Public Trustee has been directed to take control of the property, with the consent of the Public Trustee;

s. 25

- (e) the property is sold to a purchaser or otherwise assigned to a person in good faith for value who, at the time of the purchase or assignment, had no notice of the charge.
- (3) A charge created by subsection (1) on property —
 - (a) is subject to every encumbrance to which the property was subject immediately before the pecuniary penalty order was made but has priority over all other encumbrances; and
 - (b) subject to subsection (2), remains on the property despite any disposal of the property.
- (4) If —
 - (a) a charge is created by subsection (1) on property of a particular kind other than land or an interest in land; and
 - (b) any law of Western Australia provides for the registration of charges on property of that kind,

the applicant for the pecuniary penalty order may cause the charge so created to be registered under that law.
- (5) If the charge is registered under subsection (4), a person who purchases the property after the registration of the charge is, for the purposes of subsection (2) (e), to be taken to have had notice of the charge.
- (6) If a charge is created by subsection (1) on an interest in land, an appropriate officer or the Public Trustee may cause a memorial of the charge so created to be lodged under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856*, as may be appropriate, in the form approved or prescribed under the relevant Act and every such memorial shall be registered.
- (7) If a memorial of a charge is lodged under subsection (6), a person who purchases or otherwise acquires any interest in the land after the lodging of the memorial is, for the purposes of subsection (2) (e) to be taken to have had notice of the charge at the time of the purchase or acquisition.

- (8) Where a memorial of a charge has been lodged under subsection (6), an appropriate officer or the Public Trustee may cause a withdrawal of memorial, in the form approved or prescribed under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* (as may be appropriate) as to the cessation of operation of the charge, to be lodged under that Act and every such withdrawal of memorial shall be registered.

[Section 25 amended by No. 31 of 1997 s.21.]

26. Recording of restraining orders

- (1) If —
- (a) a restraining order applies to property of a particular kind other than land or an interest in land; and
 - (b) any law of Western Australia provides for the registration of title to, or encumbrances on, or documents relating to the title to property of that kind,
- the relevant registration authority under that law must, on application to it by an appropriate officer, record on the register the prescribed particulars of the restraining order.
- (2) If the prescribed particulars are so recorded, a person who disposes of, or otherwise deals with, the property after the recording of those particulars is, for the purposes of section 24, to be taken to know of the restraining order.
- (3) If a restraining order relates to property that is land or an interest in land, an appropriate officer or the Public Trustee may cause to be lodged under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* (as may be appropriate) a memorial in the form approved or prescribed under the relevant Act that the property is the subject of a restraining order under section 20 and every such memorial shall be registered.
- (4) If a memorial of a restraining order is lodged under subsection (3), a person who disposes of, or otherwise deals with, the property after the lodging of the memorial is, for the

s. 26

purposes of section 24, to be taken to know of the restraining order.

- (5) Where a memorial has been lodged under subsection (3), an appropriate officer or the Public Trustee may cause a withdrawal of memorial, in the form approved or prescribed under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* (as may be appropriate) as to the cessation of operation of the restraining order, to be lodged under that Act and every such withdrawal of memorial shall be registered.

[Section 26 amended by No. 31 of 1997 s.21.]

Part 4 — Powers of Public Trustee

27. Liability under confiscation order to be satisfied by Public Trustee

- (1) If —
- (a) the Public Trustee has taken control of property under a direction to do so contained in a restraining order made in reliance on a person being convicted of or charged or proposed to be charged with a serious offence; and
 - (b) a confiscation order is subsequently made in reliance on the conviction of that person,

the Public Trustee may apply to the Supreme Court or the court before which the person was convicted of the offence for an order under subsection (2).

- (2) On an application under subsection (1), the court may make an order directing the Public Trustee to pay out of the property of which it has taken control —
- (a) in the case of a forfeiture order, to the Crown, such amount as the Attorney General determines to be the value (as at the time of the determination) of that property; or
 - (b) in the case of a pecuniary penalty order, to the Crown, the amount of the pecuniary penalty.
- (3) A determination or purported determination of the Attorney General under subsection (2) (a) is not liable to be challenged, appealed against, reviewed, quashed or called in question in any court on any account.
- (4) The court that makes an order under subsection (2) may, at that time or at any later time on the application of the Public Trustee, make any other order that is necessary to enable the Public Trustee to comply with the order made under subsection (2).

s. 28

- (5) Examples of the kind of order that a court may make under subsection (4) are —
- (a) an order directing the Public Trustee to dispose of such of the property that is under the control of the Public Trustee as the court specifies;
 - (b) an order empowering a person to execute any document or to do anything else necessary to enable the Public Trustee to dispose of property under the control of the Public Trustee;
 - (c) an order specifying the person to whom any money left over after making the payments required by paragraphs (a), (b) and (c) of subsection (6) should be paid.
- (6) Any money realized by the Public Trustee out of the disposal of, or otherwise in connection with, property which the Public Trustee was directed to take control of by a restraining order must be applied by the Public Trustee towards the following in the order in which they are set out —
- (a) any fees payable to the Public Trustee under section 28 (1);
 - (b) any expenses incurred by the Public Trustee in disposing of, or otherwise in connection with, that property;
 - (c) any amount directed to be paid by the Public Trustee under subsection (2),
- and the Public Trustee must pay any money left over to the person specified by the court in an order made under subsection (4).
- (7) If the Public Trustee pays any money in satisfaction of the liability of a person under a confiscation order, the liability of that person under the order is, to the extent of the payment, discharged.

28. Provisions concerning the Public Trustee

- (1) The Public Trustee is entitled to receive such fees as may be prescribed by or under the *Public Trustee Act 1941* in respect of the exercise of its powers or the performance of its duties in relation to property of which the Public Trustee has taken control under a restraining order.
- (2) A person shall not hinder or obstruct the Public Trustee in the exercise of powers or the performance of duties by the Public Trustee in relation to property of which the Public Trustee has taken control under a restraining order.
Penalty: \$2 000 or imprisonment for 6 months, or both.
- (3) In subsection (2) “**Public Trustee**” includes Deputy Public Trustee and the officers, servants and agents of the Public Trustee.
- (4) A certificate under the hand of the Public Trustee or a Deputy Public Trustee and sealed with the common seal of the Public Trustee —
 - (a) certifying that a restraining order has been made directing the Public Trustee to take control of property and that the restraining order is in force; and
 - (b) stating the terms of the restraining order,is for all purposes evidence and, until the contrary is proved, sufficient evidence of the facts so certified and stated.
- (5) The Public Trustee is only personally liable for any rates, land tax or local government or other statutory charges which —
 - (a) are imposed by or under a law of Western Australia on or in respect of property of which the Public Trustee has taken control under a restraining order; and
 - (b) fall due on or after the date of the restraining order,to the extent of the rents and profits received by the Public Trustee in respect of that property on or after that date.

s. 28

- (6) If the Public Trustee, having taken control under a restraining order of a business carried on by a person, carries on that business, the Public Trustee is not personally liable for —
- (a) any payment in respect of long service leave for which that person was liable; or
 - (b) any payment in respect of long service leave to which a person employed by the Public Trustee to manage the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order.
- (7) With the leave of the Supreme Court or the court before which the person was convicted of the offence, the Public Trustee may appoint a person as agent to exercise all or any of the powers or perform all or any of the duties conferred or imposed on the Public Trustee by this Act in relation to property of which the Public Trustee has taken control under a restraining order.

[Section 28 amended by No. 14 of 1996 s.4.]

Part 5 — Search warrants

29. Interpretation

- (1) In this Part, unless the contrary intention appears —
- “forfeiture order”** includes an interstate forfeiture order;
 - “relevant serious offence”** in relation to property that is tainted property, means the serious offence by reason of the commission of which the property is tainted property;
 - “serious offence”** includes an interstate serious offence;
 - “tainted property”** includes property that —
 - (a) was used in, or in connection with, the commission of an interstate serious offence; or
 - (b) was derived or realized, directly or indirectly, by any person, as a result of the commission of an interstate serious offence.
- (2) The question of whether a person has been charged with or convicted of an interstate serious offence shall, for the purposes of this Part, be determined in accordance with the corresponding law of the State concerned.

30. Search warrants

- (1) A police officer may apply to a magistrate for a search warrant to be issued under this Part if the police officer has reasonable grounds for believing that there is in or on any premises tainted property of a particular kind.
- (2) A magistrate to whom an application is made under this section may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorizing any police officer —
- (a) to enter the premises; and
 - (b) to search the premises for tainted property of the particular kind referred to in subsection (1).

s. 31

- (3) There shall be stated in a warrant issued under this Part —
 - (a) a statement of the purpose for which the warrant is issued, which shall include a reference to the nature of the relevant serious offence; and
 - (b) a description of the kind of property authorized to be seized.
- (4) Nothing in this Part limits any of the provisions of any other written law relating to search warrants.
- (5) Schedule 1 has effect with respect to a search warrant issued under this Part.

31. Seizure of property pursuant to warrant

- (1) A police officer executing a search warrant issued under this Part may seize property of the kind specified in the warrant.
- (2) If, in the course of searching, in accordance with a warrant issued under this Part, for property that is tainted property in relation to a particular serious offence, being property of a kind specified in the warrant, a police officer finds any property that the officer believes on reasonable grounds to be —
 - (a) tainted property in relation to the serious offence, although not of a kind specified in the warrant; or
 - (b) tainted property in relation to another serious offence,and the officer believes on reasonable grounds that it is necessary to seize that property in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the serious offence or the other serious offence, the warrant shall be deemed to authorize the officer to seize that property.
- (3) The power conferred by this section to seize a thing includes —
 - (a) a power to remove the thing from the premises where it is found; and
 - (b) a power to guard the thing in or on those premises.

31A. Embargo notices

- (1) A police officer may, if he or she finds any property —
 - (a) which the police officer is authorized under this Part to seize; and
 - (b) which cannot, or cannot readily, be seized or which the police officer does not wish to seize,

serve on the possessor of that property and on any other person on whose behalf or for whose benefit that property is possessed by that possessor an embargo notice in the prescribed form in respect of that property.

- (2) Subject to this section, a possessor of any property to which an embargo notice relates who sells, leases, moves, transfers or otherwise deals with all or any of that property during the period beginning at the time when the embargo notice is served on him or her and ending at the time when that property is released to that possessor under section 35 or an order made under that section or made the subject of a forfeiture order commits an offence and is liable to a fine of \$20 000 or to imprisonment for 5 years or both.
- (3) The possessor of property to which an embargo notice relates may, on giving the Commissioner of Police notice of his or her intention to do so, apply to the District Court for leave to sell, lease, move, transfer or otherwise deal with all or any of that property.
- (4) The District Court may, on receiving an application under subsection (3), give the applicant leave in writing to sell, lease, move, transfer or otherwise deal with all or any of the property to which the embargo notice concerned relates on such conditions, if any, as the District Court thinks fit to attach to that leave.
- (5) A person —

s. 32

- (a) to whom leave has been given under subsection (4) and who sells, leases, moves, transfers or otherwise deals with all or any of the property to which that leave relates in accordance with any conditions attached to that leave; or
- (b) who, being the possessor of the property to which an embargo notice relates, moves all or any of that property for the purpose of protecting and preserving the same within the period referred to in subsection (2) with the prior consent of the police officer who served the embargo notice in accordance with any conditions attached to that consent,

does not commit an offence under subsection (2).

- (6) Notwithstanding anything in any other written law, a sale, lease, movement, transfer or other dealing with property which constitutes an offence under subsection (2) is null and void.

[Section 31A inserted by No. 49 of 1990 s.15.]

32. Search and arrest of persons pursuant to warrant

A police officer executing a search warrant issued under this Part —

- (a) may search a person found in or on the premises whom the police officer reasonably suspects of having property of the kind specified in the warrant; and
- (b) may arrest and bring before a magistrate any person found in or on the premises whom the police officer reasonably suspects of having committed an offence in respect of property seized pursuant to section 30.

33. Issue of warrant where charge not laid

A warrant may be issued under this Part in relation to property whether or not a person has been charged with the relevant serious offence, but a magistrate shall not issue a warrant under this Part in relation to property where a person has not been

charged with the relevant serious offence unless the magistrate is satisfied —

- (a) that the property is tainted property; and
- (b) that it is likely that a person will be charged within 48 hours with the relevant serious offence.

34. Commissioner of Police responsible for seized property

- (1) Where property is seized pursuant to a warrant issued under this Part, the Commissioner of Police shall arrange for the property to be kept until it is dealt with in accordance with another provision of this Act, and shall ensure that all reasonable steps are taken to preserve the property while it is so kept.
- (2) The power conferred by section 9 of the *Police Act 1892* shall be taken to include power to make orders as to the performance by members of the Police Force on behalf of the Commissioner of Police of duties imposed on the Commissioner of Police by this section and section 35.

35. Return of seized property and release of embargoed property

- (1) If —
 - (a) any property has been —
 - (i) seized under a warrant issued under this Part; or
 - (ii) subjected to an embargo notice;
 - (b) at the time when the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, a person had not been charged with the relevant serious offence; and
 - (c) before the expiry of a period of 7 days after the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, a person had not been charged with the relevant serious offence,

s. 35

then, unless an application is made for a forfeiture order in respect of that property, the Commissioner of Police shall arrange for that property to be returned or released, at the expiry of the period referred to in paragraph (c), to the person from whose possession it was seized or to the possessor of that property, as the case requires.

(2) When —

(a) any property has been —

- (i) seized under a warrant issued under this Part; or
- (ii) subjected to an embargo notice; and

(b) an information has been laid in respect of the relevant serious offence (or criminal proceedings have otherwise been commenced in respect of the relevant serious offence) —

- (i) before the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph; or
- (ii) after the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, but before the expiry of a period of 7 days after that seizure or subjection,

then, unless an application is made for a forfeiture order in respect of that property, the Commissioner of Police shall arrange for that property to be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires —

- (c) if that person or possessor is convicted of the relevant serious offence, at the expiry of 6 months; or
- (d) if that person or possessor is discharged or acquitted of the relevant serious offence, as soon as possible,

after the relevant time.

(3) When —

- (a) any property has been —
 - (i) seized under a warrant issued under this Part; or
 - (ii) subjected to an embargo notice; and
- (b) a court having jurisdiction to do so refuses to make a forfeiture order in respect of the property referred to in paragraph (a) in relation to the relevant serious offence,

the Commissioner of Police shall arrange for that property to be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires, as soon as possible after the relevant time.

- (4) When any property has been —
 - (a) seized under a warrant issued under this Part; or
 - (b) subjected to an embargo notice,

the person from whose possession the property was seized or the possessor of the property, as the case requires, may apply to an appropriate court for an order under subsection (5).

- (5) If a court is satisfied that neither it nor any other court having jurisdiction to do so would make a forfeiture order in respect of any property to which an application made under subsection (4) relates, the court may make an order directing that —
 - (a) that property be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires; or
 - (b) in the case of property seized under a warrant issued under this Part, the person from whom that property was so seized be allowed access to that property,

on such terms and conditions (if any) as the court thinks fit.

- (6) A person who applies to a court for an order under subsection (5) shall give notice, as prescribed by the regulations or by rules of court, of the making of that application and of the date, time and place fixed for the hearing of that application.

s. 36

- (7) A reference in this section to a person from whose possession property was seized includes a reference to any person who is entitled to that property.
- (8) A reference in this section to the relevant time is a reference —
- (a) subject to paragraph (b), to the date of the conviction, discharge or acquittal, or of the refusal to make the forfeiture order, as the case requires; or
 - (b) if there is a right of appeal —
 - (i) when the period provided for the lodging of the appeal has expired without such an appeal having been lodged, to the expiry of that period; or
 - (ii) when an appeal has been lodged, to the time when the appeal lapses or is finally determined.

[Section 35 inserted by No. 49 of 1990 s.16; amended by No 15 of 1992 s.8.]

36. Obstruction, etc., of person executing warrant

A person shall not, without reasonable excuse, obstruct or hinder a person executing a search warrant issued under this Part or serving an embargo notice.

Penalty: \$2 000 or imprisonment for 2 years, or both.

[Section 36 amended by No. 49 of 1990 s.17.]

Part 6 — Information gathering powers

Division 1 — Production orders

37. Production orders

(1) Where —

- (a) a person has been convicted of a serious offence and a police officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document in relation to the offence; or
- (b) a police officer has reasonable grounds for suspecting that —
 - (i) a person has committed a serious offence; and
 - (ii) a person has possession or control of a property-tracking document in relation to the offence,

the police officer may —

- (aa) lay before a Judge of the Supreme Court an information on oath setting out those grounds;
- (bb) apply to the Judge for an order under subsection (4) against the person suspected of having possession or control of the document; and
- (cc) apply for an order under subsection (4) against the person referred to in paragraph (b).

(2) Where a police officer applying for an order under this section in respect of an offence includes in the information under subsection (1) information on oath that the officer has reasonable grounds to believe that —

- (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person,

the Judge may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

- (3) In determining whether to treat a document, under subsection (2), as a property-tracking document in relation to an offence, the Judge may have regard to the matters referred to in section 52A (2).
- (4) Where an application is made under subsection (1) for an order against a person, the Judge may, subject to subsections (5), (7) and (8), make an order that the person —
 - (a) produce to a police officer any documents of the kind referred to in subsection (1) that are in the person's possession or control; or
 - (b) make available to a police officer, for inspection, any documents of that kind that are in the person's possession or control.
- (5) An order under subsection (4) (a) shall not be made in respect of bankers' books.
- (6) A Judge shall not make an order under this section unless —
 - (a) the informant or some other person has given the Judge, either orally or by affidavit, such information (if any) as the Judge requires concerning the grounds on which the order is sought; and
 - (b) the Judge is satisfied that there are reasonable grounds for making the order.
- (7) An order that a person produce a document to a police officer shall specify the time when and the place where the document is to be produced.
- (8) An order that a person make a document available to a police officer for inspection shall specify the time or times when the document is to be made available.

- (9) Where a document is produced to a police officer pursuant to an order under this section, the police 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, retention of the document is reasonably necessary for the purposes of this Act.
- (10) Where a document is made available to a police officer for inspection pursuant to an order under this section, the police 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.
- (11) Where a police officer retains a document pursuant to an order under this section, the police officer shall, on request by the person to whom the order was addressed —
- (a) give the person a copy of the document certified by the police 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.
- (12) A person is not excused from producing or making available a document when required to do so by an order under this section 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 penalty; or
 - (b) the production or making available of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.
- (13) Where a person produces or makes available a document pursuant to an order under this section, the production or making available of the document, or any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document, is not admissible against the person in any criminal proceedings except a proceeding for an offence against section 39.
- (14) For the purposes of subsection (13), proceedings on an application for a restraining order, a forfeiture order or a pecuniary penalty order are not criminal proceedings.
- (15) In this section —
- “bankers’ books”** means any accounting records used in the ordinary business of banking and includes ledgers, day-books, cash-books and account books.

[Section 37 amended by No. 15 of 1992 s.8.]

38. Variation of production order

Where a Judge makes a production order requiring a person to produce a document to a police officer, the person may apply to a Judge for a variation of the order and if the Judge is satisfied that the document is essential to the business activities of the person, the Judge may vary the production order so that it requires the person to make the document available to a police officer for inspection.

39. Failure to comply with production order

- (1) Where a person is required by a production order to produce a document to a police officer or make a document available to a police officer for inspection, the person is guilty of an offence against this subsection 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 police 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 police officer if the person is in possession of, or can reasonably acquire, the correct information.
- (2) An offence against subsection (1) is punishable, upon conviction, by —
- (a) if the offender is a natural person — a fine not exceeding \$10 000 or imprisonment for a period not exceeding 5 years, or both; or
 - (b) if the offender is a body corporate — a fine not exceeding \$50 000.

Division 2 — Search powers

40. Powers to search for, and seize, documents relevant to locating etc. property

A police officer may —

- (a) enter upon land, or upon or into premises;
- (b) search the land or premises for any property-tracking document in relation to a serious offence; and

- (c) seize any document found in the course of the search that the police officer believes, on reasonable grounds, to be a property-tracking document in relation to a serious offence,

but only if the entry, search or seizure, as the case may be, is made —

- (aa) with the consent of the occupier of the land or premises;
or
- (bb) under a warrant issued under section 41.

41. Search warrant for location etc. of property

(1) Where —

- (a) a person has been convicted of a serious offence and a police officer has reasonable grounds for suspecting that there is upon any land, or upon or in any premises, a property-tracking document in relation to the offence; or
- (b) a police officer has reasonable grounds for suspecting that —
 - (i) a person has committed a serious offence; and
 - (ii) there is upon any land, or upon or in any premises, a property-tracking document in relation to the offence,

the police officer may —

- (aa) lay before a Judge of the Supreme Court an information on oath setting out those grounds; and
- (bb) apply to the Judge for a search warrant under subsection (4) in respect of the land or premises.

(2) Where a police officer applying for a warrant under this section in respect of an offence includes in the information under subsection (1) information on oath that the officer has reasonable grounds to believe that —

- (a) the person who was convicted of the offence or who is believed to have committed the offence derived a benefit, directly or indirectly, from the commission of the offence; and
- (b) property specified in the information is subject to the effective control of the person,

the Judge may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.

- (3) In determining whether to treat a document, under subsection (2), as a property-tracking document in relation to an offence, the Judge may have regard to the matters referred to in section 52A (2).
- (4) Where an application is made under subsection (1) for a search warrant in respect of land or premises, the Judge may, subject to subsections (5) and (6), issue a search warrant authorizing a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable —
 - (a) to enter upon the land or upon or into the premises;
 - (b) to search the land or premises for documents of the kind referred to in subsection (1); and
 - (c) to seize any document found in the course of the search that the police officer believes, on reasonable grounds, to be a document of that kind.
- (5) A Judge shall not issue a search warrant under subsection (4) unless the Judge 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;
 - (b) a production order has been given in respect of the document and has not been complied with;

- (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 police officer does not gain immediate access to the document without notice to any person.
- (6) A Judge shall not issue a search warrant under this section unless —
- (a) the informant or some other person has given the Judge, either orally or by affidavit, any further information that the Judge requires concerning the grounds on which the search warrant is sought; and
 - (b) the Judge is satisfied that there are reasonable grounds for issuing the search warrant.
- (7) There shall be stated in a search warrant issued under this section —
- (a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the serious offence that has been or is believed to have been committed;
 - (b) whether entry is authorized to be made at any time of the day or night or during specified hours of the day or night;
 - (c) a description of the kind of documents authorized to be seized;
and
 - (d) a date, not being later than one month after the day of issue of the warrant, upon which the warrant ceases to have effect.

- (8) If, in the course of searching, under a warrant issued under this section, for a property-tracking document in relation to a particular offence, a police officer finds —
- (a) any document that the police officer believes, on reasonable grounds, to be —
 - (i) a property-tracking document in relation to the offence, although not of a kind specified in the warrant; or
 - (ii) a property-tracking document in relation to another serious offence; or
 - (b) any thing that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence,

and the police officer believes, on reasonable grounds, that it is necessary to seize that document or thing in order to prevent its concealment, loss or destruction, the warrant shall be deemed to authorize the police officer to seize that document or thing.

[Section 41 amended by No. 15 of 1992 s.8.]

Division 3 — Monitoring orders

42. Monitoring orders

- (1) A police officer may apply to a Judge of the Supreme Court for an order (in this section called a “**monitoring order**”) directing a financial institution to give information to a law enforcement agency.
- (2) A monitoring order shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution.
- (3) A monitoring order shall apply 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).

- (4) A Judge shall not make a monitoring order unless satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought —
- (a) has committed, or is about to commit, a serious drug offence;
 - (b) was involved in the commission, or is about to be involved in the commission, of a serious drug offence; or
 - (c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious drug offence.
- (5) A monitoring order shall specify —
- (a) the name or names in which the account is believed to be held;
 - (b) the class of information that the institution is required to give; and
 - (c) the law enforcement authority to which the information is to be given, and the manner in which the information is to be given.
- (6) If a financial institution that has been given notice of a monitoring order knowingly —
- (a) contravenes the order; or
 - (b) provides false or misleading information in purported compliance with the order,

the institution is guilty of an offence against this subsection punishable, upon conviction, by a fine not exceeding \$100 000.

- (7) A reference in this section to a transaction conducted through an account includes a reference to —

- (a) the making of a fixed term deposit; and
- (b) in relation to a fixed term deposit, the transfer of the amount deposited, or any part of it, at the end of the term.

43. Existence and operation of monitoring order not to be disclosed

- (1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person except —
 - (a) if the order specifies the Police Force as the law enforcement authority to which information is to be given, the Commissioner of Police;
 - (b) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or
 - (c) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to the order.
- (2) A person of a kind referred to in subsection (1) (a), (b) or (c) to whom a disclosure of the existence or operation of a monitoring order has been made (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) shall not —
 - (a) while he or she is such a person, disclose the existence or operation of the order except to another person of a kind referred to in subsection (1) (a), (b) or (c) for the purposes of —
 - (i) if the disclosure is made by the Commissioner of Police, a member, or member of staff, of the National Crime Authority, the performance of that person's duties;
 - (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 legal practitioner, giving legal advice or making representations in relation to the order; or
 - (b) when he or she is no longer such a person, make a record of, or disclose, the existence or the operation of the order in any circumstances.
- (3) Nothing in subsection (2) prevents the disclosure by a person of a kind referred to in subsection (1) (a) or (b) 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 of a kind referred to in subsection (1) (a) or (b) shall not be required to disclose to any court the existence or operation of a monitoring order.
- (5) A person who contravenes subsection (1) or (2) is guilty of an indictable offence against this subsection punishable, upon conviction, by —
 - (a) if the person is a natural person — a fine not exceeding \$20 000 or imprisonment for a period not exceeding 10 years, or both; or
 - (b) if the person is a body corporate — a fine not exceeding \$100 000.
- (6) For the purposes of this section, a person shall not be regarded as a director within the meaning of paragraph (c) of the definition of “**director**” in subsection (8) by reason only that the directors act on advice given by that person in the proper performance of the functions attaching to his or her professional capacity or to his or her business relationship with the directors of the financial institution or the corporation, as the case may be.
- (7) A reference in this section to disclosing the existence or operation of a monitoring order to a person includes a reference

to disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

(8) In this section —

“agent” includes, if the agent is a corporation, the officers and agents of the corporation;

“director”, in relation to a financial institution or a corporation, means —

- (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 constituent member of the body corporate;
- (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 authorized to act in the position; and
- (c) any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;

“executive officer”, in relation to a financial institution or a corporation, means any person, by whatever name called and whether or not he or she is a director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation;

“officer” means a director, secretary, executive officer or employee.

Part 7 — Interstate orders

44. Registration of interstate orders

- (1) If an interstate forfeiture order or interstate restraining order expressly applies to property in Western Australia, the order may be registered under this Act.
- (2) An order shall be regarded as registered under this Act when a copy of the order (being a copy sealed by the court that made the order) is registered in accordance with the rules of the Supreme Court.
- (3) Any amendments made to an interstate forfeiture order or interstate restraining order (before or after registration) may be registered in the same way, and any such amendments do not, for the purposes of this Act, have effect until they are registered.
- (4) An application for registration may be made by the person on whose application the order or amendments were made, by an appropriate officer or by a person affected by the order or amendments.

45. Effect of registration of interstate forfeiture order

- (1) A registered interstate forfeiture order may be enforced in Western Australia as if it were a forfeiture order made under section 10 (1) at the time of registration.
- (2) This Act (other than section 58) applies to a registered interstate forfeiture order as it applies to a forfeiture order made under section 10 (1).
- (3) A registered interstate forfeiture order does not operate so as to vest property (or any estate, interest or right in property) otherwise than in the Crown in right of Western Australia.
- (4) A registered interstate forfeiture order does not operate so as to vest property in the Crown in right of Western Australia if the

order has already operated to vest the property in the Crown in some other capacity or in some other person or entity.

46. Effect of registration of interstate restraining order

- (1) A registered interstate restraining order may be enforced in Western Australia as if it were a restraining order made under section 20 (7) at the time of registration.
- (2) This Act (other than sections 20, 21, 23 and 25) applies to a registered interstate restraining order as it applies to a restraining order made under section 20 (7).

47. Revocation or variation of registered orders

A court of the State may not revoke or vary a registered interstate forfeiture order or registered interstate restraining order or limit the manner in which such an order applies.

48. Duration of registration

If —

- (a) an interstate forfeiture order or interstate restraining order is registered under this Act; and
- (b) the order ceases to be in force in the State in which it was made,

the registered order continues to be enforceable in Western Australia (as if the order were still in force in the State in which it was made) until the registration is cancelled under section 49.

49. Cancellation of registration

- (1) The registration of an interstate forfeiture order or interstate restraining order may be cancelled by the Supreme Court if —
 - (a) registration was improperly obtained; or
 - (b) the order ceases to be in force in the State in which it was made.

s. 50

- (2) An application for cancellation of the registration of an order may be made by the person on whose application the order was made, by an appropriate officer or by a person affected by the order.

50. Charge on property subject to registered interstate restraining order

- (1) If —
- (a) an interstate restraining order is made against property of a person in connection with an interstate serious offence committed or alleged to be committed by the person;
 - (b) an interstate pecuniary penalty order is made against the person in connection with that offence;
 - (c) the interstate restraining order is registered under this Act; and
 - (d) the interstate pecuniary penalty order is registered in a court of Western Australia under the *Service and Execution of Process Act 1901* of the Commonwealth,

then, upon the registration referred to in paragraph (c) or the registration referred to in paragraph (d) (whichever last occurs), a charge is created on the property to secure payment of the amount due under the interstate pecuniary penalty order.

- (2) Where a charge is created by subsection (1) on property of a person to secure payment of the amount due under an interstate pecuniary penalty order, the charge ceases to have effect in respect of the property —
- (a) upon the interstate pecuniary penalty order ceasing to have effect (because the conviction, if any, in reliance on which the order was made has been quashed or for any other reason);
 - (b) upon the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order;

- (c) upon payment of the amount due under the interstate pecuniary penalty order;
- (d) upon the person becoming bankrupt;
- (e) upon the sale or other disposition of the property —
 - (i) under an order made by a court under the corresponding law of the State in which the interstate pecuniary penalty order was made;
 - (ii) by the owner of the property with the consent of the court that made the interstate pecuniary penalty order; or
 - (iii) where the interstate restraining order directed a person to take control of the property, by the owner of the property with the consent of that person; or
- (f) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge,

whichever first occurs.

- (3) A charge created on property by subsection (1) —
 - (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge;
 - (b) has priority over all other encumbrances; and
 - (c) subject to subsection (2), is not affected by any change of ownership of the property.
- (4) Where a charge is created by subsection (1) on property of a particular kind other than land or an interest in land and the provisions of any law of Western Australia provide for the registration of title to, or charges over, property of that kind —
 - (a) the Public Trustee or the Attorney General may cause the charge so created to be registered under the provisions of that law; and

s. 51

- (b) if the charge is so registered, a person who purchases or otherwise acquires an interest in the property after the registration of the charge shall, for the purposes of subsection (2) (f), be taken to have notice of the charge at the time of the purchase or acquisition.
- (5) If a charge under this section relates to property that is an interest in land, the Public Trustee or the Attorney General may cause to be lodged under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* (as may be appropriate) a memorial of the charge so created in the form approved or prescribed under the relevant Act and every such memorial shall be registered.
- (6) If a memorial of a charge is lodged under subsection (5), a person who purchases or otherwise acquires an interest in the property after the lodging of the memorial shall for the purposes of subsection (2) (f) be taken to have notice of the charge at the time of the purchase or acquisition.
- (7) Where a memorial of a charge has been lodged under subsection (5), the Public Trustee or the Attorney General may cause a withdrawal of memorial in the form approved or prescribed under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* (as may be appropriate) as to the cessation of operation of the charge to be lodged under that Act and every such withdrawal of memorial shall be registered.

[Section 50 amended by No. 31 of 1997 s.21.]

51. Powers of Public Trustee in relation to interstate restraining orders

If —

- (a) an interstate restraining order is registered under this Act; and
- (b) the restraining order directs an official of the State in which it was made to take control of property,

the Public Trustee may, in accordance with an agreement between the Public Trustee and the official, exercise the same powers in relation to the property that the official would have been able to exercise if the property were located in that State.

52. Interim registration of facsimile copies

- (1) A facsimile copy of —
 - (a) a sealed copy of an interstate forfeiture order or interstate restraining order; or
 - (b) a sealed copy of any amendments made to such an order,shall be regarded for the purposes of this Act as the same as the sealed copy, if the facsimile copy is itself certified in accordance with the rules of the Supreme Court.
- (2) Registration effected by means of a facsimile copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a facsimile copy has been registered by that time.
- (3) Registration of the sealed copy before the end of the period referred to in subsection (2) has effect as from the day of registration of the facsimile copy.
- (4) Although registration of a facsimile copy of an interstate forfeiture order ceases to have effect in the circumstances mentioned in subsection (2), any forfeiture already made in relation to the order is not affected.

Part 8 — Miscellaneous

52A. Court may take into account effective control of property

- (1) In determining an application for a confiscation order or a restraining order, a court may treat as property of the person in respect of whom that application is made any property that, in the opinion of the court, is, either directly or indirectly, subject to the effective control of the person whether or not the person has —
 - (a) any legal or equitable estate or interest in the property; or
 - (b) any right, power or privilege in connection with the property.
- (2) Without limiting the generality of subsection (1), the court may, in determining whether or not any property is subject to the effective control of a person within the meaning of this section, have regard to —
 - (a) shareholdings in, debentures over or directorships of any corporation within the meaning of the *Companies (Western Australia) Code* that has an interest (whether direct or indirect) in the property;
 - (b) any trust that has a relationship to the property;
 - (c) family, domestic and business relationships between persons having an interest in the property, or in corporations within the meaning of the *Companies (Western Australia) Code* of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and any other persons; and
 - (d) such matters, other than those specified in paragraphs (a), (b) and (c), as the court considers relevant,

and shall treat as subject to the effective control of a person any property which in the opinion of the court is held for the ultimate benefit of the person.

- (3) When a court, for the purposes of making a confiscation order against a person, treats particular property as the property of the person under subsection (1), the court may, on application by the Attorney General, make an order declaring that the property is available to satisfy the confiscation order.
- (4) When a court declares under subsection (3) that property is available to satisfy a confiscation order —
- (a) the confiscation order may be enforced against; and
 - (b) a restraining order may be made in respect of,
- the property as if the property were property of the person against whom the confiscation order is made.
- (5) When the Attorney General makes an application for an order under subsection (3) declaring that property is available to satisfy a confiscation order against a person —
- (a) the Attorney General shall give written notice of that application to the person and to any person who the Attorney General has reason to believe may have an interest in the property; and
 - (b) the person and any person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

[Section 52A inserted by No. 49 of 1990 s.18.]

53. Standard of proof

- (1) Subject to subsection (2), any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities.
- (2) If a person is, by reason of section 3 (2) (d), to be taken to have been convicted of a serious offence, a court must not make a forfeiture order in reliance on that conviction unless it is satisfied, beyond reasonable doubt, that the person committed the offence.

s. 54

54. Constitution of court

If an application for a confiscation order is made to a court before which a person was convicted of a serious offence —

- (a) the application may be dealt with by that court; and
- (b) any function or power may be exercised and any duty may be performed by that court in relation to the confiscation order,

whether or not that court is constituted in the same way as it was constituted when the person was convicted of the offence.

55. Limitation on power of court of petty sessions

- (1) A court of petty sessions may not, in relation to the conviction of a person for a particular offence, make a forfeiture order in respect of property unless it is satisfied that the value of the property (together with the value of any other property that is the subject of any other undischarged forfeiture order made by that court in relation to that conviction) does not exceed \$20 000.
- (2) A court of petty sessions may not, in relation to the conviction of a person for a particular offence, made a pecuniary penalty order against that person unless it is satisfied that the amount payable under the order (together with the amount payable under any other undischarged pecuniary penalty order made against that person by that court in relation to that conviction) does not exceed \$20 000.
- (3) A court of petty sessions may not make a forfeiture order in respect of real property, except in such circumstances as are prescribed.
- (4) For the purposes of this section, the value of property is its value as determined by the court of petty sessions.

56. Interstate operation of forfeiture or restraining orders

- (1) For the purpose of enabling a forfeiture order or restraining order to be registered under the corresponding law of another State, the order may be expressed to apply to property in that State.
- (2) For the purpose of enabling a forfeiture order or restraining order to be registered under a law in force in a Territory, the order may be expressed to apply to property in that Territory.
- (3) A forfeiture order or restraining order does not apply to property in a corresponding State or in a Territory, except in so far as —
 - (a) a corresponding law of that State provides that the order has effect in that State following registration under that law;
 - (b) a law in force in that Territory provides that the order has effect in that Territory following registration under that law; or
 - (c) the property was movable property and was located elsewhere than in a corresponding State or in a Territory when the order took effect.
- (4) In this section, “**corresponding State**” means a State for which a declaration of a corresponding law is in force under this Act.

57. Costs incurred on variation of forfeiture or restraining orders on application by third parties

- (1) If —
 - (a) the Supreme Court makes an order under this Act varying a forfeiture order or restraining order that is registered under a corresponding law of another State; and
 - (b) the variation is made on the application of a third party and affects the interests of the third party in relation to property in that other State,

s. 58

the Supreme Court may order that the actual costs incurred by the third party in applying for and obtaining the variation be paid to the third party.

- (2) The Supreme Court may instead order that part only of those costs be paid, if it is satisfied that special circumstances warrant such an order.
- (3) The costs shall be paid by a person or authority specified by the Supreme Court.
- (4) The Supreme Court may direct in what manner the costs are to be ascertained.
- (5) Nothing in this section limits the powers of the Supreme Court to award costs under any other law.
- (6) In this section —
 “third party”, in relation to a forfeiture order or restraining order, means a person who is not the subject of the order;
 “vary” includes limit the manner in which an order applies.

58. Appeals

- (1) Without affecting any other right of appeal, a person who has an interest in property in respect of which a forfeiture order is made may appeal against that order —
 - (a) in the case of a person convicted of an offence in reliance on which the order was made, in the same manner as if the order were, or were part of, the sentence imposed in respect of the offence; or
 - (b) in any other case, in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order were, or were part of, the sentence imposed in respect of the offence.
- (2) Without affecting any other right of appeal, a person against whom a pecuniary penalty order is made may appeal against that order in the same manner as if it were, or were part of, the

sentence imposed in respect of the offence in relation to which the order was made.

- (3) On appeal, a forfeiture order or a pecuniary penalty order may be confirmed, discharged or varied.
- (4) The Attorney General may appeal against a confiscation order or against the refusal of a court to make a confiscation order in the same manner as if the order were, or were part of, the sentence imposed in respect of the offence.

59. Operation of other laws not affected

Nothing in this Act limits or restricts the operation of any other law providing for the forfeiture of property.

60. Costs

Where —

- (a) a person brings, or appears at, proceedings under this Act;
- (b) the person is successful in those proceedings; and
- (c) the court is satisfied that the person was not involved in any way in the commission of the offence in respect of which the proceedings are related,

the court may order the Crown to pay all costs incurred by the person in connection with the proceedings or such part of those costs as is determined by the court.

61. Regulations

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

Schedule 1

(section 30 (5))

PROVISIONS RELATING TO SEARCH WARRANTS ISSUED UNDER PART 5

1. Interpretation

In this Schedule, unless the contrary intention appears —

“**occupier**” in relation to any premises, includes a person in charge of the premises;

“**occupier’s notice**” means an occupier’s notice referred to in clause 4;

“**search warrant**” means a search warrant issued under Part 5.

2. Application for warrant

(1) An application for a search warrant shall be made in writing.

(2) A magistrate shall not issue a search warrant unless —

- (a) the application for the warrant sets out the grounds on which the warrant is being sought;
- (b) the applicant has given the magistrate, either orally or in writing, such further information (if any) as the magistrate requires concerning the grounds on which the warrant is being sought; and
- (c) the information given by the applicant is verified before the magistrate on oath or affirmation or by affidavit.

3. Record of proceedings before magistrate

(1) A magistrate who issues a search warrant shall cause a record to be made of all relevant particulars of the grounds the magistrate has relied on to justify the issue of the warrant.

(2) Any matter that might disclose the identify of a person shall not be recorded pursuant to this clause if the magistrate is satisfied that the safety of any person might thereby be jeopardized.

- 4. Notice to occupier of premises entered pursuant to warrant**
- (1) A magistrate shall prepare and furnish an occupier's notice to the person to whom the magistrate issues a search warrant.
 - (2) An occupier's notice furnished in relation to a search warrant —
 - (a) shall specify —
 - (i) the name of the person who applied for the warrant;
 - (ii) the name of the magistrate who issued the warrant;
 - (iii) the date and the time when the warrant was issued; and
 - (iv) the address or other description of the premises the subject of the warrant; and
 - (b) shall contain a summary of the nature of the warrant and the powers conferred by the warrant.
 - (3) A person executing a search warrant shall —
 - (a) upon entry into or onto the premises or as soon as practicable subsequently, serve the occupier's notice on a person who appears to be an occupier of the premises and to be of or above the age of 18 years; or
 - (b) if no such person is then present in or on the premises, serve the occupier's notice on the occupier of the premises, either personally or in such other manner as the magistrate who issued the warrant may direct, as soon as practicable after executing the warrant.
 - (4) Service of an occupier's notice pursuant to subclause (3) (b) may be postponed by the magistrate who issued the search warrant if that magistrate is satisfied that there are reasonable grounds for the postponement.
 - (5) Service of an occupier's notice pursuant to subclause (3) (b) may be postponed on more than one occasion, but shall not be postponed on any one occasion for a period exceeding 6 months.

Sch. 1

5. Duty to show warrant

A person executing a search warrant shall produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.

6. Use of force to enter premises, etc.

- (1) A person authorized to enter premises pursuant to a search warrant may use such force as is reasonably necessary for the purpose of entering the premises.
- (2) A person authorized to search premises pursuant to a search warrant may, if it is reasonably necessary to do so, break open any receptacle in or upon the premises for the purposes of that search.

7. Use of assistants to execute warrant

A person may execute a search warrant with the aid of such assistants as the person considers necessary.

8. Execution of warrant by day or night

- (1) A search warrant may be executed by day, but shall not be executed by night unless the magistrate, by the warrant, authorizes its execution by night.
- (2) In subclause (1) —
“**by day**” means during the period between 6 a.m. and 9 p.m. on any day;
“**by night**” means during the period between 9 p.m. on any day and 6 a.m. on the following day.

9. Expiry of warrant

A search warrant ceases to have effect —

- (a) on the expiration of the period of 1 month after its issue;
- (b) if it is withdrawn by the magistrate who issued the warrant; or
- (c) when it is executed,

whichever first occurs.

10. Report to magistrate on execution of warrant, etc .

- (1) The person to whom a search warrant is issued shall furnish a report in writing to the magistrate who issued the warrant —
- (a) stating whether or not the warrant was executed;
 - (b) if the warrant was executed, setting out briefly the result of the execution of the warrant (including a brief description of anything seized);
 - (c) if the warrant was not executed, setting out briefly the reasons why the warrant was not executed; and
 - (d) stating whether or not an occupier's notice has been served in connection with the execution of the warrant.
- (2) A report with respect to a search warrant shall be made within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.

11. Death, absence, etc., of magistrate who issued warrant

If the magistrate who issued a search warrant has died, has ceased to be a magistrate or is absent —

- (a) a report required to be furnished to that magistrate pursuant to clause 10; or
- (b) a power exercisable by that magistrate under clause 4 (3) (b) or (4),

shall be furnished to, or may be exercised by, as the case may be, any other magistrate.

12. Defects in warrant

A search warrant is not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular.

Notes

- ^{1.} This is a compilation of the *Crimes (Confiscation of Profits) Act 1988* and includes all amendments effected by the other Acts referred to in the following Table.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Crimes (Confiscation of Profits) Act 1988</i>	47 of 1988	28 Nov 1988	28 Nov 1988 (see <i>Gazette</i> 28 Nov 1988 p.4777)
<i>Crimes (Confiscation of Profits) Amendment Act 1990</i>	49 of 1990	27 Nov 1990	Act, other than section 13 operative 27 Nov 1990 (see <i>Gazette</i> 27 Nov 1990 p.5885); Section 13 proclaimed 8 Mar 1991 (see <i>Gazette</i> 8 Mar 1991 p.1029)
<i>Acts Amendment (Confiscation of Criminal Profits) Act 1992, Part 2</i>	15 of 1992	16 Jun 1992	16 Jun 1992
<i>Sentencing (Consequential Provisions) Act 1995, Part 18</i>	78 of 1995	16 Jan 1996	4 Nov 1996 (see section 2 and <i>Gazette</i> 25 Oct 1996 p.5632)
<i>Local Government (Consequential Amendments) Act 1996, section 4</i>	14 of 1996	28 Jun 1996	1 Jul 1996 (see section 2)
<i>Acts Amendment (Land Administration) Act 1997, Part 19</i>	31 of 1997	3 Oct 1997	30 Mar 1998 (see section 2 and <i>Gazette</i> 27 Mar 1998 p.1765)
<i>Acts Amendment and Repeal (Financial Sector Reform) Act 1999, section 72</i>	26 of 1999	29 Jun 1999	1 Jul 1999 (see section 2(1) and <i>Gazette</i> 30 Jun 1999 p.2905)