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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CONFISCATION OF CRIMINAL ASSETS BILL 2002

EXPLANATORY MEMORANDUM

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Jon Stanhope MLA
Attorney General
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OUTLINE

The *Confiscation of Criminal Assets Bill 2002* (the Bill) replaces the ACT *Proceeds of Crime Act 1991* (the ACT POCA) with a new scheme for confiscating the proceeds of crime and other criminal assets.

The impetus for the development of the Bill came from the release, in 1999, of the report by the Australian Law Reform Commission of the ALRC) "Confiscation that Counts". Although the ALRC Report deals with the provisions of the Commonwealth *Proceeds of Crime Act 1987*, the ACT POCA contains substantially the same provisions as the Commonwealth legislation, with the result that many of the ALRC's recommendations are equally relevant to the ACT POCA.

In determining how best to implement the ALRC's recommendations, it became clear that grafting new provisions on to the existing scheme in the ACT POCA would present substantial drafting challenges, due to the number and extent of changes recommended. Accordingly, while this Bill replaces the ACT POCA in its entirety and incorporates many of the ALRC's recommendations, it also contains many elements that are similar in effect to the ACT POCA provisions.

The most significant of the ALRC's recommendations are those which advocate the adoption of civil (that is, non-conviction based) forfeiture order and penalty order schemes. When the ALRC released its report, civil forfeiture mechanisms existed in New South Wales, Victoria and under the Commonwealth customs legislation. Since then, Western Australia, the Northern Territory and the Commonwealth have introduced legislation which contain civil confiscation measures.

The Bill implements these recommendations by including a new mechanism for civil forfeiture and for civil penalty orders, in parts 5 and 7 of the Bill respectively.

Other significant ALRC recommendations that are adopted in the Bill include recommendations about:

- clarifying the purposes of the legislation (part 1)
- expanding the range of criminal assets that can be subject to confiscation action, and including in this range any property or benefits generated by the commercialisation of an offender's involvement in crime (parts 3, 4, 5 and 7)
- simplifying the processes for obtaining restraining orders (part 4)
- recasting judicial discretions in relation to the grant of orders (parts 4 to 7)
- clarifying the public trustee's powers to administer restrained assets (parts 8 to 10)
- strengthening the information gathering powers of law enforcement authorities (parts 12 and 13)
- providing for transaction suspension orders (part 12)
- allowing confiscation applications to be dealt with by inferior courts (part 14).

REVENUE/COST IMPLICATIONS

In assessing the revenue/cost implications of the Bill it should be noted that confiscated assets are required to be paid into the confiscated assets trust fund, not into general revenue. Accordingly, any increase in the value of assets forfeited to the Territory will not result in a net direct increase in Territory revenue. As the purposes for which distributable funds from the confiscated assets trust fund can be used include law enforcement activities and crime prevention programs, in the longer term the Bill may have a positive impact on Territory finances through a reduction in the level and impact of crime. In the short term, the Bill may result in an increased workload for the Australian Federal Police and the Office of the Director of Public Prosecutions (the DPP) with commensurate resource implications.

CONFISCATION OF CRIMINAL ASSETS BILL 2002

NOTES ON CLAUSES

Due to the length of the Bill, the following notes explain the purpose and intended operation of the Bill, focussing on key concepts and issues rather than providing a comprehensive description of the operation of each clause. The Bill itself contains many notes and examples to illustrate the effect of important provisions, which will provide users of the proposed legislation with specific information and guidance on matters of interpretation and operation. In this part of the Explanatory Statement, references to provisions of the Bill are in **bold text** to distinguish them from references to provisions in other legislation.

PART 1 PRELIMINARY

This Part of the Bill contains the formal and procedural clauses that deal with the name, commencement, purposes, application and interpretation of the proposed Act.

Clause 3 articulates the purposes of the Bill, and is included to provide a clear statement of the Legislative Assembly's intentions in enacting the proposed legislation. In summary, these purposes include:

- encouraging law abiding behaviour
- giving effect to the principle that people should not be enriched by crime
- depriving people of all material advantage gained from crime
- depriving people of property used to commit crime
- enabling the effective tracing and seizure of criminal assets
- enabling the Territory to enforce interstate confiscation measures.

The ALRC Report highlighted the fact that the existing ACT POCA has failed to achieve its purposes. The ALRC stressed the importance of ensuring that decision makers have regard to the purposes of the legislation when interpreting and applying its provisions. Accordingly, in addition to making an explicit statement of those purposes in **clause 3**, the Bill includes several provisions that expressly require decision makers to have regard to the purposes of the legislation when exercising their powers and functions.

The most significant purpose in **clause 3**, in terms of the underlying philosophy of the Bill, is giving effect to the principle that a person should not enriched by crime. In formulating its recommendations for reform, the ALRC asked whether this principle "is a concept limited to recovery of the profits of criminal conduct in respect of which a conviction has been recorded or is capable of wider application to unjust enrichment as a result of unlawful (as opposed to strictly criminal) conduct in the broad." The ALRC went on to observe, at paragraphs 2.63 to 2.66 of the Report:

> *"The answer to this question is of pivotal importance in addressing the key issue whether the current conviction based scheme might justifiably be complemented by a non-conviction based civil scheme similar in*

concept to the non-conviction based schemes in the Criminal Asset Recovery Act (NSW) and in the Confiscation Act (Vic).

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

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

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

It should be noted that punishment of offenders is not included among the purposes of the proposed Act. In paragraph 2.74 of its report, the ALRC drew the following distinction between confiscation and punishment:

"The concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the one time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and vice-versa."

This distinction is given expression in the Bill by the inclusion of proposed **section 236**, which confirms that confiscation proceedings under the proposed Act are to apply the rules and principles of evidence and procedure that govern other civil proceedings. It is also reflected in **item 1.10** of **Schedule 1** of the Bill. This item amends section 344 of the *Crimes Act 1900* to make it clear that a court, in sentencing an offender, must not reduce the severity of the sentence that would otherwise be imposed because of any forfeiture order or penalty order under the proposed *Confiscation of Criminal Assets Act 2002*.

Clause 4 makes it clear that the proposed Act applies to property and dealings whether in the ACT or elsewhere, while **clause 5** explains that it applies to offences committed before or after the commencement of the Bill. The seemingly wide operation of **clause 5** will be moderated by the time limits for making applications for confiscation proceedings that are contained in **Parts 4** and **5** of the Bill – in practice, the Bill will only be applied to an offence committed before its enactment if a confiscation proceeding is commenced within the relevant time limit.

Clause 6 explains that the dictionary at the end of the Bill will form part of the proposed Act. **Clause 7** explains that notes in the Bill are explanatory only. **Clause 8** contains notes which explain that the *Criminal Code 2002* applies to offences contained in the Bill.

PART 2 GENERAL OVERVIEW OF THE CONFISCATION SCHEME

This part consists of **clause 9**, which states that the notes to this clause provide a general overview of the confiscation scheme under the proposed Act. The drafters have used notes to provide the overview, rather than substantive clauses, to ensure that the operation of the proposed Act is not read down or otherwise affected by the brief description of the scheme contained in the overview. Under section 127 of the *Legislation Act 2001*, notes are explanatory only and do not form part of an act.

PART 3 KEY CONCEPTS

Clauses 10 to **18** define the concepts which are fundamental to the operation of the new scheme. Although the Dictionary at the back of the Bill defines many words and phrases used in the Bill, the explanations of key concepts are located in **part 3** to assist users of the legislation when working their way through the Bill's provisions.

Clause 10 explains the concept of "tainted property", which is liable to confiscation under the Bill. Property is tainted if it was derived in any way from the commission of an offence, or was used (or intended to be used) in the commission of the offence. The concept of tainted property is thus clearly linked to two of the purposes listed in **clause 3**, namely, depriving people of all material advantage gained from crime, and depriving people of property used to commit crime.

It should be noted that **clause 10(2)** creates a rebuttable presumption that property found in the offender's possession when the offence was committed is deemed to have been used for that offence.

Clause 11 defines the concept of "unclaimed tainted property", which covers tainted property that no-one has come forward to claim. The examples given in the Bill provide an indication of the circumstances in which property is unclaimed tainted property. This concept is related to **Division 5.3** of the Bill, which provides for the restraint and automatic forfeiture of unclaimed untainted property.

Clause 12 explains the concept of property being “derived” from an offence. The concept is intended to operate broadly to cover any property derived or realised from an offence, whether in whole or in part and whether directly or indirectly. It includes property derived by one person at the express or implied direction of another person. A broad definition of "derived" is important to ensure that all material benefits from an offence are available for forfeiture action under the Bill. Money-laundering activities intended to conceal the criminal origins of assets can make it very difficult for law enforcement authorities to link assets of a suspected offender with an offence. Accordingly, the concept of "derived" necessarily includes the indirect derivation or realisation of property, which includes money and other assets.

Clause 13 explains which offences come within the ambit of the Bill. The concept of "offence" includes offences against the law of the Territory, the Commonwealth, a State or another Territory. As organised crime is increasingly cross-jurisdictional in scope, it can be difficult to ascertain exactly where the elements of an offence (particularly one involving financial transactions) have taken place, especially given the use of information technology by organised crime groups. It is therefore appropriate for the Territory to be able to take confiscation action against offenders in relation to offences under Territory, Commonwealth, and other Australian jurisdictions' laws.

It is also necessary for the Bill to cover interstate and Commonwealth offences to give effect to the provisions in **part 11** of the Bill, which provide for the registration of interstate orders. **Part 10** of the Bill contains provisions for Territory participation in an "equitable sharing program" under which the Territory and other jurisdictions agree to share the value of property forfeited to the Territory under the Bill.

Clause 13 also defines the concepts of "ordinary indictable offence" and "serious offence". Different options for forfeiture action and penalty orders are available depending on whether the relevant offence is an ordinary indictable offence or a serious offence. For example, civil forfeiture orders and civil penalty orders may only be made in relation to serious offences.

Clause 14 explains the concept of "effective control" of property. This concept is necessary to give full effect to the purposes of the Bill, by making it more difficult for offenders to conceal assets by placing them in the name of other persons. This clause will enable confiscation action to be taken in relation to property that an offender has attempted to protect or conceal by giving or transferring it to another person for less than full value within the preceding six years, or by using a trust or corporate structure. The ALRC Report recommended the adoption of this broader concept of "effective control" in Recommendation 55.

Clause 15 explains the concepts of "convicted" and "quashed", which have a specific meaning in the Bill. The broad definition of "convicted" will ensure that conviction based forfeiture action can be taken in relation to a person who is deemed to have been convicted of an offence because that person absconded before trial, as well as in relation to offences for which an offender has been found guilty but no conviction has been recorded. The definition of "quashed" is necessary to ensure that conviction based forfeiture action ceases if the person’s "conviction" is quashed or otherwise set aside. It

should be noted that the quashing of a person's conviction for a serious offence will not necessarily mean that no forfeiture action can be taken against that person under the Bill. Civil confiscation action will be available if a court is satisfied on the balance of probabilities that the person committed a serious offence.

Clause 16 explains when someone is taken to "abscond". This term is linked to the concept of "convicted" in **clause 15**. As previously explained, the intention of this clause is to ensure that offenders do not frustrate the purposes of the Bill by fleeing the Territory after being committed for trial. Where a person flees the Territory before committal proceedings are finalised, **clause 16(1)(c)(ii)** ensures that the person is effectively deemed to have absconded if a court, during a confiscation proceeding, finds that the offence is of sufficient weight to support the offender's conviction for the offence. This test is substantially similar to the test that applies in committal proceedings in the ACT. The effect is that a person who would have been committed if he or she had remained in the ACT, can be taken to have "absconded".

Clause 17 explains when someone is cleared of an offence. This concept is important for determining when a restraining order made in relation to an ordinary indictable offence ceases to have effect.

Clause 18 explains when confiscation proceedings and criminal proceedings are finalised. The concepts are also relevant to determining when restraining orders and other confiscation actions under the Bill cease to have effect.

PART 4 RESTRAINT OF PROPERTY

This part deals with restraining property so that it remains available for confiscation action under the Bill. An effective restraining order system is essential if the purposes of the Bill are to be realised – the Territory will not be able to deprive a person of property in relation to an offence if that property is hidden or otherwise disposed of while applications for forfeiture orders or penalty orders are being determined. The provisions in this part are intended to be far more effective than Division 4.2 of the ACT POCA (which deals with restraining orders), in terms of ensuring that relevant property remains available for confiscation action.

To be effective, restraining orders need to:

- be capable of being made quickly and efficiently by the courts
- cover the whole range of assets likely to be required to satisfy a forfeiture or penalty order under the Bill
- be made without prior notice to the offender.

Clauses 19 to **21** contain definitions of key terms used in **part 4**, and are self-explanatory.

Clause 22 sets out the purposes for which restraining orders can be made. Given that a restraining order prevents any unauthorised dealing with restrained property, which can have a very significant impact on a person’s lifestyle or income, it is important that restraining orders are made only to ensure that property is available for confiscation

action under the Bill. It would not be appropriate for restraining orders to be made for purposes unrelated to the Bill.

Clauses 23 and **24** give restraining orders "teeth" by making it an offence (with a maximum penalty of up to 2 years imprisonment, a 200 penalty unit fine or both) to contravene a restraining order, and by giving the court the power to set aside unauthorised dealings with restrained property.

Clauses 25 to **29** detail the requirements and procedures for restraining order applications.

Clause 25 deals with applications concerning unclaimed tainted property. It will apply where law enforcement authorities wish to take confiscation action against unclaimed property (such as cash or jewellery) believed to be proceeds of crime.

Clause 26 applies to property where the owner is known. It provides that an application for a restraining order can cover stated property of a person, or all of a person's property – it is not necessary for the DPP to specify every item of property to be restrained. This flexibility enables the court to restrain a person's property even before it has been identified, located or quantified, to maximise the prospects of ensuring that an offender's property is available for confiscation action under the Bill.

Clause 27 sets out the time limits for making applications. It should be noted that under **clause 245**, the Court has a discretion to extend the time limits in special circumstances.

Clauses 28 and **29** set out the matters to be included in the affidavit that must support an application for a restraining order. The affidavit for an application will form the main part of the evidence before the court when the court decides the application, therefore it is necessary for the affidavits to contain sufficient information about the relevant offence(s) and property to enable the court to make a properly informed decision.

Clause 30 sets out the criteria for making a restraining order over unclaimed tainted property, and **clause 31** contains the criteria for making a restraining order over other property. In summary, the court must make a restraining order if it is satisfied that the criteria for making the order have been met - the court does not have a discretion as to whether or not to make an order. Importantly, **clauses 30(4)**and **31(5)(d)** make it clear it is irrelevant whether there is any actual risk of the property being dealt with in a way that would defeat the purpose of the Bill.

Clause 32 makes it clear that, when considering whether it is satisfied under **clause 31** that a person has committed a serious offence, the court does not need to be satisfied about any belief of the police officer who made the affidavit as to when the relevant offence was committed. The purpose of this provision is to ensure that confiscation can be taken in relation to criminal activity even if it is not possible to prove when exactly that activity occurred.

Clause 32 also makes it clear the order can be made even if no indictment has been presented against the offender, or the offender has not been convicted (or has been

cleared) of the offence, or a doubt has been raised about the offender's guilt. The intention of **clause 32** is to ensure that the new provisions for civil forfeiture orders and civil penalty orders are properly supported by the restraining order provisions, by allowing restraining orders to be made in these circumstances. Clearly, the value of the new civil forfeiture and civil penalty provisions would be considerably diminished if the property to which they relate is not preserved for confiscation action under the Bill.

Clauses 33 to **35** deal with the contents of restraining orders, the way in which people are to be notified about the making of a restraining order and the courts' powers to limit disclosure or publication of matters relating to the order. The powers to hold proceedings in closed court and restrict disclosure can be exercised to promote the purposes of the Act or to preserve the integrity of a investigation or a prosecution.

Clauses 33 to **35** balance the public interest in ensuring that persons affected by a restraining order are given sufficient information to enable them to avoid breaching the terms of the order or to seek to have property excluded from the order, against the public interest in ensuring that law enforcement activities are not compromised by the disclosure or publication of sensitive information.

Clause 36 contains offences that relate to breaches of a non-disclosure order made by a court in relation to a restraining order. These offences are offences of strict liability, to emphasise the importance of avoiding any deliberate or inadvertent actions which contravene the court's order.

Clause 37 and **38** allow the court that makes a restraining order to make an additional order providing for a person's reasonable living expenses and a person's legal expenses to be met from some or all of the restrained property.

For living and business expenses, the person seeking the order must satisfy the court as to the reasonableness of the expenses, the hardship that would otherwise arise, the person's inability to meet the expenses from other resources and the lawful provenance of the property from which the expenses are to be met. The intention of these clauses is to prevent the person who claims such expenses from benefiting from criminal activity by using tainted property to meet those expenses. This intention is consistent with the purposes of the Bill as articulated in **Clause 3**, particularly the purposes of depriving people of all material advantage gained from crime and depriving people of property used to commit crime.

Clause 39 empowers the court to make additional orders about restraining orders and restrained property, so that necessary steps and actions can be taken to give effect to restraining orders. This clause also identifies the types of orders which cannot be made under this provision - these types of orders are covered by other, more specific, provisions in the Bill.

Clause 40 makes it an offence to contravene an additional order made under **clause 39**.

Clauses 41 to **49** deal with the duration of restraining orders.

Clause 41 defines the concept of "forfeiture or penalty application". This concept is used for the purpose of describing when certain proceedings, and any related restraining orders, are taken to end.

Clause 42 explains that generally, restraining orders are not made for a specified period, but instead continue in force until they end in accordance with provisions in the Bill.

Under **clause 43**, a person can seek a revocation order for a restraining order that was made without notice to that person. The primary reason for making a revocation order is that there are no longer any grounds for the restraining order.

The court can also revoke a restraining order under **clause 44** if the applicant for the revocation gives security or undertakings that satisfy the DPP.

Clauses 45 to **49** explain the various ways in which restraining orders end if they are not revoked. To assist users of the legislation, **clauses 47** and **48** contain detailed tables that set out when particular types of restraining orders end given particular facts. In brief, restraining orders will end:

- when any relevant forfeiture action is completed
- when the property has been used to satisfy any relevant penalty orders
- when the time limits for taking further confiscation action have expired and no such action has been taken
- when an offender is cleared of all relevant offences and civil confiscation measures do not apply
- when all confiscation proceedings are finalised without a court making a forfeiture or penalty order.

In some cases, the time limits to which a restraining order is subject may need to be extended.

Clause 49 details the circumstances in which a court can extend the operation of a restraining order on application by the DPP. This clause will provide necessary flexibility so that the purposes of the legislation are not defeated merely because certain key facts or events did not happen, or did not become known, within the relevant time frame.

Clause 50 allows restraining orders to be noted in statutory property registers, so that persons who propose to deal with restrained property can be made aware that the restraining order exists and affects that property. It is an offence to deal with restrained property contrary to a restraining order – enabling property registers to be updated reduces the risk of inadvertently contravening a restraining order.

Clause 51 explains that the fact that property is restrained does not prevent that property being sold or disposed of to satisfy a penalty order under the Bill, if that is done in accordance with an order of the relevant court.

PART 5 FORFEITURE OF PROPERTY

The provisions in this part of the Bill explain the various mechanisms available to forfeit property to the Territory. The type of forfeiture mechanism that will be available will depend on the nature of the offence concerned, and whether or not the offender has been convicted of that offence.

In summary, the three options available under the Bill are as follows:

- automatic forfeiture - where a person has been convicted of a serious offence, or where unclaimed tainted property has remained unclaimed for 14 days after the restraining order has been made
- conviction based forfeiture – where a person has been convicted of an ordinary indictable offence
- civil forfeiture – where a court is satisfied on the balance of probabilities that a person has committed a serious offence.

Division 5.1 of the Bill explains the mechanisms for obtaining conviction forfeiture orders.

Under **clause 53** the DPP can apply for a conviction forfeiture order either before, after or at the same time as a person is convicted for an ordinary indictable offence. If the application is made after the conviction is recorded, the time limit is two years from the date of the conviction.

Clause 54 provides that the court must make the forfeiture order if it is satisfied that the offender has been convicted of the offence and has not subsequently been cleared of the offence, and that the property to be forfeited is tainted property for the offence. This clause adopts the ALRC Report recommendation that the courts should not have a discretion in relation to the making of forfeiture orders where the criteria for making such orders have been met.

Clause 55 explains that the property subject to a conviction forfeiture order is forfeited to Territory 14 days after the order is made. Where a person applies for an exclusion order relating to property covered by a conviction forfeiture order, the forfeiture cannot take effect until the application for exclusion has been decided.

Conviction forfeiture orders end under **clause 56** if an offender is cleared of the relevant offence, the order is discharged on appeal or the order has been fully satisfied.

Division 5.2 of the Bill explains how automatic forfeiture occurs when a person is convicted of a serious offence. **Clause 57** explains that this division does not apply to restrained unclaimed tainted property – that property is covered by **division 5.3**.

Under **clause 58**, if a person is convicted of a serious offence and a restraining order is made in relation to that offence, the restrained property is automatically forfeited to the Territory.

Clause 59 allows the DPP to apply to a court for an order declaring that property has been automatically forfeited under **Division 5.2**. The inclusion of this clause does not in any way mean that it is necessary for an order to be made before property is forfeited

to the Territory. Instead, the purpose of this clause is to enable the DPP to put beyond doubt that particular property has been forfeited automatically under **Division 5.2**. Similarly, **clause 60** allows a court to make orders to give effect to automatic forfeiture when that court convicts a person of a serious offence. It is an offence to fail to comply with an order under made **clause 60**.

Clause 61 explains when automatic forfeiture comes to an end. It is similar in effect to **clause 56**, described previously.

Division 5.3 of the Bill explains how automatic forfeiture occurs in relation to unclaimed tainted property.

Under **clause 62**, if a restraining order has been made in relation to unclaimed tainted property, it is forfeited to the Territory 14 days after the restraining order is made. The property will not be forfeited at that time if it is covered by an exclusion order application.

Clause 63 explains when forfeiture under this division ends – this clause is similar in effect to **clauses 56** and **61**.

Division 5.4 deals with civil forfeiture orders. Forfeiture orders can be made to forfeit tainted property where a court is satisfied, on the balance of probabilities, that a person has committed a serious offence.

Clause 64 explains that **Division 5.4** does not apply to property restrained under an artistic profits restraining order or an unclaimed tainted property restraining order. This restriction reflects the different requirements for making those types of restraining orders.

Clause 65 defines "civil forfeiture order".

Under **clause 66**, the DPP may apply for a civil forfeiture order for a serious offence. The application can be made either before, after or at the same time the DPP applies for a restraining order based on that offence.

Under **clause 67**, the court must make a civil forfeiture order if it is satisfied on the balance of probabilities that a person has committed a serious offence within the applicable time limits. In summary, the DPP must make the application within six years of the alleged commission of the offence.

Clause 67(4) makes it clear that the court cannot refuse to make an order merely because it is not satisfied that a particular offence was committed, or that the offence was committed on any particular day.

Clause 67(5) makes it clear that the court cannot refuse to make a civil forfeiture order merely because no indictment has been presented against the offender, the offender has not been convicted of any serious offence, the offender has been cleared of all serious offences or a doubt has been raised about the guilt of the offender.

Clause 68 explains that property is forfeited to the Territory 14 days after a civil forfeiture order is made. Property will not be forfeited at that time if it is covered by an application for an exclusion order.

Clause 69 enables the DPP to seek an order to close the court for all or part of civil forfeiture order proceedings. The DPP can also request the court to issue directions prohibiting or restricting the publication or disclosure of information about proceedings relating to civil forfeiture orders. In most instances, this provision will be used to protect ongoing or related investigations that may result in charges being laid against the person whose property is being forfeited.

Clause 70 makes it an offence to disclose information contrary to an order under **clause 69**. The offences in this clause parallel those contained in **clause 36**.

Clause 71 explains when civil forfeiture orders end, and is similar in effect to **clauses 56**, **61** and **63**.

PART 6 EXCLUSION OF PROPERTY

This part explains how property can be excluded from restraining and forfeiture action under the Bill. The purpose of the provisions in this part is to provide offenders with an opportunity to exclude property from forfeiture or confiscation under the Bill, if they can establish that the property concerned is not tainted property. These provisions are conceptually related to sections 51(4) and (5) of the ACT POCA, but have been significantly reworked to restrict the circumstances in which the courts are permitted to exclude property from restraint or forfeiture.

Clause 72 explains the concept of "exclusion order". An exclusion order may be made in relation to:

- property that is already restrained or is covered by an application for a restraining order
- property covered by a conviction forfeiture order
- property subject to forfeiture under the Bill.

Clause 73 explains the meaning of the term "subject to forfeiture" and **clause 74** explains that the effect of an exclusion order is to exclude property from restraint or forfeiture.

Clause 75 explains that the person claiming an interest in property can apply to a court for an exclusion order. It then explains when an application for an exclusion order can be made.

The criteria the court must apply when making an exclusion order in relation to an ordinary indictable offence are set out in **clause 76**. A court cannot make an exclusion order about property unless it is satisfied that the property is not tainted property, is not required to satisfy a penalty order and does not have evidentiary value in any criminal proceeding. If the court finds that the property is not tainted property but may be required to satisfy a future penalty order, it must make a declaration that the property is not subject to forfeiture but is to remain restrained so that it is available to satisfy a future penalty order.

Where an application for an exclusion order is made by someone other than the offender, the court cannot make an exclusion order unless it is satisfied that:

- the applicant has an interest in the property
- he or she was not a party to the relevant indictable offence
- the property was not subject to the effective control of the offender
- the property is not tainted property.

The applicant must also show that the property was acquired honestly and for sufficient consideration and that he or she took reasonable care to establish that the property could be lawfully acquired. The purpose of these requirements is to give effect to the principle that people should not be enriched by crime, by ensuring that tainted property is not excluded under this Part from confiscation action.

Clause 77 explains how the courts can make exclusion orders in relation to serious offences. If the application is made by an offender, the court cannot make an exclusion order unless it is satisfied that:

- the offender lawfully acquired the interest
- it is not tainted property
- it is not required to satisfy a penalty order
- it does not have evidentiary value in any criminal proceeding.

If the application is made by someone other than the offender, the court cannot make exclusion order unless it is satisfied that:

- the applicant has an interest in the property
- that interest was honestly and lawfully acquired
- the interest is not tainted property
- the interest is not subject to the effective control of the offender
- the interest does not have evidentiary value in any criminal proceeding.

Clause 78 explains how an exclusion order can be made in relation to unclaimed tainted property. It may seem unusual that a person can seek to exclude unclaimed property from restraint or forfeiture. This provision serves as the mechanism by which a person can come forward to claim the property after it has been restrained or become subject to automatic forfeiture. The court cannot make an exclusion order for unclaimed tainted property unless it is satisfied that:

- the applicant has a lawfully acquired interest in the property
- it is not tainted property
- it is not required to satisfy penalty order
- it does not have evidentiary value in any criminal proceeding.

PART 7 PENALTY ORDERS

The provisions in this part allow the court to impose a penalty order on an offender equal to the value of the benefits derived by that offender from the commission of the relevant offence. This part gives effect to the principle that offenders should be deprived of all material advantage gained by them from the commission of an offence. These provisions are conceptually related to the provisions in the ACT POCA dealing with “pecuniary penalty orders” (Division 2.3 of the ACT POCA), but have been extended to allow for civil penalty orders and to permit “artistic profits” to be included when calculating the value of benefits derived by an offender from the commission of an offence.

Clause 79 explains that in **part 7**, the concept of "commission" when used in the context of a serious offence, includes the alleged commission of the serious offence. The purpose of this clause is to remove any doubt that penalty orders can be made for a serious offence even where the relevant offender has not been convicted of that offence, or the precise date on which the offence occurred cannot be determined.

Clause 80 explains the concept of "benefits" derived by an offender who commits an offence. These benefits include:

- any tainted property in relation to offence, except for property that was used in relation to the commission of the offence
- artistic profits relating to the offence
- any service or other advantage derived by the offender from the commission of the offence.

The reason for excluding tainted property that was used to commit the offence from the concept of "benefits" is that penalty orders are intended to relate solely to the material advantage gained by an offender from the commission of offence. Property used to commit an offence can instead be subject to forfeiture action under **Part 5** of the Bill.

"Artistic profits" are defined in **clause 81** of the Bill. This concept can include any property, service or other advantage derived by an offender from the commercial exploitation of the notoriety of the offender or someone else associated with the offence, the depiction of the offence or the expression of the thought, opinions or emotions of someone involved in the offence. Many forms of commercial exploitation are encompassed by the concept of artistic profits, including visual recordings, sound recordings, printed material, radio or television productions and live entertainment. The court has a limited discretion in deciding whether or not to categorise artistic profits as benefits when calculating the amount of a penalty order to be imposed on an offender. The court must include artistic profits as benefits unless it is satisfied that it would not be in the public interest to do so.

Division 7.2 explains how applications for penalty orders are made and decided.

Clause 82 defines the term "penalty order".

The DPP can apply under **clause 83** for a penalty order in relation to a person who has committed an indictable offence.

The court can make a penalty order in relation to an offender who is convicted of any indictable offence under **clause 84.**

If the person is not convicted, but the relevant offence is a serious offence, the court can make a penalty order under **clause 85** if it is satisfied, on the balance of probabilities, that the person has committed a serious offence.

Clause 85(4) ensures that if a penalty order is made initially under **clause 84** because a person was convicted of a serious offence, and the person is subsequently cleared of that offence, a fresh penalty order can be made under **clause 85**, if the criteria for making an order under that clause are met.

Clause 86 explains how the amount of the penalty is to be calculated. First, the court must assess the value of any benefits derived by the offender from the commission of the offence and any related offence. Then, the court has a discretion to reduce that amount by an amount equal to:

- the value of property that has already been forfeited under the Bill or a corresponding law

- another penalty order, or other form of financial penalty, payable under a corresponding law
- any reparation order payable by the offender
- any amount payable by the offender for restitution, compensation or damages
- any amount of tax payable in relation to benefits.

The net amount is the amount that is payable under the penalty order by the offender.

Clause 87 requires a penalty order to state the amount of the penalty and by whom it is to be paid. This information is required because the order acts as a formal debt owed by the offender to the Territory (see **clause 88**) and it is desirable that the details of that debt should be certain, for enforcement purposes.

Clause 88 explains that penalty orders are judgment debts owing to the Territory. This means that if the value of any restrained property is not sufficient to satisfy a penalty order, the remainder of the penalty (or the whole penalty, if there is no restraining order in place) can be recovered as a debt in a court of competent jurisdiction.

Clause 89 enables the amount of the penalty order to be varied to reflect the assessed value of any relevant benefits at the time the variation to the penalty order is made. The purpose of this clause is to ensure that if the value of benefits actually derived by an offender increases significantly after a penalty order is made, the penalty order can be adjusted to take account of this increase in value.

Division 7.3 explains how the value of benefits is to be calculated. Among other matters, the provisions in this division ensure that the court can take account of expert evidence when determining the value of benefits for the purpose of making a penalty order under **part 7**.

Clause 90 contains definitions of "narcotic substance" and "property".

Under **clause 91**, where the value of benefits needs to be determined in relation to an ordinary indictable offence, the value of the benefits is taken to include any increase in the value of the offender's property since immediately before the offence was committed. It also includes the value of any narcotic substance involved in the offence.

Under **clause 92**, the value of benefits derived from a serious offence is taken to include:

- the value of all the offender's property when the application is made
- the value of any property held by the offender either six years immediately before the application for the penalty order is made, or between the time of the alleged commission of the offence and the making of the application, whichever is shorter
- the value of any narcotic substance involved in the offence
- the value of any expenditure by the person during the relevant period, apart from expenditure involved in acquiring property that has already been taken into account in calculating the value of benefits derived by the offender.

The value of benefits assessed by the court will not include any property that the offender satisfies the court was lawfully acquired and is not tainted property. The value

of benefits will also not include the value of expenditure derived from lawfully acquired property or benefits, or from property that is not tainted property.

Clause 93 sets out other relevant matters that the court must consider when assessing the value of benefits derived by an offender. The court must assess the value of the benefits by reference to the highest value of the benefits since the commission of the offence. The court may value the benefits differently, having regard to the purposes of the Bill. The intention of this clause is to ensure that offenders do not inadvertently retain some of the benefits from the commission of an offence due to a fluctuation in the value of those benefits.

Clause 93 also explains that in determining the value of any narcotic substance, the court can rely on expert evidence from police officers experienced in narcotics investigations. If the offender shows that all or part of the increase in value of his or her property relates to property or benefits lawfully acquired by that offender, the court's calculation of assessed value does not include that amount.

Division 7.4 of the Bill explains the way in which penalty orders can be satisfied.

Clause 94 provides that when a penalty order is made, any restrained property of the offender becomes subject to a penalty charge. This charge secures the payment to the Territory of the amount of the penalty order.

Clause 95 explains that a penalty charge over particular property ends when:

- the associated penalty order ends;
- the associated restraining order ends;
- the restrained property is sold or otherwise disposed of.

Clause 96 explains that a penalty order empowers the public trustee to satisfy a penalty order out of any restrained property or by enforcing the penalty order as a judgment debt. This means that the public trustee does not need to obtain additional court orders to give effect to the penalty order. The public trustee can dispose of restrained property in any way that he or she considers appropriate.

Clause 97 requires the public trustee to repay any surplus funds from the sale or disposal of property to the relevant offender.

Division 7.5 of the Bill consists of **clause 98**, which explains how penalty orders end. In summary, a penalty order ends when it is fully satisfied, it is set aside or discharged on appeal, or the offender is cleared of all relevant offences.

PART 8 RESTRAINED PROPERTY

This part contains provisions dealing with the management of restrained property by the public trustee. The purpose of these provisions is to ensure that the public trustee has sufficient powers to manage property pending the resolution of any confiscation proceedings under the Bill.

Clause 99 explains that **Division 8.1** applies where the public trustee is directed to take control of restrained property by an order made under the Bill. This division enables the public trustee to do anything reasonably necessary to preserve restrained property.

The examples set out in **clause 100** provide guidance as to the sorts of actions that the public trustee may take under this division. **Clause 100** also makes it an offence for a person not to disclose a tax file number when required to do so by the public trustee.

Clause 101 makes it clear that the public trustee is empowered to sell restrained property if it is deteriorating or substantially losing value, or if the cost of maintaining the property would exceed the value of the property when forfeited. The public trustee may destroy or modify restrained property if necessary to protect the public interest, for example, if the restrained property could not be used legally or represents a threat to public health or safety.

In exercising these powers, **clause 102** requires the public trustee to give written notice of the proposed sale, modification or destruction to the owner of the property and anyone else who has an interest in it. The purpose of this clause is to enable such persons to seek an order under **clause 104** preventing the proposed sale, destruction or modification.

In some cases, it will be necessary for the public trustee to modify or destroy restrained property immediately, where property is a serious threat to public health or safety. In these circumstances, **clause 103** ensures that the public trustee may act immediately without giving prior notice of the proposed destruction or modification to persons with an interest in the property.

Division 8.2 explains what happens when property that is restrained under the Bill is jointly owned and one of the joint owners dies. In the normal course of events, the death of a joint owner would vest the deceased joint owner's interest in the surviving joint owner. The effect of **clause 105** is that the death of a joint owner does not vest that person's interest in the surviving joint owner. Where the interest was held by the dead person as a tenant in common, that person's interest cannot be transferred to anyone else by that person's estate. The restraining order continues to apply to the property as though the person had not died. The purpose of this clause is to ensure that the death of an offender, who has placed tainted property in joint names, does not place that tainted property beyond the reach of confiscation action under the Bill.

PART 9 FORFEITED PROPERTY

This part explains what happens when property is forfeited to the Territory under the Bill.

Clause 106 explains the concept of "interested person", which covers the persons who may take certain steps under **Part 9**.

Under **clause 107,** the public trustee is empowered to take any steps that are reasonable or desirable to vest forfeited property in the Territory and to bring the property under the public trustee's control.

Clause 108 explains that forfeited property vests absolutely in the Territory. This means that the Territory becomes the full legal and beneficial owner of the property. **Clause 108** is subject to **clause 109,** which clarifies the status of forfeited registrable property before registration processes are complete. In this situation, the property vests in equity in the Territory until registration is complete, whereupon it vests in law in the Territory.

Clause 110 deals with the disposal of forfeited property. The public trustee must pay property, that is money, into the confiscated asset trust fund (established under **Part 10**). The public trustee is empowered to sell or otherwise dispose of other types of property (with the proceeds being paid into the trust fund). If the forfeited property has evidentiary value, any such disposal or sale can occur only:

- under a direction by the DPP
- for the purpose of vesting the property at law in the Territory or allowing the public trustee to take control of the property.

This restriction ensures that property with evidentiary value is preserved so that it can be used in criminal proceedings where necessary.

Division 9.3 of the Bill deals with the way in which improperly obtained registered property interests are to be dealt with when the relevant property is forfeited to the Territory. These provisions are necessary because the rules relating to the registration of property interests provide certain protections for such interests which could otherwise prevent the effective forfeiture of registered property that is tainted property.

Clause 111 explains when **division 9.3** applies to forfeited property. In brief, it applies where property is jointly owned and has vested in a trustee for sale, or where the property that has vested in the Territory was subject to a registrable interest (for example, a mortgage) when forfeiture occurred.

Clause 112 allows the court to order the discharge of improperly obtained registered property interests. The effect of discharge is to extinguish the interest. The court must order the discharge of a registered property interest unless it is satisfied that:

- it was acquired honestly and for consideration and the person acquiring the interest took reasonable care to ensure that it could be lawfully acquired
- if the interest was not acquired in the ordinary course of business (i.e. if it was a dealing between family members or friends), the person who acquired the interest was not involved in the relevant criminal activity, and the offender has not retained effective control of the interest in the property.

The interests of banks and other financial institutions will be protected providing that they have not "turned a blind eye" to their clients' criminal activities when lending against property that becomes forfeited. Similarly, the interests of an offender's family members will be protected providing they are not complicit in the offender's activities and the relevant property interest is genuinely not under the offender's control.

Division 9.4 sets out the processes for selling jointly owned property that has been forfeited. These processes will apply where the interest in property that has been forfeited to the Territory does not represent the whole of the property. An example would be where an offender owned a quarter share of a racehorse and that share is forfeited to the Territory.

Clause 113 explains the application of **division 9.4**. It makes it clear that **division 9.4** does not affect a person's right to sell an interest in property where that interest has not been forfeited to the Territory and an order for the sale of jointly owned property has not been made. **Clause 114** explains the interaction between the provisions of the Bill and the provisions of the *Trustee Act 1925* and the *Conveyancing Act 1919*. It provides that **Division 9.4,** and any court order made under it, prevail over those Acts to the extent of any inconsistency.

Clause 115 enables the court to order a sale under a trust for sale in relation to any jointly owned property forfeited under the Bill. An order can be made if the court considers that the sale of the property is the most practical way for the public trustee to obtain a reasonable price for the forfeited property, or the sale is just and equitable in all the circumstances. The court may permit a joint owner of the property to buy the property, but without such a direction the purchase will not be permitted.

The court is required to appoint trustees for the sale under **clause 116** . The role of the trustees is to hold the property under a trust pending its sale, and to pay the balance of the proceeds of the sale (less any expenses and costs relating to the sale) to the court.

Under **clause 117,** the joint ownership of the property ends when the property vests in the trustee for sale under the court order for the sale of the property. This means that the legal interest of the joint owners in the property is terminated by the creation of the trust for sale.

Clause 118 explains how the proceeds of the sale are to be distributed by the court. The general principle is that the net proceeds of the sale are payable to the Territory, but the court can order payment of part or all of the sale proceeds to any innocent former joint owners of the property. Such an order may only be made if:

- the innocent joint owner was not a party to the offence
- that person's interest was not under the effective control of the offender
- for property that was acquired from the offender, the property was acquired honestly and for sufficient consideration, and the innocent joint owner took reasonable care to establish that the property could be lawfully acquired.

Clause 119 allows the court to vary an order for sale. This power includes a power to vary any associated court directions about the property, its sale or the proceeds of the sale.

Division 9.5 contains provisions dealing with the return of forfeited property and the payment of compensation for forfeited property, where forfeiture action or forfeiture orders are set aside (for example, because the person is cleared of an offence).

Clause 120 defines the term "return or compensation order".

Clause 121 allows a person who held an interest in forfeited property to apply for a return or compensation order, in certain circumstances:

- where a person is cleared of the offence on which the forfeiture was based
- where a forfeiture order is overturned an appeal.

If either of these circumstances apply, the court can make a return or compensation order under **clause 122**. Depending on whether the forfeited interest has already been sold or disposed of, the court can either order the return of the forfeited property or the payment of its value.

Division 9.6 contains provisions allowing a person to buy back a forfeited interest. In order to ensure that offenders are not permitted to regain property used to commit crimes, buyback orders must be made by a court.

Clause 123 defines the term "buyback order".

Clause 124 allows a person who held an interest in forfeited property to apply for a buyback order. An application must be made within 14 days of the forfeiture of the property, or the date the person became aware the property was forfeited.

Under **clause 125**, the court can make a buyback order if the property is still vested in the Territory and the buyback order would not be contrary to the public interest. Where the buyback order would apply to a different interest in the property to that previously held by the applicant, the buyback order can be made only if the person who previously held that interest does not object.

Clause 126 requires the Territory to transfer the interest to the applicant under the buyback order within one month of the applicant paying the relevant sum to the Territory.

PART 10 CONFISCATED ASSETS TRUST FUND

This part of the Bill contains provisions dealing with the establishment and operation of the confiscated assets trust fund. It also provides for the Territory to participate with other jurisdictions in the equitable sharing program. Its provisions are substantially based on Part 3 of the ACT POCA.

Clauses 127 and **128** explain key terms used in **part 10**, including the concept of "equitable sharing program". This program is a mechanism whereby those jurisdictions that cooperate in confiscation proceedings can share the value of any recovered property and assets.

Clause 129 provides for the establishment of the confiscated assets trust fund.

Clause 130 explains which amounts must be paid into the trust fund. None of the property confiscated under the Bill is paid into consolidated revenue, it is all paid into the trust fund. The amounts paid into the trust fund include:

- income from the administration of restrained property
- any forfeited property that is money
- income earned from forfeited property
- money from the sale of forfeited property
- payments for forfeited property that has been bought back under a buyback order
- proceeds from the enforcement of interstate orders
- proceeds from the sale of items forfeited under section 250 of the *Crimes Act 1900*
- payments received under the equitable sharing program.

Clauses 131 to **132** explain the purposes of the trust fund, and set out how payments may be made from the fund. Among other matters, reserved funds can be used to cover the costs of the public trustee in relation to its functions under the Bill. The distributable funds can be used for a variety of purposes, as set out in **clause 131**, including:

- law enforcement
- criminal justice activities
- crime prevention
- assistance to victims of crime
- prevention of drug abuse
- rehabilitation of drug users.

These purposes ensure that the proceeds of crime recovered under the Bill can be used productively to address the impact of crime on the community, to prevent future crime and to assist in the rehabilitation of persons who may be involved in committing crime because of drug abuse problems.

Clause 134 requires the public trustee to review the trust fund at least once every six months. The purpose of the six-monthly review is to determine whether there are enough reserved funds to cover all the payments that must be made within the next six months. If the reserved funds are not enough, the public trustee can make a written declaration to convert distributable funds into reserved funds. If the reserved funds exceed expected requirements, the public trustee can declare the surplus to be distributable funds.

PART 11 INTERSTATE ORDERS

This part explains how confiscation orders from other jurisdictions can be enforced in the Territory. The concept of "corresponding law order" is explained in the dictionary at the back of the Bill. It encompasses a range of orders, notices, declarations and other forms of authorisation made under an enactment of another jurisdiction declared to be a corresponding law by the regulations.

Clause 135 explains when a corresponding law order is taken to "authenticated". Authentication is necessary if a corresponding law order is to be registered in the ACT.

Clause 136 provides for the registration in ACT courts of interstate restraining orders, interstate forfeiture orders and interstate automatic forfeiture decisions.

Clause 137 provides for interim registration of corresponding law orders when an originating jurisdiction provides the ACT an electronic copy of an order. This clause is included to facilitate prompt registration where any ACT-based assets covered by a corresponding law order need to be restrained immediately. Interim registration lasts for five days only. Within this period, the originating jurisdiction must send the relevant Territory court an authenticated copy of the order to be registered under **clause 136**.

Clause 138 explains the effect of registration. Once registered in the ACT, corresponding law orders have effect as though they were orders made under the Bill.

Clause 139 explains when corresponding law orders cease to be registered under the Bill.

Clause 140 explains when the registration of a corresponding law order can be cancelled.

Clause 141 deals with the creation of interstate penalty charges. When an ACT court registers an interstate restraining order, a related interstate penalty order is made and that order is registered in the ACT under the *Service and Execution of Process Act 1992* of the Commonwealth, an interstate penalty charge arises in relation to the restrained property.

Clause 142 makes it clear that an interstate penalty charge is taken to be a penalty charge made under the Bill. This means that the provisions in the Bill for registering a penalty charge and for securing payment apply to the registration and enforcement of interstate penalty charges.

PART 12 INFORMATION GATHERING

The provisions in this part deal with the way in which law enforcement agencies can collect information about tainted property and other criminal assets. They will assist those agencies to track and locate such property through the various transactions and other activities used by offenders to conceal its origins. These information gathering powers are essential for giving effect to the purposes of the Bill, as confiscation action cannot be taken unless the proceeds of crime can be located and linked to criminal activity and particular offenders.

Division 12.1 deals with inquiry notices. The purpose of this division is to enable law enforcement authorities to obtain relevant information from financial institutions about accounts and transactions which may be connected to criminal activity. The clauses in this division give effect to recommendation 76 of the ALRC report.

Clause 143 defines the term "inquiry notice".

Under **clause 144**, a police officer of the rank of commander or higher may give an inquiry notice to a financial institution. A notice requests the institution to provide information about specified accounts or transactions. An inquiry notice can be given only if the police officer is satisfied that the information is needed to decide whether to apply for an order under the Bill or to begin proceedings for an offence.

Clause 145 explains the information to be contained in an inquiry notice. The notice must:

- explain that it is an inquiry notice under the Bill
- specify which financial institution is required to provide information
- specify the information to be provided
- indicate how the information is to be given
- alert the financial institution to the consequences of non-compliance.

Clause 146 provides the financial institution with immunity from civil proceedings in relation to loss, damage or injury of any kind arising from the giving of information in good faith to a police officer in accordance with an inquiry notice.

Division 12.2 deals with monitoring orders. The clauses in this division have a similar effect to those in Division 5.3 of the ACT POCA.

Clause 147 explains that a monitoring order requires a financial institution to give a police officer stated information about transactions that have been conducted or that will be conducted by that institution in relation to a person.

Under **clause 148**, a police officer can apply to a court for a monitoring order if the officer has reasonable grounds for suspecting that the person to whom the application relates is involved in the commission of a serious offence, or has or will derive property or a benefit from the commission of a serious offence.

Clause 149 details the requirements for an affidavit to support an application for a monitoring order.

Clause 150 details the grounds on which the court may make a monitoring order. It also sets out the matters which must be included in the order. The order must state:

- that it is a monitoring order
- the financial institution to which it applies
- the person covered by the order
- the types of transaction covered by the order
- the kind of information the financial institution must provide
- how the information is to be given
- the duration of the order
- the effect of non-compliance with the order.

Division 12.3 deals with transaction suspension orders. While not expressly stated in the Bill, the objective of this division is to give law enforcement authorities an opportunity to consider whether to seek a restraining order, or to take other action, before the transaction is processed. The provisions in this division give effect to recommendation 29 of the ALRC report.

Clause 151 explains that transaction suspension orders are orders requiring a financial institution to keep law enforcement authorities informed about transactions conducted through stated accounts, and to delay the processing of transactions for 48 hours after becoming aware of the transaction.

Under **clause 152**, a police officer can apply to a court for a transaction suspension order where the police officer has reasonable grounds to suspect that a person is, or will be, involved in a money-laundering offence. The police officer must also have reasonable grounds to believe that the relevant account is under the effective control of that person. **Clause 153** requires the police officer to provide an affidavit to support the application.

Clause 154 explains the process whereby a court may make a transaction suspension order, and details the matters to be included in the order. In brief, a transaction suspension order must state:

- that it is a transaction suspension order
- what its effect is and to which financial institution it applies
- which accounts it applies to
- how notice of transactions is to be given to the police
- its duration
- the effect of non-compliance.

Division 12.4 deals with production orders for property tracking documents. These provisions are similar in effect to Division 5.1 of the ACT POCA.

Clause 155 defines "production order" and **clause 156** defines "property-tracking document".

Under **clause 157**, a police officer can apply to a court for a production order, where the police officer has reasonable grounds to suspect that someone has committed an indictable offence and the person covered by the order possesses property-tracking documents relating to that offence. **Clause 158** requires the application to be supported by an affidavit.

Under **clause 159**, the court may make a production order if it is satisfied that there are reasonable grounds for the police officer's suspicions. The court may also declare that the order is a non-disclosable production order. This option will ensure that the person required to produce the property-tracking documents can be prevented from disclosing that he or she has been required to provide the documents to law enforcement authorities, where the disclosure might alert the offender that an investigation is underway or that confiscation action under the Bill is imminent.

Clause 160 enables the court to declare that an order is a non-disclosable production order.

Clause 161 confers a power on the court to vary the terms of a production order.

Clause 162 explains that, where a document is given to a police officer under a production order, that officer is entitled to take possession of it, to make copies of it or to take extracts from it, and to keep it while it is required for the purposes of the Bill.

Division 12.5 deals with examination orders and notices. An examination order permits an unauthorised investigator to issue a notice to require a person to give a document or other information to the investigator in relation to an investigation. It should be noted that **Clause 257** details the special reporting arrangements that apply to the use of the examination notice powers.

Clause 163 contains definitions of key terms used in division **12.5**. These terms are "associate", "authorised investigator" and "investigation".

Clause 164 provides that the chief police officer can authorise a police officer of the rank of superintendent or higher to be an authorised investigator for a particular investigation. In order to ensure that persons who are appointed as authorised officers use their special powers appropriately, the chief police officer can only appoint persons who have the necessary qualifications, expertise and experience for the relevant investigation. An authorised investigator must exercise his or her functions in consultation with, and in accordance with any direction given by, the DPP. This provision ensures investigations are carried out with the full concurrence of the DPP, who will initiate any resultant confiscation proceedings and conduct any resultant criminal trials.

Clause 165 explains that an "examination order" authorises an authorised investigator to issue examination notices for an investigation.

Clause 166 provides that an unauthorised investigator can apply for an examination order if the investigator has reasonable grounds to suspect that the people to whom an examination notice would be given, if an examination order were made, could give the investigator information or documents relevant to the investigation for which the authorised investigator has been appointed.

Clause 167 details the requirements for affidavits to support applications for examination orders.

Clause 168 deals with making examination orders. Our court can make an examination order if it is satisfied that the authorised investigator has been properly appointed and that there are reasonable grounds for the investigator's suspicions as outlined in the affidavit required by **clause 167**. An examination order must state, among other matters, the persons to whom examination notices may be issued under the order, whether the order applies to documents and if so, the kind of documents to which it applies.

Clause 169 provides that the court may order that an examination order is to be a non-disclosable order.

Clause 170 defines the term "examination notice".

Under **clause 171,** an authorised investigator can give a person an investigation notice pursuant to an examination order. If the order under which the examination notices issued is non-disclosable, any examination notices issued under that order will also be non-disclosable.

Clause 172 sets out the matters that must be contained in an examination notice. The notice must state:

- that it is an examination notice
- to whom it applies
- the investigation to which relates
- the information or documents it covers
- where and when the information or documents must be given to the authorised investigator
- how the information or documents must be given to the authorised investigator
- whether the examination notice is non-disclosable
- the effect of non-compliance with the notice.

Clause 173 covers the time and place of an examination.

Clause 174 explains that an authorised investigator can examine a person on oath or affirmation, and persons are required to answer questions put to them. Examinations are quasi-judicial in nature.

Clause 175 explains how examinations are to be conducted. Examinations are to be held in private and the authorised investigator can give directions about people who may attend. A person who is being examined is entitled to be represented by a lawyer. Proceedings may be recorded, and evidence can be given by audio or audiovisual link, under the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 176 explains the role of the examined person's lawyer. The lawyer may address the authorised investigator and can examine the person in relation to any matters that the authorised investigator has already examined the person. If a legal representative is considered by the authorised investigator to be obstructing an examination, the investigator can stop the lawyer from addressing the investigator or from examining the person.

Clause 177 explains that an authorised investigator who is given documents under an examination notice may take possession of the documents, or make copies or take extracts from those documents. The authorised investigator may also retain the documents for as long as needed.

Clause 178 enables an unauthorised investigator to make directions to prohibit or restrict the publication or disclosure of information about examination notices or examinations.

Clause 179 makes it clear that an authorised investigator conducting an examination has the same protections and immunities as a judge. Again, this provision emphasises the quasi-judicial nature of the examination notice mechanism.

Clause 180 to **184** contain offences relating to the conduct of examinations.

Clause 180 makes it an offence to hinder or obstruct an authorised investigator in an examination.

Clause 181 makes it an offence to fail to attend an examination.

Clause 182 makes it an offence for a person who attends an examination to fail to be sworn or make an affirmation, fail to answer a question, fail to produce a document or leave before being excused.

Clause 183 makes it an offence for a person to be present at an examination if he or she is not entitled to be present.

Clause 184 contained offences relating to the disclosure of non-disclosable information about examinations.

Division 12.6 contains additional offences relating to "information orders" under **part 12** of the Bill.

Clause 185 explains that the concept of "information order" encompasses inquiry notices, monitoring orders, transaction suspension orders, production orders, examination orders and examination notices.

Clause 186 provides that is an offence to fail to comply with an information order.

Clause 187 makes it an offence to give false or misleading information under an information order, while **clause 188** makes it an offence to give false or misleading documents under an information order.

Clause 189 makes it an offence to destroy, damage, change or otherwise interfere with a property-tracking document that is subject to a production order or an examination notice.

Clause 190 explains the term "non-disclosable information order", which is relevant to the offence in **clause 191**.

Clause 191 contains offences relating to the disclosure of a non-disclosable information order.

Clause 192 explains that while a police officer may disclose the existence or operation of a non-disclosable information order in the context of legal proceedings, any police officer is not obliged to make such disclosures.

Clause 193 provides protection to financial institutions who comply with information orders by providing information that relates to money laundering offences. It ensures that financial institutions are taken not to have been in possession of the information given under the notice.

The purpose of this provision is to ensure that financial institutions are not taken to have been parties to the commission of relevant money-laundering offences.

PART 13 SEARCH WARRANTS

The provisions in this part cover police officers' powers to obtain and execute search warrants under the Bill.

A key concept in **part 13** is "target material", which is defined in **clause 194.** "Target material" means any property that can be subject to action under the Bill, benefits derived from the commission of an indictable offence, any evidence relating to such property or benefits and evidence relating to an indictable offence.

Division 13.2 contains general provisions relating to the application and issuing of search warrants.

Clause 195 deals with applications for search warrants**.** Applications may be made to "issuing officers", which include judges, a registrar or deputy registrar of the Supreme Court, a magistrate or a registrar or deputy registrar of the Magistrates Court (if authorised by the Chief Magistrate to do so).

Clause 196 makes it an offence to include a false or misleading statement in an application for a search warrant.

Clause 197 imposes additional requirements for search warrant applications where the police officer suspects it may be necessary to use firearms when executing the warrant.

Clause 198 explains that the search warrant can be issued if there are reasonable grounds to suspect that there is target material at the premises, or that there will be such material at those premises within the next 72 hours.

Clause 199 explains the relationship between the power to obtain and execute search warrants under **part 13** and the power to obtain a property-tracking document under **part 12**. A search warrant can only be issued in relation to a property-tracking document if:

- it would not be possible to identify or describe the documents sufficiently clearly to obtain a production order
- a production order has already been made but has not been complied with
- there are reasonable grounds to suspect that there would be non-compliance with a production order
- the relevant investigation would be seriously prejudiced if a police officer had to obtain a production order rather than a search warrant.

Clause 200 lists the matters that must be stated in a search warrant. These details are required to ensure that a person to whom a search warrant is given when it is executed can be properly informed about the terms of the warrant.

Clause 201 deals with the authorisation given by a search warrant. The purpose of these provisions is to ensure that police officers and persons affected by a search warrant can be certain as to the matters and actions that are, and are not, covered by the warrant. The certainty is important for determining whether target material recovered under the search warrant is properly admissible in a subsequent proceeding.

Division 13.3 deals with obtaining warrants by telephone or other electronic means. The purpose of these provisions is to ensure that police officers are able to obtain search warrants in an emergency (for example, where there is a risk that the delay associated in obtaining a search warrant by ordinary means may impair their ability to obtain the target material).

Clause 202 sets out the process for applying for a search warrant by telephone or other electronic means. In summary, the officer applying for the warrant will contact the issuing officer and, by telephone or that other electronic means, provide all the information that would usually be required for ordinary warrants.

Under **clause 203**, the person that issues a telephone or electronic warrant is to complete and sign the ordinary form used for a search warrant. He or she must then inform the applicant of the terms of the warrant and when it was signed. The applicant for the warrant must then make a record of the terms of the warrant, the name of the issuing officer and when the warrant was made. Once the warrant has been executed, or if it expires before it is executed, the applicant for the warrant must give the issuing officer the form of search warrant completed by the applicant (with any sworn information) and the issuing officer must attach the warrant signed by him or her to that form of warrant. This process ensures that the records of the applicant and the issuing officer can be held together, should it be necessary to locate them at a later date. It also enables the issuing officer to check that the terms of the warrant as recorded by the applicant match the terms of the warrant authorised by the issuing officer.

Clause 204 creates an assumption, to apply in court proceedings, that if a form of search warrant signed by the issuing officer is not produced in evidence, the court must assume that the powers under the search warrant were not properly authorised unless the contrary is proved. The purpose of this provision is to make it clear to police officers and issuing officers that they run the risk of jeopardising an investigation, and any subsequent proceedings, if they fail to comply with the requirements for making and recording search warrants.

Clauses 205 to 208 contain offences relating to incorrectly stating, including or recording matters covered by telephone or electronic warrant. The purpose of these provisions is to ensure that applicants for a telephone or electronic warrant take particular care to ensure that such warrants accurately reflect the terms of the warrant as issued and accurately identify when and by whom it was issued.

Division 13.4 deals with executing search warrants. Its provisions are similar to the search warrant provisions contained in the *Crimes Act 1900* and deal with matters such as:

- when warrants can be executed (**clause 209**)
- restrictions on personal searches (**clause 210**)
- when force and assistance can be used **(clause 211**)
- requirements for announcement before entry (**clause 212**)
- requirements to give the occupier details of the warrant (**clause 213**)
- occupiers' rights to be present (**clause 214**)
- powers available to executing officers (**clause 215**)
- use of equipment, including electronic equipment (**clause 216)**
- powers to move things elsewhere for examination or processing (**clause 217**)
- powers in relation to electronic equipment at premises (**clause 218**)
- assistance by persons with knowledge of computer or computer systems, including an offence for failing to assist when directed to do so (**clause 219**)
- securing electronic equipment that may provide access to target material (**clause 220**)
- requirements to provide copies of seized things (**clause 221**)
- requirements to provide documents after the execution of search warrants (**clause 222**).

Division 13.5 explains the powers that are available to police for stopping and searching vehicles.

Clause 223 provides the police with the power to stop and search a vehicle without a warrant in emergency situations. This power can be used only where a police officer suspects on reasonable grounds that there is target material in a vehicle and the search is urgently necessary to prevent that target material from being concealed, lost or destroyed.

Clause 224 explains how searches under **clause 23** are to be carried out. Importantly, the police cannot detain the vehicle for longer than necessary and reasonable to conduct the search and can only use reasonable force in conducting the search.

Division 13.6 explains what is to happen to items that are seized under search warrants.

Clause 225 requires the police to give a receipt for seized items to the person from whom those items were seized.

Clause 226 requires a police officer to take reasonable steps to return seized items to their owners when they are no longer needed for use in evidence.

Clause 227 allows the police to retain items beyond the period authorised by **clause 226,** by applying to an issuing officer for an order to allow the further retention of the item. The issuing officer can make an order under **clause 228** to allow the item to be retained for longer.

Clause 229 requires a police officer to transfer seized items to the public trustee, if so directed by the public trustee.

Division 13.7 contains miscellaneous provisions relating to search warrants, including offences associated with search warrants.

Clause 230 makes it an offence to give false or misleading information in purported compliance with a requirement under **part 13**.

Clause 231 makes it an offence to provide false or misleading documents in purported compliance with a requirement under **part 13**.

Clause 232 makes it an offence to hinder or obstruct police officers (and any persons assisting them) while they are exercising their functions under **part 13**.

Clause 233 requires police officers (and any persons assisting them) to take care to ensure that they cause as little inconvenience, detriment and damage as possible, when exercising their functions under **part 13**.

Clause 234 enables a person who suffers loss or expense because of the exercise of functions under **part 13** to seek reasonable compensation from the Territory for that loss or expense.

PART 14 COURT PROCEDURE

This part contains provisions dealing with court procedures that apply in confiscation proceedings under the Bill.

Clause 235 explains the term "confiscation proceeding". In essence, a confiscation proceeding is a court proceeding for certain orders that may be made under the Bill. These include restraining orders, conviction forfeiture orders, civil forfeiture orders, exclusion orders, penalty orders, monitoring orders, transaction suspension orders, production orders, return compensation orders, orders for the sale of jointly owned property, buyback orders and ancillary/additional orders. Proceedings relating to corresponding law orders (that is, interstate orders) are not regarded as confiscation proceedings for **clause 235** .

Clause 236 explains that confiscation proceedings and proceedings for corresponding law orders are not criminal proceedings. This provision means that the rules of court and the rules of evidence that apply to civil proceedings will apply to these proceedings.

Clause 237 explains the meaning of "relevant court". The relevant court is the court that has jurisdiction to hear and determine a confiscation proceeding. One of the

changes made by the Bill is to confer jurisdiction on the Magistrates Court for some confiscation proceedings – under the ACT POCA, only the Supreme Court had jurisdiction to deal with proceeds of crime matters.

Clause 238 explains when the Magistrates Court will have jurisdiction in confiscation proceedings. In brief, the Magistrates Court has jurisdiction if the value of the property and benefits covered by the proceeding does not exceed the jurisdictional limit of that court in personal actions at law, and if title to land is not in issue. In some cases, the Magistrates Court will have jurisdiction to deal with a matter even if the jurisdictional limit is exceeded. For example, the court can dismiss the proceeding on its merits, make an order in relation to property or benefits up to the amount of the jurisdictional limit or order the transfer of the proceedings to the Supreme Court. The Magistrates Court also has unlimited jurisdiction to deal with applications for monitoring orders, transaction suspension orders or production orders, for applications relating to indictable offences that have been dealt with summarily by the court and in relation to proceedings transferred to the Magistrates Court by the Supreme Court.

Under **clause 239**, the Magistrates Court also has jurisdiction for orders made under **part 11** in relation to corresponding law orders.

Under **clause 240,** the Supreme Court has jurisdiction to hear and decide any confiscation proceeding or corresponding law order proceeding. The Supreme Court can transfer proceedings to the Magistrates Court if the proceeding does not exceed the Magistrates Court jurisdictional limit and title to land is not genuinely in issue.

Clause 241 explains that if a proceeding has been transferred from one court to another, the proceeding is deemed to have commenced in the court to which the matter has been transferred.

Clause 242 explains that restricted access proceedings can be commenced without notice. Restricted access proceedings include proceedings for a restraining order (and associated orders), a monitoring order, a transaction suspension order or a production order. The purpose of this clause is to ensure that the objectives of these orders are not frustrated by giving offenders premature warning of impending action to restrain and confiscate their property, thereby giving them time to destroy or conceal relevant information or property.

Clause 243 deals with the notice requirements for applications for other types of confiscation proceedings. The purpose of the notice requirements is to ensure that relevant people have an opportunity to be present in court and to put arguments to the court before decisions are made. **Clause 243(7)** makes it clear that the absence from the court of a person who has been given notice does not prevent the court from making an order.

Clause 244 explains that once a confiscation proceeding has begun in relation to an offence, any other related confiscation proceeding for that offence can be commenced by way of notice of motion, or by motion, and is taken to be an interlocutory application.

Clause 245 permits the court to extend the time in which applications may be made. The court can give leave to make an application out of time if it is satisfied that:

- property or benefits covered by the application were only derived or identified after the normal time limit expired
- crucial evidence became available only after the normal time limit expired
- it is otherwise desirable having regard to the purposes of the Bill.

Clause 246 explains how the court can grant leave to amend applications. Applications can be amended at any time before the relevant proceeding has been finalised.

Clause 247 confers a general power on the court to take into account any material it considers appropriate. This power is subject to the normal rules of evidence such as those relating to relevance and admissibility.

Clause 248 is particularly important to preserve the integrity of ongoing investigations into criminal activity. It exempts a witness in confiscation proceeding from answering questions or producing documents where doing so may prejudice an investigation or prosecution in relation to an indictable offence.

Clause 249 confers a general power on the court to make additional orders associated with confiscation proceedings, other than proceedings relating to restraining orders. This restriction is included because **clause 39** deals with additional orders about restraining orders.

Clause 250 makes it an offence to contravene an additional order made under **clause 249**.

Clause 251 explains that orders in confiscation proceedings may be made by consent. In such cases, the court need not be satisfied that the grounds for making the order exist.

Clause 252 details the requirements for giving notice of the making of orders. The purpose of this provision is to ensure that all persons with an interest in the outcome of confiscation proceedings are given notice of any orders made by the court in those proceedings. The requirement to give notice does not apply where an order has been made to restrict disclosure of the making of a confiscation order, or for restraining orders (which are covered by separate provisions in **part 4**).

Clause 253 makes it clear that confiscations can proceed concurrently with other legal proceedings dealing with related matters. An example of such a proceeding would be a criminal prosecution for an offence relevant to the confiscation proceeding.

PART 15 MISCELLANEOUS

Clause 254 deals with the privilege against self-incrimination and legal professional privilege. It expressly overrides provisions in the *Legislation Act 2001* dealing with these privileges. The purpose of this clause is to ensure that these privileges do not act to protect persons engaged in serious or organised criminal activity from effective

action under the Bill, or from prosecution in relation to criminal activity that is uncovered in the course of an investigation under the Bill.

In relation to the privilege against self-incrimination, **clause 254(2)** makes it clear that the person is not excused from disclosing a matter because it might tend to incriminate that person, make that person liable to a penalty, or make that person' s property liable for forfeiture.

Clause 254(3) explains that a person is not excused from disclosure because the disclosure would breach that person's obligation not to disclose a matter. The effect of this clause is to override legal professional privilege. This provision has not been included lightly. It is included in recognition of the circumstance that offenders involved in serious or organised criminal activity, particularly money laundering, may employ legal and other professionals to assist with transactions which are intended to hide property or obscure its criminal origins. This provision ensures that the offender cannot rely on legal professional privilege to prevent a legal adviser from disclosing details of these transactions when required to do so under the Bill.

Clause 254(4) provides that anything disclosed to the authorities because of the requirement to disclose cannot be used in legal proceedings against the person, except in limited circumstances. These circumstances include prosecutions for offences under the Bill in relation to making a false or misleading disclosure and confiscation proceedings under the Bill. It should be noted that the prohibition on using disclosures against the person in legal proceedings does not extend to information derived from such disclosures. The reason for excluding derivative use immunity is that it is not unusual for a person suspected of involvement in an offence for which there is a criminal proceeds investigation underway may also be involved in other criminal activities, which come to light only as a result of a disclosure made during the investigation. If none of the information derived from a disclosure were to be admissible in other legal proceedings, the ability of the police to use the powers in the Bill to obtain crucial information would be significantly impaired.

Clause 254(5) explains that a person cannot be sued for disclosing information in breach of an obligation of confidentiality, where obliged to do under the Bill.

Clause 255 puts it beyond doubt that a person must comply with an order under the Bill even if a criminal proceeding has begun, or is about to begin, against a person.

Clause 256 explains the interaction of the Bill with other laws, by making it clear that a power under the Bill does not limit or exclude the operation of any other powers conferred by law.

Clause 257 is included to provide an additional safeguard against any misuse of the quasi-judicial powers conferred on the police under the examination notice provisions in **Division 12.5**. Similar reporting requirements are found in legislation in other jurisdictions, dealing with matters such as telephone intercept warrants and electronic surveillance warrants, in order to ensure that there is independent scrutiny of the exercise of these intrusive types of police powers. The purpose of the report under **clause 257** is to ensure that the government and the Legislative Assembly are kept

informed about how frequently these special powers are used, whether they are effective and whether they are being used appropriately.

The Chief Police Officer is required to prepare a report for the Minister for each financial year about the use of examination notice powers during the reporting period. The Minister must table the report in the Legislative Assembly. The report must detail:

- the number of persons served with examination notices in the relevant year
- the number of investigations related to those notices (for example, in a very complex investigation many individuals could be issued with an examination notice)
- the number of examinations actually conducted in that year.

The report must also contain information about other action arising during the year from the use of examination notices. To take account of lag times between the issuing of a notice and the action which may result from it, it does not matter whether the particular notice giving rise to the action was issued during the reporting year, or in a previous year. For each reporting year, the report must include details of:

- the number and type of confiscation proceedings commenced for matters where an examination notice applied
- the estimated value of property restrained or confiscated for matters where an examination notice applied
- the number of charges laid for examination notice offences
- the number of arrests made for matters where an examination notice applied
- the number and kind of complaints made to the police or the Commonwealth Ombudsman about the use of examination notices
- the number of complaints resolved, and the outcome
- the number of legal proceedings commenced about the use of examination notices
- the number of such proceedings finalised during the year and the outcome.

Clause 258 authorises the Minister to approve forms for the purposes of the Bill.

Clause 259 contains regulation making powers for the Bill.

PART 16 CONSEQUENTIAL AND TRANSITIONAL MATTERS

Clause 260 provides for the repeal of the *Proceeds of Crime Act 1991* and the *Proceeds of Crime Regulations 1993*.

Clause 261 explains how the repealed provisions will continue to apply in relation to property or benefits subject to a proceeding or order under the repealed provisions. Importantly, **clause 261(3)** provides that a restraining order made under the repealed Act is taken to be a restraining order made under the Bill. This provision will ensure that the transition period from the repealed legislation to the new legislation does not provide offenders with an opportunity to dispose of or conceal such property.

Clause 262 makes it clear that an application can be made for a civil forfeiture order or a civil penalty order for an offence under the new provisions even if an earlier

application under the repealed provisions had been made in relation to the same offence or related offence.

Clause 263 explains that property, documents or information that was seized or otherwise obtained under the repealed legislation may be used for the purposes of the new legislation.

Clause 264 explains that the funds contained in the confiscated assets trust fund established under the repealed legislation are transferred into the confiscated assets trust fund established under **part 10** of the Bill.

Clauses 265 and **266** create regulation making powers that allow the Executive to make regulations dealing with transitional matters. These clauses will facilitate a smooth transition from the previous scheme under the ACT POCA to the new scheme under the Bill.

Clause 267 explains that amendments to other legislation are contained in schedule 1.

Clause 268 explains that **part 16** will expire two years after its commencement. The purpose of this clause is to ensure that the transitional provisions in this part automatically omitted from later reprints of the Bill after they have served their purpose.

SCHEDULE 1 AMENDMENTS OF OTHER LEGISLATION

Part 1.1 *Administrative Decisions (Judicial Review) Act 1989*

Item 1.1 inserts a reference to the *Confiscation of Criminal Assets Act 2002* into schedule 1 of the *Administrative Decisions (Judicial Review) Act 1989.* The purpose of this amendment is to ensure that well-resourced offenders do not tie up valuable court and prosecutorial resources by making interlocutory challenges to administrative decisions associated with proceeds of crime investigations.

Part 1.2 *Crimes Act 1900*

This part of the schedule contains amendments to the *Crimes Act 1900*.

Item 1.2 of the Schedule inserts new section 7A into the *Crimes Act 1900*. This section explains that the principles of criminal responsibility contained in the *Criminal Code 2002* apply to the new money-laundering and organised fraud offences, and the offence of unlawful possession of money or goods. These offences will be inserted into the *Crimes Act 1900* by the Schedule to the Bill.

Item 1.3 of the Schedule inserts new division 6.2A into the *Crimes Act 1900*. This division deals with money laundering and organised fraud offences. These offences are currently located in the ACT POCA but with the repeal of that Act, they will be moved to the *Crimes Act 1900*. This relocation is an interim measure, as it is envisaged that in the longer term these provisions will be placed in the proposed ACT *Criminal Code*

2002. The offences have been re-written in language that is consistent with the *Criminal Code 2002.*

Item 1.4 of the Schedule inserts new definitions of "tainted property" and "target material" into section 185 of the *Crimes Act 1900.*

Items 1.5, 1.6 and 1.7 of the Schedule amend sections 194 and 195 of the *Crimes Act 1900* (which deal with search warrants) to include references to "target material" and "tainted property", as used in the *Confiscation of Criminal Assets Act 2002*.

Item 1.8 replaces sections 250 and 251 of the *Crimes Act 1900* with new section 250. This new provision provides for the disposal of forfeited articles by the public trustee, and makes it clear that proceeds from the sale or disposition of forfeited articles are disbursed to cover the public trustee's costs in relation to that sale or disposition, with the balance to be paid into the confiscated assets trust fund. The Minister is able to direct the public trustee to deal in another way with a forfeited article, and where such a direction is made, the public trustee must comply with it.

Items 1.9 and 1.10 of the Schedule amend section 344 of the *Crimes Act 1900* to clarify the courts' powers when sentencing an offender against whom confiscation action has been taken, or may be taken, under the Bill. The effect of these amendments is to emphasise that confiscation action is not primarily punitive in nature and to make it clear that the court cannot reduce the severity of the sentence that would otherwise be imposed because confiscation action has been taken against the offender in relation to that offence.

Item 1.11 amends section 350(1A) of the *Crimes Act 1900* to provide that an offender cannot be ordered to make reparation to a person simply because that person's property has become subject to a restraining order or forfeiture order under the *Confiscation of Criminal Assets Act 2002* (for example, where the person jointly owned property with the offender and the property is restrained because of the offender's criminal behaviour).

Item 1.12 provides for the section 350 of the *Crimes Act 1900* to be renumbered when that Act is next republished.

Item 1.13 provides for the repeal of section 386 of the *Crimes Act 1900* and its replacement with new sections 386, 386A, 386 and 386C.

New section 386 makes it an offence to have custody of unlawfully obtained money or goods, to keep unlawfully obtained money or goods in premises, or to give custody of unlawfully obtained money or goods to someone not entitled to that custody. In essence, these are offences about "fencing" stolen goods and helping people to launder money. Under new section 386A, where a person is convicted of an offence under section 386, the relevant money or goods become forfeited to the Territory, unless the owner of the goods is located and is not a person who has been convicted of a relevant offence. The forfeited money or goods are transferred to the public trustee.

Under new section 386B, the public trustee must pay any forfeited money obtained under new section 386A into the confiscated assets trust fund. Similarly, any proceeds from the sale of goods forfeited under new section 386A are to be paid into the confiscated assets trust fund.

New section 386C allows the previously unknown owner of any money or goods that have been forfeited under new section 386 to come forward and seek to return of the forfeited goods or money, or compensation.

Item 1.14 amends the dictionary to the *Crimes Act 1900* to include new definitions of "tainted property" and "target material", while **item 1.15** omits the definition of "trust fund".

Part 1.3 *Prostitution Act 1992*

Item 1.16 of the schedule makes a consequential amendment to the *Prostitution Act 1992* to reflect the transfer of money laundering offences from the repealed *Proceeds of Crime Act 1991* to the *Crimes Act 1900*.

DICTIONARY

The dictionary to the Bill contains definitions of key terms and phrases in the Bill.