

Criminal Proceeds Confiscation and Other Acts Amendment Bill 2008

Explanatory Notes

Objectives of the Bill

The objective of the Bill is to make amendments to the following Acts administered by the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland -

- The *Criminal Proceeds Confiscation Act 2002* (CPC Act), following a review of the Act, to ensure its continued effectiveness in achieving its objects;
- The *Fair Trading Act 1989* (FT Act) to remove the capacity for exemptions from the prohibited hours of door-to-door trading;
- The *Security Providers Act 1993* (SP Act) to improve industry standards through establishing a requirement that security firms belong to an approved industry association and to amend existing provisions to reflect the Commonwealth's greater role in industrial relations regulation; and
- The *Trusts Act 1973* (Trusts Act) to enable bodies which are deductible gift recipients, such as the State Library and the Queensland Art Gallery, to receive donations from 'Prescribed Private Fund' (PPF) and ancillary fund donors without compromising the donors' tax-exempt status.

Reasons for the Bill

Amendments to the Criminal Proceeds Confiscation Act 2002

The amendments are a result of a review of the CPC Act by the Department of Justice and Attorney-General pursuant to section 266 of the Act.

The Terms of Reference for the review provided:

The purpose of the review is to assess the operation of the Act since its commencement, including the strengths and achievements of the Act

and ways in which the operation of the Act may be improved. Specifically the Review will:

1. Gather information on the impact of the operation of the Act.
2. Consult with principal stakeholders in relation to:
 - a. areas where the Act is operating effectively in achieving its objects; and
 - b. factors which may have limited the achievement of the objects of the Act.
3. Consider recommendations regarding amendment to the Act, made by the Parliamentary Crime and Misconduct Commission in its Three Year Review of the Crime and Misconduct Commission, Report No. 71 October 2006.
4. Make recommendations for any changes that may be required to enable the Act to better achieve its objects.

Whilst the Review concluded that the Act was generally operating effectively, a number of amendments were identified which will improve the Act's ability to achieve its objects.

As required by the Terms of Reference, the review also considered the Parliamentary Crime and Misconduct Committee's recommendations from its report on the Crime and Misconduct Commission's confiscations operations (Report No. 71). All but one of those recommendations has been adopted.

The review also examined the legislation of other jurisdictions and the recommendations of the Independent Review of the Operations of the *Proceeds of Crime Act 2002* (Cth) ('the Commonwealth Review').

Amendments to the *Fair Trading Act 1989*

The amendments to the FT Act reflect the Government's increasingly strong approach to protecting consumers from inappropriate door-to-door trading practices. While the FT Act prescribes prohibited hours for door-to-door trading, it currently allows traders to apply to the chief executive for approval to conduct door-to-door trading outside these hours.

The ability of traders to make uninvited approaches to people in their homes causes substantial concern in the community. Some consumers feel apprehensive and fearful of unknown people attending their premises at

night, while others consider door-to-door trading to be an unwelcome disruption to their personal and family time.

Amendments to the *Security Providers Act 1993*

The SP Act provides a licensing regime for bodyguards, crowd controllers, security officers, private investigators, security advisers, security equipment installers and security firms (together security providers). Security providers must be licensed to operate in Queensland.

The key policy objective of the amendments to the SP Act is to raise standards in the private security industry. This objective delivers on the Government's 2006 announcement that professional security industry associations would be given a supplementary compliance role to ensure security firms are meeting behavioural benchmarks.

Amendments to the *Trusts Act 1973*

Government-linked arts institutions have requested amendments to enable PPFs — generally family-controlled charitable funds — and ancillary funds to make donations to the institutions without jeopardising the donors' tax-exempt status. The *Income Tax Assessment Act 1997* (C'wlth) (Tax Act) only allows charitable foundations to make grants to bodies that are both deductible gift recipients and charities for income tax purposes. While the arts institutions are deductible gift recipients, it is considered by the Australian Tax Office that for taxation purposes they are not charities at law because of their links with government, despite their pursuit of purposes that, if carried out by a non-government linked body, would be charitable.

However, following amendments by the Commonwealth to the Tax Act in 2005, PPFs and ancillary funds are able to donate to government-linked bodies that are deductible gift recipients, regardless of whether the institution is a charity at law. For PPFs and ancillary funds with existing trust deeds, this requires an amendment to the Trusts Act to enable trustees to complete a declaration stating the trust can give to deductible gift recipients that are not charities at law. Separately, the trustees must then make an application for re-endorsement with the Australian Tax Office as an income tax-exempt fund rather than a charitable fund.

Achievement of the Objectives

Amendments to the Criminal Proceeds Confiscation Act 2002

The Bill contains various amendments to the CPC Act, outlined below, which will complement and strengthen existing provisions aimed at removing the financial gain and increasing the financial loss associated with illegal activity – the main object of the Act.

Amendments to the Fair Trading Act 1989

The Bill removes the capacity from the FT Act for traders to be granted exemptions from complying with the allowable hours for door-to-door trading stipulated by section 63 of the FT Act. Removing capacity for exemptions from the prohibited hours of door-to-door trading will strike a better balance between the ability of traders to conduct door-to-door trading and the community's right to enjoy privacy at home.

Amendments to the Security Providers Act 1993

Following community and industry consultation on possible models the amendments to the SP Act will require security firms to maintain membership of a security industry association approved by the chief executive. Operating standards will also be raised by amending the existing grounds in the SP Act that empower the chief executive to consider suspending, cancelling or refusing to renew a firm's licence where specified Queensland industrial relations laws are breached to reflect the greater role now played by Commonwealth workplace relations legislation.

Amendments to the Trusts Act 1973

The Bill achieves the objectives by amending the Trusts Act so that PPFs and ancillary funds can make grants to government-linked bodies whether or not there is an express power to do so in their trust instrument. The Bill will ensure that the power, or the exercising of that power, will not invalidate the fund, nor affect its status as a charitable trust. PPFs and ancillary funds will be able to 'opt in' to this arrangement by way of completing a signed declaration to be retained by the trust. Separately, a PPF or ancillary fund will need to apply to the Australian Tax Office to change their endorsement from a 'charitable fund' to an 'income tax exempt fund'.

The amendments are retrospective to validate grants made by PPFs and ancillary funds to deductible gift recipients before the commencement of the amendments.

Victoria and New South Wales have already made similar amendments to their charitable Acts to address the problem of charitable foundations being unable to donate to government-linked institutions that are established for charitable purposes because they are not charities at law. The amendments have been modelled on the New South Wales legislation as it is less prescriptive than Victoria's.

Estimated Cost for Government Implementation

The amendments do not impose any additional obligations on Government agencies that cannot be met from existing appropriations.

Consistency with Fundamental Legislative Principles

The Bill raises a number of fundamental legislative principle issues concerning:

1. ***the abrogation of the privilege against self-incrimination.*** The Bill confirms that the CPC Act allows for dissemination of information obtained during compulsory examinations. This clarifying amendment is consistent with the legislature's original intent which is clearly expressed in the original Act's Explanatory Notes. This amendment is required as in the *DPP v Hatfield* [2006] NSWSC 195, the NSW Supreme Court considered equivalent provisions of the Commonwealth's *Proceeds of Crime Act 2002* and determined that dissemination of information disclosed in an examination to police or prosecutors to use against third parties or for use as a link to other evidence against the examinee (that is, derivative use), was not permitted under the provision as currently drafted.
2. ***compulsory acquisition of property with only fair compensation.*** Amendments to the CPC Act will strengthen provisions which allow for the restraint and forfeiture of proceeds of illegal activity and tainted property as well as enabling property to be restrained and ultimately substituted for tainted property in certain circumstances. These amendments are justified by the policy against unjust enrichment. Generally the Act contains the following safeguards (a) a person can apply to exclude property from an order if it is shown that the person's interest in the property is not illegally acquired; and (b) provisions which assist in protecting the rights and interests of third parties.

3. ***the reversal of the onus of proof.*** Confiscation proceedings are declared, under the Act, to be civil proceedings. The CPC Act currently contains various provisions which reverse the onus of proof. In addition, this Bill contains an amendment which provides that once the State has established that the respondent has been involved in a serious crime related activity, the respondent will be required to prove the lawful derivation of increased wealth and expenditure sought to be recovered under the proceeds assessment application. This is consistent with the overall intent of the civil confiscation scheme and was recommended by the Parliamentary Crime and Misconduct Committee. The Scrutiny of Legislation Committee has recognised that reverse onus mechanisms are central to the capacity of civil based forfeiture schemes to achieve their purpose.
4. ***rights and liberties of individuals and consistency with principles of natural justice.*** The Bill contains amendments to the CPC Act which enable the State to apply for an investigative order, such as an examination order, without notice of the application or the order being given to the person whose property is restrained unless they are the person to whom the application or order is directed. These changes are justified on the ground that these orders are significant investigative tools which can be compromised by the requirement to give notice, for example it might allow for collusion or intimidation or raise issues about witness safety. Also, the Bill includes an ability to apply for an investigation order without notice. Where an ex parte examination order is made there is a minimum timeframe of 7 days between the order being made and the examination taking place unless the court otherwise orders. This timeframe is intended to enable the examinee time to seek legal advice.
5. ***disclosure of private or confidential information without sufficient justification.*** The Bill contains amendments to the CPC Act which will require a financial institution, upon receipt of a written notice issued by either a police officer of minimum rank of inspector or authorised commission officer, to confirm whether a nominated person holds an account with the institution. This provision is narrower than other Australian jurisdictions, such as the Commonwealth and South Australia, under which more extensive information is compellable. The information which is compelled under the amendments are limited to the minimum required to obtain a warrant. Also, a police officer or commission officer can only compel the disclosure of this information if they reasonably believe

that the information is required (a) to determine whether to take any action under the Act; or (b) in relation to proceedings under the Act.

6. ***immunity from proceedings.*** The extension of the financial institution provisions in the CPC Act will also see the extension of the current civil immunity provisions applying to financial institutions who volunteer information under the Act. This immunity is necessary to enable a person acting under a statutory obligation to fulfil that obligation.
7. ***retrospectivity.*** The amendments to the Trusts Act will be retrospective to validate grants made by PPFs and ancillary funds to deductible gift recipients before the commencement of the amendments. This is important, as some trustees may have inadvertently breached their trust deeds by making donations to deductible gift recipients that are not charities at law due to their links with Government. The amendments to the CPC Act concerning proceeds assessment order provisions and external serious crime related activity will apply in relation to activity happening before or after the commencement of the section. This is consistent with the original transitional provisions included in the Act (see sections 14 and 78). A similar approach is taken in relation to the amendments to section 20 of the Act. The amendments to enable charges, under section 88 of the CPC Act, to be registered over property will apply from commencement. Section 88 already provides that all interests are to be charged in favour of the State and for the Public Trustee or appropriate officer to cause the charge to be registered; it is just that there is no mechanism which presently allows this to occur. Also, the Bill amends the definition of dealing to include ‘engaging in a transaction that has the direct or indirect effect of changing the value of a person’s interest in the property’. The transitional provision declares that this was, from the commencement of the definition, always a dealing with property.
8. ***whether the legislation has sufficient regard to the institution of Parliament.*** The new section 25B in the SP Act provides that the chief executive may prescribe requirements under a regulation to approve or withdraw approval of a security industry association. It may be argued that this pays insufficient regard to the institution of Parliament by allowing the delegation of legislative power. However, specifying detailed criteria in a regulation is appropriate given matters to be specified to reflect the diverse nature of the industry, for example

privacy issues in closed circuit television monitoring compared to the physical nature of security at licensed premises. Regulations are more appropriate for the detail required to address this diversity and the increasing use of technology in the industry. The criteria will also be subject to Parliamentary scrutiny through the tabling and disallowance process under Part 6 of the *Statutory Instruments Act 1992*.

Some of the amendments to the CPC Act, outlined above, merely continue existing fundamental legislative principle issues associated with the current Act.

Consultation

The Department of the Premier and Cabinet, Queensland Treasury, Queensland Police Service, Queensland Corrective Services; Department of Natural Resources and Water; Department of Education, Training and the Arts; Department of Health; Department of Infrastructure and Planning; Department of Tourism, Regional Development and Industry (DTRDI); Department of Mines and Energy; Queensland Transport; Department of Local Government, Sport and Recreation and Department of Employment and Industrial Relations were consulted in the preparation of the Bill.

Amendments to the Criminal Proceeds Confiscation Act 2002

A consultation draft of the amendments to the *Criminal Proceeds Confiscation Act 2002* was circulated to the following key stakeholders: the Chief Justice of the Supreme Court, the Crime and Misconduct Commission, the Director of Public Prosecutions, Legal Aid Queensland and the Public Trustee. Also, the following Stakeholders were consulted and given an opportunity to comment on the Terms of Reference and later, on an issues paper which outlined proposed reforms: the Chief Judge of the District Court, the Chief Magistrate, the Queensland Law Society, the Queensland Bar Association, Queensland Council for Civil Liberties, Commonwealth Director of Public Prosecutions, Australian Federal Police and Australian Crime Commission.

Amendments to the Fair Trading Act 1989

The amendments to the FT Act have not been subject to community consultation. The community's views on being disturbed in their homes by marketers are clearly demonstrated by 2.58 million Australians registering with the national "Do not call register" at the end of September 2008. Recent media coverage concerning door-to-door trading outside of

prescribed hours also highlighted substantial community concern about this issue.

Industries that conduct door-to-door trading consider that flexible hours benefit consumers who may be interested in particular products and services, but are not at home during regular business hours. Some traders argue that door-to-door trading outside of regular business hours is an important part of their business model.

However, it is considered that removing the capacity for businesses to conduct door-to-door trading outside of the hours prescribed by the FT Act is a fair and reasonable way of allowing door-to-door trading, while also addressing consumer concerns about being disrupted by unwelcome visits by traders during the evening.

Amendments to the Security Providers Act 1993

During February and March 2008, the Department of Justice and Attorney General released a Regulatory Impact Statement/Public Benefit Test on the introduction of industry compliance roles, including a requirement for membership of an approved industry association. The Department received feedback from the community, government representatives, and professional bodies, including the Australian Security Industry Association Limited (ASIAL) and the Liquor, Hospitality and Miscellaneous Union (LHMU). Stakeholders, including both ASIAL and LHMU generally supported the introduction of a mandatory membership requirement as a means of co-regulation.

Amendments to the Trusts Act 1973

The need for the amendments was identified by a group of arts statutory authorities, namely the Queensland Library Foundation, the Library Board of Queensland, the Queensland Art Gallery, the Queensland Museum, and the Queensland Performing Arts Centre, who wrote to the Government requesting these changes.

All Queensland Government departments have been consulted and support the proposed changes.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Act.

Clause 2 provides for commencement of the Act.

Part 2 Amendment of *Criminal Proceeds Confiscation Act 2002*

Clause 3 provides that Part 2 amends the *Criminal Proceeds Confiscation Act 2002*.

Clause 4 inserts a new subsection into the Act (section 5A) which clarifies the extraterritorial application of the Act. This section is consistent with recommendation 7 of the Parliamentary Crime and Misconduct Committee's Three Year Review of the Crime and Misconduct Commission (Report No. 71) [Parliamentary Report].

Clause 5 amends section 16 (Meaning of *serious crime related activity*) to include references to external serious crime related activity. This is a concept recently introduced into New South Wales's *Criminal Assets Recovery Act 1990*. New subsection (3) defines an 'external serious crime related activity'.

Clause 6 amends section 17 (Meaning of *serious criminal offence*) to expand the existing definition to include an offence under the law of the Commonwealth or a place outside Queensland, including outside Australia, that, if the offence had been committed in Queensland, would be a serious criminal offence as otherwise defined by this section.

Clause 7 amends section 20 (Meaning of *effective control of property*) to clarify that the relevant circumstances for determining effective control during the course of proceedings are those existing at the time the initial restraining order was made, prior to the Public Trustee taking control of the property.

Clause 8 inserts an additional subsection into section 28 (Application for restraining order) to provide that an application for a restraining order that relates to property derived from external serious crime related activity may be made only if the person whose property it is has a connection with Queensland, that is, if the person lives in Queensland or the property is situated in Queensland.

Clause 9 inserts an additional subsection into section 29 (Affidavit) to provide an additional requirement for an affidavit supporting an application for a restraining order which concerns property derived from external serious crime related activity. This is to ensure that confiscation proceedings in relation to the property are not already underway in the other jurisdiction.

Clause 10 amends section 37 (Supreme Court may make other orders) to give effect to the reclassification of the various orders ancillary to a restraining order as either administration orders or investigation orders (see amended section 38 and new section 38A). New subsection (8) provides that only the State may apply for an investigation order. The notice requirements for 'administrative orders' have been amended but the substance remains unchanged. New subsection (9) provides that notice of an application for an investigation order must be given to the person to whom an examination order or property particulars order is directed or the person whose property is to be seized under a property seizure order. New section (11) provides that these notice requirements are subject to the DPP asking the court to consider an application for an investigation order without notice being given. These changes, and other associated changes outlined below give effect to recommendation 8 of the Parliamentary Report.

Clause 11 inserts a new section 37A (Hearing of the application) that is similar to section 30A of the Act which was inserted when provision was made for applications for restraining orders to be made without notice. Subsection (2) provides that the court must consider an application for an investigation order without notice if the DPP asked the court to do so. Subsection (3) provides that the court may direct notice to be given to a stated person or class of persons if considered appropriate.

Clause 12 omits the existing section 38 (Particular orders Supreme Court may make) and inserts a new provision entitled 'Administration orders Supreme Court may make'. The new section classifies those orders currently contained in subsections (1)(a), (b), (e), (g) and (h) as administration orders. The section includes an additional court order

which may require a person whose property is restrained to do anything necessary or convenient to bring the property within the State. This provision is modelled on section 39 of the *Proceeds of Crime Act 2002* (Cth) and section 40 of the *Criminal Assets Confiscation Act 2005* (SA). Contravening this order is punishable by a maximum penalty of 100 penalty units or 2 years imprisonment. This is consistent with the penalty provided for contravening an examination order (section 41) and the new penalty for contravening a property particulars order (see new section 42A).

Clause 13 inserts a new section 38A (Investigation orders the Supreme Court may make') into the Act. This section classifies those orders currently contained in section 38(1)(c), (d), (f) and (i) as investigation orders. This new section goes on to provide that if an examination order is made without notice of the application being given to the examinee, the examination must not be conducted less than 7 days after the order is made unless the court considers it appropriate to be conducted at an earlier time. This minimum timeframe will enable the examinee to obtain legal advice about the examination and their obligations, as well as to apply for a grant of Legal Aid.

Clause 14 omits section 38A (Meaning of judicial registrar for subdiv 1). This is required because the position was abolished by the *Justice and Other Legislation Amendment Act 2007*.

Clause 15 replaces section 39 (Judicial registrar's power to conduct examinations) with a section entitled 'Court officer's power to conduct examinations'. The definition of 'judicial registrar' in section 38A, which is being omitted from the Act (see previous clause), included reference to 'officer of the court' and as a result, the continuation of the court officer's power to conduct examinations needs to be reflected in the provisions concerning examination orders. The substance of the section otherwise remains the same.

Clause 16 amends section 39B (Examination to take place in private) to omit the reference to 'judicial registrar' and replace it with reference to 'court officer'.

Clause 17 amends section 39C (Role of the examinee's lawyer) to omit references to 'judicial registrar' and replace them with references to 'court officer'.

Clause 18 amends section 39D (Recording evidence) to omit references to 'judicial registrar' and 'judicial registrar's' and replace them with references to 'court officer' and 'court officer's'.

Clause 19 amends section 41 (Offence to contravene examination order) to omit the reference to 'judicial registrar' and replace it with reference to 'court officer'.

Clause 20 inserts a new section 41A (Use and dissemination of examination information). This new section provides a positive mandate for the DPP or the commission to disseminate information obtained in an examination to a corresponding entity or an entity of the State, another State or the Commonwealth (defined in subsection (4)) whose lawful function is to investigate or prosecute offences, to help the respective entity to obtain other evidence or information (derived evidence) that may be relevant to the enforcement of a corresponding law or to the investigation or prosecution of an offence.

This section has been inserted as a result of the NSW Supreme Court case of *DPP v Hatfield* [2006] NSWSC 195 which considered the equivalent provisions of the Commonwealth's *Proceeds of Crime Act 2002*. In that case it was determined that dissemination of information disclosed in an examination to police or prosecutors to use against third parties or for use as a link to other evidence against the examinee (that is, derivative use) was not permitted by the provision as drafted.

However, the Explanatory Notes to the 2002 Act state that examination information can be used to 'lead to further evidence, which is admissible against the person who gave the answer or produced the document...' and this implies that information obtained therein could be disseminated to relevant the investigative or prosecuting agencies for that purpose. The amendment is required to give effect to the original intent of the provision and is consistent with recommendation 10 of the Parliamentary Report.

Subsection (2) provides that the dissemination of information, its use to obtain derived evidence or the admissibility of derived evidence is unaffected by the fact that examinations are conducted in private, any duty of confidentiality owed to the examinee, or the purpose for which information was obtained. These are issues were raised in the *Hatfield* case and the case discussed therein - *Johns v Australian Securities Commission* (1993) 178 CLR 408.

Clause 21 inserts a new section 42A (Offence to contravene property particulars order). Under this provision, a person directed under a property

particulars order to give a statement within a stated period of time must comply with that direction unless the person has a reasonable excuse. Additionally, a person must not make a statement which is false or misleading in a material particular. The penalty for contravention is consistent with the penalty for contravention of an examination order.

This new section is required as there is currently no specific mechanism to enforce compliance with such an order. It is also consistent with one of the proposals discussed in recommendation 14 of the Parliamentary Report.

Clause 22 amends section 45 (Notice of restraining order and other orders) to provide that under existing subsection (2), the commission is not required to give a person whose property is restrained under a restraining order a copy of, or notice of, an examination order or a property particulars order which is directed to another person.

Clause 23 amends section 47 (Supreme Court may exclude prescribed respondent's property from restraining order). Subclause (1) inserts new subsections (3) and (3A) to require the prescribed respondent to not only provide written notice of the making of the exclusion application and the grounds for the application but also the facts relied upon, to the State and anyone else who has a interest in the property. The grounds for the application and the facts relied upon must be fully stated in the notice. These subsections are required to compel full disclosure between the relevant parties to the application.

Subclause (2) inserts reference to 'a relevant person' into section 47(8). As a result, the section will provide that the State is not required to give notice of the grounds for opposing the exclusion order and the application for that order is not to be heard until the DPP has had a reasonable opportunity to examine the applicant or a relevant person under an examination order, whether or not an examination order has already been made. Subclause (3) defines relevant person. This amendment is consistent with recommendation D6 of the Commonwealth Review.

Clause 24 amends section 49 of the Act (Supreme Court may exclude other property from restraining order) in similar terms as the amendments to section 47. The applicant for an exclusion order under this section is, however, a person other than the prescribed respondent.

Clause 25 inserts a new section 58A (Forfeiture order relating to external serious crime related activity). Subclause (1) provides that a forfeiture order application relating to property derived from external serious crime related activity may be made only if the prescribed respondent lives in

Queensland or the property is situated in Queensland. Subclause (2) states that the court must not make the order unless it is satisfied that no action has been taken under a law of the Commonwealth or any place outside of Queensland, including outside of Australia, against the property of the prescribed respondent that is the subject of the application as a result of the external serious crime related activity. Finally, subclause (3) provides that an affidavit of an appropriate officer that includes a statement that the officer has made due enquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place outside the Queensland, including outside Australia, against the property of the prescribed respondent is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit.

Clause 26 amends section 65 of the Act (Exclusion of property from forfeiture order application) in similar terms as the amendments to section 47.

Clause 27 amends section 66 (Exclusion of property from forfeiture order) in similar terms as the amendments to section 47.

Clause 28 amends section 71 of the Act (Exclusion of value of innocent interest from forfeiture order). This clause inserts new subsections (3) and (3A) into this section to require written notice of the application being made, the grounds for the application and the facts relied upon, to the State and anyone else who has a interest in the property. The grounds for the application and the facts relied upon must be fully stated in the notice. These subsections are required to compel full disclosure between the relevant parties to the application.

Clause 29 amends section 78 of the Act (Making of proceeds assessment order). This clause amends subsection (1) and inserts a number of new subsections. Subclause (1) inserts, at the conclusion of subsection (1), a reference to ‘a *finding of serious crime related activity*’. This term is used in section 83 as amended.

Subsections (5) and (6) concern external serious crime related activity and are drafted similarly to subsections (2) and (3) of new section 58A.

Subclauses (7) and (8) concern the relationship between proceeds assessment orders and pecuniary penalty orders and adopts recommendation 12 of the Parliamentary Report. Subsection (7) states that the court may make a pecuniary penalty order and a proceeds assessment order in relation to the same serious crime related activity however, as made clear in Subsection (8), the amount of the pecuniary penalty order

must be taken into account when making a later proceeds assessment order in relation to the same serious crime related activity. Presently, section 257(1) of the Act provides that a proceeds assessment order and a pecuniary penalty order may not be made in relation to the same serious crime related activity. This provision is removed from the Act by other amendments contained in this Bill.

Clause 30 amends section 80 of the Act (Proceeds assessment order increase if forfeiture order discharged) to provide that the amount of the proceeds assessment order can be varied by the court to increase the amount payable, where the value of forfeited property is taken into account in deciding the value of the proceeds derived, but that property is subsequently excluded from the application of the forfeiture order. This is an extension of Recommendation D19 of the Commonwealth Report.

Clause 31 amends section 83 (How particulars amounts may be treated) to clarify that once the court makes a finding that the respondent has been involved in a serious crime related activity in the relevant 6 year period, any increase in the value of the person's wealth or amount of the person's expenditure must be treated as proceeds derived by a person from an illegal activity unless the court is satisfied that the reason for the difference is not related to an illegal activity. This amendment is intended to make it clear that the State is not required, in such cases, to prove that the proceeds were derived from an illegal activity.

Clause 32 amends section 88 (Charge on property) to enable a charge created by section 88(1) to be registered under the *Land Act 1994* or *Land Title Act 1994* and inserts additional subsections which will establish the process by which registration can occur.

Clause 33 amends section 103 (Meaning of effective control) to clarify that a reference in section 20 to chapter 2 is taken to be a reference to chapter 3.

Clause 34 amends section 126 (Conditions about particular payments out of restrained property) to give effect to the insertion of provisions dealing with tainted property substitution declarations.

Clause 35 amends section 129 (Supreme Court may make other orders) to give effect to the reclassification of the various orders ancillary to a restraining order as either administration orders or investigation orders (see amended section 130 and new section 130A). New subsection (8) provides that only the State may apply for an investigation order. Existing subsection (4) is amended to reflect this change. The notice requirements for 'administrative orders' have been amended but the substance remains

unchanged. New section (11) provides that these notice requirements are subject to the DPP asking the court to consider an application for an investigation order without notice being given. These changes, and other associated changes outlined below give effect to recommendation 8 of the Parliamentary Report.

Clause 36 inserts a new section 129A (Hearing of the application) which is similar to section 121 of the Act. Subsection (2) provides that the court must consider an application for an investigation order without notice if the DPP asked the court to do so. Subsection (3) provides that the court may direct notice to be given to a stated person or class of persons if considered appropriate.

Clause 37 replaces the existing section 130 (Particular orders Supreme Court may make) with a new provision entitled 'Administration orders Supreme Court may make'. The new section classifies those orders currently contained in subsections (1)(a), (b), (e), (g) and (h) as administration orders. The section includes an additional court order which may require a person whose property is restrained to do anything necessary or convenient to bring the property within the State. This provision is modelled on section 39 of the *Proceeds of Crime Act 2002* (Cth) and section 40 of the *Criminal Assets Confiscation Act 2005* (SA). Contravening this order is punishable by a maximum penalty of 100 penalty units or 2 years imprisonment.

Clause 38 inserts a new section 130A outlining the investigation orders the Supreme Court may make. The section classifies those orders currently contained in section 38(1)(c), (d), and (f) as investigation orders. This new section goes on to provide that if an examination order is made without notice of the application being given to the examinee, the examination must not be conducted less than 7 days after the order is made unless the court considers it appropriate to be conducted at an earlier time. This minimum timeframe will enable the examinee to obtain legal advice about the examination and their obligations as well as to apply for a grant of legal aid.

Clause 39 omits existing section 130A (Meaning of judicial registrar for subdiv 1). The term judicial registrar is being omitted from the Act as the position was abolished by the *Justice and Other Legislation Amendment Act 2007*.

Clause 40 replaces section 131 (Judicial registrar's power to conduct examinations) with a section entitled 'Court officer's power to conduct

examinations'. The definition of 'judicial registrar' in section 130A, which is being omitted from the Act included reference to 'officer of the court' and the continuation of the court officer's power to conduct examinations needs to be reflected in the provisions concerning examination orders. The substance of the section otherwise remains the same.

Clause 41 amends section 131B (Examination to take place in private) to omit the reference to 'judicial registrar' and replace it with reference to 'court officer'.

Clause 42 amends section 131C (Role of the examinee's lawyer) to omit references to 'judicial registrar' and replace them with references to 'court officer'.

Clause 43 amends section 131D (Recording evidence) to omit references to 'judicial registrar' and 'judicial registrar's' and replace them with references to 'court officer' and 'court officer's'.

Clause 44 amends section 133 (Offence to contravene examination order) to omit the reference to 'judicial registrar' and replace it with reference to 'court officer'.

Clause 45 inserts a new section 133A (Use and dissemination of examination information). This new section is equivalent to new section 41A and provides a positive mandate for the DPP, the commission or the commissioner for police to disseminate information obtained in an examination to an corresponding entity or an entity of the State, another State or the Commonwealth (defined in subsection (4)) whose lawful function is to investigate or prosecute offences, to help the respective entity obtain other evidence or information (*derived evidence*) that may be relevant to the enforcement of a corresponding law or investigation or prosecution of an offence.

Clause 46 inserts a new section 134A into the Act (Offence to contravene property particulars order), which is the Chapter 3 equivalent of new section 42A.

Clause 47 amends section 135 (Notice of restraining order) to provide that under existing subsection (2), the DPP is not required to give a person whose property is restrained under a restraining order a copy of, or notice of, an investigation directed to another person.

Clause 48 makes consequential amendments to section 139 (Supreme Court may exclude prescribed respondent's property from restraining

order) to give effect to the insertion of provisions dealing with tainted property substitution declarations in new sections 153A to 153E.

Clause 49 makes consequential amendments to section 140 (Supreme Court may exclude other property from restraining order) to give effect to the insertion of provisions dealing with tainted property substitution declarations in new sections 153A to 153E.

Clause 50 inserts a new Division 2A into Chapter 3, Part 4 entitled 'Tainted property substitution declaration'. The new Division will allow applications for declarations over other property in which a convicted person has an interest where the person used certain property in connection with an offence but that particular property is not available for forfeiture.

New section 153A (Definitions for div 2A) contains the relevant definitions for the new Division and section 153B (References to property that is not available for forfeiture) clarifies when property is not available for forfeiture.

New section 153C (Application for tainted property substitution declaration) provides that the State may apply for a tainted property substitution declaration. The prerequisites for such an order are outlined in subsection (2).

Section 153D (Court may make tainted property substitution declaration) outlines what the court has to be satisfied of when making such a declaration. Subsection (3) provides that once a declaration is made the substituted property is taken to be tainted property for Chapter 3.

Section 153E (Restraining order for property that may become subject to a tainted property substitution declaration) allows for the restraint of property that may become subject to a tainted property substitution declaration. This can occur on application of the State (subsection (1)). Subsections (3) and (4) relate to the application of existing restraining order provisions and outline cases where there may be deviation. This new section is intended to preserve the property until such time as the court decides whether or not to make a tainted property substitution declaration – the application for which must occur in conjunction with an application for a forfeiture order.

It is intended that enabling the court to make tainted property substitution declarations will render ineffective attempts to dispose of, or distance oneself from, tainted property. For example, the court may make a declaration in the following instance - a defendant is convicted of

producing cannabis. Despite owning his own home, the defendant has rented a house in order to grow the cannabis. Given that the rented house is not available for forfeiture, the court may make a tainted property substitution declaration over the home unit owned by the defendant and accordingly, it could be liable for forfeiture to the State under the forfeiture provisions. It is noted however that the forfeiture provisions in Chapter 3 are accompanied by a 'hardship discretion' which enables the court to have regard, when making a forfeiture order, to hardship caused by the order, the use ordinarily made or intended to be made, of the property, the seriousness of the offence and anything else the court considers appropriate.

These provisions are based, in part, on the relevant provisions of Victoria's *Confiscation Act 1997* and are consistent with recommendation 13 of the Parliamentary Report.

Clause 51 amends section 158 (Making an innocent interest exclusion order) to give effect to the insertion of provisions dealing with tainted property substitution declarations.

Clause 52 amends section 186 (Pecuniary penalty order increase if forfeiture order discharged) to provide that the amount of the pecuniary penalty order can be varied by the court to increase the amount payable, where the value of forfeited property is taken into account in deciding the value of the proceeds derived, but that property is subsequently excluded from the application of the forfeiture order. This is an extension of Recommendation D19 of the Commonwealth Report.

Clause 53 amends section 236 (Cancellation of filing) to remove references to 'judicial registrars' as this position has been abolished.

Clause 54 inserts two new division headings into Chapter 8, Part 2 of the Act. The heading of Division 1, which precedes section 247, is 'Records'. The heading of Division 2 is entitled 'Information volunteered by financial institutions'.

Clause 55 amends section 249 to include a confidentiality requirement. Existing subsection (6) has been renumbered as subsection (7). Subclause (2) inserts a new subsection (6) which provides that a person must not disclose to anyone that a financial institution or officer of a financial institution has given or intends to give information to a police officer or commission officer or the nature of information given. Failure to comply is punishable by a maximum penalty of 10 penalty units.

Clause 56 inserts a further division into Chapter 8, Part 2 entitled 'Notices to financial institutions'. Various new sections are included, the first of which is section 249A (Definition for div 3). This section contains a definition of 'officer'.

New section 249B (Giving notice to financial institution) provides that a police officer, of or above the rank of inspector, or an authorised commission officer may give a written notice to a financial institution asking them to advise whether a stated person holds an account with the institution. Subsection (2) outlines the requirements of the notice and subsection (3) provides that the notice must not be given unless the officer reasonably believes that the giving of the notice is required to decide whether to take action under the Act or in relation to proceedings under the Act.

New section 249C (Prohibition on disclosure) contains the confidentiality requirement which accompanies this new Part. The maximum penalty for disclosing information in contravention of this prohibition is 100 penalty units. A higher penalty level has been included in this section given that this is information is compellable pursuant to the operation of this provision rather than volunteered under section 249.

New section 249D (Protection from suits etc in relation to action taken under s249B) copies over subsections (4) and (5) of section 249 so that it applies to this new Part.

New section 249D (Financial institutions must comply with notice) provides that a financial institution must comply with a notice given under section 249B. Failure to do so is punishable by a maximum penalty of 100 penalty units.

Clause 57 amends section 250 (Money laundering) to include a new offence of recklessly engaging in money laundering. The definition of 'recklessly' used in this section is adopted from equivalent offences in the Commonwealth Act. The inclusion of this lower level offence is consistent with money laundering offences in the Commonwealth, New South Wales, Victoria and Tasmania. The maximum penalty for the offence will be 10 years imprisonment or 1500 penalty units. Section 251 (charging of money laundering) will also apply to the new offence.

Clause 58 inserts a new section 256A (Consent orders) to provide that a court may make an order in a proceeding under Chapter 2 and 3 with the consent of the applicant and anyone else the court has reason to believe has an interest in property that is the subject of the proceeding. The court may

also make an order if a person the court considers to have an interest in property withholds consent or the person's consent could not be obtained but the court nevertheless considers it appropriate to make the order. The court may make such orders without consideration of the matters the court would otherwise have to consider in the proceeding. Subsection (4) clarifies that this section does not apply to an order made on sentence for a criminal offence.

Clause 59 omits section 257 (Restriction on function) and inserts a new section which consists of the existing subsection (2).

Clause 60 omits section 266 (Review of the Act) given that this Bill is a result of the review undertaken pursuant to this section.

Clause 61 amends the heading of Chapter 12.

Clause 62 amends the heading of Chapter 12, Part 1 to refer to Act No. 68 of 2002. This clarifies that the provisions therein relate to the original Act.

Clause 63 inserts a new Part 3 into Chapter 12 after section 282 (Transitional provisions for the *Criminal Proceeds Confiscation Amendment Act* 2008). This new Part contains the transitional provisions for this Bill.

New section 283 (Definition for this part) contains the definitions for this Part.

New section 284 (Property controlled by public trustee) provides that the amendment to the definition of 'effective control' applies in relation to property whether the public trustee was directed to take control of the property before or after the commencement of the amendments.

New section 285 (Proceeds assessment order relating to an external serious crime related activity) contains a transitional provision for proceeds assessment orders relating to an external serious crime related activity. This provides that such orders will apply in relation to external serious crime related activity happening before or after the commencement of this section. This is consistent with original transitional provisions included in the Act - for example, see sections 14 and 78.

New section 286 (Charges on property) contains the transitional provision for charges on property. The amendment to enable charges, under section 88, to be registered over property will apply from commencement.

New section 287 (Orders under ss37 and 129) contains the transitional arrangements for applications for orders under section 37 and 129.

New section 288 (Exclusion of property from orders) contains transitional arrangements for the amendments to the relevant exclusion provisions in Chapter 2. The amendment clarifies that applicants for exclusion of property from restraining orders will be able to rely on notices already given.

New section 289 (Transitional provision for amendment of definition of dealing) contains the transitional provision for the definition of 'dealing' which declares that the transaction referred to in the extended definition was, from the commencement of the definition, always a dealing with property. This amendment is a clarifying amendment.

Clause 64 amends the example in Schedule 1, Part 2, section 3 example 1 to provide that income received from rental units acquired with the proceeds of crime is a benefit derived from illegal activity. This change reflects case law.

Clause 65 similarly amends the example in Schedule 1, Part 4, section 12 example 3.

Clause 66 amends schedule 6 to insert definitions of a number of terms utilised throughout the amendments, as well as amendments to the definitions of 'dealing', to reflect case law, and 'property'. The definition of 'property' has been extended to include reference to property whether situated in Queensland or elsewhere. This is an additional amendment to clarify that orders can be made in respect to property located outside Queensland and is consistent with the approach adopted by the Commonwealth, New South Wales, Victoria and South Australia.

Part 3 Amendment of *Fair Trading Act* 1989

Clause 67 provides that Part 3 amends the FT Act.

Clause 68 amends section 71A(1) of the FT Act (Exemptions from division for particular contracts or types of contracts) to ensure exemptions may not be granted to the prohibited hours of door-to-door trading. A dealer or supplier of goods or services may currently apply to the chief executive for an exemption from all or any of the provisions of Division 4 in the FT Act. This clause will insert 'other than section 63', which outlines the prohibited

hours for door-to-door trading, to remove the capacity for traders to be granted an exemption from the prohibited hours under section 71A.

Clause 69 will insert Part 9 into the FT Act and outline the transitional provisions for existing exemptions (and applications for exemptions) from the prohibited door-to-door trading hours prescribed by section 63. The transitional provisions state that on commencement of the amendments any existing trading hours exemption is revoked; any existing application for an exemption ends; and any entitlement or expectation to apply for or be given a trading hours exemption is extinguished. This makes clear that once the amendments commence, any existing exemptions from the prohibited hours of door-to-door trading will immediately cease.

Part 4 Amendment of *Security Providers Act 1993*

Clause 70 states that Part 4 amends the SP Act.

Clause 71 amends section 10 (Application) to introduce a requirement for applications for security firm licences to include evidence that the applicant is a current member of an approved security industry association.

Clause 72 amends the eligibility criteria set out in section 11 (Entitlement to licences – individuals) applying to individuals applying for a security provider licence. In addition to meeting the existing criteria set out in section 11, clause 72 requires an individual applying for a security firm licence to satisfy the chief executive that the person is a current member of an approved security industry association.

Clause 73 amends the eligibility criteria set out in section 13 (Entitlement to licences – corporation or firms) applying to corporations and firms applying for a security provider licence. In addition to meeting the existing criteria set out in section 13, clause 73 requires a corporation or firm to satisfy the chief executive that it is a current member of an approved security industry association.

Clause 74 amends section 21 (Grounds for suspension, cancellation or refusal to renew) by expanding the grounds for suspension, cancellation or refusal to renew a licence.

New section 21(1)(d) retains the existing capacity for a licence to be suspended or cancelled or refused renewal where the licensee is an individual or a partnership and the individual, partnership or any partner has been convicted of an offence against the *Industrial Relations Act 1999*, section 666 relating to the underpayment of wages, or has contravened an order of the industrial commission or of the Industrial Magistrates Court to pay wages.

New section 21(1)(e) expands the existing requirement to provide that a licence can be suspended or cancelled or refused renewal where the licensee is a corporation and the corporation has been convicted of an offence against the *Workplace Relations Act 1996 (Cwlth)*, section 719 in relation to the payment of an amount to a person, or contravened an order of an eligible court under the *Workplace Relations Act 1996 (Cwlth)*, section 719(6) or (7) or 720 to pay an amount to or on behalf of a person.

New section 21(1)(f) provides a licence can be suspended or cancelled or refused renewal where the licensee is not a member of an approved security industry association. However, new section 21(1A), provides that 21(1)(f) only applies where 60 days have passed since the licensee was last a member of an approved security industry association or the commencement of this subsection (whichever is the latter). This will enable security firms sufficient time to become members of an approved industry association if an existing association loses its approved status.

Clause 75 inserts a new section 21A which provides that an approved security association must, within 14 days after the end of each successive month after becoming an approved security industry association, give the chief executive written notice of each person whose membership of the association ended during the month and the date the membership ended. Clause 75 includes a maximum penalty of 20 penalty units.

Clause 76 inserts a new section 25B which provides that the chief executive may prescribe requirements under a regulation to approve or withdraw approval of a security industry association.

Clause 77 amends the heading of part 2, division 6 of the Act, '*Appeals against licence decisions*' to include '*and decisions about approval of security industry associations*'.

Clause 78 amends section 26 (Right to appeal to a court) to include section 26(3) which provides security industry associations a right of appeal against a decision by the chief executive, where the chief executive refuses

to approve the association as a approved security industry association or withdraws the association's approval under section 25B(a).

New section 26(4) provides that an appeal may be made under subsection (1) or (2) to the Magistrates Court nearest the place where the applicant or licensee resides or carries on, or proposes to carry on business or employment under the licence. An appeal under subsection (3) must be made to the Magistrates Court nearest the principal place where the security industry association carries on business, or if the association's principal place of business is outside Queensland - to the Brisbane Magistrate's Court.

Clause 79 amends the dictionary to include definitions for the terms 'approved security industry association' and 'security industry association'.

Part 5 Amendment of *Trusts Act 1973*

Clause 80 provides that this part amends the *Trusts Act 1973*.

Clause 81 renumbers the provision for approved forms under the definition for 'approved form' in section 5 (1).

Clause 82 renumbers the previous section 109.

Clause 83 renumbers parts 9 and 10 and ss107 to 115.

Clause 84 inserts the new part 9 which—

- provides for new definitions under the Act:

eligible recipient means a deductible gift recipient under the *Income Tax Assessment Act 1997 (Cwlth)*, whether or not the deductible gift recipient is a charity at law or (without limitation) is established for a charitable purpose or purposes.

A government-linked body that is established for a charitable purpose or purposes is not considered a charity at law by virtue of its connection with government or the possibility of control of that body by the government. An example of a government-linked body that is established for charitable purposes that is a deductible gift recipient but is not a charity at law is the State Library of Queensland.

The amendments to the *Trusts Act 1973* will allow a prescribed trust to give to an eligible recipient without jeopardising the prescribed trust's tax exempt status.

prescribed trust means a trust—

- a. that establishes and maintains a fund mentioned in item 2 of the table of the *Income Tax Assessment Act 1997 (Cwlth)*, section 30-15; or
- b. that is established for charitable or philanthropic purposes and is of a class prescribed under a regulation.

A prescribed trust is a prescribed private fund (PPF), a charitable fund established in accordance with Commonwealth tax legislation that is generally family-controlled. Another type of prescribed trust is an ancillary fund which acts as an intermediary between members of the public who make tax-deductible donations to the ancillary fund, and a deductible gift recipient under the *Income Tax Assessment Act 1997 (Cwlth)*.

trust instrument means the initial instrument establishing a prescribed trust, as modified by all validly executed amendments.

This is the trust deed which establishes the trust. For many prescribed trusts, their trust instrument will limit donations to only allow donations to deductible gift recipients that are also charities at law.

- The new part 9 inserts a provision under section 108 allowing a prescribed trust to include the power within its trust instrument to donate to eligible recipients.
- Part 9 also inserts a new provision in section 109 where a trust instrument does not contain an express power allowing donations to eligible recipients.

This provision provides a statutory power that allows trustees of a prescribed trust to donate to an eligible recipient or to establish an eligible recipient. The donation may be by way of providing money, property or benefits.

It is often not possible for trustees of a prescribed trust to alter the trust instrument to allow donations to eligible recipients. Doing so would go against a principle of trusts. A statute can override that principle by granting the power to make a declaration under this section.

- Section 109 subsection (2) (a) provides that this power is available to trustees of prescribed trusts despite any contrary provision in the trust instrument.
- Subsection (2) (b) provides that where there is an express prohibition against donating to a particular eligible recipient or class of eligible recipients contained in the trust instrument, then subsection (1) does not apply.
- Subsection (3) provides that the trustees of a prescribed trust must have completed and retained a declaration approving the power contained in subsection (1). This declaration can follow the approved form wording or is to have wording that gives substantially the same effect as the approved form.
- Subsection (4) allows that the approved form can be modified so that the declaration only applies to a stated eligible recipient or class of eligible recipients.
- Subsection (5) provides that where trustees have made a declaration that has limitations under subsection (4) then subsection (1) will only have effect for the stated eligible recipient or class of eligible recipients.
- Subsection (6) requires trustees to retain the declaration made under this section, or a certified copy of it, with the trust records.
- Subsection (7) states that trustees are not required to make a declaration under this section. If they do make a declaration under this section they are not in breach of a duty.
- A new section 110 is inserted containing a new provision which:

(1) defines a prescribed power as being either an express power that is contained in the trust instrument of a prescribed trust, section 108, or a power granted by section 109 where there is no express power in the trust instrument.

Subsections (2) and (3) provide that the prescribed power is to be taken as being for charitable purposes. The existence of a prescribed power or the exercise of a prescribed power does not affect the charitable status of the prescribed trust and the exercising of a prescribed power is to be taken as being for charitable purposes. This extends to when the control of a prescribed trust is by the court in the exercise of the court's general jurisdiction in relation to charitable trusts.

Clause 85 amends the heading for part 11.

Clause 86 inserts the new part 12 which—

- specifies the commencement day as being the date of assent.
- applies the Act to all prescribed trusts, whether they were created before the date of assent or on or after the date of assent.
- contains a retrospective provision. This provision ensures that any donations made to eligible recipients as defined under section 107 prior to the commencement day do not put the trustees of the donating trust in breach of their trust instrument and will not affect the charitable status of the trust.

Any prescribed power included in the trust instrument prior to commencement day is also to be considered to have been validly included and to not affect the charitable status of the trust.