



New South Wales

Confiscation of Proceeds of Crime Regulation 2010

under the

Confiscation of Proceeds of Crime Act 1989

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Confiscation of Proceeds of Crime Act 1989*.

JOHN HATZISTERGOS, MLC
Attorney General

Explanatory note

The object of this Regulation is to remake, with minor amendments, the provisions of the *Confiscation of Proceeds of Crime Regulation 2005*, which is repealed on 1 September 2010 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes provision with respect to the following:

- (a) the recognition of interstate Acts and orders under those Acts that correspond with the *Confiscation of Proceeds of Crime Act 1989* and orders under that Act,
- (b) the giving of notices,
- (c) the bodies and persons who are appropriate officers in relation to certain functions,
- (d) the prescription of offences as serious offences,
- (e) the payment of interest when property is returned,
- (f) the prescription of fees,
- (g) the exemption from filing fees for applications and other process,
- (h) savings and formal matters.

This Regulation is made under the *Confiscation of Proceeds of Crime Act 1989*, including sections 4 (1) (definitions of *appropriate officer*, *corresponding law*, *interstate forfeiture order*, *interstate pecuniary penalty order* and *interstate restraining order*), 7 (definition of *serious offence*), 20 (4), 41 (6), 42B (3), 42D (2), 42F (2), 42H (2), 42S (1), 53, 94 (1) and 95 (the general regulation-making power).

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Explanatory note

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature and matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or of another State or Territory.

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Clause 1 Confiscation of Proceeds of Crime Regulation 2010

Part 1 Preliminary

Confiscation of Proceeds of Crime Regulation 2010

under the

Confiscation of Proceeds of Crime Act 1989

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Confiscation of Proceeds of Crime Regulation 2010*.

2 Commencement

This Regulation commences on 1 September 2010 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Confiscation of Proceeds of Crime Regulation 2005* which is repealed on 1 September 2010 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

the Act means the *Confiscation of Proceeds of Crime Act 1989*.

the Australian Capital Territory Act means the *Confiscation of Criminal Assets Act 2003* of the Australian Capital Territory.

the Northern Territory Act means the *Criminal Property Forfeiture Act* of the Northern Territory.

the Queensland Act means the *Criminal Proceeds Confiscation Act 2002* of Queensland.

the South Australian Act means the *Criminal Assets Confiscation Act 2005* of South Australia.

the Tasmanian Act means the *Crime (Confiscation of Profits) Act 1993* of Tasmania.

the Victorian Act means the *Confiscation Act 1997* of Victoria.

the West Australian Act means the *Criminal Property Confiscation Act 2000* of Western Australia.

- (2) In this Regulation, a reference to a Form is a reference to a Form set out in Schedule 1.
- (3) Notes included in this Regulation do not form part of this Regulation.

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Clause 4 Confiscation of Proceeds of Crime Regulation 2010

Part 2 Corresponding legislation

Part 2 Corresponding legislation

4 Corresponding laws

For the purposes of the definition of *corresponding law* in section 4 (1) of the Act, the following laws are declared to correspond to the Act:

- (a) the Australian Capital Territory Act,
- (b) the Northern Territory Act,
- (c) the Queensland Act,
- (d) the South Australian Act,
- (e) the Tasmanian Act,
- (f) the Victorian Act,
- (g) the West Australian Act.

5 Interstate forfeiture orders

For the purposes of the definition of *interstate forfeiture order* in section 4 (1) of the Act, an order or declaration in force under any of the following provisions is declared to be within that definition:

- (a) section 54, 59 or 67 of the Australian Capital Territory Act,
- (b) section 94, 96, 97, 99, 100 or 101 of the Northern Territory Act,
- (c) section 151 or 202 of the Queensland Act,
- (d) section 47 or 77 of the South Australian Act,
- (e) section 16 of the Tasmanian Act,
- (f) section 33, 36, 38 or 39 of the Victorian Act,
- (g) section 22 or 28 of the Western Australian Act (but only if the relevant declaration is enforceable by confiscation under that Act),
- (h) section 30 of the Western Australian Act.

6 Interstate pecuniary penalty orders

For the purposes of the definition of *interstate pecuniary penalty order* in section 4 (1) of the Act, an order or declaration in force under any of the following provisions is declared to be within that definition:

- (a) section 84 or 85 of the Australian Capital Territory Act,
- (b) section 71, 75, 76 or 81 of the Northern Territory Act,
- (c) section 184 of the Queensland Act,
- (d) section 95 of the South Australian Act,
- (e) section 21 of the Tasmanian Act,

- (f) section 59 or 64 of the Victorian Act,
- (g) section 12, 16, 17 or 22 of the Western Australian Act (but only if a person is liable under that Act to pay an amount specified in the relevant declaration).

7 Interstate restraining orders

For the purposes of the definition of *interstate restraining order* in section 4 (1) of the Act, an order or notice in force under any of the following provisions is declared to be within that definition:

- (a) section 30 or 31 of the Australian Capital Territory Act,
- (b) section 43 or 44 of the Northern Territory Act,
- (c) section 122 of the Queensland Act,
- (d) section 24 of the South Australian Act,
- (e) section 26 of the Tasmanian Act,
- (f) section 18 of the Victorian Act,
- (g) section 34 or 43 of the Western Australian Act.

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Clause 8 Confiscation of Proceeds of Crime Regulation 2010

Part 3 Notices

Part 3 Notices

8 Notice of application for recovery of interest in forfeited property

For the purposes of section 20 (4) of the Act, a notice is to be given in Form 1 and is to be served on the following persons:

- (a) the Director of Public Prosecutions,
- (b) the Commissioner of Police, in the case of an application made to the Local Court,
- (c) the New South Wales Crime Commission, in the case of property forfeited following an application made by the Commission under section 13 (2) of the Act,
- (d) the NSW Trustee and Guardian, in the case of property controlled by the NSW Trustee and Guardian under an order under section 43 (2) (d) of the Act,
- (e) such other person (if any) as the court may direct.

9 Notice of application for return of or access to property

For the purposes of section 41 (6) of the Act, a notice is to be given in Form 2 and is to be served on the following persons:

- (a) the Director of Public Prosecutions,
- (b) the Commissioner of Police,
- (c) such other person (if any) as the court may direct.

10 Freezing notices

- (1) For the purposes of section 42B (3) of the Act, an application for a freezing notice (other than a telephone freezing notice) is to be made in Form 3.
- (2) For the purposes of section 42D (2) of the Act, a freezing notice is to be issued in Form 4.
- (3) For the purposes of section 42F (2) of the Act, notice of the issue of a freezing notice is to be given in Form 5 in any of the following ways:
 - (a) personally,
 - (b) by facsimile,
 - (c) by leaving the notice with a person over the age of 16 years at the last known place of residence or business of the person to whom notice is being given.

11 Records relating to the issue and execution of freezing notices

- (1) For the purposes of section 42H (2) of the Act, the record made under section 42H (1) must:
 - (a) be made in Form 6, and
 - (b) be kept by the appropriate Local Court registrar for not less than 6 years after the freezing notice is issued, and
 - (c) be available for inspection by any person who receives notice of the notice during ordinary business hours.
- (2) An authorised justice must cause a record to be made of an unsuccessful application for a freezing notice and any such record is to be kept by the appropriate Local Court registrar for not less than 6 years after the refusal.
- (3) A Local Court registrar may at any time issue a certificate to the effect that the registrar is satisfied that:
 - (a) a document or part of a document referred to in this clause contains matter:
 - (i) that could disclose a person's identity, and
 - (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or
 - (b) a document or part of a document referred to in this clause contains matter that, if disclosed, may seriously compromise the investigation of any matter.
- (4) The document or part of the document to which the certificate relates is not to be made available for inspection under this clause.
- (5) The certificate is to be kept with the document to which it relates.
- (6) A Local Court registrar (whether or not the one that issued the certificate) may revoke the certificate if satisfied (after consideration of submissions from any interested party) that disclosure of the matter to which it relates is no longer likely to jeopardise any person's safety or seriously compromise the investigation of any matter.

12 Giving of notices

For the purposes of section 94 (1) of the Act:

- (a) a notice required to be given in proceedings under the Act is to be served personally or in such other manner as the court may direct, and
- (b) except as provided by clause 10 (3), personal service of a notice is to be effected in accordance with Part 10 of the *Uniform Civil Procedure Rules 2005*.

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Clause 13 Confiscation of Proceeds of Crime Regulation 2010

Part 4 Miscellaneous

Part 4 Miscellaneous

13 Appropriate officers

For the purposes of paragraph (d) of the definition of *appropriate officer* in section 4 (1) of the Act, the following persons are prescribed as appropriate officers in relation to the functions specified and each of those functions is prescribed for the purposes of that paragraph:

- (a) the Commonwealth Director of Public Prosecutions in relation to all functions of an appropriate officer under the Act,
- (b) the New South Wales Crime Commission in relation to the following functions of an appropriate officer under the Act:
 - (i) applying for a forfeiture order under section 13 (2) (a) of the Act,
 - (ii) applying for a drug proceeds order under section 13 (2) (b) of the Act,
 - (iii) applying for an order under section 22 (1) of the Act pending forfeiture,
 - (iv) applying for a restraining order under section 43 (1) of the Act in respect of property of a person who has been, or is about to be, charged with a drug trafficking offence,
 - (v) applying under section 45 (3) of the Act for an order that is ancillary to a restraining order made by the Supreme Court,
 - (vi) applying for an order under section 45A (2) of the Act to set aside a disposition of, or dealing with, property in contravention of a restraining order made in respect of a person who has been, or is about to be, charged with a drug trafficking offence,
 - (vii) applying for particulars of a restraining order to be recorded under section 49 (1) of the Act.

14 Serious offences

For the purposes of paragraph (c) of the definition of *serious offence* in section 7 of the Act, the following offences are prescribed:

- (a) an offence under section 6, 7, 9, 17, 18, 27, 28, 30 or 37 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* in respect of which the maximum penalty that may be imposed on an individual is 100 penalty units or more,
- (b) an offence under section 578C of the *Crimes Act 1900*.

15 Interest payable on value of property

- (1) For the purposes of section 42S (1) of the Act:
 - (a) the date from which interest is payable is the date on which the property was sold or otherwise disposed of, and
 - (b) the amount of interest payable is interest at the standard rate applicable from time to time in respect of money invested for trust matters in a common fund established under section 104 of the *NSW Trustee and Guardian Act 2009*.
- (2) If there is no longer a standard rate, then the rate is the rate applicable from time to time in respect of money invested for trust matters in a common fund established under that section.

16 Fees payable to NSW Trustee or Commissioner of Police

For the purposes of section 53 of the Act, the fees that the NSW Trustee and Guardian or Commissioner of Police is entitled to receive are those set out in Schedule 2.

17 Forms generally

The forms prescribed by this Regulation are to be adapted so as to comply with such requirements as to format and formal matters as are provided for by the rules of court or regulations applicable to the respective courts in connection with which the forms are used.

18 Filing fees not payable

A filing fee is not to be charged for applications or other process under the Act.

19 Saving

- (1) Any act, matter or thing that, immediately before the repeal of the *Confiscation of Proceeds of Crime Regulation 2005*, had effect under that Regulation continues to have effect under this Regulation.
- (2) A reference in this Regulation to a Form, includes a reference to the corresponding Form in the *Confiscation of Proceeds of Crime Regulation 2005*.

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Schedule 1 Forms

Schedule 1 Forms

(Clause 3 (2))

Form 1 Notice of application for recovery of interest in forfeited property

(Clause 8)

(Confiscation of Proceeds of Crime Act 1989)

(Section 20 (4))

To: [name], [address]

[Name and address of applicant] claims an interest in the property specified in the Schedule below which was forfeited to the State by Order of the [name of Court] on [date of Order] following the conviction of [name of convicted person] for [description of offence(s)].

The applicant claims not to have been in any way involved in the commission of the offence(s) and has applied to the Court for an Order under section 20 of the *Confiscation of Proceeds of Crime Act 1989* declaring the nature, extent and value of the applicant's interest in the property.

The application has been fixed for hearing on [date] at [time] at [address of Court].

Schedule

[Description of property]

Filed: [name of applicant or applicant's solicitor]

Form 2 Notice of application for return of or access to property

(Clause 9)

(Confiscation of Proceeds of Crime Act 1989)

(Section 41 (6))

To: [name], [address]

[Name and address of applicant] has applied to the [name of Court] for an Order under section 41 (5) of the *Confiscation of Proceeds of Crime Act 1989*, relating to the property specified in the Schedule below, directing:

- * that the property be returned to the applicant
- * that the applicant be allowed access to the property.
- * Delete whichever is inapplicable.

The property was seized on [date of seizure] pursuant to a warrant issued under Part 3 of that Act.

The application has been fixed for hearing on [date] at [time] at [address of Court].

Schedule

[*Description of property*]

Filed: [*name of applicant or applicant's solicitor*]

Form 3 Application for freezing notice

(Clause 10 (1))

(Confiscation of Proceeds of Crime Act 1989)

(Section 42B (3))

On [*date*] I [*name/rank/position*], of [*place of work*] apply for a freezing notice in respect of the following specified property [*description of property*]:

I swear/solemnly, sincerely and truly declare and affirm that:

- 1 I am an authorised officer under the *Confiscation of Proceeds of Crime Act 1989* because I am a [*list rank*] of the NSW Police Force OR authorised in writing by the Minister for Police to act as an authorised officer.
- 2* I have reasonable grounds for believing that [*name of defendant*] has been charged with the following serious offence/s [*list offence/s*]:
- 3* I have reasonable grounds for believing that [*name of defendant*] is about to be charged with the following serious offence/s [*list offence/s*]:
- 4* I have reasonable grounds for believing that [*name of defendant*] has been convicted of the following serious offence/s [*list offence/s*]:
- 5* I have reasonable grounds for believing that [*name of defendant*] has not been convicted of, but has committed, the following serious offence/s [*list offence/s*]:
- 6* I have reasonable grounds for believing that the specified property is tainted property in relation to the serious offence/s [*list specified property*]:
- 7* I have reasonable grounds for believing that [*name of defendant*] has derived benefits because of having committed the serious offence.
- 8* I have reasonable grounds for believing that the specified property is the defendant's proceeds of drug trafficking.
- 9* I have reasonable grounds for believing that the specified property is subject to the effective control of [*name of defendant*] and he/she has derived a benefit, directly or indirectly, from the commission of the following serious offence/s [*list offence/s*]:

Sworn/declared and affirmed before me on [*date*] at [*place*] in the State of New South Wales.

[*Signature*]

Justice of the Peace

[**Delete if inapplicable*]

Note. In the case of an application by telephone (but not by facsimile), this form of application should be completed by the authorised justice for record purposes as if it were made in person by the applicant but not on oath.

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Schedule 1 Forms

Form 4 Freezing notice

(Clause 10 (2))

(Confiscation of Proceeds of Crime Act 1989)

(Section 42D (2))

An application to confirm this notice is to be made to the appropriate court by an authorised officer no later than 14 days after today.

On [date], I [name of authorised justice], direct that the following specified property [description of property]:

- 1 not be disposed of, or otherwise dealt with by the defendant or any other person, except in the following manner and circumstances [list manner and circumstances]:
and
- 2 be held in the custody of the following person pending the determination of an application for confirmation of the freezing notice [Commissioner of Police] or [list person]:

[Signature]

Authorised justice

[Print name]

[Date]

[Time, if telephone application]

Form 5 Notice of issue of freezing notice

(Clause 10 (3))

(Confiscation of Proceeds of Crime Act 1989)

(Section 42F (2))

To [name and address of defendant/owner of property affected by the notice/other person subject to the notice]:

I hereby notify you of the issue of the attached freezing notice.

[Signature]

[Name/rank/position]

[Place of work]

[Date]

Form 6 Authorised justice's record of issue of freezing notice

(Clause 11 (1) (a))

(Confiscation of Proceeds of Crime Act 1989)

(Section 42H (1))

On [*date*] at [*time*] I, the undersigned authorised justice, received this application for a freezing notice.

- 1 The application was made in person.
OR
The application was made by facsimile transmission/telephone and I was/was not satisfied that the freezing notice was required urgently and it was/was not practicable for the application to be made in person.
- 2 On considering the application I found/did not find* that there were reasonable grounds for issuing the freezing notice.
* If freezing notice is issued—continue
- 3 The relevant particulars of the grounds on which I relied to justify the issue of the freezing notice are as follows [*list particulars*]:
- 4 The freezing notice was issued at [*time*] on [*date*].

[*Signature*]

[*Print name*]

Authorised justice

[*Date*]

Return this Form, together with a copy of the freezing notice, to the Local Court named in the notice.

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Schedule 2 Fees payable to NSW Trustee or Commissioner of Police

Schedule 2 Fees payable to NSW Trustee or Commissioner of Police

(Clause 16)

- 1** Fees of the following amounts are payable to the NSW Trustee and Guardian or Commissioner of Police in respect of all property under the control of the NSW Trustee and Guardian or Commissioner of Police:

 - (a) for each calendar year during which the NSW Trustee and Guardian or Commissioner of Police has control of the property (whether or not the property is controlled for the whole of the year)—an amount equal to 0.22% of the value of the property (as fixed by the NSW Trustee and Guardian or Commissioner of Police) or \$220, whichever is the greater amount,
 - (b) an amount equal to the actual costs incurred and disbursements made in relation to the property by the NSW Trustee and Guardian or Commissioner of Police while in control of the property, including the costs of legal representation, the costs of obtaining legal advice and any other legal costs, agents' fees, valuation fees and costs incurred in relation to the operation of any business associated with the property.
- 2** In addition to the fees set out in clause 1 of this Schedule, fees of the following amounts are payable to the NSW Trustee and Guardian or Commissioner of Police in respect of property from which income is derived:

 - (a) an amount equal to 5.775% of the gross income (not including income referred to in paragraph (b)) derived from the property,
 - (b) if the income is received as rent and a cost has been incurred in respect of the income by the NSW Trustee and Guardian or Commissioner of Police for agency charges—an amount equal to 2.75% of the income.
- 3** In addition to the fees set out in clauses 1 and 2 of this Schedule, a fee is payable to the NSW Trustee and Guardian or Commissioner of Police, in respect of property that the NSW Trustee and Guardian or Commissioner of Police is directed by a court to sell or dispose of, of an amount equal to 2.75% of the gross amount realised by the sale or disposition of the property.