

BILLS DIGEST

CRIMINAL PROCEEDS (RECOVERY) BILL 2007

Date of Introduction: 13 March 2007

Bills Digest No. 1495



NEW ZEALAND PARLIAMENTARY LIBRARY

Bills Digest No. 1495

Published by the Parliamentary Library
Parliament Buildings, Wellington
New Zealand.

20 March 2007

Prepared by John McSoriley B.A.L.L.B., Barrister
Legislative Analyst
Ph. (04) 471-9626 (Ext. 9626)
Fax (04) 471-1250

Caution

This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.

Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Copyright

© NZ Parliamentary Library, 2007

Except for educational purposes permitted under the Copyright Act 1994, no part of this document may be reproduced or transmitted in any form or by any means, including information storage and retrieval systems, other than by Members of Parliament in the course of their official duties, without the consent of the Parliamentary Librarian, Parliament Buildings, Wellington, New Zealand.

This document may also be available through commercial online services and may be viewed and reproduced in accordance with the conditions applicable to those services.

CRIMINAL PROCEEDS (RECOVERY) BILL 2007

Date of introduction:	13 March 2007
Portfolio:	Justice
Select Committee:	As at 20 March, 1 st reading not held

PURPOSE

The aim of the Bill is to “ ... make more effective provision for the confiscation of property that either represents the profits of criminal offending or was used to facilitate the commission of crime”¹.

"The Bill consists of 3 Parts. It is intended that, at the Committee of the whole House stage, subparts 1 and 2 of Part 3 will be divided from the rest of the Bill to become a separate Mutual Assistance in Criminal Matters Amendment Bill and a separate Sentencing Amendment Bill. Parts 1 and 2 will remain as the Criminal Proceeds (Recovery) Bill and on commencement replace the Proceeds of Crimes Act 1991"². The Proceeds of Crime Act 1991 is repealed.

BACKGROUND

"The existing Proceeds of Crime Act 1991 provides for confiscation of property only where the owner has been convicted of a criminal offence. Experience has shown that this is insufficient to deal with persons who are involved in the organisation of criminal enterprises, but have succeeded in distancing themselves from the commission of specific offences. The total amount confiscated under that Act has been relatively small.

"Other jurisdictions, in Australia, Ireland, and the United Kingdom, have introduced legislation that enables criminal proceeds to be targeted without a conviction necessarily being obtained. These regimes are proving considerably more effective than previous laws in terms of the value of criminal proceeds confiscated. This Bill will introduce a similar approach in New Zealand. It will also facilitate co-operation with other jurisdictions by allowing foreign restraining and confiscation orders to be enforced in New Zealand.

"In addition, the opportunity is being taken to improve provisions enabling confiscation of property where there has been a conviction for a criminal offence.

"Accordingly, this Bill will repeal the Proceeds of Crime Act 1991. It replaces it with a conviction-based forfeiture regime limited to instruments of crime (items used to commit or facilitate the commission of criminal activity) and a non-conviction-based

¹ Criminal Proceeds (Recovery) Bill, 2007 No 81-1, Explanatory note, general policy statement, p. 1.

² Criminal Proceeds (Recovery) Bill, 2007 No 81-1, Explanatory note, Part by part analysis, p. 5.

confiscation regime to deal with all other property representing the proceeds of crime or assessed to be the value of a person's unlawfully derived income.

"The non-conviction-based regime or civil regime will operate completely independently of any criminal proceedings that may be in course or contemplated. Consequently, the same person may be the subject of both criminal prosecution (including potential forfeiture of instruments of crime) and confiscation action under the civil process"³.

MAIN PROVISIONS

Civil proceedings

Restraining orders

The Bill provides for restraining orders. A restraining order is an order that restrains certain property from being disposed of, or dealt with, other than as specified in the order and places the property in the custody and control of the Official Assignee on the grounds that the property is "tainted property"⁴ or that the person against whom the order is made (the respondent) has unlawfully benefited from "significant criminal activity" The Bill defines "significant criminal activity" in this context as " ... unless the context otherwise requires ... an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending ... that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more ... or ... from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived. The Bill also provides that a person is undertaking such an activity whether or not:

- the person has been charged with or convicted of an offence in connection with the activity; or
- the person has been acquitted of an offence in connection with the activity; or
- the person's conviction for an offence in connection with the activity has been quashed or set aside.

The Bill makes extensive and detailed provision for restraining orders. Applications for such orders may be made on or without notice. They must be registered by the appropriate registration body if requested by the applicant. They may be granted with conditions (as the Court thinks fit). orders may be made excluding any severable interest from the restrained property.

³ Criminal Proceeds (Recovery) Bill, 2007 No 81-1, Explanatory note, general policy statement, pp. 1 and 2.

⁴ The term "tainted property" means " ... any property that has, wholly or in part, been ... aquired as a result of significant criminal activity ... or ... directly or indirectly derived from significant criminal activity ... and ... includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity" (*Part 1, Clause 5(1) definition of "tainted property"*).

As a general rule, a restraining order expires one year after it is made or on any earlier date on which a forfeiture order is made or declined in respect of the restrained property. A restraining order may be extended for a period not exceeding another year by the court that made it (*Part 2, Subpart 2, Clauses 18 - 42*).

Civil forfeiture orders

The Bill provides for two types of civil forfeiture orders: assets forfeiture orders and profit forfeiture orders. Applications for civil forfeiture orders are heard in the High Court. The only person who can apply for such orders is the Director of Criminal Proceeds Confiscation (i.e. the chief executive of the recovery body). The High Court must make the order if it is satisfied on the balance of probabilities that specific property is tainted property.

The order must specify the interest in the property covered by the order and that interest vests in the Crown absolutely and is placed in the custody and control of the Official Assignee. The Bill sets out extensive and detailed provisions relating to civil forfeiture orders including matters relating to an application for, and the procedure for obtaining, one. If the order requested is an assets forfeiture order, the High Court must grant the order if it is satisfied on the balance of probabilities that specific property is tainted property.

If the order requested is a profit forfeiture order, the High Court must make the order if it is satisfied on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity "within the relevant period of criminal activity" and the respondent has interests in property (which may include "effect control" of the relevant property). Persons claiming an interest in the property sought to be forfeited under an order may apply for an order for relief. The High Court may grant such an application if it considers that, having regard to all of the circumstances, undue hardship is likely to be caused to the applicant if relief is not granted (*Part 2, Subpart 3, Clauses 43 - 69*).

Official Assignee

The Bill provides for the Official Assignee's duties in respect of property that is subject to a forfeiture order and certain property in his or her custody and control as a result of being seized under a warrant. Where property is subject to an assets forfeiture order, the Official Assignee must generally defer the disposal of the property by six months (from the date of bringing, withdrawing, or determining of appeals) to allow for claims for relief, but after that period may pay out the proceeds in the following order by:

- paying the Official Assignee's recoverable costs;
- paying the Legal Services Agency the amount (if any) payable by way of legal aid granted to the person whose interest in the property has been forfeited (less any contributions paid by that person);
- paying any outstanding fines and sentences of reparation imposed on that person;

- paying any remainder of the money to the Crown:

In relation to a profit forfeiture order, the Official Assignee must also generally defer the disposal of the property by six months but then may pay out the proceeds in the following order by:

- paying the Official Assignee and the Legal Services Agency (as described immediately above);
- paying any outstanding fines and sentences of reparation imposed on that person;
- paying the Crown the maximum recoverable amount that the Court determined on making the order (less the sum of all prior payments made out of the proceeds);
- paying any remainder of the money to the person whose interest in the property has been forfeited.

In relation an instruments forfeiture order, the Official Assignee must, defer the sale of the property to allow for any appeals against the order, and must then pay the proceeds in the same order set out above for an assets forfeiture order (see above) (*Part 2, Subpart 5, Clauses 80 - 90*).

Recovery body

The Bill establishes the Recovery body. Its chief executive is the Director of Criminal Proceeds Confiscation who must act independently of the Attorney-General in any matter relating to any decision to investigate any person or property or to take proceedings under the Bill.

The ability to review the decisions of the Director to take proceedings under the Bill are limited and the Bill further provides that if the exercise or discharge of any power or duty is subject to a legal challenge, the continued exercise or discharge of that power or duty by the Director cannot be prevented pending a final decision. The High Court must approve any settlement entered into by the Director and any person in regard to any property or sum of money to be forfeited to the Crown (*Part 2, Subpart 6, Clauses 91 - 105*).

Investigative powers

The Bill provides investigative powers for members of the Police, the Director, and also for the official Assignee. Any member of the police may obtain a warrant to search for and seize instruments of crime or evidence as to the nature and extent of any person's interest in or control over property that is an instrument of crime. The Director may obtain a warrant to search for and seize tainted property, property that is the subject of a restraining order obtained by the Director, and evidence relating to the nature and extent of any person's interests and control over particular property.

The Director may require a person whose property is the subject of a restraining order, or any officer of a financial institution who has information about property that is the

subject of a restraining order, to produce documents relevant to the Director's investigation or to any proceedings under Parts 1 and 2 of the Bill. The Director may obtain from a Judge a production order requiring any person to produce documents relevant to the Director's investigation or to any proceedings under the Bill. The Director may issue an examination notice to require any person whose property is subject to a restraining order to attend before the Director and answer questions and supply information relevant to an investigation by the Director or to any proceedings under the Bill.

The Director may obtain a search warrant if there is non-compliance with a production notice, production order, or examination notice. The Official Assignee may obtain a warrant to search for and seize property that is the subject of a restraining order or a forfeiture order, or in certain circumstances, the subject of an application for a restraining order (*Part 2, Subpart 7, Clauses 106 - 133*).

Foreign matters and the Mutual Assistance in Criminal Matters Act 1992

Provisions relating to restraining orders are applied to foreign restraining orders. The director may apply to the High Court to register a foreign restraining order if authorised under the Mutual Assistance in Criminal Matters Act 1992. The effect of such registration is that property that is subject to the order is not to be disposed of other than as provided in the order and is under the custody and control of the Official Assignee.

Similar provision is made for the registration and enforcement of foreign forfeiture orders in New Zealand. The Bill also amends various definitions in Mutual Assistance in Criminal Matters Act 1992 and, in particular provides that certain investigations certified by the Attorney-General to have commenced in New Zealand or certified by a Central Authority to have commenced in a foreign country (being investigations relating to forfeiture and restraint of property) are to be treated as criminal investigations for the purposes of Parts 2 and 3 of the Mutual Assistance in Criminal Matters Act 1992 (*Part 2, Subpart 8, Clauses 134 - 155; Part 3, Subpart 1, Clauses 231 - 242 amending the Mutual Assistance in Criminal Matters Act 1992*).

Offences

The Bill creates the following new offences:

- contravention of a restraining order or foreign restraining orders;
- contravention of forfeiture orders or foreign forfeiture orders;
- failure to comply with notices, orders, and search warrants;
- unlawful disclosure of the existence and operation of any search order;
- obstruction of persons exercising powers or carrying out functions under the Bill;
- unlawful disclosure of secrets by members of the recovery body (*Part 2, Subpart 9, Clauses 156 - 162*).

Criminal Proceedings

Instrument forfeiture orders

The Bill provides that if a person is convicted of a "qualifying forfeiture offence"⁵, the prosecutor must, if the prosecutor's opinion the Court should consider whether to make an instrument forfeiture order in respect of any property used to commit or facilitate the offence and notify the Court of the details of the property and the name of any person who have an interest in it.

The Bill sets out a procedure for determining the ownership of the property and informing persons who may have an interest in it. The Court may grant relief from an instrument forfeiture order to a person who establishes an interest in that property or who establishes that they may suffer undue hardship from the making of such an order.

After a hearing on the matter (which may be held as a separate proceeding or during the sentencing hearing, the Court may, if it is satisfied that the property is an 'instrument of crime'⁶, order that the instrument of crime or any part of it specified by the Court be forfeited to the Crown. The Bill also sets out the effect of an instrument forfeiture order, provisions for the disposal of forfeited property, applications for relief relating to instrument forfeiture orders and for third party appeals from instrument forfeiture orders (*Part 2, Subpart 4, Clauses 70 - 79; Part 3, Subpart 2, Clauses 243 - 249 and Clause 250 of the Bill, amending the Sentencing Act 2002*).

Instrument forfeiture orders and sentencing

The Bill provides that in sentencing or otherwise dealing with an offender convicted of a "qualifying forfeiture offence" the Court must take into account any "instrument forfeiture order" made, or to be made, in respect of property used to commit, or to facilitate the commission of the "qualifying forfeiture offence", any forfeiture of that property by any other order or means arising from the offender's conviction, and other matters such as any order for relief in favour of another person, the relationship between that other person and the offender. In deciding what weight it should give to the various matters, the Court must take into account the value of the property and the nature and extent of the offender's interest in the property (*Part 3, Clause 247 of the Bill, inserting New Section 10A into the Sentencing Act 2002*).

© NZ Parliamentary Library, 2007

⁵ A "qualifying forfeiture offence" is an offence punishable by a maximum term of imprisonment of five years or more and includes an attempt to commit, conspiring to commit, or being an accessory to an offence if the maximum term of imprisonment for that attempt, conspiracy, or activity is five years or more (*Part 3, Clause 246, amending Section 4(1) of the sentencing Act 2002 by inserting a definition of "qualifying forfeiture offence"*).

⁶ The Bill defines the term "instrument of crime" as " ... property used (wholly or in part) to commit, or to facilitate the commission of, a qualifying forfeiture offence" ... and " ... includes, in relation to a qualifying forfeiture offence that is an offence against section 8(1) or (2A) of the Terrorism Suppression Act 2002, funds (as defined in section 4(1) of that Act) allocated for the purpose of committing that offence" (*Part 3, Clause 246, amending Section 491) of the Sentencing Act 2002 by inserting a definition of "instrument of crime"*).