

For information

**Sub-Committee on
Rules of the High Court (Amendment) Rules 2009**

**Response to issues raised at the Sub-Committee meeting
held on 28 October 2009**

Purpose

At the Sub-committee meeting held on 28 October 2009, Members requested the Administration to provide supplementary information on the definition of “prescribed interest” as set out in the Rules of the High Court (Amendment) Rules 2009 (the “Amendment Rules”) for the purposes of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“the Ordinance”). This note provides the information requested by Members.

Defining “prescribed interest” in Order 117A

2. Section 2(1) of the Ordinance provides that -

“prescribed interest” (訂明權益), in relation to any property, means an interest in the property prescribed by rules of court as an interest for the purposes of this Ordinance.

3. Section 2(4) of the Ordinance further provides that a person who has a prescribed interest in any property shall be deemed to be a person by, for or on behalf of whom the property is or was held. The expression “by, for or on behalf of whom the property is held” (and similar expressions) is used in sections 6, 12H(4)(a)(ii), 15(1)(b), 17 and 18 of the Ordinance. For details, please see paragraphs 5 to 10 below.

4. Further, section 20(1)(e) of the Ordinance stipulates that provision may be made by the rules of court prescribing interests for the purposes of the definition of “prescribed interest”. Accordingly, rule 1(4) of Order 117A provides for a definition of “prescribed interest”.

Application of the definition of “prescribed interest” in the Ordinance

5. **Section 6(7)** provides that a person who is given a notice under section 6(1) (i.e. a “freezing notice”) is required to send a copy of the notice without delay to each person, if any, whose property it is, *or for or on behalf of whom the property is held*. This in effect means that the notice should be sent to any person who has a prescribed interest in the property to be frozen.

6. **Section 12H(4)(a)** stipulates the classes of person who may apply to the Court for a direction to release certain property detained by an order made under section 12H(2) or (3). One class of person who may make such an application is *a person by, for or on behalf of whom the property was held*. This means a person who has a prescribed interest in the property may apply to the Court for the release of the property being detained. Other persons who may make such an application are the person from whom the property was seized and persons who otherwise have an interest in the property.

7. **Section 15(1)(b)(iii)** provides that a licence to deal with property frozen under section 6 may include an exception that relates to the reasonable living expenses, reasonable legal expenses and payment liable to be made under the Employment Ordinance (Cap. 57) of *any person by, for or on behalf of whom the funds are held*. This means that the specified items of a person who has a prescribed interest in the funds being frozen would fall within the ambit of the exception.

8. **Section 17(1)(a)(ii)** provides that if any property is specified in an order under section 5(2) as terrorist property and the order is obtained in an *ex parte* application, *any person by, for or on behalf of whom the property is held* may apply to the Court for the order to be revoked. **Section 17(1)(b)** provides that if any property is frozen by a notice under section 6(1), *any person by, for or on behalf of whom the property is held* may apply to the Court for the notice to be revoked. This means that any person who has a prescribed interest in the property being specified as terrorist property or in the frozen property may apply to the Court to have the relevant order or notice revoked.

9. The other persons who may apply to the Court for the order or notice to be revoked are persons in respect of whom the Court is satisfied that they are affected by the order or notice. In fact, section 2(6) of the Ordinance provides that the Court may order that any person who may be

affected by an application under section 17 be joined as a party to the proceedings.

10. **Section 18(1)(d)** provides that if any property has ceased to be specified as terrorist property, *any person by, for or on behalf of whom the property is held* may apply to the Court for compensation to be paid by the Government. **Section 18(2A)** provides that if any property is seized under section 12G, subject to the conditions specified in section 18(2A)(b), *a person by, for or on behalf of whom the property was held* may apply to the Court for compensation to be paid by the Government. This means that a person who has a prescribed interest in the property which was once specified as terrorist property or in the property which has been seized by the Government may apply to the Court for compensation. Again, section 2(6) of the Ordinance provides that the Court may order that any person who may be affected by an application under section 18 be joined as a party to the proceedings.

Application of the definition of “prescribed interest” in Order 117A

Specification Order and Forfeiture Order

11. Rules 6, 7 and 8 of Order 117A provide for the procedures for applications to the Court by the Chief Executive to specify certain property as terrorist property under section 5(1)(b) of the Ordinance.

12. Rules 9, 10, 11 and 12 of Order 117A provide for the procedures for applications to the Court by the Secretary for Justice to forfeit terrorist property under section 13 of the Ordinance.

13. In the two types of applications identified above, the applicant needs to ascertain the whereabouts of the persons who will be affected by the order being applied for so that the applicant may serve the relevant court documents on them. It is considered that these persons should be the persons by, for or on behalf of whom the property is held. In practice, the process of ascertaining those whereabouts can only be carried out with reasonable efforts. With a view to enhancing the readability of the rules, the definition of “holder” has been included in rule 1(1) to represent this class of persons.

14. Under rule 1(1) of Order 117A, a “holder”, in the context of the two types of applications, is a person whom the applicant can reasonably ascertain to be a person by, for or on behalf of whom the property is held.

Therefore, for example, when rule 7(4) provides that certain court documents must be served on the “holders”, it means that the documents must be served on a person whom the Chief Executive can reasonably ascertain to be a person by, for or on behalf of whom the property (that is the subject of the application) is held. By virtue of section 2(4) of the Ordinance, the court documents will be served on a person who has a prescribed interest in the property that is the subject of the application.

Detention of Seized Property

15. Rules 18, 19 and 20 provide for the procedures for applications to the Court by an authorized officer for an order to authorize the detention of property seized under section 12G of the Ordinance.

16. Under rules 19(3) and 20(5), the applicant in those applications must serve the relevant order on (a) the person from whom the property was seized; and (b) on each person whom the applicant can reasonably ascertain to be *a person by, for or on behalf of whom the property was held immediately before it was seized*. By virtue of section 2(4) of the Ordinance, a person who has a prescribed interest in the seized property will be served with a copy of the order.

Scope of “Prescribed Interest”

17. Rule 1(4) of proposed Order 117A provides that “prescribed interest”, in relation to any property, means –

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege in connection with the property

18. The definition is modelled on the definition of “interest” under section 43(5) of the United Nation Office on Drugs and Crime (UNODC) Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) 2009¹ (extracts at **Annex A**) (previously section 2(1)(1) of UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill 2003²).

¹ The website for UNODC Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) 2009 is at –
<http://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf>

² The website for UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill 2003 is at –
<http://www.unodc.org/pdf/report_money_laundering_2003-09.pdf>

19. “Estate” is an interest in land. “Legal estate or interest” means the interest in property (land or personal) recognised at common law. “Equitable estate or interest” means the interest in property (land and personal) created and enforced at equity.

20. A “right” is an interest recognised and protected by the law, respect for which is a duty and disregard of which is a wrong³. A “power” is the authority vested in the donee (of the power) to modify a legal relationship, as where one disposes of property for his own or another's benefit⁴. “Privilege” is an exceptional or extraordinary right belonging to a person. In the context of United Kingdom Law in relation to property⁵, a privilege is some advantage to an individual or group of individuals. It is a right enjoyed by a few as opposed to a right enjoyed by all.⁶

21. As such, the scope of “prescribed interest” is very wide which would cover persons who own, control or have a right to possess the property concerned and those persons who have an interest and rights in the property enforceable at common law and at equity. This would, for example, include mortgagors, mortgagees, trustees, beneficiaries under a trust (for beneficiaries under a discretionary trust see paragraph 22 below), lessors and lessees and a person having a chose in action in respect of the property, etc.. Nevertheless, some categories of persons may have to be determined by the Court on a case-by-case basis in accordance with the facts of each case as to whether the persons have a “prescribed interest”, e.g. beneficiaries under a discretionary trust and licencees.

22. In the case of a discretionary trust, the beneficiaries have no equitable interest in the trust property. He is dependent upon the exercise by the trustees of their power of selection in his favour. Whether the discretionary beneficiaries could as a group or a sole member of the group may claim an entitlement to the income and thus has a right or privilege in connection with the property would depend on the terms of the discretionary trust and the circumstances of each case which, in the end, is a question for the court to decide.

23. In the case of a licence, though the licensee has no proprietary interest in the property, whether the licensee has any right, power or

³ Osborn's Concise Law Dictionary 7th Ed

⁴ A Dictionary of Law, LB Curzon

⁵ Law of Property Act 1925 c.20, s.62

⁶ Stroud's Judicial Dictionary of Words and Phrases 7th Ed..

privilege in connection of the property for the purpose of the definition “prescribed interest” would depend on the facts and circumstances. Different situations create different types of licences (e.g. bare licences, contractual licences, licences by estoppel, etc.) and hence different rights and protection for the licencees. Over the years a number of different types of licences have been recognised by the courts as enforceable and irrevocable⁷.

24. Even if the Court determines that certain categories of persons do not have the “prescribed interest” as defined in the Amendment Rules (e.g. bare licensee who has no right, power or privilege of any kind in the property), the Court may still, under section 2(6) of Cap.575, of its own motion or on application order that any person who may be affected by an application-

- (a) under section 5 in the case of an application under section 5(1) made inter partes; or
- (b) under section 13, 17 or 18,

be joined as a party to the proceedings.

25. To illustrate as an example, if a specification application is made inter partes under section 5(1)(b) of the Ordinance and under rule 7 of Order 117A to specify a land property of a terrorist as a terrorist property, the legal owner of the property, any person having an equitable interest in the property (e.g. the owner’s spouse), the mortgagee/chargee, the tenant, any person who is allowed to use the property under a contractual licence for a period of time, and, if the property is a trust property, the beneficiaries etc. would be regarded as having a “prescribed interest” under the Ordinance. These persons would be served with the summons, affidavit and orders involved in the proceedings under Order 117A as long as they can reasonably be ascertained by the applicant in those proceedings. They could also apply to the Court for compensation under section 18 of the Ordinance as of right.

26. If the Court considers that there are other persons who may also be affected by the application under section 5(1)(b) or 18 of the Ordinance, it may order that those other persons be joined as a party to the proceedings of the application.

⁷ Hurst v Picture Theatres Ltd [1915] 1 KB 1; Chandler v Kerley [1978] 1 WLR 693; Inwards v Baker [1965] 2 QB 29

Reference to Local Legislation

27. Below are some examples in Hong Kong legislation which include a reference to “interest” in relation to property –

- (a) Under section 2(1) of the Prevention of Bribery Ordinance (Cap. 201), “advantage” includes “**interest in property of any description**”. While the scope of meaning of the expression “interest in property of any description” is wide, whether it could be considered as wider or narrower than that of “prescribed interest” under Order 117A is subject to interpretation.
- (b) Under section 2(11) of the Organized and Serious Crime Ordinance (Cap. 455), property is held by any person if he holds any **interest** in it. And under subsection (1) of the same section, “interest”, in relation to property, includes right. Again, whether the scope of the meaning of “interest” under this definition could be considered wider or narrower than that of “prescribed interest” under Order 117A is subject to interpretation.
- (c) Under section 27 of the Import and Export Ordinance (Cap. 60), if an article, vessel or vehicle is liable to forfeiture under section 27(1) of Cap. 60, the **owner or the authorized agent** of the owner of the article, vessel or vehicle or **a person who was in possession** of the article, vessel or vehicle at the time of seizure, or **a person who has a legal or equitable interest** in the article, vessel or vehicle may give notice to the Commissioner of Customs and Excise claiming that the article, vessel or vehicle is not liable to forfeiture. The net under section 27 of Cap.60 appears to be narrower than that under the Ordinance as it may not, for example, cover a licensee who has the right to use the vessel. but is not in possession of it.
- (d) Under section 30 of the Trade Descriptions Ordinance (Cap. 362), if an authorized officer, for example, suspects that an offence has been committed in respect of any goods under Cap. 362, the officer may seize and detain the goods. The **owner of the goods or his authorized agents** shall be notified in writing. The goods so seized or detained may be released to **the person who appears to be the owner of the goods or the authorized**

agent of the owner. The net appears to be narrower than that under the Ordinance.

- (e) Under section 40 of the Airport Authority Ordinance (Cap. 483), the Airport Authority may detain an aircraft if there is any default in the payment of charges under the Ordinance. However, the Authority may not detain or continue to detain an aircraft by reason of any alleged default in the payment if **the operator of the aircraft or any other person claiming an interest therein** disputes that the charges are due and gives to the Authority sufficient security for the payment which are alleged to be due. As there is no definition of "interest" in Cap. 483, it is not certain whether the net could be considered as wider or narrower than that under the Ordinance.

Reference to other Common Law Jurisdictions

28. Based on information available on the Internet, we have looked at anti-terrorism legislation of certain common law jurisdictions, namely, Singapore, the United Kingdom, Australia and Canada (see **Annex B**) and found that what constitutes an "interest" in respect of property is rarely defined in overseas anti-terrorism legislation. The only legislation we have so far identified with a definition of "interest" in relation to property is the Proceeds of Crime Act 2002 of Australia. Section 338 of the Proceeds of Crime Act 2002 provides that "interest", in relation to property or a thing, means –

- (a) a legal or equitable estate or interest in the property;
- (b) a right, power or privilege in connection with the property.

The definition is identical to the definition of "interest" under UNODC's Model Provisions. The references to interest in property in the Proceeds of Crime Act 2002 are mainly related to restraining orders and forfeiture/confiscation orders (see **Annex C**).

**Security Bureau
October 2009**



UNODC
United Nations Office on Drugs and Crime



COMMONWEALTH
SECRETARIAT

INTERNATIONAL
MONETARY FUND



Annex A

**Model Provisions on Money
Laundering, Terrorist Financing,
Preventive Measures and Proceeds of
Crime
(for common law legal systems)**

April, 2009

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Introduction to the Model Provisions

These model provisions on money laundering, financing of terrorism, proceeds of crime and civil forfeiture are the outcome of a collaboration between the Commonwealth Secretariat, the International Monetary Fund (IMF) and the United Nations Office on Drugs and Crime (UNODC). They form a starting point for State authorities as they evaluate the measures that should be incorporated into domestic law in order to prevent, detect, and effectively sanction money laundering, the financing of terrorism and the proceeds of crime.

Using the Model Provisions

As part of an effort to assist jurisdictions prepare or upgrade their legislative framework to conform with international standards and best practices to implement anti-money laundering and combating the financing of terrorism (AML/CFT) measures, the UNODC in 2003 issued the [*Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill*](#).

These 2009 updated model provisions, which are based upon the relevant international instruments concerning money laundering and the financing of terrorism, the FATF 40+9 Recommendations and best practices, replace the 2003 UNODC Model.

The model provisions are intended to be a resource in drafting legislation to address money laundering and the financing of terrorism. Taken together, the provisions incorporate a legislative base for many of the requirements of the relevant international instruments and the FATF 40+9 Recommendations. The provisions also strengthen or supplement these standards in some respects. They suggest an approach both to criminally confiscate and civilly forfeit proceeds, instrumentalities and terrorist property.

State authorities considering the provisions should take care to adapt the underlying concepts and specific language to accord with constitutional and fundamental legal principles in their systems. As well, the provisions may be supplemented with additional measures a State considers suited to effectively combat money laundering and the financing of terrorism in the national context.

The eight Parts of these model provisions are set forth as separate units. Taken together they present a unified whole. Relevant definitions appear at the beginning of each Part. If all or selected Parts are used, adjustments to definitions will be necessary.

The document also includes several features to assist drafting authorities to understand the various provisions and to facilitate their consideration of choices relating to provisions:

- “Notes for Drafting Authorities” provide explanations of selected provisions and suggest various considerations for drafting authorities as they decide how best to proceed.
- Some provisions present “variants” and “optional language.” A “variant” provides two approaches for authorities to consider. Authorities should adopt one or the other, or their own separate approach. “Optional language” is italicized and sets forth an addition that may be included or not.
- Time periods for orders and other matters, whether days, months or years, appear in brackets. The bracketed number is a suggestion.

The eight Parts are as follows:

Part I:	Preliminary
Part II:	Money Laundering and Terrorist Financing Offences
Part III:	Cross Border Transportation of Currency and Bearer Negotiable Instruments
Part IV:	Preventive Measures
Part V:	Financial Intelligence Unit
Part VI:	Conviction-Based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders
Part VII	Civil Forfeiture
Part VIII	Recovered Assets Fund
Annex I	Model Decree on the Financial Intelligence Unit

The provisions were drafted by a group of experts, including participants from the Commonwealth Secretariat, the International Monetary Fund and the United Nations Office on Drugs and Crime, that met in London in March 2008, and in Washington D.C. in October 2008, and that finalised the provisions in April, 2009.

The document as a whole is a complex instrument with provisions that interconnect in various ways. The model provisions also cover a wide range of subject matter areas. While there was considerable effort to avoid inconsistencies and drafting errors, a review of model provisions by drafting authorities, the comparisons that are likely to take place with existing legislation, and experience that is gained through actual use of these or similar provisions are all likely lead to suggestions for adjustments and change.

The organisations hope to revisit the document within a reasonable period to incorporate new developments and standards, to alter the text to improve the provisions and to address any issues of inconsistency. We invite your comments and suggestions and your active participation in this endeavour. Comments should be directed to:

Commonwealth Secretariat

International Monetary Fund

United Nations Office on Drugs and Crime

O.Iguyovwe@commonwealth.int

S.Defontgalland@commonwealth.int

amlcft@imf.org

gpml@unodc.org

Part IV: Conviction-Based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders

Section 43 - Application of Part and Definitions

(5) In this Part, the following definitions shall apply:

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

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege in connection with the property.

Restraining Orders

Section 44 - Application for Restraining Order

- (1) Where a person has been convicted of an offence, has been charged with an offence, or is the subject of an investigation for an offence, (referred to hereafter in this Part as “the relevant person”), the enforcement authority may make application to the court for an order under subsection 2 against any one or more of the following:
 - (a) specified property that is reasonably believed to be proceeds or instrumentalities of such offence;
 - (b) specified property in which the relevant person has an interest.
- (2) An application for an order to restrain property reasonably believed to be proceeds or instrumentalities of an offence under subsection (1)(a) may be made to secure property for the purposes of an application for a confiscation order pursuant to Section 59.
- (3) An application for an order to restrain specified property in which the relevant person has an interest under subsection (1)(b) may be made to secure property for the purposes of a benefit recovery order [Option: or an extended benefit recovery order] pursuant to Section 63 [Option: and 65].
- (4) If so requested by the enforcement authority, an application for an order

pursuant to subsection (1) shall be heard ex parte and in camera unless to do so would clearly not be in the interest of justice.

- (5) An application made to secure property for the purposes of a confiscation order under subsection (1)(a) shall be in writing and shall be supported by an [Variants: affidavit; evidence; verified statement] of [specify officials to be authorised] indicating that the officer believes, and the grounds for his belief, that the property which is the subject of the application is proceeds of crime or an instrumentality.
- (6) Where an application under subsection (1)(a) is made prior to the charging of a person for an offence, the [Variants: affidavit; evidence; verified statement] shall also set forth the officer's belief, and the grounds for his belief, that the relevant person committed the offence, is the subject of an investigation for the offence and is likely to be charged with the offence or an offence arising from the same conduct.
- (7) An application to secure property for the purposes of a benefit recovery order [Option: or extended benefit recovery order] under subsection (1)(b) shall be in writing and shall be supported by an [Variants: affidavit; evidence; verified statement] of [specify officials to be authorised] indicating that the officer believes, and the grounds for his belief, that the relevant person derived a benefit directly or indirectly from the commission of the offence.
- (8) Where an application under subsection (1)(b) is made prior to the charging of the person with an offence, the [Variants: affidavit; evidence; verified statement] shall also set forth the officer's belief, and the grounds for his belief, that the relevant person committed the offence and is likely to be charged with the offence or a related offence.
- (9) If property which is the subject of an application under subsection (1)(b) is the property of a third party, the affidavit or statement shall indicate that the officer believes, and the grounds for his belief, that the property the subject of the application is property in which the relevant person has an interest.

Section 45 - Restraining Order

- (1) Where the enforcement authority applies to the court for a restraining order in accordance with Section 44, and the court is satisfied having regard to the facts and beliefs set out in the [Variants: affidavit; evidence; verified statement] in support of the application and any other relevant matter, that there are reasonable grounds to believe that subsection (1)(a) below, and any one of subsections (1)(b), (1)(c) [Option: and 1(d)] below are satisfied, it may order any of the matters set out in subsection (2) below:
 - (a) where the relevant person has not been convicted of the offence, that he committed the offence and that the person is either the subject of a criminal investigation or has been charged with the offence; and
 - (b) where the application for a restraining order is made for the purpose of securing property for the purpose of a confiscation order, that the property the subject of the application is proceeds of crime or an instrumentality; or
 - (c) where the application for a restraining order is made for the purpose of securing property for the purpose of a benefit recovery order, that the relevant person derived a benefit from the commission of the offence, and has an interest in that property.
 - [(d) Option: or where the application for a restraining order is made for the purpose of securing property for the purpose of an extended benefit recovery order, that offence is a serious offence for the purposes of Section 65 and that the relevant person has an interest in that property.]
- (2) The court may order any one or more of the following:
 - (a) that the property, or such part of the property as specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order;

- (b) that the property, or such part of the property as is specified in the order, shall be seized, taken into possession, delivered up for safekeeping or otherwise secured by a named authorised officer, the enforcement authority or such other person appointed for this purpose by the court; or
 - (c) if the court is satisfied that the circumstances so require, direct a named receiver or trustee to take custody and control of the property, or such part of the property as is specified in the order and to manage or otherwise deal with the whole or any part of the property in accordance with any direction from the court.
- (3) Where a receiver or trustee has been appointed under subsection (2)(c) in relation to property, he may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this:
- (a) becoming a party to any civil proceedings that affect the property;
 - (b) ensuring that the property is insured;
 - (c) realising or otherwise dealing with the property if it is perishable, subject to wasting or other forms of loss, its value volatile or the cost of its storage or maintenance is likely to exceed its value, subject to the proviso that this power may only be exercised without the prior approval of the court in circumstances where:
 - (i) all persons known by the trustee to have an interest in the property consent to the realisation or other dealing with the property; or
 - (ii) the delay involved in obtaining such approval is likely to result in a significant diminution in the value of the property; or
 - (iii) the cost of obtaining such approval would, in the opinion of the trustee, be disproportionate to the value of the property concerned;

- (d) if the property consists, wholly or partly, of a business:
 - (i) employing, or terminating the employment of, persons in the business;
 - (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis; and
 - (iii) selling, liquidating or winding up the business if it is not a viable, going concern, subject to obtaining the prior approval of the court; and
 - (e) if the property includes shares in a company, exercising rights attaching to the shares as if the trustee were the registered holder of the shares.
- (4) An order made under subsection 2(c) terminates:
- (a) when ordered by the court; or
 - (b) when an order is made pursuant to Section 70; or
 - (c) [30] days after the making of a confiscation order or a benefit recovery order.
- (5) A restraining order in respect of property may be made whether or not there is any evidence of risk of the property being disposed of, or otherwise dealt with, in such manner as would defeat the operation of this Act.

Section 46 - Enforcement of Restraining Orders Abroad

- (1) This section applies if a restraining order under Section 45 has been made.
- (2) Where the enforcement authority believes that specified property in which the relevant person has an interest is situated in a State or territory outside [insert name of the State], it may request assistance from the government

of such State or territory to enforce the restraining order in such State or territory.

Section 49 - Exclusion of Property from Restraint

(1) Where a person who is not the relevant person having an interest in property that is subject to a restraining order applies to the court to exclude his interest from the order, the court shall grant the application if satisfied:

(a) in the case of a restraining order to secure property for a confiscation order either:

(i) that the property is not proceeds or an instrumentality; or

(ii) that the applicant was not, in any way, involved in the commission of the offence in relation to which the restraining order was made;

and

(iii) where the applicant acquired the interest before the commission of the offence, the applicant did not know that the relevant person would use, or intended to use, the property in or in connection with the commission of the offence; or

(iv) where the applicant acquired the interest at the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.

(b) in the case of a restraining order to secure property for a benefit recovery order, [Option: or extended benefit recovery order] that the property interest which is the subject of the application is not property in which the relevant person has an interest.

- (2) For purposes of subsection (1)(a)(iii) and (iv), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the relevant person.
- (3) Where a person having an interest in property that is subject to a restraining order who is a defendant applies to the court to exclude his interest from the order, the court shall grant the application if satisfied:
 - (a) in the case of an order that secures property for a confiscation order, that the property is not proceeds or an instrumentality of crime; and
 - (b) in the case of an order that secures property for a benefit recovery order, [Option: or extended benefit recovery order,] that a benefit recovery order [Option: or extended benefit recovery order] cannot be made against the defendant.
- (4) Where property is restrained to secure it for the purposes of both confiscation and benefit recovery [Option: or extended benefit recovery] orders, a court may decline to make an order excluding property from restraint if the criteria for exclusion from only one kind of restraining order are satisfied upon the ground that the other purpose for which the property is restrained still applies.

Section 53 - Protection of the Trustee

Where a court has appointed a receiver or trustee in relation to property pursuant to Sections 45(2)(c) or 70, the receiver or trustee shall not be personally liable for any loss or claim arising out of the exercise of powers conferred upon him by the order or this Part unless the court in which the claim is made is satisfied that:

- (a) the applicant has an interest in the property in respect of which the loss or claim is made; and
- (b) the loss or claim arose by reason of the negligence or reckless or intentional misconduct of the receiver or trustee.

Section 59 - Confiscation Order on Conviction

- (1) A confiscation order is an order *in rem*, following conviction for an offence, to forfeit to the State property that is the proceeds or instrumentalities of such offence.
- (2) The court may make an order under this Section if the enforcement authority has applied to the court for an order under Section 55 or, in the absence of an application, if the court believes it is appropriate to make an order.
- (3) Where the court is satisfied, on a balance of probabilities, that property is proceeds of crime in respect of an offence for which the defendant has been convicted, the court shall order that it be confiscated.
- (4) Where the court is satisfied, on a balance of probabilities, that property is an instrumentality of crime in respect of an offence for which the defendant has been convicted, the court may order that it be confiscated.
- (5) In considering whether to issue a confiscation order, the court may have regard to:
 - (a) the rights and interests of third parties in the property;
 - (b) the gravity of the offence concerned;
 - (c) any extraordinary hardship, beyond that which might ordinarily be expected to flow from the operation of this section, that may reasonably be expected to be caused to any person by the operation of the order; and
 - (d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.
- (6) In determining whether property is an instrumentality of such an offence, unless satisfied to the contrary, the court may infer that the property is an instrumentality of crime if it was in the defendant's possession at the time of or immediately after the commission of the offence for which the

defendant was convicted.

- (7) In determining whether property is proceeds of such an offence, unless satisfied to the contrary, the court may infer that the property was derived, obtained or realised as a result of or in connection with the commission of the offence, if it was acquired or possessed by the defendant, during or within a reasonable time after the period of the commission of the offence.
- (8) Where the court orders the confiscation of property other than money, the court shall specify in the order the amount that it considers to be the value of the property at the time of its order.
- (9) Where the court makes a confiscation order, the court may give such directions as are necessary or convenient for giving effect to the order.

Section 62 - Exclusion of Property from a Confiscation Order

- (1) A person who is not the defendant and who has an interest in property that is subject to a confiscation order may apply to the court to exclude his interest from the order. The court shall grant the application if satisfied:
 - (a) that the property is not proceeds or an instrumentality; or
 - (b) that the applicant was not in any way involved in the commission of the offence in relation to which the confiscation order was made;and
 - (c) where the applicant acquired the interest before the commission of the offence, the applicant did not know that the defendant would use, or intended to use, the property in or in connection with the commission of the offence; or
 - (d) where the applicant acquired the interest at the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of

crime.

- (2) For purposes of subsections (1)(c) and (1)(d), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the defendant.
- (3) An application under this section may be made whether or not the interest in property the subject of the application is or was the subject of a restraining order.
- (4) An application under this section shall be made with [6] months of the day on which the confiscation order is made, except that a person who was served with the application for a confiscation order under Section 57 or made an appearance at the hearing on the application for a confiscation order may not, without leave of court, make an application under this section after the confiscation order or whose application to exclude the property from restraint under Section 49 was considered and dismissed.

Overseas Anti-terrorism Legislation

Australia

- Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2008
- Suppression of the Financing of Terrorism Act 2002
- Security Legislation Amendment (Terrorism) Act 2002
- Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002

Canada

- Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism
- Anti-Terrorism Act

UK

- Anti-terrorism, Crime and Security Act 2001

Singapore

- Terrorism (Suppression of Financing) Act (Cap. 325)
- United Nations (Anti-Terrorism Measures) Regulations 2001 made under the United Nations Act (Cap. 339)

PROCEEDS OF CRIME ACT 2002

Chapter 2 - The Confiscation Scheme

Part 2 - 1 - Restraining Orders

Division 1 - Making restraining orders

SECT 24 - Allowance for expenses

(1) The court may allow any one or more of the following to be met out of property, or a specified part of property, covered by a restraining order:

- (a) the reasonable living expenses of the person whose property is restrained;
- (b) the reasonable living expenses of any of the dependants of that person;
- (c) the reasonable business expenses of that person;
- (d) a specified debt incurred in good faith by that person.

(2) The court may only make an order under subsection (1) if:

- (a) the person whose property is restrained has applied for the order; and
- (b) the person has notified the DPP in writing of the application and the grounds for the application; and

(c) the person has disclosed all of his or her **interests** in property, and his or her liabilities, in a statement on oath that has been filed in the court; and

(ca) the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:

- (i) proceedings under this Act; or
- (ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and

(d) the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by:

- (i) a restraining order; or
- (ii) an interstate restraining order; or
- (iii) a foreign restraining order that is registered under the Mutual Assistance Act.

(3) Property that is covered by:

- (a) a restraining order; or
- (b) an interstate restraining order; or
- (c) a foreign restraining order that is registered under the Mutual Assistance Act;

is taken, for the purposes of paragraph (2)(d), not to be covered by the order if it would not be reasonably practicable for the Official Trustee to take custody and control of the property.

Division 2 - How restraining orders are obtained

SECT 26 - Notice of application

(1) Subject to subsection (4), the DPP must:

(a) give written notice of an application for a restraining order covering property to the owner of the property (if the owner is known); and

(b) include with the notice a copy of the application and any affidavit supporting the application.

(2) Subject to subsection (4), the DPP must also:

(a) give written notice of an application for a restraining order covering property to any other person the DPP reasonably believes may have an **interest** in the property; and

(b) include with the notice:

(i) a copy of the application; and

(ii) a further notice that the person may request that the DPP give the person a copy of any affidavit supporting the application.

The DPP must comply with any such request as soon as practicable.

(3) The court must not (unless subsection (4) applies) hear the application unless it is satisfied that the owner of the property to which the application relates has received reasonable notice of the application.

(4) The court must consider the application without notice having been given if the DPP requests the court to do so.

(5) The court may, at any time before finally determining the application, direct the DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

(6) A person who claims an **interest** in property may appear and adduce evidence at the hearing of the application.

Part 2 - 2 - Forfeiture Orders

Division 2 - Other relevant matters when a court is considering whether to make forfeiture orders

SECT 55 - Forfeiture orders can extend to other interests in property

(1) In specifying an **interest** in property in a forfeiture order, the court may also specify other **interests** in the property (regardless of whose they are) if:

(a) the amount received from disposing of the combined **interests** would be likely to be greater than the amount received from disposing of each of the **interests** separately; or

(b) disposing of the **interests** separately would be impracticable or significantly more difficult than disposing of the combined **interests**.

(2) If the court so specifies other **interests** in the forfeiture order, the court may make such ancillary orders as it thinks fit for the protection of a person having one or more of those other **interests**. These ancillary orders may include:

(a) an order directing the Commonwealth to pay the person a specified amount as the value of the person's **interest** in the property; or

(b) an order directing that specified other **interests** in the property be transferred to the person.

(3) In deciding whether to make an ancillary order, the court must have regard to:

(a) the nature, extent and value of the person's **interest** in the property concerned; and

(b) if the court is aware that any other person claims an **interest** in the property--the nature, extent and value of the **interest** claimed; and

(c) any other matter that the court considers relevant.

Division 3 - How forfeiture orders are obtained

SECT 61 - Notice of application

(1) The DPP must give written notice of an application for a forfeiture order to:

(a) if the order is sought relating to a person's conviction of an offence--the person; and

(b) any person who claims an **interest** in property covered by the application; and

(c) any person whom the DPP reasonably believes may have an **interest** in that property.

(2) The court hearing the application may, at any time before finally determining the application, direct the DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

SECT 64 - Procedure on application

(1) Any person who claims an **interest** in property covered by an application for a forfeiture order may appear and adduce evidence at the hearing of the application.

(2) If the application relates to a person's conviction of an indictable offence, the court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) that offence; or

(ii) if the person is taken to be convicted of that offence because of paragraph 331(1)(c)--the other offence referred to in that paragraph; and

(b) the evidence given in any such proceeding.

(3) The court may still make a forfeiture order if a person entitled to be given notice of the relevant application fails to appear at the hearing of the application.

SECT 67 - First exception--registrable property

(1) Despite section 66, if property specified in the forfeiture order is registrable property:

(a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and

(b) the DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable **interest** in that property; and

(c) the Commonwealth is entitled to be registered as the owner of that property; and

(d) the Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.

(2) Any action by the DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 69(1).

(3) The Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an **interest** in property of that kind.

Division 6 - The effect on forfeiture orders of acquittals and quashing of convictions

SECT 82 - Notice of application for confirmation of forfeiture order

(1) The DPP must give written notice of an application for confirmation of the forfeiture order to:

(a) the person whose conviction was quashed; and

(b) any person who claims, or prior to the forfeiture claimed, an **interest** in property covered by the order; and

(c) any person whom the DPP reasonably believes may have had an **interest** in that property before the forfeiture.

Note: If the DPP applies for confirmation of a forfeiture order, it can also apply for an examination order under Part 3-1.

(2) The court hearing the application may, at any time before finally determining the application, direct the DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

SECT 83 - Procedure on application for confirmation of forfeiture order

(1) Any person who claims an **interest** in property covered by the forfeiture order may appear and adduce evidence at the hearing of the application for confirmation of the order.

(2) The court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) the offence of which the person was convicted; or

(ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)--the other offence referred to in that paragraph;

including any appeals relating to the conviction; and

(b) the evidence given in any such proceeding.

Division 7 - Miscellaneous

SECT 90 - Buying out other interests in forfeited property

The Minister must arrange for an **interest** in property to be transferred to a person (the *purchaser*) if:

(a) the property is forfeited to the Commonwealth under this Part; and

(b) the **interest** is required to be transferred to the purchaser under subsection 88(1) or 89(1), or under a direction under paragraph 73(2)(c); and

(c) the purchaser's **interest** in the property, immediately before the forfeiture took place, was not the only **interest** in the property; and

(d) the purchaser gives written notice to each other person who had an **interest** in the property immediately before the forfeiture took place that:

(i) the purchaser intends to purchase that other **interest** from the Commonwealth; and

(ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that **interest** with the Minister; and

(e) no person served with notice under paragraph (d) in relation to that **interest** lodges a written objection to the purchase of that **interest** with the Minister within the period referred to in that paragraph; and

(f) the purchaser pays to the Commonwealth, while that **interest** is still vested in the Commonwealth, an amount equal to the value of that **interest**.

Part 2 - 3 - Forfeiture on conviction of a serious offence

Division 2 - Effect of forfeiture on conviction of a serious offence

SECT 97 - First exception--registrable property

(1) Despite section 96, if property forfeited under section 92 is registrable property:

(a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and

(b) the DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable **interest** in that property; and

(c) the Commonwealth is entitled to be registered as the owner of that property; and

(d) the Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.

(2) Any action by the DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 99(1).

(3) The Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an **interest** in property of that kind.

Division 3 - Recovery of forfeited property

SECT 106 - Buying out other interests in forfeited property

The Minister must arrange for an **interest** in property to be transferred to a person (the *purchaser*) if:

(a) the property is forfeited to the Commonwealth under section 92; and

(b) the **interest** is required to be transferred to the purchaser under section 105, or under a direction under subparagraph 102(1)(d)(i); and

(c) the purchaser's **interest** in the property, immediately before the forfeiture took place, was not the only **interest** in the property; and

(d) the purchaser gives written notice to each other person who had an **interest** in the property immediately before the forfeiture took place that:

(i) the purchaser intends to purchase that other **interest** from the Commonwealth; and

(ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that **interest** with the Minister; and

(e) no person served with the notice under paragraph (d) in relation to that **interest** lodges a written objection to the purchase of that **interest** with the Minister within the period referred to in that paragraph; and

(f) the purchaser pays to the Commonwealth, while that **interest** is still vested in the Commonwealth, an amount equal to the value of that **interest**.

Division 4 - The effect on forfeiture of convictions being quashed

SECT 108 - Notice of application for confirmation of forfeiture

(1) The DPP must give written notice of an application for confirmation of the forfeiture to:

(a) the person whose conviction was quashed; and

(b) any person who claims, or prior to the forfeiture claimed, an **interest** in property covered by the forfeiture; and

(c) any person whom the DPP reasonably believes may have had an **interest** in that property before the forfeiture.

Note: If the DPP applies for confirmation of a forfeiture, it can also apply for an examination order under Part 3-1.

(2) The court hearing the application may, at any time before finally determining the application, direct the DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

SECT 109 - Procedure on application for confirmation of forfeiture

(1) Any person who claims an **interest** in property covered by the forfeiture may appear and adduce evidence at the hearing of the application for confirmation of the forfeiture.

(2) The court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) the offence of which the person was convicted; or

(ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)--the other offence referred to in that paragraph;

including any appeals relating to the conviction; and

(b) the evidence given in any such proceeding.