

資料文件

《2009年高等法院規則(修訂)規則》小組委員會

對在二零零九年十月二十八日小組委員會會議 所提事項的回應

目的

在小組委員會二零零九年十月二十八日會議上，委員要求當局就為施行《聯合國(反恐怖主義措施)條例》(第 575 章)(下稱“條例”)所制訂的《2009年高等法院規則(修訂)規則》(下稱“修訂規則”)中所載列的“訂明權益”的定義，提供補充資料。本文件載述委員要求當局的有關資料。

第 117A 號命令就“訂明權益”下定義

2. 條例第 2(1)條訂明：

“訂明權益”(prescribed interest)就任何財產而言，指根據法院規則為施行本條例而訂明為權益的該財產的權益。

3. 條例第 2(4)條進一步訂明，擁有任何財產的訂明權益的人，須當作為持有或曾持有該財產的人，或由或曾由他人為之或代表持有該財產的人。“持有該財產，或由他人為之或代表持有該財產”一詞(和類似詞句)，條例第 6、12H(4)(a)(ii)、15(1)(b)、17 及 18 條也有採用。詳情見下文第 5 至 10 段。

4. 此外，條例第 20(1)(e)條訂明，法院規則可為“訂明權益”的定義訂明權益，訂定條文。第 117A 號命令第 1(4)條規則遂就“訂明權益”訂明定義。

條例內“訂明權益”一詞的定義的適用範圍

5. 第 6(7)條訂明，獲發給第 6(1)條所指通知(即“凍結通知”)的人，須立刻把該通知的副本送交該財產所屬的人，或由

他人為之或代表持有該財產的人(如有的話)。這實際上表示，該通知應送交擁有該要凍結財產的訂明權益的任何人。

6. **第 12H(4)(a)條**訂明，哪類人可向法庭申請指示，以發還某些藉根據第 12H(2)或(3)條作出的命令被扣留的財產。其中一類可提出這項申請的人，是持有該財產的人，或由他人為之或代表持有該財產的人。這表示，擁有該財產的訂明權益的人，可向法庭申請發還被扣留的財產。其他可提出這項申請的人，是原管有人及以其他方式擁有該財產的權益的人。

7. **第 15(1)(b)(iii)條**訂明，處理根據第 6 條凍結財產的特許可包括一項例外情況，這項例外情況關乎任何持有該等資金的人，或任何由他人為之或代表持有該等資金的人的合理生活開支、合理法律開支及根據《僱傭條例》(第 57 章)需要給予的費用。這表示，擁有被凍結資金的訂明權益的人的指明項目，歸入例外情況的範圍。

8. **第 17(1)(a)(ii)條**訂明，凡任何財產藉根據第 5(2)條作出的命令指明為恐怖分子財產，而有關命令是經單方面提出而取得，則任何持有該財產的人，或任何由他人為之或代表持有該財產的人，可向法庭申請撤銷該命令。**第 17(1)(b)條**訂明，凡任何財產藉根據第 6(1)條發出的通知而被凍結，則任何持有該財產的人，或任何由他人為之或代表持有該財產的人，可向法庭申請撤銷該通知。這表示，擁有該指明為恐怖分子財產的財產或被凍結財產的訂明權益的任何人，可向法庭申請撤銷有關命令或通知。

9. 其他可向法庭申請撤銷有關命令或通知的人，是獲法庭信納為受該命令或通知所影響的人。事實上，條例第 2(6)條訂明，法庭可命令任何受第 17 條所指申請所影響的人，加入成為有關法律程序的一方。

10. **第 18(1)(d)條**訂明，凡任何財產已不再被指明為恐怖分子財產，則任何持有該財產的人，或任何由他人為之或代表持有該財產的人，可向法庭申請，要求政府作出賠償。**第 18(2A)條**訂明，凡任何財產根據第 12G 條被檢取，在符合第 18(2A)(b)條指明的條件下，任何持有該財產的人，或任何由他人為之或代表持有該財產的人，可向法庭申請，要求政府作出賠償。這表示，擁有該曾被指明為恐怖分子財產的財產，或被政府檢取的財產的訂

明權益的人，可向法庭申請賠償。同樣，條例第 2(6)條訂明，法庭可命令任何受第 18 條所指申請所影響的人，加入成為有關法律程序的一方。

第 117A 號命令內“訂明權益”一詞的定義的適用範圍

指明命令和充公令

11. 第 117A 號命令第 6、7 及 8 條規則就行政長官根據條例第 5(1)(b)條向法庭提出申請，要求指明某些財產為恐怖分子財產的程序，訂定條文。

12. 第 117A 號命令第 9、10、11 及 12 條規則就律政司司長根據條例第 13 條向法庭提出申請，要求充公恐怖分子財產的程序，訂定條文。

13. 關於上述兩類申請，申請人均須尋找會受所申請命令影響的人的下落，以便把法庭文件送達有關人等。有關人等應為持有該財產的人，或由他人為之持有或由他人代為持有該財產的人。實際上，尋找有關人等下落的人，在尋找過程中必須付出合理的努力。為了使有關規則更為易明，第 1(1)條規則已納入“持有人”的定義，以表示這一類人。

14. 根據第 117A 號命令第 1(1)條規則，就這兩類申請而言，“持有人”是能合理地確定為持有該財產的人，或由他人為之持有或由他人代為持有該財產的人。因此，舉例來說，第 7(4)條規則訂明，某些法庭文件必須送達“持有人”，即指有關文件必須送達行政長官能合理地確定為持有該財產的人，或由他人為之持有或由他人代為持有該財產的人(即申請標的)。憑藉條例第 2(4)條，法庭文件會送達擁有該財產(即申請標的)的訂明權益的人。

扣留被檢取的財產

15. 第 18、19 及 20 條規則就獲授權人員向法庭提出申請，要求作出授權扣留根據條例第 12G 條被檢取財產的命令的程序，訂定條文。

16. 根據第 19(3)及 20(5)條規則，有關申請的申請人須向(a)原管有人；及(b)申請人能合理地確定為在緊接該財產被檢取之前是持有該財產的每一人，或是由他人為之持有或由他人代為持有該財產的每一人，送達有關命令。憑藉條例第 2(4)條，凡擁有被檢取財產的訂明權益的人，會獲送達該命令的文本。

“訂明權益”的涵蓋範圍

17. 建議的第 117A 號命令第 1(4)條規則訂明，“訂明權益”就任何財產而言，指一

- (a) 該財產的法律或衡平法上的產業權或權益；或
- (b) 與該財產相關的權利、權力或特權。

18. 這個定義，是以《2009 年聯合國毒品和犯罪問題辦事處有關清洗黑錢、恐怖分子融資活動、預防措施和犯罪得益(適用於普通法法律制度)的條文範本》(Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems))¹第 43(5)條所訂“權益”一詞的定義為藍本(摘錄載於附件 A (只有英文版本))(前為《2003 年聯合國毒品和犯罪問題辦事處清洗黑錢、犯罪得益和恐怖分子融資活動條例草案範本》(UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill 2003)²第 2(1)(1)條)。

19. “產業權”屬土地權益。“法律上的產業權或權益”，指普通法認許的(土地或非土地)財產的權益。“衡平法上的產業

¹ 《2009 年聯合國毒品和犯罪問題辦事處有關清洗黑錢、恐怖分子融資活動、預防措施和犯罪得益(適用於普通法法律制度)的條文範本》的網址為：

<http://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf>

² 《2003 年聯合國毒品和犯罪問題辦事處清洗黑錢、犯罪得益和恐怖分子融資活動條例草案範本》的網址為：

<http://www.unodc.org/pdf/report_money_laundering_2003-09.pdf>

權或權益”，指在衡平法上訂立和強制執行的(土地或非土地)財產的權益。

20. “權利”是獲法律認許和受法律保障的權益，必須尊重，不容漠視³。“權力”是賦予受贈人(獲授權人)的權限，以改變法律上的關係，例如，某人為了本身或他人的利益而處置財產⁴。“特權”是某人所擁有的特殊或特別權利。就關乎財產的英國法律⁵而言，特權是給予個人或一組人的某些利益，是少數人而非所有人享有的權利⁶。

21. 因此，“訂明權益”的涵蓋範圍相當廣泛，包括擁有或掌控權利或有權管有有關財產的人，以及擁有在普通法和衡平法中可強制執行的財產的權益和權利的人。因此，按揭人、承按人、受託人、信託下的受益人(關於酌情信託下的受益人，見下文第 22 段)、出租人和承租人，以及擁有有關財產的據法權產的人等等，均會包括在內。不過，某些類別人士或須由法庭按每宗個案的個別情況和根據每宗個案的案情，裁定他們是否擁有“訂明權益”，例如酌情信託下的受益人和特許持有人。

22. 就酌情信託而言，受益人並不擁有該信託財產的衡平法權益，而是取決於受託人是否行使其權力挑選他。酌情受益人可否以一組人或一組人中的單一成員的名義，申索有關收益的享有權，因而擁有與該財產相關的權利或特權，會視乎酌情信託的條款和每宗個案的情況而定，而這個問題，最終須由法庭作出決定。

23. 至於就特許而言，雖然特許持有人在有關財產沒有所有權權益，但就“訂明權益”的定義而言，特許持有人是否擁有與該財產相關的權利、權力或特權，會視乎有關事實和情況而定。不同情況會產生不同種類的特許(例如：無條件特許、契約性特許、不得退回的特許等)，而特許持有人亦因而獲得不同的權利

³ Osborn's Concise Law Dictionary 第 7 版

⁴ A Dictionary of Law, LB Curzon

⁵ 《1925 年土地財產法法令》第 20 章第 62 條

⁶ Stroud's Judicial Dictionary of Words and Phrases 第 7 版

和保障。多年來，法庭已承認多種不同的特許為可強制執行和不可撤回的特許⁷。

24. 即使法庭裁定某些類別人士並不擁有修訂規則所界定的“訂明權益”（例如：無條件特許持有人並不擁有有關財產的任何種類權利、權力或特權），法庭仍可根據第 575 章第 2(6)條，主動或應申請，命令：

- (a) 任何受第 5 條所指的申請(如屬在各方之間提出的第 5(1)條所指的申請)所影響的人；或
- (b) 任何受第 13、17 或 18 條所指的申請所影響的人，

加入成為有關法律程序的一方。

25. 舉例來說，如根據條例第 5(1)(b)條及第 117A 號命令第 7 條規則在各方之間提出指明申請，指明某一名恐怖分子的土地財產為恐怖分子財產，則根據條例，該財產的法定擁有人、任何擁有該財產的衡平法權益的人士(如擁有人的配偶)、承按人／承押記人、租客、任何根據契約性特許獲准在一段時間內使用該財產的人士及受益人(如屬信託財產)等，會視為擁有“訂明權益”。根據第 117A 號命令，只要申請人在有關法律程序中能合理地確定這些人，這些人會獲送達法律程序所涉及的傳票、誓章及命令。他們也有當然權利，根據條例第 18 條向法庭申請賠償。

26. 如法庭認為還有其他人可能也受根據條例第 5(1)(b)或 18 條提出的申請所影響，可命令該等人士加入成為有關申請的法律程序的一方。

參考本地法例

27. 以下是香港法例中就財產提述“利益”的一些例子：

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

- (a) 根據《防止賄賂條例》(第 201 章)第 2(1)條，“利益”包括“**任何種類的財產權益**”。“任何種類的財產權益”這詞句的涵義甚廣，但到底其較第 117A 號命令所指的“訂明權益”的涵義為廣，還是較其為窄，則有不同的詮釋。
- (b) 根據《有組織及嚴重罪行條例》(第 455 章)第 2(11)條，任何人持有財產上的任何**權益**，即屬持有該財產。另外，根據同一條文第(1)款，“權益”就財產而言，包括權利。至於這個定義中“權益”的涵義較第 117A 號命令所指的“訂明權益”的涵義為廣，還是較其為窄，同樣有不同的詮釋。
- (c) 根據《進出口條例》(第 60 章)第 27 條，如物品、船隻或車輛為根據第 60 章第 27(1)條可予沒收者，該物品、船隻或車輛的**擁有人或該擁有人的指定代理人**，或在作出檢取時**管有該物品、船隻或車輛的人**，或對該物品、船隻或車輛**享有法律或衡平法上的權益的人**，可向海關關長發出通知，聲請該物品、船隻或車輛不應予以沒收。第 60 章第 27 條所涵蓋的範圍似乎較條例的為窄，例如它未必涵蓋有權使用但並不管有船隻的特許持有人。
- (d) 根據《商品說明條例》(第 362 章)第 30 條，如獲授權人員懷疑有人就任何貨品已犯第 362 章所訂罪行，該人員可檢取和扣留有關貨品。**貨品擁有人或其獲授權代理人**須獲書面通知。檢取或扣留的貨品可發還予**似是該等貨品的擁有人的人或其獲授權代理人**。本條所涵蓋的範圍似乎較條例的為窄。
- (e) 根據《機場管理局條例》(第 483 章)第 40 條，如有人未有根據條例繳付費用，機場管理局可扣留有關飛機。不過，如有關**飛機的營運人或聲稱在這方面有利害關係的任何其他人**質疑有關費用是否已須繳付，以及就指稱須繳付的費用向管理局提供足夠的支付保證，則管理局不得以指稱沒有繳付費用為理由，將該飛機扣留或繼續扣留。第 483 章未有界定“權益”的定義，所以不能肯定涵蓋範圍到底較條例的為廣，還是較其為窄。

參考其他普通法適用地區

28. 我們根據在互聯網取得的資料，研究過若干普通法適用地區，即新加坡、英國、澳洲和加拿大的反恐怖主義法例(見附件B (只有英文版本))，發現海外的反恐怖主義法例鮮有就何謂財產的“權益”，作出界定。我們迄今找到有就財產的“權益”訂明定義的唯一一條法例，就是澳洲的《Proceeds of Crime Act 2002》。《Proceeds of Crime Act 2002》第 338 條訂明，“權益”就任何財產或物品而言，指一

- (a) 該財產的法律或衡平法上的產業權或權益；
- (b) 與該財產相關的權利、權力或特權。

這個定義，與聯合國毒品和犯罪問題辦事處的條文範本所訂“權益”的定義，完全相同。《Proceeds of Crime Act 2002》對財產權益的提述，主要關乎限制令和充公／沒收令(見附件C (只有英文版本))。

保安局

二零零九年十月

**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:

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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.