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HOUSE OF REPRESENTATIVES

PROCEEDS OF CRIME LEGISLATION AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the
Honourable Michael Duffy MP)



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PROCEEDS OF CRIME LEGISLATION AMENDMENT BILL 1991GENERAL OUTLINE

On 20 March 1990 the Prime Minister announced that a Trust Fund would be established 'to turn the proceeds of crime back against the criminal'. It was announced that the Trust Fund would be a pool into which would be paid all those funds which are recovered under the Proceeds of Crime Act or the drug trafficking provisions of the Customs Act. The Trust Fund will also receive money and property recovered under section 9 of the *Crimes Act 1914*.

The money in the Trust Fund is to be distributed equally to law enforcement agencies and to drug education programs and programs for the rehabilitation of drug users. Some money is required for other purposes. For example, for repatriation to a foreign country where money recovered under the Proceeds of Crime Act is derived from an international order which is registered under the *Mutual Assistance in Criminal Matters Act 1987* for enforcement in Australia and the Mutual Assistance arrangement between Australia and the foreign country may provides for repatriation of the money recovered.

It is proposed that the Trust Fund be a trust account for the purposes of the Audit Act.

FINANCIAL IMPACT

It is anticipated that approximately \$9 million will be distributed through the Trust Fund over the next three years. As at 30 June 1990, total recoveries under the Proceeds of Crime Act and Part XIII Division 3 of the Customs Act were nearly \$7 million. An amount of nearly \$47 million was restrained under both Acts pending the making of future orders.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

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| . AFP | Australian Federal Police |
| . Audit Act | <i>Audit Act 1901</i> |
| . Bankruptcy Act | <i>Bankruptcy Act 1966</i> |
| . CRF | Consolidated Revenue Fund |
| . Customs Act | <i>Customs Act 1901</i> |
| . Crimes Act | <i>Crimes Act 1914</i> |
| . LEPR | Law Enforcement Policy and Resources Committee |
| . MA Act | <i>Mutual Assistance in Criminal Matters Act 1987</i> |
| . MCDS | Ministerial Council on Drug Strategy |
| . Proceeds Act | <i>Proceeds of Crime Act 1987</i> |

NOTES ON CLAUSES**PART 1 - INTRODUCTORY****Clause 1 - Short title**

Formal.

Clause 2 - Commencement

Subclause 2(2) provides that, apart from the formal provisions which will commence upon the Royal Assent, the provisions of the Bill will commence upon a date or dates to be fixed by Proclamation. This will allow for the preparation of subordinate legislation which is required by a number of the provisions of the Bill.

Under subclause 2(3), if the provisions of the Bill are not proclaimed earlier, those provisions will commence automatically 6 months after the Royal Assent.

PART 2 - AMENDMENTS OF THE *CRIMES ACT 1914***Clause 3 - Principal Act**

This clause identifies the *Crimes Act 1914* as the Principal Act amended by Part 2.

Clause 4 - Interpretation

This clause inserts two new definitions into section 4. The new defined terms are "Official Trustee" and "Trust Fund". These new expressions are used in new subsection 9(4) and new sections 9A and 9B.

Clause 5 - Seizure and condemnation of forfeitable goods

Section 9 of the Principal Act (Seizure and condemnation of forfeitable goods) provides that any constable may, without warrant, seize any articles that are forfeited, or which he or she has reasonable ground to believe are forfeited, under any law of the Commonwealth. After subsequent condemnation proceedings, the articles are dealt with as directed by the Attorney-General. The provision is rarely used, usually in relation to counterfeit coins or illegal radio communications equipment. It should be noted that the provision applies to property which is forfeitable under any Commonwealth legislation, whether administered by the Attorney-General or another Minister.

Clause 5 proposes the insertion of a new subsection 9(4) to provide that all articles which are condemned as forfeited must be transferred to the Official Trustee to be dealt with under proposed section 9A.

Clause 6 - Insertion of new section 9A - Forfeited articles to be dealt with by Official Trustee

Proposed section 9A provides that, unless the Attorney-General otherwise directs (eg in the case of items the possession of which is unlawful destruction would be ordered), the articles be sold or otherwise disposed of by the Official Trustee and the net proceeds paid to the Trust Fund. The Attorney-General will retain his existing power to give a direction that the forfeited articles be disposed in some other manner. Proposed paragraph 9A(b) provides that the Official Trustee is authorised to deduct its remuneration and other costs, charges and expenses as provided by proposed section 9B.

Clause 6 - Insertion of new section 9B - Costs etc payable to Official Trustee

Proposed section 9B provides for the Official Trustee's remuneration, and the costs, charges and expenses, connected with its functions and duties under proposed section 9A. Regulations may be made under the Crimes Act providing for this remuneration and other charges. In the absence of such regulations, the remuneration and other charges are to be calculated pursuant to the regulations under section 55 of the Proceeds Act.

Section 55 of the Proceeds Act provides for the remuneration of the Official Trustee. The rates of remuneration are set out in the Proceeds of Crime Regulations (SR 236/1989).

PART 3 - AMENDMENTS OF THE CUSTOMS ACT 1901

Clause 7 - Principal Act

This clause identifies the *Customs Act 1901* as the Principal Act to be amended by Part 3 of the Bill.

Clause 8 - Disposal of forfeited goods

The Customs Act provides for the forfeiture of the proceeds of drug trafficking. Such goods or moneys are liable to forfeiture under section 229A of the Act. Moneys or goods forfeited under section 229A are deemed to be forfeited goods for the purposes of sections 203 and 204-208E of the Customs Act (see subsection 229A(6)). Section 208D provides that all goods seized under section 203, if they are 'narcotic-related goods', are to be dealt with in accordance with the directions of the Commissioner, or a Deputy Commissioner, of the AFP. 'Narcotic-related goods' is defined in subsection 4(1) to mean:

- (a) narcotic goods;
- (b) moneys within the meaning of section 229A to which that section applies or is believed by the person in possession of the moneys to apply;

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- (c) goods within the meaning of section 229A to which that section applies or is believed by the person in possession of the goods to apply; or
 - (d) ships, aircraft, vehicles or animals that are, or are believed by the person in possession of them to be, forfeited goods by reason of having been used in the unlawful importation, exportation or conveyance of prohibited imports, or prohibited exports, that are narcotic goods. (This will pick up forfeited ships and aircraft under section 228 and other conveyances forfeited under paragraph 229(1)(j)).

Clause 8 proposes an amendment of section 208D which will have the effect that "narcotic-related goods" will be disposed of in accordance with proposed section 208DA, which is inserted by clause 9. Goods other than narcotic-related goods will continue to be disposed of as directed by the Comptroller-General of Customs.

Clause 9 - Insertion of new section 208DA - Disposal of narcotic-related goods

It is proposed to amend the Customs Act so that narcotic-related goods, other than actual narcotic goods, will be sold or otherwise disposed of and the proceeds paid to the Trust Fund.

Under proposed section 208DA the procedure will be as follows:

- . narcotic-related goods, other than actual narcotic goods, shall be transferred to the Official Trustee to be sold and the proceeds paid to the Trust Fund (proposed subsection 208DA(2));
- . if the property is money, the Official Trustee is required to pay the money to the Trust Fund (proposed paragraph 208DA(3)(a));
- . if the property is not money the Official Trustee is required to sell or otherwise dispose of the property. The Official Trustee will have the power to deduct its remuneration and the costs of sale from the proceeds of sale and be required to pay the balance to the Trust Fund (proposed paragraph 208DA(3)(b));
- . the present power of direction in relation to "narcotic-related goods", which is given to the Commissioner, or a Deputy Commissioner, of the AFP under existing paragraph 208D(b) will be replaced by a power of direction to be conferred on the Attorney-General (proposed subsection 208DA(4)).

It will be necessary that a direction be given under proposed paragraph 208DA(4)(a) that actual narcotic goods should be destroyed, or some other suitable direction. It is envisaged that the Attorney-General be able to direct that certain assets forfeited under the provision, other than narcotic goods, be made available to a law

enforcement agency for use in connection with their operations (under proposed paragraph 208DA(4)(b)). These items would ultimately be returned for sale to the Official Trustee and the proceeds paid into the Trust Fund.

Clause 10 - Interpretation

Clause 10 proposes an amendment of section 243A of the Principal Act by inserting a definition of the term "Trust Fund".

Clause 11 - Official Trustee to discharge pecuniary penalty

Part XIII Division 3 of the Customs Act was inserted into the Act in 1979 and makes provision for the imposition of pecuniary penalties upon persons engaged in prescribed narcotics dealings (section 243B). Section 243B requires that the court make a finding on the civil onus that the person has been engaged in a prescribed narcotics dealing.

Clause 11 proposes an amendment to section 243G of the Principal Act. The effect of the amendment will be that money payable to the Commonwealth by way of a pecuniary penalty order under paragraphs 243G(6)(a)(ii) and (6)(b)(iii) will be payable to the Trust Fund established under proposed section 34B of the Proceeds Act.

Clause 12 - Duties of the Official Trustee after receiving notice of presentation of creditor's petition etc

Clause 12 proposes a consequential amendment to section 243M of the Principal Act.

PART 4 - AMENDMENTS OF THE PROCEEDS OF CRIME ACT 1987

Clause 13 - Principal Act

This clause identifies the *Proceeds of Crime Act 1987* as the Principal Act to be amended by Part 4 of the Bill.

Clause 14 - Interpretation

Clause 14 proposes that a number of new definitions be inserted in section 4 of the Principal Act. The key definitions are as follows:

'distributable funds' is an expression which identifies those moneys payable to the Commonwealth which will be available for distribution from the Trust Fund either for the funding of drug rehabilitation/drug education schemes (under proposed paragraph 34D(2)(b)), for the funding of law enforcement projects (under proposed paragraph 34D(2)(a)), or for the making of a payment to a

Government Business Enterprise, under proposed subparagraph 34C(1)(b)(i). Other funds not available for distribution in this way are termed 'suspended funds' and are to be distributed as provided by proposed paragraph 34C(1)(a).

'Equitable sharing program'. On 9 May 1989 the then Attorney-General wrote to his State and Territory counterparts to advise the details of a federal initiative known as the equitable sharing program. Under this program, it was agreed that recoveries under the Proceeds Act and Part XIII Division 3 of the Customs Act would be shared with a State or the Northern Territory where there had been participation by a State or Territory agency in the investigation of the matter. The source of the funds to make payments to the States under the equitable sharing program is a special budgetary appropriation to the Attorney-General's portfolio for payments to the States. Payments under the current scheme have been made to Western Australia and New South Wales.

The proposed definition of the term 'equitable sharing program' is relevant to proposed section 34C which provides for the payment of money out of the Trust Fund. In particular, proposed subparagraph 34C(1)(a)(i) will provide for the continued operation of the equitable sharing program. The co-operation need not be confined to co-operation in the action to confiscate the criminal assets but extends to co-operation in the investigation or prosecution of the unlawful activity from which the criminal assets recovered were derived.

The program will extend to State funded NCA investigations which result in proceeds of confiscated assets being paid into the Trust Fund.

'GBE'. The Bill proposes a definition of GBE, which will mean a prescribed Government Business Enterprise. At this stage, it is probable that the following GBE's will be prescribed:

- the Australian National Railways Commission which is continued in existence by subsection 4(1) of the *Australian National Railways Commission Act 1983*;
- the Civil Aviation Authority established by subsection 8(1) of the *Civil Aviation Act 1988*;
- the Federal Airports Corporation established by subsection 5(1) of the *Federal Airports Corporation Act 1986*;
- the Australian Postal Commission established by section 5 of the *Postal Services Act 1975*;
- QANTAS Airways Limited, which is a public company all the shares in which were acquired by the Commonwealth in 1947 as provided for by the *QANTAS Empire Airways Act 1948*;

Australian Airlines Limited which was converted to a public company pursuant to subparagraph 15(2)(c)(i) of the *Australian Airlines (Conversion to a Public Company) Act 1988*; the Commonwealth Banking Corporation established by subsection 7(1) of the *Commonwealth Banks Act 1959*. (This will pick up the Commonwealth Savings Bank, the Commonwealth Trading Bank and the Commonwealth Development Bank); AUSSAT Pty Ltd which is a company incorporated on 6 November 1981 under a law in force in the ACT which is referred to in the *Satellite Communications Act 1984*; the Health Insurance Commission established by section 4 of the *Health Insurance Commission Act 1973*; the Australian Shipping Commission continued in existence by subsection 7(1) of the *Australian Shipping Commission Act 1956*; the Pipeline Authority established by subsection 5(1) of the *Pipeline Authority Act 1973*; the Snowy Mountains Engineering Corporation established by subsection 6(1) of the *Snowy Mountains Engineering Corporation Act 1970*; the Housing Loans Insurance Corporation established by subsection 6(1) of the *Housing Loans Insurance Act 1965*; the Australian Industry Development Corporation established by subsection 5(1) of the *Australian Industry Development Corporation Act 1970*; and the Commonwealth Serum Laboratories Commission established by subsection 7(1) of the *Commonwealth Serum Laboratories Act 1961*.

The above authorities have been selected because they are all liable to pay State pay-roll tax, which is a useful indicator that the authority is off-budget and thus will not be compensated for its loss by the Government.

'Proceeds of confiscated assets'. The purpose of this definition is to identify the sources of funds, recovered under the Principal Act, the Customs Act and the Crimes Act, which are payable to the Trust Fund.

'Suspended funds'. This expression identifies those moneys which are to be distributed pursuant to proposed paragraph 34C(1)(a), which is inserted by clause 19 of the Bill. Essentially, 'suspended funds' are those funds which are not available for distribution to law enforcement projects, to drug rehabilitation/drug education programs, or to reimburse a GBE.

'Trust Fund'. This is a shorthand term for the Confiscated Assets Trust Fund.

Clause 15 - Effects of forfeiture order

Section 19 of the Principal Act provides for the forfeiture of property by order of the court (as opposed to forfeiture by operation of law under section 30 where a person has been convicted of a "serious offence"). At present, whenever property is forfeited under section 19, a direction is sought from the Attorney-General under paragraph 20(3)(b) for the disposition of the property. Most often, the direction sought is that the property be sold and the net proceeds of sale paid to the CRF. It is possible, however, for a direction to be made that the forfeited property be provided to a law enforcement agency for use in its operations. (This might be done in the case of forfeited vehicles which have some value as surveillance vehicles.)

Clause 15 proposes a number of amendments to section 20 of the Principal Act. Under proposed paragraph 20(3)(b), which is inserted by clause 15(a) of the Bill, the general procedure will be that forfeited property will be transferred to the Official Trustee to be dealt with under that paragraph. The Official Trustee will be authorised to deduct its fees payable for the administration of the restraining order and the sale or disposition and to pay the remainder to the Trust Fund.

Under proposed subsection 20(3A), which is inserted by paragraph 15(b) of the Bill, the Attorney-General will retain a power to direct that forfeited property be disposed of in some particular way, for example by directing that the property be made available for use by a law enforcement agency but ultimately sold and the proceeds paid into the Trust Fund.

Clause 16 - Effect of forfeiture order on third parties

Clause 16 makes a minor consequential amendment to subparagraph 21(6)(d)(i) of the Principal Act.

Clause 17 - Forfeiture of all restrained property if person convicted of serious offence

Section 30 provides for the automatic forfeiture of all restrained property where the person is convicted of a serious offence. ('Serious offence' is defined by section 7 of the Proceeds Act to mean a serious narcotics offence, an organised fraud offence, or a money laundering offence in relation to the proceeds of such an offence.) The offence of organised fraud is created by section 83 of the Proceeds Act.

Clause 17(a) proposes the replacement of paragraph 30(4)(b) of the Principal Act to provide that, after the appeal period referred to in the subsection, forfeited property should be sold or otherwise disposed of by the Official Trustee, unless the Attorney-General directs otherwise pursuant to his power of direction under new

subsection 30(4A), which is to be inserted by clause 17(b), and the net proceeds of sale paid to the Trust Fund.

The Official Trustee may deduct the costs of sale, including its remuneration pursuant to the regulations under section 55 of the Proceeds Act, before paying the balance to the Trust Fund.

Clause 18 - Recovery of property to which section 30 applies

Clause 18 proposes a minor consequential amendment to subparagraph 31(6)(d)(i) of the Principal Act.

Clause 19 - Insertion of new Part:

PART IIA - CONFISCATED ASSETS TRUST FUND

Clause 19 proposes to insert a new Part IIA which comprises sections 34A-34E.

New section 34A - Establishment of Fund

Proposed section 34A formally establishes the Confiscated Assets Trust Fund. Proposed subsection 34A(2) provides that the Trust Fund is a trust account for the purposes of section 62A of the Audit Act.

New section 34B - Payments into Trust Fund

The section will provide that the following money be paid to the Trust Fund:

- . proceeds of confiscated assets (proposed paragraph 34B(1)(a)). This expression is defined by a new definition inserted by clause 14 of the Bill. The expression identifies all the methods by which funds payable to the Commonwealth are generated under the Principal Act, the drug trafficking provisions of the Customs Act and under section 9 of the Crimes Act;
- . money repatriated to Australia following the successful enforcement of an Australian confiscation order overseas under the provisions of the Mutual Assistance Act (proposed paragraph 34B(1)(b));
- . the proceeds payable to the Commonwealth as a result of the successful enforcement in Australia of a foreign pecuniary penalty order which has been registered for enforcement in Australia under section 34 of the Mutual Assistance Act (proposed paragraph 34B(1)(c));
- . the proceeds from the successful enforcement in Australia of a foreign forfeiture order which has

been enforced in Australia under the provisions of the Mutual Assistance Act (proposed paragraph 34B(1)(d);

- money derived from the successful enforcement in a Commonwealth Territory of an interstate forfeiture order registered for enforcement in the Territory under the provisions of Part VI Division 2 of the Principal Act (proposed paragraph 34B(1)(e)). Under an agreement between the Commonwealth, State and Territory Attorneys-General the proceeds resulting from the forfeiture of property are to be retained by the jurisdiction in which the forfeiture occurs rather than being repatriated to the jurisdiction in which the forfeiture order was made. Thus, if an interstate forfeiture order is registered under the Proceeds Act for enforcement against property located in a Commonwealth Territory the resulting proceeds are retained by the Commonwealth and will be payable to the Trust Fund; and

- money received from a State or Territory Government pursuant to the equitable sharing program (ie money recovered under State or Territory proceeds legislation but shared with the Commonwealth because of the contribution made by a Commonwealth agency to the investigation or prosecution of the criminal matter or to the related confiscation proceedings). This is provided for by proposed paragraph 34B(1)(f).

New section 34C - Payments out of Trust Fund

Proposed section 34C provides for the payment of money out of the Trust Fund. Those funds which are identified as 'suspended funds' (an expression which is to be defined in section 4 of the Principal Act) will be distributed under proposed paragraph 34C(1)(a). This money is to be used for:

- payments under the equitable sharing program (subparagraph 34C(1)(a)(i));

- for the repatriation of money overseas pursuant to an international forfeiture order or pecuniary penalty order which was enforced in Australia and in relation to which Australia's Mutual Assistance arrangement provides for the repatriation of an amount recovered (proposed paragraph 34C(1)(a)(ii));

- it will also be possible to make a payment to a State Government under proposed subparagraph 34C(1)(a)(iii) in relation to an interstate order which was registered under the MA Act and assets were repatriated from overseas following enforcement in a foreign country under the Mutual Assistance arrangement (proposed subparagraph 34C(1)(a)(iii));

- in payment of the annual management fee for the Trust Fund. The regulations will make provision for the deduction of a management fee which will cover the administrative costs associated with the management of the Trust Fund (proposed subparagraph 34C(1)(a)(iv)); and
- in payment of any amounts that are ordered to be paid by the Commonwealth in compensation for third party interests under either subparagraph 21(6)(d)(ii), paragraph 22(4)(b) or subparagraph 31(6)(d)(ii) of the Principal Act.

Apart from these payments, other money which is identified as distributable funds as defined will be available for payment under proposed section 34D or for the reimbursement of a GBE under proposed subparagraph 34C(1)(b)(i). It will be possible to reimburse a GBE where the recovery stems from certain criminal offences which caused financial loss to the GBE. For example, if an amount is recovered under the Principal Act as a result of a fraud upon Australia Post it will be possible to reimburse Australia Post to the extent of the amount recovered or the amount of the loss, whichever is the lesser. This will apply where the criminal offence from which the confiscation of property is derived is a "relevant offence" as defined. "Relevant offence" is to be defined by proposed subsection 34C(2).

New section 34D - Application of distributable funds

Proposed section 34D makes provision for the distribution of money to law enforcement programs or to drug rehabilitation/drug education programs.

Under proposed paragraph 34D(2)(a) half of the available "distributable funds" shall be directed at the Attorney-General's discretion to specific law enforcement projects which enhance the detection, investigation or prosecution of major criminal activity. The Attorney-General will be able to consult with such advisory bodies that the Attorney-General considers appropriate. It is probable that the Attorney-General will consult the Law Enforcement Policy and Resources Committee (LEPR) in the selection of such projects. LEPR is a Committee comprising the Attorney-General, the Minister for Justice and Consumer Affairs and the heads of major Commonwealth law enforcement (and prosecution) agencies.

Under proposed paragraph 34D(2)(b) the other half of the available "distributable funds" will be directed towards drug rehabilitation and drug education programs selected by the Minister of State responsible for health matters. The Minister of State for health matters will be able to consult such advisory bodies as he or she considers appropriate. It is likely that the Minister will consult the Ministerial Council on Drug Strategy (MCDS). MCDS is

a council of Commonwealth, State and Territory law enforcement and health ministers. The Minister is required to notify the Attorney-General in writing of the programs which have been selected for funding.

Proposed subsection 34D(3) provides a definition of "law enforcement project". The definition allows for regulations to be made which specify "law enforcement agencies" for the purposes of the definition. It is probable that the expression will include the Australian Institute of Criminology, the AFP, the NCA, the Australian Securities Commission, the DPP, the Australian Customs Service, and the Cash Transaction Reports Agency.

New section 34E - Determinations by Official Trustee about suspended and distributable funds

Proposed section 34E provides that the Official Trustee shall periodically, and at least once every 6 months, determine whether the amount of suspended funds in the Trust Fund is sufficient for the requirements of paragraph 34C(1)(a).

Under proposed subsections 34E(2) and (3) the Official Trustee will be able to identify further funds as "suspended funds" in the case of a deficiency (proposed subsection (2)) or to declare that surplus "suspended funds" are to be identified as "distributable funds" and to be available for distribution under proposed paragraph 34C(1)(b) (proposed subsection 34E(3)).

Clause 20 - Official Trustee to discharge pecuniary penalty

Subsection 49(6) sets out the order for payment where a pecuniary penalty order is made under the Principal Act. Clause 20 proposes to amend subparagraphs 49(6)(a)(ii) and (6)(b)(iii) such that the remainder of the money, after payment of the amounts provided for in the preceding subparagraphs of each paragraph, is paid to the Trust Fund. Consequential amendments are made to paragraph 49(7)(a) and subsection 49(8).

Clause 21 - Duties of Official Trustee

Clause 21 proposes a minor consequential amendment to section 53 of the Principal Act.

Clause 22 - Discharge of certain registered foreign pecuniary penalty orders

Clause 22 proposes an amendment of section 63 of the Principal Act so that money payable to the Commonwealth under that section will be paid to the Trust Fund.

