



Tuvalu

# **PROCEEDS OF CRIME ACT 2004**

**Act 3 of 2004**





Tuvalu

## PROCEEDS OF CRIME ACT 2004

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Tuvalu

## PROCEEDS OF CRIME ACT 2004

Act 3 of 2004

**AN ACT TO MAKE PROVISION FOR THE CRIME OF MONEY  
LAUNDERING, FOR THE CONFISCATION OF THE PROCEEDS OF  
SERIOUS OFFENCES, AND FOR RELATED MATTERS**

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I assent,  
Rev. Filoimea Telito MBE  
GOVERNOR-GENERAL  
September, 2005

Commencement [Date]

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### PART 1 - PRELIMINARY

**1 Short title of Act**

This Act is the Proceeds of Crime Act 2004.

**2 Commencement**

This Act commences on the date fixed by notice by the Minister.

**3 Principal objects**

The principal objects of this Act are:

- (a) to deprive persons of the proceeds of, and benefits derived from, the commission of serious offences; and
- (b) to provide for the forfeiture of property used in, in connection with, or for facilitating, the commission of serious offences; and
- (c) to enable law enforcement authorities to trace such proceeds, benefits and property.

#### 4 Definitions for Act

(1) In this Act:

“**account**” means a facility or arrangement by which a financial institution or cash dealer does any 1 or more of the following:

- (a) accepts deposits of currency;
- (b) allows withdrawals or transfers of currency;
- (c) pays cheques or payment orders drawn on a financial institution or cash dealer by, or collects cheques or payment orders for, a person;
- (d) supplies a facility or arrangement for a safety deposit box.

“**Administrator**” means the Attorney-General or the person appointed by the Attorney-General under section 114.

“**appeal**” includes proceedings by way of discharging or setting aside a judgement, and an application for a new trial or for a stay of execution.

“**Unit**” means the Transaction Tracking Unit established by section 17.

“**authorised officer, for a provision of this Act**”, means a person, or a person in a class of persons, designated in writing by the Attorney-General as an authorised officer for the provision.

“**benefit**” has the meaning given by section 5.

“**cash dealer**” means:

- (a) a person who carries on a business of an insurer, an insurance intermediary, a securities dealer or a futures broker; and
- (b) a person who carries on a business of dealing in bullion, of issuing, selling or redeeming travellers’ cheques, money orders or similar instruments, or of collecting, holding and delivering cash as part of a business of providing payroll services; and
- (c) an operator of a gambling house, casino or lottery; and
- (d) a trustee or manager of a unit trust.

“**charge**”, for an offence, includes any procedure by which criminal proceedings are begun against a person, and, for an offence prosecuted summarily, includes the issue of the relevant summons.

“**conviction**” has the meaning given by subsection 6 (1).

“**Court**” means the High Court of Tuvalu.

“**currency**” means coin and paper money that is legal tender in its country of issue.

“**dealing with property**” includes:

- (a) for property that is a debt — making a payment to the creditor in reduction or discharge of the debt; and
- (b) giving or receiving property as a gift; and
- (c) removing property from Tuvalu.

“**defendant**” means a person charged with a serious offence, whether or not he or she has been convicted of the offence, and for proceedings for a restraining order, includes a person who is likely to be charged with a serious offence.

“**document**” means a record of information in any form, including:

- (a) a written or printed thing, including a map, plan, graph or drawing;
- (b) a computer file, including a record that is kept in electronic form and can be accessed in Tuvalu;
- (c) a photograph;
- (d) a disk, tape, film sound-track or other thing in which sound or other data is embodied;
- (e) a film, negative, tape or other thing in which a visual image is embodied.

“**financial institution**” means a person that carries on a business of doing any of the following:

- (a) accepting deposits and other repayable funds from the public;
- (b) lending, including consumer credit, mortgage credit, factoring (with or without recourse) and financing of commercial transactions;
- (c) financial leasing;
- (d) providing money transmission services;
- (e) issuing and administering means of payment (for example, credit cards, travellers’ cheques and bankers’ drafts);
- (f) entering into guarantees and commitments;
- (g) trading for the institution’s own account, or for account of customers, in money market instruments (for example, cheques,

bills and certificates of deposit), foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities;

- (h) underwriting share issues and participation in such issues;
- (i) giving advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the purchase of undertakings;
- (j) money-broking;
- (k) providing portfolio management and advice;
- (l) safekeeping and administration of securities;
- (m) providing credit reference services;
- (n) providing safe custody services.

**“foreign pecuniary penalty order”** has the same meaning as in the Mutual Assistance Act.

**“foreign forfeiture order”** has the same meaning as in the Mutual Assistance Act.

**“foreign restraining order”** has the same meaning as in the Mutual Assistance Act.

**“foreign serious offence”** means a serious offence against the law of a foreign country.

**“forfeiture order”** means an order made by the Court under subsection 27 (1).

**“gift”** has the meaning given by section 10.

**“gift caught by this Act”** has the meaning given by section 12.

**“interest in property”** means:

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

**“Judge”** has the same meaning as in the Superior Courts Act 1987.

**“monitoring order”** means an order under section 96.

**“Mutual Assistance Act”** means the Mutual Assistance in Criminal Matters Act 2002.

**“pecuniary penalty order”** means an order under subsection 35 (1).

**“police officer”** means a member of the Tuvalu Police.

**“proceedings”** includes any procedure (including an inquiry, investigation, or preliminary or final determination of facts) conducted by or under the supervision of a Judge or judicial officer for:

- (a) an alleged or proven offence; or
- (b) property derived from such an offence.

**“proceeds of crime”** has the meaning given by section 7.

**“property”** includes money and all other property, real or personal, including an enforceable right of action and other intangible or incorporeal property.

**“production order”** means an order under section 89.

**“property-tracking document, for an offence”**, means a document relevant to:

- (a) identifying, locating or quantifying property of a person who committed the offence; or
- (b) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or
- (c) identifying, locating or quantifying tainted property in relation to the offence; or
- (d) identifying or locating any document necessary for the transfer of tainted property in relation to the offence.

**“quash”** has the meaning given by subsections 6 (2) and (3).

**“realisable property”** has the meaning given by section 8.

**“relevant application period, for a person’s conviction of a serious offence”**, means the period of 12 months after:

- (a) if the person was actually convicted of the offence — the day when the person was convicted of the offence; or
- (b) if the person is taken to have been convicted of the offence because of paragraph 6 (1) (b) — the day when the person was discharged without conviction; or
- (c) if the person is taken to have been convicted of the offence because of paragraph 6 (1) (c) — the day when the court took the offence into account in passing sentence for the other offence referred to in that paragraph.

**“restraining order”** means an order under section 59 or 72.

**“relevant offence, for tainted property”**, means an offence because of which the property becomes tainted property.

**“serious offence”** means:

- (a) an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or
- (b) an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer.

“**tainted property**” means:

- (a) property used in, or in relation to, the commission of the offence; or
- (b) proceeds of the offence.

“**unit trust**” means an arrangement in which a person:

- (a) invests funds in a trust; and
- (b) is a beneficiary under the trust; and
- (c) receives profit or income from the acquisition, holding, management or disposal of property under the trust.

“**unlawful activity**” means an act or omission that constitutes an offence against a law of Tuvalu or the foreign country where the activity occurs.

- (2) A reference in this Act to the law of a country includes a law in force in a part of the country (for example, the law of a State of a country that has a federal system of government).

## 5 Meaning of benefit

For this Act:

- (a) a person benefits from an offence if the person receives, at any time, any payment or other reward in relation to, or derives any pecuniary advantage from, the commission of the offence; and
- (b) a reference to a benefit derived or obtained by, or otherwise accruing to, a person includes a benefit derived or obtained by, or otherwise accruing to, another person at the first person’s request or direction.

## 6 Meaning of conviction and quash

- (1) For this Act, a person is taken to have been convicted of an offence if:
  - (a) the person was convicted of the offence; or
  - (b) the person was charged with, and found guilty of, the offence but is discharged without conviction; or

- (c) the person was not found guilty of the offence, but the court, with the consent of the person, takes the offence into account in passing sentence on the person for another offence.
- (2) If a person is taken, under paragraph (1) (b), to have been convicted of an offence, for this Act the conviction is taken to be quashed if the finding of guilty is quashed or set aside.
- (3) If a person is taken, under paragraph (1) (c), to have been convicted of an offence, for this Act, the conviction is taken to be quashed if the court's decision to take the offence into account is quashed or set aside.

## 7 Meaning of proceeds of crime

- (1) For this Act:
  - “**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:
    - (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and
    - (b) income, capital or other economic gains derived or realised from that property since the offence.
- (2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

## 8 Meaning of realisable property

- (1) In this Act
  - “**realisable property**” means any property held by a person:
    - (a) who has been convicted of, or charged with, a serious offence; or
    - (b) to whom a person so convicted or charged has directly or indirectly made a gift caught by this Act.
- (2) However, property is not realisable property if:
  - (a) there is in force against the property a forfeiture order under this or another Act; or
  - (b) a forfeiture order is proposed to be made against the property under this or another Act.

## 9 How value of property is worked out

- (1) For this Act, the value of property (other than currency) to a person holding the property is:
  - (a) if another person holds an interest in the property — the market value of the person’s beneficial interest in the property, less the amount required to discharge any encumbrance on that interest; and
  - (b) in any other case — its market value.
- (2) For this Act, the value at a particular time of a transfer of property is the greater of:
  - (a) the value of the property to the recipient when he or she receives it, adjusted to take account of subsequent changes in the value of money; and
  - (b) the value to the recipient at that time of property that, in whole or in part, directly or indirectly represents in the recipient’s hands the property that he or she received.

## 10 Meaning of gift

- (1) In this Act:

“**gift**” includes a transfer (directly or indirectly) of property by 1 person to another for a consideration that is significantly less than the value of the property.
- (2) In the circumstances mentioned in subsection (1), sections 11 and 12 apply as if the person had made a gift of as much of the transferred property as bears to the whole property the same proportion as the difference between the value of the property and the value of the consideration.

## 11 What is the value of a gift

For this Act, the value at a particular time of a gift is the greater of:

- (a) the value of the gift to the recipient when he or she received it, adjusted to take account of changes in the value of money; or
- (b) the value to the person at the time of property (other than currency that the person received as a gift); or
- (c) the value of property that, in whole or in part, directly or indirectly represents in the person’s hands property that the person received as a gift.

## 12 When a gift is caught by this Act

- (1) A gift made by a person convicted of or charged with a serious offence, including a gift made before the commencement of this Act, is caught by this Act if:
  - (a) it was made after the commission of the offence (or, if more than 1 offence, the earliest of them) and the Court considers it appropriate in all the circumstances to take the gift into account; or
  - (b) it was made by the person convicted or charged at any time and was a gift of property:
    - (i) received by the person; or
    - (ii) that in whole or in part, directly or indirectly, represented in the person's hands property received by the person;

in relation to the commission of a serious offence committed by the person or another person.
- (2) For subsection (1), if proceedings for the offence have resulted in the conviction of the person, a reference to the offence is taken to include any offence that the court takes into consideration when determining sentence.

## PART 2 - MONEY-LAUNDERING

### DIVISION 1 - OFFENCES

## 13 Money-laundering

- (1) In this section:

“**transaction**” includes the receiving or making of a gift.
- (2) A person who engages in money-laundering is guilty of an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$120 000 or imprisonment for 20 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$600 000.
- (3) A person engages in money-laundering only if:
  - (a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime; or
  - (b) the person receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime.

**14 Possession of property suspected of being proceeds of crime**

- (1) A person who receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$12 000 or imprisonment for 2 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$60 000.
- (2) It is a defence to a prosecution under subsection (1) that the person charged had no reasonable grounds for suspecting that the property mentioned in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.
- (3) A person is not liable to be convicted of an offence against both section 13 and this section because of 1 act or omission.

**15 Opening account in false name**

A person who opens or operates an account with a financial institution or cash dealer in a false name commits an offence punishable by:

- (a) for a natural person — imprisonment for 2 years, or a fine of \$12,000, or both; or
- (b) for a body corporate — a fine of \$60 000.

**16 Prejudicing investigation by disclosing information**

- (1) A person who:
  - (a) knows or suspects that a report is being prepared or has been sent to the Unit; and
  - (b) discloses to another person information or other matter likely to prejudice any investigation of an offence or possible offence of money-laundering;commits an offence punishable by a fine of \$12 000, or imprisonment for 2 years, or both.
- (2) It is a defence to a prosecution under subsection (1) that the accused did not know, and had no reasonable grounds for suspecting, that the disclosure was likely to prejudice any investigation of an offence or possible offence of money-laundering.

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**DIVISION 2 – ADMINISTRATION****17 Transaction Tracking Unit — establishment**

There is established, within the Tuvalu Police Force, the Transaction Tracking Unit.

**18 Unit — functions and powers**

- (1) The functions of the Unit are:
  - (a) to receive reports of suspicious transactions issued by financial institutions and cash dealers;
  - (b) to send each report to the Attorney-General, if, having considered it, the Unit decides there are reasonable grounds for suspecting that the transaction is suspicious;
  - (c) to compile statistics and records, disseminate information within Tuvalu or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney-General;
  - (d) to create training requirements and provide training for financial institutions about transaction record-keeping and reporting obligations;
  - (e) to consult with any relevant person, institution or organisation in exercising its powers or duties.
- (2) The Commissioner of Police is responsible to the Attorney-General for the due performance of the functions mentioned in subsection (1).
- (3) A member of the Unit:
  - (a) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept for section 104, and ask questions about the record, and make notes and take copies of the whole or any part of the record; and
  - (b) must send to the Attorney-General any information derived from an inspection carried out for paragraph (a), if it gives the Unit reasonable grounds for suspecting that a transaction involves proceeds of crime; and
  - (c) may direct any financial institution or cash dealer to take appropriate steps facilitate any investigation foreseen by the Unit; and
  - (d) may not conduct any investigation into money-laundering, other than to ensure compliance with this Part by a financial institution.

**19 Unit's power to obtain search warrant**

- (1) The Unit may apply to a magistrate for a warrant to enter premises belonging to, or in the possession or control of, a financial institution or cash dealer, or any officer or employee of the institution or dealer, and to search the premises and remove any document, material or other thing on the premises.
- (2) The magistrate must grant the application if he or she is satisfied that there are reasonable grounds for believing that:
  - (a) the financial institution or cash dealer has failed to keep a transaction record, or report a suspicious transaction, as required by this Act; or
  - (b) an officer or employee of a financial institution or cash dealer is committing, has committed or is about to commit an offence of money-laundering.

**20 Unit may apply for production and monitoring orders**

- (1) To determining whether any property belongs to, or is in the possession or under the control of, a person, the Unit may apply to a magistrate for a production order or a monitoring order.
- (2) Division 6 of Part 4 applies to a production order in favour of the Unit.
- (3) Division 7 of Part 4 applies to a monitoring order in favour of the Unit.

**21 Orders to enforce compliance with obligations under this Act**

- (1) If a financial institution or cash dealer appears to have failed to comply with an obligation under Part 5, the Unit may apply to the Court for an order against the institution or dealer, or all or any officers or employees, or specified officers or employees, of the institution or dealer, in such terms as the Court thinks necessary to enforce compliance with the obligation.
- (2) In granting the order, the Court may order that, if the financial institution or cash dealer fails, without reasonable excuse, to comply with the order, the institution, dealer, officer or employee must pay a financial penalty of the amount and in the manner directed by the Court.

## **PART 3 - FORFEITURE ORDERS, PECUNIARY PENALTY ORDERS AND RELATED MATTERS**

### **DIVISION 1 - GENERAL**

#### **22 Application for forfeiture order or pecuniary penalty order on conviction**

- (1) If a person is convicted of a serious offence committed after this Act commences, the Attorney-General may apply to the Court for either or both of the following orders:
  - (a) a forfeiture order against tainted property in relation to the offence;
  - (b) a pecuniary penalty order against the person for benefits derived by the person from the commission of the offence.
- (2) However, the Attorney-General may not make such an application after the end of the relevant application period for the conviction.
- (3) An single application under this section may be made about 2 or more serious offences.
- (4) After an application under this section is finally determined, no further application for a forfeiture order or a pecuniary penalty order may be made for the offence for which the person was convicted without leave of the Court.
- (5) The Court may give leave for a new application only if:
  - (a) the property or benefit to which the new application relates was identified after the previous application was determined; or
  - (b) necessary evidence became available only after the previous application was determined; or
  - (c) it is in the interests of justice that the new application be made.

#### **23 Notice of application**

- (1) If the Attorney-General applies for a forfeiture order against tainted property in relation to a serious offence for which a person is convicted:
  - (a) the Attorney-General must give reasonable written notice of the application to the person and to any other person who the Attorney-General has reason for believing may have an interest in the property; and

- (b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application; and
  - (c) the Court may, at any time before the final determination of the application, direct the Attorney-General:
    - (i) to give reasonable written notice of the application to any person who, in the opinion of the Court, appears to have an interest in the property; or
    - (ii) to publish notice of the application, containing the particulars that the Court directs, in the Gazette and, as often as the Court directs, in a newspaper published and circulating in Tuvalu.
- (2) If the Attorney-General applies for a pecuniary penalty order against a person:
- (a) the Attorney-General must give the person reasonable written notice of the application; and
  - (b) the person may appear and adduce evidence at the hearing of the application.

## 24 Amendment of application

- (1) The Court may, before finally determining an application for a forfeiture order or pecuniary penalty order, and on the application of the Attorney-General, allow the amendment of the application to include any other property or benefit if:
- (a) the other property or benefit was not reasonably capable of identification when the application for the order was originally made; or
  - (b) necessary evidence became available only after that application was originally made.
- (2) If:
- (a) the Attorney-General applies to amend an application for a forfeiture order; and
  - (b) the effect of the amendment would be to include additional property in the application for the forfeiture order;
- the Attorney-General must give reasonable written notice of the application to amend to any person who the Attorney-General has reason for believing may have an interest in the additional property.
- (3) Any person who claims an interest in the additional property may appear and adduce evidence at the hearing of the application to amend.

- (4) If:
- (a) the Attorney-General applies to amend an application for a pecuniary penalty order against a person; and
  - (b) the effect of the amendment would be to include an additional benefit in the application for the pecuniary penalty order;
- the Attorney-General must give the person reasonable written notice of the application to amend.

## **25 Procedure on application**

- (1) On an application to the Court under section 22, the Court may:
- (a) in determining the application, take into account the transcript of any proceedings against the person for the offence; or
  - (b) defer passing sentence until the Court has determined the application if the Court:
    - (i) has not, when the application is made, passed sentence on the person for an offence because of which the property became tainted; and
    - (ii) is satisfied that it is reasonable to do so.

## **26 Application for forfeiture order if person has absconded**

- (1) If, in relation to a serious offence committed after this Act commences:
- (a) an information has been laid alleging that a person committed the offence; and
  - (b) a warrant for the person's arrest is issued for that information; and
  - (c) the person absconds;
- the Attorney-General may, within 6 months after the person absconds, apply to the Court for a forfeiture order against any tainted property.
- (2) For this section:
- (a) a person is taken to have absconded in relation to an offence if reasonable attempts to arrest the person under a warrant have been unsuccessful during the 6 months starting on the day the warrant was issued; and
  - (b) the person is taken to have absconded on the last day of that 6 months.
- (3) If the Attorney-General applies under subsection (1) for a forfeiture order against property, the Court must, before hearing the application, require:

- (a) reasonable written notice of the application to be given to any person who, in the opinion of the Court, appears to have an interest in the property; or
- (b) notice of the application, containing the particulars that the Court directs, to be published in the Gazette and, as often as the Court directs, in a newspaper published and circulating in Tuvalu.

## DIVISION 2 - FORFEITURE ORDERS

### 27 Forfeiture order on conviction

- (1) If:
  - (a) the Attorney-General applies to the Court for a forfeiture order against property in relation to a person's conviction of a serious offence; and
  - (b) the Court is satisfied that the property is tainted property in relation to the offence;

the Court may order that the property, or so much of the property as is specified by the Court in the order, be forfeited to the Crown.

- (2) In deciding whether property is tainted property, the Court may infer:
  - (a) if the evidence establishes that the property was in the person's possession at the time of, or immediately after, the offence was committed — that the property was used in, or in relation to, committing the offence; and
  - (b) if the evidence establishes that the property (in particular, money) was found, during investigations before or after the person was arrested for and charged with the offence:
    - (i) in the person's possession; or
    - (ii) under the person's control in a building, vehicle, receptacle or place;

that the property was derived, obtained or realised as a result of the person's committing the offence; and

- (c) if:
  - (i) the evidence establishes that the value, after the person committed the offence, of all the person's ascertainable property is more than the value of all the person's ascertainable property before the person committed the offence; and

- (ii) the Court is satisfied that the person's income from sources unrelated to criminal activity cannot reasonably account for the increase in value;  
that the value of all or part of the increase represents property that the person derived, obtained or realised directly or indirectly from committing the offence.
- (3) If the Court orders that property (other than money) be forfeited to the Crown, the Court must specify in the order the amount that it considers to be the value of the property when the order is made.
- (4) In considering whether to make a forfeiture order against property, the Court may take into account:
  - (a) any right or interest of a third party in the property; and
  - (b) the gravity of the offence concerned; and
  - (c) any hardship 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.
- (5) If the Court makes a forfeiture order, the Court may give any directions that are necessary or convenient to give effect to the order.

## 28 Effect of forfeiture order

- (1) In this section:  
“**registrable property**” means property the title to which is passed by registration on a register kept under a law in force in Tuvalu.
- (2) If the Court makes a forfeiture order against property (other than registrable property), the order vests the property absolutely in the Crown.
- (3) If the Court makes a forfeiture order against registrable property:
  - (a) the order vests the property in the Crown in equity, but does not vest it in the Crown at law until the applicable registration requirements have been complied with; and
  - (b) the Crown is entitled to be registered as owner of the property; and
  - (c) the Administrator may do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Crown as owner, including the execution of any necessary instrument.
- (4) If the Court makes a forfeiture order against registrable property:

- (a) the Attorney-General may do anything necessary or convenient to give notice of, or otherwise protect, the Crown's equitable interest in the property; and
  - (b) anything done by the Attorney-General under paragraph (a) is not a dealing for paragraph (5) (a).
- (5) If the Court makes a forfeiture order against property (including registrable property):
- (a) the property must not, except with the leave of the Court and in accordance with any directions of the Court, be disposed of, or otherwise dealt with, by or for the Crown, before:
    - (i) any appeal against the conviction, or the making of the order, is finally determined, or lapses; or
    - (ii) the last day for the lodging of an appeal against the conviction or order passes without such an appeal having been lodged; and
  - (b) the property may be disposed of, and the proceeds applied or otherwise dealt with as the Administrator directs, after:
    - (i) the determination or lapsing of any appeal lodged against the conviction or the making of the order; or
    - (ii) the last day for lodging such an appeal is past without such an appeal having been lodged.

## 29 Protection of third parties

- (1) If an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the Court, before the forfeiture order is made, for an order under subsection (2).
- (2) If a person applies to the Court for an order about the person's interest in property, the Court must make an order declaring the nature, extent and value (as at the time the order is made) of the person's interest if the Court is satisfied:
  - (a) that the applicant was not involved in committing an offence in relation to which forfeiture of the property is sought, or a forfeiture order against the property was made; and
  - (b) if the applicant acquired the interest when, or after, the offence was committed — that the applicant acquired the interest:
    - (i) for sufficient consideration; and
    - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property.

- (3) If a forfeiture order has already been made against property, a person who claims an interest in the property may, within 6 months starting on the day when the order is made, apply to the Court for an order under subsection (2).
- (4) A person may not make an application under subsection (3), except with the leave of the Court, if the person:
  - (a) knew about the application for the forfeiture order before the order was made; or
  - (b) appeared at the hearing of that application.
- (5) A person who applies to the Court under subsection (1) or (3) must give reasonable written notice of the application to the Attorney-General.
- (6) The Attorney-General:
  - (a) is a party to the proceedings in an application under subsection (1) or (3); and
  - (b) may make an application under subsection (1) for a person.
- (7) An appeal lies to the Court of Appeal of Tuvalu from an order under subsection (2).
- (8) The Administrator must, on application by a person who has obtained an order under subsection (2), if the period or appeals has expired and any appeal from that order has been determined or has lapsed:
  - (a) return the property, or the part of it to which the interest of the applicant relates, to the applicant; or
  - (b) pay an amount equal to the value of the interest of the applicant, as declared in the order, to the applicant.

### **30 Forfeiture order where person has absconded**

- (1) If an application is made to the Court for a forfeiture order against tainted property because a person has absconded in connection with a serious offence, and the Court is satisfied that:
  - (a) proceedings for a serious offence committed for that property were commenced; and
  - (b) any property is tainted property in relation to the offence; and
  - (c) the accused charged with the offence mentioned in paragraph (a) has absconded;

the Court may order that the property, or so much of it as the Court specifies in the order, be forfeited to the Crown.

- (2) Section 27 (except subsection (1)), and sections 28 and 29, apply (with any necessary modifications) to an order under this section.

### **31 Discharge of forfeiture order on appeal or quashing of conviction**

- (1) If the Court makes a forfeiture order against property in reliance on a person's conviction of an offence and the conviction is subsequently quashed, the quashing of the conviction discharges the order.
- (2) If a forfeiture order against property is discharged:
- (a) under subsection (1); or
  - (b) by the Court hearing an appeal against the making of the order;
- a person who claims to have had an interest in the property immediately before the forfeiture order was made may apply to the Administrator, in writing, for the transfer of the interest to the person.
- (3) On receipt of an application under subsection (2) from a person who had such an interest in the property, the Administrator must:
- (a) if the interest is vested in the Crown — transfer the property or interest in the property, or the part of it to which the interest relates, to the person; or
  - (b) if the Crown has disposed of the interest — pay the person an amount equal to the value of the interest at the time the order is made.
- (4) The Administrator may ask the Court to determine whether the person had the interest claimed under subsection (2).
- (5) The Administrator has power to do, or authorise the doing of, anything necessary or convenient to transfer or return property under section 29 or this section, including executing any instrument and applying to register an interest in the property on a register.

### **32 Payment instead of forfeiture order**

If the Court is satisfied that a forfeiture order should be made against property of a person, but that the property, or any part of it or interest in it, cannot be made subject to such an order, and, in particular:

- (a) cannot, with the exercise of due diligence, be found; or
- (b) has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred to avoid the forfeiture of the property; or
- (c) is located outside Tuvalu; or

- (d) has been mingled with other property that cannot be divided without difficulty;

the Court may, instead of ordering the property, part or interest to be forfeited, order the person to pay to the Crown an amount equal to the value of the property, part or interest.

### **33 Enforcement of order for payment instead of forfeiture**

- (1) An amount payable by a person to the Crown under an order under section 32 is a civil debt due by the person to the Crown.
- (2) An order against a person under section 32 may be enforced as if it were an order made in civil proceedings instituted by the Crown against the person to recover a debt due by the person to the Crown, and the debt arising from the order is taken to be a judgment debt.
- (3) If an order is made against a person under section 32 and the person is, or becomes, a bankrupt, the order may be enforced against the person or against any property of the person that is not vested in the person's trustee in bankruptcy.

### **34 Registered foreign forfeiture orders**

If a foreign forfeiture order is registered in the Court under the Mutual Assistance Act, this Division applies to the order as if:

- (a) the order were an order made by the Court under this Division; and
- (b) references to an appeal against the making of an order were omitted; and
- (c) the period mentioned in subsection 29 (3) were 6 weeks rather than 6 months.

## **DIVISION 3 - PECUNIARY PENALTY ORDERS**

### **35 Pecuniary penalty order on conviction**

- (1) If the Attorney-General applies to the Court for a pecuniary penalty order against a person for the person's conviction of a serious offence, the Court may, if it is satisfied that the person has benefited from the offence, order the person to pay to the Crown:
  - (a) an amount equal to the value of the person's benefit from the offence; or
  - (b) a lesser amount that the Court certifies to be the amount that might be realised at the time the pecuniary penalty order is made.

- (2) The Court must assess the value of the benefit derived by a person from committing an offence in accordance with sections 36, 37, 38, 39 and 40.
- (3) The Court must not make a pecuniary penalty order under this section:
  - (a) until the period for the lodging of an appeal against conviction has expired without an appeal having been lodged; or
  - (b) if an appeal against conviction has been lodged — until the appeal lapses or is finally determined.

### **36 Rules for determining benefit and assessing value**

- (1) If a person obtains property as the result of, or in connection with committing, a serious offence, the person's benefit is the value of the property so obtained.
- (2) If a person derives an advantage as the result of, or in connection with committing, a serious offence, the person's advantage is taken to be a sum of money equal to the value of the advantage so derived.
- (3) Unless the contrary is proved:
  - (a) property is taken to be tainted property if it is held by a person on the day when the application is made and at any time:
    - (i) if the offence or earliest offence was committed more than 5 years before the application is made — within 5 years before the application is made; and
    - (ii) in any other case — after the offence or the earliest offence was committed and before the application is made; and
  - (b) any expenditure by the person in the time mentioned in subparagraph (a) (ii) is taken to be expenditure met out of tainted property; and
  - (c) any property received or taken to have been received by the person at any time as a result of, or in connection with, committing the offence or offences is taken to have been received free of any other interests; and
  - (d) if evidence is given at the hearing of the application that the value of the person's property increased after committing an offence, the increase is taken to be part of the person's benefit from the offence.
- (4) If a pecuniary penalty order has previously been made against a person in relation to an offence, any of the person's benefits that are shown to the Court to have been taken into account in determining the amount to be recovered under the earlier order must be disregarded.

**37 Statements about benefits from committing serious offences**

- (1) If a person has been convicted of a serious offence, the Attorney-General may tender to the Court a statement about any matter relevant to:
  - (a) deciding whether the person has benefited from the offence, or from any other serious offence of which the person is convicted in the same proceedings or that is taken into account in passing sentence on the person; or
  - (b) assessing the value of the person's benefit from the offence or any other serious offence of which the person is so convicted in the same proceedings or that is so taken into account.
- (2) If the Court is satisfied that a copy of the statement has been served on the person, the Court may require the person to indicate:
  - (a) to what extent the person accepts each allegation in the statement; and
  - (b) for each allegation that the person does not accept wholly or in part — any matters the person proposes to rely on.
- (3) If the person accepts to any extent an allegation in the statement, the Court may, in deciding or assessing the matters mentioned in subsection (1), treat the person's acceptance as conclusive of the matters to which it relates.
- (4) If a person fails, wholly or in part, to comply with a requirement under subsection (2), the Court may treat the person, for this section, as having accepted every allegation in the statement, other than:
  - (a) an allegation for which the person has complied with the requirement; or
  - (b) an allegation that the person has benefited from the offence concerned, or that the person obtained any property or advantage as a result of, or in connection with, committing the offence.
- (5) An allegation may be accepted, or matter indicated, for this section either:
  - (a) orally before the Court; or
  - (b) in writing.
- (6) An acceptance by a person under this section that the person received any benefits from committing a serious offence is admissible in any proceedings against the person for any offence.

**38 Amount to be recovered under pecuniary penalty order**

- (1) The amount to be recovered from a person under a pecuniary penalty order is the amount that the Court assesses to be the value of the person's benefit from the offence, or all the offences, concerned.
- (2) If the Court is satisfied (whether by an acceptance under section 37 or otherwise) about a matter relevant to determining the amount that might be realised at the time a pecuniary penalty order is made, the Court may issue a certificate giving the Court's opinion about the matter.
- (3) The Court must issue the certificate if it is satisfied that the amount that might be realised at the time the pecuniary penalty order is made is less than the amount that the Court assesses to be the value of the person's benefit from the offence, or all the offences, for which the pecuniary penalty order may be made.

**39 Working out how much is realisable**

- (1) For sections 37 and 38, the amount that might be realised at the time a pecuniary penalty order is made against a person is the total of:
  - (a) the values at that time of all the realisable property held by the person, less the total amounts payable under any obligation having priority at that time; and
  - (b) the total of the values at that time of all gifts caught by this Act.
- (2) For subsection (1), an obligation of a person has priority at a time if it is an obligation:
  - (a) to pay a fine, or an amount due under an order of the Court imposed or made on conviction of an offence, if the fine was imposed or the order made before the pecuniary penalty order; or
  - (b) to pay an amount due as a tax, rate, duty, excise or other impost under an enactment; or
  - (c) to pay any other civil obligation as may be determined by the Court.

**40 Variation of pecuniary penalty orders**

- (1) If:
  - (a) the Court makes a pecuniary penalty order for an offence; and
  - (b) in calculating the amount of the pecuniary penalty order, the Court took into account a forfeiture of property or a proposed forfeiture of property or a proposed forfeiture order against property; and

- (c) an appeal against the forfeiture or forfeiture order is allowed, or the proceedings for the proposed forfeiture order terminate without the proposed order being made;

the Attorney-General may apply to the Court to vary the pecuniary penalty order to increase the amount of the order by the value of the property and the Court may, if it considers it appropriate to do so, vary the order accordingly.

- (2) If:
  - (a) the Court makes a pecuniary penalty order against a person in relation to an offence; and
  - (b) in calculating the amount of the pecuniary penalty order, the Court took into account an amount of tax paid by the person; and
  - (c) an amount is repaid or refunded to the person for that tax;

the Attorney-General may apply to the Court to vary the pecuniary penalty order to increase the amount of the order by the amount repaid or refunded and the Court may, if it considers it appropriate to do so, vary the order accordingly.

#### **41 Court may lift corporate veil**

- (1) In assessing the value of benefits derived by a person from committing an offence, the Court may treat as the person's property any property that, in the opinion of the Court, is under the person's effective control, whether or not the person has:
  - (a) any legal or equitable interest in the property; or
  - (b) any right, power or privilege in relation to the property.
- (2) Without limiting subsection (1), the Court may take into account:
  - (a) shareholdings in, debentures over, or directorships of a company that has an interest (whether direct or indirect) in the property; and
  - (b) a trust that has a relationship to the property; and
  - (c) any relationship between persons having an interest in the property, or in companies of the kind mentioned in paragraph (a) or trusts of the kind mentioned in paragraph (b), and other persons.
- (3) To decide, for paragraph (2) (a), whether a particular company has a direct or indirect interest in property, the Court may order the investigation and inspection of the books of the company.
- (4) If the Court, in making a pecuniary penalty order against a person, treats particular property as the person's property under subsection (1), the

Court may, on application by the Attorney-General, make an order declaring that the property is available to satisfy the order.

- (5) If the Court declares that property is available to satisfy a pecuniary penalty order:
  - (a) the order may be enforced against the property as if the property were property of the person against whom the order is made; and
  - (b) a restraining order may be made for the property as if the property were property of the person against whom the order is made.
- (6) If the Attorney-General applies for an order that property is available to satisfy a pecuniary penalty order against a person:
  - (a) the Attorney-General must give reasonable written notice of the application to the person and to any other person who the Attorney-General has reason for believing may have an interest in the property; and
  - (b) the person and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

#### **42 Enforcement of pecuniary penalty orders**

- (1) An amount payable by a person to the Crown under a pecuniary penalty order is a civil debt due by the person to the Crown.
- (2) A pecuniary penalty order against a person may be enforced as if it were an order made in civil proceedings instituted by the Crown against the person to recover a debt due by the person to the Crown, and the debt arising from the order is taken to be a judgment debt.
- (3) If a pecuniary penalty order is made against a person and the person is, or becomes, a bankrupt, the order may be enforced against the person or against any property of the person that is not vested in the person's trustee in bankruptcy.

#### **43 Amounts paid for registered foreign pecuniary penalty orders**

If a foreign pecuniary penalty order is registered in the Court under the Mutual Assistance Act, any amount paid, whether in Tuvalu or elsewhere, in satisfaction of the foreign pecuniary penalty order is taken to have been paid in satisfaction of the debt that arises because of the registration of that order.

## **PART 4 - FACILITATING INVESTIGATIONS AND PRESERVING PROPERTY**

### **DIVISION 1 - POWERS OF SEARCH AND SEIZURE**

#### **44 Warrant to search land etc. for tainted property**

- (1) A police officer may apply to a magistrate, or the Registrar of the Court, for the issue of a warrant to search land or premises for tainted property in the same way as a police officer may apply for the issue of a search warrant under section 101 of the Criminal Procedure Code.
- (2) If an application is made under subsection (1) for a warrant, the magistrate or Registrar may issue a warrant of that kind in the same way, and subject to the same conditions, as he or she could issue a search warrant under section 101 of the Criminal Procedure Code, and, subject to this Division, the warrant may be executed in the same way as if it had been issued under that section.

#### **45 Police may seize tainted property**

In the course of a search under a warrant issued under section 44, for a thing of a kind specified in the warrant, a police officer finds another thing, the warrant is taken to authorise the police officer to seize the other thing if there are reasonable grounds:

- (a) for believing the other thing to be tainted property for a serious offence, or to afford evidence about the commission of a criminal offence in Tuvalu; or
- (b) for believing that it is necessary to seize the property or thing to prevent it being concealed, lost or destroyed, or used to commit, continue or repeat the offence or another offence.

#### **46 Return of seized property — general rule**

- (1) If property has been seized under paragraph 45 (a), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.
- (2) The Court must order the Commissioner of Police to return the property to the person if the Court is satisfied that:
  - (a) the person is entitled to possession of the property; and
  - (b) the property is not tainted property; and

- (c) the person for whose conviction, charging or proposed charging the property was seized has no interest in the property.

#### **47 Return of seized property if no information laid**

- (1) Subsection (2) applies if:
  - (a) property has been seized under paragraph 45 (a); and
  - (b) when the property was seized, an information had not been laid for a relevant offence; and
  - (c) an information is not laid for a relevant offence within 48 hours after the property was seized.
- (2) The Commissioner of Police must, subject to section 49, arrange for the property to be returned to the person from whose possession it was seized as soon as practicable after the end of that 48 hours.

#### **48 Return of seized property if no forfeiture order made**

- (1) Subsection (2) applies if:
  - (a) property has been seized under paragraph 45 (a); and
  - (b) any proceedings for an offence because of which the property is tainted have been completed; and
  - (c) the Attorney-General:
    - (i) has not applied for a forfeiture order; and
    - (ii) does not apply for a forfeiture order within 14 days after the proceedings are completed; and
  - (d) the property is in the Commissioner of Police's possession.
- (2) The Commissioner of Police must, subject to section 49, arrange for the property to be returned to the person from whose possession it was seized as soon as practicable.

#### **49 Retention of seized property if restraining order made**

- (1) Subsections (2), (3) and (4) apply if:
  - (a) property has been seized under paragraph 45 (a); and
  - (b) a restraining order is made against the property before the Commissioner of Police is required by this Act to return it; and
  - (c) the restraining order directs the Administrator to take custody and control of the property.

- (2) Despite subsection 47 (2) or 48 (2), the Commissioner of Police must arrange for the property to be given to the Administrator in accordance with the restraining order.
- (3) If when the restraining order is made the property is in the Commissioner of Police's possession, the Commissioner of Police may apply to the Court for an order that the Commissioner of Police keep possession of the property.
- (4) If the Court is satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence, the Court may order that the Commissioner of Police may retain the property for as long as the property is so required as evidence.
- (5) If the Court makes an order under subsection (4) about the property, the Commissioner of Police must arrange for the property to be kept until it is dealt with in accordance with another provision of this Act.
- (6) In proceedings for an order under subsection (4), the Court may order that a witness need not:
  - (a) answer a specified question; or
  - (b) produce a specified document;if the Court is satisfied that answering the question or producing the document may prejudice the investigation of, or the prosecution of a person for, an offence.

## **50 How Commissioner of Police must deal with property subject to forfeiture order**

- (1) Subsection (2) applies if:
  - (a) property has been seized under this Division; and
  - (b) while the property is in the Commissioner of Police's possession, a forfeiture order is made against the property.
- (2) The Commissioner of Police must deal with the property as required by the order.

## **DIVISION 2 - SEARCH FOR AND SEIZURE OF TAINTED PROPERTY — FOREIGN OFFENCES**

## **51 Application of this Division**

- (1) If, under the Mutual Assistance Act, a police officer is authorised to apply to a magistrate, or the Registrar of the Court, for a search warrant under

this Act for tainted property in relation to a foreign serious offence, this Division applies to:

- (a) the application; and
- (b) any warrant issued as a result of the application.

(2) In this Division:

- (a) references to tainted property are taken to be references to tainted property in relation to a foreign serious offence; and
- (b) references to a relevant offence are taken to be references to a relevant foreign serious offence.

## **52 Police may seize tainted property**

- (1) Subsection (2) applies if, in the course of searching under a warrant mentioned in section 51 for tainted property in relation to a foreign serious offence, a police officer finds:
  - (a) property that there are reasonable grounds to believe is tainted property in relation to a foreign serious offence for which another search warrant under that section is in force; or
  - (b) anything that there are reasonable grounds to believe:
    - (i) is relevant to a criminal proceeding in the foreign country for the foreign serious offence; or
    - (ii) will afford evidence as to the commission of a criminal offence.
- (2) If there are reasonable grounds for believing that it is necessary to seize the property or thing in order to prevent its concealment, loss or destruction, or its use in committing, continuing or repeating the offence, the warrant is taken to authorise the police officer to seize the property or thing.

## **53 Return of seized property — general rule**

- (1) If property has been seized under subsection 52 (2), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.
- (2) The Court must order the Commissioner of Police to return the property to the person if the Court is satisfied that:
  - (a) the person is entitled to possession of the property; and
  - (b) the property is not tainted property; and

- (c) the person who is believed or alleged to have committed the relevant foreign serious offence has no interest in the property.

#### **54 Return of seized property if no forfeiture order made**

- (1) Subsection (2) applies if:
  - (a) property has been seized under subsection 52 (2); and
  - (b) no forfeiture order is made against the property within 30 days after it was seized; and
  - (c) the property is in the Commissioner of Police's possession at the end of that period.
- (2) The Commissioner of Police must arrange for the property to be returned to the person from whose possession it was seized as soon as practicable after the end of that period.

#### **55 Retention of seized property if restraining order made**

- (1) Subsections (2), (3) and (4) apply if:
  - (a) property has been seized under subsection 52 (2); and
  - (b) but for that subsection, the Commissioner of Police would be required to arrange for the property to be returned to a person as soon as practicable after the end of a period; and
  - (c) before the end of that period:
    - (i) a foreign restraining order against the property is registered in the Court; or
    - (ii) the Court makes a restraining order for the foreign serious offence against the property.
- (2) The Commissioner of Police must:
  - (a) if the restraining order directs the Administrator to take custody and control of the property — arrange for the property to be given to the Administrator in accordance with the restraining order; or
  - (b) if the Court has made an order under subsection (4) about the property — arrange for the property to be kept until it is dealt with in accordance with another provision of this Act.
- (3) If the property is in the Commissioner of Police's possession when the restraining order is made or registered, the Commissioner of Police may apply to the Court for an order that the Commissioner of Police retain possession of the property.

- (4) The Court may, if satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence, order that the Commissioner of Police may retain the property for as long as the property is so required as evidence.
- (5) In proceedings for an order under subsection (4), the Court may order that a witness need not:
  - (a) answer a specified question; or
  - (b) produce a specified document;if the Court is satisfied that answering the question, or producing the document, may prejudice the investigation of an offence or the prosecution of a person.

## **56 How Commissioner of Police must deal with property subject to forfeiture order**

- (1) Subsection (2) applies if:
  - (a) property has been seized under this Division; and
  - (b) while the property is in the Commissioner of Police's possession, a foreign forfeiture order against the property is registered in the Court.
- (2) The Commissioner of Police must deal with the property as required by the order.

### **DIVISION 3 - RESTRAINING ORDERS**

## **57 Application for restraining order**

- (1) The Attorney-General may apply to the Court for a restraining order against:
  - (a) any realisable property held by a defendant; or
  - (b) specified realisable property held by a person other than a defendant.
- (2) An application for a restraining order may be made ex parte.
- (3) An application for a restraining order must be in writing, and must be accompanied by an affidavit stating:
  - (a) if the relevant defendant has been convicted of a serious offence:
    - (i) the offence of which the defendant was convicted, the date of the conviction and the court before which the conviction was obtained; and

- (ii) whether an appeal has been lodged against the conviction, the result of any appeal and, if an appeal has not been finalised, what stage it has reached; and
- (b) if the defendant has not been convicted of a serious offence — the offence with which the defendant is, or is about to be, charged and the grounds for believing that the defendant committed the offence; and
- (c) if the defendant is about to be charged with a serious offence — the grounds for believing that the defendant will be charged with a serious offence within 48 hours; and
- (d) a description of the property against which the restraining order is sought; and
- (e) the name and address of the person who is believed to be in possession of the property; and
- (f) if the application seeks a restraining order against property of a defendant — the grounds for believing that the property is tainted property for an offence, or that the defendant derived a benefit directly or indirectly from committing the offence; and
- (g) if the application seeks a restraining order against property of a person other than a defendant — the grounds for believing that the property is tainted property for an offence, or is subject to the effective control of a defendant.

## **58 Notice of application for restraining order**

- (1) Before making a restraining order, the Court:
  - (a) must require reasonable written notice to be given to any person who may have an interest in the property; and
  - (b) may hear any person to whom notice is given.
- (2) However, if the Attorney-General so requests:
  - (a) the Court may consider the application without requiring notice to be given in accordance with subsection (1); but
  - (b) a restraining order made in reliance on this subsection ceases to have effect after 14 days or a lesser period that the Court specifies in the order.
- (3) The Court:
  - (a) may, on application by the Attorney-General, extend the period of operation of a restraining order made in reliance on subsection (2); but

- (b) must not consider the application without requiring reasonable written notice to be given to any person who may have an interest in the property.

## **59 Restraining orders**

- (1) The Court may make a restraining order against property if it is satisfied that:
  - (a) a defendant has been convicted of a serious offence, has been charged with a serious offence or will be charged with a serious offence within 48 hours; and
  - (b) if the defendant has not been convicted of the offence — there are reasonable grounds for believing that the defendant committed the offence; and
  - (c) if the property is property of the defendant — there are reasonable grounds for believing that the property is tainted property, or that the defendant derived a benefit directly or indirectly from the commission of the offence; and
  - (d) if the property is property of a person other than the defendant — there are reasonable grounds for believing that the property is tainted property in relation to the offence, or that the property is subject to the effective control of the defendant.
- (2) The order may:
  - (a) prohibit the defendant or any other person from disposing of, or otherwise dealing with, the property, or a part of it or interest in it specified in the order, either absolutely or except in a way specified in the order; and
  - (b) at the request of the Attorney-General, if the Court is satisfied that the circumstances so require, direct the Administrator:
    - (i) to take custody of the property or a part of it specified in the order; and
    - (ii) to manage or otherwise deal with all, or any part of, the property in accordance with the directions of the Court.
- (3) In deciding whether there are reasonable grounds for believing that property is subject to the effective control of the defendant, the Court may take into account the matters mentioned in subsection 41 (2).
- (4) The order may be subject to any conditions that the Court thinks fit and, without limiting this subsection, may provide for meeting, out of the property or a specified part of it, all or any of the following:

- (a) the person's reasonable living expenses (including the reasonable living expenses of the person's dependants, if any) and reasonable business expenses;
  - (b) the person's reasonable expenses in defending a criminal charge and any proceedings under this Act;
  - (c) another specified debt incurred by the person in good faith.
- (5) However, the order must not make such provision unless the Court is satisfied that the person cannot meet the expenses or debt out of property that is not subject to a restraining order.
- (6) If the Court gives the Administrator a direction under paragraph (2) (b) for property, the Administrator may do anything that is reasonably necessary to preserve the property, and, for that purpose:
- (a) may do anything for the property that its owner could do; and
  - (b) may do so to the exclusion of the owner.
- (7) In proceedings for a restraining order, the Court may order that a witness need not:
- (a) answer a specified question; or
  - (b) produce a specified document;
- if the Court is satisfied that answering the question or producing the document may prejudice the investigation of an offence or prosecution of a person.

## **60 Undertakings by Crown**

Before making a restraining order, the Court may require the Crown to give an undertaking about the payment of damages or costs, or both, for the making and execution of the order.

## **61 Service of restraining order**

- (1) A copy of a restraining order must be served on a person affected by it in the way the Court directs.
- (2) If the Court is satisfied that it is in the public interest to do so, it may order that service under subsection (1) be delayed for a specified period.

## **62 Ancillary orders and further orders**

- (1) If the Court makes a restraining order, any of the following may apply to the Court for an ancillary order:

- (a) the Attorney-General;
  - (b) a person whose property is the subject of the restraining order (the owner);
  - (c) if the restraining order directs the Administrator to take custody and control of property — the Administrator;
  - (d) with the leave of the Court — any other person.
- (2) An ancillary order may do any 1 or more of the following:
- (a) vary the property to which a restraining order relates;
  - (b) vary any condition to which a restraining order is subject;
  - (c) order a person to be examined on oath before the Court about the affairs of the owner or the defendant;
  - (d) provide for carrying out any undertaking about the payment of damages or costs given by the Crown in relation to the making of the restraining order;
  - (e) direct the owner or the defendant to give a specified person a statement on oath setting out the particulars of the property, or dealings with the property, that the Court directs;
  - (f) if the restraining order directs the Administrator to take custody and control of property — do any 1 or more of the following:
    - (i) regulate the performance or exercise of the Administrator's functions, duties or powers under the restraining order;
    - (ii) decide a question about the property;
    - (iii) order a person to do anything to enable the Administrator to take custody and control of the property;
    - (iv) if the restraining order provides that a person's reasonable expenses in defending a criminal charge be met out of the property — direct that those expenses be taxed as provided in the ancillary order before being met;
    - (v) provide for the payment to the Administrator out of the property of the costs, charges and expenses incurred in relation to the performance or exercise by the Administrator of functions, duties or powers under the restraining order;
  - (g) anything else that the Court considers necessary in the circumstances.
- (3) If a person who has an interest in property against which a restraining order is made applies to the Court for a variation of the order to exclude the person's interest from the order, the Court must grant the application if the Court is satisfied that:

- (a) the interest is not tainted property and that it cannot be required to satisfy a pecuniary penalty order; or
  - (b) the applicant was not involved in the commission of the offence in relation to which the restraining order was made and, if the applicant acquired the interest at the time of or after the commission (or alleged commission) of the offence, the applicant acquired the interest:
    - (i) for sufficient consideration; and
    - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property; or
  - (c) it is in the public interest to do so having regard to all the circumstances, including any financial hardship or other consequence of the interest remaining subject to the order.
- (4) The Court must not hear an application under subsection (1) unless the applicant has given reasonable written notice of the application to each other person who is entitled to make an application under that subsection for the restraining order.
- (5) The Court may require notice of the application to be given to, and may hear, any person who, in the opinion of the Court, appears to have an interest in the property.
- (6) If a person is required, in accordance with an order under paragraph (2) (c) or (e), to make a statement on oath:
- (a) the person is not excused from making the statement on the ground that the statement, or part of it, might tend to incriminate the person or make the person liable to forfeiture or a penalty; and
  - (b) the statement, and any information, document or thing obtained as a direct or indirect consequence of it, is not admissible against the person in any criminal proceedings except a proceeding for perjury in making the statement.

### **63 Administrator to satisfy pecuniary penalty order**

- (1) This section applies if:
- (a) a pecuniary penalty order is made against a defendant in reliance on the defendant's conviction of an offence; and
  - (b) a restraining order is made in reliance on the defendant's conviction, or alleged commission, of the offence, against property of:
    - (i) the defendant; or

- (ii) a person in relation to whom an order under subsection 41 (3) is in force.
- (2) The Court may direct the Administrator to satisfy the pecuniary penalty order by a payment to the Crown out of the property:
  - (a) on the making of the later of the orders; or
  - (b) on application by the Attorney-General, at any time while the restraining order remains in force.
- (3) To enable the Administrator to comply with a direction under subsection (2), the Court may:
  - (a) direct the Administrator to sell or otherwise dispose of a part of the property that the Court specifies; and
  - (b) order that the Administrator may execute, and do anything necessary to give validity and effect to, any deed or instrument in the name of a person who owns or has an interest in the property.
- (4) If the Court makes an order of the kind mentioned in paragraph (3) (b), the execution of a deed or instrument by the Administrator in accordance with the order has the same force and validity as if the deed or instrument had been executed by the person in whose name the Administrator executed it.
- (5) The Administrator must not take action to sell property under a direction under subsection (2):
  - (a) until:
    - (i) the periods for the lodging of an appeal against the relevant conviction, and the making of the relevant pecuniary penalty order and restraining order, have expired without any such appeal having been lodged; or
    - (ii) if an appeal is lodged against a relevant conviction, or the making of the relevant pecuniary penalty order or restraining order — all the appeals lapse or are finally determined; or
  - (b) if proceedings in bankruptcy against the owner of the property are in progress or the owner is a bankrupt.

## 64 Registration of restraining order

- (1) An authority that administers a law of Tuvalu that provides for the registration of title to, or charges over, property of a particular kind, may, on application by the Attorney-General, record on a register kept under that law the particulars of a restraining order that applies to property of that kind.

- (2) If those particulars are so recorded, a person who subsequently deals with the property is taken, for section 65, to have notice of the restraining order at the time of the dealing.

## **65 Contravention of restraining orders**

- (1) A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order commits an offence punishable by:
  - (a) for a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) for a body corporate — a fine of \$150 000.
- (2) If a restraining order is made against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order the Attorney-General may apply to the Court for an order setting aside the disposition or dealing.
- (3) If the Court is satisfied that the disposition or dealing was either not for sufficient consideration, or not in favour of a person who acted in good faith, the Court may:
  - (a) set aside the disposition or dealing with effect from the day when it took place; or
  - (b) set aside the disposition or dealing with effect from the day of the Court's order, and declare the right of any person who acquired an interest in the property on or after the day when the disposition or dealing took place and before the day of the order.

## **66 Court may revoke restraining orders**

- (1) If the Court has made a restraining order against a person's property, the Court may, on application by the person, revoke the order if:
  - (a) for an applicant who is a defendant — the applicant gives security satisfactory to the Court for the satisfaction of any pecuniary penalty order that may be made against the person under this Act; or
  - (b) the applicant gives undertakings satisfactory to the Court about the property.
- (2) An applicant under subsection (1) must give reasonable written notice of the application to the Attorney-General and, if the restraining order directed the Administrator to take control of property, the Administrator.

**67 When restraining order ceases to be in force**

- (1) A restraining order ceases to be in force at the end of 6 months after the day when it was made, unless it ceases sooner under subsection (5).
- (2) Within that period, on application by the Attorney-General, the Court may order that the order continues in force until a specified time or event, if the Court is satisfied that:
  - (a) a forfeiture order may still be made against the property; or
  - (b) the property may be required to satisfy a pecuniary penalty order that has not yet been made.
- (3) An order under subsection (2) does not have the effect of continuing a restraining order in force after the time when it would cease to be in force under subsection (5).
- (4) The Attorney-General must give a person reasonable written notice of an application under subsection (2) about a restraining order against the person's property.
- (5) A restraining order made in reliance on a person's conviction, or alleged commission, of a serious offence ceases to be in force, in whole or in part:
  - (a) if the order is made in reliance on the proposed charging of the person with the offence and the person is not so charged within the period of 48 hours after the making of the order — at the end of that period; or
  - (b) if the order is made in reliance on the charging of the person with the offence — when:
    - (i) the charge against the person is withdrawn; or
    - (ii) the person is acquitted of the charge and the time for an appeal by the Crown has lapsed; or
  - (c) when property subject to the order is used to satisfy a pecuniary penalty order that was made in reliance on the person's conviction of the offence; or
  - (d) when the Court refuses an application for a pecuniary penalty order in reliance on the person's conviction of the offence; or
  - (e) when property subject to the order is forfeited under Division 2 of Part 3.

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## DIVISION 4 - INTERIM RESTRAINING ORDERS FOR FOREIGN OFFENCES

### 68 Application of this Division

This Division applies to an application by the Attorney General for a restraining order under this Act against any property of a person in relation to a foreign serious offence, and to any restraining order made as a result of the application.

Note: See Mutual Assistance Act, s 30.

### 69 Definition — defendant

A person is a defendant for this Division if:

- (a) he or she has been convicted of a foreign serious offence; or
- (b) there are reasonable grounds for believing that a criminal proceeding has commenced, or is about to be commenced, against him or her in a foreign country.

### 70 Application for interim restraining order

- (1) If, under the Mutual Assistance Act, the Attorney-General applies for a restraining order under this Act against any property of a defendant, the Attorney-General may apply to the Court for an interim restraining order against:
  - (a) any realisable property held by the defendant; or
  - (b) specified realisable property held by another person.
- (2) The application may be made ex parte.
- (3) The application must be in writing, and must be accompanied by an affidavit stating:
  - (a) if the defendant has been convicted of a foreign serious offence — the offence of which the defendant was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodged against the conviction; and
  - (b) if the defendant has not been convicted of a foreign serious offence — the offence for which criminal proceedings are believed to have been commenced, and the grounds for believing that the defendant committed the offence; and
  - (c) if it is believed that criminal proceedings are about to be commenced against the defendant — the grounds for believing that the proceedings will be commenced within 48 hours; and

- (d) a description of the property against which the restraining order is sought; and
- (e) the name and address of the person who is believed to be in possession of the property; and
- (f) if the application seeks a restraining order against property of a defendant — the grounds for believing that the property is tainted property in relation to a foreign serious offence, or that the defendant derived a benefit directly or indirectly from committing such an offence; and
- (g) if the application seeks a restraining order against property of a person other than a defendant — the grounds for the belief that the property is tainted property in relation to a foreign serious offence, or is subject to the effective control of the defendant.

## **71 Notice of application for interim restraining order**

- (1) Before making an interim restraining order, the Court must require reasonable written notice to be given to, and may hear, any person who may have an interest in the property.
- (2) However, if the Attorney-General so requests, the Court must consider the application without requiring notice to be given in accordance with subsection (1), but an interim restraining order made in reliance on this subsection ceases to have effect after 14 days or a lesser period that the Court specifies in the order.
- (3) The Court may, on application by the Attorney-General, extend the period of operation of an interim restraining order made in reliance on subsection (2), but must not consider the application without requiring reasonable written notice to be given to any person who may have an interest in the property.

## **72 Interim restraining orders**

- (1) Subsection (2) applies if the Attorney-General applies to the Court for an interim restraining order against property of a defendant and the Court is satisfied that:
  - (a) the defendant has been convicted of a foreign serious offence, or a criminal proceeding for a foreign serious offence has commenced, or is reasonably believed to be about to commence, against the defendant in a foreign country; and
  - (b) if the defendant has not been convicted of a foreign serious offence — there are reasonable grounds for believing that the defendant committed the offence; and

- (c) if the application seeks a restraining order against property of a defendant — there are reasonable grounds for believing that:
  - (i) the property is tainted property in relation to a foreign serious offence; or
  - (ii) the defendant derived a benefit directly or indirectly from the commission of the offence; and
- (d) if the application seeks a restraining order against property of a person other than a defendant — there are reasonable grounds for believing that the property is:
  - (i) tainted property in relation to a foreign serious offence; or
  - (ii) subject to the effective control of the defendant.
- (2) The Court may make an order prohibiting the defendant or any other person from disposing of, or otherwise dealing with, the property, or a part of it or interest in it specified in the order, either absolutely or except in a way specified in the order.
- (3) An order under subsection (2) may be subject to any conditions that the Court thinks fit and, without limiting this subsection, may provide for meeting, out of the property or a specified part of it, all or any of the following:
  - (a) the person's reasonable living expenses (including the reasonable living expenses of the person's dependants, if any) and reasonable business expenses;
  - (b) the person's reasonable expenses in defending a criminal charge and any proceedings under this Act or in being represented in a criminal proceeding in a foreign country;
  - (c) another specified debt incurred by the person in good faith.
- (4) However, the order must not make provision of that kind unless the Court is satisfied that the person cannot meet the expenses or debt out of property that is not subject to a restraining order.
- (5) In deciding whether there are reasonable grounds for believing that property is subject to the effective control of the defendant, the Court may take into account the matters mentioned in subsection 41 (2).
- (6) In proceedings for an order under subsection (2), the Court may:
  - (a) take into account evidence that would otherwise be inadmissible; and
  - (b) order that a witness need not:
    - (i) answer a specified question; or
    - (ii) produce a specified document;

if the Court is satisfied that answering the question or producing the document may prejudice the investigation of an offence or the prosecution of a person.

### **73 Undertakings by Crown**

Before making an interim restraining order, the Court may require the Crown to give an undertaking about the payment of damages or costs, or both, for the making and execution of the order.

### **74 Service of interim restraining order**

- (1) A copy of an interim restraining order must be served on a person affected by it in the way the Court directs.
- (2) If the Court is satisfied that it is in the public interest to do so, it may order that service under subsection (1) be delayed for a specified period.

### **75 Ancillary orders and further orders**

- (1) If the Court makes an interim restraining order, any of the following may apply to the Court for an ancillary order:
  - (a) the Attorney-General;
  - (b) a person whose property is the subject of the interim restraining order (the owner);
  - (c) with the leave of the Court — any other person.
- (2) An ancillary order may do any 1 or more of the following:
  - (a) vary the property to which an interim restraining order relates;
  - (b) vary any condition to which an interim restraining order is subject;
  - (c) order a person to be examined on oath before the Court about the affairs of the owner or the defendant;
  - (d) provide for carrying out any undertaking about the payment of damages or costs given by the Crown in relation to the making of the interim restraining order;
  - (e) order the owner or the defendant to give a specified person a statement on oath setting out the particulars of the property, or dealings with the property, that the Court directs;
  - (f) anything else that the Court considers necessary in the circumstances.

- (3) If a person who has an interest in property against which an interim restraining order is made applies to the Court for a variation of the order to exclude the person's interest from the order, the Court must grant the application if the Court is satisfied that:
- (a) the applicant was not involved in the commission of the offence in relation to which the order was made and, if the applicant acquired the interest at the time of or after the commission (or alleged commission) of the offence, that the applicant acquired the interest:
    - (i) for sufficient consideration; and
    - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property; or
  - (b) it is in the public interest to do so having regard to all the circumstances, including any financial hardship or other consequence of the interest remaining subject to the order.
- (4) The Court must not hear an application under subsection (1) unless the applicant has given reasonable written notice of the application to each other person who is entitled to make an application under that subsection for the interim restraining order.
- (5) The Court may require notice of the application to be given to, and may hear, any person who, in the opinion of the Court, appears to have an interest in the property.
- (6) If a person is required, in accordance with an order under paragraph (2) (c) or (e), to make a statement on oath:
- (a) the person is not excused from making the statement on the ground that the statement, or part of it, might tend to incriminate the person or make the person liable to forfeiture or a penalty; and
  - (b) the statement, and any information, document or thing obtained as a direct or indirect consequence of it, is not admissible against the person in any criminal proceedings except a proceeding for perjury in making the statement.

## **76 Registration of interim restraining order**

- (1) An authority that administers a law of Tuvalu that provides for the registration of title to, or charges over, property of a particular kind, may, on application by the Attorney-General, record on a register kept under that law the particulars of the interim restraining order that applies to property of that kind.

- (2) If those particulars are so recorded, a person who subsequently deals with the property is taken, for section 77, to have notice of the order at the time of the dealing.

## **77 Contravention of interim restraining orders**

- (1) A person who knowingly contravenes an interim restraining order by disposing of, or otherwise dealing with, property that is subject to the order commits an offence punishable by:
  - (a) for a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) for a body corporate — a fine of \$150 000.
- (2) If an interim restraining order is made against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order the Attorney-General may apply to the Court for an order setting aside the disposition or dealing.
- (3) If the Court is satisfied that the disposition or dealing was either not for sufficient consideration, or not in favour of a person who acted in good faith, the Court may:
  - (a) set aside the relevant disposition or dealing with effect from the day when it took place; or
  - (b) set aside the disposition or dealing with effect from the day of the Court's order, and declare the right of any person who acquired an interest in the property on or after the day when the disposition or dealing took place and before the day of the order.

## **78 When interim restraining order ceases to be in force**

- (1) An interim restraining order ceases to have effect at the end of 30 days starting on the day when the order is made.
- (2) However:
  - (a) if the Court makes an interim restraining order, it may, on application by the Attorney-General made before the end of the period mentioned in subsection (2), extend the period of operation of the order; and
  - (b) if:
    - (i) an interim restraining order is made against property; and
    - (ii) before the end of the period mentioned in subsection (1) (including any extension of that period under subsection (2)),

a foreign restraining order against the property is registered in the Court under the Mutual Assistance Act;

the interim restraining order ceases to have effect when the foreign restraining order is registered.

## DIVISION 5 - FOREIGN RESTRAINING ORDERS

### 79 Application of this Division

This Division applies to a foreign restraining order registered in the Court under the Mutual Assistance Act.

### 80 Registered foreign restraining orders — Court may direct Administrator to take custody and control of property

- (1) On application by the Attorney-General the Court may, if satisfied that the circumstances so require, order the Administrator:
  - (a) to take custody and control of the property subject to the order; and
  - (b) to manage or otherwise deal with the property in accordance with the directions of the Court.
- (2) Before making an order under subsection (1), the Court must require reasonable notice to be given to, and may hear, any person who, in the opinion of the Court, may have an interest in the property.
- (3) If the Court makes an order under subsection (1) for property, the Administrator:
  - (a) may do anything that is reasonably necessary for preserving the property; and
  - (b) for that purpose may exercise any power that the owner of the property could exercise; and
  - (c) may do so to the exclusion of the owner.
- (4) If the Court makes an order under subsection (1) against property of a person, the Court may, when it makes the order or afterwards, make any of the following orders:
  - (a) an order directing the person to give the Administrator a statement on oath setting out the particulars of the property, or dealings with the property, that the Court directs;
  - (b) an order regulating the performance or exercise of the Administrator's functions, duties or powers under the foreign restraining order;
  - (c) an order deciding any question about the property;

- (d) if the relevant registered foreign restraining order provides that a person's reasonable expenses in defending a criminal charge be met out of the property — an order directing that those expenses be taxed, as provided in the order, before being met;
- (e) an order providing for the payment to the Administrator out of the property of the costs, charges and expenses incurred in relation to the performance or exercise by the Administrator of functions, duties or powers under the foreign restraining order.

### **81 Registered foreign restraining orders — undertakings**

- (1) Subsection (2) applies if:
  - (a) a foreign restraining order against property is registered in the Court under the Mutual Assistance Act; or
  - (b) the Court makes an order under section 80 about property.
- (2) The Court may, on application by a person claiming an interest in the property, make an order about giving, or carrying out, of an undertaking by the Attorney-General, for the Crown, about the payment of damages or costs for the registration, making or operation of the order.

### **82 Service of restraining order**

- (1) A copy of a restraining order or an order under section 80 must be served on a person affected by it in the way the Court directs.
- (2) If the Court is satisfied that it is in the public interest to do so, it may order that service under subsection (1) be delayed for a specified period.

### **83 Administrator to satisfy pecuniary penalty order**

- (1) In this section, a reference to a restraining order includes an order under section 80.
- (2) This section applies if:
  - (a) a foreign pecuniary penalty order is registered in the Court against a defendant; and
  - (b) a foreign restraining order is registered against property of:
    - (i) the defendant; or
    - (ii) another person against whom an order under subsection 41 (4) is in force.
- (3) The Court may direct the Administrator to satisfy the pecuniary penalty order by a payment to the Crown out of the property:

- (a) on the registration of the later of the orders; or
  - (b) on application by the Attorney-General, at any time while the restraining order remains in force.
- (4) To enable the Administrator to comply with a direction under subsection (3), the Court may:
- (a) direct the Administrator to sell or otherwise dispose of a specified part of the property; and
  - (b) order that the Administrator may:
    - (i) execute any deed or instrument in the name of a person who owns, or has an interest in, the property, and
    - (ii) do anything necessary to give validity and effect to such a deed or instrument.
- (5) If the Court makes an order of the kind mentioned in paragraph (4) (b), the execution of a deed or instrument by the Administrator in accordance with the order has the same force and validity as if the deed or instrument had been executed by the person in whose name the Administrator executed it.

#### **84 Registration of registered foreign restraining order**

- (1) In this section, a reference to a restraining order includes an order under section 80.
- (2) An authority that administers a law of Tuvalu that provides for the registration of title to, or charges over, property of a particular kind, may, on application by the Attorney-General, record on a register kept under that law the particulars of a restraining order that applies to property of that kind..
- (3) If those particulars are so recorded, a person who subsequently deals with the property is taken, for section 85, to have notice of the restraining order at the time of the dealing.

#### **85 Contravention of registered foreign restraining orders**

- (1) In this section, a reference to a registered foreign restraining order includes an order under section 80.
- (2) A person who knowingly contravenes a registered foreign restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order commits an offence punishable by:
  - (a) for a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or

- (b) for a body corporate — a fine of \$150 000.
- (3) If a foreign restraining order is registered against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order the Attorney-General may apply to the Court for an order setting aside the disposition or dealing.
- (4) If the Court is satisfied that the disposition or dealing was either not for sufficient consideration, or not in favour of a person who acted in good faith, the Court may:
  - (a) set aside the relevant disposition or dealing with effect from the day when it took place; or
  - (b) set aside the disposition or dealing with effect from the day of the Court's order, and declare the right of any person who acquired an interest in the property on or after the day when the disposition or dealing took place and before the day of the order.

## **86 Registered foreign restraining orders — when order ceases to be in force**

A foreign restraining order registered in the Court under the Mutual Assistance Act ceases to be in force when the registration is cancelled in accordance with that Act.

## **DIVISION 6 - PRODUCTION ORDERS, AND OTHER INFORMATION GATHERING POWERS**

### **87 Definition of production order**

In this Division:

“**production order**” includes an order that requires a person to make a document available for inspection.

### **88 Application for production orders**

- (1) Subsection (2) applies if:
  - (a) a person has been convicted of a serious offence and there are reasonable grounds for suspecting that a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence; or
  - (b) there are reasonable grounds for suspecting that a person has committed a serious offence and that a person has possession or

control of a property-tracking document or property-tracking documents in relation to the offence.

- (2) A police officer may apply to a magistrate for a production order against the person.
- (3) The application:
  - (a) may be made ex parte; and
  - (b) must be in writing and must be accompanied by an affidavit.
- (4) Subsection (5) applies if a police officer applies for a production order for an offence, and includes in the affidavit a statement to the effect that there are reasonable grounds for believing that:
  - (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and
  - (b) property specified in the affidavit is under the effective control of the person mentioned in paragraph (a).
- (5) For this section, the magistrate hearing the application may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document for the offence.
- (6) In deciding whether to treat a document as a property-tracking document for an offence, the magistrate may take into account the matters mentioned in subsection 41 (2).

## **89 Production orders**

- (1) The magistrate may, if satisfied that there are reasonable grounds for doing so, make a production order requiring a person to:
  - (a) produce to a police officer, at a specified time and place, any documents of the kind mentioned in subsection 88 (1) that are in the person's possession or control; or
  - (b) make available to a police officer for inspection, at a specified time or times and place or places, any documents of that kind that are in the person's possession or control.
- (2) The order has effect despite any law that prohibits disclosure of information.
- (3) However, a production order under paragraph (1) (a) may not require the production of accounting records used in the ordinary business of banking, including ledgers, day-books, cash books and account books.
- (4) If a production order requires a person to produce or make available a document that is a computer file, the order is taken to require the person:

- (a) to allow the police officer named in the order, or a person acting under the direction of that officer, to use a computer on which the document is held; and
- (b) to give the officer any password necessary to allow the officer to have access to the document; and
- (c) to allow the officer to use any computer software necessary to allow the officer to have access to the document.

## **90 Scope of police powers under production order**

- (1) If a document is produced to a police officer, or made available to a police officer for inspection, under a production order, the police officer may do any 1 or more of the following:
  - (a) inspect the document;
  - (b) take extracts from it;
  - (c) print it;
  - (d) make copies of it;
  - (e) for an order under paragraph 89 (1) (a) — keep the document if, and for as long as, reasonably necessary for this Act.
- (2) If a police officer keeps a document, the police officer must:
  - (a) make a copy of the document, certify the copy in writing to be a true copy and give the copy to the person to whom the order was addressed; or
  - (b) allow the person:
    - (i) to inspect the document; or
    - (ii) to take extracts from it; or
    - (iii) to make copies of it.

## **91 What use can be made of information**

- (1) If a person produces, or makes available, a document under a production order:
  - (a) the production or making available of the document; or
  - (b) any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document;

is not admissible against the person in any criminal proceedings except a proceeding for an offence against section 83.

- (2) A person required by a production order to produce or make available a document is not excused from doing so on the ground that producing the document or making it available:
  - (a) might tend to incriminate the person or make the person liable to a penalty; or
  - (b) would be in breach of an obligation (whether imposed by an Act or otherwise) not to disclose the existence or contents of the document.

## **92 Variation of production order**

- (1) If a production order requires a person to produce a document to a police officer, the person may apply to a magistrate to vary the order.
- (2) If the magistrate is satisfied that the document is essential to the person's business activities, the magistrate may vary the production order so that it requires the person to make the document available to a police officer for inspection.

## **93 Failure to comply with production order**

- (1) If a production order requires a person to produce a document to a police officer, or make a document available to a police officer for inspection, the person commits an offence if the person:
  - (a) contravenes the order without reasonable excuse; or
  - (b) in purported compliance with the order, produces or makes available a document that the person knows to be false or misleading in a material particular without:
    - (i) telling the police officer that the document is false or misleading, and the way in which it is false or misleading; and
    - (ii) giving correct information to the police officer if the person has, or can reasonably obtain, the correct information.
- (2) An offence against subsection (1) is punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.

**94 Search warrant to facilitate investigation**

- (1) A police officer may apply to a magistrate for a warrant under subsection (4) to search premises for a document if:
  - (a) a person is convicted of a serious offence, and there are reasonable grounds for suspecting that there is on premises a property-tracking document for the offence; or
  - (b) there are reasonable grounds for suspecting that a person has committed a serious offence and there is on the premises a property-tracking document for the offence.
- (2) If a police officer applies for a warrant under subsection (4) for an offence and includes in an accompanying affidavit a statement to the effect that there are reasonable grounds for believing that:
  - (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from committing the offence; and
  - (b) property specified in the affidavit is subject to the effective control of the person;

the magistrate may treat any document relevant to identifying, locating or quantifying the property as a property-tracking document for the offence for this section.
- (3) In deciding whether to treat a document, under subsection (2), as a property-tracking document for an offence, the magistrate may take into account the matters mentioned in subsection 41 (2).
- (4) Despite any enactment that prohibits disclosure of information, if an application is made under subsection (1) for a warrant to search premises for a property-tracking document:
  - (a) the magistrate may, if satisfied that there are reasonable grounds for doing so, issue a warrant of that kind in the same way, and subject to the same conditions, as the magistrate could issue a search warrant under section 101 of the Criminal Procedure Code; and
  - (b) subject to this Division, the warrant may be executed in the same way as if it had been issued under that section.
- (5) However, a magistrate may not issue a search warrant under subsection (4) unless the magistrate is satisfied that:
  - (a) it would not be appropriate to make a production order for the document; or
  - (b) the investigation for which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without warning to any person.

- (6) If a police officer enters premises in execution of a warrant issued under this section, the police officer may seize:
- (a) any document that is likely to be of substantial value (whether by itself or together with other documents) to the investigation for which the warrant was issued; and
  - (b) anything that the police officer believes, on reasonable grounds, will afford evidence as to the commission of a criminal offence.
- (7) In this section:
- “**premises**” includes any place and any building, receptacle or vehicle.

## **95 Production orders and search warrants for foreign offences**

- (1) If a police officer is authorised, under the Mutual Assistance Act to apply to a magistrate for:
- (a) a production order under this Act for a foreign serious offence; or
  - (b) a search warrant under this Act for a property-tracking document for a foreign serious offence;

this Division applies to the application and to any order or warrant issued as a result of the application as if a reference in this Division to a serious offence were a reference to the foreign serious offence.

- (2) If a police officer takes possession of a document under a production order made, or a warrant issued, for a foreign serious offence, the police officer may keep the document until the Attorney-General gives a written direction about how the document is to be dealt with, but not for longer than 1 month.
- (3) A direction by the Attorney-General under subsection (2) about a document may include a direction that the document is to be sent to an authority of the foreign country that requested the issue of the relevant order or warrant.

### **DIVISION 7 - MONITORING ORDERS**

## **96 Monitoring orders**

- (1) A police officer of or above the rank of sergeant may apply to a magistrate in accordance with subsection (2) for an order directing a financial institution to give information to a police officer about transactions conducted through an account held by a specified person with the institution during the period specified in the order.
- (2) The application:

- (a) may be made ex parte; and
  - (b) must be in writing and accompanied by an affidavit.
- (3) A magistrate may not make a monitoring order unless he or she is satisfied that there are reasonable grounds for suspecting that the person about whose account the information is sought:
- (a) has committed, or is about to commit, a serious offence; or
  - (b) was involved in committing, or is about to be involved in committing, a serious offence; or
  - (c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from committing a serious offence.
- (4) The period specified in the order:
- (a) must not begin before the day when notice of the order is given to the financial institution; and
  - (b) must end no later than 3 months after the day the order is made.
- (5) A monitoring order must specify:
- (a) the name or names in which the account is believed to be held; and
  - (b) the kind of information that the institution is required to give; and
  - (c) the name of the police officer to whom, and the way in which, the information is to be given.
- (6) If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made must be disregarded for the application of sections 13 and 14 to the institution.
- (7) If a financial institution that has been given notice of a monitoring order knowingly:
- (a) contravenes the order; or
  - (b) provides false or misleading information in purported compliance with the order;
- the institution is guilty of an offence punishable by a fine of \$300 000.
- (8) A reference in this section to a transaction conducted through an account includes:
- (a) the making of a fixed term deposit; and
  - (b) for to a fixed term deposit — the transfer of the amount deposited, or any part of it, at the end of the term; and
  - (c) the opening, existence or use of a deposit box held by the institution.

**97 Monitoring orders not to be disclosed**

- (1) A financial institution that is, or has been, subject to a monitoring order must not disclose the existence or the operation of the order except:
  - (a) to the Commissioner of Police, or to a police officer authorised in writing by the Commissioner of Police to receive the information; or
  - (b) to an officer or agent of the institution, to ensure that the order is complied with; or
  - (c) to a legal practitioner, to obtain legal advice or representation for the order.
- (2) A person of a kind mentioned in paragraph (1) (a), (b) or (c) to whom the existence or operation of a monitoring order has been disclosed must not:
  - (a) disclose the existence or operation of the order except to another person of a kind mentioned in paragraph (1) (a), (b) or (c):
    - (i) if the disclosure is made by the Commissioner of Police or a police officer — for the person's duties; or
    - (ii) if the disclosure is made by an officer or agent of a financial institution — to ensure that the order is complied with, or to obtain legal advice or representation for the order; or
    - (iii) if the disclosure is made by a legal practitioner — to give legal advice or make representations for the order; or
  - (b) after the person has ceased to be a person of a kind referred to in paragraph (1) (a), (b) or (c) — make a record of, or disclose, the existence or the operation of the order in any circumstances.
- (3) A person who contravenes subsection (1) or (2) is guilty of an offence punishable by:
  - (a) if the person is a natural person — a fine of \$60 000 or imprisonment for 10 years, or both; or
  - (b) if the person is a body corporate — a fine of \$300 000.
- (4) However, despite subsection (3), the Commissioner of Police or a police officer who discloses the existence or operation of a monitoring order:
  - (a) for, or in connection with, legal proceedings; or
  - (b) in the course of proceedings before a court;is not guilty of an offence.
- (5) Despite any other law, the Commissioner of Police or a police officer may not be required to disclose to a court the existence or operation of a monitoring order.

- (6) A reference in this section to disclosing the existence or operation of a monitoring order to a person includes disclosing information to the person from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

## **PART 5 - REPORTING OBLIGATIONS OF FINANCIAL INSTITUTIONS AND CASH DEALERS**

### **98 Definitions for Part**

In this Part:

**“customer, of a financial institution”**, means a person by or for whom the institution carries out a financial transaction of any of the following kinds:

- (a) opening or closing an account with the institution;
- (b) operating an account with the institution;
- (c) opening or using a deposit box held by the institution;
- (d) transferring funds telegraphically or electronically to another person;
- (e) transmitting funds between Tuvalu and a foreign country or between foreign countries;
- (f) making a loan to the person.

**“minimum retention period”** for a document means:

- (a) if the document relates to the opening of an account with a financial institution — 7 years after the day when the account is closed; or
- (b) if the document relates to the opening by a person of a deposit box held by such an institution — 7 years after the day when person ceases to use the deposit box; or
- (c) in any other case — 7 years after the day when the relevant transaction takes place.

### **99 Financial institutions and cash dealers to verify customers' identity**

- (1) To satisfy itself of the true identity of an applicant seeking to enter into a business relationship with it, or to carry out a transaction or series of transactions with it, a financial institution or cash dealer must require the

applicant to produce an official record reasonably capable of establishing the true identity of the applicant, such as:

- (a) a birth certificate, passport or other official means of identification;  
or
  - (b) for a body corporate, a copy of its certificate of incorporation.
- (2) If an applicant requests a financial institution or cash dealer to enter into:
- (a) a continuing business relationship; or
  - (b) in the absence of such a relationship — any transaction;
- the institution or cash dealer must take reasonable measures to establish whether the person is acting for another person.
- (3) If it appears to a financial institution or cash dealer that an applicant requesting it to enter into a transaction, whether or not in the course of a continuing business relationship, is acting for another person, the institution or cash dealer must take reasonable measures to establish the true identity of the person for whom, or for whose ultimate benefit, the applicant is apparently acting in the proposed transaction.
- (4) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1), (2) or (3) commits an offence punishable by:
- (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.
- (5) In deciding what measures are reasonable for subsection (1) or (3), regard must be had to all the circumstances of the case, and in particular to:
- (a) whether the applicant is based or incorporated in a country whose laws include measures intended to prevent the country's financial system being used for money-laundering; and
  - (b) custom and practice from time to time in the relevant field of business.
- (6) Nothing in this section requires the production of any evidence of identity if:
- (a) the applicant is itself a financial institution or a cash dealer to which this Act applies; or
  - (b) the transaction or series of transactions is part of a business relationship with an applicant that has already produced satisfactory evidence of identity.

**100 Financial institutions and cash dealers to establish and maintain customer records**

- (1) A financial institution or cash dealer must establish and maintain:
  - (a) records of all transactions exceeding \$200 or its equivalent in foreign currency (or a higher amount prescribed by regulations for this paragraph) carried out by it, in accordance with subsection (3); and
  - (b) if evidence of a person's identity is obtained in accordance with section 99 — a record that indicates the kind of evidence obtained, and comprises either a copy of the evidence or information that enables a copy of it to be obtained.
- (2) A financial institution or cash dealer must keep its records about an account-holder in the account-holder's true name.
- (3) The record of a transaction under paragraph (1) (a) must show:
  - (a) the name, address and occupation (or, where appropriate, the business or principal activity) of each person:
    - (i) conducting the transaction; or
    - (ii) if known — on whose behalf the transaction is being conducted; and
  - (b) how the financial institution or cash dealer verified the identity of each such person; and
  - (c) the nature and date of the transaction; and
  - (d) the type and amount of currency involved; and
  - (e) the type and identifying number of any account with the financial institution or cash dealer involved in the transaction; and
  - (f) if the transaction involves a negotiable instrument other than currency:
    - (i) the name of the drawer of the instrument; and
    - (ii) the name of the institution on which it was drawn; and
    - (iii) the name of the payee (if any); and
    - (iv) the amount and date of the instrument; and
    - (v) the number (if any) of the instrument; and
    - (vi) details of any endorsements appearing on the instrument; and
  - (g) the name and address of the financial institution or cash dealer, and of the officer, employee or agent of the financial institution or cash dealer who prepared the report.

- (4) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1), (2) or (3) commits an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.

### **101 Financial institutions and cash dealers to report suspicious transactions**

- (1) If a financial institution or cash dealer:
  - (a) is a party to a transaction; and
  - (b) has reasonable grounds for suspecting that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence;

it must do the things required by subsection (2) as soon as possible but no later than 3 working days after forming that suspicion, and if possible before the transaction is carried out.

- (2) The things are:
  - (a) taking reasonable measures to find out the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of the ultimate beneficiary; and
  - (b) making a report of the transaction in accordance with subsection (3) to the Unit in writing or in any other way that the Attorney-General from time from time approves.
- (3) A report required by paragraph (2) (b) must:
  - (a) contain the particulars about the transaction mentioned in paragraph (2) (a) and subsection 100 (3); and
  - (b) contain a statement of the grounds on which the financial institution or cash dealer holds the suspicion; and
  - (c) be signed or otherwise authenticated by the financial institution or cash dealer.
- (4) A financial institution or cash dealer that has reported a suspicious transaction in accordance with this Part must, if requested to do so by the Unit, give the Unit any further information that it has about the transaction.

- (5) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1), (2), (3) or (4) commits an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.
- (6) If a financial institution or cash dealer gives information to the Unit about its suspicion about a transaction to which it is a party, the institution or dealer, or an officer, employee or agent of the institution or dealer, must not, unless required to do so under this or another Act, disclose to anyone else:
  - (a) that the institution or dealer has formed the suspicion; or
  - (b) that information has been given; or
  - (c) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the suspicion had been formed or that the first-mentioned information had been given.
- (7) A financial institution or cash dealer, or an officer, employee or agent of such an institution or dealer, who contravenes subsection (4) is guilty of an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$12 000 or imprisonment for 2 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$60 000.

## **102 Financial institutions and cash dealers to establish and maintain internal reporting procedures**

- (1) A financial institution or cash dealer must establish and maintain internal procedures:
  - (a) to identify persons to whom an employee is to report any information that comes to the employee's attention in the course of employment, and that gives rise to knowledge or suspicion by the employee that another person is engaged in money-laundering; and
  - (b) to enable any person identified under paragraph (a) to have reasonable access to information that may be relevant to deciding whether sufficient basis exists to report the matter to the Unit; and
  - (c) to require the identified person to report the matter to the Unit, if he or she decides that sufficient basis exists to do so.
- (2) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1) commits an offence punishable by:

- (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
- (b) if the offender is a body corporate — a fine of \$150 000.

### **103 Further preventive measures by financial institutions and cash dealers**

- (1) A financial institution or cash dealer must establish and maintain internal procedures:
  - (a) to make its employees aware of domestic laws about money-laundering, and the procedures and policies established and maintained by it under this Act; and
  - (b) to train its employees to recognise and handle money-laundering transactions.
- (2) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1) commits an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.

### **104 Financial institutions to retain records**

- (1) A financial institution or cash dealer must keep, for the minimum retention period applicable to the document, a document that relates to a financial transaction carried out by the institution or dealer in its capacity as a financial institution or cash dealer, including (without limiting the generality of this obligation) a document that relates to a transaction of a kind mentioned in the definition of customer in section 98.
- (2) However, subsection (1) does not apply to:
  - (a) a document that relates to a single deposit, credit, withdrawal, debit or transfer of an amount of up to \$200 (or a higher amount prescribed for this paragraph); or
  - (b) a document that:
    - (i) is not a document given to the institution by or for a customer; and
    - (ii) need not be retained to preserve a record of the financial transaction concerned.
- (3) A financial institution or cash dealer required to keep documents under this section must keep them on microfilm or in another way that makes retrieving them, or the information in them, reasonably practicable.

- (4) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1) or (3) commits an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.
- (5) This section does not limit any other obligation of a financial institution or cash dealer to retain documents.

### **105 Register of original documents**

- (1) If, despite subsection 94 (1), a financial institution or cash dealer is required by law to release an original document before the end of the minimum retention period applicable to the document, the institution or dealer must keep a complete copy of the document until the period has ended or the original document is returned, whichever occurs first.
- (2) The financial institution or cash dealer must maintain a register of documents released under subsection (1).
- (3) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1) or (2) commits an offence punishable by:
  - (a) if the offender is a natural person — a fine of \$30 000 or imprisonment for 5 years, or both; or
  - (b) if the offender is a body corporate — a fine of \$150 000.

### **106 Protection for financial institutions etc**

If a financial institution or cash dealer, or an officer, employee or agent of a financial institution or cash dealer, gives information to a police officer or the Attorney-General under subsection 101 (1) as soon as practicable after the grounds for suspicion mentioned in that subsection become known, the institution or dealer is taken, for sections 13 and 14, not to have been in possession of that information at any time.

## **PART 6 - DISCLOSURE OF INFORMATION HELD BY GOVERNMENT DEPARTMENTS**

### **107 Direction to disclose information**

Despite any other law, the Attorney-General may direct the person in charge of a Government department or statutory body to give or disclose, to the Attorney-

General or a police officer nominated by the Attorney-General, a document or information that is in the possession or under the control of that person or to which that person has access, if the Attorney-General is satisfied that the document or information is relevant to:

- (a) establishing whether a serious offence has been, or is being, committed; or
- (b) the making, or proposed or possible making, of an order under Part 2 or 3 of this Act.

### **108 Further disclosure of information and documents**

- (1) A person to whom a document or information has been disclosed under section 107 must not further disclose the document or information except for:
  - (a) the investigation of, or the prosecution, or proposed or possible prosecution, of a person for a serious offence; or
  - (b) an investigation relating to proceedings, or proposed or possible proceedings, for the making of an order under this Act or an investigation relating to the making, or proposed or possible making, of such an order.
- (2) A person to whom a document or information has been disclosed in accordance with subsection (1) or this subsection must not disclose the document or information to another person except for a purpose mentioned in paragraph (1) (a) or (b).
- (3) If a document or information is disclosed to a person under section 91 or subsection (1) or (2), the person:
  - (a) must not voluntarily give the document or information in evidence in a proceeding before the Court other than a proceeding of a kind mentioned in paragraph (1) (a) or (b); and
  - (b) may not be required to give the document or information to the Court.
- (4) A person who discloses a document or information in contravention of this section is guilty of an offence punishable by a fine of \$12 000 or imprisonment for 2 years, or both.

### **109 Evidential value of copies**

- (1) If a document is examined by or given to the Attorney-General or a police officer under a direction under section 107, the person who examines it, or to whom it is given, or an officer or person authorised for the purpose by the person in charge of the Government department or statutory body to

which the direction was given, may make or cause to be made 1 or more copies of the document.

- (2) A copy purporting to be certified by the person in charge of the Government department or statutory body to be a copy made under subsection (1):
  - (a) is evidence of the nature and content of the original document; and
  - (b) has the same probative force as the original document would have had if it had been proved in the ordinary way.

## **PART 7 - SUSPICIOUS CURRENCY MOVEMENTS**

### **110 Seizure and detention of suspicious imports or exports of currency**

An authorised officer may seize and detain any currency that is being imported into or exported from Tuvalu if:

- (a) the amount is not less than the equivalent of \$1 000 (or a higher amount prescribed by regulation for this paragraph); and
- (b) there are reasonable grounds for suspecting that it is:
  - (i) property derived from a serious offence; or
  - (ii) intended by any person for use in the commission of a serious offence.

### **111 Detention of seized currency**

- (1) Currency detained under section 110 may not be detained for more than 24 hours after it is seized.
- (2) However, a magistrate may order its continued detention for a period not exceeding 3 months from the day it is seized, upon being satisfied that:
  - (a) there are reasonable grounds for the suspicion mentioned in paragraph 110 (1) (b); and
  - (b) its continued detention is justified while:
    - (i) its origin or derivation is further investigated; or
    - (ii) consideration is given to the institution (in Tuvalu or elsewhere) of criminal proceedings against a person for an offence with which the currency is connected.
- (3) The Court may subsequently order the continued detention of the currency if satisfied of the matters mentioned in paragraphs (2) (a) and (b), but the

total period of detention may not exceed 2 years from the date of the first order made under subsection (2).

### **112 Release of detained currency**

- (1) Currency detained under section 111 may be released in whole or in part to the person for whom it was imported or exported:
  - (a) by order of a court that its continued detention is no longer justified, upon application by or for that person and after considering any views of the Attorney-General to the contrary; or
  - (b) by an authorised officer, if satisfied that its continued detention is no longer justified.
- (2) However, currency detained under section 111 must not be released if:
  - (a) an application is made for:
    - (i) a confiscation order against the whole or any part of the currency; or
    - (ii) a restraining order against it pending determination of its liability to confiscation; or
    - (iii) the registration of a foreign confiscation order or foreign restraining order against it; or
  - (b) proceedings are under way in Tuvalu or elsewhere against a person for an offence with which the currency is connected;

until the proceedings relating to the relevant application, or the proceedings for the offence, have been concluded.

## **PART 8 - MISCELLANEOUS**

### **113 Conduct by directors, servants or agents**

- (1) For this Act, the state of mind of a person may be established in accordance with this section.
- (2) For conduct engaged in, or taken under subsection (3) to have been engaged in, by a body corporate, it is sufficient to show that a director, servant or agent of the body corporate who engaged in the conduct within the scope of his or her actual or apparent authority had that state of mind.
- (3) Conduct engaged in for a body corporate is taken, for this Act, to have been engaged in by the body corporate if it is engaged in:

- (a) by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; or
  - (b) both:
    - (i) by another person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate; and
    - (ii) if giving the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent.
- (4) For conduct taken, under subsection (5), to have been engaged in by a person (other than a body corporate), it is sufficient to show that a servant or agent of the person who engaged in the conduct within the scope of his or her actual or apparent authority had that state of mind.
- (5) Conduct engaged in for a person (other than a body corporate) is taken, for this Act, to have been engaged in by the person if it is engaged in by:
- (a) a servant or agent of the person within the scope of the servant or agent's actual or apparent authority; or
  - (b) by another person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent.
- (6) A reference in this section to the state of mind of a person includes the person's knowledge, intention, opinion, belief or purpose, and the person's reasons for that intention, opinion, belief or purpose.

## **114 Appointment of Administrator**

The Attorney-General may by instrument appoint a person to administer property forfeited, or subject to a restraining order, under this Act.

## **115 Standard of proof**

Except as otherwise provided in this Act, a question of fact to be decided by the Court in proceedings under this Act is to be decided on the balance of probabilities.

## **116 Costs**

The Court may order the Crown to pay all costs reasonably incurred by a person in connection with proceedings, or a part, specified in the order, of those costs if:

- (a) the person brings, or appears at, the proceedings under this Act before a court:
  - (i) to prevent a forfeiture, confiscation or restraining order from being made against property of the person; or
  - (ii) to have property of the person excluded from a forfeiture, confiscation or restraining order; and
- (b) the person is successful in those proceedings; and
- (c) the Court is satisfied that the person was not involved in any way in the commission of the offence for which the forfeiture, confiscation or restraining order was sought or made.

### **117 Non-liability of Administrator**

The Administrator is not personally liable for any act done, or omitted to be done, by him or her in performing the Administrator's functions under this Act.

### **118 Operation of certain other laws not affected**

Nothing in this Act prejudices, limits or restricts:

- (a) the operation of any other law that provides for the forfeiture of property or the imposition of penalties or fines; or
- (b) the remedies available to the Crown, apart from this Act, for the enforcement of its rights and the protection of its interests; or
- (c) any power of search or any power to seize or detain property that is exercisable by a police officer apart from this Act.

### **119 Regulations**

The Minister may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**PROCEEDS OF CRIME ACT 2004**  
**Explanatory memorandum**

*(This memorandum is not part of the Act)*

The Proceeds of Crime Bill 2002 implements, for Tuvalu, part of an agreement made between the law officers of the Pacific Islands nations at Honiara in 1992. Its objects are to deprive criminals of the proceeds of serious offences and of property used in the commission of serious offences, as well as enabling tracing the proceeds and property.

1. The proposed Act gives the High Court power to make and enforce the necessary orders; to require financial institutions and cash dealers to keep appropriate records and report suspicious transactions; and to prevent concealment of the proceeds of crime by, for example, operating a bank account in a false name. It does not affect the operation of any other law about forfeiture or property or the imposition of penalties, or any other rights of the Crown, or any power of search or seizure.
2. For the proposed Act, a financial institution includes persons or bodies who provide banking or financial services, a cash dealer includes most persons or bodies who might receive large sums of money and a serious offence is one that is punishable by 12 months or more imprisonment.
3. A person is taken to benefit from a crime if the person receives any payment, reward or pecuniary advantage from the offence or someone else derives a benefit at the request of the person. Proceeds of crime is property derived from the commission of a serious offence.
4. It is an offence of money-laundering to deal with money or property that a person knows, or should know, to be proceeds of crime. It is an offence to possess property reasonably suspected of being proceeds of crime, to operate an account with a financial institution or cash dealer in a false name or to disclose information that might prejudice an investigation.
5. The Transaction Tracking Unit is established, to receive reports of suspicious transactions, to keep statistics and to establish training requirements for financial institutions. It can enter the premises of a financial institution or cash dealer to inspect records and give directions to facilitate an investigation. However, it cannot undertake any investigation into money-laundering. The Unit can apply for a search warrant or a monitoring order, and can obtain an order against a financial institution or cash dealer to comply with its obligations under the proposed Act.
6. The Attorney-General may apply to the High Court for a forfeiture order or pecuniary penalty order, or both, against a person who has been convicted of a serious offence. An application may be made against an offender who has absconded. A forfeiture order vests the property in the

Crown. A forfeiture order is discharged if the relevant conviction is quashed or if an appeal against the making of the order succeeds.

7. A third party with an interest in property is protected if he or she acquired the interest without being involved in an offence, for sufficient consideration and without knowing that the property was tainted. The property can be returned to the person, or the value of the person's interest can be paid to the person out of the proceeds of the sale of the property.
8. The Court can order payment to the Crown of the value of property instead of ordering that the property is forfeit to the Crown if, for example, the property has been transferred to an innocent third party. A debt arising from an order to make such a payment is a civil debt due to the Crown and can be enforced in the same way as any other civil debt.
9. A foreign forfeiture order can be registered under the Mutual Assistance in Criminal Matters Act, and then enforced as if it had been made under the proposed Act.
10. A pecuniary penalty order can be made if, for example, an offender has derived a benefit from a serious offence, but no longer retains any tainted property. The Court works out how much the offender must pay under the order by assessing the value of the offender's benefit from the offence.
11. The Court can lift the corporate veil when assessing the value of a person's benefit from an offence, and treat property that is under a person's effective control as being the person's property, regardless of any interposed corporate structure or trust.
12. Application can be made under section 101 of the Criminal Procedure Code for a search warrant for tainted property. Other tainted property, or things that may be of value as evidence, can be seized if they are found in the course of a search under such a warrant.
13. A person whose property has been seized can apply to the Court for an order that the property be returned if the person can satisfy the Court that the property is not tainted, and that the person is entitled to possession of it.
14. The Commissioner of Police must return seized property unless an information had been laid at the time of seizure or is laid within 48 hours after that time, unless a magistrate makes an order extending the time during which the Commissioner may retain the property, or within 14 days after to end of proceedings if no application for a forfeiture order has been made.
15. The Commissioner can apply to the Court for an order to retain the property if it is required for evidence. The Court can issue a restraining order to preserve property that may be subject to forfeiture.

16. Before making a restraining order the Court must be satisfied that the person against whose property the order is to be made has been convicted of a serious offence, or that the person will be charged with the offence within 48 hours; that there are reasonable grounds for believing that the person actually committed the offence; and that the property is tainted property in relation to the offence. The order can prohibit dealings with the property, and can also direct that the property be placed under control of the Administrator.
17. Property under the control of the Administrator can be used to pay any pecuniary penalty order made against its owner. A restraining order can be registered on the appropriate register for registrable property (for example, a ship). It is an offence to contravene a restraining order, and the Court can set aside any dealing with property in contravention of a restraining order. The Administrator is exempt from personal liability for any act done in performing his or her functions under the proposed Act.
18. A restraining order generally ceases to be in force 6 months after it is made, but it can be extended by the Court on application by the Attorney-General. It ceases earlier if the person who owns the property is charged with the relevant offence and acquitted, or the charge is withdrawn, or (if the person is not charged) 48 hours after it is made.
19. A foreign country can apply for an interim restraining order against property based on a foreign serious offence under the Mutual Assistance Act. The order ceases to be in force after 30 days unless extended by the Court. This will allow sufficient time for a foreign restraining order against the property to be registered under the Mutual Assistance Act.
20. Under a registered foreign restraining order, the Court can direct the Administrator to take control of the subject property and use it to satisfy a registered foreign pecuniary penalty order. A registered foreign restraining order ceases to be in force when the registration is cancelled under the Mutual Assistance Act..
21. A magistrate can order that a property-tracking document be produced to a police officer, or that a police officer be allowed to inspect it. A property-tracking document is one that can help to identify, locate or quantify tainted property or property of a person who committed an offence, or to identify or locate another document that is necessary to transfer property of that kind.
22. This order has effect despite any other law that prohibits disclosure of information. However, it cannot require bankers' books to be produced. If a password or special computer software is necessary, the officer must be given it.

23. A document is not admissible in evidence against the person producing it or making it available. However, a person is not excused from producing the document on the ground that it might incriminate the person or would be in breach of another obligation not to disclose the document. Failure to comply with a production order, either by not producing the document, or producing a false document, is an offence.
24. A search warrant can be issued for a property-tracking document. A magistrate must not issue a search warrant for a document unless he or she is satisfied that it would not be appropriate to make a production order about the document.
25. A monitoring order can be directed to a financial institution, requiring the institution to inform a specified police officer about transactions (including the use of safe deposit boxes) conducted through an account held with the institution. It is an offence to disclose the fact that a monitoring order has been made, except disclosure for the purpose of carrying out a person's duties, ensuring that the order is carried out or to a legal practitioner for obtaining legal advice.
26. Failure to comply with an obligation of financial institutions and cash dealers under the proposed Act is an offence.
27. There is an obligation to take reasonable measures to verify customers' identities, to make sure whether a person is really acting for another person and to establish and maintain customer records containing specified particulars. The records of a customer's account must be kept in the customer's true name. There are minimum standard for retention of records, including keeping a copy if an original record must be released before the minimum retention period of 7 years expires.
28. A financial institution or cash dealer must report suspicious transactions to the Transaction Tracking Unit, and must set up internal procedures to ensure that its obligations are complied with. The Attorney-General can require government bodies to give information to the Attorney-General or a police officer.
29. An authorised officer can seize any large sum of currency that is being imported or exported and detain it for up to 24 hours, and up to 3 months on the order of a magistrate. The total period of detention must not exceed 2 years unless a forfeiture order or restraining order is made, or a foreign forfeiture order or restraining order is registered against it.

Dated 9th November 2002

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**IAKOBA T. ITALELI**

*ATTORNEY-GENERAL*

I certify that this is a true copy of the Bill no. 3 of 2004 passed by the Parliament of Tuvalu on 30th March 2004.

.....

**LILY S FAAVAE**

*ACTING CLERK TO PARLIAMENT*

I certify that this Bill is now in order for the assent of the Governor-General as representative of the Head of State.

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**IAKOBA T. ITALELI**

*ATTORNEY-GENERAL*

Published by exhibition at the public office of the Government this .....September 2005.

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**PANAPASI NELESONE**

*SECRETARY TO GOVERNMENT*

**ENDNOTES****Table of Legislation History**

<b>Legislation</b>	<b>Year and No</b>	<b>Commencement</b>

**Table of Renumbered Provisions**

<b>Original</b>	<b>Current</b>

**Table of Endnote References**