Part VI

Civil Forfeiture

Section 66 Definitions

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

Court means [insert reference to judicial authority that will be given authority to act with respect to the applications set forth in the Part].

Enforcement authority means [insert name of authority the State decides to designate to institute civil forfeiture matters under this Part].

> **Drafting note:** This part relates to the making and enforcement of orders with respect to property that is proved to be property arising out of unlawful conduct. These forfeiture orders are civil in nature; therefore, they are applied for in the civil courts, and they are available even if there is no prosecution or conviction or, indeed, if, following a criminal trial, the defendant is acquitted.
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> **Enforcement authority.** The enforcement authority should be a legal office since the authority will be pursuing civil cases before the court. Thus, it would not be appropriate in most cases for this to be a police agency. In some states, it is a completely separate office from the general prosecution office; in others, it is a branch of the prosecution.
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> The term is also used in Part V on criminal confiscation. It may be, and indeed often is, defined differently in the two parts, if necessary.

Instrumentality and **instrumentalities** carry the same meaning as in Part V, Section 38.

Interest, in relation to property, carries the same meaning as in Part V, Section 38.

Offence or **criminal offence**, except when the term refers to a specific offence, means:

Variant 1

(a) any offence under the law of [insert name of State]; and

(b) any offence under a law of a foreign State, in relation to acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 2

(a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is death or life imprisonment or other deprivation of liberty of more than one year; and

(b) any offence under a law of a foreign State, in relation to acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 3

(a) offences defined in Schedule 1 to this Act; and

(b) any offence under a law of a foreign State, in relation to acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting note: The civil forfeiture provisions apply in the case of proceeds. The definition of proceeds is property received 'through the commission of a criminal offence'. Thus, the scope that drafting authorities decide upon for 'offence' in this definition will influence the availability of civil forfeiture within the jurisdiction.

The definition of 'offence' should reflect one of the three approaches in the interpretative note to FATF 40 Recommendation 3. See also the drafting note on Recommendation 3 in Part II, Section 3, above. Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences, or some combination of these.

The use of variant 1 will permit the civil forfeiture provisions to be used for all offences including minor offences, and drafting authorities should consider whether they want to make all such offences potential triggering activity.

If variant 2 is chosen, the civil forfeiture provisions will be available in the case of all serious offences, that is those that have a penalty, as a maximum of more than a year. In those instances where a country has a minimum rather than maximum threshold in its legal system, variant 2 will need to be altered.

Use of variant 3 alone, the list approach, has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

It is essential for effective international cooperation that similar offences under the laws of other jurisdictions are also covered. This is dealt with in subsection (b) of each variant.

Person carries the same meaning as defined in Part V, Section 38.

Proceeds and **proceeds of crime** carry the same meanings as in Part II, Section 3.

Property carries the same meaning as in Part II, Section 3.

Terrorist carries the same meaning as in Part IV, Section 37.

Terrorist act carries the same meaning as in Part IV, Section 37.

Terrorist organisation carries the same meaning as in Part IV, Section 37.

Drafting note: The definitions of 'terrorist' and 'terrorist organisation' are the same as appear in the glossary to the FATF Recommendations.

Terrorist property means:

(a) proceeds from the commission of a terrorist act;

(b) property that has been, is being, or is intended to be, used to commit a terrorist act;

(c) property that has been, is being, or is intended to be, used by a terrorist organisation;

(d) property owned or controlled by, or on behalf of, a terrorist organisation; or

(e) property that has been collected for the purpose of providing support to a terrorist organisation or funding a terrorist act.

Drafting note: A definition of terrorist property (and the related definitions of terrorist, terrorist act and terrorist organisation) will not be necessary if drafters choose the option of providing for the civil forfeiture of instrumentalities. Instrumentalities, by definition, already include property provided or collected for terrorist acts or terrorist organisations.

Section 67 Civil Forfeiture Order

Drafting note: Overview: Civil forfeiture orders. Civil forfeiture enables the enforcement authority (as defined in Section 66(1)) to bring civil proceedings in an appropriate civil court in the state to recover property that is or represents property obtained through criminal conduct, is terrorist property or, if the part is drafted to cover instrumentalities, is an instrumentality.

FATF Recommendation 4 (2012) specifically requires countries to consider adopting such measures, to the extent consistent with the principles of their domestic law. It is therefore very important that all countries should give this matter consideration, at least.

This is likely to be an entirely new statutory right of action in the state, and is reserved for the enforcement authority. The procedure for civil forfeiture actions is likely to be governed by the usual rules of civil procedure in the state's courts. In some instances, jurisdictions will need to work with the judiciary on necessary amendments to civil procedure rules.

As noted above, if instrumentalities are included, it will not be necessary to include terrorist property since instrumentalities by definition cover terrorist property.

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Drafting authorities should review how the terms ‘part’ and ‘act’ are used within a state’s framework.

(1) An order for civil forfeiture is an order *in rem*, granted by a court with civil jurisdiction to forfeit to the State property that is or represents proceeds [*or instrumentalities*] or terrorist property.

Drafting note: Section 67(1) defines a civil forfeiture order. The order can be distinguished from the definition of a confiscation order: it does not follow a conviction, and it is granted by a civil court.

The subsection also makes clear that a civil forfeiture proceeding is a proceeding *in rem*. This means that the property itself is the defendant, not the owner or a person who has an interest in the property. In Canada, for example, a typical style of cause might be Attorney General v. $100,000 in cash. Since not all civil procedure rules are designed to accommodate *in rem* forfeiture proceedings, some procedural rule changes may be required. This may involve consultation with the judiciary. For example, a jurisdiction that currently does not have *in rem* proceedings may need to adopt rules regarding such matters as notice to affected persons and intervention rights.

(2) The court, on an application by the enforcement authority, shall grant a civil forfeiture order in respect of property within the jurisdiction of [insert name of the State] where it finds, on a balance of probabilities, that such property is proceeds [***option:*** *instrumentalities*] and/or terrorist property.

Drafting note: Section 67(2) empowers a court with civil jurisdiction to grant a civil forfeiture order where it is satisfied that property is proceeds, instrumentalities or terrorist property. Drafters should decide on coverage for each of these three categories of property based upon the needs within the jurisdiction and in light of the comments below. Once the court has determined that property falls into one of the categories set out in the provision, it should grant the forfeiture order. Section 67(2) also makes it clear that the standard of proof is upon the balance of probabilities, and that the power applies only to property subject to the jurisdiction of the courts of the state. This latter limitation means that only property within the state will be affected.

Proceeds. Using the definition of ‘proceeds’, it follows that property derived from the commission of an offence, including property converted or transformed into other property, will be subject to civil forfeiture. It will not be sufficient to defeat a claim for civil forfeiture to demonstrate that the property in question has been sold or otherwise disposed of. If it has been sold etc. for

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value, then the property liable to forfeiture is the consideration received for the original proceeds. This ensures that criminals cannot defeat these provisions by converting property into another asset.

Terrorist property. Section 67(1) makes it clear that the provisions apply to terrorist property as well as to proceeds. A provision that provides for the forfeiture of proceeds alone is not adequate to capture most types of terrorist property. If a jurisdiction has existing legislation providing for the forfeiture of property owned or controlled by or on behalf of a terrorist group, then adding terrorist property may not be necessary.

It is important that there be provisions for the civil forfeiture of such property for many reasons, not least the fact that it may not always be possible to commence criminal proceedings against a specific person when such property is located.

Terrorist property is a term defined under Section 66 and covers both instrumentalities – property used or intended for use in the commission of a terrorist act – and the property of a terrorist organisation.

Instrumentalities. Careful consideration should be given to inclusion of instrumentalities that some, but not all, states with civil forfeiture provisions include in an unrestricted fashion. In Section 67(2) it is suggested as an option. Instrumentalities will necessarily, by definition, include terrorist property, so care will have to be taken when including both.

Covering instrumentalities will mean that property obtained with legitimate funds, but used in committing an offence, can be forfeited civilly. Questions of proportionality may arise regarding the civil forfeiture of an instrumentality of significant value if the gravity or monetary value of the offence is relatively small.

States with civil forfeiture provisions have adopted different approaches to covering instrumentalities. In some states, civil forfeiture of an instrumentality is broadly available and there is reliance on the discretion of enforcement authorities to pursue appropriate cases.

Alternatively, the state may have to show a substantial nexus between the use of the property and the conduct. Property that has a mere incidental connection to the conduct will not be liable to forfeiture as an instrument.

Other states limit civil forfeiture of an instrumentality to cash as an instrumentality or, in another instance, to property likely to be used in unlawful activities that may result in serious bodily harm, or in the acquisition of other property. In some instances, property can be both an instrument and proceeds. For instance, drug profits (proceeds) may also be an instrument when used to purchase additional illegal drugs. Funds collected or provided for a terrorist activity are both the proceeds of a financing offence and an intended or actual instrumentality of the terrorist activity.

(3) In order to satisfy the court under subsection (2) above:

(a) that property is proceeds, it is not necessary to show that the property was derived directly or indirectly, in whole or in part, from a particular criminal offence, or that any person has been charged in relation to such an offence, only that it is proceeds from a criminal offence or offences;

(b) [***option:*** *that property is an instrumentality, it is not necessary to show that the property was used or intended to be used to commit a specific criminal offence, or that any person has been charged in relation to such an offence, only that it was used or intended to be used to commit some criminal offence or offences;*]

(c) that property is terrorist property, it is not necessary to show that:

(i) the property was derived from a specific terrorist act; or

(ii) the property has been, is being, or is intended to be, used by a terrorist organisation, or to commit a specific terrorist act, as long it is shown that it has been, is being, or is intended to be, used by some terrorist organisation or to commit some terrorist act;

(iii) the property is owned or controlled by or on behalf of a specific terrorist organisation, as long as it is shown to be owned or controlled by or on behalf of some terrorist organisation; or

(iv) the property has been provided or collected for the purpose of supporting a specific terrorist organisation or funding a specific terrorist act, as long as it is shown to have been provided or collected for the purpose of providing support to some terrorist organisation or funding some terrorist act; or

(v) that any person has been charged in relation to such conduct, provided always that the evidence reveals that the property is connected to terrorism however evidenced.

Drafting note: Section 67(3) addresses how the court should arrive at the decision that property is proceeds etc. It sets out the link between the conduct and the property. It provides that it is not necessary to show that property was obtained though a particular kind of criminal conduct, as long as it can be shown to have been obtained through an offence of one kind or another.

It will not matter, for example, that it cannot be established whether certain funds are attributable to drug dealing, money laundering, fraud or some other criminal activity, provided it can be shown that the proceeds are attributable to one or other of these in the alternative, or perhaps some combination. It will also not be necessary to show that any person has been charged with any offence in connection with the conduct described.

(4) An application for civil forfeiture may be made in respect of property into which original proceeds have been converted either by sale or otherwise.

Drafting note: Although the definition of proceeds makes it clear that tracing of proceeds is possible, Section 67(4) puts it beyond doubt that, where the original criminal proceeds have been disposed of, an application for forfeiture will be competent in respect of the 'replacement' property. This will be particularly important where the original proceeds have been acquired by an innocent third party, and will enable, for example, the court to order the forfeiture of the sale price rather than the original asset, which cannot be followed into the hands of the innocent third party.

(5) For the purposes of making a determination under subsection (2) above, proof that a person was convicted, found guilty or found not criminally responsible is proof that the person committed the conduct.

Drafting note: Section 67(5) deals with the underlying conduct that can give rise to civil forfeiture. A civil forfeiture action may be obtained over several classes of property, including proceeds. (See Section 3 for the definition of 'proceeds'.) The definition of offence/criminal offence includes foreign offences upon a dual criminality basis. The effect of this provision is to enable property that has been obtained through criminal conduct abroad to be recovered, if the conduct was unlawful where it took place, and is also criminal conduct to which the act applies in the state. This provision may not be necessary if a definition in Section 66 covers the matter, but it may be helpful for this to be made explicit in the civil forfeiture provisions, and to note the civil standard of proof that applies.

The standard of proof that the court must apply in determining whether the conduct was unlawful conduct is the balance of probabilities. The criminal standard of proof does not apply in civil recovery proceedings.

(6) Property may be found to be proceeds under subsection (2) even if a person was acquitted of any offence(s), charges were withdrawn before a verdict was returned, or if the proceedings were stayed.

Drafting note: Section 67(6) further develops the civil nature of the remedy of civil forfeiture, and makes it clear that the remedy of civil forfeiture may still be appropriate even where a person has been acquitted in a criminal process associated with the criminal conduct, or the proceedings have otherwise terminated without a conviction. The remedy may remain appropriate because the question is not whether the court is satisfied beyond reasonable doubt that a named person committed a specific criminal offence, but whether on a balance of probabilities the property was derived from criminal conduct.

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The principle behind civil forfeiture is that proceeds from criminal conduct should not be held by those whose conduct has led to their acquisition: no one should be able to profit from criminal conduct. Civil forfeiture is not a penalty. It is directed at an asset, not at a person. It is therefore not related to the concept of an individual's conviction.

(7) ***Variant 1***

Orders for civil forfeiture can be sought in respect of property whenever obtained.

Variant 2

A civil forfeiture proceeding shall not be commenced after the [insert number of years] anniversary of the date that the property became proceeds [***option:*** *instrumentality*] and/or terrorist property.

Drafting note: Civil forfeiture is based on the theory that property that is acquired as a result of unlawful conduct can never be held lawfully. It does not matter, for civil forfeiture, when the property was acquired, since the ownership can never be made legal. This is the basis for permitting a claim to be made whenever the property was acquired as is contained in this Section 67(7).

The first variant provides for actions regardless of when property was obtained.

Under the **second** variant, there would be a limitation, for *instance* 12–15 years after the date on which the property was acquired from unlawful conduct and the commencement of the civil recovery proceedings. Issues to consider include the balance between the right of the state to seek civil recovery and the point at which the state should lose that right by passage of time. It will normally be appropriate to introduce some period here, to allow enforcement authorities time to collect the relevant information.

(8) Orders for civil forfeiture may be granted with respect to property acquired or used before the Act came into force.

Drafting note: In addition to Section 67(7), which addresses only whether there is a statutory prescription period for the initiation of a civil forfeiture action, it is necessary to make clear separately and regardless of any prescription period that the act has retrospective applicability, that is that it may be applied to property acquired or used before the act came into force. This is accomplished through Section 67(8).

Some states may not use such retrospective application, but the consequence of the omission of Section 67(8) will be that the enforcement authority will be ineffective for a considerable period after the commencement of the act.

(9) An order for civil forfeiture may be sought where a person now deceased committed the conduct on which the application for forfeiture is based.

> **Drafting note:** Section 67(9) emphasises the *in rem* nature of the proceedings by making it clear that proceedings may be brought in respect of property even though the person upon whose criminal conduct the action is founded is deceased.

(10) [***option:*** *Civil forfeiture proceedings shall not be brought where the value or aggregate value of the property concerned is less than [insert amount].*]

> **Drafting note:** Section 67(10), an optional section, would set a monetary threshold before a civil forfeiture action can be brought.
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> Because the procedure before the courts can be complex and time-consuming, states may not wish to embark on this type of procedure where the value or total value of the property concerned is less than a particular amount. However, in considering whether to use a threshold, states should also be cognisant of the effect the retention of even less significant levels of criminal benefit may have on communities that see criminals maintaining property or lifestyles beyond their legitimate means.
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> In addition, drafting authorities may want to limit this section to proceeds, as different considerations are involved in the case of terrorist property and instrumentalities. In such cases, the use of the property and the threat to public safety are paramount, rather than underlying value.

Section 68 Property Freezing Order

(1) Where the enforcement authority reasonably believes that property is proceeds [***option:*** *or instrumentalities*] or terrorist property, the enforcement authority may apply to the court for a property freezing order in respect of such property.

> **Drafting note:** For civil forfeiture, there must be a mechanism to freeze property that is, or will become, the subject of proceedings. This is to ensure that the property is not dissipated pending the outcome of the proceedings. What the order is called is a matter for the state. It should normally be called something different from the order obtained in criminal proceedings, called in these laws a restraint order, to avoid confusion. But there is no requirement for it to be called a property freezing order. For example, in some states it is called a property restriction order.
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Section 68(1) provides for the making of an application for a property freezing order that will freeze the property in anticipation of an application for civil forfeiture. A property freezing order will relate only to specified and identified property. It will not relate to a generic description of everything that a person owns. This emphasises the *in rem* nature of the proceedings.

(2) Where the enforcement authority applies to the court for an order in accordance with this Section, and the court is satisfied, having regard to the facts and beliefs set out in the [***variants:*** *affidavit*; *evidence*; *verified statement*] in support of the application, and any other relevant matter, that there are reasonable grounds to believe that the property the subject of the application is proceeds of crime [***option:*** *or an instrumentality*] or terrorist property, it may make the order. An application for a property freezing order may be made *ex parte* and without notice.

Drafting note: The property freezing order, in distinction to the actual application for civil forfeiture, will most often be made *ex parte* (that is with only the applicant appearing), and without notice to those who may be affected in accordance with Section 68(2). This again will be to ensure that property is preserved. There may be circumstances in which providing notice would not jeopardise a successful freezing, but they are likely to be rare. Supporting evidence/documents for a property freezing order application will be similar to those required for a restraint order in a criminal procedure. In individual states, the requirements may differ, but the normal procedural rules should apply.

(3) The hearing of an application for a property freezing order may be heard *in camera*.

Drafting note: This is to ensure that the property is not hidden or dissipated before a freezing order is in place. The state may already have provisions under its own rules as to whether a hearing on a restraint application may be heard *in camera*.

(4) The court may make a property freezing order to preserve the property that is the subject of the application where it is satisfied that there are reasonable grounds to believe that the property, or part of it, is proceeds [***option:*** *or instrumentalities*] or terrorist property.

Drafting note: It is important to set the test for the granting of an order to freeze at the appropriate level. If the standard for granting it is too high, the enforcement authority will rarely be able to satisfy the test, and there is serious risk

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that assets that should be forfeited will be lost. On the other hand, too lenient a standard will result in unwarranted interference in the enjoyment of property. Section 68(4) sets the test at 'reasonable grounds to believe' that the property constitutes proceeds, instrumentalities or terrorist property. This standard is one that has been used in a number of systems and strikes a reasonable balance between the two arguments above. An alternative, used in some jurisdictions, is 'where there is a serious question to be tried'.

The language makes clear that it is also possible to apply for a property freezing order for property that may only be partly the proceeds of crime. However, in some situations the parts are indivisible and the order must apply to the whole asset. This provision allows for that eventuality.

(5) Within [21] days of a property freezing order being granted or such other period as the court may direct, notice of the order shall be served on all persons known to the enforcement authority to have an interest in the property affected by the order, and such other persons as the court may direct.

Drafting note: The range is generally somewhere between 15 and 45 days, with a 21-day period often chosen.

Section 69 Further Provisions in Relation to Property Freezing Orders

Drafting note: Section 69 deals with the effect of property freezing orders. Authorities should consider, when drafting provisions, the powers set out in Section 69(1)(a)–(e). There will be consequences for the enforcement authority and for choices on the use of trustees and receivers, both private and public, depending on how the provisions are drafted.

It will not normally be necessary for a property freezing order to contain all of these provisions. Section 69(1) provides the court with the power to formulate an appropriate order depending on the factual background.

A variety of different orders may be needed in a single case depending upon the location and status of the property involved.

(1) Where a court makes a property freezing order, the court may, at the time when it makes the order, or at any later time, make any further orders that it considers appropriate. Without limiting the generality of the above, the court may make any one or more of the following orders:

(a) an order that the property or part of the property specified in the property freezing order shall be seized, taken into possession, delivered up for safekeeping or otherwise secured by the enforcement authority;

(b) an order that the property or part of the property specified in the freezing order shall be dealt with in a particular manner including by an encumbrance that is ordered by the court on such property in favour of the enforcement authority together with an order that prohibits any other encumbrance, and/or by a prohibition regarding dealing in or with such property;

(c) an order to appoint a [***option:*** *add 'named'*] receiver to take custody and/or control of the property or a part of the property that is specified in the property freezing order, and to manage or otherwise deal with the whole or any part of the property in accordance with any directions of the court;

(d) such other order for the preservation, management or disposition of the property or part of the property specified in the property freezing order as the court considers appropriate.

Drafting note: There are provisions on asset management in Part XI that, if adopted, will need to be considered in the drafting of this section.

Section 69(1)(a) contains a provision that would allow the court to include in a property freezing order a power for the enforcement authority to seize or otherwise take into its possession specified property. This type of power will most commonly be used when the property is valuable movable property, such as performance motor vehicles or jewellery, that could, without such a power, easily be disposed of to frustrate any potential final order.

The enforcement authority will have to ensure the safekeeping of such items as are delivered up to it. For that purpose it may have to consider such matters as storage and insurance.

In Section 69(1)(b), it is within the court's power to order that specified property be dealt with in a particular manner (for instance not sold, transferred, mortgaged, etc.), or to order an encumbrance in favour of the enforcement authority. This provision will enable a court to give effect to its freezing order by dealing with immovable property in an effective way. There may be a need for procedural rules to ensure that the orders interface appropriately with land titles as well as with personal property security systems. An order to place an encumbrance may be needed for immovable property. Service of notice will be particularly important. Section 69(1)(c) contains a provision allowing for the appointment of a receiver. Such an appointment would normally be contemplated only for certain assets for which there is a management aspect, for example running a business.

An order under Section 69(1)(c) should specify which actions the receiver can take without further reference to the court. For example, where a house is the subject of the order, can the receiver arrange a tenancy or sell it as a result of his or her own

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decision is it necessary to go back to the court for authority? Since applications to the court will be costly, it will be advisable to give the receiver broad general powers, with reference to the court required only in exceptional circumstances.

Section 69(1)(d) is a general provision that will enable the court to make such order as it thinks appropriate depending on the nature of the assets in the property freezing order.

(2) For the purposes of this Section:

Dealing with property carries the same meaning as in Part V, Section 38.

Gift carries the same meaning as in Part V, Section 38.

(3) Any costs associated with the appointment of a receiver and the work subsequently undertaken by him or her pursuant to the appointment shall be paid from [***variants:*** *recovered assets fund; special purpose account*].

Drafting note: Section 69(3) contains important provisions that follow from those contained in Section 69(1)(c) above, in relation to the appointment of a receiver. As noted above, there are usually costs associated with such an appointment.

This provision indicates how the costs might be met. It is suggested that these could be paid for, retrospectively, out of recovered assets, but it may also be desirable to identify a particular fund for the payment of such costs. The model provisions in Part XII provide for the establishment of a recovered assets fund, and, if adopted, a link to such a fund would be appropriate. The costs may be considerable. A receiver may become involved in litigation as a result of the appointment, and his or her legal costs will have to be met. In addition, the receiver may need to consult independent professionals, for example for advice on running a specialist concern, and these too may submit fees. All of these considerations will make enforcement authorities cautious before embarking on an appointment that may ultimately have cost implications that cannot initially be quantified or estimated.

Particular care should be taken with these provisions to ensure that the payments can be made, especially initially, when there may be no recovered assets to fund such payments. The costs associated with such appointments are another reason why states may wish to consider imposing a minimum threshold value of property before embarking on civil forfeiture proceedings.

(4) Where a receiver has been appointed under subsection (1)(c) in relation to property, he or she may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this Section:

(a) by becoming a party to any civil proceedings that affect the property;

(b) by ensuring that the property is insured;

(c) by realising or otherwise dealing with the property if it is perishable, subject to wasting or other forms of loss, its value volatile or the cost of its storage or maintenance likely to exceed its value, subject to the proviso that this power may be exercised without the prior approval of the court only in circumstances where:

 (i) all persons known by the receiver to have an interest in the property consent to the realisation or other dealing with the property;

 (ii) the delay involved in obtaining such approval is likely to result in a significant diminution in the value of the property; or

 (iii) the cost of obtaining such approval would, in the opinion of the receiver, be disproportionate to the value of the property concerned;

(d) if the property consists, wholly or partly, of a business:

 (i) employing, or terminating the employment of, persons in the business;

 (ii) doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis;

 (iii) selling, liquidating or winding up the business if it is not a viable concern, subject to obtaining the prior approval of the court; or

 (iv) if the property includes shares in a company, exercising rights attaching to the shares as if the trustee were the registered holder of the shares.

Drafting note: Section 69(4) contains important provisions related to the management and sale of property in particular circumstances. There may be occasions when the assets are by nature perishable. In such circumstances it would be pointless to freeze them to await the outcome of prolonged litigation, since by then the assets would have no value. It would be better to enable the enforcement authority, or a trustee or receiver, to step in and sell the assets while they still have a value.

There is also a balancing decision when assets are particularly expensive to maintain relative to their actual value. In those circumstances too it may be appropriate to permit the enforcement authority or trustee or receiver to sell such assets since the cost of their continued maintenance would outweigh any ultimate value recovered. It will be important in such cases for there to be a court order that authorises the enforcement authority or trustee or receiver to dispose of assets in order to avoid later claims for compensation by a person who might claim the assets were irreplaceable.

(5) The court may exclude from the property freezing order such amount as it considers appropriate for the payment of reasonable living expenses to any person whose property is the subject of a property freezing order. The court shall not exercise its discretion to exclude an amount unless it is satisfied that the person cannot meet such expenses out of property that is not subject to a property freezing order and the court determines that it is in the interests of justice to make such an exclusion.

(6) The court may exclude from the property freezing order such amount as it considers appropriate for the payment of reasonable legal expenses incurred by any person whose property is the subject of a property freezing order. The court shall not exercise its discretion to exclude an amount unless it is satisfied that the person cannot meet such expenses out of property that is not subject to a property freezing order and the court determines that it in the interests of justice to make such an exclusion.

Drafting note: Legal and living expenses. Drafting authorities should consider whether to include provisions for the payment of legal and/or living expenses out of frozen assets and what the limits should be for such payments. Payments under both Section 69(5) and (6) will diminish the potential for forfeiture. Accordingly, mechanisms should be introduced to ensure that the provisions are not abused, for example by frivolous legal challenges. Jurisdictions should make choices from a policy and constitutional perspective bearing in mind issues such as fairness, equality of arms, etc.

The first provision (Section 69(5)) relates to the payment of living expenses out of the property subject to the property freezing order. The second (Section 69(6)) relates to the payment of legal expenses. In neither case may the court exercise its discretion to provide for such expenses where there are other assets to meet the expenses. Some jurisdictions have chosen to introduce only a provision in relation to access to legal expenses. Others have no such provisions at all, taking the position that in most civil cases costs follow the event – if the defendant prevails he or she will be entitled to costs under the rules of civil procedure. If a provision on legal expense payment is adopted, it may be appropriate to link payments to legal aid rules and rates.

The provisions set forth in Sections 69(5) and (6) should be compared with those for payment of living and legal expenses dealing with restrained property under the criminal part of these laws. The details of those provisions are different in some details from the Section 69 provisions. For example, Section 43(1)(e) specifies that an order may permit payment of living expenses for dependants and business expenses, whereas Section 69(5) does not refer to dependants or business expenses. Corresponding provisions under these parts should be compared to find the most desirable approach.

(7) Where a court has made a property freezing order, it may upon application by anyone with an interest in the property or by the enforcement authority and at any time make any further order or orders in respect of the property including an order to revoke the freezing order or to vary the order, where it appears to the court to be in the interests of justice to do so.

Drafting note: Orders to revoke or vary a property freezing order. Section 69(7) makes provision for an application to the court to revoke or vary the original freezing order after the original property freezing order is granted.

It should be clear that property freezing orders are always subject to revocation by the court. Those that are issued at the investigative stage before the initiation of the civil proceeding are of particular concern. This provision leaves the time period open-ended, with the order continuing until an affected party applies to the court for revocation, at which point the court must make a discretionary determination whether it is just to continue the order. This provides wide flexibility to enforcement authorities.

There may be circumstances in which no party seeks to vary or discharge the property freezing order. The enforcement authority would then have as much time as it needs to prepare its full case without the need to return to court until the substantive proceedings begin. Alternatively, drafting authorities may wish to make orders issued at the investigative stage valid for a specific period of time and, if no application for civil forfeiture is filed within that time, the freezing order is lifted unless the enforcement authority establishes to the satisfaction of the court reasons as to why it should continue.

An application under Section 69(7) can be made by anyone with an interest in the property, which would include the person who had possession of the property immediately before the order was made. It would also include, for example, a third party with an interest in the property, such as a mortgage lender who had granted a loan over the property, as well as the enforcement authority itself. There could be a variety of reasons for such an application. There might be a need for the person whose property is subject to the order to have access to it, or the enforcement authority might wish to sell the property if its value suddenly appears to be about to decrease. As property freezing orders are often in place for a substantial period of time, applications to vary may well be necessary. At the conclusion of the forfeiture proceedings, whether by way of an order for forfeiture or otherwise, it will be necessary to seek the revocation of the property freezing order so that the property can once again be freely dealt with. This will be essential even where there has been a civil forfeiture order: even the enforcement authority will be unable to realise the property until the freezing order has been revoked.

Section 70 Property Seizure Order

(1) The court may make a seizure order under this Section on application by the enforcement authority, permitting an authorised officer to search for and seize property that the court finds could be the subject of a property freezing order under Section 68 above in the following circumstances:

(a) a property freezing order would not be effective to preserve the property; or

(b) there is a reasonable suspicion of risk of dissipation or alienation of the property if the order is not granted; and

(c) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the specified property identified in this subsection and note they must be satisfied].

(2) If during the course of a search under an order granted under this Section, an authorised officer finds any property that he or she believes, on reasonable grounds, is of a kind that could have been included in the order had its existence, or its existence in that place, been known of at the time of application for the order, he or she may seize that property and the seizure order shall be deemed to authorise such seizure provided notice of the seizure of the property is reported within [ ] hours to the court and a record of the seizure of such property is left at the premises from which the property is seized and is given to the occupier of the premises.

(3) Property seized under an order granted under this Section may be retained by or on behalf of the enforcement authority for only [28] days. The enforcement authority may subsequently make application for a property freezing order in respect of such property.

> **Drafting note:** It will be important for the enforcement authority to apply to the court for a property freezing order in respect of any property recovered as a result of the use of orders granted under this section, since any seizure is time limited under this subsection.

(4) If the enforcement authority believes that the execution of an order under this Section may give rise to a breach of the peace or other criminal conduct, it may request that appropriate law enforcement officers accompany the authorised officer.

(5) An authorised officer for purposes of this Section shall be [insert name of authorities that shall apply for and execute seizure orders].

Section 71 Applications for and Granting of a Civil Forfeiture Order

(1) Where the enforcement authority believes that any property is proceeds [***option:*** *or instrumentalities*] or terrorist property, it may apply to the court for a civil forfeiture order in respect of that property, and such application shall be made in accordance with [the State's] rules of civil procedure.

> **Drafting note:** Section 71 contains the requirements for the making of the actual application for and the granting of the forfeiture order and the consequences of such an order. Section 71(1) provides that the application should be in accordance with normal rules of civil procedure, and must be in writing. Rules of procedure will vary widely, but these proceedings should be treated as a normal civil claim.

(2) Where the enforcement authority makes an application for a civil forfeiture order against property under this Section:

(a) it shall serve a copy of the application on any person whom the enforcement authority has reason to believe has an interest in the property;

(b) any person claiming an interest in the property may appear and adduce evidence at the hearing of the application; and

(c) at any time before the final determination of the application, the court may direct the enforcement authority to provide such notice as the court deems appropriate to any person who, in the court's opinion, appears to have an interest in the property.

Drafting Note: Section 71(2) clarifies those upon whom notice of the application for civil forfeiture should be served, but makes clear that ultimately the court itself will be the arbiter of who should be served with notice. Timing of the notice of the application will have to be determined. In some jurisdictions notice will be given by the enforcement authority before the application is lodged, while, in others, the court will order service. Again, in some jurisdictions adjustment to the normal rules of civil procedure may be required.

(3) Service of notice under subsection (2) shall be made in accordance with rules applicable in civil court proceedings.

Drafting note: There may be challenges or difficulties in effecting service in a civil forfeiture matter. Persons may seek to evade service, and there may be an issue regarding service of persons living in other jurisdictions. Drafting authorities could consider supplementing this provision if the usual rules regarding service are not adequate to deal with such issues.

(4) Any person who asserts an interest in the property and who seeks to oppose the making of a civil forfeiture order, or who wishes to exclude his interest from a civil forfeiture order shall file an appearance in accordance with [insert name of State]'s civil procedure rules.

Drafting note: Section 71(4) deals with the interests of persons who may have an interest in the property in respect of which the civil forfeiture order is sought. It is for this reason that service of notice is so important. The civil rules should establish the time period for claims etc. As with any civil action, there is a need for timeframes and certainty. Parties with claims should have opportunities for notice and objection and an opportunity to have their claim considered by the

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court. The system should also permit finality once a final order has issued and the time period for appeals has expired.

In some cases there are complex interests in property apart from the interest of the person upon whose criminal conduct the action is founded. For example, there may be a mortgage in respect of the property, and the granter of the mortgage will be able to assert his or her claim under this provision. The mere holding of an interest in the property, however, should not of itself be enough to justify the refusal of a civil forfeiture order.

The court should deal with the interests of such persons in a way that is compatible with the granting of the order, for example by granting a civil forfeiture of a property and at the same time making an order to repay outstanding mortgage indebtedness.

Section 72 protects the interest of the legitimate owner.

(5) Where an application for a civil forfeiture order is before the court, the court may determine by its own procedures the evidence that may be adduced before it. It shall in particular ensure that any person with an interest of any nature in the property that is the subject of the application has an opportunity to make representations to the court as to whether an order for civil forfeiture should be granted.

(6) Where the court is satisfied on a balance of probabilities that any property specified in the application is proceeds [***option:*** *or instrumentalities*] or terrorist property, it shall grant a civil forfeiture order in respect of such property.

Drafting note: Section 71(6) makes it clear the test the court will use in granting an order. Once the court is satisfied on a balance of probabilities, the court must issue the order for forfeiture.

(7) A civil forfeiture order shall have the effect of vesting the forfeited property in a named representative of the enforcement authority or specified receiver who shall be responsible for realising the property in accordance with Section 75.

Drafting note: Section 71(7) makes clear that the effect of a civil forfeiture order is a transfer of ownership of the property, or a specified part of the property. The model provision provides that the property vests with a named person in the enforcement agency, or if necessary an outside receiver with specialised skills. See Section 75 for provisions on realisation of property.

Section 72 Orders Regarding Legitimate Owners

(1) If, in the course of a hearing of an application for a civil forfeiture order, the court is satisfied on a balance of probabilities that any property that is the subject of the application is proceeds [***option:*** *instrumentalities*] or terrorist property but that a person is a legitimate owner, the court shall make any order it considers necessary to protect that person's interest in the property.

> **Drafting note:** Section 72 protects third parties who may have an interest in property that is the subject of an application for a civil forfeiture order. Section 72(1) provides that the court can protect legitimate owners, and subsection (2) provides a definition of legitimate owner in respect of the three types of property. This section should be read in conjunction with Section 67(4), which also makes it clear that applications for civil forfeiture should be made against 'replacement' assets where proceeds have been sold for value.

(2) A legitimate owner means:

(a) in the case of proceeds, a person who:

(i) was the rightful owner of the property before the criminal conduct occurred and was deprived of the property by the criminal conduct; or

(ii) acquired the property in good faith and for fair value after the criminal conduct and did not and could not reasonably have known the property was proceeds;

(b) [***option (to use if instrumentalities are included):*** *in the case of instrumentalities, a person who has done all that can reasonably be done to prevent the property being used as an instrumentality; and*]

(c) in the case of terrorist property, a person who can satisfy the court that he or she would be a legitimate owner if the property were proceeds or instrumentalities.

(3) No order may be made under subsection (1) if the property is property that it is unlawful for the person to possess in [insert name of State].

> **Drafting note:** Section 72(3) addresses property that it is unlawful to possess. For instance, if the property were a valuable firearm, a legitimate owner would not be able to claim it if he did not have a valid firearms certificate for the weapon.

Section 73 Fugitive Claims

A person who has absconded from any process of the court and is still an absconder in [insert name of State] may not appear, either personally or through a representative, in a proceeding for civil forfeiture or contest the granting of a civil forfeiture order.

> **Drafting note:** Section 73 provides that a person who might otherwise claim as a legitimate owner is not protected if the person has absconded from justice in the state where the forfeiture case is being heard. Such a person does not have standing to contest the civil forfeiture or appear in the proceeding either personally or through a representative.

Section 74 Appeals

(1) An appeal will lie to the court of appeal [or relevant appellate tribunal] by any interested party affected by a decision of [a high court] in relation to a property freezing order.

(2) An appeal will lie to the court of appeal [or relevant appellate tribunal] against the grant, or the refusal to grant, a civil forfeiture order.

> **Drafting note:** This section provides a simple framework for appeals against both property freezing orders and final determinations of civil forfeiture orders. Both should be determined in accordance with the state's normal rules of civil procedure. National time scales and procedural rules applying to civil appeals generally should be followed.

Section 75 Realisation of Forfeited Property

(1) Subject to any limits in the civil forfeiture order, the enforcement authority [**Insert:** its named representative or property manager] may take such steps to sell, destroy or otherwise deal with property as it sees fit.

(2) Subject to subsection (1) above, the enforcement authority or property manager must realise the value of the property vested in it by the civil forfeiture order, so far as practicable, in the manner best calculated to maximise the realised amount. The enforcement authority or property manager should dispose of the forfeited property as soon as practicable.

(3) The enforcement authority or property manager may incur reasonable expenditure for the purpose of realising its value.

> **Drafting note:** This subsection precludes the person who owned the property immediately before the civil forfeiture order was made from purchasing the property from the enforcement authority when the property is sold. The provision is not an essential part of the structure of a civil forfeiture regime, but may help. It may not be necessary, however, as the enforcement authority will always have discretion as to how it disposes of property. The purpose of civil forfeiture is to deprive criminals of their assets, and to remove from them the
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trappings of their criminal activity. It thus acts as a demonstrable deterrent to others. If, however, persons engaged in criminal activity are allowed to buy back their own assets at the conclusion of the proceedings, then the deterrent value is diminished, as, to the outside world, such persons remain the owner of property, which might include a valuable house or car. Authorities may also want to make practical arrangements, even without such a provision, to ensure that any funding an owner provides to purchase the property is adequately demonstrated to be of lawful origin. If this is not done, the enforcement authority may be condoning further criminal conduct by accepting proceeds from other criminal conduct.

Subsection (3) may be redundant if Part XI (Asset Management) is applied.

This section permits actions with respect to property that is the subject of a civil forfeiture order. In addition to selling the property, the enforcement authority or property manager may otherwise deal with it, including, if necessary, preserve or manage it for a period, or may destroy the property. Destroying property is appropriate in a limited range of settings, for instance where the property is the paraphernalia of an organised criminal organisation or the property, if sold, could be used for further criminal conduct.

A comparison should be made with the regime in Part V, which includes similar powers under the criminal confiscation provisions. Consideration should be given to the property management provisions in Part XI and the recovered assets fund in Part XII.

Section 75(3) grants a power to incur reasonable expenditure in the sale of the property. In the case of even a simple house sale there will typically have to be a series of adjustments for taxes paid, water bills, electricity, and so on. For a bank account, realisation may be a simple task. However, where there are numerous, complex or specialised assets to sell, it may be appropriate for the enforcement authority or property manager to employ experts in the particular field. In such a case, this provision will ensure that there is authority to pay for such professional assistance. Even if it is hoped that the enforcement authority will be self-financing in due course, it will be necessary to ensure that it is adequately funded from the outset to enable it to pay for such necessary functions.

(4) Any expenditure incurred by the enforcement authority under subsection (3) above shall be recovered from the amount of money realised by the property forfeited. In the event that the sum realised is not sufficient to cover such expenditure, the enforcement authority should recover the balance from [insert name of State's designated fund].

Drafting note: Whilst administration expenditure will ordinarily be repaid from assets realised in the course of the enforcement authority's appointment,

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the state will have to consider the designation of a special fund to ensure that the property manager of the enforcement authority can meet the expenditure incurred at the time that it arises [see Part XII].

(5) The proceeds of the realisation of any property forfeited as a result of a civil forfeiture order shall be paid into [insert where funds should go, for instance the Recovered Assets Fund created under Section 117, Part XII].

Section 76 Compensation and Protection of the Trustee

(1) *If, in the case of any property in respect of which an application for a civil forfeiture order has been made, or in respect of which a property freezing order has been made, the court does not make a civil forfeiture order or following any appeal the civil forfeiture order is set aside, the person whose property it is may make an application to the court for compensation. The person making an application must provide notice of the application to the [insert name of enforcement authority].*

(2) *If the court has made a decision by reason of which no forfeiture order could be made in respect of the property, any application for compensation must be made within the period of [three] months from the date of the decision or, if there is an appeal against the decision, from the date on which any proceedings on appeal are finally concluded.*

Drafting note: This section may be unnecessary if the property management provisions are applied

Section 76 provides for compensation claims to be made where an action for civil forfeiture has not been successful, and for the protection of the receiver from liability.

Section 76(1) sets out the broad provision that will enable such claims to be made. It is important to remember that such claims will be possible even if there has been no substantive claim for forfeiture provided the enforcement authority has secured a property freezing order. Any interference with the property owner's rights of ownership, if not followed by an order for forfeiture, could give rise to a claim for compensation. Action by the enforcement authority should not therefore be taken lightly. In many circumstances, even if the court does not ultimately grant an order of forfeiture, no compensation will be appropriate, because the enforcement authority will have looked after the property well and secured it in such a way that its value is retained. However, there will be circumstances in which compensation may be appropriate.

Section 76(2) provides a time limit for any application for compensation. Three months is suggested as appropriate time limit but drafting authorities may wish to use a longer or shorter time.

(3) *The court may grant an application made under this Section in such amount as the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.*

(4) *Where the court has appointed a receiver in relation to property pursuant to Section 40(2)(c), Section 69(1)(c) or Section 112, the receiver shall not be personally liable for any loss or claim arising out of the exercise of powers conferred upon him or her by the order or this Part unless the court in which the claim is made is satisfied that:*

(a) the applicant has an interest in the property in respect of which the loss or claim is made; and

(b) the loss or claim arose by reason of the negligence or reckless or intentional misconduct of the receiver.

Drafting note: Section 76(3) provides that it is a matter for the court to determine the level of compensation to be awarded in an appropriate case. Compensation should be just that – compensation for loss. Assuming that the enforcement authority has acted in good faith in bringing the action, there is no scope here for damages for non-monetary injury, or for punitive awards.

Section 76(4) protects the receiver from liability from claims from the exercise of his powers except where he or she is shown to have been negligent or engaged in reckless or intentional misconduct.

Section 77 Obtaining Information from Foreign Authorities

(1) The enforcement authority may make a request to an appropriate foreign authority for information or evidence relevant to a civil forfeiture investigation or proceedings, and may enter into an agreement with such authority relating to such request(s) and the disclosure and/or use of any information or evidence received.

Drafting note: This section permits the enforcement authority to seek information and evidence from a relevant foreign authority for a civil forfeiture investigation or proceedings. It is up to the foreign authority to determine whether such information or evidence can be provided and under what conditions.

Drafting authorities should consider the options available under existing laws and procedures for gathering foreign information and evidence for civil forfeiture and decide whether this provision would be useful.

If used, authorities should consider whether any coordination is necessary on a domestic basis with other parts of government for the civil enforcement authority to enter into agreement with or seek information from foreign authorities. Sometimes a mutual legal assistance treaty may be used; more often the civil nature of the proceedings precludes the use of such treaties. In such cases a bilateral treaty may be considered.

Section 78 Disclosure of Information

(1) Information the [insert name of prosecutorial authorities] has obtained or that was obtained on its behalf in connection with the exercise of any of its functions may be disclosed to the enforcement authority in connection with any of the functions of the enforcement authority under this Part.

(2) Information that is held by any of the following persons may be disclosed to the enforcement authority in connection with the exercise of any of its functions under this Part: [tailor to suit the needs of the State, incorporating a list of officials determined to be appropriate, for instance police, customs, social security, tax, etc.].

(3) Information the enforcement authority has obtained in connection with the exercise of any of its functions under this Part may be disclosed by it [notwithstanding any rules of confidentiality to the contrary] if the disclosure is for the purposes of a civil forfeiture investigation or proceeding in another jurisdiction, where the perpetrator of the unlawful conduct that has given rise to the civil forfeiture proceedings is dead or has absconded or if his or her whereabouts are unknown or his or her identity is unknown.

(4) *Information the enforcement authority has obtained in connection with the exercise of any of its functions under this Part may be disclosed by it [notwithstanding any rules of confidentiality to the contrary] if the disclosure is for any one of the following:*

(a) *consideration of and bringing of proceedings for civil forfeiture under this Part or the enforcement of any court order;*

(b) *a criminal investigation wherever that investigation may be undertaken;*

(c) *criminal proceedings wherever they may have been commenced.*

Drafting note: The section deals with four situations. The first two are mandatory and the last two are optional.

The first two subsections allow the state prosecuting authority to provide information to the enforcement authority. Since civil forfeiture is often contemplated when a prosecution is not possible, this provision will facilitate civil forfeiture investigations. The prosecuting authority is often likely to hold information that is relevant to potential actions by the enforcement authority.

The provisions of these two subsections may already exist in state legislation, but as a minimum there should be a basis for sharing information with other government agencies. A provision of this kind raises critical issues that drafters must resolve, for example whether or not data that have been gathered by various agencies and departments should be shared with other agencies and

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departments of government. The sample provisions provide a very wide gateway for sharing and should be considered carefully in connection with domestic data-sharing principles and with the recognition that such provisions would support broader effectiveness for a domestic civil forfeiture programme.

Drafters should consider whether various key public authorities, such as prosecutorial authorities, police, customs, tax authorities, etc., are able to engage in information sharing with the enforcement authority and any limitations on this power. They should consider data protection and right of privacy principles within the jurisdiction, which typically permit interference with privacy and provide for data sharing for legitimate aims subject to various protections. Since civil forfeiture is often needed and used to deal with property that criminal processes have uncovered, every effort should made to ensure that information gathered by prosecutors may be used as a basis for civil forfeiture as long as there is no misuse of the criminal mechanisms solely to assist civil forfeiture.