

Tonga.

No. 28 of 2000.



I assent,

TAUFA'AHAU TUPOU IV,

27th February, 2001.

AN ACT

**TO ENABLE THE UNLAWFUL PROCEEDS OF ALL SERIOUS
CRIME INCLUDING DRUG TRAFFICKING TO BE IDENTIFIED,
TRACED, FROZEN, SEIZED AND EVENTUALLY CONFISCATED,
TO ESTABLISH A TRANSACTION REPORTING AUTHORITY,
AND TO REQUIRE FINANCIAL INSTITUTIONS AND CASH
DEALERS TO TAKE PRUDENTIAL MEASURES TO HELP
COMBAT MONEY LAUNDERING**

[2nd October, 2000]

BE IT ENACTED by the King and Legislative Assembly of Tonga in the
Legislature of the Kingdom as follows:-

PART I - PRELIMINARY

1. This Act may be called the Money Laundering and Proceeds of Crime Act 2000. **Short title.**
2. (1) In this Act, unless the contrary intention appears: **Interpretation.**

"account" means any facility or arrangement by which a financial institution or cash dealer does any one or more of the following:

 - (a) accepts deposits of cash;
 - (b) allows withdrawals of cash or transfers into or out of the account;
 - (c) pays cheques or payment orders drawn on a financial institution or cash dealer by, or collects cheques or payment orders on behalf of, a person;

(d) supplies a facility or arrangement for a safety deposit box;

"appeal" includes proceedings by way of discharging or setting aside a judgment, and an application for a new trial or for a stay of execution;

"authorised officer" means a person or class of persons designated by notice in the Gazette by the Attorney General as an authorised officer;

"cash dealer" means;

(a) a person who carries on a business of an insurer, an insurance intermediary, a securities dealer or a futures broker;

(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;

(c) an operator of a gambling house, casino or lottery; or

(d) a trustee, or manager of a unit trust;

"cash" means the coin and paper money of Tonga or of a foreign country that is designated as legal tender and any document which is customarily used and accepted as such;

"data" means representations, in any form, of information;

"defendant" means a person charged with a serious offence, whether or not he has been convicted of the offence, and includes in the case of proceedings for a restraining order under section 58, a person who is about to be charged with a serious offence;

"document" means any record of information, and includes:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be produced, with or without the aid of anything else;

(d) a map, plan, drawing, photograph or similar thing;

(e) any material on which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device;

"financial institution" means any person who carries on a business of -

(a) acceptance of deposits and other repayable funds from the public including for life insurance and investment related insurance;

- (b) lending, including consumer credit, mortgage credit, factoring (with or without recourse) and financing of commercial transactions;
- (c) financial leasing;
- (d) money transmission services;
- (e) issuing and administering means of payment (such as credit cards, travellers' cheques and bankers' drafts);
- (f) entering into guarantees and commitments;
- (g) trading on its own account or on account of customers in money market instruments (such as cheques, bills, 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) portfolio management and advice;
- (l) safekeeping and administration of securities;
- (m) providing credit reference services; or
- (n) providing safe custody services;

"gift" includes any transfer or property by a person to another person directly or indirectly:

- (a) after the commission of a serious offence by the first person;
- (b) for a consideration the value of which is significantly less than the value of the property provided by the first person; and
- (c) to the extent of the difference between the market value of the property transferred and the consideration provided by the transferee;

"interest", in relation to property, means:

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power or privilege in connection with the property whether present or future and whether vested or contingent;

"person" means any natural or legal person;

"proceedings" means any procedure conducted by or under the supervision of a judge, magistrate or judicial officer however described, in relation to any alleged or proven offence or property derived from such offence and including an inquiry, investigation and preliminary or final determination of facts;

"proceeds of crime" means any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;

"property" means cash and all other real or personal property of every description, whether situated in Tonga or elsewhere and whether tangible or intangible, and includes an interest in any such property;

"property of or in the possession or control of a person" includes any gift made by that person;

"realisable property" means:

- (a) any property held by a defendant;
- (b) any property held by a person to whom a defendant has directly or indirectly made a gift caught by this Act;

"serious offence" means an offence against a provision of -

- (a) any law of Tonga (other than this Act), for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or more severe penalty;
- (b) a law of a foreign State, in relation to acts or omissions which, had they occurred in Tonga, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months, or more severe penalty, including an offence of a purely fiscal character;

"unit trust" means any arrangement made for the purpose or having the effect of providing for a person having funds available for investment, facilities for the participation by the person as a beneficiary under a trust in any profits or income arising from the acquisition, holding, management or disposal of any property pursuant to the trust

- (2) A reference in this Act to the law of:

- (a) Tonga;
- (b) any foreign State,

includes a written or unwritten law of, or in force in, any part of Tonga or the foreign State.

Meaning of charge in relation to a serious offence.

Meaning of conviction in relation to a serious offence.

- 3. Any reference in this Act to a person being charged or about to be charged with a serious offence includes any procedure, however described, in Tonga or elsewhere, by which criminal proceedings may be commenced.
- 4. For the purposes of this Act, a person shall be taken to be convicted of a serious offence if:

- (a) the person is convicted, whether summarily or on indictment, of the offence;
 - (b) the person is charged with, and found guilty of, the offence but is discharged without any conviction being recorded;
 - (c) the Supreme Court, with the consent of the convicted person, takes the offence of which the person has not been found guilty into account in passing sentence on the person for another serious offence.
5. For the purposes of this Act, a person's conviction of a serious offence shall be taken to be quashed:
- Meaning of quashing of convictions.**
- (a) where section 4(b) applies, if the finding of guilt is quashed or set aside;
 - (b) where section 4(c) applies, if either:
 - (i) the person's conviction of the other offence referred to in that section, is quashed or set aside;
 - (ii) the decision of the Supreme Court to take the offence into account in passing sentence for that other offence is quashed or set aside;
 - (c) where His Majesty grants the person a pardon in respect of the person's conviction of the offence.
6. (1) Subject to subsections (2) and (3), for the purposes of this Act the value of property (other than cash) in relation to any person holding the property is:
- Meaning of value of property.**
- (a) its market value; or
 - (b) where any other person holds an interest in the property:
 - (i) the market value of the first mentioned person's beneficial interest in the property; less
 - (ii) the amount required to discharge any incumbrance (other than a charging order) on the first person's beneficial interest.
- (2) Subject to section 8(2), references in this Act to the value of a gift or of any payment or reward, are references to:
- (a) the value of the gift, payment or reward to the recipient when the recipient received it, adjusted to take account of any subsequent changes in the value of money; or
 - (b) where subsection (3) applies, the value there mentioned, whichever is the greater.
- (3) Subject to section 8(2), if at the material time the recipient holds:

- (a) the property which he received (not being cash); or
- (b) property which, in whole or in part, directly or indirectly represents, in the recipient's hands, the property which he received, the value referred to in subsection (2)(b) is the value to him at the material time of the property mentioned in subsection (2)(a) or, as the case may be, subsection 2(b) so far as it represents the property which he received, but disregarding in either case any charging order.

Meaning of dealing with property.

7. For the purposes of this Act, dealing with property held by any person includes:
- (a) where the property is a debt owed to that person, making a payment to that person in reduction or full settlement of the amount of the debt;
 - (b) making or receiving a gift of the property; or
 - (c) removing the property from Tonga.

Meaning of gift caught by this Act.

8. (1) A gift is caught by this Act if –
- (a) it was made by the defendant at any time after the commission of the serious offence, or if more than one, the earliest of the offences, to which the proceedings for the time being relate; and
 - (b) the Supreme Court considers it appropriate in all the circumstances to take the gift into account.
- (2) For the purposes of this Act –
- (a) the circumstances in which the defendant is to be treated as making a gift include those where he transfers property to another person directly or indirectly, for a consideration the value of which is significantly less than the value of the property or consideration provided by the defendant; and
 - (b) in those circumstances, the provisions of sections 6(2) and (3) shall apply, as if the defendant had made a gift of such proportionate share in the property as the difference between the values referred to in subsection (2)(a) and the value of the property or consideration provided by the defendant.

Meaning of deriving a benefit.

9. A reference to a benefit derived or obtained by or otherwise accruing to a person includes a reference to a benefit derived or obtained by, or otherwise accruing to, another person at the request or direction of the first person.

Meaning of benefitting from the proceeds of a serious offence.

10. For the purposes of this Act:
- (a) a person has benefited from a serious offence if the person has, received any proceeds of that offence;
 - (b) a person's proceeds of a serious offence are:

- (i) any payments or other rewards received by the person at any time in connection with the commission of the offence by that person or another person; and
- (ii) any pecuniary advantage derived by the person at any time from the commission of the offence by that person or another person,

whether received or derived before or after the commission of the offence.

PART II - MONEY LAUNDERING

11. (1) The Attorney General, with the approval of the Cabinet, shall appoint a person or persons to be known as the Transaction Reporting Authority. **Transaction Reporting Authority.**
- (2) The Transaction Reporting Authority:
- (a) shall receive reports of suspicious transactions from financial institutions and cash dealers pursuant to section 14(1);
 - (b) shall send any such report to the appropriate law enforcement authorities if the report gives the Transaction Reporting Authority reasonable grounds to suspect that the transaction is suspicious;
 - (c) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept pursuant to section 13(1), and ask any question relating to such record, make notes and take copies of the whole or any part of the record;
 - (d) shall send to the appropriate law enforcement authorities, any information derived from an inspection carried out pursuant to subsection (2)(c), if it gives the Transaction Reporting Authority reasonable grounds to suspect that a transaction involves proceeds of crime;
 - (e) may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Transaction Reporting Authority;
 - (f) may compile statistics and records, disseminate information within Tonga or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney General;
 - (g) shall create training requirements and provide such training for any financial institution in respect of transaction record-keeping and reporting obligations provided for in sections 13(1) and 14(1);
 - (h) may consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties under subsections (2) (c), (f) or (g);

- (i) shall not conduct any investigation other than for the purpose of ensuring compliance by a financial institution with the provisions of this Part.
- Financial institutions and cash dealers to verify customers identity.**
12. (1) A financial institution or cash dealer shall take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant, when the applicant is a body corporate it shall be required to produce, a certificate of incorporation together with the latest annual return to the Registrar of Companies.
- (2) Where an applicant requests a financial institution or cash dealer to enter into a continuing business relationship or any other transaction, the institution or cash dealer shall take reasonable measures to establish whether the person is acting on behalf of another person.
- (3) If it appears to a financial institution or cash dealer that an applicant requesting it to enter into any transaction, is acting on behalf of another person, the institution or cash dealer shall take reasonable measures to establish the true identity of any person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.
- (4) In determining what constitute reasonable measures for the purposes of subsection (1) or (3), regard shall be had to all the circumstances of the case, and in particular:
- (a) to whether the applicant is a person based or incorporated in a country in which there are in force provisions applicable to it to prevent the use of the financial system for the purpose of money laundering; and
- (b) to custom and practice as may from time to time be current in the relevant field of business.
- (5) Nothing in this section shall require the production of any evidence of identity where:
- (a) the applicant is itself a financial institution or a cash dealer to which this Act applies; or
- (b) there is a transaction or a series of transactions taking place in the course of a business relationship, in respect of which the applicant has already produced satisfactory evidence of identity.
- Financial Institutions and cash dealers to establish and maintain customer records.**
13. (1) A financial institution or cash dealer shall establish and maintain:
- (a) records of all transactions of \$10,000 or more, or any series of transactions occurring in any 4 week period, totaling \$25,000 or more or the equivalent in foreign cash carried out by it, in accordance with the requirements of subsection (3);

- (b) where evidence of a person's identity is obtained in accordance with section 12, a record that indicates the nature of the evidence obtained, and which comprises either a copy of the evidence or such information as would enable a copy of it to be obtained.
- (2) Customer accounts of a financial institution or cash dealer shall be kept in the true name of the account holder.
- (3) Records required under subsection (1)(a) shall contain particulars sufficient to identify:
 - (a) the name, address and occupation (or, where appropriate, business or principal activity) of each person:
 - (i) conducting the transaction or series of transactions; or
 - (ii) if known, on whose behalf the transaction or series of transactions are being conducted;
 - (b) the method used by the financial institution or cash dealer to verify the identity of each person identified under the preceding paragraph;
 - (c) the nature and date of the transaction;
 - (d) the amount involved, and the national monetary unit in which it is denominated;
 - (e) the type and identifying number of any account with the financial institution or cash dealer involved in the transaction;
 - (f) if the transaction involves a negotiable instrument other than cash, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument;
 - (g) the name and address of the financial institution or cash dealer and of the officer, employee or agent who prepared the record.
- (4) Records required under subsection (1) shall be kept by the financial institution for a period of at least 5 years from the date the relevant transaction was completed or upon which action was last taken.
- 14. (1) Whenever a financial institution or cash dealer is a party to a transaction and has reasonable grounds to suspect that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence, it shall as soon as possible but no later than 3 working days after forming that suspicion and wherever possible before the transaction is carried out:
 - (a) take reasonable measures to ascertain the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of any ultimate beneficiary;

Financial institutions and cash dealers to report suspicious transactions.

- (b) prepare a report of the transaction in accordance with subsection (2);
- (c) pass the report to the Transaction Reporting Authority.
- (2) A report required by subsection (1) shall:
- (a) contain particulars of the matters specified in subsection (1)(a) and in section 12(1);
- (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 officer, employee or agent of the financial institution or cash dealer who prepared the report.
- (3) A financial institution or a cash dealer which has reported a suspicious transaction in accordance with this Part shall, if requested to do so by the Transaction Reporting Authority, give any further information as it has in relation to the transaction.
- Financial institutions and cash dealers to establish and maintain internal reporting procedures.**
15. A financial institution or cash dealer shall establish and maintain internal reporting procedures to:
- (a) identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering;
- (b) enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant to determining whether sufficient basis exists to report the matter pursuant to section 14(1); and
- (c) require the identified person to report the matter pursuant to section 14(1) where he determines that sufficient basis exists.
- Further preventive measures by financial institutions and cash dealers.**
16. A financial institution or cash dealer shall establish and maintain internal procedures to:
- (a) make employees aware of domestic laws relating to money laundering, and the procedures and related policies established and maintained by it pursuant to this Act;
- (b) provide its employees with appropriate training in the recognition and handling of money laundering transactions.
- Money laundering offences.**
17. A person commits the offence of money laundering if the person:
- (a) acquires, possesses or uses property knowing or having reason to believe that it is derived directly or indirectly from the commission of a serious offence;
- (b) renders assistance to another person for:

- (i) the conversion or transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence;
- (ii) concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly by the commission of a serious offence;

and shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding \$10,000 or both, and in the case of a body corporate to a fine not exceeding \$50,000.

18. (1) A person who opens or operates an account with a financial institution or a cash dealer in a false name, commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding \$20,000 or both, and in the case of a body corporate to a fine not exceeding \$100,000. **Related offences.**
- (2) (a) A financial institution or cash dealer who fails to comply with any requirement of this Part for which no penalty is specified commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding \$20,000 or both, and in the case of a body corporate, to a fine not exceeding \$100,000.
- (b) In determining whether a person has complied with any requirement of paragraph (a), the Supreme Court shall have regard to such custom and practice as may from time to time be current in the relevant trade, business, profession or employment, and may take account of any relevant guidance adopted or approved by a public authority exercising public interest supervisory functions in relation to the financial institution or cash dealer, or any other body that regulates or is representative of any trade, business or profession carried on by that person.
- (3) (a) Any person who:
- (i) knows or suspects that a report under section 14(1) is being prepared or has been sent to the Transaction Reporting Authority; and
 - (ii) discloses to another person information or other matter which is likely to prejudice any investigation of an offence or possible offence of money laundering under section 17;
- commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding \$10,000 or both.

**Seizure and
detention of
suspicious
imports or
exports of cash.**

- (b) In proceedings for an offence against paragraph (a), it shall be a defence that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation of an offence or possible offence of money laundering under section 17.
19. (1) An authorised officer may seize and, in accordance with this section detain, any property including cash which is being imported into or exported from Tonga, if he has reasonable grounds for suspecting that it is:
- (i) derived from a serious offence; or
 - (ii) intended by any person for use in the commission of a serious offence.
- (2) Cash detained under subsection (1) shall not be detained for more than 24 hours after seizure, unless a judge orders its continued detention for a period not exceeding 3 months from the date of seizure, upon being satisfied that:
- (a) there are reasonable grounds for the suspicion referred to in subsection (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 Tonga or elsewhere of criminal proceedings against any person for an offence with which the cash is connected.
- (3) A judge may subsequently order continued detention of the cash if satisfied of the matters mentioned in subsection (2), but the total period of detention shall not exceed 2 years from the date of the order made under that subsection.
- (4) Subject to subsection (5), cash detained under this section may be released in whole or in part to the person by or on whose behalf it was imported or exported:
- (a) by order of a judge that its continued detention is no longer justified, upon application by or on behalf of that person and after considering any representations by the Attorney General; or
 - (b) where there is no court order, by an authorised officer, if satisfied that its continued detention is no longer justified.
- (5) No cash detained under this section shall be released where:
- (a) an application is made under Part III of this Act for the purpose of:
 - (i) the confiscation of the whole or any part of the cash; or
 - (ii) its restraint pending determination of its liability to confiscation; or

- (b) proceedings are instituted in Tonga or elsewhere against any person for an offence with which the cash is connected, until the proceedings relating to the relevant application or the proceedings for the offence as the case may be have been concluded.
20. (1) The Transaction Authority or a police officer authorised by the Transaction Reporting Authority, may apply to the Supreme Court for a warrant to enter any premises belonging to or in the possession or control of a financial institution, cash dealer or any officer or employee thereof and to search the premises and remove any document, material or other thing therein for the purposes of the Transaction Reporting Authority, as ordered by the Supreme Court and specified in the warrant. **Transaction Reporting Authority's power to obtain search warrant.**
- (2) The Supreme Court shall grant the application if it is satisfied that there are reasonable grounds to believe 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;
- (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.
21. For the purpose of determining whether any property belongs to or is in the possession or under the control of any person, the Supreme Court may, upon the application of the Transaction Reporting Authority, make an order: **Property tracking and monitoring orders.**
- (a) that any document relevant to -
- (i) identifying, locating or quantifying any such property; or
- (ii) identifying or locating any document necessary for the transfer of any such property, belonging to, or in the possession or control of that person be delivered forthwith to the Transaction Reporting Authority;
- (b) that the financial institution or cash dealer forthwith produce to the Transaction Reporting Authority all information obtained about any transaction conducted by or for that person during such period as the Supreme Court directs.
22. (1) The Supreme Court may, upon application by the Transaction Reporting Authority, and being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance with such obligation. **Orders to enforce compliance with obligations under this Part.**

- (2) Any order granted pursuant to subsection (1), shall contain a caution that should the financial institution or cash dealer fail without reasonable excuse to comply with all or any provisions of the order, such institution, dealer, officer or employee shall pay a financial penalty in the sum and in the manner directed by the Supreme Court.
- Secrecy obligations overridden.** 23. The provisions of this Act shall have effect notwithstanding any obligation as to secrecy or other restriction on disclosure of information imposed by law or otherwise.
- Immunity where suspicious transaction reported.** 24. No action, suit or other proceedings shall lie against any financial institution or cash dealer, or any officer, employee or other representative thereof acting in the ordinary course of the person's employment or representation, in relation to any action taken in good faith pursuant to section 14.
- Immunity where official powers or functions exercised in good faith.** 25. No action, suit, or other proceedings shall lie against the Government, or any officer or other authorised person in respect of anything done by or on behalf of the Government, if done with due diligence and in good faith, in the exercise of any power or the performance of any function under this Act or any Rule or order made thereunder.
- Restitution of restrained property.** 26. Where an investigation has been started against a person for a serious offence and property has been restrained under this Act in relation to that offence:
- (a) where the person is no charged in Tonga with that serious offence within a period of 6 months after the property has been restrained;
 - (b) the person is charged in Tonga with that serious offence but is not convicted; or
 - (c) a conviction for that serious offence is quashed;
- on the application of the person against whom the investigation was started, the Supreme Court shall order restitution of the restrained property.
- Provided that on the application of the Attorney General the Court may extend the period in paragraph (a) for a further period not exceeding 6 months.
- Damages.** 27. Nothing in this Act affects the right of a person whose property has been restrained to seek the payment of damages, in cases where the action of the Government involved any abuse of process.

PART III - CONFISCATION

Division I - Confiscation and Pecuniary Penalty Orders

- Application for confiscation order or pecuniary penalty order.** 28. (1) Where a person is convicted of a serious offence, the Attorney-General may, not later than 6 months after the conviction, apply to the Supreme Court for one or both of the following orders:

- (a) a confiscation order against property that is tainted property in respect of the offence;
 - (b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.
- (2) An application under subsection (1) may be made in respect of one or more than one offence.
- (3) Where an application under this section is finally determined, no further application for a confiscation order or a pecuniary penalty order may be made in respect of the offence for which the person was convicted without the leave of the Supreme Court. The Supreme Court shall not give such leave unless it is satisfied that:-
- (a) (i) the property or benefit to which the new application relates was identified after the previous application was determined; or
 - (ii) necessary evidence became available after the previous application was determined; and
- (b) it is in the interest of justice leave be granted.
- 29. (1) Where the Attorney-General applies for a confiscation order against property in respect of a conviction of a serious offence:** **Notice of Application.**
- (a) the Attorney-General shall give no less than 14 days written notice of the application to the person convicted and to any other person who the Attorney-General has reason to believe may have an interest in the property or who may be affected by the order.
 - (b) the person convicted and any other person who claims an interest in the property or who may be affected by the order may appear and adduce evidence at the hearing of the application; and
 - (c) the Supreme Court may, at any time before the final determination of the application, direct the Attorney-General to:
 - (i) give notice of the application to any person who, in the opinion of the Supreme Court, appears to have an interest in the property;
 - (ii) publish in a newspaper published and circulating in Tonga, a notice of the application.
- (2) Where the Attorney-General applies for a pecuniary penalty order against a person convicted of a serious offence:
- (a) the Attorney-General shall give no less then 14 days written notice of the application to the person convicted; and
 - (b) the person convicted any appear and adduce evidence at the hearing of the application.

Amendment of Application.

30. (1) The Supreme Court hearing an application under section 28(1) may, before the final determination of the application, and on the application of the Attorney-General, amend the application to include any other property or benefit upon being satisfied that:
- (a) the property or benefit was not reasonably capable of identification when the application was made; or
 - (b) necessary evidence became available only after the application was originally made.
- (2) Where the Attorney-General applies to amend an application for a confiscation order and the amendment would have the effect of including additional property in the application for confiscation, he shall give no less than 14 days written notice of the application to amend to any person who he has a reason to believe may have an interest in the property the subject of the application for a confiscation order.
- (3) Any person who claims an interest in the property to be included in the application of a confiscation order may appear and adduce evidence at the hearing of the application to amend.
- (4) Where the Attorney-General applies to amend an application for a pecuniary penalty order against a person and the effect of the amendment would be to include an additional benefit in the application he shall give the person no less than 14 days written notice of the application to amend

Procedure on Application.

31. (1) Where an application is made to the Supreme Court for a confiscation order or a pecuniary penalty the Supreme Court may have regard to the transcript of any proceedings against the person convicted of the serious offence.
- (2) Where an application is made for a confiscation order or a pecuniary penalty order to the Supreme and where the Court has not, when the application is made, passed sentence on the person for the offence, the Court may, defer passing sentence until it has determined the application for the order.

Procedure for *in rem* confiscation order where person dies or absconds.

32. (1) Where:
- (a) an information has been laid alleging the commission of the offence by a person;
 - (b) a warrant for the arrest of the person has been issued in relation to that information; and
 - (c) the person named in the warrant has died or absconded,
- the Attorney-General may apply to the Supreme Court for a confiscation order in respect of any tainted property.
- (2) For the purpose of subsection (1), if reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of 6 months commencing on the day the warrant was issued, the person shall be deemed to have so absconded on the last day of that period.

- (3) Where the Attorney-General applies under this section for a confiscation order against any tainted property the Court may, before hearing the application:
- (a) direct notice of the application to be given to any person who, in the opinion of the Supreme Court, appears to have an interest in the property or who may be affected by the order.
 - (b) direct notice of the application to be published in a newspaper published and circulating in Tonga.

33. (1) Subject to section 32(3), where an application is made to the Supreme Court under section 32(1) for a confiscation order and the Court is satisfied that:
- (a) any property is tainted property in respect of the offence;
 - (b) proceedings in respect of a serious offence committed in relation to that property were commenced; and
 - (c) the accused charged with the offence referred to in subsection (b) has died or absconded;

**Confiscation
where a person
dies or
absconds.**

the Supreme Court may order that the property in the order be confiscated.

- (2) The provisions of sections 33, 34, 35 and 36 shall apply with such modifications as are necessary to give effect to this section.

34. (1) Where, upon application by the Attorney-General, the Supreme Court is satisfied that property is tainted property in respect of a serious offence of which a person has been convicted, the Supreme Court may order that property be confiscated.

**Confiscation
Order on
Conviction.**

- (2) In determining whether property is tainted property the Supreme Court may infer, in the absence of evidence to the contrary:

(a) that the property was used in or in connection with the commission of the offence for which the person was convicted if it was in the person's possession at the time of, or immediately after, the commission of the offence;

(b) (i) that the property was derived, obtained or realised as a result of the commission of the offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the offence of which the person was convicted; and

(ii) the Supreme Court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property.

- (3) Where the Supreme Court orders that property, other than money, be confiscated, the Supreme Court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.

- (4) In considering whether a confiscation order should be made under subsection (1) the Supreme Court shall have regard to:
 - (a) the rights and interests, of any person in the property;
 - (b) the gravity of the offence concerned;
 - (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) Where the Supreme Court makes a confiscation order, the Supreme Court may give such directions as are necessary or convenient for giving effect to the order.

**Effect of
Confiscation
Order.**

35. (1) Subject to subsection (2), where a Court makes a confiscation order against any property, the property vests absolutely in the Government by virtue of the order.
- (2) Where property ordered to be confiscated is registrable property:
 - (a) the property vests in the Government in equity but does not vest in the Government at law until the applicable registration requirements have been complied with;
 - (b) the Government is entitled to be registered as owner of the property;
 - (c) the Attorney-General has power on behalf of the Government to do or authorise the doing of anything necessary or convenient to obtain the registration of the Government as owner, including the execution of any instrument to be executed by a person transferring an interest in property of that kind.
- (3) Where the Supreme Court makes a confiscation order against property:
 - (a) the property shall 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 on behalf of the Government before the relevant appeal date; and
 - (b) if, after the relevant appeal date, the order has not been discharged, the property may be disposed of and the proceeds applied or otherwise dealt with in accordance with the direction of the Attorney-General.
- (4) In this section:

"registrable property" means property the right to which is passed by registration in accordance with the provisions of the Land Act;

"relevant appeal date" used in relation to a confiscation order made in consequence of a person's conviction of a serious offence means:

- (a) the date on which the period allowed by rules of court for the lodging of an appeal against a person's conviction or for the lodging of an appeal against the making of a confiscation order expires without an appeal having been lodged, whichever is the later; or
- (b) where an appeal against a person's conviction or against the making of a confiscation order is lodged, the date on which the appeal is finally determined.

36. The Supreme Court may:

Voidable Transfers.

- (a) before making a confiscation order; and
- (b) in the case of property in respect of which a restraining order was made, where the order was served in accordance with section 60,

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for sufficient consideration to a person acting in good faith and without notice.

37. (1) Where an application is made for a confiscation order against property, a person who claims an interest in the property may apply to the Supreme Court, before the confiscation order is made, for an order under subsection (2).

Protection of Third Parties.

- (2) If a person applies to the Supreme Court for an order under this section in respect of property and the Court is satisfied on a balance of probabilities:
 - (a) that the person was not involved in the commission of the offence; and
 - (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest:
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstance such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was tainted property,

the Supreme Court shall make an order declaring the nature, extent and value of the person's interests at the time the order is made.

- (3) Subject to subsection (4), where a confiscation order has already been made, a person who claims an interest in the property may, before the end of the period of 12 months commencing on the day on which the confiscation order is made, apply under this subsection to the Supreme Court for an order under subsection (2).

- (4) A person who:
- (a) had knowledge of the application for the confiscation order before the order was made; or
 - (b) appeared at the hearing of that application,
- shall not be permitted to make an application under subsection (3), except with leave of the Supreme Court.
- (5) A person who makes an application under subsection (1) or (3) shall give no less than 14 days written notice to the Attorney-General, who shall be a party to any proceedings in the application.
- (6) An applicant or the Attorney-General may in accordance with the Court of Appeal Rules, appeal to the Court of Appeal from an order made under subsection (2).
- (7) Any person appointed by the Supreme Court under section 68 shall, on application by any person who has obtained an order under subsection (2), and where the period allowed by the Court of Appeal Rules with respect to the making of appeals has expired or any appeal from that order has been determined:
- (a) direct that the property or part thereof to which the interest of the applicant relates, be returned to the applicant; or
 - (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

Discharge of Confiscation Order and quashing of conviction.

38. (1) Where the Supreme Court makes a confiscation order against property in reliance on a person's conviction of a serious offence and the conviction is quashed by the Court of Appeal, the person may apply to the Supreme Court for the discharge of the order.
- (2) Where a confiscation order is discharged under subsection (1), any person claiming to have had an interest in the property immediately before the making of the confiscation order may apply to the Supreme Court for the transfer of the interest to himself.
- (3) A person who makes an application under subsection (2) shall give no less than 14 days notice to the Attorney General and to the person who applied for the discharge of the order and both shall be parties to the proceedings.
- (4) On consideration of any application under subsection (2) the Court shall make an order declaring the nature, extent and value of the person's interest in the property the subject of the order and may take any necessary action to effect the transfer or return of the property including any registration of the interest in the property.

Payment instead of a Confiscation Order.

39. Where the Supreme Court is satisfied that a confiscation order should be made in respect of the property of a person convicted of a serious offence but the property or any part thereof or interest cannot be made subject to such an order because:

- (a) it cannot, with due diligence be located;
- (b) it has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the confiscation of the property;
- (c) it is located outside Tonga;
- (d) has been substantially diminished in value or rendered worthless; or
- (e) it cannot be separated from other property with which it has been mingled,

the Supreme Court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to Government an amount equal to the value of the property, part or interest.

40. Where the Supreme Court orders a person to pay an amount under section 39, that amount shall be treated as if it were a fine imposed upon him in respect of a conviction for a serious offence, and the Supreme Court shall -

Application of procedure for enforcing fines.

- (a) notwithstanding anything contained in any other Act, impose in default of the payment of that amount, a term of imprisonment:
 - (i) of up to 1 year, where the amount does not exceed \$5,000;
 - (ii) of up to 3 years, where the amount exceeds \$5,000 but does not exceed \$15,000;
 - (iii) of up to 5 years, where the amount exceeds \$15,000; and
- (b) direct that the term of imprisonment imposed pursuant to subsection (a) be served consecutively to any other form of imprisonment imposed on that person, or that the person is then serving.

Division 2 - Pecuniary Penalty Orders

41. (1) Subject to this section, where the Attorney-General applies to the Supreme Court for a pecuniary penalty order against a person in respect of that person's conviction for a serious offence the Court shall, if it is satisfied that the person has benefited from that offence, order him to pay to the Government an amount equal to the value of his benefit from the offence or such lesser amount as the Court certifies in accordance with section 44(2).
- (2) The Supreme Court shall assess the value of the benefits derived by a person from the commission of an offence in accordance with sections 42, 43, 44, and 45.

Pecuniary Penalty Order on Conviction.

Rules of
determining
benefit and
assessing value.

- (3) The Supreme Court shall not make a pecuniary penalty order under this section until the period allowed by the Court of Appeal Rules for the lodging of an appeal against conviction has expired or an appeal against conviction has been finally determined, whichever is the later date.
42. (1) Where a person obtains property as the result of, or in connection with the commission of a serious offence, his benefit is the value of the property so obtained.
- (2) Where a person derives an advantage as a result of or in connection with the commission of a serious offence, his advantage shall be deemed to be a sum of money equal to the value of the advantage so derived.
- (3) In determining whether a person has benefited from the commission of a serious offence or from that offence and other serious offences the Supreme Court shall, unless the contrary is proved, deem:
- (a) all property appearing to the Supreme Court to be:
- (i) held by the person on the day on which the application is made; and
- (ii) held by the person at any time:
- (aa) within the period between the day the serious offence, or the earliest serious offence, or the earliest serious offence, was committed and the day on which the application is made; or
- (bb) within the period of 6 years immediately before the day on which the application is made,
- whichever is the longer,
- to be property that came into the possession or under the control of the person by reason of the commission of that serious offence or those serious offences of which the person was convicted;
- (b) any expenditure by the person since the beginning of the longer in period in paragraph (a)(ii) to be expenditure met out of payments received by him as a result of, or in connection with, the commission of that serious offence or those serious offences; and
- (c) any property received or deemed to have been received by the person at any time as a result of, or in connection with the commission by him of that serious offence or those serious offences to be property received by him free of any interest of any other person therein.

- (4) Where a pecuniary penalty order has been previously made against a person, in assessing the value of any benefit derived by him from the commission of the serious offence, the Supreme Court shall leave out of account any benefits that are shown to have been taken into account in determining the amount to be recovered under the previous order.
- (5) If evidence is given at the hearing of the application that the value of the person's property at any time after the commission of the serious offence exceeded the value of the person's property before the commission of the offence, then the Supreme Court shall treat the value of the benefit as being not less than the amount of that excess, unless the person satisfies the Court that the whole or part of the excess was due to causes unrelated to the commission of the serious offence.

43. (1) Where:

- (a) a person has been convicted of a serious offence and the Attorney-General tenders to the Supreme Court a statement of any matters relevant to:
 - (i) determining whether the person has benefited from the offence or from any other serious offence of which he is convicted in the same proceedings or which is taken into account in determining his sentence; or
 - (ii) an assessment of the value of the person's benefit from the offence or any other serious offence of which he is convicted in the same proceedings or which is taken into account; and
- (b) the person accepts any allegation in the statement,

Statements relating to benefits from commission of serious offences.

the Supreme Court may, for the purposes of so determining or making that assessment, treat his acceptance as conclusive of the matters to which it relates.

(2) Where:

- (a) a statement is tendered under subsection (1)(a); and
- (b) the Supreme Court is satisfied that a copy of that statement has been served on the person,

the Supreme Court may require the person to indicate to what extent he accepts each allegation in the statement and, so far as the person does not accept any allegation, to indicate any matters he proposes to rely on to challenge the allegation.

- (3) Where the person fails to comply with a requirement under subsection (2), he may be treated for the purposes of this section as having accepted every allegation in the statement other than an allegation in respect of which he complied.

- (4) Where:
- (a) the person tenders to the Supreme Court a statement as to any matters relevant to determining the amount that might be realised at the time the pecuniary penalty order is made; and
 - (b) the Attorney-General accepts any allegation in the statement, the Supreme Court may, for the purposes of that determination, treat the acceptance by the Attorney-General as conclusive of the matters to which it relates.
- (5) An acceptance by a person under this section that he received any benefits from the commission of a serious offence shall be admissible in proceedings for any offence.

**Amount
recovered under
Pecuniary
Penalty Order.**

44. (1) Subject to subsection (2), the amount to be recovered from a person under a pecuniary penalty order shall be the amount which the Supreme Court assesses to be the value of the person's benefit from the serious offence, or if more than one, all the offences in respect of which the order may be made.
- (2) Where the Supreme Court is satisfied about any matter relevant for determining the amount which might be realised at the time the pecuniary penalty order is made (whether by acceptance under section 43 or otherwise), the Court shall issue a certificate giving the Court's opinion as to the matters concerned if 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 if more than one, all the offences in respect of which the pecuniary penalty order may be made.

**Variation of
Pecuniary
Penalty Order.**

45. Where the Supreme Court makes a pecuniary penalty order against a person in relation to a serious offence and:
- (a) in calculating the amount of the pecuniary penalty order, the Supreme Court took into account a confiscation order of the property or a proposed confiscation order in respect of property; and
 - (b) an appeal against confiscation or the confiscation order is allowed, or the proceedings from the proposed confiscation order terminate without the proposed confiscation order being made,

the Attorney-General may apply to the Supreme Court for a variation of the pecuniary penalty order to include the value of the property not so confiscated and the Court may, if it considers it appropriate to do so, increase the order accordingly.

46. (1) In assessing the value of benefits derived by a person from the commission of a serious offence, the Supreme Court may treat as part of the benefits derived by the person any property that, in its opinion is subject to the effective control of the person, whether or not he has: **Lifting the corporate veil.**
- (a) any legal or equitable interest in the property; or
 - (b) any right, power or privilege in connection with the property.
- (2) Without prejudice to the generality of subsection (1), the Supreme Court may have regard to:
- (a) shares in, debentures over or directorships in any company that has an interest, whether direct or indirect, in the property, and for this purpose the Supreme Court may order the investigation and inspection of the books of a named company;
 - (b) any trust that has any relationship to the property;
 - (c) any relationship whatsoever between the persons having an interest in the property or in companies of the kind referred to in paragraph (a) or trust of the kind referred to in paragraph (b), and any other persons.
- (3) Where the Supreme Court, for the purposes of making a pecuniary penalty order against a person, treats particular property as the person's property pursuant to subsection (1), the Court may, on application by the Attorney-General, make an order declaring that the property is available to satisfy the order.
- (4) Where the Supreme 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 the property of the person against whom the order is made; and
 - (b) a restraining order may be made in respect of the property as if the property were property of the person against whom the order is made.
- (5) Where the Attorney-General makes an application for an order under subsection (3) that property is available to satisfy a pecuniary penalty order against a person:
- (a) the Attorney-General shall give written notice of the application to the person and to any person who the Attorney-General has reason to believe may have an interest in the property; and
 - (b) the person and any person who claims an interest in the property may appear and adduce evidence at the hearing.
47. Where the Supreme Court orders a person to pay an amount under a pecuniary penalty order, the provisions of section 39 shall apply with such modifications as the Court may determine. **Enforcement of Pecuniary Penalty Orders.**

**Discharge of
Pecuniary
Penalty Orders.**

- 48.** A pecuniary penalty order shall be discharged:
- (a) if the conviction of the serious offence or offences in reliance on which the order was made is or is taken to be quashed and no conviction for the offence or offences is substituted;
 - (b) if the order is quashed; or
 - (c) if the order is satisfied by payment of the amount due under the order.

Division 3 - Control of Property

**Powers to
search for and
seize tainted
property.**

- 49.** (1) A police officer may:
- (a) search a person for tainted property; or
 - (b) enter upon land or upon or into premises and search the land or premises for tainted property and seize any property found in the course of the search that the police officer believes, on reasonable grounds to be tainted property.
- (2) Any search or seizure made under subsection (1) shall only be made:
- (a) with the consent of the person or the occupier of the land or premises as the case may be;
 - (b) under warrant issued under section 51; or
 - (c) under section 52.

Police searches.

- 50.** Where a police officer searches a person under the provisions of this Division, he may search:
- (a) the clothing that is being worn by the person; and
 - (b) any property in, or apparently in, the person's immediate control, provided that a female shall only be searched by a female officer unless the search is made by means of any mechanical, electronic or other similar device.

**Search Warrants
in relation to
tainted property.**

- 51.** (1) Where a police officer has reasonable grounds for suspecting that there is, or may be within the next 72 hours, tainted property of a particular kind:
- (a) on a person;
 - (b) in the clothing that is being worn by a person;
 - (c) otherwise in a person's immediate control; or
 - (d) upon land or upon or in any premises,

the police officer may lay before a magistrate an information on oath setting out those grounds and apply for the issue of a warrant to search the person, the land or the premises as the case may be, for tainted property of that kind.

- (2) Where an application is made under subsection (1) for a warrant to search a person, land or premises, the magistrate may, subject to subsection (4) issue a warrant authorising a police officer (whether or not named in the warrant) with such assistance and by such force as is necessary and reasonable:
 - (a) to search the person for tainted property of that kind;
 - (b) to enter upon the land or in or upon any premises and to search the land or premises for tainted property of that kind; and
 - (c) to seize property found in the course of the search that the police officer believes on reasonable grounds to be tainted property of that kind.
 - (3) A warrant may be issued under subsection (2) in relation to tainted property, whether or not an information has been laid in respect of the relevant offence.
 - (4) Where a summons has not been issued in respect of the relevant offence at the time when the application for the warrant is made, a magistrate shall not issue a warrant under subsection (2) unless he is satisfied that:
 - (a) an application for a summons in respect of the relevant offence within 48 hours shall be made; and
 - (b) the property described in the warrant is tainted property.
 - (5) A warrant issued under this section shall state:
 - (a) the purpose for which it is issued, including a reference to the nature of the relevant offence;
 - (b) a description of the kind of property alleged to be tainted;
 - (c) a time at which the warrant ceases to be in force; and
 - (d) whether entry is authorised to be made at any time of the day or night or during specified hours.
 - (6) If during the course of searching under a warrant issued under this section, a police officer finds:
 - (a) property that the police officer believes on reasonable grounds to be tainted property other than that specified in the warrant; or
 - (b) any thing the police officer believes on reasonable grounds will afford evidence of the commission of a serious offence;the police officer may seize that property or thing.
52. (1) Where by reason of urgency a police officer considers it necessary to do so, he may make application by telephone or other means of communication for a search warrant under section 51. **Search Warrants may be granted by telephone.**

- (2) A magistrate, to whom an application for the issue of a warrant is made by telephone or other means of communication, may sign a warrant if he is satisfied of the identity of the police officer and that it is necessary to do so, and shall inform the police officer of the terms of the warrant so signed. The police officer shall complete a form of warrant in the terms furnished by the magistrate and produce that warrant to the person named therein.
- (3) The police officer to whom a warrant is granted by telephone or other means of communication shall, not later than the next working day following the execution of the warrant, give the magistrate a sworn affidavit of the reasons for his application and the form of warrant completed by him.

Searches in emergencies.

- 53.** (1) Where a police officer suspects on reasonable grounds that:
- (a) particular property is tainted property;
 - (b) it is necessary to exercise the power of search and seizure in order to prevent the concealment, loss or destruction of the property; and
 - (c) the circumstances are so urgent that they require immediate exercise of the power without the authority of a warrant or the order of a court,

the police officer may search a person, enter upon land, or upon or into premises and search for and seize any property he suspects is tainted property;

- (2) If during the course of a search conducted under this section, a police officer finds any thing he believes on reasonable grounds will afford evidence of the commission of a criminal offence, he may seize that property or thing.

Record of Property Seized.

- 54.** A police officer who seizes property under section 51 or 53 shall provide a list of the property seized to the person who appears to be in possession of such property at the time at which it is seized and shall take reasonable care to ensure that the property is preserved.

Return of Seized Property.

- 55.** (1) Where property has been seized under section 51 or 53 (otherwise than because it may afford evidence of the commission of an offence), a person who claims an interest in the property may apply to the Supreme Court for an order that the property be returned to that person.
- (2) Where a person makes an application under subsection (1) and the Supreme Court is satisfied that:
- (a) the person is entitled to possession of the property;
 - (b) the property is not tainted property; and
 - (c) the person in respect of whose conviction, charging or proposed charging the seizure of the property was made has no interest in the property,

the Court shall order the return of the property to that person.

56. Where a foreign State requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction, and the Attorney General has granted the request for assistance from a foreign State under section 4 of the Mutual Assistance in Criminal Matters Act 2000, the provisions of sections 49 to 55 apply *mutatis mutandis*.

Search for and Seizure of tainted property in relation to foreign offences.

Division 4 - Restraining Orders

57. (1) The Attorney General may apply to the Supreme Court for a restraining order against any realisable property held by a defendant or specified realisable property held by a person other than the defendant.
- (2) An application for a restraining order may be made *ex-parte* and shall be in writing and accompanied by an affidavit stating:
- (a) where the defendant has been convicted of a serious offence, the serious offence for which he 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;
 - (b) where the defendant has not been convicted of a serious offence, the serious offence for which he is charged or about to be charged and the grounds for believing that the defendant committed the offence;
 - (c) a description of the property in respect of which the restraining order is sought;
 - (d) the name and address of the person who is believed to be in possession of the property;
 - (e) the grounds for the belief that the property is tainted property in relation to the offence or the grounds for the belief that the defendant derived a benefit directly or indirectly from the commission of the offence;
 - (f) where the application seeks a restraining order against property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the defendant; and
 - (g) the grounds for the belief that a confiscation order or a pecuniary penalty order may be or is likely to be made under this Part in respect of the property.
58. (1) Subject to this section, where the Attorney-General applies to the Court for a restraining order against property and the Supreme Court is satisfied that:
- (a) the defendant has been convicted of a serious offence, or has been charged or is about to be charged with a serious offence;

Application for Restraining Order.

Restraining Orders.

- (b) where the defendant has not yet been convicted of a serious offence, there are reasonable grounds for believing that the defendant committed the offence;
 - (c) there is reasonable cause to believe that the property is tainted property in relation to an offence, or that the defendant derived a benefit directly or indirectly from the commission of the offence;
 - (d) where the application seeks a restraining order against property of a person other than the defendant, there are reasonable grounds for believing that the property is tainted property in relation to an offence and that the property is subject to the effective control of the defendant; and
 - (e) there are reasonable grounds for believing that a confiscation order or a pecuniary penalty order is likely to be made under this Part in respect of the property,
- (2) A restraining order under subsection (1) may:
- (a) prohibit the defendant or any person from disposing of, or otherwise dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order; and
 - (b) at the request of the Attorney-General, where the Supreme Court is satisfied that the circumstances so require:
 - (i) direct the Attorney General or such other person as the Supreme Court may appoint, to take custody of the property or such part thereof as is specified in the order and to manager or otherwise deal with all or any part of the property in accordance with the directions of the Court; and
 - (ii) require any person having possession of the property to give possession thereof to the Attorney General or to the person appointed under sub-clause (i) to take custody and control of the property.
- (3) A restraining order under subsection (1) may be made subject to such conditions as the Supreme Court thinks fit and, without limiting the generality of this subsection, may make provision for meeting out of the property or a specified part of the property, any or all of the following:
- (a) the defendant's reasonable living expenses (including the reasonable living expenses of the defendant's dependants, if any) and reasonable business expenses;
 - (b) the person's reasonable expenses in defending the criminal charge and any proceedings under this Division; and
 - (c) any specified debt incurred by the defendant in good faith.

- (4) In determining whether there are reasonable grounds for believing property is subject to the effective control of the defendant, the Supreme Court may have regard to the matters referred to in section 46.
 - (5) Where the Attorney General or other person appointed under subsection (2)(b)(i) is given a direction in relation to any property, he may apply to the Supreme Court for directions on any question respecting the management or preservation of the property under his control.
 - (6) The Supreme Court may order that any application under section 57 shall be served on any person interested in the application and such person shall have the right to appear at the hearing.
 - (7) When the application is made under section 57(1) on the basis that a person is about to be charged, any order made by the Supreme Court shall lapse if the person is not charged:
 - (a) where the offence is an offence against the law of Tonga, within 2 days of the making of the order; and
 - (b) where the offence is an offence against the law of a foreign State, within 20 days of the making of the order.
- 59.** Before making an order under section 58(1), the Supreme Court may require the Attorney General to give such undertakings on behalf of the Government of Tonga as the Court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order. **Undertaking by the Government of Tonga.**
- 60.** Before making a restraining order the Supreme Court may require notice to be given to, and may hear, any person who, in its opinion, appears to have an interest in the property, unless the Court is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property. **Notice of Application for Restraining Order.**
- 61.** A copy of a restraining order shall be served on a person affected by the order in such manner as the Supreme Court directs or as may be prescribed by rules of court. **Service of Restraining Order.**
- 62.** (1) A copy of a restraining order which affects land in Tonga shall be registered with the Registrar of Lands. **Registration of Restraining Order.**
- (2) A restraining order is of no effect with respect to registered land unless it is registered as a charge under the Land Act.
- (3) Where particulars of a restraining order are registered under the Land Act, a person who subsequently deals with the property shall, for the purposes of section 63 be deemed to have notice of the order at the time of the dealing.
- 63.** (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 and is liable upon conviction to: **Contravention of Restraining Order.**

- (a) a fine of up to \$10,000 or imprisonment for a period of up to 1 year or both; or
- (b) a fine of up to \$50,000 in the case of a body corporate.

(2) Where a restraining order is made against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order, and the disposition or dealing was for insufficient consideration or in favour of a person who had not acted in good faith and without notice, the Attorney-General may apply to the Supreme Court for an order that the disposition or dealing be set aside.

- (3) Where the Attorney-General makes an application under subsection (2) in relation to a disposition or dealing, the Supreme Court may:
 - (a) set aside the disposition or dealing as from the day on which the disposition or dealing took place; or
 - (b) set aside the disposition or dealing from the day of the order under this subsection and declare the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order under this subsection.

Duration of Restraining Order.

64. A restraining order remains in force until:

- (a) it is discharged, revoked or varied;
- (b) 6 months from the date on which it is made or such later time as the Supreme Court may determine; or
- (c) a confiscation order or a pecuniary penalty order, as the case may be, is made in respect of property which is the subject of the order.

Review of Restraining Orders.

65. (1) A person who has an interest in property in respect of which a restraining order was made may, at any time, apply to the Supreme Court for an order under subsection (4).

- (2) An applicant under subsection (1) shall give to the Attorney-General at least 3 working days notice in writing of the application.
- (3) The Supreme 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.
- (4) On an application under subsection (1) the Supreme Court may revoke or vary the order or make the order subject to such conditions as the Court thinks fit. For the purposes of this subsection the Court may:
 - (a) require the applicant to enter into recognizances;
 - (b) vary the order to permit the payment of reasonable living expenses of the applicant, including his dependants, if any, and reasonable legal or business expenses of the applicant.

- (5) An order under subsection (4) shall only be made if the Supreme Court is satisfied that:
- (a) the applicant is the lawful owner of the property or is entitled to lawful possession thereof, and is innocent of any complicity in the commission of a serious offence or of any collusion in relation to such offence; and
 - (b) the property will no longer be required for the purposes of any investigation or as evidence in any proceedings.
66. (1) The Attorney-General may apply to the Supreme Court that made a restraining order for an extension of the period of the operation of the order. **Extension of Restraining Orders.**
- (2) Where the Attorney-General makes an application under subsection (1), the Court may extend the operation of a restraining order for a specified period, if it is satisfied that a confiscation order may be made in respect of the property or part thereof or that a pecuniary penalty order may be made against the person.

Division 5 - Realisation of property

67. (1) Where: **Realisation of Property.**
- (a) a pecuniary penalty order is made;
 - (b) the order is not subject to appeal; and
 - (c) the order is not discharged,
- the Supreme Court may, on an application by the Attorney General, exercise the powers conferred upon the Court by this section.
- (2) The Court may appoint a receiver in respect of realisable property.
 - (3) The Court may empower a receiver appointed under subsection (2) to take possession of any realisable property subject to such conditions or exceptions as may be specified by the Court.
 - (4) The Court may order any person having possession of realisable property to give possession of it to any such receiver.
 - (5) The Court may empower any such receiver to realise any realisable property in such manner as the Court may direct.
 - (6) The Court may order any person holding an interest in realisable property to make such payment to the receiver in respect of any beneficial interest held by the defendant or, as the case may be, the recipient of a gift caught by this Act as the Court may direct, and the Court may, on the payment being made, by order transfer, grant or extinguish any interest in the property.
 - (7) The Court shall not, in respect of any property, exercise the powers conferred subsections (3), (4), (5) or (6), unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the Court.

Application of proceeds of realisation and other sums.

68. (1) Subject to subsection (2), the following property in the hands of a receiver appointed under section 58 or 67, that is to day:

- (a) the proceeds of the realisation of any property under section 67; and
- (b) any other sums, being property held by the defendant;

shall, after such payments, if any, as the Supreme Court may direct have been made out of those sums, be payable to the Registrar of the Court and be applied on the defendant's behalf towards the satisfaction of the pecuniary penalty order in the manner provided by subsection (3).

(2) If, after the amount payable under the confiscation order has been fully paid, any such sums remain in the hands of such a receiver, the receiver shall distribute those sums:

- (a) among such of those persons who held property which has been realised under this Part; and
- (b) in such proportions,

as the Court may direct, after giving a reasonable opportunity for those persons to make representations to the Court.

(3) Property received by the Registrar of the Supreme Court on account of an amount payable under a confiscation order shall be applied as follows:

- (a) if received by him from a receiver under subsection (1), it shall first be applied in payment of the receiver's remuneration and expenses;
- (b) then it shall be applied toward the reimbursement of the expenses incurred by the Government, such amount being paid into General Revenue; and
- (c) the balance shall be paid into an interest bearing bank account called the Law Enforcement Fund Account which shall be –
 - (i) opened and maintained by the Attorney General for the purpose of depositing and paying out funds to be applied for law enforcement and related purposes; and
 - (ii) subject to annual audit to be carried out by the Audit General.

Exercise of powers over property.

69. (1) The following provisions of this section apply to the powers conferred on the Supreme Court by sections 58, 65, 66 and 67, or on a receiver appointed under section 58(2)(b) or 67(2).

(2) Subject to the following provisions of this section, the powers shall be exercised to make available for satisfying the pecuniary penalty order or, as the case may be, any pecuniary penalty order that may be made in the defendant's case, the value for the time being of realisable property held by any person by the realisation of such property.

- (3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act, the powers shall be exercised to realise no more than the value for the time being of the gift.
- (4) The powers shall be exercised to allow any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.
- (5) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

70. (1) Where a person who holds realisable property is adjudged bankrupt:

Paramourcy of this Part in bankruptcy or winding up.

- (a) property for the time being subject to a restraining order made before the order adjudging him bankrupt; and
- (b) any proceeds of property realised by virtue of section 67(5) or (6) for the time being in the hands of a person appointed under section 58(2)(b) or 67(2),

is excluded from the property of the bankrupt for the purposes of any proceedings to recover property upon bankruptcy.

- (2) Where a person has been adjudged bankrupt, the powers conferred on the Supreme Court by sections 58 and 67 or on a person appointed under section 58(2)(b) or 67(2) shall not be exercised in relation to property for the time being comprised in the property of the bankrupt for the purposes of the recovery of property upon bankruptcy.
- (3) Where, in the case of a debtor, a receiver stands appointed and any property of the debtor is subject to a restraining order under this Act, the powers conferred on the receiver by virtue of that receivership do not apply to property for the time being subject to such restraining order.
- (4) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by this Part:
 - (a) no order shall be made in virtue of the bankruptcy in respect of the making of the gift at any time when the person has been charged with a serious offence and the proceedings have not been concluded by the acquittal of the defendant or discontinuance of the proceedings, or when property of the person to whom the gift was made is subject to a restraining order or a charging order made under a bankruptcy; and
 - (b) any order made in virtue of any bankruptcy after the conclusion of the proceedings shall take into account any realisation under this Part of property held by the person to whom the gift was made.

Winding up of
company holding
realisable
property.

71. (1) Where realisable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for its voluntary winding up, the functions of the liquidator or any provisional liquidator shall not be exercisable in relation to:

- (a) property for the time being subject to a restraining order made before the relevant time; or
- (b) any proceeds of property realised by virtue of section 67(5) or (6) for the time being in the hands of a person appointed under section 58(2)(b) or 67(2),

but there shall be payable out of such property any expenses (including the remuneration of the liquidator or provisional liquidator) properly incurred in the winding up in respect of the property.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the Supreme Court by section 58 or 67 shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable:

- (a) that inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
- (b) that prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) Subsection (2) does not affect the enforcement of a charging order:

- (a) made before the relevant time; or
- (b) on property which was subject to a restraining order at the relevant time.

(4) Nothing in the Companies Act 1995 shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on the Supreme Court by section 58 or 67.

(5) In this section –

- (a) "company" means any company which may be wound up under the Companies Act 1995,
- (b) "liquidator" includes any person appointed to the office of liquidator (whether provisionally or otherwise) under the Companies Act 1995; and
- (c) "the relevant time" means:

- (i) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;

- (ii) where such an order has been made and before the presentation of the petition for the winding up of the company by the Supreme Court such a resolution had been passed by the company, the time of the passing of the resolution; and
- (iii) in any other case where such an order has been made, the time of the making of the order.

Division 6 - Production Orders and other Information Gathering Powers

72. (1) Where a person has been charged with or convicted of a serious offence and a police officer has reasonable grounds for suspecting that any person has possession or control of:

Production Orders.

- (a) a document relevant to identifying, locating or quantifying property of the person charged or convicted, or relevant to identifying or locating a document necessary for the transfer of property of such person; or
- (b) a document relevant to identifying, locating or quantifying tainted property in relation to the offence, or relevant to identifying or locating a document necessary for the transfer of tainted property in relation to the offence,

the police officer may apply *ex parte* and in writing to a Judge in chambers for a production order under subsection (2) against the person suspected of having possession or control of a document referred to in this subsection. The application shall be supported by an affidavit.

- (2) The judge may, if he considers there are reasonable grounds for so doing, make an order that the person produce to a police officer, at a time and place specified in the order, any documents referred to in subsection (1), provided that an order under this subsection shall not require the production of bankers' books.
- (3) A police officer to whom documents are produced may:
 - (a) inspect the documents;
 - (b) make copies of the documents; or
 - (c) retain the documents as long as is reasonably necessary for the purposes of this Act.
- (4) Where a police officer retains documents produced to him for more than 48 hours, he shall supply a copy of the documents to the person who produced them.
- (5) A person ordered to produce documents under this section shall not refuse on the ground that:
 - (a) the document might tend to incriminate the person or make the person liable to a penalty; or

(b) the production of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.

Evidential value of Information.

73. (1) Where a person produces a document pursuant to an order under this section, the production of the document, or any information document or things obtained as a direct or indirect consequence of the production of the document, is not admissible against the person in any criminal proceedings except proceedings under section 74.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, a confiscation order or a pecuniary penalty order are not criminal proceedings.

Failure to comply with a production order.

74. Where a person is required by a production order to produce a document to a police officer, the person commits an offence if he –

(a) contravenes the order without reasonable cause; or

(b) produces or makes available a document known by the person to be false or misleading in a material particular and does not so indicate to the police officer or provide to the police officer any correct information of which the person is in possession.

and shall upon conviction be liable to imprisonment of up to 1 year or to a fine not exceeding \$10,000 or both, and in the case of a body corporate to a fine not exceeding \$50,000.

Power to search for and seize documents relevant to locating property.

75. A police officer may:

(a) enter upon land or upon or into premises;

(b) search the land or premises for any document of the type described in section 72(1); and

(c) seize any document found in the course of that search that the police officer believes, on reasonable grounds, to be a relevant document in relation to a serious offence,

provided that the entry, search and seizure is made with the consent of the occupier of the land or the premises; or under warrant issued under section 76.

Search Warrant for location of documents relevant to locating property.

76. (1) Where:

(a) a person has been charged or convicted of a serious offence; or

(b) the police officer has reasonable grounds for suspecting that there is, or may be within the next 72 hours, upon any land or upon or in any premises, a document referred to in section 72(1) in relation to the offence,

the police officer may make application supported by information on oath to a magistrate for a search warrant in respect of that land or those premises.

- (2) Where an application is made under subsection (1), the magistrate may subject to subsection (4), issue a warrant authorising any police with such assistance and by such force as is necessary and reasonable:
 - (a) to enter upon the land upon or into any premises and to search the land or premises for documents of that kind; and
 - (b) to seize documents found in the course of the search that the police officer believes on reasonable grounds to be documents of that kind.
- (3) A magistrate shall not issue a warrant under subsection (2) unless he is satisfied that:
 - (a) a production order has been given in respect of the document and has not been complied with;
 - (b) a production order in respect of the document would be unlikely to be effective;
 - (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without any notice to any person; or
 - (d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.
- (4) A warrant issued under this section shall state:
 - (a) the purpose for which it is issued, including a reference to the nature of the relevant offence;
 - (b) a description of the kind of documents authorised to be seized;
 - (c) a time at which the warrant ceases to be in force; and
 - (d) whether entry is authorised to be made at any time of the day or night or during specified hours.
- (5) If during the course of searching under a warrant issued under this section, a police officer finds:
 - (a) a document of the type described in section 72(1) that the police officer believes on reasonable grounds to relate to the relevant offence, or to another serious offence; or
 - (b) any thing the police officer believes on reasonable grounds will afford evidence as to the commission of a serious offence,the police officer may seize that document or thing.

Probation orders and search warrants in relation to foreign offences.

77. Where a foreign State requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction, the provisions of sections 70 and 76 apply *mutatis mutandis*, provided that the Attorney-General has, under section 4(2) of the Mutual Assistance in Criminal Matters Act 2000, granted the request.

Monitoring Orders.

78. (1) A police officer may apply *ex parte* for a monitoring order (in this section called a monitoring order). The application shall be in writing and supported by an affidavit.

(2) A monitoring order shall:

- (a) direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the institution;
- (b) not have retrospective effect; and
- (c) only apply for the period specified not exceeding 3 months from the date the order is made.

(3) A judge shall not make a monitoring order unless he is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought:

- (a) has committed or has been involved in the commission or is about to commit or be involved in the commission of a serious offence; or
- (b) has benefited directly or is about to benefit directly or indirectly from the commission of a serious offence.

(4) A monitoring order shall specify:

- (a) the name or names in which the account is believed to be held; and
- (b) the class of information that the institution is required to give.

(5) Where a financial institution knowingly:

- (a) contravenes the monitoring order without reasonable cause; or
- (b) provides false or misleading information under the order, the institution commits an offence and is liable upon conviction, to a fine not exceeding \$100,000.

Monitoring Orders not to be disclosed.

79. (1) Where a financial institution is or has been subject to a monitoring order no person shall disclose the existence or operation of the order to any person except:

- (a) an officer or agent of the institution for the purpose of complying with the order;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
- (c) a police officer authorised in writing to receive the information.

If the institution fails to comply with this sub-section, the institution or person commits an offence and is liable upon conviction, in the case of a natural person, to imprisonment for a period not exceeding 1 year or a fine of up to \$10,000 or both, and in the case of the institution a fine up to \$50,000.

- (2) A person described in subsections (1)(a), (b) or (c) shall not disclose the existence or operation of a monitoring order except to another such person, and may do so only for the purposes of the performance of the person's duties or functions. Any person who fails to comply with this sub-section and is liable upon conviction to imprisonment for a period not exceeding 1 year or a fine of up to \$10,000 or both.
- (3) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purposes of or in connection with legal proceedings or in the course of proceedings before a court, provided that nothing in this section shall be construed as requiring a legal adviser to disclose to any court the existence or operation of a monitoring order.

80. The Attorney General may, with the consent of Cabinet make Regulations for the effective carrying out of the provisions of this Act. **Regulations.**

Passed by the Legislative Assembly this 2nd day of October, 2000.