

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the Criminal Assets Recovery Act 1990 (the Principal Act) to provide for unexplained wealth orders as a means of recovery of criminal assets by the NSW Crime Commission (in addition to assets forfeiture orders and proceeds assessment orders). An unexplained wealth order (like a proceeds assessment order) requires the Supreme Court to order a person who has engaged in serious crime related activity (or who has obtained illegally acquired property from the activities of such a person) to pay the Treasurer an amount equal to the value of the person's current or previous illegally acquired wealth. The main features of the proposed unexplained wealth order provisions are as follows:

- (a) The NSW Crime Commission may apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).
- (b) The Court is required to make an unexplained wealth order against a person if there is a reasonable suspicion that the person has at any time engaged in a serious crime related activity. A serious crime related activity is the commission of any offence with a maximum penalty of 5 years or more (such as a drug offence, a serious assault or homicide, theft, tax evasion or

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intentional damage to property of more than \$500 in value), whether or not the person has been charged with the offence and (if charged) whether or not the person has been convicted or acquitted.

- (c) The Court is also required to make an unexplained wealth order against a person who has at any time acquired any property derived from the serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).

(d) The amount required to be paid by an unexplained wealth order is the total value of all the current and previous wealth of the person against whom the order is made, less any wealth that the person can establish was not illegally obtained. The assessment of the unexplained wealth of a person extends to the value of any interest in property owned or under the control of the person, any property previously expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.

- (e) The Court is given a discretion to refuse to make an unexplained wealth order, or to reduce its amount, if it is in the public interest to do so.

The proposed unexplained wealth order provisions differ in a number of respects from the existing continued provisions relating to proceeds assessment orders, including in the following respects:

- (a) The Court is required to make a proceeds assessment order only if it is satisfied that it is more probable than not that the person has engaged in a serious crime related activity or acquired the proceeds of any such activity from another person (and not just a reasonable suspicion).
- (b) The Court can only make a proceeds assessment order if the relevant serious crime related activity occurred within 6 years of the application for the order (and not just at any time).
- (c) The Court cannot make a proceeds assessment order (on the basis of the acquisition of proceeds of the activity of another) unless the person knew or ought to have known that the proceeds were from some illegal activity. Such

an order also cannot be made against a child under 18 years of age.

(d) The amount required to be paid by a proceeds assessment order is not assessed on an unexplained wealth basis but on the basis of wealth assessed to be derived from any illegal activity within the previous 6 years, including a presumption that wealth is so obtained if it is the difference between total wealth before the illegal activity and total wealth (including expenditure) afterwards.

(e) The assessment of the amount payable under a proceeds assessment order may include the value of property forfeited or taken into account under another confiscation order under the Principal Act or under related legislation that applies to court orders on conviction (any such assessment is not available for unexplained wealth orders).

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(f) The Court is not given a discretion to refuse to make a proceeds assessment order (or reduce the amount payable) if it is in the public interest to do so.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Criminal Assets

Recovery Act 1990 No 23

Schedule 1 [1] includes unexplained wealth orders in the objects of the Principal Act.

Schedule 1 [2], [3], [4], [5], [8] and [12] make consequential amendments on the inclusion of unexplained wealth orders as an alternative to proceeds assessment orders.

Schedule 1 [6] and [7] enable a restraining order to be sought over all the interests in property (and not just specified interests) of a person suspected of deriving proceeds from serious crime related activities as a consequence of the application of the unexplained wealth order provisions to such a person.

Schedule 1 [9] enables the NSW Crime Commission to apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).

Schedule 1 [10] ensures that the provision that prevents a proceeds assessment order being made against a child under 18 years of age who merely acquires crime derived property does not also prevent an order from being made against a corporation.

Schedule 1 [11], [13] and [14] (in so far as it inserts proposed section 28C) transfer general provisions relating to proceeds assessment orders so that they also apply to unexplained wealth orders.

Schedule 1 [14] also inserts proposed sections 28A and 28B. Proposed section 28A enables the NSW Crime Commission to apply to the Supreme Court for an unexplained wealth order against a person (the defendant) requiring payment of the amount assessed by the Court as the unexplained wealth of the person. The Court must make such an order if it finds that there is a reasonable suspicion that the defendant has at any time engaged in a serious crime related activity or derived wealth from a serious crime related activity of another person. The Court may refuse to make an order or exclude wealth from an order if it thinks it is in the public interest to do so. Proposed section 28B provides for the assessment of the unexplained wealth of a person, which is defined as the total current or previous wealth of the person other than any part of that wealth that the Court is not satisfied on the balance of probabilities is not or was not illegally acquired wealth. The proposed section sets out the things included in the current or previous wealth of a person, including

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property expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.

Schedule 1 [15] provides that half of the proceeds of unexplained wealth orders and proceeds assessment orders are to be paid to the credit of the Victims Compensation Fund established under the Victims Support and Rehabilitation Act 1996. The proceeds are to be calculated after deducting amounts payable under other orders or to the Commonwealth, another State or a Territory or to an authority of the Commonwealth, another State or a Territory.

Schedule 1 [16] enables regulations containing provisions of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [17] provides that the amendments made to the Principal Act do not affect existing applications for proceeds assessment orders or restraining orders, and requires proceeds of existing proceeds assessment orders, received after the commencement of the proposed Act, to be paid to the Victims Compensation Fund in accordance with the amended provisions.