

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 Criminal Assets Act) and the Confiscation of Proceeds of Crime Act 1989 (the Proceeds of Crime Act) as follows:

(a) to make changes to ex parte proceedings for restraining orders under both Acts, as a consequence of the invalidity of section 10 of the Criminal Assets Act, as found by the High Court in *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 (12 November 2009) and, for that purpose, to confer a discretion under the Criminal Assets Act on the Supreme Court to notify an affected person of ex parte proceedings, to confer on a notified person the right to be heard in proceedings and to provide for and confirm in both Acts the right of the Supreme Court to set aside restraining orders,

(b) to enable the New South Wales Crime Commission (the Commission) to apply for, and to be granted, an assets forfeiture order under the Criminal Assets Act without first applying for or obtaining a restraining order and to provide for additional ancillary orders consequential on this change,

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(c) to continue, by force of the Criminal Assets Act, the effect of restraining orders that are not set aside or discharged by a court before the proposed Act commences,

(d) to exclude the State and employees of the State, or other persons acting for the State, from liability and claims for compensation and relief in relation to invalid restraining orders or assets forfeiture orders founded on invalid restraining orders under the Criminal Assets Act,

(e) to preserve current assets forfeiture orders under the Criminal Assets Act that were founded on invalid restraining orders,

(f) to make other consequential amendments and to enact other savings and transitional provisions.

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

Changes to restraining order procedures

The Criminal Assets Act currently requires applications for restraining orders, that is, orders restraining persons from disposing or otherwise dealing with or attempting to dispose or otherwise deal with interests in property, to be determined in ex parte proceedings by the Supreme Court, on affidavit evidence provided by the Commission.

Schedule 1 [3] repeals sections 10–10B of the Criminal Assets Act, which relate to proceedings for restraining orders, and re-enacts those provisions as sections 10–10D, with the following modifications and additions:

(a) the Supreme Court is given a discretion (in proposed section 10A (4)) to require the Commission to give notice of an application for a restraining order to a person who the Court has reason to believe has an interest in the property or part of the property proposed to be subject to the order. Any person who is so notified is entitled to appear and adduce evidence at the hearing of the application. Such evidence may be considered by the Court in determining an

application,

(b) a person affected by a restraining order is given the right to apply to the Supreme Court for an order setting aside a restraining order. The Court may set aside the order on the ground that the Commission has failed to establish that there are reasonable grounds for the suspicion on which the order was based or if the applicant establishes that the order was obtained illegally or not

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in good faith. An application is generally required to be made within 28 days of notice of the restraining order,

(c) the procedures for telephone applications for restraining orders have been integrated with the other provisions relating to applications for restraining orders,

(d) the provisions are re-ordered.

Schedule 1 [1], [7], [8], [10] and [11] make consequential amendments.

Schedule 1 [2] updates a definition of rules of court, so that the expression will apply to rules of the Supreme Court under the Uniform Civil Procedure Rules 2005.

Changes to procedures for assets forfeiture orders

Currently, an assets forfeiture order, that is, an order forfeiting to, and vesting in, the Crown, assets in property, can only be made if those assets are subject to a restraining order.

Schedule 1 [5] enables the Supreme Court to make an assets forfeiture order without the requirement for a restraining order to be in force in respect of the relevant interests in property. The interests in property that can be the subject of an assets forfeiture order are the same kinds of interests that can be the subject of a restraining order and the Commission may still apply for a restraining order before or at the same time as it applies for an assets forfeiture order. Schedule 1 [4] makes a consequential amendment.

Schedule 1 [9] inserts proposed Division 2B of Part 3 (proposed section 31D), as a consequence of the amendment made by Schedule 1 [5]. The proposed section enables the Commission to seek an order from the Supreme Court for the examination on oath of a person affected by a confiscation order (that is, an assets forfeiture order or a proceeds assessment order). The proposed section also enables the Commission to obtain an order directing a person to provide a statement about property or dealings with property. The proposed section enables the Commission to obtain orders now available under section 12 of the Criminal Assets Act for the purposes of its confiscation order proceedings (previously the ability to obtain such orders was available for assets forfeiture orders because of the linkage between applications for restraining orders and assets forfeiture proceedings). Schedule 1 [6] and [12] make consequential amendments.

Savings and transitional provisions relating to invalid restraining orders, current assets forfeiture orders and other matters

Schedule 1 [13] enables regulations containing provisions of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [14] inserts proposed Part 4 (proposed clauses 15–24) of Schedule 1.

Proposed clause 15 defines words and expressions used in the Part.

Proposed clause 16 gives effect, by force of the proposed clause, to the provisions of a restraining order (a former restraining order), and any ancillary orders, purported to be made before 12 November 2009 (the day the High Court declared current

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section 10 to be invalid) that had not ceased to be in force before that day (a current

former restraining order). The proposed clause applies the Criminal Assets Act, and other laws, to these provisions (restraining provisions) as if the provisions were restraining orders and ancillary orders. The proposed clause does not give effect to any order specifically set aside by the High Court decision or to anything in respect of an order set aside after 12 November 2009 for any period after the order was set aside.

Proposed clause 17 enables restraining provisions to be set aside under proposed section 10C but requires any application for such an order to be made within 28 days of the date of assent to the proposed Act. It also prohibits restraining provisions from being the subject of an application for a review by the Supreme Court on the ground that the affidavit on which the original restraining order was based contained inadmissible evidence, on the ground that the judge who determined the application for the original order failed to supply reasons for the determination or because of the invalidity of the previous section 10. The proposed clause also enables the Supreme Court, at any time on the application of the Commission, to set aside restraining provisions.

Proposed clause 18 excludes the State (including the Commission, the NSW Trustee and Guardian and any officer, employee or agent of the Crown) from liability for various matters arising directly or indirectly from the enactment of the proposed Act and relating to former restraining orders, existing interstate restraining orders and assets forfeiture orders and orders ancillary to those orders made before the commencement of the proposed Act (existing assets forfeiture orders). It also excludes compensation from being payable by or on behalf of the State for any such matters. Proceedings for compensation or other relief for the purpose of restraining any action in relation to an interest in property in accordance with a former restraining order or assets forfeiture order are also prohibited.

Proposed clause 19 provides that the validity of an existing assets forfeiture order is not affected by the fact that there was no valid restraining order in force when the application for the order, or the order, was made and prohibits any challenge to its validity on that ground. Acts or omissions with respect to existing assets forfeiture orders are validated if they would be valid after the commencement of the proposed Act.

Proposed clause 20 continues current applications for assets forfeiture orders and removes any requirement that there be a restraining order before any such application can be granted.

Proposed clause 21 continues existing interstate restraining orders in force as if they were restraining orders made under proposed section 10A and validates acts or omissions with respect to those orders if they would be valid after the commencement of the proposed Act.

Proposed clause 22 prevents a person from being liable for an offence, because of the operation of proposed clause 16, if the act or omission constituting the offence did not constitute an offence when it occurred. This clause will prevent a prosecution for

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offences such as contravening a restraining order if the restraining order was invalid when the contravention occurred.

Proposed clause 23 removes the requirement for the Commission to cancel recordings relating to property, or withdraw any relevant caveat, because of the invalidity of current former restraining orders.

Proposed clause 24 enables savings and transitional regulations to be made that are inconsistent with the provisions of the proposed Part.

Schedule 2 Amendment of Confiscation of Proceeds
of Crime Act 1989 No 90

Changes to restraining order procedures

Schedule 2 [1] makes it clear that the Supreme Court may consider any evidence adduced from an affected party when determining an application for a restraining order. Under section 44 (1) of the Proceeds of Crime Act, the Supreme Court has a discretion, despite the ex parte proceedings, to notify an affected party who may then attend the proceedings and adduce evidence.

Schedule 2 [2] inserts proposed section 44A. The proposed section confirms that the ex parte procedures in the Proceeds of Crime Act for restraining orders do not prevent the Supreme Court from exercising powers, derived from rules of court (that is, the Uniform Civil Procedure Rules 2005) and other laws (such as its inherent power to set aside ex parte orders), to set aside or vary restraining orders or ancillary orders.

Savings and transitional provisions

Schedule 2 [3] enables regulations containing provisions of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.