Agreement in Principle

Mr MICHAEL DALEY (Maroubra—Minister for Police, and Minister for Finance) [4.27 p.m.]: I move:

That this bill be now agreed to in principle.

I am pleased to introduce the Criminal Assets Recovery Amendment Bill 2009. This bill rectifies anomalies relating to restraining orders based on a recent decision by the High Court of Australia. It does this in two ways: by amending the Criminal Assets Recovery Act 1990 and by amending the Confiscation of Proceeds of Crime Act 1989. These amendments will ensure that the New South Wales Crime Commission can continue its excellent work in seizing the ill-gotten gains of serious and organised criminals.

Currently under the Criminal Assets Recovery Act the New South Wales Crime Commission may apply to the Supreme Court for an order to prevent persons or entities subject to possible future confiscation orders from disposing of their property before the substantive confiscation matter can be determined. This order is known as a restraining order and is also referred to as a freezing order as it freezes assets. This application is heard ex parte—that is, without the respondent to the application present. The Crime Commission may then proceed with the process to investigate and present the case to the court for application for the final forfeiture order, which means the court can order the person's cash and assets to be removed from them. The final forfeiture order may be set aside in certain circumstances.

On 28 May 2009 the High Court heard the matter of *International Finance Trust Company Ltd & Anor v New South Wales Crime Commission and Ors*. On 12 November the decision was handed down and the majority of the High Court found that section 10 was invalid, and the circumstances surrounding the application and the ultimate order being discharged in two limited circumstances was "repugnant to the judicial process in a fundamental degree". The circumstances that the High Court found objectionable included: that the application could, at the discretion of the commission and not the court, be made ex parte without notice to the involved party at the same time; and that the Supreme Court's level of satisfaction was based on the authorised officer's affidavit about his or her suspicions about the source of the property without the court being able to hear from the other side if it wished to do so.

The inability of the intended respondent to be notified of the ex parte application or to have a right of review outside the two limited circumstances detailed in the High Court decision was determined by the majority of the High Court to be unacceptable and the relevant section was declared invalid. Let me be completely clear: the High Court decision related only to restraining orders, that is, a temporary freeze on the disposal of suspected criminal assets and not to the power that goes to the ultimate forfeiture of the assets. There is no money—and there will be no money—to be repaid from current restraining orders. No assets are seized under a restraining order.

The order simply prevents the owner of the assets disposing of those assets until the court has had a chance to decide whether or not they should be confiscated and forfeited to the Crown. To respond fully to the High Court decision, these amendments separate the restraining order process from the forfeiture order process and make savings and transitional provisions regarding current former restraining orders and former restraining orders. The amendments include provisions that, by force of statute, validate existing forfeiture orders and make transitional provisions regarding current former restraining orders effective from the date of the High Court decision.

I turn now to the details of the bill in relation to the Criminal Assets Recovery Act [CARA], which the High Court decision specifically addressed. The amendments repeal sections 10 to 10B of the current Act and instead insert a number of new sections. New section 10 clarifies the nature of a restraining order in much the same way as the current Act. New section 10A provides for the key determinant detailed in the order including some provisions in the current Act and some new provisions. New section 10A subsections (1), (2) and (3) provide for the application process. While retaining the ex parte provisions, new subsection (4) provides that the Supreme Court may, if it thinks fit, require the Crime Commission to give notice of the application to any person with interest in the application and that such a person is entitled to appear and adduce evidence at a subsequent hearing. Such evidence may then be considered by the court in determining the application.

This is the point that the High Court made clear: the importance of the Supreme Court hearing the application having the ability to exercise its discretion and to consider arguments from both sides concerning the property and the suspicions of criminal activity. In addition to the new powers of the Supreme Court to make the restraining order after hearing from the other side, there is now also a statutory period of 28 days within which persons whose property is restrained will be able to approach the court and seek to have the order set aside on certain grounds. Subsection (5) provides for the determination of the applications and includes the provision that the Supreme Court must be satisfied based on the information contained in the affidavit and may consider evidence from the person involved in the matter if he or she attends a hearing.

If the court determines that the application should not be dealt with ex parte there will be no restraint on the assets until the affected party is notified and appears, if he or she so chooses, to adduce evidence at the hearing. The court will grant the restraining order only if the Crime Commission has satisfied the court that there is reasonable suspicion that the person is engaged in serious criminal activity, the assets are derived from criminal activity, or the assets are fraudulently acquired. Subsections (6), (7) and (8) replicate important provisions in the current Act. Subsections (9) and (10) update the existing provisions in relation to applications by telephone or other means of communication. Section 10B is also a replication of current provisions regarding the contents and effect of restraining orders.

Section 10C deals with the review of restraining orders making it clear that the court may set aside a restraining order on application by a person with interest in the affected property. Providing the application is made within 28 days of being notified of the restraining order, the person may give evidence on the grounds that the New South Wales Crime Commission failed to satisfy the court that there were reasonable grounds for the relevant suspicion, or the order was obtained illegally or against good faith. The restraining order remains in force until the court makes a ruling on the review application. Section 10D retains existing provisions regarding the duration of restraining orders. Section 14 is amended to clarify a restraining order is in force in the ordering by the court of sale of property. Section 22 deals with the making of assets forfeiture orders.

The amendments remove or unlink the relationship between restraining orders and forfeiture orders to more clearly meet the points raised by the High Court and to ensure that there is clarity about the four processes: the application for a restraining order; the hearing of that application; the further application for a forfeiture order, which may happen without a restraining order in place; and the hearing of the forfeiture order. Section 22 provides for the process where the Supreme Court makes its determination on the forfeiture order on the basis of evidence presented to it which may, or may not, include the restraining order affidavits. This provision relates to forfeiture orders and not restraining orders. This ensures the Crime Commission may move straight to a forfeiture order if it so chooses in particular circumstances and that the restraining order process conforms to the High Court's direction as to the proper role of the judiciary in such matters.

Sections 25, 31, 52B and 54 are all consequential amendments based on the earlier changes to the Act. Section 31D similarly unlinks the process of making restraining orders from the ancillary orders that may flow with the final application for confiscation orders. A confiscation order may be an asset forfeiture order or a proceeds assessment order. These provisions in sections 22 and 31D provide for greater clarity and transparency in the confiscation processes. Part 4 of schedule 1 includes a number of savings and transitional provisions. These provisions do not apply to the matter heard in the High Court, which upheld the appeal. In particular, these provisions relate to current former restraining orders, that is, those orders that were in existence before 12 November but are yet to be finalised into forfeiture orders or set aside; former restraining orders, that is, those previous orders which were then subject to forfeiture orders in the past; existing forfeiture applications; and existing forfeiture orders.

Simply put, these provisions will ensure that those current former orders or former orders will remain in force. Clause 17 clarifies that the Supreme Court has the ability to set aside restraining provisions on application but not on the basis of inadmissible evidence or the fact that the judge gave no reasons in making the order, or on the basis that section 10 was constitutionally invalid. Clause 18 provides for the limitations on liability or compensation relating to the past restraining or forfeiture orders arising from the High Court decision to protect the State and the officers involved. Clauses 19 and 20 provide for the validity of existing forfeiture orders that were made following a restraining order prior to the High Court decision. These existing forfeiture orders or applications for such orders will therefore not be open to challenge. Clause 21 provides the same validity to interstate orders. The remainder of the schedule deals with contraventions and caveats.

I deal now with the Confiscation of Proceeds of Crime Act. Based on the amendments to the Criminal Assets Recovery Act, similar amendments will be made to section 43 of the Confiscation of Proceeds of Crime Act and a new section 44A will be added. These amendments will make it abundantly clear that the evidence provided by the other party at a hearing of the application may be considered by the court in making the restraining order and the Supreme Court retains the power to set aside or vary the restraining or ancillary orders.

These provisions do not change the process for obtaining restraining orders, but merely clarify and confirm those processes in line with the High Court decision. This bill acknowledges the shortcomings identified by the High Court majority and not only remedies those anomalies, but also improves and tightens the processes within both the Criminal Assets Recovery Act and the Confiscation of Proceeds of Crime Act. The new process balances procedural fairness and certainty. Henceforward, there will be distinct processes for applying for, notifying persons of and hearing applications for restraining orders, followed by distinct processes for forfeiture orders. The New South Wales Crime Commission, the New South Wales Police Force and the Office of the Director of Public Prosecutions will continue to fight the good fight against criminals, particularly those involved in organised and serious crime, by taking from them that which they desire most—their money.

When the High Court decision was handed down I said that this Government would not allow the Crime Commission and our other law enforcement bodies to fight this fight with one hand tied behind their backs. This bill unties their hands. I said also that organised crime and criminals who fear the powers of the Crime

Commission could take no joy whatsoever from the recent decision of the High Court. This bill restores the powers of and faith in the Crime Commission. After the passage of this bill through both Houses of Parliament those criminals can take no joy or comfort in that High Court decision.