



New South Wales

Confiscation of Proceeds of Crime Legislation Amendment Bill 2022

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 *Confiscation of Proceeds of Crime Act 1989*, the *Crime Commission Act 2012*, the *Criminal Assets Recovery Act 1990* and other legislation to prevent and disrupt organised and other serious crime, including the following—

- (a) to provide law enforcement with certain powers to seize and forfeit property connected to persons involved in serious criminal offences including serious drug offences,
- (b) to provide for additional powers of the NSW Crime Commission to conduct investigations and to provide for circumstances where a person is in contempt of the Commission,
- (c) to set out circumstances in which the Supreme Court must make an unexplained wealth order,
- (d) to expand the powers of law enforcement to seize property under a search warrant,
- (e) to provide that the NSW Crime Commissioner and the NSW Police Commissioner may give notice requiring financial institutions to provide information about transactions or assets of certain persons,
- (f) to implement the recommendations resulting from the statutory review of the *Crime Commission Act 2012* and the *Criminal Assets Recovery Act 1990*.

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.

Schedule 1 **Amendment of Confiscation of Proceeds of Crime Act 1989 No 90**

Schedule 1[1] replaces the definitions of *account*, *appropriate court* and *financial institution* and inserts the definitions of *digital currency*, *drug trafficker declaration*, *registrable digital currency exchange service* and *unlawfully acquired*.

Schedule 1[3] provides that a property-tracking document is a document relevant to determining the property of a person who committed a serious offence or determining tainted property in relation to a serious offence.

Schedule 1[7] provides for circumstances where certain property (the *relevant property*) the subject of a restraining order or confirmed freezing notice is forfeited to the Crown if a person is convicted of a serious criminal offence. Each person with a beneficial interest in the relevant property must be given notice of the forfeiture by the authority who applied for the restraining order or confirmation of freezing notice and proposed section 17C sets out the particulars of the notice.

Proposed sections 17D and 17E provide for applications to the court for an exclusion order to exclude some or all of the relevant property from forfeiture and for appeals to the Supreme Court against the dismissal of an exclusion order to recover some or all of the relevant property. Proposed section 17F provides for circumstances in which the relevant court may declare the relevant property forfeited.

Proposed section 17G provides that a person may apply to the court for an order to recover the person's interest in property forfeited under proposed Division 1A. **Schedule 1[18]** provides that no duty is payable for the return of any property under proposed section 17G.

Proposed section 17H provides that the dependent of a person who has an interest in property forfeited under proposed Division 1A may apply to the Supreme Court for an order to be paid a specific amount out of the proceeds of the sale of the interest in the property if the court is satisfied the forfeiture has caused the dependent hardship.

Schedule 1[9] provides for drug trafficker declarations (a *declaration*). The Director of Public Prosecutions or a police prosecutor may apply to an appropriate court for a declaration against a person convicted of a serious drug offence. If a declaration is made against a person, an appropriate officer may apply to an appropriate court for a forfeiture order in relation to property belonging to the person and the court must make the order in relation to the property unless the person can prove the property is lawfully acquired. A declaration expires 5 years after the day the declaration was made. **Schedule 1[2], [6] and [8]** make consequential amendments.

Schedule 1[10] provides that an authorised officer may issue a search warrant for property in the control of a person against whom a drug trafficker declaration has been made or, if the person is charged with a serious drug offence, may be made if the person was convicted of the offence. **Schedule 1[12]** makes a consequential amendment and **Schedule 1[11]** inserts the definition of *authorised officer*.

Schedule 1[14] provides that an appropriate officer or a member of the Police Force may apply to the Supreme Court for a restraining order in relation to property belonging to a person against whom a drug trafficker declaration has been made or may be made. The Court may make an order if the Court is satisfied there are reasonable grounds for suspecting the property belongs to the person against whom the declaration has been made. **Schedule 1[4]** makes a consequential amendment.

Schedule 1[15] provides that the Supreme Court may treat any document as a property tracking document if the document is relevant to determining property is connected to the offence and the authorised officer has stated on oath the officer has reasonable grounds to believe the property is in the control of the person who committed the offence.

Schedule 1[16] provides for the powers of an authorised officer to seize property-tracking documents. Proposed sections 67A and 67B provide for circumstances in which an authorised

officer may apply to the Supreme Court for a search warrant for a property-tracking document and sets out the powers of the authorised officer under the warrant, including powers relating to the seizure of property-tracking documents. Proposed section 67C makes it an offence to obstruct a person executing a relevant search warrant with a maximum penalty of 1,000 penalty units or imprisonment for 5 years, or both. **Schedule 1[13]** makes a consequential amendment.

Schedule 1[17] provides that the Commissioner of Police may give a written notice to a financial institution to provide an authorised officer particular information or documents and the required particulars of the notice. Proposed section 71C sets out offences relating to a notice issued to a financial institution with a maximum penalty of 1,000 penalty units. Proposed section 72 provides for protections for a financial institution that complies with a notice given under section 71 or proposed section 71A or a monitoring order.

Schedule 1[19] requires the Minister to commence a review of certain proposed provisions as soon as practicable after 1 February 2025.

Schedule 1[20] contains transitional provisions. **Schedule 1[5]** makes a consequential amendment.

Schedule 2 Amendment of Crime Commission Act 2012 No 66

Schedule 2[1] expands the object of the Act to include preventing and disrupting organised and other serious crime.

Schedule 2[2] expands the principal functions of the NSW Crime Commission to include applications for orders under the *Crimes (Serious Crime Prevention Orders) Act 2016*.

Schedule 2[3] provides that if a person makes a claim that the person is not required to produce a document or thing related to a production notice to an officer of the NSW Crime Commission, the officer will serve the person with a summons requiring the person to appear before the Commissioner under section 47C to show cause as to why they should not be dealt with under section 47B for alleged contempt. **Schedule 2[4]–[7]** make consequential amendments.

Schedule 2[8] provides that answers and documents provided by a witness to the NSW Crime Commission may be used in evidence against the person for a relevant order unless proceedings for the order have commenced or are imminent. **Schedule 2[9]** inserts the definitions of *imminent* and *relevant order*.

Schedule 2[10] provides that the NSW Crime Commission may direct evidence given before the Commission to be given to the following—

- (a) an agency responsible for making applications for certain orders,
- (b) a court an application hearing an application for certain orders,
- (c) a defendant in proceedings for certain orders.

Schedule 2[11] provides for contempt of the NSW Crime Commission, including when a person is guilty of contempt of the Commission, the procedure the Commission may follow to require the Supreme Court to inquire into the alleged contempt and the powers and obligations of the Court in relation to a hearing about alleged contempt of the Commission.

Schedule 2[12] provides that a relevant person, as defined in the proposed section, must not disclose certain information acquired under the Act or in connection with the Commission acting in its corporate capacity, with a maximum penalty of 50 penalty units or imprisonment for 12 months, or both. Proceedings for an offence of this kind must be commenced within 3 years after the date of the alleged offence. A relevant person must not be required to produce information acquired under the Act or in connection with the Commission acting in its corporate capacity. Proposed section 80AA permits certain disclosures of information.

Schedule 2[13] requires an annual report by the Commissioner to include certain information in relation to forfeitures and freezing notices under the *Criminal Assets Recovery Act 1990*.

Schedule 2[14] provides that the office of Commissioner or Assistant Commissioner does not become vacant if the office holder is absent from duty for 14 days in the period of 12 months without the Minister's leave or unless the absence results from illness or another unavoidable cause.

Schedule 2[15] provides that proposed sections 80 and 80AA extend to anything to which the *New South Wales Crime Commission Act 1985*, section 29 applied immediately before its repeal and information acquired before 1 February 2023.

Schedule 3 Amendment of Criminal Assets Recovery Act 1990 No 23

Schedule 3[1] expands the objects of the Act to provide for the confiscation of a person's unexplained wealth where the person's current or previous wealth significantly exceeds the value of the person's lawfully acquired wealth.

Schedule 3[2] inserts the definitions of *account*, *assets forfeiture notice*, *current or previous wealth*, *dependant*, *digital currency*, *engaging in*, *registrable digital currency exchange service* and *unexplained wealth*, replaces the definition of *financial institution* to include a registrable digital currency exchange service and replaces the definition of *money* to include money held in the form of digital currency. **Schedule 3[6] and [10]** make consequential amendments.

Schedule 3[3] replaces the definition of *drug trafficking offence*, inserts the definition of *serious criminal offence* and removes the definition of *drug premises offence* for the meaning of serious crime related activity.

Schedule 3[4] requires the Supreme Court to make a restraining order against a person if an authorised officer suspects that the person has unexplained wealth that is money totalling \$250,000 or more, or for wealth that is not money, that is at least \$2,000,000. **Schedule 3[2]** replaces the definition of *property-tracking document* to include a document related to current or previous wealth that might reasonably be suspected to be unexplained wealth and to clarify that a document may be in digital or electronic form.

Schedule 3[5] provides that the suspected value of unexplained wealth of a person is grounds for a restraining order to remain in force after the first 2 working days of the operation of the order if there is an unsatisfied proceeds assessment or unexplained wealth order in force against the person.

Schedule 3[7] provides for the administration of the forfeiture of property, other than land, that is seized in connection with an investigation including the following—

- (a) circumstances in which the NSW Crime Commission may issue an assets forfeiture notice and the required particulars of the notice, including who the notice must be given to,
- (b) the requirement that the Commission give written notice of an asset forfeiture notice to an agency in possession of property relating to the notice,
- (c) the effect of an assets forfeiture notice, including particulars of the commencement of the notice and the power of the Commission to direct the person in possession of the property to sell an interest in property related to the order,
- (d) dispute claims and appeals in relation to an assets forfeiture notice,
- (e) the powers and obligations of the Supreme Court in relation to appeals against dismissals of dispute claims and for the recovery of forfeited property.

Schedule 3[13] makes a consequential amendment.

Schedule 3[8] sets out circumstances in which the Supreme Court is required to make an unexplained wealth order against a person.

Schedule 3[9] provides that an amount payable under an unexplained order must not be taken into account in determining a person's entitlement to legal aid.

Schedule 3[11] provides that the Supreme Court must deduct from the amount payable under an unexplained wealth order the value of property forfeited under proposed Part 2, Division 1A of the *Confiscation of Proceeds of Crime Act 1989*.

Schedule 3[12] provides that the Supreme Court may consider the reasonable necessities of life in relation to a person subject to an unexplained wealth order and the person's dependants when assessing the amount payable under an unexplained wealth order.

Schedule 3[14] provides for the powers of the NSW Trustee and Guardian, including limitations on liabilities, and makes it an offence to hinder the NSW Trustee and Guardian in the performance of its functions under a relevant order or notice, with a maximum penalty of 20 penalty units or imprisonment for 6 months, or both. The proposed Part also sets out fees payable to the NSW Trustee and Guardian and the particulars of an evidentiary certificate issued under proposed section 32E.

Schedule 3[15] provides that an authorised officer may apply for a search warrant for any premises if the officer has reasonable grounds for believing unexplained wealth is on the premises or will be on the premises within 72 hours. **Schedule 3[16]** provides that an authorised officer may apply for a search warrant if the officer suspects on reasonable grounds that unexplained wealth is in the possession of a person or will be in the possession of a person within 72 hours.

Schedule 3[17] expands the grounds under which an application for a search warrant may be made to include property reasonably suspected of being unexplained wealth. On the issue of the search warrant, property reasonably suspected of being unexplained wealth may be seized by the person executing the search warrant.

Schedule 3[18] provides that a person executing a search warrant in relation to unexplained wealth may use reasonable force to stop, search and detain a person and to seize and detain all or part of a thing the person reasonably suspects is unexplained wealth.

Schedule 3[19] expands the offence of obstructing a person executing a search warrant to include a warrant issued under Division 3 and increases the maximum penalty for an offence under the proposed section to 1,000 penalty units or imprisonment for 5 years, or both.

Schedule 3[20] provides that an authorised officer may apply to the Supreme Court for a search warrant under if the officer reasonably suspects a property-tracking document is in the possession of a person or will be in the possession of a person within 72 hours.

Schedule 3[21] provides that a person executing a search warrant in relation to a property-tracking document may use reasonable force to stop, search and detain a person and to seize and detain all or part of certain things.

Schedule 3[22] provides that an authorised officer executing a search warrant under Division 3 may examine, inspect or test property or evidence seized in executing the search warrant. For property or evidence that is a document, the officer may make copies. The proposed section provides for powers of an authorised officer to access property or evidence that the officer reasonably suspects to be held in a computer and self-incrimination is not a reasonable excuse to not comply with a direction related to access of property or evidence held in the computer.

Schedule 3[24] provides the particulars of the unexplained wealth of a person that is reasonable grounds for the Supreme Court to make a monitoring order.

Schedule 3[25] provides for freezing notices that may be given by the NSW Crime Commissioner to a financial institution in relation to funds certain persons the Commissioner reasonably suspects will access before the NSW Crime Commission makes an application for a restraining order or the Supreme Court determines an application for a restraining order applying to the funds. **Schedule 3[23]** makes a consequential amendment.

Schedule 3[26] makes the following an offence for a financial institution, with a maximum penalty of 1,000 penalty units—

- (a) to contravene a monitoring order,

- (b) to provide false or misleading information to indicate compliance with a monitoring order,
- (c) to contravene a freezing notice issued under proposed section 48A.

Schedule 3[28] provides that the NSW Crime Commissioner or Commissioner of Police may give a written notice to a financial institution requiring the institution to provide certain information or documents and sets out offences relating to the notice, with a maximum penalty of 1,000 penalty units. **Schedule 3[27]** makes a consequential amendment. Proposed section 52 provides certain protections for a financial institution that complies with a freezing order.

Schedule 3[29] sets out proceedings for offences the Supreme Court must deal with summarily.

Schedule 3[30] provides that if property is or has been the subject of a restraining order under the Act, an application for a forfeiture order under proposed section 34A(1) of the *Confiscation of Proceeds of Crime Act 1989* must not be made in relation to an interest in the property.

Schedule 3[31] provides that the Supreme Court may stay non-criminal proceedings under the Act if the court determines it is in the interests of justice, sets out the matters the court must consider in determining whether a stay is in the interests of justice and provides grounds where the court must not stay non-criminal proceedings. Proposed section 63A provides for the Supreme Court to make orders for non-criminal proceedings to be heard in closed court.

Schedule 3[32] omits spent and unnecessary provisions.

Schedule 3[33] requires the Minister to commence a review of the *reviewable provisions* as soon as practicable after 1 February 2025.

Schedule 3[34] contains transitional provisions.

Schedule 4 Amendment of other legislation

Schedule 4.1[1] and [2] amends the *Criminal Assets Recovery Regulation 2017*, clause 7(1) to provide that under proposed section 32D(2) of the Act, the NSW Trustee and Guardian is entitled to deduct fees from the proceeds of disposition of an interest in certain property and may take control of certain property under proposed section 21D(4) of the Act.

Schedule 4.1[3] inserts proposed clause 12A into the *Criminal Assets Recovery Regulation 2017* to provide that the maximum allowable costs for legal services are the rates set by the Attorney General.

Schedule 4.2 inserts proposed clauses into Schedule 1, Table 2, Part 13 of the *Criminal Procedure Act 1986* to provide the following offences may be dealt with summarily—

- (a) an offence under proposed section 42 of the *Criminal Assets Recovery Act 1990*,
- (b) an offence under proposed section 67C of the *Proceeds of Crime Act 1989*.

Schedule 4.3 replaces the *Unexplained Wealth (Commonwealth Powers) Act 2018*, section 8 to provide for the offences comprising a serious criminal offence, as defined by the *Criminal Assets Recovery Act 1990*, section 6(2), that are specified by the *Unexplained Wealth (Commonwealth Powers) Act 2018* for the *Proceeds of Crime Act 2002* of the Commonwealth.