

Criminal Assets Recovery Amendment Bill 2005

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**) as follows:

- (a) to include additional offences under the laws of this State as serious criminal offences in relation to which assets may be confiscated,
- (b) to include, as such serious criminal offences, offences under the law of the Commonwealth or other places outside the State (including outside Australia), being offences of a kind that would be such serious criminal offences if committed in this State,
- (c) to make it clear that property that was subject to a mortgage or other charge repaid with the proceeds of crime is to be treated as property derived from crime,
- (d) to enable property held in a false name and acquired using false identity documents or the identity documents of another person to be the subject of restraining orders and assets forfeiture orders if the interest in property is illegally acquired property,
- (e) to extend the time within which a person must be charged before a restraining order ceases to be in force from 48 hours to 2 working days,
- (f) to clarify the circumstances in which restraining orders and assets forfeiture orders may be obtained in relation to property outside the State,
- (g) to enable applications for restraining orders to be made by telephone, radio, facsimile, email or other form of communication instead of in person in certain urgent circumstances,
- (h) to enable a proceeds assessment order to be made against a person aged 18 years or over who derives proceeds from the illegal activities of another person and who knew or ought reasonably to have known that the proceeds were so derived,
- (i) to provide for the forfeiture of property not disclosed by a defendant in evidence or a warranty or representation given or made in proceedings for an assets forfeiture order or proceeds assessment order,
- (j) to require hard copies of electronic documents and data to be provided in response to production orders,
- (k) to enable the New South Wales Crime Commission (the **Crime Commission**) to request a financial institution to give the Crime Commission information about financial transactions and to provide an indemnity if the information is supplied,
- (l) to provide for the recognition and enforcement of interstate instruments,
- (m) to enable arrangements to be made between the Minister and Ministers of other States for the transmittal of evidence of offences committed in other States that is seized under the Principal Act,
- (n) to make other minor and consequential amendments and to provide for savings and transitional provisions consequential on the enactment of the proposed Act.

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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Criminal Assets Recovery Act 1990* set out in Schedule 1.

Schedule 1 Amendments

Additional serious criminal offences

The Principal Act provides for property of a person to be forfeited (under an **assets forfeiture order**), or an order (a **proceeds assessment order**) to be made requiring a person to pay an amount, in circumstances where the person or another person has engaged in serious crime related activity and the property is illegally acquired property. Serious crime related activity is activity that is a serious criminal offence within the meaning of the Principal Act, whether or not the person concerned has been charged with the offence and regardless of the outcome of any proceedings. The amendments extend the offences that are serious criminal offences for the purposes of the Principal Act.

Schedule 1 [6] and [7] amend section 6 of the Principal Act to insert additional offences in the definition of **serious criminal offence**, including firearms offences, sexual servitude offences, child prostitution offences and offences outside this State that would be serious criminal offences if committed in this State.

Schedule 1 [8] amends section 6 of the Principal Act to insert the offence of possessing precursors for manufacture or production of prohibited drugs as a drug trafficking offence that is a serious criminal offence for the purposes of the Principal Act. **Schedule 1 [9]** makes a consequential amendment.

Serious crime derived property

Schedule 1 [10] amends section 9 of the Principal Act to expressly provide that property that is or has been subject to a mortgage, lien, charge, security or other encumbrance wholly or partly discharged using all or part of the proceeds of serious crime related activity or serious crime derived property (that is, the proceeds of serious criminal offences or derived from such offences) is taken to have been acquired using serious crime derived property. The effect of this is to make such property clearly available for forfeiture and other remedies under the Principal Act.

Forfeiture of fraudulently acquired property

The proposed Act provides for property acquired using false identity documents or the identity documents of another person (**fraudulently acquired property**) to be liable for assets forfeiture orders or to be the basis of proceeds assessment orders under the Principal Act.

Schedule 1 [11] inserts proposed section 9A which defines fraudulently acquired property. This is an interest in property that is held in a false name and is knowingly acquired by using a false instrument or signature or a birth certificate or identity document of another person.

Schedule 1 [12] amends section 10 of the Principal Act to enable the Crime Commission to apply to the Supreme Court for a restraining order in respect of interests in property held in a false name. **Schedule 1 [13]** makes a consequential amendment.

Schedule 1 [14] amends section 10 of the Principal Act to require the Supreme Court to make a restraining order in relation to property held in a false name if the application is supported by an affidavit of an authorised officer stating that the officer suspects the property is fraudulently acquired property and the grounds for the suspicion and the Court considers, having regard to the affidavit, that there are reasonable grounds for the suspicion.

Schedule 1 [21] amends section 22 of the Principal Act to require the Supreme Court to make an assets forfeiture order if it finds it more probable than not that interests in property subject to an application are fraudulently acquired property that is also illegally acquired property (that is, derived from illegal activity). **Schedule 1 [24]–[26], [28] and [29]** make consequential amendments.

Schedule 1 [22] amends section 22 of the Principal Act to make it clear that the finding that fraudulently acquired property is illegally acquired property need not be based on a finding as to the commission of a particular offence but can be based on

a finding that some offence or other constituting illegal activity was committed.

Schedule 1 [23] amends section 22 of the Principal Act to provide that the raising of a doubt as to whether a person engaged in an illegal activity is not of itself sufficient to avoid a finding that fraudulently acquired property is illegally acquired property.

Schedule 1 [30] amends section 25 of the Principal Act to provide that an order excluding interests in property from the operation of an assets forfeiture order may not be made by the Supreme Court unless it is proved that it is more probable than not that the interest in property is not fraudulently acquired property or is not illegally acquired property.

Schedule 1 [31] amends section 26 of the Principal Act to enable a declaration to be made by the Supreme Court, together with an order for payment of the proceeds of sale of forfeited property, if it is proved that it is more probable than not that the interest in property is not fraudulently acquired property or is not illegally acquired property. **Schedule 1 [32]** makes a consequential amendment.

Schedule 1 [1] amends section 3 of the Principal Act to extend the objects of the Principal Act to cover the confiscation of illegally acquired property held in a false name.

Schedule 1 [44] amends section 48 of the Principal Act to enable a monitoring order, that is, an order requiring a financial institution to provide information about transactions conducted by a person with the institution, to be made on the grounds that the person concerned has acquired, or is about to acquire, fraudulently acquired property.

Restraining orders generally

Schedule 1 [15] amends section 10 of the Principal Act to extend from 48 hours to 2 working days the period for which a restraining order can remain in force without there being a pending application for an assets forfeiture order or proceeds assessment order, an unsatisfied proceeds assessment order or other order being in force.

Schedule 1 [16] inserts proposed section 10B into the Principal Act. The proposed section enables restraining orders to be applied for and granted by telephone, radio, facsimile, email or other means of communication where it is necessary to do so to prevent funds held in a financial institution from being withdrawn or transferred to a place outside New South Wales.

Orders relating to crimes committed outside New South Wales

The amendments made to the Principal Act extend the serious criminal offences that may be the basis of remedies available under the Act to crimes committed outside New South Wales.

Schedule 1 [16] inserts proposed section 10A. Proposed section 10A sets out the circumstances when an application for a restraining order may be made in respect of interests in property derived from serious crime related activity arising from offences under the law of a place outside New South Wales (including outside Australia).

Schedule 1 [27] inserts proposed section 22A. Proposed section 22A sets out the circumstances when an application for an assets forfeiture order may be made in respect of interests in property derived from serious crime related activity arising from offences under the law of a place outside New South Wales (including outside Australia).

Schedule 1 [35] amends section 27 of the Principal Act to set out the circumstances when a proceeds assessment order may be made in relation to the proceeds of serious crime related activity arising from offences under a law of a place outside New South Wales (including outside Australia).

Extension of proceeds assessment orders to third parties

A proceeds assessment order must be made under the Principal Act against a person in respect of proceeds derived from an illegal activity or illegal activities of the person if the person is found to have engaged in a serious crime related activity

involving an indictable quantity of drugs or an offence punishable by imprisonment for 5 years or more within the preceding 6 years.

Schedule 1 [35] amends section 27 of the Principal Act to enable a proceeds assessment order to be made against a person who is over 18 and who derived proceeds from an illegal activity or illegal activities of another person within the preceding 6 years if the other person is found to have engaged in a serious crime related activity involving an indictable quantity of drugs or an offence punishable by imprisonment for 5 years or more. **Schedule 1 [33], [34], [36] and [37]** make consequential amendments.

Schedule 1 [38] and [39] amend section 28 of the Principal Act to extend that section (which relates to assessment of proceeds of illegal activity for the purposes of a proceeds assessment order) to orders relating to a person other than the offender.

Orders on failure to declare interests in property in proceedings

Schedule 1 [40] inserts proposed Division 2A of Part 3 (proposed sections 31A–31C) into the Principal Act. The proposed Division enables assets forfeiture orders and proceeds assessment orders to be made if a person fails to declare an interest in property in proceedings under the Principal Act for an assets forfeiture order or proceeds assessment order or examination proceedings (***forfeiture proceedings***).

Proposed section 31A enables the Supreme Court, on the application of the Crime Commission, to make an order forfeiting to and vesting in the Crown a specified interest in property (***undeclared property***), if the interest is not specified in evidence or a warranty or representation given or made as to the defendant's interests in property in forfeiture proceedings. The order will extend to property that has been disposed of but not property subsequently acquired by a person for sufficient consideration in good faith or vested in a person on distribution of an estate. Specified provisions of the Act applicable to assets forfeiture orders will apply to orders made under the proposed section.

Proposed section 31B enables the Supreme Court, on the application of the Crime Commission, to make an order requiring a person to pay to the Treasurer the value of undeclared property subsequently acquired by a person for sufficient consideration in good faith or vested in a person on distribution of an estate. Specified provisions of the Act applicable to proceeds assessment orders will apply to orders made under the proposed section.

Proposed section 31C enables an interest forfeited to the Crown, or money paid, under the proposed Division to be vested in the original owner or repaid by order of the Supreme Court if the Court finds that property is not attributable to the proceeds of illegal activity and the offender did not know of the property at the time of the failure to disclose.

Information about financial transactions

Schedule 1 [45] amends section 51 of the Principal Act to enable the Crime Commission to request a financial institution to give to the Crime Commission information about a transaction that might be of assistance in the enforcement of the Principal Act or regulations under the Principal Act.

Schedule 1 [46] amends section 51 of the Principal Act to extend the protection against actions, suits or proceedings given to financial institutions that volunteer information to the Crime Commission to financial institutions that give information in response to a request by the Crime Commission.

Recognition of interstate instruments

The amendments provide for the registration and enforcement in New South Wales of orders and other instruments made under legislation of other States and Territories or the Commonwealth that is similar to the Principal Act. The provisions reflect those contained in the *Confiscation of Proceeds of Crime Act 1989*.

Schedule 1 [4] inserts definitions of ***corresponding law***, ***interstate assets forfeiture***

order, interstate crime related property declaration, interstate proceeds assessment order, interstate restraining order and **interstate serious offence** into section 4 of the Principal Act. The definitions of **corresponding law** and of the various declarations and orders rely on the regulations to specify the particular laws and instruments of other States and Territories or the Commonwealth that will fall within the definitions.

Schedule 1 [47] inserts proposed Part 4A (proposed sections 52A–52I).

Proposed section 52A provides for the registration, in accordance with the rules of the Supreme Court, of interstate assets forfeiture orders, interstate crime related property declarations and interstate restraining orders (**interstate instruments**) that apply to property in New South Wales.

Proposed section 52B enables an interstate restraining order to be enforced in New South Wales in the same way as a restraining order made under the Principal Act.

Proposed section 52C enables an interstate assets forfeiture order to be enforced in New South Wales in the same way as an assets forfeiture order made under the Principal Act. The property concerned is to be vested in the Crown in right of New South Wales.

Proposed section 52D enables an interstate crime related property declaration to be enforced in New South Wales in the same way as a registered interstate assets forfeiture order, subject to the regulations.

Proposed section 52E provides for a registered interstate instrument to remain in force until the registration is cancelled even if it ceases to be in force under the law under which it was made.

Proposed section 52F enables the Supreme Court, on application, to cancel the registration of an interstate instrument if the registration was improperly obtained or the instrument ceases to be in force under the law under which it was made.

Proposed section 52G creates a charge on property subject to an interstate restraining order if an interstate proceeds assessment order has been made in relation to the property and both orders are registered.

Proposed section 52H enables the Public Trustee, under an agreement with an official of another State, Territory or the Commonwealth under the law of which an interstate restraining order was made, to take control of property that the official was directed to control under the order.

Proposed section 52I enables interim registration of an interstate instrument pending provision of a sealed copy for registration under the Principal Act.

Schedule 1 [2] extends the definition of **authorised officer** to cover persons authorised to act as such officers for the purposes of proposed Part 4A.

Other amendments

Schedule 1 [3] omits definitions from section 4 of the Principal Act as a result of the updating of the definition of **financial institution**.

Schedule 1 [5] amends the definition of **financial institution** in section 4 of the Principal Act to refer to authorised deposit-taking institutions rather than building societies, banks and credit unions, as those terms are no longer used in State legislation referring to financial institutions.

Schedule 1 [19] inserts proposed section 13A. The proposed section provides that a person may not rely on the privilege against self-incrimination if required to answer a question, or produce a document or other thing, in an examination on oath under the Principal Act. However, such an answer, document or thing is not admissible in criminal proceedings against the person if the person objected on that ground or was not warned that the person could make such an objection. The proposed section also applies to a requirement to furnish a statement to the Public Trustee or the Crime Commission. Currently, under section 13 of the Principal Act, such an answer or document is not admissible in civil or criminal proceedings, except in limited circumstances. **Schedule 1 [17] and [18]** make consequential amendments.

Schedule 1 [20] amends section 22 of the Principal Act to enable an application to be made for an assets forfeiture order before an application is made for a restraining order, as well as after a restraining order is made, but prevents the application for an assets forfeiture order from being determined before a restraining order is granted.

Schedule 1 [41] amends section 33 of the Principal Act to require a person complying with a production order to produce an electronic document to make available the hard copy form of the document, including the generation of reports or the extraction of data.

Schedule 1 [42] amends section 41 of the Principal Act to prevent the return of property seized pursuant to a search warrant if an order (other than a restraining order) affecting the interest in property has been granted previously or within 7 days after the property is seized. Currently, return is prevented only if a restraining order is in force.

Schedule 1 [43] amends section 47 of the Principal Act to empower an authorised officer to seize a document or other thing under a search warrant issued under the Principal Act if the officer believes, on reasonable grounds, that it will afford evidence of a criminal offence under a law of another State or Territory or the Commonwealth.

Schedule 1 [48] amends section 54 of the Principal Act to enable a certificate by a judicial officer, registrar or other proper officer of a court as to a plea of guilt to be admissible as evidence of the commission of the offence by the person who pleaded guilty.

Schedule 1 [49] amends section 54 of the Principal Act to enable a court, in proceedings under the Principal Act, to have regard to transcripts of proceedings that have not been determined, have been discharged or have not been proceeded with for any reason.

Schedule 1 [50] inserts proposed section 59A into the Principal Act. The proposed section empowers the Minister administering the Principal Act to enter into agreements with a Minister of another State or Territory or the Commonwealth for the transfer and disposal of things seized under the Principal Act that may be relevant to offences of the other State or Territory or the Commonwealth.

Schedule 1 [51] amends Schedule 1 to the Principal Act to enable regulations containing savings and transitional provisions to be made consequential on the enactment of the proposed Act.

Schedule 1 [52] amends Schedule 1 to the Principal Act to insert savings and transitional provisions consequent on the enactment of the proposed Act.