

Passed by both Houses



New South Wales

Criminal Assets Recovery Amendment Bill 2009

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2009*



New South Wales

Criminal Assets Recovery Amendment Bill 2009

Act No , 2009

*An Act to amend the *Criminal Assets Recovery Act 1990* and the *Confiscation of Proceeds of Crime Act 1989* with respect to applications for restraining orders, former restraining orders and assets forfeiture orders; and for other purposes.*

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Assets Recovery Amendment Act 2009*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Criminal Assets Recovery Act 1990 No 23

[1] Section 4 Definitions

Omit “made under section 10 and in force” from the definition of *restraining order* in section 4 (1).

Insert instead “made under section 10A and in force”.

[2] Section 4 (1), definition of “rules of court”

Omit “made under the *Supreme Court Act 1970*”.

Insert instead “of the Supreme Court”.

[3] Sections 10–10D

Omit sections 10–10B. Insert instead:

10 Nature of “restraining order”

A *restraining order* is an order that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order.

10A Proceedings for restraining orders

(1) Application for order

The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of:

- (a) specified interests, a specified class of interests or all the interests, in property of a person suspected of having engaged in a serious crime related activity or serious crime related activities, including interests acquired after the making of the order and before the making of an assets forfeiture order affecting the interests that are subject to the restraining order, or
- (b) specified interests, or a specified class of interests, in property that are interests of any other person, or
- (c) interests referred to in both paragraphs (a) and (b).

- (2) The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of specified interests, or a specified class of interests, in property that are held in a false name.

- (3) The Commission may only apply for a restraining order that relates to interests in property derived from external serious crime related activity if the person who has the interests is domiciled in New South Wales or the property is situated in New South Wales.

(4) **Notice to affected person of application**

Despite the application for a restraining order being made ex parte, the Supreme Court may, if it thinks fit, require the Commission to give notice of the application to a person who the Court has reason to believe has a sufficient interest in the application. A person who is required to be notified is entitled to appear and adduce evidence at the hearing of the application.

(5) **Determination of applications**

The Supreme Court must make a restraining order if the application for the order is supported by an affidavit of an authorised officer stating that:

- (a) in the case of an application in respect of an interest referred to in subsection (1) (a)—the authorised officer suspects that the person has engaged in a serious crime related activity or serious crime related activities and stating the grounds on which that suspicion is based, and
- (b) in the case of an application in respect of an interest referred to in subsection (1) (b)—the authorised officer suspects that the interest is serious crime derived property because of a serious crime related activity or serious crime related activities of a person and stating the grounds on which that suspicion is based, and
- (c) in the case of an application in respect of an interest referred to in subsection (2)—the authorised officer suspects that the interest is fraudulently acquired property that is illegally acquired property and stating the grounds on which that suspicion is based,

and the Court considers that, having regard to the matters contained in any such affidavit and any evidence adduced under subsection (4), there are reasonable grounds for any such suspicion.

- (6) The Supreme Court may grant an application under this section for a restraining order for interests in property derived from external serious crime related activity only if the application is supported by an affidavit of an authorised officer stating that the officer has made due enquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place

outside this State (including outside Australia) against any interests in property of the person concerned that are the subject of the application as a result of the external serious crime related activity.

(7) Undertakings by State as to costs or damages

The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to the Court such undertakings as the Court considers appropriate as to the payment of damages or costs, or both, in relation to the making and operation of the order.

- (8)** For the purposes of an application for a restraining order, the Commission may, on behalf of the State, give to the Supreme Court such undertakings as to the payment of damages or costs, or both, as the Court requires.

(9) Urgent applications by telephone or other means of communication

An authorised officer may, on behalf of the Commission, apply for a restraining order by telephone, radio, facsimile, email or other means of communication if the application is supported by a statement of the officer that:

- (a)** the order is required urgently as there is a risk that funds in a specified financial institution (being an interest in property in respect of which the order is sought) may be withdrawn or transferred to a place outside New South Wales (including outside Australia), and
 - (b)** it is not practicable for the authorised officer to appear in person.
- (10)** If it is not possible for the application to be made directly to the Supreme Court by the applicant, the application may be transmitted to the Supreme Court by another person on behalf of the applicant.

10B Contents and effect of restraining orders

- (1)** A restraining order does not apply to an interest in property acquired after the order is made unless the order expressly provides that it does so apply.
- (2)** The Supreme Court may, when it makes a restraining order and if it considers that the circumstances so require, order the NSW Trustee and Guardian to take control of some or all of the interests in property that are interests to which the restraining order applies.

- (3) A restraining order may, at the time it is made or a later time, provide for meeting out of the property, or a specified part of the property, to which the order applies all or any of the following:
 - (a) the reasonable living expenses of any person whose interests in property are subject to the restraining order (including the reasonable living expenses of any dependants),
 - (b) subject to section 16A, the reasonable legal expenses of any person whose interests in property are subject to the restraining order, being expenses incurred in connection with the application for the restraining order or an application for a confiscation order, or incurred in defending a criminal charge.
- (4) A restraining order that is in force in respect of an interest of a person in property does not prevent:
 - (a) the levying or execution against the property in satisfaction, or partial satisfaction, of the debt arising under a proceeds assessment order in force against the person, or
 - (b) with the consent of the Supreme Court, the sale or other disposition of the interest to enable the proceeds to be applied in satisfaction or partial satisfaction of that debt, or
 - (c) with the consent of the Supreme Court, the application of the interest in satisfaction or partial satisfaction of that debt.

10C Review of restraining orders

- (1) The Supreme Court may, on the application of a person whose interest in property is affected by a restraining order, set aside the order on any of the following grounds:
 - (a) that, having regard to the affidavit supporting the restraining order application and any other evidence adduced, the Commission has failed to satisfy the Court that there are reasonable grounds for the relevant suspicion referred to in section 10A (5),
 - (b) that the applicant has established that the order was obtained illegally or against good faith.
- (2) An application under this section by a person is to be made not later than 28 days after the person is notified of the order or may be made at any time with the leave of the Supreme Court.

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- (3) If an application is made under this section, the restraining order concerned remains in force unless and until an order is made by the Supreme Court to set aside the order.
 - (4) A person who applies for an order is entitled to adduce evidence at the application.

10D Duration of restraining orders

- (1) After the first 2 working days of its operation, a restraining order remains in force in respect of an interest in property only while:
 - (a) there is an application for an assets forfeiture order pending before the Supreme Court in respect of the interest, or
 - (b) there is an unsatisfied proceeds assessment order in force against the person whose suspected serious crime related activities formed the basis of the restraining order, or
 - (c) there is an application for such a proceeds assessment order pending before the Supreme Court, or
 - (d) it is the subject of an order of the Supreme Court under section 20.
- (2) A restraining order ceases to be in force if it is set aside under section 10C.

[4] Section 14 Supreme Court may order sale

Insert “and a restraining order is in force” after “an assets forfeiture order” in section 14 (1).

[5] Section 22 Making of assets forfeiture order

Omit section 22 (1)–(2). Insert instead:

- (1) The Commission may apply to the Supreme Court for an order forfeiting to, and vesting in, the Crown specified interests, a specified class of interests or all the interests, in property of a person (an *assets forfeiture order*).
- (1A) The application must specify that the interest in property is an interest in property of any one or more of the following kinds:
 - (a) an interest in property of a person suspected by an authorised officer, at the time of the application, of having engaged in a serious crime related activity or serious crime related activities,
 - (b) an interest in property suspected by an authorised officer, at the time of the application, of being serious crime

derived property because of a serious crime related activity or serious crime related activities of a person,

- (c) an interest in property held in a false name that is suspected by an authorised officer, at the time of the application, to be fraudulently acquired property that is illegally acquired property.

(1B) An assets forfeiture order may be made whether or not an application for a restraining order relating to the interests in property the subject of the application for the assets forfeiture order has been made or granted.

(2) The Supreme Court must make an assets forfeiture order in respect of an interest in property referred to in subsection (1A) (a) or (b) if the Court finds it to be more probable than not that the person whose suspected serious crime related activity, or serious crime related activities, formed the basis of the application for the assets forfeiture order was, at any time not more than 6 years before the making of the application, engaged in:

- (a) a serious crime related activity involving an indictable quantity, or
- (b) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.

[6] Section 25 Exclusion of property from restraining order and assets forfeiture order

Insert “or 31D” after “section 12” in section 25 (7).

[7] Section 25 (8)

Insert after section 25 (7):

- (8) An application may be made by a person under this section whether or not the person has also made an application under section 10C and whether or not any such application is successful.

[8] Section 31 Charge on property

Omit “section 10 (8) (b)” from section 31 (2) (d).

Insert instead “section 10B (4) (b)”.

[9] Part 3, Division 2B

Insert after Division 2A:

Division 2B Ancillary orders relating to confiscation orders

31D Additional orders where application made for confiscation order

- (1) If an application is made for a confiscation order, the Supreme Court may, on application by the Commission, when the application for the confiscation order is made or at a later time, make any one or more of the following orders:
 - (a) an order for the examination on oath of:
 - (i) the affected person, or
 - (ii) another person,before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,
 - (b) an order for the examination on oath of a person who is the spouse or a de facto partner of the affected person, before the Court or before an officer of the Court prescribed by rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that affected person has an interest,
 - (c) an order directing a person who is or was an affected person or, if the affected person is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the affected person has or had an interest as the Court thinks proper.
- (2) The Commission must give notice of an application for an order under this section to the affected person.
- (3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12 (1).

- (4) In this section:
affected person means:
- (a) in the case of an application for an assets forfeiture order, the owner of an interest in property that is proposed to be subject to the order, or
 - (b) in the case of an application for a proceeds assessment order, the person who is proposed to be subject to the order.

[10] Section 52B Effect of registration of interstate restraining orders

Omit “section 10 (3)” wherever occurring. Insert instead “section 10A”.

[11] Section 52B (2)

Omit “other than section 10”. Insert instead “other than sections 10–10D”.

[12] Section 54 Proof of certain matters

Insert “or 31D” after “section 12” in section 54 (5).

[13] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Criminal Assets Recovery Amendment Act 2009

[14] Schedule 1, Part 4

Insert after Part 3:

Part 4 Criminal Assets Recovery Amendment Act 2009

15 Definitions

In this Part:

ancillary order means:

- (a) an order purported to be made before 12 November 2009 under section 10 (4) or (5), 12 (1) (a), (c), (c1), (d) or (e) or 17 (as in force when the order was purported to be made) in respect of a former restraining order, and
- (b) any order for costs associated with a former restraining order or any order referred to in paragraph (a).

current former restraining order means a former restraining order that had not ceased to be in force before 12 November 2009, other than because of the invalidity of section 10 (as

purported to be in force immediately before that date) on constitutional grounds.

Note. A former restraining order includes an ancillary order.

existing assets forfeiture order means an assets forfeiture order made under section 22 before the commencement of the 2009 Act.

existing forfeiture application means an application for an assets forfeiture order that was pending immediately before 12 November 2009 and that was not dismissed or discontinued for any reason before the commencement of the 2009 Act.

existing interstate restraining order means an interstate restraining order registered under this Act immediately before the commencement of the 2009 Act.

former restraining order means an order purported to be made under section 10 (3) or (3A) of this Act before 12 November 2009, and includes any ancillary order.

restraining provisions means provisions given effect to by clause 16 (1).

State means the Crown within the meaning of the *Crown Proceedings Act 1988*, and includes an officer, employee or agent of the Crown.

2009 Act means the *Criminal Assets Recovery Amendment Act 2009*.

16 Current former restraining orders

- (1) The provisions of a current former restraining order, as purported to be in force before 12 November 2009, have effect by force of this clause on and from the date on which the order was purported to be made or otherwise purported to take effect.
- (2) This Act and any other law apply to or in respect of restraining provisions in the same way that they apply to or in respect of a restraining order or ancillary order of the same kind made under this Act.
- (3) Without limiting subclause (2), restraining provisions cease to have effect, in accordance with this Act, as if they were a restraining order or ancillary orders of the same kind made by the Supreme Court under this Act.
- (4) Any thing done or omitted to be done under this Act or any other law in respect of a current former restraining order or any interest in property purported to be subject to a current former restraining order is taken to have been done or omitted in respect of the

corresponding restraining provisions or interest in property subject to those provisions.

- (5) This clause does not give effect to the provisions of any order that is set aside or discharged by a court after 12 November 2009 (for any reason) and before the date of introduction into Parliament of the Bill for the 2009 Act in respect of any period after the order was set aside or discharged.
- (6) This clause does not apply to the specific restraining orders the subject of proceedings in the Court of Appeal in *International Finance Trust Company Limited & Anor v New South Wales Crime Commission* [2008] NSWCA 291.

17 Applications to set aside restraining provisions

- (1) Restraining provisions may be the subject of an application under section 10C. Any such application must be made not later than 28 days after the commencement of the 2009 Act.
- (2) An application under section 10C in respect of restraining provisions may relate to the circumstances of the grant of the current former restraining order concerned.
- (3) Despite subclause (2), the following matters may not be the basis of an application to the Supreme Court to set aside restraining provisions:
 - (a) that the affidavit on which the current former restraining order was based contained evidence that was inadmissible,
 - (b) that the judge who determined the application for the current former restraining order failed to supply reasons for the determination,
 - (c) that the current former restraining order was invalid because of the invalidity of section 10 (as purported to be in force immediately before 12 November 2009) on constitutional grounds.

Note. The restraining provisions have effect because of clause 16 (1) and are not orders of the Supreme Court.
- (4) The Supreme Court may, at any time on the application of the Commission, make an order setting aside restraining provisions.

18 No compensation for actions relating to former restraining orders and existing assets forfeiture orders

- (1) This clause excludes liability, or compensation, or relief, only if the liability or claim for compensation or relief arises wholly or partly (whether directly or indirectly) from the determination by

the High Court in *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 (12 November 2009) of the invalidity, on constitutional grounds, of section 10 of this Act (as purported to be in force immediately before 12 November 2009).

- (2) The State does not incur any liability, and compensation is not payable by or on behalf of the State, arising directly or indirectly from any of the following matters:
- (a) the enactment of the 2009 Act,
 - (b) the operation or enforcement of, or compliance with, a former restraining order or an existing assets forfeiture order,
 - (c) the operation or enforcement of this Act or any other law, or the exercise by any person of a function under this Act or any other law, in respect of any such order or any interest in property subject to such an order,
 - (d) any statement or conduct relating to a former restraining order or any interest in property subject to such an order that would have been lawful if the former restraining order were in force,
 - (e) the payment of any fees to the NSW Trustee and Guardian in respect of the exercise of functions relating to a former restraining order or an existing assets forfeiture order,
 - (f) without limiting paragraph (b) or (c), the imposition of any penalty (whether civil or criminal) as a result of the enforcement of a former restraining order or an existing assets forfeiture order,
 - (g) without limiting paragraph (b) or (c), any undertakings as to damages given in relation to former restraining orders or existing assets forfeiture orders.
- (3) No proceedings may be instituted against the State for compensation or other relief, whether arising at law or in equity, for the purpose of:
- (a) restraining any action in relation to an interest in property in accordance with a former restraining order or an existing assets forfeiture order, or
 - (b) obtaining compensation for loss or damage arising directly or indirectly from a matter referred to in subclause (2).
- (4) This clause applies to or in respect of any act, statement or conduct whether occurring before or after the commencement of this clause.

- (5) In this clause:
- compensation* includes damages or costs or any other form of compensation (whether or not monetary).
- conduct* includes any act or omission, whether unconscionable, misleading, deceptive or otherwise.
- former restraining order* includes an existing interstate restraining order.
- statement* includes a representation of any kind:
- (a) whether made verbally or in writing, and
 - (b) whether negligent, false, misleading or otherwise.
- (6) This clause has effect despite any provision of this Act or any other law.

19 Existing assets forfeiture orders

- (1) An existing assets forfeiture order is not invalid merely because there was no valid restraining order in force when the application for the existing assets forfeiture order was made or when the existing assets forfeiture order was made.
- (2) The validity of an existing assets forfeiture order is not subject to challenge in any court on the ground that there was no valid restraining order in force when the application for the existing assets forfeiture order was made or when the existing assets forfeiture order was made.
- (3) Any act or omission with respect to an existing assets forfeiture order or property affected by such an order done or omitted before the commencement of the 2009 Act is taken to have been validly done or omitted, if it would have been valid if it had been done or omitted after that commencement.

20 Existing applications for assets forfeiture orders

- (1) An existing forfeiture application is taken to have been validly made and may be granted by the Supreme Court under section 22 whether or not a restraining order is made in respect of interests in property the subject of the application.
- (2) An application made under section 14 relating to an existing forfeiture application, and not determined before the date of assent to the 2009 Act, is taken to have been validly made and may be granted by the Supreme Court.
- (3) Nothing in subclause (1) prevents an application being made for a restraining order in respect of an interest in property that is the subject of an existing forfeiture application.

21 Interstate restraining orders

- (1) This Act (other than sections 10–10D, as inserted by the 2009 Act) applies, and is taken to have always applied, to an existing interstate restraining order on registration under this Act as if it were a restraining order made under section 10A (as substituted by the 2009 Act).
- (2) Any act or omission with respect to an existing interstate restraining order or property affected by such an order done or omitted before the commencement of the 2009 Act is taken to have been validly done or omitted, if it would have been valid if it had been done or omitted after that commencement.

22 Contraventions of former restraining orders and other offences relating to former restraining orders

A person is not, because of clause 16, liable to prosecution for any act or omission if the act or omission did not, at the time it occurred, constitute an offence.

23 Recordings and caveats

The Commission is not required to take action under section 15 (4) in respect of a current former restraining order merely because of the effect on that order of the invalidity of section 10 (as purported to be in force immediately before 12 November 2009) on constitutional grounds.

24 Regulations

Regulations under clause 1 may have effect despite any provision of this Part.

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

[1] Section 43 Restraining orders

Insert “and any evidence adduced under section 44 (1) (b)” after “affidavit” wherever occurring in section 43 (2) (b) and (4) (b).

[2] Section 44A

Insert after section 44:

44A Powers of Supreme Court to set aside or vary restraining orders not affected

Nothing in this Act prevents the application of the powers of the Supreme Court, whether conferred on the Court by rules of the Court or under any other law, to set aside or vary a restraining order or any other order under section 43 or 45.

[3] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Criminal Assets Recovery Amendment Act 2009