

Passed by both Houses



New South Wales

# **Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010**

## **Contents**

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	Page
1 Name of Act	2
2 Commencement	2
Schedule 1 Amendment of Criminal Assets Recovery Act 1990 No 23	3

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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, , 2010*



New South Wales

## **Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010**

Act No , 2010

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An Act to amend the *Criminal Assets Recovery Act 1990* with respect to the recovery of unexplained wealth; and for other purposes.

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*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.*

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*.

**2 Commencement**

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

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## **Schedule 1      Amendment of Criminal Assets Recovery Act 1990 No 23**

### **[1] Section 3 Principal objects**

Omit section 3 (b). Insert instead:

- (a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and
- (b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and

### **[2] Section 4 Definitions**

Omit “or a proceeds assessment order” from the definition of *confiscation order* in section 4 (1).

Insert instead “, proceeds assessment order or unexplained wealth order”.

### **[3] The whole Act (including the defined expression “interstate proceeds assessment order” in section 4 (1))**

Omit “interstate proceeds assessment order” wherever occurring.

Insert instead “interstate proceeds assessment or unexplained wealth order”.

### **[4] Section 4 (1), definition of “unexplained wealth order”**

Insert in alphabetical order:

*unexplained wealth order* means an order made under section 28A and in force.

### **[5] Sections 9 (5) (c), 10B (4) (a), 10D (1), 16A (2) (c), 20 (1), 22 (8), 29, 30, 31, 31A (1) (a), 31B (1) (a) and (8), 31D (4), 61 (1) and 62 (b)**

Omit “proceeds assessment order” wherever occurring.

Insert instead “proceeds assessment order or unexplained wealth order”.

**[6] Section 10A Proceedings for restraining orders**

Omit section 10A (1). Insert instead:

**(1) Application for order**

The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of specified interests, a specified class of interests, or all the interests, in property of any person (including interests acquired after the making of the order).

**[7] Section 10A (5) (a) and (b)**

Omit the paragraphs. Insert instead:

(a) in the case of an application in respect of an interest referred to in subsection (1)—the authorised officer suspects that:

- (i) the person whose interest is the subject of the application has engaged in a serious crime related activity or serious crime related activities, or
- (ii) the person whose interest is the subject of the application has acquired serious crime derived property because of any such activity of the person or of another person, or
- (iii) the interest is serious crime derived property, and stating the grounds on which that suspicion is based, and

**[8] Part 3, Division 2, heading**

Omit “**Proceeds assessment orders**”.

Insert instead “**Proceeds assessment orders and unexplained wealth orders**”.

**[9] Section 26A**

Insert before section 27:

**26A Application for proceeds assessment or unexplained wealth order**

- (1) The Commission may apply to the Supreme Court under section 27 for a proceeds assessment order or under section 28A for an unexplained wealth order (or for both).
- (2) If the Commission applies for both orders against a person, the Supreme Court cannot make both orders, but is to make the order that requires payment of the greater amount.

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- (3) If the Commission applies for only one of the orders, it may before the application is determined extend the application so that it includes an application for the other order.

**[10] Section 27 Making of proceeds assessment order**

Omit “person who is 18 years or older” from section 27 (2A).

Insert instead “person (other than an individual who is under the age of 18 years)”.

**[11] Section 27 (2B), (2C) and (5)–(12)**

Omit the subsections.

**[12] Section 28 Assessment for proceeds assessment order—illegal activity proceeds**

Omit “an assessment under section 27” from section 28 (1).

Insert instead “an assessment for a proceeds assessment order under section 27”.

**[13] Section 28 (6)**

Omit the subsection.

**[14] Sections 28A, 28B and 28C**

Insert after section 28:

**28A Making of unexplained wealth order**

- (1) The Commission may apply to the Supreme Court for an unexplained wealth order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the unexplained wealth of the person.
- (2) The Supreme Court must make an unexplained wealth order if the Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order:
  - (a) engaged in a serious crime related activity or serious crime related activities, or
  - (b) acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).

- (3) A finding under this section need not be based on a reasonable suspicion as to the commission of a particular offence and can be based on a reasonable suspicion that some offence or other constituting a serious crime related activity was committed.
- (4) The Supreme Court may refuse to make an unexplained wealth order, or may reduce the amount that would otherwise be payable as assessed under section 28B, if it thinks it is in the public interest to do so.
- (5) Engagement in a serious crime related activity or the acquisition of serious crime derived property referred to in subsection (2) extends to engagement in an activity or the acquisition of property before the commencement of this section.

**28B Assessment for unexplained wealth order—unexplained wealth**

- (1) This section applies for the purpose of making an assessment for an unexplained wealth order of the unexplained wealth of a person against whom the order is made.
- (2) The *unexplained wealth* of a person is the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity.
- (3) The burden of proof in proceedings against a person for an unexplained wealth order is on the person to prove that the person's current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.
- (4) The *current or previous wealth* of a person is the amount that is the sum of the values of the following:
  - (a) all interests in property of the person,
  - (b) all interests in property that are subject to the effective control of the person,
  - (c) all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means),
  - (d) any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person,whether acquired, disposed of or provided before or after the commencement of this section and whether within or outside New South Wales.

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- (5) In assessing the unexplained wealth of a person, the Supreme Court is not required to consider any current or previous wealth of which the Commission has not provided evidence.
  - (6) The value of any thing included as current or previous wealth is:
    - (a) in the case of wealth that has been expended, consumed or otherwise disposed of—the greater of:
      - (i) the value at the time the wealth was acquired, and
      - (ii) the value immediately before the wealth was expended, consumed or otherwise disposed of, or
    - (b) in any other case—the greater of:
      - (i) the value at the time the wealth was acquired, and
      - (ii) the value at the time the application for the unexplained wealth order was made.

**28C General provisions applying to proceeds assessment and unexplained wealth orders**

- (1) In assessing the amount payable under an unexplained wealth order, the Supreme Court must deduct the following (but only if those amounts would otherwise be included in the assessment of the amount payable under the order):
  - (a) the value of any interests in property of the defendant forfeited under another confiscation order under this Act or an interstate assets forfeiture order,
  - (b) any amounts paid or payable by the defendant under any previous proceeds assessment order or unexplained wealth order under this Act or any interstate proceeds assessment or unexplained wealth order,
  - (c) the value of any interests in property of the defendant forfeited under a confiscation order or interstate forfeiture order within the meaning of the *Confiscation of Proceeds of Crime Act 1989*,
  - (d) any amounts paid or payable by the defendant under any drug proceeds order, pecuniary penalty order or interstate pecuniary penalty order within the meaning of the *Confiscation of Proceeds of Crime Act 1989*.
- (2) The Supreme Court may not make a proceeds assessment order or unexplained wealth order in an application that relates wholly to external serious crime related activity, unless it is satisfied that no action has been taken under a law of the Commonwealth or

any other place outside this State (including outside Australia) in relation to the proceeds of the external serious crime related activity.

- (3) For the purposes of subsection (2), an affidavit by an authorised officer that includes a statement that the officer has made due inquiry 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 in relation to the proceeds of the external serious crime related activity is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit.
- (4) The quashing or setting aside of a conviction for a serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order.
- (5) The making of a proceeds assessment order or unexplained wealth order does not prevent the making under Division 1 of an assets forfeiture order based on the serious crime related activity, or on all or any of the serious crime related activities, in relation to which the proceeds assessment order or unexplained wealth order is made.
- (6) The amount a person is required to pay under a proceeds assessment order or unexplained wealth order is a debt payable by the person to the Crown on the making of the order and is recoverable as such.
- (7) If a proceeds assessment order or unexplained wealth order is made against a dead person, subsection (6) has effect before final distribution of the estate as if the person had died the day after the making of the order.
- (8) The net amount recovered under a proceeds assessment order or unexplained wealth order is to be paid to the Treasurer and credited to the Proceeds Account.
- (9) Notice of an application for a proceeds assessment order or unexplained wealth order is to be given to the person against whom the order is sought and any other person required by the regulations to be given notice.
- (10) The absence of a person entitled to be given notice of a proceeds assessment order or unexplained wealth order does not prevent the Supreme Court from making the order.
- (11) The Supreme Court may, when it makes a proceeds assessment order or unexplained wealth order or at any later time, make any ancillary orders that the Court considers appropriate.

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- (12) Despite any rule of law, or any practice, relating to hearsay evidence, the Supreme Court may, for the purposes of an application for a proceeds assessment order or unexplained wealth order, receive evidence of the opinion of:
- (a) a member of the NSW Police Force, or
  - (b) a member of the Australian Federal Police, or
  - (c) an officer of Customs within the meaning of the *Customs Act 1901* of the Commonwealth, or
  - (d) a member or officer of the Commission, who is experienced in the investigation of illegal activities involving plants or drugs, being an opinion with respect to:
    - (e) the amount that was the market value at a particular time of a particular kind of plant or drug, or
    - (f) the amount, or range of amounts, ordinarily paid at a particular time for the doing of anything in relation to a particular kind of plant or drug.

**[15] Section 32 Establishment and use of Proceeds Account**

Omit section 32 (3) (c). Insert instead:

- (c) to the credit of the Victims Compensation Fund established under the *Victims Support and Rehabilitation Act 1996*—half of the proceeds of proceeds assessment orders or unexplained wealth orders paid to the Proceeds Account (calculated after deducting from the proceeds any amounts payable under paragraph (b) or agreed to be paid to the Commonwealth, another State or a Territory or an authority of the Commonwealth, another State or a Territory), and

**[16] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

*Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*

**[17] Schedule 1, Part 5**

Insert after Part 4:

**Part 5 Criminal Assets Recovery Amendment  
(Unexplained Wealth) Act 2010**

**25 Existing proceeds assessment orders and applications for  
proceeds assessment orders**

- (1) This Act, as in force before the commencement of the *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*, continues to apply to an application for a restraining order or a proceeds assessment order that was made, but not finally determined, before that commencement.
- (2) Despite subclause (1), the proceeds of any proceeds assessment order made before that commencement that are received after that commencement are to be dealt with under section 32 as in force after that commencement.