

Criminal Assets Recovery Act 1990 No 23

[1990-23]



New South Wales

Status Information

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Previously named**
Drug Trafficking (Civil Proceedings) Act 1990
- **Does not include amendments by**
[Crime Commission Act 2012 No 66](#), Sch 5.2 [13] to the extent that it inserts sec 62 (4) (not commenced — to commence on 2.9.2013)

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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Criminal Assets Recovery Act 1990 No 23



New South Wales

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Criminal Assets Recovery Act 1990 No 23



New South Wales

An Act to provide for the confiscation of interests in property that are interests of a person engaged in serious crime related activities; to enable proceeds of serious crime related activities to be recovered as a debt due to the Crown; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Criminal Assets Recovery Act 1990*.

2 Commencement and duration

(1) This Act commences on a day or days to be appointed by proclamation.

Editorial note—

Day appointed for the purposes of this section: 3.8.1990—see Gazette No 97 of 3.8.1990, p 7096.

(2) This Act is repealed 6 years after the day, or the earlier or earliest of the days, appointed under subsection (1) unless either House of Parliament earlier resolves to the contrary.

Editorial note—

Resolution passed in Legislative Assembly on 19.6.1996 that the Act is not to be repealed in accordance with section 2 (2) of the Act.

3 Principal objects

The principal objects of this Act are:

- (a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and
- (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
- (b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and
- (c) to enable law enforcement authorities effectively to identify and recover property.

4 Definitions

(1) In this Act:

assets forfeiture order means an order made under section 22 and in force.

authorised officer means:

- (a) the Commissioner for the New South Wales Crime Commission, or
- (a1) an Assistant Commissioner for the New South Wales Crime Commission, or
- (b) a member of the Police Force, or
- (c) a person authorised in writing by the Commission, either generally or in a special case, to act as an authorised officer for the purposes of the provision in which the expression occurs.

Commission means the New South Wales Crime Commission constituted under the [Crime Commission Act 2012](#).

confiscation order means an assets forfeiture order, proceeds assessment order or unexplained wealth order.

corresponding law means a law of the Commonwealth, another State or a Territory that is prescribed by the regulations as a law that corresponds to this Act.

dealing, in relation to an interest in property, includes:

- (a) if the interest is a debt—making a payment to any person in reduction of the amount of the debt, and
- (b) removing the property in which the interest is held from New South Wales, and
- (c) receiving or making a gift of the interest, and
- (d) vesting the interest in a person in the course of administering the estate of a deceased person.

director, in relation to a financial institution or a corporation, includes:

- (a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory—a member of the body corporate, and
- (b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position, and
- (c) except as provided by subsection (4), any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act.

effective control, in relation to an interest in property, includes effective control of the interest as provided by section 8.

encumbrance, in relation to property, includes any interest, mortgage, charge, right, claim and demand in respect of the property.

external serious crime related activity means serious crime related activity arising out of an offence under the law of the Commonwealth or a place outside this State (including outside Australia) which, if the offence had been committed in this State, would be a serious criminal offence.

financial institution means:

- (a) an authorised deposit-taking institution, or
- (b), (c) (Repealed)
- (d) a body corporate that is, or if it had been incorporated in Australia would be, a financial corporation within the meaning of section 51 (xx) of the Constitution of the Commonwealth.

fraudulently acquired property means an interest in property that is fraudulently acquired property as provided by section 9A.

illegal activity means:

- (a) a serious crime related activity, or
- (b) an act or omission that constitutes an offence (including a common law offence) against the laws of New South Wales or the Commonwealth, or
- (c) an act or omission that occurs outside New South Wales, is an offence against the law of the place where it occurs and is of a kind that, if it had occurred in New South Wales, would have been an offence referred to in paragraph (b).

illegally acquired property means an interest in property that is illegally acquired property as provided by section 9.

indictable quantity means a quantity of a prohibited plant or a prohibited drug that is an indictable quantity under the [Drug Misuse and Trafficking Act 1985](#).

interstate assets forfeiture order means an order or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

interstate crime related property declaration means a declaration or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

interstate proceeds assessment or unexplained wealth order means an order or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

interstate restraining order means an order or other instrument that is made under a corresponding law and is of a kind declared by the regulations to be within this definition.

interstate serious offence means an offence (including a common law offence, where relevant) against the laws of another State, being an offence in relation to which an interstate assets forfeiture order, interstate crime related property declaration, interstate restraining order or interstate proceeds assessment or unexplained wealth order may be made under a corresponding law of the State.

money means money in the form of cash.

monitoring order means an order made under section 48 and in force.

officer means a director, secretary, executive officer or employee.

owner, in relation to an interest in property, includes a person who has effective control of the interest.

premises includes all or part of any structure, building, aircraft, vehicle, vessel and place (whether built on or not).

proceeds, in relation to an activity, includes any interest in property, and any service, advantage or benefit, that is derived or realised, directly or indirectly, as a result of the activity:

- (a) by the person engaged in the activity, or
- (b) by another person at the direction or request (given or made directly or indirectly) of the person engaged in the activity.

Proceeds Account means the Confiscated Proceeds Account established under section 32.

proceeds assessment order means an order made under section 27 and in force.

production order means an order made under section 33 and in force.

prohibited drug means a substance that is a prohibited drug under the *Drug Misuse and Trafficking Act 1985*.

prohibited plant means a plant that is a prohibited plant under the *Drug Misuse and Trafficking Act 1985*.

property-tracking document means:

(a) a document relevant to:

- (i) identifying, locating or quantifying any interest in property of a person who might reasonably be suspected of being, or of having been, engaged in a serious crime related activity, or
- (ii) identifying or locating any document necessary for the transfer of an interest in property of a person who might reasonably be suspected of being, or of having been, engaged in a serious crime related activity, or

(b) a document relevant to:

- (i) identifying, locating or quantifying an interest in property that might reasonably be suspected of being an interest that is serious crime derived property, or
- (ii) identifying or locating any document necessary for the transfer of an interest in property that might reasonably be suspected of being an interest that is serious crime derived property.

restraining order means an order made under section 10A and in force.

rules of court means rules of the Supreme Court.

serious crime derived property means an interest in property that is serious crime derived property as provided by section 9.

serious crime related activity means serious crime related activity referred to in section 6.

serious criminal offence—see section 6.

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

working day means any day that is not a Saturday, Sunday or a public holiday.

- (2) A reference in this Act to acquiring an interest in property for sufficient consideration is a reference to acquiring the interest for a consideration that, having regard solely to commercial considerations, reflects the value of the interest.
- (3) A reference in this Act to a transaction of any kind (including sale, disposition, dealing and acquisition) includes a reference to a transaction outside New South Wales.
- (4) For the purposes of this Act, a person is not to be regarded as being a director of a financial institution or corporation within the meaning of paragraph (c) of the definition of **director** in subsection (1) just because the directors act on advice given by that person in the proper performance of the functions attaching to his or her professional capacity.
- (5) If an expression used in this Act would ordinarily impose a duty, it is not to be construed in a particular case or particular cases as conferring a discretion.
- (6) In this Act:
 - (a) a reference to a function includes a reference to a power, authority and duty, and
 - (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (7) Notes included in this Act are explanatory notes and do not form part of this Act.

5 Proceedings are civil, not criminal

- (1) For the purposes of this Act, proceedings on an application for a restraining order or a confiscation order are not criminal proceedings.
- (2) Except in relation to an offence under this Act:
 - (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of the provisions of this Act, and
 - (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

6 Meaning of “serious crime related activity”

- (1) In this Act, a reference to a serious crime related activity of a person is a reference to anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:
 - (a) has been tried, or
 - (b) has been tried and acquitted, or
 - (c) has been convicted (even if the conviction has been quashed or set aside).

- (2) In this section, a reference to a serious criminal offence is a reference to:
- (a) an offence referred to (before the commencement of the *Drug Misuse and Trafficking Act 1985*) in section 45A of the *Poisons Act 1966*:
 - (i) of supplying any drug of addiction or prohibited drug within the meaning of the *Poisons Act 1966*, or
 - (ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act, or
 - (iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises, or
 - (b) a drug trafficking offence, or
 - (c) a prescribed indictable offence, or an indictable offence of a prescribed kind, that is of a similar nature to a drug trafficking offence, including in either case an offence under a law of the Commonwealth, another State or a Territory, or
 - (d) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide, or
 - (e) an offence under section 50A, 51, 51B, 51BA or 51BB of the *Firearms Act 1996*, or
 - (e1) a drug premises offence, or
 - (f) an offence under section 80D or 80E of the *Crimes Act 1900*, or
 - (g) an offence under Division 15 or 15A of Part 3 of the *Crimes Act 1900* (other than an offence under section 91D (1) (b) of that Act), or
 - (g1) an offence under section 93T or 93TA of the *Crimes Act 1900*, or
 - (h) an offence under section 197 of the *Crimes Act 1900*, being an offence involving the destruction of or damage to property having a value of more than \$500, or
 - (i) an offence under the law of the Commonwealth or a place outside this State (including outside Australia) which, if the offence had been committed in this State, would be a serious criminal offence referred to in paragraphs (a)–(h), or
 - (j) an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence referred to in any other paragraph of this

subsection.

(3) In subsection (2) (b):

drug trafficking offence means an offence under any of the following provisions of the *Drug Misuse and Trafficking Act 1985*:

- (a) section 23 (Offences with respect to prohibited plants),
- (b) section 24 (Manufacture and production of prohibited drugs),
- (b1) section 24A (Possession of precursors for manufacture or production of prohibited drugs),
- (c) section 25 (Supply of prohibited drugs),
- (c1) section 25A (Offence of supplying prohibited drugs on an ongoing basis),
- (d) section 26 in so far as it relates to conspiring to commit an offence referred to in paragraph (a), (b), (b1), (c) or (c1),
- (e) section 27 in so far as it relates to aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence referred to in paragraph (a), (b), (b1), (c) or (c1),
- (f) section 28 in so far as it relates to conspiring to commit, or aiding, abetting, counselling or procuring the commission of an offence, under a law in force outside New South Wales which corresponds to a provision referred to in paragraph (a), (b), (b1), (c) or (c1).

(4) In subsection (2) (e1):

drug premises offence means a second or subsequent offence under section 36Y (Allowing use of premises as drug premises—offence by owner or occupier) of the *Drug Misuse and Trafficking Act 1985*.

7 Meaning of “interest in property”

(1) In this Act, a reference to an interest of a person in property is a reference to:

- (a) an interest the person has in real or personal property, or
- (b) a chose in action enforceable at the suit of the person, or
- (c) an interest of the person that is within a class of interests prescribed as interests in property for the purposes of this Act.

(2) Without limiting the generality of subsection (1), a reference in this Act to an interest of a person in property includes a reference to:

- (a) the person's money, and
- (b) an interest that the person has in the goodwill of a business, and
- (c) an interest that the person has in a licence required to be held in order to carry on a business.

(2A) A reference in this Act to an interest of a person in property includes a reference to an interest of a person in property situated outside New South Wales (including outside Australia).

(3) For the purposes of this Act, if:

(a) but for this subsection, a person would have an interest in property as provided by subsection (1), and

(b) the interest is subject to the effective control of another person,

the interest is an interest of the person who has effective control and is not an interest of the person referred to in paragraph (a).

(4) In this section:

interest, in relation to property, means:

(a) a legal or equitable estate or interest in the property, or

(b) a right, power or privilege in connection with the property,

whether present or future and whether vested or contingent.

8 Meaning of “effective control of interest in property”

(1) An interest in property may be subject to the effective control of a person within the meaning of this Act even if:

(a) the person does not have a legal or equitable estate or interest in the property, or

(b) the person has no direct or indirect right, power or privilege in connection with the interest.

(2) In determining whether or not an interest in property is subject to the effective control of a person, regard may be had to any relevant matter, including (without being limited to) the following matters:

(a) shareholdings in, debentures of, or directorships of, a company that has the interest,

(b) a trust that has a relationship to the interest,

(c) family, domestic, business and other relationships between that person and other

persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b).

9 Meaning of “serious crime derived property” and “illegally acquired property”

- (1) An interest in property is serious crime derived property if:
 - (a) it is all or part of the proceeds of a serious crime related activity, or
 - (b) it is all or part of the proceeds of the disposal of or other dealing in serious crime derived property, or
 - (c) it was wholly or partly acquired using serious crime derived property.
- (2) The references in subsection (1) (b) and (c) to serious crime derived property are not limited to serious crime derived property described in subsection (1) (a) but also include interests in property that are serious crime derived property because of a previous operation or previous operations of subsection (1) (b) or (c) or their combined operation.
- (2A) Without limiting subsection (1), an interest in property is taken to be wholly or partly acquired using serious crime derived property if it 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 a serious crime related activity or serious crime derived property.
- (3) Once an interest in property becomes serious crime derived property it remains serious crime derived property even if the interest is disposed of or otherwise dealt with (including by being used to acquire an interest in property), but this is qualified by subsection (5).
- (4) The meaning of ***illegally acquired property*** is ascertained by substituting, in subsections (1)–(3), ***illegally acquired property*** for ***serious crime derived property*** and ***illegal activity*** for ***serious crime related activity***.
- (5) An interest in property ceases to be serious crime derived property or illegally acquired property:
 - (a) when it is acquired by a person for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that the interest was, at the time of acquisition, serious crime derived property or illegally acquired property, or
 - (b) when it vests in a person as a result of the distribution of the estate of a deceased person, or
 - (c) when the interest is sold or otherwise disposed of under the authority of this Act (including when discharging a proceeds assessment order or unexplained wealth

order), or

- (d) when it is the proceeds of the sale or other disposition of serious crime derived property or illegally acquired property under the authority of this Act except a sale under section 10 (8) (b) or 14, or
 - (e) when it is acquired by a person as payment of reasonable legal expenses incurred in connection with an application under this Act or incurred in defending a criminal charge, or
 - (f) in such other circumstances as may be prescribed.
- (6) If an interest in property that is not serious crime derived property or illegally acquired property was once owned by a person and was then serious crime derived property or illegally acquired property, the property becomes serious crime derived property or illegally acquired property, respectively, if and when it is again acquired by the person.
- (7) The proceeds of a sale or other dealing do not lose their identity as such merely as a result of being credited to an account.
- (8) It does not matter whether the serious crime related activity, illegal activity, disposition or other dealing or acquisition by reason of which an interest in property becomes serious crime derived property or illegally acquired property took place before or after the commencement of this section.
- (9) The following are examples of the practical operation of this section showing the ways in which an interest in property can become serious crime derived property and stop being serious crime derived property:
- (a) if money that is the proceeds of a serious crime related activity is used to buy land, the land becomes serious crime derived property and the money used (which is now in the hands of some other person) continues to be serious crime derived property,
 - (b) if the land is then sold it continues to be serious crime derived property and the money paid for it becomes serious crime derived property,
 - (c) if the money paid for the land is then used to buy a car, the car becomes serious crime derived property and the money used to buy it (now in the hands of the car's former owner) continues to be serious crime derived property unless the purchase was for sufficient consideration from an innocent person.

9A Meaning of “fraudulently acquired property”

- (1) An interest in property is fraudulently acquired property if the interest is held in a false name and any of the following was knowingly used for the purposes of acquiring,

or dealing with, that property:

- (a) a false instrument (including a birth certificate or other identity document) or signature,
- (b) a birth certificate or other identity document of another person.

(2) In this section:

false instrument has the same meaning as it has in Division 2 (False instruments) of Part 5 of the *Crimes Act 1900*.

identity document includes any document that may be used for the purposes of an identity verification procedure under the *Financial Transaction Reports Act 1988* of the Commonwealth.

Part 2 Restraining orders

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 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).
- (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)—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

- (b) (Repealed)

- (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.
- (3A) The Supreme Court may direct the NSW Trustee and Guardian to pay legal expenses with respect to which provision is made under this section in stages out of some or all of the property to which the restraining order applies that is under the control of the NSW Trustee and Guardian if the Supreme Court:
 - (a) is satisfied (by a bill of costs in assessable form or other evidence acceptable to the Supreme Court) that the reasonable legal expenses incurred at the time the direction is made exceed the amount prescribed by the regulations and that further expenses will be incurred, and
 - (b) it considers the circumstances so require.

- (3B) Before making a direction under subsection (3A), the Supreme Court may refer the matter to a costs assessor (within the meaning of Part 3.2 of the *Legal Profession Act 2004*) for inquiry and report.
- (3C) For the purpose of enabling the NSW Trustee and Guardian to comply with a direction under subsection (3A), the Supreme Court may order it to sell or otherwise dispose of any interest in the property concerned.
- (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 or unexplained wealth 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.
- (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 or unexplained wealth 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 or unexplained wealth 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.

11 Notice of restraining order

- (1) If the Supreme Court makes a restraining order, the Commission must give notice of the order and of any variation of the order to:
- (a) the Director of Public Prosecutions, and
 - (b) the Commissioner of Police.

(2) If:

- (a) a restraining order is made in respect of an interest in property of a person, and
- (b) the person was not notified of the application for the making of the restraining order,

notice of the making or variation of the order is to be given by the Commission to the person.

(3) A restraining order does not cease to be in force just because proper efforts to give notice of its making have been unsuccessful.

12 Supreme Court may make further orders

- (1) The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:
- (a) an order varying the interests in property to which the restraining order relates,
 - (b) an order for the examination on oath of:
 - (i) the owner of an interest in property that is subject to the restraining order, or

- (ii) another person,
before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest,
- (b1) an order for the examination on oath of a person who is the spouse or a de facto partner of the owner of an interest in property that is subject to the restraining order, before the Court or before an officer of the Court prescribed by the rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that owner has an interest,
- (c) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given on behalf of the State in connection with the making of the restraining order,
- (c1) an order directing a person who is or was the owner of an interest in property that is subject to the restraining order or, if the owner is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission or NSW Trustee and Guardian, 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 owner has or had an interest as the Court thinks proper,
- (d) if the restraining order requires the NSW Trustee and Guardian to take control of an interest in property:
 - (i) an order regulating the manner in which the NSW Trustee and Guardian may exercise functions under the restraining order, or
 - (ii) an order determining any question relating to the interest, including any question affecting the liabilities of the owner of the interest or the functions of the NSW Trustee and Guardian, or
 - (iii) (Repealed)
- (e) an order requiring or authorising the seizure or taking possession of property.

Note—

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

- (2) An order under subsection (1) may be made on application:
 - (a) by the Commission, or
 - (b) by the owner, or
 - (c) if the restraining order directed the NSW Trustee and Guardian to take control of

an interest in property—by the NSW Trustee and Guardian, or

(d) with the leave of the Supreme Court—by any other person.

(3) The applicant for an order under subsection (1) must give notice of the order:

(a) if the applicant is a person referred to in subsection (2) (a), (b) or (c)—to the other persons referred to in those paragraphs, or

(b) if the applicant is a person referred to in subsection (2) (d)—to the persons referred to in subsection (2) (a)–(c).

13 Privilege

(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that:

(a) (Repealed)

(b) production of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document, or

(c) the answer or production would disclose information that is the subject of legal professional privilege.

(2) A statement or disclosure made by a person in answer to a question put in the course of an examination under section 12, or any document or other thing obtained as a consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except proceedings that comprise:

(a) proceedings in respect of the false or misleading nature of a statement or disclosure made under this Act, or

(b) proceedings on an application under this Act, or

(c) proceedings ancillary to an application under this Act, or

(d) proceedings for enforcement of a confiscation order, or

(e) in the case of a document or other thing—civil proceedings for or in respect of a right or liability it confers or imposes.

(3), (4) (Repealed)

13A Privilege against self-incrimination

(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that the answer or production might incriminate, or tend to incriminate, the person or make

the person liable to forfeiture or penalty.

- (2) However, any answer given or document produced by a natural person being examined under section 12 is not admissible in criminal proceedings (except proceedings for an offence under this Act or the regulations) if:
 - (a) the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person, or
 - (b) the person was not advised that the person might object on the ground that the answer or document might incriminate the person.
- (3) Further information obtained as a result of an answer being given or the production of a document in an examination under section 12 is not inadmissible in criminal proceedings on the ground:
 - (a) that the answer had to be given or the document had to be produced, or
 - (b) that the answer given or document produced might incriminate the person.
- (4) A person directed by an order under section 12 to furnish a statement to the NSW Trustee and Guardian or the Commission is not excused from:
 - (a) furnishing the statement, or
 - (b) setting out particulars in the statement,on the ground that the statement or particulars might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty.
- (5) If a person furnishes a statement to the NSW Trustee and Guardian or the Commission in accordance with an order under section 12, the statement is not admissible against the person in any criminal proceedings except proceedings in respect of the false or misleading nature of the statement.

14 Supreme Court may order sale

- (1) If an application is made for a confiscation order and a restraining order is in force, the Supreme Court may, when the application is made or at a later time, make an order directing the NSW Trustee and Guardian to sell an interest in property that is subject to the restraining order if:
 - (a) the property is subject to waste or substantial loss of value, or
 - (b) in the opinion of the NSW Trustee and Guardian, the cost of controlling the interest would exceed the value of the interest if the restraining order were made.
- (2) Notice of an application for an order under this section must be given to the owner of

the interest in property to which the application relates.

- (3) The proceeds of the sale under subsection (1) of an interest in property are subject to the restraining order to which the interest was subject.

15 Recording of restraining order

- (1) If a restraining order applies to an interest in property of a particular kind and the provisions of any law, whether or not a law of the State, provide for the registration of title to, an interest in or a charge over, property of that kind, the authority responsible for administering those provisions must, on application by the Commission, record in the register kept under those provisions the particulars of the restraining order.
- (2) If the particulars of a restraining order are so recorded, a person who subsequently deals with or attempts to deal with the property is, for the purposes of section 16, to be taken to have had notice of the restraining order.
- (3) If a restraining order applies to an interest in land under the provisions of the *Real Property Act 1900*, a caveat may be lodged under that Act in relation to the order.
- (4) If a restraining order recorded under this section ceases to have effect in relation to an interest in property in respect of which it was made, the Commission must:
 - (a) apply for cancellation of the recording, and
 - (b) withdraw any caveat lodged in relation to the order.

16 Contravention of restraining order

- (1) A person who contravenes a restraining order, or any ancillary order under section 12, by disposing of or attempting to dispose of, or by otherwise dealing with or attempting to otherwise deal with, an interest in property that is an interest subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the interest (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both, unless it is proved that the person had no notice that the interest was subject to the restraining order and no reason to suspect that it was.
- (2) Subsection (1) does not prevent a person from being dealt with for a contempt of the Supreme Court, but a person may not, for the same contravention of a restraining order, be punished both for a contempt of the Court and under subsection (1).
- (3) If:
 - (a) a restraining order is made against an interest in property, and
 - (b) the interest is disposed of, or otherwise dealt with, in contravention of the restraining order, and

(c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

the disposition or dealing is void.

(4) It is not a contravention of a restraining order to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property under the authority of this Act.

16A Restrictions on payment of legal expenses from restrained property

(1) The following restrictions apply to a restraining order making provision for the payment of any legal expenses of a person:

(a) no provision is to be made except to the extent (if any) that the Supreme Court is satisfied that the person cannot meet the expenses concerned out of the person's unrestrained property,

(b) no provision is to be made in relation to any particular interest in property if the Supreme Court is satisfied that the interest is illegally acquired property,

(c) no provision is to be made unless a Statement of Affairs disclosing all the person's interests in property and liabilities and verified on oath by the person has been filed with the Supreme Court,

(d) no provision is to be made unless the Supreme Court is satisfied that the person has taken all reasonable steps to bring all of the person's interests in property within the jurisdiction of the Court,

(e) any such provision must specify the particular interest in property out of which the expenses concerned may be met.

(1A) This section does not apply to or in respect of a provision of a restraining order made under section 10B (3) (b), with the consent of each person whose interests in property are subject to the restraining order, that is in the terms of an agreement negotiated between a person whose interests are subject to the restraining order and the Commission.

(2) A person's **unrestrained property** is any interest in property of the person:

(a) that is not subject to a restraining order under this Act, or

(b) that the Supreme Court is satisfied is not within the Court's jurisdiction (whether or not it is subject to a restraining order under this Act), or

(c) that the Supreme Court is satisfied would not be available to satisfy a proceeds assessment order or unexplained wealth order against the person (assuming such an order were to be made against the person).

16B Maximum legal expenses that can be met from restrained property

- (1) Despite provision in a restraining order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any maximum allowable cost for the service that is fixed under this section.
- (2) For the purposes of this Act, the regulations may fix maximum allowable costs for legal services provided in connection with an application for a restraining order or confiscation order or the defending of a criminal charge.
- (3) Regulations under this section can fix costs by applying, adopting or incorporating, with or without modification, the provisions of any Act or any instrument made under an Act (for example, regulations under the *Legal Profession Act 2004*) or of any other publication, whether of the same or a different kind, as in force on a particular day or as in force for the time being.
- (4) This section operates only to limit the amount of the legal expenses that are authorised to be met out of property that is subject to a restraining order and does not limit or otherwise affect any entitlement of an Australian legal practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum.

17 Order for taxation of legal expenses

- (1) If a restraining order makes provision for meeting a person's reasonable legal expenses:
 - (a) the Commission, or
 - (b) the NSW Trustee and Guardian if the order provides for the NSW Trustee and Guardian to take control of an interest in the property,may apply to the Supreme Court for an order under this section.
- (2) The NSW Trustee and Guardian or the Commission must give to the person notice of an application under this section.
- (3) On an application under this section, the Court must order that the expenses be taxed as provided in the order.
- (4) After an application is made for an order under this section, the NSW Trustee and Guardian need not, except as ordered by the Court, take any steps for the purpose of meeting the expenses as provided by the restraining order unless and until:
 - (a) an order under this section in relation to the expenses is complied with, or
 - (b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, otherwise than by the making of such an order.

18 Protection of NSW Trustee and Guardian

- (1) A person who hinders or obstructs the NSW Trustee and Guardian in the performance of the NSW Trustee and Guardian's obligations under a restraining order is guilty of an offence.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

- (2) Section 121 of the *NSW Trustee and Guardian Act 2009* applies to and in respect of the functions of the NSW Trustee and Guardian under this Act in the same way as it applies to and in respect of the functions of the NSW Trustee and Guardian under that section, but nothing in this section is to be read as limiting the operation of that section.
- (3) The NSW Trustee and Guardian is not liable for any rates, land tax or other statutory charges imposed by or under a law of the State on or in respect of an interest in property of which the NSW Trustee and Guardian has been directed by a restraining order to take control, being rates, land tax or other statutory charges that fall due on or after the date of the restraining order, except to the extent, if any, of the rents and profits received by the NSW Trustee and Guardian in respect of that property on or after the date of the restraining order.
- (4) If the NSW Trustee and Guardian, in accordance with a restraining order, takes control of a business carried on by a person, the NSW Trustee and Guardian is not liable:
 - (a) for any payment in respect of long service leave for which the person was liable, or
 - (b) for any payment in respect of long service leave to which a person employed by the NSW Trustee and Guardian in his or her capacity of manager of the business, or the legal personal representative of such a person, becomes entitled after the date of the restraining order, or
 - (c) to meet, otherwise than out of the income or assets of the business, any liabilities and expenses incurred in controlling the business.

- (5) In this section:

NSW Trustee and Guardian includes staff and agents of the NSW Trustee and Guardian.

19 Fees payable to NSW Trustee and Guardian

If the NSW Trustee and Guardian takes control of an interest in property in accordance with a restraining order, or if an interest in property is vested in the NSW Trustee and Guardian on an assets forfeiture order taking effect, the NSW Trustee and Guardian is entitled to deduct from the proceeds of disposition of the interest such fees, in respect of the exercise of functions in relation to the property, as may be prescribed. If the interest is

not disposed of, the NSW Trustee and Guardian is entitled to be paid those fees from the Proceeds Account.

20 Effect on restraining order of refusal to make confiscation order

- (1) If, while a restraining order is in force, the Supreme Court does not make an assets forfeiture order in respect of interests in property to which the restraining order relates or a proceeds assessment order or unexplained wealth order in respect of any person whose interests in property are affected by the restraining order, the Court may:
 - (a) if it considers it appropriate, make an order in relation to the period for which the restraining order is to remain in force, and
 - (b) make such other order or orders as it considers appropriate in relation to the operation of the restraining order.
- (2) An order under subsection (1) may be made to take effect:
 - (a) forthwith, or
 - (b) at a specified time, or
 - (c) on the happening of a specified event.

21 Certificate by NSW Trustee and Guardian

If a restraining order is made directing the NSW Trustee and Guardian to take control of an interest in property, a certificate under the hand of the NSW Trustee and Guardian or an officer authorised by the Chief Executive Officer of the NSW Trustee and Guardian and sealed with the NSW Trustee and Guardian's seal:

- (a) certifying that the restraining order has been made and is in force, and
- (b) stating the terms of the restraining order,

is to be accepted by all courts, officers and other persons, whether acting under any Act or not, as evidence of the matters so certified and stated and of the NSW Trustee and Guardian's right to act under the restraining order.

Part 3 Confiscation

Division 1 Assets forfeiture orders

22 Making of assets forfeiture order

- (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.

(2A) The Supreme Court must make an assets forfeiture order if the Court finds it more probable than not that interests in property subject to an application are fraudulently acquired property that is also illegally acquired property.

(3) A finding of the Court for the purposes of subsection (2) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:

- (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
- (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.

(3A) A finding of the Supreme Court for the purposes of subsection (2A) need not be based on a particular finding as to the commission of a particular offence and can be based on a finding that some offence or other constituting illegal activity was

committed.

- (4) When an assets forfeiture order is made it must be made so as to apply to specified interests in property.
- (5) The reference in subsection (2) to a period of 6 years includes a reference to a period that began before the commencement of this section.
- (6) The raising of a doubt as to whether a person engaged in a serious crime related activity or whether a quantity is an indictable quantity is not of itself sufficient to avoid a finding by the Supreme Court under subsection (2).
- (6A) The raising of a doubt as to whether a person engaged in an illegal activity is not of itself sufficient to avoid a finding by the Supreme Court under subsection (2A).
- (7) The quashing or setting aside of a conviction for a serious crime related activity or illegal activity does not affect the validity of an assets forfeiture order that was made before or after the conviction was quashed or set aside and was based on the activity.
- (8) The making of an assets forfeiture order does not prevent the making of a proceeds assessment order or unexplained wealth order under Division 2 which assesses the value of the proceeds of, or is based on, the serious crime related activity or illegal activity on which the assets forfeiture order was based.
- (9) Notice of an application under this section is to be given to a person to whom the application relates and the person may appear, and adduce evidence, at the hearing of the application.
- (10) The absence of a person entitled to be given notice of an application for an assets forfeiture order does not prevent the Court from making the order.

22A Assets forfeiture orders relating to external serious crime related activity

- (1) An application for an assets forfeiture order that relates to interests in property derived from external serious crime related activity may be made only if the person who has the interests is domiciled in New South Wales or the property is situated in New South Wales.
- (2) The Supreme Court may not make an assets forfeiture order on any such application unless it 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.
- (3) For the purposes of subsection (2), an affidavit of an authorised officer that includes a statement 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 is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit.

23 Effect of assets forfeiture order

- (1) On an assets forfeiture order taking effect in relation to an interest in property:
 - (a) the interest is forfeited to the Crown and vests in the NSW Trustee and Guardian on behalf of the Crown, and
 - (b) if the person forfeiting the interest was in possession, or was entitled to possession, of the property, the NSW Trustee and Guardian may take possession of the property on behalf of the Crown.
- (2) An interest forfeited under subsection (1) is to be disposed of by the NSW Trustee and Guardian in accordance with the directions of the Treasurer and the proceeds are to be paid to the Treasurer and credited to the Proceeds Account.
- (3) The Treasurer may delegate the power to give directions for the purposes of subsection (2).
- (4) The Supreme Court may, when it makes an assets forfeiture order or at any later time, make any ancillary orders that the Court considers appropriate. For example, the Court may make ancillary orders for and with respect to facilitating the transfer to the Crown of interests in property forfeited to the Crown under such an order.

23A Dealing with forfeited property prohibited

- (1) A person must not dispose of or otherwise deal with an interest in property that is the subject of an assets forfeiture order.
- (2) A person who contravenes subsection (1) is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the interest concerned (as determined by the Supreme Court) or by imprisonment for a period not exceeding 2 years, or both, unless it is proved that the person had no notice that the interest was subject to the order concerned and no reason to suspect that it was.
- (3) This section does not prevent a person from being dealt with for a contempt of the Supreme Court, but a person may not, for the action, be punished both for a contempt of the Court and under this section.
- (4) If an interest in property is disposed of or otherwise dealt with in contravention of this section and the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith, the disposition or dealing is void.
- (5) It is not a contravention of this section if an interest in property is disposed of or dealt

with under the authority of this Act.

24 Relief from hardship—spouses and dependants

- (1) If the Supreme Court is satisfied that an assets forfeiture order will operate to cause hardship to any dependant of the person who will forfeit an interest in property under the order, the Court:
 - (a) may order that the dependant is entitled to be paid a specified amount out of the proceeds of sale of the interest, being an amount that the Court thinks is necessary to prevent hardship to the dependant, and
 - (b) may make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who is under 18 years of age.
- (2) The Court is not to make an order under this section in favour of the dependant of a person whose serious crime related activity or illegal activity formed the basis for the assets forfeiture order concerned unless the Court is satisfied that the dependant had no knowledge of any serious crime related activities or illegal activities of the person.
- (3) Subsection (2) does not apply if the dependant concerned is under 18 years of age.
- (4) In this section:

dependant, in relation to a person, means:

- (a) a spouse or a de facto partner of the person, or
- (b) a child of the person, or a member of the household of the person, dependent for support on the person.

25 Exclusion of property from restraining order and assets forfeiture order

- (1) If an assets forfeiture order:
 - (a) has been applied for but not made—a person whose interest in property might be subject to the order if made, or
 - (b) has been made—a person whose interest in property was forfeited by the order,may apply to the Supreme Court for an order (in this section called an ***exclusion order***) excluding the interest from the operation of the assets forfeiture order or any relevant restraining order.
- (2) The Supreme Court must not make the exclusion order applied for unless it is proved that it is more probable than not that:
 - (a) in the case of an order relating to fraudulently acquired property—the interest in property to which the application relates is not fraudulently acquired property or is not illegally acquired property, or

- (b) in any other case—the interest in property to which the application relates is not illegally acquired property.
- (3) An exclusion order must declare the nature and extent of the interest in property to which it relates and:
 - (a) if the interest has been forfeited to the Crown, but not disposed of—must require the Crown to vest the interest in the claimant, or
 - (b) if the interest has been disposed of—must require payment by the Crown to the claimant of an amount declared by the Supreme Court to be the value, as at the date of the order, of the former interest of the claimant.
- (4) After an assets forfeiture order has been made, an application for an exclusion order may not be made by a person:
 - (a) if the person was given notice of the proceedings that led to the relevant restraining order or assets forfeiture order—unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court, or
 - (b) in any other case—unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.
- (5) Notice of an application for an exclusion order is to be given to the Commission and any other person required by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.
- (6) The applicant for an exclusion order must give the Commission notice of the grounds on which the exclusion order is sought.
- (7) If the Commission proposes to contest an application for an exclusion order, it must give the applicant notice of the grounds on which the application is to be contested.

In such a case, the Commission is not required to give the applicant notice of those grounds, and the application must not be heard, until the Commission has had a reasonable opportunity to conduct an examination of the applicant under section 12 or 31D.
- (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.

26 Exclusion of the value of innocent interests from assets forfeiture order

- (1) If it is proved that it is more probable than not that a specified proportion of the value of an interest in property that has been forfeited under an assets forfeiture order is

not attributable to the proceeds of an illegal activity, the Supreme Court may:

- (a) make a declaration to that effect, and
- (b) order that the person who has forfeited the interest is entitled to be paid the proportion of the proceeds of sale of the interest that is specified in the declaration.

(1A) If it is proved that it is more probable than not that a specified proportion of the value of an interest in property that has been forfeited under an assets forfeiture order on the ground that it was fraudulently acquired property was not fraudulently acquired property or is not attributable to the proceeds of an illegal activity, the Supreme Court may:

- (a) make a declaration to that effect, and
- (b) order that the person who has forfeited the interest is entitled to be paid the proportion of the proceeds of sale of the interest that is specified in the declaration.

(2) A declaration that an interest in property is not attributable to the proceeds of an illegal activity is to be made on the basis of the extent to which the interest in property concerned was not, when it first became illegally acquired property, acquired using the proceeds of an illegal activity.

(3) The Supreme Court may make a declaration and order under this section in relation to an interest in property on the application of the person whose interest it was when forfeited under an assets forfeiture order.

(4) After an assets forfeiture order has been made, an application for an order under this section may not be made by a person:

- (a) if the person was given notice of the proceedings that led to the assets forfeiture order—unless it is made within 6 months after the assets forfeiture order took effect and leave to apply has been granted by the Supreme Court, or
- (b) in any other case—unless it is made within 6 months after the assets forfeiture order took effect or the Supreme Court has granted leave to apply after that time.

(5) Notice of an application for an order under this section is to be given to the Commission and any other person required by the regulations to be given notice and a person entitled to be given notice may appear, and adduce evidence, at the hearing of the application.

(6) The applicant for an order under this section must give the Commission notice of the grounds on which the order is sought.

(7) If the Commission proposes to contest an application for an order under this section it

must give the applicant notice of the grounds on which the application is to be contested.

Division 2 Proceeds assessment orders and unexplained wealth orders

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.
- (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.

27 Making of proceeds assessment order

- (1) The Commission may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity, or illegal activities, of the person or another person that took place not more than 6 years before the making of the application for the order, whether or not any such activity is an activity on which the application is based as required by subsection (2) or (2A).
- (2) The Supreme Court must make a proceeds assessment order if the Court finds it to be more probable than not that the person against whom the order is sought was, at any time not more than 6 years before the making of the application for the order, 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.
- (2A) The Supreme Court must make a proceeds assessment order against a person (other than an individual who is under the age of 18 years) if the Court finds it more probable than not that:
 - (a) the person derived proceeds from an illegal activity or illegal activities of another person, and
 - (b) the person knew or ought reasonably to have known that the proceeds were derived from an illegal activity or illegal activities of another person, and

- (c) the other person was, at any time not more than 6 years before the making of the application for the order, engaged in:
 - (i) a serious crime related activity involving an indictable quantity, or
 - (ii) a serious crime related activity involving an offence punishable by imprisonment for 5 years or more.

(2B), (2C) (Repealed)

- (3) A finding of the Court for the purposes of subsection (2) or (2A) need not be based on a finding as to the commission of a particular offence or a finding as to any particular quantity involved, and can be based:
 - (a) on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for 5 years or more was committed, or
 - (b) on a finding that some offence or other constituting a serious crime related activity was committed involving some quantity or other that was an indictable quantity.
- (4) The references in subsections (1) and (2) to a period of 6 years include a reference to a period that began before the commencement of this section.
- (4A) The reference in subsection (2A) to a period of 6 years includes a reference to a period that began before the commencement of that subsection.
- (5)-(12) (Repealed)

28 Assessment for proceeds assessment order—illegal activity proceeds

- (1) For the purpose of making an assessment for a proceeds assessment order under section 27 in relation to the proceeds derived by a person (in this section called **the defendant**) from an illegal activity, or illegal activities, of the person or another person the Supreme Court is to have regard to the following matters:
 - (a) the money, or the value of any interest in property other than money, directly or indirectly acquired by:
 - (i) the defendant, or
 - (ii) another person at the request, or by the direction, of the defendant, because of the illegal activity or activities,
 - (b) the value of any service, benefit or advantage provided for:
 - (i) the defendant, or
 - (ii) another person at the request, or by the direction, of the defendant,

because of the illegal activity or activities,

(c) the market value, at the time of the illegal activity or of each illegal activity, of a plant or drug similar, or substantially similar, to any involved in the illegal activity or each illegal activity, and the amount that was, or the range of amounts that were, ordinarily paid for an act similar, or substantially similar, to the illegal activity or each illegal activity,

(d) the value of the defendant's property before and after the illegal activity or each illegal activity,

(e) the defendant's income and expenditure before and after the illegal activity or activities.

(2) If evidence is given at the hearing of an application for a proceeds assessment order that the value of the defendant's property after an illegal activity or illegal activities of the defendant exceeded the value of the defendant's property before the activity or activities, the Supreme Court is to treat the excess as proceeds derived by the defendant from the activity or activities, except to the extent (if any) that the Supreme Court is satisfied the excess was due to causes unrelated to an illegal activity or activities.

(3) If evidence is given at the hearing of an application for a proceeds assessment order of the amount of the defendant's expenditure during the period of 6 years before the making of the application for the order, the Supreme Court is to treat any such amount as proceeds derived by the defendant from an illegal activity or activities, except to the extent (if any) that the Supreme Court is satisfied the expenditure was funded from income, or money from other sources, unrelated to an illegal activity or activities.

(3A) The Supreme Court is not to take expenditure into account under subsection (3) to the extent that the Court is satisfied that it resulted in the acquisition of property the value of which is taken into account under subsection (2).

(4) In making an assessment as provided by this section, none of the following amounts are to be subtracted:

(a) expenses or outgoings incurred by the defendant in relation to the illegal activity or activities,

Note—

For example, in the case of an illegal activity involving the sale of drugs, in determining the value of the proceeds derived by the defendant from the sale of drugs there is to be no reduction on account of any expenditure by the defendant in acquiring the drugs.

(b) the value of any proceeds derived as agent for or otherwise on behalf of some other person (whether or not any of the proceeds are received by that other

person).

Note—

For example, where the defendant is paid money for drugs in the course of a “controlled buy” but was acting merely as an agent or messenger for some other person (and gives the money to the other person), in calculating the proceeds derived by the defendant the amount given to the other person is not to be subtracted and the full amount is considered to have been derived by the defendant.

- (5) This section applies to, and in relation to:
- (a) property that comes into the possession, or under the effective control, of a person either within or outside New South Wales, and
 - (b) proceeds acquired either within or outside New South Wales in relation to an illegal activity.
- (6) (Repealed)

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.
- (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.
- (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.

29 Enforcement of order against property under effective control

- (1) On the application of the Commission, the Supreme Court must, if of the opinion that an interest in property is subject to the effective control of a person in relation to whom the Court has made a proceeds assessment order or unexplained wealth order, make an order declaring that the interest is available to satisfy the order to the extent that other property is not readily available for that purpose.
- (2) If the Supreme Court declares that an interest in property is available to satisfy a proceeds assessment order or unexplained wealth order, the proceeds assessment order or unexplained wealth order may be enforced against the property to the extent

specified in the declaration.

- (3) If application is made for an order under this section:
- (a) the Commission must give notice of the application to the person against whose interest in property the order is sought and to any other person who the Commission has reason to believe may also have an interest in the property to which the application relates, and
 - (b) each person to whom notice is given, and any other person who claims an interest in the property, may appear, and adduce evidence, at the hearing of the application.
- (4) Despite section 7, an interest in property is not available to satisfy a proceeds assessment order or unexplained wealth order made against a person who has effective control of the interest unless the Supreme Court makes a declaration under this section in relation to the interest.

30 NSW Trustee and Guardian may discharge proceeds assessment order or unexplained wealth order

- (1) If:
- (a) the NSW Trustee and Guardian has, under a restraining order, taken control of an interest in property, and
 - (b) a proceeds assessment order or unexplained wealth order has been made against the person entitled to the interest,
- the Supreme Court may, on application by the NSW Trustee and Guardian, make an order (in this section referred to as **the later order**) directing the NSW Trustee and Guardian to pay to the Treasurer an amount sufficient to discharge the debt created by section 27 arising under the proceeds assessment order or unexplained wealth order.
- (2) For the purpose of enabling the NSW Trustee and Guardian to comply with the later order, the Supreme Court may, by that order or by a subsequent order:
- (a) direct the NSW Trustee and Guardian to sell or otherwise dispose of a specified interest in property under the control of the NSW Trustee and Guardian, and
 - (b) appoint an officer of the Court or any other person to execute any deed or instrument in the name of the person entitled to the interest and to do all acts and things necessary to give validity and operation to the deed or instrument.
- (3) The execution of the deed or instrument by the person so appointed has the same force and validity as it would have if it had been executed by the person who was entitled to the interest to which it relates.

- (4) As soon as practicable after the making of the later order, the NSW Trustee and Guardian:
- (a) is to apply the money which has come into the NSW Trustee and Guardian's possession or under the NSW Trustee and Guardian's control because of the sale or other disposition specified in the later order, or the subsequent order, or otherwise in the course of the performance of the NSW Trustee and Guardian's duties in respect of the interests in property to which the restraining order relates, in payment of:
 - (i) the fees payable in connection with, and
 - (ii) the expenses incurred by the NSW Trustee and Guardian in or in connection with,

the performance of the duties imposed on the NSW Trustee and Guardian under the restraining order, including the expenses incurred by the NSW Trustee and Guardian in or in connection with the sale or other disposition of any of the interests in property to which the restraining order relates, and
 - (b) is to pay the rest of the money as provided by subsection (5).
- (5) If the money to which subsection (4) (b) applies exceeds the amount required to discharge the debt arising under the proceeds assessment order or unexplained wealth order, the NSW Trustee and Guardian is to use the money to discharge the debt by payment of the appropriate amount to the Treasurer and, if the property sold or disposed of:
- (a) was also the subject of an assets forfeiture order—is to pay the balance of the money to the Treasurer, or
 - (b) was not the subject of an assets forfeiture order—is to pay the balance of the money to the person against whom the proceeds assessment order or unexplained wealth order was made.
- (6) Money paid to the Treasurer under subsection (5) is to be credited to the Proceeds Account.
- (7) If the NSW Trustee and Guardian pays, in accordance with the later order, money to the Treasurer in respect of the liability of a person under a proceeds assessment order or unexplained wealth order, the liability of the person under the proceeds assessment order or unexplained wealth order is discharged to the extent of the payment.

31 Charge on property

- (1) If the Supreme Court makes a proceeds assessment order or unexplained wealth order against a person, all the interests of the person in property are, while the

assessed amount remains unpaid, charged in favour of the Crown to the extent necessary to secure payment of the assessed amount.

- (2) A charge created by subsection (1) on the making of a proceeds assessment order or unexplained wealth order ceases to have effect:
 - (a) if the proceeds assessment order or unexplained wealth order is discharged on the hearing of an appeal against the making of the order, or
 - (b) on payment to the Treasurer of the assessed amount, or
 - (c) on the bankruptcy of the person subject to the order, or
 - (d) on the sale or other disposition of the interest charged under the authority of this Act except under section 10B (4) (b) or 14, or
 - (e) on the sale of the interest charged to a purchaser for sufficient consideration who, at the time of purchase, had no notice of the charge,whichever first occurs.
- (3) A charge that, on the making of a proceeds assessment order or unexplained wealth order, is created by subsection (1) over an interest in property:
 - (a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this paragraph, have priority over the charge, and
 - (b) has priority over all other encumbrances, and
 - (c) subject to subsection (2), is not affected by any change of ownership of the interest charged.
- (4) If a charge is created by subsection (1) on an interest in property of a particular kind and the provisions of any law, whether or not a law of the State, provide for the registration of title to, interests in, or charges over, property of that kind, the NSW Trustee and Guardian or an appropriate officer may cause the charge so created to be registered under the provisions of that law.
- (5) Section 73 (2) of the *Personal Property Securities Act 2009* of the Commonwealth is declared to apply to a charge created by subsection (1).

Division 2A Further orders if interests in property not disclosed

31A Assets forfeiture orders after interests in property not disclosed

- (1) This section applies if:
 - (a) an application for an assets forfeiture order or proceeds assessment order or

unexplained wealth order is made, and

- (b) evidence or a warranty or other representation was given or made in proceedings for the order, or examination proceedings under this Act, by a person against whom the order is made (the **defendant**) as to the defendant's interests in property.
- (2) The Commission may apply to the Supreme Court for an order forfeiting to, and vesting in, the Crown a specified interest in property of the defendant at the time the evidence, warranty or representation was given or made that was not disclosed in the evidence, warranty or representation.
 - (3) The Supreme Court must make the order if the Court finds it more probable than not that the interest in property was an interest of the defendant at the time the evidence, warranty or representation was given or made.
 - (4) An order may be made even if the interest in property was disposed of after the evidence, warranty or representation was given or made but may not extend to an interest in property if:
 - (a) the whole or part of that interest was subsequently acquired by a person for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that the interest was, at the time of acquisition, serious crime derived property or illegally acquired property, or
 - (b) the whole or part of that interest subsequently vested in a person as a result of the distribution of the estate of a deceased person.
 - (5) An order may be made despite the terms of any orders previously made by consent.
 - (6) Notice of an application under this section is to be given to the defendant and any person having an interest in property to which the application relates and the defendant or person may appear, and adduce evidence, at the hearing of the application.
 - (7) The absence of a person entitled to be given notice of an application for an order under this section does not prevent the Court from making the order.
 - (8) This Act (other than sections 25 and 26) applies to an order made under this section in the same way that it applies to an order made under section 22.
 - (9) An application under this section may be made together with an application under section 31B.

31B Proceeds assessment orders or unexplained wealth orders after interests in property not disclosed

- (1) This section applies if:

- (a) an application for an assets forfeiture order or proceeds assessment order or unexplained wealth order is made, and
 - (b) evidence or a warranty or other representation is given or made in proceedings for the order, or examination proceedings under this Act, by a person against whom the order is made (the **defendant**) as to the defendant's interests in property.
- (2) The Commission may apply to the Supreme Court for an order requiring the defendant to pay to the Treasurer the value of the whole or part of an interest in property of the defendant at the time the evidence, warranty or representation was given or made, that was not disclosed in the evidence, warranty or representation, if:
- (a) the whole or part of that interest was subsequently acquired by a person for sufficient consideration without knowing, and in circumstances that would not arouse a reasonable suspicion, that the interest was, at the time of acquisition, serious crime derived property or illegally acquired property, or
 - (b) the whole or part of that interest subsequently vested in a person as a result of the distribution of the estate of a deceased person.
- (3) An order may be made despite the terms of any orders previously made by consent.
- (4) The Supreme Court must make an order under this section if it finds it more probable than not that:
- (a) an interest in property was an interest of the defendant at the time the evidence, warranty or representation was given or made, and
 - (b) the interest was subsequently disposed of as referred to in subsection (2) (a) or (b).
- (5) Notice of an application under this section is to be given to the defendant and any person having an interest in property to which the application relates and the defendant or person may appear, and adduce evidence, at the hearing of the application.
- (6) The absence of a person entitled to be given notice of an application for an order under this section does not prevent the Court from making the order.
- (7) The amount a defendant is required to pay under an order under this section is recoverable as a debt payable by the defendant to the Crown.
- (8) Sections 29, 30 and 31 apply to an order made under this section in the same way as they apply to a proceeds assessment order or unexplained wealth order.
- (9) An application under this section may be made together with an application under section 31A.

31C Exclusion of the value of interests from orders

- (1) If it is proved that it is more probable than not that a specified proportion of the value of an interest in property forfeited or paid under this Division is not attributable to the proceeds of an illegal activity and that, at the time of the failure to disclose the interest, the defendant did not know of his or her interest in the property, the Supreme Court may:
 - (a) make a declaration to that effect, and
 - (b) in the case of an interest forfeited to the Crown—order that the Crown vest the interest in the applicant, and
 - (c) in any other case—order that the person who has forfeited the interest or paid the amount is entitled to be paid the proportion of the proceeds of sale, or the amount paid, as the case requires, specified in the declaration.
- (2) An application for an order under this section must be made not later than 6 months after the order under section 31A or 31B was made, or with the leave of the Supreme Court.
- (3) Notice of an application for an order under this section is to be given to the Commission and any other person required by the regulations to be given notice.
- (4) A person entitled to be given notice of an application for an order under this section may appear, and adduce evidence, at the hearing of the application.
- (5) The applicant for an order under this section must give the Commission notice of the grounds on which the order is sought.
- (6) If the Commission proposes to contest an application for an order under this section it must give the applicant notice of the grounds on which the application is to be contested.

Division 2B Ancillary orders relating to confiscation orders

31D Additional orders where application made for confiscation order or order relating to evidence, warrant or representation made in proceedings for confiscation order

- (1) If an application is made for a confiscation order or an order under section 31A (2) or 31B (2) (a ***non-disclosure order***), the Supreme Court may, on application by the Commission, when the application for the confiscation order or non-disclosure 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 or unexplained wealth order, the person who is proposed to be subject to the order, or
- (c) in the case of a non-disclosure order—the defendant whose interest in property is proposed to be subject to the order.

Division 3 Confiscated Proceeds Account

32 Establishment and use of Proceeds Account

- (1) The Treasurer is to establish in the Special Deposits Account at the Treasury an account called the Confiscated Proceeds Account.
- (2) To the credit of the Proceeds Account there is to be paid the money required by this or any other Act to be paid to the Proceeds Account.
- (3) From the Proceeds Account there is to be paid:

- (a) to the Treasurer—the amounts from time to time determined by the Treasurer in consultation with the Minister as payable for the purpose of administering this Act, and
- (a1) to the NSW Trustee and Guardian—such amounts from time to time as the Treasurer is satisfied the NSW Trustee and Guardian is entitled to be paid under section 19, and
- (b) any amount required to be paid in accordance with an order of the Supreme Court under this Act, and
- (c) to the credit of the Victims Support Fund established under the *Victims Rights and Support Act 2013*—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
- (d) other amounts in aid of law enforcement, victims support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation or drug education as directed by the Treasurer in consultation with the Minister.

Part 4 Information gathering powers

Division 1 Production orders

33 Making of production order

- (1) If an authorised officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document, or property-tracking documents, the authorised officer may:
 - (a) lay before the Supreme Court an information on oath setting out those grounds, and
 - (b) apply to the Court, *ex parte*, for a production order against the person suspected of having possession or control of the document or documents.
- (2) The Supreme Court may order the person against whom an application for a production order is made under subsection (1):
 - (a) except in the case of bankers' books, to produce to an authorised officer at a specified time, or between specified times, and at a specified place any property-tracking documents that are in the person's possession or control, or
 - (b) to make available to an authorised officer, for inspection at a specified time or times, or between specified times, at the place at which they are kept, any property-tracking documents that are in the person's possession or control.

(2A) A requirement to produce a document that is in electronic form, or to make any such document available for inspection, includes a requirement to produce, or make available, a hard copy form of the document, including the generation of reports or the extraction of data.

(3) In this section:

bankers' books means any accounting records of a bank used in its ordinary business of banking, and includes ledgers, day-books, cash-books and account books.

34 Powers under production order

(1) If a document is produced to an authorised officer under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document,
- (b) take extracts from the document,
- (c) make copies of the document,
- (d) retain the document if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(2) If a document is made available to an authorised officer for inspection under a production order, the authorised officer may do any one or more of the following:

- (a) inspect the document,
- (b) take extracts from the document,
- (c) make copies of the document.

(3) An authorised officer who retains a document under subsection (1) (d) must, on request by the person against whom the order is made:

- (a) give the person a copy of the document certified by the authorised officer in writing to be a true copy of the document, and
- (b) unless the person has received a copy of the document under paragraph (a)—permit the person to do any one or more of the following:
 - (i) inspect the document,
 - (ii) take extracts from the document,
 - (iii) make copies of the document.

35 Effect of production order on proceedings etc

(1) A person is not excused from complying with a production order on the ground that:

- (a) the production or making available of the document might tend to incriminate the person or make the person liable to a forfeiture or penalty, or
- (b) the production or making available of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document, or
- (c) the production or making available of the document would disclose information that is the subject of legal professional privilege.

(2) If a person objects to a production order:

- (a) the production or making available of the document, or
- (b) any document or thing obtained as a consequence of the production or making available of the document,

is not admissible against the person in any criminal proceedings except proceedings for an offence under section 37 (Failure to comply with production order).

36 Variation of production order

If the Supreme Court makes an order under section 33 requiring a person to produce a document to an authorised officer, the person may apply to the Court for a variation of the order and the Court may, if satisfied that the document is essential to the business activities of the person, vary the production order so that it requires the person to make the document available under section 33 (2) (b) to an authorised officer for inspection.

37 Failure to comply with production order

- (1) If a person is required by a production order to produce a document to an authorised officer or to make a document available to an authorised officer for inspection, the person is guilty of an offence if the person:
- (a) contravenes the order without reasonable excuse, or
 - (b) in purported compliance with the order produces or makes available a document known to the person to be false or misleading in a material particular without:
 - (i) indicating to the authorised officer to whom the document is produced or made available that the document is false or misleading and the respect in which the document is false or misleading, and
 - (ii) providing correct information to the authorised officer if the person is in possession of, or can reasonably acquire, the correct information.

Maximum penalty: 500 penalty units if the offender is a body corporate or, in any other case, 100 penalty units or imprisonment for 2 years, or both.

- (2) It is sufficient compliance with a requirement of a production order that a person produce a document or make a document available if:
- (a) the person has provided the Commission with a statement verified by statutory declaration to the effect that the person does not have possession and does not have control of the document, and
 - (b) the Commission has notified the person in writing that the Commission is prepared to accept provision of the statement as compliance with the order.

37A Prohibited disclosures about production orders

- (1) A person against whom a production order is made must not disclose:
- (a) the existence or nature of the order, or
 - (b) any information to a person from which the person could reasonably be expected to infer the existence or nature of the order.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) Subsection (1) does not apply to a production order unless it (or a notice accompanying it) specifies that information about the order must not be disclosed.
- (3) A person does not contravene this section if:
- (a) the disclosure is made to an employee, agent or other person in order to obtain a property-tracking document to comply with the order and the employee, agent or other person is directed not to inform the person to whom the document relates about the matter, or
 - (b) the disclosure is made to obtain legal advice or representation in relation to the order, or
 - (c) the disclosure is made for the purposes of, or in the course of, legal proceedings.

Division 2 Search powers (general)

38 Search warrants

- (1) An authorised officer under this Act may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*, for the issue of a search warrant under this Division if the authorised officer under this Act has reasonable grounds for believing that there is or, within 72 hours, will be on any premises:
- (a) anything in which a person has an interest that constitutes serious crime derived property, or

- (b) anything in which a person has an interest that constitutes illegally acquired property of a person reasonably suspected of having been engaged in serious crime related activities, or
 - (c) evidence of a serious crime related activity, or
 - (d) evidence of illegal activity of a person reasonably suspected of having been engaged in serious crime related activities, or
 - (e) property an interest in which is subject to a restraining order.
- (2) The authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom the application for a search warrant is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer under this Act (who, if a member of the Police Force, need not be named in the warrant) to enter the premises and there search for any or all of the property or evidence referred to in subsection (1).
- (3) Nothing in this Division limits the operation of Division 2 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- (4) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this Division.

39 Seizure of property and searching of person

- (1) The person or persons executing a search warrant under this Division may seize anything that might reasonably be suspected of being:
- (a) something in which a person has an interest that constitutes serious crime derived property, or
 - (b) something in which a person has an interest that constitutes illegally acquired property of a person reasonably suspected of having been engaged in serious crime related activities, or
 - (c) evidence of a serious crime related activity, or
 - (d) evidence of illegal activity of a person reasonably suspected of having been engaged in serious crime related activities, or
 - (e) property an interest in which is subject to a restraining order.
- (2) The power conferred by this section to seize anything includes:
- (a) power to remove it from the premises where it is found, and
 - (b) power to guard it on those premises.

- (3) A person executing a search warrant issued under this Division may search a person found on the premises who might reasonably be suspected of being in possession of property or evidence that may be seized under this section.
- (4) A person executing a search warrant issued under this Division may:
 - (a) examine any property or evidence seized in executing the warrant, and
 - (b) inspect and test any such property, and
 - (c) in the case of evidence that is a document—make copies of, and take extracts from, the document.

40 Responsibility for seized property

- (1) If property or evidence is seized when a search warrant issued under this Division is executed, reasonable measures for its preservation while in custody are to be taken:
 - (a) by the Commission, if the warrant was issued on the application of a member of the Commission, or
 - (b) by the Commissioner of Police, if the warrant was issued on the application of a member of the Police Force.
- (2) A person authorised by the Commission for the purpose may:
 - (a) examine any property or evidence seized when a search warrant issued under this Division is executed, including a warrant issued on the application of a member of the Police Force, and
 - (b) inspect and test any such property, and
 - (c) in the case of evidence that is a document—make copies of, and take extracts from, the document.

41 Return of certain seized property

- (1) If:
 - (a) property has been seized pursuant to a search warrant issued under this Division, and
 - (b) at the time when the property was seized, a restraining order or other order under this Act affecting an interest in the property had not been applied for or granted, and
 - (c) before the expiration of 7 days after the property was seized, such a restraining order or other order under this Act had not been applied for or granted or, if applied for, had been refused, and

(d) the responsible person does not propose to use the property as evidence in any proceedings,

the responsible person is to arrange for the property to be returned, at the expiration of that period, to the person from whose possession it was seized.

(2) In this section:

responsible person, in relation to property, means:

(a) if the property is in the custody, or under the control, of the Commission—the Commission, or

(b) if the property is in the custody, or under the control, of a member of the Police Force—the Commissioner of Police.

42 Obstruction etc of person executing warrant

A person who, without reasonable excuse, obstructs or hinders a person executing a search warrant issued under this Division is guilty of an offence.

Maximum penalty: 20 penalty units or imprisonment for 2 years, or both.

42A Disposal of seized property to Commission

(1) Anything seized pursuant to section 49 of the *Law Enforcement (Powers and Responsibilities) Act 2002* may under subsection (3) of that section be directed by a court or Magistrate to be disposed of by being delivered into the custody or control of the Commission if the court or Magistrate is satisfied that the thing seized is proposed to be used in evidence in any proceedings under this Act.

(2) Anything so delivered to the custody or control of the Commission is taken to have been seized (when it was delivered) pursuant to a search warrant under this Division.

Division 3 Search powers (property tracking)

43 Consent to search for, and to seizure of, property-tracking document

With the consent of the occupier of premises, an authorised officer may:

(a) enter the premises, and

(b) search the premises for any property-tracking document, and

(c) seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a property-tracking document.

44 Application for search warrant for location of property-tracking document

If an authorised officer has reasonable grounds for suspecting that a property-tracking

document is, or may be within the next following 72 hours, in or on any premises, the authorised officer may:

- (a) lay before the Supreme Court an information on oath setting out those grounds, and
- (b) apply to the Court for the issue of a search warrant under section 45 in respect of the premises.

45 Search warrant for location etc of property

- (1) If an application is made under section 44 for a search warrant in respect of premises, the Supreme Court may issue a search warrant authorising an authorised officer (who, if a member of the Police Force, need not be named in the warrant), with such assistance, and by the use of such force, as is necessary and reasonable:
 - (a) to enter the premises, and
 - (b) to search the premises for property-tracking documents, and
 - (c) to seize any document found in the course of the search that the authorised officer believes, on reasonable grounds, to be a property-tracking document.
- (2) The Supreme Court is not to issue a search warrant under this section unless the Court is satisfied that:
 - (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of the document, or
 - (b) a production order has been made in respect of the document and has not been complied with, or
 - (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that such a production order would not be complied with, or
 - (d) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the authorised officer does not gain immediate access to the document without notice to any person.

46 Requirements of search warrant

There must be stated in a search warrant issued under section 45:

- (a) whether entry is authorised to be made at any time of the day or night or only during specified hours of the day or night, and
- (b) the date, not being later than one month after the day of issue of the warrant, on which the warrant ceases to have effect.

47 Other documents and evidence may be seized

If an authorised officer executing a search warrant issued under section 45:

- (a) finds any document or other thing that the authorised officer believes, on reasonable grounds, will afford evidence of a criminal offence (whether under the law of this State or the Commonwealth or another State or a Territory), and
- (b) believes, on reasonable grounds, that it is necessary to seize the document or thing in order to prevent its concealment, loss or destruction,

the search warrant is to be taken to authorise seizure of the document or thing.

47A Legal professional privilege

- (1) The fact that a document contains or may contain information that is the subject of legal professional privilege does not prevent seizure of the document under the authority of a search warrant issued under this Division.
- (2) If a person objects to the seizure of a document under the authority of such a search warrant on the ground that the document contains or may contain information that is the subject of legal professional privilege, any information, document or thing obtained as a direct or indirect consequence of the seizure of the document is not admissible in any criminal proceedings against the person entitled to claim that privilege.

Division 4 Monitoring orders

48 Monitoring orders

- (1) If an authorised officer has reasonable grounds for suspecting that a financial institution may obtain information about transactions conducted by a particular person with the institution, the officer may:
 - (a) lay before the Supreme Court an information on oath setting out those grounds, and
 - (b) apply to the Court for the making of an order directing the financial institution to give to the Commission, or to an authorised officer nominated by the Commission, information obtained by the institution about transactions conducted by the person with the institution.
- (2) The Supreme Court is not to make a monitoring order unless satisfied that there are reasonable grounds for suspecting that the person in respect of whose transactions the information is sought:
 - (a) has been, or is about to be, involved in a serious crime related activity, or
 - (b) has acquired, or is about to acquire, directly or indirectly, any serious crime

derived property or, in the case of a person referred to in paragraph (a), any illegally acquired property, or

(c) has acquired, or is about to acquire, any fraudulently acquired property.

(3) A monitoring order must specify:

(a) the nature of the transactions to be monitored, and

(b) the kind of information that the institution is required to give, and

(c) the manner in which the information is to be given.

(4) A monitoring order applies in relation to transactions conducted during the period specified in the order (being a period commencing not earlier than the day on which notice of the order is given to the financial institution and ending not later than 3 months after the date of the order).

(5) If the Supreme Court makes a monitoring order, the Commission must give notice of the order to the financial institution to which the order applies.

49 Offences relating to monitoring order

A financial institution that has been given notice of a monitoring order is guilty of an offence if it knowingly:

(a) contravenes the order, or

(b) provides false or misleading information in purported compliance with the order.

Maximum penalty: 1,000 penalty units.

50 Existence and operation of monitoring order not to be disclosed

(1) A financial institution that is, or has been, subject to a monitoring order is guilty of an offence if it discloses the existence or the operation of the order to any person (including the person to whom the order relates) except:

(a) the Commission or the person authorised by the Commission and named in the order, or

(b) an officer or agent of the institution, for the purpose of ensuring that the order is complied with, or

(c) an Australian legal practitioner, for the purpose of obtaining legal advice or representation in relation to the order.

Maximum penalty: 1,000 penalty units.

(2) A person described in subsection (1) (a), (b) or (c) to whom the existence or operation

of a monitoring order has been disclosed (whether in accordance with subsection (1) or a previous application of this subsection or otherwise) is guilty of an offence if he or she:

- (a) while still a person so described—discloses the existence or operation of the order, otherwise than to another person described in subsection (1) (a), (b) or (c) for the purpose of:
 - (i) if the disclosure is made by a person described in subsection (1) (a) or (b)—the performance of that person's duties, or
 - (ii) if the disclosure is made by an officer or agent of the institution—ensuring that the order is complied with or obtaining legal advice or representation in relation to the order, or
 - (iii) if the disclosure is made by an Australian legal practitioner—giving legal advice, or making representations, in relation to the order, or
- (b) while no longer a person so described—makes a record of, or discloses, the existence or operation of the order in any circumstances.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (3) Nothing in subsection (2) prevents the disclosure by a person described in subsection (1) (a) of the existence or operation of a monitoring order:
 - (a) for the purposes of, or in connection with, legal proceedings, or
 - (b) in the course of proceedings before a court.
- (4) A person described in subsection (1) (a) is not to be required to disclose to any court the existence or operation of a monitoring order.
- (5) A reference in this section to disclosing the existence or operation of a monitoring order to a person includes a reference to disclosing to the person information from which the person could reasonably be expected to infer the existence or operation of the monitoring order.

51 Communication of information by financial institutions to prescribed authorities

- (1) If a financial institution has reasonable grounds for believing that information it has about a transaction with the institution:
 - (a) might be relevant to an investigation of a serious crime related activity or the making of a confiscation order, or
 - (b) might otherwise be of assistance in the enforcement of this Act or the regulations, the institution may give the information to the Commission.

- (1A) The Commission may at any time request a financial institution to give information to the Commission about a transaction with the institution that might be of assistance in the enforcement of this Act or the regulations.
- (2) An action, suit or proceeding does not lie against:
- (a) a financial institution, or
 - (b) an officer, employee or agent of the institution acting in the course of the person's employment or agency,
- in relation to the giving of the information by the institution or person under subsection (1) or (1A).

52 Protection for financial institution—money laundering

- (1) If a financial institution is, or has been, subject to a monitoring order, the fact that the monitoring order has been made is to be disregarded for the purposes of section 73 (Money laundering) of the *Confiscation of Proceeds of Crime Act 1989* in relation to the institution.
- (2) If a financial institution, or a person who is an officer, employee or agent of the institution, gives information pursuant to section 51 as soon as practicable after forming the belief referred to in that section, the institution or person is to be taken, for the purposes of section 73 of the *Confiscation of Proceeds of Crime Act 1989* (Money laundering) not to have been in possession of the information at any time.

Part 4A Recognition of interstate instruments

52A Registration of interstate orders

- (1) If an interstate assets forfeiture order, interstate crime related property declaration or interstate restraining order expressly, or by operation of the law of the Commonwealth, another State or a Territory, applies to property in New South Wales, the order may be registered under this Act.
- (2) An order or declaration is registered under this Act when a copy of the order or declaration, sealed by the court or body that issued the order or declaration, is registered in accordance with the rules of the Supreme Court.
- (3) A sealed copy of an interstate assets forfeiture order, interstate crime related property declaration or interstate restraining order is not required for the purposes of registration if it is not the practice of the court or body that issued the order or declaration to seal copies of a declaration.
- (4) Any amendments made to an interstate assets forfeiture order, interstate crime related property declaration or interstate restraining order (before or after registration) may be registered in the same way. Any such amendment has no effect

for the purposes of this Act until it is registered.

- (5) An application for registration may be made by the person on whose application the order or declaration or amendments were made, by an authorised officer or by a person affected by the order or declaration or amendments.

52B Effect of registration of interstate restraining orders

- (1) A registered interstate restraining order may be enforced in New South Wales as if it were a restraining order made under section 10A at the time of registration.
- (2) This Act (other than sections 10–10D) applies to a registered interstate restraining order in the same way as it applies to a restraining order made under section 10A.

52C Effect of registration of interstate assets forfeiture orders

- (1) A registered interstate assets forfeiture order may be enforced in New South Wales as if it were an assets forfeiture order made under section 22 (2) at the time of registration.
- (2) This Act (other than sections 22 and 25) applies to a registered interstate assets forfeiture order in the same way as it applies to an assets forfeiture order made under section 22 (2).
- (3) A registered interstate assets forfeiture order does not operate so as to vest property (or any estate, interest or right in property) otherwise than in the Crown in right of New South Wales.
- (4) A registered interstate assets forfeiture order does not operate so as to vest property in the Crown in right of New South Wales if the order has already operated to vest the property in the Crown in some other capacity or in some other person or entity.

52D Effect of registration of interstate crime related property declarations

- (1) A registered interstate crime related property declaration is, subject to the regulations, to be enforced as if it were a registered interstate assets forfeiture order and this Part applies accordingly.
- (2) Regulations may be made for or with respect to the circumstances in which a registered interstate crime related property declaration is to be treated as a registered interstate assets forfeiture order.

52E Duration of registration

A registered interstate assets forfeiture order, registered interstate crime related property declaration or registered interstate restraining order is enforceable in this State under this Act until its registration is cancelled under section 52F, even if the order or declaration has already ceased to be in force under the law under which the order or declaration was

made.

52F Cancellation of registration

- (1) The registration of an interstate assets forfeiture order, interstate crime related property declaration or interstate restraining order may be cancelled by the Supreme Court if:
 - (a) the registration was improperly obtained, or
 - (b) the order or declaration ceases to be in force under the law of the Commonwealth, another State or a Territory under which the order or declaration was made.
- (2) An application for cancellation of the registration may be made by the person on whose application the order or declaration was made, by an authorised officer or by a person affected by the order or declaration.

52G Charge on property subject to interstate restraining order

- (1) A charge is created on property subject to an interstate restraining order to secure payment of the amount due under an interstate proceeds assessment or unexplained wealth order if:
 - (a) the order was made in connection with an interstate serious offence committed or alleged to be committed by the owner of the property, and
 - (b) an interstate proceeds assessment or unexplained wealth order is made in connection with that offence, and
 - (c) the interstate proceeds assessment or unexplained wealth order is registered in a court in New South Wales under the *Service and Execution of Process Act 1992* of the Commonwealth.
- (2) The charge is created as soon as both the interstate restraining order and the interstate proceeds assessment or unexplained wealth order are registered.
- (3) The charge ceases to have effect as soon as any of the following events occurs:
 - (a) the interstate proceeds assessment or unexplained wealth order ceases to have effect,
 - (b) the interstate proceeds assessment or unexplained wealth order is discharged by a court hearing an appeal against the making of the order,
 - (c) the amount due under the interstate proceeds assessment or unexplained wealth order is paid,
 - (d) the owner of the property becomes bankrupt,

- (e) the property is sold or disposed of:
 - (i) under an order made by a court under the corresponding law of the State in which the interstate proceeds assessment or unexplained wealth order was made, or
 - (ii) by the owner of the property with the consent of the court that made the interstate proceeds assessment or unexplained wealth order, or
 - (iii) if the interstate restraining order directed a person to take control of the property—by the owner of the property with the consent of that person.
- (4) A charge created on property under this section:
 - (a) is subject to every encumbrance on property that came into existence before the charge and that would, apart from this subsection, have priority over the charge, and
 - (b) has priority over all other charges, and
 - (c) subject to subsection (3), is not affected by any change of ownership of the property.
- (5) If a charge is created under this section on property of a particular kind and the provisions of any law (whether or not a law of the State) provide for the registration of title to, or charges over, property of that kind:
 - (a) the NSW Trustee and Guardian or an authorised officer may or, in the case of land, must cause the charge to be registered under the provisions of that law, and
 - (b) a person who purchases or otherwise acquires an interest in the property after the registration of the charge is, for the purposes of this section, taken to have notice of the charge at the time of the purchase or acquisition.
- (6) A charge under this section on land under the *Real Property Act 1900* has no effect until it is registered under that Act.
- (7) Section 73 (2) of the *Personal Property Securities Act 2009* of the Commonwealth is declared to apply to a charge created by this section.

52H Powers of NSW Trustee and Guardian in relation to interstate restraining orders

If an interstate restraining order registered under this Act directs an official of the jurisdiction in which it was made to take control of the property, the NSW Trustee and Guardian may, in accordance with an agreement between the NSW Trustee and Guardian and the official, exercise the same powers in relation to the property as the official would have been able to exercise if the property were located in that State.

52I Interim registration of facsimile or other electronic copies

- (1) A facsimile or other electronic copy of:
 - (a) a sealed copy of an interstate assets forfeiture order, interstate crime related property declaration or interstate restraining order, or
 - (b) a sealed copy of any amendments made to any such order,is regarded for the purposes of this Act as the same as the sealed copy, if the copy is certified in accordance with the requirements of the court or body that issued it.
- (2) Registration effected by means of a facsimile or other electronic copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a facsimile or other electronic copy has been registered by that time.
- (3) Registration of the sealed copy before the end of the period referred to in subsection (2) has effect as from the day of registration of the facsimile or other electronic copy.
- (4) Although registration of a facsimile or other electronic copy of an interstate assets forfeiture order ceases to have effect in the circumstances mentioned in subsection (2), any forfeiture already made in relation to the order is not affected.

Part 5 General

53 Proceedings for offences

- (1) Except as otherwise provided by this section, proceedings for an offence under this Act are to be dealt with summarily before the Local Court.
- (2) The Local Court may not deal with an offence under section 16 (Contravention of restraining order).
- (3) Proceedings for an offence under section 16 are to be dealt with before the Supreme Court in its summary jurisdiction.
- (4) Proceedings for an offence under section 49 (Offences relating to monitoring order) or 50 (1) (which relates to disclosure of the existence of a monitoring order) are to be taken before the Supreme Court in its summary jurisdiction.
- (5) If proceedings for an offence are dealt with before the Local Court, the maximum penalty that the Court may impose is 100 penalty units or the maximum penalty provided for the offence, whichever is less.

54 Proof of certain matters

- (1) A certificate that purports to have been signed by a full-time member or a delegate of the Commission and certifies that a specified person was or was not an authorised

officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts certified.

- (2) A certificate of conviction of an offence (being a certificate referred to in section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*) is admissible in any civil proceedings under this Act and is evidence of the commission of the offence by the person to whom it relates.
- (2A) A document certified by a judicial officer, registrar or other proper officer of a court stating that a specified person pleaded guilty to a specified offence on a specified day, and that the plea of guilty was not withdrawn, is admissible in any civil proceedings under this Act and is evidence of the commission of the offence by the person to whom it relates.
- (3) In any proceedings under this Act, a certificate referred to in section 43 of the *Drug Misuse and Trafficking Act 1985* is prima facie evidence of the same matters of which it is prima facie evidence in legal proceedings under that Act, without proof of the signature, employment or appointment of the person appearing to have signed the certificate.
- (4) In any proceedings on an application for an order under this Act, the court may, in determining the application, have regard to the transcript of any proceedings against a person for an offence to which the application relates and to the evidence given in any such proceedings.
- (5) In any proceedings on an application for an order under this Act, the transcript of any examination under section 12 or 31D is evidence of the answers given by a person to a question put to the person in the course of the examination.
- (6) In subsection (4), a reference to proceedings is a reference to proceedings regardless of their outcome, and includes proceedings that have not been determined or that were discharged or not proceeded with for any reason.

55 Conduct of directors, employees or agents

- (1) If it is necessary, for the purposes of this Act, to establish the state of mind of a body corporate in respect of conduct engaged in, or taken by subsection (2) to have been engaged in, by the body corporate, it is sufficient to show that a director, employee or agent of the body corporate (being a director, employee or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.
- (2) Any conduct engaged in on behalf of a body corporate:
 - (a) by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority, or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent,

is to be taken, for the purposes of this Act, to have been engaged in by the body corporate.

(3) If it is necessary, for the purposes of this Act, to establish the state of mind of a person in relation to conduct taken by subsection (4) to have been engaged in by the person, it is sufficient to show that an employee or agent of the person (being an employee or agent by whom the conduct was engaged in within the scope of his or her actual or apparent authority) had that state of mind.

(4) Conduct engaged in on behalf of a person other than a body corporate:

(a) by an employee or agent of the person within the scope of his or her actual or apparent authority, or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent,

is to be taken, for the purposes of this Act, to have been engaged in by the first-mentioned person.

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's knowledge, intention, opinion, belief or purpose.

56 Serious crime related activity can form basis of a number of orders

The fact that a restraining order or an assets forfeiture order has been made on the basis of a person's serious crime related activity does not prevent the making of another or other restraining orders or assets forfeiture orders on the basis of that activity.

57 Orders can be extended to innocent interests

(1) The purpose of this section is to provide for an order of the Supreme Court under this Act in relation to an interest of a person in property to be extended to other interests in the property (whether of that person or another person) if:

(a) the proceeds of disposal of those interests combined would be likely to be greater than the proceeds of disposal of each of the interests separately, or

(b) the disposal of the interests separately would be impracticable or significantly more difficult than disposal of the combined interests.

- (2) When the Supreme Court makes an order under this Act in relation to an interest of a person in property, the Court may, if it is consistent with the purpose of this section to do so, by that order or a subsequent order direct that the order is also to apply to specified other interests in the property.
- (3) When the Supreme Court extends the operation of an order to an interest in property that the order would not (but for this section) have applied to, the Court may make such ancillary orders as it thinks fit for the protection of the person whose interest it is, such as:
 - (a) an order declaring that there is payable to the person a specified amount as the value of the person's interest in the property, or
 - (b) an order directing that specified other interests in the property be transferred to the person.
- (4) In deciding whether to declare that an amount is payable to a person or to direct that an interest in property be transferred to a person, the Supreme Court is to have regard to:
 - (a) the nature, extent and value of the person's interest in the property concerned, and
 - (b) if the Court is aware that any other person claims an interest in the property—the nature, extent and value of the interest claimed, and
 - (c) any other matter that seems to the Court to be relevant.
- (5) The rules of court may make provision for and with respect to the operation of this section.

58 Effect of death of person involved

- (1) Any notice authorised or required to be given to a person under this Act is, if the person is dead, sufficiently given if given to the person's legal personal representative.
- (2) A reference in this Act to an interest in property of a person is, in the case of a person who is dead, a reference to an interest in the property that the person had immediately before death.
- (3) An order can be applied for and made under this Act:
 - (a) in respect of a person's interest in property even if the person is dead, and
 - (b) on the basis of the activities of a person who is dead.

58A Effect of death of joint owner of restrained property

- (1) If a person has an interest in property as joint owner of the property, the person's death after a restraining order is made in respect of the interest does not (while the order is in force) operate to vest the interest in the surviving joint owner or owners and the restraining order continues to apply to the interest as if the person had not died.
- (2) An assets forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died.
- (3) If a restraining order ceases to apply to an interest in property without an assets forfeiture order being made in respect of that interest, subsection (1) is taken not to have applied to the interest.

59 Arrangements to avoid operation of Act

- (1) In this section:

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, or
 - (b) any scheme, plan, proposal, action, course of action or course of conduct.
- (2) If the Supreme Court is satisfied on the application of the Commission that a scheme carried out by a person was carried out for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of this Act in any respect, the Court may for the purpose of defeating that purpose:
 - (a) make an order declaring the scheme void in whole or in part, or
 - (b) make an order varying the operation of the scheme in whole or in part.
 - (3) The Supreme Court may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter or for giving effect to any orders of the Court under this section, including any of the following orders:
 - (a) the making of any disposition of property,
 - (b) the payment of money,
 - (c) the sale or other realisation of property and the disposition of the proceeds,
 - (d) the creation of a charge on property in favour of any person and the enforcement of a charge so created.
 - (4) The Supreme Court may rescind or vary any order of the Court under this section.

59A Ministerial arrangements for things seized in connection with extra-territorial offences

- (1) The Minister may enter into arrangements with a Minister of another State or a Territory or the Commonwealth under which things seized under this Act that may be relevant to the investigation of an offence against the law of that State or Territory or the Commonwealth:
 - (a) are to be transmitted to the appropriate authority in that State or Territory or the Commonwealth for the purposes of the investigation of, or proceedings in respect of, that offence, and
 - (b) when no longer required for the purposes of any such investigation or proceedings, are (unless disposed of by order or direction of a court or Magistrate) to be returned to the Commissioner of Police.
- (2) This section has effect despite section 41.
- (3) In this section:

appropriate authority means:

- (a) in relation to another State or Territory (other than the Australian Capital Territory)—an authority exercising, in relation to the police force of that State or Territory, functions corresponding to those of the Commissioner of Police in relation to the NSW Police Force, or
- (b) in relation to the Commonwealth or the Australian Capital Territory—the Commissioner of the Australian Federal Police.

60 Act binds Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

61 Restriction on functions

- (1) A proceeds assessment order or unexplained wealth order under this Act and a drug proceeds order under the [Confiscation of Proceeds of Crime Act 1989](#) may not both be made in relation to the same serious crime related activity.
- (2) A restraining order cannot be made under this Act and under the [Confiscation of Proceeds of Crime Act 1989](#) so as to be in force in respect of the same interest in property at the same time.
- (3) Except as provided by this section, this Act does not affect the exercise of a function under another Act and another Act does not affect the exercise of a function under this Act.

62 Orders made by consent

- (1) The Supreme Court may, on the application of the Commission and with the consent of all persons whose interest in property will be subject to an order under this Act, make that order by an order under this section (a **consent order**) that gives effect to the terms of an agreement negotiated between the Commission and any one or more persons whose interest in property will be subject to the order under this Act.
- (2) A consent order may be made by the Supreme Court without consideration of the matters that the Supreme Court would otherwise consider before making the order.
- (3) In particular, and without limiting subsection (2), the Supreme Court is not required to consider the matters set out in section 16A in making a restraining order by consent order that makes provision of the kind referred to in section 10B (3) (b).

63 Stay of proceedings

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings.

64 Stamp duty

No stamp duty is payable under the [Stamp Duties Act 1920](#) in respect of the vesting of any property under section 25 (Exclusion of property from restraining order and assets forfeiture order) or 57 (Orders can be extended to innocent interests).

65 Requirements to give notice

- (1) The regulations may make provision for and with respect to the manner in which a notice authorised or required by this Act to be given to a person is to be given.
- (2) Any such provisions may include provision for substituted service.
- (3) A person is to be considered to have been given notice if all reasonable efforts were made to give the notice whether or not the person actually received notice.

66 Transitional provision

If section 45A of the [Poisons Act 1966](#) was in force during a period of 6 years referred to in section 22 or 27 of this Act, a reference in section 22 or 27 of this Act to a serious crime related activity involving an indictable quantity includes a reference to a serious crime related activity to which section 45A of the [Poisons Act 1966](#) applied during that period.

66A Savings and transitional provisions

Schedule 1 has effect.

67 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units.

68-70 (Repealed)

Schedule 1 Savings and transitional provisions

(Section 66A)

Part 1 General

1 Savings and transitional regulations

- (1) The regulations may include provisions of a savings or transitional nature consequent on the enactment of this Act and the following Acts:

Drug Trafficking (Civil Proceedings) Amendment Act 1997

Criminal Assets Recovery Amendment Act 2005

Criminal Assets Recovery Amendment Act 2009

Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010

- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or from a later date.
- (3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State), in respect of anything done or omitted to be done before the date of its publication.

Part 2 Drug Trafficking (Civil Proceedings) Amendment Act 1997

2 Meaning of "1997 amending Act"

In this Part:

1997 amending Act means the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*.

3 Application of amendments to earlier serious crime related activities

An amendment made by the 1997 amending Act extends to a serious crime related activity that took place before the commencement of the amendment.

4 Application of amendments to existing orders

- (1) An amendment made by the 1997 amending Act that relates to restraining orders, assets forfeiture orders or production orders, or orders ancillary to any of those orders, extends to orders, and applications for orders, made before the commencement of the amendment, except as otherwise provided by this Part.
- (2) Section 16A does not extend to a restraining order made before the commencement of the section unless the restraining order does not, as at that commencement, make provision under section 10 (5) (b).
- (3) Section 16B extends to a restraining order made before the commencement of the section but not so as to apply in respect of a legal service provided before the commencement of the section.
- (4) The amendment made by the 1997 amending Act to section 16 (1) does not apply to a contravention of a restraining order that took place before the commencement of the amendment.
- (5) The amendment made to section 25 (7) by the 1997 amending Act extends to an application for an exclusion order made but not heard before the commencement of the amendment.
- (6) Section 58A does not apply in the case of a joint owner of property who died before the commencement of that section.

5 Application of amendments to search warrants

- (1) An amendment made by the 1997 amending Act with respect to search warrants does not apply to a search warrant issued before the commencement of the amendment, except as provided by this clause.
- (2) Section 42A extends to anything seized before the commencement of the amendment.

6 Application of amendments to pending proceeds assessment order applications

- (1) This clause applies to an application for a proceeds assessment order that was made under section 27 before the commencement of the amendments made to that section by the 1997 amending Act and that had not commenced to be heard before the

commencement of those amendments.

- (2) An application to which this clause applies is taken to have been made under section 27 as amended by the 1997 amending Act, and both that section and section 28 apply as amended by the 1997 amending Act to the application.

7 Evidentiary matters

- (1) Section 54 (3) extends to a certificate referred to in that subsection issued before the commencement of the subsection.
- (2) Section 54 (4) extends to a transcript of any proceedings that took place before the commencement of the subsection.
- (3) Section 54 (5) extends to a transcript of any examination that took place before the commencement of the subsection.

8 Change of name of Proceeds Account

The change of name by the 1997 amending Act of the Account established under section 32 does not affect the identity or continuity of that Account.

Part 3 Criminal Assets Recovery Amendment Act 2005

9 Meaning of “2005 amending Act”

In this Part:

2005 amending Act means the *Criminal Assets Recovery Amendment Act 2005*.

10 Application of amendments to earlier activities

An amendment made to this Act by the 2005 amending Act extends to serious crime related activities or illegal activities that took place before the commencement of that amendment.

11 Application of amendments to previous fraudulently acquired property

This Act applies to fraudulently acquired property that was acquired before the commencement of section 9A (as inserted by the 2005 amending Act).

12 Application of amendments to property in custody or under control of Commission or Commissioner of Police

The amendments made to this Act by the 2005 amending Act extend to property in the custody or under the control of the Commission or the Commissioner of Police immediately before the commencement of this clause.

13 Forfeiture of undeclared assets

Sections 31A and 31B, as inserted by the 2005 amending Act, do not apply to or in respect of assets forfeiture orders made before the commencement of section 31A.

14 Mutual recognition of interstate orders

Part 4A (as inserted by the 2005 amending Act) extends to interstate restraining orders, interstate crime related property declarations and interstate assets forfeiture orders in force immediately before the commencement of that Part.

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.

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.