

South Australia

# **Serious and Organised Crime (Unexplained Wealth) Act 2009**

An Act to provide for the making and enforcement of unexplained wealth orders; to make related amendments to the *Criminal Assets Confiscation Act 2005*; and for other purposes.

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## **Contents**

### Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Interpretation
- 4 Meaning of effective control
- 5 Extra-territorial operation
- 6 Criminal intelligence
- 7 Role of Crown Solicitor

### Part 2—Unexplained wealth orders

- 8 Determining the value of property and benefits
- 9 Unexplained wealth orders
- 10 Appeals to Supreme Court

### Part 3—Investigative and enforcement powers

#### Division 1—Preliminary

- 11 Application of Part
- 12 Limitation on exercise of powers and functions under Part

#### Division 2—Investigative notices, orders and warrants

- 13 Notices to deposit holders
- 14 Monitoring orders
- 15 Orders for obtaining information
- 16 Warrants
- 17 Powers conferred by warrant
- 18 Exercise of jurisdiction

#### Division 3—Enforcement powers

- 19 Enforcement of unexplained wealth orders
- 20 Restraining orders
- 21 Refusal to make an order for failure to give undertaking
- 22 Form of restraining order
- 23 Notice of restraining order

- 24 Right of objection
- 25 Variation or revocation of restraining order
- 26 Appeals to Supreme Court
- 27 Cessation of restraining order
- 28 Contravention of restraining order

#### Division 4—General provisions relating to investigative and enforcement powers

- 29 Representation of Commissioner of Police
- 30 Ex parte proceedings
- 31 Immunity from liability
- 32 Making false or misleading statements
- 33 Failing to comply with notice or order

#### Part 4—Reviews and expiry of Act

- 34 Annual review and report as to exercise of powers
- 35 Review of operation of Act
- 36 Expiry of Act
- 37 Authorisations by DPP

#### Part 5—Miscellaneous

- 38 Manner of giving notices
- 39 Immunity from liability
- 40 Protection from proceedings etc
- 41 Proceedings under Act are civil proceedings
- 42 Ancillary orders
- 43 Consent orders
- 44 Costs
- 45 Credits to Victims of Crime Fund
- 46 Regulations

#### Schedule 1—Related amendments

##### Part 1—Preliminary

- 1 Amendment provisions

##### Part 2—Amendment of *Criminal Assets Confiscation Act 2005*

- 2 Insertion of section 8A
  - 8A Certain property and benefits not subject to proceedings under Act

#### Legislative history

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### The Parliament of South Australia enacts as follows:

#### Part 1—Preliminary

##### 1—Short title

This Act may be cited as the *Serious and Organised Crime (Unexplained Wealth) Act 2009*.

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## 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

## 3—Interpretation

- (1) In this Act, unless the contrary intention appears—

*benefit* includes a service or advantage;

*corresponding unexplained wealth order* means an order made under a law of another State, a Territory or the Commonwealth that is of a kind declared by the regulations to be within this definition;

*criminal intelligence* means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety;

*deposit holder* means—

- (a) an ADI; or
- (b) a friendly society; or
- (c) an organisation that holds money in accounts on behalf of other persons; or
- (d) a person who carries on business as a pawnbroker; or
- (e) an institution of a kind declared by regulation to be a deposit holder;

*DPP* means the Director of Public Prosecutions and includes a person acting in the position of Director of Public Prosecutions;

*effective control*—see section 4;

*executive officer*, in relation to a deposit holder or a corporation, means any person, by whatever name called and whether or not the person is a director of the deposit holder or corporation, who is concerned, or takes part, in the management of the deposit holder or corporation;

*gift* includes a transaction (other than a transaction entered into in the ordinary course of trade or commerce) under which a person acquires property for less than a commercially adequate consideration;

*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;

*premises* means any land, building, structure, vehicle, vessel or aircraft;

*property* means real or personal property (tangible or intangible) including—

- (a) a chose in action; and
- (b) an interest in property;

*restraining order* means an order made under section 20;

*safe custody facility* includes any facility or arrangement through which a deposit holder accepts deposits or allows withdrawals and any other facility through which a deposit holder holds property on behalf of a person;

*unexplained wealth order* means an order made under section 9;

*wealth* of a person consists of the following:

- (a) all property that the person owns or has previously owned (including property acquired by the person before the commencement of this Act);
  - (b) all other benefits that the person has at any time acquired (including benefits acquired by the person before the commencement of this Act);
  - (c) all property that is, or has previously been, subject to the person's effective control (including property that became subject to the person's effective control before the commencement of this Act).
- (2) For the purposes of this Act, property that is or has been subject to the effective control of a person will be taken to have been *acquired* by that person when the property became subject to the effective control of the person.

#### 4—Meaning of effective control

- (1) For the purposes of this Act, the following principles apply when determining whether property is subject to the *effective control* of a person:
- (a) property may be subject to the effective control of a person whether or not the person has an interest in the property;
  - (b) property that is held on trust for the ultimate benefit of a person is taken to be subject to the effective control of the person;
  - (c) if a person is 1 of 2 or more beneficiaries under a discretionary trust, the following undivided proportion of the trust property is taken to be subject to the effective control of the person:  
$$\frac{1}{\text{number of beneficiaries}}$$
  - (d) property may be subject to the effective control of a person even if 1 or more other persons have joint control of the property.
- (2) In determining whether or not property is subject to the effective control of a person, regard may be had to—
- (a) securities (within the meaning of section 92 of the *Corporations Act 2001* of the Commonwealth) in, or directorships of, a company that has an interest (whether direct or indirect) in the property; and
  - (b) a trust that has a relationship to the property; and
  - (c) family, domestic and business relationships between 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), and other persons.

## **5—Extra-territorial operation**

It is the intention of the Parliament that this Act apply within the State and outside the State to the full extent of the extra-territorial legislative capacity of the Parliament.

## **6—Criminal intelligence**

- (1) No information provided by the Commissioner of Police to the DPP or the Crown Solicitor for the purposes of this Act may be disclosed to any person (except to the Attorney-General, a court, a person conducting a review under Part 4 or a person to whom the Commissioner of Police authorises its disclosure) if the information is classified by the Commissioner of Police as criminal intelligence.
- (2) In any proceedings under this Act, the court determining the proceedings—
  - (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
  - (b) may take evidence consisting of, or relating to, information that is so classified by the Commissioner of Police by way of affidavit.
- (3) The Commissioner of Police may not delegate the function of classifying information as criminal intelligence for the purposes of this Act except to a Deputy Commissioner or Assistant Commissioner of Police.

## **7—Role of Crown Solicitor**

- (1) For the avoidance of doubt, where this Act specifies that a power or function is to be exercised by the Crown Solicitor, the Crown Solicitor exercises an independent discretion in relation to that power or function and does not act on the instructions of any other person or body.
- (2) In proceedings under this Act the Crown Solicitor acts as a model litigant for, and on behalf of, the State.

## **Part 2—Unexplained wealth orders**

### **8—Determining the value of property and benefits**

The following provisions apply when determining the value of any property or benefits for the purposes of this Part:

- (a) the value of any property or benefit that has been disposed of, used, consumed or is for any other reason no longer available will be taken to be—
  - (i) the value of the property or benefit at the time it was acquired; or
  - (ii) the value of the property or benefit immediately before it was disposed of, used, consumed or otherwise ceased to be available,whichever is the higher;
- (b) the value of any other property or benefit will be taken to be—
  - (i) the value of the property or benefit at the time it was acquired; or

- (ii) the value of the property or benefit on the day that the application for an unexplained wealth order was made,

whichever is the higher.

## 9—Unexplained wealth orders

- (1) If the DPP reasonably suspects that a person has wealth that has not been lawfully acquired, the DPP may authorise the Crown Solicitor to make an application to the District Court under this section.
- (2) If, on an application by the Crown Solicitor under this section, the Court finds that any components of a person's wealth specified in the application have not been lawfully acquired, the Court may make an order (an *unexplained wealth order*) that the person pay to the Crown a specified amount.
- (3) If the Court makes findings as to a person's wealth as specified in subsection (2), the Court should make an unexplained wealth order specifying an amount equal to the value of those components of the person's wealth that have not been lawfully acquired unless the Court determines that it would be manifestly unjust to make such an order (in which case the Court may reduce the amount payable or decline to make the order, as the Court thinks fit).
- (4) The application—
  - (a) must specify with sufficient particularity the components of the person's wealth to which the application relates; and
  - (b) subject to subsection (6), must be served on the person and on any other persons that should, in the opinion of the Court, be served with the application.
- (5) The Court may allow the Crown Solicitor to subsequently vary the components of the person's wealth specified in the application (and may, in such a case, make any consequential orders as to service of the application as so varied that the Court thinks fit).
- (6) The Court may hear and determine an application in the absence of a party if—
  - (a) the Court is satisfied that the person cannot be found; or
  - (b) the person fails to appear after being given reasonable notice of the application.
- (7) For the purposes of this section, each component of a person's wealth specified in the application will be presumed not to have been lawfully acquired unless the person proves otherwise.
- (8) Property or a benefit that has been acquired by a person on the payment of any consideration will only be taken to have been lawfully acquired by the person for the purposes of this Part if the consideration given for the property or benefit was lawfully acquired.
- (9) Property or a benefit that has been acquired by a person as a prize or as the proceeds of any form of gaming will only be taken to have been lawfully acquired by the person for the purposes of this Part if any money or other item of value used by the person for the purposes of entering the prize draw or for the purposes of the gaming (as the case may be) was lawfully acquired.

- (10) Property or a benefit that has been acquired by a person as a gift or on the distribution of the estate of a deceased person will only be taken to have been lawfully acquired for the purposes of this Part if the donor of the gift or the deceased person (as the case may be) lawfully acquired the property or benefit.
- (11) If, in determining an application under this section relating to wealth of a person, the Court is satisfied—
- (a) that it is not reasonably possible for the person to establish that a component of his or her wealth was lawfully acquired (due to the effluxion of time, the circumstances in which that component was acquired or any other reason); and
  - (b) that the person has acted in good faith,
- the Court may determine that that component should be excluded from the application.
- (12) The Court must not make an unexplained wealth order relating to—
- (a) property that has been forfeited under any Act or law (whether of the State or another jurisdiction); or
  - (b) property or benefits in respect of which a pecuniary penalty order has been made against the person under the *Criminal Assets Confiscation Act 2005*; or
  - (c) literary proceeds in respect of which a literary proceeds order has been made against the person under the *Criminal Assets Confiscation Act 2005*; or
  - (d) property or benefits that have comprised (wholly or in part) the basis for a previous unexplained wealth order, or a corresponding unexplained wealth order.

## 10—Appeals to Supreme Court

- (1) The Crown Solicitor or a person subject to an unexplained wealth order may appeal to the Supreme Court against a decision of the District Court on an application under this Part.
- (2) An appeal lies as of right on a question of law and with permission on a question of fact.
- (3) An appeal must be commenced within the time, and in accordance with the procedure, prescribed by rules of the Supreme Court.
- (4) On an appeal, the Supreme Court may—
- (a) confirm, vary or revoke the decision subject to appeal; and
  - (b) make any ancillary orders that the Supreme Court considers appropriate.

## Part 3—Investigative and enforcement powers

### Division 1—Preliminary

#### 11—Application of Part

Subject to this Part, the powers and functions specified in this Part may be exercised for the purpose of investigating, or restraining, wealth of a person either before or after an unexplained wealth order, or an application for an unexplained wealth order, has been made against the person.

#### 12—Limitation on exercise of powers and functions under Part

- (1) Powers and functions under this Part may not be exercised before an unexplained wealth order has been made unless—
  - (a) the powers and functions are exercised for the purpose of investigating, or restraining, wealth of a person who—
    - (i) has been convicted of a serious offence or declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* in relation to a charge of a serious offence; or
    - (ii) is, or has been, the subject of a control order; or
  - (b) the DPP has authorised the exercise of those powers or functions.
- (2) The DPP may not authorise the exercise of powers and functions under this Part unless satisfied that the powers and functions are to be exercised for the purpose of investigating, or restraining, wealth of a person who the DPP reasonably suspects of being—
  - (a) a person who engages or has engaged in serious criminal activity; or
  - (b) a person who regularly associates, or has regularly associated, with persons who engage, or have engaged, in serious criminal activity; or
  - (c) a person who is, or has been, a member of an organisation that is, at the time at which the authorisation of the DPP is sought, a declared organisation; or
  - (d) a person who has acquired property or a benefit as a gift from a person of a kind referred to in paragraph (a), (b) or (c) or on the distribution of the estate of a deceased person who was a person of a kind referred to in paragraph (a), (b) or (c).
- (3) Information provided to the DPP under this section must not be disclosed to any person (except to the Attorney-General, a person conducting a review under Part 4 or a person to whom the Commissioner of Police authorises its disclosure).
- (4) A court must not determine proceedings under this Part unless satisfied that the proceedings—
  - (a) relate to investigating, or restraining, wealth of a person in relation to whom an unexplained wealth order has been made; or
  - (b) are authorised under this section.



(5) In this section—

**control order** means a control order under the *Serious and Organised Crime (Control) Act 2008*;

**declared organisation** has the same meaning as in the *Serious and Organised Crime (Control) Act 2008*;

**member**, in relation to a declared organisation, has the same meaning as in the *Serious and Organised Crime (Control) Act 2008*;

**serious criminal activity** means the commission of serious offences;

**serious offence** has the same meaning as in the *Criminal Assets Confiscation Act 2005*.

## Division 2—Investigative notices, orders and warrants

### 13—Notices to deposit holders

- (1) A police officer of or above the rank of Superintendent may give a written notice to a deposit holder requiring the deposit holder to provide to the Commissioner of Police any information or documents relevant to any of the following:
  - (a) determining whether an account is held by a specified person with the deposit holder;
  - (b) determining whether a specified person is a signatory to an account;
  - (c) if a person holds an account with the deposit holder—the current balance of the account;
  - (d) determining whether any related accounts are held with the deposit holder and the names of those who hold those accounts.
- (2) A notice must—
  - (a) state that the notice is given under this Act; and
  - (b) specify the information or documents required to be provided; and
  - (c) specify the form and manner in which the information or documents are to be provided; and
  - (d) state that the information or documents must be provided within 14 days of the day on which the notice was given; and
  - (e) if the notice specifies that information about the notice must not be disclosed—set out the effect of subsections (3) and (4); and
  - (f) set out the effect of section 33.
- (3) If a notice given to a deposit holder under this section specifies that information about the notice must not be disclosed, a person who either—
  - (a) discloses the existence or nature of the notice to another person; or
  - (b) discloses information to another person from which the other person could infer the existence or nature of the notice,

is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (4) Subsection (3) does not apply if the disclosure—
- (a) is necessary to comply with the notice; or
  - (b) is made for the purpose of obtaining legal advice or legal representation in relation to the notice; or
  - (c) is made for the purposes of, or in the course of, legal proceedings.

#### **14—Monitoring orders**

- (1) A court may, on application by the Commissioner of Police make an order (a **monitoring order**) requiring a deposit holder to report, as soon as practicable, transactions of a kind specified in the order relevant to identifying, tracing, locating or valuing a person's wealth.
- (2) An application to a court under this section must be accompanied by an affidavit that specifies how the transactions to which the application relates are relevant to identifying, tracing, locating or valuing a person's wealth.
- (3) A monitoring order must—
- (a) specify the kind of information the deposit holder is required to give; and
  - (b) specify the form and manner in which the information is to be given; and
  - (c) set out the effect of subsections (6) and (7); and
  - (d) set out the effect of section 33.
- (4) Subject to subsection (5), a monitoring order remains in force for a period of not more than 6 months specified in the order.
- (5) A court that has made a monitoring order may, on application by the Commissioner of Police or the deposit holder, extend, vary or revoke the order.
- (6) If a monitoring order is made, a person who—
- (a) discloses the existence or nature of the order to another person; or
  - (b) discloses information to another person from which the other person could infer the existence or nature of the order,

is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (7) Subsection (6) does not apply if the disclosure—
- (a) is authorised by the order; or
  - (b) is necessary to comply with the order; or
  - (c) is made for the purpose of obtaining legal advice or legal representation in relation to the order; or
  - (d) is made for the purposes of, or in the course of, legal proceedings.

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## 15—Orders for obtaining information

- (1) A court may, on application by the Commissioner of Police, make an order of 1 or both of the following kinds:
  - (a) an order requiring a person to give oral or affidavit evidence to the court on questions relevant to identifying, tracing, locating or valuing a person's wealth;
  - (b) an order requiring a person to produce before the court documents or other materials relevant to identifying, tracing, locating or valuing a person's wealth.
- (2) An application to a court under this section must be accompanied by an affidavit that specifies how the evidence, documents or materials to which the application relates are relevant to identifying, tracing, locating or valuing a person's wealth.
- (3) If a person is ordered to give evidence or to produce documents or other materials under this section, the Commissioner of Police must ensure that a copy of the order is served on the person, in accordance with any directions of the court, and that the person is advised that the order was made under this section.
- (4) A person ordered to give evidence or to produce documents or other materials may not refuse to give the evidence, or to produce documents or materials, on the ground that the evidence, or the contents of the documents or materials, would tend to incriminate the person of an offence, but evidence so given or documents or materials so produced cannot be used against that person in proceedings in which that person is charged with an offence (other than proceedings for an offence the basis of which is a charge that the person knowingly provided false or misleading information in the evidence so given or the documents or materials so produced).
- (5) If a person is ordered to give evidence or to produce documents or other materials under this section, the court may order the Crown to pay the person's legal costs in connection with complying with that order (which may be costs as between solicitor and client) or such part of those costs as is determined by the court.

## 16—Warrants

- (1) A court may, on application by the Commissioner of Police, issue a warrant authorising—
  - (a) the seizure of a document or article relevant to identifying, tracing, locating or valuing a person's wealth;
  - (b) the search of a particular person, or particular premises, and the seizure of documents and articles of a kind referred to in paragraph (a) found in the course of the search.
- (2) Subject to this section, an application to a court under this section must be accompanied by an affidavit that specifies—
  - (a) in the case of a warrant referred to in subsection (1)(a)—how the documents and articles to which the application relates are relevant to identifying, tracing, locating or valuing a person's wealth; or

- (b) in the case of a warrant referred to in subsection (1)(b)—why it is believed that the person or premises to which the application relates might have or contain documents or articles relevant to identifying, tracing, locating or valuing a person's wealth.
- (3) An application for a warrant may be made to a judicial officer of a court by telephone if, in the opinion of the applicant, a warrant is urgently required and there is not enough time to make the application personally.
- (4) If an application for a warrant is made by telephone—
  - (a) the applicant must inform the judicial officer that he or she is acting on behalf of the Commissioner of Police, and the judicial officer, on receiving that information, is entitled to assume, without further inquiry, that the applicant is so acting; and
  - (b) the applicant must inform the judicial officer—
    - (i) in the case of a warrant referred to in subsection (1)(a)—how the documents and articles to which the application relates are relevant to identifying, tracing, locating or valuing a person's wealth; or
    - (ii) in the case of a warrant referred to in subsection (1)(b)—why it is believed that the person or premises to which the application relates might have or contain documents or articles relevant to identifying, tracing, locating or valuing a person's wealth; and
  - (c) if it appears to the judicial officer from the information given by the applicant that there are proper grounds to issue a warrant, the judicial officer must inform the applicant of the facts that justify, in the judicial officer's opinion, the issue of the warrant, and must not proceed to issue the warrant unless the applicant undertakes to make an affidavit verifying those facts; and
  - (d) if the applicant gives such an undertaking, the judicial officer may then make out and sign a warrant, noting on the warrant the facts that justify, in the opinion of the judicial officer, the issue of the warrant; and
  - (e) the warrant is taken to have been issued, and comes into force, when signed by the judicial officer; and
  - (f) the judicial officer must inform the applicant of the terms of the warrant; and
  - (g) the applicant must fill out and sign a warrant form (the *duplicate warrant*) that—
    - (i) sets out the name of the judicial officer who issued the original and the terms of the warrant; and
    - (ii) complies with any other requirements prescribed by regulation; and
  - (h) the applicant must, as soon as practicable after the issue of the warrant, forward to the judicial officer an affidavit verifying the facts referred to in paragraph (c) and a copy of the duplicate warrant.
- (5) A judicial officer by whom a warrant is issued must file the warrant, or a copy of the warrant, and the affidavit verifying the facts referred to in subsection (4)(c), in the relevant court.

## 17—Powers conferred by warrant

- (1) A warrant authorises any police officer, with assistants the officer considers necessary—
  - (a) to seize documents and other articles relevant to identifying, tracing, locating or valuing a person's wealth referred to in the warrant;
  - (b) if the warrant authorises the search of a person—to search that person and seize anything suspected on reasonable grounds to be a document or other article relevant to identifying, tracing, locating or valuing a person's wealth;
  - (c) if the warrant authorises the search of premises—to enter and search the premises and anything in the premises and seize anything suspected on reasonable grounds to be a document or other article relevant to identifying, tracing, locating or valuing a person's wealth.
- (2) A warrant must not be executed between the hours of 7 o'clock in the evening and 7 o'clock in the following morning unless the judicial officer by whom the warrant is issued expressly authorises its execution between those hours.
- (3) A police officer, or a person assisting a police officer, may use such force as is reasonably necessary for the execution of the warrant.
- (4) A police officer who executes a warrant—
  - (a) must prepare a notice in the prescribed form containing—
    - (i) the officer's name and rank; and
    - (ii) the name of the judicial officer who issued the warrant and the date and time of its issue; and
    - (iii) a description of anything seized under the warrant; and
  - (b) must, as soon as practicable after execution of the warrant—
    - (i) in the case of a warrant authorising search of a person—give the notice to the person;
    - (ii) in any other case—give the notice to the occupier of the premises or leave it in a prominent position on those premises.
- (5) A warrant, if not executed at the expiration of 1 month from the date of its issue, then expires.

## 18—Exercise of jurisdiction

The jurisdiction of a court under this Division may be exercised by a judicial officer sitting in chambers.

## Division 3—Enforcement powers

### 19—Enforcement of unexplained wealth orders

- (1) If an amount payable under an unexplained wealth order remains unpaid 21 days after the making of the order, the order may be enforced under the *Enforcement of Judgments Act 1991*.

- (2) If—
- (a) a person is subject to an unexplained wealth order; and
  - (b) the Commissioner of Police applies to a court for an order under this subsection; and
  - (c) the court is satisfied that particular property is subject to the effective control of the person,
- the court may make an order declaring that the whole, or a specified part, of that property is to be taken to be property of the person for the purposes of the *Enforcement of Judgments Act 1991*.
- (3) The Commissioner of Police must, on applying for an order under subsection (2) relating to particular property, give written notice of the application to—
- (a) the person who is subject to the unexplained wealth order; and
  - (b) any person whom the Commissioner of Police has reason to believe may have an interest in the property; and
  - (c) any other persons that should, in the opinion of the court, be given notice of the application.
- (4) The person who is subject to the unexplained wealth order, and any person who claims an interest in the property, may appear and adduce evidence at the hearing of the application.

## **20—Restraining orders**

- (1) A court may, on application by the Commissioner of Police, make an order (a *restraining order*) preventing—
- (a) the disposal of specified property; or
  - (b) specified kinds of transactions involving safe custody facilities,
- except in the manner and circumstances, if any, specified in the order.
- (2) A court may only make a restraining order if satisfied that the order is reasonably necessary to ensure payment of an amount that is, or may become, payable under an unexplained wealth order (and the application for the order must be accompanied by an affidavit setting out matters that would justify such a finding).
- (3) A restraining order may be subject to such conditions as the court thinks fit.
- (4) In determining whether or not to make a restraining order, or the terms of a restraining order, the court must have regard to any serious hardship that may be caused to any person as a result of the order.

## **21—Refusal to make an order for failure to give undertaking**

- (1) A court may refuse to make a restraining order if the Crown refuses or fails to give the court an appropriate undertaking with respect to the payment of any costs that may be awarded against the Crown in accordance with section 44.
- (2) The Commissioner of Police may give such an undertaking on behalf of the Crown.

**22—Form of restraining order**

- (1) A restraining order must—
  - (a) set out the terms of the order; and
  - (b) subject to subsection (2)—include a statement of the court's reasons for issuing the order; and
  - (c) if the order was made on an application made without notice to any person—set out an explanation of the right of objection under section 24.
- (2) A statement of the court's reasons for issuing the order must not contain information that must not be disclosed in accordance with section 6.
- (3) A copy of the affidavit that accompanied the application for the order must be attached to the restraining order unless disclosure of information included in the affidavit would be in breach of section 6.
- (4) If disclosure of information included in the affidavit would be in breach of section 6, an edited copy of the affidavit, from which the information that cannot be disclosed has been removed or erased, may be attached to the restraining order.

**23—Notice of restraining order**

- (1) If a court makes a restraining order prohibiting the disposal of property, the Commissioner of Police should give written notice of the order (including a copy of the order) to—
  - (a) the person who is the owner of the property; and
  - (b) any person who has an interest in the property; and
  - (c) any other persons that should, in the opinion of the court, be given notice of the order.
- (2) If a court makes a restraining order prohibiting transactions, the Commissioner of Police should give written notice of the order (including a copy of the order) to—
  - (a) the relevant deposit holder; and
  - (b) any person who, but for the prohibition in the restraining order, would have had a legal entitlement to enter into the transaction; and
  - (c) any other persons that should, in the opinion of the court, be given notice of the order.
- (3) For the purposes of this section, written notice of an order will be taken to have been given to a deposit holder or a corporation if it is given to an executive officer of the deposit holder or corporation (as the case requires).

**24—Right of objection**

- (1) If a restraining order is made on an application made without notice to any person, a person who has been, or should have been, given notice of the order under section 23 may lodge a notice of objection with the court that made the order within 14 days after becoming aware of the making of the order (or such longer period as the court may allow).
- (2) The grounds of the objection must be stated fully and in detail in the notice of objection.

- (3) A copy of the notice of objection must be served by the objector on the Commissioner of Police by registered post at least 7 days before the day appointed for hearing of the notice.
- (4) The court must, when determining a notice of objection, consider whether, in the light of the evidence presented by both the Commissioner of Police and the objector, sufficient grounds existed for the making of the restraining order.
- (5) The court may, on hearing a notice of objection—
  - (a) confirm, vary or revoke the restraining order; and
  - (b) make any other orders of a kind that could have been made by the court on the making of the restraining order.

## **25—Variation or revocation of restraining order**

- (1) A court may vary or revoke a restraining order made by the court on application—
  - (a) by the Commissioner of Police; or
  - (b) by a person who was, or should have been, given notice of the order under section 23.
- (2) An application for variation or revocation of a restraining order may only be made by a person referred to in subsection (1)(b) with the permission of the court.
- (3) The court must, before varying or revoking a restraining order under this section, allow all parties a reasonable opportunity to be heard on the matter.
- (4) If an application for variation or revocation of a restraining order is made in order to allow the payment of legal costs of a person, the court may only vary or revoke the order if satisfied that the person has no other source of funds (within or outside the State) to which he or she could reasonably have recourse for the legal costs.

## **26—Appeals to Supreme Court**

- (1) The Commissioner of Police or a person who has been, or should have been, given notice of an order under section 23 may appeal to the Supreme Court against a decision of a court under this Division.
- (2) An appeal lies as of right on a question of law and with permission on a question of fact.
- (3) An appeal must be commenced within the time, and in accordance with the procedure, prescribed by rules of the Supreme Court.
- (4) The commencement of an appeal under this section does not affect the operation of the restraining order to which the appeal relates.
- (5) On an appeal, the Supreme Court may confirm, vary or reverse the decision appealed against.

## **27—Cessation of restraining order**

- (1) A restraining order, of a kind referred to in section 20(1)(a), relating to property will be taken to have been discharged—
  - (a) in a case where no unexplained wealth order had been made when the restraining order was made—if 1 or more of the following occurs:



- (i) no application is made, within 21 days after the making of the restraining order, for an unexplained wealth order against an owner of the property, or a person who effectively controls the property;
    - (ii) where application is made, within 21 days after the making of the restraining order, for an unexplained wealth order against an owner of the property, or a person who effectively controls the property—that application is withdrawn;
    - (iii) the District Court refuses an application to make an unexplained wealth order against an owner of the property, or a person who effectively controls the property; or
  - (b) in any other case—if 1 or more of the following occurs:
    - (i) the unexplained wealth order is satisfied;
    - (ii) the property is sold or disposed of to satisfy the unexplained wealth order;
    - (iii) the unexplained wealth order is revoked, discharged or otherwise ceases to have effect.
- (2) A restraining order, of a kind referred to in section 20(1)(b), relating to transactions will be taken to have been discharged—
- (a) in a case where no unexplained wealth order had been made when the restraining order was made—if 1 or more of the following occurs:
    - (i) no application is made, within 21 days after the making of the restraining order, for an unexplained wealth order against any person who has the legal authority to engage in the transactions;
    - (ii) where application is made, within 21 days after the making of the restraining order, for an unexplained wealth order against a person who has the legal authority to engage in the transactions—that application is withdrawn;
    - (iii) the District Court refuses an application to make an unexplained wealth order against a person who has the legal authority to engage in the transactions; or
  - (b) in any other case—if 1 or more of the following occurs:
    - (i) the unexplained wealth order is satisfied;
    - (ii) the unexplained wealth order is revoked, discharged or otherwise ceases to have effect.

## **28—Contravention of restraining order**

- (1) A person is guilty of an offence if the person, knowing of the existence of a restraining order—
- (a) deals with or permits a dealing with property that is subject to the order; or
  - (b) engages in, facilitates or permits a transaction that is subject to the order, contrary to the terms of the order.

Maximum penalty: \$20 000 or imprisonment for 4 years.

- (2) A person is guilty of an offence if—
- (a) the person deals with or permits a dealing with property, or engages in, facilitates or permits a transaction, subject to a restraining order; and
  - (b) by so doing, contravenes the order (whether or not the person knows or is reckless as to that fact); and
  - (c) the person was given notice of the order under section 23.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (3) A dealing with property or a transaction contrary to this section is void against anyone except a person who acquires an interest in property in good faith for value and without notice of the terms of the order.
- (4) This section does not limit the jurisdiction of the Court to deal with a contravention of a restraining order as a contempt of court.

## **Division 4—General provisions relating to investigative and enforcement powers**

### **29—Representation of Commissioner of Police**

In proceedings under this Part, the Commissioner of Police may be represented—

- (a) by a police officer; or
- (b) by counsel.

### **30—Ex parte proceedings**

A court may make an order under this Part on an application made without notice to any person.

### **31—Immunity from liability**

No liability attaches to a person in relation to any action taken by the person under a notice or order under this Part or in the mistaken belief that action was required under a notice or order under this Part.

### **32—Making false or misleading statements**

A person who knowingly or recklessly makes a false or misleading statement (whether orally, in a document or in any other way) in, or in connection with, a notice or order under this Part is guilty of an offence.

Maximum penalty: \$5 000 or imprisonment for 1 year.

### **33—Failing to comply with notice or order**

A person who refuses or fails to comply with a notice or order under this Part is guilty of an offence.

Maximum penalty: \$5 000 or imprisonment for 1 year.

## Part 4—Reviews and expiry of Act

### 34—Annual review and report as to exercise of powers

- (1) The Attorney-General must, before 1 July in each year (other than the calendar year in which this section comes into operation), appoint a retired judicial officer to conduct a review to determine whether powers under this Act were exercised in an appropriate manner during the period of 12 months preceding that 1 July.
- (2) The Attorney-General, the DPP, the Crown Solicitor and the Commissioner of Police must ensure that a person appointed to conduct a review is provided with such information as he or she may require for the purpose of conducting the review.
- (3) A person conducting a review must maintain the confidentiality of information provided to the person that is classified by the Commissioner of Police as criminal intelligence.
- (4) A report on a review must be presented to the Attorney-General on or before 30 September in each year.
- (5) The Attorney-General must, within 12 sitting days after receipt of a report under this section, cause copies of the report to be laid before each House of Parliament.
- (6) In this section—

*judicial officer* means a person appointed as a judge of the Supreme Court or the District Court or a person appointed as judge of another State or Territory or of the Commonwealth.

### 35—Review of operation of Act

- (1) The Attorney-General must, as soon as practicable after the fourth anniversary of the commencement of this section, conduct a review of the operation and effectiveness of this Act.
- (2) The Attorney-General, or any person conducting the review on behalf of the Attorney-General, must maintain the confidentiality of information provided to the Attorney-General or other person that is classified by the Commissioner of Police as criminal intelligence.
- (3) The Attorney-General must prepare a report based on the review and must, within 12 sitting days after the report is prepared, cause copies of the report to be laid before each House of Parliament.

### 36—Expiry of Act

This Act will expire 10 years after the date on which this section comes into operation.

### 37—Authorisations by DPP

- (1) An authorisation given by the DPP for the purposes of section 9 or section 12 lapses 3 years after the date on which it was given.
- (2) In any proceedings—
  - (a) a certificate of the DPP certifying that the exercise of powers or functions specified in the certificate has been authorised in accordance with section 9 or section 12 is conclusive evidence of the matters so certified; and

- (b) an apparently genuine document purporting to be a certificate of the DPP under this subsection is to be accepted in any proceedings as such a certificate in the absence of proof to the contrary.
- (3) The DPP may not delegate any powers or functions of the DPP under section 9 or section 12.

## **Part 5—Miscellaneous**

### **38—Manner of giving notices**

A notice, order or other document required or authorised by this Act to be given to or served on a person may be given or served—

- (a) by delivering it personally to the person or an agent of the person; or
- (b) by leaving it for the person at the person's place of residence or business with someone apparently over the age of 16 years; or
- (c) by posting it to the person or an agent of the person at the person's or agent's last known place of residence or business; or
- (d) in any other manner prescribed by regulation.

### **39—Immunity from liability**

Except as specifically provided in this Act, no civil or criminal liability attaches to—

- (a) the Attorney-General, the DPP, the Crown Solicitor, the Commissioner of Police or any other person exercising powers and functions under this Act; or
- (b) the Crown,

in respect of an act or omission in good faith in the exercise or discharge, or purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act.

### **40—Protection from proceedings etc**

- (1) No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—
  - (a) a decision or determination, or purported decision or determination, of the DPP or the Crown Solicitor under this Act; or
  - (b) procedures adopted by the DPP or the Crown Solicitor under this Act or purportedly adopted by the DPP or the Crown Solicitor under this Act; or
  - (c) an act, omission, matter or thing incidental or relating to the operation of this section.
- (2) Neither the DPP nor the Crown Solicitor are required to provide procedural fairness in exercising powers or performing functions under this Act.

### **41—Proceedings under Act are civil proceedings**

Except in relation to an offence under this Act—

- (a) proceedings under this Act are civil proceedings; and

- (b) any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities; and
- (c) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and
- (d) the rules of evidence applicable in civil proceedings apply to proceedings under this Act.

#### **42—Ancillary orders**

- (1) A court may, when making an order under this Act or at any later time, make any ancillary orders that the court considers appropriate.
- (2) Without limiting subsection (1), the court may make an ancillary order requiring that information about an order not be disclosed to a particular person or class of persons.

#### **43—Consent orders**

A court may make an order in proceedings under this Act with the consent of the parties to the proceedings (and such an order may be made without consideration of the matters that the court would otherwise be obliged to consider in the proceedings).

#### **44—Costs**

A court may, if—

- (a) a person brings, or appears at, civil proceedings under this Act; and
- (b) the person is successful in those proceedings or in any aspect of those proceedings,

order the Crown to pay the person legal costs in connection with the proceedings (which may be costs as between solicitor and client) or such part of those costs as is determined by the court.

#### **45—Credits to Victims of Crime Fund**

Money recovered by the Crown under an unexplained wealth order must be applied, in accordance with guidelines issued by the Treasurer, towards the costs of administering this Act and the *Serious and Organised Crime (Control) Act 2008* and the balance must be paid into the Victims of Crime Fund maintained under the *Victims of Crime Act 2001*.

#### **46—Regulations**

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) The regulations may—
  - (a) be of general application or vary in their application according to prescribed factors;
  - (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Attorney-General, the DPP, the Crown Solicitor or the Commissioner of Police.

## Schedule 1—Related amendments

### Part 1—Preliminary

#### 1—Amendment provisions

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### Part 2—Amendment of *Criminal Assets Confiscation Act 2005*

#### 2—Insertion of section 8A

After section 8 insert:

##### **8A—Certain property and benefits not subject to proceedings under Act**

- (1) Despite any provision of this Act, if an unexplained wealth order has been made against a person, any property or benefits that were taken into account as wealth of the person that was not lawfully acquired for the purposes of that order may not be made the subject of proceedings under this Act for a restraining order or a confiscation order (provided that the person is the suspect for the purposes of those proceedings).
- (2) In this section—  
*unexplained wealth order* means an unexplained wealth order under the *Serious and Organised Crime (Unexplained Wealth) Act 2009* or a corresponding unexplained wealth order within the meaning of that Act.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Expiry of Act

The *Serious and Organised Crime (Unexplained Wealth) Act 2009* will expire on 29.8.2020: see s 36.

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2009	60	<i>Serious and Organised Crime (Unexplained Wealth) Act 2009</i>	26.11.2009	29.8.2010 ( <i>Gazette</i> 5.8.2010 p3978)
2013	32	<i>Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013</i>	1.8.2013	Sch 1 (cl 1)—11.8.2013 ( <i>Gazette</i> 8.8.2013 p3468)