No 27 of 2021 assented to 1.7.2021

South Australia

Unexplained Wealth (Commonwealth Powers) Act 2021

An Act to adopt certain laws of the Commonwealth relating to unexplained wealth and information gathering, and to refer certain matters relating to unexplained wealth and information gathering to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the *Constitution of the Commonwealth*, and to make related amendments to the *Criminal Assets Confiscation Act 2005* and the *Serious and Organised Crime (Unexplained Wealth) Act 2009*.

Contents

1 Short title
2 Commencement
3 Interpretation
4 Adoption of National Unexplained Wealth Laws
5 Reference of matters
6 Amendment of Commonwealth law
7 Rollback of particular express amendments
8 Relevant offences
9 Termination of adoption and amendment reference
10 Termination in particular circumstances
11 Effect of termination of amendment reference before termination of adoption 1
12 Regulations

Schedule 1—Related amendments

Part 1—Preliminary

1 Amendment provisions

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

2 Amendment of section 209—Credits to Victims of Crime Fund
3 Amendment of section 209A—Credits to Justice Rehabilitation Fund
4 Insertion of Part 7 Division 3A

Division 3A—National cooperative scheme on unexplained wealth

209B Interpretation
209C Application of Division—National Cooperative Scheme
209D Notification of shareable proceeds
209E Contribution by foreign jurisdiction
209F Net amount
209G CJC subcommittee
209H Payment to contributing non-participating State
209I Payment to contributing CJC members
209J Payment period

209K Payment to Victims of Crime Fund or Justice Rehabilitation Fund

Part 3—Amendment of *Serious and Organised Crime (Unexplained Wealth) Act 2009*

5 Amendment of section 45—Credits to Victims of Crime Fund

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Unexplained Wealth (Commonwealth Powers) Act 2021*.

2—Commencement

(1) This Act comes into operation on a day to be fixed by proclamation.

(2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to this Act or to a provision of this Act.

3—Interpretation

In this Act, unless the contrary intention appears—

adoption 1 means the adoption under section 4(1)(a);

adoption 2 means the adoption under section 4(1)(b);

amendment reference means the reference under section 5(1);

Commonwealth Proceeds of Crime Act means the *Proceeds of Crime Act 2002* of the Commonwealth (as in force from time to time);

express amendment of the Commonwealth Proceeds of Crime Act, means the direct amendment of the text of that Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of the Commonwealth Proceeds of Crime Act;

information gathering means the production or provision of information for the purposes of, or relevant to, the taking of action, or the institution of proceedings, under a law of the State;

lawfully acquired includes, but is not limited to, its meaning in the Commonwealth Proceeds of Crime Act as in force immediately before the enactment of the *Unexplained Wealth (Commonwealth Powers) Act 2018* of New South Wales;

National Unexplained Wealth Laws 1 of the Commonwealth, means the ***post-amended version 1 of this Act*** within the meaning of section 14C of the Commonwealth Proceeds of Crime Act as that section is in force immediately before this Act is assented to by the Governor;

National Unexplained Wealth Laws 2 of the Commonwealth, means the ***post-amended version 2 of this Act*** within the meaning of section 14C of the Commonwealth Proceeds of Crime Act as that section is in force immediately before this Act is assented to by the Governor;

property includes, but is not limited to, its meaning in the Commonwealth Proceeds of Crime Act as in force immediately before the enactment of the *Unexplained Wealth (Commonwealth Powers) Act 2018* of New South Wales;

relevant offence means an offence of a kind specified in section 8;

unexplained wealth means property or wealth that might not have been lawfully acquired;

unexplained wealth provisions means—

(a) section 20A and Part 2-6 of the Commonwealth Proceeds of Crime Act; and

(b) the other provisions of that Act in so far as they relate to section 20A and Part 2-6 of that Act, and

(c) instruments made under that Act for the purposes of a provision referred to in paragraph (a) or (b);

wealth includes, but is not limited to, its meaning in the Commonwealth Proceeds of Crime Act as in force immediately before the enactment of the *Unexplained Wealth (Commonwealth Powers) Act 2018* of New South Wales.

4—Adoption of National Unexplained Wealth Laws

(1) The following laws of the Commonwealth are adopted within the meaning of section 51(xxxvii) of the *Constitution of the Commonwealth*:

(a) National Unexplained Wealth Laws 1;

(b) National Unexplained Wealth Laws 2.

(2) The adoption of a law under subsection (1) has effect for a period—

(a) beginning when this section commences; and

(b) ending at the end of the day fixed under section 9 or 10 as the day on which the adoption is to terminate,

but no longer.

(3) The operation of a paragraph in subsection (1) is not affected by any other paragraph contained in that subsection or in section 5(1).

5—Reference of matters

(1) The following matters are referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to those matters by making express amendments of the Commonwealth Proceeds of Crime Act:

(a) matters relating to unexplained wealth (not including a matter excluded by subsection (2));

(b) matters relating to information gathering.

(2) The following matters are excluded for the purposes of subsection (1):

(a) the matter of including a provision in section 20A or Part 2-6 of the Commonwealth Proceeds of Crime Act that requires a person to pay an amount otherwise than by order of a court;

(b) the matter of including a provision in section 20A or Part 2-6 of the Commonwealth Proceeds of Crime Act that requires or permits property to be restrained, forfeited or seized otherwise than by order of a court.

(3) The reference of a matter under subsection (1) has effect only—

(a) if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference for the purposes of section 51(xxxvii) of the *Constitution of the Commonwealth*); and

(b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.

(4) Despite any other provision of this section, a reference under subsection (1) has effect for a period—

(a) beginning when this section commences; and

(b) ending at the beginning of the day fixed under this Act as the day on which the reference is to terminate,

but no longer.

(5) The operation of a paragraph in subsection (1) is not affected by any paragraph contained in section 4(1).

6—Amendment of Commonwealth law

For the avoidance of doubt, it is the intention of the Parliament of the State that—

(a) the Commonwealth Proceeds of Crime Act may be expressly amended, or have its operation otherwise affected, at any time by provisions of Commonwealth Acts the operation of which is based on legislative powers that the Parliament of the Commonwealth has apart from a reference of any matters for the purposes of section 51(xxxvii) of the *Constitution of the Commonwealth*; and

(b) the Commonwealth Proceeds of Crime Act may have its operation affected, otherwise than by express amendment, at any time by provisions of instruments made or issued under that Act.

7—Rollback of particular express amendments

(1) For the purposes of section 14G of the Commonwealth Proceeds of Crime Act, the Governor may, by proclamation, declare that an express amendment of that Act (other than Subdivision B of Division 2 of Part 1-4) is not to apply to proceedings covered by subsection (3), (4) or (5) of that section.

Note—

To be effective for the purposes of section 14G of the Commonwealth Proceeds of Crime Act, the proclamation must come into force in the period of 6 months beginning on the day the amendment is enacted. On the coming into force of the proclamation, that Act applies to the proceedings as if the amendment had not been enacted.

(2) For the purposes of section 14J of the Commonwealth Proceeds of Crime Act, the Governor may, by proclamation, declare that an express amendment of that Act (other than Subdivision B of Division 2 of Part 1-4) is not to apply to:

(a) an application covered by subsection (3) of that section; or

(b) an order made as a result of an application referred to in paragraph (a); or

(c) a notice covered by subsection (4) of that section.

Note—

To be effective for the purposes of section 14J of the Commonwealth Proceeds of Crime Act, the proclamation must come into force in the period of 6 months beginning on the day the express amendment is enacted. On the coming into force of the proclamation, that Act applies to the application, order and notice as if the amendment had not been enacted.

8—Relevant offences

For the purpose of the Commonwealth Proceeds of Crime Act, in so far as it relates to an offence of a kind that is specified by this Act, the following offences are specified:

(a) an indictable offence against a law of the State;

(b) an offence against—

(i) section 68(3) of the *Criminal Law Consolidation Act 1935*; or

(ii) section 52, 53, 72 or 74 of the *Fisheries Management Act 2007*; or

(iii) section 99 of the *Liquor Licensing Act 1997*; or

(iv) a provision of the *Lottery and Gaming Act 1936*; or

(v) section 47, 48, 48A, 51 or 60 of the *National Parks and Wildlife Act 1972*; or

(vi) section 28(1)(a) or 41 of the *Summary Offences Act 1953*.

9—Termination of adoption and amendment reference

(1) The Governor may, at any time, by proclamation, fix a day as the day on which—

(a) adoption 1 and the amendment reference are to terminate; or

(b) adoption 2 is to terminate; or

(c) the amendment reference is to terminate; or

(d) adoption 1 is to terminate (if the amendment reference has been previously terminated).

(2) The Governor may, by proclamation, revoke a proclamation published under subsection (1).

(3) A revoking proclamation under subsection (2) has effect only if published before the day fixed under subsection (1).

(4) If a revoking proclamation has effect, the revoked proclamation is taken, for the purposes of sections 4 and 5, never to have been published but the revocation does not prevent publication of a further proclamation under subsection (1).

10—Termination in particular circumstances

(1) The Governor may, by proclamation, fix a day as the day on which adoption 1 and the amendment reference are to terminate if the Commonwealth Parliament enacts an express amendment of the Commonwealth Proceeds of Crime Act that, in the opinion of the Governor, is inconsistent with the fundamental attributes of the unexplained wealth provisions.

(2) Without limiting subsection (1), an express amendment of the Commonwealth Proceeds of Crime Act that is inconsistent with the fundamental attributes of the unexplained wealth provisions includes an amendment to section 20A or Part 2-6 of that Act that has the effect of allowing a restraining order, payment order, seizure order or forfeiture order to be made under those provisions otherwise than by order of a court.

(3) For the purposes of section 14F of the Commonwealth Proceeds of Crime Act, the Governor may, by proclamation, fix a day as the day on which both adoption 1 and the amendment reference are to terminate, or the amendment reference only is to terminate, if the Commonwealth Parliament enacts an express amendment of section 14G or 14J (about rollback), or Division 2 of Part 4-3 (about sharing proceeds), of the Commonwealth Proceeds of Crime Act.

(4) The Governor may, by proclamation, revoke a proclamation published under subsection (1) or (3).

(5) A revoking proclamation under subsection (4) has effect only if published before the day fixed under subsection (1) or (3).

(6) The revocation of a proclamation published under subsection (1) or (3) does not prevent publication of a further proclamation under that subsection.

(7) A proclamation under subsection (1) or (3) has effect despite any earlier proclamation published under section 9(1).

11—Effect of termination of amendment reference before termination of adoption 1

(1) If the amendment reference is terminated but adoption 1 is not terminated, the termination of the amendment reference does not affect—

(a) laws that were made under the amendment reference (but not repealed) before that termination (whether or not they have come into operation before that termination); or

(b) the continued operation in this State of the Commonwealth Proceeds of Crime Act as in operation immediately before that termination or as subsequently amended or affected by—

(i) laws referred to in paragraph (a) that come into operation after that termination; or

(ii) provisions referred to in section 6.

(2) Accordingly, the amendment reference continues to have effect for the purposes of subsection (1) unless adoption 1 is terminated.

(3) Subsection (1) does not apply to or in relation to an amendment of the Commonwealth Proceeds of Crime Act that is excluded from the operation of this section by the proclamation that terminates the amendment reference.

(4) For the purposes of subsection (1)—

(a) the laws referred to in subsection (1)(a) include instruments under the Commonwealth Proceeds of Crime Act; and

(b) the reference in subsection (1)(b) to the Commonwealth Proceeds of Crime Act as in operation immediately before the termination of the amendment reference includes that legislation as affected by instruments under that Act that have come into operation before that time.

12—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) Without limiting subsection (1), the regulations may deal with matters of a transitional, application or savings nature relating to an offence becoming, or ceasing to be, a relevant offence.

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—Amendment of section 209—Credits to Victims of Crime Fund

(1) Section 209(1)—after "Subject to" insert:

Division 3A,

(2) Section 209(4), definition of ***equitable sharing program***—after paragraph (b) insert:

but does not include the national cooperative scheme (within the meaning of section 209B(1));

3—Amendment of section 209A—Credits to Justice Rehabilitation Fund

Section 209A(4)—after "Subject to" insert:

Division 3A and

4—Insertion of Part 7 Division 3A

Part 7—after Division 3 insert:

Division 3A—National cooperative scheme on unexplained wealth

209B—Interpretation

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

CJC subcommittee—see section 209G;

Cooperating Jurisdiction Committee means the Cooperating Jurisdiction Committee established under the NCSUW agreement;

cooperating State has the same meaning as in section 14F of the *Proceeds of Crime Act 2002* of the Commonwealth (as in force from time to time);

corresponding proceeds has the same meaning as in the NCSUW agreement;

decision-making period means—

(a) the period specified in the NCSUW agreement as being the decision-making period for the purposes of the national cooperative scheme; or

(b) if paragraph (a) does not apply—the period prescribed by the regulations as being the decision-making period for the purposes of the national cooperative scheme;

foreign jurisdiction means a jurisdiction outside Australia;

forfeiture proceeds means proceeds arising from a confiscation, forfeiture or payment under a relevant law that are paid or payable to this State;

national cooperative scheme means the National Cooperative Scheme on Unexplained Wealth established by the NCSUW agreement;

NSC threshold has the same meaning as in the NCSUW agreement;

NCSUW agreement means the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth (as in force from time to time);

net amount—see section 209F(2);

non-participating State has the same meaning as in section 338 of the *Proceeds of Crime Act 2002* of the Commonwealth (as in force from time to time);

participating State has the same meaning as in section 14C of the *Proceeds of Crime Act 2002* of the Commonwealth (as in force from time to time);

relevant law—each of the following laws is a relevant law:

(a) section 47 (forfeiture orders);

(b) section 56A (deemed forfeiture orders);

(c) section 72(1);

(d) section 73(f);

(e) section 74;

(f) section 81(1)(c);

(g) section 82(f);

(h) section 95 (pecuniary penalty orders);

(i) section 111 (literary proceeds orders);

(j) section 206;

(k) section 9 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (unexplained wealth orders);

(l) a prescribed law;

shareable—forfeiture proceeds are ***shareable*** if—

(a) the proceeds are corresponding proceeds of this State; and

(b) the amount of the proceeds exceeds the NCS threshold (whether or not the full amount is realised).

(2) The NCSUW agreement and the regulations may specify that the ***decision-making period*** starts or ends at a time before an amount is paid to the Victims of Crime Fund.

(3) Decisions may be made under this Division in relation to an amount before the amount is paid to the Victims of Crime Fund or becomes the net amount.

209C—Application of Division—National Cooperative Scheme

This Division—

(a) applies in respect of forfeiture proceeds of the State that are shareable under the national cooperative scheme; and

(b) sets out the process for sharing with the Commonwealth or another State or Territory any forfeiture proceeds of the State that are shareable.

209D—Notification of shareable proceeds

(1) The Minister must notify the Cooperating Jurisdiction Committee by notice in writing within 60 days of a final order, negotiated settlement or other forfeiture under a relevant law relating to forfeiture proceeds that are shareable under the national cooperative scheme.

(2) A notification under subsection (1) must include sufficient information to enable a member jurisdiction of the Cooperating Jurisdiction Committee to determine if it has made a contribution for the purposes of the national cooperative scheme (within the meaning of the NCSUW agreement) in relation to the forfeiture proceeds the subject of the notification.

209E—Contribution by foreign jurisdiction

If the Minister decides that—

(a) a foreign jurisdiction has made a contribution in relation to the recovery of shareable forfeiture proceeds; and

(b) it is appropriate that a specified amount of the proceeds be payable to the foreign jurisdiction,

then the specified amount is payable to the foreign jurisdiction.

209F—Net amount

(1) Forfeiture proceeds that are shareable with the Commonwealth or another State or Territory under the national cooperative scheme are to be reduced by any amount that is payable under—

(a) an order of a court under this Act; and

(b) section 209E.

(2) The amount left after any reduction is made under subsection (1) is the ***net amount***.

209G—CJC subcommittee

(1) The Cooperating Jurisdiction Committee must establish a subcommittee (the ***CJC subcommittee***) for the purposes of deciding matters under this Division in relation to the net amount.

(2) The CJC subcommittee must consist of the following members of the Cooperating Jurisdiction Committee:

(a) this State; and

(b) any other member of the Cooperating Jurisdiction Committee that is found, by unanimous decision of the Cooperating Jurisdiction Committee, to have made a contribution (within the meaning of the NCSUW agreement) in relation to the recovery of the forfeiture proceeds comprising the net amount.

209H—Payment to contributing non-participating State

If, in the decision-making period, the CJC subcommittee makes a unanimous decision that—

(a) a non-participating State (other than a cooperating State) made a contribution (within the meaning of the NCSUW agreement) in relation to the recovery of the forfeiture proceeds comprising the net amount; and

(b) it is appropriate that a specified proportion of the net amount be payable to that State,

then the specified proportion of the net amount is payable to that State under the national cooperative scheme.

209I—Payment to contributing CJC members

(1) Subject to subsection (2), any part of the net amount that remains after the application of section 209H is to be divided into equal proportions between this State and each of the other jurisdictions represented on the CJC subcommittee and the resulting proportion for each of those other jurisdictions is payable to the jurisdiction under the national cooperative scheme.

(2) If the CJC subcommittee makes a unanimous decision in the decision-making period that—

(a) it is inappropriate for the division referred to in subsection (1) to apply; and

(b) a specified proportion, of any part of the net amount that remains after the application of section 209H, be payable to each of the jurisdictions represented on the subcommittee (other than this State),

then the specified proportion for each of those jurisdictions, of any part of the net amount that remains after the application of section 209H, is payable to the jurisdiction under the national cooperative scheme.

209J—Payment period

If an amount is payable to the Commonwealth or another State or Territory under this section, then the Attorney-General must cause the amount to be paid to the Commonwealth or the other State or Territory in the period that is—

(a) the period specified in the NCSUW agreement as being the payment period for the purposes of the national cooperative scheme; or

(b) if paragraph (a) does not apply—the period prescribed by the regulations as being the payment period for the purposes of the national cooperative scheme.

209K—Payment to Victims of Crime Fund or Justice Rehabilitation Fund

(1) Subject to subsection (2), any amount of shareable forfeiture proceeds remaining after the application of this Division (being this State's share of the shareable forfeiture proceeds) must be paid into the Victims of Crime Fund.

(2) Shareable forfeiture proceeds of a prescribed drug offender remaining after the application of this Division (being this State's share of the shareable forfeiture proceeds of the prescribed drug offender) must be paid into the Justice Rehabilitation Fund.

(3) Any amount paid to this State by the Commonwealth, another State or a Territory under the national cooperative scheme must be paid into the Victims of Crime Fund.

Part 3—Amendment of *Serious and Organised Crime (Unexplained Wealth) Act 2009*

5—Amendment of section 45—Credits to Victims of Crime Fund

(1) Section 45—delete "Money" and substitute:

Subject to subsection (2), money

(2) Section 45—after its present contents as amended by this section (now to be designated as subsection (1)) insert:

> (2) Money recovered by the Crown under an unexplained wealth order that is shareable forfeiture proceeds within the meaning of Division 3A of Part 7 of the *Criminal Assets Confiscation Act 2005* is to be dealt with in accordance with that Division.