

Criminal Proceeds Confiscation Regulation 2023

Explanatory notes for SL 2023 No. 113

Made under the

Criminal Proceeds Confiscation Act 2002

General Outline

Short Title

Criminal Proceeds Confiscation Regulation 2023

Authorising law

Section 267 of the *Criminal Proceeds Confiscation Act 2002*

Policy objectives and the reasons for them

The *Criminal Proceeds Confiscation Regulation 2013* (2013 Regulation) is due to automatically expire under section 54 of the *Statutory Instruments Act 1992* on 1 September 2023.

The 2013 Regulation prescribes various matters to support the objects of the *Criminal Proceeds Confiscation Act 2002* (the Act) which include removing the financial gain and increasing the financial loss associated with illegal activity and ensuring orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.

There are three principal and separate civil confiscation schemes within the Act which seek to achieve its objectives:

1. the non-conviction-based scheme in Chapter 2 which is administered by the Crime and Corruption Commission (CCC) and enables proceedings to be started to confiscate property from illegal activity whether or not a person who has engaged in the relevant activity has been convicted of any offence and enables proceedings to be taken to confiscate property derived from a serious crime related activity even though the person who engaged in the relevant activity has not been identified;
2. the serious drug offender confiscation order scheme in Chapter 2A which is also administered by the CCC and enables proceedings to be started for the forfeiture of particular property of, or gifts given to someone else during a particular period by, a

- person who has been convicted of a qualifying offence for which a serious drug offence certificate has been issued; and
3. the conviction-based scheme in Chapter 3 which is administered by the Director of Public Prosecutions (DPP) and enables proceedings to be started against a person to recover property and benefits derived from, and anything used for, or in the commission of, a confiscation offence, after the person has been charged with or convicted of the offence.

Various types of orders can be made under the schemes, including for example restraining orders which prevent property from being dealt with.

Mutual recognition and cooperation between jurisdictions in Australia facilitates the effective confiscation of proceeds of crime, ensuring that wealth and assets cannot escape confiscation simply because they may be located across multiple jurisdictions within Australia. Chapter 7 of the Act deals with interstate orders and warrants and section 11 of the Act provides for the operation of particular orders made under the Act to be registered in other jurisdictions.

The 2013 Regulation prescribes various matters to support the facilitation of the civil confiscation schemes and mutual recognition under the Act.

Achievement of policy objectives

The *Criminal Proceeds Confiscation Regulation 2023* (the Regulation) will repeal and replace the 2013 Regulation in substantially the same form and thereby continues to support the Act's objects.

The Regulation achieves its objectives by continuing to prescribe:

- offences for the purpose of the meaning of a 'serious criminal offence' in section 17(1) of the Act;
- offences for the purpose of the meaning of a 'confiscation offence' in section 99(e) of the Act;
- providing for when a Magistrates Court may make a forfeiture order for real property; and
- prescribing 'corresponding laws'.

The Regulation will also update the 2013 Regulation to include additional orders from other Australian jurisdictions that Queensland recognises as corresponding interstate proceeds of crime orders. Additional forfeiture orders and drug trafficker restraining orders in New South Wales, unexplained wealth restraining orders and unexplained wealth orders in the Australian Capital Territory and unexplained wealth orders in South Australia are prescribed in the relevant schedules as corresponding interstate orders.

While provisions in each jurisdiction are not uniform and use different terminology, the equivalent interstate orders prescribed are broadly similar in nature. For example, in Queensland under the Act, unexplained wealth orders are separate orders to pecuniary penalty orders, but similar orders in other jurisdictions are recognised as interstate pecuniary penalty orders or interstate restraining orders according to how the order operates to achieve its purpose.

Additionally, the Regulation is amended to remove references to repealed Western Australian legislation that are no longer required and to specifically prescribe sections in

Part 8 of the Victorian *Confiscation Act 1997* (relating to pecuniary penalty orders and a related forfeiture order) consistent with the approach to similar interstate provisions.

Further, some minor and technical amendments are made to reflect current legislative drafting practice.

The Regulation will commence on 1 September 2023.

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objectives of the authorising law.

Inconsistency with policy objectives of other legislation

The Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

This Regulation provides benefits by ensuring that:

- the objects of the Act are supported; and
- Queensland contributes to the process of mutual recognition of confiscation orders made across Australian jurisdictions.

No significant costs impacts are expected, and any costs associated will be met from existing resources.

Consistency with fundamental legislative principles

The Regulation potentially breaches the fundamental legislative principles (FLP) in sections 4(2)(a), 4(3)(d) and 4(3)(i) of the *Legislative Standards Act 1992* (LSA). These principles require legislation to have sufficient regard to rights and liberties of individuals by way of ensuring that legislation does not reverse the onus of proof in criminal proceedings without adequate justification or, provides for the compulsory acquisition of property only with fair compensation.

Legislation has sufficient regard to the rights and liberties of individuals

The fundamental legislative principle at section 4(2)(a) of the LSA is relevant as parties other than the respondent to the confiscation proceedings under the Act may be affected, including the respondent's dependants or a third party. The potential FLP departure is considered justified for the purpose of deterring criminal activity and removing the financial gain and increasing the financial loss associated with illegal activity.

Additionally, the strong confiscation powers in the Act are balanced by a range of appropriate safeguards designed to protect the individual rights of persons who may be subject to the scheme. For example, the requirement for notice to be given to any person who may have an interest in the relevant property or, who may be affected by an order under the Act. Any person given notice may appear at the hearing of the application. The court also has power to make an order excluding property from confiscation (including a

dependant's principal place of residence) or a hardship order requiring payment of an amount necessary to prevent hardship to any dependant of the respondent.

Does not reverse the onus of proof in criminal proceedings without adequate justification

The fundamental legislative principle at section 4(3)(d) of the LSA is raised as various provisions under the Act reverse the burden of proof, requiring the respondent, their dependants, or a third party to satisfy the court that property was lawfully acquired or, that they had no knowledge of the relevant illegal activity. Confiscation proceedings under the Act are civil in nature and are not punitive. The prescription of serious criminal offences facilitates confiscation under the non-conviction-based scheme in Chapter 2 and may subject a person to the reverse onus.

The reversal of the burden of proof, requiring the respondent to satisfy the court that property was not unlawfully acquired, is a key element of effective confiscation regimes. The reversal is appropriate as information about the lawful source of an asset is peculiarly within the knowledge of the respondent. Accordingly, it would be significantly more difficult and costly for the State to establish this information. The importance of depriving persons of illegally acquired property and deterring future criminal activity by removing the incentive to engage in criminal activity, justifies the imposition of a burden on the respondent, their dependants or a third party to prove that the property was lawfully acquired.

Provides for the compulsory acquisition of property only with fair compensation

Section 4(3)(i) of the LSA is raised as the Regulation facilitates the confiscation and compulsory acquisition of property without compensation through the prescription of serious criminal offences and confiscation offences. As forfeiture relates to property and assets obtained through illegal activity, the departure from FLPs is considered justified and necessary to further the main objective of the Act, to remove the financial gain and increase the financial loss associated with illegal activity. The Regulation will ensure those involved in criminal activity are not unjustly enriched at the expense of the Queensland community.

The addition of further interstate orders extends the Act's facilitation of compulsory acquisition of property without compensation. However, this is considered justified by the policy against unjust enrichment and because the addition of these orders furthers the main objective of the Act to remove the financial gain and increase the financial loss associated with illegal activity by ensuring orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.

Consultation

The CCC and the DPP, being responsible for the administration of the confiscation schemes under the Act, were consulted. Interstate justice agencies and key legal stakeholders, including the Queensland Law Society and Bar Association of Queensland, were also consulted on a draft of the Regulation.

Feedback (which concerned provisions relating to interstate confiscation orders) was considered and informed the making and finalisation of the Regulation.

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The Department of Justice and Attorney-General undertook and provided a sunset review of the 2013 Regulation to the Office of Best Practice Regulation (OBPR) for assessment, in line with the '*Queensland Government Guide to Better Regulation*' (Guidelines). OBPR consider that the objectives for sunset reviews under the Guidelines have been satisfied and that no further regulatory impact analysis was required.