

Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020

Explanatory notes for SL 2020 No. 165

Made under the

Criminal Proceeds Confiscation Act 2002

General Outline

Short Title

Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences)
Amendment Regulation 2020

Authorising law

Sections 17, 267 and Schedule 6 of the *Criminal Proceeds Confiscation Act 2002*

Policy objectives and the reasons for them

The Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020 (the Amendment Regulation) seeks to amend the *Criminal Proceeds Confiscation Regulation 2013* (the Regulation) to support the objects of the *Criminal Proceeds Confiscation Act 2002* (the CPCA) to:

- remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity; and
- ensure orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.

The CPCA provides for confiscation of property derived from illegal activity, whether or not a particular person is convicted of an offence because of the activity.

Chapter 3 of the CPCA deals with confiscation of property after conviction, with confiscation of property without conviction provided for in Chapter 2. Under Chapter 2 of the CPCA, a court can order forfeiture of a person's property if it finds it more probable than not that a person engaged in serious crime related activity or that the property involved is serious crime derived property. Anything done by a person that was, when it was done, a 'serious criminal offence' is a serious crime related activity. A 'serious criminal offence' is defined in section 17 of the CPCA and includes:

- (a) an indictable offence for which the maximum penalty is at least five years imprisonment; or
- (b) an offence prescribed under regulation.

Schedule 1 of the Regulation prescribes 'serious criminal offences' for the purpose of section 17 of the CPCA.

The Crime and Corruption Commission (CCC), as administrators of the non-conviction based confiscation scheme under Chapter 2 of the CPCA, have advised that it is not uncommon for persons to be charged solely under section 252 of the CPCA or section 10A of the *Drugs Misuse Act 1986* (DMA) (being offences for possessing suspected tainted property), when police locate large sums of cash. Neither of these offences are categorised as 'serious criminal offences' as they both carry maximum penalties less than five years imprisonment. Accordingly, under the current confiscation scheme a conviction will be required for tainted property offences and, for a forfeiture order to be sought at sentence; if a person is not convicted, a forfeiture order cannot be sought and the property (i.e. cash) must be returned.

Chapter 7 of the Act deals with interstate orders, which include interstate forfeiture orders, pecuniary penalty orders and restraining orders. Each of the terms 'interstate forfeiture order', 'interstate pecuniary penalty order' and 'interstate restraining order' are defined in Schedule 6 of the CPCA, as orders made under a 'corresponding law', declared under the Regulation. Accordingly, for an interstate order to be recognised under the CPCA, the relevant interstate Act must be prescribed under Schedule 3 of the Regulation as a 'corresponding law' and then the relevant order must be prescribed in either Schedule 4 (interstate forfeiture orders), 5 (interstate pecuniary penalty orders) or 6 (interstate restraining orders) of the Regulation.

Once properly filed, a relevant interstate order applies to property held in Queensland and is taken to be an order made under the CPCA. In addition, section 237 of the CPCA provides for the creation of a charge on property, subject to a filed interstate restraining order, in order to satisfy an amount payable under an interstate pecuniary penalty order.

Mutual recognition and cooperation between jurisdictions is essential to ensure nationally effective schemes of confiscating proceeds of crime. Recognition of proceeds of crime orders from other jurisdictions ensures that wealth and assets cannot escape confiscation simply because they may be located across multiple jurisdictions within Australia.

As is to be expected, a number of jurisdictions have amended their confiscations legislation, introducing new provisions and amending existing provisions. Accordingly, the Regulation needs to be updated in order to ensure that it accurately reflects all relevant interstate provisions.

Achievement of policy objectives

The purpose of the Amendment Regulation is to expand the non-conviction based forfeiture scheme, in Chapter 2 of the CPCA, to tainted property offences, in order facilitate the forfeiture of property acquired through illegal activity and, to deny profiteering from illegal activity and, reinvestment of such financial gain into further illegal activity.

To achieve this purpose, the Amendment Regulation prescribes tainted property offences at section 252 of the CPCA and section 10A of the *Drugs Misuse Act 1986* (DMA) as 'serious criminal offences' in Schedule 1 of the Regulation. This will allow property to be confiscated for tainted property offences without the need for conviction, if a court finds it more probable than not that a person engaged in serious crime related activity or, that the property involved is serious crime derived property.

By expanding the scope of the non-conviction based forfeiture scheme to tainted property offences, the Amendment Regulation increases the financial risk associated with committing offences and acts to deter criminal offending and disrupt and combat serious and organised crime, consistent with the main object of the CPCA. Further, adding tainted property offences to Schedule 1 will ensure consistency with the majority of other Australian jurisdictions that allow for the confiscation without conviction, of tainted property which is reasonably suspected of being the proceeds of crime.

The Amendment Regulation will also update orders from other Australian jurisdictions that Queensland recognises are corresponding interstate proceeds of crime orders, and will prescribe the unexplained wealth orders in proceeds of crime legislation in South Australia and Tasmania. Furthermore, it will recognise Victorian and South Australian orders which are very similar to Queensland's serious drug offender confiscation orders.

The Amendment Regulation will also make a number of minor technical amendments to Schedules 3, 4, 5 and 6 of the Regulation to accurately reflect current drafting practice.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the policy objectives of the CPCA to:

- remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity; and
- ensure orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is consistent with policy objectives of other legislation.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives.

Benefits and costs of implementation

This Amendment Regulation provides benefits by ensuring that:

- the objects of the Act are supported;
- the Act is consistent with corresponding laws in other Australian jurisdictions; and
- Queensland contributes to the process of mutual recognition of confiscation orders made across Australian jurisdictions.

There may be an increase in forfeiture proceedings, which will have financial implications for the Supreme Court, however, this impact is not expected to be significant and, any costs associated will be met from existing resources.

Consistency with fundamental legislative principles

The inclusion of tainted property offences as ‘serious criminal offences’ in Schedule 1 of the Regulation and the recognition of interstate confiscation orders engages fundamental legislative principles at 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.

The fundamental legislative principle at section 4(3)(d) of the LSA is raised as various provisions under the CPCA 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. Although confiscation proceedings under the CPCA are civil in nature they are inextricably linked with criminal proceedings.

Section 4(3)(i) of the LSA is engaged as the Amendment Regulation will provide for the confiscation of property without conviction in relation to tainted property offences and, therefore, provides for the compulsory acquisition of property (without compensation) in relation to a broader range of offences.

The departure from fundamental legislative principles is considered justified and necessary to further the main objective of the CPCA, to remove the financial gain and increase the financial loss associated with illegal activity. The Amendment Regulation will ensure those involved in criminal activity are not unjustly enriched at the expense of the Queensland community.

Through the recognition of interstate confiscation orders, the Amendment Regulation will also increase the effectiveness of the CPCA to support a nationally consistent approach to compulsory acquisition of property derived from illegal activity. The Amendment Regulation also facilitates effective enforcement of orders made by courts in other Australian jurisdictions.

The strong confiscation powers in the CPCA 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 CPCA. Any person given notice may appear at the hearing of the application. Further, the Supreme Court may only make an order if it is more probable than not that the respondent engaged in serious crime related activity or that the relevant property is derived from serious crime. Ultimately, however, the court can refuse to make an order if it is not in the public interest to do so. 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.

Confiscation proceedings are civil in nature and are not punitive. 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.

Consultation

The CCC and Office of the Director of Public Prosecutions (ODPP), being responsible for the administration of the conviction and non-conviction based schemes under the CPCA, were consulted. Consultation was also undertaken with the Queensland Police Service (QPS), the Chief Justice, the Queensland Law Society (QLS) and the Bar Association of Queensland (BAQ).

The CCC, ODPP and QPS were supportive of the Amendment Regulation. No response was received from the Chief Justice or BAQ. The QLS were supportive of the amendments to further recognise interstate proceeds of crime orders, however, raised concern with the categorisation of tainted property offences as serious criminal offences.

Although not explicitly provided in the CPCA, any decision by the CCC or ODPP to instigate forfeiture proceedings will take into consideration a variety of factors, including the cost of litigation and value of property involved. The CPCA also contains significant safeguards in order to ensure the proportionality of confiscation proceedings, including the ability of the court to refuse to make an order if it is not in the public interest and, the ability to exclude property or make a hardship order to support innocent parties.

A self-assessment by the Department of Justice and Attorney-General has determined that a Regulatory Impact Statement is not required as the regulatory proposal is excluded under category (j) of the Queensland Government Guide to Better Regulation. Accordingly, the Office of Best Practice Regulation was not consulted in relation to the regulatory proposal.