



# EXPLANATORY STATEMENT

## Criminal Property Forfeiture Amendment Bill 2019

SERIAL NO. 108

LEGISLATIVE ASSEMBLY OF THE  
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

### GENERAL OUTLINE

The Bill amends the *Criminal Property Forfeiture Act 2002* to implement provisions related to the Northern Territory Government's participation in the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth, and legislates the equitable sharing of proceeds that are obtained as a result of contributing to actions under unexplained wealth legislation.

### NOTES ON CLAUSES

#### **Clause 1            Short title**

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Criminal Property Forfeiture Amendment Act 2019*.

#### **Clause 2            Commencement**

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator in a Gazette notice.

### **Clause 3            Act amended**

This is a formal clause which provides that amendments are made to the *Criminal Property Forfeiture Act 2002*.

### **Clause 4            Section 5 amended (Definitions)**

This clause amends section 5 of the *Criminal Property Forfeiture Act 2002* which provides definitions for terms used throughout the Act. This clause amends the existing definitions for the terms ***corresponding law*** and ***unexplained wealth*** in the Act, to incorporate new concepts utilised by the provisions of the *Criminal Property Forfeiture Amendment Act 2019*.

The term ***corresponding law*** presently refers to ‘...a law of the Commonwealth, a State or another Territory that is prescribed in the Regulations as a law that corresponds to this Act’. Schedule 1 of the *Criminal Property Forfeiture Regulations 2003* identifies the laws of the states and territories that are corresponding laws.

The definition for ***corresponding law*** is now also expanded to include, for the purposes of new Part 10A, which is also being inserted by the *Criminal Property Forfeiture Amendment Act 2019*, a further definition in new section 130A. That definition refers to ‘...a law of the Territory that is declared by the *Proceeds of Crime Regulations 2002* (Cth) to be a law that corresponds to the *Proceeds of Crime Act 2002* (Cth)’.

The term ***unexplained wealth*** presently refers to the explanation of unexplained wealth contained in section 68, which specifies that ‘...a person has unexplained wealth...if the total value of all the items of property, and all the services, advantages and benefits, that together constitute the person's wealth is greater than...the total value of all the

items of property, and all the services, advantages and benefits, that constitute the person's wealth and were lawfully acquired'.

The definition for ***unexplained wealth*** is now also expanded to include, for the purposes of new Part 10A, which is also being inserted by the *Criminal Property Forfeiture Amendment Act 2019*, a further definition in new section 130A. That definition refers to '...property or wealth that might not have been lawfully acquired' which follows the definition in the **NCS**.

This definition is required is to define ***unexplained wealth*** in terms of the **NCS** as distinct from the existing definition provided by the *Criminal Property Forfeiture Act 2002*. For the purposes of new Part 10A, the new definition is to define when the Territory is a ***contributing jurisdiction***.

The broad definition that is being inserted by this provision ensures that the Territory is not inadvertently excluded from being classified as a ***contributing jurisdiction*** when definitions of ***unexplained wealth*** matters vary between jurisdictions.

## **Clause 5            Part 10A inserted**

A new Part 10A is inserted into the *Criminal Property Forfeiture Act 2002* which deals with the equitable sharing arrangements set out in the National Cooperative Scheme on Unexplained Wealth, and the procedure for dealing with proceeds arising out of relevant actions.

New Part 10A contains new Division 1 which contains new sections 130A to 130E, which deal with preliminary matters related to the National Cooperative Scheme on Unexplained Wealth.

New section 130A contains definitions for terms used throughout new Part 10A, many of which are defined by specific new sections in new Part 10A.

The new term **CJC**, which refers to the Cooperating Jurisdiction Committee, as established by the ***Intergovernmental Agreement***.

The new term **CJC subcommittee**, which refers to the Cooperating Jurisdiction sub-Committee, is defined in new section 130H(1).

The new term **confiscation**, is defined to include forfeiture. Including forfeiture with confiscation links the Territory's forfeiture actions with the equivalent Commonwealth confiscation actions. This is required in order to reference the Commonwealth's terms for some matters, and reference the Territory's terminology for others.

The new term **contributing jurisdiction**, is defined to include the Commonwealth, a participating State, a cooperating State, or the Australian Capital Territory that make a **contribution** for the purposes of the national cooperative scheme.

The new term **contribution**, is defined in new section 130B.

The new term **cooperating State**, is defined in section 14F of the *Proceeds of Crime Act 2002* (Cth).

The new term **corresponding law**, is defined to mean a law of the Territory that is declared by the *Proceeds of Crime Regulations 2002* (Cth) to be a law that corresponds to the *Proceeds of Crime Act 2002* (Cth). Regulation 7 of the *Proceeds of Crime Regulations 2019* (Cth) specifies the *Criminal Property Forfeiture Act 2002* (NT) as a corresponding law.

The new term ***corresponding proceeds***, is defined to mean an amount that is paid to the Territory under a ***corresponding law***, that corresponds to, or is similar to, an amount that is proceeds of confiscated assets under the *Proceeds of Crime Act 2002* (Cth), and is paid in relation to a ***relevant application*** or a ***relevant order***.

The new term ***decision-making period***, is defined in new section 130H(2).

The new term ***foreign jurisdiction***, is defined to mean a jurisdiction that is outside Australia.

The new term ***forfeiting jurisdiction***, is defined to mean a jurisdiction that obtains a final order, enters into a negotiated settlement, or receives any other amount that is proceeds of confiscated assets under the *Proceeds of Crime Act 2002* (Cth) or the corresponding proceeds of a State or Territory.

The new term ***forfeiture action***, is defined to mean the proceedings in relation to a ***relevant application*** or a ***relevant order***.

The new term ***forfeiture proceeds***, is defined to mean the proceeds arising from an action that are paid or payable to the Territory under a ***relevant order***.

The new term ***Intergovernmental Agreement***, is defined to mean the Intergovernmental agreement establishing the ***NCS*** as in force from time to time.

The new term ***NCS***, is defined to mean the National Cooperative Scheme on Unexplained Wealth established by the ***Intergovernmental Agreement*** and entered into by the Territory on 7 December 2018.

The new term ***NCS threshold***, is defined to mean the National Cooperative Scheme threshold, which is further defined to mean an amount greater than \$100 000, or another amount that is prescribed by regulation. Providing for alternative amounts to be prescribed by regulation 'future-proofs' the Act by allowing the Territory to adjust the ***NCS threshold*** in the event that this changes in future iterations of the ***Intergovernmental Agreement***.

The new term ***participating jurisdiction***, is defined to mean the Territory, a ***participating State***, or the Australian Capital Territory.

The new term ***participating State***, is defined in section 14C of the *Proceeds of Crime Act 2002* (Cth).

The new term ***payment period***, is defined to mean a time period of six months, beginning from the date on which the assets are realised in their entirety, or when the maximum amount from a final order or negotiated settlement that is likely to be realised, has been realised, whichever is the later.

The new term ***relevant application*** is defined to mean an application for a declaration under section 36A of the *Misuse of Drugs Act 1990* that a person is a drug trafficker, or an application that is prescribed by regulation.

The new term ***relevant order***, is defined in new section 130C.

The new term ***shareable proceeds***, is defined in new section 130D.

The new term ***unexplained wealth***, is defined to mean property or wealth that might not have been lawfully acquired.

New section 130B sets out the definition for a **contribution** under the **NCS** and when a jurisdiction is taken to have contributed. A **contribution** engages certain aspects of the **NCS**, set out in clause 6.2(6) of the **Intergovernmental Agreement**, including when a jurisdiction will be eligible to share in the proceeds of an action that takes place in another jurisdiction.

For the purposes of the **NCS**, a **contribution** can include providing intelligence which is relevant to an action, an investigation, or legal proceedings, restraining assets for the purposes of a confiscation action, or holding and managing restrained assets, or recovering a debt created by an order.

A **contribution** may also occur when the Commonwealth relies on an offence of a jurisdiction in an **unexplained wealth** action.

New section 130C sets out the definition for a Territory **relevant order** under the **NCS**. A **relevant order** is a restraining order under section 44(1)(b)(ii) of the *Criminal Property Forfeiture Act 2002* (an unexplained wealth declaration), a declaration of forfeiture under section 94 (forfeitures of declared drug trafficker's property), a forfeiture order under section 97 (forfeiture applications relating to crime-derived property), or section 100 (forfeiture applications relating to unexplained wealth) of the *Criminal Property Forfeiture Act 2002*, or another order that is prescribed by Regulation.

Under the **Intergovernmental Agreement**, these are the orders listed in Appendix A. The Territory has agreed to notify the **CJC** when it applies for, or obtains one of these orders.

These notification requirements are imposed at law by new section 130G.

New section 130D sets out the definition for **shareable proceeds** under the **NCS**. Proceeds that are obtained as the result of a Commonwealth forfeiture order under Part 2-2, Division 1 of the *Proceeds of Crime Act 2002* (Cth); a forfeiture on conviction of a serious offence under Part 2-3, Division 1 of the *Proceeds of Crime Act 2002* (Cth); a pecuniary penalty order under Part 2-4 of the *Proceeds of Crime Act 2002* (Cth); a literary proceedings order under Part 2-5 of the *Proceeds of Crime Act 2002* (Cth); an unexplained wealth order under Part 2-6 of the *Proceeds of Crime Act 2002* (Cth); or an amount paid to the Commonwealth in settlement proceedings under the *Proceeds of Crime Act 2002* (Cth) will be shareable if the amount in the **relevant application** or **relevant order**, or that is otherwise forfeited under a **corresponding law** exceeds the **NCS threshold**. Under the **Intergovernmental Agreement**, these are the orders listed in Appendix B.

Proceeds that are obtained by a non-Commonwealth party will also be **shareable proceeds** if they are **corresponding proceeds** of a State or Territory and the amount in the **relevant application** or **relevant order**, or that is otherwise forfeited under a **corresponding law** exceeds the **NCS threshold**.

New section 130E sets out that the provisions of new Part 10A will apply when a **relevant application** is made; when a court makes a **relevant order**, or a **relevant payment** is made to the Territory, and the **shareable proceeds** are above the **NCS threshold**.

New Part 10A contains new Division 2 which contains new sections 130F to 130H, which deal with the Cooperating Jurisdiction Committee and Cooperating Jurisdiction sub-Committee under the National Cooperative Scheme on Unexplained Wealth.



New section 130F sets out that the Commissioner of Police may nominate Territory representatives to the **CJC**, as set out in Appendix C of the **Intergovernmental Agreement**.

New section 130G sets out that under the **NCS** the Territory is required to notify the **CJC** of a **relevant application** being made or a court making a **relevant order** and the amount of the application or order is above the **NCS threshold**. The Territory is also required to notify the **CJC** when **shareable proceeds** are received by the Territory in relation to a **relevant application** or **relevant order**, even if the realised **shareable proceeds** are below the **NCS threshold**.

The new section also specifies that the notification must be in writing, contain sufficient information to enable **participating jurisdictions** to identify whether they have **contributed** to the action, and must be provided within 60 days of the application or order being made, or the **shareable proceeds** being received.

The Territory will not be required to notify the **CJC** when the Commissioner of Police determines that the action is not, and will not become a cross-jurisdictional matter and that the action will not create operational inconsistencies with another jurisdiction. This is intended to limit the application of the **NCS** to relevant actions which have been pursued with the **contribution** of another jurisdiction.

The new section also sets out further notification requirements under the **NCS**, which requires the Territory to notify the **CJC** within 30 days of a **CJC subcommittee** deciding that a non-cooperating State has **contributed** to the realisation of **shareable proceeds** and what proportion of those assets are attributable to their contribution, or where a **CJC subcommittee** decides to alter the presumption that realised

**shareable proceeds** be shared equally between **contributing jurisdictions** and what how those assets are to be apportioned.

The Territory will also be required to notify the **CJC** when; **shareable proceeds** are realised in their entirety, or when the maximum amount from a final order or negotiated settlement that is likely to be realised, has been realised; and when the Territory receives a payment of **shareable proceeds** from a **forfeiting jurisdiction**, or makes a payment of **shareable proceeds** to a **contributing jurisdiction**.

New section 130H sets out the definition for the **CJC subcommittee** (the Cooperating Jurisdiction sub-Committee) and how it is constituted, when the **CJC** must convene a **CJC subcommittee**, and other matters.

A **CJC subcommittee** will be convened within six months of the Territory notifying the CJC under new section 130G(1) (which is defined as the **decision-making period**), which will be comprised of the Territory's CJC representative and the representatives of each **contributing jurisdiction** in relation to a particular action.

Within the **decision-making period**, the **CJC subcommittee** is required to determine whether the Commonwealth, a **participating jurisdiction** or a **cooperating State** made a **contribution** to the **forfeiture action**. In accordance with the **NCS**, the determination must be unanimous.

New Part 10A contains new Division 3 which contains new sections 130J to 130M, which deal with the process for considering and determining the contribution of other jurisdictions to actions under the National Cooperative Scheme on Unexplained Wealth.

New section 130J sets out the procedure for distributing **shareable proceeds** among the **contributing jurisdictions**, beginning from a presumption under the **NCS** that sharing of **net realised proceeds** of a **forfeiture action** is to be in equal portions.

Within the decision-making period, the **CJC subcommittee** must determine whether the presumption is appropriate for each **forfeiture action** and may otherwise determine what the appropriate portions are. In accordance with the **NCS**, a determination to depart from the presumption must be unanimous.

The new section also set out the definition for **net realised proceeds** to mean the remainder of the realised proceeds after payments have been made in accordance with new sections 130K and 130L.

New section 130K sets out when **contributions** by certain other jurisdictions may be considered. Within the **decision-making period**, the **CJC subcommittee** must consider whether a **non-participating non-cooperating jurisdiction** has contributed to the **forfeiture action**, and if so in what proportion of the **shareable proceeds** are payable to that jurisdiction. In accordance with the **NCS**, the determination must be unanimous and, if unanimity cannot be reached, the **non-participating non-cooperating jurisdiction** is taken to have not contributed to that **forfeiture action**.

The new section also specifies the Territory's own reporting requirements by requiring the Commissioner of Police to notify the Minister as soon as practicable of a determination by the **CJC subcommittee**. For the purposes of Part 10A, the Minister of Police, Fire and Emergency Services is intended to be the relevant Minister.

New section 130L sets out when a **contribution** by a **foreign jurisdiction** may be considered. Within the **decision-making period** the Commissioner of Police must notify the Minister whether, in the Commissioner's opinion, a **foreign jurisdiction** has **contributed** to a **forfeiture action**, and provide information necessary for the Minister to make a determination.

The Minister must determine whether the **foreign jurisdiction** has **contributed** to the **forfeiture action** and, if so, what portion of the **shareable proceeds** are payable to the **foreign jurisdiction**. The Minister must give the Commissioner of Police written notice of the determination, and the Commissioner must in turn notify the CJC of the Minister's determination.

New section 130M sets out the ability for the **CJC subcommittee** or the Minister to make determinations under this Division, despite **forfeiture proceeds** having not yet been fully or partially realised.

New Part 10A contains new Division 4 which contains new sections 130N to 130R, deal with the payment of shared proceeds from actions under the National Cooperative Scheme on Unexplained Wealth.

New section 130N specifies that other payments required by the *Criminal Property Forfeiture Act 2002* are payable out of **forfeiture proceeds** when they are realised, before any remaining funds are distributed under this Division. This ensures that sufficient funds are available to pay required amounts, including under section 115 (Public Trustee's liability for charges on restrained property); section 117 (Fees payable to Public Trustee); section 148(2) (money to cover the costs of the Public Trustee); and section 154(5) (reimbursing the NT Legal Aid Commission or another legal aid organisation out of funds realised

from the forfeited property). These are existing provisions of the *Criminal Property Forfeiture Act 2002*, which are not altered by the provisions of the Bill.

New section 130P sets out the procedure for paying an amount to a ***foreign jurisdiction*** as determined by the Minister under new section 130L. An amount in recognition of the ***contribution*** of a ***foreign jurisdiction*** is to be paid, where another ***contributing jurisdiction*** is also to be paid, at the time that those sharing payments are made; or otherwise where no payments are to be made to other ***contributing jurisdictions***, before the end of the ***payment period***.

New section 130Q sets out a requirement for the Minister to ensure that all amounts payable under new Part 10A are to be paid before the end of the ***payment period***.

New section 130R sets out that, in accordance with the ***Intergovernmental Agreement***, if a ***forfeiture action*** has started, but ***shareable proceeds*** have not been distributed, and the ***Intergovernmental Agreement*** ceases effect or the Territory ceases to be a ***participating jurisdiction***, ***shareable proceeds*** that would have been payable to the Commonwealth under the ***NCS*** must still be paid as though the ***Intergovernmental Agreement*** were still in effect or the Territory was still a ***participating jurisdiction***.

New Part 10A contains new Division 5 which contains new section 130S, deals with the Territory's record-keeping requirements for the sharing of proceeds from actions under the National Cooperative Scheme on Unexplained Wealth.

New section 130S sets out the record-keeping requirements for actions taken under the **NCS**, set out in clause 6.5 of the **Intergovernmental Agreement**. The Commissioner of Police is required to keep a record of the specifics concerning each **forfeiture action**, and retain those records for as long as necessary to comply with the reporting requirements of the **NCS**.

New Part 10A contains new Division 6 which contains new section 130T, deals with the Territory's reporting requirements for the sharing of proceeds from actions under the National Cooperative Scheme on Unexplained Wealth.

New section 130T sets out the requirements for the Commissioner of Police to annually report to the Minister on the NT Police's use of investigative powers under the **participating jurisdiction information gathering provisions** of the NCS. The Minister must in turn provide that report to the responsible Commonwealth Minister.

The new section also sets out the definition for **participating jurisdiction information gathering provisions** which are the provisions set out in Schedule 1 of the *Proceeds of Crime Act 2002* (Cth)

#### **Clause 6            Part 15 inserted**

A new Part 15 is inserted into the *Criminal Property Forfeiture Act 2002* which deals with transitional provisions as a result of the commencement of the *Criminal Property Forfeiture Amendment Act 2019*.

New Part 15 contains new section 168 which specifies that the *Criminal Property Forfeiture Act 2002* as in force prior to the commencement of the *Criminal Property Forfeiture Amendment Act 2019* will apply to actions which were commenced prior to the commencement of the *Criminal Property Forfeiture Amendment Act 2019*, and the *Criminal Property Forfeiture Act 2002* as amended by the *Criminal Property Forfeiture Amendment Act 2019* will apply to actions which are commenced after the commencement of the *Criminal Property Forfeiture Amendment Act 2019*.

This ensures certainty by clarifying the point at which the new provisions will apply to certain actions and ensure that any potential actions which are ongoing at the time that the *Criminal Property Forfeiture Act 2002* is amended will not be affected by the amendments.

#### **Clause 7            Repeal of Act**

This is a standard clause which provides that the *Criminal Property Forfeiture Amendment Act 2019* is repealed on the day after it commences.