

# **Criminal Proceeds (Recovery) Amendment Bill**

Government Bill

## **Explanatory note**

### **General policy statement**

#### **Overview of Criminal Proceeds (Recovery) Act 2009**

The Criminal Proceeds (Recovery) Act 2009 (the **principal Act**) establishes a civil regime for forfeiture to the Crown of a person's property that has been derived from significant criminal activity or that represents the value of the person's benefit from that criminal activity. The aims of the regime include eliminating the chance for persons to profit from significant criminal activity and deterring that criminal activity.

The regime enables restraining orders and civil forfeiture orders to be made in relation to property. Restraining orders are interim orders that preserve the property concerned and place it under the control and custody of the Official Assignee of New Zealand (the **Official Assignee**). Civil forfeiture orders are final orders. They vest property in the Crown absolutely (subject to orders for relief from civil forfeiture, and the resolution of any appeals).

There are a number of different circumstances in which different types of restraining orders may be made. Applications for a restraining order under section 24 of the principal Act (a **section 24 restraining order**) are made by the Commissioner of Police (the **Commissioner**) to the High Court. The court may make a section 24 restraining order only if satisfied that there are reasonable grounds to believe that the property concerned is tainted property. **Tainted property** is property that has, wholly or in part, been acquired as a result of, or derived from, significant criminal activity.

A section 24 restraining order enables the New Zealand Police (the **Police**) to further investigate the source of the property to determine whether there is sufficient evidence to apply for an assets forfeiture order (a type of civil forfeiture order). To make an assets forfeiture order, the High Court must be satisfied on the balance of probabilities (meaning that it must be satisfied that it is more likely than not) that the property is tainted property.

### Responding to organised criminal offending

Currently, organised criminal groups can attempt to structure their affairs to avoid restraint and forfeiture of tainted property under section 24 restraining orders and asset forfeiture orders (renamed by the Bill as type 1 assets forfeiture orders).

As an alternative to those orders, the Bill allows specific property to be restrained or forfeited to the Crown if the High Court is satisfied that it has reasonable grounds to believe (in the case of a restraining order), or is satisfied on the balance of probabilities (in the case of a forfeiture order called a type 2 assets forfeiture order), that—

- the respondent is associated with a member of or participant in an organised criminal group who has been involved in, or unlawfully benefited from, significant criminal activity; and
- the legitimate property of the respondent that was readily able to be used by them to acquire the specific property would have been insufficient to enable them to acquire it at or near reasonable market value; and
- the reasonable market value of the specific property (excluding the proportion potentially attributable to that legitimate property (the **convertible legitimate property**)) is at least \$30,000.

The court must not make a type 2 assets forfeiture order in respect of specific property if—

- the respondent can show, on the balance of probabilities, that the specific property is not tainted property; or
- the court is satisfied that it would not be in the interests of justice to make the order.

If a type 2 assets forfeiture order is made, the share of the specific property that could not have been acquired at reasonable market value using the convertible legitimate property is generally forfeited to the Crown. However, that share is decreased to the extent that the respondent can show, on the balance of probabilities, that the specific property was not derived from significant criminal activity.

### New disclosure of source order applying to person who is overseas

As noted in the overview above, a section 24 restraining order may be made if the High Court is satisfied that there are reasonable grounds to believe that the property concerned is tainted property. The significant criminal activity to which tainted property relates involves certain conduct in or outside New Zealand that, if prosecuted as a criminal offence, would be an offence in New Zealand.

It can be difficult for the Police to obtain the necessary evidence from foreign jurisdictions to support an application for a type 1 assets forfeiture order if the owner of the property to which a section 24 restraining order applies is overseas (whether the offending occurred in New Zealand or overseas). This difficulty can result in the principal Act being thwarted.

In response to that difficulty, the Bill enables the High Court to make a disclosure of source order, on application by the Commissioner, in relation to property to which a section 24 restraining order applies if the respondent is overseas. A disclosure of source order will require the respondent to provide certain information to the Police, mainly relating to the source of the property.

The respondent will have an incentive to provide the information within the time required by the order (generally, within 2 months after the order is made) because of the risk that the property will be forfeited to the Crown under a type 1 assets forfeiture order—without the Commissioner having to satisfy the court that the property is tainted property. If the Commissioner applies for a type 1 assets forfeiture order and shows that the respondent has failed to comply with the disclosure of source order, the property is presumed to be tainted property. The respondent may rebut the presumption by showing that the respondent had a reasonable excuse for failing to comply with the order or that the property is not tainted property. The presumption does not apply if the court is satisfied that it would not be in the interests of justice for the presumption to apply.

A disclosure of source order would put overseas respondents in a similar position to domestic respondents, who can be made subject to production and examination orders served within New Zealand. Production and examination orders require the persons on whom they are served to supply the Police with documents, information, or answers to questions that are relevant to investigations or proceedings under the Act, and failure to comply is an offence. However, those orders are not able to be effectively enforced when those persons are overseas.

### **Providing that funds in KiwiSaver scheme may be subject to orders under principal Act**

The Bill amends the principal Act and the KiwiSaver Act 2006 to overcome a legal loophole to the effect that funds in a KiwiSaver scheme are not subject to forfeiture or debt recovery under the principal Act until they are withdrawn under the KiwiSaver Rules.

The loophole has been revealed by case law, including *Commissioner of Police v Harrison* [2021] NZCA 540. It arises largely because the KiwiSaver Act 2006 generally prohibits a member's interest and future benefits under a KiwiSaver scheme from being passed to another person (for example, the Official Assignee), except in accordance with that Act.

The amendments are intended to prevent criminals from exploiting the loophole and also create consistency with other retirement savings vehicles and bank accounts.

### **Closing gap in Official Assignee's authority to hold seized property**

The Bill allows the Official Assignee to hold property that is seized under a search warrant (including property seized by the Police and transferred to the Official Assignee) until an application for a restraining order relating to the property is determined, but only if the application is made as soon as practicable and before the expiry

of the period of 28 days (the **28-day period**) after the date on which the property comes into the Official Assignee's custody or control.

Currently, the Official Assignee can hold property that is seized under a search warrant for the 28-day period, or until a restraining order relating to the property expires (if the order is obtained before the expiry of that period), or until an application for a forfeiture order relating to the property is determined. This leaves a gap in cases where the Police apply for a restraining order in relation to the property before the expiry of the 28-day period but the courts do not determine the application until after that period expires. By contrast, if the Police have applied for a forfeiture order, the Official Assignee can hold the property until the court has made a determination (for as long as that takes). The Bill will remove the gap and ensure consistency in the rules about when the property must be returned.

### **Other amendments**

The Bill makes amendments of a minor or technical nature, including consequential amendments.

### **Departmental disclosure statement**

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2022&no=163>

### **Regulatory impact statement**

The Ministry of Justice produced a regulatory impact statement on 9 December 2020 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/>
- <https://treasury.govt.nz/publications/informationreleases/ris>

### **Clause by clause analysis**

*Clause 1* is the Title clause.

*Clause 2* is the commencement clause. If the Bill is enacted, most of the Act will come into force on the date set by the Governor-General by Order in Council or 12 months after Royal assent (if not brought into force earlier by Order in Council). The reason for the deferred commencement is that regulations will need to be made to

give effect to relevant provisions of the Bill (for example, to prescribe forms of new orders and applications and to update existing prescribed forms).

The amendments relating to the following will come into force on the day after Royal Assent:

- the forfeiture of interests held in a KiwiSaver scheme (*clause 32 and subpart 1 of Part 2*):
- the return of property seized under a search warrant (*clause 34*):
- savings, transitional, and other provisions (*clauses 7 and 42*).

## Part 1

### Amendments to Criminal Proceeds (Recovery) Act 2009

#### Preliminary

*Clause 3* provides for *Part 1* to amend the Criminal Proceeds (Recovery) Act 2009 (the **principal Act**).

*Clause 4* amends the interpretation section.

#### Organised criminal groups: property of associates of members and participants

##### *Interpretation*

*Clause 5* inserts *new sections 5A and 5B*. Those new sections contain key definitions for the purposes of *new sections 24A and 50A to 50D* (see *clauses 15 and 21*), which enable the High Court to make a restraining order or a new type of forfeiture order (a type 2 forfeiture order) applying to specific property that was acquired by the respondent when they were an associate of a member of or participant in an organised criminal group.

*New section 5A* defines associate (in relation to a member of or participant in an organised criminal group) and organised criminal group. The definition of associate is broadly defined to include anyone who is associated with the member or participant (except for a mere acquaintance). It also includes anyone who is themselves a member of or participant in the group (whether or not a mere acquaintance).

The definition of organised criminal group and related concepts in *new section 5A* are partly based on section 98A of the Crimes Act 1961 (the offence of participating in an organised criminal group).

*New section 5B* defines legitimate property of a respondent to mean all property acquired by the respondent. Legitimate property includes (among other things) any property gifted or loaned to the respondent (including money available to the respondent by way of credit). Legitimate property does not include any property acquired by the respondent as a result of, or directly or indirectly derived from, an activity carried out by the respondent or any other person that is an offence.

The concept of legitimate property of a respondent is used in *new sections 24A and 50A to 50D* only to refer to property that the respondent might have used to acquire specific property to which the relevant restraining order or forfeiture order (or the application for the order) applies. It is not used to describe the specific property itself.

*New section 5B* also defines exempt proportion, which is the proportion of the value of the specific property that the respondent would have been able to acquire for reasonable market value if they had used only the property that, at the relevant time before they acquired the specific property,—

- was their legitimate property; and
- was readily able to be used by them for that acquisition.

### *Restraining order*

*Clause 15* inserts *new section 24A*, which enables a court to make a restraining order applying to specific property of the respondent if satisfied that it has reasonable grounds to believe that the following 4 criteria are met:

- when the respondent acquired the specific property, the respondent was an associate of 1 or more members of or participants in an organised criminal group (**critterion 1**):
- all or any of those members or participants have, as members of or participants in the group, been involved in, or unlawfully benefited from, significant criminal activity at any time (**critterion 2**):
- at the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property would have been insufficient to enable them to acquire the specific property at or near reasonable market value (**critterion 3**):
- when the application was made, the reasonable market value of the specific property, excluding the value represented by the exempt proportion of that property, was at least the threshold amount (**critterion 4**).

As is the case with restraining orders under the principal Act generally, *new section 24A* enables (rather than requires) a court to make a restraining order.

The relevant time referred to in criterion 3 would be immediately before the respondent acquires the specific property if the respondent makes an outright purchase. In other cases, there may be more than 1 relevant time (for example, if the respondent pays for the specific property in instalments before taking possession of it).

Criterion 3 is hypothetical. This means, for example, that it is not necessary for the court to be satisfied that it has reasonable grounds to believe that the respondent did not in fact use any or only legitimate property (of the respondent or any other person) to acquire the specific property (at, above, or below reasonable market value).

The threshold amount referred to in criterion 4 is \$30,000 or a prescribed amount that exceeds \$30,000. (*See* the definition of threshold amount that is inserted by

*clause 4(2)* into section 5(1) of the principal Act.) *Clause 40* makes a consequential amendment to the regulation-making power in the principal Act.

The threshold amount is consistent with the current definition of significant criminal activity in section 6(1) of the principal Act, which includes offending from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived. *Clause 6* makes a consequential amendment to the definition of significant criminal activity to ensure that this consistency is maintained.

Under *new section 24A(3)*, the property that, at a relevant time, was legitimate property of the respondent and readily able to be used by them to acquire specific property is presumed to consist of the property that the application for the restraining order states was, at the relevant time, their legitimate property and readily able to be used by them for that acquisition. This is relevant to criterion 3 and also when determining the exempt proportion for the purposes of criterion 4.

Under *new section 24A(4)*, the respondent may rebut the presumption to the extent that they satisfy the court, on the balance of probabilities, that, at the relevant time, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property consisted of—

- some or all of the property stated in the application and other property; or
- other property not stated in the application.

The balance of probabilities is a higher standard of proof than the standard of proof generally applying under *new section 24A* (reasonable grounds to believe).

*New section 24A(5)* provides that the Commissioner must exercise all due diligence in identifying the property in the application that is alleged to be the legitimate property of the respondent and that the respondent was readily able to use to acquire the specific property. However, under *new section 24A(6)*, the Commissioner is required to identify that alleged legitimate property only on the basis of information that is reasonably available to the Commissioner using methods that would not prejudice any ongoing investigation for the purposes of any related type 2 assets forfeiture order.

*Clauses 8, 12 to 14, and 16* make consequential amendments.

#### *Type 2 assets forfeiture order*

*Clause 21* inserts *new sections 50A to 50D*, which provide for the making of a new kind of assets forfeiture order called a type 2 assets forfeiture order and for related matters.

Currently, the High Court can make an assets forfeiture order under the principal Act only if satisfied, on the balance of probabilities, that specific property to which an application for the order relates is tainted property (as defined by section 5(1) of the principal Act). The Bill renames that type of assets forfeiture order as a type 1 assets forfeiture order. (See the new definition of assets forfeiture order inserted by *clause 4(1)* and the definitions of type 1 assets forfeiture order and type 2 assets forfeiture order inserted by *clause 4(2)*.)

*New section 50A* provides for the matters that the Commissioner must specify in an application for a type 2 assets forfeiture order.

*New section 50C* generally requires the High Court to make a type 2 assets forfeiture order, in respect of specific property to which an application for the order relates, if satisfied on the balance of probabilities that 4 criteria are met. The criteria are the same as those applying to a restraining order under *new section 24A* and are described above.

*New section 50B* provides for a rebuttable presumption as to what is legitimate property for the purposes of criterion 3 and the concept of the exempt proportion in criterion 4. The new section is similar to *new section 24A(3) to (5)*.

Under *new section 50C(2)*, the High Court must not make a type 2 assets forfeiture order in respect of specific property if—

- the respondent satisfies the court, on the balance of probabilities, that the specific property is not tainted property; or
- the court is satisfied that it would not be in the interests of justice to make the order.

*New section 50D* identifies the matters that must be specified in a type 2 assets forfeiture order, including that the property to which the order applies (the **subject property**) vests in the Crown absolutely but only to the extent of the interest specified in the order. That interest is to be expressed as a proportion of the value of the subject property that remains after excluding the exempt proportion (if any) of that property. To the extent that the respondent satisfies the court, on the balance of probabilities, that a proportion of the value is not attributable to significant criminal activity, that proportion is to be treated as the exempt proportion when determining the extent of the interest that is to vest in the Crown. In contrast, the property to which a type 1 assets forfeiture order applies vests in the Crown absolutely and no account is taken of any proportion of the value that is not attributable to significant criminal activity.

*Clauses 8 to 11, 17 to 19, 20(1), (2), and (4), 22 to 26, 27(2), and 28 to 31* make consequential amendments (including amendments that are a consequence of renaming the type of assets forfeiture order that currently may be made under the principal Act as a type 1 assets forfeiture order).

### Disclosure of source orders

*Clause 20(3)* amends section 50, which provides that the court must make an assets forfeiture order in respect of specific property if satisfied, on the balance of probabilities, that the specific property is tainted.

The amendments insert—

- *new section 50(2A)*, which provides that the specific property is presumed to be tainted if the Commissioner shows, on the balance of probabilities, that the respondent was served with an order made under *new section 109A(1)* (a **disclosure of source order**) in relation to that property and that the respondent—
  - failed to comply with the order; or



- in purported compliance with the order, made a statement that is false or misleading in a material particular; and
- *new section 50(2B)*, which enables the presumption to be rebutted if the respondent shows, on the balance of probabilities, that—
  - the respondent had a reasonable excuse for failing to comply with the order or for making the false or misleading statement; or
  - the specific property is not tainted property; and
- *new section 50(2C)*, which provides that the presumption does not apply if the court is satisfied that it would not be in the interests of justice for the presumption to apply.

*Clause 33* inserts *new section 109A*. The new section enables the High Court to make a disclosure of source order that requires a respondent to whom a section 24 restraining order applies to give the Commissioner certain information (**source information**) about the restrained property if the respondent—

- is residing outside New Zealand (whether temporarily or permanently) or absent from New Zealand; or
- is a corporation that is incorporated outside New Zealand (other than an overseas company that is registered under Part 18 of the Companies Act 1993).

The source information must be provided within the period specified in the order. That period must not exceed 2 months after the order is made unless the court is satisfied that special circumstances exist that make a longer period appropriate.

*Clauses 35 to 39* make consequential amendments.

### **Restraint and forfeiture of interest held in KiwiSaver scheme**

*Clause 32* inserts *new section 84A*, which (together with amendments made to the KiwiSaver Act 2006 in *subpart 1 of Part 2*) ensures that, if property that is an interest in a KiwiSaver scheme is specified in an assets forfeiture order or profit forfeiture order, an amount up to the member's accumulation must be released from the scheme into the custody and control of the Official Assignee as soon as practicable after the time by which all property specified in the order must be disposed of.

The interest that a member of a KiwiSaver scheme has in the scheme is a chose in action (a type of personal property) consisting of the right that the member has to participate in, or receive financial benefits under, the scheme. Under the Financial Markets Conduct Act 2013, that interest is a managed investment product.

The interest is distinct from the member's accumulation, which is defined in section 4(1) of the KiwiSaver Act 2006 as the net value of the total of—

- the member's contributions; and
- any vested employer contributions in respect of the member; and
- certain fee subsidies; and
- the Crown contribution paid in respect of the member.

It will be possible for a type 1 assets forfeiture order to be made that applies to an interest in a KiwiSaver scheme if the member has acquired the interest by using funds that are tainted property (as this would make the interest itself tainted property). Profit forfeiture orders (unlike type 1 assets forfeiture orders) do not require the property to which they apply to be tainted property.

The amount required to be released under *new section 84A* may be less than the member's accumulation if, for example (in the case of an assets forfeiture order), an interest (held by a person other than the member) in the KiwiSaver interest is able to be severed under section 30 of the principal Act.

### **Return of seized property**

*Clause 34* replaces sections 112 and 113 with *new sections 112 and 113*.

*New section 112* generally recreates the effect of sections 112 and 113. Currently,—

- section 112 identifies when the Official Assignee must return property that the Police or the Official Assignee has seized under a search warrant issued under the principal Act; and
- section 113 provides for an exception to section 112.

Property seized by the Police is required to be transferred to the Official Assignee (section 103).

The main substantive change made by *new section 112* is a new exception to the general requirement that, if a restraining order did not apply to the property when the warrant was issued, the property must be returned as soon as practicable after 28 days have elapsed since the date on which the property came into the Official Assignee's custody or control. The new exception is that, if a restraining order is not obtained in relation to that property before the expiry of the 28-day period but an application for a restraining order is made as soon as practicable and before that expiry, the property must be returned as soon as practicable after the application is determined. The new section makes it clear that it does not require the return of property if a forfeiture order applies to the property—

- when the property is seized or transferred to the Official Assignee; or
- when a requirement to return the property to the appropriate person as soon as practicable would otherwise apply under the section.

If a forfeiture order is made in relation to the property, it is vested in the Crown and is, therefore, not required to be returned.

*New section 113* is similar to section 154 of the Search and Surveillance Act 2009. It ensures that, if property is required by *new section 112* to be returned to the person who is the owner or entitled to possession of the property but there is a dispute or uncertainty about who that person is, the District Court may (on the application by the Official Assignee)—

- order that the property be destroyed; or

- order that the property be delivered to the person appearing to the court to be the owner of the property or entitled to possession of it; or
- if the owner or person entitled to possession cannot be found, make any order with respect to the property's possession or sale that the court thinks fit.

### Other amendments

*Clauses 7 and 42 and Schedule 1* provide for transitional, savings, and related provisions. *Clause 7* inserts *new section 7A*, which indicates that transitional, savings, and related provisions are set out in *new Schedule 1*.

*Clause 42* inserts *new Schedule 1* (set out in *Schedule 1*). *New Schedule 1* contains transitional and other provisions related to this Bill, including provisions about restraint and forfeiture of interests held by a person as a member of a KiwiSaver scheme.

*Clause 27(1)* renumbers and repositions a section that currently appears in a group of provisions applying to profit forfeiture orders. The section is expressed as applying not only in relation to profit forfeiture orders, but also to restraining orders, and is transferred to a group of general provisions applying to both kinds of orders.

*Clause 41* repeals redundant amendments that were a consequence of the enactment of the principal Act (which came into force on 1 December 2009).

## Part 2 Amendments to other Acts

### Subpart 1—Amendments to KiwiSaver Act 2006

*Clause 43* provides for *subpart 1 of Part 2* to amend the KiwiSaver Act 2006.

The amendments made by *clauses 45 and 47* operate together with the amendment made to the Criminal Proceeds (Recovery) Act 2009 by *clause 32*.

*Clause 45* amends a provision that generally prohibits a member's interest (as defined by the KiwiSaver Act 2006) or a member's future benefits under a KiwiSaver scheme from being passed to another person. The amendment ensures that the general prohibition does not prevent an amount up to the value of the member's accumulation from being released to the Official Assignee if that release is required because of a civil forfeiture order under the Criminal Proceeds (Recovery) Act 2009.

*Clause 47* amends the KiwiSaver scheme rules to ensure that the manager of a KiwiSaver scheme must comply with a requirement to release funds from the scheme if the requirement arises because of a civil forfeiture order under the Criminal Proceeds (Recovery) Act 2009.

*Clauses 44 and 46 and Schedule 2* provide for transitional, savings, and related provisions. *Clause 44* inserts *new section 6A*, which indicates that transitional, savings, and related provisions are set out in *new Schedule 1AA*.

*Clause 46* inserts *new Schedule 1AA* (set out in *Schedule 2*). *New Schedule 1AA* contains transitional and other provisions related to the amendments made by *clauses 45 and 47*.

### Subpart 2—Amendments to Mutual Assistance in Criminal Matters Act 1992

*Clause 48* provides for *subpart 2 of Part 2* to amend the Mutual Assistance in Criminal Matters Act 1992.

*Clauses 49 and 50* make amendments that are related to restraining orders under *new section 24A* of the Criminal Proceeds (Recovery) Act 2009 (which is inserted by *clause 15*) and type 2 assets forfeiture orders under *new section 50C* of that Act (which is inserted by *clause 21*). Those amendments ensure that the Attorney-General may make requests to a foreign country for assistance in respect of investigations or proceedings relating to the restraint or forfeiture of property that is the subject of—

- a restraining order under *new section 24A* or an application (or a proposed application) for that kind of restraining order; or
- a type 2 assets forfeiture order under *new section 50C* or an application (or a proposed application) for a type 2 assets forfeiture order.

In particular, the amendments treat those investigations or proceedings (if the Attorney-General certifies that they have commenced in New Zealand) as criminal matters (even though they are civil in nature). This is in line with the way in which investigations and proceedings in respect of other civil forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 are treated for the purposes of the Attorney-General's requests for assistance under the Mutual Assistance in Criminal Matters Act 1992.

### Subpart 3—Amendment to Sentencing Act 2002

*Clause 51* provides for *subpart 3 of Part 2* to amend the Sentencing Act 2002.

*Clause 52* makes an amendment as a consequence of *clause 27* (which renumbers a provision of the Criminal Proceeds (Recovery) Act 2009).

*Hon Kiritapu Allan*

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| 39 | New section 165A inserted (Self-incriminating statement made in response to disclosure of source order) | 18 |
|    | 165A Self-incriminating statement made in response to disclosure of source order                        | 19 |
| 40 | Section 173 amended (Regulations)   | 19 |
| 41 | Subpart 10 of Part 2 repealed   | 19 |
| 42 | New Schedule 1 inserted   | 19 |

**Part 2**

**Amendments to other Acts**

Subpart 1—Amendments to KiwiSaver Act 2006

|    |  |    |
|----|--|----|
| 43 | Principal Act  | 19 |
| 44 | New section 6A inserted (Transitional, savings, and related provisions)    | 19 |
|    | 6A Transitional, savings, and related provisions                           | 20 |
| 45 | Section 127 amended (Member’s interest in KiwiSaver scheme not assignable) | 20 |
| 46 | New Schedule 1AA inserted  | 20 |
| 47 | Schedule 1 amended   | 20 |

|    |   |    |
|----|---|----|
|    | Subpart 2—Amendments to Mutual Assistance in Criminal<br>Matters Act 1992   |    |
| 48 | Principal Act   | 20 |
| 49 | Section 2A amended (Certain investigations relating to civil<br>proceedings deemed to be criminal investigations) | 20 |
| 50 | Section 2B amended (Certain civil proceedings deemed to be<br>criminal proceedings)                               | 21 |
|    | Subpart 3—Amendment to Sentencing Act 2002  |    |
| 51 | Principal Act   | 21 |
| 52 | Section 142I amended (Determining ownership of property)  | 21 |
|    | <b>Schedule 1</b>   | 22 |
|    | <b>New Schedule 1 inserted into Criminal Proceeds (Recovery)<br/>Act 2009</b>                                     |    |
|    | <b>Schedule 2</b>   | 24 |
|    | <b>New Schedule 1AA inserted into KiwiSaver Act 2006</b>  |    |

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Criminal Proceeds (Recovery) Amendment Act **2022**.

**2 Commencement**

- (1) This Act comes into force— 5
- (a) on a date set by Order in Council; or
- (b) to the extent not brought into force earlier, 12 months after Royal assent.
- (2) However, **sections 7, 32, 34, and 42** and **subpart 1 of Part 2** of this Act come into force on the day after Royal assent.
- (3) An Order in Council made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 10

**Part 1**

**Amendments to Criminal Proceeds (Recovery) Act 2009**

**3 Principal Act**

This Part amends the Criminal Proceeds (Recovery) Act 2009. 15

**4 Section 5 amended (Interpretation)**

- (1) In section 5(1), replace the definition of **assets forfeiture order** with:
- assets forfeiture order** means—
- (a) a type 1 assets forfeiture order; or



- (b) a type 2 assets forfeiture order
- (2) In section 5(1), insert in their appropriate alphabetical order:
- associate**, in relation to a member of or participant in an organised criminal group, has the meaning given to it in **section 5A**
- disclosure of source order** means an order made under **section 109A(1)** 5
- exempt proportion**, in relation to specific property of a respondent, has the meaning given to it in **section 5B**
- legitimate property** of a respondent has the meaning given to it in **section 5B**
- organised criminal group** has the meaning given to it in **section 5A** 10
- threshold amount**, for the purposes of sections 6(1)(b), **24A(1)(d)**, and **50C(1)(d)**, means \$30,000 or a prescribed amount that exceeds \$30,000
- type 1 assets forfeiture order** means an order made under section 50
- type 2 assets forfeiture order** means an order made under **section 50C**
- (3) In section 5(1), definition of **restraining order**, after “24,”, insert “**24A**,”. 15
- (4) In section 5(1), definition of **specific property**, after “identifiable owner”, insert “(subject to section 13)”.

## 5 New sections 5A and 5B inserted

After section 5, insert:

- 5A Meanings of associate and organised criminal group** 20
- Meaning of associate*
- (1) In this Act, unless the context otherwise requires, **associate**, in relation to a member of or participant in an organised criminal group,—
- (a) means a person who—
- (i) is associated with the member or participant; and 25
- (ii) is not a mere acquaintance of the member or participant; and
- (b) includes another member of or participant in the organised criminal group (whether or not a mere acquaintance of the member or participant).
- (2) For the purposes of **subsection (1)**, a person is capable of being a participant in an organised criminal group whether or not the person shares the objective or objectives described in **subsection (3)** of the persons comprising the group. 30
- Meaning of organised criminal group*
- (3) In this Act, unless the context otherwise requires, **organised criminal group** 35 means a group of 3 or more people who have as their objective, or one of their objectives, obtaining a material benefit from significant criminal activity.

- (4) In **subsection (3)**, **obtaining a material benefit from significant criminal activity** means obtaining, directly or indirectly, any privilege, pecuniary advantage, property, or other valuable consideration of any kind for—
- (a) carrying out that activity; or
  - (b) doing any thing that forms part of carrying out that activity. 5
- (5) For the purposes of **subsection (3)**, a group of persons is capable of being an organised criminal group whether or not—
- (a) some of the persons in the group are subordinates or employees of others in the group; or
  - (b) only some of the people involved in the group at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or 10
  - (c) the membership of the group changes from time to time.
- Compare: 1961 No 43 ss 2(1) (definition of obtain a material benefit), 98A
- 5B Meanings of legitimate property and exempt proportion** 15
- Meaning of legitimate property*
- (1) In this Act, unless the context otherwise requires, **legitimate property** of a respondent—
- (a) means all property acquired by the respondent, including—
    - (i) any property gifted or loaned to the respondent (including money available to the respondent by way of credit); and 20
    - (ii) any property acquired by the respondent through another person acting for, on behalf of, or for the benefit of the respondent; but
  - (b) does not include any property acquired as a result of, or directly or indirectly derived from, an activity that is carried out by the respondent or any other person and is an offence. 25
- (2) For the purposes of **subsection (1)(b)**, a person **carries out an activity that is an offence** whether or not—
- (a) they have been charged with or convicted of an offence in connection with the activity; or 30
  - (b) they have been acquitted of an offence in connection with the activity; or
  - (c) their conviction for an offence in connection with the activity has been quashed or set aside.
- Meaning of exempt proportion*
- (3) In this Act, unless the context otherwise requires, **exempt proportion**, in relation to specific property of a respondent, means the proportion of the value of the specific property that they would have been able to acquire for reasonable 35

|           |   |           |
|-----------|---|-----------|
|           | market value if they had used only the property that, at the relevant time before they acquired the specific property,—   |           |
|           | (a) was their legitimate property; and  |           |
|           | (b) was readily able to be used by them for that acquisition.   |           |
| <b>6</b>  | <b>Section 6 amended (Meaning of significant criminal activity)</b>   | <b>5</b>  |
|           | In section 6(1)(b), replace “\$30,000” with “the threshold amount”.   |           |
| <b>7</b>  | <b>New section 7A and cross-heading inserted</b>  |           |
|           | After section 7, insert:  |           |
|           | <i>Savings, transitional, and related provisions</i>  |           |
| <b>7A</b> | <b>Transitional, savings, and related provisions</b>  | <b>10</b> |
|           | The transitional, savings, and related provisions set out in <b>Schedule 1</b> have effect according to their terms.  |           |
| <b>8</b>  | <b>Section 13 amended (No identifiable owner required for certain proceedings relating to specific property)</b>  |           |
|           | Replace section 13(2) with:   | <b>15</b> |
| (2)       | Subsection (1) does not apply to—   |           |
|           | (a) proceedings for an order made under <b>section 24A</b> or a type 2 assets forfeiture order; or  |           |
|           | (b) proceedings to register a foreign restraining order.  |           |
| <b>9</b>  | <b>Section 15 amended (No criminal proceedings required for civil forfeiture order or in registering foreign forfeiture order)</b>  | <b>20</b> |
|           | In section 15, insert as subsection (2):  |           |
| (2)       | In this section, the significant criminal activity on which a type 2 assets forfeiture order is to be treated as being based is significant criminal activity in which any persons (as members or participants of the organised criminal group that is referred to in <b>section 50C(1)(a)</b> ) have been involved at any time.  | <b>25</b> |
| <b>10</b> | <b>Section 16 amended (Quashing criminal proceedings does not impact on civil forfeiture)</b>   |           |
|           | After section 16(2), insert:  |           |
| (3)       | In this section, significant criminal activity is to be treated as the basis for a type 2 assets forfeiture order or an application for an order of that kind if it is significant criminal activity in which any persons (as members or participants of the organised criminal group that is referred to in <b>section 50C(1)(a)</b> ) have been involved at any time. | <b>30</b> |

|            |   |    |
|------------|---|----|
| <b>11</b>  | <b>Section 17 amended (Multiple forfeiture orders and foreign forfeiture orders)</b>  |    |
|            | In section 17(1)(a), replace “assets” with “type 1”.  |    |
| <b>12</b>  | <b>Section 18 amended (Applying for restraining order)</b>  |    |
|            | In section 18(a), after “24”, insert “, <b>24A</b> ,”.  | 5  |
| <b>13</b>  | <b>Section 20 amended (Court to which application for restraining order made)</b>   |    |
|            | In section 20(a), after “24”, insert “, <b>24A</b> ,”.  |    |
| <b>14</b>  | <b>Section 24 amended (Making restraining order relating to specific property)</b>  | 10 |
|            | In the heading to section 24, after “specific”, insert “potentially tainted”.   |    |
| <b>15</b>  | <b>New section 24A inserted (Making restraining order relating to specific property of associates of certain persons connected to organised criminal group)</b>   |    |
|            | After section 24, insert:   | 15 |
| <b>24A</b> | <b>Making restraining order relating to specific property of associates of certain persons connected to organised criminal group</b>  |    |
|            | <i>Grounds and making of order</i>  |    |
| (1)        | A court hearing an application for a restraining order relating to specific property of the respondent may make an order under this section if satisfied that it has reasonable grounds to believe each of the following:   | 20 |
| (a)        | when the respondent acquired the specific property, the respondent was an associate of 1 or more members of or participants in an organised criminal group:   |    |
| (b)        | all or any of those members or participants have, as members of or participants in the group,—  | 25 |
| (i)        | been involved in significant criminal activity at any time; or  |    |
| (ii)       | unlawfully benefited from significant criminal activity at any time:  |    |
| (c)        | at the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property would have been insufficient to enable them to acquire the specific property at or near reasonable market value: | 30 |
| (d)        | when the application was made, the reasonable market value of the specific property, excluding the value represented by the exempt proportion of that property, was at least the threshold amount.  | 35 |

- (2) The restraining order that the court may make is an order that the property to which it applies (the **restrained property**)—
- (a) is not to be disposed of, or dealt with, other than as provided for in the restraining order; and
- (b) is to be under the Official Assignee’s custody and control. 5
- Legitimate convertible property before acquisition presumed to be property stated in application*
- (3) For the purposes of this section (including when determining the exempt proportion of specific property of the respondent), the property that, at a relevant time, was legitimate property of the respondent and readily able to be used by them to acquire specific property is presumed to consist of the property that the application for the restraining order states was, at the relevant time,— 10
- (a) their legitimate property; and
- (b) readily able to be used by them for that acquisition.
- (4) However, that presumption may be rebutted by the respondent to the extent that the respondent satisfies the court, on the balance of probabilities, that, at the relevant time, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property consisted of— 15
- (a) some or all of the property stated in the application and other property; or 20
- (b) other property not stated in the application.
- Identifying alleged convertible legitimate property*
- (5) In an application for a restraining order under this section, the Commissioner must exercise all due diligence in identifying the property that the Commissioner alleges was, at the relevant time before the respondent acquired specific property, the legitimate property of the respondent and readily able to be used by the respondent to acquire the specific property. 25
- (6) However, the Commissioner is required to identify that alleged legitimate property only on the basis of information that is reasonably available to the Commissioner using methods that would not prejudice any ongoing investigation for the purposes of any related type 2 assets forfeiture order. 30

**16 Section 30 amended (Excluding severable interest from restrained property)**

- (1) After section 30(2)(b), insert:
- (ba) if the order was or is to be made under **section 24A**, that the applicant has not unlawfully benefited from significant criminal activity in which any persons (as members or participants of the organised criminal group that is referred to in **section 24A(1)(a)**) have been involved at any time; and 35

- (2) In section 30(3)(b), replace “the significant criminal activity or qualifying” with “any significant criminal activity or the qualifying”.
- 17 Cross-heading above section 49 replaced**  
Replace the cross-heading above section 49 with:
- Type 1 assets forfeiture order: application and making* 5
- 18 Section 49 amended (Application for assets forfeiture order to specify proposed forfeited property, grounds, respondent (if any), and persons with interests (if known))**
- (1) Replace the heading to section 49 with “**Contents of application for type 1 assets forfeiture order**”. 10
- (2) In section 49, replace “an assets” with “a type 1 assets”.
- 19 Cross-heading above section 50 repealed**  
Repeal the cross-heading above clause 50.
- 20 Section 50 amended (Making assets forfeiture order)**
- (1) In the heading to section 50, after “**Making**”, insert “**type 1**”. 15
- (2) In section 50(1), (3), (4), and (5), replace “an assets” with “a type 1 assets” in each place.
- (3) After section 50(2), insert:
- (2A) The specific property is presumed to be tainted property if the Commissioner shows, on the balance of probabilities, that the respondent was served with a disclosure of source order in relation to that property and that the respondent— 20
- (a) failed to comply with the order; or
- (b) in purported compliance with the order, made a statement that is false or misleading in a material particular (*see* section 152).
- (2B) The presumption may be rebutted if the respondent shows, on the balance of probabilities, that— 25
- (a) the respondent had a reasonable excuse for failing to comply with the order or for making the false or misleading statement (as the case may be); or
- (b) the specific property is not tainted property. 30
- (2C) The presumption does not apply if the Court is satisfied that it would not be in the interests of justice for the presumption to apply.
- (4) In section 50(5), replace “the assets” with “the type 1 assets”.
- 21 New sections 50A to 50D and cross-heading inserted**  
After section 50, insert: 35

*Type 2 assets forfeiture order: application and making***50A Contents of application for type 2 assets forfeiture order**

The Commissioner must specify each of the following in an application for a type 2 assets forfeiture order:

- (a) the respondent: 5
- (b) the specific property of the respondent to which the application relates:
- (c) the reasonable market value of the specific property, as determined by the Commissioner, at the following dates:
  - (i) the date on which it was acquired by the respondent:
  - (ii) the date of the application: 10
- (d) the property that the Commissioner alleges was, at the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily able to be used by the respondent to acquire the specific property (*see section 50B*):
- (e) the value of that alleged legitimate property, as determined by the Commissioner, at the relevant time: 15
- (f) any persons other than the respondent who, to the knowledge of the Commissioner, have an interest in the specific property to which the application relates.

**50B Convertible legitimate property before acquisition presumed to be property stated in application** 20*Presumption*

- (1) For the purposes of **section 50C** (including when determining the exempt proportion of specific property of the respondent), the property that, at a relevant time, was legitimate property of the respondent and readily able to be used by them to acquire specific property is presumed to consist of the property that the application for the type 2 assets forfeiture order states was, at the relevant time,— 25
  - (a) their legitimate property; and
  - (b) readily able to be used by them for that acquisition. 30
- (2) However, that presumption may be rebutted by the respondent to the extent that the respondent satisfies the court, on the balance of probabilities, that, at the relevant time, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property consisted of—
  - (a) some or all of the property stated in the application and other property; 35  
or
  - (b) other property not stated in the application.

*Commissioner to exercise all due diligence in identifying alleged convertible legitimate property*

- (3) In an application for a type 2 assets forfeiture order, the Commissioner must exercise all due diligence in identifying the property that the Commissioner alleges was, at the relevant time before the respondent acquired specific property, the legitimate property of the respondent and readily able to be used by the respondent to acquire the specific property. 5

**50C Making type 2 assets forfeiture order**

- (1) The High Court must make a type 2 assets forfeiture order, in respect of specific property of a respondent to which an application for the order relates, if satisfied, on the balance of probabilities, that,— 10
- (a) when the respondent acquired the specific property, the respondent was an associate of 1 or more members of or participants in an organised criminal group; and
  - (b) all or any of those members or participants have, as members of or participants in the group,— 15
    - (i) been involved in significant criminal activity at any time; or
    - (ii) unlawfully benefited from significant criminal activity at any time; and
  - (c) at the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property would have been insufficient to enable them to acquire the specific property at or near reasonable market value; and 20
  - (d) when the application was made, the reasonable market value of the specific property, excluding the value represented by the exempt proportion of that property, was at least the threshold amount. 25
- (2) However, the Court must not make a type 2 assets forfeiture order in respect of specific property if— 30
- (a) the respondent satisfies the Court, on the balance of probabilities, that the specific property is not tainted property; or
  - (b) the Court is satisfied that it would not be in the interests of justice to make the order.
- (3) *See also sections 51 (exclusion of respondent’s property from assets forfeiture order because of undue hardship) and sections 61 to 69 (which relate to relief from a civil forfeiture order for persons other than a respondent).* 35



**50D Matters to be specified in type 2 assets forfeiture order**

- (1) The Court must specify in a type 2 assets forfeiture order the specific property to which the order applies (the **subject property**) and that the subject property—
- (a) vests in the Crown absolutely to the extent of the interest specified in the order; and 5
- (b) is in the custody and control of the Official Assignee.
- (2) The interest that vests in the Crown is to be expressed as a proportion of the value of the subject property that remains after excluding the exempt proportion (if any) of that property. 10
- (3) To the extent that the respondent satisfies the Court, on the balance of probabilities, that a proportion of the value of the subject property is not attributable to significant criminal activity,—
- (a) that proportion is to be treated as the exempt proportion for the purpose of **subsection (2)**; and 15
- (b) the definition in **section 5B(3)** does not apply for that purpose.
- (4) The proportion of the value that is not attributable to significant criminal activity is the proportion of that value that—
- (a) was not acquired by the respondent as a result of significant criminal activity engaged in by any person; and 20
- (b) was not directly or indirectly derived by the respondent from significant criminal activity engaged in by any person.

**22 New cross-heading above section 51 inserted**

Before section 51, insert:

*Exclusion from type 1 or type 2 assets forfeiture order*

**23 Section 51 amended (Exclusion of respondent's property from assets forfeiture order because of undue hardship)**

In section 51(2)(c), before “the circumstances”, insert “in the case of a type 1 assets forfeiture order,”.

**24 Cross-heading above section 52 replaced**

Replace the cross-heading above section 52 with:

*Profit forfeiture order: application and making*

**25 Cross-heading above section 53 repealed**

Repeal the cross-heading above section 53.

- 26 Section 54 amended (High Court must determine maximum recoverable amount)**
- (1) In section 54(1)(b) and (3), replace “an assets” with “a type 1 assets”.
  - (2) In section 54(3), replace “the assets” with “the type 1 assets”.
- 27 Section 58 renumbered and repositioned (Court may treat effective control over property as interest in property)** 5
- (1) Renumber section 58 as **section 17A** and reposition it after section 17.
  - (2) In section 58(4), replace “profit forfeiture order and in any restraining order” with “restraining order, any type 2 assets forfeiture order, or any profit forfeiture order”. 10
- 28 Section 60 amended (Civil forfeiture order relating to land)**
- In section 60(1), after “section 50”, insert “, **50C, 50D**”.
- 29 Section 66 amended (Making order for relief from civil forfeiture order where person has interest and was not involved in significant criminal activity)** 15
- Replace section 66(1)(b) with:
- (b) has not unlawfully benefited from the following significant criminal activity:
- (i) in the case of a type 2 assets forfeiture order or proposed type 2 assets forfeiture order, any significant criminal activity in which any persons (as members or participants of the organised criminal group that is referred to in **section 50C(1)(a)**) have been involved at any time: 20
  - (ii) in any other case, the significant criminal activity to which the civil forfeiture order or proposed civil forfeiture order relates. 25
- 30 Section 67 amended (Making order for relief from civil forfeiture order on grounds of undue hardship)**
- (1) In section 67(2)(c), replace “the significant criminal activity to which the property relates” with “any significant criminal activity to which the civil forfeiture order or proposed civil forfeiture relates”. 30
  - (2) In section 67(2)(d), replace “the significant criminal activity to which the property or order relates” with “any significant criminal activity to which the civil forfeiture order or proposed civil forfeiture order relates”.
- 31 Section 82 amended (Discharge of assets forfeiture order by Official Assignee)** 35
- After section 82(3), insert:

- (4) If the assets forfeiture order is a type 2 assets forfeiture order, the property may be disposed of only to the extent of the interest specified in the order.
- (5) If that interest is not severable from the property to which it relates, that property may be wholly disposed of, but—
- (a) the money resulting from the disposal that is to be applied under subsection (1) is limited to the proportion of the realised amount that is equal to the proportion referred to in **section 50D(2)**; and
  - (b) any remaining money must be paid to the former interest holder.

### 32 New section 84A and cross-heading inserted

After section 84, insert:

#### *Discharge of civil forfeiture order applying to interests in KiwiSaver scheme*

#### **84A Discharge of civil forfeiture order applying to interests in KiwiSaver scheme**

- (1) To the extent that the property specified in a civil forfeiture order is an interest held by a person as a member of a KiwiSaver scheme, the interest must be disposed of in accordance with this section.
- (2) At the time that the property is required to be disposed of under section 82 or 83, the Official Assignee must notify the manager of the scheme.
- (3) As soon as practicable after the Official Assignee notifies the manager, the manager must arrange for an amount up to the member's accumulation to be released into the custody and control of the Official Assignee.
- (4) In this section,—
- KiwiSaver scheme** has the meaning given to it in section 4(1) of the KiwiSaver Act 2006
- manager**, in relation to a KiwiSaver scheme, means the person who is the manager (as defined in section 6(1) of the Financial Markets Conduct Act 2013) of the scheme
- member's accumulation** has the meaning given to it in section 4(1) of the KiwiSaver Act 2006.

### 33 New section 109A and cross-heading inserted

After section 109, insert:

#### *Disclosure of source orders*

#### **109A High Court may make disclosure of source order**

- (1) On application by the Commissioner, the High Court may make an order (a **disclosure of source order**) requiring a respondent to whom a section 24

- restraining order relates to give the Commissioner, in the prescribed form and within the period specified in the order, the source information.
- (2) The Court may make a disclosure of source order only if satisfied that there are reasonable grounds to believe that the respondent—
- (a) is residing outside New Zealand (whether temporarily or permanently) or absent from New Zealand; or
  - (b) is a corporation that is incorporated outside New Zealand (other than an overseas company that is registered under Part 18 of the Companies Act 1993).
- (3) The **source information** is the following information relating to the respondent's property to which the restraining order applies:
- (a) the name of each person who the respondent knows holds, or believes may hold, an interest in the property and the nature of that interest:
  - (b) the circumstances in which the respondent acquired the property, including—
    - (i) how they acquired it; and
    - (ii) the source of any funds or other property used for that acquisition:
  - (c) if the property is tangible and movable property that the respondent acquired outside New Zealand and, after that acquisition, was brought into New Zealand,—
    - (i) the country or place in which they acquired the property; and
    - (ii) any countries or places through which the property transited before being moved into New Zealand:
  - (d) any other information of a kind specified in the disclosure of source order:
  - (e) any documents of a kind specified in the order to substantiate the information referred to in any of **paragraphs (a) to (d)**.
- (4) The period specified in the order must not exceed the period of 2 months after the order is made unless the Court is satisfied that special circumstances exist that make a longer period appropriate.
- (5) On application by the Commissioner or the respondent, the Court may vary the period specified in the order by way of a further order.
- (6) The order must inform the respondent of the effect of **section 50(2A) to (2C)**. (*See also* sections 123(5) and 152.)
- (7) In this section, **section 24 restraining order** means an order made under section 24.

#### 34 Sections 112 and 113 replaced

Replace sections 112 and 113 with:

- 112 Return of seized property that is not subject of forfeiture order**
- (1) Any property that is transferred to the Official Assignee under section 103, or seized under a warrant issued under section 110, must be returned to the appropriate person in accordance with this section.
- (2) However, this section does not require the return of property if that property is the subject of a forfeiture order—
- (a) when the property is seized or transferred as referred to in **subsection (1)**; or
- (b) when a requirement to return the property to the appropriate person as soon as practicable would otherwise apply under this section.
- (3) If the property was the subject of a restraining order when the relevant search warrant was issued, the property must be returned to the appropriate person as soon as practicable after the expiry of the restraining order.
- (4) If the property was not the subject of a restraining order when the relevant search warrant was issued, the property must be returned to the appropriate person as soon as practicable after the expiry of 28 days after the date on which the property comes into the custody or control of the Official Assignee (the **28-day period**).
- (5) However,—
- (a) if a restraining order is obtained in relation to that property before the expiry of the 28-day period, the property must be returned to the appropriate person as soon as practicable after the order expires; or
- (b) if a restraining order is not obtained in relation to that property before the expiry of the 28-day period but an application for a forfeiture order is made as soon as practicable and before that expiry, the property must be returned as soon as practicable after the application is determined; or
- (c) if an application for a restraining order is made as soon as practicable and before the expiry of the 28-day period, but not determined before that expiry, the property must be returned as soon as practicable after—
- (i) the application is determined if the application is refused; or
- (ii) the expiry of the restraining order if the application is granted.
- (6) This section is subject to **section 113**.
- (7) In this section, the **appropriate person** to whom property must be returned is the owner of the property or the person entitled to possession of it.
- 113 Disputed ownership, etc, of seized property to which section 112 applies**
- (1) The Official Assignee may apply to the District Court for an order under this section if there is a dispute, or the Official Assignee is uncertain (for any reason), about whom property must be returned to under **section 112**.
- (2) On an application under this section, the District Court may—

- (a) order that the property be destroyed; or
- (b) order that the property be delivered to the person appearing to the court to be the owner of the property or entitled to possession of it; or
- (c) if the owner or person entitled to possession cannot be found, make any order with respect to the property’s possession or sale that the court thinks fit. 5
- (3) If, after the District Court makes an order under this section in relation to any property, an action is commenced against the Crown or for the recovery of the property or its value, the order and the delivery of the property in accordance with the order may be given and must be received in evidence in bar of the action. 10
- (4) However, the order or delivery does not affect the right of any persons entitled by law to possession of the property to recover the property from any person or body (other than the Crown).
- (5) In this section, **Crown** includes— 15
- (a) the Commissioner or any Police employee (within the meaning of section 4 of the Policing Act 2008); and
- (b) the Official Assignee or any delegate of the Official Assignee or any other member of staff of the Official Assignee. 20
- Compare: 2012 No 24 s 154 20
- 35 Section 152 amended (Failing to comply with orders and search warrants)**  
In section 152(1), replace “or production order” with “, a production order, or a disclosure of source order”.
- 36 Section 163 amended (Privilege against self-incrimination no excuse)**  
In section 163, replace “or 107” with “, 107, or **109A**”. 25
- 37 Section 164 amended (Admissibility of evidence)**  
In section 164(1), replace “or 107” with “, 107, or **109A**”.
- 38 Section 165 amended (Admissibility of self-incriminating statements)**  
In the heading to section 165, after “statements”, insert “made orally”.
- 39 New section 165A inserted (Self-incriminating statement made in response to disclosure of source order)** 30  
After section 165, insert:

|             |   |    |
|-------------|---|----|
| <b>165A</b> | <b>Self-incriminating statement made in response to disclosure of source order</b>  |    |
| (1)         | Any self-incriminating statement or disclosure that a person who is required to comply with a disclosure of source order makes in response to the order is not admissible against the person in any civil or criminal proceedings.  | 5  |
| (2)         | However,—   |    |
| (a)         | any statement or disclosure the person makes in response to the order may be used in or for civil proceedings about an application for a type 1 assets forfeiture order (for example, by the respondent to that application, and to show, under <b>section 50(2B)</b> , that the property is not tainted property); and | 10 |
| (b)         | any statement or disclosure the person makes in relation to the person's refusal or failure to provide information that the order requires them to provide may be used in evidence against them in any prosecution for an offence under section 152 arising from that refusal or failure; and                           | 15 |
| (c)         | any statement or disclosure that the person makes in response to the order that is false or misleading in a material particular may be used in evidence against them in any prosecution for an offence under section 152 arising from that act.   |    |
| <b>40</b>   | <b>Section 173 amended (Regulations)</b>  | 20 |
|             | After section 173(1)(b), insert:  |    |
|             | (ba) prescribing an amount for the purposes of the definition of threshold amount in section 5(1):  |    |
| <b>41</b>   | <b>Subpart 10 of Part 2 repealed</b>  |    |
|             | Repeal subpart 10 of Part 2.  | 25 |
| <b>42</b>   | <b>New Schedule 1 inserted</b>  |    |
|             | Insert the <b>Schedule 1</b> set out in <b>Schedule 1</b> of this Act as the first schedule to appear after the last section of the principal Act.  |    |
|             | <b>Part 2</b>   |    |
|             | <b>Amendments to other Acts</b>   | 30 |
|             | Subpart 1—Amendments to KiwiSaver Act 2006  |    |
| <b>43</b>   | <b>Principal Act</b>  |    |
|             | This subpart amends the KiwiSaver Act 2006.   |    |
| <b>44</b>   | <b>New section 6A inserted (Transitional, savings, and related provisions)</b>  |    |
|             | After section 6, insert:  | 35 |

|   |   |    |
|---|---|----|
| <b>6A</b>   | <b>Transitional, savings, and related provisions</b>  |    |
|   | The transitional, savings, and related provisions set out in <b>Schedule 1AA</b> have effect according to their terms.  |    |
| <b>45</b>   | <b>Section 127 amended (Member’s interest in KiwiSaver scheme not assignable)</b>   | 5  |
| (1)   | In section 127(2), replace “However, subsection” with “Subsection”.   |    |
| (2)   | After section 127(2), insert:   |    |
| (3)   | Subsection (1) also does not prevent an amount up to the value of the member’s accumulation from being released to the Official Assignee of New Zealand on behalf of the Crown if that release is required because of a civil forfeiture order within the meaning of section 5(1) of the Criminal Proceeds (Recovery) Act 2009. | 10 |
| <b>46</b>   | <b>New Schedule 1AA inserted</b>  |    |
|   | Insert the <b>Schedule 1AA</b> set out in <b>Schedule 2</b> of this Act as the first schedule to appear after the last section of the principal Act.  | 15 |
| <b>47</b>   | <b>Schedule 1 amended</b>   |    |
|   | In Schedule 1, replace clause 7(2) with:  |    |
| (2)   | A requirement to release funds from the KiwiSaver scheme under any enactment includes a requirement to release funds from the KiwiSaver scheme by or because of an order of any court under any enactment.  | 20 |
| (3)   | Examples of an order of a court referred to in <b>subsection (2)</b> are—   |    |
| (a)   | an order made under section 31 of the Property (Relationships) Act 1976; and  |    |
| (b)   | a civil forfeiture order within the meaning of section 5(1) of the Criminal Proceeds (Recovery) Act 2009 ( <i>see</i> <b>section 84A</b> of that Act).  | 25 |
| <b>Subpart 2—Amendments to Mutual Assistance in Criminal Matters Act 1992</b> |   |    |
| <b>48</b>   | <b>Principal Act</b>  |    |
|   | This subpart amends the Mutual Assistance in Criminal Matters Act 1992.   |    |
| <b>49</b>   | <b>Section 2A amended (Certain investigations relating to civil proceedings deemed to be criminal investigations)</b>   | 30 |
|   | After section 2A(2), insert:  |    |
| (2A)  | An investigation certified by the Attorney-General to have commenced in New Zealand relating to the restraint or forfeiture of property must be treated as a criminal investigation for the purposes of Part 2 if the property—   | 35 |
| (a)   | is, or is proposed to be, the subject of an application for—  |    |



- (i) a restraining order under **section 24A** of the Criminal Proceeds (Recovery) Act 2009 (the **CPR Act**); or
  - (ii) a type 2 assets forfeiture order (within the meaning of the CPR Act); or
  - (b) is the subject of a restraining order under **section 24A** of the CPR Act. 5
- (2B) **Subsection (2A)** applies despite the related proceedings being civil in nature.

**50 Section 2B amended (Certain civil proceedings deemed to be criminal proceedings)**

After section 2B(2), insert:

- (2A) A proceeding certified by the Attorney-General to have been instituted in respect of the forfeiture or restraint of property by way of an application for any of the following orders must be treated as a criminal proceeding for the purposes of Part 2 despite being civil in nature: 10
  - (a) a restraining order under **section 24A** of the Criminal Proceeds (Recovery) Act 2009: 15
  - (b) a type 2 assets forfeiture order (within the meaning of that Act).

Subpart 3—Amendment to Sentencing Act 2002

**51 Principal Act**

This subpart amends the Sentencing Act 2002.

**52 Section 142I amended (Determining ownership of property)** 20

In section 142I, replace “section 58” with “**section 17A**”.

**Schedule 1**  
**New Schedule 1 inserted into Criminal Proceeds (Recovery) Act**  
**2009**

s 42

**Schedule 1**  
**Transitional, savings, and related provisions**

5

s 7A

**Part 1**  
**Provisions relating to Criminal Proceeds (Recovery) Amendment**  
**Act 2022**

10

**1 Definitions**

In this Part, **amendment Act** means the Criminal Proceeds (Recovery) Amendment Act **2022**.

**2 Restraining order under section 24A and type 2 assets forfeiture order**

- (1) An order may be made under **section 24A** in respect of any specific property of a respondent whether the respondent acquired that property before, on, or after the commencement of that section. 15
- (2) A type 2 assets forfeiture order may be made in respect of any specific property of a respondent whether the respondent acquired that property before, on, or after the commencement of **section 50C**. 20

**3 Variation of existing restraining order to extend to interest in KiwiSaver scheme**

- (1) A court may make an order under section 35 varying the restrained property to which an existing restraining order relates so that the restrained property is or includes an interest held by a person as a member of a KiwiSaver scheme. 25
- (2) **Subsection (1)** does not limit the generality of section 34(1) or 35(a).
- (3) In this clause, **existing restraining order** means a restraining order made under section 24 or 25 that is in force on the commencement of **section 84A**.

**4 Discharge of civil forfeiture order applying to interest in KiwiSaver scheme**

30

**Section 84A** applies only in relation to a civil forfeiture order made on or after the commencement of that section.

**5 Return of seized property that is not subject of forfeiture order**

- (1) New **sections 112 and 113** extend to property that was transferred to the Official Assignee under section 103, or seized under a warrant issued under section 110, before the commencement of those new sections if, immediately before that commencement, the property had not yet been returned under section 112 (as in force before its replacement by new **section 112**).
- (2) In this section, a reference to a new section is a reference to the section, as inserted by the amendment Act.

5

**Schedule 2**  
**New Schedule 1AA inserted into KiwiSaver Act 2006**

s 46

**Schedule 1AA**  
**Transitional, savings, and related provisions**

5

s 6A

**Part 1**  
**Provisions relating to Criminal Proceeds (Recovery) Amendment Act 2022**

- 1 Application of amendments relating to civil forfeiture orders under Criminal Proceeds (Recovery) Act 2009** 10
- (1) The relevant provisions extend to a civil forfeiture order made in respect of an interest held in a KiwiSaver scheme that is issued before the commencement of **subpart 1 of Part 2** of the amendment Act.
- (2) However, the relevant provisions apply only in relation to a civil forfeiture order made on or after that commencement. 15
- (3) In this section,—
- amendment Act** means the Criminal Proceeds (Recovery) Amendment Act **2022**
- civil forfeiture order** has the same meaning as in section 5(1) of the Criminal Proceeds (Recovery) Act 2009 20
- relevant provisions** means the following provisions (as inserted by the amendment Act):
- (a) **section 127(3):**
- (b) **clause 7(3)(b) of Schedule 1.** 25