

South Australia

# **Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Act 2016**

An Act to amend the *Criminal Assets Confiscation Act 2005*.

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**The Parliament of South Australia enacts as follows:**

**Part 1—Preliminary**

**1—Short title**

This Act may be cited as the *Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Act 2016*.

**2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

**3—Amendment provisions**

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

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

**4—Amendment of long title**

Long title—after "crime;" insert:

to provide for the confiscation of property of certain drug offenders as an additional punishment for their offending;

**5—Amendment of section 3—Interpretation**

- (1) Section 3(1)—after the definition of *conviction day* insert:

*conviction offence*, in relation to a prescribed drug offender, has the meaning given in section 6A;

- (2) Section 3(1)—after the definition of *premises* insert:

*prescribed drug offender*—see section 6A;

- (3) Section 3(1)—after the definition of *property-tracking document* insert:

*protected property* of a person means property owned by or subject to the effective control of the person that is of a class declared by regulation for the purposes of this definition;

- (4) Section 3(1)—after the definition of *search warrant* insert:

*serious and organised crime* has the same meaning as in the *Australian Crime Commission (South Australia) Act 2004*;

- (5) Section 3(1), definition of *tainted property*—after paragraph (b) insert:

or

- (c) property owned by, or subject to the effective control of, a prescribed drug offender on the conviction day for the conviction offence (other than protected property of the prescribed drug offender); or

- (d) property owned by, or subject to the effective control of, a person who has been charged with, or is proposed to be charged with, an offence where the person would, if convicted of the offence, become a prescribed drug offender (other than protected property of the person);

## 6—Amendment of section 6—Meaning of effective control

Section 6(1)(d)—delete paragraph (d) and substitute:

- (d) if property is initially owned by a person and, within 6 years (whether before or after) of—
  - (i) an application for a restraining order or a confiscation order being made; or
  - (ii) the person becoming a prescribed drug offender,is disposed of to another person without sufficient consideration, then the property is taken still to be subject to the effective control of the first person;

## 7—Insertion of section 6A

After section 6 insert:

### 6A—Meaning of prescribed drug offender

- (1) For the purposes of this Act, a person is a *prescribed drug offender* if the person is convicted of a serious drug offence (the *conviction offence*) committed after the commencement of this section and—
  - (a) the conviction offence is a commercial drug offence; or
  - (b) the person has at least 2 other convictions for prescribed drug offences and those offences and the conviction offence were all committed on separate occasions within a period of 10 years, not including any period during which the person was in government custody.
- (2) A conviction may be taken into account for the purposes of subsection (1)(b)—
  - (a) whether the offence to which the conviction relates was committed before or after the commencement of this section; and
  - (b) whether or not the offence to which the conviction relates has previously been taken into account for the purposes of any proceeding under this Act.
- (3) In this section—

*commercial drug offence* means—

  - (a) an offence against section 32(1) or (2), section 33(1) or (2), section 33A(1) or (2), section 33B(1) or (2) or section 33C(1) or (2) of the *Controlled Substances Act 1984*; or

- (b) an offence against Part 5 Division 3 of the *Controlled Substances Act 1984* involving a commercial quantity or large commercial quantity of a controlled drug;

*detainee* means a person who—

- (a) is detained in a training centre within the meaning of the *Young Offenders Act 1993*; or
- (b) is detained as a result of being declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935*;

*external serious drug offence* means an offence against a law or former law of the Commonwealth, of another State or of a Territory of a kind prescribed by regulation;

*government custody* means—

- (a) custody as a prisoner or detainee; or
- (b) custody under a law of another jurisdiction in the nature of custody referred to in paragraph (a);

*prescribed drug offence* means—

- (a) a serious drug offence; or
- (b) an offence against a former law of the State of a kind prescribed by regulation; or
- (c) an external serious drug offence;

*serious drug offence* means an offence against Part 5 Division 2 or 3 of the *Controlled Substances Act 1984* that is an indictable offence.

## **8—Amendment of section 10—Application of Act**

Section 10—delete "This Act" and substitute:

Subject to any express provision to the contrary, this Act

## **9—Amendment of section 24—Restraining orders**

- (1) Section 24(4)—delete "subsection (5)" and substitute:

subsections (5) and (5a)

- (2) Section 24—after subsection (5) insert:

- (5a) The court may not specify property in a restraining order that is protected property of a person unless subsection (1)(c) applies to the property.

## **10—Amendment of section 34—Court may exclude property from restraining order**

Section 34(1)(b)—after subparagraph (i) insert:

- (ia) —
  - (A) if the suspect has been convicted of the serious offence to which the restraining order relates—

- the suspect has not become a prescribed drug offender as a result of the conviction; or
  - the suspect has become a prescribed drug offender as a result of the conviction, but the property was not owned by or subject to the effective control of the suspect on the conviction day for that offence or is property that should not be subject to the restraining order in accordance with section 24(5a); or
- (B) if the suspect has not been convicted of the serious offence to which the restraining order relates—
- the suspect would not become a prescribed drug offender if convicted of the offence; or
  - the suspect would become a prescribed drug offender if convicted of the offence, but the property is not owned by or subject to the effective control of the suspect or is property that should not be subject to the restraining order in accordance with section 24(5a); and

## 11—Insertion of Part 4 Division 1 Subdivision 1A

After section 56 insert:

### Subdivision 1A—Deemed forfeiture orders

#### 56A—Prescribed drug offenders

- (1) Immediately on a person becoming a prescribed drug offender, a forfeiture order (a *deemed forfeiture order*) will be taken to have been made under Subdivision 1 by the convicting court.
- (2) A deemed forfeiture order applies to all property owned by, or subject to the effective control of, the prescribed drug offender on the conviction day for the conviction offence other than the following:
  - (a) protected property of the prescribed drug offender;
  - (b) property that has been excluded from a restraining order under Part 3 Division 3;
  - (c) property that is otherwise forfeited to the Crown under this Act.
- (3) Except as provided in subsection (4), section 59A and section 209A, this Act applies to a deemed forfeiture order in all respects as if it were a forfeiture order made under section 47(3)(a) in relation to conviction for the conviction offence, subject to such modifications as may be prescribed, or as may be necessary for the purpose.

- (4) Any power that may be exercised by a court that is hearing or that is to hear an application for a forfeiture order may be exercised, in relation to a deemed forfeiture order, by the convicting court at any time within the period of 6 months (or such longer period as may be allowed by the convicting court) after the conviction day for the conviction offence.
- (5) In this section—  
***convicting court***, in relation to a prescribed drug offender, means the court that convicted the prescribed drug offender of the conviction offence.

**56B—Court may declare that property has been forfeited under this Subdivision**

A court may declare that particular property has been forfeited under this Subdivision if—

- (a) the DPP applies to the court for the declaration; and
- (b) the court is satisfied that the property is forfeited under this Subdivision.

**12—Insertion of section 59A**

After section 59 insert:

**59A—Exclusion orders based on cooperation with law enforcement agency**

- (1) If a person becomes a prescribed drug offender, the convicting court may make an order excluding property from forfeiture under Subdivision 1A (an ***exclusion order***) if—
  - (a) a person applies for the exclusion order in accordance with section 60; and
  - (b) the forfeiture applies to the applicant's property; and
  - (c) the court is satisfied that the property to be specified in the exclusion order is neither proceeds nor an instrument of unlawful activity; and
  - (d) the court is satisfied that it would be appropriate to reduce the effect of forfeiture because the person has cooperated with a law enforcement agency and the cooperation relates directly to a serious and organised crime offence that has been committed or may be committed in the future.
- (2) An exclusion order under subsection (1) must—
  - (a) specify the nature, extent and value (at the time of making the order) of the property concerned; and
  - (b) direct that the property be excluded from the operation of Subdivision 1A; and

- (c) if the property has vested (in law or equity) in the Crown under this Division and is yet to be disposed of—direct the Crown to transfer the property to the applicant; and
  - (d) if the property has vested (in law or equity) in the Crown under this Division and has been disposed of—direct the Crown to pay the applicant an amount equal to the value specified under paragraph (a).
- (3) An applicant for an exclusion order under subsection (1) must give written notice to the DPP of the application and the grounds on which the order is sought.
- (4) The DPP—
- (a) may appear and adduce evidence at the hearing of the application; and
  - (b) must give the applicant notice of any grounds on which it proposes to contest the application.

**13—Amendment of section 62A—No exclusion or compensation where forfeiture taken into account in sentencing**

Section 62A—delete "Despite" and substitute:

Subject to section 59A but despite

**14—Amendment of section 76—Excluding property from forfeiture under this Division**

Section 76(1)(c)—after subparagraph (i) insert:

- (ia) the person convicted of the serious offence to which the restraining order relates—
  - (A) is not, as a result of the conviction, a prescribed drug offender; or
  - (B) is, as a result of the conviction, a prescribed drug offender but the property is protected property of the person; and

**15—Insertion of section 76AA**

After section 76 insert:

**76AA—Excluding property based on cooperation with law enforcement agency**

- (1) The court that made the restraining order referred to in section 74(1)(b) may make an order excluding particular property from forfeiture under this Division if—
- (a) a person applies for the order; and
  - (b) the applicant has become a prescribed drug offender as a result of being convicted of the serious offence to which the restraining order relates; and
  - (c) the applicant owns the property; and

- (d) the court is satisfied that the property is neither proceeds nor an instrument of unlawful activity; and
  - (e) the court is satisfied that it would be appropriate to reduce the effect of forfeiture because the applicant has cooperated with a law enforcement agency and the cooperation relates directly to a serious and organised crime offence that has been committed or may be committed in the future.
- (2) To avoid doubt, an order under this section cannot be made in relation to property if the property has already been forfeited under this Division.
  - (3) The applicant must give written notice to the DPP of both the application and the grounds on which the order is sought.
  - (4) The DPP—
    - (a) may appear and adduce evidence at the hearing of the application; and
    - (b) must give the applicant notice of any grounds on which it proposes to contest the application.
  - (5) This section is in addition to, and does not derogate from, section 76.

**16—Amendment of section 76A—No exclusion where forfeiture taken into account in sentencing**

Section 76A—after "Despite section 76" insert:

but subject to section 76AA

**17—Substitution of section 203**

Section 203—delete the section and substitute:

**203—Proceeds from sale of property**

Amounts realised from a sale of controlled property under section 200 are taken to be covered by the restraining order that covered the property and must, for the purposes of this Act, be treated as if they—

- (a) if the restraining order covered the property on the basis that the property was proceeds of a serious offence to which the order relates—continue to be proceeds of the offence; or
- (b) if the restraining order covered the property on the basis that the property was an instrument of a serious offence to which the order relates—continue to be an instrument of the offence; or
- (c) if the restraining order covered the property on the basis that the property was owned by or was subject to the effective control of a particular person—continue to be property owned by or subject to the effective control of that person.



## 18—Amendment of heading

Heading to Part 7 Division 3—delete the heading to Division 3 and substitute:

### **Division 3—Credits to funds**

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

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

section 209A and

## 20—Insertion of section 209A

After section 209 insert:

### **209A—Credits to Justice Rehabilitation Fund**

- (1) The *Justice Rehabilitation Fund* (the *Fund*) is established.
- (2) The Fund must be kept as directed by the Attorney-General.
- (3) The Fund is to consist of the following money:
  - (a) money paid into the fund under subsection (4);
  - (b) any money appropriated by Parliament for the purposes of the Fund;
  - (c) any money paid into the Fund at the direction or with the approval of the Attorney-General;
  - (d) any income from investment of money belonging to the Fund;
  - (e) any money paid into the Fund under any other Act.
- (4) Subject to any direction of a court under this Act, any proceeds of confiscated assets of a prescribed drug offender must be paid into the Fund.
- (5) The Fund may be applied by the Attorney-General (without further appropriation than this subsection) in the absolute discretion of the Attorney-General as additional government funding for the provision of programs and facilities, for the benefit of offenders, victims and other persons, that will further crime prevention and rehabilitation strategies.
- (6) Nothing in subsection (5) authorises the application of monies from the Fund—
  - (a) to a law enforcement authority of the State for criminal investigation or other law enforcement purposes (whether civil or criminal); or
  - (b) for a purpose that the Attorney-General has determined could be the subject of a payment from the Victims of Crime Fund under section 31 of the *Victims of Crime Act 2001*.

- (7) The Attorney-General may invest any of the money belonging to the Fund that is not immediately required for the purposes of the Fund in such manner as the Attorney-General thinks fit.

## **21—Amendment of section 224—Effect of confiscation scheme on sentencing**

Section 224(b)—delete paragraph (b) and substitute:

- (b) must not have regard to any forfeiture (whether under this Act or a corresponding law), pecuniary penalty order or recognised Australian pecuniary penalty order that relates to the offence or that might result from conviction for the offence, to the extent that the forfeiture or order applies to—
- (i) proceeds of the offence; or
  - (ii) if the conviction has resulted in the person becoming a prescribed drug offender—property that was owned by or subject to the effective control of the person on the conviction day for the offence; and

## **22—Insertion of section 229A**

After section 229 insert:

### **229A—Annual report relating to prescribed drug offenders**

- (1) The Attorney-General must, on or before 30 September in each year, lay before both Houses of Parliament a report on the operation of the amendments enacted by the *Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Act 2016* during the financial year ending on the preceding 30 June.
- (2) A report under this section must include the following information for the financial year to which the report relates:
- (a) the number of persons who became prescribed drug offenders during that period;
  - (b) the number of restraining orders made during that period in relation to persons who, if convicted of the serious offence to which the restraining order relates, will become prescribed drug offenders;
  - (c) details of property forfeited under this Act during that period that was owned by or subject to the effective control of a prescribed drug offender on the conviction day for the conviction offence.
- (3) A report required under this section may be incorporated into any other report required to be laid before both Houses of Parliament by the Attorney-General.

## **23—Review of Act**

- (1) The Attorney-General must, within 3 years after the commencement of this Act, undertake a review of the amendments to the *Criminal Assets Confiscation Act 2005* enacted by this Act.

- (2) The Attorney-General must cause a report on the outcome of the review to be tabled in both Houses of Parliament within 12 sitting days after its completion.