

House of Assembly—No 112

As laid on the table and read a first time, 18 May 2011

South Australia

Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2011

A BILL FOR

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 2011*.

5 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.

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

4—Amendment of long title

Long title—delete "proceeds and instruments of crime" and substitute:
criminal assets

5—Amendment of section 3—Interpretation

15 (1) Section 3—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, definition of *extension order*—delete the definition

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

20 *prescribed drug offender*—see section 6A;

(4) Section 3—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 could not be taken in proceedings against the person under the laws of bankruptcy (as modified by regulations under this Act);

25

(5) Section 3—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*;

(6) Section 3, definition of *serious offence*, (b)—delete paragraph (b)

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

or

- 5 (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
- 10 (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);

(8) Section 3—after its present contents as amended by this section (now to be designated as subsection (1)) insert:

- 15 (2) A reference in this Act to an *indictable offence* includes an indictable offence of a kind that is required to be prosecuted, and dealt with by the Magistrates Court, as a summary offence under a provision of any Act.

6—Amendment of section 6—Meaning of effective control

Section 6(1)(b), (c) and (d)—delete "under the" wherever occurring and substitute in each case:

20 subject to the

7—Insertion of section 6A

After section 6 insert:

6A—Meaning of prescribed drug offender

- 25 (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 30 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)—
- 35 (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 40 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

(1) 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

(2) Section 34(2)(a)(ii)—delete "under" and substitute:

subject to

(3) Section 34—after subsection (2) insert:

(3) Despite any other provision of this section, if a court has, in determining sentence in respect of a person's conviction of a serious offence, had regard to any forfeiture of property under this Act that might result from conviction for the offence, the property cannot be excluded from a restraining order relating to the offence on application made by the convicted person.

11—Amendment of section 46—Cessation of restraining orders

Section 46(4)—delete "Part 4 Division 2 or Division 3" and substitute:

this or any other Act

12—Amendment of section 47—Forfeiture orders

(1) Section 47(1)(a)—delete paragraph (a) and substitute:

(a) a person has been convicted of 1 or more serious offences and the court is satisfied that—

- (i) the property to be specified in the order is proceeds of 1 or more of those offences; or
- (ii) the person is a prescribed drug offender and the property to be specified in the order was owned by or subject to the effective control of the person on the conviction day for the conviction offence (and was not, on that day, protected property of the person); or

(2) Section 47(5)—delete "this section" and substitute:
subsection (3)

13—Amendment of section 48—Instrument substitution declarations

Section 48—after "forfeiture order" insert:
under section 47(3)

14—Amendment of section 57—Relieving certain dependants from hardship

Section 57(1)(a)—delete "section 47(1)(a)" and substitute:
section 47(1)(a)(i)

15—Amendment of section 58—Making exclusion orders before forfeiture order is made

Section 58(1)(c)(ii)—delete subparagraph (ii) and substitute:

- (ii) the property to be specified in the exclusion order is neither proceeds nor an instrument of a serious offence to which the application for a forfeiture order relates; and
- (iii) if the forfeiture order would be one to which section 47(1)(a)(ii) applies—the property to be specified in the exclusion order is not property that could be specified in a forfeiture order in accordance with that subparagraph; and

16—Amendment of section 59—Making exclusion orders after forfeiture

Section 59(1)(c)—after subparagraph (ii) insert:

- (iii) if the forfeiture order was one to which section 47(1)(a)(ii) applies—the property to be specified in the exclusion order was not property that could be specified in a forfeiture order in accordance with that subparagraph; and

17—Insertion of section 59A

After section 59 insert:

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

- 5 (1) A court that has made a forfeiture order or a court that is hearing, or is to hear, an application for a forfeiture order, may make an order excluding property from forfeiture (an *exclusion order*) if—
- 10 (a) a person applies for the exclusion order in accordance with section 60; and
- (b) the forfeiture order or the application for a forfeiture order (as the case may be) specifies the applicant’s property; and
- (c) the forfeiture order is, or would be, one to which section 47(1)(a)(ii) applies; and
- 15 (d) the court is satisfied that the property to be specified in the exclusion order 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 person has cooperated with a law enforcement agency and the cooperation relates directly to a serious and organised crime offence that has
- 20 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
- 25 (b) direct that the property be excluded from the operation of the forfeiture order; 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
- 30 (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.
- 35 (4) The DPP—
- (a) may appear and adduce evidence at the hearing of the application; and
- 40 (b) must give the applicant notice of any grounds on which it proposes to contest the application.

18—Insertion of section 62A

After section 62 insert:

62A—No exclusion or compensation where forfeiture taken into account in sentencing

5 Subject to section 59A but despite any other provision of this
Subdivision, if a court has, in determining sentence in respect of a
person's conviction of a serious offence, taken into account any
forfeiture of property under this Act that relates to the offence or that
10 might result from conviction for the offence, the person cannot apply
for an exclusion order or a compensation order under this
Subdivision in respect of that property.

19—Amendment of section 74—Forfeiting restrained property without forfeiture order if person convicted of serious offence

(1) Section 74(5)—after "this section" insert:

15 and section 75

(2) Section 74(6), definition of *relevant period*, (b)—delete paragraph (b) and substitute:

(b) if, at the end of the 6 month period starting on the day of the
conviction, an extended period applies in accordance with
section 75—that extended period.

20—Substitution of section 75

Section 75—delete the section and substitute:

75—Extended period

(1) An extended period will apply for the purposes of the definition of
relevant period in section 74 if the applicant has, not later than
25 6 months after the start of the day of the relevant conviction, applied
to a court under this Act to exclude the property from the restraining
order or to exclude the property from forfeiture and that application
has not yet been finally determined.

(2) The extended period applying is the period ending when the
30 application to exclude property from the restraining order or from
forfeiture (as the case may be) is finally determined.

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

(1) Section 76(1)(a)—delete paragraph (a) and substitute:

35 (a) a person has been convicted of a serious offence to which the
restraining order relates; and

(ab) a person applies for the exclusion order; and

(ac) the applicant owns the property; and

(2) Section 76(1)(b)—after "restraining order" insert:

(or is security given under section 38(a)(iii) for the exclusion of property that was covered by the restraining order or under section 44(a)(iii) for the revocation of the restraining order)

5 (3) Section 76(1)(c)(ii)—delete subparagraph (ii) and substitute:

(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

10 (B) is, as a result of the conviction, a prescribed drug offender but the property is protected property of the person; and

(ii) the applicant's interest in the property was lawfully acquired; and

(4) Section 76(3)—delete "person" and substitute:

applicant

15 **22—Insertion of sections 76A and 76B**

After section 76 insert:

76A—Excluding property based on cooperation with law enforcement agency

20 (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

25 (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

30 (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.

35 (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.

76B—No exclusion where forfeiture taken into account in sentencing

Despite section 76 but subject to section 76A, if a court has, in determining sentence in respect of a person’s conviction of a serious offence, had regard to any forfeiture of property under this Act that relates to the offence or that might result from conviction for the offence, the convicted person cannot apply for an order under this Subdivision excluding the property from forfeiture under this Division.

23—Amendment of section 95—Making pecuniary penalty orders

(1) Section 95(1), (2), (3) and (4)—delete subsections (1), (2), (3) and (4) and substitute:

- (1) A court must, on application by the DPP, make an order (a *pecuniary penalty order*) requiring a specified person to pay to the Crown an amount determined under Subdivision 2 if satisfied that—
 - (a) the person has been convicted of, or has committed, a serious offence; and
 - (b) the person derived benefits from the commission of the offence.
- (2) A court may, on application by the DPP, make an order (a *pecuniary penalty order*) requiring a specified person to pay to the Crown an amount determined under Subdivision 2 if satisfied that—
 - (a) the person has been convicted of, or has committed, a serious offence; and
 - (b) the person's property includes an instrument of the offence.
- (3) In considering whether it is appropriate to make a pecuniary penalty order under subsection (2), the court may have regard to—
 - (a) any hardship that may reasonably be expected to be caused to any person (other than the person against whom the order is sought) by the operation of the order; and
 - (b) the use that is ordinarily made, or was intended to be made, of the property; and
 - (c) the gravity of the offence or offences concerned; and
 - (d) any other matter the court thinks fit.

(4) A court is not prevented from making a pecuniary penalty order in relation to a serious offence merely because of the existence of another confiscation order in relation to the offence.

(2) Section 95(5)(b)—delete paragraph (b) and substitute:

(b) if, at the end of the period of 9 months commencing on the conviction day, an extended period applies in accordance with section 75—before the end of the period of 3 months commencing on the day the extended period ends.

(3) Section 95(7)—after "in relation to" insert:

benefits derived from the commission of

24—Amendment of section 96—Additional application for pecuniary penalty order

(1) Section 96(1)—after "offence or" insert:

a pecuniary penalty order against a person in respect of

(2) Section 96(1)(a)—delete "under this Division in respect of the benefits or instrument" and substitute:

order in respect of the benefits or instrument (as the case may be)

(3) Section 96—delete subsection (3) and substitute:

(3) Except as provided in this section, nothing prevents the DPP from making more than 1 application for a pecuniary penalty order against a person in relation to a serious offence.

25—Insertion of section 98A

After section 98 insert:

98A—Property subject to a person's effective control

For the purposes of this Division, the court may treat as property of a person any property that is, in the court's opinion, subject to the person's effective control.

26—Amendment of section 99—Determining penalty amounts

(1) Section 99(a)—delete "relating to benefits derived from the commission of a serious offence" and substitute:

under section 95(1)

(2) Section 99(b)—delete "relating to an instrument of a serious offence" and substitute:

under section 95(2)

27—Amendment of section 104—Benefits and instruments already the subject of pecuniary penalty

(1) Section 104(1)—after "benefit" wherever occurring insert in each case:

or instrument

(2) Section 104(2)—delete subsection (2) and substitute:

- (2) For the purposes of this section, a pecuniary penalty imposed in respect of a benefit includes a literary proceeds amount ordered in respect of the benefit.

5 **28—Repeal of section 105**

Section 105—delete the section

29—Amendment of section 106—Effect of property vesting in an insolvency trustee

10 Section 106—delete "purpose of assessing the value of benefits that a person has derived from the commission of a serious offence, the" and substitute:
purposes of this Subdivision, a

30—Amendment of section 107—Reducing penalty amounts to take account of forfeiture and proposed forfeiture

Section 107—after its present contents (now to be designated as subsection (1)) insert:

- 15 (2) If a pecuniary penalty order relates to instruments of a serious offence, the penalty amount under the order is reduced by an amount equal to the value, at the time of making the order, of any instruments of the offence if—
- 20 (a) the instruments have been forfeited, under this Act or any other law, in relation to the offence to which the order relates; or
- (b) an application has been made for a forfeiture order that would cover the instruments.

25 **31—Amendment of section 108—Reducing penalty amounts to take account of fines etc**

Section 108(1)—delete subsection (1) and substitute:

- 30 (1) The court may, if it considers it appropriate, reduce the penalty amount under a pecuniary penalty order made in relation to a serious offence by an amount equal to a monetary sum paid, or payable, by the person in relation to the offence (or equal to any proportion of such a monetary sum).

32—Amendment of section 149—Interpretation

Section 149(1)(a) and (b)—delete "property of" wherever occurring and substitute in each case:

35 property owned by or subject to the effective control of

33—Substitution of section 203

Section 203—delete the section and substitute:

203—Proceeds from sale of property

5 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—

- 10 (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
- 15 (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.

34—Amendment of heading

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

Division 3—Credits to funds

35—Amendment of section 209—Credits to Victims of Crime Fund

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

section 209A and

36—Insertion of section 209A

After section 209 insert:

209A—Credits to Justice Resources Fund

- 30 (1) The *Justice Resources Fund* (the **Fund**) is established.
- (2) The Fund must be kept as directed by the Treasurer.
- (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;
- 35 (c) any money paid into the Fund at the direction or with the approval of the Minister and the Treasurer;
- (d) any income from investment of money belonging to the Fund;
- (e) any money paid into the Fund under any other Act.

- 5
- (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 for the following purposes:
- 10
- (a) for the provision of courts infrastructure, equipment or services;
- (b) for the provision of programs and facilities within the justice system for dealing with drug and alcohol related crime.
- (6) Nothing in subsection (5) authorises the application of monies from the Fund—
- 15
- (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, with the approval of the Treasurer, invest any of the money belonging to the Fund that is not immediately required for the purposes of the Fund in such manner as is approved by the Treasurer.
- 20

37—Amendment of section 219—Consent orders

Section 219(1)(a)—delete "applicant in" and substitute:

25 parties to

38—Substitution of section 224

Section 224—delete the section and substitute:

224—Effect of confiscation scheme on sentencing

30 Despite any provision of the *Criminal Law (Sentencing) Act 1988*, in determining sentence in respect of a person's conviction of a serious offence, a court—

- (a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
- 35
- (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
- 40
- proceeds of the offence; and

- 5
- (c) must 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 any other property; and
 - (d) must not have regard to any literary proceeds order that relates to the offence.

224A—Court must not allow inspection etc of certain material

- 10
- 15
- 20
- (1) Subject to subsection (2), but despite any other provision of this Act or any other Act or law, a court must not permit a person to inspect or obtain a copy of any material in the possession of the court relating to proceedings in which a court excludes property owned by, or subject to the effective control of, a suspect from forfeiture under this Act on the basis that the suspect 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) A court may permit a person to inspect or obtain a copy of material referred to in subsection (1)—
 - (a) with the written consent of both the suspect and the Attorney-General (and, if such consent is conditional, in accordance with any conditions of consent); or
 - (b) in accordance with the regulations.