

Legislative Council—No 120A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 27 September 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*.

2—Commencement

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

3—Amendment provisions

5 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*

5—Amendment of section 3—Interpretation

- (2) Section 3, definition of *extension order*—delete the definition
- (6) Section 3, definition of *serious offence*, (b)—delete paragraph (b)
- 10 (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:

subject to the

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

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

subject to
- (3) Section 34—after subsection (2) insert:
 - 25 (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
 - 30 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

- 35 (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)

18—Insertion of section 62A

After section 62 insert:

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

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 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:
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 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 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:

(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)
- (3) Section 76(1)(c)(ii)—delete subparagraph (ii) and substitute:
 - (ii) the applicant's interest in the property was lawfully acquired; and
- (4) Section 76(3)—delete "person" and substitute:
 - applicant

22—Insertion of sections 76A and 76B

After section 76 insert:

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

Despite section 76, 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.

5 (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:

10 (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

15 **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

20 (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:

25 (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

30 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:

35 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

5 (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.

28—Repeal of section 105

10 Section 105—delete the section

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

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:

15 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:

20 (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—

25 (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.

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

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

(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).

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32—Amendment of section 149—Interpretation

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

property owned by or subject to the effective control of

37—Amendment of section 219—Consent orders

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

38—Substitution of section 224

5 Section 224—delete the section and substitute:

224—Effect of confiscation scheme on sentencing

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—

- 10 (a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
- 15 (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 proceeds of the offence; and
- 20 (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
- 25 (d) must not have regard to any literary proceeds order that relates to the offence.