

Legislative Council—No 13A

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South Australia

Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015

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 2015*.

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*

5 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

10 (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;

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

20 (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

25 (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

30 (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—Insertion of section 6A

After section 6 insert:

6A—Meaning of prescribed drug offender

- 5 (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
- 10 (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)—
- 15 (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.
- 20 (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
- 25 (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*;
- 30 *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
- 40 (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.

7—Amendment of section 10—Application of Act

Section 10—delete "This Act" and substitute:

Subject to any express provision to the contrary, this Act

8—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.

9—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

10—Amendment of section 47—Forfeiture orders

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

11—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)

12—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

13—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

14—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—
- (a) a person applies for the exclusion order in accordance with section 60; and
- 10 (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.

15—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

5 **16—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—

10 (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

17—Insertion of section 76AA

15 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.

18—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

19—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.

21—Amendment of section 209—Credits to the Victims of Crime Fund

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

subsection (1a) and

(2) Section 209—after subsection (1) insert:

(1a) The Attorney-General must ensure that in each financial year an amount equal to 50% of the proceeds of confiscated assets of prescribed drug offenders for the preceding financial year is, instead of being paid into the Victims of Crime Fund under subsection (1), applied as additional government funding for drug rehabilitation programs (and such money may be applied without further appropriation than this subsection).

23—Amendment of section 224—Effect of confiscation scheme on sentencing

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

- 5 (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
- 10 (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

24—Amendment of section 226—Appeals

Section 226—after subsection (3) insert:

- 15 (3a) On an appeal under this section the court may discharge or vary the order if satisfied that it is in the interests of justice to do so (and may do so regardless of whether this Act authorised or required the order to be made).

25—Insertion of sections 229A and 229B

20 After section 229 insert:

229A—Confiscation guidelines relating to prescribed drug offenders

25 Property may not be the subject of an application under this Act on the basis that the property is owned by or subject to the effective control of—

- (a) a prescribed drug offender; or
- (b) a person who has been charged with, or is suspected on reasonable grounds of having committed, an offence that will, if he or she is convicted of the offence, result in him or her becoming a prescribed drug offender,
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 unless the DPP has published in the Gazette guidelines setting out policies applied by the DPP in relation to the making of such applications.

229B—Annual report relating to prescribed drug offenders

- 35 (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 2015* during the financial year ending on the preceding 30 June.

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- (2) A report under this section must include the following information for the financial year to which the report relates:
- (a) the number of restraining orders and forfeiture orders made in relation to property owned by, or subject to the effective control of—
 - 10 (i) prescribed drug offenders; and
 - (ii) persons who have been charged with, or are suspected on reasonable grounds of having committed, an offence that will, if the person is convicted of the offence, result in him or her becoming a prescribed drug offender;
 - (b) details of property forfeited under this Act that was, immediately before such forfeiture, owned by, or subject to the effective control of, a prescribed drug offender.
- 15 (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.

26—Review of Act

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- (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.