

(Reprint No. 1)

SOUTH AUSTRALIA

CRIMES (CONFISCATION OF PROFITS) ACT, 1986

This Act is reprinted pursuant to the Acts Republication Act, 1967, and incorporates all amendments in force as at 1 July 1991.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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SCHEDULE

CRIMES (CONFISCATION OF PROFITS) ACT, 1986

being

Crimes (Confiscation of Profits) Act, 1986, No. 17 of 1986 [Assented to 20 March 1986]¹

as amended by

Crimes (Confiscation of Profits) Act Amendment Act, 1988, No. 28 of 1988 [Assented to 21 April 1988]
Crimes (Confiscation of Profits) Act Amendment Act, 1990, No. 10 of 1990 [Assented to 12 April 1990]²
Statutes Amendment (Attorney-General's Portfolio) Act 1991 No. 33 of 1991 [Assented to 24 April 1991]³

An Act to provide for the confiscation of profits of crime; to make related amendments to the Controlled Substances Act, 1984; and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short title

1. This Act may be cited as the *Crimes (Confiscation of Profits) Act, 1986*.

Commencement

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

Interpretation

3. (1) In this Act, unless the contrary intention appears—

“the Administrator” means a person nominated by the Attorney-General to administer property forfeited or subject to restraining orders under this Act:

“appropriate court” means—

(a) the Supreme Court;

(b) in relation to an application for a restraining order—

(i) if a person has been charged with (but not convicted of) the prescribed offence in respect of which the order is sought—any court with jurisdiction to try the offence;

(ii) if a person has been convicted of the prescribed offence in respect of which the order is sought—the court by which that person was convicted;

or

¹Came into operation 1 March 1987: *Gaz.* 19 February 1987, p. 381.

²Came into operation 1 September 1990: *Gaz.* 16 August 1990, p. 582.

³Came into operation 6 June 1991: *Gaz.* 6 June 1991, p. 1776.

(c) in relation to an application for a forfeiture order—a court before which a person has been convicted of the prescribed offence in respect of which the order is sought:

“corresponding law” means a law of another State, or a Territory, of the Commonwealth declared by proclamation to be a law corresponding to this Act:

“drug” means a substance that is a drug of dependence or a prohibited substance as defined in the *Controlled Substances Act, 1984*:

“financial institution” means—

- (a) a bank;
- (b) a building society;
- (c) a credit union;
- (d) a friendly society;
- (e) an institution of a kind declared by regulation to be a financial institution:

“forfeitable property” means—

- (a) any property of a person involved in the commission of a prescribed offence who is liable to forfeiture of property under this Act;
- (b) any property—
 - (i) of a person who is liable to forfeiture of property or a pecuniary penalty under a corresponding law;
 - or
 - (ii) in respect of which a restraining order has been, or could be, made under a corresponding law;
- (c) any property held on behalf of a person referred to in paragraph (a) or (b) or in the effective control of any such person:

“gift” includes a transaction (not being a transaction entered into in the ordinary course of trade or commerce) under which a person acquires property for less than a commercially adequate consideration:

“party” to the commission of an offence, means a person who participates in, or is an accessory before or after the fact to, the commission of the offence:

“premises” means a building, structure or place (whether built on or not and whether enclosed or unenclosed) and includes an aircraft, vessel or vehicle:

“prescribed offence” means—

- (a) an indictable offence;
- or
- (b) an offence against—
 - (i) section 34(1) or (2) or 44(1) or (2) of the *Fisheries Act, 1982*;
 - (ii) section 63(1)(a) of the *Lottery and Gaming Act, 1936*;
 - (iii) section 47(1), (2) or (4), 48(1), 48a(1), 51(1) or 60(1) of the *National Parks and Wildlife Act 1972*;
 - (iv) section 117(1) of the *Racing Act, 1976*;

(v) section 28(1)(a), 37 or 38 of the *Summary Offences Act, 1953*;

(vi) a provision of the *Companies (South Australia) Code*;

(vii) a provision of the *Companies (Acquisition of Shares) (South Australia) Code*;

(viii) a provision of the *Securities Industry (South Australia) Code*;

“proceeds” of an offence means—

(a) property derived directly or indirectly from the commission of the offence;

(b) property into which property of a kind mentioned in paragraph (a) is converted;

(c) property resulting from a series of transactions —

(i) in which property is converted from one form to another;

and

(ii) of which the first transaction is one involving property of a kind mentioned in paragraph (a):

“property” means real or personal property, whether tangible or intangible, and includes an interest in any such property:

“search warrant” means a warrant under this Act authorizing a search of a person or premises:

“serious drug offence” means an offence involving trade in a drug or the growing, manufacture or preparation of a drug for trade:

“tainted property” means—

(a) property acquired for the purpose of committing a prescribed offence or used in, or in connection with, the commission of a prescribed offence;

or

(b) property that is the proceeds of a prescribed offence:

“telephone” includes any telecommunication device.

(2) For the purposes of this Act, a person shall be deemed to have been charged with an offence as soon as an information or complaint is laid against that person alleging the commission of the offence irrespective of whether that person then has notice of the allegation.

(3) For the purposes of this Act, a person shall be deemed to have been convicted of an offence if—

(a) that person is adjudged guilty of the offence by a court but is discharged without conviction;

or

(b) a court, at the request of that person, takes the offence into account in determining the penalty for some other offence or offences.

(3a) For the purposes of this Act, a person is involved in the commission of a prescribed offence if that person—

- (a) commits the offence or is a party to its commission;
- (b) receives property (except in the course of the administration or enforcement of this Act) that is tainted by reason of the commission of the offence knowing of its origin or in circumstances such as should raise a reasonable suspicion as to its origin.

(4) A reference in this Act to the origin of tainted property is a reference to the circumstances by virtue of which the property is tainted.

(4a) In determining for the purposes of this Act whether the property of one person is in the effective control of another, a court may have regard to legal, equitable, corporate, personal and other relationships.

(5) The Governor may, by proclamation, declare a law of another State, or of a Territory, of the Commonwealth to be a law corresponding to this Act and may, by subsequent proclamation, vary or revoke any such declaration.

Note: For definition of divisional penalties see Appendix 2.

Sentencing court not to have regard to forfeiture of property

3a. A court, in determining sentence for a prescribed offence, must not have regard to the question of whether or not the offender's property is, or could be, the subject of an application for forfeiture under this Act.

Liability to forfeiture

4. (1) A person involved in the commission of a prescribed offence is liable to forfeit property as follows:

- (a) the person is liable to forfeit tainted property;
- (b) if the person has received or enjoyed at any time an accretion of property or other benefit in anticipation or in consequence of the commission of the offence, he or she is liable to forfeit property of equivalent value,

(but where a person is liable to forfeiture under both paragraphs, an appropriate reduction in the value of property to be forfeited under paragraph (b) will be made if that is necessary to prevent double forfeiture in respect of the same accretion or benefit).

(2) If a person who commits or is a party to the commission of a prescribed offence—

- (a) obtains any benefit in respect of the publication, or prospective publication, of material concerning the circumstances of the offence;
- (b) obtains any benefit in respect of the publication or prospective publication of material concerning his or her opinions, exploits or life history, or the opinions, exploits or life history of any other person who committed or was a party to the commission of the offence (being a benefit attributable in whole or part to notoriety achieved through commission of the offence);

or

- (c) obtains any benefit by commercial exploitation in any other way of notoriety achieved through commission of the offence,

that person is liable to forfeit that benefit or property of equivalent value under subsection (1).

(3) A person who commits, or is a party to the commission of, a serious drug offence is liable to forfeit all property except property as to which the court is satisfied, on evidence given or adduced by that person, that the property is not, and was not derived from, the proceeds of offences against the law of this State or any other law.

(4) Where a person not involved in the commission of a prescribed offence receives tainted property by way of gift from a person who was so involved that person is liable to forfeit the gift or property of equivalent value.

(5) Where—

(a) a person holds property on behalf of a person involved in the commission of a prescribed offence;

or

(b) a person holds property that is in the effective control of a person involved in the commission of a prescribed offence,

the property will be treated for the purposes of this Act as property of the person involved in the commission of the offence and the person by whom the property is held should (where appropriate) be joined as a party to proceedings under this Act.

Forfeiture orders

5. (1) Where the appropriate court is satisfied, on the application of the Attorney-General—

(a) that a prescribed offence has been committed;

(b) that the person by whom the offence was committed—

(i) has been convicted of the offence;

or

(ii) is dead, cannot be found, or is for some other reason, not amenable to justice;

and

(c) that a person is, in consequence of commission of the offence, liable to forfeit property under this Act,

the court may make an order for forfeiture against the person so liable.

(2) The order may be for the forfeiture of property specified in the order or for a pecuniary forfeiture unrelated to specific property (or both).

(2a) Where a person is liable to forfeit an interest in property but there are other interests in the same property that are not (apart from this subsection) liable to forfeiture, the court may, if it thinks fit, order that the property be forfeited in its entirety but that a person whose interest in the property was not liable to forfeiture apart from this subsection be paid a specified amount out of the proceeds of realization of the property or a specified proportion of the net proceeds of realization.

(2b) Where the value of a specific item of property exceeds or may exceed the amount in respect of which a forfeiture should, in the opinion of the court, be imposed, the court may order the forfeiture of that item of property and direct that, if the net proceeds of realization exceed that amount, the balance be returned to the person against whom the forfeiture is imposed.

(3) Subject to subsection (4), any question of fact to be decided by a court on an application for forfeiture shall be decided on the balance of probabilities.

(4) An allegation that a person was involved in the commission of a particular offence must, if that person has not been convicted of that offence or some other offence establishing the alleged involvement, be proved beyond reasonable doubt.

(5) A person who has an interest in property alleged to be liable to forfeiture—

(a) is entitled to such notice of the application as may be determined by the court to which the application is made;

and

(b) is entitled to appear and be heard on the application.

(6) Where a court orders the forfeiture of specified property under this section, the property vests in the Administrator.

(7) The Administrator may and, if the court by which the forfeiture order is made so directs, must sell or convert into money property forfeited under this section.

Restraining orders

6. (1) Where the appropriate Court is satisfied, on the application of the Attorney-General, that there are reasonable grounds to suspect that property is forfeitable property, the court may make a restraining order prohibiting, subject to the exceptions (if any) stated in the order, any dealing with the property.

(2) A restraining order may be made on the basis of an *ex parte* application but, in that event, the court shall allow the owner of the property a reasonable opportunity to be heard on the question of whether the order should continue in force and, if after hearing the owner, the court is not satisfied that there is good reason to continue the order in force, the order shall be revoked.

(3) A restraining order may—

(a) confer on the Administrator powers relating to the getting in, management or control of property subject to the order;

(b) make any other provision for management or control of the property;

(c) provide for payment of specified expenditure, or expenditure of a specified kind out of the property subject to the order;

(d) allow the owner of the property subject to the order to use the property in a manner and to an extent specified by the court as a security for raising money;

(e) make any other provision in relation to the property subject to the order that may be necessary or desirable in the circumstances.

(4) Where a person deals with property that is subject to a restraining order contrary to the terms of the order—

(a) the dealing is void;

and

(b) the person is guilty of an offence.

Penalty: \$5 000 or imprisonment for 2 years.

(5) A restraining order may be varied or revoked at any time.

(6) Subject to subsection (7), a restraining order lapses—

- (a) if at the expiration of the prescribed period from the date of the order, a charge of the offence in respect of which the order was made has not been laid under the law of this State or the law of another State, or a Territory, of the Commonwealth;
 - (b) if the charge of the offence in respect of which the order was made is withdrawn and a new charge of the commission of another offence (being either a prescribed offence or an offence against the law of another State, or a Territory, of the Commonwealth in consequence of which property is liable to forfeiture under a corresponding law), arising out of the same circumstances as the first charge, has not been laid within 7 days of the first charge being withdrawn;
 - (c) if the person charged with the offence in respect of which the order was made is acquitted;
 - (d) if the person charged with the offence in respect of which the order was made is convicted of the offence but proceedings for forfeiture of the property are not commenced within the prescribed period after the date of the conviction;
- or
- (e) proceedings for forfeiture of the property subject to the restraining order are determined.

(7) A restraining order does not lapse under subsection (6)(a) if within the prescribed period proceedings for forfeiture of the property to which the order relates are commenced under this Act or a corresponding law.

(8) In this section—

“prescribed period” means the period of one month or such longer period, not exceeding 2 months, as may be determined, on application by the Attorney-General, by the court by which the restraining order was made.

Issue of search warrants

7. (1) Where, on application by a member of the police force, a magistrate is satisfied that there are reasonable grounds to believe that a search of a particular person or of particular premises would reveal—

(a) forfeitable property;

or

(b) a document or other material relevant to identifying, tracing, locating or quantifying forfeitable property,

the magistrate may issue a search warrant in respect of that person or those premises.

(2) An application for the issue of a search warrant may be made either personally or by telephone.

(3) The grounds of an application for a search warrant must be verified by affidavit.

(4) An application for the issue of a search warrant shall not be made by telephone unless in the opinion of the applicant a search warrant is urgently required and there is insufficient time to make the application personally.

(5) Where an application for the issue of a search warrant is made by telephone, the following provisions apply:

- (a) the applicant shall inform the magistrate of the applicant's name and rank and number in the police force, and the magistrate, on receiving that information, is entitled to assume, without further inquiry, that the applicant is a member of the police force;
- (b) the applicant shall inform the magistrate of the grounds on which the issue of the search warrant is sought;
- (c) if it appears to the magistrate from the information furnished by the applicant that there are proper grounds for the issue of a search warrant, the magistrate shall inform the applicant of the facts that justify, in the magistrate's opinion, the issue of the warrant, and shall not proceed to issue the warrant unless the applicant undertakes to make an affidavit verifying those facts;
- (d) if the applicant gives such an undertaking, the magistrate may then make out and sign a search warrant, noting on the warrant the facts that justify, in the magistrate's opinion, the issue of the warrant;
- (e) the search warrant shall be deemed to have been issued, and shall come into force, when signed by the magistrate;
- (f) the magistrate shall inform the applicant of the terms of the warrant;
- (g) the applicant shall, as soon as practicable after the issue of the warrant, forward to the magistrate an affidavit verifying the facts referred to in paragraph (c).

(6) A magistrate by whom a search warrant is issued shall file the warrant, or a copy of the warrant, and the affidavit verifying the grounds on which the application for the warrant was made, in the Adelaide Magistrates Court.

Powers conferred by search warrant

8. (1) A search warrant authorizes any member of the police force, with such assistants as the member thinks necessary—

- (a) in the case of a warrant issued in respect of a person—to search that person;
- (b) in the case of a warrant issued in respect of premises—to enter and search the premises and anything in the premises.

(2) A search warrant shall not be executed between the hours of 7 o'clock in the evening and 7 o'clock in the following morning unless the magistrate by whom the warrant is issued expressly authorizes its execution between those hours.

(3) A member of the police force, or a person assisting the member, may use such force as is reasonably necessary for the execution of a search warrant.

(4) A member of the police force executing a search warrant may seize anything that the member suspects on reasonable grounds—

- (a) to be forfeitable property;

or

- (b) a document or other material relevant to identifying, tracing, locating or quantifying forfeitable property.

(5) Anything seized in pursuance of a search warrant must be returned to its owner at the expiration of 14 days from the date of seizure unless—

(a) an order for forfeiture or a restraining order is made in respect of the property within that period;

or

(b) the owner consents to its retention beyond that period.

(6) A member of the police force who executes a search warrant—

(a) shall prepare a notice in the prescribed form containing—

(i) the member's name and rank;

(ii) the name of the magistrate who issued the warrant and the date and time of its issue;

and

(iii) a description of anything seized in pursuance of the warrant;

and

(b) shall, as soon as practicable after execution of the warrant—

(i) in the case of a warrant issued in respect of a person—give the notice to the person;

(ii) in the case of a warrant issued in respect of premises—give the notice to the occupier of the premises or leave it in a prominent position on those premises.

(7) A search warrant, if not executed at the expiration of one month from the date of its issue, shall then expire.

Offence of hindering execution of search warrant

9. A person who, without lawful excuse, hinders a member of the police force, or a person assisting a member of the police force, in the execution of a search warrant shall be guilty of a summary offence.

Penalty: \$2 000 or imprisonment for 6 months.

Orders for obtaining information

9a. (1) The Supreme Court may, if satisfied on the application of the Attorney-General, the Administrator or a member of the police force, that an order under this section is reasonably required for the administration or enforcement of this Act, or a corresponding law, make an order of one or more of the following kinds:

(a) an order that a person appear before the Court for examination on questions relevant to identifying, tracing, locating or quantifying forfeitable property;

(b) an order that a person produce before the Court documents or other materials relevant to identifying, tracing, locating or quantifying forfeitable property;

(c) an order (a "monitoring order") requiring a financial institution to report promptly transactions affecting an account held with the institution.

(2) The following provisions apply in relation to a monitoring order:

(a) a monitoring order will remain in force (subject to revocation by the court) for a period of not more than three months specified in the order;

(b) a monitoring order must specify—

- (i) the name in which the account is held;
 - (ii) the kind of information the financial institution is required to give;
 - (iii) the person to whom the information is to be given;
- and
- (iv) the manner in which the information is to be given;

(c) an officer or agent of a financial institution to which a monitoring order is addressed who discloses the existence of the order except—

- (i) as may be necessary to give effect to the order;
- (ii) as may be required or authorized by the order;

or

- (iii) for the purpose of obtaining legal advice or representation for the financial institution, or an officer or agent of the financial institution, on a matter related to the order,

is guilty of an offence.

Penalty: Division 8 fine or imprisonment.

(3) A person ordered to appear before the Supreme Court for examination or to produce documents or other materials under this section may not refuse to answer a question, or to produce documents or materials, on the ground that the answer to the question, or the contents of the documents or materials, would tend to incriminate him or her of an offence, but evidence so given or produced cannot be used against that person in proceedings in which that person is charged with an offence.

(4) The jurisdiction of the Supreme Court under this section may be exercised by a Judge or Master sitting in chambers.

Payment into Criminal Injuries Compensation Fund

10. (1) Subject to any direction of the court by which the forfeiture is imposed, any money forfeited under this Act or obtained by realization of other property forfeited under this Act, must be dealt with as follows:

(a) the costs of the administration of this Act must be paid out of that money;

and

(b) the balance must be paid into the Criminal Injuries Compensation Fund.

(2) The costs referred to in subsection (1)(a) include the salary and other costs associated with the employment of the Administrator.

(3) The purposes for which money may be applied from the Criminal Injuries Compensation Fund include the financial support, to an extent determined by the Attorney-General, of programmes directed at the treatment and rehabilitation of persons who are dependent on drugs (but the extent of that support cannot exceed the income of the Fund derived from forfeitures imposed in respect of serious drug offences).

Registration of interstate orders

10a. (1) An order under a corresponding law will, on application by the Administrator, be registered by the Supreme Court.

(2) Subject to subsection (3), on registration the order has in relation to property in this State to which it is expressed to apply the same effect as it has in relation to property in the State or Territory in which it was made.

(3) The Court may make such adaptations or modifications to the order (as it applies in this State) as the Court considers necessary or desirable for the effective operation of the order in this State.

Summary offences

11. The offences constituted by this Act are summary offences.

Regulations

12. The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

Amendment of Controlled Substances Act

13. The *Controlled Substances Act, 1984*, is amended as indicated in the schedule.

SCHEDULE

The *Controlled Substances Act, 1984*, is amended as follows:

Section 4

Strike out the definition of "related person or body".

Section 43

Strike out this section and substitute the following section:

Classification of offences

43. (1) Subject to this section—

(a) offences against this Act that are punishable by imprisonment are indictable offences and those punishable by imprisonment for a maximum of less than 5 years are minor indictable offences;

and

(b) offences against this Act that are not punishable by imprisonment are summary offences.

(2) The offence of producing, or taking part in the production of, cannabis may be prosecuted either as a summary or an indictable offence but, if prosecuted as a summary offence, the court shall, if it is proved that the defendant produced or took part in the production of cannabis, presume that the cannabis was produced solely for the defendant's own smoking or consumption.

(3) Where a person produces, or takes part in the production of cannabis for his or her own smoking or consumption, the offence is, for the purposes of the *Crimes (Confiscation of Profits) Act, 1986*, a summary offence.

Sections 47 to 49 (inclusive)

These sections are repealed.

Section 52(2)(i)

Strike out the passage "or may be liable to forfeiture to the Crown".

APPENDIX 1

Legislative History

Section 3(1):	definition of "the Administrator" inserted by 10, 1990, s. 3(a) definition of "appropriate court" substituted by 10, 1990, s. 3(b) definition of "drug" inserted by 10, 1990, s. 3(c) definition of "financial institution" inserted by 10, 1990, s. 3(c) definition of "forfeitable property" inserted by 10, 1990, s. 3(c) definition of "gift" inserted by 10, 1990, s. 3(c) definition of "party" inserted by 10, 1990, s. 3(c) definition of "prescribed offence" amended by 10, 1990, s. 3(d); 33, 1991, s. 6 definition of "proceeds" substituted by 10, 1990, s. 3(e) definition of "property" substituted by 10, 1990, s. 3(e) definition of "serious drug offence" inserted by 10, 1990, s. 3(f) definition of "tainted property" inserted by 10, 1990, s. 3(f)
Section 3(3a):	inserted by 10, 1990, s. 3(g)
Section 3(4):	substituted by 10, 1990, s. 3(h)
Section 3(4a):	inserted by 10, 1990, s. 3(h)
Section 3a:	inserted by 28, 1988, s. 2
Section 4:	substituted by 10, 1990, s. 4
Section 5(1) and (2):	substituted by 10, 1990, s. 5(a)
Section 5(2a) and (2b):	inserted by 10, 1990, s. 5(a)
Section 5(4):	substituted by 10, 1990, s. 5(b)
Section 5(6) and (7):	inserted by 10, 1990, s. 5(c)
Section 6(1):	substituted by 10, 1990, s. 6(a)
Section 6(2):	amended by 10, 1990, s. 6(b)
Section 6(3):	substituted by 10, 1990, s. 6(c)
Section 6(4) - (8):	amended by 10, 1990, s. 6(b)
Section 7(1):	substituted by 10, 1990, s. 7
Section 8(4) and (5):	substituted by 10, 1990, s. 8(a)
Section 8(6):	amended by 10, 1990, s. 8(b)
Section 9a:	inserted by 10, 1990, s. 9
Section 10:	substituted by 10, 1990, s. 10
Section 10a:	inserted by 10, 1990, s. 11

APPENDIX 2

Divisional Penalties

At the date of publication of this reprint divisional penalties are, as provided by section 28a of the *Acts Interpretation Act, 1915*, as follows:

Division	Maximum imprisonment	Maximum fine
1	15 years	\$60 000
2	10 years	\$40 000
3	7 years	\$30 000
4	4 years	\$15 000
5	2 years	\$8 000
6	1 year	\$4 000
7	6 months	\$2 000
8	3 months	\$1 000
9	—	\$500
10	—	\$200
11	—	\$100
12	—	\$50

Note: This appendix is provided for convenience of reference only.