



ANNO TRICESIMO NONO

ELIZABETHAE II REGINAE

A.D. 1990

No. 10 of 1990

An Act to amend the Crimes (Confiscation of Profits) Act, 1986.

[Assented to 12 April 1990]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Crimes (Confiscation of Profits) Act Amendment Act, 1990*.

(2) The *Crimes (Confiscation of Profits) Act, 1986*, is referred to in this Act as “the principal Act”.

Commencement

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

Interpretation

3. Section 3 of the principal Act is amended—

(a) by inserting before the definition of “appropriate court” the following definition:

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

(b) by striking out the definition of “appropriate court” and substituting the following definition:

“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

(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;;

(c) by inserting after the definition of “corresponding law” the following definitions:

“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;;

(d) by striking out the word “or” from between subparagraphs (iv) and (v) of paragraph (b) of the definition of “prescribed offence” and inserting after subparagraph (v) the following subparagraphs:

- (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*;

(e) by striking out the definitions of “proceeds” and “property” and substituting the following definitions:

“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;;

(f) by inserting after the definition of “search warrant” the following definitions:

“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;;

(g) by inserting after subsection (3) the following subsection:

(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.;

and

(h) by striking out subsection (4) and substituting the following subsections:

(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.

Substitution of s. 4

4. Section 4 of the principal Act is repealed and the following section is substituted:

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. Section 5 of the principal Act is amended—

(a) by striking out subsections (1) and (2) and substituting:

(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.

(b) by striking out subsection (4) and substituting:

(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.

and

(c) by inserting after subsection (5) the following subsections:

(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. Section 6 of the principal Act is amended—

(a) by striking out subsection (1) and substituting the following subsection:

(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;

(b) by striking out “sequestration” wherever it occurs in subsections (2), (4), (5), (6), (7) and (8) and substituting, in each case, “restraining”;

(c) by striking out subsection (3) and substituting the following subsection:

(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.

Issue of search warrants

7. Section 7 of the principal Act is amended by striking out subsection (1) and substituting the following subsection:

(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.

Powers conferred by search warrant

8. Section 8 of the principal Act is amended—

(a) by striking out subsections (4) and (5) and substituting the following subsections:

(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.;

and

(b) by striking out “any property” from subsection (6) (a) (iii) and substituting “anything”.

Insertion of s. 9a

9. The following section is inserted after section 9 of the principal Act:

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.

Substitution of s. 10

10. Section 10 of the principal Act is repealed and the following section is substituted:

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).

Insertion of s. 10a

11. The following section is inserted after section 10 of the principal Act:

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.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor