

# CRIMES (CONFISCATION OF PROFITS) AMENDMENT ACT

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No. 49 of 1990

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AN ACT to amend the *Crimes (Confiscation of Profits) Act 1988*.

[Assented to 27 November 1990.]

The Parliament of Western Australia enacts as follows:

## Short title

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

## Commencement

2. The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation.

### Principal Act

3. In this Act the *Crimes (Confiscation of Profits) Act 1988\** is referred to as the principal Act.

[\*Act No. 47 of 1988.]

### Section 3 amended

4. Section 3 of the principal Act is amended—

(a) in subsection (1) by—

(i) inserting in the appropriate alphabetical positions the following definitions—

“ “effective control”, in relation to property to which an application for a confiscation order, a special forfeiture order or a restraining order relates, has the meaning given by section 52A;

“embargo notice” means embargo notice served under section 31A (1);

“possessor”, in relation to any property, means person having it in his or her possession, whether on his or her own behalf or on behalf of or for the benefit of another person;

“unlawful act” means act or omission that constitutes a serious offence, whether or not that act or omission is the subject of a conviction. ”; and

(ii) deleting the full stop at the end of the definition of “tainted property” and substituting a semi-colon;

and

(b) by inserting after subsection (1) the following subsection—

“ (1a) For the purposes of the definition of “possessor” in subsection (1), “possession” includes control or having dominion over, and having the order or disposition of. ”.

**Section 5 amended**

5. Section 5 of the principal Act is amended by repealing subsection (3) and substituting the following subsection—

“ (3) Subject to subsection (1), this Act as amended by the *Crimes (Confiscation of Profits) Amendment Act 1990* applies to—

(a) an offence committed or believed to have been committed at any time; and

(b) the conviction of a person at any time of an offence,

whether before or after 28 November 1988. ”.

**Section 6 amended**

6. Section 6 of the principal Act is amended—

(a) in subsection (3) by deleting “If” and substituting the following—

“ Subject to subsection (3a), if ”; and

(b) by inserting after subsection (3) the following subsection—

“ (3a) If an application under paragraph (a) or (b) of subsection (1) has been refused in respect of property or benefits derived or realized by a person as a result of the commission of an unlawful act other than the serious offence in reliance on which the application was made and the person is subsequently convicted of a serious offence constituting the whole or any part of that unlawful act, another application may be made to a court under subsection (1) in respect of that property or those benefits and, if so made, shall be dealt with by the court in all respects as if the firstmentioned application had not been made. ”.

**Section 10 amended**

**7. Section 10 of the principal Act is amended—**

(a) in subsection (1) by deleting—

(i) “State” and substituting the following—

“ Crown ”; and

(ii) paragraph (b) and substituting the following paragraph—

“ (b) was derived or realized, directly or indirectly, by the person convicted of the offence or another person, or is subject to the effective control of the person convicted of the offence, as a result of the commission of the offence or of any other unlawful act. ”;

(b) in subsection (3) by deleting “made under subsection (1)” and substituting the following—

“ referred to in subsection (1) ”; and

(c) by inserting after subsection (3) the following subsections—

“ (4) When an application is made to a court under section 6 (1) (a) against a person in reliance on a serious offence that is a serious drug offence in respect of which a declaration has been made under section 32A of the *Misuse of Drugs Act 1981*, all property acquired by, or brought under the effective control of, the person during the period commencing on the day 6 years before the day, or the first day, on which that serious offence was committed shall be presumed, unless the contrary is proved, to be property that was derived or realized by the person as a result of the commission of an unlawful act.

(5) If, at the hearing of an application referred to in subsection (1), it is shown that property to which that application relates—

- (a) may have been derived or realized, directly or indirectly, as a result of the commission of an unlawful act; and
- (b) was derived or realized during the period commencing on the day 6 years before the day, or the first day, on which the serious offence in reliance on which that application was made was committed,

it shall be presumed, unless the contrary is proved, that that property was derived or realized within the meaning of paragraph (a).

(6) If, on an application referred to in subsection (1), a court is satisfied that property to which that application relates was acquired partly with moneys derived or realized, directly or indirectly, as a result of the commission of an unlawful act and partly with moneys not so derived or realized, the court may, if it thinks fit, make an order directing the Attorney General to sell that property and pay to the person against whom that application is made an amount which bears the same proportion to the proceeds of that sale as the moneys not so derived or realized bear to the total cost of that acquisition. ”.

## **Section 12 amended**

8. Section 12 of the principal Act is amended—

- (a) in subsection (4) (a) by deleting “the offence” and substituting the following—

“ the unlawful act ”;

- (b) by deleting “and” after subsection (4) (b);

- (c) in subsection (4) (c) by deleting subparagraph (ii) and substituting the following—

“ (ii) was derived or realized, directly or indirectly, by any person as a result of the commission of an unlawful act; ”;

- (d) by inserting after subsection (4) (c) the following—

“ and

(d) that the property is not subject to the effective control of the person against whom the forfeiture order was made, ”;

and

- (e) in subsection (5) by—

- (i) deleting “the offence” in paragraph (a) and substituting the following—

“ the unlawful act ”;

- (ii) deleting “and” after paragraph (a);

- (iii) deleting “the offence” in paragraph (b) and substituting the following—

“ the unlawful act ”;

- (iv) deleting “was made,” at the end of paragraph (b) and substituting the following—

“ was made; and ”; and

- (v) inserting after paragraph (b) the following paragraph—

“ (c) that the property is not subject to the effective control of the person against whom the forfeiture order was made, ”.

## Section 15 amended

9. Section 15 of the principal Act is amended by repealing subsection (1) and substituting the following subsections—

“ (1) If an application is made to a court under section 6 (1) (b), the court may, if it considers it appropriate—

(a) assess the value of the benefits derived by the person against whom the application is made as a result of the commission of the serious offence in reliance on which the application is made or of any other unlawful act; and

(b) order the person referred to in paragraph (a) to pay to the Crown a pecuniary penalty equal to the value of those benefits as assessed under this subsection, less—

(i) the value as at the time of the making of that order of any property in respect of which a forfeiture order has been made in reliance on; and

(ii) if the court thinks it desirable to take it into account, any amount payable by way of restitution or compensation in relation to,

the unlawful act referred to in that paragraph.

(1a) If, at the hearing of an application referred to in subsection (1), it is shown that the benefits to which that application relates—

(a) may have been derived as a result of the commission of an unlawful act; and

(b) were derived during the period commencing on the day 6 years before the day, or the first day, on which the serious offence in reliance on which that application was made was committed,

it shall be presumed, unless the contrary is proved, that those benefits were derived within the meaning of paragraph (a). ”.

**Section 16 amended**

10. Section 16 of the principal Act is amended—

(a) in subsection (1) by—

(i) deleting “an offence,” and substituting the following—

“ an unlawful act, ”;

(ii) deleting “the offence” in subsection (1) (a) and substituting the following—

“ the unlawful act ”; and

(iii) deleting paragraph (b) and substituting the following paragraphs—

“ (b) any property (whether situated within or outside Western Australia and however derived or realized) which was in the opinion of the court brought under the effective control of that person as a result of the commission of an unlawful act; and

(c) any benefit provided (whether within or outside Western Australia) for that person or another person, at the request or by the direction of the firstmentioned person, as a result of the commission of an unlawful act. ”;

and

(b) in subsection (4) by deleting—

(i) the passage beginning with “a serious drug offence—” and ending with “shall be presumed,” and substituting the following—

“ a serious drug offence in respect of which a declaration has been made under section 32A of the *Misuse of Drugs Act 1981*, all property acquired by, or brought under the



effective control of, the person during the period commencing on the day 6 years before the day, or the first day, on which that serious offence was committed shall be presumed, ”; and

(ii) “the offence.” and substituting the following—

“ an unlawful act. ”.

### Section 17 repealed

11. Section 17 of the principal Act is repealed.

### Section 20 amended

12. Section 20 of the principal Act is amended—

(a) in subsection (1) by—

(i) deleting “or” at the end of paragraph (b); and

(ii) inserting after paragraph (b) the following—

“ (ba) specified property subject to the effective control of that person;

(bb) all property subject to the effective control of that person; or ”;

(b) in subsection (2) by deleting paragraphs (c) and (d) and substituting the following—

“ and

(c) in the case of an application in respect of all the property of a person, that a pecuniary penalty order may be made if the person is convicted of that offence, ”;

- (c) in subsection (6) by deleting “7” and substituting the following—

“ 21 ”;

- (d) in subsection (9) by deleting “A restraining order” and substituting the following—

“ Subject to subsection (9a), a restraining order ”;  
and

- (e) by inserting after subsection (9) the following subsection—

“ (9a) A restraining order shall not make the provision referred to in subsection (9) unless the person against whom the restraining order is made satisfies the Supreme Court that he or she cannot meet the reasonable living and business expenses, and the reasonable costs and expenses, referred to in that subsection out of property to which the restraining order does not apply. ”.

## Section 22 amended

13. Section 22 of the principal Act is amended in subsection (4) by—

- (a) deleting the full stop at the end of paragraph (e) and substituting a semi-colon; and

- (b) inserting after paragraph (e) the following paragraph—

“ (f) an order under section 110 (1) of the *Evidence Act 1906*. ”.

## Section 24 amended

14. Section 24 of the principal Act is amended by deleting—

- (a) “\$5 000” and substituting the following—

“ \$100 000 ”; and

(b) “2 years” and substituting the following—

“ 5 years ”.

### Section 31A inserted

15. The principal Act is amended by inserting after section 31 the following section—

#### Embargo notices

“ 31A. (1) A police officer may, if he or she finds any property—

(a) which the police officer is authorized under this Part to seize; and

(b) which cannot, or cannot readily, be seized or which the police officer does not wish to seize,

serve on the possessor of that property and on any other person on whose behalf or for whose benefit that property is possessed by that possessor an embargo notice in the prescribed form in respect of that property.

(2) Subject to this section, a possessor of any property to which an embargo notice relates who sells, leases, moves, transfers or otherwise deals with all or any of that property during the period beginning at the time when the embargo notice is served on him or her and ending at the time when that property is released to that possessor under section 35 or an order made under that section or made the subject of a forfeiture order commits an offence and is liable to a fine of \$20 000 or to imprisonment for 5 years or both.

(3) The possessor of property to which an embargo notice relates may, on giving the Commissioner of Police notice of his or her intention to do so, apply to the District Court for leave to sell, lease, move, transfer or otherwise deal with all or any of that property.

(4) The District Court may, on receiving an application under subsection (3), give the applicant leave in writing to sell, lease, move, transfer or otherwise deal with all or any of the property to which the embargo notice concerned relates on such conditions, if any, as the District Court thinks fit to attach to that leave.

(5) A person—

(a) to whom leave has been given under subsection (4) and who sells, leases, moves, transfers or otherwise deals with all or any of the property to which that leave relates in accordance with any conditions attached to that leave; or

(b) who, being the possessor of the property to which an embargo notice relates, moves all or any of that property for the purpose of protecting and preserving the same within the period referred to in subsection (2) with the prior consent of the police officer who served the embargo notice in accordance with any conditions attached to that consent,

does not commit an offence under subsection (2).

(6) Notwithstanding anything in any other written law, a sale, lease, movement, transfer or other dealing with property which constitutes an offence under subsection (2) is null and void. ”.

### **Section 35 repealed and section 35 substituted**

16. Section 35 of the principal Act is repealed and the following section is substituted—

#### **Return of seized property and release of embargoed property**

“ 35. (1) If—

(a) any property has been—

(i) seized under a warrant issued under this Part; or

- (ii) subjected to an embargo notice;
- (b) at the time when the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, a person had not been charged with the relevant serious offence; and
- (c) before the expiry of a period of 7 days after the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, a person had not been charged with the relevant serious offence,

then, unless an application is made for a forfeiture order in respect of that property, the Commissioner of Police shall arrange for that property to be returned or released, at the expiry of the period referred to in paragraph (c), to the person from whose possession it was seized or to the possessor of that property, as the case requires.

(2) When—

(a) any property has been—

- (i) seized under a warrant issued under this Part; or
- (ii) subjected to an embargo notice;

and

(b) an information has been laid in respect of the relevant serious offence (or criminal proceedings have otherwise been commenced in respect of the relevant serious offence)—

- (i) before the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph; or
- (ii) after the property referred to in paragraph (a) was seized or subjected within the meaning of that paragraph, but before the expiry of a period of 7 days after that seizure or subjection,

then, unless an application is made for a forfeiture order in respect of that property, the Commissioner of Police shall arrange for that property to be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires—

- (c) if that person or possessor is convicted of the relevant serious offence, at the expiry of 6 months; or
- (d) if that person or possessor is discharged or acquitted of the relevant serious offence, as soon as possible,

after the relevant time.

(3) When—

(a) any property has been—

- (i) seized under a warrant issued under this Part; or
- (ii) subjected to an embargo notice;

and

- (b) a court having jurisdiction to do so refuses to make a forfeiture order in respect of the property referred to in paragraph (a) in relation to the relevant serious offence,

the Commissioner of Police shall arrange for that property to be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires, as soon as possible after the relevant time.

(4) When any property has been—

- (a) seized under a warrant issued under this Part; or

(b) subjected to an embargo notice,

the person from whose possession the property was seized or the possessor of the property, as the case requires, may apply to an appropriate court for an order under subsection (5).

(5) If a court is satisfied that neither it nor any other court having jurisdiction to do so would make a forfeiture order in respect of any property to which an application made under subsection (4) relates, the court may make an order directing that—

- (a) that property be returned or released to the person from whose possession it was seized or to the possessor of that property, as the case requires; or
- (b) in the case of property seized under a warrant issued under this Part, directing that the person from whom that property was so seized be allowed access to that property,

on such terms and conditions (if any) as the court thinks fit.

(6) A person who applies to a court for an order under subsection (5) shall give notice, as prescribed by the regulations or by rules of court, of the making of that application and of the date, time and place fixed for the hearing of that application.

(7) A reference in this section to a person from whose possession property was seized includes a reference to any person who is entitled to that property.

(8) A reference in this section to the relevant time is a reference—

- (a) subject to paragraph (b), to the date of the conviction, discharge or acquittal, or of the refusal to make the forfeiture order, as the case requires; or

(b) if there is a right of appeal—

- (i) when the period provided for the lodging of the appeal has expired without such an appeal having been lodged, to the expiry of that period; or
- (ii) when an appeal has been lodged, to the time when the appeal lapses or is finally determined. ”.

### **Section 36 amended**

17. Section 36 of the principal Act is amended by inserting after “this Part” the following—

“ or serving an embargo notice ”.

### **Section 52A inserted**

18. Part 8 of the principal Act is amended by inserting before section 53 the following section—

#### **Court may take into account effective control of property**

“ 52A. (1) In determining an application for a confiscation order or a restraining order, a court may treat as property of the person in respect of whom that application is made any property that, in the opinion of the court, is, either directly or indirectly, subject to the effective control of the person whether or not the person has—

- (a) any legal or equitable estate or interest in the property; or
- (b) any right, power or privilege in connection with the property.



(2) Without limiting the generality of subsection (1), the court may, in determining whether or not any property is subject to the effective control of a person within the meaning of this section, have regard to—

- (a) shareholdings in, debentures over or directorships of any corporation within the meaning of the *Companies (Western Australia) Code* that has an interest (whether direct or indirect) in the property;
- (b) any trust that has a relationship to the property;
- (c) family, domestic and business relationships between persons having an interest in the property, or in corporations within the meaning of the *Companies (Western Australia) Code* of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and any other persons; and
- (d) such matters, other than those specified in paragraphs (a), (b) and (c), as the court considers relevant,

and shall treat as subject to the effective control of a person any property which in the opinion of the court is held for the ultimate benefit of the person.

(3) When a court, for the purposes of making a confiscation order against a person, treats particular property as the property of the person under subsection (1), the court may, on application by the Attorney General, make an order declaring that the property is available to satisfy the confiscation order.

(4) When a court declares under subsection (3) that property is available to satisfy a confiscation order—

- (a) the confiscation order may be enforced against; and
- (b) a restraining order may be made in respect of,

the property as if the property were property of the person against whom the confiscation order is made.

(5) When the Attorney General makes an application for an order under subsection (3) declaring that property is available to satisfy a confiscation order against a person—

- (a) the Attorney General shall give written notice of that application to the person and to any person who the Attorney General has reason to believe may have an interest in the property; and
  - (b) the person and any person who claims an interest in the property may appear and adduce evidence at the hearing of the application. ”.
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