

Mutual Assistance in Criminal Matters Amendment Regulations 2002 (No. 1) 2002 No. 258

EXPLANATORY STATEMENT

Statutory Rules 2002 No. 258

Issued by the authority of the Minister for Justice and Customs

Proceeds of Crime Act 2002

Proceeds of Crime Regulations

Financial Transaction Reports Act 1988

Financial Transaction Reports Amendment Regulations 2002 (No. 1)

Mutual Assistance in Criminal Matters Act 1987

Mutual Assistance in Criminal Matters Amendment Regulations 2002 (No. 1)

Proceeds of Crime Regulations

Section 328 of the *Proceeds of Crime Act 2002* (the Proceeds Act) provides that the Governor-General may make regulations for the purposes of the Act. Those regulations may be as required or permitted by the Proceeds Act to be prescribed, or as necessary or convenient to be prescribed for carrying out or giving effect to the Proceeds Act.

The Proceeds Act implements a number of recommendations made by the ALRC in its 1999 report '*Confiscation that Counts: a Review of the Proceeds of Crime Act 1987*', including the establishment of a civil-forfeiture regime at the Commonwealth level and the improvement of the existing conviction-based scheme. Existing information gathering tools from the *Proceeds of Crime Act 1987* are incorporated in an improved form into the Proceeds Act, along with the ability for an approved examiner and the Director of Public Prosecutions to compulsorily examine suspects and other person.

The Proceeds of Crime Regulations will enable the confiscation regime to operate fully from the commencement of the relevant legislation, by:

- prescribing classes of persons who may control and carry out examinations as 'approved examiners'
- prescribing an examination notice, which will be issued to notify a person that they are required to attend the examination, to provide that person with the time and place of the examination, and to advise whether they will be required to produce any particular document at the examination
- prescribing which State and Territory confiscation legislation is 'corresponding law' for the purposes of registering and enforcing particular orders under State and Territory legislation in Australia's non-governing Territories, and
- prescribing which forfeiture orders, pecuniary penalty orders and restraining orders made under a 'corresponding law' are orders which may be registered and enforced in the non-governing Territories.

The details of the Proceeds Act Regulations are set out in the Attachment.

Financial Transaction Reports Amendment Regulations 2002 (No. 1)

Section 43 of the *Financial Transaction Reports Act 1988* (the FTR Act) provides that the Governor-General may make regulations not inconsistent with the Act. Those regulations may be as required or permitted by the FTR Act to be prescribed, or as necessary or convenient to be prescribed for carrying out or giving effect to the FTR Act.

Schedule 3 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* repeals Division 4 of Part IV of the *Proceeds of Crime Act 1987* and effectively re-inserts it into the FTR Act as a new Part VIA. Part VIA provides, at subclause 40H(1), that it is an offence for financial institutions not to retain, for the minimum retention period, the original or a copy of a customer generated financial transaction document. Subparagraph 40H(2)(a) provides that the retention obligation only relates to single transactions exceeding \$200. Subparagraph 40H(2)(b) provides that an amount higher than \$200 may be specified by regulation.

The amended FTR Regulations prescribe that the amount for single transactions to which retention obligations relate is now \$1000. This increase is consistent with one of the recommendations in the August 2002 Report of the Taskforce on the Financial Transaction Reports Act and Regulations. The Taskforce was established under the Commonwealth Legislation Review Program. The purpose of the Program is to review legislation which restricts competition or imposes costs or confers benefits on business.

Mutual Assistance in Criminal Matters Amendment Regulations 2002 (No. 1)

Section 44 of the *Mutual Assistance in Criminal Matters Act 1987* (the MA Act) provides that the Governor-General may make regulations not inconsistent with the Act. Those regulations may be as required or permitted by the MA Act to be prescribed, or as necessary or convenient to be prescribed for carrying out or giving effect to the MA Act. Regulations may also be made prescribing the practice and procedure in relation to the performance by Magistrates of functions under the MA Act and prescribing certain penalties.

Schedule 2 of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* makes a number of changes to the *Mutual Assistance in Criminal Matters Act 1987* ('MA Act'), including the ability to enforce a foreign civil-forfeiture order and to make a restraining order where foreign civil forfeiture proceedings have commenced.

The effect of the amended MA Regulations is that the Attorney-General may consider requests from the USA, the UK, Ireland, South Africa and Canada for assistance to enforce in Australia a civil-forfeiture order made in one of those countries, or assistance to make in Australia a restraining order on the basis of civil-forfeiture proceedings in one of those countries.

Prescribing those five countries is in accordance with the explanatory memorandum to the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*, which in part states that Australia's ability to comply with MA requests for assistance in civil-forfeiture matters "is limited to where the foreign country is specified in the regulations. This will ensure that the Commonwealth is enforcing civil orders made on a similar basis to the [Proceeds of Crime Act 2002]" (page 22).

ATTACHMENT

Details of Proceeds of Crime Regulations 2002

Item 4 Approved examiner

Chapter 3 of the Proceeds Act provides a number of information gathering tools, including orders for the compulsory examination of persons about the., affairs (including the nature and location of property) of a person suspected of engaging in criminal conduct, a person who owns restrained property or a spouse of either of those people. An examination is controlled by an approved examiner, and the approved examiner and DPP may ask the person questions.

Section 183 of the Proceeds Act defines an approved examiner to include a person who holds an office or is included in a class of persons specified in the regulations.

Item 4 of the Proceeds of Crime Regulations 2002 provides that persons who hold the office of Member of the Administrative Appeals Tribunal and who are of or above the rank of Senior Member can be approved examiners under the Proceeds Act. Item 1 also provides that persons who have held judicial office and have signified in writing their willingness to be an approved examiner, and former magistrates who have signified in writing their willingness to be an approved examiner, are persons who can be approved examiners. Under Item 1 such persons must be named on a list of approved examiners, which will be maintained by the Minister. This will ensure that there is an identified list of persons appointed as approved examiners.

Item 5 Approved form - examination notice

The Proceeds Act provides that where a court has made an order for a person to attend an examination, the approved examiner may then issue that person with an examination notice, advising that the person is required to attend the examination. Section 185 of the Proceeds Act specifies that the examination notice must be in the prescribed form, and must require the person to attend the examination and specify the time and place of the examination. Section 185 also provides that the examination notice may require the person to produce at the examination any documents specified in the notice. Item 5 notes that Schedule 1 contains the prescribed form of the examination notice and contains those items set out in section 185.

Item 6 Declaration of State laws - definition of corresponding law

Part 4-5 of the Proceeds Act enables the enforcement of certain State and Territory restraining and confiscation orders in the non-governing Territories where those orders are made under a 'corresponding law'. The non-governing Territories are the Territory of Ashmore and Cartier Islands, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, Jervis Bay Territory, the Australian Antarctic Territory, the Coral Sea Islands Territory and the Territory of Heard Island and McDonald Islands.

Clause 338 of the Proceeds Act defines 'corresponding law' as a law of a State, the Northern Territory, the ACT or Norfolk Island which is declared by the regulations to be a law that corresponds to the Proceeds Bill.

Item 6 lists all current State and Territory forfeiture legislation, both conviction-based and civil-based regimes.

Item 7 Declaration - definition of interstate forfeiture order

One of the orders able to be enforced under Part 4-5 of the Proceeds Act is an 'interstate forfeiture order'. Clause 338 of the Proceeds Act defines an 'interstate forfeiture order' as an

order made under a corresponding law which is declared by the regulations to be within the definition.

Item 7 lists all provisions under State and Territory Acts which provide for court-order forfeiture (both conviction-based and civil-based forfeiture), apart from those provisions of the Western Australia Criminal Property Confiscation Act 2000 which provide for 'unexplained wealth' orders to be made. Those orders have not been included on the basis that they are not sufficiently similar to court-ordered civilforfeiture orders in the Proceeds Act. 'Unexplained wealth' orders are orders made on a finding that the person's total wealth exceeds the person's legitimate wealth. Unlike the Commonwealth forfeiture regime, there is no requirement that the person be shown (on either the criminal or civil standard) to have committed an offence.

Item 8 Declaration - definition of interstate pecuniary penalty order

Another of the orders able to be enforced under Part 4-5 of the Proceeds Act is an 'interstate pecuniary penalty order'. Clause 338 of the Proceeds Act defines an 'interstate pecuniary penalty order' as an order made under a corresponding law which is declared by the regulations to be within the definition.

Item 8 lists all provisions under State and Territory Acts which provide for pecuniary penalty orders or forfeiture mechanisms which operate sufficiently similar to a pecuniary penalty order. Both convictionbased and civil-based orders are included in the definition.

Item 9 Declaration - definition of interstate restraining order

Part 4-5 of the Proceeds Act also provides for 'interstate restraining orders' to be enforced in nongoverning Territories. Clause 338 of the Proceeds Act defines an 'interstate restraining order' as an order made under a corresponding law which is declared by the regulations to be within the definition.

Item 9 lists all provisions under State and Territory Acts which provide for orders restraining or freezing assets and property to be made. Both conviction-based and civil-based orders are included in the definition.

Schedule 1 Forms

Schedule 1 contains the prescribed form which must be used to advise a person that he or she is required to attend an examination. The form is in accordance with section 185 of the Proceeds Act, and is discussed above under Item 6.