

# **Proceeds of Crime Amendment Regulations 2004 (No. 1) 2004 No. 293**

## **EXPLANATORY STATEMENT**

Statutory Rules 2004 No. 293

Issued by the authority of the Minister for Justice and Customs

*Proceeds of Crime Act 2002*

*Proceeds of Crime Amendment Regulations 2004 (No. 1)*

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

The purpose of the Act is to prevent criminals from being able to enjoy the fruits of their crimes, by depriving them of the proceeds and benefits gained from criminal conduct, and to prevent re-investment of those proceeds and benefits in further criminal activities. The Act creates a civil forfeiture regime enabling confiscation of unlawfully acquired property, without first requiring a conviction. This regime operates together with a conviction-based confiscation regime also under the Act.

The Act also enables court orders to be sought requiring the payment to the Commonwealth of pecuniary penalties representing benefits gained from the commission of certain offences and amounts representing any literary proceeds derived as a result of the commission of certain offences.

The purpose of the Regulations is to facilitate the smoother operation of the Act and the *Proceeds of Crime Regulations 2002* (the Principal Regulations) by remedying a range of deficiencies that have become apparent since the Act commenced.

The Regulations make the following amendments:

- Update references in the Principal Regulations to corresponding State and Territory legislation that also deal with the confiscation and forfeiture of property that is the proceeds of crime.
- Broaden the definition of 'narcotic substance' to ensure proceeds of crime orders made under the Act in relation to serious offences can be made for all serious drug offences.
- Outline the particulars that must be included on a certificate issued by a court enabling either a pecuniary penalty order or literary proceeds order under the Act to be made in a court with jurisdiction to deal with the recovery of debts of the same amount as the relevant order.
- Expand the class of persons that can be placed on the register of 'approved examiners' for the purposes of examination under the Act. Under the Principal Regulations, the Minister maintains a register of approved examiners who may conduct examinations of a person's financial affairs where a restraining order is in force preventing that person from disposing of their property. Broadening the class of persons who can be placed on the register of 'approved examiners' will enable more timely examination processes under the Act.

- Replace the existing regulations that provide for remuneration of the Official Trustee (OT) and the repayment of costs, charges and expenses incurred by the OT in carrying out its duties. The existing regulations are those that applied to relevant provisions in the *Proceeds of Crime Act 1987* and have continued operation under the transitional provisions of the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*. Under the Act, a court may order the OT to take custody and control of restrained property where the court considers it necessary to do so. The OT also plays a fundamental role with respect to forfeited property, which may include disposal of forfeited property on behalf of the Commonwealth.
- Clarify which funds in the Confiscated Assets Account (CAA) constitute 'distributable funds' and 'suspended funds'. The CAA, as its name suggests, contains funds that are the proceeds of confiscated assets under the Act. It also contains funds received from States, Territories and foreign jurisdictions under their respective confiscation and forfeiture regimes.
- Provide for payment of an increased annual management fee to the OT for managing the CAA from the 2003 calendar year on. The annual management fee for the CAA is paid out of suspended funds held in the CAA. The payment for the 2003 calendar year 'tops-up' the payment that has already been made for that year. Although this particular provision concerns payment of an amount for a past year, it is not a retrospective provision, because it prescribes that the additional amount is payable at a point in the future (30 December 2004).
- Outline the processes by which the Australian Federal Police and Director of Public Prosecutions should notify the OT where a claim may be made by another jurisdiction with respect to condemned or forfeited property under

the 'equitable sharing program'. The 'equitable sharing program' is an arrangement under which the Commonwealth, participating States and Territories share the proceeds of unlawful activity recovered under Commonwealth, State or Territory law. This arrangement has application where, in the relevant Minister's opinion, another jurisdiction has made a significant contribution to the recovery of the proceeds, or to the investigation or prosecution of the relevant unlawful activity.

Details of the Regulations are set out in the [Attachment](#).

The Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations commence on the date of their notification in the *Gazette*.

## **Attachment**

### **Details of the *Proceeds of Crime Amendment Regulations 2004 (No. 1)***

#### **Regulation 1**

Regulation 1 provides for the regulations to be named the *Proceeds of Crime Amendment Regulations 2004 (No. 1)*.

#### **Regulation 2**

Regulation 2 provides for the regulations to commence on the date of their notification in the *Gazette*.

#### **Regulation 3**

Subregulation 3(1) provides for the *Proceeds of Crime Regulations 2002* (the Principal Regulations) to be amended as set out in Schedule 1. Schedule 1 simply renumbers the Principal Regulations (see explanation of Item 1 of Schedule 1 below). Subregulation 3(2) provides that Schedule 2 amends the Principal Regulations, as renumbered under Schedule 1.

### **Schedule 1 - Amendments (renumbering)**

#### **Item 1 - Regulation renumbering**

Item 1 renumbers existing regulations 4 to 10 of the Principal Regulations to correspond with the sections of the *Proceeds of Crime Act 2002* (the Act) to which those regulations relate.

#### **Item 2 - Schedule 1, heading**

Item 2 amends the reference to regulation 5 in the heading of Schedule 1 of the Principal Regulations so that it instead refers to regulation 13. Under the renumbering of the regulations in Item 1 (above) regulation 5 becomes regulation 13.

### **Schedule 2 - Amendments following amendments made by Schedule 1**

#### **Item 1 - Before regulation 1**

Item 1 inserts the heading, 'Part 1 Preliminary' before regulation 1.

#### **Items 2 and 3 - Paragraphs 4(d), (h) and (i)**

Items 2 and 3 amend regulation 4 (regulation 6 before renumbering) to update the references to corresponding laws in States or self-governing Territories for the purposes of the definition of 'corresponding law' in section 338 of the Act.

Item 2 amends paragraph 4(d) to include the *Criminal Proceeds Confiscation Act 2002* (CPC Act) of Queensland which was enacted with the repeal of the *Crimes Confiscation Act 1989* (CC Act) of Queensland. Conduct that has occurred prior to the operation of the CPC Act may still be dealt with under the CC Act. Accordingly, paragraph 4(da) is inserted ensuring the CC Act, as in force immediately before its repeal, will also be considered a 'corresponding law' under the Act.

Item 3 amends paragraphs 4(h) and (i) to update references to corresponding laws in the Northern Territory and the Australian Capital Territory, whilst retaining the capacity to deal with matters covered by repealed legislation.

Existing paragraph 4(h) is amended to include the *Criminal Property Forfeiture Act 2002* (2002 Act) of the Northern Territory, which replaced the *Crimes (Forfeiture of Proceeds) Act 1988* (1988 Act) of the Northern Territory. Conduct that has occurred prior to the operation of the 2002 Act may still be dealt with under the 1988 Act. Accordingly, the new paragraph 4(i) ensures the 1988 Act, as in force immediately before its repeal, will also be considered a 'corresponding law' under the POC Act.

New paragraph 4(j) includes the *Confiscation of Criminal Assets Act 2003* (2003 Act) of the Australian Capital Territory, which replaced the *Proceeds of Crime Act 1991* (1991 Act) of the Australian Capital Territory. Conduct that has occurred prior to the operation of the 2003 Act may still be dealt with under the 1991 Act. Accordingly, new paragraph 4(k) ensures the 1991 Act, as in force immediately before its repeal, will also be considered a 'corresponding law' under the POC Act.

#### **Item 4 - After regulation 7**

##### *New regulation 8 - Meaning of narcotic substance*

Section 338 of the Act defines 'serious offence' to include an indictable offence punishable by imprisonment for 3 or more years, involving, among other things, unlawful conduct relating to a 'narcotic substance' (also defined in section 338). Participation in a serious offence provides a basis for restraining and forfeiture orders under the Act.

Although there is provision to do so under the definition of 'narcotic substance' in the Act, the Principal Regulations do not currently extend the definition of 'narcotic substance' beyond narcotic substances as defined by the *Customs Act 1901* (Customs Act). New regulation 8 broadens the range of substances that come within the definition of 'narcotic substance' under the Act to include substances that are defined as either a 'narcotic drug' or 'psychotropic substance' under the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* and substances listed as Tier 1 goods under the *Customs Regulations 1926*.

This broadening of the definition of 'narcotic substance' and resultant effect on the definition of 'serious offence' under the Act is necessary to ensure appropriate orders can be made in relation to serious offences involving all drugs covered by relevant Commonwealth legislation.

#### **Item 5 - After regulation 9**

Item 5 inserts new regulations 10 and 11. Before the relevant provisions, this item also inserts the headings, 'Part 2 The confiscation scheme', 'Division 2.1 Pecuniary penalty orders' and 'Division 2.2 Literary proceeds orders'. These headings reflect the parts of the Act to which new regulations 10 and 11 relate. Chapter 2 of the Act is entitled 'The Confiscation scheme'. Part 2.4 of that chapter deals with pecuniary penalty orders and Part 2.5 with literary proceeds orders.

##### *New regulation 10 - Penalty amounts exceeding court's jurisdiction - certificate*

Part 2.4 of the Act allows for pecuniary orders to be made, ordering payments to the Commonwealth of amounts based on the benefits that a person has derived from certain offences and in some cases the benefits that the person has derived from other unlawful activity. Such an order requires a person to pay an amount of money to the Commonwealth, where the court is satisfied that the person has derived a benefit from the commission of an indictable offence. An amount payable by a person to the Commonwealth under a pecuniary penalty order

is a civil debt due by the person to the Commonwealth. Application for a penalty order is made to a relevant court.

Section 144 of the Act provides that a court may issue a certificate where an order has been made by a court and the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount. The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.

New regulation 10 prescribes information that must be included on a certificate authorised by section 144. New subregulation 10(1) details the particulars that must be included as: the name of the court that made the pecuniary penalty order; the date of the order; the amount of money that is to be paid under the order; and the identity of the person who must pay the amount. New subregulation 10(2) specifies how such a certificate may be registered.

#### *New regulation 11 - Literary proceeds amounts exceeding the court's jurisdiction - certificate*

Part 2.5 of the Act provides that if certain offences have been committed, literary proceeds orders can be made, which compel payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. Literary proceeds are any benefit that a person derives from the commercial exploitation of the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence; or the notoriety of another person, involved in the commission of that offence. An amount payable by a person to the Commonwealth under a literary proceeds order is a civil debt due by the person to the Commonwealth. Application for a literary proceeds order is made to a relevant court.

Section 171 of the Act provides that a court may issue a certificate where a literary proceeds order has been made by a court and the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount. The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.

New regulation 11 prescribes information that must be included on a certificate authorised by section 171. New subregulation 11(1) details particulars that must be included as: the name of the court that made the literary proceeds order; the date of the order; the amount of money that is to be paid under the order; and the identity of the person who must pay the amount. New subregulation 11(2) specifies how such a certificate may be registered.

## **Item 6 - Regulation 12**

Item 6 substitutes a new regulation 12 for the existing provision (regulation 4 before renumbering). Also inserted, before the new regulation 12 is the heading, 'Part 3 Information gathering'. This reflects the part of the Act to which regulations 12 and 13 (regulation 5 before renumbering) relate. Chapter 3 of the Act has the same title.

#### *New regulation 12 Approved examiners*

Section 183 of the Act provides that approved examiners for the purposes of the Act are to be specified in the regulations. New regulation 12 amends the existing regulation to expand the class of persons who may be specified for the purposes of paragraph 183(4)(a) to also include: members of the Administrative Appeals Tribunal (AAT) who have been enrolled for not less than 5 years as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory; and persons who have held the office of judge in a District Court or

County Court of a State or Territory, who have stated in writing that they are willing to be an approved examiner.

Existing regulation 12 (regulation 4 before renumbering) currently provides that a person is included in the specified class of people if they are: a presidential member or senior member of the AAT; a person who has held the office of judge in the Supreme Court of a State or Territory and who has stated in writing that they are willing to be an approved examiner; or a former magistrate who has stated in writing that they are willing to be an approved examiner.

Broadening the class of persons who can be placed on the register of approved examiners will enable more timely examination processes under the Act.

### **Item 7 - After regulation 13**

Item 7 inserts new regulations 14 to 19. Before the relevant provisions, this item also inserts the headings, 'Part 4 Administration', 'Division 4.1 Powers and duties of the Official Trustee' and 'Division 4.2 Confiscated Assets Account'. These headings reflect the parts of the Act to which new regulations 14 to 19 relate. Chapter 4 of the Act is entitled 'Administration'. Part 4.1 of that chapter deals with the powers and duties of the Official Trustee and Part 4.3 with the Confiscated Assets Account.

#### *New regulation 14 - Costs etc payable to Official Trustee*

Under the Act a court may order the Official Trustee (OT) to take custody and control of restrained property where the court considers it necessary to do so. For example, the court may order this if there is a risk that the property would otherwise be dealt with contrary to the restraining order. Alternatively, the property may require the OT to manage it to ensure it does not lose value. The OT also plays a fundamental role with respect to forfeited property, which may include disposal of forfeited property on behalf of the Commonwealth.

Paragraph 288(1)(a) of the Act provides that the regulations may make provision for the costs, charges and expenses incurred by the OT in connection with its exercise of powers and the performance of its functions or duties under the Act and Part VI of the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act). New regulation 14 allows for the OT to be repaid an amount of costs equal to that incurred while carrying out duties under the Act and Part VI of the Mutual Assistance Act. Under paragraph 297(1)(e), this amount is paid out of suspended funds held in the Confiscated Assets Account (outlined below) to the extent that the OT is unable to recover them itself.

#### *New regulation 15 - Remuneration of Official Trustee*

Paragraph 288(1)(b) of the Act provides that the regulations may make provision for the OT's remuneration with respect to the exercise of its powers and performance of functions and duties under the Act and Part VI of the Mutual Assistance Act. New regulation 15 ensures the OT is appropriately remunerated according to criteria prescribed in the *Bankruptcy Regulations 1996*. New subregulation 15(2) attaches a price of taxable supply to such an amount that is also payable to the OT. This amount of 8.4 per cent of the remuneration would be otherwise payable by the OT as goods and services taxation.

#### *New regulation 16 - Identity of amounts credited to Confiscated Assets Account*

Part 4.3 of the Act provides for the establishment of the Confiscated Assets Account (CAA), which is a special account for the purposes of the *Financial Management and Accountability Act 1997*. The CAA receives credits from the following sources: proceeds of confiscated assets; money paid to the Commonwealth by a foreign country under a treaty or arrangement providing

for mutual assistance in criminal matters; money paid to the Commonwealth following the successful enforcement of the foreign pecuniary penalty order in Australia under the provisions of the Mutual Assistance Act; money deriving from the successful enforcement of an interstate forfeiture order; money received from a State or the ACT or NT Government pursuant to the equitable sharing program; and money that is paid to the Commonwealth by a foreign country in recognition of assistance provided by Commonwealth law enforcement agencies.

Subsection 296(2) of the Act provides that all amounts paid into the CAA are to be identified in accordance with the regulations as either 'distributable funds' or 'suspended funds', and that those funds must retain that identity while they remain within the CAA. New regulation 16 provides which amounts credited to the CAA are to be identified as 'distributable funds' (new subregulation 16(1)) and which credited amounts are to be identified as 'suspended funds' (new subregulation 16(2)).

#### *New regulation 17 - Annual management fee for Confiscated Assets Account*

Among other things, suspended funds in the CAA are drawn on when paying the annual management fee for the OT. The annual management fee for OT's management of the CAA up to the 2002 calendar year was \$10,840 per annum. The amount of this payment had not increased since 1991. New regulation 17 provides for payment of an annual management fee of \$22,000 to the OT from the 2003 calendar year on.

New subregulations 17(1) and (2) allow for the 'topping-up' of the annual management fee of \$10,840 that has already been paid, by providing that a second instalment of \$11,160 is payable by 30 December 2004. These provisions ensure a total annual management fee of \$22,000 is paid for the 2003 calendar year. New subregulations 17(3) and (4) provide that an annual management fee of \$22,000 is payable within 28 days of 27 December each year, starting with the 2004 calendar year.

#### *New regulation 18 - Notice by AFP of possible claims under the equitable sharing program*

Under subsection 296(4) of the Act, the 'equitable sharing program' is an arrangement under which the Commonwealth, participating States and self-governing Territories share the proceeds of unlawful activity recovered under Commonwealth, State or Territory law. This arrangement has application where, in the relevant Minister's opinion, another jurisdiction has made a significant contribution to the recovery of the proceeds, or to the investigation or prosecution of the relevant unlawful activity. Similarly, the Commonwealth may share proceeds of unlawful activity with a foreign country.

New regulation 18 directs that an AFP member must give notice in writing to the OT if the member considers that certain condemned goods are property in respect of which an equitable sharing claim may be made. The goods in question must be narcotic-related goods (other than narcotic goods). Any notice must include: the name of the claimant State or self-governing Territory; the percentage of the value of the property that is likely to be payable in respect of the claim; and other brief particulars of the claim.

#### *New regulation 19 - Notice by DPP of possible claims under the equitable sharing program*

New regulation 19 directs that the DPP must give notice in writing to the OT if the DPP considers that property subject to a restraining or forfeiture order, or property forfeited under section 92 of the Act, is property in respect of which an equitable sharing claim may be made. The DPP must also notify the OT when, as a result of a pecuniary penalty order made by a court under Part 2.4 of the Act or section 243B of the Customs Act, an amount is, or may be, paid into the CAA that the DPP considers could be the subject of a claim under the equitable sharing program.

Section 243B of the Customs Act allows pecuniary penalty orders to be made by a court in relation to certain prescribed dealings with narcotics.

Any notification under new regulation 19 must include: the name of the claimant State or self-governing Territory; the percentage of the value of the property that is likely to be payable in respect of the claim; and other brief particulars of the claim.