

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Proceeds of Crime Act 2002

Proceeds of Crime Regulations 2019

The *Proceeds of Crime Act 2002* (the POC Act) provides a scheme to trace, restrain and confiscate the proceeds and benefits gained from, and the instruments used in the commission of, Commonwealth indictable offences, foreign indictable offences and certain offences against state and territory law.

The POC Act also allows confiscated funds to be given back to the Australian community to prevent and reduce the harmful effects of crime in Australia.

Section 328 of the POC 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 POC Act also provides other regulation-making powers, including (but not limited to) the power to make regulations as to:

- the characteristics of persons who may be appointed by the Minister as ‘approved examiners’ under the POC Act (paragraph 183(5)(a));
- the form and content of examination notices and various certificates, and the procedural steps to be taken in registering the certificates in a court (subsections 144(1) and (2), 171(1) and (2) and paragraphs 185(1)(a) and (d));
- the remuneration payable to the Official Trustee for the costs, charges and expenses incurred in connection with the Official Trustee’s exercise of powers and performance of functions or duties under the POC Act or under Part VI of the *Mutual Assistance in Criminal Matters Act 1987* (paragraph 288(1)(a));
- the remuneration payable to the Official Trustee in respect of the above activities (paragraph 288(1)(b));
- the annual management fee payable to the Official Trustee (paragraph 297(f)); and
- the definition of key terms, including (but not limited to) ‘authorised officer’, ‘serious offence’, ‘corresponding law’, ‘enforcement agency’, ‘interstate forfeiture order’, ‘interstate pecuniary penalty order’, ‘interstate restraining order’, ‘narcotic substances’ and ‘unexplained wealth legislation’ (section 338).

The *Proceeds of Crime Regulations 2002* (the POC Regulations 2002) are due to sunset on 1 October 2019 and prescribe a number of matters related to the operation of the POC Act. These matters relate to: the definition of key terms in the Act, the remuneration, costs and annual management fee of the Official Trustee, the appointment of approved examiners and the form and content of examination notices and various certificates.

The *Proceeds of Crime Regulations 2019* (the Regulations) remakes the POC Regulations 2002 in their entirety, with amendments that ensure the Regulations remain relevant and fit for purpose.

The Regulations make the following substantive changes to the POC Regulations 2002:

- updating the definitions of ‘narcotic substances’, ‘interstate forfeiture order’, ‘interstate pecuniary penalty order’ and ‘interstate restraining order’ to reflect changes in state and Commonwealth legislation;
- repealing section 16 of the *POC Regulations 2002* to remove outdated references to ‘suspended funds’ and ‘distributable funds’, as these terms are no longer contained in the POC Act;
- repealing sections 18 and 19 of the *POC Regulations 2002* as these notice requirements in equitable sharing arrangements are effectively dealt with through informal arrangements between agencies;
- inserting provisions to clarify the procedural requirements underpinning buy back and transfer orders under sections 57, 102 and 103 of the POC Act; and
- providing that particular offences relating to dangerous weapons, identity crime and ‘failing to produce a document or thing pursuant to a notice to produce’ in Australian Criminal Intelligence Commission examinations are ‘serious offences’ for the purposes of the POC Act.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights is set out in Attachment B.

The Regulations were informed by consultation with Commonwealth agencies, including: the Department of Home Affairs, Treasury, Australian Federal Police, Australian Criminal Intelligence Commission, Attorney-General’s Department, Australian Financial Security Authority, Commonwealth Director of Public Prosecutions, Department of Communications and the Arts, and the Australian Taxation Office, which supported these changes.

The following state and territory justice agencies were also consulted:

- the Justice and Community Safety Directorate (Australian Capital Territory);
- the Department of Justice (New South Wales);
- the Office of the Director of Public Prosecutions for Western Australia;
- the Department of Justice and Attorney-General (Queensland);
- the Department of Justice and Regulation (Victoria);
- the Attorney-General’s Department (South Australia);
- the Department of the Attorney-General and Justice (Northern Territory); and
- the Department of Justice (Tasmania).

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislation.

Authority: Section 328 of the *Proceeds of Crime Act 2002*

Details of the *Proceeds of Crime Regulations 2019*

Part 1 – Preliminary

Section 1 – Name

This section provides that the title of this instrument is the *Proceeds of Crime Regulations 2019* (the Regulations).

Section 2 – Commencement

This section provides that the whole of the instrument is to commence the day after the instrument is registered.

Section 3 – Authority

This section provides that this instrument is made under the *Proceeds of Crime Act 2002* (the POC Act).

Section 4 – Schedule 6

This section provides that each instrument specified in Schedule 6 to this instrument is amended or repealed as set out in the applicable items to that Schedule. Schedule 6 repeals the *Proceeds of Crime Regulations 2002*.

Section 5 – Definitions

This section prescribes definitions for the following terms in the Regulations.

Act

The term ‘Act’ is defined as meaning the POC Act.

Condemned goods

The term ‘condemned goods’ is defined as having the same meaning as the term in subsection 208DA(1) of the *Customs Act 1901*.

Narcotic goods

The term ‘narcotic goods’ is defined as having the same meaning as the term in subsection 4(1) of the *Customs Act 1901*.

Narcotic-related goods

The term ‘narcotic-related goods’ is defined as having the same meaning as the term in subsection 4(1) of the *Customs Act 1901*.

Section 6 – Meaning of ‘authorised officer’

Paragraph (e) of the definition of ‘authorised officer’ in section 338 of the POC Act provides that the regulations may specify a member, officer or employee of any other agency (other than an agency listed in paragraphs 338(a)-(d)) who is authorised by the head of that agency to be an ‘authorised officer’.

Subsection 6(1) of the Regulations prescribes a person who is an APS employee in the Australian Taxation Office, and authorised by the Commissioner of Taxation (for the purposes of paragraph (e) of the definition of ‘authorised officer’ in section 338 of the POC Act) to be an ‘authorised officer’.

Subsection 6(2) provides that the section does not apply to the use of the term ‘authorised officer’ in (a) Part 3-5 of the Act (except section 225); or (b) the definition of ‘executing officer’ in section 338 of the Act. Subsection (3) notes that to avoid doubt, subsection (1) applies to the use of the term ‘authorised officer’ in the definition of ‘person assisting’ in section 338 of the Act.

This has the effect of expressly indicating that it is not intended that the Australian Tax Office is responsible for seeking or executing search and seizure warrants, as these warrants are instead handled by officers with specialised training, including officers in the Australian Federal Police (AFP).

Section 7 – State and self-governing Territory laws that correspond to the Act

In addition to the Commonwealth POC Act, each state and territory has laws governing the proceeds of crime schemes for their respective jurisdictions. To assist effective coordination between the Commonwealth’s proceeds of crime scheme and state and territory schemes, the POC Act establishes a mechanism for the recognition and enforcement of proceeds orders made under state and territory laws.

The POC Act (at section 338) provides that ‘corresponding law’ means a law of a ‘State’ or a ‘self-governing Territory’ that is declared by the regulations to be a law that corresponds to the POC Act.

Prescribing relevant state or territory laws and orders ensures that:

- where a court makes an order in a Commonwealth proceeding, that the court must take into account the effect of any interstate proceeds of crime orders that have already been made (sections 303 and 309 of the POC Act), and
- where interstate forfeiture or restraining orders apply to property in a ‘non-governing territory’, they may be registered in that territory’s Supreme Court and enforced as if they had been made under the POC Act (section 307 of the POC Act).

This section prescribes, in a table, state and territory laws that correspond to the POC Act. The laws that are listed as ‘corresponding laws’ are as follows:

- *Confiscation of Proceeds of Crime Act 1989* (New South Wales)
- *Criminal Assets Recovery Act 1990* (New South Wales)
- *Confiscation Act 1997* (Victoria)
- *Criminal Proceeds Confiscation Act 2002* (Queensland)
- *Criminal Property Confiscation Act 2000* (Western Australia)
- *Criminal Assets Confiscation Act 1996* (South Australia)
- *Criminal Assets Confiscation Act 2005* (South Australia)
- *Crime (Confiscation of Profits) Act 1993* (Tasmania)
- *Confiscation of Criminal Assets Act 2003* (Australian Capital Territory)
- *Criminal Property Forfeiture Act 2002* (Northern Territory)

These state and territory laws are prescribed as they are in force from time to time. This is permitted by section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) which has the effect that references to state and territory Acts can also be taken to be references to those Acts as in force from time to time. The Acts prescribed represent the state and territory equivalents of the POC Act as they provide schemes to trace, restrain and confiscate the proceeds, and benefits gained from, the commission of offences. The Acts prescribed are freely and readily available from the websites of the respective state and territory offices of Parliamentary Counsel.

Section 8 – Meaning of ‘enforcement agency’

Paragraph 338(b) of the POC Act provides that ‘enforcement agency’ means an agency specified in the regulations to be a law enforcement, revenue or regulatory agency for the purposes of the POC Act.

Section 8 of the Regulations prescribes the Australian Taxation Office as a revenue agency for the purposes of paragraph (b) of the definition of ‘enforcement agency’ in section 338 of the POC Act.

Subsection 8(2) notes that subsection (1) does not apply to the use of the term ‘enforcement agency’ in section 254 of the POC Act. This has the effect of expressly indicating that it is not intended that the Australian Taxation Office deals in any way with the execution of search warrants or in dealing with things seized under a search warrant.

Section 9 – Orders that are declared to be ‘interstate forfeiture orders’

Section 338 of the POC Act provides that ‘interstate forfeiture order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition.

Section 9 of the Regulations provides that for the purposes of the definition of ‘interstate forfeiture order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 1 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

Section 10 – Orders that are declared to be ‘interstate pecuniary penalty orders’

Section 338 of the POC Act provides that an ‘interstate pecuniary penalty order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition.

Section 10 of the Regulations provides that for the purposes of the definition of ‘interstate pecuniary penalty order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 2 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

Section 11– Orders that are declared to be ‘interstate restraining orders’

Section 338 of the POC Act provides that an ‘interstate restraining order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition.

Section 11 of the Regulations provides that for the purposes of the definition of ‘interstate restraining penalty order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 3 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

Section 12 – Substances that are specified to be ‘narcotic substances’

This section provides that, for the purposes of paragraph (b) of the definition of ‘narcotic substance’ in section 338 of the POC Act, the following substances are specified:

- a) a substance that is a narcotic drug within the meaning of section 3 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*;
- b) a substance that is a psychotropic substance within the meaning of section 3 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*;
- c) substances that are Tier 1 goods specified in an item in the table in Part 1 in clause 1 of Schedule 7 to the *Customs Regulation 2015*.

Paragraph 12(c) differs from paragraph 8(c) of the *Proceeds of Crime Regulations 2002* to acknowledge that the *Customs Regulations 1926* has now been repealed and replaced with the *Customs Regulation 2015*.

The references to the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* and the *Customs Regulation 2015* are references to that legislation as it is in force from time to time. In relation to the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, reference to the Act as in force from time to time is permitted by section 10 of the *Acts Interpretation Act 1901*. In relation to the *Customs Regulation 2015*, which is a disallowable legislative instrument, reference to the instrument as in force from time to time is permitted by subparagraph 14(1)(a)(ii) of the *Legislation Act 2003*. The Acts and instruments referred to above are freely and readily available on the Federal Register of Legislation.

The note provides that in addition to the substances specified in section 12 of this instrument, a substance that is a narcotic substance within the meaning of the *Customs Act 1901* is a narcotic substance for the purposes of the POC Act.

Section 338 of the POC 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 of the POC Act). Commission of a serious offence provides a basis for the making of certain restraining and confiscation orders under the POC Act.

Section 13 – Indictable offences that are specified to be serious offences

The POC Act provides enhanced restraint and confiscation powers where property is linked to a 'serious offence' or a person commits a 'serious offence'. A 'serious offence' is defined in section 338 of the POC Act to include a number of indictable offences. Paragraph 338(h) of the definition of 'serious offence' provides that a 'serious offence' includes an 'indictable offence' specified in the regulations. 'Indictable offence' is defined as any offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention applies (section 338 POC Act and section 4G *Crimes Act 1914*).

If a person is reasonably suspected of committing a 'serious offence', a court is able to make a restraining order against property under a person's 'effective control' and to forfeit this property unless the person can establish that, on the balance of probabilities, it was not derived from unlawful activity (sections 18, 29, 47 and 73 of the POC Act). In addition, if a person is convicted of a 'serious offence', all property subject to a restraining order under section 17 or 18 will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument of a serious offence (sections 29, 92 and 94 of the POC Act).

The court also has the ability to restrain and forfeit instruments of serious offences under the 'asset-directed' restraint and forfeiture powers in the POC Act, even where the offender cannot be identified (subparagraphs 19(d)(ii) and 49(1)(c)(iv) of the POC Act).

Section 13 of the Regulations provides that each 'indictable offence' specified in an item in a table in Schedule 4 of this instrument is prescribed as a 'serious offence'. Schedule 4 prescribes a number of 'indictable offences' under the *Australian Crime Commission Act 2002*, *Copyright Act 1968* and the *Criminal Code Act 1995* as 'serious offences'.

Part 2 – The confiscation scheme

Division 1 – Orders about forfeited property

Section 14 – Application for order under section 57 of Act

Under section 57 of the POC Act a court that has made an order forfeiting property (under sections 47, 48 or 49 of the Act) may make an order allowing a person to buy back this property.

Section 14 of the Regulations outlines the procedural requirements in relation to an application to buy back property under section 57 of the POC Act. The purpose of this section is to clarify ambiguities around the appropriate authority to respond to an application under section 57 and align these procedural requirements with those specified for buy back orders that are made following automatic forfeiture following conviction for a ‘serious offence’ (see sections 103 and 104 of the POC Act).

Subsection 14(1) of the Regulations provides that an applicant for an order under section 57 of the POC Act must give written notice to the ‘responsible authority’ of both the application and the grounds on which the order is sought. This requirement aligns with subsection 104(4) of the Act, which applies to buy back orders following automatic forfeiture. The *Proceeds of Crime Regulations 2002* do not currently require this notice to be given.

Subsection 14(2) of the Regulations provides that the ‘responsible authority’ may appear and adduce evidence at the hearing of an application for an order under section 57 of the POC Act. Subsection 14(4) also provides that, to avoid doubt, the responsible authority may represent the Commonwealth in proceedings relating to an application for an order under section 57 of the POC Act.

Currently, the POC Act and the *Proceeds of Crime Regulations 2002* contain no provisions to the effect that the ‘responsible authority’ is entitled to be served with, and be heard on, an application under section 57. This contrasts with other provisions in the POC Act and the *Proceeds of Crime Regulations 2002* which specify that the ‘responsible authority’ may appear on behalf of the Commonwealth in relation to other orders and creates ambiguity about who is the appropriate authority to respond to buy back applications.

It is therefore necessary to put it beyond doubt that the ‘responsible authority’ can represent the Commonwealth in proceedings relating to an application for an order under section 57, as well as dealing with notices about such proceedings. This reflects that the ‘responsible authority’ will already have knowledge of the matter and consequently is best placed to respond to applications to buy back property associated with that matter.

The purpose of subsections 14(2) and (4) of the Regulations is to make it abundantly clear that it is the ‘responsible authority’ (and not the Minister) that is the emanation of the Commonwealth responsible for conduct of the relevant proceedings. It should also be noted that there are many other provisions of the POC Act that permit the ‘responsible authority’ to ‘appear and adduce evidence’ at hearings, but do not explicitly permit the ‘responsible authority’ to represent the Commonwealth in associated proceedings. It is not necessary to include a provision equivalent to subsection 14(4) for those provisions, as it is clear from

their legislative context that the ‘responsible authority’ is the emanation of the Commonwealth that may represent the Commonwealth in relevant proceedings.

Subsection 14(3) of the Regulations provides that the ‘responsible authority’ must give the applicant notice of any grounds on which it proposes to contest the application. This is similar to the requirements at subsection 104(6) of the POC Act, which applies to buy back orders following automatic forfeiture. The *Proceeds of Crime Regulations 2002* do not currently require this notice to be given.

Section 14 of the Regulations relies on the necessary and convenient power in paragraph 328(b) of the POC Act.

Section 15 – Function of responsible authority in relation to sections 102 and 103 of the Act

Under section 102 of the POC Act a court may make an order transferring property which has been automatically forfeited following conviction for a ‘serious offence’ (see section 92) to another person. Section 103 of the POC Act allows a court to make an order allowing a person to buy back their interest in this property.

Section 15 of the Regulations provides that, to avoid doubt, the ‘responsible authority’ may represent the Commonwealth in proceedings relating to an application for an order under section 102 or 103 of the POC Act. This complements existing subsection 104(5) of the POC Act, which provides that the ‘responsible authority’ may appear and adduce evidence at the hearing of an application under section 102 or 103.

This reflects that the ‘responsible authority’ will already have knowledge of the matter and consequently is best placed to respond to applications for orders under sections 102 and 103 of the POC Act.

It should also be noted that there are many other provisions of the POC Act that permit the ‘responsible authority’ to ‘appear and adduce evidence’ at hearings, but do not explicitly permit the ‘responsible authority’ to represent the Commonwealth in associated proceedings. It is not necessary to include a provision equivalent to section 15 for those provisions, as it is clear from their legislative context that the ‘responsible authority’ is the emanation of the Commonwealth that may represent the Commonwealth in relevant proceedings.

Section 15 expands on existing section 9A of the *Proceeds of Crime Regulations 2002*. Existing section 9B of the *Proceeds of Crime Regulations 2002* is repealed as this section is already replicated in subsections 104(5) and (6) of the POC Act.

This section relies on the necessary and convenient power in paragraph 328(b) of the POC Act.

Division 2 – Pecuniary penalty orders

Section 16 – Penalty amounts exceeding court’s jurisdiction – certificate

Part 2-4 of the POC Act allows for a court to make a pecuniary order, 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’ or committed a ‘serious 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.

Section 144 of the POC 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.

Section 16 of the Regulations prescribes information that must be included on a certificate authorised by section 144 of the POC Act. Subsection 16(1) of the Regulations 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 name of the person who must pay the amount. Subsection 16(2) specifies how such a certificate may be registered.

Division 3 – Literary proceeds orders

Section 17 – Literary proceeds amounts exceeding the court’s jurisdiction – certificate

Part 2-5 of the POC Act provides that if certain offences have been committed, a court may make a literary proceeds order, 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.

Section 171 of the POC 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.

Section 17 of the Regulations prescribes information that must be included on a certificate authorised by section 171 of the POC Act. Subsection 17(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 name of the person who must pay the amount. Subsection 17(2) specifies how such a certificate may be registered.

Part 3 – Information gathering

Section 18 – Approved examiners

Part 3-1 of the POC Act provides that a ‘responsible authority’ may apply to an ‘approved examiner’ to issue an examination notice for the examination of a person.

A POC Act examination is an information-gathering tool that enables law enforcement authorities to effectively trace proceeds of crime. Under Division 1 of Part 3-1 of the POC Act, approved examiners may conduct coercive examinations in a range of situations (see sections 180-180E of the POC Act). Examination orders are made by a court, though the actual examination is conducted by an approved examiner.

The powers of an approved examiner are set out in Part 3-1 of the POC Act. These powers include the power to summon a person to appear before an examination and evidence-gathering powers, including the power to compel a person to answer questions and produce documents.

Section 183 of the POC 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. Section 18 of the Regulations specifies those persons.

Subsection 18(1) provides that the following offices are specified for the purposes of paragraph 183(5)(a) of the POC Act:

- a) the office of President of the Administrative Appeals Tribunal;
- b) the office of Deputy President of the Administrative Appeals Tribunal;
- c) an office of non-presidential member of the Administrative Appeals Tribunal, if the person holding office is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory, and has been enrolled for at least 5 years.

Subsection 18(2) provides that the following classes of people be specified for the purposes of paragraph 183(5)(a) of the POC Act:

- a) persons who have held the office of judge in the Supreme Court, District Court or County Court of a State or Territory and have stated, in writing, that they are willing to be an approved examiner;
- b) persons who have held the office of magistrate and have stated, in writing, that they are willing to be an approved examiner.

Section 19 – Approved form – examination notice

The POC 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 183 of the POC 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 for the examination. It also

specifies the examination notice may require the person to produce at the examination any documents specified in the notice.

Section 19 of the Regulations provides that the prescribed form of examination notice is set out at Schedule 5 of this instrument.

Section 20 – Unexplained wealth legislation of a State or Territory

The *Unexplained Wealth Legislation Amendment Act 2018* established a National Cooperative Scheme on Unexplained Wealth (the Scheme), aimed at enhancing the ability of Commonwealth, state and territory law enforcement agencies to trace, identify and seize assets that cannot be connected to a lawful source.

Section 338 of the POC Act provides that ‘unexplained wealth legislation’ of a State or self-governing Territory means a law of the State or Territory that is prescribed by the Regulations. Under the Scheme, state and territory agencies may issue notices to financial institutions and production orders specified in Schedule 1 of the POC Act in relation to their prescribed ‘unexplained wealth legislation’, and may use, communicate and record lawfully intercepted information in relation to this legislation under the *Telecommunications (Interception and Access) Act 1979*.

Section 20 of the Regulations ensures that New South Wales and the Northern Territory (which are currently members of the Scheme) can access these information gathering and information-sharing measures to further investigations and litigation under their ‘unexplained wealth legislation’. While the Australian Capital Territory is also currently a member of the Scheme, it does not currently have ‘unexplained wealth legislation’ to prescribe.

Subsection 20(1) defines the ‘unexplained wealth legislation’ of New South Wales as Division 2 of Part 3 of the *Criminal Assets Recovery Act 1990* (NSW), and the other provisions of that Act that relate to that Division. The accompanying note states that section 6 of the *Criminal Assets Recovery Act 1990* (NSW) is an example of a provision that relates to Division 2 of Part 3 of that Act because Division 2 refers to that term.

Subsection 20(2) defines the ‘unexplained wealth legislation’ of the Northern Territory as Division 1 of Part 6 of the *Criminal Property Forfeiture Act 2002* (NT), and the other provisions of that Act that relate to that Division. The accompanying note states that section 100 of the *Criminal Property Forfeiture Act 2002* (NT) is an example of a provision that relates to Division 1 of Part 6 of that Act because it relates to unexplained wealth declarations.

The term ‘other provisions of that Act that relate to that Division’ is intended to be interpreted broadly to include (but not be limited to) investigative powers and orders that are exercised or made under each jurisdiction’s unexplained wealth regime.

Part 4 – Administration

Division 1 – Powers and duties of the Official Trustee

Section 21 – Costs etc. payable to Official Trustee

Under the POC 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 (see section 38). 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 the realisation of property confiscated under the Act.

Paragraph 288(1)(a) of the POC 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 POC Act and Part VI of the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act).

Section 21 of the Regulations allows for the OT to be repaid an amount of costs equal to that incurred while carrying out duties under the POC Act and Part VI of the Mutual Assistance Act. Under paragraph 297(e) of the POC Act, this amount is paid out of funds held in the Confiscated Assets Account to the extent that the OT is unable to recover them itself.

Section 22 – Remuneration of Official Trustee

Paragraph 288(1)(b) of the POC 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 POC Act and Part VI of the Mutual Assistance Act.

Section 22 ensures that the OT is appropriately remunerated. This section provides for the amount of remuneration payable to the OT, being \$62.50 for each period of 15 minutes, or part of 15 minutes.

It should be noted that the Regulations do not replicate existing section 16 of the *Proceeds of Crime Regulations 2002*. This section expanded on the definitions of 'distributed funds' and 'suspended funds', which are no longer contained in the POC Act.

The Regulations also do not replicate sections 18 and 19 of the *Proceeds of Crime Regulations 2002*. The sections imposed reporting requirements on AFP members and 'responsible authorities' to report possible claims under the equitable sharing program to the OT. Current informal information-sharing arrangements, however, are sufficient to achieve the policy objective underpinning these sections. The Regulations do not replicate sections 18 and 19 to promote greater flexibility in these informal arrangements.

Division 2 – Confiscated Assets Account

Section 23 – Annual management fee for Confiscated Assets Account

All confiscated money, and the funds derived from the sale of confiscated assets, are returned to the Commonwealth and placed into the Confiscated Assets Account. With approval by the

Minister, those funds are then reinvested into the community through a variety of means including programs for crime prevention, law enforcement, drug treatment and diversionary measures across Australia. There are also provisions for the Australian Government to approve the sharing of confiscated funds with other jurisdictions including overseas in recognition of their effort involved in joint investigations or prosecutions of unlawful activity.

Paragraph 297(f) of the POC Act provides that paying the annual management fee of the OT out of the Confiscated Assets Account is one of the purposes of this Account.

Subsection 23(1) of the Regulations provides that the annual management fee of \$272,500 is specified for the 2019 calendar year and each later calendar year.

Subsection 23(2) specifies that the fee is payable within 28 days after 27 December in the year to which the fee relates.

Subsection 23(3) provides that a fee mentioned in this section is the price of the taxable supply within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*.

Schedule 1- Interstate forfeiture order

Item 1 – Orders under corresponding laws

Section 338 of the POC Act provides that ‘interstate forfeiture order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition. Section 338 also provides that ‘corresponding law’ means a law of a ‘State’ or a ‘self-governing Territory’ that is declared by the regulations to be a law that corresponds to the POC Act.

Section 9 of the Regulations provides that for the purposes of the definition of ‘interstate forfeiture order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 1 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

New South Wales

Table 1 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for New South Wales:

- a forfeiture order – subsection 18(1) of the *Confiscation of Proceeds of Crime Act 1989*
- an order declaring that specified property is available to satisfy a drug proceeds order – subsection 32(2) of the *Confiscation of proceeds of Crime Act 1989*
- an assets forfeiture order – section 22 of the *Criminal Assets Recovery Act 1990*

- an order declaring that an interest in property is available to satisfy a proceeds assessment order or unexplained wealth order – subsection 29(1) of the *Criminal Assets Recovery Act 1990*
- an order requiring a defendant to pay the New South Wales Treasurer the value of the whole or part of an interest in property of the defendant – subsection 31A(3) of the *Criminal Assets Recovery Act 1990*

Victoria

Table 2 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for Victoria:

- a forfeiture order – Division 1 of Part 3 of the *Confiscation Act 1997*
- a tainted property substitution declaration – subsection 34C(1) of the *Confiscation Act 1997*
- a declaration that property has been forfeited under section 35 of the *Confiscation Act 1997* – subsection 36(1) of the *Confiscation Act 1997*
- a tainted property substitution declaration – subsection 36F(1) of the *Confiscation Act 1997*
- a declaration that property has been forfeited under section 36GA of the *Confiscation Act 1997* – subsection 36GB(1) of the *Confiscation Act 1997*
- a civil forfeiture order – Division 2 of Part 4 of the *Confiscation Act 1997*
- a declaration that property has been forfeited under section 40ZA of the *Confiscation Act 1997* – subsection 40ZB(3) of the *Confiscation Act 1997*

Queensland

Table 3 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for Queensland:

- a forfeiture order – subsection 58(1) of the *Criminal Proceeds Confiscation Act 2002*
- a serious drug offender confiscation order – section 93ZZB of the *Criminal Proceeds Confiscation Act 2002*
- a forfeiture order – subsection 151(1) of the *Criminal Proceeds Confiscation Act 2002*
- a tainted property substitution declaration – subsection 153D(1) of the *Criminal Proceeds Confiscation Act 2002*

Western Australia

Table 4 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for Western Australia:

- a confiscable property declaration – subsection 28(1) of the *Criminal Property Confiscation Act 2000*
- a declaration of confiscation – section 30 of the *Criminal Property Confiscation Act 2000*

The Regulations do not replicate existing references at paragraph 5(i) of the *Proceeds of Crime Regulations 2002* to the *Crimes (Confiscation of Profits) Act 1988* (WA) and the *Criminal Property Confiscation (Consequential Provisions) Act 2000* (WA), as these Acts are no longer in operation.

The Regulations do not replicate paragraph 5(g) of the *Proceeds of Crime Regulations 2002*, as the orders referred to in this paragraph are better characterised as ‘interstate pecuniary penalty orders’.

South Australia

Table 5 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for South Australia:

- a forfeiture order – subsection 47(1) of the *Criminal Assets Confiscation Act 2005*
- an instrument substitution declaration – section 48 of the *Criminal Assets Confiscation Act 2005*
- a declaration that particular property has been forfeited under Division 2 of Part 4 of the *Criminal Assets Confiscation Act 2005* – section 77 of the *Criminal Assets Confiscation Act 2005*
- a forfeiture order (under section 8 of the *Criminal Assets Confiscation Act 1996*) as continued in force under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* – item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005*
- a forfeiture order (under subsection 9(1) of the *Criminal Assets Confiscation Act 1996*) as continued in force under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* – item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005*)

Tasmania

Table 6 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for Tasmania:

- a forfeiture order – section 16 of the *Crime (Confiscation of Profits) Act 1993*
- a wealth forfeiture order – section 152 of the *Crime (Confiscation of Profits) Act 1993*

Australian Capital Territory

Table 7 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for the Australian Capital Territory:

- a forfeiture order – subsection 54(1) of the *Confiscation of Criminal Assets Act 2003*
- an order declaring that property has been automatically forfeited under Division 5.2 of Part 5 of the *Confiscation of Criminal Assets Act 2003* – subsection 59(2) of the *Confiscation of Criminal Assets Act 2003*
- an order that restrained property be forfeited to the Territory – subsection 67(2) of the *Confiscation of Criminal Assets Act 2003*

Northern Territory

Table 8 in Schedule 1 prescribes the following as ‘interstate forfeiture orders’ and ‘corresponding laws’ respectively for the Northern Territory:

- a crime-used property substitution declaration – subsection 81(2) of the *Criminal Property Forfeiture Act 2002*
- a declaration that property specified in an application that is not owned by the respondent is available for forfeiture under Part 7 of the *Criminal Property Forfeiture Act 2002* – subsection 92(1) of the *Criminal Property Forfeiture Act 2002*
- a declaration that property has been forfeited by operation of section 94 of the *Criminal Property Forfeiture Act 2002* – subsection 94(4) of the *Criminal Property Forfeiture Act 2002*
- an order that property restrained on suspicion of being crime-used is forfeit to the Territory – subsection 96(1) of the *Criminal Property Forfeiture Act 2002*
- an order that property restrained on suspicion of being crime-derived is forfeit to the Territory – section 97 of the *Criminal Property Forfeiture Act 2002*
- an order that property subject to a restraining order is forfeit to the Territory – section 99 of the *Criminal Property Forfeiture Act 2002*
- an order that property subject to a restraining order is forfeit to the Territory – section 100 of the *Criminal Property Forfeiture Act 2002*
- an order that property subject to a restraining order is forfeit to the Territory – section 101 of the *Criminal Property Forfeiture Act 2002*

Schedule 2 – Interstate pecuniary penalty order

Item 1 – Orders under corresponding laws

Section 338 of the POC Act provides that an ‘interstate pecuniary penalty order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition. Section 338 also provides that ‘corresponding law’ means a law of a ‘State’ or a ‘self-governing Territory’ that is declared by the regulations to be a law that corresponds to the POC Act.

Section 10 of the Regulations provides that for the purposes of the definition of ‘interstate pecuniary penalty order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 2 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

New South Wales

Table 1 in Schedule 2 prescribes the following as ‘interstate pecuniary penalty orders’ and ‘corresponding laws’ respectively for New South Wales:

- a pecuniary penalty order – subsection 24(1) of the *Confiscation of Proceeds of Crime Act 1989*
- a drug proceeds order – subsection 29(1) of the *Confiscation of Proceeds of Crime Act 1989*
- a proceeds assessment order – section 27 of the *Criminal Assets Recovery Act 1990*
- an unexplained wealth order – subsection 28A(2) of the *Criminal Assets Recovery Act 1990*
- a proceeds assessment order or unexplained wealth order – subsection 31B(4) of the *Criminal Assets Recovery Act 1990*

Victoria

Table 2 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for Victoria:

- a pecuniary penalty order – Part 8 of the *Confiscation Act 1997*

Queensland

Table 3 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for Queensland:

- a proceeds assessment order – subsection 78(1) of the *Criminal Proceeds Confiscation Act 2002*

- an unexplained wealth order – section 89G of the *Criminal Proceeds Confiscation Act 2002*
- a pecuniary penalty order – subsection 184(1) of the *Criminal Proceeds Confiscation Act 2002*
- a special forfeiture order – subsection 202(1) of the *Criminal Proceeds Confiscation Act 2002*

Western Australia

Table 4 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for Western Australia:

- an unexplained wealth declaration – section 12 of the *Criminal Property Confiscation Act 2000*
- a criminal benefits declaration – section 16 of the *Criminal Property Confiscation Act 2000*
- a criminal benefits declaration – subsection 17(1) of the *Criminal Property Confiscation Act 2000*
- a crime-used property substitution declaration – section 22 of the *Criminal Property Confiscation Act 2000*

The Regulations do not replicate existing references at paragraph 6(j) of the *Proceeds of Crime Regulations 2002* to the *Crimes (Confiscation of Profits) Act 1988* (WA) and the *Criminal Property Confiscation (Consequential Provisions) Act 2000* (WA), as these Acts are no longer in operation.

South Australia

Table 5 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for South Australia:

- a declaration that particular property has been forfeited under Division 2 of Part 4 of the *Criminal Assets Confiscation Act 2005* – section 77 of the *Criminal Assets Confiscation Act 2005*
- a pecuniary penalty order – subsection 95(1) of the *Criminal Assets Confiscation Act 2005*
- a literary proceeds order – subsection 111(1) of the *Criminal Assets Confiscation Act 2005*
- a pecuniary penalty order (under paragraph 9(4)(b) of the *Criminal Assets Confiscation Act 1996*) as continued in force under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* – item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005*

Tasmania

Table 6 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for Tasmania:

- a pecuniary penalty order – section 21 of the *Crime (Confiscation of Profits) Act 1993*

Australian Capital Territory

Table 7 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for the Australian Capital Territory:

- a penalty order – subsection 84(1) of the *Confiscation of Criminal Assets Act 2003*
- a penalty order – subsection 85(1) of the *Confiscation of Criminal Assets Act 2003*

Northern Territory

Table 8 in Schedule 2 prescribes the following as an ‘interstate pecuniary penalty order’ and ‘corresponding law’ respectively for the Northern Territory:

- an unexplained wealth declaration – subsection 71(1) of the *Criminal Property Forfeiture Act 2002*
- a criminal benefit declaration – subsection 75(1) of the *Criminal Property Forfeiture Act 2002*
- a criminal benefit declaration – subsection 76(1) of the *Criminal Property Forfeiture Act 2002*
- a crime-used property substitution declaration – subsection 81(2) of the *Criminal Property Forfeiture Act 2002*

Schedule 3 – Interstate restraining order

Item 1 – Orders under corresponding laws

Section 338 of the POC Act provides that an ‘interstate restraining order’ means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition. Section 338 also provides that ‘corresponding law’ means a law of a ‘State’ or a ‘self-governing Territory’ that is declared by the regulations to be a law that corresponds to the POC Act.

Section 11 of the Regulations provides that for the purposes of the definition of ‘interstate restraining penalty order’ in section 338 of the POC Act, each order specified in an item in a table in Schedule 3 and made under a ‘corresponding law’ specified in the item is declared to be an order of a kind within that definition.

New South Wales

Table 1 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for New South Wales:

- an order directing that property specified in the order not be disposed of – subsection 22(2) of the *Confiscation of Proceeds of Crime Act 1989*
- confirmation of a freezing notice – subsection 42L(1) of the *Confiscation of Proceeds of Crime Act 1989*
- a restraining order – subsection 43(2) of the *Confiscation of Proceeds of Crime Act 1989*
- a restraining order – subsection 10A(5) of the *Criminal Assets Recovery Act 1990*

Victoria

Table 2 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for Victoria:

- a restraining order – section 18 of the *Confiscation Act 1997*
- a civil forfeiture restraining order – section 36M of the *Confiscation Act 1997*
- an unexplained wealth restraining order – section 40I of the *Confiscation Act 1997*

Queensland

Table 3 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for Queensland:

- a restraining order – section 31 of the *Criminal Proceeds Confiscation Act 2002*
- a restraining order – section 93M of the *Criminal Proceeds Confiscation Act 2002*
- a restraining order – section 122 of the *Criminal Proceeds Confiscation Act 2002*

Western Australia

Table 4 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for Western Australia:

- a freezing order – section 34 of the *Criminal Property Confiscation Act 2000*
- a freezing order – section 43 of the *Criminal Property Confiscation Act 2000*

The Regulations do not replicate existing references at paragraph 7(i) of the *Proceeds of Crime Regulations 2002* to the *Crimes (Confiscation of Profits) Act 1988* (WA) and the

Criminal Property Confiscation (Consequential Provisions) Act 2000 (WA), as these Acts are no longer in operation.

South Australia

Table 5 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for South Australia:

- a restraining order – subsection 24(1) of the *Criminal Assets Confiscation Act 2005*
- an instrument substitution declaration – section 48 of the *Criminal Assets Confiscation Act 2005*
- a declaration that particular property has been forfeited under Division 2 of Part 4 of the *Criminal Assets Confiscation Act 2005* – section 77 of the *Criminal Assets Confiscation Act 2005*
- a restraining order (under section 15 of the *Criminal Assets Confiscation Act 1996*) as continued in force under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* – item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005*

Tasmania

Table 6 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for Tasmania:

- a restraining order – section 26 of the *Crime (Confiscation of Profits) Act 1993*
- an interim wealth-restraining order – section 116 of the *Crime (Confiscation of Profits) Act 1993*
- a wealth-restraining order – section 118 of the *Crime (Confiscation of Profits) Act 1993*

Australian Capital Territory

Table 7 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for the Australian Capital Territory:

- a restraining order – subsection 30(2) of the *Confiscation of Criminal Assets Act 2003*
- a restraining order – subsection 31(2) of the *Confiscation of Criminal Assets Act 2003*

Northern Territory

Table 8 in Schedule 3 prescribes the following as ‘interstate restraining orders’ and ‘corresponding laws’ respectively for the Northern Territory:

- an interim restraining order – subsection 40(1) of the *Criminal Property Forfeiture Act 2002*

- a restraining order – subsection 43(1) or (2) of the *Criminal Property Forfeiture Act 2002*
- a restraining order – subsection 44(1) of the *Criminal Property Forfeiture Act 2002*

Schedule 4 – Indictable offences that are serious offences

The POC Act provides enhanced restraint and confiscation powers where property is linked to a ‘serious offence’ or a person commits a ‘serious offence’. A ‘serious offence’ is defined in section 338 of the POC Act to include a number of indictable offences. Paragraph 338(h) provides that a ‘serious offence’ includes an indictable offence specified in the regulations.

Section 13 of the Regulations provides that each indictable offences specified in an item in a table in Schedule 4 of this instrument is prescribed as a ‘serious offence’. Schedule 4 prescribes a number of indictable offences under the *Australian Crime Commission Act 2002*, *Copyright Act 1968* and the *Criminal Code Act 1995* to be ‘serious offences’.

The Regulations replicate all existing ‘serious offences’ under the *Proceeds of Crime Regulations 2002*, and expand ‘serious offences’ to include offences of ‘failing to produce a document or thing pursuant to a notice to produce’ in Australian Criminal Intelligence Commission examinations, dangerous weapon offences and identity crime offences.

Item 1 – Table 1 – Australian Crime Commission Act 2002

This section provides a table specifying the indictable offences against provisions of the *Australian Crime Commission Act 2002* for the purposes of paragraph (h) of the definition of ‘serious offence’ in section 338 of the POC Act.

These offences, of failing to attend or answer questions at an Australian Criminal Intelligence Commission (ACIC) examination (section 30), of providing false or misleading evidence to the ACIC (section 33), failing to produce a document or thing pursuant to a notice to produce (subsection 21A(4)), and of obstructing, hindering, disrupting or threatening an ACIC examiner or other person (section 35), are indictable offences punishable by a maximum of 200 penalty units or 5 years’ imprisonment.

These offences directly support the ACIC’s role in uncovering wealth derived from serious and organised crime. By frustrating an ACIC examination, a suspect can potentially thwart proceeds of crime litigation and protect large amounts of criminal wealth. Prescribing these offences as ‘serious offences’ reflects the gravity of this conduct, allows for this wealth to be recovered, and is necessary to preserve the efficacy of the ACIC’s investigative powers.

Under the existing definition of ‘serious offence’ in subparagraph 338(a)(iii) of the POC Act, unless an offence is explicitly prescribed, an indictable offence under the *Australian Crime Commission Act 2002* will only fall within the definition of ‘serious offence’ where the infringing activity subject to the offence has caused, or is intended to cause, a benefit or loss to the value of at least \$10,000.

Determining the monetary benefit derived from a failure to comply with an ACIC examination, however, is often impossible, as the examination itself is often necessary to construct a financial profile of the examined person, and a failure to comply with the examination will often prevent authorities from obtaining this information.

Item 2 – Table 2 – Copyright Act 1968

This section provides a table specifying the indictable offences against provisions of the *Copyright Act 1968* for the purposes of paragraph (h) of the definition of ‘serious offence’ in section 338 of the POC Act.

The following provisions of the *Copyright Act 1968* are prescribed as ‘serious offences’ in Table 2:

- subsection 132AC(1) (commercial-scale infringement prejudicing copyright owner)
- subsection 132AD(1) (making infringing copy commercially)
- subsection 132AE(1) (selling or hiring out infringing copy)
- subsections 132AF(1) and (2) (offering infringing copy for sale or hire)
- subsections 132AG(1) and (2) (exhibiting infringing copy in public commercially)
- subsection 132AH(1) (importing infringing copy commercially)
- subsections 132AI(1) and (2) (distributing infringing copy)
- subsection 132AJ(1) (possessing infringing copy for commerce)
- subsections 132AL(1) and (2) (making or possessing device for making infringing copy)
- subsection 132AN(1) (causing work to be performed publicly)
- subsection 132AO(1) (causing recording or film to be heard or seen in public)
- subsection 132AQ(1) (removing or altering electronic rights management information)
- subsection 132AR(1) (distributing, importing or communicating copies after removal or alteration of electronic rights management information), and
- subsection 132AS(1) (distributing or importing electronic rights management information).

These offences are indictable offences punishable on conviction by a maximum of 500 penalty units (650 penalty units in the case of the offence against subsection 132AH(1)) or 5 years’ imprisonment. The offences were introduced as part of a major reform of the

Copyright Act 1968 undertaken in 2006 to address the growing problem of copyright piracy in the digital age.

The inclusion of these offences in the definition of ‘serious offence’ within the POC Act is designed to strengthen Australia’s copyright enforcement regime and potentially assist in minimising lost revenue to the Government through the detection of other economic related crime such as tax evasion and money laundering.

Under the POC Act, unless otherwise prescribed in the regulations, an indictable offence under the *Copyright Act 1968* will only fall within the definition of ‘serious offence’ where the infringing activity subject to the offence has caused, or is intended to cause, a benefit or loss to the value of at least \$10,000 (subparagraph 338(a)(iii)). The application of this monetary threshold may exclude the application of remedies under the POC Act with respect to indictable copyright offences as it can be difficult in cases of copyright piracy to accurately determine the benefit to be gained by infringing activity involving potentially a high volume of transactions of low-value items. This includes, for example, tangible media such as pirated DVDs, as well as pirated digital content in respect of which advertising revenue or other indirect forms of financial gain may be the primary driver.

Section 3 – Table 3 – *Criminal Code*

This section provides a table specifying the indictable offences against provisions of the *Criminal Code* for the purposes of paragraph (h) of the definition of ‘serious offence’ in section 338 of the POC Act.

People smuggling offences

The following provisions of the Criminal Code, relating to people smuggling offences, are prescribed as ‘serious offences’ in Table 3:

- section 73.1 (offence of people smuggling)
- section 73.2 (aggravated offence of people smuggling (danger of death or serious harm etc.))
- section 73.3 (aggravated offence of people smuggling (at least 5 people))
- section 73.3A (supporting the offence of people smuggling)
- section 73.8 (making, providing or possessing a false travel or identity document)
- section 73.9 (providing or possessing a travel or identity document issued or altered dishonestly or as a result of threats)
- section 73.10 (providing or possessing a travel or identity document to be used by a person who is not the rightful user)
- section 73.11 (taking possession of or destroying another person’s travel or identity document)

The categorisation of these offences as serious offences recognises the grave nature of these offences and the enduring impact that they have on victims. The prescription of these crimes as serious offences better allows the restraint and confiscation of property that the offender has used in connection with the perpetration of these crimes.

In addition, characterising these crimes as serious offences enhances information sharing across agencies, and supports investigation and seizure of any proceeds of the crime. The seizure and forfeiture of the proceeds prevents the use of these funds in supporting other criminal activities.

Human trafficking, slavery and slavery-like offences

The following provisions of the Criminal Code, relating to forced marriage, organ trafficking and people trafficking offences, are prescribed as ‘serious offences’ in Table 3:

- section 270.3 (slavery offences)
- section 270.5 (servitude offences)
- section 270.6A (forced labour offences)
- section 270.7 (deceptive recruiting for labour or services)
- section 270.7B (forced marriage offences)
- section 270.7C (offence of debt bondage)
- section 271.2 (offence of trafficking in persons)
- section 271.3 (trafficking in persons—aggravated offence)
- section 271.4 (offence of trafficking in children)
- section 271.5 (offence of domestic trafficking in persons)
- section 271.6 (domestic trafficking in persons—aggravated offence)
- section 271.7 (offence of domestic trafficking in children)
- section 271.7B (offence of organ trafficking—entry into and exit from Australia)
- section 271.7C (organ trafficking—aggravated offence)
- section 271.7D (offence of domestic organ trafficking)
- section 271.7E (domestic organ trafficking—aggravated offence)
- section 271.7F (harbouring a victim)
- section 271.7G (harbouring a victim—aggravated offence)

The classification of these offences as ‘serious offences’ for the purposes of the POC Act acknowledges their severity. These offences represent serious forms of human exploitation that fundamentally curtail the freedom of their victims. Victims are often the most vulnerable in Australian society, and can experience significant harm, including physical or mental injury, emotional suffering, and economic loss. These offences can also cause significant financial impact on business and industry, distorting global markets and undercutting responsible business.

Under the existing definition of ‘serious offence’ in subparagraph 338(a)(iii) and (iv) of the POC Act, unless an offence is explicitly prescribed, it will only fall within the definition of ‘serious offence’ where the infringing activity subject to the offence has caused, or is intended to cause, a benefit or loss to the value of at least \$10,000. However, it can be difficult to quantify the financial gain or loss created by human trafficking, slavery and slavery-like offences. Often the extent of exploitation is unclear or the motivation underpinning the intended exploitation is difficult to determine. Further, relying solely on a benefit or loss threshold of \$10,000 does not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and cost to society.

While some of these crimes are not always driven by profit motive, their prescription as serious offences better allows the restraint and confiscation of property that the offender has used in connection with the perpetration of these crimes.

Child sexual abuse offences

The following provisions of the Criminal Code, relating to child sexual abuse, are prescribed as ‘serious offences’ in Table 3:

- section 272.8 (sexual intercourse with child outside Australia)
- section 272.9 (sexual activity (other than sexual intercourse) with child outside Australia)
- section 272.10 (aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
- section 272.11 (persistent sexual abuse of child outside Australia)
- section 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority)
- section 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)
- section 272.14 (procuring child to engage in sexual activity outside Australia)
- section 272.15 (“grooming” child to engage in sexual activity outside Australia)
- section 272.18 (benefiting from offence against Division 272 of the *Criminal Code*)
- section 272.19 (encouraging offence against Division 272 of the *Criminal Code*)

- section 272.20 (preparing for or planning offence against Division 272 of the *Criminal Code*)
- section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia)
- section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia)
- section 273.7 (aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
- section 471.16 (using a postal or similar service for child pornography material)
- section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
- section 471.19 (using a postal or similar service for child abuse material)
- section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
- section 471.22 (aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
- section 471.24 (using a postal or similar service to procure persons under 16)
- section 471.25 (using a postal or similar service to “groom” persons under 16)
- section 471.26 (using a postal or similar service to send indecent material to person under 16)
- section 474.19 (using a carriage service for child pornography material)
- section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
- section 474.22 (using a carriage service for child abuse material)
- section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
- section 474.24A (aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
- section 474.25A (using a carriage service for sexual activity with person under 16 years of age)

- section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant)
- section 474.26 (using a carriage service to procure persons under 16 years of age)
- section 474.27 (using a carriage service to “groom” persons under 16 years of age)
- section 474.27A (using a carriage service to transmit indecent communication to person under 16 years of age)

The offences to be listed in Table 3 cover a wide range of child sexual abuse offences relating to child pornography material, child abuse material, and grooming and procuring persons under the age of 16 to engage in, or submit to, sexual activity or intercourse. These offences are indictable offences that carry substantial penalties (including imprisonment).

Prescribing these offences as ‘serious offences’ for the purposes of the POC Act is appropriate, particularly given as child sexual abuse has clear links to transnational, serious and organised crime groups and has devastating and long-term impacts on victims and their families. These offences also represent a growing crime type in Australia, with a growing number of reports being received by the AFP. Each report can contain thousands of images and videos.

Well-structured and global networks are profiting from the sexual abuse of children, with low operating costs and high profits incentivising offenders. Child abuse material has become a growing commodity on the Dark Net, as well as on the Clear Net more broadly. For example, via pay-per-view arrangements a buyer can watch—in real-time—a child being sexually abused by an adult or another child. Perpetrators are also increasingly travelling overseas in order to sexually abuse or exploit children. Their offending may be comprised of short-stay contact offending, long-term embedded contact offending, and/or online offending.

Under the existing definition of ‘serious offence’ in subparagraph 338(a)(iii) of the POC Act, unless an offence is explicitly prescribed, an indictable offence under the Criminal Code will only fall within the definition of ‘serious offence’ where the infringing activity subject to the offence has caused, or is intended to cause, a benefit or loss to the value of at least \$10,000. However, determining the monetary benefit derived from child sexual abuse offences can be difficult, in part because the exploitation or abuse may not be motivated by direct financial gain (though financial gain is an outcome for some active participants, such as producers and online administrators). Further, relying solely on a benefit or loss threshold of \$10,000 would not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and cost to society. For example, it is currently estimated that every seven minutes, a webpage shows a child being sexually abused. Victims whose images are shared online can be re-victimised hundreds of times a day.

It is essential that those child sexual abuse offences prescribed by Table 3 that do not reach the \$10,000 benefit or loss threshold still qualify as ‘serious offences’ for the purposes of the POC Act. Classifying these offences as ‘serious offences’ enhances law enforcement’s ability to undermine the business model of child exploitation networks, and prevents seized funds from being reinvested in criminal activity.

Dangerous weapon offences

The following provisions of the Criminal Code, relating to dangerous weapons, are prescribed as ‘serious offences’ in Table 3:

- section 360.2 (cross-border offence of disposal or acquisition of a firearm or firearm part)
- section 360.3 (taking or sending a firearm or firearm part across borders)
- section 361.2 (trafficking prohibited firearms or firearm parts into Australia)
- section 361.3 (trafficking prohibited firearms or firearm parts out of Australia)

Listing these offences is appropriate as the proliferation of illicit firearms is inherently harmful to Australian society and foreign countries. These firearms have the strong potential to be used by organised crime groups to either finance their illegal activities or cause threatened or actual violence to others. Significant powers are required to combat this practice.

Firearms are easy to conceal and transport, and offer lucrative profits to criminals trafficking in illicit small arms and light weapons. Given the strong links between firearms trafficking and other criminal activities of serious and organised criminal groups, law enforcement may seek to use the power in order to carry out disruption activities.

While these offences currently qualify as ‘serious offences’ where they are intended to cause a benefit or loss of \$10,000 (see subparagraph 338(a)(iii) of the definition of ‘serious offence’ in the POC Act), in many cases the trafficking of firearms may not be motivated by direct financial gain or clearly linked to financial loss. For example, a serious and organised crime figure who imported firearms illegally for their own use or to lend to other criminal figures could potentially avoid being captured by the enhanced forfeiture powers.

Identity crime offences

The following provisions of the Criminal Code, relating to identity crime, are prescribed as ‘serious offences’ in Table 3:

- section 372.1 (dealing in identification information)
- section 372.1A (dealing in identification information that involves use of a carriage service)
- section 372.2 (possession of identification information)
- section 372.3 (possession of equipment used to make identification documentation)

Prescribing these offences is appropriate as identity crime is a key enabler for serious and organised crime, facilitating offences in nearly all crime markets. It is one of the most prevalent crime types in Australia, costing Australians approximately \$2 billion per year and affecting one in four Australians in their lifetime.

As a primarily profit-driven crime type, characterising these crimes as ‘serious offences’ enhances a proceed of crime authorities’ ability to seize and forfeit property derived from these offences, dissuading organisations and individuals from engaging in this conduct. It is internationally recognised that fraudulent use of identity and travel documents presents a threat to the security of countries and their citizens, as well as economies and global commerce, because it can facilitate a wide range of crime types, including terrorism.

While these offences currently qualify as ‘serious offences’ where they are intended to cause a benefit or loss of \$10,000 (subparagraph 338(a)(iii)(iv) of the definition of ‘serious offence’ in the POC Act), it is often impossible to gather evidence to prove that a person had a particular motivation to engage in identity crime. It is also often difficult to quantify the benefit to be gained, as identity fraud offences enable a wide range of crime types that carry larger penalties, including drug trafficking, money laundering, tax evasion, and dealing in stolen motor vehicles. Identity fraud is also used to protect the true identities of organised crime and terrorist group members.

Attaching a benefit or loss threshold of \$10,000 does not reflect the significant mental or emotional distress caused by this offence type, which may lead to persons being wrongfully accused of crimes or other misconduct.

Organised crime offences

The following provisions of the Criminal Code, relating to organised crime, are prescribed as ‘serious offences’ in Table 3:

- section 390.3 (associating in support of serious organised criminal activity)
- section 390.4 (supporting a criminal organisation)
- section 390.5 (committing an offence for the benefit of, or at the direction of, a criminal organisation)
- section 390.6 (directing activities of a criminal organisation)

These offences are aimed at deterring individuals from supporting organised criminal activity by criminalising association with other persons involved in organised criminal activity and criminalising varying levels of involvement in the activities of a criminal organisation.

Prescribing these offences is appropriate as organised crime has a negative impact on Australian society, costing Australia up to \$47 billion per year, and significant powers are required to combat the impacts of these criminal groups. These groups have been acting in an increasingly fluid and networked nature, using sophisticated business structures and technologies to disguise their activities.

According to the Australian Institute of Criminology, organised crime is thought to be responsible for a high proportion of the criminal activities generating proceeds of crime, with these criminal groups being primarily profit-motivated and becoming progressively businesslike in their approaches to laundering money and acquiring assets. Classifying the above offences as ‘serious offences’ enhances law enforcement’s ability to undermine the business model of these organisations, dissuading individuals from supporting them, reducing

the profitability of organised crime and preventing seized funds from being reinvested in criminal activity.

While these offences currently qualify as ‘serious offences’ where they are intended to cause a benefit or loss of \$10,000 (subparagraphs 338(a)(iii)(iv) of the definition of ‘serious offence’ in the POC Act), it is often impossible to determine a person’s motivation in supporting or directing a criminal organisation. Often, kingpins of criminal organisations will direct the activities of these organisations at an arm’s length, disguising their motivations through professional intermediaries. It is vital that, in these instances, law enforcement is afforded appropriate powers to restrain all property under this person’s effective control.

Schedule 5 – Forms

Schedule 5 contains the prescribed form which must be used to advise a person they are required to attend an examination. The form outlines the name and address of the person required to attend, the time and place of the examination, and any documents that must be produced. The form must be signed by an approved examiner (see section 18 of the Regulations – approved examiners). The form must be in accordance with the requirements under section 183 of the POC Act.

Schedule 6 – Repeals

This section repeals the *Proceeds of Crime Regulations 2002* in their entirety, as the Regulations replace the *Proceeds of Crime Regulations 2002*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Proceeds of Crime Regulations 2019

1. This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

2. The *Proceeds of Crime Regulations 2019* (the Regulations) remake the *Proceeds of Crime Regulations 2002* (the POC Regulations 2002) in their current form with amendments to ensure that the Regulations remain relevant and fit for purpose. The POC Regulations 2002 are scheduled to be automatically repealed on 1 October 2019 in accordance with the sunseting regime under Part 4 of Chapter 3 of the *Legislation Act 2003*.

3. The Regulations are made under the *Proceeds of Crime Act 2002* (the POC Act). The POC Act provides a scheme to trace, restrain and confiscate the proceeds and benefits gained from, and the instruments used in the commission of, Commonwealth indictable offences, foreign indictable offences and certain offences against state and territory law.

4. **Part 1 of the Regulations** sets out preliminary matters, such as the name of the instrument, commencement and authority. It defines key terms used throughout the Regulations, including the terms ‘authorised officer’, ‘corresponding law’, ‘enforcement agency’, ‘interstate forfeiture order’, ‘interstate pecuniary penalty order’, ‘interstate restraining order’, ‘narcotic substances’ and ‘serious offences’. Part 1 also provides that the definitions of ‘interstate forfeiture order’, ‘interstate pecuniary penalty order’, ‘interstate restraining order’ and ‘serious offence’ are further outlined in Schedules 1, 2, 3 and 4 respectively. There are no substantive changes to definitions in the POC Regulations 2002 in this Part, other than the definition of ‘narcotic substances’ being updated to acknowledge that the *Customs Regulations 1926* have been repealed and replaced by the *Customs Regulation 2015*.

5. **Part 2 of the Regulations** includes provisions relating to the confiscation scheme under the POC Act. Division 1 includes provisions relating to orders about forfeited property, including the application requirements for an order under section 57 of the POC Act, and the function of the responsible authority in relation to sections 57, 102 and 103 of the POC Act. Divisions 2 and 3 prescribe information that must be included on a certificate under sections 144 (pecuniary penalty orders) and 171 (literary proceeds orders) of the POC Act, 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 the amount prescribed under the order. Part 2 remakes corresponding provisions in the POC Regulations 2002 and expands these provisions to clarify the procedures underpinning orders under sections 57, 102 and 103 of

the POC Act.

6. **Part 3 of the Regulations** includes provisions relating to information gathering. It sets out the offices and classes of people who are specified as ‘approved examiners’ and provides that the approved form for an examination notice is set out at Schedule 5. Part 3 also sets out the ‘unexplained wealth legislation’ of New South Wales and the Northern Territory for the purposes of the National Cooperative Scheme on Unexplained Wealth. Part 3 remakes corresponding provisions in the POC Regulations 2002 without substantive amendment.

7. **Part 4 of the Regulations** includes provisions of an administrative nature relating to the power and duties of the Official Trustee (OT), including provisions relating to the costs, remuneration and annual management fee payable to the OT. Part 4 does not remake the content of section 16 of the POC Regulations 2002 as the terms ‘distributable funds’ and ‘suspended funds’ are no longer contained in the POC Act. Part 4 also does not remake the content of sections 18 and 19 of the POC Regulations 2002 as these notice requirements in equitable sharing arrangements are effectively dealt with through informal arrangements between agencies. It otherwise remakes corresponding provisions of the POC Regulations 2002.

8. **The Schedules to the Regulations** set out the ‘interstate forfeiture orders’, ‘interstate pecuniary penalty orders’, ‘interstate restraining orders’ and ‘corresponding laws’ of the states and territories (Schedules 1- 3). Schedule 4 sets out the indictable offences that are specified as serious offences under the *Australian Crime Commission Act 2002*, *Copyright Act 1968* and *Criminal Code Act 1995*. Schedule 5 contains the prescribed examination notice form. Schedule 6 repeals the POC Regulations 2002.

9. The Schedules remake corresponding provisions of the POC Regulations 2002, with minor updates to acknowledge changes in state and territory legislation. They also expand on these provisions by providing that offences relating to dangerous weapons, identity crime and ‘failing to produce a document or thing pursuant to a notice to produce’ in Australian Criminal Intelligence Commission examinations are ‘serious offences’ for the purposes of the POC Act.

Human rights implications

10. The Regulations engage Australia’s international obligations under the *International Covenant on Civil and Political Rights* (ICCPR). Engaged rights include:

- the right to a fair hearing in Article 14(1) of the ICCPR, and
- the right to freedom from arbitrary and unlawful interference with privacy, family, home and correspondence in Article 17 of the ICCPR.

Right to a fair hearing – Article 14 of the ICCPR

11. Article 14 of the ICCPR provides two separate sets of obligations. Article 14(1) provides for the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’, both in the cases of a ‘criminal charge’ and the determination of

one's rights and obligations in 'a suit at law'. Article 14(2) to (7) then provide the minimum guarantees which apply to criminal proceedings only.

Regulations promote, and do not limit, the right to a fair hearing under Article 14(1)

12. The Regulations promote the right to a fair hearing under Article 14(1), as it contains mechanisms to promote equality before the courts in civil proceedings under the POC Act.

13. Specifically, subsections 14(2) and 14(4) and section 15 of the Regulations support the operation of sections 57, 102 and 103 of the POC Act, which relate to the buyback and recovery of property forfeited under civil proceedings. Subsections 14(2) and 14(4) and section 15 of the Regulations make it clear that the 'responsible authority' is the proper respondent in relation to applications made under sections 57, 102 and 103, and is the Commonwealth's representative in these proceedings. This allows the 'responsible authority' to maintain carriage of all proceeds matters under the POC Act from their commencement. Allowing an applicant to clearly identify a respondent in these matters promotes a fair hearing by ensuring that the applicant is able to present their case against the correct respondent and by allowing matters to be dealt with more efficiently.

14. Subsection 14(1) also promotes the right to a fair hearing in requiring an applicant for an order under section 57 of the POC Act to give written notice to a responsible authority of both the application and the grounds on which an order is sought, while subsection 14(3) promotes this right by requiring a responsible authority to give the applicant notice of the grounds on which it proposes to contest the application. These requirements ensure that both the applicant and the respondent are aware of an application before the courts and have sufficient time to prepare a response.

15. It should also be noted that proceedings under the POC Act are heard by Commonwealth, state and territory courts in accordance with relevant procedures of those courts. This affords an affected person adequate opportunity to present his or her case, such that the right to a fair hearing is not limited. The Regulations do not affect the civil court procedures applicable to POC Act proceedings.

Minimum guarantees in criminal proceedings under Articles 14(2) to (7)

16. The Regulations do not engage the minimum guarantees in criminal proceedings under Articles 14(2) to (7) of the ICCPR.

17. The POC Act explicitly provides, at section 315, that applications under the Act are not criminal proceedings, that the rules of construction in relation to criminal law do not apply in the interpretation of the POC Act and the rules of evidence in civil proceedings apply (not the rules applicable only in criminal proceedings). As the POC Act is civil in nature, the minimum guarantees in criminal proceedings under Articles 14(2) to (7) are not engaged.

18. It is also pertinent to note that, apart from sections 14 and 15 of the Regulations (which promote the right to a fair hearing), none of the remaining sections of the Regulations directly impact upon the right to a fair hearing under Article 14 more generally.

Right to privacy – Article 17 of the ICCPR

19. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. In General Comment 16, the United Nations Human Rights Committee stated that the term ‘home’ is to be understood to indicate the place where a person resides or carries out his usual occupation. ‘Correspondence’ also includes electronic means of communication. Interferences are permissible so long as they are authorised by law and are not arbitrary.

20. The United Nations Human Rights Committee has not defined ‘privacy’, however it should be understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

21. The term ‘unlawful’ in Article 17 means no interference can take place except in cases authorised by law. What is ‘arbitrary’ will be determined by the circumstances of each case. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The United Nations Human Rights Committee has interpreted reasonableness in this context to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

22. The Regulations are clearly lawful, in that they are prescribed by law. The below analysis also provides that, if these provisions limit the rights in Article 17, these limitations are not arbitrary, as they are reasonable, necessary and proportionate to achieve the legitimate purpose of protecting public order and the rights and freedoms of others.

Freedom from arbitrary or unlawful interference with privacy – production orders and notices to financial institutions

23. To the extent that the Regulations support the operation of the POC Act in relation to production orders and notices to financial institutions, they may engage the right to privacy.

24. Section 20 of the Regulations defines the term ‘unexplained wealth legislation’ to include specific legislation under the New South Wales (NSW) and the Northern Territory (NT) jurisdictions. Under the POC Act relevant authorities in Territories and ‘participating States’ can compel persons to provide documents and/or information using production orders or notices to financial institutions for purposes connected with their ‘unexplained wealth legislation’.

25. To the extent that the application of these provisions are activated by section 20 of the Regulations, the right to privacy may be engaged. However, the extended application is reasonable, necessary and proportionate to achieve the legitimate objectives of preserving public order and protecting the rights and freedoms of others. This is because these powers assist in combating serious and organised crime by enhancing information-gathering and information-sharing arrangements within Commonwealth, State and Territory agencies whose functions relate to unexplained wealth.

26. Extending these Commonwealth investigative powers to Territories and ‘participating States’ is necessary to ensure uniformity in powers between jurisdictions (assisting individuals and financial institutions in responding to these orders) and to give law enforcement greater options in pursuing vital information in unexplained wealth cases. The permissible uses of information gathered under these powers will also be aligned, allowing jurisdictions to work closer together to investigate and prosecute serious offences.

27. This extension is also reasonable and proportionate as there are significant protections in the POC Act that protects information obtained under these orders/notices. After obtaining this information, persons are only permitted to disclose it to specific authorities where there are reasonable grounds to believe that the disclosure will service a specific purpose (see Part 3 of Schedule 1 to the POC Act). This includes disclosing to investigative or prosecutorial bodies to investigate a crime punishable by at least three years imprisonment.

28. There are also ‘use protections’ which attach to information obtained by production orders, which prevent this information from being admissible in criminal proceedings against the person who disclosed it (unless the proceedings relate to making or producing a false or misleading document under section 137.1 or 137.2 of the Criminal Code).

29. Further, the use of production orders and notices to financial institutions is supervised by the Parliamentary Joint Committee on Law Enforcement, ensuring oversight for the exercise of these powers in relation to sharing information with the NSW and NT jurisdictions.

30. Sections 6, 8, 18 and 19 of the Regulations relate to examinations orders. These sections do not engage human rights, as they are technical measures to support the operation of the relevant provisions in the POC Act.

31. To the extent that the Regulations support the operation of the POC Act in relation to production orders and notices to financial institutions, they may engage the right to privacy, but any limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of preserving public order and protecting the rights and freedoms of others.

Freedom from arbitrary or unlawful interference with privacy – Telecommunications (Interception and Access) Act 1979

32. To the extent that section 20 of the Regulations expands the operation of provisions under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to NSW and NT jurisdictions, it may limit the right to privacy.

33. Section 20 of the Regulations defines ‘unexplained wealth legislation’ for the purposes of the TIA Act. This activates relevant provisions of the TIA Act which provide that officers in Commonwealth, Territory and ‘participating State’ agencies may use, record, or communicate lawfully intercepted information or interception warrant information for a purpose connected with an unexplained wealth proceeding in relation to the agency. These amendments also allow the chief officer of an agency to communicate lawfully intercepted information to the relevant Commissioner of Police if that information relates to the ‘unexplained wealth legislation’ of that jurisdiction.

34. If section 20 of the Regulations limits the right to privacy, however, these limitations are necessary, reasonable and proportionate to achieve the legitimate objective of preserving public order. This is because these powers ensure that law enforcement authorities are in a position to effectively combat serious and organised crime by improving the information-sharing arrangements between law enforcement agencies that deal with unexplained wealth and proceeds of crime.

35. Section 20 of the Regulations is necessary as, without this Section, there would be doubt as to whether lawfully intercepted information could be shared for the purposes of particular unexplained wealth orders. The TIA Act already allows lawfully intercepted information to be used for proceedings for the confiscation or forfeiture of property or for the imposition of a pecuniary penalty in connection with the commission of a prescribed offence, which includes some unexplained wealth proceedings. Section 20 of the Regulations ensures that it is available for use in particular unexplained wealth matters, even if those matters do not require a connection with the commission of an offence.

36. Section 20 of the Regulations is necessary as the tools available under the interception regime in the TIA Act are often useful in obtaining information about organised criminal activities when ‘traditional’ investigative techniques prove inadequate. By prescribing NSW and NT as jurisdictions with whom lawfully intercepted information can be shared, section 20 of the Regulations allows information obtained under the TIA Act to be used, stored and shared by these jurisdictions, thereby facilitating the effective investigation of unexplained wealth matters, which often involve the covert movement of funds across state and territory borders.

37. Section 20 of the Regulations is also reasonable and proportionate in achieving the legitimate objectives mentioned above, as the use of the powers activated under the TIA Act is subject to a number of safeguards. Agencies, for example, are prohibited from intercepting communications or accessing stored communications except for proper purposes under a warrant or authorisation, and may only share lawfully intercepted or stored information with other agencies in particular circumstances and for particular purposes.

38. There are also limitations on the purposes for which disclosure can occur, and with which authorities information can be shared. Further, there are:

- prohibitions on a range of people associated with the telecommunications industry, such as employees of carriers and emergency call service people, from disclosing any information or document relating to a communication, which includes telecommunications data, and
- requirements that an authorised officer must consider the privacy of a person before authorising the disclosure of particular information, or that persons who issue warrants must consider the privacy of the persons affected by those warrants.

39. To the extent that section 20 of the Regulations may limit the right to privacy, by prescribing NSW and NT as jurisdictions with whom lawfully intercepted personal information can be shared, these limitations are reasonable, necessary and proportionate to achieving the legitimate objective of protecting public order, by ensuring that law

enforcement authorities are in a position to effectively combat serious and organised crime by improving the information-sharing arrangements between law enforcement agencies that deal with unexplained wealth and proceeds of crime.

Freedom from arbitrary or unlawful interference with privacy – home and family

40. Article 17 of the ICCPR includes a right to be protected against arbitrary or unlawful interference with a person's home, family and correspondence. To the extent that section 13 and Schedule 4 of the Regulations support the operation of the POC Act by prescribing the 'serious offences' under the POC Act, the Regulations may engage the rights in Article 17. This is because restraint and confiscation action under the POC Act is enhanced when initiated on the basis of a link to a 'serious offence'.

41. Under these enhanced arrangements, if a person is reasonably suspected of committing a 'serious offence', a court is able to make a restraining order against property under a person's 'effective control' and to forfeit this property unless the person can establish that, on the balance of probabilities, the property is not derived from the proceeds of unlawful activity or the instrument of a serious offence (sections 18, 29, 47 and 73 of the POC Act). In addition, if a person is convicted of a 'serious offence', all property subject to a restraining order under section 17 or 18 will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument (sections 29, 92 and 94 of the Act).

42. The Court also has the ability to restrain and forfeit instruments of serious offences under the 'asset-directed' restraint and forfeiture powers in the POC Act, even where the offender cannot be identified (subparagraphs 19(d)(ii) and 49(1)(c)(iv) of the POC Act).

43. Under the existing definition of 'serious offence' in subparagraphs 338(a)(iii) and (iv) of the POC Act, unless an 'indictable offence' is explicitly prescribed, it will only fall within the definition of 'serious offence' where the infringing activity subject to the offence has caused, or was intended to cause, a benefit or loss to the value of at least \$10,000. The offences in Schedule 4 have been explicitly prescribed, and the requirement to prove a link to an actual, or intended, benefit or loss of \$10,000 has been removed, as this threshold is often impossible to prove, unnecessarily limits law enforcements ability to target serious and organised crime and/or is otherwise inappropriate to apply to the listed offences.

44. If enhancing restraint and forfeiture for these 'serious offences' limits the right to protection against interference with a person's home, this limitation is necessary, reasonable and proportionate to achieve the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

Prescribing 'serious offences' is necessary

45. It is necessary to prescribe the 'serious offences' under Schedule 4 of the Regulations as these offences have a corrosive effect on society and significant powers are required to combat them. Prescribing these offences as 'serious offences' is also necessary to remove the requirement to prove a link to an actual or intended benefit or loss, as such a link is inappropriate for these crime types and unnecessarily frustrates law enforcement's ability to

undermine the business model of criminal organisations, dissuading individuals from supporting them and preventing seized assets from being reinvested in criminal activity.

46. Table 1 of Schedule 4 of the Regulations provides that particular offences relating to non-compliance with Australian Criminal Intelligence Commission (ACIC) compulsory examinations are ‘serious offences’ for the purposes of the POC Act. By frustrating an ACIC examination, a suspect can potentially thwart proceeds of crime litigation and protect large amounts of criminal wealth. Prescribing offences of non-compliance with ACIC examinations as ‘serious offences’ reflects the gravity of this conduct, assists in recovering criminal wealth, and is necessary to strengthen the efficacy of the ACIC’s investigative powers.

47. Determining the financial value of an actual or intended benefit or loss derived from a failure to comply with an ACIC examination is also often impossible, as the examination itself is often necessary to construct a financial profile of the examined person, and a failure to comply with the examination will often prevent authorities from obtaining this information.

48. Table 2 of Schedule 4 of the Regulations provides that particular offences relating to copyright infringement are ‘serious offences’ for the purposes of the POC Act. The inclusion of these offences in the definition of ‘serious offence’ strengthens Australia’s copyright enforcement regime and assists in minimising lost revenue to the Government through the detection of other economic related crime such as tax evasion and money laundering.

49. Determining the value of an actual or intended financial benefit or loss derived from copyright piracy is also often extremely difficult, as these cases generally involve a high volume of transactions of low-value items. This includes, for example, tangible media such as pirated DVDs, as well as pirated digital content in respect of which advertising revenue or other forms of indirect financial gain may be the primary driver.

50. Table 3 of Schedule 4 of the Regulations provides that particular offences relating to firearms trafficking are ‘serious offences’ for the purposes of the POC Act. Listing these offences is appropriate as the proliferation of illicit firearms is inherently harmful to Australian society and foreign countries. These firearms have the strong potential to be used by organised crime groups to either finance their illegal activities or cause threatened or actual violence to others. Significant powers are required to combat this practice, and listing these offences as ‘serious offences’ provides law enforcement with enhanced powers to restrain and seize assets that can be linked to these offences (including the firearms themselves).

51. Removing the need to prove the value of an actual or intended financial benefit or loss arising from these offences is also necessary, as in many cases the trafficking of firearms may not be motivated by direct financial gain or clearly linked to financial loss. For example, a serious and organised crime figure who imported firearms illegally for their own use or to lend to other criminal figures could potentially avoid being captured by the enhanced forfeiture powers if these offences were not listed.

52. Table 3 of Schedule 4 of the Regulations also provides that particular offences relating to identity crime are ‘serious offences’ for the purposes of the POC Act. Prescribing these offences is appropriate as identity crime is a key enabler for serious and organised crime, facilitating offences in nearly all crime markets. It is one of the most prevalent crime types in Australia, costing Australians approximately \$2 billion per year and affecting one in four Australians in their lifetime.

53. As a primarily profit-driven crime type, characterising identity crimes as ‘serious offences’ enhances the Commonwealth’s ability to seize and forfeit property derived from these offences or used in connection with these offences, dissuading organisations and individuals from engaging in this conduct. It is internationally recognised that fraudulent use of identity and travel documents presents a threat to the security of countries and their citizens, as well as economies and global commerce, because it can facilitate a wide range of crime types, including terrorism.

54. Removing the need to prove the value of an actual or intended financial benefit or loss arising from these offences is also necessary, as it is often impossible to gather evidence to prove that a person had a particular motivation to engage in identity crime. It is also often difficult to quantify the benefit to be gained, as identity fraud offences enable a wide range of crime types that carry larger penalties, including drug trafficking, money laundering, tax evasion, and dealing in stolen motor vehicles. Requiring proof of this link does also not reflect the significant mental or emotional distress caused by this offence type, which may lead to persons being wrongfully accused of crimes or other misconduct.

55. Table 3 of Schedule 4 of the Regulations also provides that particular offences relating to organised crime are ‘serious offences’ for the purposes of the POC Act. Prescribing these offences is appropriate as organised crime has a negative impact on Australian society, costing Australia up to \$47 billion per year, and significant powers are required to combat the impacts of these criminal groups. These groups have been acting in an increasingly fluid and networked nature, using sophisticated business structures and technologies to disguise their activities.

56. Organised crime is responsible for a high proportion of the criminal activities generating proceeds of crime, with these criminal groups being primarily profit-motivated and becoming progressively businesslike in their approaches to laundering money and acquiring assets. Classifying the above offences as ‘serious offences’ enhances law enforcement’s ability to undermine the business model of these organisations, dissuading individuals from supporting them, reducing the profitability of organised crime and preventing seized funds from being reinvested in criminal activity.

57. Often kingpins of criminal organisations will direct the activities of these organisations at an arm’s length, disguising their motivations through professional intermediaries. As such, it is necessary to remove the need to prove the value of an actual or intended financial benefit or loss arising from a person supporting or directing a criminal organisation, which can often be difficult to ascertain with certainty due to these disguised motivations. It is vital that, in these instances, law enforcement is afforded appropriate powers to restrain the property under the kingpin’s effective control.

58. Table 3 of Schedule 4 of the Regulations also provides that particular offences relating to child sexual abuse are ‘serious offences’ for the purposes of the POC Act. Prescribing these offences is appropriate, as child sexual abuse is a growing crime type that is becoming increasingly sophisticated and borderless with clear links to transnational, serious and organised crime groups. Child sexual abuse—which targets society’s most vulnerable—has devastating and long-term impacts on victims and their families. For example, victims of online abuse are re-victimised countless times and in an ongoing capacity as their images are shared prolifically on the internet. Aided by rapidly evolving technology, anonymising tools and encryption, online offenders are also able to continuously adapt and diversify their methods to conceal their activities and evade law enforcement. Classifying the above offences as ‘serious offences’ enhances law enforcement’s ability to undermine the business model of child exploitation networks, and prevents seized funds from being reinvested in criminal activity.

59. Removing the need to prove the value of an actual or intended financial benefit or loss arising from these offences is also necessary. Determining the monetary benefit derived from child sexual abuse offences can be difficult, in part because the abuse of children may not be motivated by direct financial gain (though financial gain is an outcome for some active participants, such as producers and online administrators). Further, relying solely on a benefit or loss threshold of \$10,000 would not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and cost to society. For example, it is currently estimated that every seven minutes, a webpage shows a child being sexually abused. Victims whose images are shared online can be re-victimised hundreds of times a day.

60. Table 3 of Schedule 4 of the Regulations also provides that particular offences relating to human trafficking, slavery and slavery-like practices are ‘serious offences’ for the purposes of the POC Act. The classification of these offences as ‘serious offences’ for the purposes of the POC Act acknowledges their severity. These offences represent serious forms of human exploitation that fundamentally curtail freedom of their victims. Victims are often the most vulnerable in Australian society, and can experience significant harm, including physical or mental injury, emotional suffering, and economic loss. These offences can also cause significant financial impact on business and industry, distorting global markets and undercut responsible business.

61. Removing the need to prove the value of an actual or intended financial benefit or loss arising from these offences is also necessary as it can be difficult to quantify the financial gain or loss of human trafficking, slavery and slavery-like offences. Often the extent of exploitation is unclear or the motivation underpinning the intended exploitation is often difficult to determine. Further, relying solely on a benefit or loss threshold of \$10,000 would not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and cost to society. While some of these crimes are not always driven by profit motive, their prescription as serious offences better allows for the restraint and confiscation of property that the offender has used in connection with the perpetration of these crimes.

62. Table 3 of Schedule 4 of the Regulations also provides that particular offences relating to people smuggling are ‘serious offences’ for the purposes of the POC Act. The

categorisation of these offences as serious offences recognises the grave nature of these offences and the enduring impact that they have on victims. While some of these crimes are not always driven by profit motive, their prescription as serious offences will better allow the restraint and confiscation of property that the offender has used in connection with the perpetration of these crimes.

Prescribing ‘serious offences’ is reasonable and proportionate

63. If prescribing the above offences as ‘serious offences’, allowing for enhanced restraint and confiscation of property under the POC Act, limits the right against interference with a person’s privacy, family, home or correspondence, this limitation is also reasonable and proportionate in achieving the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

64. The POC Act contains a number of safeguards and procedures to provide additional protections to individuals whose property may be subject to restraint or forfeiture orders on the basis of a link to a ‘serious offence’:

- If an individual’s property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42) or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3)).
- If an individual’s property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person’s interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102).
- A court can refuse to make an order in relation to an ‘instrument’ of an offence in certain circumstances (sections 47(4), 48(2) and 49(4)).
- An individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103).
- Where an individual acquires property that constituted ‘proceeds’ or an ‘instrument’ in the legitimate situations outlined under section 330(4), this property ceases to be ‘proceeds’ or an ‘instrument’ of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire property legitimately are adequately protected.

65. Proceeds of crime authorities are also Commonwealth agencies that are bound by an obligation to act as model litigants (see paragraph 4.2 and Appendix B of the *Legal Services Directions 2017*). This obligation requires these authorities to act honestly and fairly in handling litigation brought under the Act, and includes (but is not limited to) obligations not to take advantage of a claimant who lacks resources to litigate a legitimate claim and not to rely on technical defences except in limited circumstances.

(c) Conclusion

66. To the extent that the inclusion of ‘serious offences’ listed in Schedule 4 of the Regulations limits the right to protection against interference with a person’s privacy, family, home or correspondence, this limitation is necessary, reasonable and proportionate to achieve the legitimate objective of protecting public order and the rights and freedoms of others, by ensuring that property that can be linked to criminal conduct can be restrained and confiscated in appropriate circumstances.

Conclusion

67. The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives.