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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER
MEASURES) BILL 2015**

EXPLANATORY MEMORANDUM

Circulated by authority of the
Minister for Justice, the Hon Michael Keenan MP

CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER MEASURES) BILL 2015

GENERAL OUTLINE

1. This Bill amends the *Proceeds of Crime Act 2002* (POC Act), *Criminal Code Act 1995* (Criminal Code), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), and the *AusCheck Act 2007* (AusCheck Act).
2. The Bill contains a range of measures to improve and clarify Commonwealth criminal justice arrangements, including:
 - amending the POC Act to clarify the operation of the non-conviction based proceeds of crime regime in response to recent court decisions
 - amending the Criminal Code to insert two new offences of false dealing with accounting documents
 - amending the serious drug offences in Part 9.1 of the Criminal Code to clarify the definitions of the terms ‘drug analogue’ and ‘manufacture’ and ensure that they capture all relevant substances and processes
 - clarifying and addressing operational constraints identified by law enforcement agencies with the AML/CTF Act, and expanding the list of designated agencies authorised to access AUSTRAC information to include the Independent Commissioner Against Corruption of South Australia
 - clarifying and extending the circumstances under which AusCheck can disclose AusCheck background check information to the Commonwealth and to state and territory government agencies performing law enforcement and national security functions.
3. The Bill contains 5 Schedules.
4. **Schedule 1** will amend the POC Act to clarify the operation of the non-conviction based confiscation regime provided under that Act.
5. The non-conviction based forfeiture scheme is an essential tool under the POC Act, which is designed to target those who distance themselves from commission of offences, but profit as a result of illegal activity. Under the POC Act, a proceeds of crime authority (the Commissioner of the Australian Federal Police or the Commonwealth Director of Public Prosecutions) may apply to restrain property reasonably suspected of being the proceeds of crime, without requiring any person to be charged. The restrained property may later be forfeited if the court is satisfied on the balance of probabilities that the property is proceeds of crime.
6. The non-conviction based scheme operates in addition to the conviction-based forfeiture scheme. Section 319 of the POC Act provides that the fact that criminal proceedings have been instituted or have commenced (whether or not under the POC Act) is not a ground on which a court may stay proceedings under this Act that are not criminal

proceedings. This reflects the Parliament's intention that the non-conviction based scheme could operate even where criminal proceedings are on foot.

7. The measures in Schedule 1 of the Bill address issues relating to the non-conviction based forfeiture scheme raised in two court decisions - *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 ('*Zhao and Jin*') and *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 ('*Zhang*').

8. Schedule 1 of the Bill contains amendments to the POC Act following these decisions to:

- clarify the principles a court may consider when granting an application for a stay of proceedings under the POC Act, including providing grounds on which a stay is not to be granted
- strengthen protections against disclosure and use of material related to the confiscation proceedings in subsequent criminal proceedings
- clarify that where an exclusion application has been made pursuant to Division 3 of Part 2-1 (dealing with restraining orders) of the POC Act, this application must be heard and finalised prior to the hearing of a forfeiture application.

9. **Schedule 2** will amend the Criminal Code to create two new offences of false dealing with accounting documents. These offences implement Australia's obligation as a party to the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention). Article 8 of the Convention requires parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official.

10. The two new offences are inserted in a new Division of the Criminal Code titled 'Division 490-False dealing with accounting documents', in a new Part titled 'Part 10.9-Accounting records'. The first of the two new offences, at section 490.1 of the Criminal Code, applies where a person makes, alters, destroys or conceals an accounting document, or where a person fails to make or alter an accounting document that the person is under a duty to make or alter, with the intention that the person's conduct would facilitate, conceal or disguise the receiving or giving of a benefit that is not legitimately due, or a loss that is not legitimately incurred. The second offence, at section 490.2, applies in the same circumstances as the first offence, but where the person is reckless as to whether the benefit or loss would arise.

11. Schedule 2 provides for penalties proportionate to the differing fault element structure of each offence. The offence at section 490.1 imposes a maximum penalty for an individual of 10 years' imprisonment, a fine of 10 000 penalty units (\$1.8 million), or both. The maximum penalty for a body corporate is the greater of: (a) 100 000 penalty units (\$18 million); (b) (where the court can determine the value of the benefit) three times the value of the benefit obtained by the body corporate and any related body corporate from the offence; and (c) (where the court cannot determine the value of the benefit) 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred. For the second offence, at section 490.2, to which the lower fault element of recklessness attaches, the penalties are half of the penalties for the offence at section 490.1.

12. The offences will apply both within Australia and overseas, in prescribed circumstances where constitutional power permits. Section 490.6 provides that it is necessary to seek the Attorney-General's consent to commence proceedings where the alleged conduct occurs outside Australia and where the alleged offender is not an Australian citizen, an Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory. This requirement to seek the Attorney-General's consent seeks to ensure that, in circumstances where the nexus between the offending conduct and Australia may not be obvious, the Attorney-General is given the opportunity to review relevant considerations concerning international law and comity prior to deciding at his or her discretion whether to consent to the commencement of proceedings. It is intended that the Office of International Law in the Attorney-General's Department would be consulted prior to seeking the Attorney-General's consent.

13. **Schedule 3** will amend the serious drug offences in Part 9.1 of the Criminal Code to clarify the definitions of the terms 'drug analogue' and 'manufacture' and ensure that they capture all relevant substances and processes. The Schedule makes two amendments to the definition of 'drug analogue' in section 301.9 of the Criminal Code.

14. First, it clarifies that the terms 'addition' and 'replacement' have their ordinary meaning, not their scientific meaning. This change is necessary to remove ambiguity in the section and ensure that it operates to capture all substances that are structurally similar to listed controlled and border controlled drugs.

15. Secondly, the Schedule clarifies that a substance will be a drug analogue of a listed controlled drug even if that substance is also listed as a border controlled drug (and vice versa). These amendments are necessary to remove ambiguities in the section, highlighted by the decision of the ACT Supreme Court in *R v Poulakis* (No. 3) [2015] ACTSC 191.

16. The Schedule also amends the definition of the term 'manufacture' in section 305.1 to ensure that it applies to processes where a substance is converted from one form into another, but which do not necessarily create a new substance or change the chemical structure of the substance. These changes are necessary to remove ambiguities in the definition, highlighted by the decision of the Victorian Court of Appeal in *Beqiri v R* (2013) 37 VR 219.

17. **Schedule 4** will amend the AML/CTF Act to clarify and address operational constraints identified by law enforcement agencies, and enable a wider range of designated officials and agencies to access and share information obtained under the AML/CTF Act. These amendments will:

- list the Independent Commissioner Against Corruption of South Australia (ICAC SA) as a 'designated agency' under section 5 of the AML/CTF Act, which will enable it to access AUSTRAC information (subject to the requirements of section 126 of that Act)
- enable the AFP and the ACC to share AUSTRAC information with the International Criminal Police Organisation (INTERPOL) and the European Police Office (Europol), and provide for a regulation-making power to enable additional international bodies to be prescribed in future
- clarify the circumstances in which entrusted investigating officials of the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Department of

Immigration and Border Protection (DIBP), and the Australian Commission for Law Enforcement Integrity (ACLEI) may disclose information obtained under section 49 of the AML/CTF Act.

18. **Schedule 5** will make amendments to Part 1 and Division 1 of Part 3 of the AusCheck Act to clarify and extend the circumstances under which AusCheck can share AusCheck scheme personal information. Specifically, the amendments in Schedule 5 will enable AusCheck to directly share AusCheck scheme personal information with a broader range of Commonwealth agencies and with state and territory government agencies performing law enforcement and national security functions.

19. AusCheck scheme personal information is defined in subsection 4(1) of the AusCheck Act and includes information relating to an individual's identity and information obtained as a result of an AusCheck national security background check. The purpose of these amendments is to support Commonwealth and state and territory agencies performing law enforcement and national security functions by providing access to AusCheck scheme personal information, as appropriate.

20. AusCheck is a branch within the Attorney-General's Department (AGD) that provides national security background checking services for the Aviation Security Identification Card (ASIC), Maritime Security Identification Card (MSIC), and National Health Security (NHS) check regimes. This background check is intended to identify individuals who should not be allowed access to secure areas of Australia's airports or seaports or to security sensitive biological agents (SSBA). A background check, defined in section 5 of the AusCheck Act, is an assessment relating to an individual's identity, criminal history, security assessment, and citizenship status, residency status or entitlement to work in Australia. Background checks are conducted under the *Aviation Transport Security Act 2004* (ATSA), the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA), or other primary legislation or legislative instruments.

21. AusCheck undertakes background checking activities within a legislative framework comprising the AusCheck Act and the *AusCheck Regulations 2007* (AusCheck Regulations). This framework is supported by Guidelines for Accessing Information on the AusCheck Database (AusCheck Guidelines).

22. AusCheck uses information provided by an applicant for an ASIC, MSIC or NHS clearance to request a security assessment from the Australian Security Intelligence Agency (ASIO), a criminal history check from CrimTrac (which accesses all state and territory criminal convictions) and, if necessary, a citizenship status check from the Department of Immigration and Border Protection. Providing a centralised government background checking mechanism for these sectors means that private organisations and industry bodies do not need to deal with sensitive information, including personal and criminal history information. The vast majority of AusCheck activities relate to the ASIC and MSIC schemes, which are established under the *Aviation Transport Security Act 2004* and *Maritime Transport and Offshore Facilities Security Act 2003*. The Department of Infrastructure and Regional Development (Infrastructure) administers these schemes.

23. The information handling provisions in AusCheck's legislative framework are primarily addressed at obtaining, using and disclosing information for purposes connected to background checking. There is some scope for information sharing for other purposes—section 14(2)(b)(ii) and (iii) allow AusCheck to use or disclose information in responding to a

national security incident and for law enforcement or security intelligence purposes by the Commonwealth, or by Commonwealth authorities with law enforcement or national security functions.

24. AusCheck is limited in its ability to share AusCheck Scheme personal information. Currently, AusCheck can share with Commonwealth and relevant Commonwealth authorities (bodies incorporated) with functions relating to law enforcement or national security. These restrictions limit the flow of relevant information to other Commonwealth agencies dealing with national security and crime threats. They also prevent AusCheck from sharing relevant information with Commonwealth agencies which are not traditionally considered to be law enforcement agencies but which may require access to the information for law enforcement or national security purposes. AusCheck is also unable to directly share information with state and territory agencies with functions relating to law enforcement or national security, including state and territory police. These restrictions are at odds with the significant role these agencies play in law enforcement and national security, and the collaborative approach that is necessary to combat the cross-border threats of terrorism and serious crime. This also causes particular challenges for agencies that undertake law enforcement and national security operations at secure airport and maritime port areas, such as state and territory led police taskforces targeting drug importation.

25. In order to address these challenges and support the efforts of agencies performing law enforcement and national security functions, Schedule 5 to the Bill amends the AusCheck Act to enable AusCheck to directly share information with state and territory authorities and with a broader range of Commonwealth authorities. This sharing will continue to be limited to the performance of functions relating to law enforcement or national security, and be subjected to strong safeguards.

Safeguards

26. Appropriate safeguards are in place to protect the disclosure of AusCheck scheme personal information under the AusCheck Act.

27. Criminal offences are included in section 15 of the AusCheck Act which makes it an offence to unlawfully disclose AusCheck scheme personal information. An offence under this section is punishable by up to two years' imprisonment. These offences provide additional protections for information obtained by AusCheck and create an obligation on AusCheck staff to ensure information is shared appropriately at all times.

28. AusCheck issues privacy notices to applicants advising them how their information will be used and to acquire consent for the collection and disclosure of their personal information. Each applicant receives a privacy notice and the privacy policy is also published on the AusCheck web page of the AGD website.

29. The Secretary of the AGD issues the AusCheck Guidelines under regulation 15 of the AusCheck Regulations which establish a compulsory framework for AusCheck staff to consider in determining the legality of requests for personal information under subparagraph 14(2)(b)(iii) of the AusCheck Act. The AusCheck Guidelines implement recommendation 46 of the AusCheck Privacy Impact Assessment for the development of a protocol relating to the disclosure of AusCheck scheme personal information.

30. The AusCheck Guidelines are developed in consultation with agencies that will be receiving information, to ensure appropriate contact officers and authorisations are in place. The AusCheck Guidelines are published on the AusCheck webpage. They require Commonwealth agencies seeking access to AusCheck scheme personal information to be a 'recognised Commonwealth authority' or accredited as an 'authority to use information for law enforcement and national security purposes'. In order to be accredited, agencies must provide information to AusCheck establishing its law enforcement or national security functions and legislative or other authority supporting this function. Information is only shared with nominated Senior Executives, and written undertakings outline the law enforcement or national security purposes for the information.

31. The AusCheck Guidelines will continue to apply how information is shared with Commonwealth authorities under subparagraph 14(2)(b)(iii).

32. To ensure appropriate accreditation and protections for information shared with state and territory authorities under new subparagraph 14(2)(b)(iiia), state and territory authorities will also be subject to AusCheck Guidelines established under regulation 15 of the AusCheck Regulations.

33. AusCheck has memoranda of understandings (MOUs) in place with relevant authorities that set out the key principles and obligations relating to the sharing of AusCheck scheme personal information. The MOUs outline the purposes for which AusCheck information may be shared, and place obligations on receiving agencies to manage and control access to AusCheck information at all times so as to protect the privacy of individuals and the confidentiality of the information received.

34. These safeguards will continue to apply to information disclosed under new subparagraphs 14(2)(b)(iii) and (iiia) to ensure AusCheck scheme personal information is only accessed by Commonwealth, state and territory agencies performing law enforcement or national security functions, and this information is dealt with appropriately within these receiving agencies. Agencies that receive AusCheck scheme personal information are also required to comply with all relevant privacy, recordkeeping, records disposal, auditing and reporting requirements.

FINANCIAL IMPACT

35. The amendments made by Items 2, 4–6, and 8 of Schedule 1 of the Bill will ensure that the Commonwealth's ability to confiscate the proceeds and benefits of criminal offences via non-conviction based forfeiture proceedings is maintained.

36. The remaining Schedules within this Bill will have little or no financial impact on Government revenue.

ACRONYMS

ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AGD	Attorney-General's Department
AML/CTF	Anti-money laundering and counter-terrorism financing
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APPs	Australian Privacy Principles
ASIC	Aviation Security Identification Card
ATSA	<i>Aviation Transport Security Act 2004</i>
AusCheck Act	<i>AusCheck Act 2007</i>
AUSTRAC	Australian Transaction Reports and Analysis Centre
CEO	Chief Executive Officer
COAG	Council of Australian Governments
DIBP	Department of Immigration and Border Protection
Europol	European Police Office
FATF	Financial Action Task Force
ICAC SA	Independent Commissioner Against Corruption of South Australia
INTERPOL	International Criminal Police Organisation
MSIC	Maritime Security Identification Card
MTOFSA	<i>Maritime Transport and Offshore Facilities Security Act 2003</i>
NHS	National Health Security
OECD	Organisation for Economic Cooperation and Development
POC Act	<i>Proceeds of Crime Act 2002</i>

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

37. The Bill 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*. To the extent that the measures in the Bill may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Bill.

Overview of the Bill

38. The Bill amends the following Acts:

- *Proceeds of Crime Act 2002* (POC Act)
- *Criminal Code Act 1995* (Criminal Code)
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act)
- *AusCheck Act 2007* (AusCheck Act).

39. The Bill contains a range of measures to improve Commonwealth criminal justice arrangements, including amendments to:

- clarify the operation of the non-conviction based confiscation regime provided under the POC Act
- insert two new offences of false dealing with accounting documents into the Criminal Code
- amend the definitions of ‘drug analogue’ and ‘manufacture’ to remove ambiguities and ensure that the offences in Part 9.1 of the Criminal Code apply to all relevant substances and processes
- enhance the ability of designated officials and agencies to share information obtained under the AML/CTF Act, and allow the Independent Commissioner Against Corruption of South Australia to access AUSTRAC information
- clarify and extend the circumstances under which AusCheck can disclose AusCheck background check information to the Commonwealth and to state and territory government agencies performing law enforcement and national security functions.

40. Further details regarding the measures in the Bill and their human rights implications are set out below.

Schedule 1 – Proceeds of Crime

41. Schedule 1 will amend the POC Act to clarify the operation of the non-conviction based confiscation regime provided under that Act. The measures in the Bill make amendments to the POC Act to:

- clarify the principles a court may consider when granting an application for a stay of proceedings under the POC Act, including providing grounds on which a stay is not to be granted
- strengthen protections against disclosure and use of material related to the confiscation proceedings in subsequent criminal proceedings
- clarify that, where an exclusion application has been made pursuant to Division 3 of Part 2-1 (dealing with restraining orders) of the POC Act, this application must be heard and finalised prior to the hearing of a forfeiture application.

42. The POC Act provides for a scheme to trace, restrain and confiscate the proceeds and instruments of, and benefits gained from, Commonwealth indictable offences, foreign indictable offences and certain offences against state and territory law.

43. The non-conviction based forfeiture scheme is an essential tool under the POC Act, which is designed to target those who distance themselves from commission of offences, but profit as a result of illegal activity. Under the POC Act, a proceeds of crime authority may apply to restrain property reasonably suspected of being the proceeds of crime, without requiring any person to be charged. The restrained property may later be forfeited if the court is satisfied on the balance of probabilities that the property is proceeds of crime. Section 338 of the POC Act provides that the Commissioner of the Australian Federal Police and the Commonwealth Director of Public Prosecutions are proceeds of crime authorities.

44. The non-conviction based forfeiture scheme was introduced in 2002 in response to findings of the 1999 ALRC Report entitled *Confiscation that counts*, which concluded that Commonwealth conviction-based proceeds of crime laws were inadequate. Earlier laws had failed to impact at all upon those at the pinnacle of criminal organisations, who, with advancements in technology and globalisation, could distance themselves from the individual criminal acts, thereby evading conviction and placing their profits beyond the reach of conviction-based laws.

45. The non-conviction based scheme operates in addition to the conviction-based forfeiture scheme. Section 319 of the POC Act provides that the fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under the POC Act that are not criminal proceedings. This reflected the Parliament's intention that the non-conviction based scheme could operate even where criminal proceedings are on foot.

46. The High Court handed down its decision in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 ('*Zhao and Jin*') on 12 February 2015. The High Court upheld the decision to stay non-conviction based forfeiture proceedings under the POC Act until criminal charges against the respondent had been determined. The Bill seeks to clarify the operation of the POC Act following this decision.

47. The Bill inserts a new section 319 which does a number of things.

48. Firstly, new subsection 319(1) clarifies that the court may grant a stay of civil proceedings under the POC Act if the court considers that it is in the interests of justice to do so.

49. Secondly, new subsections 319(2)-(5) clarify where a court must not grant a stay. These principles are designed to clarify the intention that concurrent civil and criminal proceedings are possible, and require specific consideration of the individual circumstances and associated risks of prejudice. The amendments clarify that proceedings under the Act may only be stayed where the granting of a stay is the only means of addressing the circumstances (ie. the prejudice that may result to a concurrent or subsequent criminal trial). The proposed amendments are primarily designed to ensure that the court will consider the individual circumstances of the proceedings, including the nature of the overlap between the civil and criminal proceedings, and prevent the risk that a person need only claim a risk of prejudice but not provide evidence explaining the nature of that risk.

50. Thirdly, new subsection 319(6) provides that, in determining whether a stay of proceedings under this Act is justified, the court will be required to have regard to the following factors:

- that both civil and criminal proceedings should proceed as expeditiously as possible
- the cost and inconvenience to the Commonwealth of retaining property subject to proceedings under this Act and being unable to expeditiously to realise its proceeds
- the risk of a proceeds of crime authority suffering any prejudice (whether general or specific) in relation to the conduct of the POC Act proceedings if the proceedings were stayed
- whether any prejudice that a person (other than a proceeds of crime authority) would suffer if the POC Act proceedings were not stayed may be addressed by the court by means other than a stay of the proceedings, and
- any orders (other than an order for the stay of the POC Act proceedings) that the court could make to address any prejudice that a person (other than a proceeds of crime authority) would suffer if the proceedings were not stayed.

51. Recognising that there may be levels of overlap in individual cases, the Bill also includes supporting measures to strengthen the protection of sensitive information.

52. Firstly, amendments to section 266A of the POC Act clarify that information obtained under the POC Act cannot be shared with an authority where this would contravene a specific non-disclosure order by the court.

53. Secondly, the Bill inserts new section 319A into the POC Act to provide that a court may order that proceedings under this Act (other than criminal proceedings) be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of criminal justice. This provides an additional option for the court to consider instead of a stay of proceedings.

54. The Bill also clarifies the order in which certain applications under the POC Act will be heard, following the decision in *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 ('Zhang'). Schedule 1 makes amends to the POC Act to section 315A to clarify that, where an exclusion application has been made pursuant to

Division 3 of Part 2-1 (dealing with restraining orders) of the POC Act, this application must be heard and finalised prior to the hearing of a forfeiture application. A restraining order is an interim measure aimed at preventing a respondent from dissipating property prior to the court having the opportunity to consider the forfeiture of the property. If an exclusion application in respect of a restraining order is not to be heard until after forfeiture has occurred, the more appropriate path would be to make an application for exclusion from forfeiture, as there would be no extant restraining order on foot once forfeiture had been ordered. The amendments do not affect the ability of an individual to make an application for exclusion of property from restraint or forfeiture.

Schedule 2 – False accounting

55. Schedule 2 will amend the Criminal Code to insert two new offences of false dealing with accounting documents.

56. The new offences implement Australia's obligation as a party to the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention). Article 8 of the Convention requires parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official. Under Article 8, parties are required to:

- prohibit persons from using irregular accounting methods, such as maintaining off-the-books accounts, for the purpose of bribing foreign public officials or hiding such bribery, and
- provide effective, proportionate and dissuasive civil, administrative or criminal penalties for the prohibited conduct.

57. Australia's implementation of the Convention was reviewed most recently in 2012 by the OECD Working Group on Bribery (Working Group). The Working Group found Australia has not fully implemented the accounting obligations required under Article 8 of the Convention.

58. Australia has relied on s 286 (obligation to keep financial records) and s 1307 (falsification of books) of the *Corporations Act 2001*, and similar offences existing at the state and territory level to combat false accounting and demonstrate implementation of Article 8 of the Convention.

59. The Working Group found that these provisions either do not apply to a wide enough range of circumstances to appropriately criminalise false accounting for the purpose of enabling bribe payments, or do not apply adequate sanctions.

60. The new offences are inserted in a new Division of the Criminal Code, titled 'Division 490—False dealing with accounting documents' in a new Part, titled 'Part 10.9—Accounting records'. The first of the two new offences, at section 490.1 of the Criminal Code, applies where a person makes, alters, destroys or conceals an accounting document, or where a person fails to make or alter an accounting document that the person is under a duty to make or alter, with the intention that the person's conduct would facilitate, conceal or disguise the receiving or giving of a benefit that is not legitimately due, or a loss that is not legitimately incurred. The second offence, at section 490.2, applies in the same circumstances as the first offence, but where recklessness (rather than intention) attaches to the fact that the

benefit or loss would arise. In order to establish either of these offences, it will not be necessary to prove that a benefit was actually received or given or a loss actually incurred, or that the defendant intended that a particular person would receive or give a benefit or incur a loss.

61. Schedule 2 imposes penalties that are proportionate to the gravity of each offence. For the offence at section 490.1, to which the fault element of intention attaches, the maximum penalty for an individual is 10 years' imprisonment, a fine of 10 000 penalty units (\$1.8 million), or both. The maximum penalty for a body corporate is the greater of: (a) 100 000 penalty units (\$18 million); (b) (where the court can determine the value of the benefit) three times the value of the benefit obtained by the body corporate and any related body corporate from the offence; and (c) (where the court cannot determine the value of the benefit) 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred.

62. For the offence at section 490.2, to which the fault element of recklessness attaches, the penalties are half of the penalties for the offence at section 490.1. The maximum penalty for contravention of the offence at section 490.2 for an individual is five years' imprisonment, a fine of 5 000 penalty units (\$900 000), or both. The maximum penalty for a body corporate is the greater of: (a) 50 000 penalty units (\$9 million); (b) (where the court can determine the value of the benefit) one and a half times the value of the benefit obtained by the body corporate and any related body corporate from the offence; and (c) (where the court cannot determine the value of the benefit) five per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred.

63. The new offences apply both within Australia and overseas, in prescribed circumstances where constitutional power permits. Section 490.6 provides that it is necessary to seek the Attorney-General's consent to commence proceedings where the alleged conduct occurs outside Australia and where the alleged offender is not an Australian citizen, an Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory. The requirement to seek the Attorney-General's consent seeks to ensure that where the nexus between the alleged offending conduct and Australia may not be obvious, the Attorney-General is given the opportunity to review relevant considerations concerning international law and comity prior to deciding at his discretion whether to consent to the commencement of proceedings. It is intended that the Office of International Law in the Attorney-General's Department would be consulted prior to seeking the Attorney-General's consent.

Schedule 3 – Criminal Code amendments

Drug analogues

64. The serious drug offences in Part 9.1 of the Criminal Code apply to substances listed as controlled and border controlled drugs, plants and precursors in the *Criminal Code Regulations 2002*. Controlled and border controlled drugs are listed by their chemical structure.

65. The offences relating to controlled and border controlled drugs also apply to substances that are structurally similar to a listed drug, called 'drug analogues'. Section 301.9 of the Criminal Code sets out the circumstances in which a substance will be a drug analogue

of a listed drug. In part, this is to ensure that manufacturers of listed controlled and border controlled drugs cannot alter their chemical structure in order to avoid prosecution under the Criminal Code.

66. The amendments to section 301.9 in Schedule 3 will remove ambiguities in the section and ensure the serious drug offences in Part 9.1 continue to apply to all relevant substances. The amendments will clarify that the terms ‘addition’ and ‘replacement’ have their ordinary meaning. They will also clarify that a substance may be a drug analogue of a listed controlled drug even if that substance is also listed as a border controlled drug (and vice versa).

Manufacture

67. Division 305 of Part 9.1 of the Criminal Code contains offences relating to the manufacture of controlled drugs. Subsection 305.1(1) defines ‘manufacture’ to be any process by which a substance is produced, other than the cultivation of a plant. The subsection states that the processes of extracting or refining a substance, and of transforming a substance into a different substance are included in the meaning of ‘manufacture’.

68. In *Beqiri v R* (2013) 37 VR 219, the Victorian Court of Appeal found that, in order for a process to fall within the meaning of ‘manufacture’ under subsection 305.1(1), the process had to produce a new substance.

69. The amendments to section 305.1 in Schedule 3 will clarify the meaning of the term ‘manufacture’ where it is used throughout Part 9.1, including in Division 305 (commercial manufacture of controlled drugs) and section 308.4 (possessing substance, equipment or instructions for commercial manufacture of controlled drugs). These amendments will make it clear that a process which converts a substance from one form into another will fall within the meaning of manufacture. The amendments are intended to capture processes that change the form of the substance (for example, from powder to liquid or from powder into a pill), but that do not necessarily create a new substance or change the chemical structure of the existing substance.

Schedule 4 – Anti-Money Laundering and Counter-Terrorism Financing amendments

70. Item 1 of Schedule 4 will amend the definition of ‘designated agency’ in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to include the Independent Commissioner Against Corruption of South Australia (ICAC SA). ICAC SA is a statutory body established under the *Independent Commissioner Against Corruption Act 2012* (SA) (ICAC Act). It is charged with identifying and investigating corruption in public administration, and referring corrupt conduct for prosecution. Adding ICAC SA as a designated agency will enable it to access the financial intelligence holdings of the Australian Transaction Reports and Analysis Centre (AUSTRAC), bringing it into line with the abilities of similar statutory bodies in all other states.

71. Item 2 of Schedule 4 will amend the definition of ‘foreign law enforcement agency’ in section 5 of the AML/CTF Act to specifically include the International Criminal Police Organisation (INTERPOL) and the European Police Office (Europol). Under the current definition, AUSTRAC information is only able to be shared with a government body that has responsibility for law enforcement in a foreign country or a part of a foreign country. This does not extend to international law enforcement coordination and cooperation bodies that are

comprised of multiple member countries. The amended definition will also provide for a regulation-making power that is intended to enable additional international bodies, including those with multijurisdictional law enforcement coordination and cooperation functions, to be prescribed. As regulations are a disallowable instrument, the prescription of any additional bodies will remain subject to Parliamentary scrutiny.

72. Item 3 of Schedule 4 will amend subsection 22(1) of the AML/CTF Act to clarify that for the purposes of the AML/CTF Act, an ‘official’ of a designated agency includes a person appointed as the ‘Independent Commissioner Against Corruption’ under the ICAC Act or acting in that office; a person appointed as the Deputy Commissioner under that Act or acting in that office; and a person appointed as an examiner or investigator under that Act.

73. Item 4 of Schedule 4 will amend subsection 122(3) of the AML/CTF Act to ensure that ‘entrusted investigating officials’ (as defined in subsection 122(1) of the AML/CTF Act, and excluding the Commissioner of Taxation or a taxation officer, who are subject to their own disclosure regime pursuant to paragraphs 122(3)(g) and (ga)) have clear authority to make external disclosures of information and documents obtained under section 49 of the AML/CTF Act, where such disclosure is done for the purposes of, or in connection with, the performance of the duties and functions of their office.

74. Section 49 of the AML/CTF Act enables certain designated persons to obtain further information and documents by written notice, based on a Suspicious Matter Report, Threshold Transaction Report, or International Funds Transfer Instruction report made under the AML/CTF Act. This section implements international standards set by the Financial Action Task Force (FATF) requiring competent authorities to be able to obtain documents and information for use in investigations, prosecutions and related actions in relation to money laundering, underlying predicate offences, and terrorist financing.

75. Section 122 sets out what an entrusted investigating official may do with section 49 information. The amendment in Item 4 of Schedule 4 will clarify the operation of subsection 122(3) of the AML/CTF Act in relation to the onward disclosure of section 49 information. In particular, the amendment makes explicit the ability of section 49 information to be disclosed onward by a prescribed official, provided that such disclosure is done for the purposes of, or in connection with, the performance of the duties and functions of their office, including for investigative purposes such as disclosure in applications for warrants. Legislative certainty is required to support the proper performance of investigative and law enforcement functions. Any other disclosures will continue to remain subject to the relevant restrictions on the use of section 49 information set out in Part 11 of the AML/CTF Act.

Schedule 5 – Disclosure etc. of AusCheck scheme personal information

76. Schedule 5 to the Bill will make amendments to Part 1 and Division 3 of Part 1 of the *AusCheck Act 2007* (‘the AusCheck Act’) to clarify and extend the circumstances under which AusCheck can share AusCheck scheme personal information. Specifically, the amendments in Schedule 5 will enable AusCheck to directly share AusCheck scheme personal information with state and territory agencies and a broader range of Commonwealth agencies performing law enforcement or national security functions. AusCheck scheme personal information includes information relating to the individual’s identity and information obtained as a result of an AusCheck national security background check – such as criminal history information, matters relevant to a security assessment under the

Australian Security Intelligence Organisation Act 1979 and information relating to an individual's citizenship status, residency status and entitlement to work in Australia.

77. The disclosure of information will continue to be protected by robust safeguards including criminal offences in section 15 of the AusCheck Act for the unlawful disclosure of AusCheck scheme personal information, the use of privacy notices to inform applicants and acquire consent for the collection and disclosure of their personal information, the accreditation process for agencies seeking access to information and requirements relating to disclosure under the AusCheck Guidelines; and memoranda of understanding with relevant authorities.

Human rights implications

Schedule 1 – Proceeds of Crime

Schedule 1 engages the following rights:

- right to a fair hearing in Article 14 of the International Covenant on Civil and Political Rights (ICCPR)
- the prohibition on retrospective punishment in Article 15 of the ICCPR
- the right to privacy in Article 17 of the ICCPR.

Article 14 - Right to a fair hearing

78. The amendments in Schedule 1 of the Bill engage the right to a fair trial and public hearing guaranteed by Article 14 of the ICCPR.

79. 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.

80. Asset recovery actions under the POC Act make no determination of a person's guilt or innocence, but are civil actions designed to complement criminal laws that criminalise conduct such as drug trafficking, corruption and terrorism. This Bill aims to clarify only the POC Act's non-conviction based asset recovery scheme. These proceedings cannot in themselves create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanction. The POC Act authorises the imposition of penalties that aim to confiscate the proceeds of offences, the instruments of offences and the benefits derived from offences. These are stand-alone penalties aimed at preventing the reinvestment of illicit proceeds and unexplained wealth amounts in further criminal activities. These penalties are not able to be commuted into a period of imprisonment, and are separate and less severe from the criminal penalties imposed by a court with respect to a person's conduct.

81. These amendments clarify the civil court procedures applicable to POC Act proceedings that may be used by the court to reduce the risk of prejudice to criminal trials. The amendments do not impact on the processes for hearing of criminal trials.

82. It is possible that a person may be subject to the civil non-conviction based asset recovery scheme and also be charged with a criminal offence. Given the civil nature of the non-conviction based asset recovery scheme, this does not engage the protections against double jeopardy in Article 14(7).

83. Accordingly, the Bill engages the right to a fair and public hearing in Article 14(1) of the ICCPR for both civil and criminal matters but does not engage rights in Article 14(2)-(7) relating to minimum guarantees in criminal proceedings.

84. Analysis about compatibility on points arising from Article 14(1) is outlined below:

Article 14(1) - right to a public hearing

85. Article 14(1) provides that ‘everyone shall be entitled to a fair and public hearing’ and that any judgement rendered in criminal or civil proceedings should be made public, except in limited circumstances. Article 14(1) of the ICCPR also expressly provides that the press and the public may be excluded from all or part of a trial for reasons set out in the Article, including ‘to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.

86. Courts within Australia already have the ability to make orders which limit open justice. For example, section 17 of the *Federal Court of Australia Act 1976* provides that the court may make an order to close the proceedings to the public if it is considered in the interests of justice.

87. New section 319A provides an additional discretion for the court to order that proceedings under the POC Act be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of criminal justice. Preventing interference with the administration of criminal justice is designed to meet the legitimate interests of justice in the circumstances of the POC Act. The discretion is designed to protect the interests of a respondent, where they are also a defendant in a criminal trial ensuring that the court may exercise its discretion to protect a respondent’s fair trial rights in that criminal trial. In addition to discretion about whether closure is necessary, the court will also have discretion about the extent to which a closed court is appropriate in the individual circumstances. This will allow the court to close only where, for example, it is hearing particular evidence.

88. Article 14(1) in respect of public hearings is also engaged by new subsection 319(6). The effect of subsection 319(6) is to require the courts to *consider* making any other orders, including the exercise of its discretion to close proceedings, to address any prejudice to a person, as an alternative to a complete stay of the non-conviction based proceeds of crime proceedings. Accordingly, subsection 319(6) does not impose further limits on Article 14(1) in respect of the right to a public hearing. The measures are compatible with the right to a fair and public hearing as the right is only affected to the extent necessary to reduce the risk of prejudice to any criminal trial and accordingly enable the interests of justice to be met in this context.

Article 14(1) – Independence of courts and judicial discretion

89. Article 14(1) of the ICCPR also provides that criminal trials and suits at law must be heard by a ‘competent, independent and impartial tribunal established by law’. The Human

Rights Committee has confirmed that requirement of independence principally relates to systemic safeguards to ensure the independence of judges, such as security of tenure and fixed and transparent rules around remuneration and promotion, to avoid undue political influence.

90. New section 319 specifies grounds that will not warrant the exercise of the court's discretion to stay proceedings and requires the court to consider particular factors when exercising this discretion, and new section 315A will require the court to resolve matters related to a restraining order (an interim order under the POC Act) before hearing applications related to final forfeiture of the property. While these amendments direct the court to consider particular factors and manage proceedings in a particular order, this is not a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, nor where the latter is able to control or direct the former. For these reasons, new section 319 and 315A do not interfere with the independence of the judiciary and are compatible with Article 14(1) of the ICCPR.

Article 15 of the ICCPR – Prohibition against retrospective punishment

91. Article 15 of the ICCPR prohibits the retrospective operation of criminal laws, including the imposition of a heavier penalty than was applicable at the time when a criminal offence was committed. This prohibition does not extend to civil proceedings, such as the determination of a person's rights in non-conviction based asset recovery proceedings under the POC Act.

92. The following information is provided with respect to the application provisions in the Bill.

93. Item 8 of the Bill contains application provisions for the amendments. The amendments will apply to hearings under the POC Act after commencement. The effect of this is that a court in considering a stay application in confiscation proceedings, or considering an application for exclusion from a restraining order, would do so in accordance with the amended procedures regardless of whether the proceeding was initiated before or after the commencement of the POC Act.

94. The application provisions do not change the basis on which restraint has occurred, and does not allow for the making of any new confiscation order retrospectively. As provided for by section 7 of the *Acts Interpretation Act 1901* (Cth) the amended Act would not affect any legal proceeding that has already taken place and would not affect remedies, rights and privileges that have been acquired or incurred following this proceeding.

95. Requiring the court to conduct a proceeding in accordance to the amended procedures from the date of commencement will not result in any detriment, or unfairness to a person, whose property or assets are already restrained and subject to the relevant orders made under the POC Act. In these circumstances, proceeds of crime authorities must have already satisfied a court that the property should be restrained, and of the basis on which this restraint should occur. The amended procedure would only apply to the hearing of future applications of exclusion from this order, or future considerations of whether or not the proceedings should be stayed.

Article 17 of the ICCPR -Right to privacy

96. Article 17 of the ICCPR among other things prohibits unlawful or arbitrary interferences with a person's privacy, including personal information, and provides that persons have the right to the protection against such interference.

97. Section 266A of the POC Act engages the right to privacy as it governs the circumstances in which information obtained through use of POC Act powers can be shared which will generally have the effect of limiting the right to privacy.

98. The Bill clarifies on the face of section 266A that information obtained by law enforcement agencies cannot be disclosed where a court has made an order which prevents disclosure to an authority for a particular purpose. In this way, the amendments promote the right to privacy.

Conclusion

99. Schedule 1 is compatible with human rights because they promote the protection of the right to privacy in Article 17 and, to the extent that they may limit human rights in Article 14(1), those limitations are reasonable, necessary and proportionate.

Schedule 2 – False accounting

100. Schedule 2 is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act*.

Schedule 3 – Criminal Code amendments

101. Schedule 3 removes ambiguities and clarifies existing definitions in Part 9.1 of the Criminal Code. It does not engage any of the applicable rights or freedoms.

Conclusion

102. Schedule 3 of this Bill is compatible with human rights as it does not raise any human rights issues.

Schedule 4 – AML/CTF Act amendments

103. Schedule 4 of the Bill engages the right to privacy and reputation under Article 17 of the ICCPR. Article 17 of the ICCPR prohibits unlawful and arbitrary interference with a person's privacy, family, home and correspondence. It also prohibits arbitrary attacks on a person's reputation.

104. Collecting, using, storing, disclosing or publishing personal information without a person's consent amounts to an interference with privacy. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR, and be reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement

of ‘reasonableness’ as implying that “any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.”¹

105. To the extent that the measures in Schedule 4 of the Bill limit the rights protected under article 17 of the ICCPR, these limitations are not arbitrary, and are reasonable, necessary and proportionate to the achievement of legitimate objectives in fulfilling Australia’s international obligations to combat money laundering and the financing of terrorism, and enhance Australia’s relations with foreign countries and international organisations.

106. These amendments are consistent with this objective, in that they will assist designated agencies to carry out their functions more effectively, including to combat money laundering and terrorist financing, and will enhance cooperation with relevant international organisations.

107. Schedule 4 of the Bill interacts with the right to privacy and reputation in a number of ways, each of which are considered in further detail below.

Access to AUSTRAC information by ICAC SA

108. The proposed amendment including ICAC SA in the definition of ‘designated agency’ in section 5 of the AML/CTF Act will enable it to access AUSTRAC information, which may include personal information. The collection, disclosure, storage or use of personal information without a person's consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in Article 17 of the ICCPR.

109. The amendment seeks to address a legitimate objective by enabling ICAC SA to access AUSTRAC information, which will enhance its capacity to fulfil its statutory mandate to investigate corruption in public administration and bring it into line with the abilities of similar statutory bodies in other states.

110. Use and disclosure of AUSTRAC information by ICAC SA will be subject to the secrecy and access regime set out in Part 11 Division 4 of the AML/CTF Act. In addition, in accordance with the requirements of section 126(3) of the AML/CTF Act, ICAC SA will be required to comply with the Australian Privacy Principles (APPs) under the *Privacy Act 1988* (Privacy Act) in its dealings with, and use of, personal information.

111. To the extent that an individual’s right to privacy is affected by these provisions, the impact is not arbitrary. As outlined above, the amendments and existing provisions provide that information can only be accessed and disclosed in particular circumstances and only for particular purposes, consistent with the requirements of the AML/CTF Act, the Privacy Act, and APPs. Further, these measures are reasonable, necessary and proportionate to the achievement of the legitimate objective of assisting to fulfil Australia’s international obligations to combat money laundering and combat financing of terrorism, and, to enhance Australia’s collaboration with international organisations.

¹ *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

Disclosure of AUSTRAC information to foreign law enforcement agencies

112. The proposed amendment to the definition of ‘foreign law enforcement agency’ in section 5 of the AML/CTF Act will engage, and limit, Article 17 of the ICCPR by allowing the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) to disclose AUSTRAC information to international agencies such as INTERPOL and Europol.

113. The amendment seeks to address a legitimate objective by removing an operational constraint that limited the AFP and the ACC’s ability to fulfil Australia’s international obligations to combat money laundering and terrorism financing. The amendment will also beneficially affect Australia’s relations with foreign countries and international organisations by enabling timely and effective cooperation in the investigation of transnational and multi-jurisdictional crime.

114. To the extent that an individual’s right to privacy is affected by these provisions, the impact is not arbitrary. As outlined above, the amendments and existing provisions provide that information can only be accessed and disclosed in particular circumstances and only for particular purposes, consistent with the requirements of the AML/CTF Act, the Privacy Act, and APPs. Disclosure of information to foreign law enforcement agencies is subject to the restrictions on dissemination set out in subsections 132(3) and (6) of the AML/CTF Act. These restrictions stipulate that, prior to disclosing any information, the AFP Commissioner and the CEO of the ACC must first satisfy themselves that the foreign law enforcement agency in question has given appropriate undertakings for the protection of the confidentiality of the information, for controlling the use that will be made of the information, and for ensuring that the information will be used only for the purpose for which it is communicated to that agency. Further, this measure is reasonable, necessary and proportionate to the achievement of the legitimate objective of assisting Australia to combat money laundering and terrorist financing, by enhancing collaboration with foreign enforcement agencies.

Onward disclosure of section 49 information

115. The proposed amendment to subsection 122(3) of the AML/CTF Act will engage, and limit, Article 17 of the ICCPR by facilitating the onward disclosure of information or documents obtained under section 49 of the AML/CTF Act. The ability to request section 49 information is limited to certain Commonwealth agencies, and this amendment is further limited to those agencies with an investigation role: the AFP, ACC, Department of Immigration and Border Protection (DIBP), and the Australian Commission for Law Enforcement Integrity (ACLEI).

116. The amendment seeks to address a legitimate objective by clarifying the operation and effect of subsection 122(3) of the AML/CTF Act. This is necessary to ensure that investigative and enforcement agencies are able to utilise section 49 information for investigative purposes, including in applications for warrants in relation to money laundering, predicate offences (including in relation to serious and organised criminal activity), and terrorism financing.

117. Designated entrusted investigating officials from the AFP, ACC, DIBP, and ACLEI are already entitled to access and disclose information or documents obtained under section 49 of the AML/CTF Act; this amendment seeks only to provide additional clarity regarding the scope and extent of this authority. To the extent that an individual’s right to privacy is

affected by these provisions, the release of information will occur under the law and will not be arbitrary.

118. Entrusted investigating officials can only disclose information where it is for the purposes of, or in connection with, the performance of the duties and functions of their office. Any other disclosures will continue to remain subject to the restrictions on the use of section 49 information set out in Part 11 of the AML/CTF Act. Further, it is reasonable, necessary and proportionate to the achievement of the legitimate objective of enabling officials to perform their duties effectively, to assist Australia to fulfil its international obligations to combat money laundering and terrorist financing.

Conclusion

119. Schedule 4 of the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

Schedule 5 – Disclosure etc. of AusCheck scheme personal information

120. Schedule 5 engages the right to privacy under article 17 of the ICCPR.

Right to privacy

121. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Accordingly, interferences with the right to privacy will be permitted provided they are not arbitrary and are authorised by law. In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that:

- limitations serve a legitimate objective
- limitations adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

122. The amendments in Schedule 5 will interact with the right to privacy in that it will facilitate AusCheck’s sharing of individuals’ personal information with Commonwealth, state and territory agencies where there is a law enforcement or national security need.

123. AusCheck is already authorised to disclose information to Commonwealth agencies for law enforcement and national security related purposes in circumstances currently provided in subparagraph 14(2)(b)(iii) of the AusCheck Act. The amendments enable AusCheck to disclose AusCheck scheme personal information with a broader range of Commonwealth agencies. However, disclosure must still be for the performance of functions relating to law enforcement or national security. The amendments also allow AusCheck to disclose information directly to state and territory agencies, including state and territory police, for the performance of functions relating to law enforcement or national security.

124. AusCheck performs an important national security role by coordinating background checking of individuals that require access to secure aviation and maritime security zones. AusCheck scheme personal information contains valuable security information such as criminal history and ASIO security assessment information on individuals who pose criminal and national security related risk. The amendments, which improve access to AusCheck Scheme personal information, provide a reasonable and proportionate means of supporting relevant Commonwealth agencies to effectively perform their law enforcement and national security functions. These agencies could benefit from better access to AusCheck information about individuals with access to secure areas. At present, a number of agencies that play a role in Australia's national security are outside the scope of those with which AusCheck can share information—particularly state and territory police operating at airports and maritime ports. The amendments in Schedule 5 are reasonable and proportionate in achieving the end of contributing to effective law enforcement and the national security of Australia.

125. Appropriate safeguards are in place to protect the disclosure of AusCheck scheme personal information under the AusCheck Act. Recipients of the information will still have to satisfy the criteria in new subparagraphs 14(2)(b)(iii) and (iiia) of the AusCheck Act. Specifically, AusCheck can only share information with Commonwealth, state or territory authorities which perform law enforcement and national security functions. This information will continue to be protected through existing privacy protections in the AusCheck scheme. Criminal offences are established in section 15 of the AusCheck Act which criminalise the unlawful disclosure of AusCheck scheme personal information. AusCheck also has robust administrative procedures and practices for ensuring its information is managed in an open and transparent way. The privacy notice outlines the uses and purposes to which personal information will be put. The notice is provided to each applicant prior to lodging an application and is also available on the AusCheck website. The policy includes information on contacting the AGD Privacy Contact Officer and the Office of the Australian Information Commissioner, should an individual feel aggrieved about the treatment of their personal information and wish to make a complaint.

126. AusCheck has also developed Guidelines for Accessing Information on the AusCheck Database ('AusCheck Guidelines') under regulation 15 of the AusCheck Regulations which establish a compulsory framework for providing access to AusCheck information. The AusCheck Guidelines are publicly available on the AusCheck website and require proactive steps for agencies to be approved for access to AusCheck information. The AusCheck Guidelines also publish the agencies approved for access to the database, and the AGD Annual Report includes information about these agencies and the purposes and frequency of access to AusCheck information. The AusCheck Guidelines will be updated to reflect the amendments in Schedule 5 to the Bill and continue to protect the disclosure of AusCheck scheme personal information.

127. Information sharing arrangements are also governed by memoranda of understanding with relevant authorities. AusCheck currently has MOUs to govern its information sharing with the Australian Federal Police (AFP) and the Australian Customs and Border Protection Service (ACBPS) – prior to its integration with the Department of Immigration and Border Protection.

128. The safeguards provide a robust framework that appropriately protects the disclosure of AusCheck scheme personal information.

Conclusion

129. The privacy statement and amendments in Schedule 5 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcome of contributing to effective law enforcement and the national security of Australia. The amendments are limited to sharing for the purpose of law enforcement and national security, are subject to strict safeguards and do not arbitrarily or unlawfully interfere with individuals' privacy.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

130. This clause provides for the Bill to be cited as the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2015*.

Clause 2 – Commencement

131. This clause provides for the commencement of each provision in the Bill, as set out in the table. Item 1 in the table provides that sections 1 to 3, which concern the formal aspects of the Bill, as well as anything in the Bill not elsewhere covered by the table, will commence on the day on which the Bill receives Royal Assent.

132. Item 2 in the table provides that Schedules 1 to 4 will commence on the day after the Bill receives the Royal Assent.

133. Item 3 in the table provides that the amendments in Schedule 5 will commence on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of six months beginning on the day the Bill receives the Royal Assent, they will commence on the day after the end of that period.

Clause 3 – Schedules

Schedule 1 – Proceeds of crime

Item 1 – Subsection 266A(2)

134. This Item amends subsection 266A(2) to clarify the circumstances in which information obtained under the POC Act can be disclosed.

135. Under the POC Act, a person may be compelled by a court, or an approved proceeds of crime examiner to provide a sworn statement, or disclose certain information. Part 3-6 of the POC Act sets out the circumstances in which information obtained as a result of these processes may be disclosed and the authorities to whom such disclosures may be made.

136. Section 266A of the POC Act Itemises in a table the authorities to which disclosure may be made and the purposes for which disclosure may be made where information has been obtained either:

- as a result of a person giving a sworn statement in relation to interests or liabilities in property, or the identification or location of property interests pursuant to paragraph 39(1)(ca), (d) or (da) of the POC Act, or
- through the exercise of powers or a function under Part 3-1 (examinations), 3-2 (production orders), 3-3 (notices to financial institutions), 3-4 (monitoring orders) or 3-5 (search and seizure powers) of the Act.

137. Subsection 266A(2) currently provides that disclosure of information to an authority described in an Item of the table may occur if a person believes on reasonable grounds that disclosure will serve the purposes described in the associated Item within the table.

138. This Item makes amendments to replace subsection 266A(2) and insert two subparagraphs.

139. Subparagraph 266A(2)(a) retains the requirement that disclosure of information to an authority described in an Item of the table may only occur where the person believes on reasonable grounds that the disclosure will serve that purpose.

140. Subparagraph 266A(2)(b) is new, to clarify that disclosure may also only occur where a court has not made an order prohibiting the disclosure of the information to the authority for that purpose.

141. The amendments recognise that courts will already have powers to make orders protecting information under a number of sources. A non-disclosure order is an example of an order which could be made by court to address any prejudice a person would suffer if the POC Act proceedings were not stayed. Such an order would prevent information that a person may have been compelled to disclose in the course of a proceeds of crime investigation and hearing from being used in a criminal trial that has been instituted or commenced against that person, or another person.

142. The amendments clarify the effect on disclosure under the POC Act of a court order which specifically prohibits disclosure to an authority.

143. The amendments operate together with new subparagraph 319 (6)(e) to provide protection where a court considers that disclosure of information may raise prejudice for a criminal trial.

Item 2 - Section 315A

144. This Item makes a technical amendment to existing section 315A to insert (1) before 'A court' to create new subsection 315A(1). Existing section 315A will become subsection (1). This is consequential to Item 3, which inserts a new subsection 315A(2).

Item 3 – At the end of section 315A

145. This Item inserts a new subsection 315A(2) to clarify the order in which certain applications under the POC Act may be heard.

146. Part 2-1 of the POC Act provides for the making of restraining orders. Under Part 2-1, a proceeds of crime authority (the Australian Federal Police or the Commonwealth Director of Public Prosecutions) can apply to restrain property reasonably suspected of being the proceeds of crime. Restraining orders are interim orders that restrict a person's ability to dispose of or otherwise deal with property. These provisions ensure that property is preserved. A forfeiture order is a 'final' order that makes payable to the Commonwealth an amount which, in the court's opinion has been derived from the commission of a relevant offence.

147. Sections 29 and 29A of the POC Act ensure that an individual with an interest in restrained property may apply to the court for orders to exclude some or all of the property from the restraining order. Sections 29 and 29A require an individual to provide the court with evidence as to the reasons why the property should not be restrained. For example, subparagraph 29(2)(a) provides that property may be excluded from a restraining order if it is neither the proceeds or instrument of unlawful activity.

148. Current section 315A provides that a court may hear and determine 2 or more applications under the POC Act at the same time. Section 315A does not specify that matters relating to restraint should be heard and finalised by a court prior to matters relating to forfeiture being considered. However, if an application for a final forfeiture order must be heard before an exclusion application in respect of a restraining order, this creates an anomalous situation and undermines the provisions allowing exclusion of property from a restraining order.

149. New subsection 315A(2) provides that the court may only hear the application for the forfeiture order after the application for the exclusion order in respect of the restraining order has been determined.

Item 4 – Section 319

150. This Item repeals the existing section 319 and replaces it with six new subsections.

151. Current section 319 provides that the fact that criminal proceedings have been instituted or have commenced is not ground on which a court may stay proceedings under the POC Act that are not criminal proceedings. This reflects the Parliament's intention that the non-conviction based scheme would operate in addition to the conviction-based forfeiture scheme under the POC Act, and could operate in parallel with criminal proceedings.

152. New section 319 is designed to clarify the process for granting a stay of civil proceedings under the POC Act, following the High Court's decision in *Zhao and Jin*.

153. In particular, it clarifies the principles to be taken into account by a court when considering an application for a stay of proceedings under the POC Act, and the grounds on which a stay is not to be granted.

154. New subsection 319(1) provides that a court may stay proceedings under the POC Act that are not criminal proceedings if the court considers that it is in the interests of justice to do so. This subsection replicates current section 319 of the POC Act to ensure that the court's existing discretion to grant a stay of proceedings in appropriate circumstances is maintained.

155. New subsection 319(2) builds on current section 319 and sets out grounds on which it would not be appropriate to grant a stay. New subsection 319(2) provides that a court must not stay the proceedings on any or all of the following grounds:

- that criminal proceedings have been, are proposed to be or may be instituted or commenced against the person subject to proceedings under the POC Act. (new subparagraph 319(2)(a)).
- that criminal proceedings have been, are proposed to be or may be instituted or commenced against another person in respect of matters relating to the subject matter of the proceedings under the POC Act (new subparagraph 319(2)(b))

- that a person may consider it necessary to give evidence, or to call evidence from another person, in the POC Act proceedings and the evidence is or may be relevant to a matter at issue in criminal proceedings that have been, are proposed to be or may be instituted or commenced against the person or any other person (new subparagraph 319(2)(c)(i) and (ii)), or
- on the ground that POC Act proceedings in relation to another person have been, are to be or may be stayed (new subparagraph 319(2)(d)).

156. A successful stay application will enable a person to delay the determination of the forfeiture proceedings until their criminal trial is complete. Such a delay would have flow on effects on the availability of evidence, would impede the operation of the non-conviction based scheme and would frustrate the objects of the POC Act. The grounds on which a stay is not to be granted are designed to prevent a respondent from claiming merely a generalised ‘risk’ of prejudice to support a stay of proceedings. New subparagraphs 319(2)(a) to (d) are designed to ensure that the court will consider the individual circumstances of the proceedings, including the nature of the overlap between the civil and criminal proceedings, and the specific nature of the risk of prejudice being claimed.

157. New subsection 319(3) relates to the operation of the new subparagraph 319(2)(a)). This subsection is intended to make it clear that a stay is not to be granted under the POC Act on the basis of a concurrent criminal proceeding against the person described in subparagraph 319(2)(a) even if the circumstances pertaining to the proceedings are or may be the same as, or substantially similar to, the circumstances pertaining to the criminal proceedings.

158. New subsection 319(4) relates to the operation of new subparagraph 319(2)(b). This subsection is intended to make it clear that a stay is not to be granted under the POC Act on the basis of a concurrent criminal proceeding against the person described in subparagraph 319(2)(b) even if the circumstances pertaining to those proceedings are or may be the same as, or substantially similar to, the circumstances pertaining to the criminal proceeding.

159. New subsection 319(5) which relates to subparagraph 319(2)(d). Subparagraph 319(2)(d) provides that a stay must not be granted on the ground that POC Act proceedings in relation to another person have been, are to be or may be stayed. New subsection 319(5) provides that subparagraph 319(2)(d) applies even if the staying of the POC Act proceedings would avoid a multiplicity of POC Act proceedings.

160. Proceedings under the POC Act may be sought against several different people, each of whom may have an interest in the property that is subject to an order, or applications for an order to be made under the Act. In these circumstances, courts may consider it undesirable to have separate proceedings, given the principle that a multiplicity of proceedings is to be avoided. The application of this principle with respect to granting stays of proceedings under the POC Act has an anomalous impact on the conduct of proceedings under the Act. For example, a court may consider it appropriate to have a single hearing with respect to two parties, both of whom have an interest in property that has been subject to a restraining order under the POC Act. One of these parties may consider that the conduct of the POC Act proceedings could create prejudice to their rights in a concurrent or anticipated criminal proceeding, and apply to the court to stay the proceedings under the POC Act on this ground. Ordinarily each party seeking a stay would need to individually demonstrate specific

prejudice. However, the preference for a multiplicity of proceedings to be avoided may result in proceedings against all parties being stayed, without the need for a party against whom no criminal proceeding has been, or is proposed to be instituted needing to demonstrate specific prejudice. New subsection 319(5) makes it clear that a proceeding under the POC Act should not be stayed simply on the basis that it would avoid a multiplicity of POC Act proceedings in such circumstances.

161. New subsection 319(6) relates to new subsection 319(1) and provides for factors that a court must have regard to in considering whether to grant a stay of proceedings. This list is not a closed list, and does not prevent the court from considering other issues in its determination of the interests of justice under new subsection 319(1).

162. New subparagraphs 319(6)(a) to (e) state that in considering whether to grant a stay of the proceedings, the court must have regard to the following matters:

- that the POC Act proceedings, and any criminal proceedings of a kind referred to in paragraph (2)(a) or (b), should proceed as expeditiously as possible (new subparagraph 319(6)(a))
- the cost and inconvenience to the Commonwealth of retaining property to which the POC Act proceeding relates and being unable to expeditiously realise its proceeds (new subparagraph 319(6)(b))
- the risk of a proceeds of crime authority suffering any prejudice (whether general or specific) in relation to the conduct of the POC Act proceedings if the proceedings were stayed (new subparagraph 319(6)(c))
- whether any prejudice that a person, other than a proceeds of crime authority, would suffer if the POC Act proceedings were not stayed may be addressed by the court by means other than a stay of the proceedings, and (new subparagraph 319(6)(d))
- any orders, other than an order for the stay of the POCA proceedings, that the court could make to address any prejudice that a person, other than a proceeds of crime authority, would suffer if the proceedings were not stayed. (new subparagraph 319(6)(e))

163. These subparagraphs ensure that the court considers other options instead of a stay which may be available to prevent prejudice. A court hearing POC Act proceedings will have access to a range of alternative tools and powers to prevent prejudice to the respondent. These could include requiring evidence to be served, rather than filed, in the first instance, or making orders restricting the disclosure of material prejudicial to a defence of criminal proceedings that would be generated in the course of proceedings under the POC Act. A note is inserted after new subsection 319(6) to give examples of orders the court could make to address any prejudice that a person would suffer if a proceeding under the POC Act were not stayed. This note provides examples of orders that the court could make to address any prejudice that a person (other than a proceeds of crime authority) would suffer if the POCA proceedings were not stayed, to include an order under new section 319A (closed court) or an order prohibiting the disclosure of information.

164. New section 319A, which provides that a court may order that proceedings, other than criminal proceedings, under the POC Act be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of criminal justice.

165. New section 319A provides an additional option for the court to consider instead of stay of proceedings, and does not affect any other options which a court may already have. This Item relates to new subparagraph 319(6)(e) that provides that in considering whether a stay of the proceedings, the court must have regard to matters including any orders, other than an order for the stay of the POCA proceedings, that the court could make to address any prejudice that a person, other than a proceeds of crime authority, would suffer if the proceedings were not stayed. The discretion is primarily designed as a tool to protect the interests of a respondent, where they are also a defendant in a criminal trial. As it remains at the discretion of the court, it will not impede the placing of law enforcement officers' conduct under public scrutiny. In addition to discretion about whether closure is necessary, the court will also have discretion about the extent to which a closed court is appropriate in the individual circumstances. This will allow the court to close only where, for example, it is hearing particular evidence.

Item 5 – Application provisions

166. This Item sets out how the amendments made in Schedule 1 apply.

Subsection 266A(2)

167. Sub-Item (1) provides that the amendments to subsection 266A(2) of the POC Act apply in relation to the disclosure of information after the commencement of this Item, whether the information was obtained before or after that commencement. The amendments to subsection 266A(2) clarify that information may not be disclosed where the disclosure to an authority for a purpose has been prohibited by a court order. This sub-Item ensures that this protection applies regardless of whether the information subject to the court's non-disclosure order was obtained before, during or after the commencement. While the amendments may apply retrospectively to cover information obtained before commencement, this retrospective operation does not impose new liabilities or extinguish existing rights. Rather, the application of the amendment in this way extends a further protection to a person who may be concerned that the disclosure of information creates a risk to the person's rights in a concurrent or anticipated criminal trial.

Section 315A

168. Sub-Item (2) provides that amendments to subsection 315A(2) of the POC Act apply in relation to an application made after the commencement of this Item. The amendment to section 315(A) provides that the court may only hear the application for the forfeiture order after the application for the exclusion order has been determined.

169. The effect of this sub-Item is that should an application for a forfeiture order be made under the POC Act after commencement, the hearing of this application will only take place after any applications for exclusion from an existing restraining order have been dealt with by the court. This sequencing of hearings will apply regardless of when the interest in the property which is subject to the restraining order was acquired. If a person acquires an interest in property that is restrained prior to commencement of the amended section 315A, and makes an application for exclusion of this interest from the restraining order following commencement, this sub-Item ensures that the exclusion application is dealt with prior to the court finalising matters relating to the forfeiture of the property. The operation of the amendments in this way means that a party, with an interest in the property, regardless of when this interest is acquired, may still have the opportunity for this interest to be excluded

from restraint, prior to the court making any final orders with respect to the property. The operation of the sub-Item does not retrospectively impose new liabilities on either party or extinguish existing rights.

Sections 319 and 319A

170. Sub-Item (3) provides that the amendments to sections 319 and 319A of the POC Act apply in relation to proceedings instituted or commenced before or after the commencement of this Item.

171. The amendments to section 319 and 319A affect the process by which stay of proceedings may be granted by a court. Amended section 319 expands the principles to be taken into account by a court when granting an application for a stay of proceedings under the POC Act, including providing grounds on which a stay is not to be granted. New section 319A provides that a court may order proceedings under the POC Act be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of criminal justice.

172. Under this sub-Item, the amended procedures will apply only to the exercise of the court's discretion to make orders under the POC Act after commencement. However, the effect of this application is partially retrospective, as a court will apply the amended procedures from commencement, regardless of when the proceedings under the POC Act were started. Requiring the court to conduct a proceeding in accordance to the amended procedures from the date of commencement will not result in any detriment, or unfairness to a person, whose property or assets are already restrained and subject to the relevant orders made under the POC Act. This retrospective operation does not affect any legal proceeding that has already taken place and would not affect remedies, rights and privileges that have been acquired or incurred following this proceeding.

Schedule 2 – False accounting

173. Schedule 2 amends the Criminal Code to insert two offences of false dealing with accounting documents.

174. These offences implement Australia's obligation as a party to the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention). Article 8 of the Convention requires parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official. Under Article 8, parties are required to:

- prohibit persons from using irregular accounting methods, such as maintaining off-the-books accounts, for the purpose of bribing foreign public officials or hiding such bribery, and
- provide effective, proportionate and dissuasive civil, administrative or criminal penalties for the prohibited conduct.

175. Australia's implementation of the Convention was reviewed most recently in 2012 by the OECD Working Group on Bribery (Working Group). The Working Group found

Australia has not fully implemented the accounting obligations required under Article 8 of the Convention.

176. Australia has relied on s 286 (obligation to keep financial records) and s 1307 (falsification of books) of the *Corporations Act 2001*, and similar offences existing at the state and territory level to combat false accounting and demonstrate implementation of Article 8 of the Convention.

177. The Working Group found that these provisions either do not apply to a wide enough range of circumstances to appropriately criminalise false accounting for the purpose of enabling bribe payments, or do not apply adequate sanctions.

178. The new offences are inserted in a new Division of the Criminal Code, titled 'Division 490—False dealing with accounting documents' in a new Part, titled 'Part 10.9—Accounting records'. The first of the two new offences, at section 490.1 of the Criminal Code, applies where a person makes, alters, destroys or conceals an accounting document, or where a person fails to make or alter an accounting document that the person is under a duty to make or alter, with the intention that the person's conduct would facilitate, conceal or disguise the giving or receiving of a benefit that is not legitimately due, or a loss that is not legitimately incurred. The second offence, at section 490.2, applies in the same circumstances as the offence at section 490.1, but where recklessness (rather than intention) attaches to the fact that the benefit or loss would arise. In order to establish either of these offences, it will not be necessary to prove that a benefit was actually given or received or a loss actually incurred, or that the defendant intended that a particular person would give or receive a benefit or incur a loss.

179. Schedule 2 imposes penalties that are proportionate to the gravity of each offence. For the offence at section 490.1, the maximum penalty for an individual is 10 years' imprisonment, a fine of 10 000 penalty units (\$1.8 million), or both. The maximum penalty for a body corporate is the greater of: (a) 100 000 penalty units (\$18 million); (b) three times the value of the benefit obtained by the body corporate and any related body corporate from the offence; and (c) (where the court cannot determine the value of the benefit) 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred. For the offence at section 490.2, to which the lower fault element of recklessness is attached, the penalties are half the value of the penalties imposed for contravention of the offence at section 490.1.

180. The offences apply both within Australia and overseas, in prescribed circumstances where constitutional power permits. Section 490.6 provides that it is necessary to seek the Attorney-General's consent to commence proceedings where the alleged conduct occurs outside Australia and where the alleged offender is not an Australian citizen, an Australian resident or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory. The requirement to seek the Attorney-General's consent seeks to ensure that where the nexus between the alleged offending conduct and Australia may not be obvious, the Attorney-General is given the opportunity to review relevant considerations concerning international law and comity prior to deciding at his discretion whether to consent to the commencement of proceedings. It is intended that the Office of International Law in the Attorney-General's Department would be consulted prior to seeking the Attorney-General's consent.

Criminal Code Act 1995

Item 1 – Part 10.9

181. Item 1 inserts a new Part, titled ‘Part 10.9—Accounting records’, at the end of Chapter 10 of the Criminal Code.

182. Item 1 creates a new Division, titled ‘Division 490—False dealing with accounting documents’, in the new Part 10.9 of the Criminal Code.

490.1 Intentional false dealing with accounting documents

183. Section 490.1 provides for a new offence, titled ‘Intentional false dealing with accounting documents’.

184. Paragraph 490.1(1)(a) provides that a person commits an offence if the person:

- (i) makes, alters, destroys or conceals an accounting document, or
- (ii) fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter.

185. The words ‘that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter’ in subparagraph 490.1(1)(a)(ii) qualify the words ‘fails to make or alter an accounting document’ in subparagraph 490.1(1)(a)(ii) only, and do not qualify subparagraph 490.1(1)(a)(i).

186. The reference to a duty ‘under a law of the Commonwealth, a State or Territory or at common law’ in subparagraph 490.1(1)(a)(ii) is inserted to ensure that the offence is consistent with the finding of the majority of the High Court of Australia in *Commonwealth DPP v Poniatowska* (2011) 282 ALR 200, that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform.

187. Paragraph 490.1(1)(b) provides that it is an element of the offence under section 490.1 that a person intended the making, alteration, destruction or concealment referred to in subparagraph 490.1(1)(a)(i), or the failure to make or alter referred to in subparagraph 490.1(1)(a)(ii), to facilitate, conceal or disguise the occurrence of one or more of the following:

- (i) the person receiving a benefit that is not legitimately due to the person,
- (ii) the person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit,
- (iii) another person receiving a benefit that it not legitimately due to the other person,
- (iv) another person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit, (who may be the first-mentioned person),
- (v) loss to another person that is not legitimately incurred by the other person.

188. Paragraph 490.1(1)(c) provides that it is an element of the offence at section 490.1 that one or more of the circumstances in subsection 490.1(2) applies.

189. Subsection 490.1(2) sets out circumstances, one or more of which must apply in order to establish an offence under either sections 490.1 or 490.2, as provided in paragraphs 490.1(1)(c) and 490.2(1)(c).

190. Under subsection 490.1(2), the offences at sections 490.1 and 490.2 apply in a broad range of circumstances, for which the Australian Government's power to legislate derives from the Australian Constitution.

191. Subparagraph 490.1(2)(a)(i) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the person is a constitutional corporation, or a corporation that is incorporated in a Territory.

192. Subparagraph 490.1(2)(a)(ii) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the person is 'an officer or employee of a constitutional corporation acting in the performance of his or her duties or the carrying out of his or her functions'. The purpose of the words 'acting in the performance of his or her duties or the carrying out of his or her functions' is to ensure that the offence does not apply where the person is acting in a private capacity. Rather, subparagraph 490.1(2)(a)(ii) requires a substantive connection between the conduct provided for in subsections 490.1(1) or 490.2(1) and the person's duties or functions as an employee or officer of a constitutional corporation. The fact that the person's conduct may be a contravention of an offence under Division 490 does not of itself mean that the person was not acting in the performance of his or her duties or the carrying out of his or her functions as an officer or employee of a constitutional corporation.

193. Subparagraph 490.1(2)(a)(iii) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the person is 'a person engaged to provide services to a constitutional corporation and acting in the course of providing those services'. The purpose of the words 'acting in the course of providing those services' is to ensure that the offence does not apply where the person is acting in a private capacity. Rather, subparagraph 490.1(2)(a)(iii) requires a substantive connection between the conduct provided for in subsections 490.1(1) or 490.2(1) and the services the person is engaged to provide to a constitutional corporation. The fact that the person's conduct may be a contravention of an offence under Division 490 does not of itself mean that the person was not acting in the course of providing services to a constitutional corporation.

194. Subparagraph 490.1(2)(a)(iv) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the person is 'a Commonwealth public official acting in the performance of his or her duties or the carrying out of his or her functions'. The purpose of the words 'acting in the performance of his or her duties or the carrying out of his or her functions' is to ensure that the offence does not apply where the person is acting in a private capacity. Rather, subparagraph 490.1(2)(a)(iv) requires a substantive connection between the conduct provided for in subsections 490.1(1) or 490.2(1) and the person's duties or functions as a Commonwealth public official. The fact that the person's conduct may be a contravention of an offence under Division 490 does not of itself mean that the person was not acting in the performance of his or her duties or the carrying out of his or her functions as a Commonwealth public official.

195. Subparagraph 490.1(2)(b) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the person's act or omission referred to in paragraph 490.1(1)(a):

- (i) occurs in a Territory, or
- (ii) occurs outside Australia, or
- (iii) concerns matters or things outside Australia, or
- (iv) facilitates, or conceals the commission of an offence against a law of the Commonwealth.

196. Subparagraph 490.1(2)(c) provides that it is a circumstance for the purposes of paragraphs 490.1(1)(c) or 490.2(1)(c) where the accounting document:

- (i) is outside Australia, or
- (ii) is in a Territory, or
- (iii) is kept under or for the purposes of a law of the Commonwealth, or
- (iv) is kept to record the receipt or use of Australian currency.

197. Subsection 490.1(3) provides that absolute liability applies to paragraph 490.1(1)(c). Paragraph 490.1(1)(c) provides that it is an element of the offence that one or more of the circumstances in subsection 490.1(2) applies.

198. A note to subsection 490.1(3) indicates that absolute liability is defined in section 6.2 of the Criminal Code. Relevantly, subsection 6.2(2) provides that if a law that creates an offence provides that absolute liability applies to a particular physical element of the offence, there are no fault elements for that physical element, and the defence of mistake of fact is unavailable in relation that physical element.

199. The effect of subs 490.1(3) is that in a prosecution under section 490.1, no fault element applies in relation to whether one or more of the circumstances in subsection 490.1(2) applies, and a defendant may not raise the defence of mistake of fact in relation to whether one or more of the circumstances in subsection 490.1(2) applies.

200. Absolute liability removes a fault element that would otherwise attach to a physical element. Because proof of fault is one of the most fundamental protections of criminal law, absolute liability should only apply in limited circumstances and where there is adequate justification.

201. As noted by the Senate Scrutiny of Bills Committee in its Alert Digest No 2 of 2010 at page 30, absolute liability may be justified where it applies to particular physical elements of an offence. For instance, the Committee notes that absolute liability may be justified where the relevant physical element is a jurisdictional element rather than one going to the essence of the offence. The Committee observes that the application of absolute liability to a jurisdictional physical element of an offence is consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

202. The circumstances listed in subsection 490.1(2) are jurisdictional matters. Subsection 490.1(2) indicates the circumstances for which the Australian Government's capacity to legislate in relation to the new offences at sections 490.1 and 490.2 is supported

by powers derived from the Australian Constitution. The matters in subsection 490.1(2) do not relate to the essence of the conduct of false dealing in accounting documents, but are jurisdictional matters. For these reasons, the application of absolute liability under subsection 490.1(3) is justified.

203. Subsections 490.1(4)-(5) are concerned with the penalties imposed for an offence under section 490.1. The penalties imposed under subsections 490.1(4) and (5) align with the current penalties imposed under subsections 70.2(4) and (5) of the Criminal Code for the offence of bribing a foreign public official at section 70.2. Aligning the penalties imposed for an offence under section 490.1 with the offence of bribing a foreign public official at section 70.2 aims to ensure Australia's compliance with Australia's obligation under Article 8 of the OECD Convention, to provide effective, proportionate and dissuasive penalties for the conduct of false accounting for the purpose of enabling or concealing bribe payments. These penalties serve to deter the conduct of false dealing with accounting documents.

204. Subsection 490.1(4) provides that the penalty for offence against section 490.1 committed by an individual is a maximum of 10 years' imprisonment, a fine of 10 000 penalty units (\$1 800 000), or both. The inclusion of a significant monetary penalty for individuals serves to deter false accounting.

205. The ratio between the term of imprisonment and penalty units in subsection 490.1(4) is inconsistent with other provisions in the Criminal Code where, generally, there is a ratio of five penalty units for every month of imprisonment, in accordance with subsection 4B(2) of the *Crimes Act 1914*. The significant pecuniary penalty imposed under subsection 490.1(4) ensures Australia's compliance with Australia's obligation under Article 8 of the OECD Convention, to provide effective, proportionate and dissuasive penalties for the conduct of false accounting and will deter the conduct of false dealing with accounting documents.

206. Subsection 490.1(5) provides that the maximum penalty for a body corporate is the greatest of the following:

- (a) 100 000 penalty units (\$18 000 000)
- (b) (where the court can determine the value of the benefit) three times the value of any benefit that was directly or indirectly obtained and that is reasonably attributable to the conduct constituting the offence (including any body corporate related to the body corporate)
- (c) if the court cannot determine the value of the benefit referred to in paragraph 490.1(5)(b), 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month in which the conduct constituting the offence occurred.

207. The effect of subsection 490.1(5) is that a body corporate found guilty of an offence against section 490.1 will face a maximum penalty of at least \$18 000 000. This penalty will have a significant deterrent effect on those bodies corporate tempted to engage in false dealing with accounting documents.

208. The alternative sanctions available under paragraphs 490.1(5)(b) and (c) have the effect of penalising a body corporate proportionately to either the benefit obtained, or 10 per

cent of the annual turnover of the body corporate, so that the risk of being successfully prosecuted for this offence outweighs any potential benefit that may result from the false dealing with accounting documents.

209. The corporate multiplier outlined in subsection 4B(3) of the Crimes Act 1914, does not apply to this corporate penalty because a contrary intention is expressed in subparagraph 490.1(5)(a) that the penalty for a body corporate is 100 000 penalty units.

490.2 Reckless false dealing with accounting documents

210. Section 490.2 provides for a new offence, titled ‘Reckless false dealing with accounting documents’.

211. The offence at section 490.2 is identical to the offence at section 490.1, with the exception that whereas the fault element of intention applies in paragraph 490.1(1)(b), the fault element of recklessness applies in the corresponding position at paragraph 490.2(1)(b).

212. Subsection 490.2(1)(a) provides that a person commits an offence if the person:

- (i) makes, alters, destroys or conceals an accounting document, or
- (ii) fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter.

213. The words ‘that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter’ in subparagraph 490.2(1)(a)(ii) qualify the words ‘fails to make or alter an accounting document’ in subparagraph 490.2(1)(a)(ii) only, and do not qualify subparagraph 490.2(1)(a)(i).

214. The reference to a duty ‘under a law of the Commonwealth, a State or Territory or at common law’ in subparagraph 490.2(1)(a)(ii) is inserted to ensure that the offence is consistent with the finding of the majority of the High Court of Australia in *Commonwealth DPP v Poniatowska* (2011) 282 ALR 200, that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform.

215. Paragraph 490.2(1)(b) provides that it is an element of the offence under section 490.2 that a person is reckless as to whether the making, alteration, destruction or concealment referred to in subparagraph 490.2(1)(a)(i), or the failure to make or alter referred to in subparagraph 490.2(1)(a)(ii), facilitates, conceals or disguises the occurrence of one or more of the following:

- (i) the person receiving a benefit that is not legitimately due to the person
- (ii) the person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit
- (iii) another person receiving a benefit that it not legitimately due to the other person
- (iv) another person giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit (who may be the first-mentioned person)

- (v) loss to another person that is not legitimately incurred by the other person.

216. Paragraph 490.2(1)(c) provides that it is an element of the offence at section 490.2 that one or more of the circumstances in subsection 490.1(2) applies.

217. Subsection 490.2(2) provides that absolute liability applies to paragraph 490.2(1)(c). For a discussion of the application of absolute liability in Division 490, see the paragraphs relating to subsection 490.1(3) above.

218. Subsections 490.2(3)-(4) are concerned with the penalties imposed for an offence against section 490.2. The penalties imposed under subsections 490.2(3) and (4) are half the penalties imposed for an offence against section 490.1, because whereas the fault element of intention attaches to paragraph 490.1(1)(b), the lower fault element of recklessness attaches to paragraph 490.2(1)(b).

219. Subsection 490.2(3) provides that the penalty for offence against section 490.2 committed by an individual is a maximum of five years' imprisonment, a fine of 5 000 penalty units (\$900 000), or both. The inclusion of a significant monetary penalty for individuals serves to deter false accounting.

220. The ratio between the term of imprisonment and penalty units is inconsistent with other provisions in the Criminal Code where, generally, there is a ratio of five penalty units for every month of imprisonment, in accordance with subsection 4B(2) of the Crimes Act. The significant pecuniary penalty imposed for an offence against section 490.2 ensures Australia's compliance with Australia's obligation under Article 8 of the OECD Convention, to provide effective, proportionate and dissuasive penalties for conduct of false accounting.

221. Subsection 490.2(4) provides that the maximum penalty for a body corporate is the greatest of the following:

- (a) 50 000 penalty units (\$9 000 000)
- (b) (where the court can determine the value of the benefit) 1.5 times the value of any benefit that was directly or indirectly obtained and that is reasonably attributable to the conduct constituting the offence (including any body corporate related to the body corporate)
- (c) if the court cannot determine the value of the benefit referred to in paragraph 490.2(4)(b), five per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month in which the conduct constituting the offence occurred.

222. The amendments mean that a body corporate found guilty of an offence against section 490.2 will face a maximum penalty of at least a \$9 000 000 fine. This penalty will have a significant deterrent effect on those bodies corporate tempted to engage in false dealing with accounting documents.

223. The alternative sanctions available under paragraphs 490.2(4)(b) and (c) have the effect of penalising a body corporate proportionately to either the benefit obtained, or five per cent of the annual turnover of the body corporate, so that the risk of being successfully prosecuted for this offence outweighs any potential benefit that may result from the false dealing with accounting documents.

224. The corporate multiplier outlined in subsection 4B(3) of the Crimes Act 1914, does not apply to this corporate penalty because a contrary intention is expressed in subparagraph 490.2(4)(a) that the penalty for a body corporate is 50 000 penalty units.

490.3 Meaning of annual turnover

225. Section 490.3 explains the meaning of the term annual turnover of a body corporate for the purposes of Division 490. It is the sum of the values of all the supplies that the body corporate and any body corporate related to the body corporate have made or are likely to make, with some exceptions. Those exceptions include supplies made between related bodies corporate, input taxed supplies, supplies that are not for consideration and supplies that are not made in connection with an enterprise that the body corporate carries on. Those exceptions are necessary because otherwise the assessment of a body corporate's annual turnover would not be accurate.

226. Subsection 490.3(2) clarifies that expressions used in section 490.2 that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act) have the same meaning in section 490.2 as they have in the GST Act.

490.4 Related bodies corporate

227. Section 490.4 provides guidance on how to determine whether two bodies corporate are related to each other. This concept is relevant to determining a penalty amount under paragraphs 490.1(5)(b) and 490.2(4)(b).

228. Section 490.4 states that the question of whether two bodies corporate are related to each other is to be determined in the same way as for the purposes of the *Corporations Act 2001*. Section 50 of the Corporations Act provides that two bodies corporate are related where one body corporate is a holding company of another body corporate, or a subsidiary of another body corporate, or a subsidiary of a holding company of another body corporate.

490.5 Proof of certain matters unnecessary

229. Section 490.5 provides that in a prosecution for an offence against Division 490, it is not necessary to prove:

- (a) the occurrence of any of the following:
 - (i) the defendant receiving or giving a benefit;
 - (ii) another person receiving or giving a benefit;
 - (iii) loss to another person; or
- (b) that the defendant intended that a particular person receive or give a benefit, or incur a loss.

490.6 Consent to commencement of proceedings

230. Section 490.6 provides that proceedings for an offence against Division 490 must not be commenced without the Attorney-General's written consent if the conduct constituting the alleged offence occurs wholly in a foreign country and at the time of committing the alleged offence, the person alleged to have committed the offence is not an Australian citizen, a

resident of Australia or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

231. Section 490.6 seeks to ensure that where the nexus between the alleged offending conduct and Australia may not be obvious, the Attorney-General is given the opportunity to review relevant considerations concerning international law and comity prior to deciding at his discretion whether to consent to the commencement of proceedings. It is intended that the Office of International Law in the Attorney-General's Department would be consulted prior to seeking the Attorney-General's consent.

232. Where the person alleged to have committed an offence under Division 490 is not a person listed in subparagraphs 490.6(1)(b)(i)-(iii), it may not be appropriate for proceedings to commence in Australia even if the usual criteria for commencing proceedings are met. In these circumstances, the written consent of the Attorney-General must be sought to commence proceedings. It is intended that the Attorney-General will have regard to considerations of international law, practice and comity, international relations, prosecution action that is being or might be taken in another country, and other public interest considerations, and will decide at his or her discretion whether it is appropriate that proceedings should commence.

233. Subsection 490.6(2) provides that, where the Attorney-General's consent is sought under subsection 490.6(1) and before the Attorney-General's consent is given under that subsection, the alleged offender may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against Division 490. This subsection is intended to ensure that a person may not evade the criminal justice system by fleeing Australia—after becoming aware of an investigation but before the Attorney-General has consented to prosecution—because the person was not able to be arrested prior to consent being given. Where a person has been arrested and the Attorney-General subsequently declines to give consent, the proceedings would not be able to progress further, and the charges would be withdrawn and the person would be released from custody or bail obligations.

490.7 Saving of other laws

234. Section 490.7 is a savings provision in relation to other relevant Commonwealth, State or Territory laws.

235. Section 490.7 provides that Division 490 is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

Item 2—# Dictionary of the *Criminal Code*

236. Item 2 inserts a definition of accounting document into the Dictionary of the Criminal Code.

237. Item 2 provides that accounting document means: (a) any account; or (b) any record or document made or required for any accounting purpose; or (c) any register under the Corporations Act, or any financial report or financial records within the meaning of the Corporations Act.

238. Paragraph (b) of Item 2 includes the words ‘made or required for any accounting purpose’. These words are adopted directly from paragraph 83(1)(a) of the offence of false accounting at section 83 of the *Crimes Act 1958* (Vic). In interpreting these words, reference may be made to judicial consideration of section 83, including (but not confined to) the judgements handed down in *R v Holt* [1983] VicSC 552 (19 December 1983) (unreported) and *R v Jenkins* (2002) 6 VR 81.

Schedule 3 – Criminal Code amendments

Item 1 – Paragraph 301.9(1)(b) of the *Criminal Code*

239. This item will repeal paragraph 301.9(1)(b).

240. Paragraph 301.9(1)(b) currently states that a substance will be a drug analogue of a listed controlled or border controlled drug if it has been obtained by a structural modification involving the addition of specified groups. It is not chemically possible for these groups to be added (within the ordinary meaning of the word) to a listed controlled or border controlled drug without replacing (within the ordinary meaning of the term) another atom or group.

241. As the replacement of the groups listed in paragraph 301.9(1)(b) with another such group is dealt with in subparagraph 301.9(1)(c)(iii), paragraph (b) is no longer necessary.

Item 2 – Subparagraph 301.9(1)(c)(iii) of the *Criminal Code*

242. This item will repeal subparagraph 301.9(1)(c)(iii) and replace it with a new subparagraph.

243. Under new subparagraph 301.9(1)(c)(iii), a substance will be a drug analogue of a listed controlled or border controlled drug if it has been obtained by a structural modification involving the replacement of one or more of the groups or atoms specified in new subsection 301.9(2) with one or more of the other groups or atoms specified in that subsection.

244. New subparagraph 301.9(1)(c)(iii) reproduces previous subparagraph (iii) with some minor amendments to reflect the repeal of paragraph 301.9(1)(b) and the movement of the list of potential structural modifications to new subsection 301.9(2).

245. Under new subsection 301.9(5), the term ‘replacement’ in new subparagraph 301.9(1)(c)(iii) will have its ordinary meaning.

Item 3 – Subsection 301.9(2) of the *Criminal Code*

246. This item will repeal existing subsection 301.9(2) and replace it with new subsections 301.9(2) to (4).

New subsection 301.9(2)

247. New subsection 301.9(2) specifies the groups and atoms that may be replaced in a listed controlled or border controlled drug in order for it to fall within the definition of a drug analogue under subparagraph 301.9(1)(c)(iii). It replaces paragraph 301.9(1)(b).

248. New subsection 301.9(2) specifies the same list of groups of chemicals as previous paragraph 301.9(1)(b). It will also specify hydrogen atoms in paragraph 301.9(2)(d).

Including hydrogen atoms in subsection 301.9(2) is necessary to account for some of the most common methods of synthesising drug analogues. In many cases, manufacturers will modify a listed controlled or border controlled drug by replacing one or more hydrogen atoms in the substance with one or more of the groups listed in paragraphs 301.9(2)(a) to (c). It is appropriate for listed drugs modified in this way to be caught by the definition of drug analogue.

New subsection 301.9(3)

249. New subsection 301.9(3) replaces current subsection 301.9(2). It is intended to more clearly set out the circumstances in which a substance is not a drug analogue of a listed controlled or border controlled drug, following the decision of the ACT Supreme Court in *R v Poulakis (No. 3)* [2015] ACTSC 191. In that case, Murrell CJ interpreted current subsection 301.9(2) to mean that a substance could not be a drug analogue of a listed border controlled drug if the substance was listed as either a border controlled drug or as a controlled drug. As this was not the intended effect of current subsection 301.9(2) of the Criminal Code, new subsection 301.9(3) will remove any ambiguity in the provision.

250. New paragraph 301.9(3)(a) clarifies that a substance cannot be a drug analogue of a listed controlled drug if the substance is itself listed as a controlled drug.

251. New paragraph 301.9(3)(b) clarifies that a substance cannot be a drug analogue of a listed border controlled drug if the substance is itself listed as a border controlled drug.

252. If a substance is listed as a border controlled drug, new paragraph 301.9(3)(a) will not prevent it from being a drug analogue of a listed controlled drug. If the substance meets the criteria in subsection 301.9(1) in relation to the listed controlled drug, then it will be a drug analogue of that drug.

253. Similarly, if a substance is listed as a controlled drug, new paragraph 301.9(3)(b) will not prevent it from being a drug analogue of a listed border controlled drug. If the substance meets the criteria in subsection 301.9(1) in relation to the listed border controlled drug, then it will be a drug analogue of that drug.

254. For example, Britt conceals a commercial quantity of 2-bromoamphetamine inside tinned vegetables with the intention of assisting another person in its sale to Daniel. Daniel exports the 2-bromoamphetamine out of Australia.

255. 2-bromoamphetamine falls within the meaning of 'drug analogue' in subsection 309.1(1) with respect to the drug amphetamine. Amphetamine is listed as both a controlled and border controlled drug. 2-bromoamphetamine is itself listed as a controlled drug, but not as a border controlled drug.

256. In these circumstances, Daniel would commit an offence against section 307.1 of the Criminal Code for having exported a drug analogue of amphetamine, a listed border controlled drug. The fact that 2-bromoamphetamine is also listed as a controlled drug does not affect its status as a drug analogue of amphetamine, a listed border controlled drug.

257. Britt would commit an offence against section 302.2 of the Criminal Code for having trafficked a commercial quantity of the listed controlled drug 2-bromoamphetamine. Although 2-bromoamphetamine would be a drug analogue of the listed controlled drug

amphetamine under subsection 301.9(1), it is already listed as a controlled drug. Under paragraph 301.9(3)(a), 2-bromoamphetamine cannot be a drug analogue of the listed controlled drug amphetamine.

New subsection 301.9(4)

258. New subsection 301.9(4) clarifies that the terms ‘addition’ and ‘replacement’ have their ordinary meaning where they are used in section 301.9. ‘Addition’ is used in subparagraph 301.9(1)(c)(ii). ‘Replacement’ is used in subparagraph 301.9(1)(c)(i) and new subparagraph 301.9(1)(c)(iii).

259. The terms ‘addition’ and ‘replacement’ have a scientific meaning which is different to their ordinary meaning. New subsection 301.9(4) is intended to clarify that the terms are not to be given their scientific meaning. Rather:

- addition is to be given its ordinary meaning of the act or process of uniting or joining two or more things so as to increase the number or quantity, and
- replacement is to be given its ordinary meaning of the act or process of a thing filling or taking the place of, or substituting for, another thing.

Item 4 – Subsection 305.1(1) of the Criminal Code

260. This item will repeal subsection 305.1(1) and replace it with a new subsection defining the term ‘manufacture’. The definition applies throughout Part 9.1, including in Division 305 and section 308.4 (possessing substance, equipment or instructions for commercial manufacture of controlled drugs).

261. Under new subsection 305.1(1), there will be two limbs to the definition of ‘manufacture’.

262. The first limb, under paragraph 305.1(1)(a), reproduces current subsection 305.1(1). It will capture the same processes as that subsection. That is, under paragraph (a), manufacture means any process by which a substance is produced, including through processes of extracting or refining a substance, or transforming the substance into a different substance. Under this limb, manufacture does not include the process of cultivating a plant.

263. The second limb, under paragraph 305.1(1)(b), will capture processes that convert a substance from one form into another. This paragraph would include processes of extracting or refining a substance that convert it from one form into another. Under paragraph (b), a process will be manufacturing even if it does not create a new substance or does not modify the chemical structure of an existing substance. The paragraph is intended to capture processes that change the physical form or state of a substance, or which convert a substance from an unusable form into a usable form.

264. For example, Eleanor possesses cocaine, a listed controlled drug, that has been suspended in a liquid. She engages in a process that converts the cocaine into crystals with the intention of selling the drug. While the cocaine has retained the same chemical structure throughout the process, Eleanor has manufactured the cocaine as she has converted its physical form from its suspension in a liquid into crystals. Depending on the amount of cocaine Eleanor has manufactured, she will have committed an offence under sections 305.3,

305.4 or 305.5 of the Criminal Code. She may also have committed other offences against Part 9.1 of the Code.

265. Paragraph 301.1(1)(b) is intended to overcome ambiguities in current subsection 305.1(1), which the Victorian Court of Appeal identified in *Beqiri*. In that case, the Court considered that current subsection 305.1(1) required a new substance to be produced by the manufacturing process. The Court held that the process of extracting cocaine that had been impregnated in towels did not fall within the meaning of the term ‘manufacture’ because, at all relevant times during the process of extracting it, the substance remained cocaine.

Schedule 4 – Anti-money laundering and counter-terrorism financing amendments

266. Schedule 4 will amend the definition of ‘designated agency’ in section 5 of the AML/CTF Act to include ICAC SA, a statutory body established under the ICAC Act that is charged with identifying and investigating corruption in public administration, and referring corrupt conduct for prosecution. The jurisdiction of ICAC SA extends to all South Australian public administration; this includes state and local government agencies and officers, Members of Parliament, members of the judiciary, statutory authorities and the police. ICAC SA also oversees the Office for Public Integrity (OPI), which receives complaints from members of the public and reports from public officers, public authorities and inquiry agencies. These complaints and reports are assessed by the OPI, and recommendations are made to ICAC SA.

267. Adding ICAC SA as a designated agency will enable it to access the financial intelligence data holdings of AUSTRAC, bringing it into line with the abilities of similar statutory bodies in New South Wales, Victoria, Queensland, Western Australia, and Tasmania. This will considerably enhance its capacity to investigate serious and systemic corruption and misconduct in public administration, and assist it to fulfil its statutory obligations.

268. Consequential amendments will also be made to subsection 22(1) to clarify that for the purposes of the AML/CTF Act, an ‘official’ of a designated agency includes: a person appointed as the Independent Commissioner Against Corruption under the ICAC Act or acting in that office; a person appointed as the Deputy Commissioner under that Act or acting in that office; and a person appointed as an examiner or investigator under that Act. This is intended to remove any doubt regarding these officials’ status that might have arisen on the basis of how these offices are established under the ICAC Act.

269. Schedule 4 will amend the definition of ‘foreign law enforcement agency’ in section 5 of the AML/CTF Act to specifically include INTERPOL and Europol. Section 132 of the AML/CTF Act allows the ACC and the AFP to disclose AUSTRAC information to foreign law enforcement agencies in certain circumstances. However, under the current definition, this information is only able to be shared with a government body that has responsibility for law enforcement in a foreign country or a part of a foreign country. This definition does not extend to international law enforcement coordination and cooperation bodies that are comprised of multiple member countries. The current restrictive definition has significantly impaired the capacity of law enforcement agencies to assist these bodies in projects targeting money laundering and other serious and organised criminal activity.

270. In many instances, AUSTRAC information is used to facilitate investigations relating to non-financial offences (for example, transnational child pornography rings). Given the

transnational nature of these offences, investigations are often coordinated by international law enforcement organisations. The power to share AUSTRAC information in an efficient and timely manner is necessary in order to fully and efficiently cooperate with these bodies in such investigations, where time is of the essence.

271. The amended definition of ‘foreign law enforcement agency’ in section 5 of the AML/CTF Act will also provide for a regulation-making power to enable additional international bodies, including those with multijurisdictional law enforcement coordination and cooperation functions, to be prescribed in the future. As regulations are a disallowable instrument, the prescription of any additional bodies will remain subject to Parliamentary scrutiny.

272. Schedule 4 will amend subsection 122(3) of the AML/CTF Act to ensure that ‘entrusted investigating officials’ (as defined in subsection 122(1) of the AML/CTF Act, and excluding the Commissioner of Taxation or a taxation officer) have clear authority to make onward disclosures of information and documents obtained under section 49 of the AML/CTF Act, where such disclosures are made for the purposes of, or in connection with, the performance of the duties and functions of their office.

273. Section 49 of the AML/CTF Act enables certain designated persons to obtain further information and documents by written notice, insofar as they are relevant to a Suspicious Matter Report, Threshold Transaction Report, or International Funds Transfer Instruction report made by a reporting entity under sections 41, 43, or 45 of the AML/CTF Act. The ability to issue a section 49 notice allows a greater level of detail to be obtained by entrusted investigating officials for investigative purposes. This section implements international standards set by the FATF requiring competent authorities to be able to obtain documents and information for use in investigations, prosecutions and related actions in relation to money laundering, underlying predicate offences, and terrorist financing.

274. Section 122 sets out what an entrusted investigating official may do with section 49 information. The amendments to subsection 122(3) of the AML/CTF Act will clarify the operation of subsection 122(3) in relation to the onward disclosure of section 49 information. In particular, the amendment makes explicit the ability of section 49 information to be disclosed onward by a prescribed official, provided that such disclosure is done for the purposes of, or in connection with, the performance of the duties and functions of their office, including for investigative purposes such as disclosure in applications for warrants. Legislative certainty is required to support the proper performance of investigative and law enforcement functions. Any other disclosures will continue to remain subject to the relevant restrictions on the use of section 49 information set out in Part 11 of the AML/CTF Act.

Item 1 – Section 5 (definition of *designated agency*)

275. Item 1 will amend the definition of ‘designated agency’ in section 5 of the AML/CTF Act to include the Independent Commissioner Against Corruption of South Australia.

Item 2 – Section 5 (definition of *foreign law enforcement agency*)

276. Item 2 will repeal the existing definition of ‘foreign law enforcement agency’ in section 5 of the AML/CTF Act and replace it with a revised definition that includes the International Criminal Police Organisation (INTERPOL) and the European Police Office (Europol). The revised definition will also include a regulation-making power to enable

additional international bodies, including those with multijurisdictional law enforcement coordination and cooperation functions, to be prescribed for the purposes of that paragraph.

Item 3 – Subsection 22(1)

277. Item 3 will insert a new paragraph 22(1)(j) in order to clarify that, for the purposes of the AML/CTF Act, an ‘official’ of a designated agency includes: a person appointed as the Independent Commissioner Against Corruption under the *Independent Commissioner Against Corruption Act 2012* (SA) or acting in that office; a person appointed as the Deputy Commissioner under that Act or acting in that office; and a person appointed as an examiner or investigator under that Act.

Item 4 – Subsection 122(3)

278. Item 4 will insert a new paragraph 122(3)(c) in order to clarify that the prohibition on disclosure of section 49 information in subsection 122(2) does not apply where the disclosure is for the purposes of, or in connection with, the performance of the duties of an entrusted investigating official (other than the Commissioner of Taxation or a taxation officer).

279. New paragraph 122(3)(c) will ensure that entrusted investigating officials from the AFP, ACC, DIBP, and ACLEI are able to better utilise information and documents obtained in response to a written notice issued under section 49 of the AML/CTF Act for investigative purposes, including through disclosure in applications for a variety of warrants.

Item 5 – Application

280. Item 5 clarifies that once paragraph 122(3)(c) of the AML/CTF Act commences, entrusted investigating officials (other than the Commissioner of Taxation or a taxation officer) may disclose section 49 information under that paragraph, regardless of whether the information was obtained before or after the time of commencement.

Schedule 5 – Disclosure etc. of AusCheck scheme personal information

AusCheck Act 2007

Item 1 – Subsection 4(1) (definition of *Commonwealth authority*)

281. This Item will amend the definition of *Commonwealth authority* in subsection 4(1) to include a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth. The amended definition will be slightly broader than the current definition which includes a body corporate established for a public purpose by or under a law of the Commonwealth.

282. The amended definition of Commonwealth authority will put beyond doubt AusCheck’s ability to share information with Commonwealth agencies and non-corporate Commonwealth statutory authorities such as specific areas within government departments.

283. This definition appears in new subparagraph 14(2)(b)(iii) which will be inserted by Item 3 below. Combined with the amendment to subparagraph 14(2)(b)(iii), this Item will clarify AusCheck’s ability to share information with non-corporate Commonwealth entities. While the amendments enable AusCheck to share information with a broader range of Commonwealth agencies, they do not remove the safeguards that currently protect the

disclosure of AusCheck scheme personal information. In particular, AusCheck will only be permitted to share information with Commonwealth agencies in the performance of law enforcement or national security functions. The recipient agency will be required to establish their law enforcement or national security functions before AusCheck may share AusCheck scheme personal information.

Item 2 – Subsection 4(1) (definition of *State or Territory authority*)

284. This Item will insert into the AusCheck Act, a new definition of *State or Territory authority* to include a body (whether incorporated or not) established for a public purpose by or under a law of a state or territory. This definition appears in new subparagraph 14(2)(b)(iiia) which will be inserted by Item 3 below.

285. The new definition of State or Territory authority is intended to capture state and territory agencies such as state and territory police forces and justice departments, recognising that these agencies also play a role in performing national security and law enforcement functions. Combined with the amendment to subparagraph 14(2)(b)(iiia), the amendment will enable AusCheck to share information with state and territory agencies performing law enforcement and national security functions.

286. The disclosure of AusCheck scheme personal information to state and territory agencies will be subject to the safeguard which currently protect the disclosure of information to Commonwealth agencies. AusCheck will only be permitted to share with state and territory agencies which have established their law enforcement or national security functions to AusCheck.

Item 3 – Subparagraph 14(2)(b)(iii)

287. This Item will repeal subparagraph 14(2)(b)(iii) and substitute new subparagraphs 14(2)(b)(iii) and (iiia).

288. Currently, paragraph 14(2)(b) provides grounds for disclosing AusCheck scheme personal information. Subparagraph 14(2)(b)(iii) provides the ground for disclosing information to Commonwealth agencies. The subparagraph restricts AusCheck's ability to share information to circumstances where the receiving agency uses the information for the collection, correlation, analysis or dissemination of criminal or security intelligence. This prevents AusCheck from disclosing information to Commonwealth agencies in a number of circumstances including where the receiving agency is not traditionally considered to be a law enforcement agency, and would not use the information specifically for criminal intelligence or security intelligence purposes, but may still require access to the information for law enforcement or national security purposes. This could include areas within a government department that exercise law enforcement and national security functions.

289. The amendment to subparagraph 14(2)(b)(iii) will improve and strengthen AusCheck's ability to share information with Commonwealth agencies established for a public purpose.

290. Specifically, subparagraph 14(2)(b)(iii) will be amended to remove the current requirement of the information needing to be used for the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence. This will put beyond doubt AusCheck's ability to disclose AusCheck scheme personal information to the Commonwealth

or a Commonwealth authority which is not traditionally considered to be a law enforcement agency but may require access to the information to respond to national security or crime threats.

291. This amendment will not affect AusCheck's ability to share information with Commonwealth agencies that are currently authorised under subparagraph 14(2)(b)(iii) to receive AusCheck scheme personal information.

292. Item 3 will also insert new subparagraph 14(2)(b)(iiia) to enable AusCheck to share AusCheck scheme personal information to state and territory agencies.

293. Currently, the AusCheck Act does not support the direct disclosure of AusCheck scheme personal information with the states and territories. As a result, AusCheck is unable to directly disclose information to state and territory agencies, such as police forces, to support their efforts to address national security risks and otherwise exercise law enforcement functions. For example, under the current framework, AusCheck is prevented from sharing AusCheck scheme personal information directly with police agencies undertaking operational activities at maritime ports in relation to drug importation. AusCheck is also similarly prevented from sharing information with state and territory non-police agencies for the performance of functions relating to law enforcement or national security, such as state and territory justice departments.

294. Item 3 will therefore insert subparagraph 14(2)(b)(iiia) to enable AusCheck to disclose AusCheck scheme personal information for purposes of the performance of functions relating to law enforcement or national security by a state or territory or a *State or Territory Authority*.

295. As described in the outline and in Items 1 and 2 above, the AusCheck scheme contains appropriate safeguards to protect the use and disclosure of AusCheck scheme personal information. Safeguards include criminal offences in section 15 of the AusCheck Act for the unlawful disclosure of AusCheck scheme personal information, the use of privacy notices to inform applicants and acquire consent for the collection and disclosure of their personal information, memoranda of understanding with relevant authorities and the AusCheck Guidelines which underpin AusCheck's information sharing. The AusCheck Guidelines will be updated to reflect the amendments in Schedule 5 to the Bill and continue to protect the disclosure of AusCheck scheme personal information. All of these safeguards will continue to apply to information shared in accordance with the amendments.

Item 4 – Subparagraph 14(2)(b)(iv)

296. This Item will amend subparagraph 14(2)(b)(iv) as a consequence of the amendments in Item 3.

Item 5 – Application provision

297. This Item will provide that the amendments to subparagraphs 14(2)(b)(iii) and (iiia) apply in relation to the use or disclosure of information on or after the commencement of Schedule 5 to the Bill, irrespective of when the information is collected.