

EXPLANATORY STATEMENT

1989 No. 236

Proceeds of Crime Act 1987

Proceeds of Crime Regulations (Amendment)

Section 104 of the Proceeds of Crime Act 1987 (the Proceeds Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The proposed regulations will amend the Proceeds of Crime Regulations by:

- . inserting references to new State and Territory enactments, and provisions of those enactments, which correspond to the Proceeds Act, and to provisions of the Proceeds Act, in order to facilitate the enforcement of orders made under the State and Territory enactments in Commonwealth territories;
- . replacing the schedule of prescribed substances for the purposes of the definition of "narcotic substance" in subsection 4(1) of the Proceeds Act;
- . inserting a scale of charges for the purposes of calculating the remuneration of the Official Trustee under section 55 of the Proceeds Act;
- . prescribing four forms of notice of application for the purposes of sections 21, 23A and 31 of the Proceeds Act.

Details of the proposed regulations are as follows:

Clause 1: The commencement provision links commencement of the regulations to the commencement of section 65 of the Law and Justice Legislation Amendment Act 1988. Proclamation of section 65 will therefore trigger the commencement of the regulations. Section 65 is to be proclaimed to commence on 5 September 1989.

Clause 2: This clause is a formal provision which identifies the Proceeds of Crime Regulations as the principal regulations to be amended.

Clause 3: The definition of "corresponding law" in section 4 of the Proceeds of Crime Act identifies those State and Territory enactments which correspond to the Proceeds Act. Those corresponding laws will then become enforceable in Commonwealth Territories. It should be noted that the term

"Territory" as defined by the Proceeds Act does not include the Northern Territory. The Northern Territory has enacted its own legislation in this area and that legislation will become enforceable in, for example, the A.C.T. and the external territories once the Northern Territory Act is prescribed as a corresponding law. However, for an order made under a State enactment to become enforceable in the Northern Territory it will be necessary for the State Act to be prescribed as a corresponding law under the Northern Territory Act.

When the principal regulations were made in 1987 three states (New South Wales, Victoria and South Australia) had enacted legislation which corresponded with the Proceeds Act. Since then Queensland, Western Australia and the Northern Territory have enacted legislation dealing with the confiscation of the proceeds of crime. In addition, N.S.W. has repealed its 1985 Act and replaced it with the Confiscation of Proceeds of Crime Act 1989.

Clause 3 amends regulation 3 of the principal regulations by adding references to the new enactments in Queensland, Western Australia, the Northern Territory and N.S.W.

Clause 4: The Proceeds Act empowers the Court to order that property shall be forfeited to the Commonwealth. Each of the corresponding laws makes similar provision for property to be ordered by the Court to be forfeited to the State or Territory. Accordingly the Proceeds Act provides for "interstate forfeiture orders". These are forfeiture orders made under a prescribed provision of a corresponding law. Where an order is made under a provision prescribed in regulation 4 of the principal regulations that interstate forfeiture order will become enforceable in Commonwealth Territories as defined.

Clause 5: The Federal, State and Territory legislation dealing with the confiscation of the proceeds of crime empowers the court to make pecuniary penalty orders. The structure is that the court must assess the value of the benefits derived by a convicted person as a result of having engaged in the criminal activity. A pecuniary penalty, corresponding in amount to this benefit, may then be imposed and that order becomes enforceable in accordance with the enactment. In order to facilitate the enforcement of such pecuniary penalty orders made under a State or Territory enactment in Commonwealth Territory, the State and Territory legislative provisions are prescribed as "interstate pecuniary penalty orders". Those interstate pecuniary penalty orders will then become enforceable under Part VI of the Proceeds Act. Clause 5 amends regulation 5 of the principal regulations by adding references to pecuniary penalty orders made under the Queensland, West Australian and Northern Territory legislation, and by adding a reference to the new N.S.W. enactment.

It will be noted that there is no reference to the South Australian Act in regulation 5. This is because the South Australian Act, the Crimes (Confiscation of Profits) Act 1986, does not contain a procedure which corresponds with the Federal, State or Territory enactments in this regard. Accordingly, it is not possible to prescribe a South Australian provision for the purposes of the definition of "interstate pecuniary penalty order".

Clause 6: The Proceeds Act provides for the making of restraining orders which are designed to restrain dealings with property in anticipation of a future pecuniary penalty order. Each corresponding law contains provision for the making of similar restraining orders.

Regulation 6 of the principal regulations identifies those provisions of corresponding laws which provide for the making of restraining orders. These orders, called "interstate restraining orders", will be enforceable in Commonwealth Territories pursuant to Part VI of the Proceeds Act. Clause 6 amends regulation 6 of the principal regulations by including references to the new State and Territory legislation.

Clause 7: Regulation 7 of the principal regulations incorporates into the regulations the schedule of substances for the purposes of the definition of "narcotic substance" in subsection 4(1) of the Proceeds Act. Under that definition a narcotic substance is a substance defined as such under the Customs Act 1901 or a substance declared by the regulations to be a narcotic substance. Thus, the substances included in the Schedule to the principal regulations supplement the range of substances which are regarded as narcotic substances under the Customs Act.

Clause 7 of the amending regulations replaces the existing schedule with a new, and extended, schedule of substances. This reflects the rapid development of new "designer drugs" in laboratories.

Clause 8: Clause 8 inserts a new regulation 8 into the principal regulations. The new regulation will prescribe a rate of remuneration for the Official Trustee for the purposes of section 55 of the Proceeds Act. Section 55 of the Proceeds Act was repealed and replaced by section 65 of the Law and Justice Legislation Amendment Act 1988. Under the new section, the regulations may make provision for the remuneration of the Official Trustee in respect of the performance by the Official Trustee of its functions under the Proceeds Act.

The Official Trustee in Bankruptcy is a statutory corporation sole, established under section 18 of the Bankruptcy Act 1966. The proposed regulation 8 prescribes three rates of hourly remuneration, differentiated according to the level in the Australian Public Service of the officer performing the function on behalf of the statutory corporation.

In the case of an officer at or above the classification of level 1 in the Senior Executive Service ("SES") an hourly rate of \$150 will apply. If the officer is an Administrative Service Officer ("ASO") class 7 or above, but is not an SES officer, an hourly rate of \$100 will apply. If the officer is an ASO class 6 or below an hourly rate of \$75 will apply. In each case the hourly charges apply in respect of each complete hour, or part of an hour, during which the function is performed.

Clause 9: Section 55 of the Proceeds Act also provides that the regulations may make provision for the costs, charges and expenses of the Official Trustee. Clause 9 proposes the insertion of a new regulation 9 which entitles the Official Trustee to recover its out of pocket expenses incurred in connection with the performance of its functions under the Proceeds Act.

Clause 10: Clause 10 is the vehicle for prescribing the forms of notice of application contained in schedule 2. Four forms are prescribed. Form 1 is a notice of an application under subsection 21(1); form 2 is a notice of an application under subsection 21(2); form 3 is a notice of an application under subsection 23A(10); and form 4 is a notice of an application under subsection 31(7A) of the Proceeds Act.

Attorney-General