

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 209

Issued by the Authority of the Minister for Justice and Customs

Proceeds of Crime Act 2002

Proceeds of Crime Amendment Regulations 2006 (No. 3)

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

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

The Act also provides for the recovery of forfeited property, for example where a court is satisfied that a person was not involved in the commission of an offence.

In particular, section 102 of the Act enables a court to make an order declaring the nature, extent and value of the interest applying to a person who has made an application to have property excluded from forfeiture after forfeiture has occurred, and to direct the Commonwealth to transfer the interest back to the person if it is still vested in the Commonwealth, or to pay the applicant an amount equal to the value of that interest if it is no longer vested in the Commonwealth.

In addition, section 103 of the Act enables a court to make an order declaring the nature, extent and value of the interest applying to a person who has made an application to have property excluded from forfeiture after forfeiture has occurred, and permitting that person to buy back the property on payment to the Commonwealth of an amount equal to the value of the property.

The purpose of the proposed Regulations is to explicitly state that the Director of Public Prosecutions (DPP) may represent the Commonwealth in proceedings relating to an application for an order under section 102 or 103 of the Act.

The proposed Regulations would also require an applicant for an order under section 102 or 103 to give written notice to the DPP of both the application and the grounds on which the order is sought. Further, the proposed Regulations would require the DPP to give the applicant notice of any grounds on which it proposes to contest the application.

The Act contains no provisions to the effect that the DPP is entitled to be served with, and be heard on, an application under section 102 or 103. This contrasts with other

provisions in the Act which specify that the DPP may appear on behalf of the Commonwealth.

On the face of the existing legislative framework, the Commonwealth could be obliged to seek separate representation from the DPP in relation to applications under section 102 or 103 of the Act. This is not an intended effect of the provisions.

It is therefore necessary to put it beyond doubt that the DPP can represent the Commonwealth in proceedings relating to an application for an order under section 102 or 103, as well as dealing with notices about such proceedings.

Details of the Regulations are set out in the Attachment.

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

The Regulations would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Consultation on the Regulations was undertaken under section 17 of the *Legislative Instruments Act 2003*.

The Commonwealth Director of Public Prosecutions was consulted on this initiative.

A Regulation Impact Statement exemption (no.8476) has been obtained from the Office of Regulation Review.

The Regulations commenced on the day after registration on the Federal Register of Legislative Instruments.

Details of the proposed *Proceeds of Crime Amendment Regulations 2006 (No. 3)*

Regulation 1 – Name of Regulations

Regulation 1 provides for the Regulations to be called the *Proceeds of Crime Amendment Regulations 2006 (No. 3)*.

Regulation 2 – Commencement

Regulation 2 provides for the Regulations to commence on the day after they are registered.

Regulation 3 – Amendment of *Proceeds of Crime Regulations 2002*

Regulation 3 provides for the *Proceeds of Crime Regulations 2002* (the Principal Regulations) to be amended as set out in Schedule 1.

Schedule 1 Amendment

Schedule 1 amends the Principal Regulations as follows:

Item 1 – Before Division 2.1

Item 1 inserts a new Division 2.1A- Orders about forfeited property

New regulation 9A provides for an additional function of the DPP to represent the Commonwealth in proceedings relating to an application for an order under section 102 or 103 of the Act.

New regulation 9B provides for notice of matters relevant to an application for an order under section 102 or 103. Sub-regulation 9B(1) provides that an applicant for an order under section 102 or 103 must give written notice to the DPP of both the application and the grounds on which the order is sought. Sub-regulation 9B(2) provides that the DPP must give the applicant notice of any grounds on which it proposes to contest the application.