

## **EXPLANATORY STATEMENT**

Issued by the Minister for Justice

*Proceeds of Crime Act 2002*

*Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016*

The *Proceeds of Crime Act 2002* (the POC Act) establishes a scheme to trace, investigate, restrain and confiscate proceeds of crime and provides the means for returning the benefits of those confiscated funds to the community, among other things.

Sections 183, 288, 297 and 338 of the Act provides that the Governor-General may make regulations prescribing persons or offices that the Minister may appoint as approved examiners, remuneration for the exercise of powers and performance of functions or duties by the Official Trustee in Bankruptcy and for payment of an annual management fee, and ‘corresponding laws’ for the purposes of the Act.

The *Proceeds of Crime Regulations 2002* (the Principal Regulations) provides that the Minister may appoint particular classes of person as approved examiners provided their names are kept on a register maintained by the Minister, and specifies the rate of remuneration and the annual management fee amount for the Official Trustee.

The purpose of the *Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016* (the proposed Regulation) is to amend the Principal Regulations to reflect recent changes to the POC Act under the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* and corresponding state and territory legislation.

In particular, the proposed Regulation will amend the POC Regulations to:

- remove the requirement that the Minister keep a register for the purposes of section 183 of the POC Act, and
- update references to state and territory proceeds of crime-related orders, specifying that a number of proceeds of crime orders under the *Criminal Property Forfeiture Act* (NT) and the *Confiscation Act 1997* (Vic) are ‘corresponding laws’ for the purposes of the POC Act.

The proposed Regulation also increases the rate of remuneration and the annual management fee for the Official Trustee. The increase in the Official Trustee’s rate of remuneration would align with the Official Trustee’s rate of remuneration in bankruptcy. The increase to the annual management fee would reflect the increased complexity and workload in the Official Trustee’s management of the Confiscated Assets Account.

A Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny Act) 2011* is set out in Attachment A.

Details of the proposed Regulation are set out in Attachment B.

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

The proposed Regulation is an instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulation commences on the day after the instrument was registered on the Federal Register of Legislation.

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

## Statement of Compatibility with Human Rights

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

*Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016*

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

### Overview of the Legislative Instrument

This legislative instrument amends the *Proceeds of Crime Regulations 2002* (the POC Regulations) to:

- reflect changes to the process in the *Proceeds of Crime Act 2002* (the POC Act) for appointment of approved proceeds of crime examiners under the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*
- update references to state and territory proceeds of crime-related orders to assist in ensuring recognition and enforcement of orders across Australian jurisdictions, and
- increase the annual fee for administering the Confiscated Assets Account (CAA) and the rate of remuneration for the Official Trustee.

The POC Act establishes a comprehensive scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth law, and also enables confiscated funds to be given back to the community to help prevent and reduce the harmful effects of crime. Under the POC Act, proceeds of crime authorities (the Australian Federal Police (AFP) or the Commonwealth Director of Public Prosecutions) are able, among other things, to seek court orders to deprive persons of the proceeds of, instruments of and benefit derived from serious and indictable offences against the laws of the Commonwealth.

Section 328 of the POC Act allows the Governor-General to make regulations to prescribe matters necessary for giving effect to the Act.

The proposed amendments are technical amendments to the POC Regulations that aim to ensure the continued efficient operation of the proceeds of crime regime.

### Appointment of approved examiners

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

A POC Act examination is an information-gathering tool which enables law enforcement authorities to effectively trace proceeds of crime. Under Division 1 of Part 3-1 of the POC Act, approved examiners undertake coercive examinations for the purposes of gathering information with respect to:

- restraining orders (under sections 180 and 180E of the POC Act)

- applications for exclusion from forfeiture orders (under section 180A)
- applications for compensation (under section 180B)
- applications to transfer forfeited property (under section 180C)
- the enforcement of confiscation orders (under section 180D), and
- the quashing of convictions (under section 181).

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

The *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* amended the process for appointing proceeds of crime examiners, to increase probity and integrity. The 2015 amendments introduced additional qualification requirements which an approved examiner must possess, as a precondition for appointment. The current process for appointment is now set out in subsection 183(5) of the POC Act, which provides that an approved examiner is a person appointed by the Minister for Justice:

- who holds an office specified in the POC Regulations (paragraph 183(5)(a)), or
- is enrolled for five years as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a state or territory, and has indicated their willingness to be appointed (paragraph 183 (5)(b)).

Subregulation 12(1) of the POC Regulations currently provides that ‘for the purposes of paragraph 183(4) of the Act, the class of people specified is the class that includes (a) a person subregulation 12(2) applies to, and (b) whose name is kept on a register kept by the Minister for the purposes of section 183 of the Act’.

This legislative instrument makes two changes to subregulation 12(1) of the POC Regulations.

Firstly, the existing requirement in subregulation 12(1)(b) that the Minister keep a register of names of persons that are approved examiners for the purposes of section 183 of the POC Act is being repealed. This change follows a review of the existing register which identified inaccuracies and redundancies. As a result a new administrative process for listing approved examiners has been developed. This process includes a key role for the Attorney-General’s Department Register of Authorised Persons for Warrants and Other Functions (RAPWOF). The RAPWOF was established in 2014, and holds information about federal judges and Administrative Appeals Tribunal (AAT) members authorised by the Attorney-General or the Minister for Justice to undertake a range of personal functions under Commonwealth legislation, including the POC Act. As an online system accessible by key agencies, the RAPWOF facilitates greater monitoring of content and making it a more reliable vehicle to maintain a list of approved examiners. Removing the specific legislative requirement in subregulation 12(1)(b) to maintain a separate register will accordingly reduce duplication in processes while maintaining an up-to-date and accessible source of information for law enforcement.

Secondly, this legislative instrument will make a minor technical amendment to remove a redundant reference to subsection 183(4) of the POC Act from subregulation 12(1) and replace it with the relevant reference to new subsection 183(5) of the POC Act. This amendment is consequential to the amendments made by the POC Act to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015*.

#### Updating list of state and territory laws

In addition to the Commonwealth POC Act, each state and territory has laws governing the proceeds of crime schemes for their respective jurisdictions. To assist effective coordination between the Commonwealth's proceed of crime scheme and state and territory schemes, the POC Act establishes a mechanism for the recognition and enforcement of POC orders made under state and territory laws. The POC Act provides that the POC Regulations may prescribe state and territory laws to be 'corresponding laws'. The Act also provides for orders made under these state and territory laws to be listed in the POC Regulations. These orders, which are similar to the type of orders made available under the POC Act, are listed in the POC Regulations as either:

- interstate forfeiture orders (Regulation 5)
- interstate pecuniary penalty orders (Regulation 6), or
- interstate restraining orders (Regulation 7).

Prescribing relevant state or territory laws and orders ensures that:

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

The state and territory orders listed as 'interstate forfeiture orders', 'interstate pecuniary penalty orders' and 'interstate restraining orders' was last updated in 2014. Since that time new proceeds of crime orders and confiscation orders have been introduced in the states and territories. For example, Victoria enacted a 'serious drug offender' scheme and an 'unexplained wealth' scheme in 2014. Restraining and forfeiture orders made available under these schemes are not currently listed in the POC Regulations, and cannot therefore be recognised and enforced under the POC Act.

This legislative instrument updates the list of laws and orders in the POC Regulations to include references to confiscation orders recently introduced by Victoria and the Northern Territory. This update does not affect the making of any order under the POC Act nor does the instrument change the conduct of any proceeding under the Act.

#### Payments from the Confiscated Assets Account

Paragraph 297(1)(f) of the POC Act provides that paying the annual management fee of the Official Trustee of the Confiscated Assets Account is one of the purposes of this Account.

This legislative instrument increases the annual management fee under Regulation 17 of the POC Regulations from \$22,000 to \$272,500 (indexed annually). This change is necessary as the annual management fee has remained unchanged since 2004 and the balance and complexity of the assets held in the account have increased significantly since this fee was last updated.

This legislative instrument also increases the rate of remuneration of the Official Trustee under Regulation 15 to align with the current remuneration rate in bankruptcy matters, as the current rate of remuneration was not amended when the bankruptcy rate was increased in 2013.

## **Human rights implications**

This legislative instrument engages the following rights:

- the right to a fair hearing under Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), and
- the right to privacy under Article 17 of the ICCPR.

### *Right to a fair hearing*

Article 14 of the ICCPR provides two separate sets of obligations. Article 14, subsection (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, subsections (2) to (7) then provide the minimum guarantees which apply to criminal proceedings only

Examinations under the POC Act are information gathering procedures that relate to civil proceedings that affect a person’s property rights. Neither an examination or subsequent civil proceeding under the POC Act involve determinations being made of a person’s guilt or innocence or the conferral of criminal liability. As such, the POC Act scheme engages the fair trial rights provided for in Article 14(1) but not the guarantees conferred by Article 14, subsections (2) to (7).

Examiners play a role in the process under the POC Act, which must, from the time action commences against an individual under the POC Act, constitute a ‘fair’ hearing for the purposes of Article 14(1) of the ICCPR. The POC Act includes safeguards that ensure that a person’s procedural rights are protected with respect to an examination and these safeguards are not affected by this Regulation. These safeguards include entitling the person subject to an examination notice to be accompanied by a lawyer (section 188), and entitling that lawyer to participate in, and be consulted during the examination (subsection 189(1)). The Regulation will not vary the circumstances in which an examination may take place, or change the scope or range of the powers provided to an examiner when undertaking an examination under the POC Act. Courts will retain their current discretion under the POC Act to refuse to allow an examination take place.

The fair trial rights provided for in Article 14(1) include the privilege against self-incrimination.

During an examination, an approved examiner may request that answers be given or documents be produced with respect to certain specified matters. Under section 180 of

the POC Act these matters may relate to the affairs of a person whose property is, or a person who has or claims an interest in property that is subject of the restraining order (or that person's defacto or spouse), or a person who is a suspect in relation to the restraining order (or that person's defacto or spouse). A person that fails to comply with these requests may be subject to criminal penalty under section 196 of the POC Act.

The POC Act includes reasonable and appropriate safeguards to protect the person's privilege against self-incrimination. The POC Act provides reasonable and appropriate exclusions from the obligation to allow for disclosure of incriminating information in certain circumstances. Information obtained by approved examiners using coercive powers is subject to derivative use immunity in most circumstances. This immunity ensures that a disclosure made by a person who gave an answer or produced a document in an examination is not admissible in evidence against the person in a civil or criminal proceeding. Section 198 of the POC Act provides that this immunity does not apply in certain limited circumstances. These include proceedings for giving false or misleading information, and proceedings on an application under the POC Act, or proceedings ancillary to an application under the POC Act. These exceptions are reasonable and appropriate.

The POC Act also sets clear parameters around the circumstances in which information obtained by approved examiners using coercive powers can be shared. Commonwealth proceeds of crime authorities will only be able to disclose information to appropriate foreign authorities or to state and territory authorities for the purpose of identifying, locating, tracing, investigating or confiscating proceeds or instruments of crime. Disclosures to foreign authorities will only be made where the proceeds or instruments of crime concerned would be capable of being confiscated under Australian proceeds of crime law.

This legislative instrument does not change either the scope or safeguards attached to fair hearing rights, including the privilege against self-incrimination. Thus, the proposed amendment does not limit or promote human rights with respect to a 'fair hearing'.

### *Right to privacy*

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. This includes the right to protection from interferences with a person's territory, property and personal information. Accordingly, lawful interferences with a person's privacy will be permitted provided they are not arbitrary.

As noted above, examinations under the POC Act are information gathering procedures.

The answers or documents required of a person subject to examination will usually divulge personal information, as it will relate to 'the affairs' of a relevant person. Thus, the obtaining of personal information under the POC Act may constitute interferences with a person's privacy. Lawful interferences with a person's privacy will be allowed by Article 17 of the ICCPR, provided that they are not arbitrary.

This legislative instrument does not change either the scope or safeguards attached to the use and disclosure of information gathered by examiners. The proposed amendment does not alter the conditions under which a person may be subject to examination; the type of information that may be required by examiners under the POC Act; the use of that information; or any of the safeguards attached to its use or disclosure. To the extent that

examinations under the POC Act currently engage with privacy rights provided for in Article 17, limitations of these rights are necessary to achieve, and reasonable in achieving the aim of disrupting criminal activity and combating serious and organised crime.

## **Conclusion**

This legislative instrument is compatible with human rights because, to the extent that it may limit human rights through its application, as part of the broader existing scheme those limitations are reasonable, necessary and proportionate.



**Details of the Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016**

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Proceeds of Crime Amendment (Approved Examiners and Other Measures) Regulation 2016*.

**Section 2 – Commencement**

This section provides for the legislative instrument to commence on the day after the instrument is registered.

**Section 3 – Authority**

This section provides that the instrument is made under the POC Act.

**Section 4 – Schedules**

This section provides that the Principal Regulation specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

***Proceeds of Crime Regulations 2002***

**Item [1] – Regulation 5**

Includes declarations that property has been automatically forfeited under a serious drug offender order or an unexplained wealth forfeiture order under the *Confiscation Act 1997* (Vic) as ‘corresponding laws’ for the purposes of the POC Act.

**Item [2] and [3] – Regulation 7**

Includes unexplained wealth restraining orders under the *Confiscation Act 1997* (Vic) and interim restraining orders under the *Criminal Property Forfeiture Act* (NT) as ‘corresponding laws’ for the purposes of the POC Act.

**Item [4] – Regulation 12**

Removes the requirement that the Minister keep a register for the purposes of section 183 of the POC Act and clarifies the persons and offices that can be appointed as approved examiners under this section as: presidential members of the Administrative Appeals Tribunal (AAT), non-presidential members of the AAT enrolled as a legal practitioner for at least 5 years, and persons who have held the office of judge or magistrate and have stated, in writing, willingness to be an approved examiner.

**Schedule 2 – Amendments**

***Proceeds of Crime Regulations 2002***

**Item [1] – Regulation 15**

Increases the rate of remuneration for the Official Trustee in Bankruptcy from \$50 per 15 minute period to \$62.50 per 15 minute period. This increase aligns the Official Trustee’s remuneration rate under the Principal Regulation with the Official Trustee’s remuneration rate in bankruptcy.

**Items [2] and [3] – Regulation 17**

Removes references to the previous annual management fee and increases the annual management fee to \$272,500 for the 2016 calendar year and each later calendar year. This increase to the annual management fee reflects the increased complexity and workload in the Official Trustee's management of the Confiscated Assets Account.