



## Proceeds of Crime Actions

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### The CDPP's Responsibilities for Conducting POCA Proceedings

1. *Proceeds of Crime Act 2002* (POCA) proceedings can be conducted by a 'proceeds of crime authority' which is defined in section 338 of the POCA to be the Commissioner of the AFP or the CDPP. The AFP led Criminal Assets Confiscation Taskforce (the Taskforce) conducts POCA investigations and litigation for the Commissioner of the AFP and is responsible for the majority of POCA work.
2. The CDPP and the AFP have agreed upon the division of responsibilities for the conduct of POCA proceedings, which is set out in the MOU on the division of responsibilities under the POCA agreed between the CDPP and the AFP (the MOU). Pursuant to clause 5.2 of the MOU the CDPP is responsible for conducting applications for:
  - a forfeiture order pursuant to section 48 of the POCA where no restraining order has been sought at the time the application is made; and
  - a pecuniary penalty order pursuant to section 116 of the POCA relating to a person's conviction where no restraining order has been sought at the time the application is made.

The Commissioner of the AFP is responsible for conducting litigation for all other POCA proceedings.

### Authorisations

3. It is the responsibility of the particular Practice Group that conducts the prosecution to consider and take POCA action. The Director has issued Authorisations for recovering the proceeds of crime and other matters which govern the taking and settlement of action under the POCA. All POCA applications and settlement of POCA proceedings must be made pursuant to an appropriate approval.

### When will action be taken

4. In deciding whether to commence confiscation action prosecutors must have regard to all relevant factors including:
  - the strength of the available evidence and the extent of any further investigation that may be required;
  - the seriousness of the alleged crime;
  - the value of ill-gotten gains thought to have been derived by the person;
  - total value of the assets potentially subject to confiscation action;
  - the assets available to the person (including any assets outside Australia);
  - the interests of third parties;
  - the views of the investigative agency;
  - the potential cost of the litigation should the matter be disputed; and
  - whether other avenues for confiscation are available to any person or agency.

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5. The CDPP must not commence criminal confiscation action unless satisfied that there are reasonable prospects of success in the matter and that, in all the circumstances of the case, the public interest would be served by taking confiscation action.
6. In general, the CDPP will not commence confiscation action for the purpose of ensuring goods are destroyed. It is usually the case that it would be inappropriate to return the goods to the defendant who may be committing an offence by possessing the goods once more and arrangements to have the goods destroyed by consent should be considered.
7. Wherever possible, conviction based orders should be sought at sentence because the application for the order will be primarily based on the evidence before the court in the criminal proceedings and may be relevant to sentence. It is most efficient and fair to ensure that the application is able to be made immediately following conviction and for section 320 of the POCA to be applied at sentence.
8. To enable an application for an order to be made in a timely manner following conviction, it is essential that any forfeitable property or pecuniary penalty order amount, any relevant supporting evidence and any potentially interested persons are identified at an early stage in the criminal proceedings. Assessment of evidence in support of the application should ideally occur at the time of assessment of the prosecution brief and any request for approval of the application should be obtained at an early stage so that resolution of the application can be explored with the defence.

In some areas where the CDPP might take confiscation action, specific issues arise. These include people smuggling and instruments of child pornography.

#### People Smuggling

9. In people smuggling matters cash is sometimes seized from the captain and crew of intercepted SIEV's and retained as an exhibit for the purposes of trial. Where there is an evidential basis for doing so, these amounts can be subject to forfeiture under s48 of the POCA at the conclusion of a successful prosecution.

Notwithstanding the relatively small amounts of money that may be involved, the sums may represent significant amounts for defendants who in the normal course of their lives are very lowly paid, often existing on a subsistence income.

Consequently, there may be circumstances where taking action under POCA has an impact which is disproportionately harsh. The authorised CDPP officer retains a discretion when determining whether to take POCA action when satisfied that the impact of taking action is disproportionately harsh as opposed to inherently proportionate to the deterrent and disabling purpose in taking action.

#### Child Pornography Instruments

10. It has been the policy of the CDPP to take action to forfeit the instruments of child pornography and child abuse offences where there is an evidentiary basis for doing so, notwithstanding the low or nil value of the computer equipment used in the offences. Pursuant to the *Crimes Act 1914* Part IE - Forfeiture of child pornography material and child abuse material, an alternative regime to POCA exists for forfeiting such items. The regime is designed to be a more expeditious alternative to POCA action and caters for applications by defendants and third parties to retrieve material from the forfeitable computers. However the *Crimes Act* forfeiture regime will only apply to instruments seized in relation to offences against the *Criminal Code*. Where child pornography offences are charged pursuant to the *Customs Act* or pursuant to State legislation different statutory forfeiture regimes will apply.
11. Accordingly, and given there may be up to four different forfeiture regimes depending on the offences charged, a practice has developed whereby the instruments of child pornography and child abuse offences can also be disposed of by the AFP with the consent of the defendant/parties with an interest in the property without formal court order.

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12. As with all criminal confiscation action, consideration should be given to the most appropriate method of taking action in each matter.

#### **Pecuniary Penalty Orders (PPO)**

13. A PPO is an order for a person to pay an amount equivalent to the benefits obtained from their offending. Once made, the PPO becomes a debt to the Commonwealth and the POCA provides a regime for enforcing the PPO against the property of the person or property under the person's effective control. The POCA provides for a court to make a series of orders that enables the Official Trustee (AFSA) to realise the property to satisfy the PPO. However for this to occur, the property must be the subject of a restraining order.
14. Pursuant to the division of responsibilities between CDPP and the AFP, the CDPP will not seek a conviction based PPO in a matter where a restraining order has been obtained. Accordingly it is not appropriate for the CDPP to seek PPOs with a view to obtaining a restraining order at a later date to enable the enforcement of the PPO. Such matters should be referred to the Taskforce by the investigating agency.
15. In general, approval to apply for a PPO will be limited to those matters where the defendant has advised of an intention to pay the PPO immediately or in accordance with an arrangement to make scheduled payments and a restraining order is not required to ensure enforcement. Empty PPOs (i.e. PPOs for an amount greater than the value of the assets against which the PPO can be enforced) should be avoided as they do not result in a recovery to the Commonwealth and must be administratively written off. They have little deterrent effect in so far as they do not remove the benefits and motive of the crime from the offender and are not compatible with the objects of the POCA set out in section 5. Wherever possible and permitted, the PPO should be sought in the court's criminal jurisdiction to avoid incurring unnecessary filing fees (noting that Queensland practice and procedural rules require orders to be sought in the civil jurisdiction).

#### **Seeking a conviction-based forfeiture order or a PPO**

16. Information Notes setting out the procedure for seeking a conviction-based forfeiture order (s48 POCA) and/or a conviction-based PPO (s116 POCA) are posted on the Proceeds of Crime portal page.
17. If a conviction-based forfeiture order or a conviction-based PPO is made, the relevant CDPP case officer should attend to the following:
  - a) Email a copy of the signed order to:
    - the **Official Trustee**, together with a letter setting out any relevant matters (including the Informant's details and the end date of any appeal period). This will assist the Official Trustee to enforce the order in accordance with its responsibilities under Part 4 of the POCA; and
    - the CDPP **IASA drop-box**. IASA Canberra Office is responsible for maintaining the CARS (Criminal Assets Recording System) database. Upon receipt of the order IASA Canberra Office will create a file in CARS and enter the relevant details. CARS is used to monitor POCA matters and to compile POCA statistics (including for the CDPP's Annual Report); and
    - the **informant**. The AFP and other agencies have no authority to deal with property forfeited under POCA other than as instructed by the Official Trustee. It therefore assists the Official Trustee to be able to contact the informant and vice versa (e.g. so that the Official Trustee can issue instructions to the informant about how to deal with the forfeited property). Consequently, CDPP case officers should refrain from giving advice to informants about what to do with exhibits forfeited under POCA.

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- b) In due course the Official Trustee will issue a Final Report and also a Statement of Receipts and Disbursements regarding the property. When these are received the case officer should email a copy to the **IASA drop-box**. This will allow the CDPP to finalise the CARS entry for recording and reporting purposes.

#### **Transfer of matters from the AFP to CDPP**

18. Section 315B of the POCA provides for the transfer of principal orders (i.e. a restraining order, forfeiture order, pecuniary penalty order or unexplained wealth order) and applications for principal orders between proceeds of crime authorities.
19. Any request from the Taskforce to take transfer of a principal order or an application for a principal order should be referred to the IASA Practice Group leader.

#### **Responsibility for the conduct of further investigations to support POCA action**

20. Where further investigations are required to support proposed POCA action by the CDPP, these should be referred to the investigating agency. Where a new POCA matter is to be conducted by the CDPP in accordance with the division of responsibilities, and the AFP or a Taskforce partner has investigated the matter, the AFP or Taskforce partner remains responsible for conducting the proceeds of crime investigation until the case has been completed.
21. Where the further investigation requested requires the exercise of a compulsory power under the POCA (for example, a production order pursuant to section 202 or the issue of a notice to a financial institution pursuant to section 213 of the POCA), the CDPP may seek assistance from the Taskforce where the investigating agency is not an authorised agency under the POCA.
22. Where the investigating agency is not an authorised agency, the CDPP may request assistance from the Taskforce where matters conducted by the CDPP require the exercise of compulsory powers under the POCA. Where that work is not undertaken, notwithstanding clause 5.2 of the MOU, the matter may be referred by the CDPP to the Taskforce for the Commissioner of the AFP to consider taking action under the POCA.
23. However, the investigating agency is not precluded from seeking the assistance from the Taskforce and the investigating agency should be asked to do this before any approach is made by the CDPP.

#### **Examinations**

24. Section 180D of the POCA enables an examination of the person against whom the confiscation order was made or his or her spouse/de facto to take place if the confiscation order has not been satisfied. Given the limited range of matters the CDPP is responsible for the need to conduct examinations should rarely arise and the IASA Practice Group leader should be consulted if such a course is being considered.

#### **Superannuation Orders**

25. These instructions do not apply to applications by the CDPP under the *Crimes (Superannuation Benefits) Act 1989* or Part VA of the *Australian Federal Police Act 1979* to forfeit the employer-funded component of superannuation payable to Commonwealth and AFP employees who have been convicted of corruption offences.



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