

## **Appendix 4**

### **Comparison table – ACC Act and Proceeds of Crime Act examinations**

See overleaf

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### ACC Act examinations

#### Who can be an examiner?

ACC examiners are appointed by the Governor-General, in consultation with an Inter-Governmental Committee.

ACC examiners must be legal practitioners of at least 5 years experience. They are appointed on a full-time basis for periods of up to 5 years and may only serve for 10 years total (ACC Act, s 46B).

### Proceeds of Crime Act examinations

Approved examiners under POCA are any persons who hold an office, or fall within a class of people, specified in the *Proceeds of Crime Regulations 2002* (POCA, s 183).

Approved examiners can be drawn from any of the office holders or classes of people specified, depending on who is available for a particular examination at a given time.

The following office holders and classes of people are specified by regulation 12 of the Proceeds of Crime Regulations:

- presidential members of the Administrative Appeals Tribunal (AAT)
- non-presidential AAT members who are legal practitioners with at least 5 years experience
- ex-State or Territory Supreme Court, District Court and County Court judges who agree in writing to be examiners, and
- ex-magistrates who agree in writing to be examiners.

**What can examinations be conducted in relation to?**

ACC examinations can be conducted in relation to special operations or investigations (s 24A).

The ACC Board determines which operations are special operations and which investigations are special investigations. These determinations are subject to oversight by the Inter-Governmental Committee.

Under Part 3-1, Division 1 of POCA, a court may order that an examination be conducted following an application by a proceeds of crime authority.

Examinations can be conducted in relation to the affairs of persons who have an interest in property subject to POCA orders, suspects (in the case of restraining orders) and the spouse or de facto of either of these categories of person.

Examinations can be conducted in the following circumstances:

- where a restraining order is in force
- where an application for an order to exclude property from a forfeiture order under sections 73 or 94 has been made
- where an application for an order for compensation for forfeited property under sections 77 or 94A has been made
- where a person has applied under section 102 for an interest in forfeited property to be transferred to them
- where a confiscation order has been made but has not been satisfied
- where a restraining order has been revoked under section 44, and
- where an application relating to the quashing of a person's conviction is made as mentioned in sections 81, 107, 146 and 173.

## What powers do examiners have?

ACC examiners may:

- summon a person to appear before an examination to give evidence and to produce documents or other things if it is reasonable to do so
- require a person appearing at the examination to produce a document or thing, and
- require a person appearing at the examination to give evidence either to take an oath or to make an affirmation (ss 28, 29).

ACC examiners may also request information from a range of Commonwealth and State agencies, subject to certain limitations (s 19A).

If a person being examined claims that answering a question or producing a document may incriminate them or expose them to some penalty, that information is not admissible against the person in criminal proceedings or proceedings to impose a penalty, with the exception of:

- confiscation proceedings, and
- proceedings in respect of the falsity of an answer or information stated in a document (s 30).

A POCA examiner may:

- require a person either to take an oath or to make an affirmation, and
- require a person to answer questions about the affairs of any person whose affairs are able to be examined.

An examination notice may require a person being examined to produce certain documents at the examination.

A person is not entitled to refuse to answer or a question or produce a document on the grounds that it may incriminate them, expose them to a penalty, or may be subject to legal professional privilege or other privileges (s 197).

**How can information obtained from examinations be used?**

The ACC's CEO, Board, staff members and examiners may divulge, or provide to a court, information obtained in performance of their duties, if it is for the purpose of giving effect to one of the following:

- the ACC Act
- a State or Territory law under which the ACC performs its duties
- the *Law Enforcement Integrity Commissioner Act 2006* and related regulations, and
- the *Parliamentary Joint Committee on Law Enforcement Act 2010*.

Information may also be divulged for the purposes of prosecutions initiated as a result of an ACC operation or investigation (see s 51).

Under section 266A, information obtained from a POCA examination may be disclosed to:

- an authority performing functions under POCA, to facilitate its performance of that function
- Commonwealth, State and Territory investigation or prosecution authorities, to assist in the investigation or prosecution of offences punishable by 3 or more years imprisonment
- Foreign investigation or prosecution authorities, to assist in the investigation or prosecution of offences that would be punishable by 3 or more years imprisonment if they occurred in Australia, and
- the Australian Taxation Office, to protect public revenue.

Answers given or documents produced in a POCA examination are only admissible as evidence in the following civil or criminal proceedings:

- POCA proceedings and ancillary proceedings
- proceedings to enforce a confiscation order
- criminal proceedings for giving false or misleading information, and
- civil proceedings in relation to a right or liability which a disclosed document confers or imposes.

## Secrecy

Under section 25A, ACC examinations must be held in private. An examiner may give directions as to the persons who may be present during the examination or a part of the examination. A person giving evidence may be represented by a lawyer.

An examiner may direct that the following must not be published, or must be published subject to restrictions imposed by the examiner:

- any evidence given before the examiner
- the contents of any document, or a description of any thing, produced to the examiner
- any information that might enable a person who has given evidence before the examiner to be identified, and
- the fact that any person has given or may be about to give evidence at an examination.

Examiners are required to give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

An examiner has the general power to regulate the conduct of proceedings at an examination as he or she thinks fit.

POCA examinations take place at the time and place specified by the examination order, or at such time and place as the examiner sees fit (s 186).

Examinations must take place in private and may only be attended by the examiner, the person being examined, the person's lawyer, the proceeds of crime authority and anyone else the examiner declares can attend (s 188).

A person can be examined by video link if an examiner is satisfied that the necessary facilities are available, that it would not cause unreasonable expense or inconvenience for the person to attend, and that it is in the interests of justice (s 190).

Records must be kept of statements made at the examination if they are requested by the proceeds of crime authority or the person being examined. The examiner otherwise has the discretion to decide whether records are kept (s 191).

A person being examined must be given a copy of the written records if they request it, but the examiner can impose conditions on its disclosure (s 191).

An examiner must restrict public disclosure of answers given or documents produced in examinations if requested to do so by the person being examined or the proceeds of crime authority. Examiners may also restrict public disclosure on their own initiative (s 193).

## **Offences relating to examinations**

**Under Part II, Division 2 of the Act, it is an offence for a person to:**

- attend an examination without the examiner's permission
- disclose that they have been summoned to an examination
- disclose any information about official matters related to the summons, such as the existence of an ACC operation, investigation or examination
- fail to attend an examination as required
- fail to answer questions or produced documents as required
- give false or misleading evidence, and
- obstruct or hinder an ACC examiner.

**Under section 34A, a person can be in contempt of the ACC if they:**

- refuse or fail to take an oath or affirmation
- refuse or fail to answer a question put to them by an examiner
- refuse or fail to produce a document which they are required to produce
- give evidence which they know to be false or misleading

**Under Part 3-1, Division 4 of the Act, it is an offence for a person to:**

- attend an examination without being entitled to attend
- fail to attend an examination as required
- refuse or fail to swear an oath or make an affirmation
- refuse or fail to answer a question put to them by an examiner
- refuse or fail to produce a document which they are required to produce
- breach a requirement imposed on records of an examination
- breach a direction preventing or restricting disclosure of information, and
- give false or misleading answers.

- obstruct or hinder an examiner in performance of their functions
- disrupt an examination, or
- threaten an examiner.

Contempt of the ACC is dealt with by the Federal Court or a Supreme Court.