

2010 - 2011 - 2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CRIMES LEGISLATION AMENDMENT  
(SERIOUS DRUGS, IDENTITY CRIME AND OTHER MEASURES) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
The Honourable Nicola Roxon MP)

**CRIMES LEGISLATION AMENDMENT  
(SERIOUS DRUGS, IDENTITY CRIME AND OTHER MEASURES) BILL 2012**

**GENERAL OUTLINE**

This Bill amends the *Australian Federal Police Act 1979*, *Crimes Act 1914*, *Crimes (Superannuation Benefits) Act 1989*, *Criminal Code Act 1995*, *Customs Act 1901*, and *Law Enforcement Integrity Commissioner Act 2006*.

The Bill contains a range of measures to improve Commonwealth criminal justice arrangements, including amendments to:

- ensure that the Commonwealth's serious drug offences framework can respond quickly to new and emerging substances
- expand the scope of existing identity crime offences, as well as enact new offences for the use of a carriage service in order to obtain and/or deal with identification information
- create new offences relating to air travel and the use of false identities
- improve the operation of the *Law Enforcement Integrity Commissioner Act 2006*
- clarify that superannuation orders can be made in relation to all periods of a person's employment as a Commonwealth employee, not only the period in which a corruption offence occurred, and
- increase the value of a penalty unit and introduce a requirement for the triennial review of the penalty unit.

**PURPOSE**

The purpose of Schedule 1 is to strengthen the Commonwealth's serious drug offences framework and ensure the Commonwealth's serious drug offences framework remains up to date and effective in combating the illicit drug trade.

Schedule 1 will move the lists of substances to which the Commonwealth's serious drug offences apply to regulations, improve emergency determination mechanisms and establish and refine criteria for listing substances. This will make the Commonwealth's serious drug framework more flexible and better able to respond to new and emerging substances.

The purpose of Schedule 2 is to broaden existing identity crime provisions in Part 9.5 of the *Criminal Code Act 1995* and create new offences and powers relating to air travel and the use of false identities.

Part 1 of Schedule 2 will expand identity crime offences to include dealing in identity information with an intention to commit, or facilitate, the commission of a foreign indictable offence. It will also create a new offence of using a carriage service, such as the internet or a mobile phone, to obtain and/or deal in identification information where a person intends to commit, or facilitate the commission of, a Commonwealth, State, Territory or foreign indictable offence.

These expanded offences will help prevent identity crime by ensuring that the Commonwealth's laws account for the transnational and multi-jurisdictional nature of identity crime.

Part 2 of Schedule 2 will introduce new offences and police powers relating to the use of false identities for the purposes of travelling by air. The offences will capture people who take flights or identify themselves at airports using a false identity, subject to certain requirements, and will also capture people who use a false identity to book tickets using a carriage service such as the internet. It will also give police new powers to request identity information at airports.

The purpose of Schedule 3 is to make amendments relating to the functions of the Law Enforcement Integrity Commissioner, the value of penalty units and superannuation orders.

Part 1 of Schedule 3 will clarify the function of the Integrity Commissioner with respect to detection and prevention of corruption, widen the Integrity Commissioner's scope to consider ACLEI corruption issues and enable the Integrity Commissioner to delegate the power to conduct public inquiries to an Assistant Integrity Commissioner. This will strengthen the Commonwealth public sector integrity system by clarifying the functions of the Integrity Commissioner.

Part 2 of Schedule 3 will adjust the value of the penalty unit in the *Crimes Act 1914*, which regulates value of monetary penalties for criminal offences in Commonwealth legislation and Territory ordinances. This adjustment will accommodate increases in the Consumer Price Index (CPI). Part 2 will also provide for the regular review of the value of the penalty unit in the future.

Part 3 of Schedule 3 will amend the *Crimes (Superannuation Benefits) Act 1989* (the CSB Act) and the *Australian Federal Police Act 1979* (the AFP Act) to make it clear that a superannuation order can be made in relation to employer benefits accrued during all periods of Commonwealth employment, not just the period of employment in which the corruption offence was committed. This will ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment.

## **FINANCIAL IMPACT STATEMENT**

Part 2 of Schedule 3 to the Bill will increase pecuniary penalties imposed for the commission of Commonwealth criminal offences. Other items will have little or no impact on Government revenue.

## ACRONYMS AND ABBREVIATIONS

ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AFP Act	<i>Australian Federal Police Act 1979</i>
CPI	Consumer Price Index
CSB Act	<i>Crimes (Superannuation Benefits) Act 1989</i>
LEIC Act	<i>Law Enforcement Integrity Commissioner Act 2006</i>
PJCLE	Parliamentary Joint Committee on Law Enforcement

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

This Bill 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*.

An overview of measures in the Bill and their human rights implications is below.

### **Serious drugs**

#### **Overview**

Schedule 1 to the Bill makes a number of amendments to Part 9.1 of the *Criminal Code Act 1995* (Cth) to strengthen the Commonwealth's serious drug offences framework.

The amendments will ensure the Commonwealth's serious drug offences framework remains up to date and effective in combating the illicit drug trade. Amendments to Part 9.1 include; the transfer of the lists of substances from the Criminal Code to the *Criminal Code Regulations 2002* (Cth), the proposal of conditions and criteria for listing controlled and border controlled substances in regulations, and improving the emergency determination mechanism by expanding the listing period and refining the criteria that must be satisfied before a determination can be made. These improvements to the Commonwealth serious drug offences framework will assist the Commonwealth to better respond to the emergence of new and emerging substances.

Division 301 of the Criminal Code contains the mechanisms for listing additional drugs, plants and precursors temporarily through interim regulations (for a period of up to 12 months) and/or urgently through emergency determinations (for a period of up to 56 days) for the purposes of the serious drug offences in Part 9.1. The amendments will repeal the interim regulations mechanism and emergency determination mechanism and provide for a single emergency determination mechanism which will initially cover a 12 month period with the possibility for extension to 18 months. This will provide the Minister with the capacity to respond rapidly to emerging unknown substances. The conditions for listing via this new mechanism are based largely on the current conditions in the Criminal Code for listing substances by interim regulation and the emergency mechanism.

It is also proposed that a substance or plant can be included in the regulations in the first instance, without having to list substances initially through an emergency determination. This would be appropriate in circumstances where enough is known about a substance to warrant its indefinite listing from the outset. The amendments clearly outline what the Minister will have regard to before a regulation to list a new substance may be made. These criteria are largely based on the detrimental effect the substance has on the individual and the risk to the community, reflecting what is currently found in the Criminal Code and what is in place in other jurisdictions for the listing of illicit substances.

#### **Human rights implications**

Schedule 1 does not engage any of the applicable rights or freedoms.

## **Conclusion**

The serious drugs measures in Schedule 1 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## **Identity crime**

### **Overview**

Part 1 of Schedule 2 of the Bill makes a number of amendments to identity crime offences in Part 9.5 of the *Criminal Code Act 1995* (Cth).

The current offence of dealing in identification information under Division 372 will be amended to include foreign indictable offences in addition to Commonwealth indictable offences. A definition for foreign indictable offences will also be included.

The Bill will introduce the offence of using a carriage service in order to deal in identification information. An offence will have been committed where a person uses a carriage service, such as an internet or telecommunications service, in order to make, supply or use identification information for the purpose of passing themselves, or someone else, off as the person identified in the information with the intention of committing, or facilitating, the commission of a Commonwealth, State, Territory or foreign offence.

The new offence will apply absolute liability to the element of using a carriage service along with a presumption that the person used a carriage service where the prosecution is able to prove, beyond reasonable doubt, that the person dealt in identification information and the person is unable to prove to the contrary.

An identical offence has also been introduced for dealing in identification information obtained using a carriage service.

The penalty for these offences will be 5 years imprisonment.

A number of consequential amendments are made to provisions dealing with possession of identification information and possession of equipment used to make identification information.

### **Human rights implications**

#### *Presumption of innocence*

The presumption of innocence is contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and is one of the guarantees in relation to legal proceedings contained in article 14.

The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

The offences interact with this presumption by applying absolute liability to elements of the offences. The application of absolute liability engages the presumption of innocence because it allows for a physical element of an offence to be proven without the need to prove fault.

New subsections 372.1A(2) and (4) apply absolute liability to the elements of using a carriage service and the element of showing that the offence was a Commonwealth, State, Territory or foreign indictable offence.

Absolute liability is appropriate and required for these elements of the offences because they are jurisdictional elements that go towards the Commonwealth's power to legislate and do not relate to the substance of the offence or the culpability of the defendant. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Subsection 372.1A(5) will insert a new presumption relating to the requirement in paragraphs 372.1A(1)(b) and 372.1A(3)(b) that the relevant criminal conduct was engaged in using a carriage service. The presumption will provide that, in relation to the element of the offence that a carriage service was used, if the prosecution proves beyond a reasonable doubt that the person engaged in the relevant criminal conduct, then it is presumed that, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct. As the presumption will only apply to the element of using a carriage service, the prosecution will still have the burden of proving, beyond reasonable doubt, that the person obtained and/or dealt in identification information with the intention to pass themselves, or someone else, off as the person identified in the documentation for the purpose of committing a Commonwealth, State, Territory or foreign indictable offence. The person will have a legal burden of rebutting the presumption, requiring the person to prove, on the balance of probabilities, that a carriage service was not used.

This engages the presumption of innocence by placing a burden of proof on the defendant. Under international human rights law, a reverse onus provision will not violate the presumption of innocence if the law is reasonable in the circumstances and maintains the rights of the accused. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.

The purpose of this subsection is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the criminal conduct. In the context of identity crime, often the evidence that a carriage service was used to engage in the conduct is entirely circumstantial, consisting of evidence that the defendant's computer had identification information of another person on the hard drive, that the computer was connected to the internet and that records show that the computer accessed particular websites with names suggesting an association with identity crime. Although an inference may be drawn from this type of evidence, it can be extremely difficult for the prosecution to show that it was the defendant who physically accessed the particular websites to obtain the information found on the computer.

A presumption is also appropriate in this instance given it is not an element that goes to the substance of the offence, or to the person's culpability, but is a jurisdictional element that provides the relevant connection to the Commonwealth's constitutional power. That is, it is

an element marking a boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

It is appropriate for a defendant to bear a legal burden to rebut this presumption as it is more practical for the defendant to prove a carriage service was not used than for the prosecution to prove that it was used. Such a presumption already exists in subsection 475.1B(1) of the Criminal Code in relation to telecommunications offences in Division 474 of the Criminal Code.

## **Conclusion**

The identity crime measures in Part 1 of Schedule 2 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcome of Part 1 of Schedule 2.

## **False identity and air travel**

### **Overview**

Part 2 of Schedule 2 to the Bill will amend the Criminal Code to include provisions that would make it an offence for a person to:

- at a constitutional airport, use false identification information to identify themselves for the purposes of travelling on a flight
- obtain a ticket, using a carriage service, for a flight using identification information that is false in relation to the individual who takes, or intends to take, the flight
- take a flight using a ticket, obtained by using a carriage service, using identification information that is false in relation to the person
- obtain a ticket for a constitutional flight using identification information that is false in relation to the individual who takes, or intends to take, the flight, and
- take a constitutional flight using a ticket obtained using identification information that is false in relation to person.

The maximum penalty for the offences will be 12 months imprisonment.

To support these offences, the Bill will empower a constable at an airport to request that a person provide identification information, such as a person's name and address or evidence of identity, subject to a threshold test. At constitutional airports, the constable must reasonably suspect that the person has committed, is committing or intends to commit a Commonwealth, State or Territory offence punishable by imprisonment of 12 months or more. At airports that are not constitutional airports, the reasonable suspicion must relate to a Commonwealth offence punishable by imprisonment of 12 months or more.

Part 2 makes it an offence to fail to comply with such a request, punishable by 20 penalty units.

## Human rights implications

### *Presumption of innocence*

The presumption of innocence is contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and is one of the guarantees in relation to legal proceedings contained in article 14.

The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

The offences interact with this presumption by applying absolute liability to elements of the offences. The application of absolute liability engages the presumption of innocence because it allows for a physical element of an offence to be proven without the need to prove fault.

The absolute liability elements for each of the offences are set out below.

<b>Offence</b>	<b>Absolute liability element(s)</b>
Using false identification information at a constitutional airport to identify a person for the purposes of travelling on a flight.	The place is a constitutional airport.
Obtaining a ticket, using a carriage service, for a flight using identification information that is false in relation to the individual who takes, or intends to take, the flight.	The ticket is obtained using a carriage service. The flight is within Australia or into or out of Australia.
Taking a flight using a ticket, obtained by using a carriage service, obtained by using identification information that is false in relation to the individual who took the flight.	The ticket is obtained using a carriage service. The flight is within Australia or into or out of Australia.
Obtaining a ticket for a constitutional flight using identification information that is false in relation to the individual who takes, or intends to take, the flight.	The flight is a constitutional flight.
Taking a constitutional flight using a ticket obtained by using identification information that is false in relation to the individual who took the flight.	The flight is a constitutional flight.

Absolute liability is appropriate and required for these elements of the offences because they are jurisdictional elements that go towards the Commonwealth's power to legislate and do not relate to the substance of the offence or the culpability of the defendant. This is consistent with Commonwealth criminal law practice, as described in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

Strict liability attaches to two elements of the offence of not providing identity information to a constable when requested to do so. These elements are that the request was made in accordance with the requirements of the legislation and that the constable complied with his or her obligations. Strict liability means that a physical element of the offence can be proved without the need to prove fault. However, unlike absolute liability, the defence of honest and reasonable mistake of fact is available to the defendant.

Applying strict liability is appropriate in these circumstances as the defendant's knowledge of those issues is not relevant to their culpability. However, the general defence of mistake of fact will be available to the defendant.

Subsection 376.3(3) will insert a new presumption relating to the requirement in subsections 376.3(2) and 376.3(2) that the relevant criminal conduct was engaged in using a carriage service. The presumption will provide that, in relation to the element of the offence that a carriage service was used, if the prosecution proves beyond a reasonable doubt that the person engaged in the relevant criminal conduct, then it is presumed that, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

As the presumption will only apply to the element of using a carriage service, the prosecution will still have the burden of proving, beyond reasonable doubt, that the person obtained and/or dealt in identification information with the intention to pass themselves, or someone else, off as the person identified in the documentation for the purpose of committing a Commonwealth, State, Territory or foreign indictable offence. The person will have a legal burden of rebutting the presumption, requiring the person to prove, on the balance of probabilities, that a carriage service was not used.

This engages the presumption of innocence by placing a burden of proof on the defendant. Under international human rights law, a reverse onus provision will not violate the presumption of innocence if the law is reasonable in the circumstances and maintains the rights of the accused. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.

A presumption in this instance is appropriate given it is not an element that goes to the substance of the offence, or to the person's culpability, but is a jurisdictional element that provides the relevant connection to the Commonwealth's constitutional power. That is, it is an element marking a boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

A legal burden for this proof is appropriate as it is more practical for the defendant to prove a carriage service was not used than for the prosecution to prove that it was used. Such a presumption already exists in subsection 475.1B(1) of the Criminal Code in relation to telecommunications offences under Division 474 of the Criminal Code

#### *Right to protection against arbitrary and unlawful interferences with privacy*

The requirement to provide identification information to a constable engages the right to privacy.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Accordingly, interferences with the right to privacy will be permitted provided they are not arbitrary and are authorised by law. In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that:

- limitations serve a legitimate objective,
- limitations adopt a means that is rationally connected to that objective, and
- the means adopted are not more restrictive than they need to be to achieve that objective.

The introduction of the offences related to travelling under a false identity is in response to recommendations made by the Parliamentary Joint Committee on Law Enforcement *Inquiry into the Adequacy of Aviation and Maritime Security Measures to Combat Serious and Organised Crime* (the PJCLE report). The PJCLE recommendation was made to address concerns that members of criminal organisations travel under false identities to facilitate their illegal activities and avoid law enforcement.

The ability to request identification information is a necessary corollary of introducing these offences. Without a means of checking an individual’s identity, law enforcement officers will be limited in their ability to investigate the commission of these offences.

In addition to serving this legitimate objective, there are a number of safeguards that ensure the power is connected to the objective and not more restrictive than necessary.

- The interference with a person’s privacy is minimal. It merely requires the disclosure of evidence of identity (as defined in the *Crimes Act 1914*) or name and address. This protects people who may not be carrying government issued photographic identification from committing an offence and ensures the provision is not a de-facto requirement to carry identification.
- The power is not arbitrary. It requires a threshold to be met before it can be exercised. A constable may only require a person to produce evidence of their identity where the person is at an airport and the constable reasonably suspects that the person has committed, is committing or intends to commit an offence punishable by imprisonment for 12 months or more.
- The person will be informed of the consequences of not complying with the request. The constable is required to inform the suspect that it may be an offence not to comply with the request, or to provide false or misleading information.
- People will be aware of the constable’s authority – if the constable is not in uniform, they are required to show the person evidence that he/she is a constable and, if asked, any further details set out in new subsection 3UKB(6).

A defence of reasonable excuse, as in section 3V (the requirement to furnish names etc) of the Crimes Act, has not been included. This is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide). The Guide notes that such a defence is open-ended and difficult to rely upon because it is unclear what needs to be established. In addition, it is difficult to see what reasonable excuse could be claimed for not providing name and address. The defence of mistake of fact will still be able to be relied upon.

The threshold of ‘reasonably suspects’ is also different to the ‘believes on reasonable grounds’ threshold in section 3V of the Crimes Act. The higher threshold of ‘believes on reasonable grounds’ is the general threshold required in order for police to make an arrest.

The lower threshold of ‘reasonably suspects’ is therefore necessary to allow police to investigate an offence and obtain information in order to come to a belief about whether an offence has been committed.

## **Conclusion**

The false identity and air travel measures in Part 2 of Schedule 2 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of Part 2 of Schedule 2.

## **Integrity Commissioner functions**

### **Overview**

Part 1 of Schedule 3 to the Bill amends the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to clarify the functions of the Integrity Commissioner with respect to detection and prevention of corruption. It widens the Integrity Commissioner’s scope to consider ACLEI corruption issues and enables the Integrity Commissioner to delegate the power to conduct public inquiries to an Assistant Integrity Commissioner.

The LEIC Act sets out the powers and functions of the Integrity Commissioner and establishes the Australian Commission for Law Enforcement Integrity (ACLEI) as a supporting statutory agency. The main objectives of the Integrity Commissioner and ACLEI are the maintenance and strengthening of the integrity of law enforcement at the Commonwealth level.

Part 1 of Schedule 3 clarifies the function of the Integrity Commissioner with respect to detection and prevention of corruption by making specific reference to these functions in section 15 of the LEIC Act. It also widens the Integrity Commissioner’s scope to consider ACLEI corruption issues by giving the Minister responsible for ACLEI the discretion to refer an ACLEI corruption issue to the Integrity Commissioner, unless it involves the Integrity Commissioner or an Assistant Integrity Commissioner.

Part 1 of Schedule 3 will also remove restrictions that prevent the Integrity Commissioner from delegating his power to conduct a public hearing to an Assistant Integrity Commissioner.

### **Human rights implications**

Part 1 of Schedule 3 does not engage any of the applicable rights or freedoms.

### **Conclusion**

The Integrity Commissioner function measures in Part 1 of Schedule 3 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Penalty units**

#### **Overview**

Part 2 of Schedule 3 to the Bill amends the *Crimes Act 1914* to increase the value of the penalty unit for Commonwealth criminal offences from \$110 to \$170. This amendment accommodates changes in the Consumer Price Index since the value of the penalty unit was last adjusted in 1997. It also provides for the value of the penalty unit to be reviewed every three years.

#### **Human rights implications**

Part 2 of Schedule 3 does not engage any of the applicable rights or freedoms.

#### **Conclusion**

The penalty unit measures in Part 2 of Schedule 3 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Superannuation orders**

#### **Overview**

The *Crimes (Superannuation Benefits) Act 1989* (the CSB Act) and the *Australian Federal Police Act 1979* (the AFP Act) provide for the forfeiture and recovery of employer funded superannuation benefits that are payable, or have been paid, to Commonwealth employees who have been convicted of corruption offences by a court and sentenced to more than 12 months' imprisonment. For the purposes of these two Acts, 'employees' includes public servants, members of the Australian Defence Force and Australian Federal Police, parliamentarians and judges.

The forfeiture and recovery provisions only apply to employees who commit serious corruption offences. A ‘corruption offence’ is narrowly defined as an offence by a person who was an employee, at the time the offence was committed, being an offence that involved an abuse of office, corruption or perverting or attempting to pervert the course of justice. Further, the forfeiture and recovery of employer funded superannuation benefits only apply to persons sentenced to more than 12 months’ imprisonment for the corruption offence(s), and do not apply if the sentence is wholly suspended or is an alternative sentencing option, such as a community service order.

The purpose of the legislative scheme, which has been in place since 1989, is to clearly implement the public policy objective of ensuring that superannuation benefits are not paid from public monies to Commonwealth employees convicted of corruption offences committed in the course of their employment.

Part 3 of Schedule 3 to the Bill amends both Acts to clarify that a superannuation order can be made in relation to employer funded contributions and benefits accrued during all periods of Commonwealth employment, regardless of whether an employee had a continuous period of employment or several separate periods of employment. The scheme was not intended to operate so that the forfeiture and recovery of employer funded contributions and benefits is restricted to the particular period of employment in which an employee committed a corruption offence.

These amendments will ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether they have one continuous period of employment or several separate periods of employment.

The amendments will apply to offences that were committed before or after commencement of the provisions, but only if an application for a superannuation order is made in relation to those offences on or after the commencement date. Until recently, it was thought that the existing scheme applied equally to employees who have one continuous period of employment as well as to those who have had several separate periods of employment. Therefore, Commonwealth employees convicted of a ‘corruption offence’ and sentenced to more than 12 months’ imprisonment would have had an expectation that they would lose all their employer funded superannuation contributions under the existing scheme.

## **Human rights implications**

### *Rights in work*

Providing for the forfeiture and recovery of superannuation benefits will engage Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7(a) provides for the right of everyone to the enjoyment of just and favourable conditions of work, including remuneration which provides all workers with fair wages and a decent living for themselves and their families. Superannuation benefits are not mentioned explicitly in the treaty. However, payment of superannuation benefits is a form of remuneration for Commonwealth employees.

Article 4 of the ICESCR specifies that economic and cultural rights may be limited by measures determined by law insofar as may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The

restrictive measures must be proportional and the least restrictive alternative and, where permitted, should be of limited duration and subject to review.

The Bill will limit the rights of Commonwealth employees, who are convicted of corruption offences and sentenced to more than 12 months' imprisonment, to access certain remuneration by requiring the forfeiture and recovery of employer funded superannuation benefits. Employees convicted of corruption offences have committed serious offences in the course of their employment. As a result, they have failed to fulfil a condition of their employment and this should result in the forfeiture employer funded superannuation benefits. Minor offences are effectively outside the scope of the scheme, which only operates where a sentence of more than 12 months' imprisonment is imposed. The purpose of the existing scheme is to provide a strong financial disincentive to ensure that the consequences of serious criminal activity, such as official corruption, are less attractive.

The Bill is intended to clarify the operation of a long-standing legislative scheme to ensure that all employees who are convicted of corruption offences and sentenced to more than 12 months' imprisonment will be subject to the forfeiture and recovery of their employer funded superannuation.

If the legislation is not amended, it may be the case that the legislation applies less favourably to those employees who have one continuous period of employment as opposed to those who have had several separate periods of employment. For example, upon committing a corruption offence, a person with one long and continuous period of employment may have a superannuation order made against all their employer funded superannuation benefits. In contrast, a person with separate periods of employment may have a superannuation order made only in respect of the employer funded superannuation benefits that accrued during the period in which they committed the corruption offence.

The amendments will ensure that the scheme applies equally to all employees who have committed a corruption offence while an employee, regardless of whether they have one continuous period of employment or more than one separate period of employment.

The employee's own superannuation contributions (and interest on that sum) cannot be subject to forfeiture or recovery. Orders for the forfeiture or recovery of employer funded superannuation benefits can only be made by a court, and are subject to the usual avenues of appeal available from that court, ensuring access to a fair trial provided by Article 14 of the International Covenant on Civil and Political Rights. Further, such orders are automatically revoked if the person's conviction is later quashed, or the person's sentence is reduced or otherwise changed so that it no longer meets the condition precedent of 12 months' imprisonment.

## **Conclusion**

This superannuation order measures in Part 3 of Schedule 3 to the Bill are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of Part 3 of Schedule 3.

## NOTES ON CLAUSES

### Clause 1: Short title

This clause provides that, when enacted, the Bill may be cited as the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*.

### Clause 2: Commencement

This clause sets out when the various parts of the Act are to commence.

Sections 1 to 3 will commence on the day the Act receives Royal Assent.

Schedule 1, Part 1 will commence on a day to be fixed by Proclamation. If the provisions do not commence within 6 months of the day the Act receives Royal Assent, they will commence on the day after that 6 month period finishes. This is to allow sufficient time for regulations to be made to provide updated lists of substances.

Schedule 1, Part 2 will commence on the day after the Act receives Royal Assent.

Schedule 2 will commence on the day after the Act receives Royal Assent.

Schedule 3, Part 1 will commence on the day after the Act receives Royal Assent.

Schedule 3, Part 2 will commence on a day to be fixed by Proclamation. If the provisions do not commence within 1 month of the day the Act receives Royal Assent, they will commence on the day after that 1 month period finishes. This commencement provision has been included to provide agencies that administer Commonwealth criminal offences with sufficient time to amend their business systems to reflect the new penalty unit value.

Schedule 3, Part 3 will commence on the day after the Act receives Royal Assent.

### Clause 3: Schedule(s)

This is a formal clause that enables the Schedules to amend Acts by including amendments under the title of the relevant Act.

## **Schedule 1 – Serious drugs**

### **GENERAL OUTLINE**

The purpose of Schedule 1 is to strengthen the Commonwealth's serious drug offences framework.

Illicit drugs have a terrible impact on the Australian community and cause a wide range of social, economic and personal harms. The amendments in this Schedule ensure that Commonwealth laws are up to date and allow for flexible, quick responses to new and emerging drug threats.

This Schedule will transfer the lists of substances to which the Commonwealth's serious drug offences apply from the Criminal Code to the *Criminal Code Regulations 2002* (Cth), establish conditions and criteria for listing controlled and border controlled substances in regulations, improve emergency determination mechanisms by extending the listing period, and refine the criteria that must be satisfied before a determination can be made.

## **Part 1 – Amendments**

### ***Criminal Code Act 1995***

#### **Item 1 – subsection 300.1(1) of the *Criminal Code***

This item inserts ‘(the TINDAPS Convention)’ after ‘20 December 1988’ to clarify the expression, which is used in new sections 301.1, 301.2 and 301.3.

The TINDAPS Convention is the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, done at Vienna on 20 December 1988.

#### **Item 2 – section 300.2 of the *Criminal Code* (definition of *border controlled drug*)**

This item repeals the definition of *border controlled drug* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by proposed section 301.4 (see item 16 for a detailed description of the definition of *border controlled drug*).

#### **Item 3 – section 300.2 of the *Criminal Code* (definition of *border controlled plant*)**

This item repeals the definition of *border controlled plant* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by new section 301.5 (see item 16 for a detailed description of the definition of *border controlled plant*).

#### **Item 4 – section 300.2 of the *Criminal Code* (definition of *border controlled precursor*)**

This item repeals the definition of *border controlled precursor* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by proposed section 301.6 (see item 16 for a detailed description of the definition of *border controlled precursor*).

#### **Item 5 – section 300.2 of the *Criminal Code* (definition of *commercial quantity*)**

This item repeals the definition of *commercial quantity* from existing section 300.2 of the *Criminal Code*, and in relation to a serious drug, controlled precursor, or border controlled precursor, and replaces it with a reference to the definition provided for that term by proposed section 301.10 (see item 16 for a detailed description of the definition of *commercial quantity*).

#### **Item 6 – section 300.2 of the *Criminal Code* (definition of *controlled drug*)**

This item repeals the definition of *controlled drug* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by proposed section 301.1 (see item 16 for a detailed description of the definition of *controlled drug*).

**Item 7 – section 300.2 of the *Criminal Code* (definition of *controlled plant*)**

This item repeals the definition of *controlled plant* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by proposed section 301.2 (see item 16 for a detailed description of the definition of *controlled plant*).

**Item 8 – section 300.2 of the *Criminal Code* (definition of *controlled precursor*)**

This item repeals the definition of *controlled precursor* from existing section 300.2 of the *Criminal Code* and replaces it with a reference to the definition provided for that term by proposed section 301.3 (see item 16 for a detailed description of the definition of *controlled precursor*).

**Item 9 – section 300.2 of the *Criminal Code***

*Determined* is a new term introduced into Part 9.1 of the *Criminal Code*. The term *determined* has been introduced to assist with the interpretation of paragraphs 307.4(1)(b), 307.7(1)(c), 307.10(1)(c), and 308.1(1)(b), which have been amended by items 17 and 18 so that they do not apply to *determined* substances. This will mean that ‘possession’ offences and the offence of importing or exporting without commercial intent will not apply to substances listed by emergency determination. The rationale for this is described in detail at items 17 and 18.

This item defines *determined* in relation to a serious drug, controlled precursor or border controlled precursor. ‘Serious drug’ is defined in 300.2 as a controlled drug, border controlled drug, controlled plant and border controlled plant. Each of these terms is also defined in Subdivision A of Division 301 (see item 16 for the detailed descriptions of the definitions of these terms).

Paragraph 300.2(a) defines *determined* in relation to a ‘serious drug’ to mean determined by the Minister under the emergency determination mechanism at section 301.13 (see item 16 for detailed description of this mechanism).

Paragraph 300.2(b) defines *determined* in relation to a controlled precursor or border controlled precursor to mean determined by the Minister under the emergency determination mechanism for serious drug precursors at new section 301.14 (see item 16 for detailed description of this mechanism).

**Item 10 – section 300.2 of the *Criminal Code***

A *drug analogue* was not previously defined in section 300.2 (the definition section of Part 9.1) of the *Criminal Code*. The definition of a drug analogue was included next to the lists of controlled and border controlled drugs in Division 314 of the *Criminal Code*. This item inserts the definition of a drug analogue into section 300.2. A *drug analogue* is defined with reference to the definition provided for that term by new section 301.9 (see item 16 for a detailed description of the definition of *drug analogue*).

### **Item 11 – section 300.2 of the *Criminal Code***

*Listed* is a new term introduced into Part 9.1 of the Criminal Code.

The term *listed* is generally defined to mean listed in the *Criminal Code Regulations 2002* (Cth). The term has been introduced to assist with the definitions of controlled drugs (section 301.1), controlled plant (section 301.2), border controlled drugs (section 301.4), and border controlled plants (section 301.5).

The definition directs the reader to specific paragraphs which provide for the listing of drugs and plants (controlled and border controlled) by a regulation. This item clarifies that:

- a *listed* controlled drug is a drug listed by a regulation in accordance with paragraph 301.1(a)
- a *listed* controlled plant is a plant listed by a regulation in accordance with paragraph 301.2(a)
- a *listed* border controlled drug is a drug listed by a regulation in accordance with paragraph 301.4(a), and
- a *listed* border controlled plant is a plant listed by a regulation in accordance with paragraph 301.5(a).

The definition of *listed* also assists with the interpretation of what is a drug analogue for the purposes of the offence provisions in Part 9.1 (the definition of ‘drug analogue’ is found at section 301.9). The term *listed* does not include listed precursors (section 301.8). This means analogues of listed precursors will not be subject to the serious drug offences, which is in line with the current approach in Part 9.1 of the Criminal Code.

### **Item 12 – section 300.2 of the *Criminal Code* (definition of *marketable quantity*)**

This item repeals the current definition of *marketable quantity* in section 300.2 of the Criminal Code and replaces it with a reference to the marketable quantity of a serious drug (as defined in new section 300.2 to mean a controlled drug, border controlled drug, controlled plant or border controlled plant), controlled precursor or border controlled precursor as defined by new section 301.11 (see item 16 for a detailed description of the definition of *marketable quantity*).

### **Item 13 - section 300.2 of the *Criminal Code***

*Serious drug* is a new term introduced into Part 9.1 of the Criminal Code.

The term *serious drug* has been introduced to assist with the understanding of other new provisions in Part 9.1, in particular the definitions of *commercial quantity*, *marketable quantity* and the conditions for listing by regulation (new section 301.7, see item 16 for a detailed description of this provision)

*Serious drug* means a controlled drug (defined in section 301.1 and described at item 16), a controlled plant (defined in section 301.2 and described at item 16), a border controlled drug

(defined in section 301.4 and described at item 16) or a border controlled plant (defined in section 301.5 and described at item 16). The definition does not include precursors.

The lists of controlled drugs, controlled plants, border controlled drugs and border controlled plants will be enacted in the *Criminal Code Regulations 2002* (Cth).

The term ‘serious drugs’ is also used in headings throughout Part 9.1 of the Criminal Code (as amended), in this context the term is used for indicative purposes only and is not intended to define the scope of the provision.

#### **Item 14 – section 300.2 of the *Criminal Code***

This item inserts ‘TINDAPS Convention has the meaning given by section 300.1’ into section 300.2 (the definition section of Part 9.1). This item refers the reader to the full name and details of the TINDAPS Convention (the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, done at Vienna on 20 December 1988).

#### **Item 15 - section 300.2 of the *Criminal Code* (definition of *trafficable quantity*)**

This item repeals the current definition of *trafficable quantity* in section 300.2 of the Criminal Code and replaces it with a reference to the trafficable quantity of a controlled drug or a controlled plant as defined by section 301.12 (see item 16 for a detailed description of the definition of *trafficable quantity*).

#### **Item 16 – Division 301 of the *Criminal Code***

This item repeals Division 301, which provides for the listing of additional drugs, plants and precursors by interim regulations and emergency determination. Division 301 is replaced with the following provisions:

#### **Division 301 – Serious drugs and precursors**

##### **Subdivision A – Serious drugs and precursors: definitions**

##### Section 301.1 - meaning of ‘controlled drug’

This item replaces the current definition of *controlled drug* in section 300.2 with a new definition which takes into account the amendments proposed to Part 9.1 by this Schedule, and clearly identifies that drug analogues are also controlled drugs for the purpose of the offence provisions in Part 9.1.

Under proposed section 301.1 a *controlled drug* is a substance, other than a growing plant, that is listed by a regulation as a controlled drug, a drug analogue of a controlled drug listed by a regulation, or a drug determined by the Minister as a controlled drug in accordance with the serious drug emergency determination mechanism at section 301.13. ‘Regulation’ refers to the *Criminal Code Regulations 2002* (Cth).

Proposed subsection 301.1(2) indicates to the reader that the substances listed in the regulations as controlled drugs are internationally controlled substances (or analogues of

internationally controlled substances) under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (see item 14).

A note has been included following proposed section 301.1 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to list a controlled drug by regulation or by determination can be made. Before a controlled drug can be listed in a regulation, the Minister must be satisfied of the criteria in section 301.7. A controlled drug is listed indefinitely in regulations until removed. ‘Regulation’ refers to the *Criminal Code Regulations 2002* (Cth).

Alternatively, a determination may be made by the Minister in relation to a controlled drug if at least one of the conditions in subsection 301.13(2) is satisfied. A determination to list a controlled drug may have effect for an initial period of up to 12 months, which in exceptional circumstances may be extended up to a total of 18 months from the time the determination is registered. Determinations and regulations are legislative instruments under the *Legislative Instruments Act 2003* (Cth) and therefore subject to Parliamentary scrutiny and disallowance (see sections 301.13 and 301.7 for further details).

A further note is included directing the reader to the definition of *drug analogue*, which can be found at section 301.9. Drug analogues are defined as substances that have similar chemical structure to a controlled or border controlled drug and may be reasonably expected to have a similar pharmacological effect to that of that listed drug.

#### Section 301.2 - meaning of ‘controlled plant’

This item replaces the current definition of *controlled plant* in section 300.2 with a modified definition that takes into account the amendments made to Part 9.1.

Under proposed section 301.2 a *controlled plant* is a growing plant that is either listed by a regulation as a controlled plant or has been determined by the Minister as a controlled plant in accordance with the serious drug emergency determination mechanism at proposed section 301.13. ‘Regulation’ refers to the *Criminal Code Regulations 2002* (Cth).

A note has been included following section 301.2 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to seek to list a controlled plant by regulation or by determination can be made. Before a controlled plant can be listed in a regulation, the Minister must be satisfied of the criteria in section 301.7.

A controlled plant is listed indefinitely in regulations until removed.

Alternatively, a determination may be made by the Minister in relation to a controlled plant if at least one of the conditions in subsection 301.13(2) is satisfied. A determination to list a controlled plant may have effect for an initial period of up to 12 months, which may in exceptional circumstances be extended up to a total of 18 months from the time the determination is registered. Determinations and regulations are legislative instruments under the *Legislative Instruments Act 2003* (Cth) and therefore subject to Parliamentary scrutiny and disallowance (see sections 301.13 and 301.7 for further details).

Proposed subsection 301.2(2) indicates to the reader that the substances listed in the regulations as controlled plants are internationally controlled substances (or analogues of

internationally controlled substances) under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (see item 14).

### Section 301.3 - meaning of ‘controlled precursor’

This item replaces the current definition of *controlled precursor* in section 300.2 with a new definition to take into account the amendments made to Part 9.1 and to clearly identify that salts or esters of a listed controlled precursor are also controlled precursors for the purpose of the offence provisions in Part 9.1 of the Criminal Code. Salts or esters of controlled precursors are included as they represent equivalent chemical forms in which the controlled precursors are commonly available.

Under proposed section 301.3, a *controlled precursor* is a substance, including a growing plant, that is listed by a regulation as a controlled precursor, a salt or ester of a listed controlled precursor, or a controlled precursor determined by the Minister in accordance with the serious drug precursor emergency determination mechanism at section 301.14.

A note has been included following section 301.3 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to list a controlled precursor by regulation or by determination can be made. Before a controlled precursor can be listed in a regulation, the Minister must be satisfied of the criteria in section 301.8, that is that there is a risk that the substance will be used to unlawfully manufacture a controlled drug (other than a substance determined by the Minister in accordance with 301.13 or 301.14). A controlled precursor is listed indefinitely in regulations until removed. ‘Regulation’ refers to the *Criminal Code Regulations 2002* (Cth).

Alternatively, a determination can be made by the Minister in relation to a controlled precursor if satisfied that there is an imminent and substantial risk that the substance will be used to unlawfully manufacture a controlled drug (subsection 301.14(2)). A controlled precursor may be listed for a period of up to 18 months from the time the determination is registered.

Proposed subsection 301.3(2) indicates to the reader that the substances listed in the regulations as controlled precursors are internationally controlled substances (or analogue of internationally controlled substances) under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (see item 14).

A further note is included directing the reader to the definition of *drug analogue*, which can be found at section 301.9. A drug analogue is defined as a substance that has a similar chemical structure to a controlled or border controlled drug and may be reasonably expected to have a similar pharmacological effect to that of the listed drug.

### Section 301.4 - meaning of ‘border controlled drug’

This item replaces the current definition of *border controlled drug* in section 300.2 with a new definition which takes into account the amendments made to Part 9.1 and clearly identifies that drug analogues are also border controlled drugs for the purpose of the offence provisions in Part 9.1 of the Criminal Code.

Under new section 301.4, a *border controlled drug* is a substance, other than a growing plant, that is listed by a regulation as a border controlled drug, a drug analogue of a border controlled drug listed by a regulation, or a drug determined by the Minister as a border controlled drug in accordance with the serious drug emergency determination mechanism at section 301.13.

A note has been included following section 301.4 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to list a border controlled drug by regulation or by determination can be made. Before a border controlled drug can be listed in a regulation, the Minister must be satisfied of the criteria in section 301.7. A border controlled drug is listed indefinitely in regulations until removed. 'Regulation' refers to the *Criminal Code Regulations 2002* (Cth).

Alternatively, a determination may be made by the Minister in relation to a border controlled drug if at least one of the conditions in subsection 301.13(2) is satisfied. A determination to list a border controlled drug may have effect for a period of up to 18 months from the time the determination is registered.

A further note is included directing the reader to the definition of *drug analogue*, which can be found at section 301.9. A drug analogue is defined as substance that has a similar chemical structure to a controlled or border controlled drug and may be reasonably expected to have a similar pharmacological effect to that of the listed drug.

#### Section 301.5 - meaning of 'border controlled plant'

This item replaces the current definition of *border controlled plant* in section 300.2 with a new definition to take into account the amendments made to Part 9.1 of the Criminal Code. Under proposed section 301.5 a *border controlled plant* is a growing plant that is listed by a regulation as a controlled plant or a substance that has been determined by the Minister as a border controlled plant in accordance with the serious drug emergency determination mechanism at section 301.13. 'Regulation' refers to the *Criminal Code Regulations 1995* (Cth).

A note has been included following section 301.5 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to list a border controlled plant by regulation or by determination can be made. Before a border controlled plant can be listed in a regulation, the Minister must be satisfied of the criteria in section 301.7. A border controlled plant is listed indefinitely in regulations until removed. 'Regulation' refers to the *Criminal Code Regulations 2002* (Cth).

Alternatively, a determination can be made by the Minister in relation to a border controlled plant if satisfied of the conditions in subsection 301.13(2)). A determination to list a border controlled plant may have effect for a period of up to 18 months from the time the determination is registered.

#### Section 301.6 - meaning of 'border controlled precursor'

This item replaces the current definition of *border controlled precursor* in section 300.2 with a new definition that takes into account the amendments made to Part 9.1 of the Criminal Code. The definition clearly identifies that salts, esters and immediate precursors of a listed

border controlled precursor are also border controlled precursors for the purpose of the offence provisions in Part 9.1.

Salts and esters of border controlled precursors are included as they represent equivalent chemical forms in which border controlled precursors are commonly available. Immediate precursors of border controlled precursors are included as they represent substances from which border controlled precursors may be directly obtained in a chemical manufacturing process.

Under proposed section 301.6 a *border controlled precursor* is a substance, including a growing plant, that is listed by a regulation as a border controlled precursor, a salt or ester of a listed border controlled precursor, an immediate precursor of listed border controlled precursor, or a border controlled precursor determined by the Minister in accordance with the serious drug precursor emergency determination mechanism at section 301.14.

A note has been included following section 301.6 to explain to the reader that the Minister must be satisfied of certain conditions before a decision to list a border controlled precursor, by regulation or by a determination can be made. Before a border controlled precursor can be listed in a regulation, the Minister must be satisfied of the criteria under section 301.8, that is that there is a risk that the substance will be used to unlawfully manufacture a controlled drug (other than a substance determined by the Minister in accordance with sections 301.13 or 301.14 which relate to the listing by emergency determination). A border controlled precursor is listed indefinitely in regulations until removed. ‘Regulation’ refers to the *Criminal Code Regulations 1995* (Cth).

Alternatively, a determination can be made by the Minister in relation to a border controlled precursor if satisfied of the conditions in subsection 301.14(2), that is that there is an imminent and substantial risk that the substance will be used to unlawfully manufacture a controlled drug. A determination to list a border controlled precursor may have effect for a period of up to 18 months from the time the determination is registered.

Subsection 301.6(2) provides that, for the purposes of subsection 301.6(1), an *immediate precursor* of a precursor listed in regulations means a chemical or compound (other than another precursor that is so listed) that is an immediate precursor in the manufacture by a chemical process of the listed precursor. This definition has been taken from current subsection 314.6(3) of the Criminal Code.

#### Section 301.7 – serious drugs – conditions for listing by regulation

This item is a new provision to Part 9.1 of the Criminal Code

Currently, the listings and quantities of ‘controlled’ and ‘border controlled’ drugs, plants and precursors are contained within Division 314 of the Criminal Code. An amendment to the listings (for example to add an additional drug to the list of ‘controlled drugs’) requires a legislative amendment. The legislative process may delay the timely listing of a substance as a controlled or border controlled substance in the Criminal Code, and this may be exploited by entrepreneurial criminals and organised crime groups.

‘Serious drug’ is defined in section 300.2 as controlled drugs, border controlled drugs, controlled plants and border controlled plants. Each of these terms is also defined in new Subdivision A of Division 301.

Given the growing markets in new and emerging substances, law enforcement agencies consider that it is increasingly important that swift action can be taken to proscribe new substances, where appropriate. Transferring the listings of illicit (controlled or border controlled) substances to regulations will improve the Government’s ability to be responsive as the illicit drugs market evolves, allowing new and emerging substances to be included in regulations more quickly than listing substances in the Criminal Code. This would be consistent with the recommendation of the Model Criminal Code Officers Committee which developed the model criminal offences relating to serious drugs in 1998. The Committee recommended that lists of controlled substances and threshold quantities be contained in regulations ‘so that they can be quickly and easily updated’.<sup>1</sup>

In circumstances where enough is known about a substance, in particular its effect, it is appropriate for a new drug or plant to be prescribed in the *Criminal Code Regulations 2002* (Cth) where the indefinite listing in regulations is warranted.

The intention of section 301.7 is to capture only illicit substances. Before a substance can be listed in regulations the Minister must be satisfied that the substance or plant is likely to be taken without appropriate medical supervision. To be taken without medical supervision in this context means to be used in circumstances beyond those considered appropriate for medical or therapeutic purposes. In addition to this, the Minister must also be satisfied of one or more the five listed criteria in paragraph 301.7(b) before a regulation may be made.

For a substance to be listed in regulations, the Minister must be satisfied that:

- (i) taking the substance or plant would create a risk of death or harm
- (ii) taking the substance would have a physical or mental effect substantially similar to that caused by taking a listed serious drug
- (iii) the substance has the capacity to cause physiological dependence
- (iv) possession or conduct is proscribed under a similar law of another jurisdiction, or
- (v) the substance or plant poses a substantial risk to the health or safety of the public.

The criteria at paragraph 301.7(b) are consistent with the approach taken by other jurisdictions such as Queensland, New Zealand and the United States, for listing illicit substances subject to criminal offences.

---

<sup>1</sup> Page 249, *Model Criminal Code: Chapter 6 Serious Drug Offences Report*, Model Criminal Code Officers Committee, October 1998.

The processes differ for listing a substance through the determination mechanism and permanently in regulations. There are also important differences between some of the requirements for making an emergency determination as compared to making a regulation.

A determination is made by the Minister and is a quicker process than having a substance listed in regulations. For a determination to be made, the Minister must be satisfied that there is an *imminent and substantial* risk that the drug or plant will be taken without appropriate medical supervision. In contrast, the process of preparing a regulation does not require the Minister to be satisfied that there is an ‘imminent and substantial’ risk associated with the substance before a regulation may be made. If the Minister is satisfied of 301.7(a) and one of the criteria in section 301.7(b), a regulation may be prepared for consideration by the Governor-General. This difference reflects that the emergency determination mechanism should only be used in the cases that require immediate action to control a high risk substance.

Before a regulation is made consultation will take place between relevant Commonwealth agencies (including the Attorney-General’s Department, the Australian Federal Police, the Australian Customs and Border Protection Service, the Department of Health and Ageing, and the Australian Crime Commission) to ensure consistency across Commonwealth instruments as much as possible and so that all available information in relation to a new substance is considered.

A regulation made by the Governor General to list a new substance will be a legislative instrument. An emergency determination by the Minister will also be a legislative instrument. The regulation or determination will be referred to the Senate Standing Committee on Regulations and Ordinances for consideration (*Legislative Instrument Act 2003*) where it will be scrutinised to ensure (among other things) that it does not unduly trespass on personal rights and liberties and it is in accordance with the provisions in the Criminal Code. In accordance with section 42 of the *Legislative Instrument Act 2003* the regulation will also be subject to disallowance.

#### Section 301.8 - serious drug precursors – conditions for listing by regulation

This item is a new provision to Part 9.1 of the Criminal Code.

Before a regulation may be made to list a substance as a controlled precursor or a border controlled precursor, the Minister must be satisfied that there is a risk that the substance will be used to unlawfully manufacture a controlled drug (other than a controlled drug determined by the Minister under the emergency determination mechanism).

The definition of ‘controlled drug’ is found at section 301.1. A controlled drug is a substance, other than a growing plant, that is listed by a regulation as a controlled drug, a drug analogue of a listed controlled drug; or a drug determined by the Minister as a controlled drug under section 301.13.

The manufacture of a controlled drug can be unlawful according to any or a number of federal, State or Territory laws. Because precursors have a wide range of legitimate uses, this provision identifies the necessary nexus to illicit drug manufacture. Manufacturing a controlled drug is a major indicator of criminality in the context of the precursor offences in Part 9.1 of the Criminal Code.

### Section 301.9 - meaning of ‘drug analogue’

Existing subsections 314.1(2) and 314.4(2) of the Criminal Code provide the definition of *drug analogue*. The amendments proposed in this Schedule would repeal these two sections and enact section 301.9, which contains a similar definition of a drug analogue.

Drug analogues are substances that have a similar chemical structure, and may be expected to have a similar pharmacological effect, to that of a controlled or border controlled drug listed in regulations (in accordance with section 301.7).

Subsection 301.9(2) provides that a drug analogue does not include a substance that is itself a listed controlled drug or border controlled drug. This is consistent with the existing provisions for drug analogues in the Criminal Code.

### **Subdivision B – Serious drugs and precursors: commercial, marketable and trafficable quantities**

#### Section 301.10 - meaning of ‘commercial quantity’

Section 301.10 is a new provision which brings together the current provisions found at subsections 314.1(5) and 314.4(4) of the Criminal Code with the commercial threshold quantities found in the list of substances at section 314 of the Criminal Code. For ease of reading this item provides a table which indicates to the reader all possible meanings of ‘commercial quantity’ that apply to the offences in Part 9.1 of the Criminal Code.

In relation to all serious drugs (other than analogues), controlled precursors and border controlled precursors, the minimum commercial quantity to be taken into account when applying the offences in Part 9.1 is the commercial quantity listed in the regulations for that substance.

In relation to any drug, plant or precursor covered by an emergency determination, the minimum commercial quantity is the quantity determined by the Minister in accordance with the emergency determination provision at section 301.15.

In relation to a drug analogue of a controlled drug or border controlled drug, the minimum commercial quantity is the commercial quantity listed in the regulations for that controlled drug or border controlled drug. If a substance is a drug analogue of two or more listed controlled drugs or border controlled drugs then the minimum commercial quantity of the drug analogue is calculated by taking the smallest commercial quantity of the two or more listed drugs.

A note has been included in section 301.10 to refer the reader to the definition of *drug analogue* at section 301.9. A drug analogue is a substance that has a similar chemical structure, and may be expected to have a similar pharmacological effect, to that of a controlled or border controlled drug.

#### Section 301.11 - meaning of ‘marketable quantity’

Section 301.11 is a new provision which brings together the current provisions found at subsections 314.1(4) and 314.4(3) with the marketable threshold quantities found in the list of substances at section 314 of the Criminal Code. For ease of reading this item provides a table

which indicates to the reader all possible meanings of ‘marketable quantity’ that apply to the offences in Part 9.1 of the Criminal Code.

In relation to all serious drugs (other than analogues), controlled precursor and border controlled precursors listed by a regulation the minimum marketable quantity to be taken into account when applying the offences in Part 9.1 is the marketable quantity listed in the regulations for that substance.

In relation to any drug, plant or precursor covered by an emergency determination, the minimum marketable quantity is the quantity determined by the Minister in accordance with the emergency determination provision at section 301.15.

In relation to a drug analogue of a controlled drug or border controlled drug, the minimum marketable quantity is the marketable quantity listed in the regulations for that controlled drug or border controlled drug. If a substance is a drug analogue of two or more listed controlled drugs or border controlled drugs then the minimum marketable quantity of the drug analogue is calculated by taking the smallest marketable quantity of the two or more listed drugs.

A note has been included in section 301.11 to refer the reader to the definition of *drug analogue* at section 301.9. A drug analogue is a substance that has a similar chemical structure, and may be expected to have a similar pharmacological effect, to that of a controlled or border controlled drug.

#### Section 301.12 - meaning of ‘trafficable quantity’

Section 301.12 is a new provision which brings together the current provision at subsection 314.1(3) of the Criminal Code with the trafficable threshold quantities found in the list of substances at section 314 of the Criminal Code. For ease of reading, this item provides a table which indicates to the reader all possible meanings of ‘trafficable quantity’ that apply to the offences in Part 9.1 Criminal Code.

Trafficable quantities are only prescribed for controlled drugs and controlled plants in the Criminal Code. The minimum trafficable quantity to be taken into account when applying the offences in Part 9.1 is the trafficable quantity listed in the regulations for that substance.

The quantity threshold tiers (i.e trafficable, marketable and commercial quantities) currently in place for substances listed in the Criminal Code will not be amended by this Schedule. In relation to controlled drugs or controlled plants covered by an emergency determination the minimum trafficable quantity is the quantity determined by the Minister in accordance with the emergency determination provision at section 301.15.

In relation to a drug analogue of a controlled drug or border controlled drug the minimum trafficable quantity is the trafficable quantity listed in the regulations for that controlled drug or border controlled drug. If a substance is a drug analogue of two or more listed drugs then the minimum trafficable quantity of the drug analogue is calculated by taking the smallest trafficable quantity of the two or more listed drugs.

To assist in interpreting section 301.12, a note has been included which directs the reader to the definition of *drug analogue* at section 301.9. A drug analogue is a substance that has a

similar chemical structure, and may be expected to have a similar pharmacological effect, to that of a controlled or border controlled drug. A drug analogue of a listed controlled or border controlled drug is itself a drug for the purposes of the offence provisions in Part 9.1 of the Criminal Code.

### **Subdivision C – Serious drugs and precursors: emergency determinations**

#### Section 301.13 - emergency determinations – serious drugs

This item adopts, with some modification, existing sections 301.6 and 301.8 of the Criminal Code which deals with the power to make emergency determinations for listing substances as controlled and border controlled drugs and plants.

The emergency determination mechanism aims to increase public safety by ensuring that substances with unknown or unidentified harms can be prohibited in a responsive manner, until such time as an appropriate assessment has been made.

In order to make a determination under section 301.13, the Minister must first be satisfied that there is an imminent and substantial risk that the substance or plant will be taken without appropriate medical supervision. In this context, to be ‘taken without medical supervision’ means to be used in circumstances beyond those considered appropriate for medical or therapeutic purposes. This may include circumstances where there is not yet evidence available that the substance is being taken without medical supervision in Australia, but there is evidence from other countries that the substance is available in circumstances beyond those considered appropriate for medical or therapeutic purposes, and there is a risk the substance may be amenable to abuse in Australia. The requirement for the Minister to consider whether the substance may be taken without medical supervision reflects existing sections 301.6 and 301.8 of the Criminal Code.

Once satisfied that there is an imminent and substantial risk that the substance or plant will be taken without appropriate medical supervision the Minister must then consider the conditions in paragraph 301.13(b). For a determination to be made, the Minister must be satisfied of one or more of the following:

- (i) taking the substance or plant may create a risk of death or harm
- (ii) taking the substance or plant may have a physical or mental effect substantially similar to that caused by taking a listed serious drug
- (iii) there is limited or no known lawful use of the substance or plant in Australia, and the substance or plant has been found by a public official in the course of the performance of the official’s duties
- (iv) the substance or plant may pose a substantial risk to the health or safety of the public.

Subsections 301.13(b)(i),(ii) and (iv) include the word ‘may’ to reflect that there *may be risks* associated with the substance, but these risks may not be able to be confirmed by evidence at the time. This will enable the proscription of the substance through a determination, pending expert advice to determine whether the substance should be proscribed in regulations in the longer term.

Subsection 301.14(3) makes it clear that the Minister cannot make more than one determination in relation to a particular substance or plant. Threshold quantities of drugs listed through determinations may be prescribed through the determination in accordance with section 301.15.

Before an emergency determination to list a new substance is made under section 301.13, consultation will take place between relevant Commonwealth agencies (including the Attorney-General's Department, the Australian Federal Police, the Australian Customs and Border Protection Service, the Department of Health and Ageing, and the Australian Crime Commission) to ensure consistency across Commonwealth instruments as much as possible and so that all available information in relation to a new substance is considered.

The processes differ for listing a substance through the determination mechanism and permanently in regulations. There are also important differences between some of the requirements for making an emergency determination as compared to making a regulation.

A determination is made by the Minister and is a quicker process than having a substance listed by regulations. For a determination to be made the Minister must be satisfied that there is an *imminent and substantial* risk that the drug or plant will be taken without appropriate medical supervision. Alternatively, the process of preparing a regulation does not require the Minister to be satisfied that there is an 'imminent and substantial' risk associated with the substance before a regulation may be made. If the Minister is satisfied of 301.7(a) and one of the criteria in section 301.7(b), a regulation may be prepared for consideration by the Governor-General. This difference reflects that the emergency determination mechanism should only be used in the cases that require immediate action to control the substance.

An emergency determination will be a legislative instrument. The determination will be referred to the Senate Standing Committee on Regulations and Ordinances for consideration (*Legislative Instrument Act 2003*) where it will be scrutinised to ensure (among other things) that it does not unduly trespass on personal rights and liberties and it is in accordance with the provisions in the Criminal Code. In accordance with section 42 of the *Legislative Instrument Act 2003* the determination will also be subject to disallowance.

#### Section 301.14 - emergency determinations – serious drug precursors

This item adopts, with some modification, current sections 301.7 and 301.9 of the Criminal Code. Section 301.14 gives the Minister the power to make emergency determinations listing substances as a controlled precursor or border controlled precursor for the purposes of Part 9.1 of the Criminal Code. In order to make a determination under section 301.14, the Minister must first be satisfied that there is an imminent and substantial risk that the substance will be used to unlawfully manufacture a controlled drug.

The definition of 'controlled drug' is found at section 301.1. A controlled drug is a substance, other than a growing plant, that is listed by a regulation as a controlled drug, a drug analogue of a listed controlled drug; or a drug determined by the Minister as a controlled drug under section 301.13 (which outlines the emergency determination mechanism).

The manufacture of a controlled drug can be unlawful according to any or a number of federal, State or Territory laws. Because precursors have a wide range of legitimate uses, this provision identifies the necessary nexus to illicit drug manufacture. Manufacturing a

controlled drug is a major indicator of criminality in the context of the precursor offences in Part 9.1 of the Criminal Code.

Before an emergency determination to list a new controlled precursor is made under section 301.14, consultation will take place between Commonwealth agencies (the Attorney-General's Department, the Australian Federal Police, the Australian Customs and Border Protection Service, the Department of Health and Ageing, the Australian Crime Commission and other relevant agencies) to ensure consistency across Commonwealth instruments as much as possible and so that all available intelligence in relation to a new substance is considered.

Subsection 301.14(3) makes it clear that the Minister cannot make more than one determination in relation to a particular substance or plant.

An emergency determination will be a legislative instrument. The determination will be referred to the Senate Standing Committee on Regulations and Ordinances for consideration (*Legislative Instrument Act 2003*) and will be scrutinised to ensure (among other things) that it does not unduly trespass on personal rights and liberties and it is in accordance with the provisions in the Criminal Code. In accordance with section 42 of the *Legislative Instrument Act 2003* the determination will also be subject to disallowance.

#### Section 301.15 - emergency determinations – commercial, marketable and trafficable quantities

Subsection 301.15(1) allows the Minister to, by legislative instrument, prescribe quantities of a substance when an emergency determination is made. This replaces the (more complex) approach taken in existing section 301.10 of the Criminal Code. The Minister may prescribe commercial, marketable or trafficable quantities for controlled drugs and controlled plants, and commercial and marketable quantities for controlled precursors or border controlled precursors.

Subsection 301.15(2) restricts the Minister's power under subsection 301.15(1). The Minister may only make a determination specifying the quantity of a substance if there is no regulation in force at the time that specifies the quantity of that drug or precursor. This ensures that the quantities prescribed in regulations have precedence over those made in determinations.

A note is included to indicate to the reader that the definitions of commercial quantity, marketable quantity and trafficable quantity in Subdivision B (sections 301.10, 301.11 and 301.12) allow for quantities of serious drugs and precursors to be listed in regulations.

#### Section 301.16 - emergency determinations - effectiveness

This provision applies to emergency determinations made under new Subdivision C and adopts with modification current subsection 301.11(1) and section 301.12 of the Criminal Code

Under the current provisions in the Criminal Code a determination has effect for 28 days, or such shorter period as specified. However, evidence to support ongoing listing will not necessarily be readily available when the substance first comes to the attention of the

Government, particularly when a substance is new and emerging. A 28 day period is insufficient time to obtain and assess such evidence sufficiently for a decision to be made on ongoing listing. Consequently, there may be difficulties and subsequent delays in satisfying the requirements for the listing of a new substance.

This was shown when the interim regulation mechanism was used for the first time in April 2011 to proscribe four drugs and one precursor (and threshold quantities) to be subject to Part 9.1 of the Criminal Code. These substances were Benzylpiperazine (BZP), Ketamine, Methcathinone, 4-Methylmethcathinone (4-MMC) and Phenylpropanolamine.<sup>2</sup> For the more novel substances (BZP and 4-MMC), it was difficult to obtain evidence to satisfy the particular requirements for listing. A significant proportion of this information was obtained from the European Monitoring Centre for Drugs and Drug Addiction and international sources found online.

When little is known about a substance, it is difficult to obtain enough information about the harms and effects of the substance in time to prevent their entry to the Australian market or their proliferation within Australia. The benefit of an emergency determination is that the Government can act quickly to prevent trade in potentially harmful substances.

Subsection 301.16(1) aims to provide sufficient time for appropriate analysis, information gathering and consultation to be undertaken, by extending the 28 day period to provide that an emergency determination has effect for an initial period up to 12 months from the time that the determination is registered (within the meaning of the *Legislative Instruments Act 2003*). The 12 month period of effect is considered appropriate in order to allow for expert analysis in determining the harms of a substance and, on the basis of this assessment, for an informed decision to be made about whether it should be listed indefinitely in the regulations. The 12 month period is also consistent with the approach taken by the United States and New Zealand for temporary or emergency listing of substances

Subsections 301.16(2) and 301.16(3) establish an extension mechanism for emergency determinations. If exceptional circumstances prevent the listing by regulation of the substance or quantity, these subsections provide that the Minister may extend by legislative instrument the period in which the determination is in force for a further period or periods, providing that the determination is in force for no longer than 18 months after the time of registration.

Subsection 301.16(4) ensures that an emergency determination made under Subdivision C has no effect to the extent that it is inconsistent with a regulation made to list a substance under Subdivision A.

#### Section 301.17 - emergency determinations – publication

Section 301.17 adopts current subsections 301.11(4) and (5) of the Criminal Code which establish an additional requirement on the Minister when making an emergency determination under Subdivision C.

---

<sup>2</sup> The interim regulations commenced on 9 April 2011 through the *Criminal Code Amendment Regulations 2011 (No.1)*.

Subsection 301.17(1) provides that on or before the day on which the determination is registered, the Minister must (a) make a public announcement of the determination, and (b) cause a copy of the announcement to be published on the internet and in a newspaper circulating in each State, the Australian Capital Territory and the Northern Territory.

A public announcement is considered appropriate given the serious criminal offences that are enlivened by the determination that a substance is subject to Part 9.1 of the Criminal Code. An announcement made under subsection 301.17(1) is not a legislative instrument under the Legislative Instrument Act 2003 (Cth).

**Item 17 - at the end of paragraphs 307.4(1)(b), 307.7(1)(c) and 307.10(1)(c) of the *Criminal Code***

This item adds ‘other than a determined border controlled drug or a determined border controlled plant’ at the end of paragraphs 307.4(1)(b), 307.7(1)(c) and 307.10(1)(c).

Emergency determinations are designed to cater for the situation where there are reasons to justify the urgent proscription of a substance, allowing substances with suspected but unconfirmed harms to be prohibited quickly pending full consideration by experts. If harms are then identified, the Minister would be able to consider preparing a regulation for the permanent listing of the substance in regulations.

On the basis that an emergency determination can be made in relation to a substance where the known risks may not yet be fully substantiated and that may later be found to have no known harms, it is not appropriate to subject an individual to criminal punishment on the basis of possessing a small quantity of the substance or importing/exporting border controlled substance without commercial intent.

For this reason, Part 9.1 of the Criminal Code has been amended so that a person cannot be subject to an offence against section 307.4, 307.7, 307.10, in relation to a substance that is subject to an emergency determination.

Remaining offence provisions in Part 9.1 will continue to apply with respect to substances subject to an emergency determination (as applicable).

**Item 18 - at the end of paragraph 308.1(1)(b) of the *Criminal Code***

This item adds ‘other than a determined controlled drug’ to the end of paragraph 308.1(1)(b)

Emergency determinations are designed to cater for the situation where there are reasons to justify the urgent proscription of a substance, allowing substances with suspected but unconfirmed harms to be prohibited quickly pending full consideration by experts. If harms are then identified, the Minister would then be able to consider preparing a regulation for the permanent listing of the substance in regulations. On the basis that an emergency determination can be made in relation to a substance where the known risks may not yet be fully substantiated and that may later be found to have no known harms, it is not appropriate to subject an individual to criminal punishment on the basis of possessing a small quantity of the substance.

For this reason, Part 9.1 of the Criminal Code has been amended so that a person cannot be subject to an offence against section 308.1 (possessing controlled drugs) in relation to a substance that is subject to an emergency determination.

The remaining offence provisions in Part 9.1 will continue to apply with respect to substances subject to an emergency determination (as applicable).

#### **Item 19 – Division 314 of the *Criminal Code***

This item repeals existing Division 314 of the Criminal Code.

Existing Division 314 of the Criminal Code currently contains the listings and quantities of ‘controlled’ and ‘border controlled’ drugs, plants and precursors. These listings are to be moved to the *Criminal Code Regulations 2002* (Cth).

It is considered appropriate to transfer the listings of illicit substances to the regulations in order to allow the Government to respond swiftly to proscribe new substances that arise as the illicit drugs market evolves. In addition, it will permit new and emerging substances to be included in the regulations more quickly than listing substances in the Criminal Code, where an amendment to the list requires a legislative amendment. This is consistent with the recommendation of the Model Criminal Code Officers Committee which developed the model criminal offences relating to serious drugs in 1998.

#### ***Customs Act 1901***

##### **Item 20 – subsection 51A(1)**

This item omits the phrase, ‘301.8 or 301.9 of the Criminal Code’ from existing subsection 51A(1) of the *Customs Act 1901*, and replaces it with the phrase ‘Subdivision C of Division 301 of the Criminal Code (which deals with emergency Ministerial determinations of serious drugs and precursors)’.

This is a consequential amendment which is necessary as a result of item 16, which repeals Division 301 of the Criminal Code.

##### **Item 21 – subsection 112A(1)**

This item omits the phrase, ‘301.8 of the *Criminal Code*’ in existing subsection 112A(1) of the *Customs Act 1901*, and replaces it with the phrase ‘section 301.13 of the *Criminal Code* (which deals with emergency Ministerial determinations of serious drugs)’.

This is a consequential amendment which is necessary as a result of item 16, which repeals Division 301 of the Criminal Code.

##### **Item 22 - subsection 112A(3)**

This item omits the phrase ‘301.9 of the *Criminal Code*’ from existing subsection 112A(3) of the *Customs Act 1901*, and replaces it with the phrase ‘section 301.14 of the Criminal Code (which deals with emergency Ministerial determinations of serious drug precursors)’.

This is a consequential amendment which is necessary as a result of item 16, which repeals Division 301 of the Criminal Code.

## **Part 2 – Application and transitional**

### **Item 23 – Application – offences committed after commencement**

This is a formal clause that specifies that the amendments made by this Act apply to offences committed (or alleged to have been committed) on or after the commencement of the Act.

A note has been included which cross references section 2 of the Act, which provides that the Act commences on a day fixed by proclamation or 6 months following Royal Assent (whichever is earlier).

### **Item 24 – Transitional – listing of existing serious drugs and precursors by regulation**

This item explains that substances listed in the Criminal Code before the commencement of this schedule will remain in the same class of substance. For example, amphetamine is listed as a controlled drug in section 314.1 of the Criminal Code, following the commencement of the Schedule, amphetamine will remain a controlled drug and be listed as a controlled drug in the *Criminal Code Regulations 2002* (Cth). The Minister will not need to be satisfied of the criteria in new sections 301.7 or 301.8 (which relate to listing of new serious drugs and precursors by a regulation, explained in item 16 above) for the substances currently subject to the offences in Part 9.1 of the Criminal Code.

## **Schedule 2 – Identity crime and air travel**

### **GENERAL OUTLINE**

The purpose of Schedule 2 is to expand identity crime offences in the *Criminal Code Act 1995* and create new offences and powers relating to air travel and the use of false identities.

### **Identity crime**

Law enforcement agencies have identified identity crime as a significant threat and as one of the fastest growing crimes in Australia. The internet and other new technologies have provided ideal instruments for organised criminals to harness and exploit the identity information of others.

Part 1 of this Schedule expands existing identity crime offences to include dealing in identification information to commit foreign indictable offences, in addition to Commonwealth indictable offences. This will strengthen the current regime for identity crime by capturing individuals located in Australia who engage in international identity crime.

Part 1 also introduces a new offence of dealing in identity information using a carriage service. This will capture persons who use the internet to make, supply or use identification information with the intent of passing themselves, or someone else, off as the person identified in the information for the purpose of committing, or facilitating, a Commonwealth, State, Territory or foreign offence.

### **False identity and air travel**

Part 2 of this Schedule amends the *Crimes Act 1914* and the *Criminal Code Act 1995*. The amendments are aimed at enabling law enforcement agencies to target individuals who travel by air under false identities. In particular, they seek to prevent individuals involved in serious and organised crime from taking flights under false identities in order to facilitate criminal activities and avoid police detection.

In its June 2011 report on its *Inquiry into the Adequacy of Aviation and Maritime Security Measures to Combat Serious and Organised Crime*, the Parliamentary Joint Committee on Law Enforcement (PJCLE) found that criminal networks have infiltrated Australia's aviation and maritime sectors. The PJCLE had regard to evidence that individuals involved in organised crime had been travelling by air under false identities in order to avoid police detection and facilitate criminal activities such as money laundering and illicit drug trafficking.

It is not currently a criminal offence to use false identification information to travel by air, although offences for using falsified official documents may apply such as offences for the use of false passports under the *Australian Passports Act 2005*. The PJCLE recommended the creation of a new offence of travelling under a false identity to reduce this vulnerability that is being exploited by criminal networks. The Government agreed to this recommendation in its response to the PJCLE's report, and the amendments in Part 2 give effect to the recommendation.

To support the offences, the Bill will introduce a power to allow police officers at relevant airports to request identification information from individuals where the police officer holds a reasonable suspicion that the person has committed, is committing or intends to commit a serious criminal offence.

## **Part 1 – Identity crime**

### *Criminal Code Act 1995*

#### **Item 1 – at the end of Division 370 of Part 9.5 of the *Criminal Code***

##### Section 370.2

Section 370.2 contains a definition of foreign indictable offence that applies to Division 372. Foreign indictable offence has been defined as an offence against a law of a foreign country or part of a foreign country that is constituted by conduct that, if engaged in Australia, could constitute an indictable offence against the law of the Commonwealth.

This definition is modelled on the definition of ‘foreign offence’ in section 390.1 of the Criminal Code, relating to criminal associations and organisations, and expressly includes offences against the law of a foreign country and offences against a law of part of a foreign country. The definition will ensure that an offence against the law of a particular jurisdiction within a country, such as a State or Province, will be captured by the definition.

Under section 4G of the Crimes Act, offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

##### Section 370.3

The intention of section 370.3 is to ensure that State and Territory laws that create overlapping offences will continue to operate alongside Part 9.5 of the Criminal Code. This approach of allowing overlapping Commonwealth, State and Territory offences to operate concurrently is consistent with Parliament’s approach to other serious crimes such as terrorism, serious drug offences and telecommunications offences.

Subsection 4C(2) of the Crimes Act protects defendants from double jeopardy by preventing multiple penalties being imposed for substantially the same conduct.

#### **Item 2 - paragraph 372.1(1)(c)**

This item repeals paragraph 372.1(1)(c) and substitutes a new paragraph.

Section 372.1 currently provides that it is an offence for a person to deal in identification information with the intention of passing themselves, or someone else, off as another person for the purpose of committing, or facilitating the commission of, an indictable offence against the laws of the Commonwealth.

This item expands the offence of dealing in identification to include foreign indictable offences in addition to indictable offences against the law of the Commonwealth. This aims to ensure that a greater range of identity crime can be captured by the dealing in identification information offence.

For example, this amendment will capture a situation where a person deals in identification information in Australia for the purposes of committing fraud in another country. This will

allow Australian law enforcement agencies to take action to investigate and prosecute such activities within Australia, potentially preventing the overseas fraud from ever taking place.

### **Item 3 – after section 372.1 of the *Criminal Code***

#### Subsections 372.1A(1) and (2)

New subsection 372.1A(1) makes it an offence to deal in identification information using a carriage service, such as the internet or a mobile phone, with the intention that a person pass themselves off as another person for the purpose of committing, or facilitating the commission of, an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

‘Identification information’ and ‘deal’ in information are defined in section 370.1 of the Criminal Code. Under item 1 of this Schedule, it ‘foreign indictable offence’ is defined as an offence against a law of a foreign country or part of a foreign country that is constituted by conduct that, if engaged in in Australia, could constitute an indictable offence against the law of the Commonwealth

An example of such an offence would include a person using the internet to supply identification information such as a driver’s licence or financial account number with the intention of passing themselves off as that person to fraudulently acquire a benefit.

To establish the offence in subsection 371.1A(1), the prosecution will need to prove beyond a reasonable doubt that:

- a person intentionally made, supplied or used identification information
- the person did so using a carriage service, and
- the person intended that they, or any other person, would use that identification information to pretend to be, or to pass themselves off as, another person for the purpose of committing, or facilitating the commission of, an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

New subsection 372.1A(2) provides that absolute liability will apply to paragraphs 372.1A(1)(b) and (d). Absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to these elements would be that no fault element needs to be proved and the defence of mistake of fact is not available.

In relation to paragraph 372.1A(1)(b), the application of absolute liability would mean that the prosecution would not be required to prove that the defendant knew or was reckless as to whether a carriage service was used. In relation to paragraph 372.1A(1)(d), the application of absolute liability would mean that the prosecution would not be required to prove that a person knew or was reckless that the offence they were committing with the identification information is an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

Absolute liability is appropriate and required for these elements of the offence because they are jurisdictional elements which do not relate to the substance of the offence or the

culpability of the defendant, but mark a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and the States. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The application of absolute liability is consistent with other offences in the Criminal Code.

This offence will be punishable by a maximum penalty of 5 years imprisonment. This is consistent with the penalty provided for in existing section 372.1 of the *Criminal Code Act 1995*.

New subsection 372.1A(5) will insert a new presumption applying to the element that a carriage service was used to engage in the relevant criminal conduct. This element provides the relevant connection to the Commonwealth's constitutional power. The presumption will provide that, in relation to the element of the offence that a carriage service was used, if the prosecution proves beyond a reasonable doubt that the person engaged in the relevant criminal conduct in paragraph 372.1A(1)(a) then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct. The operation of the new presumption is described in detail below (under the heading 'Subsection 372.1A(5)').

#### Subsections 372.1A(3) and (4)

New subsection 372.1A(3) makes it an offence to deal in identification information obtained using a carriage service, such as the internet or a mobile phone, with the intention that a person pass themselves off as another person for the purpose of committing, or facilitating the commission of, an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

'Identification information' and 'deal' in information are defined in section 370.1 of the Criminal Code. Under item 1 of this Schedule, 'foreign indictable offence' is defined as an offence against a law of a foreign country or part of a foreign country that is constituted by conduct that, if engaged in Australia, could constitute an indictable offence against the law of the Commonwealth

This offence differs from the offence in subsection 372.1A(1) because it applies where a person deals in identification information in any way where the information was obtained using a carriage service. For example, the offence would apply where a person obtains identification information through a website, but then prints the information out and uses the hard copy version for the purposes of facilitating the commission of another offence.

To establish this offence, the prosecution will need to prove beyond a reasonable doubt that:

- a person intentionally obtained identification information
- the person intentionally did so using a carriage service
- the person made, supplied or used identification information, and
- the person intended that they, or any other person, would use that identification information to pretend to be, or to pass themselves off as, another person for the purpose

of committing, or facilitating the commission of, an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

New subsection 372.1A(4) provides that absolute liability will apply to paragraphs 372.1A(3)(b) and (e). Absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to these elements would be that no fault element needs to be proved and the defence of mistake of fact is not available.

In relation to paragraph 372.1A(3)(b), the application of absolute liability would mean that the prosecution would not be required to prove that the defendant knew or was reckless as to whether a carriage service was used. In relation to paragraph 372.1A(3)(e), the application of absolute liability would mean that the prosecution would not be required to prove that a person knew or was reckless that the offence they were committing with the identification information is an indictable offence against the law of the Commonwealth, a State or a Territory or a foreign indictable offence.

Absolute liability is appropriate and required for these elements of the offence because they are jurisdictional elements which do not relate to the substance of the offence or the culpability of the defendant, but mark a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and the States. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The application of absolute liability is consistent with other offences in the Criminal Code.

This offence will be punishable by a maximum penalty of 5 years imprisonment. This is consistent with the penalty provided for in existing section 372.1 of the Criminal Code.

New subsection 372.1A(5) inserts a new presumption applying to the element that a carriage service was used to engage in the relevant criminal conduct. This element provides the relevant connection to the Commonwealth's constitutional power. The presumption will provide that, in relation to the element of the offence that a carriage service was used, if the prosecution proves beyond a reasonable doubt that the person engaged in the relevant criminal conduct in paragraph 372.1A(3)(c) then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct. The operation of the new presumption is described below.

#### Subsection 372.1A(5)

Subsection 372.1A(5) will insert a new presumption relating to the requirement in paragraphs 372.1A(1)(b) and 372.1A(3)(b) that the relevant criminal conduct was engaged in using a carriage service. The presumption is consistent with existing section 475.1B of the Criminal Code, which relates to telecommunications offences in Division 474 of the Criminal Code.

The purpose of this subsection is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the criminal conduct. In the context of identity crime, often the evidence that a carriage service was used to engage in the conduct is entirely circumstantial, consisting of evidence that the defendant's computer had identification information of another person on the hard drive, that

the computer was connected to the internet and that records show that the computer accessed particular websites with names suggesting an association with identity crime.

Subsection 372.1A creates offences aimed at the use of a carriage service to commit identity crime. To a great extent, these offences rely on the Commonwealth's telecommunications power under the Constitution. Thus, the requirement in subsection 372.1A that the relevant criminal conduct be carried out through a carriage service is a jurisdictional requirement. A jurisdictional element of the offence is an element that does not relate to the substance of the offence or the defendant's culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

Subsection 372.1A(5) will provide for a new presumption applying to the physical element in the offences in subsections 372.1A(1) and (3) that a carriage service was used to engage in the particular criminal conduct. That is, in paragraphs 372.1A(1)(b) and 372.1A(3)(b) where the physical element of the offence consists of a person using a carriage service to engage in the particular criminal conduct contained in paragraphs 372.1A(1)(a) and 372.1A(3)(a) and the prosecution proves beyond a reasonable doubt that the person engaged in the conduct set out in paragraphs 372.1A(1)(a) and 372.1A(3)(a), then it is presumed, unless the person proves to the contrary, that the person used a carriage service to engage in that conduct.

A defendant will bear a legal burden in relation to proving that he or she did not use a carriage service to engage in the conduct. Sections 13.4 and 13.5 of the Criminal Code provide that in the case of a 'legal burden', a defendant must prove the relevant matter on the balance of probabilities. If this is done, it is then for the prosecution to refute the matter beyond reasonable doubt. A legal burden is appropriate because, if the prosecution has proved beyond reasonable doubt that the defendant engaged in the relevant criminal conduct, then the defendant should only be absolved from liability for a Commonwealth identity crime if the defendant can prove they did not use a carriage service to engage in the conduct.

#### Subsection 372.1A(6)

Subsection 372.1A(6) provides that the dealing in identification information using a carriage service offences in subsections 372.1A(1) and (3) apply even if it is impossible to commit the Commonwealth, State, Territory or foreign indictable offence or the offence is to be committed at a later time. For example, a person may still commit an offence under section 372.1A even if law enforcement agencies intervene to prevent a foreign fraud offence from being committed.

It would not be a defence that the person to whom the information relates consented to the information being made, supplied or used.

A person would not, however, commit these offences by dealing in their own identification information.

#### **Item 4 – paragraph 372.2(1)(c) of the *Criminal Code***

This item inserts a reference to the new carriage service offences in subsections 372.1A(1) and (3) into the offence of possession of identification information in section 372.2 of the Criminal Code. This will broaden the scope of the 'possession' offence in section 372.2.

The effect of the amendment is that a person commits an offence if they possess identification information and intend that any person will use the identification information to commit an offence that involves dealing in identification information using a carriage service.

For example, this would capture a situation in which a person holds identification information, such as a driver's licence or credit card information, on a personal hard drive where that hard drive may be provided to another person for the purposes of dealing in identification information using the internet. In such circumstances, Australian law enforcement agencies could investigate and prosecute the first person for possession of the identification information so long as it can be shown that it was provided to another person with the intention that it be used to commit an offence against section 372.1 or subsection 372.1A (1) or (3).

**Item 5 – paragraph 372.3(1)(d) of the *Criminal Code***

This item inserts a reference to the new carriage service offences in subsections 372.1A(1) and (3) into the offence of possession of equipment used to make identification documentation in section 372.3 of the *Criminal Code*. This will broaden the scope of the 'possession of equipment' offence in section 372.3.

The effect of the amendment is that a person commits an offence if they possess equipment and intend that any person will use the equipment to make identification documentation (as defined in section 370.1 of the *Criminal Code*) with the intention that that identification documentation will be used to commit an offence that involves dealing in identification information using a carriage service.

An example would be where a person has possession of a scanner or copier which they intend to use in order to manufacture a birth certificate with the intention of using that birth certificate to commit an offence. In such circumstances, Australian law enforcement agencies could investigate and prosecute the person for possession of the equipment so long as it can be shown that it was intended to be used to make identification information for the purposes of committing an offence against 372.1 or subsection 372.1A (1) or (3).

**Items 6 and 7 – subsections 372.5(1) and (2) of the *Criminal Code***

This item will amend the existing alternative verdict provision in section 372.5 to include the new carriage service offences in section 372.1A. This will mean that a trier of fact, in a prosecution for an offence under section 372.1 or subsection 372.1A(1) or (3), will be able to find a person guilty of the offence under section 372.2 instead, provided that the person was accorded procedural fairness in relation to that finding of guilt. The trier of fact must be satisfied beyond reasonable doubt that the person is guilty of the section 372.2 offence.

The offence in section 372.2 of possession of identification information is preparatory to the offences of dealing in identification information. As a matter of logic, a person must 'possess' identification information to make, supply or use it in a dealing offence. The point at which the possession offence becomes the dealing offence is when the person passes themselves off as another person to commit a relevant offence.

If a trier of fact is satisfied that a person possessed identification information with the intention of engaging in conduct that would be an offence under subsection 372.1A(1) or (3),

but not that the person committed the more serious dealing offence, the person should not escape prosecution for the preparatory offence, subject to the safeguard of procedural fairness.

## **Part 2 – False identity and air travel**

### *Crimes Act 1914*

#### **Item 8 – after Division 3A of Part IAA**

This item inserts a new Division 3B—Powers to require identity information at airports. Division 3B will empower constables to request production of identification information at airports in certain circumstances.

This is necessary in order to support detection and investigation of the offences relating to air travel and false identity in new Division 376 of the Criminal Code. The power will also assist law enforcement authorities in the investigation of other serious offences as it can be used where a constable holds a reasonable suspicion that a person at an airport has committed, is committing, or is intending to commit an offence punishable by imprisonment for 12 months or more.

#### **Division 3B—Powers to require identity information at airports**

##### Section 3UL

This section will insert definitions associated with the power to request identity information at airports in new Division 3B.

The definition of *constitutional airport* is identical to the same term defined in new Division 376 of the Criminal Code (at item 9 of this Schedule). The definition includes two components. The first component, in paragraph (a) of the definition of *constitutional airport*, is linked to the definition of *Commonwealth aerodrome* in section 3 of the *Crimes (Aviation) Act 1991*. This aspect of the definition is intended to rely on the Commonwealth Parliament's power under subsection 52(i) of the Constitution to make laws with respect to Commonwealth places.

The definition of Commonwealth aerodrome refers to 'an area of land or water in Australia that is owned by the Commonwealth and used, or intended for use, either wholly or partly, for, or in connection with, the arrival, departure or other movement of aircraft', or a core regulated airport within the meaning of the *Airports Act 1996*.

Section 7 of the Airports Act lists a number of airports as *core regulated airports*, including all Australia capital city airports, Sydney West Airport, Gold Coast Airport, Launceston Airport, Alice Springs Airport, Townsville Airport, and any other airport specified by regulation. The Airports Regulations lists a range of regional airports.

The second component in paragraph (b) of the definition of *constitutional airport* relates to airports that are located in Territories. This aspect of the definition is intended to rely on the Commonwealth Parliament's power under section 122 of the Constitution to make laws with respect to territories.

New section 3UL will insert a definition of *government photographic identity document*. The definition will cover any government-issued photographic identification such as a passport, driver licence or proof of age card. The definition also includes photographic

identities issued by foreign governments, for example foreign passports or national identity cards. Government identity documents have been specified as they are proofs of identity most likely to be accurate. The definition would not include identification documents issued by private bodies, such as credit cards, or documents issued by the Government without a photograph, such as a Medicare card.

New section 3UL will insert a definition of *identity document*. The definition is based on the definition of *evidence of identity* in Part IAC of the Crimes Act relating to assumed identities. *Identity document* is defined broadly to include the documents that would fall within the definition of *government photographic identity document* (described above) as well as birth certificates, credit cards, student cards, and a variety of other documents that can be used to evidence or indicate a person's identity or any aspect of a person's identity.

The definition of *identity document* also provides for exclusion of certain documents by regulation, for example if certain types of identity documentation are found to be particularly unreliable or susceptible to fraud.

### Section 3UM

Under new section 3UM, constables at airports will have the power to request identification from an individual, if a threshold test is satisfied. Due to constitutional considerations, the threshold test differs depending on the nature of the airport at which the request is made.

The term *constable* has been used for consistency with existing terminology in the Crimes Act. Section 3 of the Crimes Act defines a *constable* as 'a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory'.

Subsection 3UM(1) applies where a request is made at a constitutional airport. Section 3UL defines constitutional airport.

A constable at a constitutional airport can make a request under subsection 3UM(1) if they reasonably suspect that an individual has committed, is committing or intends to commit a Commonwealth, State or Territory offence punishable by imprisonment of 12 months or more. In practice, subsection 3UM(1) would apply to most major airports, including all Australian capital city airports, and all airports located in Territories.

Subsection 3UM(1) relies upon the Commonwealth Parliament's power to make laws with respect to Commonwealth places and Territories.

Subsection 3UM(2) would apply where a request is made at an airport within Australia that is not a constitutional airport. A constable at an airport that is not a constitutional airport can make a request under the section if they reasonably suspect that an individual has committed, is committing or intends to commit a Commonwealth offence punishable by imprisonment of 12 months or more. In practice, subsection 3UM(2) would apply to all remaining Australian airports including Cairns Airport, which is the only international airport that is not a constitutional airport.

Under subsections 3UM(1) and (2), only those individuals who the police reasonably suspect may be involved in serious criminal activity could be asked to provide identification. The

threshold of reasonable suspicion is consistent with the threshold for other investigations powers such as search warrants.

Under subsection 3UM(3), once a threshold test in subsections 3UM(1) or (2) is satisfied, a constable may request that the person under suspicion (the suspect) provide evidence of the suspect's identity.

There is currently no requirement for individuals in Australia to carry identification. As a result, the provision allows for a series of cascading requests. The constable may request from the suspect a government photographic identity document in relation to the suspect. If the suspect does not produce such a document, the constable may request some other identity documentation as defined in section 3UL. If the suspect does not produce any identification documentation, the constable may request that the suspect provide their name and address, either verbally or by another method such as in writing.

A person who has been subject to a request under subsection 3UM(3) must comply with the request. Section 3UN sets out an offence of failing to comply with the request.

Subsections 3UM(4) and (5) provide procedural fairness safeguards by inserting duties with which the requesting constable must comply.

Before making a request under subsection 3UM(3), a constable who is not in uniform must comply with subsection 3UM(4). In such a case, the constable is required to show the suspect evidence that the constable is a constable (subparagraph 3UM(4)(a)(i)) and, if the suspect requests, the constable must also comply with the requirements of subsection 3UM(5) (subparagraph 3UM(4)(a)(ii)).

Under paragraph 3UM(4)(b), a constable must inform the suspect that it may be an offence not to comply with the request or to give a false or misleading document or false or misleading information in response to a request.

Subsection 3UM(5) will apply if the constable is not in uniform and the suspect requests further information from the constable, either under subparagraph 3UM(4)(a)(ii) or otherwise. If requested, the constable must give the suspect the constable's name (paragraph 3UM(5)(a)), the address of the constable's place of duty (paragraph 3UM(5)(b)), the constable's identification number if any (paragraph 3UM(5)(c)) and, if the constable has no identification number, the constable's rank ((paragraph 3UM(5)(d)).

The constable would commit an offence under new subsection 3UN(3) if he or she did not comply with these requirements (detailed below).

#### Subsections 3UN(1) and (2)

Under new subsection 3UN(1), a person would commit an offence if he or she fails to comply with a request under section 3UM and the requesting constable has complied with the duties that apply to the constable under that section. A person can fail to comply with a request under section 3UM if they refuse to provide evidence of their identity, or if they do not provide any appropriate response.

To establish that the offence under section 3UN(1) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- a constable had made a request in accordance with section 3UM
- the suspect intentionally failed to comply with the request, and
- the constable had not failed to comply with his or her duties in subsection 3UM(4).

The offence at subsection 3UN(1) will be punishable by a maximum penalty of 20 penalty units. This penalty is consistent with the penalty for the offences of refusing or failing to comply with a request to provide name and address in relation to preventative detention orders (section 105.21 of the Criminal Code) and protective service offences (section 14I of the *Australian Federal Police Act 1979*).

A note has been included alerting the reader to the fact that, in failing to comply with the request, a person may also be committing the more serious offences of giving or producing false or misleading information under sections 137.1 and 137.2 of the Criminal Code (maximum penalty of 12 months imprisonment) or obstructing a Commonwealth public official (maximum penalty of 2 years imprisonment).

Subsection 3UN(2) provides that strict liability applies to paragraphs 3UN(1)(a) and (c). Strict liability is set out in section 6.1 of the Criminal Code. The effect of applying strict liability to an element of an offence will mean that no fault element needs to be proved and the defence of mistake of fact is available. Accordingly, the prosecution will be required to prove that the constable did in fact make a request in accordance with section 3UM, and that the constable complied with their duties in subsection 3UM(4), but will not need to prove that the person knew that the request was in accordance with subsection 3UM(4) or that the person knew that the constable had complied with his or her duties. Applying strict liability is appropriate in these circumstances as the defendant's knowledge of those issues is not relevant to their culpability. However, the general defence of mistake of fact will be available to the defendant.

The defence of mistake of fact is set out in section 9.2 of the Criminal Code. The defence provides that a person is not criminally responsible for an offence that includes a physical element to which strict liability applies if:

- at or before the time of the conduct constituting the physical element, the person considered whether or not a fact existed, and is under a mistaken but reasonable belief about those facts, and
- had those facts existed, the conduct would not have constituted an offence.

### Subsection 3UN(3)

Under subsection 3UN(3), a constable would commit an offence if he or she fails to comply with the duties set out in subsection 3UM(4). Those duties require the constable to provide evidence of their position as a constable if they are not in uniform, and to inform the suspect of the consequences of non-compliance with a request.

To establish that the offence under subsection 3UN(3) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the constable is reckless as to whether they are subject to the requirements in section 3UM(4), being that they are about to make a request under section 3UM
- the constable intentionally engages in conduct, and
- the constable's conduct recklessly breaches the requirements as set out in subsection 3UM(4).

The offence at subsection 3UN(1) will be punishable by a maximum penalty of 5 penalty units. This penalty is consistent with the maximum penalty for a similar offence in subsection 105.21(4) of the Criminal Code.

#### Subsection 3UN(4)

Subsection 3UN(4) sets out what constitutes conduct for the purpose of the offences. The provision clarifies that both the doing of an act or an omission to perform an act constitute conduct for the purposes of section 3UN.

For example, a plain clothes constable at an airport forms a reasonable suspicion that a person is committing an offence applicable to subsections 3UM(1) or (2). The constable proceeds with making a request of the suspect under section 3UM without providing the suspect with evidence that they are a constable and without informing the suspect that it may be an offence not to comply with the request. These omissions are considered conduct for the purposes of paragraph 3UN(3)(b).

#### ***Criminal Code Act 1995***

#### **Item 9 – At the end of Part 9.5 of the *Criminal Code***

This item will insert a new Division 376—False identity and air travel—at the end of Part 9.5 of the Criminal Code. Division 376 will contain offences for:

- using a false identity at a constitutional airport for the purpose of travelling on a flight (new section 376.2)
- using a false identity to obtain a flight ticket via a carriage service (new subsection 376.3(1))
- taking a flight using a ticket obtained via a carriage service under a false identity (new subsection 376.3(2))
- using a false identity to obtain a ticket for a constitutionally covered flight (new subsection 376.4(1)), and
- taking a constitutionally covered flight using a ticket obtained using a false identity (new subsection 376.4(2))

## Section 376.1

This section will contain definitions relevant to new Division 376.

The definition of *air passenger ticket* is based on to the definition of the same term in the *Air Passenger Ticket Levy (Collection) Act 2001*. The definition is wide enough to include physical tickets (such as a boarding card) and electronic tickets (such as an e-ticket that can be displayed on a mobile telephone for scanning). Air passenger ticket can refer to a single or multiple flights, meaning single tickets with multiple journey sectors are included in the definition. There is no requirement for an air passenger ticket to be purchased, and as a result all means by which a person is entitled to travel on a flight or flights are covered, including complimentary flights and flights obtained by exchanging rewards points.

The definition of *false* is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. Instances where a person's identification may not be considered false despite a discrepancy between their formal name and purported name in a given situation include:

- where the person uses a more common version of their name, such as Ken instead of Kenneth
- where the person uses a former name (such as a maiden name) and the person is generally known by both names, or
- where the person is commonly known by a name different from their formal name, such as their middle name.

The definition of *false* includes the term *identification information*, which refers to the existing definition in section 370.1 of the Criminal Code. *Identification information* has been defined broadly, and includes:

- information such as name or address, for example a name on a flight ticket or booking confirmation, and
- an identity document, such as a driver licence or passport.

## Section 376.2

New section 376.2 creates an offence when a person uses false identification information at a constitutional airport to identify themselves to travel on a flight.

To establish that the offence under section 376.2 has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the defendant intentionally uses information at a place
- the defendant does so reckless as to whether the information is used to identify the defendant as a passenger on a flight
- the defendant is reckless as to whether the information is identification information

- the defendant is reckless as to whether the information is false in relation to the defendant, and
- the place is a constitutional airport.

Examples of where section 376.2 would apply include:

- a person checks in for a flight at Kingsford Smith Airport (a constitutional airport) under a false name, for the purposes of taking a flight from Sydney to Canberra
- a person shows a boarding pass under a false name at a Tullamarine Airport (a constitutional airport) gate, in order to board a flight from Melbourne to Adelaide
- a person provides a false name or shows false identification at Canberra Airport (a constitutional airport), in order to purchase a ticket for a flight from Wagga Wagga to Dubbo.

Recklessness has been applied as the fault element for the conduct element in paragraph 376.2(1)(b). Section 5.4 of the Criminal Code contains the definition of recklessness. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur, and, having regard to the circumstances, it is unjustifiable to take the risk. Recklessness has been applied for the element in paragraph 376.2(1)(b) of the offence as it is the standard fault element for this type of physical element under the Criminal Code.

Paragraph 376.2(1)(d) requires the information to be ‘false’ in relation to the defendant. The offence is not intended to cover situations where there is a mere discrepancy between the name that an individual is travelling under and their identity. The proposed definition of *false* in section 376.1 is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. The definition of false is described in detail at section 376.1, above.

The existing Criminal Code defence of lawful authority under section 10.5 would apply in other situations where individuals may fly under names other than their own for legitimate purposes, for example, persons in witness protection.

The maximum penalty for the offence will be 12 months imprisonment. This penalty has been applied as the offence is similar in nature to the offences of providing false or misleading documents in Part 7.4 of the Criminal Code, which carry a maximum penalty of 12 months imprisonment.

Subsection 376.2(2) will specify that absolute liability applies to paragraph 376.2(1)(e). This element relates to whether the place in which the defendant uses information is a constitutional airport.

As indicated by the note to subsection 376.2(2), absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. Accordingly, the prosecution will not be

required to prove that the defendant knew or was reckless as to the fact that the place at which the defendant uses information is a constitutional airport.

Absolute liability is appropriate and required for the element in the offence that relates to a constitutional airport because this element is a jurisdictional element of the offence. A jurisdictional element of the offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not. The issue of whether the defendant intended to engage in the conduct at a constitutional airport is not relevant to their culpability. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Subsection 376.2(3) contains a definition of constitutional airport. The definition has two components. The first component in paragraph 376.2(3)(a) is linked to the definition of Commonwealth aerodrome in section 3 of the *Crimes (Aviation) Act 1991*. The definition of Commonwealth aerodrome refers to ‘an area of land or water in Australia that is owned by the Commonwealth and used, or intended for use, either wholly or partly, for, or in connection with, the arrival, departure or other movement of aircraft’, or a core regulated airport within the meaning of the *Airports Act 1996*.

Section 7 of the *Airports Act* lists a number of airports as a ‘core regulated airport’, including all Australia capital city airports, Sydney West Airport, Gold Coast Airport, Launceston Airport, Alice Springs Airport, Townsville Airport, and any other airport specified by regulation. The *Airports Regulations* lists a range of regional airports. The first component of the definition is intended to rely on the Commonwealth Parliament’s power under subsection 52(i) of the Constitution to make laws with respect to Commonwealth places.

The second component of the definition of constitutional airport in paragraph 376.2(3)(b) relates to airports that are located in a Territory. This aspect of the definition is intended to rely on the Commonwealth Parliament’s power under section 122 of the Constitution to make laws with respect to territories. In accordance with section 3A of the *Criminal Code*, the definition includes external Territories.

The definition of constitutional airport is consistent with the definition in new section 3UL of the *Crimes Act* in relation to powers to require identity information at airports. This is described in detail at item 8 of this Schedule.

#### Subsection 376.3(1)

Subsection 376.3(1) applies to individuals who obtain flight tickets using a carriage service using a false identity with respect to the person who will take the flight. This offence is necessary as, in practice, the vast majority of tickets for flights are purchased over the internet (either directly from an airline’s website or through a third party website) or over the telephone and the carriage service element provides a connection to the Commonwealth’s constitutional power.

To establish that the offence in subsection 376.3(1) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the defendant intentionally used information
- the defendant used the information:
  - reckless as to whether, as a result of their use of the information, a ticket for a flight was obtained by the defendant or another person
  - reckless as to whether the information was used to identify the defendant or another person as a passenger on the flight
- the defendant was reckless as to whether the information was identification information
- the defendant was reckless as to whether that information was false in relation to the person who would take, or intended to take, the flight using the ticket
- the ticket was obtained (note the carriage service presumption in subsection 376.3(3))
- the flight starts or ends within Australia.

Subsection 376.3(1) is intended to capture a number of scenarios in which a flight ticket can be obtained using a false identity. The offence is framed so that it applies where the defendant uses false information to cause the defendant or another person such as a travel agent to obtain a ticket. The offence could also apply where a person obtains a flight ticket from a third party website. The offence is also framed to capture the situation where a person purchases a ticket for another person, where the booking name is false with respect to that other person.

In the following examples Adelle would be committing an offence under subsection 376.3(1):

- Adelle uses the internet to book a flight under the name of Belinda, when Adelle intends to use the ticket herself.
- Adelle calls an airline to book a flight under the name of Belinda, knowing or being reckless as to whether Claire would use the ticket to fly.
- Adelle engages a travel agent to book a flight for herself, but provides the name of Belinda to the travel agent for the purpose of booking the ticket. The agent makes the booking over the internet.

Paragraph 376.3(1)(d) requires the information to be ‘false’ in relation to the defendant. The offence is not intended to cover situations where there is a mere discrepancy between the name that an individual is travelling under and their identity. The proposed definition of *false* in section 376.1 is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. The definition of false is described in detail at section 376.1, above.

The offence at subsection 376.3(1) will be punishable by a maximum penalty of 12 months imprisonment. This penalty has been applied as the offence is similar in nature to the offences of providing false or misleading documents in Part 7.4 of the Criminal Code, which carry a maximum penalty of 12 months imprisonment.

### Subsection 376.3(2)

Subsection 376.3(2) applies to an individual who takes a flight using a ticket in a false identity that has been obtained using a carriage service. The offence in subsection 376.3(2) applies regardless of whether the defendant was involved in obtaining the ticket or not.

To establish that the offence under section 376.3(2) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the defendant intentionally took a flight using an air passenger ticket
- the defendant:
  - intentionally used identification information to obtain the ticket, or
  - was reckless as to whether another person used identification information to obtain the ticket
- the defendant was reckless as to whether the information would result in the identification of a person as a passenger on the flight
- the defendant was reckless as to whether the information was false in relation to the defendant
- a ticket for the flight was obtained using a carriage service (note the carriage service presumption in subsection 376.3(3))
- the flight starts or ends within Australia.

In the following examples Stephen would be committing an offence under subsection 376.3(2):

- Stephen takes a flight using a ticket that he purchased over the internet in the name of Tom.
- Stephen takes a flight using a ticket that Tom purchased over the telephone, the ticket is in the name of Tom, and Stephen was reckless as to whether the name on the ticket he used was false (note: Tom may also have committed an offence under subsection 376.3(1) if he knew or was reckless to the fact that Stephen would be using the ticket that has been issued in Tom's name).
- Stephen takes a flight using a ticket that Tom obtained through a travel agent, who booked the flight over the internet, and the ticket is in the name of Jerry (note: Tom may also have committed an offence under subsection 376.3(1) if he knew or was

reckless to the fact that Stephen or someone else would be using the ticket that has been issued under the name of Jerry).

Two different fault elements apply to paragraph 376.3(2)(b) depending on who obtained the ticket using the false identification information. Where the defendant obtained the ticket, the element relates to conduct of the defendant in using or having used identification information, which carries a default fault element of intention.

Where another person obtained the ticket, the element is a circumstance in which the defendant's conduct occurred, which carries a default fault element of recklessness. Section 5.4 of the Criminal Code contains the definition of recklessness. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur, and, having regard to the circumstances, it is unjustifiable to take the risk. Under subsection 376.3(2), the prosecution would need to show that the defendant was aware of a substantial risk that a ticket was obtained by another person using false identification information.

Paragraph 376.3(2)(d) requires the information to be 'false' in relation to the defendant. The offence is not intended to cover situations where there is a mere discrepancy between the name that an individual is travelling under and their identity. The definition of *false* in section 376.1 is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. The definition of false is described in detail at section 376.1, above.

The offence at subsection 376.3(2) will be punishable by a maximum penalty of 12 months imprisonment. This penalty has been applied as the offence is similar in nature to the offences of providing false or misleading documents in Part 7.4 of the Criminal Code, which carry a maximum penalty of 12 months imprisonment.

### Subsection 376.3(3)

Subsection 376.3(3) provides for a presumption that a carriage service was used to obtain the flight ticket for the purposes of paragraphs 376.3(1)(e) and 376.3(2)(e). The presumption is similar to the presumption in section 475.1B(1) of the Criminal Code in relation to telecommunications offences.

The presumption will provide that, in relation to the element of the offences that a carriage service was used, if the prosecution proves beyond reasonable doubt that a ticket for a flight was obtained, then it is presumed, unless the defendant proves to the contrary, that a carriage service was used to obtain that ticket.

Its effect is that it is presumed that a person (the defendant or another person) used a carriage service to obtain the ticket, if the prosecution can prove beyond reasonable doubt that the air passenger ticket to which the offence relates was obtained. The presumption can be rebutted if the defendant is able to prove on the balance of probabilities that a carriage service was not used to obtain the ticket.

The carriage service element of the offences in section 376.3 provides a necessary connection to the Commonwealth's constitutional power. Insertion of the presumption is necessary to address problems experienced by law enforcement agencies in proving beyond reasonable

doubt that a carriage service was used to engage in relevant conduct. A presumption in this instance is appropriate, given it is not an element that goes to the substance of the offence, or to the person's criminal culpability, but is a jurisdictional element. That is, an element marking a boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

#### Subsection 376.3(4)

Subsection 376.3(4) will specify that absolute liability applies to paragraphs 376.3(1)(e) and (f) and paragraphs 376.3(2)(e) and (f). These elements relate to whether a carriage service was used to obtain a flight ticket and that the relevant flight starts or ends within Australia in subsections 376.3(1) and (2) respectively.

As indicated in the note to subsection 376.4(4), absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to an element of an offence is that no fault element needs to be proved and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. Accordingly, the prosecution will not be required to prove that the defendant knew or was reckless as to the fact that a carriage service was used to obtain the ticket (note the operation of the presumption in subsection 376.3(3)), and that the relevant flight starts or ends within Australia.

Absolute liability is appropriate and required for these elements in the offences that relate to use of a carriage service and where a flight starts and ends because these elements are jurisdictional elements of the offences. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not. The issue of whether a carriage service was used to obtain a flight ticket or whether the flight started or ended within Australia is not relevant to the defendant's culpability. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

#### Subsection 376.4(1)

Subsection 376.4(1) will insert an offence relating to obtaining a flight ticket under a false identity, where the flight is a constitutionally covered flight. The effect of the provision is that any person who books a flight under a false identity commits an offence, where the flight falls within the definition of *constitutional flight*.

To establish that the offence in subsection 376.4(1) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the defendant intentionally used information
- the defendant used the information:
  - reckless as to whether, as a result of their use of the information, a ticket for a flight was obtained by the defendant or another person
  - reckless as to whether the information was used to identify the defendant, or another person, as a passenger on the flight

- the defendant was reckless as to whether the information was identification information
- the defendant was reckless as to whether the information was false in relation to the person who takes, or intends to take, the flight using the ticket
- the flight is a constitutional flight.

Subsection 376.4(1) is drafted to capture a number of scenarios in which a ticket for a constitutional flight can be obtained using a false identity. Subparagraph 376.4(1)(b)(i) is framed so that it applies if the defendant uses false information to cause the defendant or another person such as a travel agent to obtain a ticket, with the defendant being culpable in both scenarios. Paragraph 376.4(1)(d) is framed to capture the situation where a person purchases a ticket for another person, where the booking name is false with respect to that other person.

In the following examples Manny would be committing an offence under subsection 376.4(1):

- Manny books a ticket under the name of Nick, for a flight from Canberra to the Gold Coast (a flight that starts in a territory), when Manny intends to use the ticket himself.
- Manny books a charter flight ticket under the name of Nick, for a flight from Sydney to Melbourne (a commercial flight between two states), knowing or being reckless as to whether Oliver would use the ticket to fly.
- Manny engages a travel agent to book a flight for himself, the agent books a flight ticket to travel from Sydney to Bangkok (a commercial flight between Australia and a foreign country), but Manny provides the name of Nick to the travel agent for the purpose of booking the ticket.
- Manny engages a travel agent purportedly to book a flight for Nick, the agent books a flight from Darwin to Alice Springs (a flight that starts and ends in a territory), and Manny knew or was reckless as to whether Oliver would use the ticket to fly.

Paragraph 376.4(1)(d) requires the information to be ‘false’ in relation to the defendant. The offence is not intended to cover situations where there is a mere discrepancy between the name that an individual is travelling under and their identity. The definition of *false* in section 376.1 is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. The definition of false is described in detail at section 376.1, above.

The offence at subsection 376.4(1) will be punishable by a maximum penalty of 12 months imprisonment. This penalty has been applied as the offence is similar in nature to the offences of providing false or misleading documents in Part 7.4 of the Criminal Code, which carry a maximum penalty of 12 months imprisonment.

### Subsection 376.4(2)

Subsection 376.4(2) will create an offence applying to individuals who fly on a constitutionally covered flight, regardless of whether the defendant was involved in obtaining the ticket or not.

To establish that the offence under section 376.4(2) has been committed, the prosecution will need to prove beyond reasonable doubt that:

- the defendant intentionally took a flight using an air passenger ticket
- the defendant intentionally used identification information, or the defendant was reckless as to whether another person used identification information (whichever applies in the circumstances), to obtain the ticket
- the defendant was reckless as to whether the information would result in the identification of a person as a passenger on the flight
- the defendant was reckless as to whether the information was false in relation to the defendant, and
- the flight is a constitutional flight.

In the following examples Diana would be committing an offence under subsection 376.4(2):

- Diana takes a flight from the Gold Coast to Canberra (a flight that ends in a Territory) using a ticket she purchased under the name of Elizabeth.
- Diana takes a flight from Sydney to Melbourne (a commercial flight between two states) using a ticket that Elizabeth purchased, the ticket is in the name of Elizabeth, and Diana was reckless as to whether the name on the ticket she used was false (note: Elizabeth may have committed an offence under subsection 376.4(1) if she knew or was reckless to the fact that Diana would be using the ticket that has been issued in Elizabeth's name).
- Diana takes a flight from Sydney to Bangkok (a commercial flight between Australia and a foreign country) using a ticket that Elizabeth obtained through a travel agent using Elizabeth's frequent flyer points, the ticket is in the name of Fay, and Diana was reckless as to whether the name on the ticket she used was false (note: Elizabeth may also have committed an offence under subsection 376.4(1) if she knew or was reckless to the fact that Diana or someone else would be using the ticket that has been issued under the name of Fay).

Two different fault elements apply to paragraph 376.4(2)(b), which relates to use of identification information to obtain a flight ticket. Where the defendant obtained the ticket, the element relates to conduct of the defendant in using or having used identification information, which carries a default fault element of intention.

Where another person obtained the ticket, the element relates to a circumstance in which the defendant's conduct occurred, which carries a default fault element of recklessness. In this case, the prosecution would need to show that the defendant was reckless as to whether that other person had used false identification information (with respect to the defendant) to obtain a flight ticket, which the defendant then used to take a flight.

Paragraph 376.4(2)(d) requires the information to be 'false' in relation to the defendant. The offence is not intended to cover situations where there is a mere discrepancy between the name that an individual is travelling under and their identity. The definition of *false* in section 376.1 is intended to cover instances where identification information is materially, and not merely technically, false with respect to the person being identified. The definition of false is described in detail at section 376.1, above.

The offence at subsection 376.4(2) will be punishable by a maximum penalty of 12 months imprisonment. This penalty has been imposed as the offence is similar in nature to the offences of providing false or misleading documents in Part 7.4 of the Criminal Code, which carry a maximum penalty of 12 months imprisonment.

#### Subsection 376.4(3)

Subsection 376.4(3) will specify that absolute liability applies to paragraphs 376.4(1)(e) and 376.4(2)(e). These elements relate to whether a flight to which an air passenger ticket relates or a flight that is taken by the defendant is a constitutional flight in subsections 376.4(1) and (2) respectively.

As indicated by the note to subsection 376.2(2), absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to an element of an offence is that no fault element needs to be proved and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. Accordingly, the prosecution will not be required to prove that the defendant knew or was reckless as to the fact that the flight to which an offence under section 376.4 is a constitutional flight.

Absolute liability is appropriate and required for these elements in the offences that relate constitutional flights because these elements are jurisdictional elements of the offences. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not. The issue of whether a carriage service was used to obtain a flight ticket or whether the flight started or ended within Australia is not relevant to the defendant's culpability. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

#### Subsection 376.4(4)

Subsection 376.4(4) sets out the definition of *constitutional flight*, being:

- (a) a flight that starts or ends in a Territory
- (b) a flight between Australia and a foreign country in the course of trade and commerce, where the flight is a passenger flight, or

- (c) a flight between one State and another State in the course of trade and commerce, where the flight is a passenger flight.

The categories of *constitutional flight* at paragraph 376.4(4)(a) rely upon the Commonwealth Parliament's power under section 122 of the Constitution to make laws with respect to territories.

The categories of *constitutional flight* at paragraphs 376.4(4)(b) and (c) rely upon the Commonwealth Parliament's power under subsection 51(i) of the Constitution to make laws with respect to trade and commerce with other countries and among the states. In practice, these paragraphs would apply to any commercial or chartered flight between Australia and another country or between Australian states, where a flight is a passenger flight (i.e. not solely for cargo).

This section would apply to the majority of flights within, into or out of Australia.

#### Section 376.5

This section applies Category D extended geographical jurisdiction to the offences in new sections 376.3 and 376.4, which relate to flight tickets that have been obtained using a carriage service and constitutionally covered flights respectively.

Section 15.4 of the Criminal Code sets out the meaning of Category D extended geographical jurisdiction. Application of section 15.4 to an offence will result in the offence applying whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct constituting the alleged offence occurs in Australia.

For the offences of obtaining a ticket for a flight under subsections 376.3(1) and 376.4(1), this means the offence would apply where the defendant used false identification information outside Australia in order to obtain an air passenger ticket. For example, a person may be located in a foreign country when they purchase a ticket for a constitutionally covered flight or purchase the ticket using a carriage service (provided that the booked flight started or ended in Australia).

For the offences in subsections 376.3(2) and 376.4(2), this means the offence would apply where the defendant takes a flight from a foreign country to Australia. For example, the offence would apply where a person takes a flight from Paris to Brisbane using a ticket obtained using a false identity.

## **Part 3 – Application of amendments**

### **Item 10 – Amendments made by Part 2**

Subsection (1) of this item provides that the new Division 3B of Part IAA of the *Crimes Act 1914* can be applied to individuals reasonably suspected, on or after commencement, of relevant serious offences. However, those suspected offences can relate to conduct or circumstances that occurred before commencement. This does not create any retrospective liability.

Subsection (2) of this item provides that the new Division 376 of the *Criminal Code* applies to conduct and circumstances that occur on or after commencement.

As indicated in the note in this item, this item commences on the day after the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Bill receives Royal Assent.

## **Schedule 3 – Other measures**

### **GENERAL OUTLINE**

The purpose of Schedule 3 is to make amendments relating to the functions of the Law Enforcement Integrity Commissioner, the value of penalty units and superannuation orders.

### **Integrity Commissioner functions**

Part 1 amends the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to strengthen the Commonwealth public sector integrity system by clarifying the functions of the Integrity Commissioner.

The LEIC Act sets out the powers and functions of the Integrity Commissioner and establishes the Australian Commission for Law Enforcement Integrity (ACLEI) as a supporting statutory agency. The main objectives of the Integrity Commissioner and ACLEI are the maintenance and strengthening of the integrity of law enforcement at the Commonwealth level.

These amendments clarify the function of the Integrity Commissioner with respect to detection and prevention of corruption, widen the Integrity Commissioner's scope to consider ACLEI corruption issues and enable the Integrity Commissioner to delegate the power to conduct public inquiries to an Assistant Integrity Commissioner.

### **Penalty units**

Part 2 amends the Crimes Act to adjust the value of the penalty unit to accommodate increases in the Consumer Price Index (CPI) and to provide for the regular review of the value of the penalty unit moving forward.

The value of monetary penalties for criminal offences in Commonwealth legislation and Territory ordinances is regulated by the penalty unit mechanism established in Part 1A of the Crimes Act. Section 4AA of the Crimes Act specifies the monetary value of a penalty unit at any particular time. The penalty unit mechanism allows the maximum monetary penalty for all offences under Commonwealth law, or Territory ordinances, to be automatically adjusted with a single amendment to section 4AA of the Crimes Act. This removes the need for multiple legislative amendments and ensures that monetary penalties in Commonwealth legislation and Territory ordinances remain comparable.

### **Superannuation orders**

Part 3 amends the *Crimes (Superannuation Benefits) Act 1989* (the CSB Act) and the *Australian Federal Police Act 1979* (the AFP Act).

These two Acts provide for the forfeiture and recovery of employer funded superannuation benefits that are payable, or have been paid, to employees who have been convicted of corruption offences, and sentenced to more than 12 months' imprisonment. Under the two Acts, 'employees' include public servants, members of the Australian Defence Force and Australian Federal Police, parliamentarians and judges.

The amendments will make it clear that a superannuation order can be made in relation to employer benefits accrued during all periods of Commonwealth employment, not just the period of employment in which the corruption offence was committed.

This will ensure that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment.

## **Part 1 – Integrity Commissioner functions**

### **Division 1 - Amendments**

#### ***Law Enforcement Integrity Commissioner Act 2006***

##### **Item 1 – before paragraph 15(a)**

This item inserts a new paragraph 15(aa) into the LEIC Act, which adds the detection of corrupt conduct in law enforcement agencies to the Integrity Commissioner’s functions. Section 3 sets out the objects of the LEIC Act and section 15 sets out the functions of the Integrity Commissioner. However, aspects of section 3 – the detection and prevention of corrupt conduct – were previously not translated into corresponding functions of the Integrity Commissioner under section 15.

Reference to an explicit detection function under section 15 better reflects the LEIC Act’s objects and provides a legislative basis for the detection aspects of the Integrity Commissioner’s work, augmenting the investigative process and enabling ACLEI to take a proactive approach to dealing with corruption.

##### **Item 2 – after paragraph 15(d)**

This item inserts a new paragraph 15(da) into the LEIC Act, which adds the prevention of corrupt conduct in law enforcement agencies to the Integrity Commissioner’s functions.

Section 3 sets out the objects of the LEIC Act and section 15 sets out the functions of the Integrity Commissioner. However, aspects of section 3 – the detection and prevention of corrupt conduct – were previously not translated into corresponding functions of the Integrity Commissioner under section 15.

Reference to an explicit prevention function under section 15 better reflects the LEIC Act’s objects and provides a legislative basis for the prevention aspects of the Integrity Commissioner’s work, augmenting the investigative process and enabling ACLEI to take a proactive approach to dealing with corruption.

##### **Item 3 – subsection 104(5)**

This item corrects an error in subsection 104(5) of the LEIC Act, omitting a reference to ‘an authorisation’ and substituting ‘a delegation’.

Subsection 104(5) refers to ‘an authorisation under section 219’. However, section 219 makes no reference to an authorisation but rather a delegation.

##### **Item 4 – subsection 156(3)**

This item replaces subsection 156(3) of the LEIC Act to give the Minister discretion to refer an ACLEI corruption issue to the Integrity Commissioner, unless it involves the Integrity Commissioner or an Assistant Integrity Commissioner.

Under subsection 156(2)(a) of the LEIC Act, the Minister can refer a corruption issue involving a member of ACLEI to the Integrity Commissioner for investigation, allowing the Integrity Commissioner to manage to potential internal corruption issues. However, subsection 156(3) prevents the Integrity Commissioner investigating an issue involving ACLEI staff appointed under the *Public Service Act 1999*. This is highly restrictive as the majority of ACLEI staff are appointed under the Public Service Act.

Subsection 156(3) also requires the Integrity Commissioner to notify the Minister of the alleged ACLEI corruption issue as soon as practicable. This provides no opportunity to undertake a preliminary investigation to identify the basis of the claim and whether external investigation is warranted.

In addition to limiting the Integrity Commissioner's ability to manage internal corruption issues, the restriction in subsection 156(3) unnecessarily limits the Integrity Commissioner's ability to manage internal staffing issues and results in significant expenditure on independent, external investigations.

### **Item 5 – subsection 219(2)**

This item repeals subsection 219(2) of the LEIC Act.

Currently, section 219 of the LEIC Act enables the Integrity Commissioner to delegate all or any of his or her powers to an Assistant Integrity Commissioner, however, subsection 219(2) prevents this applying to the Integrity Commissioner's power to hold public hearings.

To date, ACLEI has not held any public hearings (private hearings are preferred for protection of both witnesses and information). However, there may be a time where public hearings become necessary and the ability of an Assistant Integrity Commissioner to conduct a public hearing would provide flexibility in the event that the workload of the Commissioner prevents him from holding such a hearing personally.

## **Division 2 – Application**

### **Item 6 – application of amendment**

This item clarifies that the amendments to the LEIC Act apply in relation to conduct engaged in before, on or after the commencement of the amendments.

This is consistent with the existing definitions of 'engages in corrupt conduct' and 'corruption issue' in sections 6 and 7 of the LEIC Act.

## **Part 2 – Penalty units**

### **Division 1 - Amendments**

#### *Crimes Act 1914*

##### **Item 7 – subsection 4AA(1) (definition of *penalty unit*)**

Subsection 4AA(1) of the Crimes Act specifies the monetary value of a penalty unit at any particular time. Currently, subsection 4AA(1) defines a penalty unit as \$110.00. To accommodate increases in the Consumer Price Index (CPI), this item will amend the definition of ‘penalty unit’ so that the value of the penalty unit is set at \$170.00.

##### **Item 8 – after subsection 4AA(1)**

This item will insert new subsection 4AA(1A) into the Crimes Act.

New subsection 4AA(1A) will require the Attorney-General to cause a review of the value of the penalty unit, as defined in subsection 4AA(1), every three years after the date the value of the penalty unit was last reviewed. This will ensure that the value of the penalty unit is regularly reviewed and amended to accommodate changes in the CPI moving forward.

### **Division 2 – Application**

##### **Item 9 – application of amendments**

This item will set out the application of amendments made by this Schedule to section 4AA of the Crimes Act.

This item makes it clear that the amendment to subsection 4AA(1) applies only in relation to an offence which is committed on or after the commencement of the item. This will ensure that the increased value of the penalty unit will apply only to offences committed after the commencement of this Schedule, being a date to be fixed by proclamation.

This item also makes it clear that new subsection 4AA(1A) applies to the alteration to the value of the penalty unit made by this Schedule, and to all future alterations. This will ensure that the requirement for the Attorney-General to cause a review of the value of the penalty unit every three years after the date it was last reviewed will apply to the amendment made by item 7 of this Schedule, and to all future alterations.

## **Part 3 – Superannuation orders**

### **Division 1 – Amendments**

#### ***Australian Federal Police Act 1979***

##### **Item 10 – paragraph 46(3)(a)**

Section 46 of the AFP Act deals with the making of a superannuation order in respect of a person who has been convicted of a corruption offence.

A ‘corruption offence’ is defined in section 41 of the AFP Act to mean an offence by a person who was an AFP employee, or an old law member or staff member, at the time the offence was committed, being an offence that involved an abuse of office, corruption or perverting or attempting to pervert the course of justice.

Subsection 46(3) requires a court to work out, and specify in the superannuation order, the amount it thinks reflects the value of the sum of the employer contributions or benefits made or payable by the Commonwealth or a Commonwealth organisation in respect of the person under any superannuation scheme. It also requires the court to include in the superannuation order an order that the specified amount be paid to the Commonwealth or the Commonwealth organisation.

This item amends existing paragraph 46(3)(a) of the AFP Act to clarify that the reference to employer contributions or benefits made or payable in respect of the person under any superannuation scheme includes contributions or benefits made or payable for any period of employment, not just a period during which the offence was committed.

This will clarify that the legislation applies equally to all AFP employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment.

##### **Item 11 – paragraph 46(4)(a) (definition of AB (*amount of benefits*))**

Section 46 of the AFP Act deals with the making of a superannuation order in respect of a person who has been convicted of a corruption offence.

A ‘corruption offence’ is defined in section 41 of the AFP Act to mean an offence by a person who was an AFP employee, or an old law member or staff member, at the time the offence was committed, being an offence that involved an abuse of office, corruption or perverting or attempting to pervert the course of justice.

Subsection 46(4) refers to a situation where employer contributions or benefits in respect of the person under any superannuation scheme have already been paid to the person. It requires a court to specify, in the superannuation order, the amount worked out using a formula subtracting employee contributions from the value of the sum of the employer benefits paid by the Commonwealth or a Commonwealth organisation in respect of the person under the superannuation scheme. It also requires the court to include in the

superannuation order an order that the specified amount be paid to the Commonwealth or the Commonwealth organisation.

This item amends existing paragraph 46(4)(a) of the AFP Act to clarify that the reference to benefits paid in respect of the person under the superannuation scheme includes or benefits made for any period of employment, not just a period during which the offence was committed.

This will clarify that the legislation applies equally to all AFP employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment.

### ***Crimes (Superannuation Benefits) Act 1989***

#### **Item 12 – paragraph 19(3)(a)**

Section 19 of the CSB Act deals with the making of a superannuation order in respect of a person who has been convicted of a corruption offence.

A ‘corruption offence’ is defined in section 2 of the CSB Act to mean an offence by a person who was an employee at the time the offence was committed, being an offence that involved an abuse of office, corruption or perverting or attempting to pervert the course of justice.

Subsection 19(3) requires a court to work out, and specify in the superannuation order, the amount it thinks reflects the value of the sum of the employer contributions or benefits made or payable by the Commonwealth or a Commonwealth authority in respect of the person under any superannuation scheme. It also requires the court to include in the superannuation order an order that the specified amount be paid to the Commonwealth or the Commonwealth authority.

This item amends existing paragraph 19(3)(a) of the CSB Act to clarify that the reference to employer contributions or benefits made or payable in respect of the person under any superannuation scheme includes contributions or benefits made or payable for any period of employment, not just a period during which the offence was committed.

This will clarify that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment.

In relation to a person who is taken to be employed by the Commonwealth under section 7 of the CSB Act, ‘employment’ will have a corresponding meaning in accordance with section 18A of the *Acts Interpretation Act 1901*.

#### **Item 13 – paragraph 19(4)(a) (definition of AB (*amount of benefits*))**

Section 19 of the CSB Act deals with the making of a superannuation order in respect of a person who has been convicted of a corruption offence.

A 'corruption offence' is defined in section 2 of the CSB Act to mean an offence by a person who was an employee at the time the offence was committed, being an offence that involved an abuse of office, corruption or perverting or attempting to pervert the course of justice. Subsection 19(4) refers to a situation where employer contributions or benefits in respect of the person under any superannuation scheme have already been paid to the person. It requires a court to specify, in the superannuation order, the amount worked out using a formula subtracting employee contributions from the value of the sum of the employer benefits paid by the Commonwealth or a Commonwealth authority in respect of the person under the superannuation scheme. It also requires the court to include in the superannuation order an order that the specified amount be paid to the Commonwealth or the Commonwealth authority.

This item amends existing paragraph 19(4)(a) of the CSB Act to clarify that the reference to benefits paid in respect of the person under the superannuation scheme includes or benefits made for any period of employment, not just a period during which the offence was committed.

This will clarify that the legislation applies equally to all employees who have committed a corruption offence while an employee, regardless of whether an employee has one continuous period of employment or more than one separate periods of employment. In relation to a person who is taken to be employed by the Commonwealth under section 7 of the CSB Act, 'employment' will have a corresponding meaning in accordance with section 18A of the *Acts Interpretation Act 1901*.

## **Division 2 – Application**

### **Item 14 – application of amendments: the *Australian Federal Police Act 1979***

This item makes it clear that the amendments made by items 10 and 11 above to section 46 of the AFP Act apply in relation to a superannuation order applied for on or after the commencement of this item, regardless of whether an offence to which the order relates was committed before or after the commencement date.

### **Item 15 – application of amendments: the *Crimes (Superannuation Benefits) Act 1989***

This item makes it clear that the amendments made by items 12 and 13 above to section 19 of the CSB Act apply in relation to a superannuation order applied for on or after the commencement of this item, regardless of whether an offence to which the order relates was committed before or after the commencement date.