

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 13

Issued by the authority of the Minister for Home Affairs

Crimes Act 1914 (Cth)

Crimes Legislation Amendment (Serious and Organised Crime) Act 2010

Crimes Amendment Regulations 2010 (No. 1)

Section 91 of the *Crimes Act 1914* (the Crimes Act) provides that the Governor-General may make regulations, not inconsistent with the Crimes Act, prescribing all matters required or permitted by the Crimes Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Crimes Act.

Item 19 of Schedule 4 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (the SOC Act) provides that the Governor-General may make regulations dealing with matters of a transitional nature relating to the amendments and repeals made by the SOC Act.

The SOC Act contains measures for a comprehensive national response to combat organised crime. Among other things, the SOC Act amends the Crimes Act to implement model laws for controlled operations, assumed identities and witness identity protection. A controlled operation is a covert investigation method in which a law enforcement officer conceals his or her identity in order to associate with people suspected of involvement in criminal activity. The model laws are intended to facilitate the mutual recognition of controlled operations, the acquisition and use of assumed identities, and the protection of witness identities by law enforcement agencies across the Commonwealth Government (the Commonwealth) and the states and territories.

The SOC Act repeals Parts IAB and IAC of the Crimes Act and inserts new Parts IAB, IAC and IACA to implement model laws for controlled operations, assumed identities and witness identity protection.

The purpose of these Regulations is to repeal the clauses in the *Crimes Regulations 1990* which relate to the current Crimes Act provisions for controlled operations and assumed identities and insert new clauses to implement new Parts IAB, IAC and IACA of the Crimes Act.

Controlled operations

The Regulations prescribe certain State and Territory controlled operations laws as corresponding laws for the purposes of the new controlled operations regime. The laws prescribed are those which implement, or substantially implement, the model laws. This provides protection against liability for Commonwealth offences for participants in operations that have been validly authorised under corresponding laws, without requiring a separate Commonwealth authority to be sought for the controlled operation.

To address an issue identified in *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, the SOC Act provides for retrospective protection for controlled operations authorised under a State and Territory controlled operations law prior to the commencement of the SOC Act. This protects evidence obtained from, and participants in,

operations authorised under a State or Territory controlled operations law. The Regulations prescribe the State and Territory controlled operations legislation to which this protection applies.

Assumed identities

The Regulations prescribe certain State and Territory assumed identity laws as corresponding laws. The laws prescribed are those which implement, or substantially implement, the model laws. This would enable a person authorised to acquire and use an assumed identity under the Crimes Act to lawfully acquire evidence of that assumed identity (such as a driver's licence or birth certificate) from a participating jurisdiction, and vice versa. The Regulations also ensures that officers who are authorised under a corresponding State or Territory law to acquire and use an assumed identity are protected from criminal liability under Commonwealth law when using that identity.

Witness identity protection

The Regulations prescribe certain State and Territory witness identity protection laws as corresponding laws. The laws prescribed are those which implement, or substantially implement, the model laws. This allows a certificate issued under a corresponding law to be treated as if it had been given under the Crimes Act, thereby providing protection for State and Territory operatives in proceedings held in federal courts and federal matters heard in State and Territory courts.

The Regulations also specify that certain applications in a proceeds of crime matter are proceedings to which the witness identity protection regime applies.

Other matters

The regulations also:

- allow the chief officer of the Australian Crime Commission (ACC) to delegate to any Senior Executive Service employee, who is an ACC staff member, his or her duties and power of notification of damage or injury caused by controlled operations
- provide for transitional arrangements so that the repealed provisions of the Crimes Act and the regulations made under them apply to operations and authorities approved before the commencement of the SOC Act, and
- recognise the new South Australian law on forensic procedures and DNA evidence sharing.

Details of the Regulations are set out in the Attachment.

Neither the Crimes Act nor the SOC Act specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Relevant enforcement agencies (the Australian Federal Police (AFP), the ACC, the Australian Customs and Border Protection Service (Customs), the Australian Commission for Law Enforcement Integrity (ACLEI) and the Australian Taxation Office (ATO)) and intelligence agencies were consulted on the development of these Regulations, and their comments were incorporated into the drafting. These regulations are not likely to impact on business or restrict competition.

ATTACHMENT

Details of the Crimes Amendment Regulations 2010 (No. 1)

The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (the SOC Act) implements model laws on controlled operations, assumed identities and witness identity protection.

The model laws were developed by a Joint Working Group of the Standing Committee of Attorneys-General (SCAG) and the then Australasian Police Ministers Council, and were published in November 2003 in the Joint Working Group's *Cross-Border Investigative Powers for Law Enforcement Report*.

The purpose of the model laws is to create a national set of investigative powers and facilitate the mutual recognition of such powers across the Commonwealth, States and Territories.

A number of States and Territories have enacted or are in the process of enacting the model laws. It is anticipated that those that have not yet done so will consider implementing the laws in order to enhance the operation and effect of the model law regime. At the federal level, the *Surveillance Devices Act 2004* implements the model laws for surveillance devices. The SOC Act implements the remaining sets of model laws.

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Crimes Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Crimes Regulations 1990*

This regulation provides that the *Crimes Regulations 1990* (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 – Amendments

Item [1] – regulation 4A

Former regulation 4A of the Principal Regulations prescribed certain offences to be serious Commonwealth offences for the purposes of section 15HB of the Crimes Act. The SOC Act repealed this section. Accordingly, item 1 repeals and replaces regulation 4A.

New regulation 4A prescribes certain State and Territory controlled operations laws and provisions as corresponding laws for the purposes of section 15GC of the Crimes Act (inserted by the SOC Act). The recognition of corresponding controlled operations legislation provides protection against liability for Commonwealth offences for participants in operations that have been validly authorised under

corresponding laws, without requiring a separate Commonwealth authority to be sought for the controlled operation.

New regulation 4A prescribes controlled operations laws in New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory (ACT) as corresponding laws. These laws implement (or substantially implement) the model provisions on controlled operations.

Items [2] to [8] – regulation 4B

Former regulation 4B of the Principal Regulations set out requirements for indemnification under section 15IA of the Crimes Act. The SOC Act repealed and replaced sections 15IA and 15IB of the Crimes Act with new section 15HB. Section 15HB provides that the Commonwealth must indemnify a participant in an authorised controlled operation against any civil liability incurred because of conduct that the participant engages in in the course of, and for the purposes of, the controlled operation.

As repealed section 15IA of the Crimes Act and new section 15HB are substantially similar, regulation 4B has been retained with some modifications to reflect new terminology introduced by the SOC Act and to refer correctly to the new section number.

Item [2]

Item 2 substitutes the heading to regulation 4B to reflect that the regulation is now made under new section 15HB of the Crimes Act (inserted by the SOC Act), instead of repealed section 15IA.

Item [3]

Item 3 amends subregulation 4B(1) to replace the reference to repealed subsections 15IA(1) and (2) with a reference to new paragraph 15HB(f) of the Crimes Act.

Items [4] to [8]

These items amend subregulations 4B(1) and (2) to reflect changes in terminology from ‘agency head’ to ‘chief officer’, and from ‘officer or person’ to ‘participant’.

These terms are defined in section 15GC of the Crimes Act, inserted by the SOC Act. For the purposes of the new controlled operations provisions, a ‘chief officer’ is the head of the AFP, a State or Territory police force, Customs, the ACC or the ACLEI. ‘Participant’ means a person who is authorised under Part IAB to engage in controlled conduct for the purposes of a controlled operation.

Item [9] – regulations 4BAA and 4BAB

Former regulations 4BA, 4BB and 4BC prescribed authorising persons for participating Commonwealth, State and Territory agencies for the purposes of section 15XA of the Crimes Act. As the SOC Act repealed and replaced the previous assumed identity provisions in the Crimes Act, item 9 repeals former regulations 4BA, 4BB and 4BC and replaces them with new regulations 4BAA and 4BAB.

Section 15HG of the Crimes Act (inserted by the SOC Act) provides that a chief officer is responsible for notifying a person who suffers loss of or serious damage to property, or personal injury, that the loss, damage or injury was caused in the course of, or as a direct result of a controlled operation.

Under subsection 15HG(5), a chief officer of a law enforcement agency may delegate this duty of notification to a person of a rank specified for that agency.

Paragraph 15HG(5)(c) states that the regulations may prescribe the position to which the chief officer of the ACC may delegate his or her powers of notification.

New regulation 4BAA provides that the chief officer of the ACC may delegate his or her duties under section 15HG to any SES employee who is a member of the staff of the ACC. The 'chief officer' of the ACC is the Chief Executive Officer of the ACC.

New regulation 4BAB prescribes state and territory assumed identity laws and provisions as corresponding laws for the purposes of section 15K of the Crimes Act (inserted by the SOC Act). The recognition of corresponding assumed identity legislation allows law enforcement agencies in those jurisdictions to request evidence of an assumed identity from a Commonwealth agency, and allows Commonwealth agencies to request evidence of an assumed identity from agencies in those jurisdictions. Evidence of an identity is defined in section 15K as a document or thing that evidences or indicates (or can be used to evidence or indicate) a person's identity or aspect of a person's identity, such as a drivers' license or birth certificate. Recognition of corresponding assumed identity legislation also ensures that officers who are authorised under a corresponding state or territory law to use an assumed identity are protected from criminal liability under Commonwealth law when using that identity.

The regulations prescribe assumed identity laws in Victoria, Queensland, South Australia, Tasmania and the ACT as corresponding laws. These laws implement (or substantially implement) the model provisions on assumed identities.

Items [10] to [16] – regulation 4C

Former regulation 4C of the Principal Regulations set out requirements for indemnification under section 15XD of the Crimes Act. The SOC Act repealed and replaced section 15XD with new section 15KS. This section provides people who are authorised to acquire or use an assumed identity with protection from liability arising from an act done in the course of acquiring or using an assumed identity in accordance with a lawful authority.

Items 10 to 16 modify regulation 4C as a consequence of this amendment.

Item [10]

Item 10 substitutes the heading to regulation 4C to reflect that the regulation is now made under new section 15KS of the Crimes Act (inserted by the SOC Act), instead of repealed section 15XD.

Item [11]

Item 11 amends subregulation 4C(1) to reflect that the regulation is now made under new paragraph 15KS(2)(c) of the Crimes Act, instead of repealed subsections 15XD(1) and (2).

Items [12] to [15]

These items amend subregulation 4C(1) to reflect changes in terminology from 'agency head' to 'chief officer', and from 'officer or person' to 'authorised person'.

These terms are defined in section 15K of the Crimes Act, inserted by the SOC Act. For the purposes of the new assumed identities provisions, 'chief officer' is the head of an intelligence agency, an issuing agency or a law enforcement agency (including the AFP, Customs, the ACC, the ACLEI and the ATO). 'Authorised person' means a civilian, intelligence officer, law enforcement officer or foreign officer who is authorised to acquire or use an assumed identity.

Item [16]

Former subregulation 4C(2) provided a definition of 'agency head'. As a result of the change in terminology from 'agency head' to 'chief officer', this definition is no longer necessary and is repealed by this item.

Item [17] – regulation 4D and 4E

Item 17 inserts new regulations 4D and 4E into the Principal Regulations.

Regulation 4D

New regulation 4D prescribes certain State and Territory witness identity protection laws and provisions as corresponding laws for the purposes of subsection 15M(1) of the Crimes Act (inserted by the SOC Act). The recognition of corresponding witness identity protection legislation means that a certificate issued under a corresponding law will be treated as if it had been given under section 15ME of the Crimes Act. This ensures that an operative under a corresponding law who is issued with a certificate by a State or Territory agency will be protected in proceedings held in federal courts and federal matters heard in State and Territory courts.

New regulation 4D prescribe laws in Victoria, Queensland, South Australia, Tasmania and the ACT as corresponding laws. These laws implement (or substantially implement) the model provisions on assumed identities.

Regulation 4E

The new witness identity protection provisions apply to a civil or criminal proceeding in which an operative is, or may be, required to give evidence obtained as an operative (section 15MD). A civil proceeding is defined in section 15MB as including proceedings on an ex parte application, evidence discovery procedures, appeal proceedings and interlocutory proceedings.

New regulation 4E provides that for the purposes of section 15MB of the Crimes Act, a 'civil proceeding' includes an application for a restraining order under Part 2-1 of

the *Proceeds of Crime Act 2002*, and an examination conducted pursuant to Part 3-1 of the *Proceeds of Crime Act*. This provides certainty that applications and examinations under the *Proceeds of Crime Act* constitute civil proceedings for the purposes of section 15MB.

Item [18] – paragraph 6E(1)(d)

Section 23YUA of the *Crimes Act* provides that the regulations may specify corresponding State and Territory laws for the purposes of the forensics procedure provisions in Part ID of the *Crimes Act*. This allows for the sharing of DNA information which underpins the national DNA database.

Regulation 6E prescribes State and Territory laws on forensics procedures and DNA databases as ‘corresponding laws’ for the purpose of Part ID of the *Crimes Act*.

The *Criminal Law (Forensic Procedures) Act 1998* (SA) was repealed and replaced by the *Criminal Law (Forensics Procedures) Act 2007* (SA). Item 18 amends regulation 6E to refer to the 2007 Act. This amendment confirms that the Commonwealth can engage in inter-jurisdictional DNA matching with South Australia under its new forensic procedures legislation.

Item [19] – regulation 11

Item 19 inserts new regulation 11 into the Principal Regulations. This gives effect to the transitional matters contained in new Schedule 5 to the Principal Regulations inserted by item 20.

Item 19 of Part 3 of Schedule 4 to the SOC Act provides that the Governor-General has the power to make regulations prescribing matters of a transitional nature relating to the amendments or repeals made by that Act.

Subregulation 11(1) provides that Part 1 of Schedule 5 applies to the chief officers’ reporting obligations in relation to controlled operations. The transitional application of repealed provisions to pre-commencement controlled operations means that reporting is required under both the repealed section and the new section. Part 1 of Schedule 5 clarifies that a single report may be issued to fulfil the obligations set by these sections.

Subregulation 11(2) provides that Part 2 of Schedule 5 applies to pre-commencement controlled operations. Under transitional arrangements in the SOC Act, repealed Part IAB continues to apply to controlled operations authorised prior to the commencement of Schedule 3 to the SOC Act. Part 2 of Schedule 5 provides that the regulations under the former Part IAB also apply to these pre-commencement controlled operations.

Subregulation 11(3) provides that Part 3 of Schedule 5 applies to jurisdictions that are not participating jurisdictions (those for which there is not a corresponding assumed identities law in force). Under the transitional arrangement in the SOC Act, repealed section 15XH of the *Crimes Act* continues in effect in relation to a State or Territory that is not a participating jurisdiction. Further, repealed Part IAC (and any related provision) continues in effect in relation to authorisation under that Part and assumed identities acquired or used under such authorisations.

Accordingly, Part 3 of Schedule 5 preserves the definitions of ‘authorising person’ and ‘State or Territory participating agency’ in former regulations 4BB and 4BC of the Principal Regulations.

Subregulation 11(4) prescribes certain laws to be ‘State controlled operations laws’ for the purposes of items 12 and 16 of Schedule 3 to the SOC Act.

Item 12 of Schedule 3 to the SOC Act provides for protection from criminal liability for conduct engaged in before, on or after commencement of the new provision under a State or Territory controlled operation authorised before commencement. Item 16 of Schedule 3 to the SOC Act provides that a ‘State controlled operations law’ is a law of a State or Territory prescribed by the regulations.

It should be noted that a *State controlled operations law* is different to a *corresponding State controlled operations law*, as prescribed in item 1 above.

A ‘State controlled operations law’ includes legislation and provisions that are not based on the model legislation. This ensures that there is retrospective protection for evidence obtained from, and participants in, all operations validly authorised under State or Territory laws before commencement of Schedule 3 to the SOC Act and which may have involved the commission of Commonwealth offences.

Subregulation 11(5) clarifies that, for the purposes of the regulation, ‘Amendment Act’ means the SOC Act, and that ‘participating jurisdiction’ and ‘pre-commencement controlled operations’ are as defined in the relevant provisions of the SOC Act.

Item [20] – Schedule 5

This item inserts a new Schedule 5, to address transitional matters in the Principal Regulations.

Part 1

Under previous section 15T of the Crimes Act, the Minister was required to table a report before each House of the Parliament detailing the controlled operations authorised in that financial year (subject to certain exclusions). The SOC Act repealed section 15T, but provided it with transitional application through the provisions in Part 3 of Schedule 3 to the SOC Act. Section 15HN of the Crimes Act (inserted by the SOC Act) also requires the Minister to table a report detailing the controlled operations authorised under the new provisions.

Part 1 allows the Minister to table a combined report under the previous provision (which has transitional application), and the new provision inserted by the SOC Act.

Part 2

Part 2 ensures that the Principal Regulations as in force immediately before commencement of Schedule 3 to the SOC Act continue to apply to pre-commencement controlled operations (controlled operations authorised prior to the commencement of Schedule 3 to the SOC Act). This is consistent with the transitional arrangements in Part 3 of Schedule 3 to the SOC Act, under which the

repealed provisions of the Crimes Act continue to apply to pre-commencement controlled operations.

Part 3

Part 3 ensures that the Principal Regulations that apply to assumed identities under the repealed provisions in the Crimes Act continue to have legal effect where applicable. The transitional provisions in Part 3 of Schedule 3 to the SOC Act provide that the repealed provisions of the Crimes Act continue to have legal effect for non-participating jurisdictions (item 20). This means that assumed identities continue to be authorised under repealed section 15XH of the Crimes Act for non-participating jurisdictions. Part 3 of Schedule 5 to the Amendment Regulations ensures that the applicable Principal Regulations that correspond to those provisions of the Crimes Act continue to have legal effect for non-participating jurisdictions which authorise the acquisition or use of assumed identities under repealed section 15XH of the Crimes Act.

That is, where repealed Crimes Act provisions still apply due to the transitional arrangements in Part 3 of Schedule 3 to the SOC Act, the corresponding Principal Regulations continue to apply as well.

The term ‘participating jurisdiction’ is defined in new section 15K of the Crimes Act as a jurisdiction in which a corresponding assumed identity law is in force.