

AUSTRALIAN FEDERAL POLICE ASSOCIATION

Inquiry into the legislative arrangements to outlaw serious and
organised crime groups

3 November 2008

AFPA Submission



Prepared by

Jon Hunt-Sharman
National President
AFPA

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Item No. 1.1

Subject:	Harmonisation of federal powers of arrest
AFP Portfolio:	Cross Portfolio
Provision:	Sections 3W; 3X; 3Y; and 3Z <i>Crimes Act 1914</i> (Cth) and Section 210 <i>Customs Act 1901</i> (Cth)
Explanation:	<p>When examining Police powers of arrest, two terms, being reasonable grounds to suspect and reasonable grounds to believe, deem the knowledge required prior to the application of the arrest power. There is no harmonisation of federal crime legislation.</p> <p>Contemporary federal crime legislation refer to reasonable grounds to suspect consistent with the vast majority of State and Territory legislation. In the following legislation arrest is based on reasonable grounds to suspect:-</p> <p><i>Crimes (Aviation) Act 1991</i> (Cth) <i>Crimes (Internationally protected persons) Act 1976</i> (Cth) <i>Migration Act 1958</i> (Cth)</p> <p><i>Crimes Act 1900</i> (ACT), section 212 <i>Police Offences Act 1935</i> (TAS) <i>Misuse of Drugs Act 2001</i> (TAS) <i>Summary Offences Act 1953</i> (SA), section 75 <i>Crimes Act 1900</i> (NSW), section 352 <i>Law Enforcement (Powers & Responsibilities) Act 2002</i> (NSW) <i>Police Powers and Responsibilities Act 2000</i> (Qld) <i>Crimes Act 1961</i> (NZ)</p>
Recommendation:	That Sections 3W; 3X; 3Y and 3Z <i>Crimes Act 1914</i> (Cth) and section 210 <i>Customs Act 1901</i> (Cth) be amended to reflect reasonable grounds to suspect, and that the Criminal Code articulates that for offences under the Code grounds for arrest by a constable is done on reasonable grounds to suspect.

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Item No. 1.2

Subject:	AFP Criminal Caution Amendment
AFP portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914</i> (Cth), Section 23F (cautioning persons under arrest)
Explanation:	<p>The phraseology of the current criminal caution creates an impression that it is best not to speak to Police rather than cooperate with police investigations.</p> <p>The current criminal caution has the two fold negative effect of :-</p> <ol style="list-style-type: none"> 1. 'stopping' innocent people providing a legitimate explanation at the time and therefore 'wasting" police, DPP and court resources as the legitimate explanation has not been provided until the Court case. And 2. allowing a guilty person to fabricate an explanation at Court based on any perceived gaps in the evidence presented by the Prosecution. <p>This issue has been identified in the United Kingdom leading to the development of a criminal caution that encourages innocent people to cooperate with investigators and that potentially negate false defences at court.</p> <p>The adoption of UK criminal caution, with slight variation for Australia, would benefit police, DPP, courts, victims of crime and the larger community both in relation to reducing public expenditure and in establishing the truth in relation to criminal investigations.</p>
Recommendation:	<p>The current AFP Criminal Caution be amended to a slight variation of the English Criminal Caution (The Criminal Justice and Public Order Act 1994) to state:</p> <p><i>'You do not have to say or do anything, but it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say or do may later be given in evidence'.</i></p>

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Item No. 1.3

Subject:	"Four Hour Rule"
AFP Portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914</i> (Cth), Section 23C
Explanation:	<p>The AFP is the only law enforcement Agency in Australia where a four hour rule is imposed from the time of arrest of an offender. Other agencies such as the Victorian police have a "reasonable time" rule. The four hour rule is impractical in the current policing environment and is routinely extended by application of a "time extension".</p> <p>Under section 23D the investigation period may be extended for a period not exceeding 8 hours and must not be extended more than once.</p> <p>To avoid this over utilisation of extending the current four hours if the provisions were reversed there would be a longer period at the time of arrest an less need for unnecessary extensions.</p>
Recommendation:	Amend Section 23C of the <i>Crimes Act 1914</i> (Cth) to extend the "four hour rule" to "eight hours" and reduce the extension of "up to 8 hours" to "up to 4 hours".

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Item No. 1.4

Subject:	Power to enter premises to arrest a person who has been released on bail where the constable believes on reasonable grounds that the person has contravened or is about to contravene a condition of a recognizance on which bail was granted.
AFP portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914</i> (Cth): Section 3Y – Power to arrest without warrant of person on bail; Section 3ZB – Power to enter premises to arrest offender; Section 3W – Power of arrest without warrant by constables.
Explanation:	The current legislation is unclear in relation to entering premises to arrest a person who has been released on bail where the constable believes on reasonable grounds that the person has contravened or is about to contravene a condition of a recognizance on which bail was granted to the person in respect of an offence.
Recommendation:	That 3ZB(2) Power to enter premises to arrest offender be amended to read: Subject to subsection (3), if: a) a constable may, under section 3W, arrest a person without warrant for an offence; and b) the offence is an indictable offence; OR (ba) a constable may, under section 3Y, arrest a person without warrant who has been released on bail in respect of an offence; and c) the constable believes on reasonable grounds that the person is on any premises; The constable may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

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Item No. 1.5

Subject:	Power to detain under a Search Warrant
AFP Portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914</i> (Cth), Section 3F – The things that are authorised by a search warrant
Explanation:	<p>Under section 157(1)(e) of the <i>Police Powers and Responsibilities Act 2000 (Qld)</i>, Queensland police have the ability to detain people while executing a search warrant. The <i>Crime Act 1914</i> (Cth) does not have such a provision.</p> <p>Section 157(1) states:</p> <p>A police officer may lawfully exercise the following powers under a search warrant (search warrant powers) – (e) power to detain anyone at the relevant place for the time reasonably necessary to find out if the person has anything sought under the warrant;</p> <p>This provision has several practical benefits:</p> <ul style="list-style-type: none"> • It ensures that search warrants can be executed efficiently and effectively even in circumstances where a person is not arrested or charged. • It could prevent the loss of evidence and or interference with evidence. • It enables police to identify all persons at the target premises. • It protects the safety of police officers.
Recommendation:	That the <i>Crimes Act 1914</i> (Cth), Section 3F be amended to include a similar power to that provided in s157(1)(e) of the <i>Police Powers and Responsibilities Act 2000</i> (Qld).

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Item No. 1.6

Subject:	Provision to Search a person prior to arrest
AFP Portfolio:	Cross Portfolio
Provision:	<p>Crimes Act 1914 (Cth), Section 3ZF and 3ZE – Power to conduct an ordinary search and frisk search of an arrested person.</p> <p><i>Criminal Code Act 1995</i> (Cth), Sections 105.23 and 105.24 – Power to conduct a frisk search and an ordinary search.</p>
Explanation:	<p>Currently the <i>Crimes Act 1914</i> (Cth) and the <i>Criminal Code Act 1995</i> (Cth) do not give police the power to conduct a frisk search or ordinary search without taking a person into custody.</p> <p>Sections 29 and 30 of the <i>Police Powers and Responsibilities Act 2000</i> (Qld) provide:</p> <p>29 Searching persons without warrant</p> <p>1) <i>A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following</i></p> <ul style="list-style-type: none"> a) <i>stop and detain a person;</i> b) <i>search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.</i> <p>2) <i>The police officer may seize all or part of a thing</i></p> <ul style="list-style-type: none"> a) <i>that may provide evidence of the commission of an offence; or</i> b) <i>that the person intends to use to cause harm to himself, herself or someone else; or</i> c) <i>if section 30(b) applies, that is an antique firearm.</i> <p>30 Prescribed circumstances for searching persons without warrant</p> <p><i>The prescribed circumstances for searching a person without a warrant are as follows</i></p> <ul style="list-style-type: none"> a) <i>the person has something that may be</i> <ul style="list-style-type: none"> i) <i>a weapon, knife or explosive the person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or</i> ii) <i>an unlawful dangerous drug; or</i> iii) <i>stolen property; or</i> iv) <i>unlawfully obtained property; or</i> v) <i>tainted property.</i> <p>These provisions have significant practical benefits. They ensure the operational safety of police. They also increase policing efficiency by satisfying police suspicion immediately and preventing unnecessary arrests.</p>
Recommendation:	<p>That the <i>Criminal Code</i> adopts provisions similar to those in the <i>Police Powers and Responsibilities Act 2000</i> (Qld) to allow police to conduct a frisk search and ordinary search without having to take the person into custody or obtain a warrant.</p>

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Item No. 1.7

Subject:	Searching a Suspect in Custody
AFP Portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914 (Cth)</i>
Explanation:	<p>At present the legislation only allows for “a constable who arrests a person, or who is present at such an arrest” to conduct a search of the suspect (s3ZE, 3ZF, 3ZG <i>Crimes Act 1914 (Cth)</i>). The exception to this is when a person has <u>not</u> had an ordinary search conducted and the person is brought into a Police Station, then s3ZH allows for a person to have an ordinary search or a strip search conducted.</p> <p>In most jobs in Federal Operations the arresting officer (or persons present) hands the suspect over to other AFP Police Officers at the Office for processing and lodging in the watch-house. Under the legislation as it stands, the Police Officers who take custody of the suspect are not entitled to conduct a search. This is a serious officer safety issue and needs to be addressed.</p>
Recommendation:	That the <i>Crimes Act 1914 (Cth)</i> be amended to allow for a search to be conducted by police officers taking a suspect into custody.

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Item No. 1.8

Subject:	Cross-examination prior to trial
AFP Portfolio:	Cross Portfolio
Provision:	<i>Magistrates' Court Act 1989</i> (VIC), Section 56A – Compulsory examination procedure
Explanation:	<p><i>Victorian Magistrates Court Act 1989</i> (VIC) allows for non-compliant witnesses to be summons to attend court and be cross-examined by the prosecution prior to a trial.</p> <p>This issue arises where a witness refuses to give a statement. The DPP will not summons the witness to attend court without knowing what evidence the witness will say for fear that they will not assist the prosecution. We have had prosecutions that have been derailed due to non co-operative witnesses such as professional advisors – accountants for example who will not assist.</p> <p>Such a provision would have a significant practical benefit of obtaining evidence upfront and enabling a full assessment of a witness' testimony prior to a trial.</p>
Recommendation:	That the Commonwealth introduces a provision similar to the <i>Victorian Magistrates' Court Act 1989</i> (VIC) to allow for non-compliant witnesses to be summons to attend court and be cross-examined by the prosecution prior to a trial.

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Item No 1.9

Subject:	Confirming that AFP members also have common law powers and duties
AFP portfolio:	Cross Portfolio
Provision:	<i>Australian Federal Police Act 1979 (Cth)</i>
Explanation:	<p>There is confusion in relation to AFP members acting, or in deed, not acting, to protect life and property within State & NT jurisdictions. The duties and powers of the Office of Constable exist outside of statute and places a responsibility and obligation on all Constables of the Crown to act to protect life and property no matter what jurisdiction the offence is occurring within.</p> <p>The recent New Zealand Police Act 2008 clarified the relationship between the state law and the common law for NZ Police Constables.</p>
Recommendation	The <i>Australian Federal Police Act 1979 (Cth)</i> be amended to state:- Nothing limits or affects the powers and duties conferred or imposed on the office of Constable by common law and an AFP member under this Act is a Constable under common law.

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Item No. 1.10

Subject:	Lack of federal legislation that outlaws criminal groups and membership of and association with these groups
AFP portfolio:	Cross Portfolio
Provision:	Proposed legislation
Explanation:	<p>Serious and organised crime impacting on the Commonwealth covers a diverse range of criminal activities including the trafficking of people, identity theft, the importation, manufacture and distribution of illicit drugs, money laundering, bribery, and financial fraud. Organised crime groups are very adaptable and have the capacity to access external expertise, undertake corruption and exploit domestic and international opportunities.</p> <p>Measures implemented in the UK to support the work of the Serious Organised Crime Agency (SOCA) represent the most applicable model for consideration for federal legislation. These include:</p> <p><u>Serious Crime Prevention Orders</u> SCPOs are civil orders, a breach of which is a criminal offence. They are a tool to prevent, restrict or disrupt serious criminal activities. SCPOs may be made for a maximum period of five years against individuals, bodies corporate, partnerships or unincorporated associations. Their function is to prohibit, restrict, impose requirements or include other terms the Court considers appropriate to protect the public by preventing, restricting or disrupting serious crime.</p> <p><u>Financial Reporting Orders</u> A Financial Reporting Order (FRO) is a conviction-based reporting order that the court can impose on an individual. They are intended to serve as a preventative measure and there are penalties for non-compliance and providing false or misleading information. A person under an FRO can be required to report on their finances at intervals and in detail commensurate with their level of offending.</p> <p>The South Australian <i>Serious and Organised Crime (Control) Bill</i> provides for court to impose control orders on a person where the court is satisfied that the person is a member of a declared organisation and engages or has engaged in serious criminal activity. Control orders may prohibit the subject from associating or communicating with a specified class of persons, entering or being in the vicinity of a premise or premises of a specified class of persons or possessing specified articles or articles of a specified class. In making the order the court may take into account any legitimate associations the subject may have with persons to be specified in the order.</p> <p>The South Australian control order regime is similar to the control order regime in Division 104 of the Commonwealth Criminal Code which allows a court to impose obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act.</p>
Recommendation:	That the Commonwealth adopt similar measures to that in the UK and the SA Bill to ensure the effective policing of serious and organised crime.

Australian Federal Police Association

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Item No. 1.11

Subject:	Organised Crime Syndicate provision
AFP portfolio:	Cross Portfolio
Act & Section:	<i>Crimes Act 1914</i> (Cth)
Explanation:	<p>There is a need for an organised crime syndicate provision to cover criminal groups involved in organised crime. The AFP has identified a number of groups committing many types of offences as a syndicate with individual members having specifically designed roles. Whilst each person is committing relatively minor offences, in total as a group they are committing organised crime. It is difficult to charge those involved in the smaller roles. As a result those offenders at 'arms length' are only charged for minor offences although intelligence indicates that they are often the main organisers of the criminal enterprise.</p> <p>A Provision similar to that of the 'part of terrorist group' offences in the Criminal Code would ensure organised crime syndicate members receive appropriate sentencing for their part in the criminal enterprise.</p> <p>Aspects of the US and Canadian approaches that could have applicability in the Australian context are:</p> <ul style="list-style-type: none"> • Use of objective indices of membership of an organised crime group (for example: course of conduct, in concert with others, derives substantial income or resources) as a circumstance of aggravation which attracts a higher penalty for a range of serious offences. • Parole and bail conditions used to impose non-association conditions on organised crime members. Higher thresholds apply to organised crime members (based on objective indices) seeking bail or parole. • Aspects of investigative law (telephone interception and controlled operations) have been amended to take into account the challenges presented by organised crime investigations, such as increased duration of telephone interception warrants and the ability to undertake long term controlled operations in the context of organised crime money laundering investigations. • The introduction of "Special Administrative Measures" within the corrective services system to address organised crime members who continue to participate in or direct organised crime activities from within the corrective system. • The use of regulation around certain premises, occupations and sectors to prevent organised crime members from holding licences or participating in high risk occupations or sectors. • Investment in proactive strategies to educate and engage high risk sectors and industries to harden them to organised criminal infiltration.
Recommendation	That the <i>Crimes Act 1914</i> (Cth) be amended to include a provision for 'part of organised crime syndicate' offences.

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Item No. 1.12

Subject:	Lack of general federal offences relating to servitude and debt bondage.
AFP Portfolio:	Cross Portfolio
Provision:	<i>Criminal Code Act 1995</i> (Cth),
Explanation:	<p>There is a lack of general federal offences relating to coercion of Australians to participate in federal crimes.</p> <p>There are provisions in the <i>Criminal Code Act 1995</i> (Cth), Division 270- Slavery, sexual servitude and deceptive recruiting; and Division 271 – Trafficking in person and debt bondage. However, servitude and debt bondage equally applies to drug addicts recruited to participate in narcotic importations, or vulnerable people who are recruited for other offences such as fraud on the Commonwealth, organised crime, terrorism, theft etc.</p>
Recommendation:	That the <i>Criminal Code Act 1995</i> (Cth) be amended to include offences relating to coercion of Australians to participate in federal crime and the provision be similar to Division 270 and 271.

Australian Federal Police Association

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Item No. 1.13

Subject:	Admissibility of certain evidence from foreign countries
AFP Portfolio:	Cross Portfolio
Provision:	<i>Crimes Act 1914</i> (Cth), Part 1C
Explanation:	<p>Part 1C was developed prior to the increase of trans-national crime and the need for inter-jurisdictional admissibility of evidence.</p> <p>Part 1C needs to be contemporised to address evidence obtained from foreign countries where the evidence has been obtain lawfully without any threat promise or inducement but has not complied with the procedure outlined in Part 1C.</p>
Recommendation:	That Part 1C be amended to allow certain evidence to be admissible in court proceedings where the evidence has been obtained lawfully but not in accordance with Part 1C.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 2.1

Subject:	Seizure of narcotic goods and evidential material without a warrant
AFP Portfolio:	Border and International
Provision:	<i>Customs Act 1901 (Cth)</i> , Section 203C
Explanation:	<p>Section 203C(2) provides that in circumstances outlined by this section an authorised person may, without a warrant, seize goods that are suspected on reasonable grounds to be narcotics, if any are found there.</p> <p>Section 203C(3) provides that if in the course of searching for narcotics the authorised person finds a thing they believe on reasonable grounds to be evidential material relating to an offence, they may seize that thing.</p> <p>Section 203C(2) requires that a search occurs prior to seizure. Section 203C(3) demands a higher threshold (i.e believe rather than suspect) before evidential material found during a search can be seized. Therefore, evidential material cannot be seized without searching the evidential material until the suspicion is raised to a belief. It is difficult to reconcile how a suspicion can be raised to a belief without searching the item.</p> <p>It appears that under this section it is necessary to search all items on site prior to seizure. Current practice within the AFP is to seize the item of the nature described in this section and then a deconstruction occurs at the AFP. There is a distinct risk that any evidence obtained under this section may be excluded due to seizure of an item without either searching it on site or obtaining a warrant.</p>
Recommendation:	<p>That the threshold for exercising the powers prescribed by 203C be made consistent. It is recommended that the appropriate standard is that the authorised person “suspects on reasonable grounds.”</p> <p>This would prevent the risk of evidence being excluded due to it failing to meet the prescribed threshold.</p>

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Item No. 2.2

Subject:	Pre-trial destruction of precursors, exhibits and associated items related to the manufacture of synthetic drugs.
AFP Portfolio:	Border & International
Provision:	<i>Criminal Code Act 1995 (Cth)</i>
Explanation:	<p>The AFP / Customs are currently experiencing a significant increase in the quantity of border controlled precursors seized. Unlike bulk drug material, there is currently no legislation to support the pre-trial destruction of bulk precursor material.</p> <p>AFP National Offices are now holding large amounts of pseudoephedrine and other border controlled precursors which can not currently be destroyed until the end of legal proceedings. Pseudoephedrine is a relatively innocuous precursor and can be stored in plastic bags as per drug bulk. Considerable storage space is now utilised to store this bulk over an extended period. Other precursors such as MDP2P, P2P, and safrole are suspected carcinogens and in the case of safrole a suspected mutagen. These need to be stored in UN rated chemical storage containers. This takes up a large amount of space in AFP premises and is a significant security risk to store off-site. This storage also creates a significant expense to the Commonwealth.</p> <p>Other Jurisdictions such as New South Wales have mechanisms to destroy these items within a reasonable time frame after seizure. The <i>Drug Misuse and Trafficking Act 1985 (NSW)</i>, section 39PA allows for the destruction of dangerous exhibits. An addition to the <i>Criminal Code Act 1995 (Cth)</i> of this nature would assist in the destruction of this material.</p>
Recommendation:	<p>That the issue of the destruction of precursor bulk material be addressed in federal legislation. Options include:</p> <ul style="list-style-type: none"> • A provision based on section 207(1) of the <i>Customs Act 1901 (Cth)</i> but in relation to precursors be enacted. • A section based on section 39PA <i>Drug Misuse and Trafficking Act 1985 (NSW)</i> be inserted into federal legislation.

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Item No. 2.3

Subject:	Controlled Operations and Criminal Informants
AFP Portfolio:	Border and International
Provision:	<i>Crimes Act 1914 (Cth)</i> , Part IAB
Explanation:	<p>Section 15 provides that law enforcement officers are not liable for offences committed for purposes of authorised controlled operation.</p> <p>These provisions exclude an informant of a law enforcement officer.</p> <p>It is important that this provision differentiates between informants involved in the actual criminal activity versus informants who can assist in providing evidence through participation in a controlled operation.</p>
Recommendation:	<p>That Section 15I Part IAB be amended to include non-liability for certain informants who commit offences for the purposes of controlled operations.</p> <p><u>Example of amendment:</u> Section 15I(2A)(a) 15IA(2A)(a) be amended to read “is an informant of a law enforcement officer who is believed to have been involved, other than for law enforcement purposes, in the criminal activity in respect of which the controlled operation was authorised.”</p>

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Item No. 2.4

Subject:	Requirement that suspects have knowledge that precursors are to be manufactured into a controlled drug
AFP Portfolio:	Border and International
Provision:	Criminal Code Act 1995 (Cth), Section 307.11 - Importing and exporting commercial quantities of border controlled precursors
Explanation:	<p>Border controlled precursors are becoming one of the major drug type seizures being intercepted by the AFP. Section 307.11 of the Criminal Code Act 1995 (Cth) as it is currently drafted makes prosecution more difficult than for other drug types because of point Section 307.11(1)(b) which requires knowledge that the precursor is to be manufactured into a controlled drug. This provision increases the difficulty of proving the charge as not only do investigators need to prove knowledge that the imported good is a pre-cursor but also requires knowledge of the next step in the process.</p> <p>Difficulties have already been experienced with these provisions in practice. Suspects have been acquitted due to a lack of evidence pertaining to their knowledge of what was to happen to the pre-cursor (pseudoephedrine) after it had been imported.</p>
Recommendation:	That legislation relating to precursors is amended to mirror the provisions relating to border controlled drugs.

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Item No. 2.5

Subject:	Requirement for 'Delayed Notification Search Warrants'
AFP portfolio:	Border & International
Provision:	Proposed amendment in the <i>Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006</i>
Explanation:	<p>A delayed notification search warrant would enable police officers to get search warrants that will allow the covert entry and search of premises to prevent or investigate Commonwealth terrorism offences and a limited range of other serious Commonwealth offences punishable on conviction by imprisonment for a period of 10 years or more.</p> <p>The AFP representative told the Senate Committee that:</p> <p style="padding-left: 40px;">“The ability for police to enter and search premises without notifying the occupants of the target premises is an important investigative tool. Searches of this nature—such as controlled operations, telecommunications interception and the use of electronic surveillance devices and stored communication warrants—complement the existing investigative tools available to law enforcement because they allow the examination of physical evidence such as computers, diaries and correspondence that enable police to identify the full range of people involved in suspected serious criminal activity and to obtain evidence of that activity. It is particularly important in being able to operate to prevent criminal activity. The rationale for seeking this power and the context in which it would be used is that there are investigations where keeping the existence of the investigation confidential, in particular from targets of the investigation and their associates, is often critical to the success of that investigation.”</p> <p>These types of warrants exist at the state level. Delayed notification warrants in the New South Wales jurisdiction have, as their exclusive focus, prevention and response to terrorist acts. In Victoria and the Northern Territory the warrants are limited to circumstances in which 'a terrorist act has been, is being, or is likely to be committed'. In Queensland, the warrants are available in relation to the investigation of organised crime, terrorism or designated offences, where 'designated offences' is limited to offences involving death or serious injury with a maximum penalty of life imprisonment.</p>
Recommendation	That delayed notification of Search Warrants provision in the <i>Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006</i> be supported by the Federal Government for a limited range of serious Commonwealth offences punishable on conviction by imprisonment for a period of 10 years or more.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 2.6

Subject:	Penalty for possession of any quantity of precursor drugs is inadequate compared with federal & state (import & supply) drug legislation
AFP Portfolio:	Border & International
Provision:	<i>Criminal Code Act 1995</i> (Cth), Section 308.2
Explanation:	<p>Under the <i>Criminal Code Act 1995</i> (Cth), possession of any quantity of controlled precursors (such as pseudoephedrine) carries a maximum of 2 years imprisonment (Section 308.2).</p> <p>Whereas possession of commercial quantities of border controlled drugs carries a maximum penalty of life imprisonment (section 307.5). Possession of a marketable quantity of border controlled drugs carries a maximum penalty of 25 years imprisonment (section 307.6).</p> <p>The AFP has recently conducted controlled deliveries in relation to seizures of in excess of 800 kilograms of pseudoephedrine. Although the importation carries a maximum penalty of 25 years, the subsequent possession of the pseudoephedrine only carries a 2 year penalty.</p> <p>The AFP has had to charge suspects in possession of the precursors (with no involvement in the import) with NSW drug supply charges in order to reflect the seriousness of the offence and to assist in having bail refused.</p>
Recommendation	That the penalties for possession of precursors be increased in line with the penalties for possession of border controlled drugs.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 2.7

Subject:	Money Laundering and Foreign Indictable Offences
AFP Portfolio:	Border and International
Provision:	<i>Criminal Code Act 1995 (Cth)</i> – Part 10.2, Division 400: Money Laundering
Explanation:	<p>It is arguable that this division of the Code does not apply to the proceeds of a foreign indictable offence.</p> <p>Section 400.1 provides that proceeds of crime is any property derived from the commission of an offence that may be dealt with as an indictable offence.</p> <p>The Dictionary (Defined in the end of the <i>Criminal Code Act 1995 (Cth)</i>) defines an offence as "...an offence against a law of the Commonwealth".</p> <p>It is clear from the definition of deals with money or other property that proceeds of foreign offences were intended to be included under this Division. However, this is only possible if the definition of "offence" is subject to Division 400.</p> <p>Advice received from the Commonwealth DPP states:</p> <p>"... it is arguable that the reference to 'offence' in the definition of 'proceeds of crime' is to be understood to be referring to Commonwealth indictable offences and foreign indictable offences, despite the Dictionary definition of 'offence' in the Dictionary that offence means 'an offence against a law of the Commonwealth'. I am mindful that section 4(2) of the <i>Criminal Code Act 1995</i> provides that definitions in the Code of expressions used in the Code apply to its construction except insofar as the context of the subject matter otherwise indicates or requires. In this instance it is apparent that the provisions regarding dealing with money or property have no operation at all in relation to the proceeds of foreign indictable offences if the reference to 'offence' were not read subject to its context in Division 400. This is something that should be addressed legislatively in my view however."</p>
Recommendation:	<p>It is recommended that the definition of proceeds of crime in section 400.1 be amended to read:</p> <p><i>"proceeds of crime"</i> means any money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence) <u>or from the commission of a foreign indictable offence.</u></p>

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.1

Subject:	Consideration of a False Claims Bill to combat contractual fraud on Commonwealth agencies
AFP portfolio:	Economic and Special Operations
Provision:	N/A
Explanation:	<p>The <i>False Claims Act</i> in the United States allows people who are not affiliated with the government to file actions against federal contractors in relation to fraud against government agencies. The act of filing such actions is informally called "whistleblowing". Claims are filed by persons with insider knowledge of false claims which have typically involved health care, military, or other government spending programs.</p> <p>The Act establishes liability when any person or entity improperly receives from or avoids payment to the Federal government with the exception of tax fraud. By far the most frequent cases involve situations in which a defendant (usually a corporation but on occasion an individual) overcharges the federal government for goods or services. Other typical cases entail failure to test a product as required by the rigorous government specifications or selling defective products.</p> <p>The False Claims Act has a detailed process for making a claim. Mere complaints to the government agency are insufficient to bring claims under the Act. A complaint (lawsuit) must be filed in the Federal Court. Persons filing under the Act stand to receive a portion (usually about 15-25 per cent) of any recovered damages.</p> <p>After an investigation by the Department of Justice, it decides whether it will pursue the case. If the case is pursued, the amount of the reward is less than if the Department of Justice decides not to pursue the case and the plaintiff continues the lawsuit him or herself. However, the success rate is higher in cases that the Department of Justice decides to pursue.</p> <p>The U.S. Justice Department has announced that \$2 billion has been recovered under the federal False Claims Act in 2007, of which \$1.45 billion came from whistleblower-filed cases. The total amount returned to the U.S. Government under the False Claims Act since 1986 is well over \$20 billion.</p>
Recommendation	The Federal Government consider a <i>False Claims Bill</i> to combat contractual fraud on Commonwealth agencies.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.2

Subject:	Search warrants to obtain banking records
AFP Portfolio:	Economic & Special Operations
Provision:	<i>Crimes act 1914</i> (Cth), Section 3E
Explanation:	<p>The same legislation covers search warrants issued for “physical evidence” as for evidence held in cyber space such as banking records. This has led to a contrived process between financial institutions and police to “create” an address for the search warrant. The legislation covering search warrants for obtaining financial and electronic information is out of date.</p> <p>It is also possible that a search warrant is not needed as the information is owned by the bank. In this case, the conditions of the <i>Privacy Act</i> may come into effect.</p> <p>Search warrants for banking records are unduly onerous in preparation extending from between ten and thirty pages. It also relies on the cooperation of the bank to generate the information from their data base which is something they are not strictly required to do.</p> <p>Other agencies such as the ACC, Taxation and Centrelink have provisions in their legislation for obtaining financial information without the need for a search warrant. The AFP is the only agency that uses Section 3E warrants to obtain banking information.</p>
Recommendation:	Create a provision under the crimes act similar to “notice to produce” provisions of the ACC Act authorising the AFP to issue a notice to a financial institution or other third party innocent organisation to produce records, that are adequately described in the notice.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.3

Subject:	Enact a production order provision to enable criminal investigators to obtain information from financial institutions
AFP portfolio:	Economic and Special Operations
Provision:	<i>Crimes Act 1914 (Cth)</i>
Explanation:	<p>Financial institutions almost always require legal compulsion to provide records to law enforcement agencies. Currently the only legislative tool available is a search warrant issued under Section 3E of the Crimes Act 1914.</p> <p>This is an inappropriate tool to utilise as in practice the execution of the warrant involves an exchange of documentation by arrangement of the warrant.</p> <p>Often documentation is not available or it is not practicable for the institution to provide documents until analysis of statement material is undertaken to narrow a request. Since the warrant only has effect at the time of execution, reliance is placed upon the financial institution to volunteer documentation that was covered by the warrant some weeks or often month's later, or subsequent warrants are sought for the same material.</p>
Recommendation	Enact a production order provision similar to Section 202 of the <i>Proceeds of Crime Act 2002</i> to enable criminal investigators to obtain information from financial institutions. Include in this a non-disclosure provision.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.4

Subject:	Disclosure of account holder information in criminal investigations
AFP portfolio:	Economic & Special
Provision:	<i>Crimes Act 1914</i> (Cth)
Explanation:	<p>When investigating criminal matters there presently is no means to compel financial institutions to disclose account holder information. Over time almost all financial institutions ignore the <i>Privacy Act</i> exemptions and require a compulsion to provide information before handing over information.</p> <p>Practice currently involves serving a letter on the financial institution asking them to volunteer the existence of account holder information. Upon the institution searching and volunteering account holder information the investigator then forms suspicion sufficient to enable an application for a <i>Crimes Act 1914</i> search warrant. Should the institution not be prepared to volunteer information sufficient to form the necessary suspicion required to obtain a search warrant then there is presently no legislative tool available to obtain the information for a criminal investigation.</p> <p>Additionally, should the financial institution not fully disclose any account holder information when they volunteer information then there are no sanctions available to investigators.</p> <p>The additional inclusion of a non disclosure clause in the notice would prevent institutions informing their customers of the interest of law enforcement – an issue which threatens the confidentiality of criminal investigations prior to the existence of the inquiry being made known to a suspect.</p>
Recommendation	Enact a notice provision or similar for service on financial institutions similar to Section 213 of the <i>Proceeds of Crime Act 2002</i> (Cth) requiring the disclosure of account holder information in criminal investigations. Include in this a non-disclosure provision.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.5

Subject:	Trademark infringement penalties
AFP Portfolio:	Economic and Special Operations
Provision:	<i>Trade Marks Act 1995 (Cth)</i>
Explanation:	Low penalties for breaches of the <i>Trade Marks Act 1995 (Cth)</i> is resulting in AFP referrals to the DPP being rejected despite counterfeiting and other trademark infringements receiving funding and policy priority at the AFP.
Recommendation:	That penalties for breaches of the <i>Trade Marks Act 1995 (Cth)</i> be increased to ensure its effective enforcement.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.6

Subject:	Amend Section 400.9(2)(c) of the <i>Criminal Code Act 1995</i> (Cth) to impose a time period in line with the <i>Proceeds of Crime Act 2002</i> (Cth) for the calculation of a persons income and expenditure.
AFP portfolio:	Economic and Special Operations
Provision:	<i>Criminal Code Act 1995</i> (Cth) Section 400.9(2)(c)
Explanation:	<p>With no defined period of time to base a calculation upon it is presently open for a defendant to rely on the acquisition of the property during a period prior to the requirement to maintain records for taxation purposes. This makes it virtually impossible to refute any assertion that property has been lawfully acquired previously.</p> <p>This issue would be addressed if the time period for the calculation of a person's income and expenditure replicated the <i>Proceeds of Crime Act 2002</i> (Cth). It would also harmonize the <i>Criminal Code Act 1995</i> (Cth) with the <i>Proceeds of Crime Act 2002</i> (Cth).</p>
Recommendation	Amend Section 400.9 (2)(c) of the <i>Criminal Code Act 1995</i> (Cth) to impose a time period in line with the <i>Proceeds of Crime Act 2002</i> (Cth) for the calculation of a persons income and expenditure.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.7

Subject:	Release of information by the Australian Taxation Office (ATO) to assist in the prosecution of criminal offences other than purely tax related offences.
AFP portfolio:	Economic and Special Operations
Provision:	<i>Income Tax Administration Act 1953 (Cth)</i>
Explanation:	<p>Section 400.9 (2)(c) of the <i>Criminal Code Act 1995 (Cth)</i> refers to an element of the deeming provisions related to the offence of the “Possession of property reasonably suspected of being proceeds of crime”. The section makes reference to a consideration to assess whether money or property is proceeds of crime as being “the value of the money and property involved in the conduct is in the opinion of the trier of fact, grossly out of proportion to the defendant’s income and expenditure”.</p> <p>Presently there is no release provision for the use of income tax information held by the ATO to be used in evidence in criminal proceedings to enable the calculation of a defendant’s income as referred to in Section 400.9 of the <i>Criminal Code Act 1995 (Cth)</i>.</p> <p>The release provisions only enable the release of information to be used in evidence in furtherance of a tax related prosecution, for use with the making of an order under the <i>Proceeds of Crime Act 2002 (Cth)</i> or as intelligence in connection with the investigation of an indictable offence.</p>
Recommendation	Amend Section 3E of the <i>Income Tax Administration Act 1953 (Cth)</i> to enable the release of information by the Australian Taxation Office (ATO) to assist in the prosecution of criminal offences other than purely tax related offences.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.8

Subject:	The ability to use Examination Orders without having to first obtain a Restraining Order over property.
AFP portfolio:	Economic & Special Operations
Provision:	<i>Proceeds of Crime Act 2002 (Cth)</i> , Section 180.
Explanation:	<p>The requirement to have obtained a restraining order over property prior to being able to apply for an examination order limits the effectiveness of the Act. The use of examination powers should be made available to assist investigators identify the existence of assets through the requirement to lodge a statement of assets and liabilities and by enabling examination of business dealings to assess a possible beneficial interest in an asset.</p> <p>It is logical to consider the need to question a person prior to being in a position to apply for a restraining order where it is alleged the asset is owned by or held under the effective control of the suspect and an argument for restraint must be made.</p>
Recommendation	Amend Section 180 of the <i>Proceeds of Crime Act 2002 (Cth)</i> to enable the use of Examination Orders without having to first obtain a Restraining Order over property.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.9

Subject:	Amend Section 225 of the <i>Proceeds of Crime Act 2002</i> (Cth) to include a non disclosure provision.
AFP portfolio:	Economic and Special Operations
Provision:	Section 225 of the <i>Proceeds of Crime Act 2002</i> (Cth)
Explanation:	<p>Sections 213 and 202 of the <i>Proceeds of Crime Act 2002</i> include non-disclosure provisions to prevent parties under investigation being informed of asset tracing inquiries so as to prevent the disposal of assets prior to restraint.</p> <p>It currently makes no sense why a search warrant issued for the same purpose should not also contain a non-disclosure provision to prevent disclosure to an accused.</p> <p>The example is where a professional advisor has acted on behalf of an accused. The production order may be used but has a 14 day time frame for the supply of records unless the applicant can demonstrate to a magistrate that it is not impracticable for the person receiving the order to supply the records sought in a shorter timeframe. This in itself is an issue to convince a magistrate without having first spoken to the person receiving the order. In this instance a search warrant enables a record to be obtained immediately but there is no protection under the Act to prevent the professional advisor informing the client that the warrant has been served.</p>
Recommendation	Amend Section 225 of the <i>Proceeds of Crime Act 2002</i> (Cth) to include a non-disclosure provision.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.10

Subject:	Inclusion of a “freezing notice provision” in the <i>Proceeds of Crime Act 2002</i> (Cth) enabling a magistrate to make an interim order to prevent the disposal of an asset prior to the application for a Restraining Order.
AFP portfolio:	Economic and Special Operations
Provision:	<i>Proceeds of Crime Act 2002</i> (Cth)
Explanation:	<p>Under the present provisions there are often time delays for the DPP to apply for restraining orders, partly due to the undertaking for costs that needs to be made and adjudicated on by the Director or his/her delegate, and partly due to the time it takes to schedule applications before judges in different jurisdictions.</p> <p>A “freezing notice provision” would be an ideal solution to prevent a suspect disposing of the balance of a bank account prior to a restraining order being issued by a magistrate.</p>
Recommendation	Introduce a freezing notice provision similar to the WA <i>Proceeds of Crime Legislation</i> enabling a magistrate to make an interim order to prevent the disposal of an asset prior to the application for a Restraining Order.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.11

Subject:	Introduce Cash seizure provision in the <i>Proceeds of Crime Act 2002</i> (Cth)
AFP portfolio:	Economic and Special Operations
Provision:	<i>Proceeds of Crime Act 2002</i> (Cth)
Explanation:	<p>There are presently very weak provisions to seize and investigate cash that is suspected to be the proceeds of crime.</p> <p>The UK provision places an obligation upon a suspect or person laying a claim of ownership over cash seized by police to account for their lawful acquisition of the cash.</p> <p>The Act also provides for investigation periods to be available to law enforcement agencies to investigate the origin and source of funds in light of the ownership claim made by the person to the cash.</p> <p>Periods of investigation and orders to retain cash are subject to review by magistrates to enable more efficient operation of the Act. It would follow that a restraint under existing provisions would follow the investigation framework that might be introduced under this provision.</p>
Recommendation	Introduce a cash seizure provision in the <i>Proceeds of Crime Act 2002</i> (Cth) similar to the United Kingdom <i>Proceeds of Crime</i> legislation.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.12

Subject:	Urgent amendments needed in relation to the <i>Proceeds of Crime Act 2002</i> (Cth) as recommended by Mr Tom Sherman AO.
AFP portfolio:	Economic and Special Operations
Provision:	<i>Proceeds of Crime Act 2002</i> (Cth)
Explanation:	<p>On 6 April 2006 Mr Tom Sherman AO was engaged to conduct an independent review under section 327 of the <i>Proceeds of Crime Act 2002</i> (Cth). Section 327 states:</p> <p style="padding-left: 40px;">1) <i>The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after the third anniversary of the commencement of this Act.</i></p> <p>The Report on the independent review of the operation of the <i>Proceeds of Crime Act 2002</i> (Cth) was tabled in July 2006. It contained significant recommendations to remove fundamental deficiencies in the Act after considering expert and professional submissions from stakeholders including the AFPA, DPP, AFP, ACC, ASIC, ITSA, ATO, who have been directly involved in the operation of the <i>Proceeds of Crime</i> legislation. The Report was tabled in Parliament in October 2006.</p> <p>It appears that all but one of these important recommendations has been ignored. Only a trivial recommendation D28 replacing references to the 'Official Receiver' with 'Inspector-General in Bankruptcy' in section 299 of the Act appear to have been passed by Parliament.</p>
Recommendation	That as a matter of urgency the <i>Proceeds of Crime Act 2002</i> (Cth) is amended to include all recommendations from the Report on the independent review of the operation of the <i>Proceeds of Crime Act 2002</i> (Cth) conducted by Mr Tom Sherman AO and tabled in Parliament in October 2006, some two years ago.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.13

Subject:	Confiscated Assets Account (CAA) payment criteria too limiting
AFP portfolio:	Economic and Special Operations
Provision:	<i>Proceeds of Crime Act 2002</i> (Cth), Section 298
Explanation:	<p>The CAA occupies an important place in the scheme of the <i>Proceeds of Crime Act 2002</i> (Cth). It is the repository of funds ultimately realised as proceeds of crime and enables expenditure on payments to other governments, to cover certain costs, and on projects which have criminal justice objectives as specified in section 298(2) of the Act.</p> <p>Section 298(2) is too limiting in relation to ‘projects’ and requires amendment to allow for other circumstances relating to law enforcement or as a result of criminal activity.</p> <p>A broader definition will allow for other opportunities for criminals assets to be used, if appropriate, to assist victims of crime and charitable organisations linked to law enforcement.</p> <p>It would also provide the Minister with the opportunity to approve grants for other purposes deemed appropriate.</p>
Recommendation	That section 298(2) includes “direct or indirect assistance to victims of crime, charitable organisations linked to law enforcement; or for any other purpose deemed appropriate by the Minister”.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.14

Subject:	Unexplained Wealth Provision to be included in the <i>Proceeds of Crime Act 2002</i> (Cth)
AFP portfolio:	Economic and Special Operations
Provision:	<i>Proceeds of Crime Act 2002</i> (Cth)
Explanation:	<p>A number of State and Territory civil forfeiture laws now include an Unexplained Wealth Provision consistent with the resolution of 1997 Interpol General Assembly which <i>“recognized that unexplained wealth is a legitimate subject of inquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country’s domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect of unexplained wealth”.</i></p> <p>Unexplained Wealth Provisions have now existed in WA since 2000 under ss12-14 of the <i>Criminal Property Confiscation Act 2000</i> (WA), and the NT under ss 67-72 of the <i>Crimes (Forfeiture of Proceeds) Act 1988</i> (NT). South Australia Government as part of its current legislative reform program targeting serious and organised crime, is amending the <i>Criminal Assets Confiscation Act (SA)</i> to provide for unexplained-wealth orders. The provisions are based on the provisions in Division 1 of Part 6 of the Northern Territory’s <i>Criminal Property Forfeiture Act</i>.</p> <p>Under these provisions the relevant Director of Public Prosecutions can apply to a court for an unexplained wealth declaration against a person, and the court must declare that the person has unexplained wealth if it is more likely than not that the total value of the respondent’s wealth is greater than the value of the person’s lawfully acquired wealth. The respondent must establish that wealth has been lawfully acquired.</p> <p>The need for an Unexplained Wealth Provision in <i>Proceeds of Crime Act 2002</i> (Cth) is best supported by a relevant anecdote told by the first CDPP, Ian Temby, in relation to a long standing organised crime target Bruce ‘snapper’ Cornwell. Whilst awaiting extradition to Australia to face serious drug charges, (which he eventually pleaded guilty to with a 23 year sentence), he wrote: <i>‘I don’t give a f**k what they do to me as long as we keep safe all that we worked for!’</i></p> <p>Leaders of criminal enterprises are rarely close to the predicate criminal activities. Underlings can be paid to take those risks. Unexplained Wealth provision enables law enforcement to confiscate the illicit profits that are a number of steps removed but under the indirect control of organised crime leaders. The AFP has examples where criminal intelligence has identified individuals who have accumulated significant assets and wealth with no detectable legal means to account for it.</p>
Recommendation:	That an unexplained wealth provision be included in the <i>Proceeds of Crime Act 2002</i> (Cth).

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups


Item No. 3.15

Subject:	Future Carbon Offences
AFP portfolio:	Economic and Special Operations
Provision:	Proposed new legislation
Explanation:	<p>The federal government's proposed Carbon Pollution Reduction Scheme is based on a carbon cap and trade scheme. The Government will auction Carbon Pollution Permits however industry will be able to trade these Permits. There will be a requirement by the Government to monitor and audit companies holding Carbon Pollution Permits in relation to carbon pollution levels. It is envisaged that there will also be Offset Credits which will be a reward for reduction in emission.</p> <p>It is anticipated that initially 1,000 large businesses will be subject to the scheme as of 2010. With more industries included by 2015.</p> <p>It is highly likely that the Carbon Pollution Reduction Scheme will create new crime types as some businesses seek to have unfair advantage over competitors. Traditional crime types will be adapted to this scheme such as falsification of emission records, corruption of Carbon Pollution Reduction Scheme Inspectors, theft and counterfeiting of Carbon Pollution Permits and fraud.</p> <p>Rather than State and Territory offences it would seem appropriate to have federal legislation underpinning the Carbon Pollution Reduction Scheme.</p>
Recommendation	Consideration be given to the development of federal carbon pollution reduction legislation that incorporates specific offences.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 3.16

Subject:	Future Water Offences
AFP portfolio:	Economic and Special Operations
Provision:	Proposal for new Legislation
Explanation:	 <p>The Murray River and its tributary, the Darling River, are the main rivers in the Murray-Darling River Basin. However, the Murrumbidgee River and the Snowy River are also included. The Murray-Darling River Basin therefore impacts on QLD, NSW, ACT, Victoria, and SA. This drainage basin comprises the major part of the interior wetlands of Australia, covering more than one million square kilometres, or about 14 per cent of Australia.</p> <p>Under the <i>Water Act 2007</i>, the Australian Competition and Consumer Commission (ACCC) has the task of advising the Government on draft rules to give farmers flexibility to trade their water access rights and help ensure more efficient and sustainable water use across the Murray-Darling Basin.</p> <p>The Federal Government is already investing \$12.9 Billion in a long term 'Water for the Future' plan for a number of other river systems that cross State borders, of which there are many. QLD and NT share the Nicholson River. QLD and NSW share the Warrego, Condamine and Barwon Rivers. QLD and SA share Coopers Creek and Diamantina River. NSW shares the Murrumbidgee with the ACT. NSW shares the Snowy River, Murray Darling, Ovens, Goulburn, Lachlan and Campaspe Rivers with Victoria. NSW shares the Murray River with SA.</p> <p>With water scarcity there will be crime in relation to water trading, water theft, etc. With so many main rivers crossing State and Territory borders it would seem appropriate that federal legislation is put in place articulating various offences rather than being dealt with at the State level.</p>
Recommendation:	That federal legislation is developed in relation to future water crimes to underpin the 'Water for the Future' plan.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.1

Subject:	Fingerprints and Photographs
AFP Portfolio:	Forensic and Technical
Provision:	<i>Crimes Act 1914</i> (Cth), Section 3ZJ
Explanation:	<p>If a person is in lawful custody it is necessary to satisfy the requirements of section 3ZJ(3) to obtain identification material.</p> <p>Section 230(3)(a) of the <i>Crimes Act 1900</i> (ACT) allows police to take identification material from a person in lawful custody if the identification material is prints of the person's fingers or photographs of the person.</p> <p>Under this section the only requirement to take fingerprints and photographs of a person is that they are in lawful custody.</p>
Recommendation:	<p>It is recommended that the <i>Crimes Act 1914</i> (Cth) be amended to adopt the provisions of section 230 of the <i>Crimes Act 1900</i> (ACT).</p> <p>Such an amendment would have a beneficial practical outcome. Currently, it is necessary to get of a Commonwealth offender court ordered fingerprints after conviction. It is more appropriate for this to occur when the offender is charged.</p>

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.2

Subject:	Deletion or amendment of Sections 3ZM - ZO of the <i>Crimes Act 1914</i> dealing with the introduction of identification evidence.
AFP portfolio:	Economic and Special Operations
Provision:	Crimes Act 1914 Section 3ZM-ZO
Explanation:	<p>The reliance on the use of Identification parades in the Commonwealth law is at odds with the majority of State and Territory legislation. Many of these jurisdictions have removed identification parades.</p> <p>The use of photographic evidence should be made more simple and not as an adjunct to the use of an identification parade due to impracticality of attempting to arrange a parade using volunteers. As an alternative, greater use should be considered of video tape and/or photographic identification means.</p>
Recommendation	Deletion or amendment of Sections 3ZM - ZO of the <i>Crimes Act 1914</i> (Cth) dealing with the introduction of identification evidence and the use of identification parades and photographs.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.3

Subject:	Marking of plastic explosives
AFP Portfolio:	Forensic and Technical
Provision:	Division 72B of the <i>Criminal Code Act 1995</i> (Cth)
Explanation:	<p>Recently introduced MARPLEX (marking of Explosives) legislation is difficult to apply. The legislation requires that all plastic explosives contain at least 1% of a marking agent at the time of manufacture.</p> <p>However the agents are volatile and degrade over time such that tests often return marking agent indicators of less than 1%. Tests required to identify the marking agent are expensive and where a sample falls below 1% its use as evidence could be challenged.</p>
Recommendation:	The legislation needs amending to allow for the degraded marking agents that fall below 1% after time of manufacture to be admissible as evidence.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.4

Subject:	The inclusion of a use of force provision for the collection of a sample from a serious convicted offender.
AFP Portfolio:	Forensic and Technical
Provision:	<i>Crimes Act 1914</i> (Cth), section 23XWO – Judge or magistrate order for carrying out forensic procedure on offender
Explanation:	<p>In July 1998, the <i>Crimes Act 1914</i> (Cth) was amended to enable the taking of forensic samples for the purposes of Commonwealth investigations. The Act was further amended in 2001 to enable the taking of forensic samples including DNA samples from suspects, volunteers and offenders still under sentence, and the use of those samples in the new national DNA database. These amendments commenced on 20 June 2001.</p> <p>There is at s23XJ legislative provision, subject to s23XK, for use of reasonable force on suspects for the purposes of carrying out a forensic procedure, however this does not apply to convicted criminals.</p> <p>Advice received from the Attorney General's Department (AGD), the Commonwealth Director of Public Prosecutions (CDPP) and the Australian Government Solicitor (AGS) is that there is no power under this section, s23XWO in relation to serious convicted offenders, for an Order to include that reasonable force may be used to execute such an Order.</p> <p>This has lead to the situation where a prisoner who was the subject to an Order refusing to consent to the procedure and the AFP not being able to physically carrying out the Order.</p> <p>Therefore, the Act provides for the detention and forceable taking of a sample from a suspect, but not for the forceable taking of a sample from a person who is a person convicted of a serious Commonwealth offence who is currently incarcerated for that offence.</p>
Recommendation:	That the <i>Crimes Act 1914</i> (Cth) be amended to include a use of force provision for the collection of a sample from a serious convicted offender.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.5

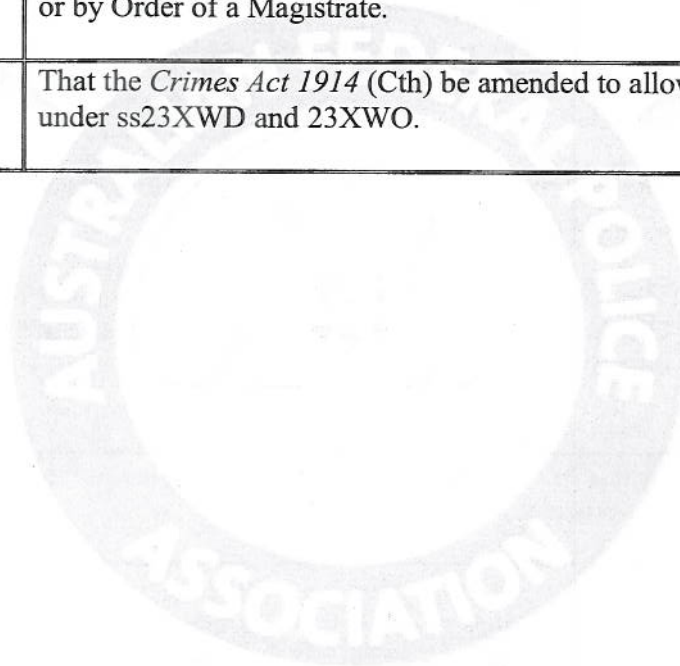
Subject:	Broaden the definition of "Authorised Applicant"
AFP Portfolio:	Forensic and Technical
Provision:	<i>Crimes Act 1914</i> (Cth), Section s23WA, Authorised Applicant for Magistrates/Judges Orders.
Explanation:	<p>As a matter of a procedural issue, the act only allows for the Officer-in-Charge of a Police Station, (eg an Office Manager) the Investigating Officer in relation to a particular offence, or the Director of Public Prosecutions to be the 'Authorised Applicant' to obtain an Order on a convicted serious offender.</p> <p>The DPP has advised that local DPP offices should not involve themselves as the applicant in such matters.</p> <p>This obviously leaves only two people, either the Station OIC or the Case Officer to make an application. Thus reducing significantly the operational effectiveness of such a process.</p>
Recommendation:	That the <i>Crimes Act 1914</i> (Cth) be amended to improve the efficiency of this process.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 4.6

Subject:	Judges Issuance of Orders
AFP Portfolio:	Forensic and Technical
Provision:	<i>Crimes Act 1914</i> (Cth)
Explanation:	Advice received from the DPP is that Orders are not able to be obtained from a Judge as although s23XWO enables a Judge to make an Order s23XWD states that such a procedure may only be carried out with consent or by Order of a Magistrate.
Recommendation:	That the <i>Crimes Act 1914</i> (Cth) be amended to allow judges to make orders under ss23XWD and 23XWO.



Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.1

Subject:	Interference with telecommunication devices
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Telecommunications (Interception and Access) Act 1979</i> (Cth)
Explanation:	<p>The <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) does not allow law enforcement agencies to interfere with the telecommunication devices of targets.</p> <p>The legal authority to conduct this activity would significantly assist investigations. Interfering with a telecommunications signal may include, but is not limited to the following:</p> <ul style="list-style-type: none">• Deactivating the international roaming capabilities of a phone with an Australian carrier; and• Blocking an outgoing phone signal at an examination facility.
Recommendation:	<p>That the <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) be amended to allow the AFP to interfere with the telecommunications service of a target.</p> <p>An amendment such as this would significantly assist in law enforcement. It would have an impact on all aspects of crime including community policing, drug importation and counter terrorism.</p>

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.2

Subject:	Requirement for the provision of information regarding critical infrastructure.
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Aviation Transport Security Act 2004</i> (Cth) <i>Crimes (Aviation) Act 1991</i> (Cth) National Counter Terrorism Plan National Guidelines for protecting Critical Infrastructure from Terrorism
Explanation:	<p>The AFP along with other Federal government organisations (such as the Department of Infrastructure, Transport, Regional Development and local Government) have a primary responsibility to protect this infrastructure and respond to an incident involving this infrastructure.</p> <p>The AFP provides protection at 11 Airports within Australia but there is no requirement for plans and information enabling the protection of this infrastructure in a usable format to the AFP. Privately owned corporations are seeking to charge the AFP large sums of money for provision of this data and profit from the AFP responsibilities of protecting the community.</p> <p>As part of critical infrastructure protection, there is a need to obtain building plans and area plans of this infrastructure that can be included in the AFP's planning, modelling and dispatch systems. The critical infrastructure includes airports, ports, dams, electrical grids, and important government buildings.</p> <p>Without this information the AFP is not able to provide efficient and effective protection and response capability as it has been tasked in relation to identified critical infrastructure. This compromises the effectiveness of the AFP's service to Australia.</p>
Recommendation:	That legislation requiring the provision information regarding identified critical infrastructure be provided to the AFP and other nominated agencies charged with the protection of the critical infrastructure.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.3

Subject:	Mobile Phone Offences
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Criminal Code Act 1995 (Cth)</i> <i>Crimes Act 1914 (Cth)</i>
Explanation:	<p>Currently there is no offence to purchase or possess a mobile phone/sim card under a false name.</p> <p>Many offences are committed in these circumstances. This issue has been a significant practical impediment in conducting investigations.</p>
Recommendation:	That the <i>Criminal Code Act 1995 (Cth)</i> be amended to include an offence for the purchase and/or possession and/or using a mobile phone under a false name.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.4

Subject:	Retrieval of Surveillance Devices
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Surveillance Devices Act 2004</i> (Cth)
Explanation:	The warrant authorising trespass to install surveillance devices does not entitle legal trespass for retrieval of the device for which a new warrant is required. This seems counter productive.
Recommendation:	That the Surveillance Devices Act be reformed to enable the lawful retrieval of devices with the initial warrant.



Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.5

Subject:	The 72 Hour Rule
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Crimes Act 1914</i> (Cth), Section 3K – Use of equipment to examine or process things
Explanation:	<p>Section 3K of the <i>Crimes Act 1914</i> (Cth) provides that things can be moved to another place for the purposes of determining whether it may be seized under a warrant if it is more practicable and if there is reasonable grounds to believe that it contains evidential material.</p> <p>Section 3K(3A) provides that the thing may be moved to another place for examination or processing for no longer than 72 hours.</p> <p>In practice this section has proven to be unworkable. Police have been unable to get computers forensically examined in this timeframe.</p> <p>It is noted that section 3K(3B) allows for an executing officer to apply for an extension if they believe on reasonable grounds that the thing cannot be examined or processed within 72 hours. However, the default provision of 72 hours is insufficient for the examination of computers to reduce the requirement of such extensions as a matter of course, thereby reducing court and police resources being diverted.</p>
Recommendation:	That Section 3K(3A) be amended to allow a more reasonable time to examine things that are moved to another place in order to satisfy a warrant.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.6

Subject:	Telecommunications Reporting – Final Effectiveness Report
AFP Portfolio:	High Tech Crime Operations
Provision:	<i>Telecommunications (Interception and Access) Act 1979 (Cth)</i> , Sections 94 and 94A
Explanation:	<p>After every Telecommunications Intercept and Surveillance Device warrant expires or is revoked a Final Effectiveness Report (FER) is required to be submitted. FER's are submitted to the Special Projects registrar in the region and are then on-forwarded to Special Projects Canberra. The FER's are used to produce annual reports and are also scrutinised by the ombudsman's office. There are currently two practical issues which compromise the efficiency of this process.</p> <ol style="list-style-type: none"> 1) The FER proforma in its current form is open to mistakes and misinterpretation, a much better system for producing FER's would be to use the RADAR's system to generate a report at the expiry of the warrant which would provide all of the relevant details, all that would be required of the investigator would be to record the effectiveness of the warrant and the number of arrests directly leading from the use of the product. By utilising RADARS, many hours would be saved by both investigators and the special projects registrar. 2) To comply with the legislation, Use and Communication forms are required to be submitted attached to the FER's. These forms are supposed to record each and every time an individual call is used in an affidavit, communicated to a surveillance team, sent in an OLC etc, etc. The task of recording individual occurrences of the use of special projects is extremely time consuming and usually requires one member of a team to be dedicated to the task. I believe that a single blanket explanation of the overall use and communication of all calls captured under the warrant would be sufficient to show that it was reasonable for the warrant to have been issued.
Recommendation:	<ol style="list-style-type: none"> 1) That Special Projects Canberra be approached to develop a RADARS reporting system; 2) That Special Projects, the Telecommunication Ombudsman and AG's be approached to reduce the time required for compliance of use and communication forms, and the legislation amended accordingly.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.7

Subject:	Lack of ability to track bank account/financial transactions in relation to serious and organised crime including drug importations and terrorism related offences.
AFP portfolio:	Hight Tech Crime Operations
Provision:	<i>Crimes Act 1914 (Cth)</i>
Explanation:	<p>The <i>Crimes Act 1914 (Cth)</i> does not provide for monitoring orders to be placed on banks / institutions to monitor in real time, transactions in bank accounts suspected of being used to finance criminal activity.</p> <p>It would be significant benefit to AFP investigations to be able to track in real time, transactions through the bank accounts of persons suspected of committing serious and organised crime including drug importations and terrorism offences. Often it is the trail of money that provides the detail of where / who is planning a drug importation or terrorist act. While extremely useful, AUSTRAC does not capture all transactions.</p>
Recommendation	That an instrument similar to monitoring orders under the <i>Proceeds of Crime Act 2002 (Cth)</i> be introduced under the <i>Crimes Act 1914</i> to allow for the real time monitoring of bank accounts used by persons suspected of committing serious and organised crime including drug importations and terrorism related offences.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 5.8

Subject:	Need for Organised Retail Crime Legislation
AFP portfolio:	High Tech Crime Operations
Act & Section:	N/A
Explanation:	<p>The proposed legislation would address e-fenceing (on-line sales of stolen property). On-line sellers would need to show that they have taken steps to insure that stolen property is not being sold on the internet. It should also allow retailers to sue on-line auction sites who sell their stolen merchandise.</p> <p>Organised retail crime is a large and growing national issue impacting on the Australian economy. It also threatens public health and safety when thieves tamper with items.</p> <p>On-line auctions and other markets on the Internet allow stolen or counterfeit goods to be resold easily. Requiring Internet marketplaces to live up to their responsibility to block the sale of obviously stolen merchandise is not unreasonable.</p> <p>The proposed legislation should define organised retail crime as “the acquiring of retail merchandise by illegal means for the purpose of reselling the items” and make such activity, including transportation, sale or receipt of stolen retail goods, a federal crime.</p> <p>The proposed legislation should also establish that operation of on-line marketplaces such as auction sites can be considered “facilitation” of organised retail crime unless the operator can show that specific steps had been taken to ensure that goods being sold were not obtained by theft or fraud. Site operators would be required to “expeditiously” investigate complaints that stolen items are being sold, maintain records of the names and physical addresses of high-volume sellers, and require high-volume sellers to either post that information along with merchandise offerings or make it available upon request to any business with a reasonable suspicion about the merchandise.</p>
Recommendation:	The Government considers introducing Organised Retail Crime legislation to cover internet marketplaces.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 6.1

Subject:	Attempt to pass a weapon through a screening point.
AFP Portfolio:	Aviation
Provision:	<i>Aviation Transport Security Act 2004 (Cth), Section 47 (a) & (b)</i>
Explanation:	<p>A federal offence only occurs under Commonwealth legislation when someone passes a weapon through a screening point. An offence only occurs if the person is successful in passing the weapon through the point. Since the detection devices inevitably detect weapons no Commonwealth offence occurs if a weapon is detected.</p> <p>Federal Law enforcement officers rely on relevant state laws covering the offence of "being armed or carrying a weapon in a public place"</p>
Recommendation:	That Commonwealth legislation is amended to make it an offence to attempt to pass a weapon through a screening point.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 6.2

Subject:	Power to obtain passenger information
AFP Portfolio:	Aviation
Provision:	<i>Aviation Transport Security Act 2004 (Cth)</i> , Part 5, Division 3.
Explanation:	<p>Currently it is necessary for police to obtain a search warrant in order to obtain information pertaining to manifests - passenger, freight and crew details. Section 77 of Division 2 allows for law enforcement officers to be appointed Aviation Security Inspectors (ASI) by the Secretary of Infrastructure, however no officers have been appointed and advice has been received that there is no intention to do so. Even if law enforcement officers were appointed ASI, the powers are limited to investigating contraventions of the <i>Aviation Transport Security Act 2004 (Cth)</i>.</p> <p>Such an amendment would clear up issues relating to the disclosure of information by airlines, freight companies and other aviation industry related participants. This is especially the case when law enforcement are investigating time critical matters/offences.</p>
Recommendation:	<p>That the <i>Aviation Transport Security Act 2004 (Cth)</i> be amended to allow police to request documents etc similar to Section 79 powers for ASI. This would include the power to obtain information for the purposes of:</p> <ul style="list-style-type: none"> • Investigating a possible contravention of <i>Aviation Transport Security Act 2004 (Cth)</i>; and • Investigation of a criminal offence as defined by State, Territory or Commonwealth Acts.

Australian Federal Police Association

Federal Crime Justice Forum

Item No. 6.3

Subject:	Aviation Security Identification Cards
AFP Portfolio:	Aviation
Provision:	<i>Aviation Transport Security Regulations (2005), Part 6 Security Identification</i>
Explanation:	<p>The process for the issuing of Aviation Security Identification Cards (ASICs) is inadequate.</p> <p>It would provide further security and assist in subsequent investigations if those applying for an ASIC were sponsored by a third party.</p>
Recommendation:	<p>That the <i>Aviation Transport Security Regulations (2005)</i> be amended to require that an ASIC holder must be sponsored by a third party (employer/company director) and that the registered third party must provide information to Law Enforcement Agencies (LEA) to assist the investigation of offences related to the <i>Aviation Transport Security Regulations 2005</i>.</p> <p>This would stop the issue of ASIC to persons who have left employment during the application process and no longer have a reason to hold an ASIC.</p>

Australian Federal Police Association

Federal Crime Justice Forum

Item No. 6.4

Subject:	Recovery of Aviation Security Identification Cards
AFP Portfolio:	Aviation
Provision:	<i>Aviation Transport Security Regulations 2005, Section 6.42</i>
Explanation:	<p>Currently no penalty exists if an Aviation Security Identification Card (ASIC) holder does not notify the issuing body of a changed name or changed address.</p> <p>Such a provision would aid ASIC Issuing Bodies and Law Enforcement Agencies in recovering expired ASIC cards by putting responsibility on ASIC holders to assist with maintaining a current residential address database. Issuing Bodies would also be able to contact holders and inform them of impending expiries and/or ASIC return procedures.</p>
Recommendation:	That section 6.42 of the <i>Aviation Transport Security Regulations 2005</i> include a provision that requires holders of ASIC to inform the ASIC issuing body of a change of their residential address or name within 30 days.

Australian Federal Police Association

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Item No. 6.5

Subject:	Travelling under a false name, assumed name, or the name of another person
AFP Portfolio:	Aviation
Provision:	<i>Aviation Transport Security Act 2004 (Cth)</i>
Explanation:	<p>It is currently not an offence to travel on a domestic flight under a false name, assumed name or the name of another person. This poses a significant security risk to domestic travel.</p> <p>It is noted that the independent review of Airport Security conducted by Sir John Wheeler in 2005 did not specifically address this issue. However, it did highlight the importance of “assessing threat and risks on an ongoing basis and mitigating these in a timely way.”</p> <p>Airport security would be significantly enhanced if it was an offence to travel on a domestic flight under a false name or assumed name.</p> <p>Further to this offence, a second offence should be created in relation to a person or organisation assisting a person to undertake travel under a false or assumed name or the name of another person.</p>
Recommendation:	<p>That an offence be inserted into the <i>Aviation Transport Security Act 2004 (Cth)</i> that will make it an offence to travel on a domestic flight under a false or assumed name or the name of another person.</p> <p>That a further offence be inserted into the <i>Aviation Transport Security Act 2004 (Cth)</i> in relation to a person or organisation assisting a person to undertake travel under a false or assumed name or the name of another person.</p>

