

# Law Enforcement (Controlled Operations) Act 1997 No 136

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New South Wales

## Status Information

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### Authorisation

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# Law Enforcement (Controlled Operations) Act 1997 No 136



New South Wales

An Act with respect to the authorisation, conduct and monitoring of certain operations conducted by law enforcement agencies; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Law Enforcement (Controlled Operations) Act 1997*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act:

**authorised operation** means a controlled operation for which an authority is in force and, in Parts 3 and 5, includes any operation in the nature of a controlled operation that is authorised by or under the provisions of a corresponding law.

**authority** means an authority in force under Part 2, and includes any variation of such an authority and any retrospective authority granted under section 14.

**chief executive officer** means the person for the time being holding office or acting as:

- (a) in relation to the NSW Police Force, the Commissioner of Police, and
- (b) in relation to the Independent Commission Against Corruption, the Commissioner for that Commission, and
- (c) in relation to the New South Wales Crime Commission, the Commissioner for that Commission, and
- (d) in relation to the Police Integrity Commission, the Commissioner for that Commission, and

(e) in relation to a law enforcement agency prescribed by the regulations, the chief executive officer (however described) of that agency,

and, in relation to an authorised operation, means the chief executive officer of the law enforcement agency on whose behalf the operation has been, is being or is proposed to be conducted.

**civilian participant** in an authorised operation means a participant in the operation who is not a law enforcement officer.

**code of conduct** means a code of conduct referred to in section 20.

**conduct**, when used as a noun, includes any act or omission.

**controlled activity** means an activity that, but for section 16, would be unlawful.

**controlled conduct** means conduct in respect of which, but for section 20K or 20L, a person would be criminally liable.

**controlled operation** means an operation conducted for the purpose of:

- (a) obtaining evidence of criminal activity or corrupt conduct, or
- (b) arresting any person involved in criminal activity or corrupt conduct, or
- (c) frustrating criminal activity or corrupt conduct, or
- (d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),

being an operation that involves, or may involve, a controlled activity.

**corresponding authorised operation** means any operation in the nature of a cross-border controlled operation that is authorised by or under the provisions of a corresponding law.

**corresponding authority** means an authority authorising a cross-border controlled operation (within the meaning of a corresponding law) that is in force under a corresponding law.

**corresponding law** means a law of the Commonwealth, or of another State or Territory, referred to in Schedule 1.

**corresponding participant** means a person who is authorised by a corresponding authority to participate in a corresponding authorised operation.

**corrupt conduct** has the same meaning as it has in the [Independent Commission Against Corruption Act 1988](#).

**criminal activity** means any activity that involves the commission of an offence by one or more persons.

**cross-border controlled operation** means a controlled operation that is, will be, or is likely to be, conducted in this jurisdiction and in one or more participating jurisdictions.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**law enforcement agency** means each of the following:

- (a) the NSW Police Force,
- (b) the Independent Commission Against Corruption,
- (c) the New South Wales Crime Commission,
- (d) the Police Integrity Commission,
- (e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:
  - (i) the Australian Federal Police,
  - (ii) the Australian Crime Commission,
  - (iii) the Australian Customs Service.

**law enforcement officer** means:

- (a) an officer or employee of a law enforcement agency or a person who is seconded to such an agency, including (but not limited to) a police officer, or
- (b) a member of a police force or police service (however described) of another State, a Territory or another country.

**law enforcement participant** in an authorised operation means a participant in the operation who is a law enforcement officer.

**participant** in an authorised operation means a person who is authorised under this Act to engage in controlled activities for the purposes of the operation.

**participating jurisdiction** means a jurisdiction in which a corresponding law is in force.

**Presiding Officer**, in relation to a House of Parliament, means the President of the Legislative Council or the Speaker of the Legislative Assembly.

**principal law enforcement officer** for an authorised operation means the law enforcement officer who is identified by the authority for the operation as the law enforcement officer who is to conduct, and to have responsibility for, the operation.

**sexual offence** means:

- (a) an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900*, or
- (b) any other offence of a similar kind prescribed by the regulations for the purposes of this definition.

**this jurisdiction** means New South Wales.

- (2) For the purposes of this Act, a cross-border controlled operation is taken to be conducted in this jurisdiction (whether or not it is also conducted in another jurisdiction) if a participant in the operation is a law enforcement officer of this jurisdiction.

**Note—**

Subsection (2) is intended to cover the situation where an officer of this jurisdiction is conducting an operation in another jurisdiction for the purposes of obtaining evidence of an offence in this jurisdiction (for example, a NSW officer is investigating a conspiracy to import drugs into NSW from Victoria, and the operation is to be conducted wholly in Victoria).

- (3) Notes included in this Act do not form part of this Act.

**3A Act not to affect certain matters**

- (1) This Act does not affect, and is taken never to have affected, the existence or exercise of any discretions (including any administrative or judicial discretions) that, apart from this Act, may lawfully be exercised in relation to the commencement, conduct or conclusion of legal proceedings.
- (2) Without limiting subsection (1), the discretions referred to in that subsection include the following:
  - (a) any discretion as to whether or not legal proceedings should be commenced or terminated,
  - (b) any discretion as to whether or not evidence should be admitted in legal proceedings,
  - (c) any discretion as to how a person found guilty in respect of a charge should be dealt with.
- (3) This section applies to all activities, whether or not they are engaged in for the purposes of, or in the course of, an authorised operation.
- (3A) Despite the other provisions of this section, in determining whether evidence should



be admitted or excluded in any proceedings, the fact that the evidence was obtained as a result of a person engaging in criminal activity is to be disregarded if:

- (a) the person was a participant or corresponding participant acting in the course of an authorised operation or corresponding authorised operation, and
- (b) the criminal activity was a controlled activity within the meaning of this Act or controlled conduct within the meaning of a corresponding law.

(4) In this section, **legal proceedings** includes disciplinary proceedings.

#### 4 Amendment of Schedule 1

The regulations may amend Schedule 1 so as to insert, amend or omit the name of a law of the Commonwealth or a law of another State or Territory.

## Part 2 Authorisation of controlled operations

### Note—

Part 3A contains additional provisions relating to cross-border controlled operations.

#### 5 Applications for authorities

(1) A law enforcement officer for a law enforcement agency may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.

(2) An application for an authority may be made:

- (a) by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a **formal application**), or
- (b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an **urgent application**).

(2A) In any application, whether formal or urgent, the applicant must provide the following particulars:

- (a) a plan of the proposed operation,
- (b) the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted,
- (c) the nature of the controlled activity in respect of which an authority is sought,
- (d) a statement of whether or not the proposed operation, or any other controlled operation with respect to the same criminal activity or corrupt conduct, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or variation granted.

- (2B) The regulations may make provision for or with respect to the following matters:
- (a) the circumstances in which an urgent application may be made,
  - (b) the procedure for making an urgent application,
  - (c) the extent to which a chief executive officer is to be satisfied as to the validity of the circumstances in which an urgent application is made,
  - (d) the keeping of records in relation to an urgent application,
  - (e) the form in which a formal application may be made.
- (3) The chief executive officer may require the applicant to furnish such additional information concerning the proposed controlled operation as is necessary for the chief executive officer's proper consideration of the application.

## **6 Determination of applications**

- (1) After considering an application for authority to conduct a controlled operation, and any additional information furnished under section 5 (3), the chief executive officer:
- (a) may authorise a law enforcement officer for the law enforcement agency concerned to conduct the operation, either unconditionally or subject to conditions, or
  - (b) may refuse the application.
- (2) An authority to conduct a controlled operation on behalf of a law enforcement agency may not be granted unless a code of conduct is prescribed by the regulations in relation to that agency.
- (3) An authority to conduct a controlled operation may not be granted unless the chief executive officer is satisfied as to the following matters:
- (a) that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency,
  - (b) that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation,
  - (c) that the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity or corrupt conduct,
  - (d) that the proposed controlled activities will be capable of being accounted for in sufficient detail to enable the reporting requirements of this Act to be fully complied with.

- (4) In considering the matters referred to in subsection (3), the chief executive officer must have regard to the following:
- (a) the reliability of any information as to the nature and extent of the suspected criminal activity or corrupt conduct,
  - (b) the likelihood of success of the proposed controlled operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes,
  - (c) the duration of the proposed controlled operation.
- (5) (Repealed)

## **7 Certain matters not to be authorised**

- (1) An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:
- (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
  - (b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property, or
  - (c) engaging in conduct that involves the commission of a sexual offence against any person.
- (2) A person must not be authorised to participate in a controlled operation unless the chief executive officer is satisfied that the person has the appropriate skills to participate in the operation.
- (3) A civilian participant:
- (a) must not be authorised to participate in any aspect of a controlled operation unless the chief executive officer is satisfied that it is wholly impracticable for a law enforcement participant to participate in that aspect of the operation, and
  - (b) must not be authorised to engage in a controlled activity unless it is wholly impracticable for the civilian participant to participate in the aspect of the controlled operation referred to in paragraph (a) without engaging in that activity.

## **8 Form of authority**

- (1) An authority to conduct a controlled operation may be granted:
- (a) by means of a written document, signed by the chief executive officer, or by

means of a facsimile transmission of a document so signed (a **formal authority**),  
or

(b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an **urgent authority**).

(2) An authority, whether formal or urgent:

(a) must identify the operation by reference to the plan referred to in section 5 (2A) (a), and

(b) must identify the law enforcement officer who is to conduct the operation, and

(c) must identify each person who may engage in controlled activities for the purposes of the operation, and

(d) must state whether or not any such person may operate under an assumed name, and

(e) must identify:

(i) with respect to the law enforcement participants, the nature of the controlled activities that those participants may engage in, and

(ii) with respect to the civilian participants, the particular controlled activities (if any) that each such participant may engage in, and

(f) in respect of an urgent authority, must specify the period (not exceeding 72 hours) for which the authority is to remain in force, and

(g) in respect of a formal authority, must specify the period (not exceeding 6 months) for which the authority is to remain in force, and

(h) must specify any conditions to which the conduct of the operation is subject under section 6 (1) (a).

(3) A person is sufficiently identified for the purposes of subsection (2) (b) or (c) if the person is identified:

(a) by an assumed name under which the person is operating, or

(b) by a code name or code number,

so long as the assumed name, code name or code number can be matched to the person's identity by reference to documentation kept by the chief executive officer.

(4) Unless it sooner ceases to have effect, an urgent authority ceases to have effect 72 hours after it is granted.

(5) A chief executive officer who grants an urgent authority must ensure that written

notes are kept of the following matters:

- (a) the date and time when the authority was granted,
- (b) the identity of the law enforcement officer to whom the authority was granted,
- (c) the particulars referred to in subsection (2).

(6) The regulations may make provision for or with respect to the following matters:

- (a) the procedure for granting an urgent authority,
- (b) the keeping of records in relation to an urgent authority,
- (c) the form in which a formal authority may be granted.

## 9 Duration of authorities

Unless it is sooner cancelled, an authority has effect for the period specified in the authority in accordance with section 8 (2) (f) or (g).

## 10 Variation of authority

(1) The principal law enforcement officer for an authorised operation, or any other law enforcement officer on behalf of the principal law enforcement officer, may apply to the chief executive officer for a variation of an authority for any one or more of the following purposes:

- (a) to extend the period for which the authority has effect,
- (b) to provide for an alternative principal law enforcement officer for the operation,
- (c) to authorise additional or alternative persons to engage in controlled activities for the purposes of the operation,
- (d) to authorise participants in the operation to engage in additional or alternative controlled activities.

(1A) More than one application for a variation may be made in respect of the same authority, but no single variation may extend an authority for more than 6 months at a time.

(1B) An application for a variation of an authority may be made:

- (a) by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a **formal application**), or
- (b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an **urgent application**).

(1C) The regulations may make provision for or with respect to the following matters:

- (a) the circumstances in which an urgent application may be made,
  - (b) the procedure for making an urgent application,
  - (c) the extent to which a chief executive officer is to be satisfied as to the validity of the circumstances in which an urgent application is made,
  - (d) the keeping of records in relation to an urgent application,
  - (e) the form in which a formal application may be made.
- (2) The chief executive officer may require the applicant to furnish such information concerning the proposed variation as is necessary for the chief executive officer's proper consideration of the application.
- (3) After considering an application for a variation of an authority, and any additional information furnished under subsection (2), the chief executive officer:
- (a) may vary the authority in accordance with the application, either unconditionally or subject to conditions, or
  - (b) may refuse the application.
- (4) An authority may not be varied unless the chief executive officer is satisfied that:
- (a) the success of the operation, or
  - (b) the protection of the health or safety of a participant in the operation or any other person, or
  - (c) the protection of property from loss or damage,
- can reasonably be expected to require the variation sought by the application.
- (5) Section 7 applies to an application under this section in the same way as it applies to an application under section 5.
- (6) A variation of authority may be granted:
- (a) by means of a written document, signed by the chief executive officer, or by means of a facsimile transmission of a document so signed (a **formal variation of authority**), or
  - (b) by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an **urgent variation of authority**).
- (7) Unless it sooner ceases to have effect, an urgent variation of authority ceases to have effect 72 hours after it is granted.
- (8) A chief executive officer who grants an urgent variation of authority is to ensure that

written notes are kept of the following matters:

- (a) the date and time when the variation of authority was granted,
- (b) the identity of the law enforcement officer to whom the variation of authority was granted,
- (c) the terms of the variation.

(9) The regulations may make provision for or with respect to the following matters:

- (a) the procedure for granting an urgent variation of authority,
- (b) the keeping of records in relation to an urgent variation of authority,
- (c) the form in which a formal variation of authority may be granted.

(10) If an authority to conduct a controlled operation is varied, it is a sufficient defence to criminal or disciplinary proceedings arising from conduct that is engaged in by the defendant in reliance on the authority as in force prior to that variation if the defendant satisfies the court or tribunal before which the proceedings are being heard:

- (a) that the defendant engaged in the conduct in good faith for the purposes of, and in the course of, the controlled operation, and
- (b) that, had the authority not been varied, the conduct would have been lawful by operation of section 16, and
- (c) that the defendant was unaware, and could not reasonably be expected to have been aware, that the authority had been varied.

## **11 (Repealed)**

## **12 Cancellation of authorities**

- (1) An authority for a controlled operation may be cancelled by the chief executive officer, by order in writing, at any time and for any reason.
- (2) Cancellation of an authority for a controlled operation takes effect at the time the order is made or at such later time as may be specified in the order.
- (3) It is a sufficient defence to criminal or disciplinary proceedings arising from conduct that has been engaged in by the defendant in reliance on an authority that has been cancelled if the defendant satisfies the court or tribunal before which the proceedings are being heard:
  - (a) that the defendant engaged in the conduct in good faith for the purposes of, and in the course of, a controlled operation for which the authority had been in force, and

(b) that, had the authority been in force when the defendant engaged in the conduct, the conduct would have been lawful by operation of section 16, and

(c) that the defendant was unaware, and could not reasonably be expected to have been aware, that the authority had been cancelled.

### **13 Effect of authorities**

While it has effect, an authority for a controlled operation:

(a) authorises each law enforcement participant to engage in the controlled activities specified in the authority in respect of the law enforcement participants, and

(b) authorises each civilian participant (if any) to engage in the particular controlled activities (if any) specified in the authority in respect of that participant.

### **13A Defect in authority**

An application for an authority or variation of authority, and any authority or variation of authority granted on the basis of such an application, is not invalidated by any procedural defect, other than a defect that affects the substance of the application, authority or variation in a material particular.

## **Part 3 Conduct of controlled operations**

### **14 Retrospective authority**

(1) If a participant in an authorised operation engages in unlawful conduct (other than unlawful conduct that is a controlled activity) in the course of the operation, the principal law enforcement officer for the operation may, within 24 hours after the participant engages in that conduct, apply to the chief executive officer for retrospective authority for the conduct.

(2) An application under this section may be made in such manner as the chief executive officer may permit.

(3) The chief executive officer may require the principal law enforcement officer to furnish such information concerning the relevant conduct as is necessary for the chief executive officer's proper consideration of the application.

(4) After considering an application under subsection (1), and any additional information furnished under subsection (3), the chief executive officer:

(a) may grant retrospective authority in accordance with the application, or

(b) may refuse the application.

(5) Retrospective authority may not be granted unless the chief executive officer is satisfied:



- (a) that the following circumstances existed when the relevant conduct occurred:
    - (i) the participant who engaged in the conduct believed on reasonable grounds:
      - (A) that there was a substantial risk to the success of the authorised operation, or
      - (B) that there was a substantial risk to the health or safety of a participant in the operation, or any other person, as a direct result of the conduct of the authorised operation, or
      - (C) that criminal activity or corrupt conduct other than the criminal activity or corrupt conduct in respect of which the authorised operation is being conducted had occurred, or was likely to occur, and that there was a substantial risk that evidence relating to that criminal activity or corrupt conduct would be lost,
    - (ii) the participant could not avoid that risk otherwise than by engaging in the relevant conduct, and
  - (b) that, at all times prior to those circumstances arising, the participant had been acting in good faith and in accordance with the relevant code of conduct, and
  - (c) that the participant had not foreseen, and could not reasonably be expected to have foreseen, that those circumstances would arise, and
  - (d) that, had it been possible to foresee that those circumstances would arise, authority for the relevant conduct would have been sought, and
  - (e) it was not reasonably possible in those circumstances for the participant to seek a variation of the authority for the operation to authorise the relevant conduct.
- (6) Subsection (5) does not allow retrospective authority to be granted with respect to conduct giving rise to any of the following:
- (a) the offence of murder,
  - (b) any other offence for which the common law defence of duress would not be available.

## **15 Reports on controlled operations**

- (1) Within 2 months after completing an authorised operation, the principal law enforcement officer for the operation must cause a report on the operation to be given to the chief executive officer.
- (2) The regulations may make provision for or with respect to the matters to be included in such a report.

## **16 Lawfulness of controlled activities**

Despite any other Act or law, an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

## **17 Lawfulness of activities with respect to assumed names**

(1) Despite any other Act or law, the following activities:

- (a) the preparation of any false documentation (such as the preparation of a driver licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,
- (b) the inclusion of any false information in any record or register (such as that relevant to the issue of a driver licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,
- (c) the use of such documentation or information by any person in the course of, and for the purposes of, an authorised operation conducted on behalf of a law enforcement agency,

are not unlawful, and do not constitute offences or corrupt conduct, so long as the documentation or information is the subject of a certificate, signed by the chief executive officer of the agency, to the effect that the documentation or information is to be used for the purposes of this Act.

(2) Subsection (1) does not render lawful the preparation of false documentation, the inclusion of false information in any record or register or the use of such documentation or information in relation to matters of the kind recorded or registered under the *Births, Deaths and Marriages Registration Act 1995*.

## **18 Lawfulness of certain ancillary activities**

(1) Despite any other Act or law, an activity that is engaged in by a person:

- (a) in connection with a controlled activity, or
- (b) in connection with an activity referred to in section 17 (1) (a), (b) or (c),

is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is engaged in (whether by a participant in an authorised operation or otherwise) in the course of, and for the purposes of, an authorised operation.

(2) This section applies to an activity that (but for this section) would be unlawful because (ignoring the operation of sections 16 and 17) the activity in connection with which it

is engaged in is unlawful (such as an activity that would otherwise give rise to the offence of aiding and abetting the commission of an offence or of conspiring to commit an offence), and does not apply to any other activity.

## **19 Exclusion of civil liability**

Conduct of:

- (a) a chief executive officer, or
- (b) the principal law enforcement officer for an authorised operation, or
- (c) a participant in an authorised operation, or
- (d) a person acting in accordance with the directions of:
  - (i) a chief executive officer, or
  - (ii) the principal law enforcement officer for an authorised operation,

does not, if the conduct was in good faith and for the purpose of executing this Act, subject the chief executive officer, principal law enforcement officer, participant or person so acting personally to any action, claim, liability or demand.

## **20 Codes of conduct**

- (1) The regulations may prescribe codes of conduct for authorised operations conducted on behalf of law enforcement agencies.
- (2) Different codes of conduct may be prescribed for different law enforcement agencies.
- (3) A code of conduct may make provision for or with respect to any aspect of the conduct of an authorised operation.
- (4) A regulation may not be made for the purposes of this section except on the recommendation of the Inspector of the Police Integrity Commission.
- (5) Contravention of the code of conduct for a law enforcement agency by any person (including a law enforcement officer) employed within that agency is taken to be misconduct for the purposes of any disciplinary proceedings taken against that person with respect to the contravention.

## **Part 3A Cross-border controlled operations**

### **20A Application of Act to cross-border controlled operations**

- (1) This Act applies in respect of cross-border controlled operations (with any necessary modifications), subject to the modifications set out in this Part.
- (2) Section 14 (Retrospective authority) does not apply in respect of a cross-border

controlled operation.

## 20B Definitions

(1) For the purposes of this Part:

**illicit goods** means goods the possession of which is a contravention of a law of this jurisdiction.

**relevant offence** means:

- (a) an offence against the law of this jurisdiction that carries a maximum penalty of imprisonment for 3 years or more, or
- (b) any other offence against the law of this jurisdiction that is prescribed by the regulations.

**suspect**, when used as a noun, means a person reasonably suspected of having committed or being likely to have committed, or of committing or being likely to be committing, a relevant offence.

(2) For the purposes of this Part, references in this Act:

- (a) to a **controlled activity** are to be construed (with any necessary modifications) as references to **controlled conduct**, and
- (b) to **criminal activity or corrupt conduct** as a single phrase (but not to **criminal activity** on its own) are to be construed (with any necessary modifications) as references to a **relevant offence**.

## 20C Applications for authorities to conduct cross-border controlled operations

(1) An application under section 5 for an authority to conduct a proposed cross-border controlled operation:

- (a) must be made to the chief executive officer of the law enforcement agency concerned, and
- (b) must state that the proposed controlled operation is a cross-border controlled operation, and
- (c) must specify (in place of the particulars required by section 5 (2A) (b)) the relevant offence in respect of which the proposed operation is to be conducted.

(2) Without limiting any regulations made under section 5 (2B), an urgent application for an authority to conduct a proposed cross-border controlled operation may be made only if the applicant has reason to believe that the delay caused by making a formal application may affect the success of the operation.

(3) Nothing in this Act prevents an application for an authority being made in respect of a

cross-border controlled operation that has been the subject of a previous application, but in that case the subsequent application must be a formal application.

- (4) As soon as practicable after making an urgent application for an authority to conduct a cross-border controlled operation, the applicant must make a record in writing of the application and give a copy of it to the chief executive officer.

**20D Determination of applications for authorities to conduct cross-border controlled operations—additional criteria to be met**

- (1) An authority to conduct a cross-border controlled operation may not be granted unless the chief executive officer is satisfied as to the matters set out in this section (in addition to the matters specified in section 6, as modified by this section).
- (2) The chief executive officer must be satisfied on reasonable grounds:
  - (a) that a relevant offence has been, is being, or is likely to be, committed, and
  - (b) that the controlled operation will be, or is likely to be, conducted in this jurisdiction and in one or more participating jurisdictions, and
  - (c) that the nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation in this jurisdiction and in one or more participating jurisdictions, and
  - (d) that the operation will be conducted in a way that will minimise the risk of more illicit goods being under the control of persons (other than law enforcement officers) at the end of the operation than are reasonably necessary to enable the officers to achieve the purpose of the controlled operation.

**20E Form of authority to conduct cross-border controlled operation**

An authority to conduct a cross-border controlled operation must (in addition to the requirements of section 8 (2)):

- (a) state the name and rank or position of the chief executive officer, and
- (b) state that it authorises the conduct of a cross-border controlled operation, and
- (c) state whether it is a formal authority or an urgent authority, and
- (d) state the participating jurisdictions in which the controlled conduct is, or is likely, to be engaged in, and
- (e) identify (to the extent known) any suspect, and
- (f) state the date and time when the authority is granted, and
- (g) identify (to the extent known):

- (i) the nature and quantity of any illicit goods that will be involved in the operation, and
- (ii) the route through which those goods will pass in the course of the operation.

#### **20F Duration of authorities for cross-border controlled operations**

Section 8 (2) (f) and (g) are to be construed, in respect of an authority to conduct a cross-border controlled operation, as if the periods of 72 hours and 6 months specified in those paragraphs were periods of 7 days and 3 months, respectively.

#### **20G Variation of authorities**

- (1) An authority to conduct a cross-border controlled operation may be varied under section 10 by the chief executive officer at any time on the chief executive officer's own initiative (as well as on application under that section).
- (2) An application for a variation of an authority to conduct a cross-border controlled operation may be made (and an application may be granted) for the purpose (in addition to the purposes specified in section 10 (1)) of identifying additional suspects (to the extent known).
- (3) Section 10 (1A) is to be construed, in respect of a variation of an authority to conduct a cross-border controlled operation, as if the period of 6 months specified in that subsection were a period of 3 months.
- (4) A variation cannot be made that has the effect of extending the period of validity of an urgent authority in respect of a cross-border controlled operation.
- (5) An urgent application for a variation of an authority to conduct a proposed cross-border controlled operation may be made only if the applicant has reason to believe that the delay caused by making a formal application may affect the success of the operation.

#### **20H Effect of authorities to conduct cross-border controlled operations**

- (1) An authority to conduct a cross-border controlled operation authorises each participant to engage in the activities referred to in section 13 in this jurisdiction and in any participating jurisdiction (subject to any corresponding law of the participating jurisdiction).
- (2) The authority to engage in controlled conduct given to a participant in a cross-border controlled operation cannot be delegated to any other person.

#### **20I Documents relating to cross-border controlled operations**

The chief executive officer of a law enforcement agency must cause the following to be kept in relation to cross-border controlled operations:

- (a) each formal application made by a law enforcement officer of the agency,
- (b) each formal application granted to a law enforcement officer of the agency,
- (c) each formal variation application made by a law enforcement officer of the agency,
- (d) each formal variation of application granted to a law enforcement officer of the agency,
- (e) each order cancelling an authority granted to a law enforcement officer of the agency,
- (f) each report of a principal law enforcement officer of the agency under section 15 or 20Q (1).

**20J Register relating to cross-border controlled operations**

- (1) The chief executive officer of a law enforcement agency must cause a register relating to cross-border controlled operations to be kept.
- (2) The register is to specify the following:
  - (a) for each application (including an application for a variation of authority) made under this Act in respect of a cross-border controlled operation:
    - (i) the date of the application, and
    - (ii) whether the application was formal or urgent, and
    - (iii) whether the application was granted, refused or withdrawn, and
    - (iv) if the application was refused or withdrawn—the date and time of the refusal or withdrawal,
  - (b) for each authority granted to a law enforcement officer of the agency in respect of a cross-border controlled operation:
    - (i) the date and time the authority was granted, and
    - (ii) whether the authority was formal or urgent, and
    - (iii) the name and rank or position of the chief executive officer, and
    - (iv) each relevant offence in respect of which controlled conduct under the authority was to be engaged in, and
    - (v) the period of validity of the authority, and
    - (vi) if the authority was cancelled, the date and time of the cancellation, and
    - (vii) the date and time the authorised operation began and the date of completion of the operation, and

- (viii) the date on which the principal law enforcement officer for the operation made a report under section 15, and
  - (ix) if the authorised operation involved illicit goods, to the extent known:
    - (A) the nature and quantity of the illicit goods, and
    - (B) the route through which the illicit goods passed in the course of the operation, and
  - (x) details of any loss of, or serious damage to, property or any personal injuries, occurring in the course of, or as a direct result of, the operation,
- (c) for each variation of authority:
- (i) the date and time the variation was made, and
  - (ii) whether the variation was formal or urgent, and
  - (iii) the name and rank or position of the chief executive officer who made the variation.

**20K Protection from criminal responsibility for controlled conduct during authorised operations**

- (1) Section 16 (Lawfulness of controlled activities) does not apply in relation to an authorised operation that is a cross-border controlled operation.
- (2) However, despite any other Act or law of this jurisdiction, a participant who engages in conduct (whether in this jurisdiction or elsewhere) in an authorised operation that is a cross-border controlled operation in the course of, and for the purposes of, the operation, is not, if engaging in that conduct is an offence, criminally responsible for the offence, if:
  - (a) the conduct is authorised by, and is engaged in in accordance with, the authority for the operation, and
  - (b) the conduct does not involve the participant's intentionally inducing a person to commit an offence under a law of any jurisdiction or the Commonwealth that the person would not otherwise have intended to commit, and
  - (c) the conduct does not involve the participant's engaging in any conduct that is likely:
    - (i) to cause the death of, or serious injury to, any person, or
    - (ii) to involve the commission of a sexual offence against any person, and
  - (d) the participant is a civilian participant—he or she acts in accordance with the instructions of a law enforcement officer.



## **20L Protection from criminal responsibility for certain ancillary conduct**

- (1) Section 18 (Lawfulness of certain ancillary activities) does not apply in relation to an authorised operation that is an authorised cross-border controlled operation.
- (2) This section applies to conduct such as aiding and abetting the commission of an offence or of conspiring to commit an offence (**ancillary conduct**) for which a person may be criminally responsible because it involves conduct engaged in by another person that is controlled conduct for which the other person would (but for section 20K) be criminally responsible (the **related controlled conduct**).
- (3) Despite any other Act or law of this jurisdiction, a person who engages in ancillary conduct that is an offence (whether or not the person is a participant in a controlled operation) is not criminally responsible for the offence if at the time the person engaged in the ancillary conduct he or she believed that the related controlled conduct was being engaged in, or would be engaged in, by a participant in an authorised operation.

## **20M Indemnification of participants against civil liability**

- (1) Section 19 (Exclusion of civil liability) does not apply in relation to an authorised operation that is an authorised cross-border controlled operation.
- (2) However, this section applies to a law enforcement agency if a cross-border controlled operation has been authorised by the chief executive officer of the agency under section 6.
- (3) The State must indemnify a participant in the authorised operation against any civil liability (including reasonable costs) the participant incurs because of conduct the participant engages in if:
  - (a) the participant engages in the conduct in the course of, and for the purposes of, the operation in accordance with the authority for the operation, and
  - (b) the conduct does not involve the participant's intentionally inducing a person to commit an offence under a law of any jurisdiction or the Commonwealth that the person would not otherwise have intended to commit, and
  - (c) the conduct does not involve the participant's engaging in any conduct that is likely:
    - (i) to cause the death of, or serious injury to, any person, or
    - (ii) to involve the commission of a sexual offence against any person, and
  - (d) the participant is a civilian participant—he or she acts in accordance with the instructions of a law enforcement officer, and

(e) the relevant requirements (if any) of the regulations have been met.

**20N Effect of sections 20K and 20L on other laws relating to criminal investigation**

Sections 20K and 20L do not apply to a person's conduct in the course of a cross-border controlled operation that is, or could have been, authorised under a law of this jurisdiction relating to the following:

- (a) the arrest or detention of individuals,
- (b) searches of individuals,
- (c) entry onto, or searches or inspections of, premises,
- (d) searches, inspections or seizures of other property,
- (e) forensic procedures,
- (f) electronic surveillance devices or telecommunications interception,
- (g) identification procedures,
- (h) the use or acquisition of assumed identities,
- (i) any other matter concerning powers of criminal investigation.

**20O Effect of being unaware of variation or cancellation of authority**

- (1) If an authority for a cross-border controlled operation is varied in any way that limits its scope, this Part continues to apply to a participant in the operation as if the authority had not been varied in that way, for so long as the participant:
  - (a) is unaware of the variation, and
  - (b) is not reckless about the existence of the variation.
- (2) If an authority for a cross-border controlled operation is cancelled, this Part continues to apply to a participant in the operation as if the authority had not been cancelled, for so long as the participant:
  - (a) is unaware of the cancellation, and
  - (b) is not reckless about the existence of the cancellation.
- (3) For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if:
  - (a) the person is aware of a substantial risk that there has been a variation or cancellation, and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to

continue to engage in conduct that was authorised by the authority but which, because of the possible variation or cancellation, may be no longer authorised.

- (4) Sections 10 (10) and 12 (3) do not apply in respect of a cross-border controlled operation.

## **20P Compensation for property loss or serious damage**

- (1) If a person suffers loss of, or serious damage to, property as a direct result of an authorised cross-border controlled operation, the State is liable to pay to the person such compensation as is agreed between the State and the person or, in default of agreement, compensation of an amount determined in proceedings against the State, in a court of competent jurisdiction, for a debt of the amount claimed by the person.
- (2) Subsection (1) does not apply if:
- (a) the person suffered the loss or damage in the course of, or as a direct result of, engaging in any criminal activity (other than criminal activity that is controlled conduct), or
  - (b) the person was a law enforcement officer at the time of suffering the loss or damage.

## **20Q Notification requirements**

- (1) If any loss of, or serious damage to, property occurs in the course of or as a direct result of an authorised cross-border controlled operation (other than property of the law enforcement agency on behalf of which the operation is conducted or of a participant in the operation), the principal law enforcement officer for the operation must report the loss or damage to the chief executive officer of the law enforcement agency as soon as practicable.
- (2) The chief executive officer must take all reasonable steps to notify the owner of the property of the loss or damage.
- (3) However, the chief executive officer is not required to notify the owner of the property until the chief executive officer is satisfied that the notification would not:
- (a) compromise or hinder the authorised operation, or
  - (b) compromise the identity of a participant in the authorised operation, or
  - (c) endanger the life or safety of any person, or
  - (d) prejudice any legal proceeding, or
  - (e) otherwise be contrary to the public interest.

## **20R Unauthorised disclosure of information**

(1) A person is guilty of an offence if:

- (a) the person intentionally, knowingly or recklessly discloses any information, and
- (b) the person knows that, or is reckless as to whether, the information relates to a cross-border controlled operation, or a corresponding authorised operation, and
- (c) the person knows that, or is reckless as to whether, the disclosure is not made:
  - (i) in connection with the administration or execution of this Part or a corresponding law, or
  - (ii) for the purposes of any legal proceeding arising out of or otherwise related to this Part or a corresponding law or of any report of any such proceedings, or
  - (iii) in accordance with any requirement imposed by law.

Maximum penalty: Imprisonment for 2 years.

(2) A person is guilty of an offence against this subsection if the person commits an offence against subsection (1) in circumstances in which the person:

- (a) intends to endanger the health or safety of any person or prejudice the effective conduct of a cross-border controlled operation or corresponding authorised operation, or
- (b) knows that, or is reckless as to whether, the disclosure of the information:
  - (i) endangers, or will endanger, the health or safety of any person, or
  - (ii) prejudices, or will prejudice, the effective conduct of a cross-border controlled operation or corresponding authorised operation.

Maximum penalty: Imprisonment for 10 years.

(3) An offence against subsection (2) is to be prosecuted on indictment. However, Chapter 5 of the [Criminal Procedure Act 1986](#) (which relates to the summary disposal of certain indictable offences unless an election is made to proceed on indictment) applies to and in respect of any such offence.

## **20S Mutual recognition of corresponding authorities**

The following provisions apply, with any necessary changes, to a corresponding authority under a corresponding law, and to a corresponding authorised operation under that law, as if the corresponding authority were an authority given under section 6 (1) to conduct a cross-border controlled operation:

- (a) section 13 (Effect of authorities),

- (b) section 13A (Defect in authority),
- (c) section 20H (Effect of authorities to conduct cross-border controlled operations),
- (d) section 20K (Protection from criminal responsibility for controlled conduct during authorised operations),
- (e) section 20L (Protection from criminal responsibility for certain ancillary conduct),
- (f) section 20M (Indemnification of participants against civil liability),
- (g) section 20N (Effect of sections 20K and 20L on other laws relating to criminal investigation),
- (h) section 20O (Effect of being unaware of variation or cancellation of authority),
- (i) section 28 (Identity of certain participants not to be disclosed in legal proceedings).

## **Part 4 Monitoring of controlled operations**

### **21 Ombudsman to be notified of certain matters**

- (1) Within 21 days after:
  - (a) granting an authority (other than a retrospective authority) or variation of authority, or
  - (b) receiving a report on the conduct of an authorised operation to which an authority relates,a chief executive officer must cause written notice of that fact to be given to the Ombudsman.
- (1A) A chief executive officer who grants a retrospective authority must provide the Ombudsman with written details of the retrospective authority and the circumstances justifying that authority.
- (1B) The details are to be provided as soon as practicable after the retrospective authority is granted but, in any case, no later than 7 days after it is granted.
- (2) The Ombudsman may require the chief executive officer to furnish such information concerning the authority, variation or report as is necessary for the Ombudsman's proper consideration of it.

### **22 Inspection of records by Ombudsman**

- (1) The Ombudsman:
  - (a) must inspect the records of each law enforcement agency at least once every 12 months, and

(b) may inspect the records of any law enforcement agency at any time,

for the purpose of ascertaining whether or not the requirements of this Act are being complied with.

- (2) The provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* apply to an inspection conducted under this section in the same way as they apply to an inspection conducted under that Act.
- (3) The Ombudsman may, at any time, make a special report to the Presiding Officer of each House of Parliament with respect to any inspection conducted under this section.
- (4) Nothing in this section requires the Ombudsman to inspect records in relation to an authorised operation that has not been completed.

### **23 Annual reports by Ombudsman**

- (1) The Ombudsman must, as soon as practicable after 30 June in each year, prepare a report of the Ombudsman's work and activities under this Act for the preceding 12 months and furnish the report to the Presiding Officer of each House of Parliament.
- (2) The report must include, for each law enforcement agency, the following particulars:
  - (a) the number of formal authorities that have been granted or varied by the chief executive officer of that agency, and the number of formal applications for the granting or variation of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,
  - (a1) the number of urgent authorities or urgent variations of authorities that have been granted by the chief executive officer of that agency, and the number of urgent applications for authorities or urgent variations of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,
  - (b) the nature of the criminal activity or corrupt conduct against which the controlled operations conducted under those authorities were directed,
  - (c) the number of law enforcement participants, and the number of civilian participants, involved in the controlled operations conducted under those authorities,
  - (d) the nature of the controlled activities engaged in for the purposes of the controlled operations conducted under those authorities,
  - (e) the number of law enforcement participants, and the number of civilian participants, who have engaged in controlled activities for the purposes of the controlled operations conducted under those authorities.

- (3) Nothing in this section requires particulars of an authorised operation to be included in a report for a year if the operation had not been completed as at 30 June in that year, but the particulars must instead be included in the report for the year in which the operation is completed.

#### **24 Ancillary matters concerning reports**

- (1) A report prepared under this Part must not include any information that, if made public, could reasonably be expected:
- (a) to endanger the health or safety of any person, or
  - (b) to disclose the methodology used in any investigation (whether or not an authorised operation) that is being, has been or is proposed to be conducted by any law enforcement agency, or
  - (c) to prejudice any investigation (whether or not an authorised operation) that is being or is proposed to be conducted by a law enforcement agency, or
  - (d) to prejudice any legal proceedings arising from any such investigation.
- (2) Sections 30 (2) and 31AA of the [Ombudsman Act 1974](#) apply to a report prepared under this Part in the same way as they apply to an annual report prepared under section 30 of that Act.
- (3) The Ombudsman must give a copy of any report prepared under this Part to the chief executive officer of the law enforcement agency to which the report relates and to the Minister responsible for that agency.

### **Part 5 Miscellaneous**

#### **25 Act binds Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

#### **26 DPP to be notified of evidence obtained in the course of an authorised operation**

The chief executive officer of a law enforcement agency on whose behalf an authorised operation is conducted must ensure that any evidence obtained in the course of the operation that is sent to the Director of Public Prosecutions for the purposes of any legal proceedings is accompanied by:

- (a) a written notice to the effect that the evidence has been obtained in the course of an authorised operation conducted on behalf of the agency, and
- (b) a copy of the authority for the operation.

## **27 Evidentiary certificates**

A certificate:

- (a) that is issued by the chief executive officer of a law enforcement agency, and
- (b) that states that, when granting or varying an authority, the chief executive officer was satisfied as to matters specified in the certificate,

is admissible in any legal proceedings and is conclusive evidence that the chief executive officer was satisfied as to those matters.

## **28 Identity of certain participants not to be disclosed in legal proceedings**

- (1) If, in proceedings before a court, a tribunal or a Royal Commission or other commission of inquiry, the identity of a participant in an authorised operation is in issue or may be disclosed, the court, tribunal or commission must, unless it considers that the interests of justice otherwise require:
  - (a) ensure that such parts of the proceedings as relate to the identity of the participant are held in private, and
  - (b) make such orders as to the suppression of evidence given before it as, in its opinion, will ensure that the identity of the participant is not disclosed.
- (2) In particular, the court, tribunal, Royal Commission or other commission of inquiry:
  - (a) may allow any participant in an authorised operation who has been authorised to participate in the operation under an assumed name to appear before it under that name, and
  - (b) may make orders prohibiting the publication of any information (including information derived from evidence given before it) that identifies, or might facilitate the identification of, any person who has been or is proposed to be called to give evidence.
- (3) A person must not make a publication in contravention of an order in force under this section.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

## **29 Delegations**

- (1) Except as provided by this section (and despite any other Act or law to the contrary):
  - (a) the functions of a chief executive officer under this Act may not be delegated to any other person, and
  - (b) the functions of the Ombudsman under this Act with respect to the inspection of documentation referred to in section 8 (3) may not be delegated to any other



person.

- (2) A chief executive officer may delegate any of the chief executive officer's functions under this Act (except this power of delegation) as follows:
  - (a) in the case of the NSW Police Force:
    - (i) to a police officer for the time being holding office as a Deputy Commissioner or an Assistant Commissioner, and
    - (ii) except for functions under Part 3A—to a police officer for the time being holding office as a Superintendent who is nominated from time to time by the Commissioner of Police for the purposes of this subsection (not more than two nominations being in force at any one time),
  - (b) in the case of any other law enforcement agency—to a person for the time being holding a position prescribed by the regulations as a position to which functions under this Act may be delegated.
- (3) A position cannot be prescribed as a position to which functions under this Act may be delegated unless it is a position within the law enforcement agency concerned.
- (4) No more than one delegation may be in force under subsection (2) (b) at any one time, and no more than one position may be prescribed at any one time as a position to which functions under this Act may be delegated.
- (5) Subsection (4) does not apply in respect of the delegation of the functions of the chief executive officer of the Australian Crime Commission.
- (6) The functions of the Ombudsman under this Act with respect to the inspection of documentation referred to in section 8 (3) may be delegated to an Assistant Ombudsman.

### **30 Proceedings for offences**

Proceedings for an offence against this Act (other than an offence under section 20R (2)) are to be dealt with summarily by the Local Court.

### **31 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### **32 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

- (2) The review is to be undertaken as soon as possible after the period of 12 months from the commencement of this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 12 months.
- (4) A further review is to be undertaken as soon as possible after 1 December 2002.
- (5) A report on the outcome of the review undertaken in accordance with subsection (4) is to be tabled in each House of Parliament by 1 December 2003.
- (6) A further review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the [Law Enforcement \(Controlled Operations\) Amendment Act 2006](#).
- (7) A report on the outcome of the review undertaken in accordance with subsection (6) is to be tabled in each House of Parliament within 3 months after the end of the period of 5 years referred to in subsection (6).

### **33 Savings and transitional provisions**

Schedule 2 has effect.

## **Schedule 1 Corresponding laws**

(Sections 3 and 4)

The [Crimes Act 1914](#) of the Commonwealth

Chapters 11 and 12 of the *Police Powers and Responsibilities Act 2000* of Queensland

The *Crimes (Controlled Operations) Act 2004* of Victoria

The *Crimes (Controlled Operations) Act 2008* of the Australian Capital Territory

## **Schedule 2 Savings and transitional provisions**

(Section 33)

## **Part 1 Preliminary**

### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

[Law Enforcement \(Controlled Operations\) Amendment Act 2006](#)

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

## **Part 2 Provision consequent on enactment of [Law Enforcement \(Controlled Operations\) Amendment Act 2006](#)**

### **2 Existing delegations**

- (1) This clause applies to a delegation in force under section 29 immediately before the repeal and re-enactment of that section by the amending Act.
- (2) If a delegation to which this clause applies could be made under section 29 as re-enacted by the amending Act, the delegation is not affected by the amending Act and continues in force until it is revoked.
- (3) Subclause (2) does not apply to a delegation under clause 13 (a) (ii) of the [Law Enforcement \(Controlled Operations\) Regulation 1998](#) as in force immediately before the repeal and remake of that clause by the amending Act.

#### **Note—**

Clause 13 (a) (ii) permitted delegation to 3 police officers of or above the rank of Superintendent. Section 29 as re-enacted permits no more than 2 delegations to police officers of the rank of Superintendent to be in force at any one time.

- (4) In this clause, **the amending Act** means the [Law Enforcement \(Controlled Operations\) Amendment Act 2006](#).