



Crimes Legislation Amendment Act 2011

No. 2, 2011

An Act to amend various Acts relating to the enforcement of the criminal law, and for other purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	1
3	Schedule(s).....	2
Schedule 1—Amendments relating to ACC dismissal powers		3
Part 1—Amendment of the Australian Crime Commission Act 2002		3
<i>Australian Crime Commission Act 2002</i>		3
Part 2—Amendment of the Telecommunications (Interception and Access) Act 1979		6
<i>Telecommunications (Interception and Access) Act 1979</i>		6
Part 3—Review of amendments		8
Schedule 2—Amendments relating to appointment of ACC examiners		9
<i>Australian Crime Commission Act 2002</i>		9
Schedule 3—Amendment of the Crimes Act 1914		12
Part 1—Amendments relating to warrants issued in relation to persons		12
<i>Crimes Act 1914</i>		12
Part 2—Amendments relating to retention etc. of things seized and documents produced		16
<i>Crimes Act 1914</i>		16
Part 3—Amendment relating to fingerprints and photographs		22
<i>Crimes Act 1914</i>		22
Schedule 4—Amendments relating to special payments to AFP appointees		23
<i>Australian Federal Police Act 1979</i>		23



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No. 2, 2011

An Act to amend various Acts relating to the enforcement of the criminal law, and for other purposes

[Assented to 2 March 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Crimes Legislation Amendment Act 2011*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with
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column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	2 March 2011
2. Schedules 1 and 2	The day this Act receives the Royal Assent.	2 March 2011
3. Schedule 3	The day after this Act receives the Royal Assent.	3 March 2011
4. Schedule 4	The day this Act receives the Royal Assent.	2 March 2011

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in Column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to ACC dismissal powers

Part 1—Amendment of the Australian Crime Commission Act 2002

Australian Crime Commission Act 2002

1 Subsection 4(1)

Insert:

serious misconduct, by a member of the staff referred to in subsection 47(1), has the meaning given by subsection 47A(8).

2 After section 47

Insert:

47A Termination of employment of member of staff for serious misconduct

CEO may make declaration

- (1) This section applies if the CEO terminates the employment of a member of the staff referred to in subsection 47(1) and the CEO believes, on reasonable grounds, that the staff member's conduct or behaviour, or any part of it:
- (a) amounts to serious misconduct by the staff member; and
 - (b) is having, or is likely to have, a damaging effect on:
 - (i) the professional self-respect or morale of some or all of the members of the staff of the ACC; or
 - (ii) the reputation of the ACC with the public, or any section of the public, or with an Australian or overseas government, or with a law enforcement agency or a foreign law enforcement agency.

Note: See section 29 of the *Public Service Act 1999* for termination of the employment of a member of the staff referred to in subsection 47(1) of this Act.

- (2) The CEO may, in accordance with subsection (5), make a declaration that he or she has the belief referred to in subsection (1) in relation to the staff member.

Effect of declaration on Fair Work Act

- (3) If the CEO makes the declaration for the staff member, the *Fair Work Act 2009* (other than Part 3-1 and Division 9 of Part 3-3 of that Act) does not apply in relation to:
- (a) the termination of the staff member's employment; or
 - (b) the making of the declaration.

Note 1: This means, for example, that the provisions of the *Fair Work Act 2009* dealing with unfair dismissal, and notice of termination or payment in lieu, do not apply in relation to the staff member.

Note 2: Part 3-1 of the *Fair Work Act 2009* deals with general protections, and Division 9 of Part 3-3 of that Act deals with payments relating to periods of industrial action.

- (4) To avoid doubt, subsection (3) applies despite section 8 of the *Public Service Act 1999*.

Procedural requirements

- (5) The declaration must be:
- (a) in writing; and
 - (b) made within 24 hours of the CEO's decision to terminate the staff member's employment.
- (6) The CEO must give the staff member a copy of the declaration.

CEO to give report after making declaration

- (7) The CEO must give the Minister and the Board a written report containing the following, as soon as practicable after making the declaration:
- (a) the grounds for the CEO's belief referred to in subsection (1) in relation to the staff member;
 - (b) the nature and findings of any investigation of, or inquiry into, the staff member's conduct or behaviour;
 - (c) details of any other matter the CEO considers relevant.

Meaning of serious misconduct

(8) In this section:

serious misconduct, by a member of the staff referred to in subsection 47(1), means:

- (a) corruption, a serious abuse of power, or a serious dereliction of duty, by the staff member; or
- (b) any other seriously reprehensible act or behaviour by the staff member, whether or not acting, or purporting to act, in the course of his or her duties as such a staff member.

3 Application of item 2

Section 47A of the *Australian Crime Commission Act 2002* (as inserted by item 2 of this Schedule) applies in relation to a decision to terminate the employment of a member of the staff referred to in subsection 47(1) of that Act, where that decision is made after the commencement of this item.

4 At the end of section 59A

Add “(other than a power or function under section 47A)”.

Part 2—Amendment of the Telecommunications (Interception and Access) Act 1979

Telecommunications (Interception and Access) Act 1979

5 Subsection 5(1) (at the end of paragraph (aa) of the definition of *permitted purpose*)

Add:

- (iii) an investigation of, or an inquiry into, alleged misbehaviour, or alleged improper conduct, of a member of the staff referred to in subsection 47(1) of the *Australian Crime Commission Act 2002*; or
- (iv) a report on such an investigation or inquiry; or
- (v) the making by a person of a decision, following such an investigation or inquiry, in relation to the employment of such a staff member (including a decision to terminate the staff member's employment); or
- (vi) a review (whether by way of appeal or otherwise) of such a decision; or

6 After paragraph 68(c)

Insert:

(ca) if:

- (i) the information relates, or appears to relate, to an act or omission by a member of the staff of the ACC that may give rise to a decision by the Chief Executive Officer of the ACC to terminate the employment of the staff member; and
- (ii) the originating agency is not the ACC;
to the Chief Executive Officer of the ACC; and

7 Application

The *Telecommunications (Interception and Access) Act 1979*, as amended by this Part, applies in relation to the communication, use and making of a record of information, and the giving of information in evidence in proceedings, on or after the commencement of this item, whether the information was obtained before or after that commencement.

Part 3—Review of amendments

8 Review of operation of amendments relating to serious misconduct by staff member

- (1) The Minister must cause an independent review to be undertaken of the operation of section 47A of the *Australian Crime Commission Act 2002*, as inserted by this Schedule, and the amendments made by Part 2 of this Schedule.
- (2) The review must be undertaken as soon as practicable after the end of the period of 2 years after the commencement of this Schedule.

Schedule 2—Amendments relating to appointment of ACC examiners

Australian Crime Commission Act 2002

1 Subsection 46A(3)

Omit “a special”, substitute “an”.

2 Savings provision for item 1

To avoid doubt, the amendment made by item 1 does not affect an arrangement made under subsection 46A(3) of the *Australian Crime Commission Act 2002* before the commencement of this item.

3 At the end of section 46A

Add:

- (4) The CEO must, as soon as practicable after 30 June and 31 December each year, notify the Minister in writing of:
 - (a) each arrangement that the CEO has made with an examiner under subsection (3) during the previous 6 months; and
 - (b) the nature of the ACC operation/investigation to which the arrangement relates.

4 Transitional provision for item 3

Despite subsection 46A(4) of the *Australian Crime Commission Act 2002* (as inserted by item 3 of this Schedule), the first notification under that subsection must relate to arrangements made during the period:

- (a) starting at the commencement of this item; and
- (b) ending at the end of the first 30 June or 31 December (as the case requires) after that time.

5 Subsection 46B(4) (third sentence)

Repeal the sentence.

6 Application of item 5

The amendment made by item 5 of this Schedule applies to the appointment of an examiner after the commencement of this item, whether or not the person has previously been appointed as an examiner.

7 At the end of subsection 46B(4)

Add:

Note: An examiner is eligible for reappointment: see the *Acts Interpretation Act 1901*.

8 Subsection 46B(5)

Repeal the subsection, substitute:

Basis of appointment

(5) An examiner may be appointed on a full-time basis or on a part-time basis.

9 Subsection 46D(1)

Omit “An examiner”, substitute “A full-time examiner”.

Note: The following heading to subsection 46D(1) is inserted “*Full-time examiners*”.

10 Subsection 46D(2)

Omit “an examiner”, substitute “a full-time examiner”.

11 At the end of section 46D

Add:

Part-time examiners

(3) The CEO may grant a part-time examiner leave of absence on the terms and conditions that the CEO determines in writing.

12 Section 46G

Omit “An examiner”, substitute “(1) A full-time examiner”.

Note: The following heading to subsection 46G(1) is inserted “*Full-time examiners*”.

13 At the end of section 46G

Add:

Part-time examiners

- (2) A part-time examiner must not engage in any paid employment that, in the CEO's opinion, conflicts or may conflict with the proper performance of his or her duties.
- (3) The CEO may, by written notice given to a part-time examiner, require the examiner to give the CEO the details specified in the notice, about the examiner's employment, by the time specified in the notice. The examiner must comply with the requirement.

14 Paragraph 46H(2)(b)

After "the examiner", insert "(being a full-time examiner)".

15 Paragraph 46H(2)(d)

After "the examiner", insert "(being a full-time examiner)".

16 Paragraph 46H(2)(d)

Omit "office.", substitute "office (see subsection 46G(1)); or".

17 At the end of subsection 46H(2)

Add:

- (e) the examiner (being a part-time examiner):
 - (i) engages in paid employment that, in the CEO's opinion, conflicts or may conflict with the proper performance of his or her duties (see subsection 46G(2)); or
 - (ii) does not comply with a requirement under subsection 46G(3) (notifying the CEO of employment details).

18 Savings provision for items 5 to 17

To avoid doubt, the amendments made by items 5 to 17 of this Schedule do not affect the validity of an appointment of an examiner made before the commencement of this item.

Schedule 3—Amendment of the Crimes Act 1914

Part 1—Amendments relating to warrants issued in relation to persons

Crimes Act 1914

1 Subsection 3K(1)

Omit “or constable assisting”, substitute “of a warrant in relation to premises, or constable assisting.”.

Note: The following heading to subsection 3K(1) is inserted “*Equipment may be brought to warrant premises*”.

2 Subsection 3K(2)

Omit “the premises” (first occurring), substitute “warrant premises, or a thing found during a search under a warrant that is in force in relation to a person.”.

Note: The following heading to subsection 3K(2) is inserted “*Thing may be moved for examination or processing*”.

3 Paragraph 3K(2)(b)

Before “the occupier”, insert “for a thing found at warrant premises—”.

4 At the end of subsection 3K(2)

Add:

; or (c) for a thing found during a search under a warrant that is in force in relation to a person—the person consents in writing.

5 Paragraph 3K(3)(a)

Omit “the occupier”, substitute “the person referred to in paragraph (2)(b) or (c) (as the case requires)”.

Note 1: The following heading to subsection 3K(3) is inserted “*Notification of examination or processing and right to be present*”.

Note 2: The following heading to subsection 3K(3A) is inserted “*Time limit on moving a thing*”.

6 Paragraph 3K(3)(b)

Omit “the occupier”, substitute “that person”.

7 Subsection 3K(3C)

Omit “the occupier of the premises”, substitute “the person referred to in paragraph (2)(b) or (c) (as the case requires)”.

8 Subsection 3K(3C)

Omit “the occupier” (second occurring), substitute “that person”.

9 Subsection 3K(4)

Omit “or a constable assisting”, substitute “of a warrant in relation to premises, or a constable assisting,”.

Note: The following heading to subsection 3K(4) is inserted “*Equipment at warrant premises may be operated*”.

10 Subsection 3L(1)

Omit “or a constable assisting”, substitute “of a warrant in relation to premises, or a constable assisting,”.

11 Subsection 3LAA(1)

Omit “found at the warrant premises”.

12 Paragraph 3LAA(5)(b)

Omit “by the occupier of the equipment”, substitute “of the equipment, by the person referred to in paragraph 3K(2)(a) or (b) (as the case requires),”.

13 Subparagraph 3LA(1)(a)(ii)

Repeal the subparagraph, substitute:

- (ii) has been moved under subsection 3K(2) and is at a place for examination or processing; or

14 Subparagraph 3LA(1)(a)(iii)

Omit “and is no longer on the warrant premises”.

15 Subsection 3LA(3) (note)

Repeal the second sentence.

16 Paragraph 3LB(1)(a)

Repeal the paragraph, substitute:

- (a) data is accessed, in relation to a warrant, under subsection 3L(1) or 3LAA(1); and
- (aa) either:
 - (i) if the warrant is in relation to premises—the data is held on premises other than the warrant premises; or
 - (ii) if the warrant is in relation to a person—the data is held on any premises; and

Note: The heading to section 3LB is altered by omitting “**other**” and substituting “**certain**”.

17 Paragraph 3LB(1)(b)

Omit “the other premises”, substitute “the premises on which the data is held”.

18 Subsection 3LB(2)

Omit “the other premises”, substitute “the premises on which the data is held”.

19 Subsection 3M(4)

Repeal the subsection, substitute:

- (4) In determining the amount of compensation payable, regard is to be had to whether any of the following persons, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment:
 - (a) if the equipment was operated under a warrant issued in relation to premises—the occupier of the premises, or the occupier’s employees or agents;
 - (b) if the equipment was operated under a warrant issued in relation to a person—that person, or that person’s agents.

20 Subsection 3ZQV(1)

Omit “from warrant premises”.

21 Subsection 3ZQV(5) (note)

Omit “removed under that section from warrant premises”, substitute “moved under that section”.

22 Subsection 3ZQW(4)

Repeal the subsection, substitute:

- (4) In determining the amount of compensation payable, regard is to be had to whether any appropriate warning or guidance was provided, before the equipment was operated, on the operation of the equipment.

23 Application of this Part

- (1) The amendments made by this Part, other than items 14 and 22, apply in relation to any warrant issued in relation to a person after this Part commences.
- (2) The amendment made by item 14 of this Schedule applies in relation to any thing seized under Division 2 of Part IAA of the *Crimes Act 1914*, whether before or after this Part commences.
- (3) The amendment made by item 22 of this Schedule applies in relation to applications instituting proceedings in a court of competent jurisdiction that are made after this Part commences.

Part 2—Amendments relating to retention etc. of things seized and documents produced

Crimes Act 1914

24 Subsection 3(1)

Insert:

terrorist act has the same meaning as in subsection 100.1(1) of the *Criminal Code*.

25 Subsection 3C(1) (definition of *magistrate*)

Omit “3ZQZ”, substitute “3ZQZB”.

26 Section 3CA

Omit “3ZQZ” (wherever occurring), substitute “3ZQZB”.

27 Section 3UA (definition of *terrorist act*)

Repeal the definition.

28 Subsection 3ZQM(7) (definition of *terrorist act*)

Repeal the definition.

29 Subdivision B of Division 4C of Part IAA (heading)

Repeal the heading, substitute:

Subdivision B—Returning things seized and documents produced

30 Before paragraph 3ZQX(2)(a)

Insert:

(aa) either:

- (i) the thing may be retained because of an order under subsection 3ZQZB(3), or any other order under that subsection has been made in relation to the thing; or
- (ii) the Commissioner has applied for such an order and the application has not been determined; or

31 At the end of section 3ZQX

Add:

When documents produced under Division 4B must be returned

- (3) If the Commissioner is satisfied that a document produced under Division 4B is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the Commissioner must take reasonable steps to return the document to the person who produced the document or to the owner if that person is not entitled to possess it.
- (4) However, the Commissioner does not have to take those steps if:
 - (a) either:
 - (i) the document may be retained because of an order under subsection 3ZQZB(3), or any other order under that subsection has been made in relation to the document; or
 - (ii) the Commissioner has applied for such an order and the application has not been determined; or
 - (b) the document may otherwise be retained, destroyed or disposed of under a law, or an order of a court or tribunal, of the Commonwealth or of a State or a Territory; or
 - (c) the document is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

Note 1: The heading to section 3ZQX is replaced by the heading “**When things seized or documents produced under Division 2, 4 or 4B must be returned**”.

Note 2: The following heading to subsection 3ZQX(1) is inserted “*When things seized under Division 2 or 4 must be returned*”.

32 Subdivision C of Division 4C of Part IAA (heading)

Repeal the heading.

33 Paragraph 3ZQY(2)(b)

Repeal the paragraph, substitute:

- (b) either:
 - (i) the thing may be retained because of an order under subsection 3ZQZB(2) or (3), or any other order under subsection 3ZQZB(3) has been made in relation to the thing; or

- (ii) the Commissioner has applied for such an order and the application has not been determined; or

34 Section 3ZQZ

Repeal the section.

35 Subdivision D of Division 4C of Part IAA (heading)

Repeal the heading.

36 At the end of subsection 3ZQZA(2)

Add:

; or (c) either:

- (i) the thing may be retained because of an order under subsection 3ZQZB(2) or (3), or any other order under subsection 3ZQZB(3) has been made in relation to the thing; or
- (ii) the Commissioner has applied for such an order and the application has not been determined; or
- (d) the thing may otherwise be retained, destroyed or disposed of under a law, or order of a court or tribunal, of the Commonwealth or of a State or a Territory; or
- (e) the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

Note: The heading to section 3ZQZA is replaced by the heading “**When things seized under Division 3A must be returned**”.

37 Subsection 3ZQZA(3)

Omit “If”, substitute “Despite subsection (2), if”.

38 Subsection 3ZQZA(4)

Repeal the subsection.

39 Section 3ZQZB

Repeal the section, substitute:

3ZQZB Magistrate may permit a thing seized or document produced under this Part to be retained, forfeited etc.

- (1) A magistrate may, on application by the Commissioner, make an order under subsection (2) or (3) in relation to a thing seized or a document produced under this Part.

Use for purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings

- (2) The magistrate may order that a thing seized under Division 3 or 3A be retained for the period specified in the order if the magistrate is satisfied that the thing is being used, or is required to be used, for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings.

Preventing use in committing terrorist act, terrorism offence or serious offence

- (3) The magistrate may make any of the orders referred to in subsection (4) if the magistrate is satisfied that there are reasonable grounds to suspect that, if a thing seized or document produced under this Part is returned to any of the following persons, it is likely to be used by that person or another person in the commission of a terrorist act, a terrorism offence or a serious offence:

- (a) the owner of the thing or document;
- (b) in the case of a thing—the person from whom the thing was seized;
- (c) in the case of a document—the person who produced the document.

- (4) The orders are as follows:

- (a) an order that the thing or document may be retained for the period specified in the order;
- (b) an order that the thing or document is forfeited to the Commonwealth;
- (c) for a thing that is not a document—an order that:
 - (i) the thing be sold and the proceeds given to the owner of the thing; or
 - (ii) the thing be sold in some other way;

- (d) an order that the thing or document is to be destroyed or otherwise disposed of.

Thing or document must be returned if magistrate not satisfied

- (5) The magistrate must order that a thing or document be returned to the following person if the magistrate is not satisfied as mentioned in subsection (2) or (3):
 - (a) in the case of a thing—the person from whom the thing was seized;
 - (b) in the case of a document—the person who produced the document;
 - (c) if the person referred to in paragraph (a) or (b) is not entitled to possess the thing or document—the owner of the thing or document.

Persons with an interest in thing or document

- (6) Before making an application under this section in relation to a thing or document, the Commissioner must:
 - (a) take reasonable steps to discover who has an interest in the thing or document; and
 - (b) if it is practicable to do so, notify each person who the Commissioner believes to have such an interest of the proposed application.
- (7) The magistrate must allow a person who has an interest in the thing or document to appear and be heard in determining the application.

Special rule for things seized under Division 3

- (8) The Commissioner may only make an application under this section in relation to a thing seized under Division 3 if the application is made:
 - (a) before the end of 60 days after the seizure; or
 - (b) before the end of a period previously specified in an order in relation to the thing under this section.

40 Application of items 30 to 39

The amendments made by items 30 to 39 of this Schedule apply to a thing seized or a document produced under Part IAA of the *Crimes Act 1914*, whether before or after this Part commences.

41 Section 3ZW

Before “The Commissioner”, insert “(1)”.

42 At the end of section 3ZW

Add:

- (2) The Commissioner may delegate to a Commonwealth officer any or all of the Commissioner’s powers, functions or duties under Division 4C of this Part if the Commissioner is satisfied on reasonable grounds that the officer is able to properly exercise those powers, functions or duties.

Part 3—Amendment relating to fingerprints and photographs

Crimes Act 1914

43 After paragraph 3ZJ(3)(b)

Insert:

(ba) both of the following apply:

- (i) the identification material taken, or caused to be taken, is fingerprints or photographs (including video recordings) of the person;
- (ii) the offence is punishable by imprisonment for a period of 12 months or more; or

44 Application of this Part

The amendment made by this Part applies to any person who, after this Part commences, is taken into lawful custody in respect of an offence that is punishable by imprisonment for a period of 12 months or more.

Schedule 4—Amendments relating to special payments to AFP appointees

Australian Federal Police Act 1979

1 At the end of subsection 20(2A)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to Deputy Commissioners.

2 At the end of subsection 27(1)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to AFP employees.

3 At the end of subsection 35(2)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to consultants and independent contractors who are determined to be AFP appointees.

4 After Division 3 of Part III

Insert:

Division 3A—Payments in special circumstances

35A Payments in special circumstances

- (1) The Commissioner may authorise the making of payments to a person (the *payee*) under subsection (2) if the Commissioner considers it appropriate to do so because of special circumstances that relate to, or arise out of:
 - (a) the payee's engagement as an AFP appointee; or
 - (b) another person's engagement as an AFP appointee.
- (2) The Commissioner may authorise the making of any of the following payments:

- (a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);
 - (b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).
- (3) Payments may be authorised under this section even though the payments would not otherwise be authorised by law or required to meet a legal liability.
- (4) An authorisation cannot be made under this section if it would involve, or be likely to involve, a total amount of more than \$100,000.
- (5) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.

Note: Payments under this section must be made from money appropriated by the Parliament. Generally, a payment can be debited against the Australian Federal Police's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration.

5 At the end of subsection 40E(1)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to special members.

6 At the end of section 40EC

Add:

Note: The Commissioner may, under section 35A, authorise special payments to special protective service officers.

7 At the end of subsection 69A(2)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to persons engaged under this section.

8 Section 69C

Before "The Commissioner", insert "(1)".

9 Section 69C

After “this Act”, insert “(other than the Commissioner’s power under section 35A (payments in special circumstances))”.

10 At the end of section 69C

Add:

- (2) The Commissioner may, in writing, delegate to a senior executive AFP employee the Commissioner’s power under section 35A (payments in special circumstances).

11 At the end of subsection 69D(2)

Add:

Note: The Commissioner may, under section 35A, authorise special payments to a person performing functions under an agreement.

12 Application of item 4

The amendment made by item 4 of this Schedule applies in relation to any special circumstances, whether occurring before or after this Schedule commences.

*[Minister’s second reading speech made in—
Senate on 29 September 2010
House of Representatives on 9 February 2011]*

(210/10)
