Digest of Bill

Purpose

To amend the Telecommunications (Interception) Act 1979 to extend the interception powers of the Australian Federal Police (AFP) to 'serious' offences in addition to narcotic offences; to enable certain bodies to apply for the issue of a warrant authorising the interception of telecommunications by the AFP; and to provide for the establishment of a Telecommunications Interception Division of the AFP.

Background

Electronic communications were introduced in Australia in the mid 1800s when the telegraph was adopted. Privacy quickly became an issue. As a result, the first statutes in respect of telecommunications, such as the Electric Telegraphs Act, 1857 (NSW), were designed to protect the privacy of the people using the devices regulated by those statutes. At the international level, the need to preserve the privacy of telecommunications and the mail has long been recognised through conventions such as the International Telecommunications Convention. Both the Australian Telecommunications Commission (Telecom Australia) and the Overseas Telecommunications Commission (OTC) are required by their respective statutes to implement Australia's obligations under such treaties as they apply to Australia.¹

The Telecommunications (Interception) Act 1979 (the Principal Act) was introduced to complement the Australian Security Intelligence Organization Act 1979. The Principal Act gives ASIO the power to intercept communications passing over telecommunication systems in certain circumstances.

In December 1983, the Australian Law Reform Commission (ALRC) presented its report on Privacy.² The ALRC's deliberations on interference with communications started from the general principle that a person's private communications should not be monitored or intercepted without that person's consent. On the basis that technology does not change the essence of the act of communicating, the ALRC did not hesitate to extend the principle to telecommunications.³ Among its recommendations were:

that the availability and suitability of other methods of obtaining the evidence be taken into account by the Judge when considering an application for the grant of a warrant to intercept a telecommunication (paragraph 1162);
that a warrant authorising the use of secret surveillance devices to intercept telecommunications should remain in force for a maximum of 30 days (paragraph 1165); and

that an application for a warrant to intercept a telecommunication should be able to be made by telephone where it is impracticable to make the application in person (paragraph 1171)

The Royal Commission of Inquiry into Alleged Telephone Interceptions (the Stewart Royal Commission) was established in March 1985 and Volume One of the Report of the Commission was tabled in Parliament on 1 May 1986. The Commission's terms of reference included inquiring into the alleged unlawful interception of telephone conversations in New South Wales. Another task of the Commission was to make recommendations arising out of its inquiry as it thought appropriate, including recommendations as to the legislative changes which might be considered necessary or desirable in the light of the results of the inquiry. To a large degree, the Stewart Royal Commission endorsed the legislative changes proposed by the ALRC, including those noted above.

A further recommendation of the ALRC, which was endorsed by the Stewart Royal Commission, was that the scope for issuing a warrant to intercept a telecommunication be broadened to include the investigation of 'serious offences' as opposed to simply 'narcotic offences'. Unlike the other recommendations, this recommendation was not adopted in the Telecommunications (Interception) Amendment Bill 1986. As the result of resolutions passed by the House of Representatives and the Senate, a Joint Select Committee on Telecommunications Interception was appointed to examine and report on the Bill, in particular

- the appropriateness of the proposed legislative safeguards for authorising interceptions and dealing with the information obtained;
- the feasibility of having a central Commonwealth agency to carry out interceptions for other authorities; and
- the question of extending the powers of interception to cover all serious offences.

This Bill will implement the Government's response to the Committee's recommendations.

Main Provisions

For a detailed analysis of the clauses of the Bill, refer to the Explanatory Memorandum.

Section 5 of the Principal Act contains the interpretation provisions. Clause 5 will amend the section by inserting a series of new definitions, the most important of these being

- 'class 1 offence' - murder and kidnapping or their equivalents; a narcotic offence; aiding, abetting, counselling, procuring, being knowingly concerned in, being party to the commission of, or conspiring to commit any of these offences; or an offence which is the subject of special investigation by the National Crime Authority;
- 'class 2 offence' - an offence which is punishable by imprisonment for life or for at least seven years, and which involves loss, or serious risk, of loss of life; serious or serious risk of, personal injury; serious damage to property, endangering a person's safety; narcotic drug
trafficking; serious fraud; serious loss to Commonwealth or State revenue; or aiding, abetting, counselling, procuring, being knowingly concerned in, being party to the commission of, or conspiring to commit any of these offences;

- 'serious offence' - an offence that is or has been a class 1 offence or a class 2 offence; and
- 'State' - State or the Northern Territory.

Clause 6 will insert a new section 5B into the Principal Act to define an 'exempt proceeding' as a proceeding:

- by way of prosecution for a prescribed offence;
- for the confiscation or forfeiture of property, or for the imposition of certain pecuniary penalties;
- for the taking of evidence under extradition legislation;
- for extradition from New Zealand or between Australian States;
- which is a police disciplinary proceeding; or
- which relates to alleged misbehaviour or alleged improper conduct by a Commonwealth or State officer.

An 'eligible Judge' will be a Judge of a court created by the Parliament who has been declared by the Minister to be an eligible Judge for the purposes of this Bill. The Judge must have consented in writing to being nominated for declaration (clause 7 which will insert a new section 6D into the Principal Act).

Section 7 of the Principal Act contains a general prohibition on the interception of telecommunications, with exceptions. Clause 9 will amend sub-section 7(2) so that the exceptions will include an interception under a warrant issued to the

- Australian Security Intelligence Organization (ASIO);
- Australian Federal Police (AFP);
- National Crime Authority (NCA); or
- an eligible authority of a State, being a State Police Force or the NSW Drug Crime Commission, which is declared under clause 34 to be an agency for the purposes of this Bill.

Clause 14 will empower the AFP to intercept telegrams in connection with class 1 or class 2 offences. A warrant to inspect and copy telegrams must be obtained from an eligible Judge (proposed sections 20A and 20B). The maximum period for which a warrant is to remain in force is 90 days (clause 15 which will substitute a new sub-section 21(4) into the Principal Act). The Commissioner or a Deputy Commissioner of the AFP is to ensure that inspection is discontinued and the warrant revoked where satisfied that the grounds for its issue have ceased (clause 16 which will substitute a new section 23 into the Principal Act).

Clause 21 will insert new Parts VI to XI into the Principal Act.

Part VI (proposed sections 32 to 61) deals with warrants authorising the AFP to intercept telecommunications.

The Commissioner of the AFP is to establish the Telecommunications Interception Division (TID) within the AFP to execute warrants (proposed sections 32 and 33).
At the request of a State Premier, the Minister may declare an eligible authority to be an agency for interception (proposed section 34). The Minister must be satisfied that the State's law will provide for proper records to be kept and reports submitted on the use made of intercepted information. In addition, the State must have agreed to meet the expenses of issuing and executing warrants and to pay a proportion of the expenses incurred in establishing the TID (proposed section 35): A declaration is to be notified in the Gazette and laid before each House of the Parliament within 15 sitting days. It will be subject to disallowance by either House (proposed section 36). The Minister will be empowered to revoke a declaration if satisfied that State law or payment agreements are not being maintained or satisfactorily observed; or there has been unsatisfactory compliance with the provisions of this Bill; or the State Premier has requested the revocation (proposed section 37).

Applications to an eligible Judge for warrants to intercept telecommunication services may be made, on behalf of their respective agencies, by a member of the AFP, a member (including a police force staff member) of the NCA or NSW Drug Crime Commission, or a State Police Force officer (proposed section 39). Provision will be made for telephone applications (proposed section 43).

Proposed sections 45 and 46 will provide that the issue of a warrant is a discretionary matter for a Judge who must be satisfied that

* there has been compliance with application requirements;
* in the case of a telephone application, it was urgent;
* there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service;
* the information obtained would be likely to assist the investigation of a class 1 or class 2 offence; and
* some or all of the information cannot appropriately be obtained by other available methods, having regard to how much information would be obtained and how much the investigation would be prejudiced by using those methods.

Authority to intercept communications will be limited to action taken by a Telecom officer in execution of the warrant (proposed section 47).

A warrant may authorise entry on specified premises. The Judge must be satisfied that, for technical reasons or because Telecom's actions might jeopardise the security of an investigation into a serious offence, it would be impracticable or inappropriate to intercept communications except with equipment installed on the premises (proposed section 48).

The chief officer of an agency to which a warrant has been issued is to notify details of the warrant to the Commissioner of the AFP forthwith (proposed section 53).

The authority conferred by a warrant may only be exercised by an approved AFP member. Written approval may be given by the Commissioner of Police or a member of the AFP appointed, in writing, by the Commissioner (proposed section 55).

Proposed sections 56 to 60 deal with circumstances under which warrants are to be revoked and interceptions discontinued.
Part VII (proposed sections 62 to 80) deals with intercepted information and will apply generally to information obtained, an interception carried out or a proceeding started, before and after the commencement of the Part (proposed section 62).

Proposed section 63 will place a general prohibition on the communication, use, recording or giving in evidence of information obtained from an interception. The prohibition will not apply to a proceeding which has started before this Part comes into force (proposed section 64). Other exceptions are contained in proposed sections 65 to 71 which will specify the circumstances in which lawfully obtained information may be communicated, used or recorded by specified persons in connection with ASIO and by Commonwealth agencies and State eligible authorities. Provision will be made for the communication of information suspected of constituting an offence against the Principal Act. This provision will apply to information obtained from a lawful or unlawful interception (proposed section 72). Most lawfully obtained information will be admissible in exempt proceedings (proposed section 75), as will information which has been obtained unlawfully because of a defective warrant (proposed section 76). Unlawfully obtained information may also be given in a proceeding by way of prosecution for certain offences against the Principal Act (proposed section 77).

Part VIII (proposed sections 81 to 93) deals with the records of Commonwealth agencies.

Proposed sections 81 and 82 will require the AFP and NCA to record details of warrants and interceptions. The Commonwealth Ombudsman will be given the additional functions of inspecting the records twice a year and reporting the results to the Minister at the end of each financial year (proposed sections 83, 84 and 85).

Part IX (proposed sections 94 to 105) deals with reports to the Minister about interceptions under Parts IV, V and VI of the Principal Act which provide for interceptions of telegrams, interceptions by Telecom in emergencies, and interceptions by the AFP. All agencies will be required to report annually. The Commissioner of the AFP, Chairman of the NCA and Managing Director of Telecom are to report details of activities carried out consequential to the issue of a warrant within three months of the warrant ceasing to be in force (proposed sections 95, 98 and 99).

The Minister is to report annually on activities under Parts IV and VI of the Principal Act (proposed section 100). The report is to contain the particulars of applications for, and issue of, warrants, their duration and effectiveness, as set out in proposed sections 101 to 103. This report and the report on emergency interceptions are to be tabled in each House of the Parliament. Neither report is to enable the identification of a person (proposed section 105 which will replace section 31 of the Principal Act).

Part X creates the offences of unlawful interception, obstruction of a person acting under a warrant, and for offences in connection with the Ombudsman’s powers of inspection. Penalties are also provided (proposed sections 106 to 108).

Part XI deals with the regulation making power. The Governor-General will be empowered to make regulations consistent with this Bill (proposed section 109).

References
2. Ibid.
3. Ibid., para.1141.

For further information, if required, contact the Law and Government Group.

15 May 1987

Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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