UPDATE
New Law for Government Access to Digital Information: International Production Orders

Introduction

On 5 March 2020 the federal government introduced the *Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (**Bill**) in the House of Representatives. The proposed new law will allow Australian law enforcement and national security agencies to issue international production orders (**IPOs**) to communications service providers outside Australia in certain circumstances. The Bill is of particular interest because corresponding laws likely to be put in place in the USA and other "like minded" countries will enable the law enforcement and national security agencies offshore to issue similar orders directly to Australian companies.

Background

The Bill implements a legislative framework to support a bilateral agreement between Australia and the US regarding cooperation under the US Cloud Act. The legislative framework is also intended to support future bilateral and multilateral agreements to be entered into with other countries. These agreements are referred to in the Bill as **d*esignated international agreements***.

Legislative Framework

The Bill primarily amends the *Telecommunications (Interception and Access) Act 1979* (**TIA Act**) by inserting a new Schedule 1 dealing with IPOs. Some familiar terminology is used but redefined for the purposes of the Schedule. For example, the definition of "designated communication provider" (**DCP**), describing the potential recipient of an IPO, does not have the same meaning as given in Part 15 of the Telecommunications Act 1997 (**Telecoms Act**). However, the concept of a DCP as defined in the Bill is similar, covering carriers and carriages service providers, over-the-top communications systems and data storage providers. Broadly speaking, the proposed new law is more specific and less open ended than the corresponding framework for domestic interception and access.

IPOs

The Bill provides for IPOs relating to interception of communications and access to stored communications and telecommunications data with different (but overlapping) lists of agencies being entitled to apply for each. Interception Agencies will be able to issue IPOs relating to interception, Criminal-law Enforcement Agencies will be able to issue IPOs relating to stored communications and Enforcement Agencies will be able to issue IPOs for telecommunications data. ASIO can also issue IPOs and the Bill creates a new category of agencies: the ***control order IPO agency*** which means any Commonwealth agency and certain declared state agencies.

Interception Agencies currently comprise the Australian Commission for Law Enforcement Integrity, Australian Criminal Intelligence Commission, Australian Federal Police, Corruption and Crime Commission (Western Australia), Crime and Corruption Commission (Queensland), Independent Broad-based Anti-corruption Commission, Independent Commission Against Corruption, New South Wales Crime Commission, New South Wales Police Force, Northern Territory Police, Law Enforcement Conduct Commission, Queensland Police Service, Independent Commissioner Against Corruption, South Australia Police, Tasmania

Police, Victoria Police and the Western Australia Police. The list of Enforcement Agencies and Criminal-law Enforcement Agencies is currently identical. Each term refers to all Interception agencies plus Home Affairs, ASIC and the ACCC.

IPOs can be issued for the purpose of Investigating a serious offence, monitoring of a person the subject of a control order or for ASIO to carry out its functions. The Bill has a separate Part dealing with the issue of IPOs for each purpose.

Applications for an IPO must be made to an eligible judge or nominated AAT member (made eligible or nominated for the task by the Attorney-General). The application should be in writing but in urgent cases can be by telephone. The application must nominate an applicable designated international agreement and come with an affidavit that sets out "the facts and other grounds" for the application amongst other things.

The eligible judge or nominated AAT member must have regard to certain listed matters in deciding whether to grant the IPO. For example, if the IPO is sought by an Interception Agency for the investigation of a serious offence, it is relevant to consider whether issue of the IPO would be likely to assist in connection with the investigation by the Interception Agency of an offence punishable by 7 years or longer in prison (called a category 2 offence). If the IPO is sought by a Criminal-law Enforcement Agency or and Enforcement Agency seeking access to a stored communication or telecommunications data, it is relevant to consider whether it would be likely to assist in connection with the investigation by the agency of an offence punishable by 3 years or longer in prison (called a category 1 offence).

Where the purpose of the IPO is monitoring a person the subject of a control order, relevant considerations include the protection of the public from a terrorist act and preventing the provision of support for, or the facilitation of, a terrorist act. Where the purpose of the IPO is national security, relevant considerations include how much the use of such methods would be likely to assist ASIO in carrying out its function of obtaining intelligence relating to security.

Once made, an IPO must be given to the Australian Designated Authority (ADA). The ADA is the secretary of the Attorney-General's Department. If the ADA is satisfied that the order complies with the designated international agreement nominated in the order the ADA will issue it to the DCP. If not satisfied the ADA must cancel the IPO.

Compliance

The Bill imposes a maximum civil penalty of $50,000 for a DCP not complying with an IPO if the order meets the "enforcement threshold". However, if the Communications Access Coordinator makes an application to the Federal Court, a maximum penalty of $10m may be awarded. The enforcement threshold is defined in section 125 of the Bill. In broad summary, to meet the enforcement threshold the DCP must own or operate a telecommunications network in Australia or provide a relevant service to one or more Australians unless the network or service cannot reasonably be considered to have been offered or provided on the basis of it being available to Australians.

There is a mechanism for DCPs to object to an IPO by notice to the ADA on grounds that it does not comply with the designated international agreement. There is a mechanism of DCPs issue evidentiary certificates to support the use in court of evidence delivered in response to the DCP.

Reporting, oversight and Protected Information.

The Bill provides for annual reports to be provided to the Attorney-General regarding the issue of IPOs and the compliance with IPOs of DCPs. The Bill also imposes record keeping requirements on IPO issuing entities and powers for the Commonwealth Ombudsman to provide oversight of activity and compliance. The ADA must keep a register of IPOs. There is an obligation to destroy material received in response to an IPO if it is no longer required.

The Bill restricts the use, recording and disclosure of "Protected Information" for purposes not associated with the purpose of collection and the administration of the scheme. Protected Information is defined as the information obtained by an IPO and information about an application for an IPO, the issue of an IPO, the existence or non-existence of an IPO, compliance with an IPO and/or its revocation or cancellation. The penalty for use, recording or disclosing Protected Information in breach of this provision is 2 years in prison.

Exemptions for compliance with IPOs from offshore

The Bill facilitates compliance by Australian companies with orders issued pursuant to a designated international agreement by a foreign authority (**Foreign Origin IPOs**) by exempting "an act or thing done in compliance with" a Foreign Origin IPO from provisions that prohibit or restrict interception, access, using and disclosing information contained in the TIA Act and the Telecoms Act. The Bill authorises disclosure of information under a Foreign Origin IPO under the Privacy Act 1988.

Observations and conclusion

The Bill does not contain a provision corresponding to 314 of the Telecoms Act whereby the recipient of a warrant (for interception or stored data) or authorisation (for telecommunications data) is entitled to recover costs but not profit from compliance with the warrant or authorisation. The Bill does not penalise Australian companies that do not comply with Foreign Origin IPOs and appears to rely on Australian law to enforce compliance with IPOs even though, by definition, DCPs will be outside the jurisdiction.

It seems remarkable that there is no mechanism for the ADA to monitor the issue of Foreign Origin IPOs (including those issued for national security purposes) to Australian Business nor for corresponding offshore regulators to monitor the issue of IPOs from Australia. Perhaps this mechanism will be or is contained in a relevant designated international agreement?

According to the TIA Act Annual report for 2018–19, during the period of the report there were only two occasions in which lawfully intercepted information was provided to a foreign country under section 13A(1) of the Mutual Assistance in Criminal Matters Act 1987 (**MLAT**) and the AFP made 19 disclosures to foreign law enforcement agencies. Considering these relatively small numbers, it is possible that the scheme implemented by the Bill will not have a major impact in Australia. On the other hand, if the reason MLAT is not being used is because it is too slow and inefficient, as has been suggested, the scheme implemented by the Bill could lead to a substantial increase in interception and data access requests from offshore.

Please contact me if you have any questions regarding these developments

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