

Terrorism (Extraordinary Powers) Amendment Bill 2015

EXPLANATORY MEMORANDUM

Outline

The *Terrorism (Extraordinary Powers) Amendment Bill 2015* ('the Bill') amends the *Terrorism (Extraordinary Powers) Act 2005* ('the Act') to:

- extend the expiry date to 19 December 2025;
- clarify issues regarding reasonable grounds to believe/suspect;
- extend access to computers to any device or equipment that holds, records or processes 'data';
- clarify that access to 'data' is subject to the provisions of the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Telecommunications (Interception and Access) Western Australia Act 1996*;
- provide that, for the purposes of searching a vehicle or place, a police officer may:
 - access and operate any device or equipment that holds, records or processes data;
 - seize a thing he or she reasonably suspects is a thing connected with a terrorist act or that is or may be evidence in relation to a serious indictable offence;
 - in order to search for any record or other data, exercise the powers set out in the *Criminal Investigation Act 2006* section 148 to copy and seize the records or data; and
 - to facilitate access, order a person to provide any information or assistance that is reasonable and necessary to enable the officer to gain access to or operate the device or equipment or to make a reproduction of the data stored therein.
- enable the search of vehicles, including vessels and aircraft, under a covert search warrant;
- provide for alternate reporting back to the issuing judge and extended timeframes;
- include membership of a terrorist organisation and suspicion of advocating terrorism as grounds for a covert search warrant;
- allow for the appointment of "special officers" from foreign jurisdictions; and
- extend section 20 of the Act to avoid further litigation on a matter that has already been decided (*Kirk v Industrial Court (NSW)* [2010] HCA 1).

Clause Notes

Part 1 – Preliminary

Clause 1 Short title

This clause cites the short title of the Act as the *Terrorism (Extraordinary Powers) Amendment Act 2015*.

Clause 2 Commencement

This clause provides that sections 1 and 2 come into operation on the day on which the Act receives Royal Assent, and the rest of the Act on the day after that day.

Clause 3 Act amended

This clause provides that this Act amends the *Terrorism (Extraordinary Powers) Act 2005*.

Clause 4 Section 3 amended

This clause inserts a definition of “data” in alphabetical order in section 3.

Part 2 – Special police powers

Clause 5 Section 7 amended

This clause amends section 7(2) to provide that the Commissioner has reasonable grounds to “suspect” rather than “believe” certain things pursuant to the issuing of a Commissioner’s warrant.

Clause 6 Section 14 amended

Subclause (1) amends section 14(1)(b) to allow for a “target vehicle” that may be contained within another vehicle – for example, a car within a truck.

Subclause (2) inserts new paragraph (c) in section 14(2) to allow a police officer searching a vehicle in accordance with subsection (1) to access and operate any device or equipment in the vehicle that holds or processes data.

Clause 7 Section 15 amended

This clause inserts new subsection (2A) to allow a police officer searching a place in accordance with subsection (1) to access and

operate any device or equipment in the place that holds or processes data.

Clause 8 Section 16 amended

This clause inserts new subsection (3) in relation to seizing things, to allow a police officer, to access and operate any device or equipment in the thing that holds or processes data.

Clause 9 Section 17 amended

This clause amends section 17(1) to allow the Commissioner to appoint, for the purposes of the Act, sworn employees of the New Zealand Police and/or law enforcement officers of other foreign jurisdictions which may be prescribed for the purposes of subsection (1).

Clause 10 Section 20 amended

The amendment to section 20 is the result of the decision in *Kirk v Industrial Court (NSW)* [2010] HCA 1; a case that decided that any provision purporting to finally and completely oust the jurisdiction of the court in a manner set out in section 20 would be wrong on the face of it. As a result, this provision has been inserted to avoid further litigation on a matter that has already been decided. See the *Criminal Investigation (Covert Powers) Act 2012* section 82(5) as an example.

Part 3 – Covert search warrants

Clause 11 Section 22 amended

This clause amends section 22 to insert in alphabetical order two new definitions, being “Commonwealth terrorist offence” and “target vehicle”, for the purpose of covert search warrants.

Clause 12 Section 23 amended

This clause amends section 23(2) to provide that the Commissioner must be satisfied there are reasonable grounds to “suspect” rather than “believe” certain things when authorising a police officer to apply for a covert search warrant.

In addition to the advent of a terrorist act, subsection (2) is extended to allow for offences against section 102.3 and section 80.2C as set out in the Schedule to the *Criminal Code Act 1995* (Commonwealth), these being, respectively, offences of membership of a terrorist organisation and advocating terrorism.

Section 23 is also amended by inserting new subsection (3A) to provide that the Commissioner may authorise a police officer to apply for a

covert search warrant if the Commissioner is satisfied there are reasonable grounds to believe:

- (i) that the entry and search will substantially assist in preventing an act or investigating an act or offence; and
- (ii) that the entry and search needs to be carried out without the occupier's or vehicle operator's knowledge.

The Commissioner has a two-stage satisfaction process. Firstly he/she must suspect one of three things in section 23(2)(a) to (c), and then, having been satisfied of at least one of those things, he/she must believe the two other things set out in section 23(3A)(a) and (b). Once the Commissioner is so satisfied, he/she can authorise a police officer to make an application for a covert search warrant.

Clause 13 Section 24 amended

This clause amends section 24(3) to make allowance for the entry and search of a target vehicle under a covert search warrant, similar to section 14 which allows the search of a target vehicle under a Commissioner's warrant.

Clause 13 also sets out the grounds on which the applicant "suspects" certain things and "believes" others, both of which must be included in the application for a covert search warrant. The applicant is required to either suspect or believe each matter individually. The effect is that the applicant has to have the same suspicions and beliefs that the Commissioner of Police has before the applicant can apply for a warrant.

Searching for a thing, either in the target place or target vehicle, is extended by clause 13 to include a thing connected with a Commonwealth terrorist offence. The application for a covert search warrant must state the grounds on which the applicant suspects that the thing is so connected.

Clause 14 Section 26 amended

Subclause (1) amends section 26(1) to allow a judge to issue a covert search warrant in respect of a vehicle as well as a place. The judge must be satisfied there are reasonable grounds for the applicant to "suspect" or "believe" the matters set out in section 24(3).

Subclause (2) amends section 26(2) to include entering a place adjoining or near a target vehicle as a matter a judge must consider when conferring a power of entry under a covert search warrant.

Subclause (3) amends section 26(3) to include the nature and seriousness of a Commonwealth terrorist offence as a matter a judge must consider when deciding whether the issue of a covert search warrant is justified.

Subclause (4) amends section 26(5) to include information in relation to a target vehicle in the information that a covert search warrant must contain.

Clause 15 Section 27 amended

Subclause (1) amends section 27(6) to make allowance for the inclusion of entry to a vehicle for the purpose of executing the warrant.

Subclause (2) amends section 27(7) to extend the primary powers available under the warrant to include entry and search, and if necessary re-entry, of a target vehicle without the knowledge of the person in charge of the target vehicle. In paragraph (e), the power of seizure is extended to include a thing that is not connected with a “Commonwealth terrorist offence” but which the officer executing the warrant reasonably suspects may be evidence relevant to a serious indictable offence.

Subclause (3) amends section 27(8) to extend the ancillary powers available under the warrant to include the use of powers in regard to a target vehicle and the person in charge of a target vehicle. The power to search for any record is extended to “other data” and paragraph (e)(ii) is deleted and replaced to allow the executing officer to access and operate any device or equipment that holds, records or processes data and to exercise the powers to copy and seize records or data as set out in the *Criminal Investigation Act 2006* section 148.

Subclause (4) inserts after section 27(8) a new subsection (9A) to make it clear that access to data under a covert search warrant is subject to any limitations imposed by the *Telecommunications (Interception and Access) Act 1979* (Commonwealth) and the *Telecommunications (Interception and Access) Western Australia Act 1996*.

Subclause (5) amends section 27(11) to include reference to a target vehicle in the conditions applying to re-entry under a covert search warrant.

Clause 16 Section 28A inserted

This clause inserts new section 28A to make allowance for an officer to order a person, or an employee of that person, to provide any information or assistance that is reasonable and necessary to enable the officer to seize a record or data or exercise a power under a covert search warrant. The officer must reasonably suspect that the person knows how to gain access to or operate the device or equipment.

A person who fails to obey such an order without reasonable excuse is liable to a penalty of \$12,000 and imprisonment for 12 months. A claim of self-incrimination by virtue of the information that may be made available as a result of such access or operation is considered no defence to a charge of failing to obey the order.

Clause 17 Section 28 amended

Subclause (1) inserts new subsections (2A) and (2B), amending section 28 to make allowance for circumstances where the authorised applicant named in a covert search warrant has died or is unavailable to report back to the judge who issued the warrant.

Another police officer of the same or higher rank, who has been nominated by the Commissioner in writing, must provide a written report to the issuing judge or, in the absence of that judge, the Chief Justice about the execution of the warrant. Failure to supply the written report may incur a penalty of up to \$12,000 or imprisonment for 12 months.

Subclause (2) rephrases section 28(2) and inserts new subsections (3A) and (3B) to make clear when the report to the judge is due. If the warrant was not executed, subsection (2) requires the report to be given to the judge within 7 days after the expiry date specified in the warrant.

New subsections (3A) and (3B) make allowance for an interim report and extension of time to be made available by the judge in circumstances where the applicant named in the covert search warrant has died or is unavailable. If the warrant was executed, the report or an interim report must be given to the judge within 7 days after the day on which it was executed unless the judge grants an extension of time.

Subclause (3) amends section 28(3) to allow the report to the judge to include additional information relating to target vehicles; persons in charge of target vehicles; details and circumstances relating to re-entry of a target vehicle, and any thing that was seized, removed or substituted under an executed covert search warrant.

Additionally, the amendment to section 28(3) makes allowance for reporting the grounds upon which it was suspected that a thing may be connected with a Commonwealth terrorist offence; whether or not the execution of the warrant assisted in the prevention or investigation of the Commonwealth terrorist offence; and, if so, how it assisted.

Clause 18 Section 29 amended

This clause amends section 29(1) to make allowance for an interim report in circumstances where an extension of time is required for reporting back to the judge about the execution of a covert search warrant.

Clause 19 Section 30 amended

This clause amends section 30(1) to include in the Commissioner's annual report to the Minister information for the previous financial year on the number of vehicles entered under covert search warrants, how

many times things connected with Commonwealth terrorist offences were seized, and how many times a vehicle was re-entered to return or retrieve anything removed or substituted under the warrant.

Part 4 – Miscellaneous

Clause 20 Section 35 amended

Clause 20 extends the expiry date of the Act by 10 years to 19 December 2025.

Clause 21 Schedule 1 clause 7 amended

This clause inserts a new subclause (2A) to provide ancillary powers allowing a police officer to operate a device or equipment which has been seized under the Act to gain access to, recover and reproduce a record or other data held or processed by that device or equipment. The officer must reasonably suspect that the record or other data may be seized under the warrant.