Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

26 February 2021

To whom it may concern

The AIIA welcomes the opportunity to make this brief submission on the *Surveillance Legislation Amendment (Identify and Disrupt)* Bill 2020.

About the AIIA

The Australian Information Industry Association (**AIIA**) is Australia's peak representative body and advocacy group for those in the digital ecosystem. We are a not-for-profit organisation to benefit members, and AIIA membership fees are tax deductible. Since 1978, the AIIA has pursued activities to stimulate and grow the digital ecosystem, to create a favourable business environment for our members and to contribute to Australia's economic prosperity.

We do this by delivering outstanding member value by:

• providing a strong voice of influence
• building a sense of community through events and education
• enabling a network for collaboration and inspiration; and
• developing compelling content and relevant and interesting information.

We represent the end-to-end digital ecosystem in Australia, including:
• multinational companies
• large Australian technology, telecommunications and digital and cloud infrastructure companies; and
• a large number of small and medium businesses, start-ups, universities and digital incubators.

Introduction

The AIIA supports the intent behind this legislation that seeks to disrupt and frustrate the commission of serious offences online. The AIIA joins with other industry groups in urging the government to ensure that the guardrails and thresholds associated with this legislation are managed appropriately and that the government considers not only the civil liberty implications of the Bill but also the feasibility and implications of assistance and compliance for the technology sector on both an individual and global level.

Factors a decision maker must consider

In 2018, in response to industry concern, the government included in the *Assistance and Access Act* (which introduced Part XV of the *Telecommunications Act*) provisions that listed certain factors decision-makers have to consider in determining whether industry assistance notices are reasonable and proportionate, including the security of relevant systems and technical feasibility.

The AIIA recommends that the government include these technical and security-related factors in the list of factors that must be considered, such as for example s3ZZUP Determining the Application, which at present makes reference to the gravity of the offences, the existence of alternative means, privacy impacts, evidentiary value, and previous warrants sought or issued in connection with the same alleged offence. We recommend that the Committee amend the legislation so that sections such as s3ZZUP list relevant factors informed by a holistic awareness of the systems involved.

Good faith immunity

The AIIA calls on the government to introduce immunity from prosecution for both assisting entities and those employees or officers of assisting entities who are acting in good faith.

In the Critical Infrastructure reform process, government introduced section 30BE Liability into the bill following consultation, which states:

> (1) An entity is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith […]
> (2) An officer, employee or agent of an entity is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in connection with an act done or omitted by the entity as mentioned in subsection (1).

The AIIA posits that the government should introduce a like provision in the *Identify and Disrupt* Bill to protect entities, and officers, employees or agents thereof, acting or omitting action in good faith.

Cost recovery provisions

The AIIA suggests that the legislation provide for cost recovery for private entities for the costs that they incur in implementing assistance orders. This provision would be enlivened where there is a significant loss or extraordinary cost to the assisting entity, whether in repairing vulnerabilities, restoring service, addressing a human resources burden, or intensive technical impact incurred by the company in complying with an assistance order.

Clarification about roles and responsibilities of 'specified person' in the Acts

In respect of the use of the term 'specified person' in the Acts (Surveillance Devices Act ss 64A and 64B(1), Crimes Act s 3ZZVG), the AIIA queries how this might impact the ability for law enforcement to compel 'specified persons' to provide reasonable information and assistance to help them carry out a warrant. The AIIA seeks further clarification of the roles and responsibilities of a 'specified person' in the legislation, and what 'provid[ing] any information or assistance that is reasonable and necessary' could constitute in the context of what law enforcement could compel a 'specified person' to do. We note the existing examples of deleting activity logs and disabling two-factor authentication.

Mandatory consultation clause

The AIIA suggests that the government introduce a provision mandating the formal consultation with any relevant company, service provider or related entity that will have any relevant computer or account asset accessed or investigated by authorised officers under the legislation. Such consultation would involve formal and confidential notification that a warrant is being applied for that will require assistance from that relevant entity or network, and an outline of the reasons for that warrant being sought. This would allow the entity or network to be on notice and consider the technical feasibility and impacts of the operation, resulting in a smooth and anticipated process of cooperation between government and service provider.

Independent technical advice

The AIIA suggests that the government stand up an independent board or approved list of communications and technology technical experts that are able to be consulted before applications for warrants are made as has been recommended for reforms to the *Telecommunications and other Legislation Amendment* (Assistance & Access) Act 2018. This board would have regard to security, integrity and technical feasibility considerations of government intervention in systems and networks and could provide advice to both government and industry in facilitating the disruption of crime in a reasonable, proportionate and technically feasible fashion.

Raising the threshold for eligible offences and 'reasonable suspicion'

The AIIA supports the suggestion of the Queensland Council for Civil Liberties that the threshold for the grant of warrants be raised from 'reasonably suspecting' the commission of a crime to 'reasonably believing on the grounds of probative evidence'. 'Reasonable suspicion' has been called out in recent times by legal experts as a murky threshold and a dangerously low bar to meet.

Given the gravity of the brands of intervention and interference proposed by the government, only the most serious of offences should be eligible for the grant of these new warrants; at present warrants may be issued in respect of offences attracting three years' imprisonment.

Reconsidering the seriousness of the penalty regime

The imposition of 600 penalty units or 10 years' imprisonment – or both – seems disproportionate, especially in the absence of appropriate good faith immunity provisions in this legislation.

Publishing or communicating warrant information – where such publication or communication is considered to prejudice the effective conduct of an investigation – or being deemed uncooperative with warrants despite one's ability to cooperate, are some of the offences that would incur such penalties.

The AIIA submits that these penalties are disproportionate, especially where they could be applied to officers, employees or agents of entities on the matter of interpretation of their conduct, or where their conduct is naïve or inadvertent, as opposed to the criminal actor themselves.

Limit issuing authority to judicial officers

In line with other groups, the AIIA calls on the government to only allow the issue of warrants by judicial officers, not members of the Administrative Appeals Tribunal (AAT). While the AIIA fully respects the AAT and its remit, the extraordinary powers of intervention and hacking allowed for by these new warrants calls for a high judicial threshold where the rule of law and jurisdictional implications are carefully considered by an experienced and senior member of the judiciary.

Allow merits review of decision to grant warrant

Affected entities should be able to appeal from the order to grant a warrant where they believe the issuance was inappropriate, with proper merits review processes in place for another judicial officer to reconsider the decision.

We would welcome a further opportunity to engage with government on this legislation. Should you have any questions about the content of this submission, please contact [redacted]

Yours sincerely,

[redacted]

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AIIA