



## Telecommunications Interception Legislation Amendment Bill 2008

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## Telecommunications Interception Legislation Amendment Bill 2008

**Date introduced:** 25 June 2008

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Sections 1 to 3 will commence on the day on which the Act receives the Royal Assent. Schedule 1 will commence on the day after the Act receives the Royal Assent. Schedule 2 items 1 to 11, 13, 21 and 25 to 27 will commence on the day after the Act receives the Royal Assent. Schedule 2 items 12, 14 to 20 and 22 will commence on the later of: (a) the start of the day after this Act receives the Royal Assent; and (b) immediately after the commencement of section 5 of the *Police Integrity Act 2008* of Victoria. Items 12, 14 to 20 and 22 will not commence at all if section 5 of the *Police Integrity Act 2008* of Victoria does not commence. Schedule 2 items 23 and 24 will commence on the day on which this Act receives the Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The main purpose of the Telecommunications Interception Legislation Amendment Bill 2008 (the Bill) is to amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) and *Surveillance Devices Act 2004* (the Surveillance Devices Act) to ensure that officeholders can validly authorise others to act on their behalf in performing certain legislative functions.

The Bill proposes a number of other minor technical amendments. The amendments will tidy the telecommunications interception and access regime so that it is current and accurately reflects the status of related regimes.

### Background

*Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 108 ALR

The explanatory memorandum notes that the need for the amendments is based on the *Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 108 ALR case (the Hong Kong Bank case).

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The Hong Kong Bank case considered whether a decision by the Australian Securities Commission to authorise a person, as referred to in section 597(1) of the Corporations law, was a valid authorisation and a reviewable decision from the Administrative Appeals Tribunal (the Tribunal). The Federal Court in that case decided that the Tribunal did not have jurisdiction to review the validity of the authorisation because the decision in question was not made under the Corporations Law (which would normally attract the jurisdiction of the Tribunal). The Court suggested that the authority came from the *Australian Securities Commission Act (1989)* and thus any challenge in the Tribunal to the authorisation failed.<sup>1</sup> The court held that a provision allowing an authorised person to perform certain functions does not implicitly empower a person to be an ‘authorised person’.

### Need for express conferral of powers

The Explanatory Memorandum notes that the Attorney-General’s Department obtained legal advice indicating that the definitions in the TI Act and the SDA are distinguishable from those in the *Hong Kong Bank* case. The Explanatory Memorandum notes that there is still some risk that a court would find that the relevant existing subsections of the Acts do not confer power on designated office holders to make authorisations.

The intention of the amendments is to remove any uncertainties that may arise in a similar way to the uncertainty of implied authorisations that were found in the Hong Kong Bank case.

The drafting issue came to light and was noted in Drafting Direction No. 3.4 (May 2006) by the Office of Parliamentary Council (OPC).<sup>2</sup> This Direction notes that legislative drafters need to ‘be careful about assuming that powers can safely be conferred by implication and should consider whether an express conferral of power would be more appropriate.’<sup>3</sup>

In essence, the amendments will expressly confer power on office holders to make authorisations for the purposes of these Acts.

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1. Barnes, J. ‘The Incidental Powers of the Australian Securities Commission: Federal Court v Supreme Court’, *Australian Business Law Review*, Vol 21, December 1993, No. 6 at p.442.
  2. Drafting Direction No. 3.4 (May 2006), Office of Parliamentary Council, [Hhttp://www.opc.gov.au/about/drafting\\_series/DD%203.4.pdf](http://www.opc.gov.au/about/drafting_series/DD%203.4.pdf)H at paragraphs 12–18.
  3. Drafting Direction No. 3.4 (May 2006), Office of Parliamentary Council, [Hhttp://www.opc.gov.au/about/drafting\\_series/DD%203.4.pdf](http://www.opc.gov.au/about/drafting_series/DD%203.4.pdf)H at paragraph 18.

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## Financial implications

Given that the amendments do not create or expand powers of the authorised persons, the bill is unlikely to have any financial impact. The explanatory memorandum notes that the amendments made by this Bill will have no financial impact.

## Main provisions

### Schedule 1 – Surveillance Devices Act 2004

**Items 1 to 7** will amend the *Surveillance Devices Act 2004* (SD Act) by identifying a person who is specifically authorised under proposed sections 6A or 6B of the SD Act as an ‘appropriate authorising officer’ or ‘law enforcement officer’.

**Item 8** will insert **new sections 6A and 6B** at the end of section 6 of the SD Act. These sections will confer express powers on designated officers to authorise other persons to act on their behalf for the purposes of the SD Act. These sections will ensure that authorisations are valid and that persons authorised under the SD Act to act as an ‘appropriate authorising officer’ or a ‘law enforcement officer’ can legally exercise their prescribed functions.

**Item 9 to 10** will ensure that actions previously taken by persons authorised under subsection 6(1) of the SD are still valid. Items 9 and 10 treat previous authorisations as if they had been made under the express authorisation powers inserted by Item 8 of this Bill. This would appear to be a retrospective application of Item 8 but would be unlikely to have an adverse effect on individuals.

### Schedule 2 – Telecommunications Interception (Interception and Access) Act 1979

**Items 1 to 11** identify a person who is specifically authorised under new sections 5AC, 5AD or 5AE of the TIA Act as inserted by item 21 of this Bill as being a ‘certifying officer’, ‘certifying person’ or ‘member of the staff of a Commonwealth Royal Commission’.

**Item 13** is not commented on in the explanatory memorandum. That item will amend subsection 5(1)(b) of the definition of ‘member of staff of a Commonwealth Royal Commission’ to allow that person to be authorised under proposed section 5AE.

**Item 21** inserts new sections 5AC, 5AD and 5AE at the end of section 5AB of the TIA Act. These sections will confer express powers on designated officers to authorise another person to act on their behalf for the purposes of the TIA Act. These provisions will ensure that persons authorised under the TIA Act to act as a ‘certifying officer’, ‘certifying person’, or ‘member of the staff of a Commonwealth Royal Commission’, can exercise their prescribed functions without any doubt as to the validity of their authorisations.

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**Items 25 to 27** will confirm that actions previously taken by persons authorised under subsection 5(1) of the TIA are still valid. **Items 25 to 27** treat previous authorisations as if they had been made under the express authorisation powers inserted by **Item 21** of this Bill. This would appear to be a retrospective application of **Item 21** but would be unlikely to have an adverse effect on individuals.

### The Office of Policy Integrity (Victoria)

The Victorian Government has introduced legislation to place the Office of Police Integrity as a standalone authority. The Bill went to the Victorian Scrutiny of Acts and Regulations Committee in June 2008 and a transcript of proceedings can be found on the Victorian Parliament website.<sup>4</sup> At the time of writing this Digest, the Committee has not reported on the Bill.

**Items 12 and 14 to 20** replace references in subsection 5(1) of the TIA Act to the Police Regulation Act with the new legislation so as to preserve the Office's powers and functions under the TIA Act. These provisions would only come into effect if the Victorian Act is passed.

**Item 22** makes a consequential amendment to subparagraph 39(2)(ea)(ii) as a result of **item 15** of the Bill which identifies the Office of Police Integrity as being 'the Office of Police Integrity established by the *Police Integrity Act 2008*'.

**Item 23** updates references to sections 45 and 45A of the TIA Act which have been repealed. This ensures that service carriers are not required to report against redundant provisions.

## Concluding comments

The *Hong Kong Bank* case was decided in 1992 and there has been a considerable lag since that decision and the Drafting Direction of 2006. It is not clear why the lag has occurred. The provisions came to the attention of the drafters at OPC when preparing a prior Bill and the Attorney-General's Department has subsequently moved to eliminate the risk that OPC identified. There is no suggestion that the amendments are addressing a particular case that has arisen by an implied authorisation under the TIA Act.

There is nothing controversial or of particular concern in this Bill. However, there is no indication whether the uncertainties that are evidenced here exist in other legislation.

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4. Transcript of proceedings, Victorian Scrutiny of Acts and Regulations Committee 2008, [http://www.parliament.vic.gov.au/sarc/Police\\_Integrity\\_Bill\\_08/Evidence/DPC%2004\\_06\\_08.pdf](http://www.parliament.vic.gov.au/sarc/Police_Integrity_Bill_08/Evidence/DPC%2004_06_08.pdf)

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