THE TELECOMMUNICATIONS (Interception) ACT 1979-1987

by Greg James Q.C.

HISTORY

The power of the Commonwealth to legislate on this topic has resulted in complex legislation on which only limited judicial guidance has been given. The Telephonic Communications (Interception) Act 1960, considered by the High Court in Miller v Miller (1978) 141 CLR 269 has been replaced by the Telecommunications (Interception) Act 1979 considered by the High Court in Hilton v Wells (1985) 58 ALR 245 and by Mr. Justice Lee, Chief Judge at Common Law of the New South Wales Supreme Court in Edelsten v Investigating Committee (1986) 7 NSWLR 222. The present principal Act was substantially amended by the Telecommunications (Interception) Amendment Act 1987. In addition various amendments have permitted the communication of information, subject to the Act, to Royal Commissions, The National Crime Authority, The Commissioner of Public Complaints of NSW, The Fitzgerald Inquiry and various NSW Commissions of Inquiry. Provision was made by Act No. 63 of 1985 for emergency requests where an honest belief is formed that a person is or is likely to die or has been, is being or is likely to be seriously injured. Other amendments have been made to amplify ASIO's powers. Many other amendments have been made both formal and substantive.

CASE LAW

Since Miller v Miller the Acts have been seen as covering the field to the exclusion of State law (see Edelsten supra). Although, since, at least the NSW Listening Devices Acts of 1969 and 1984 dealt with hearing recording or listening to a private conversation, the Section 109 inconsistency with the relevant Commonwealth Acts was limited to that activity being performed

by the interception of a communication passing over the telecommunications system. The question of whether there is such an interception has been answered positively in the case of car phones in Edelsten.

In Hilton v Wells 58 ALR 245 the majority, on the basis of an assumed correctness of the Boilermakers Case, upheld the validity of the conferral of warrant-issueing powers on the designated Judges (which now include judges of a court created by the Parliament who have consented in writing). Such judges act administratively and as persona designata rather than as courts.

Further it was held that the creation of the offences of intercepting or communicating the results of interception did not render the material obtained inadmissable and that the common law discretion was all that was available to exclude the material. Mason and Deane JJ dissented.

Although the 1987 amendment dramatically alters the Act, there seems no reason to doubt the general applicability of this case-law, as far as it goes, to the existing Act, except on the question of admissability. Section 63 now provides that, subject to Part V11 of the Act a person shall not communicate to another person make use of, or make a record of or give in evidence in a proceeding lawfully obtained information or information obtained by intercepting a communication in breach of Section 7 (which prohibits interception). Thus the teeth pulled by the High Court have been statutorily replaced. The effect of the exemption of certain pending proceedings is awaiting consideration in the Edelsten matter.

GENERAL NATURE OF THE ACT

Except where expressly permitted, the Act prohibits the interception of communications (Section 7) passing over a telecommunications system by listening or recording without the knowledge of the person making the communication, except by a person lawfully on premises or in a vessel,

vehicle or aircraft utilizing a service connected thereto (Section 6) and further prohibits the communication of information so derived or the use of a record so obtained (Section 63). In addition, the Act protects the confidentiality of telegrams. Access to telegrams, ~~and~~ Interception recording and communication of communications are permitted however where the interception was authorised by warrant issued under the Act or by officers of Telecom in the course of their duties or acting pursuant to an emergency request from the police under Part V.

The Act contains elaborate provisions authorising limited use of recordings or information obtained as a result of access or interception authorised by warrant and provides a complex scheme for the keeping of records, oversight by the Ombudsman and reports to and by the Minister.

Most important to the operation of the Act are Part V1 (Police warrants for interception) and Part V11 (dealing with intercepted information).

WARRANTS

Under Part 111 of the Act warrants may be obtained by ASIO from the Attorney-General in circumstances where the use of the service or the telegram is reasonably suspected to be prejudical to security or to assist ASIO to obtain intelligence relating to security (Section 9). In emergencies 48 hour warrants may be issued by the Director-General of Security. Attorney-General's warrants may not exceed 6 months and may be revoked earlier.

POLICE WARRANTS

Under Parts 1V and V1 respectively of the Act judicial warrants may be issued for access to telegrams and to communications. Different criteria apply for warrants relating to class1 offences (ie. murder, kidnapping or equivalent offences, any narcotic offence punishable under Section 235 of the Customs Act 1901 and aiding and abetting, being knowingly concerned in

or conspiring to committ these offences) and class 2 offences (offences punishable by imprisonment of a maximum of 7 years or more where the particular conduct involves loss or serious risk of loss, of life, serious personal injury or serious risk of it, serious danger to property endangering a person, trafficking in narcotic drugs, serious fraud or serious loss of revenue of the Commonwealth or a State and aiding and abetting etc. those offences. (Sections 5, 20A and 20B, Sections 45 and 46). The criteria are much lighter, of course, for class 1 offences, where basically the judge needs to be satisfied that the access is useful and likely to be appropriate in the light of any other available methods of investigation. The criteria for Class 2 offences in addition require regard to privacy and the gravity of the conduct.

In the case of an interception, both classes require compliance with Division 3 which requires an application for a warrant to be in writing and accompanied by an affidavit of facts and grounds complying withSection 42, except in circumstances of urgency in which case a telephone application may be made giving particulars of the urgent circumstances.

Interception warrants may be obtained by an agency ie. the Australian Federal Police, the National Crime Authority or a State authority (usually the State Police) declared to be an eligible authority under Section 34. The pre-conditions for such a declaration under Section 35 require an agreement to elaborate record keeping, reporting, and confidentiality. Such declarations may be revoked under Section 37.

A Warrant for interception may be for up to 90 days and may be subject to conditions or restrictions and shall contain short particulars of each serious offence in relation to which it issues as well as certain formal requirements (Section 49). After a telephone application affidavits must be filed or the warrant may be revoked (Sections 51 and 52). Warrants must be revoked

if the grounds for their issue have ceased to exist and interceptions discontinued (Sections 56,57 and 58).

The authority conferred by a warrant may only be exercised by approved members of the Australian Federal Police (Section 55). There shall be within the Australian Federal Police, the Telecommunications Interception Division whichshall execute warrants (Sections 32 and 33).

DEALING WITH INTERCEPTED INFORMATION

The use of information derived from an interception is governed by Part V11. Otherwise than in accord with the Part neither lawfully obtained information nor information obtained by intercepting a communication in breach of Subsection 7 (1) may be communicated, used, recorded or given in evidence. (Section 63) ASIO and ~~their~~ its officers may for the purpose of their functions use the information. The interceptor may communicate the information obtained to the agency to whom the warrant issued, whose officers may use the information only for purposes connected with investigations or proceedings for class 1 or 2 offences, some Telecommunications Act offences or offences punishable by a maximum of 3 years imprisonment or more, investigations into public officers' misbehaviour and reports and decisions thereon and to communicate relevant information to relevant Police Forces (Sections 67 and 68). Police officers may communicate with each other in performing their duties and withpersons whose assistance is required in an emergency. In respect of certain offences against this Act, communication may be made to the Attorney-General, the DPP, the Police or the NCA notwithstanding a breachof Subsection 7(1). Lawfully obtained information may be given in evidence in exempt proceedings ie. those proceedings for offences referred to above, proceedings for confiscation or forfeiture or penalties in respect of those offences, taking of evidence for extradition for those offences, police or public officer disciplinary proceedings (Sections 5B and 74C).

Lawfully obtained information is that obtained by intercepting otherwise than in contravention of subsection 7(1) or by virtue of a warrant.(Section 6E). The applicability of subsection 7 (1) may be determined on the balance of probabilities (Section 74 (2)). Where a court is satisfied that an irregularity which should be disregarded has caused a breach of Subsection 7(1) by an interception purportedly under a judicial warrant, the information may still be given in evidence (Section 75). Information obtained in breach may be used for offences under this Act (Section 76). Unless Sections 74,75 and 76 permit the evidence, neither information nor a record is admissable (Section77).

FURTHER

Various offences are created by PartX and Part X1 provides for Regulations.

COMMENTARY

GENERAL

The terminology and the complex scheme of the Act are an incitement to vagaries of interpretation.(e.g. Is a Family Law "snatch" equivalent conduct to a kidnapping? What is "serious"? What does Section 6E mean? How wide is serious loss of revenue?) The vagueness of the criteria for the exercise of discretion is an inducement to ideosyncratic decision and judge shopping. The guardians of the Act's protections are essentially those who might most wish the greatest latitude in the use of the powers granted. The recent example of the New South Wales Police' illegal telephone bugging and the subsequent grant of immunities hardly inspires confidence in the efficacy of the protections unless one can count on an undesireable tension between State Police Forces and the Federal Police as a protection. The breadth of the offences and proceedings for which warrants are available is very wide. The breadth of the proceedings in respect of which evidence so derived may be given is immense. On normal principles it would be necessary to set aside a warrant, apparently lawful on its face, to have rejected evidence

obtained under it where the warrant was wrongly issued. See Hilton v Wells p.255 line 46. Some effective review mechanism should have been provided for such an event in the Act itself to avoid a multiplicity of proceedings since most proceedings in which intercept evidence is tendered will be in State Courts which would have no power to quash the warrant.

There seems to be little, if any room left for the judicial discretion to exclude. The sole room for discretion appears to be on issue of the warrant. Is this what was intended?

Even where the warrant is partially bad it may be severable Peters & Love v A.G. for NSW unrep. NSWCA 30/11/88. What then is to be excluded?

What is to happen where there is a lawful interception i.e. where there is a warrant or no breach of subsection 7 (1) (are these different) and information is obtained of unsuspected offences?

In R v Jackson unrep. Roden J held that information obtained from the interception of calls to and from H's phone (in respect of which a warrant had issued in respect of certain suspected offences) could be given in evidence against J., in respect of whose service no warrant had issued, in proceedings for offences in respect of which no warrant had issued. If this decision is right the ambit of the Act is greatly broadened beyond what might be expected on its face. How wide is the embrace of this Act?

The invitation to litigation is obvious but are the ornate restrictions and safeguards merely illusory?

Rejection of evidence is one thing but what happens to information wrongfully obtained?

The purpose of this paper is to introduce the Act and stimulate discussion of potential problems in its administration. I do not seek to answer questions so much as to raise them. The importance of this Act to criminal lawyers

is great. Effective representation in cases in which it may be utilized requires not only skill in statutory interpretation but also knowledge of constitutional and administrative law.

The resolution of the questions raised by the Act may well require the re-evaluation of what are considered to be acceptable modes of investigation and proof. This Act may represent the use by the Commonwealth Parliament of its constitutional powers on this topic to take a dramatic step towards a national criminal investigative function to complement the National Crime Authority, the Customs Act, taxation legislation and to weld together with the Commonwealth authorities, the State and Territory agencies by ensuring a dependency on the Federal Police and the Federal Court Judges for the use of this evidence. Is such a step to national unity bought at too high a price?

The minority justices in Hilton v Wells putting aside Boilermakers Case, considered that the basic separation of powers doctrine in the Constitution might prohibit the use of judges in this way. Were they right? Does such a function do violence to the judicial role? Should Boilermakers be re-considered? In R v Jones (unrep special leave refused) the High Court declined to re-consider Hilton v Wells, but the Commonwealth Parliament was on notice to re-convene urgently in case Hilton v Wells was decided differently. Does the breadth of the Amendment Act mean another challenge, with a different court might succeed? Could such a challenge result in a new Constitutional approach? Should any of you wish to give it a go, Good luck! Can I come too? I've lost too many lately to miss this one.