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THE HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon. Lionel Bowen M.P.)

TELECOMMUNICATIONS (INTERCEPTION)

AMENDMENT BILL 1986

OUTLINE

The Bill amends the Telecommunications (Interception) Act 1979 for the following main purposes:

to extend the present interception powers of the Australian Federal Police (AFP) under the Act (in relation to narcotics offences punishable under the Customs Act) to cover, in addition, 'serious trafficking offences' (ie offences against Commonwealth laws involving narcotic drugs and punishable by imprisonment for life or a maximum period of 7 years or longer);

to make telecommunications interception powers available to State and Territory police forces in relation to 'serious trafficking offences' against State and Territory laws; and

to make telecommunications interceptions powers available to the National Crime Authority (NCA) and the State Drug Crime Commission of New South Wales (the State Commission) in relation to 'serious trafficking offences' the subject of an investigation under their respective Acts.

The Bill gives effect to an agreement made by the Commonwealth Government at the Special Premiers' Conference on Drugs held in Canberra in 1985 and takes into account certain recommendations made by the Royal Commission of Inquiry into Alleged Telephone Interceptions (the Stewart Royal Commission).

The Bill imposes stringent safeguards on the use of interception powers. As far as State and Northern Territory authorities are concerned, those participating will be required to enact legislative safeguards at least as stringent as those applying to the Australian Federal Police (AFP) under the Act

in its present form. Those safeguards include a requirement for judicial warrants, provisions for the auditing by an independent authority of interception activities and of compliance with State laws and the requirements of the Telecommunication (Interception) Act, and provisions regulating the use, disclosure and destruction of intercepted information. Information obtained in contravention of the Act will be inadmissible in evidence in any court, except for the purpose of establishing the contravention.

Statement of Financial Impact

The Bill requires any State or the Northern Territory, if it wishes interception powers to be made available to its authorities, to enter into an agreement undertaking to pay the cost of all interception operations carried out by those authorities. The extension of the present interception powers of the AFP and the proposed conferring of powers on the NCA will have financial implications. The amount involved will depend upon the number of interceptions carried out and it is therefore not possible to quantify the amount.

NOTES ON CLAUSES

Clause 1 - Short title

1. Formal

Clause 2 - Commencement

2. Clauses 1 (Short title) and 2 (Commencement) will come into operation on Royal Assent. The remaining clauses will come into operation on a day to be fixed by Proclamation. The delayed commencement will ensure that amendments of the Act made by the Australian Security Intelligence Organization Amendment Act 1986 are in operation by the time the provisions of the Bill come into operation and give time for the preparation of regulations prescribing forms of warrant.

Clause 3 - Interpretation

3. Clause 3 amends sub-section 5(1) of the Telecommunications (Interception) Act 1979 ('the Principal Act') by inserting a number of new definitions. The most important are:

- (1) 'Judge' - is defined (except for the purposes of the new Part VII dealing with warrants issued to State and Territory Police Forces and the State Commission) as a Judge of the Federal Court of Australia or of the Supreme Court of the Australian Capital Territory nominated under section 6A; a Judge of the Supreme Court of a State in respect of whom an appropriate arrangement in force under section 6B is applicable; or a Judge of the Supreme Court of the Northern Territory (other than a Federal Court Judge or a Judge of the Supreme Court of the Australian Capital Territory) in respect of whom an appropriate arrangement in force under section 6B is applicable. This definition replaces the definition of 'Judge' contained in section 18 of the Principal Act for the

purposes of Part IV of that Act (warrants issued to the AFP). As interception warrants are to be issued by the same classes of Judges both to the AFP under Part IV and to the NCA under the new Part VI, a general definition of 'Judge' is now necessary;

(2) 'prescribed offence' - is defined as a narcotics offence; an offence against sub-section 7(1) or 7AA(1) of the Act; an offence against section 86, 87, 88, 94 or 94A of the Telecommunications Act 1975; any other offence against a law of the Commonwealth or of a State punishable by imprisonment for life or for a period, or maximum period, of not less than 3 years; or an offence against certain provisions of the Crimes Act (aiding, abetting, conspiring, etc.) relating to any of those offences that are Commonwealth offences;

(3) 'relevant proceeding' - is defined, in relation to a State or Territory, as:

(a) a proceeding by way of prosecution for a prescribed offence against a law of the State or Territory;

(b) a proceeding under a law of the State or Territory for the confiscation or forfeiture of property, or for the imposition of a pecuniary penalty, in connection with the commission of a prescribed offence;

(c) certain extradition proceedings and proceedings for the taking of evidence pursuant to the Extradition (Commonwealth Countries) Act 1966 or the Extradition (Foreign States) Act 1966 in so far as the proceedings relate to a prescribed offence against a law of the State or Territory;

(d) certain disciplinary proceedings against an officer of the Police Force of the State or Territory; or

- (e) a proceeding against a State or Territory officer for misbehaviour or misconduct, other than a prosecution for an offence.
- (4) 'serious trafficking offence' - is defined as a narcotics offence (i.e. certain Commonwealth offences as currently defined in the Act) or an offence against a law of the Commonwealth or of a State or Territory involving narcotic drugs and punishable by imprisonment for life or for a period, or maximum period, of not less than 7 years.

4. Clause 3 also amends sub-section 5(3) of the Principal Act by inserting a number of new interpretation provisions. The most important are:

- (a) a new paragraph (ac), which provides that a reference to an officer, in relation to a State or Territory (other than a reference to an officer of a State or Territory Police Force) includes a reference to a person holding, or acting in, an office (including a judicial office) or appointment, or employed under a law of the State or Territory; or a person who is, or is a member, officer or employee of, an authority or body established by or under a law of the State or Territory;
- (b) a new paragraph (ae), which provides that a reference to a proceeding for the confiscation or forfeiture of property, or for the imposition of a pecuniary penalty, in connection with the commission of a prescribed offence, includes a reference to -
 - (i) a proceeding for the condemnation or recovery of a ship or aircraft, or of goods, seized under section 203 of the Customs Act 1901 in

connection with the commission of a narcotics offence; and

- (ii) a proceeding for an order under sub-section section 243(1) of the Customs Act 1901.

Clause 4 - Nomination of Judges; Arrangements with States and Northern Territory; Evidentiary certificates; and Provisions relating to annual reports.

5. Clause 4 inserts a new section 6A into the Principal Act providing for the nomination by the Minister, by notice in the Gazette, of persons, or classes of persons, who are Judges of the Federal Court of Australia or the Supreme Court of the Australian Capital Territory to perform the functions of a Judge under the Act.

6. The purpose of the new section 6A is to avoid any possible argument that the power given to Judges of the Federal Court and of the Supreme Court of the Australian Capital Territory to issue interception warrants to members of the AFP and to members of the NCA is invalid because it amounts to the conferral of a non-judicial power on a court. The matter was considered by the High Court in Hilton v. Wells (1985) 58 ALR 245, where a majority held that there is no necessary constitutional impediment preventing the Parliament from conferring non-judicial power on a particular individual who happened to be a member of a court. The new section 6A makes it clear that the power to issue warrants is conferred on individual persons or classes of persons nominated by the Minister who happen to be Judges of the relevant courts.

7. Clause 4 also inserts a new section 6B into the Principal Act providing that the Governor-General may make arrangements with the Governor of a State or with the Administrator of the Northern Territory for the performance by specified persons, or classes of persons, who are Judges of the Supreme Court of that State or Territory, of the functions of a Judge under the Act.

8. The new section 6B replaces section 19 of the Principal Act, which contained similar provisions designed to enable certain Judges of the State and Northern Territory Supreme Courts to issue interception warrants under Part IV of the Principal Act to members of the AFP. The same classes of Judges are to be empowered under new Part VI to issue warrants to the NCA. It is therefore necessary to replace the present section 19 with a new provision governing the issuing of warrants under both Part IV and the proposed Part VI. Again, the new section 6B is worded so as to make it clear that the non-judicial power exercised pursuant to an arrangement is conferred on specified persons or classes of persons who happen to be Judges of the relevant State or Northern Territory courts.

9. Clause 4 also inserts a new section 6C into the Principal Act, replacing the equivalent provisions of section 25A of the Principal Act and providing for the issue of conclusive evidentiary certificates by the Managing Director of Telecom in respect of acts or things done by, or in relation to, officers of Telecom for the purpose of enabling a warrant issued under section 20 (to the AFP), section 33 (to the NCA) or section 44 (to a State or Northern Territory authority) to be executed.

10. Section 25A of the Principal Act, applies only in relation to the execution of warrants under section 20. The extension of interception powers to the NCA and to certain State and Territory authorities requires the extension of the conclusive evidentiary provisions and their re-location in the Act.

11. Clause 4 also inserts a new section 6D into the Principal Act. The new section contains standard provisions relating to the tabling in the Parliament of the annual reports by the Minister required by proposed new sections 27A, 40 and 49 and by existing section 30. Sub-section 6D(3) makes it clear that an annual report under any of those sections is not to be made in a manner that is likely to enable the identification of a person. This provision is necessary not only to ensure proper

privacy protection but also to avoid the possibility of prejudicing an investigation.

Clauses 5 and 6 - Introduction

12. Section 7 of the Principal Act contains 3 different kinds of provisions:

- (a) sub-sections 7(1), (2) and (3) are essentially concerned with prohibiting the interception of telecommunications and the exceptions to that prohibition;
- (b) sub-sections 7(4) and (5) are concerned with prohibiting the communication, use or recording of intercepted information; the exceptions to that prohibition; and the regulation of lawful communication of intercepted information; and
- (c) sub-section 7(6) contains provisions providing that intercepted information may be given in evidence in certain proceedings.

13. The section requires amendment in view of the proposed provisions extending interception powers to the NCA and certain State and Territory authorities. It also requires amendment to overcome the effects of the decision in Hilton v Wells that sub-sections 7(4) and (6) referred only to information that was lawfully obtained and did not prohibit the disclosure of unlawfully obtained material to a court. The proceedings specified in sub-section 7(6) could not therefore be regarded as exhaustive and there was nothing to prevent information, whether lawfully obtained or otherwise, from being given in evidence in any proceedings.

14. The approach adopted in the Bill is to divide the existing section 7 into 4 separate provisions: this approach

is substantially similar to that recommended by the Australian Law Reform Commission in its Privacy Report.

Clause 5 - Telecommunications not to be intercepted

15. Clause 5 amends section 7 of the Principal Act by omitting sub-sections (4) to (8), inclusive. As so amended, section 7 will prohibit the interception of telecommunications (sub-section 7(1)) subject to the exceptions set out in sub-section 7(2). Those exceptions include an interception in pursuance of a warrant issued under the Act to ASIO, the AFP, the NCA or a State or Territory authority.

16. Clause 5 limits the scope of the exception contained in sub-paragraph 7(2)(a)(ii) of the Principal Act, which permitted an interception by an officer of Telecom for the purpose of identifying or tracing any person who has contravened, or is suspected of having contravened or of being likely to contravene, a provision of the Telecommunications Act 1975 or of any regulation or by-law in force under that Act. In his Report of the Review of Matters Affecting the Australian Telecommunications Commission (1984), Mr F.H.R. Vincent, Q.C., recommended that 'Staff By-laws and other trivial offences in the Telecommunications Act, General By-laws and Regulations and which are currently the basis of some permitted interceptions' be excluded from the operation of sub-paragraph 7(2)(a)(ii).

17. As amended by clause 5, the exemption provided by sub-paragraph 7(2)(a)(ii) will extend only in relation to contraventions, or suspected contraventions or likely contraventions, of section 86, 87, 88, 94 or 94A of the Telecommunications Act.

Clause 6 - Disclosure of information; Evidence; Contravention of sub section 7(1) or 7AA(1)

18. Clause 6 inserts a new section 7AA into the Principal Act. Proposed sub-section 7AA(1) prohibits, subject to the

remaining provisions of the section and to section 7AB, the communication, use or recording of information obtained by intercepting a communication, (whether lawfully or not), or obtained by virtue of a warrant issued under section 11, 11A or 21. This prohibition does not apply to a communication, use or recording by an officer of Telecom when, and only when, such officer is acting in the performance of his or her duties as such an officer.

19. Proposed sub-section 7AA(1) further prohibits, subject to the remaining provisions of the section and to section 7AB, a person from giving in evidence information obtained before or after the commencement of the section by a lawful or an unlawful interception or by virtue of a warrant issued under section 11, 11A or 21.

20. Proposed sub-section 7AA(2) provides that a person may communicate, use or make a record of prescribed information in, or in connection with, the performance by ASIO of its functions or otherwise for security purposes, or the performance by an officer of Telecom of his or her duties as such an officer. The proposed provision corresponds to the exceptions contained in paragraphs 7(4)(a) and (c) of the Principal Act.

21. Proposed sub-section 7AA(3), (4) and (5) regulate the communication of intercepted information by the Director-General of Security, or by an officer authorised by the Director-General. Proposed sub-section 7AA(3) permits the communication, use and recording of information obtained pursuant to a warrant issued under section 11A in, or in connection with the performance by ASIO of its functions. Proposed sub section 7AA(4) is the equivalent of paragraph 7(5)(a) of the Principal Act; proposed sub-section 7AA(5) provides that a person to whom information obtained by virtue of a warrant under section 11A has been communicated in accordance with sub-section (4) or with an approval given under sub-section (4) may communicate the information in accordance with the written approval of the Attorney-General.

22. Proposed sub sections 7AA(6) and (7) regulate the communication, use and recording of lawfully intercepted information by the AFP. Under proposed sub section 7AA(6), a member of the AFP may communicate, use or record 'prescribed information' for a purpose connected with -

- (a) the investigation by the AFP, or the prosecution, of a prescribed offence against a law of the Commonwealth;
- (b) a proceeding under a Commonwealth law for the confiscation or forfeiture of property, or the imposition of a pecuniary penalty, in connection with the commission of a prescribed offence;
- (c) certain proceedings for the taking of evidence and for the extradition of a person in so far as those proceedings relate to a prescribed offence against a law of the Commonwealth;
- (d) certain disciplinary proceedings against a member of the Australian Federal Police; or
- (e) a proceeding (other than a prosecution for an offence) against an officer of the Commonwealth for misbehaviour or improper conduct.

23. 'Prescribed information' is defined in proposed sub-section 7AA(17) as information obtained from a lawful interception (otherwise than pursuant to a warrant under section 11A) or by virtue of a warrant issued under section 11 or 21. The information could thus have been originally obtained from any lawful interception by a State authority, by the NCA or by Telecom as well as an interception by the AFP itself.

24. The proposed provisions will enable lawfully intercepted information to be communicated, for example, to potential witnesses, accused persons and to counsel for such persons.

25. Proposed sub-section 7AA(7) regulates the communication by the Commissioner (or by a member of the AFP authorised by the Commissioner) of information obtained by virtue of a warrant under section 20 or 21 to the Director-General of Security, the Chairman of the NCA, the Commissioner or an officer of the Police Force of a State or Territory, or the Chairperson of the State Commission. The provisions permit communication of information that relates to 'prescribed offences', which include offences punishable by imprisonment for 3 years or longer. Warrants are not, however, available in relation to offences other than 'serious trafficking offences'.

26. The provisions of proposed sub section 7AA(7) are designed to ensure that the authority that makes a lawful interception will remain, as far as possible, in control of the communication of intercepted information to other authorities. Thus, where the AFP receives information from a State Police Force that has been obtained as a result of a lawful interception by that State Police Force, the AFP may use that information in accordance with the provisions of proposed sub section 7AA(6) but may not communicate it, for example, to the NCA. Any such communication would be a matter for the State Police Force that carried out the interception.

27. Proposed sub section 7AA(8) is equivalent to paragraph 7(5)(d) of the Principal Act. It permits the communication of information communicated to a police officer in accordance with sub-section 30(3) of the Principal Act. The provisions of section 30 deal with emergency requests for officers of Telecom to intercept telephone communications for the purpose of tracing callers.

28. Proposed sub-sections 7AA(9) and (10) regulate the communication, use and recording of lawfully intercepted

information by the NCA. Under proposed sub-section 7AA(9), a member of the Authority, or a member of the staff of the Authority, may communicate, use or record prescribed information (see the definition of 'prescribed information' in proposed sub-section 7AA(17)) for a purpose connected with -

- (a) a prescribed investigation, in so far as it relates to a prescribed offence; or
- (b) a prosecution for a prescribed offence.

29. A 'prescribed investigation' is defined as having the same meaning as it has in the National Crime Authority Act 1984. The definition covers any investigation by the Authority under its Act, whether a special investigation pursuant to a reference under its Act or otherwise.

30. Proposed sub-section 7AA(10) regulates the communication by the Chairman of the Authority (or by a member, or member of the staff, of the Authority authorised by the Chairman) of information obtained by virtue of a warrant under proposed section 33 to the Director-General of Security, the Commissioner or a member of the AFP, the Commissioner or an officer of a State or Territory Police Force, or the Chairperson of the State Commission. Again, information may be communicated in accordance with this provision, if it relates, or appears to relate, to a 'prescribed offence' and the provision is designed to ensure that the Authority may only communicate information obtained by virtue of a warrant issued to it.

31. Proposed sub-sections 7AA(11) and (12) regulate the communication, use and recording of lawfully intercepted information by State and Territory Police Forces. Under proposed sub-section 7AA(11), an officer of a State or Territory Police Force may communicate, use or record

prescribed information (see the definition of 'prescribed information' in proposed sub-section 7AA(17)) for a purpose connected with -

- (a) the investigation by that Police Force of a prescribed offence against a law of that State; or
- (b) a relevant proceeding in relation to that State or Territory (see the definition of 'relevant proceeding' in clause 3).

32. Proposed sub-section 7AA(12) regulates the communication by the Commissioner of a State or Territory Police Force (or by an officer of that Police Force authorised by the Commissioner) of information obtained by virtue of a warrant issued under section 44 on an application made by an officer of that Police Force. The provision sets out the circumstances in which such information may be communicated to the Director-General of Security, the Chairman of the NCA, the Commissioner or a member of the AFP, the Commissioner or an officer of the Police Force of another State or Territory or the Chairperson of the State Commission. Again, information may be communicated in accordance with this provision if it relates, or appears to relate, to a 'prescribed offence' and the provision is designed to ensure that a State or Territory Police Force may only communicate information obtained by virtue of a warrant issued on application by one of its officers.

33. Proposed sub-sections 7AA(13) and (14) regulate the communication, use and recording of lawfully intercepted information by the State Commission. Under proposed sub-section 7AA(13), a member, or member of the staff, of the Commission may communicate, use or record prescribed information (see the definition of 'prescribed information' in

proposed sub-section 7AA(17)) for a purpose connected with -

- (a) a relevant investigation, in so far as it relates to a prescribed offence against a law of New South Wales; or
- (b) a prosecution for such an offence.

34. A 'relevant investigation' is defined in proposed sub-section 7AA(17) as an investigation that the Commission is conducting in the performance of its functions under its Act.

35. Proposed sub-section 7AA(14) regulates the communication by the Chairperson of the Commission (or by a member, or member of the staff, of the Commission authorised by the Chairperson) of information obtained by virtue of a warrant issued under proposed section 44 upon an application made by a member of the Commission. The provision sets out the circumstances in which such information may be communicated to the Director General of Security, the Chairman of the NCA, the Commissioner or a member of the AFP, or the Commissioner or an officer of the Police Force of a State or Territory. Again, information may be communicated in accordance with this provision if it relates, or appears to relate, to a 'prescribed offence' and the provision is designed to ensure that the Commission may only communicate information obtained by virtue of a warrant issued on application by one of its members.

36. Proposed sub-section 7AA(15) provides that a person to whom prescribed information has been communicated for a purpose under proposed sub-sections 7AA(6), (9), (11) or (13) may in turn communicate, use or record that information for that purpose. Thus, for example, where a member of the AFP communicates lawfully intercepted information to another person under sub-section 7AA(6) for a purpose connected with a proceeding against an officer of the Commonwealth for misbehaviour, proposed sub-section 7AA(15) will permit that

person to communicate, use and record that information for the purpose of those proceedings.

37. Proposed sub-section 7AA(16) permits a person who is entitled to communicate information in accordance with proposed sub-sections 7AA(4), (7), (10), (12) or (14) to record, or cause a recording to be made of, that information for the purpose of making the communication.

38. Proposed sub-section 7AA(17) defines a number of expressions for the purposes of the section, the most important of which have been referred to above. Proposed sub-section 7AA(18) is also an interpretation provision. Under proposed sub-section 7AA(18), references to lawfully intercepting a communication are to be read as references to intercepting a communication otherwise than in contravention of sub-section 7(1). 'Obtained' is defined in proposed sub-section 7AA (17) so as to cover information obtained before or after the commencement of the provision.

39. Clause 6 also inserts a new section 7AB into the Principal Act. The effect of the proposed provision is to make lawfully intercepted information inadmissible in evidence in any proceedings other than proceedings of the kind referred to in proposed sub section 7AB(1) and to make information intercepted in contravention of the Act inadmissible in any proceedings except for the purpose of establishing the contravention. Where, however, the contravention is caused solely by an insubstantial defect or irregularity whether in relation to a warrant or in relation to the execution of a warrant, the Judge will have a discretion to admit the information. The provision applies to information obtained before or after the commencement of the proposed section.

40. Lawfully intercepted information will only be admissible in evidence in a proceeding -

- (a) by way of prosecution for a prescribed offence;
- (b) for the confiscation or forfeiture of property, or for the imposition of a pecuniary penalty, in connection with the commission of a prescribed offence;
- (c) for the taking of evidence pursuant to the Extradition (Commonwealth Countries) Act or the Extradition (Foreign States) Act in relation to a prescribed offence;
- (d) for the extradition of a person from New Zealand to Australia or from one State or Territory to another in connection with the commission of a prescribed offence;
- (e) that is a disciplinary proceeding (other than a prosecution for an offence) against a member of the AFP or an officer of a State or Territory Police Force; or
- (f) against a Commonwealth, State or Territory officer for misbehaviour or improper conduct (other than a prosecution for an offence).

41. Proposed sub-section 7AB(2) provides that, for the purposes of the application of the section, a contravention of sub-section 7(1) need only be established on the balance of probabilities.

42. Proposed sub-section 7AB(8) provides that the section does not render anything admissible in evidence in proceedings to a greater extent than it would have been admissible in those proceedings if the section and section 7AA had not been enacted.

43. Proposed sub-section 7AB(9) makes it clear that 'obtained' is to be read as including information obtained

before or after the commencement of the section. It also defines 'proceeding' as having the same meaning as it has in proposed section 7AA. That section defines 'proceeding' as a proceeding or proposed proceeding in a federal court, a State court or a Territory court or before any tribunal, body, authority or person in Australia empowered to take evidence on oath.

44. Clause 6 also inserts a new section 7AC into the Principal Act dealing with contraventions of sub-sections 7(1) and 7AA(1). Proposed sub-section 7AC(2) provides that an offence against either of those provisions is an indictable offence punishable, on conviction, by a fine not exceeding \$5,000 or imprisonment for 2 years. Proposed sub-sections (3) and (4) contain standard provisions enabling offences to be dealt with summarily and imposing lesser penalties on conviction by a court of summary jurisdiction.

Clause 7 - Documents or information may be given to Law Enforcement Agencies, & c.

44. Clause 7 amends section 7C of the Principal Act, which enables a person to give information or documents in his or her possession to the Attorney-General, the Director of Public Prosecutions, the Commissioner of Police or the NCA if he or she suspects on reasonable grounds the information or documents to be evidence of the commission or proposed commission of an offence against sub-section 7(1). The amendment extends this provision to cover offences or proposed offences against the new sub-section 7AA(1).

Clause 8 - Obstruction

45. Clause 8 alters the penalty at present imposed by section 16 of the Principal Act (a fine of \$1,000) to the standard penalty for this offence of \$1,000 or imprisonment for 6 months.

Clause 9 - Issue of warrants for the Australian Federal Police to intercept communications

46. Clause 9 amends section 20 of the Principal Act by extending the present interception power of the AFP in relation to narcotics offences to cover 'serious trafficking offences'. That expression is defined so that the AFP will retain its present powers in relation to certain Commonwealth narcotics offences but will have, in addition, interception powers in relation to other Commonwealth offences involving narcotic drugs and punishable by imprisonment for life or a maximum period of 7 years or longer.

47. The amendments also include a new requirement that a judge, in deciding whether or not to issue a warrant, must be satisfied that the information sought is not readily available from another source, having regard to any prejudice to the conduct of the investigation that may result if the interception is not granted.

48. The amendments also include new provisions (proposed sub-sections 20(3A), (3B), (3C), (3D) and (3E)) enabling a Judge to issue a warrant upon an application made by telephone, by specially authorised members of the AFP, in circumstances of urgency. Provisions of this kind were recommended by the Australian Law Reform Commission in its Report on Privacy.

49. Sub-section 20(5) of the Principal Act is amended by paragraph (f) of clause 9 by reducing the maximum period for which a warrant is to remain in force from 6 months to 90 days.

Clause 10 - Issue of warrants for the Australian Federal Police to inspect telegrams

50. Clause 10 amends section 21 of the Principal Act by making telegram inspection powers available to the AFP in relation to serious trafficking offences. The present provision applies to certain narcotics offences only and the amendment will avoid any inconsistency between the offences in

relation to which telecommunications interceptions and telegrams inspections are available. A similar requirement in relation to the issue of warrants to that included in section 20 (see para. 47 above) is included in section 21.

51. Clause 10 also amends sub-section 21(4) of the Principal Act by reducing the maximum period for which a warrant is to remain in force from 6 months to 90 days.

Clause 11 - Persons authorised to intercept communications for the Australian Federal Police

52. This clause effects an amendment of section 22 of the Principal Act of a formal drafting nature .

Clause 12 - Discontinuance of interception; Certain copies and records to be destroyed

53. This clause replaces section 23 of the Principal Act with a new section 23. The proposed new section, like the section it replaces, imposes two separate obligations on the Commissioner where the grounds on which a warrant was issued have ceased to exist. Those obligations are to cause interceptions pursuant to the warrant to be discontinued forthwith and to revoke the warrant in writing. The new section, however, will enable a Deputy Commissioner to carry out those duties, thus ensuring speedy action in cases where the Commissioner is for any reason unavailable.

54. Clause 12 also replaces section 24 of the Principal Act with a new section regulating the destruction of records of intercepted communications and telegrams. The proposed new section requires the Commissioner of Police to cause the record to be destroyed where it is in the possession or custody, or

under the control, of the AFP and the Commissioner is satisfied that -

- (a) the record will not, and is not likely to, assist in the investigation of a prescribed Commonwealth offence or in connection with a proceeding of the kind referred to in proposed sub-section 7AA(6); and
- (b) the record is not required, or likely to be required, for lawful communication purposes.

55. Similar provisions are to be inserted in relation to the NCA, and State and Northern Territory legislation to the same effect will be required to cover the destruction of records by their respective authorities. The duty to destroy irrelevant records will thus lie with the authority that has possession, custody or control of the records.

Clause 13 - Manner in which warrants, & c., to be dealt with

56. Section 25 of the Principal Act requires the Commissioner to cause a copy of a warrant or instrument of revocation, certified in writing by the Commissioner to be a true copy, to be forwarded to the Managing Director of Telecom (paragraph 25(1)(b)). Clause 13 amends that provision for the purpose of enabling a Deputy Commissioner to certify copies of warrants and instruments of revocation. Clause 13 also replaces the existing sub-section 25(3) with a new provision to take account of warrants obtained on telephone applications.

Clause 14 - Repeal of section 25A

57. Clause 14 repeals section 25A of the Principal Act (Evidentiary certificates) as a consequence of the insertion of proposed new section 6C by clause 4. Sub-clauses 14 (2) and (3) save the effect of evidentiary certificates issued under section 25A.

Clause 15 - Obstruction

58. Clause 15 amends section 26 of the Principal Act by replacing the penalty (a fine of \$1,000) with the standard penalty for this offence of \$1,000 or imprisonment for 6 months.

Clause 16 - Annual report relating to warrants under this Part

59. Clause 16 inserts a new section 27A into the Principal Act requiring the Minister to report annually to the Parliament on the number of warrants issued under sections 20 and 21 and the use made of information obtained by virtue of those warrants. Similar annual report provisions in relation to warrants issued to the NCA and State and Territory authorities are contained in proposed new sections 40 and 49.

Clause 17 - Annual report to be made to Minister concerning interceptions requested under this Part.

60. Clause 17 amends section 31 of the Principal Act, which provides for annual reports in relation to interceptions requested under Part V of the Act. The clause omits sub-sections 31(2), (4) and (5) as a consequence of the insertion by clause 4 of proposed section 6D, which contains equivalent provisions.

Clause 18 - Addition of New Parts VI and VII

61. Clause 18 adds 2 new Parts to the Principal Act. New Part VI (sections 32 to 41, inclusive) deals with warrants authorising the NCA to intercept telecommunications. New Part VII (sections 42 to 50, inclusive) deals with warrants authorising State and Territory authorities to intercept telecommunications.

Part VI - Warrants authorising the NCA to intercept telecommunications

62. Proposed section 32 contains definitions of 'Chairman' and 'member' for the purposes of Part VI.

63. Proposed section 33 provides for the issue by a Judge of a warrant upon application by a member of the NCA. Before issuing a warrant, the Judge must be satisfied, on the basis of information furnished to the Judge -

- (a) that the Authority is conducting a prescribed investigation under its Act in relation to a serious trafficking offence;
- (b) there are reasonable grounds for suspecting that the relevant telecommunications service is being, or is likely to be, used by a person who is committing or has committed, or who is suspected on reasonable grounds of committing or having committed, that offence;
- (c) the interception of communications to or from the service will, or is likely to, assist the Authority in the investigation; and
- (d) the information sought is not readily available from another source, having regard to any prejudice to an inquiry likely to result from a refusal to grant an interception warrant.

A warrant must be in accordance with the prescribed form and it authorises approved persons to intercept, subject to any conditions or restrictions specified by the Judge, communications to or from the service (proposed sub-section 33(1)).

64. Proposed sub-section 33(2) provides that an application for a warrant (other than a telephone application) is to be in writing and must set out the facts and other grounds for the issue of the warrant. Under proposed sub-section 33(3), information furnished to a Judge must be given on oath (except in the case of telephone applications), may be given orally or otherwise and must include the facts and other grounds relied on by the applicant.

65. Proposed sub-sections 33(4), (5), (6) and (7) set out procedures enabling a Judge to issue a warrant upon a telephone application in circumstances of urgency. The provisions require a Judge who issues a warrant upon a telephone application to complete and sign the warrant and send a copy to the Authority. The Authority is required, within 24 hours, to complete a form of warrant in the terms indicated by the Judge and furnish the form to the Judge together with affidavits by each person who furnished information to the Judge in relation to the application. A form of warrant completed by the Authority is to be deemed to be a warrant for the purposes of the Act.

66. Under proposed sub-section 33(8), a warrant may be issued in respect of a telecommunications service situated anywhere in Australia. It will not, however, authorise entry on premises or entitle an interception to be carried out except through Telecom (proposed sub-section 33(9)).

67. Proposed sub-section 33(10) provides that the maximum period for which a warrant is to remain in force is 90 days. Subsequent warrants are, to be available in respect of the same service (proposed sub-section 33(11)).

68. Proposed section 34 provides for the approval by the Chairman, or an authorised member, or member of the staff, of the Authority to approve 'eligible persons' who may carry out interceptions pursuant to warrants. 'Eligible persons' are defined in sub-section 34(2) to cover members of the AFP whose

services are made available to the Authority pursuant to section 49 of the National Crime Authority Act; officers of a State Police Force or the Northern Territory Police Force seconded to the Authority pursuant to arrangements under section 58 of that Act; members of Task Forces under section 11 of that Act; and translators.

69. Proposed section 35 requires the Chairman, where satisfied that the grounds on which a warrant was issued have ceased to exist, to revoke the warrant and forthwith take the necessary steps to ensure that interceptions pursuant to the warrant are discontinued.

68. Proposed section 36 regulates the destruction of records or copies of communications intercepted pursuant to a warrant and copies of telegrams made pursuant to a warrant, that are in the possession or custody, or under the control of the Authority. The provision covers all such records or copies, whether they originate from an interception pursuant to a warrant issued to the Authority or otherwise. The Chairman is required to cause such records or copies to be destroyed where the Chairman is satisfied that they will not, or are not likely to, assist the Authority in a prescribed investigation relating to a prescribed offence or a prosecution for a prescribed offence and are not needed, or likely to be needed, for the purposes of lawful communication.

71. Proposed section 37 requires the Authority to notify the Managing Director of Telecom forthwith when a warrant is issued or revoked and, as soon as practicable, to send to the Managing Director a certified copy of each warrant or instrument of revocation (sub-section 37(1)). The Authority is required by proposed sub-section 37(2) to retain in its records each warrant issued to the Authority, each form of warrant completed by the Authority on a telephone application and each instrument of revocation. The proposed provisions are similar to those that apply in relation to the AFP under section 25 of the Principal Act.

72. Proposed section 38 makes it an offence to obstruct or hinder, without reasonable excuse, a person acting pursuant to a warrant.

73. Proposed section 39 requires the Chairman of the Authority to furnish the Minister, as soon as practicable, with copies of each warrant and instrument of revocation (sub-section 39(1)). Under proposed sub-section 39(2) the Chairman is required, within 3 months after the expiration or revocation of a warrant, to furnish the Minister with a written report of the use made of information obtained by virtue of that warrant and of any communication of that information to persons other than members, or members of the staff, of the Authority or 'eligible persons' within the meaning of proposed section 34. The provisions are similar to those that apply to the AFP under section 27 of the Principal Act.

74. Proposed section 40 requires the Minister to report annually to the Parliament on the number of warrants issued under Part VI during the preceding year and the use made of information obtained by virtue of those warrants. Similar reporting provisions will apply in relation to warrants issued to the AFP (see clause 16 - proposed section 27A) and to State and Territory authorities (see proposed section 49).

75. Proposed section 41 contains a regulation making power for the purpose of prescribing forms of warrants under Part VI.

Part VII - Warrants authorising certain State and Northern Territory authorities to intercept telecommunications

76. Proposed section 42 contains definitions for the purposes of Part VII. The most important are:

'declared authority' - which is defined, in relation to a State, as an eligible authority of that State in relation

to which a declaration under sub-section 43(1) is in force;

'eligible authority' - which is defined, in relation to a State, as the Police Force of that State and, in addition, in the case of New South Wales, the State Drug Crime Commission;

'eligible Judge' - which is defined, in relation to a State or the Northern Territory, as a Judge of the Supreme Court of that State or Territory (other than a Federal Court Judge or a Judge of the Supreme Court of the Australian Capital Territory) and who is designated, or included in a designated class of persons, under a law of that State or Territory, to perform the functions of an eligible Judge;

'eligible officer' - which is defined, in relation to an eligible authority of a State, as an officer of the Police Force of that State or a member of the staff of the State Drug Crime Commission or an officer of the New South Wales Police Force whose services are made available to that Commission;

'relevant investigation' - which is defined as an investigation by the State Drug Crime Commission in the performance of its functions under its Act.

77. Under proposed section 43, the Attorney-General may, at the request of the Premier of a State or the Chief Minister of the Northern Territory, declare, by notice in the Gazette, an eligible authority of that State or Territory to be a declared authority (sub-section 43(1)). Proposed sub-section 43(2) requires the Attorney-General to be satisfied, before making a declaration, that the law of the State or Territory concerned makes satisfactory provision:

for the designation of Supreme Court Judges to perform the functions of an eligible Judge;

for the approval of persons who may carry out interceptions pursuant to warrants;

for the approval of classes of equipment to be used to make interceptions pursuant to warrants;

for the retention of warrants and instruments of revocation by the declared authority of the State or Territory;

requiring the declared authority to keep and retain proper records relating to interceptions, the use made of intercepted information and the communication and destruction of intercepted information;

requiring the declared authority to keep records of intercepted communications in a secure place;

for the regular inspection of records by an independent authority and for the reporting by that authority to the relevant State or Territory Minister of the results of each inspection and the extent of compliance with the requirements of the State law and with the provisions of the Telecommunications (Interception) Act;

for the relevant State or Territory Minister to furnish to the Attorney-General copies of all reports by the independent authority;

for the chief officer of the declared authority to furnish to the State or Territory Minister copies of all warrants and instruments of revocation and, within 3 months after the expiration or revocation of a warrant, to report to the State or Territory Minister on the use

made of intercepted information and the communication of that information;

for the State or Territory Minister to furnish to the Attorney-General copies of all warrants and instruments of revocation and a report in writing describing in general terms the use and communication of information obtained by virtue of those warrants;

for the destruction of irrelevant records and copies of intercepted communications and telegrams.

78. Before making a declaration, the Attorney-General must also be satisfied that the State or Northern Territory has entered into an agreement to pay all expenses connected with the issuing of warrants and the interception of communications in that State or Territory and to reimburse Telecom for all expenses incurred by Telecom in connection with those warrants. (Proposed sub-section 43(3)).

79. Proposed sub-section 43(4) empowers the Attorney-General to revoke a declaration where the relevant State or Territory law is not maintained; where compliance with the law is unsatisfactory; where the agreement in relation to the payment of expenses ceases to operate or is unsatisfactorily observed; or where there is not satisfactory compliance with the provisions of the Act. A declaration may also be revoked on the request of the relevant Premier or Chief Minister.

80. Proposed section 44 relates to the issue of warrants by State Supreme Court Judges on application by a declared authority. The provisions are equivalent to those that apply under Part IV of the Principal Act in relation to the AFP (see section 20, as amended by the Bill) and are similar to those that the Bill proposes to be applied to the NCA.

81. In the case of a State Police Force that has been declared as a declared authority, warrants will be available in

relation to the investigation by that Police Force of serious trafficking offences against a law of that State. Where the State Drug Crime Commission has been declared a declared authority, warrants will be available to it in relation to serious trafficking offences against a law of New South Wales that are the subject of an investigation by the Commission pursuant to its Act (proposed sub-section 44(1)).

82. A warrant will only authorise interceptions in relation to a telecommunications service situated within the State concerned and only by means of equipment approved under the State law required by proposed section 43 (proposed sub-section 44 (1)). In addition, a warrant will not authorise entry on premises or any interception other than through Telecom (proposed sub-section 44(9)).

83. Under proposed sub-section 44 (10) a warrant will remain in force for a maximum period of 90 days. Proposed sub-section 44 (11) will enable further warrants in respect of the same service to be obtained.

84. The formal requirements in relation to applications for warrants, including telephone applications in circumstances of urgency, are similar to those that apply to the AFP and the NCA. The relevant provisions are contained in proposed sub-section 44(2),(3),(4),(5),(6),(7) and (8).

85. Proposed section 45 contains provisions for the revocation of warrants and the discontinuance of interceptions similar to those that apply to the AFP (Clause 12 - proposed section 23) and the NCA (Clause 18 - proposed section 35).

86. Proposed section 46 contains provisions relating to the notifying of the Managing Director of Telecom of the issue and revocation of warrants under Part VII and requiring the Managing Director to be provided with certified copies of warrants and instruments of revocation. The provisions are

similar to those that apply to the AFP (section 25 of the Principal Act) and the NCA (clause 18 - proposed section 37).

87. Proposed section 47 contains provisions prohibiting the obstruction or hindering, without lawful excuse, of a person acting pursuant to a warrant. Similar provisions are contained in section 26 of the Principal Act in relation to Part IV warrants and in clause 18 (proposed section 38) in relation to Part VI warrants.

88. Proposed section 48 requires the Managing Director of Telecom, not later than 3 months after receiving a copy of a warrant, to report to the Minister on the acts and things done by or in relation to officers of Telecom to enable the warrant to be executed.

89. Proposed section 49 contains annual report provisions similar to those that apply under Part IV (Clause 16 - proposed section 27A) and Part VI (Clause 18 - proposed section 40).

90. Proposed section 50 contains a regulation making power for the purpose of prescribing forms of warrants under Part VII.

Clauses 19 and 20 - Further amendments

91. These clauses make formal consequential amendments to the Principal Act and the Telecommunications (Interception) Act 1984, respectively.