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Search & Surveillance Powers Bill —Using a Sledgehammer to Crack a Walnut?

On 18 September 2009, submissions close on the Search and Surveillance Powers Bill (“the Bill”). While the Bill proposes to consolidate search powers from across the statute books, and the common law, the Bill also proposes to grant significant new powers to the Police and also to regulatory agencies. While there are a number of proposals which practitioners may view favourably the overwhelming impression is that the Bill, in its current form, grants significant new search and surveillance powers to enforcement agencies in circumstances where it is far from clear that such new powers are necessary.

Positive Proposals

There appear to be some positive developments to note should the Bill come into law:

1. The Bill proposes to consolidate search and surveillance powers from across the statute books and the common law. Most practitioners, and law enforcement officers, would no doubt regard this as a helpful development. Certainty is preferable. Particularly in an area where if law enforcement agencies are unsure:

(a) Officers may delay—thus losing the opportunity to seize evidence;

(b) Alternatively, officers may proceed with a search only to have their actions reviewed by a Court at some later stage. This review is obviously not available to people on the receiving end of search powers at the time they are executed; and

(c) If an officer does proceed, albeit incorrectly, and their actions are reviewed by a Court the evidence can often be ruled inadmissible which is also undesirable.

2. In a similar vein, the codification of common law search powers is to be commended. For example the Bill proposes to permit

“plain view” searches. If the Police search a clan-lab with a warrant for methamphetamine related activity, but happen to stumble across evidence of an unrelated crime, such as theft for example, the Police may now be justified in seizing what is “plainly” evidence of criminal offending provided that the evidence is in plain view. This is a sensible development. In the past there was dispute about the extent of plain view searches and the “warrant preference rule” was inefficient.

3. The Bill also provides for what we suspect will become known as “e-warrants”. This procedure allows for the police and enforcement officers to apply for warrants electronically or on the papers. Applicants will not have to appear before the issuing officer in person. “E-warrants” must be more efficient and will most likely have the positive effect of requiring applicants to get their affidavits in support correct from the outset.

4. Finally, there is provision for “residual warrants”. This is an interesting proposal as it enables an enforcement officer, if they are unclear about whether a search or surveillance technique is authorised, to apply for a warrant prior to search and obtain the Court’s sanction for the proposed search or surveillance method.

Developments which May be of Concern

5. One significant addition to the powers of police is the proposal to grant them the ability to apply for “examination orders”. Basically these orders would allow the police to examine witnesses/suspects in a serious fraud or organised crime context. As a safeguard, the powers are not able to be used unless the person in question has been given a reasonable opportunity to provide the information, by consent, first. Additional safeguards include:

(a) The right to have a lawyer present (cl 40); and



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(b) Protection against self incrimination.

6. Notwithstanding those safeguards, examination orders are clearly an incursion into rights to silence. Additionally, if a person fails to comply with an examination order they commit an indictable offence (clause 165). Standing back, it is debateable whether the Police (as opposed to other regulatory agencies) actually require this power at all.

Proposed Powers for Enforcement Officers

7. The definition of “enforcement officers” is a key provision in the Bill. The definition includes Police Officers but also includes a host of law enforcement officers from regulatory agencies. For a full list of the agencies concerned practitioners are invited to examine the schedule to the Bill. The schedule contains reference to a number of Acts, from well known criminal statutes such as the Extradition Act through to obscure legislation such as the Boxing and Wrestling Act of 1981.
8. Part three of the Bill proposes granting significant additional powers to regulatory agencies who enforce such acts, including the power for agencies to use:
 - (a) Tracking devices;
 - (b) Recording devices (or interception devices); and
 - (c) Covert surveillance within, or of, the home.
9. We would normally expect such techniques to be associated with the Police when investigating serious crime.
10. It seems, at first glance, disproportionate to imbue regulatory agencies with such invasive powers in circumstances where many of the agencies referred to in the schedule of the Bill do not actually investigate indictable offences. For example, the Commerce Commission, enforces the Commerce and Fair Trading Acts,. However, there is only one indictable offence within those two Acts. That is section 80E of the Commerce Act, however this indictable offence relates to directors who breach prohibition orders having been banned from being directors. It is difficult to

envisage how tracking devices or recording devices would really be necessary to investigate what is essentially regulatory offending.

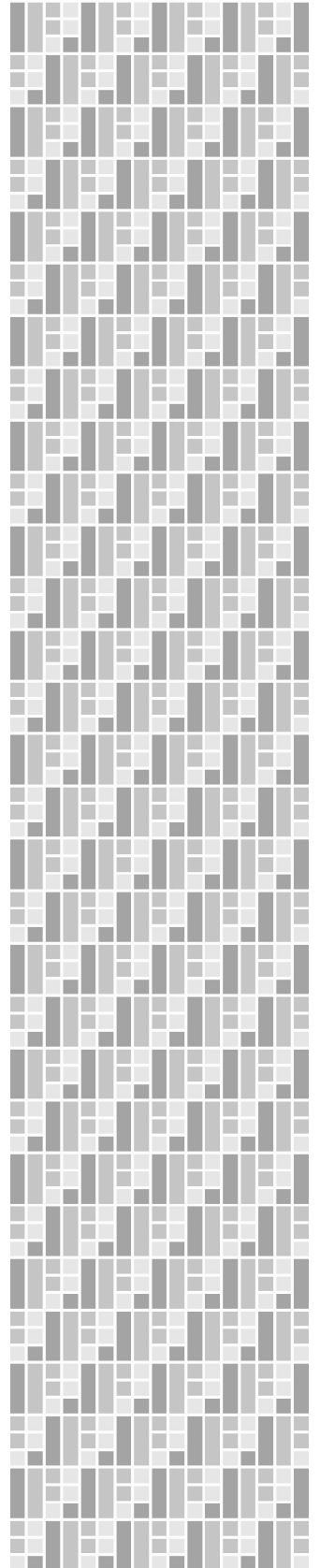
11. To use a colloquialism: the granting of these new powers to regulatory agencies is akin to using a sledgehammer to crack a walnut. Secondly, it is by no means clear that regulatory agencies are truly faced with insurmountable barriers when investigating the quasi-criminal or summary offences that they do prosecute. Practitioners may think there would need to be a compelling case for granting significant invasive powers to regulatory agencies. It is questionable whether the correct balance has been struck with the way in which the Bill is presently drafted.

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