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Independent National Security Legislation Monitor
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Review of Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth) ('TOLA')

Supplementary Submission

Dear Dr Renwick,

We thank you and your staff for the opportunity to give evidence at the hearings held in Canberra on 20 and 21 February this year. Further to our oral evidence, we now provide a response to the questions on notice from 21 February.

Adequate Reporting Measures

We took a question on notice as to what we would consider an adequate system or mechanism of public reporting. We note the suggestion that the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('*CSNO Act*') may provide a sound basis for reporting/suppression of operational secrets. We understand the Court must adequately explain the grounds or reason for permitting the suppression of information. We also note the *Act* operates from the presumption of the public's right to know; 'a primary objective of the administration of justice is to safeguard the public interest in open justice', a sentiment echoed in the *International Covenant on Civil and Political Rights* ('*ICCPR*') art 14.

In the context of the *TOLA Act*, we would modify the objective to adapt to a context where decisions are made by the executive branch, and not exclusively the judicial branch, of government. The grounds listed under s 8 of the *CSNO Act* adequately describe the basis for suppressing information and include reasons of national or international security. Further, similar to the *CSNO Act*, an explanation should be provided as to why certain information is being withheld.

The challenge is less in the need to take into account security considerations in deciding what can be disclosed, and rather ensuring that this does not become an excuse to disclose no details beyond the relevant statutory provision. In particular, we believe that, at a minimum, transparency requires reporting as to number of TARs, broken down into those issued in written and oral form, indications of the agencies (or types of agencies) making the requests, the types of designated

communications providers affected, whether the designated communications provider acquiesced to the request, perhaps even the geographical location (such as within Australia or external to Australia), the types of crimes or criminal activity being investigated and numbers of successful prosecutions flowing from the TAR. It may thus be appropriate to include a presumption that such information will not compromise security.

It will also be critical to highlight the type of initial warrant obtained to access that information. For example, was a stored communications warrant issued to access the encrypted information and due to that encryption, followed up by a TAR to request the DCP to make the messages humanly intelligible? Ensuring that the link between a warrant and a TAR or TAN is present will ensure the public are assured that a warrant process to access the information is in place and not able to be circumvented by obtaining a TAR or TAN.

Qualitative statements regarding collated statistics for the scheme should be made. These statements should be made by an appropriate oversight body (or multiple bodies in collaboration) who is able to view both restricted and unrestricted documents. This gives the oversight body the ability to draw from publicly released data and data withheld for operational secrecy to be able to reassure the public of the effectiveness, or otherwise, of the scheme.

We also highlight that where a technical capability notice has been issued, a general explanation as to how broader technical issues and conflicts were resolved (without compromising operational secrecy) should be provided. This will go some way to addressing public concerns regarding broader network security, mass surveillance, and impact on the Australian technology industry.

IPCO Model

We note the discussions surrounding the IPCO system in the UK for approving the types of authorisations in the *TOLA Act* (TAN and TCN). We took a question on notice regarding the independence of the technical expert who would sit with the retired judge and advise on technical matters. The question specifically proposed was how independent must that expert be? Would contractual work for ASIO or law enforcement agencies preclude a candidate based on a lack of independence? We would suggest that this kind of work should preclude an individual from being an independent expert. Irrespective of any possibility that the individual could, within their own minds, maintain some form of independence, to other participants, particularly DCP, there would be a doubt as to impartiality. We note similar issues were raised as to the security of tenure for AAT members and the possibility that this could be seen as a conflict as to their independence. Those same issues arise should an individual undertake contract work for ASIO or law enforcement agencies. Providing advice which may not agree with ASIO or law enforcement agencies position may preclude an individual from obtaining a future contract with those agencies, reducing perceptions of impartiality.

The challenge of impartiality highlights concerns about a technical expert interacting with a judge or retired judge outside the normal court process. Where proceedings are adversarial, it would be preferable for technical evidence to be led and countered in the normal course. Where proceedings are not adversarial, an expert in chambers with the judge is preferable to a process where no expert advice is available.

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