30 April 2020

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Mr Hastie,

RE: ***Telecommunications Legislation Amendment (International Production Orders) Bill 2020***

Communications Alliance welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the *Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (Bill).

Communications Alliance members comprise carriers and carriage services providers (C/CSPs) but also search engines and digital platforms. These two groups of communications services providers are impacted quite differently by the proposed legislation, as set out below.

Our C/CSP members have not raised any major concerns with the legislation from a compliance perspective. As we understand it, and as explained by the Department of Home Affairs in individual briefings, Part 13 "Incoming orders and requests" of the Bill creates a permissive regime by removing the exceptions on disclosure and interception in the *Telecommunications Act 1997* and the *Telecommunications (Access and Interception) Act 1979*, and ensures that C/CSPs would not be breaching the *Privacy Act 1988* when disclosing information pursuant to a valid International Production Order (IPO).

However, we highlight that the Bill currently does not contain any arrangements for the reimbursement of costs that providers are likely to incur when complying with an IPO. We request that a reimbursement scheme be included, mirroring the arrangements contained in Section 314 of the *Telecommunications Act 1997*.

Our search engine and platform members are supportive of, and indeed have actively called for, improved international information sharing arrangements, and welcome the spirit and intention of the US *Clarifying Lawful Overseas Use of Data Act* (CLOUD Act).

However, due to the global nature of their operations, our search engine and digital platform members raise concern with some aspects of the draft legislation which can be summarised, at a high level, as follows:

1. The CLOUD Act itself does not create a compulsory obligation on the service provider to comply with a request.

   However, Part 8, Clause 124 of the Bill seeks to require the compulsory production of user data from service providers pursuant to international agreements and seeks to subject service providers to civil penalties for non-compliance.

This attempt to require the compulsory production of user data and the associated contemplated civil penalties do not conform with the intention and spirit of the CLOUD Act and, accordingly, ought to be removed from the Bill.

In addition, Clause 125 sets a very low compliance threshold (indeed it is hard to think of a lower threshold) on designated communications providers, i.e. the compliance threshold is triggered by the provision of a service (from an already extensive range of services that are within scope) to a single Australian resident.

2. Part 1, Clause 17 of the Bill allows the Attorney-General to nominate a member of the Security Division of the Australian Appeals Tribunal (AAT) for the purpose of issuing IPOs in relation to national security (Part 4 of the Bill). That nominated AAT member can be a member of the Security Division at any level (but must be an active legal practitioner and also have been a legal practitioner for at least 5 years).

   As with the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act), we believe that independent judicial oversight and authorisation of IPOs is required given the potential intrusiveness of IPOs where they relate to interception, stored communications or communications data of individuals, i.e. covert access to potentially significant amounts of personal information.

   We note that the Senate Standing Committee for the Scrutiny of Bills has equally highlighted this point in its recent *Scrutiny Digest 5/20*:

   > "The committee has a long-standing scrutiny view that the power to issue warrants or orders relating to the use of intrusive powers should only be conferred on judicial officers. In this regard, the committee does not consider that consistency with existing provisions is, of itself, a sufficient justification for allowing warrants or orders relating to the use of intrusive powers to be issued by non-judicial officers."[1]

   The Committee also considered

   > "that the bill should be amended to establish a national system so that public interest monitors may make submissions in relation to all IPO applications, regardless of whether they relate to interception or involve Victorian or Queensland law enforcement agencies."[2] (Public interest monitors already exist in these two States and they "can appear at hearings of IPO applications to test the content and sufficiency of the information relied on, can question any person giving information, and can make oral and written submissions as to the appropriateness of granting the application, which must be considered by the judge or AAT member when deciding whether to grant an IPO."[3])

   We agree with both Committee requests, i.e. the requirement for judicial authorisation of IPOs and the establishment of a national system for public interest monitors in relation to IPO applications.

3. Part 7, Clause 121 only allows the designated communications provider to whom an IPO is directed, to object to the IPO "on the grounds that the order does not comply with the designated international agreement nominated in the application for the order", i.e. the draft legislation does not contemplate a merits review.

   This appears to be a potentially very limited set of circumstances. This is particularly concerning as the Bill allows for significant invasions of an individual's privacy but does not envisage Parliamentary oversight for the creation of the designated international agreements which are to 'operationalise' the Bill.

[1] p.26. Scrutiny Digest 5/20, Senate Standing Committee for the Scrutiny of Bills
[2] Ibid
[3] p.26/27, ibid

This was also raised by the Senate Standing Committee for the Scrutiny of Bills. The Committee noted:

> "The committee's concerns are heightened by the lack of parliamentary oversight of any relevant international agreement. Clause 3 merely provides that the name of the relevant designated international agreement must be specified in the regulations. Given the significant nature of the power and the potential trespass on a person's rights and liberties, the committee considers that, at a minimum, the bill should be amended to require that designated international agreements be subject to parliamentary scrutiny."[4]

The Committee goes on to request the Minister's advice as to whether the Bill could be amended to

> "specify that designated international agreements must be tabled in the Parliament; and provide that any regulation that specifies the name of a designated international agreement does not commence until after the Parliament has had the opportunity to scrutinise the designated international agreement."[5]

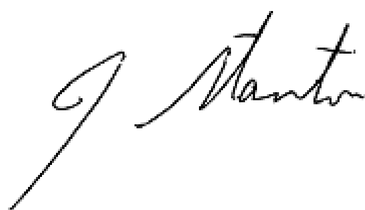
Communications Alliance concurs with the Committee's view and requests on this issue.

We look forward to further engaging with the PJCIS and all relevant stakeholders on this important Bill.

Please contact Christiane Gillespie-Jones (c.gillespiejones@commsalliance.com.au) if you have any questions.

Please note that Communications Alliance members may make additional individual submissions.

Yours sincerely,



John Stanton
Chief Executive Officer
Communications Alliance

[4] p.34, ibid
[5] p.35, ibid