



LITIGATION

MAJOR CHANGES PROPOSED TO SEARCH AND SURVEILLANCE POWERS

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Parliament is currently considering a law change that could mean increased powers of search and surveillance for agencies such as the Commerce Commission.

The Search and Surveillance Bill 2009 aims to update the law relating to use of search powers, particularly by the police. The measures would also apply to a number of regulatory agencies, including the Commerce Commission, local authorities and the Overseas Investment Office.

Much of the bill simply seeks to update the rules on search powers by codifying what has become common practice or by taking into account recent developments in information technology. Many of the bill's proposals are based on the recommendations made in the Law Commission's Report, Search and Surveillance Powers (June 2007), and are intended to, among other things:

- improve the consistency and coherence of the search powers granted to regulatory agencies;
- reduce the uncertainty as to the nature and extent of certain existing search powers granted to regulatory agencies;
- increase the powers of regulatory agencies to deal with unlawful activity committed through or facilitated by electronic devices; and

- address concerns about the quality of applications for search warrants.

However, the powers of the Commerce Commission in applying for and executing search warrants will be expanded as they are brought into line with the new regime. One aspect of the bill that may prove controversial is the proposal to extend the power to obtain surveillance warrants to agencies such as the Commerce Commission.

Currently, the Commerce Commission's rights and powers in relation to search warrants are set out in the Commerce Act 1986 and the Fair Trading Act 1986. Proposed changes from the current regime include:

- The power conferred by a search warrant will include the power to detain any persons at the search scene in order to determine if they are connected with the search.
- The power to remove or copy any material will expressly include the power to copy any intangible material from a computer or other information storage device.
- An officer of the Commission will be allowed to seize as evidence any material that they find while lawfully on a premises, even if not executing a

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search warrant or there for an unrelated purpose.

- A search warrant will be able to be issued in respect of legally privileged material if the issuer is satisfied that the purpose of the communication was to plan or commit an offence or otherwise dishonest. Special provisions will apply to the issue of search warrants over a lawyer's premises.
- The Commission will be given a new power to apply for a surveillance warrant authorising the use of surveillance devices, including interception devices, tracking devices or visual surveillance devices.
- The issue of a surveillance warrant will allow enforcement officers to enter specified premises to install a surveillance device.
- The Commission will be able to apply for a "residual warrant" authorising an investigative technique that is not otherwise covered by the bill.

Given their significance, the proposed changes require close scrutiny. The Law Commission itself has acknowledged that the proposed surveillance warrant measures are "novel" and the extension of these powers to non-police agencies may raise concerns "about the potential creep of state powers and the emergence of a surveillance society".

As the experiences in other jurisdictions demonstrate, when regulatory agencies are given additional powers, the powers can be used in ways that are not always consistent with the purposes for which they were intended. Those who deal with the regulators will be concerned to ensure that they will only be able to use any new search powers in a responsible and proportionate manner.

Once the bill passes its first reading, the

public will have an opportunity to make submissions on it during the select committee process.

Some of the issues that ought to be addressed during that process include:

- the justifications for, and proportionality of, some of the expansions of the search and surveillance powers of the regulatory agencies;
- whether it is necessary for commercial regulators such as the Commerce Commission to obtain police-style surveillance powers given that they already enjoy many powers that the police do not (such as information-gathering notices and the ability to compel individuals to answer questions); and
- more generally, whether the powers of various regulatory agencies to obtain search and surveillance warrants should be consolidated under a single statute as proposed or whether the public interest is better served by differentiated powers under specific statutes.

We will continue to monitor the bill's progress through Parliament and report on future developments.