

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

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The Committee asked the following question:

What kind of publicly available information there will be in relation to how the agreements are used and what they result in?

The response to the question is as follows:

The Attorney-General is required to table an annual report on Australian agencies' use of the IPO framework in Parliament each financial year. Clause 131 in Schedule 1 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) identifies the relevant statutory reporting requirements, including the relevant details identified in clauses 128 and 130, listed below for reference:

128 Annual reports by relevant agencies

The chief officer of a relevant agency must, within 3 months after the end of each financial year, give the Minister a written report that sets out:

- (a) the relevant statistics about applications made by the agency under clause 22 during the financial year; and
- (b) the relevant statistics about applications made by the agency under clause 33 during the financial year; and
- (c) the relevant statistics about applications made by the agency under clause 42 during the financial year; and
- (d) the relevant statistics about applications made by the agency under clause 52 during the financial year; and
- (e) the relevant statistics about applications made by the agency under clause 63 during the financial year; and
- (f) the relevant statistics about applications made by the agency under clause 72 during the financial year; and
- (g) for each designated international agreement—the number of applications made by the agency under Part 2 or 3 of this Schedule during the financial year that nominated the designated international agreement; and
- (h) if one or more international production orders were issued before the end of the financial year in response to applications made by the agency:
 - (i) the number of occasions during the financial year on which protected information obtained in accordance with those orders was shared with other relevant agencies; and

- (ii) the number of arrests that were made during the financial year on the basis of protected information obtained in accordance with those orders; and
- (iii) the number of prosecutions where protected information obtained in accordance with those orders was used in evidence during the financial year; and
- (iv) the number of convictions during the financial year where protected information obtained in accordance with those orders was used in evidence in the prosecutions that resulted in those convictions; and
- (i) if one or more international production orders were issued under clause 30 during the financial year, in response to applications made by the agency, on grounds relating to the investigation of one or more offences—the type or types of those offences; and
- (j) if one or more international production orders were issued under clause 39 during the financial year, in response to applications made by the agency, on grounds relating to the investigation of one or more offences—the type or types of those offences; and
- (k) if one or more international production orders were issued under clause 48 during the financial year, in response to applications made by the agency, on grounds relating to the investigation of one or more offences—the type or types of those offences; and
- (l) the number of international production orders revoked by the chief officer under clause 114 during the financial year; and
- (m) if subparagraph 30(2)(g)(ii) or (h)(ii) applied to one or more international production orders issued under clause 30 during the financial year in response to applications made by the agency—the number of those orders; and
- (n) if subparagraph 60(2)(g)(ii) or (h)(ii) applied to one or more international production orders issued under clause 60 during the financial year in response to applications made by the agency—the number of those orders.

130 Annual reports by the Australian Designated Authority

- (1) The Australian Designated Authority must, within 3 months after the end of each financial year, give the Minister a written report that sets out, for each relevant agency:
 - (a) if one or more international production orders issued in response to applications made by the agency were given by the Australian Designated Authority to prescribed communications providers during the financial year:
 - (i) the number of those orders; and
 - (ii) the number of each type of those orders; and
 - (iii) for each designated international agreement—the number of those orders that invoked the designated international agreement; and
 - (b) if subparagraph 30(2)(g)(ii) or (h)(ii) applied to one or more international production orders that were:
 - (i) issued under clause 30 in response to applications made by the agency; and
 - (ii) given by the Australian Designated Authority to prescribed communications providers during the financial year;
the number of those orders; and
 - (c) if subparagraph 60(2)(g)(ii) or (h)(ii) applied to one or more international production orders that were:

- (i) issued under clause 60 in response to applications made by the agency; and
 - (ii) given by the Australian Designated Authority to prescribed communications providers during the financial year;
- the number of those orders; and
- (d) if one or more international production orders issued in response to applications made by the agency were cancelled by the Australian Designated Authority under clause 111 during the financial year—the number of those orders; and
- (e) if one or more international production orders issued in response to applications made by the agency were cancelled by the Australian Designated Authority under clause 122 during the financial year—the number of those orders; and
- (f) if one or more instruments of revocation of international production orders issued in response to applications made by the agency were given by the Australian Designated Authority to prescribed communications providers during the financial year—the number of those instruments; and
- (g) if one or more objections were received by the Australian Designated Authority under clause 121 during the financial year in relation to international production orders issued in response to applications made by the agency:
 - (i) the number of international production orders to which those objections relate; and
 - (ii) the number of each type of those orders; and
 - (iii) for each designated international agreement—the number of those orders that invoked the designated international agreement.

Article 11 of the Agreement requires both parties (via the Designated Authority) to exchange an annual report on their compliance with the terms of the Agreement, which may include a review of the issuance and transmission of Orders, and a review of the Party's handling of data acquired pursuant to an Order to determine whether to modify procedures adopted under this Agreement. The department expects that much of Australia's reporting under Article 11 will reflect the statutory reporting set out above.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Hansard page: 11

Josh Wilson MP asked the following question:

Can you list the set of considerations that are part of the judicial consideration in approving orders?

The response to the question is as follows:

Each IPO under Schedule 1 to the TIA Act includes a number of matters which are relevant to the issuance of an IPO. The relevant provisions are extracted at **Attachment A**.

The *Telecommunications Legislation Amendment (International Production Orders) Act 2021* commenced on 24 July 2021. This legislation amended the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to insert Schedule 1, which establishes the International Production Orders (IPO) framework. A fact sheet with further information on the IPO framework is at **Attachment B**.

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Interception international production order for the enforcement of the criminal law

Clause 30 reads:

Issue of international production order

- (2) If the eligible Judge or nominated AAT member is satisfied, on the basis of the information given to the eligible Judge or nominated AAT member under this Division in connection with the application, that:
- (a) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that:
 - (i) the prescribed communications provider owns or operates a telecommunications network that is, or is likely to be, used to supply those individual transmission services; or
 - (ii) the prescribed communications provider supplies those individual transmission services; and
 - (b) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that the prescribed communications provider provides those individual message/call application services; and
 - (ba) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (c) Subdivision A has been complied with in relation to the application; and
 - (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
 - (e) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that a particular person is using, or is likely to use, those individual transmission services; and
 - (f) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that a particular person is using, or is likely to use, those individual message/call application services; and
 - (g) in the case of an application for an international production order that is in respect of one or more individual transmission services—information that would be likely to be obtained by intercepting, under an order issued under this clause, communications that are being carried by those individual transmission services would be likely to assist in connection with the investigation by the interception agency of a serious category 2 offence, or serious category 2 offences, in which:
 - (i) the particular person is involved; or
 - (ii) another person is involved with whom the particular person is likely to communicate using those individual transmission services; and
 - (h) in the case of an application for an international production order that is in respect of one or more individual message/call application services—information that would be likely to be obtained by intercepting, under an order issued under this clause, messages sent or received, voice calls made or received, or video calls made or received, using those individual message/call application services would

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be likely to assist in connection with the investigation by the interception agency of a serious category 2 offence, or serious category 2 offences, in which:

- (i) the particular person is involved; or
- (ii) another person is involved with whom the particular person is likely to communicate using those individual message/call application services;

Matters to which eligible Judge or nominated AAT member must have regard

- (5) In deciding whether to issue an international production order under subclause (2), the eligible Judge or nominated AAT member must have regard to the following matters:
 - (a) in the case of an application for an international production order that is in respect of one or more individual transmission services:
 - (i) how much the privacy of any person or persons would be likely to be interfered with by intercepting, under an international production order, communications that are being carried by those individual transmission services; and
 - (ii) the gravity of the conduct constituting the serious category 2 offence or serious category 2 offences being investigated; and
 - (iii) how much the information mentioned in paragraph (2)(g) would be likely to assist in connection with the investigation by the interception agency of the serious category 2 offence or serious category 2 offences; and
 - (iv) to what extent methods of investigating the serious category 2 offence or serious category 2 offences that do not involve so intercepting communications have been used by, or are available to, the interception agency; and
 - (v) how much the use of such methods would be likely to assist in connection with the investigation by the interception agency of the serious category 2 offence or serious category 2 offences; and
 - (vi) how much the use of such methods would be likely to prejudice the investigation by the interception agency of the serious category 2 offence or serious category 2 offences, whether because of delay or for any other reason; and
 - (vii) in relation to an application by an interception agency of Victoria—any submissions made by a Victorian PIM under clause 28 to the eligible Judge or nominated AAT member; and
 - (viii) in relation to an application by an interception agency of Queensland—any submissions made by a Queensland PIM under clause 29 to the eligible Judge or nominated AAT member; and
 - (ix) such other matters (if any) as the eligible Judge or nominated AAT member considers relevant;
 - (b) in the case of an application for an international production order that is in respect of one or more individual message/call application services:
 - (i) how much the privacy of any person or persons would be likely to be interfered with by intercepting, under an international production order, messages sent or received, voice calls made or received, or video calls made or received, using those individual message/call application services; and
 - (ii) the gravity of the conduct constituting the serious category 2 offence or serious category 2 offences being investigated; and

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- (iii) how much the information mentioned in paragraph (2)(h) would be likely to assist in connection with the investigation by the interception agency of the serious category 2 offence or serious category 2 offences; and
- (iv) to what extent methods of investigating the serious category 2 offence or serious category 2 offences that do not involve so intercepting messages, voice calls or video calls have been used by, or are available to, the interception agency; and
- (v) how much the use of such methods would be likely to assist in connection with the investigation by the interception agency of the serious category 2 offence or serious category 2 offences; and
- (vi) how much the use of such methods would be likely to prejudice the investigation by the interception agency of the serious category 2 offence or serious category 2 offences, whether because of delay or for any other reason; and
- (vii) in relation to an application by an interception agency of Victoria—any submissions made by a Victorian PIM under clause 28 to the eligible Judge or nominated AAT member; and
- (viii) in relation to an application by an interception agency of Queensland—any submissions made by a Queensland PIM under clause 29 to the eligible Judge or nominated AAT member; and
- (ix) such other matters (if any) as the eligible Judge or nominated AAT member considers relevant.

Stored communications international production order for the enforcement of the criminal law

Clause 39 reads:

Issue of international production order

- (2) If the issuing authority is satisfied, on the basis of the information given to the issuing authority under this Division in connection with the application, that:
 - (a) there are reasonable grounds for suspecting that the prescribed communications provider holds any of the following stored communications:
 - (i) stored communications that consist of communications that the relevant person has made using a telecommunications network owned or operated by the prescribed communications provider;
 - (ii) stored communications that consist of communications that another person has made using a telecommunications network owned or operated by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (iii) stored communications that consist of communications that the relevant person has made using a transmission service supplied by the prescribed communications provider;
 - (iv) stored communications that consist of communications that another person has made using a transmission service supplied by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (v) stored communications that consist of messages that the relevant person has sent or received using a message/call application service provided by the prescribed communications provider;

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- (vi) stored communications that consist of recordings of voice calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
- (vii) stored communications that consist of recordings of video calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
- (viii) stored communications that consist of material that the relevant person has uploaded for storage or back-up by a storage/back-up service provided by the prescribed communications provider;
- (ix) stored communications that consist of material that the relevant person has posted to a general electronic content service provided by the prescribed communications provider; and
- (aa) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
- (b) Subdivision A has been complied with in relation to the application; and
- (c) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
- (d) information that would be likely to be obtained by making a copy, under an order issued under this clause, of the stored communications would be likely to assist in connection with the investigation by the criminal law-enforcement agency of a serious category 1 offence, or serious category 1 offences, in which the relevant person is involved;

Matters to which issuing authority must have regard

- (3) In deciding whether to issue an international production order under subclause (2), the issuing authority must have regard to the following matters:
 - (a) how much the privacy of any person or persons would be likely to be interfered with by the criminal law-enforcement agency obtaining, under an international production order, a copy of the stored communications;
 - (b) the gravity of the conduct constituting the serious category 1 offence or serious category 1 offences being investigated;
 - (c) how much the information mentioned in paragraph (2)(d) would be likely to assist in connection with the investigation by the criminal law-enforcement agency of the serious category 1 offence or serious category 1 offences;
 - (d) to what extent methods of investigating the serious category 1 offence or serious category 1 offences that do not involve so obtaining a copy of the stored communications have been used by, or are available to, the criminal law-enforcement agency;
 - (e) how much the use of such methods would be likely to assist in connection with the investigation by the criminal law-enforcement agency of the serious category 1 offence or serious category 1 offences;
 - (f) how much the use of such methods would be likely to prejudice the investigation by the criminal law-enforcement agency of the serious category 1 offence or serious category 1 offences, whether because of delay or for any other reason;
 - (g) such other matters (if any) as the issuing authority considers relevant.

Telecommunications data international production order for the enforcement of the criminal law

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Clause 48 reads:

Issue of international production order

- (2) If the issuing authority is satisfied, on the basis of the information given to the issuing authority under this Division in connection with the application, that:
 - (a) there are reasonable grounds for suspecting that the prescribed communications provider holds, or is likely to commence to hold, any of the following telecommunications data:
 - (i) telecommunications data that relates to communications carried by an individual transmission service supplied using a telecommunications network owned or operated by the prescribed communications provider;
 - (ii) telecommunications data that relates to an individual transmission service supplied using a telecommunications network owned or operated by the prescribed communications provider;
 - (iii) telecommunications data that relates to communications carried by an individual transmission service supplied by the prescribed communications provider;
 - (iv) telecommunications data that relates to an individual transmission service supplied by the prescribed communications provider;
 - (v) telecommunications data that relates to messages sent or received using an individual message/call application service provided by the prescribed communications provider;
 - (vi) telecommunications data that relates to voice calls made or received using an individual message/call application service provided by the prescribed communications provider;
 - (vii) telecommunications data that relates to video calls made or received using an individual message/call application service provided by the prescribed communications provider;
 - (viii) telecommunications data that relates to an individual message/call application service provided by the prescribed communications provider;
 - (ix) telecommunications data that relates to material that has been uploaded by an end-user for storage or back-up by a storage/back-up service provided by the prescribed communications provider;
 - (x) telecommunications data that relates to material that has been posted on a general electronic content service provided by the prescribed communications provider; and
 - (aa) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (b) Subdivision A has been complied with in relation to the application; and
 - (c) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
 - (d) disclosing the telecommunications data to the enforcement agency, under an order issued under this clause, would be likely to assist in connection with the investigation by the enforcement agency of a serious category 1 offence, or serious category 1 offences;

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Matters to which issuing authority must have regard

- (5) In deciding whether to issue an international production order under subclause (2), the issuing authority must have regard to the following matters:
- (a) how much the privacy of any person or persons would be likely to be interfered with by disclosing, under an international production order, the telecommunications data;
 - (b) the gravity of the conduct constituting the serious category 1 offence or serious category 1 offences being investigated;
 - (c) how much the telecommunications data would be likely to assist in connection with the investigation by the enforcement agency of the serious category 1 offence or serious category 1 offences;
 - (d) to what extent methods of investigating the serious category 1 offence or serious category 1 offences that do not involve so disclosing the telecommunications data have been used by, or are available to, the enforcement agency;
 - (e) how much the use of such methods would be likely to assist in connection with the investigation by the enforcement agency of the serious category 1 offence or serious category 1 offences;
 - (f) how much the use of such methods would be likely to prejudice the investigation by the enforcement agency of the serious category 1 offence or serious category 1 offences, whether because of delay or for any other reason;
 - (g) such other matters (if any) as the issuing authority considers relevant.

Interception international production order relating to a part 5.3 supervisory order

Clause 60 reads:

Issue of international production order

- (2) If the eligible Judge or nominated AAT member is satisfied, on the basis of the information given to the eligible Judge or nominated AAT member under this Division in connection with the application, that:
- (a) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that:
 - (i) the prescribed communications provider owns or operates a telecommunications network that is, or is likely to be, used to supply those individual transmission services; or
 - (ii) the prescribed communications provider supplies those individual transmission services; and
 - (b) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that the prescribed communications provider provides those individual message/call application services; and
 - (ba) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (c) Subdivision A has been complied with in relation to the application; and
 - (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and

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- (e) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that a particular person is using, or is likely to use, those individual transmission services; and
- (f) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that a particular person is using, or is likely to use, those individual message/call application services; and
- (g) in the case of an application for an international production order that is in respect of one or more individual transmission services:
 - (i) a Part 5.3 supervisory order is in force in relation to the particular person; or
 - (ii) a Part 5.3 supervisory order is in force in relation to another person, and the particular person is likely to communicate with the other person using those individual transmission services; and
- (h) in the case of an application for an international production order that is in respect of one or more individual message/call application services:
 - (i) a Part 5.3 supervisory order is in force in relation to the particular person; or
 - (ii) a Part 5.3 supervisory order is in force in relation to another person, and the particular person is likely to communicate with the other person using those individual message/call application services; and
- (i) in the case of an application for an international production order that is in respect of one or more individual transmission services—information that would be likely to be obtained by intercepting, under an order issued under this clause, communications that are being carried by those individual transmission services would be likely to substantially assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with; and
- (j) in the case of an application for an international production order that is in respect of one or more individual message/call application services—information that would be likely to be obtained by intercepting, under an order issued under this clause, messages sent or received, voice calls made or received, or video calls made or received, using those individual message/call application services would be likely to substantially assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;

Matters to which eligible Judge or nominated AAT member must have regard

- (5) In deciding whether to issue an international production order under subclause (2) (in the case of an application for an international production order that is in respect of one or more individual transmission services), the eligible Judge or nominated AAT member must have regard to the following matters:
 - (a) how much the privacy of any person or persons would be likely to be interfered with by intercepting, under an international production order, communications that are being carried by those individual transmission services;
 - (b) how much the information referred to in paragraph (2)(i) would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or

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- (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;
- (c) to what extent methods for:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;that do not involve so intercepting communications have been used by, or are available to, the agency;
- (d) how much the use of such methods would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;
- (e) how much the use of such methods would be likely to prejudice:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;whether because of delay or for any other reason;
- (f) whether intercepting, under an international production order, communications carried by those individual transmission services would be the method that is likely to have the least interference with any person's privacy;
- (g) in relation to a Part 5.3 supervisory order that is a control order—the possibility that the person in relation to whom the control order is in force:
 - (i) has engaged, is engaging, or will engage, in a terrorist act; or
 - (ii) has provided, is providing, or will provide, support for a terrorist act; or
 - (iii) has facilitated, is facilitating, or will facilitate, a terrorist act; or
 - (iv) has provided, is providing, or will provide, support for the engagement in a hostile activity in a foreign country; or
 - (v) has facilitated, is facilitating, or will facilitate, the engagement in a hostile activity in a foreign country;
- (ga) in relation to a Part 5.3 supervisory order that is an extended supervision order or an interim supervision order—the possibility that the person in relation to whom the order is in force has committed, is committing, or will commit, a serious Part 5.3 offence;
- (gb) in relation to any Part 5.3 supervisory order—the possibility that the person in relation to whom the Part 5.3 supervisory order is in force:
 - (i) has contravened, is contravening, or will contravene, the Part 5.3 supervisory order; or
 - (ii) will contravene a succeeding Part 5.3 supervisory order;
- (h) in relation to an application by a Part 5.3 IPO agency of Victoria—any submissions made by a Victorian PIM under clause 58 to the eligible Judge or nominated AAT member;
- (i) in relation to an application by a Part 5.3 IPO agency of Queensland—any submissions made by a Queensland PIM under clause 59 to the eligible Judge or nominated AAT member;
- (j) such other matters (if any) as the eligible Judge or nominated AAT member considers relevant.

Stored communications international production order relating to a part 5.3 supervisory order

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Clause 69 reads:

Issue of international production order

- (2) If the issuing authority is satisfied, on the basis of the information given to the issuing authority under this Division in connection with the application, that:
- (a) a Part 5.3 supervisory order is in force in relation to the relevant person; and
 - (b) there are reasonable grounds for suspecting that the prescribed communications provider holds any of the following stored communications:
 - (i) stored communications that consist of communications that the relevant person has made using a telecommunications network owned or operated by the prescribed communications provider;
 - (ii) stored communications that consist of communications that another person has made using a telecommunications network owned or operated by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (iii) stored communications that consist of communications that the relevant person has made using a transmission service supplied by the prescribed communications provider;
 - (iv) stored communications that consist of communications that another person has made using a transmission service supplied by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (v) stored communications that consist of messages that the relevant person has sent or received using a message/call application service provided by the prescribed communications provider;
 - (vi) stored communications that consist of recordings of voice calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
 - (vii) stored communications that consist of recordings of video calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
 - (viii) stored communications that consist of material that the relevant person has uploaded for storage or back-up by a storage/back-up service provided by the prescribed communications provider;
 - (ix) stored communications that consist of material that the relevant person has posted to a general electronic content service provided by the prescribed communications provider; and
 - (ba) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (c) Subdivision A has been complied with in relation to the application; and
 - (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
 - (e) information that would be likely to be obtained by making a copy, under an order issued under this clause, of the stored communications would be likely to substantially assist in connection with:
 - (i) achieving a Part 5.3 object; or

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- (ii) determining whether the Part 5.3 supervisory order has been, or is being, complied with;

Matters to which issuing authority must have regard

- (3) In deciding whether to issue an international production order under subclause (2), the issuing authority must have regard to the following matters:
 - (a) how much the privacy of any person or persons would be likely to be interfered with by the Part 5.3 IPO agency obtaining, under an international production order, a copy of the stored communications;
 - (b) how much the information mentioned in paragraph (2)(e) would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order has been, or is being, complied with;
 - (c) to what extent methods for:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order has been, or is being, complied with;that do not involve so obtaining a copy of the stored communications have been used by, or are available to, the Part 5.3 IPO agency;
 - (d) how much the use of such methods would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order has been, or is being, complied with;
 - (e) how much the use of such methods would be likely to prejudice:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order has been, or is being, complied with;whether because of delay or for any other reason;
 - (f) such other matters (if any) as the issuing authority considers relevant.

Telecommunications data international production order relating to a part 5.3 supervisory order

Clause 78 reads:

Issue of international production order

If the issuing authority is satisfied, on the basis of the information given to the issuing authority under this Division in connection with the application, that:

- (a) a Part 5.3 supervisory order is in force in relation to the relevant person; and
- (b) there are reasonable grounds for suspecting that the prescribed communications provider holds, or is likely to commence to hold, any of the following telecommunications data:
 - (i) telecommunications data that relates to communications that the relevant person has made using an individual transmission service supplied by the prescribed communications provider;
 - (ii) telecommunications data that relates to an individual transmission service supplied using a telecommunications network owned or operated by the prescribed communications provider, where the individual transmission service is used, or is likely to be used, by the relevant person;

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- (iii) telecommunications data that relates to an individual transmission service supplied by the prescribed communications provider, where the individual transmission service is used, or is likely to be used, by the relevant person;
 - (iv) telecommunications data that relates to messages sent or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
 - (v) telecommunications data that relates to voice calls made or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
 - (vi) telecommunications data that relates to video calls made or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
 - (vii) telecommunications data that relates to an individual message/call application service provided by the prescribed communications provider, where the individual message/call application service is used, or is likely to be used, by the relevant person;
 - (viii) telecommunications data that relates to material that has been uploaded by the relevant person for storage or back-up by a storage/back-up service provided by the prescribed communications provider;
 - (ix) telecommunications data that relates to material that has been posted by the relevant person on a general electronic content service provided by the prescribed communications provider; and
 - (ba) the person who made the application on behalf of the agency reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (c) Subdivision A has been complied with in relation to the application; and
 - (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
 - (e) disclosing the telecommunications data to the agency, under an order issued under this clause, would be likely to substantially assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;
- (5) In deciding whether to issue an international production order under subclause (2), the issuing authority must have regard to the following matters:
- (a) how much the privacy of any person or persons would be likely to be interfered with by obtaining, under an international production order, the telecommunications data;
 - (b) how much the telecommunications data would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;
 - (c) to what extent methods for:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;

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that do not involve so obtaining the telecommunications data have been used by, or are available to, the Part 5.3 IPO agency;

- (d) how much the use of such methods would be likely to assist in connection with:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;
- (e) how much the use of such methods would be likely to prejudice:
 - (i) achieving a Part 5.3 object; or
 - (ii) determining whether the Part 5.3 supervisory order, or any succeeding Part 5.3 supervisory order, has been, or is being, complied with;whether because of delay or for any other reason;
- (f) such other matters (if any) as the issuing authority considers relevant.

Interception international production order relating to a national security

Clause 89 reads:

Issue of international production order

- (2) If the nominated AAT Security Division member is satisfied, on the basis of the information given to the nominated AAT Security Division member under this Division in connection with the application, that:
 - (a) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that:
 - (i) the prescribed communications provider owns or operates a telecommunications network that is, or is likely to be, used to supply those individual transmission services; or
 - (ii) the prescribed communications provider supplies those individual transmission services; and
 - (b) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that the prescribed communications provider provides those individual message/call application services; and
 - (ba) the person who made the application on behalf of the Organisation reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
 - (c) Subdivision A has been complied with in relation to the application; and
 - (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
 - (e) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that those services are being, or are likely to be:
 - (i) used by a person engaged in, or reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to security; or
 - (ii) the means by which a person receives or sends a communication from or to another person who is engaged in, or reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to security; or
 - (iii) used for purposes prejudicial to security; and

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- (f) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that those services are being, or are likely to be:
 - (i) used by a person engaged in, or reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to security; or
 - (ii) the means by which a person receives or sends a message, or receives or makes a voice call or video call, from or to another person who is engaged in, or reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to security; or
 - (iii) used for purposes prejudicial to security; and
- (g) in the case of an application for an international production order that is in respect of one or more individual transmission services—there are reasonable grounds for suspecting that information that would be likely to be obtained by intercepting, under an order issued under this clause, communications that are being carried by those individual transmission services would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security; and
- (h) in the case of an application for an international production order that is in respect of one or more individual message/call application services—there are reasonable grounds for suspecting that information that would be likely to be obtained by intercepting, under an order issued under this clause, messages sent or received, voice calls made or received, or video calls made or received, using those individual message/call application services would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security;

Matters to which nominated AAT Security Division member must have regard

- (5) In deciding whether to issue an international production order under subclause (2), the nominated AAT Security Division member must have regard to the following matters:
 - (a) in the case of an application for an international production order that is in respect of one or more individual transmission services:
 - (i) to what extent methods of carrying out the Organisation's function of obtaining intelligence relating to security (so far as carrying out that function relates to the target) that are less intrusive than intercepting, under such an order, communications being carried by those individual transmission services have been used by, or are available to, the Organisation; and
 - (ii) how much the use of such methods would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the target); and
 - (iii) how much the use of such methods would be likely to prejudice the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the target), whether because of delay or for any other reason; and
 - (iv) such other matters (if any) as the nominated AAT Security Division member considers relevant;
 - (b) in the case of an application for an international production order that is in respect of one or more individual message/call application services:
 - (i) to what extent methods of carrying out the Organisation's function of obtaining intelligence relating to security (so far as carrying out that function relates to the target) that are less intrusive than intercepting, under such an order, messages sent or received, voice calls made or received, or video calls

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made or received, using those individual message/call application services have been used by, or are available to, the Organisation; and

- (ii) how much the use of such methods would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the target); and
- (iii) how much the use of such methods would be likely to prejudice the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the target), whether because of delay or for any other reason; and
- (iv) such other matters (if any) as the nominated AAT Security Division member considers relevant.

Stored communications international production order relating to a national security

Clause 98 reads:

Issue of international production order

- (2) If the nominated AAT Security Division member is satisfied, on the basis of the information given to the nominated AAT Security Division member under this Division in connection with the application, that:
 - (a) there are reasonable grounds for suspecting that the relevant person is engaged in, or is likely to engage in, activities prejudicial to security; and
 - (b) there are reasonable grounds for suspecting that the prescribed communications provider holds any of the following stored communications:
 - (i) stored communications that consist of communications that the relevant person has made using a telecommunications network owned or operated by the prescribed communications provider;
 - (ii) stored communications that consist of communications that another person has made using a telecommunications network owned or operated by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (iii) stored communications that consist of communications that the relevant person has made using a transmission service supplied by the prescribed communications provider;
 - (iv) stored communications that consist of communications that another person has made using a transmission service supplied by the prescribed communications provider, and for which the relevant person is the intended recipient;
 - (v) stored communications that consist of messages that the relevant person has sent or received using a message/call application service provided by the prescribed communications provider;
 - (vi) stored communications that consist of recordings of voice calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
 - (vii) stored communications that consist of recordings of video calls that the relevant person has made or received using a message/call application service provided by the prescribed communications provider;
 - (viii) stored communications that consist of material that the relevant person has uploaded for storage or back-up by a storage/back-up service provided by the prescribed communications provider;

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- (ix) stored communications that consist of material that the relevant person has posted to a general electronic content service provided by the prescribed communications provider; and
- (ba) the person who made the application on behalf of the Organisation reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
- (c) Subdivision A has been complied with in relation to the application; and
- (d) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
- (e) information that would be likely to be obtained by making a copy, under an order issued under this clause, of the stored communications would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security;

Matters to which nominated AAT Security Division member must have regard

- (3) In deciding whether to issue an international production order under subclause (2), the nominated AAT Security Division member must have regard to the following matters:
 - (a) to what extent methods of carrying out the Organisation's function of obtaining intelligence relating to security (so far as carrying out that function relates to the relevant person) that are less intrusive than obtaining, under such an order, a copy of the stored communications have been used by, or are available to, the Organisation;
 - (b) how much the use of such methods would be likely to assist the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the relevant person);
 - (c) how much the use of such methods would be likely to prejudice the Organisation in carrying out its function of obtaining intelligence relating to security (so far as carrying out that function relates to the relevant person);
 - (d) such other matters (if any) as the nominated AAT Security Division member considers relevant.

Telecommunications data international production order relating to a national security

Clause 107 reads:

Issue of international production order

- (2) If the nominated AAT Security Division member is satisfied, on the basis of the information given to the nominated AAT Security Division member under this Division in connection with the application, that:
 - (a) there are reasonable grounds for suspecting that the prescribed communications provider holds, or is likely to commence to hold, any of the following telecommunications data:
 - (i) telecommunications data that relates to communications that the relevant person has made using an individual transmission service supplied by the prescribed communications provider;
 - (ii) telecommunications data that relates to an individual transmission service supplied using a telecommunications network owned or operated by the prescribed communications provider, where the individual transmission service is used, or is likely to be used, by the relevant person;

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- (iii) telecommunications data that relates to an individual transmission service supplied by the prescribed communications provider, where the individual transmission service is used, or is likely to be used, by the relevant person;
- (iv) telecommunications data that relates to messages sent or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
- (v) telecommunications data that relates to voice calls made or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
- (vi) telecommunications data that relates to video calls made or received by the relevant person using an individual message/call application service provided by the prescribed communications provider;
- (vii) telecommunications data that relates to an individual message/call application service provided by the prescribed communications provider, where the individual message/call application service is used, or is likely to be used, by the relevant person;
- (viii) telecommunications data that relates to material that has been uploaded by the relevant person for storage or back-up by a storage/back-up service provided by the prescribed communications provider;
- (ix) telecommunications data that relates to material that has been posted by the relevant person on a general electronic content service provided by the prescribed communications provider; and
- (aa) the person who made the application on behalf of the Organisation reasonably suspects that the prescribed communications provider is based in, or operates in, a foreign country that is a party to the designated international agreement nominated in the application; and
- (b) Subdivision A has been complied with in relation to the application; and
- (c) in the case of a telephone application—because of urgent circumstances, it was necessary to make the application by telephone; and
- (d) disclosing the telecommunications data to the Organisation, under an order issued under this clause, would be in connection with the performance by the Organisation of its functions;

Matters to which nominated AAT Security Division member must have regard

- (5) In deciding whether to issue an international production order under subclause (2), the nominated AAT Security Division member must have regard to the following matters:
 - (a) to what extent methods of performing the Organisation's functions (so far as performing those functions relates to the relevant person) that are less intrusive than obtaining, under such an order, the telecommunications data have been used by, or are available to, the Organisation;
 - (b) how much the use of such methods would be likely to assist the Organisation in performing its functions (so far as performing those functions relates to the relevant person);
 - (c) how much the use of such methods would be likely to prejudice the Organisation in performing its functions (so far as performing those functions relates to the relevant person), whether because of delay or for any other reason;
 - (d) such other matters (if any) as the nominated AAT Security Division member considers relevant.

Attachment B

Telecommunications Legislation Amendment (International Production Orders) Act 2021 – Fact Sheet

Intention of the Act

The Act amended the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to establish an international production order (IPO) framework that allows Australian law enforcement and national security agencies to, amongst other things, issue extraterritorial orders for electronic data on foreign prescribed communications providers (PCPs) where there is an agreement in place. The IPO framework also establishes minimum requirements for Australia entering into international agreements under the TIA Act.

The IPO framework will complement other international crime cooperation mechanisms (such as mutual legal assistance) and is not intended to restrict other means of obtaining electronic data.

Key features of the Act

What international providers are covered?

International production orders can be directed to a range of communications service providers, including:

- Carriers and carriage service providers (*e.g. internet service providers and telephone carriers*)
- Message, voice and video call application service providers (*e.g. Facebook Messenger, Skype, WhatsApp*)
- Storage backup providers (*e.g. cloud storage providers*)
- General electronic content providers (*e.g. chat forums, social media platforms and other website providers*)

Who can apply for an international production order?

International production orders will be obtained by the same agencies that can currently seek domestic warrants for interception, stored communications, or telecommunications data, under the TIA Act. Law enforcement agencies can only apply for orders for the purpose of:

- Investigating a serious criminal offence (offence thresholds apply depending on the type of data to be disclosed¹¹); or
- Monitoring a person subject to a Commonwealth part 5.3 supervisory order, so as to protect the public from terrorist acts and hostile acts overseas, prevent support for terrorist acts and hostile acts overseas, and determine breaches of the part 5.3 supervisory order.

The Australian Security Intelligence Organisation will be able to apply for orders relating to national security.

What activities are authorised by an international production order?

1. Interception of communications – this includes the interception of live video, voice or combined activities.
2. Disclosure of stored communications – this includes disclosure of stored messages, recordings of calls and voicemail messages and other material such as videos, images and files.
3. Disclosure of telecommunications data – this includes disclosure of information about the communication, for example billing information, contact lists, calendar data and metadata related to saved multimedia and files.

¹¹ For interception IPOs the threshold is generally an offence threshold of 7 years' imprisonment or more, or punishable by imprisonment for life, unless otherwise provided for under legislation. For stored communications and access to telecommunications data, an offence threshold of 3 years' imprisonment or more, or punishable by imprisonment for life.

What is the criteria for obtaining an international production order?

All orders will be issued by an independent authority, such as an eligible judge or nominated Administrative Appeals Tribunal member. The authority will need to consider a range of matters depending on the order, including:

- how much the privacy of any person would likely be interfered with
- the gravity of the conduct constituting a serious offence
- how much the information would likely assist in protecting the public
- how much the information obtained would likely assist the prevention, detection, investigation or prosecution of a serious offence
- to what extent other methods to obtain the information have been used

What oversight and accountability is there?

There are rigorous oversight and accountability measures, consistent with the current domestic warrants regime established in the TIA Act, such as:

- Commonwealth Ombudsman oversight of agencies' compliance with the scheme. The Ombudsman will provide an annual report to the Minister about the results of those inspections.
- The Minister will prepare an annual report based on this information and table it in Parliament.
- The Inspector-General of Intelligence and Security will provide oversight over the Australian Security Intelligence Organisation's use of the scheme

There will be strict destruction and record keeping requirements. Agencies will only be able to keep information obtained from an international production order where there is a legitimate reason to do so. Otherwise agencies will be required to immediately destroy all records obtained from the international production order.

What can other countries ask from Australia?

- Schedule 1 to the TIA Act ensures that Australian service providers can respond to orders or requests for electronic information by countries with which Australia has a designated international agreement.
 - Individual international agreements will establish the appropriate procedures and mechanisms to do so, ensuring there are robust privacy and civil liberty safeguards.
 - While these agreements will create a new paradigm for international cooperation, the impact on Australian industry is not expected to be significant. Government will continue to work with industry to ensure new arrangements operate with minimal impact on businesses.
- The Australian Designated Authority, hosted by the Attorney-General's Department will act as the intermediary between Australian and foreign agencies, and domestic and foreign communication providers.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Hansard page: 10

Senator Green asked the following question:

Do you know the average length of time it takes to receive data from the US under the 1,000 requests that have been made?

The response to the question is as follows:

In the time available, the department was unable to manually calculate the average length of time taken for the US to return Communication Service Provider related evidence for the 1,000 requests in response to the Honourable Senator's question. However, the department has reviewed data received from the US in the last financial year (2021-22), and has calculated that material was received in an average timeframe of 15 months.

Timeframes associated with a request vary depending on the complexity of the matter and the nature of the assistance sought. For example, a non-complex request for non-content data for 1-2 subscribers/users (e.g. subscriber information) can take as little as 3 months, whereas a more complex request for content data (e.g. messages and photos) or content and non-content from multiple accounts can take up to 2 years to receive material. There may also be a number of other complexities that arise in the mutual legal assistance process that vary from case to case that will impact on the associated timeframes.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Hansard page: Page 10

Senator Nita Green asked the following question:

Would Australia be notified of a substantial change to new crimes or a different classification of criminal offences?

The response to the question is as follows:

Article 3(1) of the Agreement requires each Party to “advise the other of any material changes in its domestic laws that would substantially frustrate or impair the operation of this Agreement.” Furthermore, Article 3(5) requires each Party to “advise the other of any material changes in its domestic law that significantly affect the protections for data received” under the Agreement.

Together these Articles ensure that both parties to the Agreement must report any substantive changes to domestic laws as they relate to the operation of the Agreement, such as any changes that might restrict providers’ compliance with orders and amendments to data protection laws. There is no requirement for parties to notify the other for changes in laws outside of those which are integral to the operation of the Agreement.

Article 5(1) states that “Orders subject to this Agreement shall be issued in compliance with the domestic law of the Issuing Party, and shall be based on requirements for a reasonable justification based on articulable and credible facts, particularity, legality, and severity regarding the conduct under investigation.” Article 5(2) requires that “Orders subject to this Agreement shall be subject to review or oversight under the domestic law of the Issuing Party by a court, judge, magistrate, or other independent authority prior to, or in proceedings regarding, enforcement of the Order.”

Therefore, if a Party to the Agreement were to make changes to their domestic legal framework or reclassify a criminal offence, as long as it complies with domestic legislation of the issuing party and is subject to the review and oversight from an external issuing authority it would remain a valid request and would be complied with.

If one Party to the Agreement were to make substantial changes to their domestic legal framework, such as the introduction of a new of criminal offence or reclassification of an existing criminal offence, to which the other Party takes issue, they have the option to declare it an ‘essential interest’. Under Article 9(4) a Party, unless they have express permission from the other party, cannot use data obtained from an International Production Order relating pursuant to a legal process in regard to the other Party’s essential interest.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Would the Department expect that as a consequence of the proposed Agreement coming into force, people may move their data away from US Covered Providers?

The response to the question is as follows:

The department considers that this is unlikely. This data can already be obtained under Mutual Legal Assistance by Australia, so if persons were concerned about law enforcement access it is likely they would have already moved data away from US Covered Providers. The United Kingdom has already entered into an agreement and the United States has announced commencement of negotiations with Canada and the European Union.

There is a strong history of cooperation with international legal assistance requests and the United States remains the largest global data controller. US providers like Microsoft and Google welcomed the passage of the CLOUD Act by the US Congress in 2018 and have supported the Australian government to negotiate and implement the AUS-US Data Access Agreement.

Based on the department's engagement with them to-date, providers are not expecting a significant impact (if any) on people choosing to use services they provide.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Under Australian legislation (TIA Act), ASIO can apply for Orders on the basis of national security rather than in respect of offences under criminal law, how does this relate to Covered Offences under the proposed Agreement?

The response to the question is as follows:

Article 4.1 of the AUS-US Data Access Agreement requires Orders subject to the Agreement be for the purpose of obtaining information relating to the prevention, detection, investigation, or prosecution of a Covered Offence.

Covered Offence is defined in Article 1.5 as conduct under the law of the issuing party, which constitutes as Serious Crime, including terrorist activity. Serious Crime is defined in Article 1.15 as an offence punishable by a maximum term of imprisonment of at least three years.

ASIO can apply for International Production Orders (IPOs) in connection with the carrying out of its functions. Under section 17 of the *ASIO Act 1979* the functions of the Organisation include: to obtain, correlate and evaluate intelligence relevant to 'security'. Security is defined in section 4 of the ASIO Act as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage;
- (ii) sabotage
- (iii) politically motivated violence
- (iv) promotion of communal violence;
- (v) attacks on Australia's defence system; or
- (vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

The security matters above may encompass activity that is also a criminal offence attracting a term of imprisonment of at least three years, and therefore may be 'Covered Offences' for the purposes of seeking an IPO.

It is anticipated that ASIO could use IPOs for matters relating to counter espionage, counter terrorism or counter foreign interference – all of which are serious crimes.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Does the proposed Agreement in effect limit the purposes for which ASIO can apply for an Order to a subset of the purposes that would otherwise be valid in relation to domestic interception/access under the TIA Act, requiring it to be in relation to the investigation of a Covered Offence?

The response to the question is as follows:

Yes. The Agreement requires all orders be in relation to the investigation of a Covered Offence (an offence punishable by a maximum term of imprisonment of at least three years). The requirement in the Agreement will limit the purposes for which ASIO can apply for an Order under the Agreement to the prevention, detection, investigation, or prosecution of matters that meet the definition of Covered Offence.

This limitation was included to ensure consistency across the purposes of all Orders invoking the Agreement by both Australia and the US.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

A 'Receiving Party Person' includes an unincorporated association with a 'substantial number' of members who are citizens or permanent residents. What is considered a 'substantial number'?

The response to the question is as follows:

The reference to a 'substantial number' within the Agreement reflects a US drafting decision derived from the definition of a "United States Person" within the *Clarifying Lawful Overseas Use of Data (CLOUD) Act 2018* (US). The CLOUD Act defines a United States Person as "a citizen or national of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation that is incorporated in the United States". This definition derives its legislative history from 50 USC § 1801(i) of the *Foreign Intelligence Surveillance Act (FISA) 1978* (US). Representatives from the United States Department of Justice define a 'substantial number' as "a significant proportion, less than a majority". The department has been advised by counterparts at the US Department of Justice that this number is approximately 40 per cent.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

When an Order relates to data in respect of a person outside Australia, the notice requirement replaces the broad definition of 'person' with 'individual'. What is the significance of this definitional change?

The response to the question is as follows:

In respect of Article 5(10), the use of 'individual' is intended to have its ordinary meaning. This paragraph uses 'individual' so to be distinguished from a 'person' under the Agreement, which could unintentionally be conflated with the definition of a 'Receiving Party Person'.

The distinction is made between an 'individual' and a 'person' in Article 5(10) as that Article relates specifically to the targeting of an individual who is not a national, citizen or lawful permanent resident of the issuing country. The notification requirement to third parties is not applicable to elements of the definition of 'Receiving Party Person' under the agreement, such as an unincorporated association of a substantial number of members, or a corporation.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Under the proposed Agreement, would Australia be able to issue an Order that targets a government entity, unincorporated association, or corporation of a third country?

The response to the question is as follows:

Yes.

The targeting restrictions in the Agreement (Article 4) set out requirements for orders, particularly that orders shall not intentionally target a Receiving-Party Person.

A Receiving-Party Person means:

- i. Any governmental entity, including a federal entity or an entity of a political subdivision thereof, of the Receiving Party;
- ii. A citizen or national of the Receiving Party;
- iii. A person lawfully admitted for permanent residence in the Receiving Party;
- iv. An unincorporated association a substantial number of members of which fall into subparagraphs (ii) and (iii);
- v. A corporation that is incorporated in the Receiving Party; or
- vi. A person located in the territory of the Receiving Party.

Australia would be able to issue an order that targets an account controlled by a government entity, unincorporated association, or corporation (or any other person as described in the above list) of a third country where the requested data relates to the prevention, detection, investigation or prosecution of a serious crime in Australia.

These entities would fall under the definition of 'Covered Person' within the Agreement definitions, which is defined as "*a person who, upon application of the procedures required by Article 7.1, is reasonably believed not to be a Receiving-Party Person at the time the Agreement is invoked for an Order pursuant to Article 5.*".

This instance may arise if a government entity, unincorporated association, or corporation is suspected to have committed a Covered Offence under Australian law, in which Covered Data could be used as evidence, which is likely to be held in an account stored with a US Covered Provider.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Have Australia and/or the US adopted targeting and minimisation procedures as yet? What constitutes 'good faith' and 'reasonable' efforts with regard to targeting procedures?

The response to the question is as follows:

Australia has finalised its targeting and minimisation procedures, following consultations with the US. Consultations with the US on its targeting and minimisation procedures have concluded, and the US procedures are close to being finalised.

Requesting agencies must exercise due diligence, using the information reasonably available to them, in conducting their targeting assessments prior to obtaining an order. These agencies vary in significant ways, including their size, the types of matters they investigate, the profile of their targets and the powers and technical capabilities available to them. As such, the Agreement and procedures rely on the established legal principles of 'good faith' and 'reasonableness' to set a common standard, with that standard to be implemented according to each agency's circumstance. The reference to 'good faith, reasonable efforts' makes clear that it is not necessary to be absolutely certain about the identity or location of a target in order to comply with the targeting requirements in the Agreement. For example, 'reasonable' efforts may involve each agency using their available resources and information to determine if there is any information available that they hold around the identity and location of a target. Australia and the US are both instituting oversight mechanisms to ensure requesting agencies comply with the Agreement and targeting procedures, including to assess their reasonableness.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

With regard to the prohibition on transferring data to a third-party government or international organisation, what does 'except to the extent that such data has already been made public in accordance with the Issuing Party's domestic law' mean in practice? Can an example be given for clarification?

The response to the question is as follows:

The Agreement restricts the disclosure of covered data by a Party to the Agreement to third-party countries without the express consent of the other Party. If covered data was to be made public in a manner consistent with the relevant domestic law, for example if it was used as evidence in a public court hearing, then that information would now be in the public domain and would no longer be considered covered data. This means that the data would no longer be subject to restriction under this Agreement and would be able to be shared to a third-party country.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

How would Australia determine its essential interests may be implicated if it is not aware of an Order provided directly to a Covered Provider?

The response to the question is as follows:

The US is required under the Agreement and the Letters of Understanding to notify the Australian Government if Australia's essential interests may be implicated by use of data received under the Agreement.

The issuing of an Order itself, or the provision of data back to the US by a Covered Provider, does not risk the implication of Australia's essential interest. Australia's essential interests will only be engaged if the US seeks to use Australian data in the prosecution of an offence in which the death penalty is being sought, or to support or justify the detention of a current person, or a person nominated, or designated for, detention at Guantanamo Bay, Cuba.

Article 9.4 of the Agreement requires each party to obtain permission to use data that is, or could be, contrary to the other party's essential interests. In addition to these safeguards, Article 11.1 of the Agreement enables the parties to engage in a review of each party's compliance with the Agreement, including reviewing the other party's handling of data acquired pursuant to an Order subject to the Agreement.

This provides both case-by-case assessment and retrospective avenues to determine if Australian essential interests are, or have been, implicated by use of the Agreement.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Would the annual reports of the Designated Authorities be published? If not, in what circumstances would providing aggregate data to a Designated Authority be inconsistent with operational or national security?

The response to the question is as follows:

Part 9 of Schedule 1 to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) outlines the statutory reporting requirements for the International Production Order (IPO) framework. This information will be made public in a report tabled in Parliament by the Attorney-General. The department anticipates that this statutory reporting will comprise much of the Australian Designated Authority's reporting to the US Designated Authority.

The annual reports shared between the Australian and US Designated Authorities under Article 11 of the Agreement will not be published. The intent of the annual reports, reciprocated between each Designated Authority, is to assess each party's compliance with the Agreement and review the practical effectiveness of the Agreement.

Although the department considers it would be exceptional, there may be instances where providing aggregate data to a Designated Authority may be considered inconsistent with operational or national security, but can be appropriately risk managed. This is reflected in domestic legislation.

For example, disclosure of data under Schedule 1 to the TIA Act is not permitted without an exception. Paragraph 153(1)(z) of Schedule to the TIA Act allows the use or disclosure of 'protected information' for the purposes of a designated international agreement. Given the Agreement includes the reporting requirements in Article 11, the sharing of IPO-related data by the Australian Designated Authority to meet reporting obligations is a permitted purpose under Australian legislation. Another example for reference recognises that information about international production orders relating to national security, as set out in Part 4 of Schedule 1 to the TIA Act, is not publicly reported.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Why is it Designated Authorities are not to be provided the detail of Orders issued, only aggregate data?

The response to the question is as follows:

The intent of the annual reports reciprocated between each Designated Authority is to assess each party's compliance with the Agreement including the Targeting and Minimisation Procedures. The annual reports will identify specific instances where further details about an order will be required. Both parties will be able to request and provide additional information to the Designated Authority about information contained in the reports. Aggregate data is considered sufficient for this purpose.

The review, referred to in Article 11, will focus on the procedural and other requirements contained in the Agreement with a focus on determining whether procedures adopted under this Agreement need to be amended.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Is it possible Australia would not know of Orders issued to Australian Covered Providers, even in an aggregated sense, if US authorities are of the view it would not be consistent with operational or national security?

The response to the question is as follows:

Schedule 1 to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) outlines Australia's annual reporting requirements for international production orders (IPOs) sent by Australia to US Prescribed Communications Providers. These annual reporting requirements only relate to IPOs for enforcement of the criminal law and for Part 5.3 Supervisory Orders. National security IPOs will not be reported on publicly.

The reporting between the Designated Authorities, under Article 11 is being finalised with the US Department of Justice (DOJ). The department expects to use the statutory reporting set out in the TIA Act as the foundation of the Australian Designated Authority's reporting to the US DOJ with additional reporting that goes to Australia's compliance with the terms of the Agreement including the targeting and minimisation procedures. The department would expect to see equivalent reporting from the DOJ so the department can understand the full suite of orders being given to Australian providers.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

How many of the 1,000 requests between 2007 and 2020 were delayed and/or declined due to US concerns about protections for freedom of speech in Australia—as highlighted in the side letter to the proposed Agreement?

The response to the question is as follows:

The International Crime Cooperation Central Authority does not collect this data. While some mutual legal assistance requests have previously been delayed or declined due to US concerns about freedom of speech, anecdotal information indicates that the volume of these delayed or declined requests is low.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

Between 2007 and 2020 under the MLAT process, the RIS states Australia received fewer than 30 requests for the types of data that would be provided for under the proposed Agreement. The RIS also states under the proposed Agreement, this number would be lower due to the proposed Agreement's targeting restrictions. Can you explain how targeting restrictions would reduce the number of requests for data from Australian providers issued by US law enforcement authorities?

The response to the question is as follows:

The RIS outlines that of the 30 requests, 'not all would be permitted to be served under the new Agreement due to the... targeting restrictions'. This is because the targeting restrictions prevent the US from invoking the Agreement in respect of an order that targets an Australian Receiving Party Person (Article 4(3)). Under Article 1 of the Agreement, a Receiving Party Person means '(i) any governmental entity, including a federal entity or an entity of a political subdivision thereof, of the Receiving Party; (ii) a citizen or national of the Receiving Party; (iii) a person lawfully admitted for permanent residence in the Receiving Party; (iv) an unincorporated association a substantial number of members of which fall into subparagraphs (ii) or (iii); (v) a corporation that is incorporated in the Receiving Party; or (vi) a person located in the territory of the Receiving Party.' Article 7(1) outlines that each party shall adopt and implement appropriate targeting procedures, through which good-faith, reasonable efforts shall be employed to establish that any Account targeted by an Order is used or controlled by a 'Covered Person' (that is a person reasonably believed not to be a Receiving-Party Person).

Where any requests relate to the electronic data of Australian Receiving Party Persons, they could not be made under this Agreement and would still need to proceed via the mutual legal assistance process.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

The definition of 'serious crime' is listed as a crime with a penalty of at least three years imprisonment; this threshold has been criticised for being too low. Crimes like terrorism and child exploitation are often used as examples for the need for this agreement but carry much higher penalties. What was the rationale behind this definition and is it in line with other understandings of 'serious crime'?

The response to the question is as follows:

The definition of Serious Crime in the AUS-US Agreement is consistent with Australian domestic law.

The offence thresholds for obtaining international production orders (IPOs) are closely modelled on the existing offence thresholds in the *Telecommunications (Interception and Access) Act 1979* (TIA Act). The definition of Serious Crime given in Article 1.15 of the Agreement mirrors that of Serious Category 1 offence given in Clause 2 of Schedule 1 to the TIA Act. A Serious Category 1 Offence in Schedule 1 is consistent with 'Serious Contraventions' as described in Section 5E of the TIA Act.

For interception IPOs, a Serious Category 2 Offence is defined as a 'serious offence' as set out in section 5D of the TIA Act, or an offence that is punishable by a maximum term of imprisonment of 7 years or more, or life.

The definition is also consistent with the UK-US Agreement.

The department notes that Article 3 of the *Mutual Assistance in Criminal Matters Act 1987* defines a serious offence as one for which the maximum penalty is death, imprisonment for a period exceeding 12 months.

Joint Standing Committee on Treaties

Attorney-General's Department

Hearing date: 14 September 2022

Question date: 15 September 2022

The Committee asked the following question:

What are the possible implications of an agreement of this nature in terms of having the definition of 'serious crime' so broad and for future data exchange agreements? Is this setting a precedent for future agreements of a much lower threshold?

The response to the question is as follows:

Article 5(1) of the Agreement requires orders subject to this Agreement to be issued in compliance with the domestic law of the Issuing Party. The offence thresholds for obtaining International Production Orders (IPOs) are closely modelled on the existing offence thresholds in the *Telecommunications (Interception and Access) Act 1979* (TIA Act). For example, the Agreement's definition of Serious Crime mirrors that of Serious Contravention outlined in Section 5E of the TIA Act.

The definition of serious crime in the Agreement acts as the minimum bar offences must meet for an Order to invoke the Agreement.

The Agreement also mirrors the definition of serious crime contained in the similar UK-US Agreement. This indicates that there is broad consensus on this definition of serious crime as it is applied in each country's domestic context.

There are currently no plans to pursue negotiations with other countries. Based on the successful implementation of this Agreement, the Australian Government might wish to explore other agreements in the future. Any future agreement would be subject to negotiation with the other party, but it is likely the department would look to mirror the threshold set out in the AUS-UK agreement, consistent with Australian domestic thresholds.