



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation  
Parliament House, Canberra ACT 2600  
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12 November 2020

The Hon Peter Dutton MP  
Minister for Home Affairs  
Parliament House  
CANBERRA ACT 2600

Via email: [Peter.Dutton.MP@aph.gov.au](mailto:Peter.Dutton.MP@aph.gov.au)

CC: [dlo@homeaffairs.gov.au](mailto:dlo@homeaffairs.gov.au)

Dear Minister,

**Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2019 [F2020L01141]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Scope of administrative powers***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

The instrument repeals and replaces the Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2018 (2018 instrument) to reflect a restructure of the Department of Home Affairs (department).

Section 5 of the instrument provides that certain individuals in the department, including certain Executive Level 1 and 2 employees, are specified as a Communications Access Co-ordinator, for the purposes of subsection 6R(2) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act). This appears to have the effect of enabling such individuals to exercise a range of significant powers and functions under the TIA Act and the *Telecommunications Act 1997*.

Where an instrument delegates functions or powers, the committee generally expects that the scope and purpose of those powers should be clearly explained on the face of the instrument or in the explanatory statement. The committee also generally expects that



such delegation should be restricted to members of the Senior Executive Service or, at a minimum, that the relevant persons have appropriate qualifications and expertise.

In this instance, the explanatory statement to the instrument does not provide any information as to the scope of the powers and functions that will be performed by the individuals specified as a Communications Access Co-ordinator under the instrument, nor does it outline any relevant qualifications or expertise they are required to possess.

**The committee therefore requests your advice as to:**

- **what functions and powers will be, or have been, performed or exercised by individuals specified as a Communications Access Co-ordinator under section 5 of the instrument;**
- **what qualifications and expertise individuals specified as a Communications Access Co-ordinator under section 5 of the instrument are required to possess; and**
- **what functions and powers individuals specified as a Communications Access Co-ordinator under section 5 of the instrument may further subdelegate (if any).**

***Compliance with Legislation Act 2003—registration of instrument***

In addition, Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) with regard to the registration of legislative instruments.

Subsection 15G(1) of the Legislation Act provides that a rule-maker must lodge a legislative instrument for registration as soon as practicable after its made. Subsection 15K(1) further provides that a legislative instrument is not enforceable by or against any person unless the instrument is registered as a legislative instrument.

In this instance, the instrument was made on 1 July 2019; however it was not registered on the Federal Register of Legislation until 7 September 2020. As a result, pursuant to section 2 of the instrument, the instrument commenced at the start of the day on 8 September 2020 and therefore did not have effect prior to that time. As a result, the 2018 instrument was also not repealed and replaced until this time.

In the absence of further information in the explanatory materials, it is unclear why the registration of the instrument was delayed and, accordingly, how this complies with the requirements of subsection 15G(1) of the Legislation Act. In addition, it is unclear whether any functions were performed or powers were exercised pursuant to the instrument prior to it being registered.

**The committee would therefore appreciate your advice as to:**

- **why the registration of the instrument was delayed by approximately 14 months; and**

- **whether each individual who performed the functions or exercised the powers of a Communications Access Co-ordinator in the period between 1 July 2019 and 7 September 2020 were authorised to do so under the 2018 instrument.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator ~~the~~ Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**



**THE HON PETER DUTTON MP  
MINISTER FOR HOME AFFAIRS**

Ref No: MS20-002942

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the  
Scrutiny of Delegated Legislation  
Parliament House  
Canberra ACT 2600

*Connie,*  
Dear Chair,

I refer to your letter of 12 November 2020 seeking my advice on the *Telecommunications (Interception and Access) (Communications Access Co-ordinator Instrument 2019 [F2020L01141] (CAC Instrument)*.

Please see below my responses to the Committee's questions.

**First Question**

***What functions and powers will be, or have been, performed or exercised by individuals specified as a Communications Access Co-ordinator (CAC) under section 5 of the instrument?***

The functions of the Communications Access Co-ordinator (CAC) transferred from the Attorney-General's Department to the Department of Home Affairs (the Department) in May 2018. Since then, the functions of the CAC have been carried out by the same two areas of the Department, namely, the Office of the Communications Access Coordinator (OCAC) within the National Security Policy Branch and the Critical Infrastructure Centre (CIC) within the Telecommunications and Technology Branch.

**National Security Policy Branch**

Functions exercised by a CAC within OCAC relate to the following decisions:

- interception capability obligations (see sections 192, 196, 197, 198, 202 and 203) under the *Telecommunications (Interception and Access) Act 1979* (TIA Act)
- data retention obligations (see sections 183 and 187) under the TIA Act
- carrier licence applications (see sections 56 and 58) under the *Telecommunication Act 1997* (Telco Act)



The CAC powers exercised by OCAC generally relate to high-volume decisions. These include approving interception capability plans, exemptions or variations from data retention obligations and consulting law enforcement and national security agencies on carrier licence applications.

OCAC consults interception agencies (primarily ASIO) on all decisions and relies on their technological expertise and knowledge of the law enforcement/national security space to inform CAC decisions.

Complex or sensitive decisions, such as those involving decisions to delay the issue of a carrier licence, are referred to an SES Band 1 decision-maker to ensure decisions that are detrimental to an applicant have additional oversight.

All decisions are managed through the Department's 'Customer Relationship Manager' system and recorded in TRIM.

### Telecommunications and Technology Branch

Functions exercised by the CAC within the CIC relate to the following decisions:

- notification obligations (see section 314A) under the Telco Act

The notification is reviewed internally by a technical Subject Matter Expert (SME) with expertise and experience in cybersecurity and risk management, in close consultation with security agencies. The SME then documents an overall technical threat assessment based on a combination of the security agency input and his/her own evaluation before drafting advice to the CAC for approval. The draft advice is reviewed by the EL1 & EL2, before it is progressed to the Communications Access Co-Ordinator (SES Band 1) for review and approval.

### **Second Question**

***What qualifications and expertise individuals specified as a Communications Access Co-ordinator under section 5 of the instrument are required to possess?***

There is significant on-the-job training, mentoring and policy guidance in order to ensure all CACs are appropriately qualified to perform the functions and make decisions relevant to CAC-related tasks assigned administratively to their classification level. In assigning CAC-related functions to particular classification levels, based on the CAC instrument, the Department has had regard to the Australian Public Service Commission's APS Work level standards, and Integrated Leadership System. In addition, sections 25 to 29 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) set out the general duties that apply to officials that requires all officials to meet high standards of governance, performance and accountability.

In order to support CACs in carrying out their functions, both the National Security Policy Branch and the Telecommunications and Technology Branch have guides and standard operating procedures in place detailing the processes required for making CAC decisions.

### Third Question

**What functions and powers individuals specified as a Communications Access Co-ordinator under section 5 of the instrument may further subdelegate (if any)?**

Under the TIA Act, a CAC is defined as the Secretary of the Department of Home Affairs or a person or body specified by the Minister in a legislative instrument to be a CAC. There is no power for either the Secretary or a person specified by the Minister to further delegate their powers or functions.

### Fourth Question

**Why the registration of the instrument was delayed by approximately 14 months?**

The vast majority of delegation and authorisation instruments prepared and finalised in the Department are administrative instruments, and do not require registration on the Federal Register of Legislation (FRL). The CAC Instrument was prepared, signed by the Minister, and returned to the Department as part of a package of delegation and authorisation instruments required to give effect to major structural changes in the Department at that time. Unfortunately, when the instruments were returned to the Department, the unique nature of the CAC Instrument as a legislative instrument, and the need for it to be registered on the FRL, was overlooked by the area receiving the signed instruments. The failure to register the CAC Instrument did not become apparent until June 2020 when drafting was underway on the 2020 Amendment Instrument, resultant from further restructuring.

Measures are now in place to ensure that, in the future, officers responsible for preparing and finalising delegation and authorisation instruments are aware that the CAC authorisation instrument is a legislative instrument, that the Minister must approve an Explanatory Statement for it, and both documents must be registered on the FRL.

### Fifth Question

**Whether each individual who performed the functions or exercised the powers as a Communications Access Co-ordinator in the period between 1 July 2019 and 7 September 2020 were authorised to do so under the 2018 instrument?**

All individuals who exercised powers or functions as a CAC during this period were authorised to do so by the 2018 Instrument. All such individuals carried out CAC functions in Branches of the Department named in the 2018 instrument. The names of those two Branches have not changed since 2018.

Yours sincerely

PETER DUTTON

02/12/20



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22 January 2021

The Hon Peter Dutton MP  
Minister for Home Affairs  
Parliament House  
CANBERRA ACT 2600

Via email: [dlo@homeaffairs.gov.au](mailto:dlo@homeaffairs.gov.au)

Dear Minister,

**Telecommunications (Interception and Access) (Communications Access Co-ordinator)  
Instrument 2019 [F2020L01141]**

Thank you for your response of 2 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 22 January 2021. On the basis of the advice that all powers were exercised validly under the 2018 instrument and that none of the powers delegated via the instrument may be further subdelegated, the committee has concluded its examination of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation