

New state powers for computer and data examination and seizure in New South Wales introduced together with covert search powers

Amendments to the Law Enforcement (Powers and Responsibilities) Act 2002

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New state powers to examine and seize computer equipment and data in New South Wales have been introduced together with covert search powers. The powers allow those executing covert search warrants to go to extraordinary lengths to conceal the execution of a warrant raise significant privacy concerns for private and commercial clients alike. Practitioners and clients should be aware of these important developments and the impact that the developments will have upon clients' rights.

Introduction and summary

Recent amendments to the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA) contained within the Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009 (NSW) create new powers in New South Wales for computer and data examination and seizure. The amendments commenced on 29 May 2009 and permit the removal of computers and similar devices from premises named on a search warrant for up to 7 days for examination, or longer on application. The amendments also create new powers to operate equipment at the premises the subject of the warrant to access data that may be seized under the warrant. Importantly, this includes networked computers at premises other than those at the premises named on the warrant. The new powers are similar to existing

powers under Commonwealth legislation, but are being introduced simultaneously with new New South Wales covert search powers. Under some circumstances, the new computer and data examination and seizure powers may be used in conjunction with the new covert search powers. Clients whose interests will, or have been the subject of computer or data examination or seizure under LEPRA, pursuant to an ordinary or covert warrant, should obtain legal advice as soon as they become aware of the fact.

This article sets out the offences to which the new computer powers relate and outlines the differing processes for obtaining ordinary search warrants, and covert search warrants. The article then examines the new computer and data examination and seizure powers, before noting the differences in the requirements for notices to occupiers under the

ordinary and covert search warrant regimes. The article concludes by making some observations regarding the operation of the new powers.

Offences to which new computer powers relate

The computer and data examination and seizure powers apply to warrants for various offences defined by LEPRA as a "searchable offence", including:¹

- (a) indictable offences;
- (b) some firearms or prohibited weapons offences;
- (c) some narcotics offences;
- (d) some child pornography offences and publication of obscene article offences;
- (e) an offence involving a thing being stolen or otherwise unlawfully obtained; and

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(f) some child prostitution offences.

The amendments also create a new category of search warrants described as covert search warrants. Covert warrants may also be issued in respect of the new examination and seizure of computer equipment and data powers, where the suspected offence is a “searchable offence” which is also a “serious offence” as defined by LEPRA.

Broadly, a “serious offence”² is an indictable offence punishable by imprisonment for a period of 7 or more years and which involves conduct set out in Box 1 below.

Covert search warrants are covert in the sense that the officer executing the warrant may:³

- (a) conduct the entry and search of the premises without the knowledge of any occupier of the premises;
- (b) if necessary enter and search the subject premises, enter premises adjoining the subject premises, or premises providing access to the subject premises – without the knowledge of the occupier of the premises not being

searched;

(c) impersonate another person for the purposes of executing the warrant; and

(d) do “anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant” from the occupier of the subject premises.⁴

Process for obtaining search warrants

An ordinary search warrant for computer and data examination and seizure may be obtained by a police officer, upon application to an “authorised officer”, defined as:⁵

- (a) a Magistrate or Children’s Magistrate;
- (b) a Registrar of a Local Court; or
- (c) an authorised employee of the Attorney General’s Department.

The police officer must believe on reasonable grounds that there is, or within 72 hours will be, a thing connected with a “searchable offence” on the premises.⁶ If the authorised officer is satisfied that there are reasonable grounds for the issuing of a warrant, he or she

may do so.⁷

Applications are to be made in person, except where the authorised officer is satisfied that the warrant is required urgently, and that it is not practicable for the application to be made in person.⁸ Under such circumstances, applications may be made by telephone, or by any other communication device, for example by radio or facsimile.⁹ There are criminal sanctions contained in LEPRA for a person who gives information to an authorised officer in connection with an application for a warrant that the applicant knows to be false or misleading.¹⁰

Practitioners should be aware that the authorised officer is not to issue a warrant if the warrant application does not comply with certain formal requirements.¹¹ Practitioners whose clients are subject to search warrants for computer examination and seizure should ascertain whether the formal requirements have been complied with.

When determining a warrant application, in addition to any other considerations, the authorised officer is to consider.¹²

Box 1: Serious offences for which a covert search warrant may be issued

1 Supply, manufacture or cultivation of drugs or prohibited plants	10 Possession, sale or manufacture of firearms
2 Money laundering	11 Car or boat rebirthing
3 Unauthorised access to or modification or impairment of computer data or electronic communications	12 An activity involving theft carried out on an organised basis
4 Grievous bodily harm or wounding	13 Possession, manufacture or supply of false instruments
5 Corruption	14 Destruction of property
6 Homicide	15 Kidnapping
7 Rape or sexual assault	16 Sexual servitude
8 Possession, supply or manufacture of explosives	17 Child prostitution or pornography
9 Possession of data with intent to commit a serious computer offence, or producing, supplying or obtaining data with intent to commit a serious computer offence	18 Attempting to commit, or conspiring or inciting to commit, or aiding or abetting an offence referred to in 1 to 17 above

- (a) the reliability of the information upon which the application is based, including the nature of the source of the information; and
- (b) if the warrant is sought to search for a thing in relation to an alleged offence, whether there is sufficient connection between the thing sought and the offence.

When faced with a prosecution in which material obtained on warrant is sought to be adduced as evidence, practitioners should ascertain whether the authorised officer has adequately considered these factors. Where material is obtained on a warrant which is not issued in accordance with LEPR, a Court may exercise its discretion under section 138 of the Evidence Act 1995 (NSW) to exclude the material on the basis that it has been improperly or illegally obtained.

It is worth noting that Commonwealth equivalents of the new New South Wales computer and data examination and seizure powers have existed for some time. The Commonwealth equivalents are contained within sections 3K and 3L of the Crimes Act 1914 (Cth) and may be exercised in relation to a thing relevant to an indictable offence, or a thing relevant to a summary offence. In this sense, the Commonwealth powers are arguably more broadly applicable than the new New South Wales powers.

Process for obtaining covert search warrants

The process for obtaining a covert search warrant differs to that for obtaining an ordinary search warrant. An application for a covert warrant may be made by an "eligible applicant", being:¹³

- (a) a police officer authorised to make the application by a police officer holding the rank of Superintendent or above;

- (b) the Commissioner or an Assistant Commissioner for the Police Integrity Commission or a member of staff of the Police Integrity Commission authorised to make the application by the Commissioner or an Assistant Commissioner; or
- (c) the Commissioner or an Assistant Commissioner for the New South Wales Crime Commission or a member of the staff of the New South Wales Crime Commission authorised to make the application by the Commissioner or an Assistant Commissioner.

An authorisation to apply for a covert search warrant can only be made if the person giving the authorisation:¹⁴

- (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing connected with a searchable offence; and
- (b) considers that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier.

Covert search warrants may only be issued by a Judge of the Supreme Court of New South Wales, who has consented to be appointed an eligible Judge by the NSW Attorney-General under the LEPR, and declared by the NSW Attorney-General to be an eligible Judge under the LEPR.¹⁵ An eligible applicant who proposes to search premises covertly may apply to an eligible Judge if the applicant:¹⁶

- (a) suspects on reasonable grounds that there is, or within 10 days will be, in or on the premises a thing connected with a searchable offence; and
- (b) considers that it is necessary for the entry and search of those premises to be conducted

without the knowledge of any occupier.

A Judge must not issue a covert search warrant unless the same formal requirements for the issue of an ordinary search warrant are complied with.¹⁷ In addition, an application for a covert search warrant must contain certain other information.¹⁸ Practitioners whose clients are affected by the execution of a covert search warrant should familiarise themselves with these formal requirements. Non-compliance may give rise to a ground for setting aside the warrant, may provide grounds upon which to exclude any material obtained from being admitted as evidence in any subsequent proceeding, and in some circumstances, may give rise to a cause of action for any damages resulting from an illegal search.

In determining whether reasonable grounds exist to issue a covert warrant, a Judge must consider those matters that are required to be considered in any application for the issue of an ordinary warrant.¹⁹ In addition, a Judge is to consider:²⁰

- (a) the "extent to which it is necessary"²¹ for the entry and search to be conducted without the knowledge of any occupier of the premises;
- (b) the nature and gravity of the offence in respect of which the warrant is sought;
- (c) the extent to which the privacy of a person who is not believed to be "knowingly concerned" in the commission of the searchable offence is likely to be affected if the warrant is issued;
- (d) whether any conditions should be imposed on the execution of the warrant; and
- (e) if premises adjoining or providing access to the subject premises are to be entered for

the purpose of entering the subject premises:

- (i) whether it is reasonably necessary to enter the adjoining premises in order to enable access to the subject premises; or
- (ii) whether it is reasonably necessary to enter the adjoining premises in order to avoid compromising the investigation of an offence.

The use of the words “extent to which it is necessary” contained in section 62(4) LEPRA is problematic. The subsection does not prescribe a level of satisfaction to be met in determining whether to issue a covert search warrant. It will be left to the issuing Judge to consider the level of satisfaction that he or she must attain in deciding whether or not to issue a covert search warrant – without the benefit of submissions from any party other than that applying for the warrant to be issued.

Another aspect of the covert search warrants powers which is problematic is the ambiguity in relation to the impersonation power in section 47A(2) LEPRA. It is not entirely clear whether that subsection authorises an executing officer to impersonate another person for the purpose of executing the warrant only during the search on the subject premises, or whether it also authorises impersonation during any entry onto adjoining premises. Such an ambiguity clearly has the potential to adversely impact upon the rights of innocent third parties during the execution of a covert search warrant, and practitioners should keep aware of developments to this aspect of the LEPRA.

Applications for covert search warrants are to be dealt with in the absence of the public.²² As is the case with ordinary forms of search warrants, applications are to be made in person, except where the eligible Judge is satisfied that the warrant is required urgently, and

that it is not practicable for the application to be made in person.²³ Under such circumstances, applications may be made by telephone, or any other communication device, for example by radio or facsimile.²⁴ Criminal sanctions also apply to a person who gives false or misleading information to an authorised officer in connection with an application for a covert search warrant that the applicant knows to be false or misleading.²⁵

Power to operate equipment at premises and remove for examination – new section 75A

Section 75A LEPRA contains the new power to search and remove electronic and computer equipment. That section enables a person executing or assisting in the execution of a search warrant to bring any electronic equipment and other equipment to a premises named on a warrant reasonably necessary to examine something found at the premises to determine whether the item found is something that may be seized under the warrant. The person executing or assisting execution of the warrant may also use equipment already at the premises to search something found at the premises. The item found at the premises may be moved to another place for up to 7 days for the purpose of examining the item to determine whether it is something that may be seized under the warrant, or contains a thing that may be seized under the warrant, where -

- (a) the occupier consents, or if:
- (b) it is significantly more practicable to remove the thing having regard to the timeliness and cost of examining the thing at the premises, and the availability of expert assistance; and
- (c) there are reasonable grounds to suspect the thing is, or contains a thing that may be searched under the warrant.

The equivalent Commonwealth legislation allows an item to be removed for the purposes of examination to ascertain whether it is something that may be seized under a warrant for a period of only 72 hours - which is considerably shorter than the 7 days allowed under LEPRA.²⁶

If it cannot be ascertained whether the item removed is, or contains something that may be seized under the warrant, application to extend the period for which the thing may be examined off the premises may be made to:²⁷

- (a) a Magistrate or a Children’s Magistrate;
- (b) a Registrar of a Local Court;
- (c) an authorised employee of the Attorney General’s Department; or
- (d) in the case of a covert search warrant, a Supreme Court Judge, appointed by the Attorney-General for that purpose.²⁸

If an additional period is required to determine whether the item is or contains something that may be seized under the warrant, the time for which the item may be removed may be extended upon application, for periods of up to 7 working days at a time. Again, this is substantially longer than the equivalent Commonwealth provision which allows time to be extended by a maximum of 72 hours at a time.²⁹ An extension of time which exceeds more than 28 days in total is only to be made under exceptional circumstances.³⁰

Power to access and download data from computers including access to computers located off premises named on a warrant – new section 75B

Section 75B LEPRA allows a person executing or assisting with the execution of a warrant to operate equipment at the premises the subject of the warrant to access data (including data held at

premises other than the subject premises) if the person believes on reasonable grounds that the data might be data that could be seized under the warrant. The section also allows a person to copy accessed data to a device and remove the copy from the premises for examination to determine whether the accessed data is data that can be seized under the warrant. The person may operate equipment in such a way as to put the accessed data into documentary form and those documents may be seized. If it is not possible to remove a copy of accessed data from the premises, or possession of the equipment or device could constitute an offence, the equipment containing the accessed data may be seized. Data that is copied or seized and subsequently determined not to be data which comes within the terms of a warrant must be removed from any device to which it has been copied, and any other copy destroyed.³¹

The equivalent Commonwealth legislation is broadly similar in terms and effect.³²

Notice to occupier need not be served for up to 3 years

A person executing an ordinary search warrant must serve an occupier's notice on a person who appears to be an occupier of the premises and to be at least 18 years of age, upon or as soon as practicable after entry onto the premises.³³ If there is no such person present, a person executing a warrant must serve the occupier's notice on the occupier within 48 hours after executing the warrant.³⁴ If this cannot be achieved, the person executing the warrant may seek orders for substituted service.³⁵

To maintain the secrecy of a covert search warrant, service of notice on the occupier of premises subject to a covert search warrant may be delayed. The maximum period of delay in service is up to 3 years, but only under exceptional

circumstances.³⁶ Service of notice on any occupier of premises adjacent to premises subject to a covert search warrant is not required to be effected until notice has been served on the occupier of the subject property, and may be dispensed with upon direction of the issuing Judge.³⁷

Concluding remarks

The new computer powers and the covert search warrants contained in LEPR raise a number of significant issues for practitioners and clients. The major criticisms that can be made of the safeguards to clients' interests in the amendments to LEPR relate to the lack of a specific compensation regime for any damage to computer or other equipment occasioned by an examination or seizure under the new powers. The equivalent Commonwealth legislation contains a specific regime to enable compensation to be paid to the owner of the equipment which is damaged, where the damage is caused as a result of:³⁸

- (a) insufficient care being exercised in selecting who was to operate the equipment; or
- (b) insufficient care being exercised by the person operating the equipment.

There is also an inherent problem faced by clients in the case of covert warrants. Damages resulting from an illegal search will not be easily assessed for breaches of privacy, or relevantly to commercial clients, for subsequent reputational loss. Privacy breaches may be of limited direct concern to commercial clients, but their own customers, investors, or commercial partners may object to the disclosure of those parties' information during the pursuit of an unrelated (in the case of mistake) or tangentially related third party. In such circumstances, the client will have to pursue any damages claim

against New South Wales police in the ordinary way.

The LEPR contains provisions which require the Ombudsman to inspect the records of the New South Wales Police Force in relation to covert search warrants and report annually to the Attorney-General and the Minister for Police on his or her activities.³⁹ Relevantly, the Commissioner for Police must also report to the Minister for Police and the Attorney-General annually on the exercise of powers in relation to covert search warrants by police officers⁴⁰. Such reports are an important step in maintaining administrative oversight of the new powers. However, the potential impacts of the new LEPR powers are significant. Clients whose interests will, or have been the subject of computer or data examination or seizure under LEPR, pursuant to an ordinary or covert warrant, should obtain legal advice as soon as they become aware of the fact.

¹ Section 46A LEPR

² See section 46A LEPR

³ Section 47A(2) LEPR

⁴ Section 47A(2)(d) LEPR

⁵ Sections 75A and 3 LEPR

⁶ Section 47(1) LEPR

⁷ Section 48(1) LEPR

⁸ Section 60 LEPR

⁹ Section 61 LEPR

¹⁰ Section 63(1) LEPR. The maximum penalty is 100 penalty units, or imprisonment for 2 years, or both.

¹¹ See section 62(1) LEPR for the information to be included in a warrant application. A warrant application must also be in the form prescribed by the regulations: section 60(1) LEPR.

¹² Section 62(3) LEPR

¹³ Section 46C LEPR

¹⁴ Section 46C(2) LEPR

¹⁵ See section 46B LEPR

¹⁶ Section 47(3) LEPR

¹⁷ Section 62(1) LEPRA

¹⁸ See section 62(2) LEPRA and section 66 LEPRA

¹⁹ Section 62(3) LEPRA. The use of the words "extent to which it is necessary" is discussed below.

²⁰ Section 62(4) LEPRA

²¹ Section 62(4)(a) LEPRA

²² Section 76A LEPRA

²³ Section 60 LEPRA

²⁴ Section 61 LEPRA

²⁵ Section 63(1) LEPRA. The maximum penalty is 100 penalty

units, or imprisonment for 2 years, or both. The maximum penalties are the same as those that apply in relation to false or misleading information in an application for an ordinary search warrant.

²⁶ Section 3L *Crimes Act 1914* (Cth)

²⁷ Sections 75A and 3 LEPRA

²⁸ Sections 46 and 46B LEPRA

²⁹ Section 3L *Crimes Act 1914*

³⁰ Section 75A LEPRA

³¹ Section 75B(6) LEPRA

³² See section 3L *Crimes Act 1914*

³³ Section 67(4)(a) LEPRA

³⁴ Section 67(4)(b) LEPRA

³⁵ Section 67(5) LEPRA

³⁶ Section 67A LEPRA

³⁷ Section 67A(4) LEPRA

³⁸ Section 3M *Crimes Act 1914*

³⁹ Section 242 LEPRA

⁴⁰ Section 242A LEPRA

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- the detection of fraudulent emails;
- the litigation against iiNet alleging copyright infringement; and
- the Australian Government's review of options for reforming the existing telecommunications regime.