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AUSTRALIA

TERRORISM LAWS: CONTROL ORDERS

Executive Summary

Australia has the legislative basis for Control Orders, which are used to impose obligations, prohibitions, or restrictions on persons as deemed necessary to protect the public from terrorist acts. Control Orders may be requested by the Australian Federal Police and are issued by a court. The procedures governing Control Orders, the types of controls that may be imposed, and applicable time frames are set forth in the Criminal Code Act. An initial Interim Control Order, issued with the Attorney-General's consent, only becomes a Confirmed Control Order upon the court's approval, following a hearing at which the subject of the order is allowed to rebut the evidence. The Act provides streamlined procedures for urgent circumstances.

A Control Order is a court order that places obligations, prohibitions, or restrictions upon a person for the purpose of protecting the public from an act of terrorism.¹ The issuance and use of these orders is governed by the Criminal Code Act 1995 (Cth).² The constitutionality of Control Orders was unsuccessfully challenged in the High Court of Australia.³

I. Issuance of Control Orders

The Australian Federal Police (AFP) may seek a Control Order,⁴ which is issued via a two-step process. Firstly an Interim Control Order is made, specifying a date on which the subject of the order must attend court, where the order may be confirmed, voided, or revoked.⁵ Where an Interim Control Order is confirmed it is a Confirmed Control Order.⁶

¹ Criminal Code Act 1995 (Cth) § 104.1. Further information on Australian Control Orders is available in BRONWEN JAGGERS, ANTI-TERRORISM CONTROL ORDERS IN AUSTRALIA AND THE UNITED KINGDOM: A COMPARISON, Research Paper no. 28 2007-08 (Law and Bills Digest Section, Australian Parliamentary Library, Apr. 29, 2008), available at http://www.aph.gov.au/library/pubs/RP/2007-08/08RP28.htm#_Toc197240523 (last visited Aug. 29, 2008).

² Criminal Code Act 1995 (Cth) Division 104.1.

³ Thomas v. Mowbray [2007] HCA 33 (2 Aug. 2007).

⁴ Criminal Code Act 1995 (Cth) §§ 104.2, 104.3.

⁵ Criminal Code Act 1995 (Cth) § 104.5(1)(e).

⁶ *Id.* § 104.15(3).

To obtain an Interim Control Order a “senior member” of the AFP⁷ must obtain the consent of the Attorney-General and apply to an Issuing Court.⁸

To obtain the Attorney-General’s consent the AFP must provide the Attorney-General with a draft of the proposed Interim Control Order and include a statement of relevant facts (including information about any previous Control Orders or preventative detentions of the subject of the order); an explanation of each obligation, prohibition, and restriction within the Control Order; and a summary of the grounds for the basis of the order.⁹

In instances of “urgent circumstances” an AFP member may, prior to obtaining the consent of the Attorney-General, request that the Issuing Court issue an urgent Interim Control Order.¹⁰ However the Attorney-General’s consent to the Interim Control Order must be obtained within four hours of the order being made or the Interim Control Order ceases to be valid,¹¹ and within 24 hours of the order being made the AFP must provide written evidence of the Attorney-General’s consent to the Issuing Court.¹²

An Issuing Court is the Federal Court of Australia, the Federal Magistrates’ Court of Australia, or the Family Court of Australia.¹³ The Issuing Court must, on the balance of probabilities, be satisfied that the Control Order would substantially assist in preventing a terrorist attack, or that the subject of the Control Order provided training to or received training from a terrorist organization.¹⁴ The court must also, on the balance of probabilities, be satisfied that each obligation, prohibition, or restriction is reasonably necessary and appropriate to protect the public from a terrorist act.¹⁵

An Interim Control Order is not operational until it is served by the AFP personally on the subject of the order.¹⁶

At least 48 hours before the court date specified in the Interim Control Order, the Senior AFP Member who requested the Interim Control Order must elect whether or not to seek a Confirmed Control Order.¹⁷ Notification of the Senior AFP Member’s decision must be provided to the Issuing Court and the subject.¹⁸ If the Senior AFP Member elects not to seek confirmation of the order the Interim Control Order ceases to exist and the Senior AFP

⁷ A senior AFP member means the Commissioner or Deputy Commissioner of the Australian Federal Police, or an Australian Federal Police member of or above the rank of Superintendent. Criminal Code Act 1995 (Cth) § 100.1.

⁸ Criminal Code Act 1995 (Cth) § 104.2, 104.3. An Issuing Court is the Federal Court of Australia, the Family Court of Australia, or the Federal Magistrates Court. Criminal Code Act 1995 (Cth) § 100.1.

⁹ *Id.* § 104.2(3).

¹⁰ *Id.* §§ 104.6-104.9.

¹¹ *Id.* § 104.10.

¹² *Id.* §§ 104.6(4), 104.7(5), 104.9(3).

¹³ *Id.* § 100.1.

¹⁴ *Id.* § 104.4(1).

¹⁵ *Id.* § 104.4(1).

¹⁶ *Id.* § 104.5(d).

¹⁷ *Id.* § 104.12A.

¹⁸ *Id.* § 104.12A(2).

Member must notify the subject of the order of its cessation by annotating the order with notification of its cessation and serving the annotated order on the subject.¹⁹

When seeking a Confirmed Control Order the AFP must notify the subject of the order and provide them with a statement of facts justifying the order and (if known by the AFP) any facts against the order, as well as an explanation of the obligations or prohibitions, and any other information necessary to enable the subject to understand and respond to the facts that are the basis for the order.²⁰ The AFP is not, however, obliged to provide any document that would prejudice national security or be protected by public interest immunity, or that would put at risk either the safety or operations of law enforcement or intelligence officers.²¹

After consideration of all adduced evidence the court may: (1) declare the order void on the basis that there are no grounds to make the order;²² (2) revoke the order on the basis that the court is not, on the balance of probabilities, satisfied that making the order would substantially assist in preventing a terrorist attack, or satisfied, on the balance of probabilities, that the subject of the order has participated in terrorist training; or (3) confirm the order with or without variation.²³ Submissions to the court may be made by the AFP, the subject of the Control Order (or their representative), and, in Queensland only, by the Queensland Public Monitor.²⁴

Confirmation of an Interim Control Order by the court constitutes, in effect, the issuance of a new order – a Confirmed Control Order.²⁵

II. Serving a Control Order

An Interim Control Order is not operational until it is served by the AFP personally on the subject of order.²⁶

As soon as practicable after an Interim Control Order is declared void, revoked, or confirmed, a copy of the declaration must be served on the subject.²⁷

¹⁹ *Id.* § 104.12A(4).

²⁰ *Id.* § 104.12A(2).

²¹ *Id.* § 104.12A(3). In general, information required under the Act to be disclosed for an Interim or Confirmed Control Order need not be disclosed if disclosure is likely to prejudice national security within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004. Criminal Code Act 1995 (Cth) §§ 104.2 (3A), 104.5 (2A), 104.12A(3), 104.23(3A). In general, use of national security classified information within court proceedings is governed by the National Security Information (Criminal Proceedings) Act 2004 (Cth).

²² Thus, the order is considered never to have been in force. Criminal Code Act 1995 (Cth) §§ 104.14(6), 104.15(1).

²³ Criminal Code Act 1995 (Cth) § 104.14(7). In considering what is reasonable the court must consider the impact of the obligations or restrictions on the person's circumstances, including financial and personal circumstances. Criminal Code Act 1995 (Cth) § 104.4(2).

²⁴ Criminal Code Act 1995 (Cth) § 104.14(1).

²⁵ *Id.* §§ 104.15(3), 104.16.

²⁶ *Id.* § 104.5(1)(d).

²⁷ *Id.* § 104.17.

III. Applicable Time Periods

A Confirmed Control Order may be made for a period of up to 12 months from the date of the original Interim Control Order;²⁸ however, successive Control Orders may be made in relation to the same person.²⁹

IV. Persons Below the Age of 18

A Control Order may not be requested or imposed on a person under the age of sixteen and may only be imposed on a person between the ages of sixteen and eighteen for a period of three months or less.³⁰

V. Terms of a Control Order

The Issuing Court has discretion regarding what obligations or restrictions requested by the AFP are included in the order.³¹ In determining what obligations are necessary the Court must consider the impact of the obligations on the subject's circumstances.³² The Court may also require that the person wear a tracking device, undertake regular reporting, be photographed and fingerprinted,³³ and (with the subject's agreement) take part in education or counseling.³⁴

Prohibitions or restrictions that may be imposed via a Control Order include: (1) being at specified areas or places; (2) leaving Australia; (3) communicating or associating with specific individuals; (4) accessing or using specified types of telecommunications, including the internet; (5) possessing or using specified articles or substances; (6) carrying out specified activities;³⁵ (7) a prohibition on being at specified areas or places; and, (8) a requirement that the subject remain at specified premises at certain times of the day.³⁶

A Control Order may not prohibit contact between the subject of the order and their lawyer unless the lawyer is specifically named within the order.³⁷

The AFP Commissioner may seek variations to a Control Order where such variations are necessary to prevent terrorism.³⁸

²⁸ *Id.* § 104.5(1)(f).

²⁹ *Id.* § 104.16(2).

³⁰ *Id.* §104.28.

³¹ *Id.* § 104.4(3).

³² *Id.* § 104.4(2).

³³ *Id.* § 104.5(3). Photographs and fingerprints must only be used to confirm compliance with the order. Criminal Code Act 1995 (Cth) § 104.22.

³⁴ Criminal Code Act 1995 (Cth) § 104.5(3)(l).

³⁵ *Id.* §§ 104.5(3), 104.16.

³⁶ *Id.* § 104.5(3).

³⁷ *Id.* § 104.5(5).

³⁸ *Id.* §§ 104.23-104.24.

VI. Rights of Those Subject to a Control Order

The subject of a Control Order may apply to have the order revoked or varied.³⁹ A lawyer representing the subject of a Control Order may request a copy of the order.⁴⁰ Photographs or fingerprints taken as part of an obligation of a Control Order may only be used for the purposes of ensuring compliance with the Control Order.⁴¹

At any time a Control Order is in force the AFP Commissioner may apply to have the order varied or revoked.⁴²

VII. Complaints

The Attorney-General must prepare an annual report for Parliament detailing the number of Control Orders requested, issued, varied, confirmed, voided, or revoked, and the number of complaints (made to the Commonwealth Ombudsman or Internal Investigation division of the AFP) received in relation to Control Orders.⁴³

The AFP Commissioner must notify the Attorney-General of any Control Orders that are revoked, voided, or varied.⁴⁴

VIII. Offenses in Relation to Control Orders

It is an offense, with a penalty of up to five years, to breach an Interim Control Order or confirmed Control Order.⁴⁵

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³⁹ *Id.* § 104.18.

⁴⁰ *Id.* § 104.21.

⁴¹ *Id.* § 104.22.

⁴² *Id.* § 104.19.

⁴³ *Id.* § 104.29.

⁴⁴ *Id.* § 104.30.

⁴⁵ *Id.* § 104.27.