15 September 2015

Ms Anna Harmer
Assistant Secretary
Electronic Surveillance Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email: anna.harmer@agd.gov.au

Dear Ms Harmer

Public Interest Advocates — Draft Regulations

Thank you for your letters of 14 September 2015 inviting Seven West Media and NewsCorp Australia (on behalf of several media organisations) to comment on a draft of the proposed *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015* (Cth). We welcome the opportunity to provide comments on the draft proposed regulation and this letter is our joint submission.

We have identified a number of issues arising from the draft proposed regulation which, in our view, have the potential to undermine the efficacy of the role of the Public Interest Advocates (**PIAs**) within the scheme of the legislative provisions for journalist information warrants (**JIWs**). The issues are broadly as follows and each is addressed in more detail below:

1. *A JIW should never be issued without submissions from a PIA being taken into account;*
2. *A PIA must have all relevant information about an application for a JIW;*
3. *A PIA should be independent from government and should be of appropriate seniority and experience;*
4. *A PIA should be properly remunerated for his or her work; and*
5. *Other issues previously raised and not reflected in the draft proposed regulation*

1. A JIW should never be issued without submissions from a PIA being taken into account

In our view, it is a central principle of the legislative scheme for JIWs that submissions of a PIA be made to the Minister or Part 4-1 issuing authority (as the case may be) and that the Minister or Part 4-1 issuing authority take those submissions into account. That is manifest in the scheme of Div 4C of Pt 4-1 of the Act and, in particular, ss 180L(2)(b)(v), 180T(2)(b)(v) and 180X.

The regulations should facilitate, and not undermine, that central principle.

We support, in general, the requirement that an applicant for a JIW ensure that a copy of the proposed request or application is given to a PIA (regs 6(1), 7(1), and 7(2)) and the requirement that a PIA deal with requests and applications (reg 8(1)(b)). We also support, in general, the requirement for PIAs who advise that they will prepare submissions to prepare submissions (reg 9(1)).

However, the scheme of the regulations—we assume unintentionally—admits the possibility that a PIA might advise that he or she is unable to prepare a submission (reg 7(1)(b)(ii)) with the consequence that no submission is ever prepared. There is no continuing obligation on an applicant for a JIW to notify a different PIA who *is* able to prepare a submission.

In our view, this problem would be best dealt with in the Act itself, by a prohibition on the Minister or Part 4-1 issuing authority issuing a JIW unless the submissions of a PIA had been taken into account. It could alternatively be dealt with in the regulations by requiring an applicant for a JIW to give notice to a PIA unless and until reg 8(1)(b)(i) applies (cf reg 9(1)).

We also believe that there should be a requirement that notice of a request or application for a JIW be given to a PIA a specified time (say no less than 48 hours) before the request or application is made. Whilst there are some timing requirements for what the PIA must do (respond within a reasonable time etc), there is no indication of when the proposed application or information about the warrant must be provided to the PIA, except that it must be "before" the application is made. It is therefore possible to provide the proposed application to the PIA only a short time before making the application and thereby almost guaranteeing that the PIA will advise that he or she is unable to prepare any submission in response. The Regulations should therefore specify that the proposed application be provided at least 48 hours or other reasonable time period before the application is proposed to be made.

2. A PIA must have all relevant information about a request or application for a JIW

The scheme for JIWs contemplates that PIAs perform a very important function in the public interest. It is intended that the submissions of a PIA be meaningful, be given weight by the decision-maker, and take account of all relevant circumstances affecting the public interest. It is therefore critical that a PIA have all relevant information about a request or application for a JIW in relation to which he or she is to make submissions.

We support, in general, as we have said, the requirement that an applicant for a JIW ensure that a copy of the proposed request or application is given to a PIA (regs 6(1), 7(1), and 7(2)).

However, this is not adequate if “further information” relating to requests or applications is given to the Minister or Part 4-1 issuing authority under ss 180K or 180R of the Act. The PIA must also be provided with that further information. If the PIA is not provided with that further information, then the important public interest function of making submissions to the Minister or Part 4-1 issuing authority will be undermined.

To this end, reg 11 should be amended in two respects: the provision of further information to a PIA should be mandatory rather than discretionary; and it should be the further information itself, and not merely a summary of it, which is provided to the PIA. No reason is identified in reg 11 for *not* providing the PIA with the further information: the discretion is entirely unstructured and subject to no explicit constraints. In our view, there is no good reason why the PIA should not be provided with the further information (it may be noted that the draft proposed regulations contemplate that PIAs will hold relevant security clearance, so legitimate secrecy cannot be the reason).

Our concern with reg 11 is heightened in light of the very minimal mandatory content of a request or application for a JIW (ss 180J and 180Q of the Act). The "further information" is likely to be very significant to the determination of a request or application for a JIW and it would undermine the scheme for submissions in the public interest if the relevant PIA were not entitled to consider the further information.

3. A PIA should be independent from government and should be of appropriate seniority and experience

The role to be performed by a PIA in the scheme of the Act is one of responsible advocacy in the public interest. That requires a sophisticated understanding of the legislative scheme and of its interactions with, among other things, the criminal law, the law of privacy, media law, and the constitutional and common law principles and values that necessarily underlie and inform the balancing function to be performed by the Minister or Part 4-1 issuing authority in deciding whether to issue a JIW.

We therefore support, in general, the requirement that a PIA be a legal practitioner or retired judge (reg 13) but we do not consider that this sets the bar high enough.

To be eligible, a legal practitioner should be of sufficient seniority and standing in the profession. We would support a requirement that only Senior Counsel or Queen's Counsel be eligible. Alternatively, we would support a requirement that the legal practitioner have a minimum period of experience as a legal practitioner.

Apart from the question of seniority, there is a question of independence. In fulfilling the important function of responsible advocacy in the public interest, it is imperative that the PIA enjoy a sufficient degree of independence from the executive governments at both Commonwealth and State level. The purpose of the PIA is to ensure that the *public* interest—as distinct from *governmental* interest—is taken into account when issuing JIWs. The governmental interest will be adequately represented by the government parties requesting or applying for JIWs. To live up to the promise of its name—a *truly* "public interest" advocate—the PIA must be independent from government.

The draft proposed regulation expressly contemplates that full-time office-holders or employees of the Commonwealth or State and Territory governments might be appointed as PIAs (regs 6(2), 7(3), 13, 15(3)). We do not support that possibility. Indeed, reg 15(3) may even be seen to create a financial incentive to prefer government employees over independent members of the legal profession. Regulation 13(2) should be amended to exclude all government employees and officers from eligibility for appointment.

We also do not think that a security clearance is necessary if the pool of potential PIAs is limited to appropriately senior and eminent members of the legal profession.

On the assumption that a security clearance is required, however, we are concerned about reg 20(2)(c)(ii), which contains an ambiguity that should be clarified. We support, in general, the requirement that a PIA be appointed for a fixed (renewable) term, terminable only for misbehaviour (including non-compliance with regs 17 and 18), incapacity or insolvency (reg 20). Reg 20(2)(c)(ii), however, would provide an additional ground for termination in that the PIA "ceases to hold a security clearance to a level that the Prime Minister considers appropriate". This wording should be changed to read: "ceases to hold a security clearance to <u>the</u> level that the Prime Minister <u>considered</u> appropriate <u>when the person was declared to be a Public Interest Advocate</u>". This would make clear that the Prime Minister, having appointed the PIA as a person eligible under s 13(1)(a), cannot subsequently change the level of security clearance that he "considers appropriate"

for that PIA. Otherwise, the Prime Minister could easily terminate PIAs, contrary to the intention evinced by the restricted grounds of misbehaviour, incapacity and insolvency.

4. A PIA should be properly remunerated for his or her work

In order to attract individuals of appropriate seniority and standing to accept appointment as PIAs, it is important that they be properly remunerated for their work.

Regulation 15(1) should be amended to clarify that a PIA is entitled to charge remuneration for time spent performing *any* of the PIA's functions under the Act or Regulations, and not only in "making a submission".

Regulation 15(4) should be amended to enable a PIA to negotiate a higher daily rate with the approval of the Office of Legal Services Coordination or the Attorney-General. It should also be amended to enable a PIA to negotiate terms on which he or she may be paid a higher daily rate on a one-off basis to reflect the necessity to perform more than 6 hours' work in a day, particularly in light of the realistic possibility that applications for JIWs may be made urgently. Both these amendments would be consistent with the *Legal Services Directions 2005* (see Appendix D, cll 5 and 9).

5. Other issues raised previously and not reflected in the draft proposed regulation

As you are aware, we have in previous correspondence raised a number of other concerns with the scheme of the Act and many of these remain unaddressed by the draft proposed regulation. We do not repeat those matters in this letter, but we maintain them as concerns

In particular, it is our strong view that the PIA should perform the role of a contradictor in an application for a JIW. That is not inconsistent with their role as representatives of the "public interest": the whole scheme of Div 4C of Pt 4-1 is that there are *competing* public interests that must be weighed: the public interest in issuing a JIW and the public interest in protecting the confidentiality of the identity of the journalist's source. The weighing of the competing public interests should not be the task of the PIA; it is manifestly the task of the Minister or Part 4-1 issuing authority. The PIA should have responsibility for making submissions in support of the public interest in protecting the confidentiality of the identity of the journalist's source. The public interest in issuing the warrant will be advocated by the applicant for the JIW. The Minister or Part 4-1 issuing authority will then have the benefit of submissions in support of *both* competing interests.

As raised in previous correspondence, we are also concerned that the offence provisions of the TIA prevent a telecommunications carrier from being advised as to whether a JIW is in place before providing material relating to a journalist's source. We understood that this oversight was to be corrected in the regulations and would request that further provisions be included to address this issue.

We would very much like an opportunity to discuss these matters with you in person. If it is not possible to do this face to face, can we suggest that a telephone conference could be convened so we could discuss these important matters in greater detail.