

## PORTFOLIO COMMITTEE NO. 5

### PROVISIONS OF THE FIREARMS AND WEAPONS LEGISLATION AMENDMENT (CRIMINAL USE) BILL 2020

#### CLARIFICATION OF EVIDENCE & RESPONSE TO QUESTION TAKEN ON NOTICE

Mr Chair and Members of the Committee,

In my evidence to the Committee on 10 December 2020, I gave evidence relating to Firearm Prohibition Orders (FPO) and the ability for those Orders to be appealed to the NSW Civil & Administrative Tribunal (NCAT), which is referred to at pages 25 and 26 of the transcript.

My evidence was that pursuant to s. 75 of the *Firearms Act 1996* (the Act), relief could not be sought in the Tribunal where a person is the subject of an FPO. At that time, I did not have access to the Act and Mr Shoebridge clarified that in quoting from s. 75(1)(f), relief could be sought. I accept that assertion from Mr Shoebridge and seek to withdraw that evidence.

However, I wish to clarify what I intended by that evidence. It is clear that a person who is a “disqualified person” pursuant to s. 11(5) of the Act cannot seek relief in the Tribunal, but a person who is not a “disqualified person” can.

Those who are not “disqualified persons” will generally have an FPO made against them based on Police intelligence; for example, but not limited to, they are or have been a member of an Outlaw Motorcycle Gang (OMCG) or other interactions with the Police.

In circumstances where a person seeks relief in the Tribunal, the Commissioner will seek to adduce closed evidence in the proceedings pursuant to s. 64(1)(d) of the *Civil and Administrative Tribunal Act 2013*. The effect of this is the Applicant and their legal representative is not provided with or allowed to be part of the proceedings whilst this closed evidence is adduced. The Applicant therefore has no knowledge as to what the evidence is and cannot challenge any document or cross-examine any witness giving that evidence as they are not privy to it. This places the Applicant at a severe, if not fatal disadvantage in their case. The Commissioner has relied on the provision in general proceedings before the Tribunal in which I have appeared, not only in FPO proceedings.

The reality of this is there is little to no chance of successfully appealing an FPO in the Tribunal and the only practical way of having it removed is by way of writing directly to the officer who made the Order to seek their consideration of revoking it. If the officer refuses to revoke the Order, it remains in place in perpetuity.

It is for that reason I gave the evidence before the Committee and hope this clarifies the issue from a practical perspective as to the operation of FPOs and the ability to appeal them in the Tribunal.

Further, at page 27 of the transcript I was asked by Mr Khan what access Police should have to a person's mobile phone contents where they have formed a reasonable suspicion the person may have committed an offence. I took that question on notice.

I maintain my view that a person who is under suspicion of the Police is entitled to their common law and statutory rights to silence or refusing to provide assistance on the basis of self-incrimination, without being under the legislative threat of committing a criminal offence by exercising those rights.

The Police currently have legislative provisions upon which they can rely during the course of investigations which have the protections of the court. If Police are lawfully in a person's premises and seek access to a person's mobile phone, the person may choose to consent to allowing that access and no issue arises.

However, in circumstances where a person does not consent, Police are able to apply to the court for a search warrant. This provides an independent aspect to the process where the court can objectively balance the actions of the Police with the person's rights and the legitimate forensic purpose for the warrant. Search Warrants, when executed by Police are generally done with a Commissioned Officer present, who is not connected to the investigation, to oversight the actions of the Police. I am of the view this situation should remain and there should be no further removal of a citizen's rights in the proposed legislative amendment.

In either scenario, access should only be allowed to material relevant to the investigation and the Commissioned Officer present should form part of that assessment process.

I hope the above assists the Committee in its consideration of the Bill.

Respectfully submitted,

**STEPHEN MAINSTONE**  
**SOLICITOR**

18 January 2021