

## Questions on Notice (QoN)

### 1. Summary of question: *provide further information to illustrate the significance of proposed new requirements: comparison of status quo versus proposed obligations under Schedule 2, including quantification of the number of changes.*

. Contrary to what has been implied by the evidence presented by the Attorney-General's Department (AGD) and the Department of Broadband, Communications and the Digital Economy (DBCDE), the proposed bill does not merely re-instate previous arrangements. The Associations contend that the proposed Schedule 2 considerably extends and broadens the obligations of the existing Telecommunication Act

The table below provides a comparison of the requirements under the current regime and the obligations that would arise under the proposed Schedule 2. It also includes indicative numbers of notifications in an attempt to illustrate the burden on industry quantitatively.

Note: it is problematic to estimate the quantitative effect of the proposed changes, not least because the procedures and notification trigger points within the draft Schedule 2 are unclear (as explained in our submission).

Previous legislation	Schedule 2	Difference	Comment
Refers to new technology and changes to existing technologies.	<p>Expands from interception to add customer information and service usage information.</p> <p>Refers to a change to a telecommunications service or system which is defined to included (but may not be limited to) new service/s, change of location and procurement of notifiable equipment (including outside AU), entering into outsourcing arrangements (including in respect to service delivery, service management, or management of information being information which S276 of</p>	<p>Sch 2 is MUCH broader.</p> <p>The TIA Act definitions of Telecommunications Service and Telecommunications Network are broad and widen the obligations on carriers and carriage service providers to include content services and any equipment used to supply content services. <b>This was previously excluded.</b></p> <p>Extension to Section 313 significantly increases the number. of matters that must be examined for each service.</p>	<p>The obligations have considerably expanded. It is not simply the case that the current arrangements are formalised.</p> <p>This has substantial business impact, as illustrated below.</p>

Previous legislation	Schedule 2	Difference	Comment
	the TA applies to, i.e. protected information, e.g. details of carriage services, affairs of personal particulars of customers)		
ICP submitted annually, with updates submitted if there are changes that are likely to impact interception capabilities.	Formal notification required of any <b>proposed</b> changes likely to have impact.	Timing of notification: ICP requires ex-post notification; Sch 2 requires <b>ex-ante</b> notification.	<p>Combined with the considerable broadening of the requirement, the requirement to formally notify of <b>proposed</b> changes creates a significant administrative burden as illustrated by the numbers below.</p> <p>Note: industry does not dispute the benefits of early engagement. Regular (informal) meetings allow agencies and industry to efficiently work together to identify any potential impact on (and solutions to) interception capabilities without the need for formal advice to the CAC. This is evidenced by the very sparing use, if at all, of Determinations under S203 of the Telecommunications Act.</p>
<p>Indicative figures for number of projects covered by an organisation's annual ICP:</p> <p>The way the information is presented in an ICP is not standardised.</p>	<p>Estimated number of notifications under Schedule 2 per year:</p> <p>Even obtaining the information required to estimate the impact of the changes is problematic, particularly for global organisations with a distributed functional base and with many</p>	<p>Even ignoring timing changes to the notification regime, the broader requirements mean that the number of projects captured will substantially increase.</p> <p>e.g. status quo does not include data or management systems which are now caught under the draft sections 202B.</p>	<p>Note: of the 104 projects listed in one carrier's ICP, 17 contained detailed technical descriptions. The remaining 87 projects required no details as existing legal interception platforms were adequate.</p> <p>Note that the regular meetings provide the opportunity for informal</p>

Previous legislation	Schedule 2	Difference	Comment
<p>However, one organisation advises that 104 projects were listed in their 2010 ICP.</p> <p>Other organisations were able to provide information to illustrate the extent of the scope increase – as reflected in the information contained in the columns to the right.</p> <p>No. of ICP <b>updates</b> per year:</p> <p>Between 0 and 4 formal updates, with an average of under 2.</p> <p>Supplemented by informal briefings to agencies (e.g. 50-60 per year)</p>	<p>product initiatives being commenced outside Australia.</p> <p>Where it was possible to provide indicative numbers, advice is that the impact is substantial:</p> <p>One organisation advised that the new proposals would potentially generate over 500 notifications per year: 500 projects per year would need to be reviewed and potentially reported upon, based on current projects (over last 12 months); plus there are another 50-60 network equipment purchases that would have to be considered and added into the reporting process.</p> <p>A second organisation presented similar figures, noting that approximately 350 projects in the past 12 months had required some Legal Intercept assessment/review. The extension of requirements to IT and outsourcing projects (currently excluded from requirements) would further increase the number of notifications required.</p>	<p>Considerably more administration and paperwork, even where it is concluded that advice to CAC is not required. 'Letters' would have to be drafted about each project. Clearly this would also provide additional administrative burden on AGDs.</p> <p>As the figures illustrate, the administration load could increase dramatically: potentially from between 1 and 5 pieces of advice per organisation per year (the ICP plan plus any updates), to somewhere around 500 notifications per organisation per year.</p> <p>Informal briefings provide the opportunity to provide Parties to assess and review legal intercept requirements without the need for written reports. The value of this cooperation was recently commented on by a senior office of the AGD:</p> <p><i>"Industry are very good in coming to us and giving forewarning on when technology is going to change that may have an effect on law enforcement's views. They are always wanting to make sure that we can keep pace with technology; they are very helpful in that respect. Given that they service a lot of requests from these particular databases, if those databases are</i></p>	<p>technical briefings on new products and services. No written technical descriptions are required for these.</p> <p>The difficulty in even obtaining the quantitative information to provide indicative numbers illustrates that the administrative burden of assessing a 'likely impact' of proposed changes (especially pre- launch) is substantial, even if it is found that the change does not trigger a formal notification.</p>

Previous legislation	Schedule 2	Difference	Comment
		<i>not going to exist, they are moving into new technologies, they want to know if law enforcement will want access to the new technologies!</i>	

<sup>1</sup>Catherine Smith, Assistant Secretary, Telecommunications and Surveillance Law Branch, Attorney-General's Department, presenting to the Senate E&C References Committee, Friday 29th October 2010

## **2. Summary of question: *put forward specific changes to the current arrangements or improvements you would prefer to the procedures set out in Schedule 2.***

As noted in our submission, the Associations contend that no demonstrated need exists for the far reaching proposed changes in Schedule 2. Instead, minor amendments to the existing interception regime would constitute a more efficient and effective approach to a reasonable and sustainable interception regime. It is unclear how Schedule 2 would practically assist or achieve any improvements over the status quo.

The explanatory memorandum for the Bill maintains that the current procedure is considered inadequate as it only provides for notification of changes after they are about to happen.

It does not mention any inadequacies relating to the scope of the current arrangements.

It also states that the changes will have no financial impact. The Associations dispute this statement, given the significantly increased administrative burden, the possible delays to market, veto of product launch, distortion of competition etc). Further, as explained in the Associations' submission, the provisions may prevent a C/NCSP from realising cost savings through outsourcing, or cheaper service or equipment supply.

### **Specific changes to the ICP arrangements**

If the objective is simply to ensure that Agencies receive advance notification of changes that are likely to impact on relevant interception capability, the Associations suggest that the simplest way to achieve this aim is to amend ICP provisions to require the annual ICP to include (and be updated to include) proposed changes that are likely to impact interception capabilities.

The Associations note that the regular informal meetings between industry players and Agencies provide a quick and efficient mechanism for both parties to discuss and assess the 'likely impact' of proposed changes in a timely manner. It thereby ensures that paperwork is not required for changes that both parties agree are not material.

### **Changes to Schedule 2**

The Associations believe that the proposed Schedule 2 should be abolished in favour of making changes to the ICP requirements, as noted above.

However, if it is decided to proceed with implementing Schedule 2, the Associations suggest the amendments as presented in Attachment 1 (red text). These changes ensure that the scope of requirements is not expanded beyond addressing the issue of timeliness (ex-post vs. ex-ante) which the Explanatory Memorandum identifies as the reason to introduce changes. The suggested changes also address the business certainty and proportionality issue raised in paragraphs 37 and 38 of the Associations' submission; and confidentiality concerns.

The Associations contend that other changes to the proposed Schedule 2 are also required. Due to time constraints, drafting suggestions have not been provided to address these issues, but the Associations are keen to work with the AGD to develop appropriate wording.

The issues not covered in the draft wording provided include:

- Confirmation in the Explanatory Memorandum that the Bill is not intended to result in Agencies mandating the equipment that must be used in Australia, specifically, it is not intended to be used to require that industry keeps legacy systems running.
- Measures to ensure transparency in procedures and assessment criteria, e.g. the inclusion of, or reference to, criteria, that will be used by the Communications Access Coordinator (CAC) to assess proposals; reporting measures to enable oversight of CAC actions;
- Clearer procedures and trigger points (e.g. who determines if a proposed change is likely to have a 'materially adverse affect'?)

## Attachment 1

### Schedule 2—Requirement to inform of proposed changes

#### *Telecommunications (Interception and Access) Act 1979*

##### 1 Subsection 5(1)

Insert:

*carriage service provider* has the meaning given by the *Telecommunications Act 1997*.

*content service* has the meaning given by the *Telecommunications Act 1997*.

##### 2 Subsection 5(1) (definition of *carrier*)

Repeal the definition, substitute:

*carrier* means:

(a) except in Parts 5-4 and 5-4A:

(i) a carrier (within the meaning of the *Telecommunications Act 1997*); or

(ii) a carriage service provider; and

(b) in Parts 5-4 and 5-4A—a carrier (within the meaning of the *Telecommunications Act 1997*).

##### 3 Subsection 5(1)

Insert:

*nominated carriage service provider* means a carriage service provider covered by a declaration in force under subsection 197(4).

##### 4 Subsection 5(1)

Insert:

*notifiable equipment*, in relation to a carrier or nominated carriage service provider, means equipment that:

(a) provides all or part of the carrier or provider's telecommunication services **that are not content services**; or

(b) manages all or part of the provision of the carrier or provider's telecommunication services **that are not content services**; or

(c) manages some or all of the information to which section 276 of the *Telecommunications Act 1997* applies in relation to the carrier or provider.

## 5 Chapter 5 (heading)

Repeal the heading, substitute:

# Chapter 5—Co-operation with agencies

## 6 Section 194

Repeal the section.

## 7 Subsection 197(4)

After “Part”, insert “and Part 5-4A”.

## 8 After Part 5-4

Insert:

# Part 5-4A—Requirement arising from proposed changes

### 202A Purpose of Part

The purpose of this Part is:

(a) to require carriers and nominated carriage service providers to give notice of the particulars of any change that is proposed in relation to a telecommunications service or a telecommunications system, whose implementation may affect the capacity of the carrier or provider to comply with its obligations under:

(i) this Act; or

(ii) section 313 of the *Telecommunications Act 1997*; and

(b) to allow the Communications Access Co-ordinator to notify agencies of such proposed changes.

### 202B Carrier or provider to notify of proposed change

(1) This section applies if, at any time, a carrier or a nominated carriage service provider becomes aware that the implementation by the carrier or provider of a change that is proposed to a telecommunications service or a telecommunications system is likely to have a **significant** material adverse effect on the capacity of the carrier or provider to comply with its obligations under:

(a) this Act; or

(b) section 313 of the *Telecommunications Act 1997*.

**Note:** changes that impact on mass market carriage services are more likely to be significant, changes that impact on specialised business services are less likely to be significant.



(1A) This section does not apply to content services.

(2) A change to a telecommunications service that is not a content service or a telecommunications system, excluding any equipment or facility solely supplying a content service, includes (but is not limited to) the following:

(a) the carrier or carriage service provider providing one or more new telecommunication services;

(b) the carrier or carriage service provider changing the location of notifiable equipment (including moving equipment outside Australia);

(c) the carrier or carriage service provider procuring notifiable equipment (including procuring equipment that is located outside Australia);

(d) the carrier or carriage service provider entering into outsourcing arrangements:

(i) to have all or part of the telecommunication services provided for the carrier or provider; or

(ii) to have all or part of the provision of telecommunication services managed for the carrier or provider; or

(iii) to have all or some information to which section 276 of the *Telecommunications Act 1997* applies in relation to the carrier or provider, managed for the carrier or provider;

(e) the carrier or carriage service provider entering into arrangements to have all or some information to which section 276 of the *Telecommunications Act 1997* applies in relation to the carrier or provider accessed by persons outside Australia.

(3) The carrier or provider must notify the Communications Access Co-ordinator, in writing, of its intention to implement the proposed change.

(4) A notification provided under subsection (3) must include a description of the proposed change.

(5) After notifying the Communications Access Co-ordinator of a proposed change, the carrier or provider may implement the change if the carrier or provider has not been notified in writing by the Co-ordinator within 30 days after the day the carrier or provider notifies the Co-ordinator.

(6) If:

- (a) the Communications Access Co-ordinator notifies the carrier or provider in writing within 30 days after the day the carrier or provider notifies the Co-ordinator; and
- (b) within 30 days after the Co-ordinator so notifies the carrier or provider, the Co-ordinator makes a determination under section 203 that applies to the carrier or provider; the carrier or provider must not implement the proposed change until the carrier or provider has complied with the determination.

(7) To avoid doubt, subsection (6) does not prevent the Communications Access Co-ordinator from making a determination under section 203, that applies to the carrier or provider, more than 30 days after the Co-ordinator first notifies the carrier or provider in writing as mentioned in paragraph (6)(a).

### **202C Communications Access Co-ordinator may notify agencies**

- (1) After the Communications Access Co-ordinator has been notified by a carrier or nominated carriage service provider of an intention to implement a proposed change, the Co-ordinator may notify agencies that are likely to be interested of the proposed change.
- (2) On receiving notification from a carrier or provider of an intention to implement a proposed change, the Communications Access Co-ordinator, and each agency that receives notification of the proposed change,
  - (a) must treat the proposed change as confidential; and
  - (b) must ensure that it is not disclosed to any person or body not referred to in this subsection without the written permission of the carrier or provider

### **Subsection 203 (3)**

After “consult” delete “the ACMA”

After “subsection (1)”, delete “.” and insert “,”  
insert

- (a) the ACMA
- (b) any affected carrier or nominated carriage service provider.

### **Section 204**

insert

(3) where a determination is made in relation to a telecommunications service that is already supplied to customers, that determination shall not come into effect for a particular carrier or carriage service provider until 18 months after the Agencies and that carrier or carriage service provider have agreed terms under Section 209 (2).

## **9 Application of this Schedule**

The amendments made by this Schedule apply in relation to changes that are proposed, after this Schedule commences, to telecommunications services or telecommunications systems.