



CYBERSPACE LAW & POLICY COMMUNITY

Senate Environment and Communications Legislation Committee
Submitted on-line

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Submission on inquiry into *Telecommunications Legislation Amendment (Deregulation) Bill 2014*

This submission is made by researchers at the Cyberspace Law & Policy Community (CLPC), based at UNSW Australia Faculty of Law. The CLPC's focus is on research into networked transactions, from a public interest perspective.

We note the removal of Schedule 5 from the *Telecommunications Legislation Amendment (Deregulation) Bill 2014 (Bill)*. This submission will address privacy and transparency issues arising from provisions in the remainder of the Bill. We focus on disclosure of personal information about consumers between carriage service providers, the Secretary of the Department of Communications and other government agencies. These are found in the proposed changes to the *Telecommunications (Consumer Protection and Service Standards) Act 1999* in Schedule 1 Part 3 of the Bill. We return to the question of Schedule 5, and what is intended to replace it, at the end of this submission.

Proposed changes in the Bill

Our concerns on the Bill itself relate to the transparency of the process and the autonomy of consumers in relation to disclosure and use of their personal information for purposes other than those for which it was collected. While some similar provisions exist in the *Telecommunications Universal Service Management Agency Act 2012*, the scope of purposes with respect to which information must be disclosed has increased (paragraph 13(1)(e)) and the Bill envisages disclosures to additional government agencies for additional purposes (paragraph 36). It is therefore a useful point to re-evaluate privacy implications.

The Explanatory Memorandum refers to the privacy implications of the Bill, asserting that these are outweighed by the Bill's objectives. However, there appears no evidence of a meaningful attempt to measure the extent to which telecommunications consumer privacy may be impacted, nor investigation of alternative arrangements that may decrease the impact on privacy or personal information security. In particular, the Explanatory Memorandum does not indicate a privacy impact assessment of the proposed legislation was conducted. It is unclear how the "weighing" was possible in its absence.

We recommend such a privacy impact assessment before further action on the Bill, with results to be made public on completion of the analysis. Analysis would take into account that personal information disclosure under the Bill would include in some circumstances (for example, for users of the National Relay Service) identification of an individual disability. It would also consider risks to which

individuals may be exposed by virtue of their personal information being more widely disclosed, including increased risk of data breach or identity theft.

The Bill could enhance privacy protections while still fulfilling its aims. One mechanism that could be introduced is a requirement that consumers be notified on the occurrence of particular events, such as:

- 1) receipt of a notice by a former carriage service provider requiring information that includes a consumer's personal information under paragraph 12E (sch 1 cl 114);
- 2) receipt of a notice by a carriage service provider or an NBN corporation requiring information or documents containing a consumer's personal information, under paragraphs 23 or 30, respectively (sch 1 cl 123);
- 3) intention to disclose any information obtained from a carriage service provider to a different carriage service provider that includes a consumer's personal information under paragraph 28 (sch 1 cl 123);
- 4) receipt of a notice by a carriage service provider requiring consent be given to a third party contacting a consumer under paragraph 29 (sch 1 cl 123);
- 5) disclosure of personal information about a consumer under paragraph 36 (sch 1 cl 123).

Such notification would, at a minimum, advise consumers that their personal information would be disclosed or used in a particular way in accordance with the relevant provision. It should also explain the purpose of such disclosure or use, such as to help ensure continuity of supply of carriage services. Where possible, and where only the individual consumer is affected, consumers could be given an option to "opt-out" and avoid their information being disclosed or used in the proposed manner. This should be done so as to avoid confusion about any consequences of opting out.

To enhance transparency and accountability, we also recommend a recurrent audit process to ensure that personal consumer information (1) is only used narrowly for the purposes specified in the Bill; (2) is stored securely, with regular testing against the constantly increasing threat level; and (3) is destroyed when no longer necessary for these purposes. The results of the audit should be publicly available.

Transparency is particularly important given the potential wide scope of personal information that can be disclosed. For instance, paragraph 23 applies where "the Secretary believes on reasonable grounds that the carriage service provider has information or a document that is relevant to the achievement of the policy objective set out in paragraph 13(1)(e)". Paragraph 13(1)(e) is broadly worded, and 13(1)(e)(iv) allows the policy objectives to be expanded through regulations. In addition, paragraph 12E(8) allows the Minister to make a determination by legislative instrument that may expand the kinds of personal information that may be disclosed by carriage service providers to other providers and government.

There is thus a potential for more extensive information disclosure than may be anticipated by consumers. This emphasizes the need for preliminary assessment, transparency and other means to protect consumers from risk of "scope creep".

Communication for affected consumers is also important for facilitating other protective provisions referred to in the Explanatory Memorandum. As noted there, the *Privacy Act 1988* (Cth) allows consumers to make a complaint about the handling of their personal information to the Office of the Australian Information Commission. However, as there is no provisions in the Bill requiring consumer notification prior to the use or disclosure of personal information, this protection is limited.

Proposed deregulation of Part 13 of the *Telecommunications Act 1997* (Cth)

Media and members of Parliament have commented on the political context of the removal of Schedule 5. The intention is to pave the way to deregulate Part 13 of the *Telecommunications Act 1997* (Cth). In particular, we note:

The government proposes to remove schedule 5 from the bill in an amendment I will shortly be moving. The rationale for the measures in schedule 5 was to remove an administratively burdensome set of record keeping and reporting obligations in the Telecommunications Act imposed on telecommunications companies on the grounds that they provided no real consumer benefit. This measure was supported by industry and consumer groups alike. However, some concerns have subsequently been expressed that this measure gave the appearance of reducing transparency and privacy. The government therefore undertook further consultation with a range of industry players. The outcome of that consultation was that the measures in schedule 5, while felt to be desirable from an industry perspective, were recognised to deliver only a modest regulatory saving. At the same time, there was recognition that removing schedule 5, if it would facilitate the passage of the bill and hence the implementation of other important measures contained in it, was a sensible step to take. **The removal of schedule 5 will allow the government to consider the deregulation of Part 13 of the *Telecommunications Act* in the broader context of privacy protections and consumer safeguards.** [emphasis ours]

(Paul Fletcher, Parliamentary Secretary to the Minister for Communications, "Telecommunications Legislation Amendment (Deregulation) Bill 2014", 25 Nov. 2014, <http://www.paulfletcher.com.au/speeches/parliamentary-speeches/item/1244-telecommunications-legislation-amendment-deregulation-bill-2014.html>)

The above statement foreshadows the deregulation of Part 13 – Privacy Protections and Consumer Safeguards, relating this to the removal of Schedule 5 from the Bill. Part 13 regulates secondary use and disclosure of protected information and imposes record-keeping obligations on telecommunications providers. The government has advocated that Part 13 is no longer an efficient, fair or effective method to safeguard privacy, preferring to use the *Privacy Act 1988* (Cth) as the primary instrument for privacy and consumer safeguards (in addition to the *Telecommunications Consumer Protection Code*).

We look forward to a future opportunity to make a full submission on the proposed deregulation of Part 13, should this proposal be pursued. At this stage, we simply note that the removal of Part 13 *potentially* raises important issues regarding privacy, informed consent, personal information security and consumer protection in the telecommunications context. These are matters of increasing interest to Australians.

Yours Sincerely,

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