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AMTA Submission to the Senate Inquiry
Telecommunications (Interception and Access)
Amendment Bill 2007

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1 Executive summary

AMTA welcomes the opportunity to provide comment on the *Telecommunications (Interception and Access) Amendment Bill 2007 (the Bill)*. AMTA recognises that the assistance that the telecommunications industry provides to law enforcement and security agencies contributes to the effectiveness and efficiency of those agencies and benefits the Australian community. AMTA also recognises that ongoing changes in technology and industry structure mean that the interception regime will require adjustments from time to time.

AMTA notes that the main area of concern for the industry in relation to Ministerial powers in making Determinations, particularly in relating to the establishment of standards as to interception capability has been addressed in the Bill, specifically that a Determination must specify an 'international Standard or guideline'. This provides the industry with greater certainty in relation to future regulatory reach and cost implications moving forward and is consistent with the objects and regulatory policy of the Telecommunications Act 1997.

In addition, AMTA is supportive of the changes to the Telecommunication Act 1997 in relation to Subsections 313 (7) and (8) which clarify the application of principle that Carriers and Carriage Service Providers (CSP) should neither profit nor suffer losses from their activities in providing assistance to law enforcement agencies.

However AMTA have some outstanding concerns which are outlined in this submission, along with suggestions about how its concerns might be addressed.

AMTA believes its concerns can be addressed in a relatively straightforward manner through minor amendments to the Bill. Any further points of clarification can be resolved through discussions with the Australian Communications and Media Authority (ACMA) and the Attorney General's Department.

In summary AMTA's concerns and recommendations are:

- **Communications Access Coordinator (CAC)**

The proposed section 6R (3) states that the role of the Communications Access Coordinator (CAC) is to act on behalf of all the interception agencies. In the context of the CAC's role in matters such as Interception Capability Plans and the nomination of Delivery Points, this clause does not provide adequate guidance to the CAC and would appear to give priority to Agency requirements in the absence of any requirement for the CAC to take account of the objects of the Telecommunications Act 1997.

AMTA recommends an addition clause to section 6R to effect of:

(4) the Communications Access Coordinator, in performance of any duties under Chapter 5, must take into account the objects and regulatory policy of the Telecommunications Act 1997.

- **Definitions**

The redefinition of Interception Capability, rather than using the term from the Telecommunications Act 1997 has the potential for serious, even if unintended, consequences for Carriers and CSPs. AMTA is concerned that the proposed definition includes any equipment connected to a telecommunications network. Provision of

services in an Internet environment involves use of a variety of separate components that are clearly defined in the Telecommunications Act 1997, including customer equipment, carriage services, that is, the carrying of Internet 'packets' across networks and Internet applications and content services, such as instant messaging and web hosting. For the most part Internet applications, content services and customer equipment can be independent of the Carrier or CSP.

AMTA's suggests changes to the definition, section 187 (2) to include:

(d) Interception Capability is not required in customer equipment, as defined in the Telecommunications Act 1997

(e) Interception Capability is not required in equipment supplying a content service, as defined in the Telecommunications Act 1997.

- **Delivery Points**

The list of factors to be considered in determining Delivery Points currently proposed in the Bill is deficient as it does not explicitly make delivery capability a matter that must be considered. In AMTA's view any reasonable consideration of Delivery Points must take into account the impact of Part 5-5, the Delivery Capability obligation. In particular, meeting the Delivery Capability requirements often involves the installation of specialised equipment for this purpose. In practical terms, the location of a delivery point will be affected by the physical location of equipment performing the Delivery Capability function. Therefore, the factors to be considered in determining Delivery Points should also take account of the location of any equipment performing Delivery Capability functions.

AMTA suggests an addition to section 188 (6) to include:

(f) the location of any Delivery Capability function existing in relation to a particular telecommunication service.

In addition,

(g) any determination by the ACMA made under 188 (5) must be subject to appeal at the Administrative Appeals Tribunal.

- **The Communications Access Coordinator may grant exemptions**

AMTA has concerns in relation to section 192 (6). While it is recognised that this is a transfer of an existing provision, the practical effect of 192 (6) is that Carriers and CSPs will most likely be unable to launch new services or utilise new technology until a response is received from the CAC as there is no time limit on when the CAC refusal may occur. Although under section 192 (5) a time limit is set of 60 days for the CAC to provide direction, after which the Coordinator is taken to have granted an exemption, the application of section 192 (6) allows the CAC to refuse an application for exemption **anytime** after that period.

AMTA suggests that section 192 (6) should be deleted, or

Text added to 192 (6) “where a period greater than 180 days has elapsed from the day on which the Communications Access Coordinator has received the application, the Communications Access Coordinator must first establish that a demonstrated agency need for interception exists”.

- **Nature of an Interception Capability Plan**

The new section 195 significantly expands the factors that must be included in an Interception Capability Plan to include “or a change in marketing or pricing of services”. AMTA is concerned that this section 195 will place a significant burden on carriers and CSPs to submit updated plans to the CAC each time a price change is made or marketing campaign is launched for each product service.

AMTA suggests that the plan should be restricted to significant technology changes that could impact on the carrier’s ability to undertake legal interception to meet the requirements under the Bill.

- **Consideration of Interception Capability Plans**

Clauses 198 (3) to (7) describe a process for amendment of an interception capability plan. The CAC and the ACMA are to evaluate whether any interception agency request for amendment is reasonable. There are no criteria established against which ‘reasonableness’ is to be tested by the CAC or the ACMA.

AMTA recommends that the objects and regulatory policy of the Telecommunication Act 1997 should form part of the reasonableness test. In addition, any agency request must be consistent with the obligations imposed on Carriers and CSPs under Part 5 of the Act, and not an extension of those obligations.

AMTA also recommends that any determination by the ACMA made under section 198 (6) must be subject to appeal at the Administrative Appeals Tribunal.

2 Introduction and overview

2.1 Introduction

The Australian Mobile Telecommunications Association (**AMTA**) is the Australian mobile industry’s peak body. AMTA’s members include mobile phone carriers, handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. AMTA’s mission is to promote a socially, environmentally and financially responsible and successful mobile telecommunications industry in Australia. For more details about AMTA, see <http://www.amta.org.au>.

AMTA is committed, as always, to working cooperatively with relevant government and law enforcement agencies to develop close and workable relationships in achieving shared outcomes. AMTA welcomes the opportunity to provide comments to the Senate Committee on the Telecommunications (Interception and Access) Amendment Bill 2007.

2.2 Overview of AMTA's position

AMTA submits that while it generally supports the Bill the proposed amendments have implications for the telecommunications industry and is keen to achieve a balanced policy outcome for the industry, law enforcement agencies and the national security agenda. It should be noted that, in cooperating in the provision of interception and related activities, the industry is obliged to give weight to other national and commercial objectives, including:

- maintaining the competitiveness of the Australian telecommunications industry, relative to our major trading partners
- commercial interests in meeting legitimate shareholder expectations of return on investment, and
- maintaining individual competitiveness through the ongoing exploitation of new technologies, innovation and the launch of new services to consumers

AMTA's support for the proposed Bill assumes that the ACMA and Attorney General's Department will carefully work through the operational and implementation issues of the Bill with industry to ensure that the Bill's requirements are met in the most efficient manner possible.

AMTA's concerns on practical and operational aspects of the Bill's implementation are detailed below.

3 Specific Concerns

3.1 Part 1 – Item 11 – Section 6R – Communications Access Coordinator (CAC)

The proposed section 6R (3) states that the role of the Communications Access Coordinator (CAC) is to act on behalf of all the interception agencies. In the context of the CAC's role in matters such as Interception Capability Plans and the nomination of Delivery Points, this clause does not provide adequate guidance to the CAC and would appear to give priority to Agency requirements in the absence of any requirement for the CAC to take account of the objects of the Telecommunications Act 1997.

AMTA is concerned that the Bill does not effectively transfer to critical decision-making functions of the CAC the requirements to have regard to objects and policy objectives that protect the legitimate interests of the telecommunications industry as set out in the Telecommunications Act 1997.

AMTA recommends an addition clause to section 6R to effect of:

(4) the Communications Access Coordinator, in performance of any duties under Chapter 5, must take into account the objects and regulatory policy of the Telecommunications Act 1997.

3.2 Part 5-1 – Section – 187 - Definitions

The redefinition of Interception Capability, rather using the term from the Telecommunications Act 1997 has the potential for serious, even if unintended, consequences for Carriers and CSPs. AMTA is concerned that the proposed definition includes any equipment connected to a telecommunications network. Provision of services in an Internet environment involves use of a variety of separate components that are clearly defined in the Telecommunications Act 1997,

including customer equipment, carriage services, that is, the carrying of Internet 'packets' across networks and Internet applications and content services, such as instant messaging and web hosting. For the most part Internet applications, content services and customer equipment can be independent of the Carrier or CSP.

This may have the unintended effect of making Carriers and CSPs immediately non-compliant with the obligations in section 191. Carriers and CSPs will be able to intercept at the Internet packet level, but may not be able to intercept at the level of each and every individual internet service. As an example, Carriers and CSPs may not be able to intercept at the level of web browsing being performed on a broadband access service. In addition, Carriers and CSPs may not be able to implement "named person warrants" at the individual user level for content services or internet applications, as the identity of individual users may not be known to the Carrier or CSP.

AMTA suggests this can be remedied by minor changes to the definition to exclude matters that are effectively outside of the control of the Carriers and CSPs, i.e. customer equipment and equipment used to supply content services. Without the suggested changes there is a potential for all Carriers and CSPs supplying internet access services to be in breach of the amended legislation on enactment. In particular, AMTA recommends changes to the definition, section 187 (2) to include:

(d) Interception Capability is not required in customer equipment, as defined in the Telecommunications Act 1997

(e) Interception Capability is not required in equipment supplying a content service, as defined in the Telecommunications Act 1997.

3.3 Part 5.2 - Section 188 – Delivery Points

The list of factors to be considered in determining Delivery Points currently proposed in the Bill is deficient as it does not explicitly make delivery capability a matter that must be considered. In AMTA's view any reasonable consideration of Delivery Points must take into account the impact of Part 5-5, the Delivery Capability obligation. In particular, meeting the Delivery Capability requirements often involves the installation of specialised equipment for this purpose. In practical terms, the location of a delivery point will be affected by the physical location of equipment performing the Delivery Capability function. Therefore, the factors to be considered in determining Delivery Points should also take account of the location of any equipment performing Delivery Capability functions. AMTA suggests an addition to 188 (6) to include:

(f) the location of any Delivery Capability function existing in relation to a particular telecommunication service.

In addition,

(g) any determination by the ACMA made under 188 (5) must be subject to appeal at the Administrative Appeals Tribunal.

3.4 Part 5.3 - Division 2 – Section 192 - The Communications Access Coordinator may grant exemptions

AMTA feels that the ability of the CAC to grant exemptions from the obligations in Part 1 is an important component of the interception framework and its ability to deliver a balanced and practical outcome. If structured and functioning correctly, the 'exemption function' can deliver certainty to both agencies, Carriers and CSPs about the scope of existing obligations and

where special cases may fit within the framework. AMTA has concerns however in relation to section 192 (6). While it is recognised that this is a transfer of an existing provision, the practical effect of 192 (6) is that Carriers and CSPs will most likely be unable to launch new services or utilise new technology until a response is received from the CAC as there is no time limit on when the CAC refusal may occur. Although under section 192 (5) a time limit is set of 60 days for the CAC to provide direction, after which the Coordinator is taken to have granted an exemption, the application of section 192 (6) allows the CAC to refuse an application for exemption **anytime** after that period. This potential delay and uncertainty may mean that the industry is unable to proceed with the provision of services to customers, or that service provision will be significantly delayed.

AMTA suggests that section 192 (6) should be deleted, or

Text added to 192 (6) “where a period greater than 180 days has elapsed from the day on which the Communications Access Coordinator has received the application, the Communications Access Coordinator must first establish that a demonstrated agency need for interception exists”.

3.5 Division 2 – Part 5-4 - Section 195 – Nature of an Interception Capability Plan

While the new section 195 reproduces the current sections 329 (1) and (2) of the Telecommunications Act it significantly expands the factors that must be included in an Interception Capability Plan to include “or a change in marketing or pricing of services”. AMTA is concerned that this section 195 will place a significant burden on carriers and CSPs to submit updated plans to the CAC each time a price change is made of marketing campaign is launched for each product service.

AMTA suggests that the plan should be restricted to significant technology changes that could impact on the carrier’s ability to undertake legal interception to meet the requirements under the Bill.

3.6 Part 5.4 – Section 198 – Consideration of Interception Capability Plans

Clauses 198 (3) to (7) describes a process for amendment of an interception capability plan. The CAC and the ACMA are to evaluate whether any interception agency request for amendment is reasonable. There are no criteria established against which ‘reasonableness’ is to be tested by the CAC or the ACMA.

AMTA recommends that the objects and regulatory policy of the Telecommunication Act 1997 should form part of the reasonableness test. In addition, any agency request must be consistent with the obligations imposed on Carriers and CSPs under Part 5 of the Act, and not an extension of those obligations.

AMTA also recommends that any determination by the ACMA made under section 198 (6) must be subject to appeal at the Administrative Appeals Tribunal.

4 Drafting Points

4.1 Item 5 Subsection 5 (1) Definition of Delivery Point

The Bill provides for a definition of ‘delivery point’ which is consistent with the Explanatory Memorandum (EM) however the EM expands on the delivery of intercepted content to include

the phrase 'intercept related information'. There is no definition provided for 'intercept related information' in either the Bill or the EM.

AMTA suggests that this phrase be defined or removed from the Explanatory Memorandum.

5 Conclusion

- 5.1 AMTA recognises the challenge facing government in developing policy that balances the interest of law enforcement agencies, consumers and the industry in a timely manner. AMTA appreciates the opportunity to provide a submission to the inquiry on the *Telecommunications (Interception and Access) Amendment Bill 2007*. AMTA is committed, as always, to working cooperatively with relevant government and law enforcement agencies to develop close and workable relationships in achieving shared outcomes.
- 5.2 In the context of the draft Bill, AMTA's interest is to ensure that the balance the Government has currently drawn between obligations to assist law enforcement on the one hand, and commercial and business imperatives on the other, is not significantly altered from the current position. In saying this, AMTA supports the proposed transfer of key provisions via the Bill, which support this balance prescribed in the current Telecommunications Act 1997.
- 5.3 AMTA thanks the Senate for the opportunity to comment on the Bill and looks forward to working with relevant agencies and departments to address its concerns.