

## **Telstra's Submission on the Telecommunications (Interception and Access) Amendment Bill 2007**

### **1 Executive Summary**

Telstra welcomes the opportunity to make a submission on the *Telecommunications (Interception and Access) Amendment Bill 2007* (Cth) ("**TIA Bill**").

As a carrier and a carriage service provider ("**CSP**") under the *Telecommunications Act 1997* (Cth) ("**Telco Act**"), and as a carrier under the *Telecommunications (Interception and Access) Act 1979* (Cth) ("**TIA Act**"), Telstra is directly affected by the contents of the TIA Bill.

Telstra does not object to the transfer of the national security and law enforcement related provisions from the Telco Act to the TIA Act, but has some concerns over parts of the TIA Bill. Telstra's primary concerns relate to the:

- the lack of industry consultation required prior to any Ministerial or CAC Determinations; and
- the use of new terminology for interception capability which causes confusion as to the scope of responsibility of carriers in relation to providing such capability.

Telstra also requests that consideration be given to:

- expanding the matters to be taken into account by the Minister and the Communications Access Co-ordinator ("**CAC**") prior to making a determination and by the CAC in deciding whether to grant an exemption;
- requiring the CAC and ACMA to give reasons for the rejection of any exemption request and establishing an appeal process from any exemption decision;
- removing the impractical effect of deemed exemptions caused by s.192(6);
- clarifying the definition of "interception capability" and obligation on carriers in s.191 to ensure the scope of interception obligations on carriers remains identical to that currently under the Telco Act;
- including delivery capability as a factor to be considered in determining Delivery Points;
- providing greater recognition of the privacy rights of our customers in respect of the issue of any authorisations;
- clarifying the pecuniary penalty and protection of public revenue bodies caught under definition of "enforcement agency"; and
- clarifying in s.195(4) that any matters specified by the Minister to be included in a carrier's interception capability plan must only relate to reporting on matters relevant to a carrier's interception capability obligations.

## **2 Co-operation with Interception Agencies**

### **2.1 Ministerial Determination Making Power**

#### *(a) Industry Consultation*

Industry consultation is a vital pre-cursor to any Ministerial determinations. Due to the potential impact of any such determination on the telecommunications industry and those relying on the services provided by the industry, Telstra was supportive of the inclusion of a formal consultation process in the Exposure Draft. However, we note that this consultation process has now been removed in the TIA Bill and the Minister is no longer required to consult with industry prior to making a determination.

We submit that s.189 should be amended to provide that, prior to making a determination, the Minister must make the terms of the draft determination available to industry for comment. We suggest that industry should be given a reasonable time to consider the financial, technical and practical effect of any proposed Ministerial determinations and make submissions regarding the proposed determination. We also suggest that the Minister be required to take into account any submissions received in respect of the proposed determination.

#### *(b) Matters to be Taken Into Account*

In s.189(4), we suggest that the list of matters to be taken into account by the Minister before making a determination should be expanded to include:

- the effect of the determination on the Australian users of telecommunications services, including the effect on their privacy, ability to access new and innovative products and services and cost implications;
- the effect of the determination on the ability of the telecommunications industry to introduce new and innovative products and services;
- the effect of the determination on existing products and services in the market, including the costs to be incurred by carriers in ensuring that existing products and services in the market are compliant with the determination; and
- the availability of equivalent services in the market not subject to the determination.

### **2.2 Exemptions**

#### *(a) Reasons for the Rejection of Exemption Requests*

The CAC (or the Australian Communications and Media Authority ("ACMA") in the case of trial services) has broad discretion to grant exemptions under ss192 and 193 of the TIA Bill. Telstra recommends that these sections be amended to require the CAC (or ACMA) to provide reasons for the rejection of an exemption request. We also consider that it would be useful for industry if guidelines were developed by the CAC that would help achieve certainty in respect of when a carrier may and may not reasonably expect to be granted an exemption.



(b) *Matters to be Taken into Account*

We support the inclusion of s.192(7) as it gives some guidance to the industry on the matters the CAC will consider in granting an exemption. However, we consider additional matters should also be required to be taken into account.

Circumstances may arise where determinations are issued under s189 specifying interception capabilities applicable to products already launched on the market. While these products were compliant with the interception capability requirements in force at the time of launch, they may not comply with subsequent determinations. Changes to interception capability may require significant time and resources on the part of carriers and may cause an initially commercially viable product into an unviable one. The application of determinations to existing products and services in the market will therefore create much uncertainty for the telecommunications industry.

As submitted above, the effect and likely impact of a proposed determination on existing products and services in the market is therefore an important factor to be taken into account by the Minister before making any determination. In line with that submission, we also propose that s.192(7) be amended to provide that this issue must also be taken into account where carriers seek exemptions from compliance with subsequently issued determinations in relation to existing products and services in the market. We consider that this reason should constitute a strong ground for the granting of an exemption unless, for example, the product poses a significant risk to national security or law enforcement.

As previously discussed with the Department, Telstra is also concerned about the application of interception capability requirements on carriers which do not apply to non-carrier suppliers of equivalent services in the market (for example, Google, Microsoft and Skype). In recognition of this issue, we suggest that section 192(7) also be amended to include a requirement that the CAC take into account the availability of equivalent services in the market not subject to the TIA Act when considering an exemption application.

(c) *Appeals Process*

We submit that the exemption provisions should also be amended to include an appeals process for reviewing exemption decisions. One option would be to allow appeals to ACMA, similar to the appeal provisions for interception capability plans (see our additional comments below on that process).

(d) *Validity Period of Exemption*

While Telstra acknowledges that s.192(6) reflects the current Telco Act requirements, this provision causes considerable uncertainty when read with s192(5). A deemed exemption which takes effect under s192(5) could cease to have effect at anytime if the CAC makes a contrary decision. This will have a significant impact on a carrier or CSP who may wish to launch its new product and on customers who may be waiting for such product. We therefore submit that any deemed exemption should be irrevocable for at least a 12 month period before it can be reconsidered by the CAC. This will provide carriers and CSPs some certainty in relation to launching a new product/service.

### 3 Interception and Delivery Capability

#### 3.1 Interception Capability

##### (a) *Definition of Interception Capability*

We note that the new definition of "interception capability" under s.187 refers to existing defined terms in the TIA Act. While this approach is understandable from a consistency perspective, it unintentionally causes confusion over the scope of responsibility by carriers in relation to the provision of interception capability. The new terminology extends the concept of a telecommunications system to equipment which may not be within the control of the carrier; such as, customer equipment. We would recommend that the definition be amended to clarify that the scope of each carrier's responsibility to provide interception capability remains unchanged from the Telco Act.

##### (b) *Interception Capability Obligation on Carriers*

We also note there has been some changes to the wording transferred from the Telco Act to s.191 of the TIA Bill and the obligation to provide interception capability is now on the carrier "supplying" a particular kind of telecommunications service. We query whether the word "supplying" could be read as requiring a carrier purely reselling wholesale services to the public to provide interception capability on a network which it does not operate nor is it within its control. As in 2.3(a) above, we suggest amending the provision to clarify that Carriers' obligations to provide interception capability remain unchanged from the Telco Act.

##### (c) *Delivery Points*

We submit that one of the most important criteria to be considered in determining a delivery point should be delivery capability as the nature of equipment required to comply with the Delivery Capability requirements may impact on the number of viable locations of Delivery Points. This factor should be added to the list in s.188(6).

We also note that the Explanatory Memorandum refers to "intercept related information" under its explanation of the definition of "Delivery Point". We are unclear what this is in reference to as the delivery obligation should only be in respect of "lawfully intercepted information". We suggest this wording be removed from the Explanatory Memorandum as it could lead to confusion if referred to for ascertaining the intent and purpose of that and related clauses.

##### (d) *Interception Capability Plans*

We suggest that s.195(4) be amended to clarify that any matters specified by the Minister to be included in a carrier's interception capability plan should only relate to reporting on matters relevant to a carrier's interception capability obligations. In particular, a Ministerial determination under section 195(4) cannot be used as a way of expanding or changing the scope of a carrier's interception capability obligations.

We also submit that there should be some guidelines on what would constitute a "reasonable" request for amendments by an interception agency. We submit that the reasonableness of a request must be ascertained in light of the objects of the Telecommunications Act 1997 and that there should be an ability to appeal a decision by ACMA.

### **3.2 Delivery Capability Determinations**

We note that the power of the CAC to make determinations in relation to delivery capabilities under s.203 is not subject to any requirement of prior consultation, nor does it prescribe a list of matters that the CAC must take into account before making a determination.

We consider that there would be great benefits to both agencies and industry in particular by including a requirement for prior consultation. We suggest this prior consultation process should be consistent with the consultation arrangements we propose above for s.189.

## **4 Access to Telecommunications Data**

### **4.1 Authorisations**

We note that the interference with our customers' privacy is only required to be taken into account where an authorisation is issued by a certifying officer of a criminal law-enforcement body for access to prospective information or documents (s.180). Telstra is committed to providing its customers with the highest level of customer service and this includes protecting the privacy of our customers. For this reason, we submit that before any authorisation is issued by an authorised body under Chapter 4, the relevant officer should be required to have regard to the extent of any interference on the privacy of any person by the disclosure.

### **4.2 'Civil Penalty-Enforcement Agency and "Public Revenue Agency"**

We note that the concepts of a 'civil penalty-enforcement body' and "public revenue agency" from the Telco Act has been transferred to the TIA Bill by incorporating those concepts into the general definition of "enforcement agency". We suggest this definition (insofar as it covers these two concepts) is very broad and covers a significant number of government agencies and bodies.

To provide greater certainty and clarity regarding the bodies covered by this definition and in recognition of the privacy rights of our customers, we request that consideration be given to further refining this definition. We suggest this could be done by specifying the bodies that fall within this definition (consistent with the approach taken regarding the definition of 'criminal law-enforcement agency') or by specifying limits on the issue of authorisations by these bodies in line with the approach taken in ss. 180(4) and (5).

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