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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Secretary,

Telecommunications Interception Amendment Bill 2006 (TIA)

At the Committee hearing today on the Anti-Money Laundering (AML)/Counter-Terrorist Financing (CTF) Exposure Draft (ED), the ABA raised a possible issue for AML/CTF in the application of TIA. The issue also appears to apply to other activities banks undertake in preventing crime, and in protecting their assets and the interests of their customers.

The Committee Chair today requested a brief note on the matter.

The main thrust of TIA is to regulate access to stored communications, held on equipment maintained by telecommunications carriers. The Bill implements some, but not all, of the recommendations set out in the *Report of the Review of the Regulation of Access to Communications* dated August 2005 (Blunn Report).

Possible issue - impact on monitoring communications

The primary focus of the Bill, being the regulation of stored communications held on equipment maintained by telecommunications carriers, is not itself presently of concern. The Bill also provides, however, that s6(2) of the *Telecommunications (Interception) Act 1979* ("TIA") is to be repealed.

In our view, that section at present provides an exemption to the general prohibition on the interception (without the consent of the person making the communication) of electronic messages as they pass over a telecommunications system. It allows the "live" monitoring of communications without consent, so long as, among other things, the relevant monitoring is performed using apparatus or equipment that is connected to a telecommunications system. High Court and Family Court authorities support this view, but the Attorney-General's

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Department (AGD) believes 6(2) was intended to provide protection to the then monopoly carrier.

Section 6(2) is consequently most useful in the context of emails where it is not possible to ensure that the person making the communication has "knowledge" of any recording or listening activities. The repeal of the section may therefore impact on the ability of organisations to monitor incoming emails. This is a matter of grave concern in light of the need for organisations to perform, for various reasons, the routine interception and scanning of such communications.

Application of TIA

There is some doubt as to the extent of the reach of TIA. One possible interpretation is that it does not apply when electronic communications such as emails have entered private systems, eg, entering a gateway router into an organisation's LAN or WAN. If that is accepted, there is no need to rely on the exception set out in section 6(2).

In proceedings of the Committee in March 2004, however, the Committee noted the view of the Attorney-General's Department, which is that the telecommunications network extends "up and including a user's personal equipment." To some degree the Blunn Report echoes this position. If that view was accepted, then the monitoring of emails by private sector organisations would be regarded as interceptions under TIA - and if s6(2) is repealed, the exemption which permits conditional "live" interception will be removed.

The Blunn Report did acknowledge the need to exempt from the purview of the TIA interception activities of the owner of a private network which are designed to protect the network. In the UK, such an exemption exists under *The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000*, but the Government has not sought to include a provision of this kind in the Bill.

Of course, the TIA also extends to the monitoring of telephone calls. The risks that the repeal of section 6(2) raises in that context may be easier to manage (via the use of warning messages, etc) than the risks that the repeal of section 6(2) creates in respect of email monitoring and related activities.

In discussions with the AGD, it would appear there is an acceptance that there is a possible issue for AML/CTF, but there is a view that TIA and the head legislation can be read down in such a way as to permit legitimate commercial activities for AML and CTF and other necessary purposes. We look forward to further advice from AGD.

Yours faithfully

Tony Burke