

20 March 2006

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Senate Legal and Constitutional Committee
Parliament House
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Dear Sir

Submission on the *Telecommunications (Interception) Amendment Bill 2006* ("Bill")

Telstra considers the *Telecommunications (Interception) Act 1979* ("Act") an important piece of legislation, and we welcome the opportunity to provide a submission on these significant amendments.

1 Executive summary

- 1.1 Telstra supports the purpose of the Bill to provide better regulation of access to communications under the Act.
- 1.2 As a carrier and CSP, Telstra requires certainty regarding what its obligations are under the Act. In addition, we require certainty as to the various prohibitions under the Act. In this submission, Telstra seeks clarification and makes recommendations on particular issues in the Bill in order to provide such certainty. We do not, however, make any comment on the policy issues contained in the Bill.
- 1.3 Telstra seeks clarification with regard to:
 - whether stored communications warrants are limited to accessing communications received, rather than sent, by a person of interest;
 - whether communications related data (identification and address details of sender and recipient, time of sending) is excluded from the definition of stored communications; and
 - our position if we execute a warrant in circumstances where it turns out that an IMEI number given in relation to a named person telecommunications warrant has been duplicated and does not satisfy the requirement of being "unique" (s 6Q).
- 1.4 We make the following recommendations:

- that independent contractors of carriers are given the same status as employees of carriers, under both the exceptions contained in s 108(2) and the permitted dealings contained in s 135;
- that s 135 be amended to reflect s 108, such that:
 - the requirement that the information may only be used or communicated if it relates to operations and maintenance is removed; and
 - the permitted dealings with lawfully accessed information (under s 135) reflect the ways in which that information may be lawfully accessed (under s 108(2));
- that, for the purposes of s 6Q, “unique” be defined so that an IMEI number will be considered unique if the applicant agency has satisfied certain requirements aimed at, as best possible, ensuring that the IMEI number is unique, and is not a duplicate; and
- that the repealing of s 6(2) be reconsidered, in light of the other applications it has and the potential impact its repealing will have on private organisations.

1.5 We consider these issues in more detail below.

2 Clarification of scope of “stored communication”

Communications received

- 2.1 The definition of “stored communication” appears to limit stored communication warrants to accessing communications received by a person of interest, but not communications sent by a person of interest.
- 2.2 A communication can only become a stored communication once it has passed over a telecommunications system, and is no longer passing over a telecommunications system. A communication only becomes a stored communication once it has been received. Carriers cannot necessarily know whether, or when, a communication that has been sent has been received by the intended recipient and, therefore, whether a communication that has been sent has become a stored communication.
- 2.3 As such, communications that have been received by a person of interest would be stored communications, and could be accessed under a stored communications warrant. In contrast, communications that have been sent by the person of interest would not be stored communications, and therefore, could not be accessed under a stored communications warrant. Presumably, if access is required to communications sent by a person of interest, it would be achieved using a telecommunications interception warrant, and not a stored communications warrant.
- 2.4 Telstra seeks to clarify that the intention of the Bill is to limit the operation of stored communication warrants to allowing access to communications received by a person of interest.

Call associated data

- 2.5 Telstra suggests that further clarity is also required in regards to what is included in the definition of “communication”. The definition of communication, in s 5(1) of the Act, is inclusive and includes “conversation and a message” in the form of data. However, it is unclear, particularly in the case of SMS and email communications, whether sender information could be considered part of the stored communication, given that such information often forms part of the communication itself as well. We note that currently communications related information is accessed by agencies under Part 15 of the *Telecommunications Act 1997*, and not under a telecommunications interception warrant.
- 2.6 Telstra considers it important that it is made clear whether or not communications related data (identity and address of sender, identity and address of recipient, time of sending) is excluded from stored communications.

3 Practical issues

Independent contractors

- 3.1 Telstra notes that under new s 108(2)(d), employees of carriers are, in certain circumstances, exempt from the general prohibition on accessing stored communications. The scope of the exception applying to independent contractors of carriers (under s 108(2)(e)) is narrower than that granted to employees of carriers under subsection (2)(d). We note that the same distinction between employees and contractors is made in the exceptions to the prohibition on interception (s 7(2)).
- 3.2 Telstra, and indeed the industry, engages a large number of independent contractors for a wide range of activities, including those previously done by employees. Currently, the Bill could have the effect of limiting the scope of activities for which contractors could be engaged. In light of these considerations, the distinction between employees and independent contractors appears to be artificial and impractical.
- 3.3 Telstra suggests that persons lawfully engaged by a carrier should enjoy the same status as employees of a carrier, and accordingly, the Bill should be amended such that the scope of subsection (2)(e) mirrors subsection (2)(d). We also suggest that the same amendment be made to the equivalent subsections of s 7(2) (subsections (a) and (aa)).

Dealings with accessed information

- 3.4 Under new s 108(2), an employee of a carrier can access stored communications in the course of performing duties related to:
- installing a line or equipment used, or intended to be used, in connection with a telecommunications service; or
 - the operation or maintenance of the telecommunications system.

However, the permitted dealings with information lawfully accessed from a stored communication (“**accessed information**”), by employees of carriers, is limited to where the accessed information relates to:

- the operation or maintenance of a telecommunications network operated by the carrier; or
- the supply of services via a telecommunications network by the carrier (new s 135 (3) and (4)).

It is unclear why the accessed information must itself relate to operations or maintenance or the supply of services. We recommend that s 135(3) and (4) be amended to reflect that it is the communication or use of the information (rather than the information itself) which should relate to those matters.

- 3.5 Further, there is a difference in scope between s 135 and s 108(2). Telstra recommends that the drafting of new s 135 be amended to mirror s 108 so that the permitted dealings with lawfully accessed information reflect the ways in which that information may be lawfully accessed.
- 3.6 We also note that the consideration relating to the treatment of independent contractors under s 108, also applies to s 135. We recommend that the provisions relating to permitted dealings be amended to give persons lawfully employed by a carrier the same status as employees of a carrier. Again, we also recommend that the same amendment be made to existing s 63B.

4 Equipment-based interception

- 4.1 For the purposes of equipment-based interception, new s 6Q allows telecommunications devices to be identified via either a unique telecommunications number or a unique identifying factor. The Explanatory Memorandum to the Bill explains that the requirement that the telecommunications number or identifying factor be unique is designed to “*ensure that interception only occur where an interception agency is able to identify the particular telecommunications device that is to be the subject of the telecommunications interception.*”
- 4.2 Telstra seeks clarification on its position if it executes a warrant in circumstances where it turns out that the IMEI number given for the purposes of identifying the telecommunications device has been duplicated and is not “unique”. Would the warrant be invalid, and furthermore, would Telstra be liable for an unlawful interception?
- 4.3 Telstra proposes that “unique” be defined so that an IMEI number will be considered unique if the applicant agency has satisfied certain requirements aimed at, as best possible, ensuring that the IMEI number is unique, and is in fact, not a duplicate.

5 Other amendments - s 6(2)

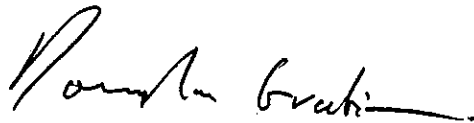
- 5.1 The Explanatory Memorandum to the Bill explains that subsection 6(2) was intended to exempt the activities of telecommunications carriers, and their employees, from the general prohibition against interception, for the purposes of testing equipment and ensuring the proper operation of the telecommunications network. The repealing of subsection 6(2) is intended to reflect the fact that it no longer has any application in the

“deregulated telecommunications market” and to ensure that it does not undermine privacy considerations.

- 5.2 However, subsection 6(2) has other applications apart from those identified in the Explanatory Memorandum. For example, subsection 6(2) permits private organisations to monitor incoming communications (such as monitoring incoming emails for viruses and to filter spam), and is also the only provision under which extension phones do not result in a breach the Act.
- 5.3 In light of these considerations, Telstra recommends that the repealing of s 6(2) be reconsidered.

Telstra would like to thank you again for the opportunity to make a submission on this important issue. We would welcome any further opportunity to discuss this submission or any other related matters.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Douglas Gration', with a long horizontal flourish extending to the right.

Douglas Gration
Company Secretary
Telstra Corporation Limited