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ACMA submission to the Review of the mandatory data retention regime

Introduction

The Australian Communications and Media Authority (ACMA) is Australia's regulator for telecommunications, broadcasting, some online content and radiocommunications. Our purpose is to maximise the economic and social benefits of communications and media for Australia.

The ACMA's roles in relation to the data retention regime include reporting to the Minister for Communications, Cyber Safety and the Arts on the compliance costs associated with the regime and enforcing compliance with the data retention obligations under the applicable enforcement mechanisms set out in the *Telecommunications Act 1997* (the Act).

Submission overview

The Parliamentary Joint Committee on Intelligence and Security has commenced its Review of the mandatory data retention regime prescribed by Part 5-1A of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

The ACMA's submission to this Review responds to two of the Terms of Reference, as set out below, and includes information about:

- > the compliance costs borne by industry which have been reported by the ACMA; and
- > agency access to certain retained telecommunications data under the Act.

ToR: costs, including ongoing costs borne by service providers for compliance with the regime

The ACMA has reported annually to the Minister on the cost of compliance with the requirements of Part 5-1A of the TIA Act (about data retention) under paragraph 105(5A)(b) of the Act.

The table below shows the industry reported cost of complying with the data retention obligations as published in the ACMA's *Communications report 2016–17*¹ and *Communications report 2017–18*²:

¹ ACMA, *Communications report 2016–17*, available at: <https://www.acma.gov.au/theACMA/previous-communications-reports>

² ACMA, *Communications report 2017–18*, available at: <https://www.acma.gov.au/theACMA/communications-report>

Financial year	Data retention compliance cost (exclusive of data retention industry grants)	Costs recovered from Criminal Law Enforcement Agencies
2014–15	\$11,972,288.15	\$7,316,341.41
2015–16	\$44,426,132.06	\$9,412,132.06
2016–17	\$119,793,739.83	\$9,829,783.17
2017–18	\$35,355,577*	\$12,515,681
Total	\$211,547,737.04	\$39,073,9370.64

Note 1: The data represents the administrative and substantive compliance costs reported to the ACMA by industry participants. Industry participants were permitted to report on behalf of subsidiary organisations.

Note 2: Although the data retention obligations came into effect in October 2015, the ACMA reported costs from October 2014. This is because the Data Retention Industry Grants Programme Guidelines³ allowed carriers and carriage service providers to submit direct (establishment) costs associated with meeting their obligations, which had been incurred (or would be incurred) from 30 October 2014 onwards.

** One carriage service provider reported its administrative costs in British pounds. The data retention compliance costs reported include the Australian dollar equivalent of this amount as at the date it was reported to the ACMA.*

Source: Carriers and carriage service providers. The Department of Home Affairs provided information relating to the funding of grants.

The ACMA notes that of the 498 entities that reported to the ACMA in 2017–18, two percent of the entities were responsible for almost 70 percent of the data retention compliance costs.

ToR: any access by agencies to retained telecommunications data outside the TIA Act framework, such as under the Telecommunications Act 1997

Disclosures of customer information under section 280 of the Act

Under Part 13 of the Act, carriers, carriage service providers, number-database operators, emergency call persons and their associates are prohibited from disclosing customer information that they hold to other parties, except in limited circumstances. Carriers, carriage service providers and number-database operators are required to report specific disclosures to the ACMA under section 308 of the Act.

Section 280 of the Act permits the disclosure or use of information if:

- > in a case where the disclosure or use is in connection with the operation of an enforcement agency⁴—the disclosure or use is required or authorised under a warrant; or
- > in any other case—the disclosure or use is required or authorised by or under law.

The ACMA is required under paragraph 57(f) of the *Australian Communications and Media Authority Act 2005* to include in its annual report certain information on disclosures, including disclosures of customer information, made by carriers and carriage service providers during the reporting year.

In 2017–18, 11,976 disclosures were reported under section 280 of the Act.⁵ In the same period, 563,670 disclosures were made under all TIA Act provisions⁶.

³ A copy of the Guidelines is available at: <https://www.homeaffairs.gov.au/nat-security/files/data-retention-industry-grants-programme-guidelines.pdf>

⁴ *Enforcement agency* has the same meaning as in the TIA Act (see subsection 280(2) of the Act)

⁵ ACMA, *Annual report 2017–18*, Appendix 6: Disclosures of information, available at: <https://www.acma.gov.au/theACMA/Library/Corporate-publications/annual-report>

⁶ Sections 177, 178, 178A, 179, 180, 180A, 180B of the TIA Act

Provision of reasonably necessary assistance under section 313 of the Act

Subsections 313(3) and 313(4) of the Act require carriers, carriage service providers and carriage service intermediaries to give officers and authorities of the Commonwealth and of the States and Territories such help as is reasonably necessary for the following purposes:

- (a) enforcing the criminal law and laws imposing pecuniary penalties;
- (b) assisting the enforcement of the criminal laws in force in a foreign country;
- (c) assisting the investigation and prosecution of crimes within the jurisdiction of the International Criminal Court (within the meaning of the *International Criminal Court Act 2002*) and Tribunal offences (within the meaning of the *International War Crimes Tribunals Act 1995*);
- (d) protecting the public revenue;
- (e) safeguarding national security.

Carriers, carriage service providers and carriage service intermediaries must comply with the requirement to provide reasonable assistance on the basis that they neither profit from, nor bear the costs of, giving that help.⁷ However, they are not required to report on agency requests for assistance made under section 313 of the Act.

In line with guidelines set by the government⁸, Commonwealth agencies report to the ACMA on the use of subsection 313(3) for the lawful disruption of access to online services. State and territory agencies are encouraged to also report. In the 2017–18 financial year, the ACMA actively sought information from Commonwealth and selected state and territory agencies on whether they had used subsection 313(3). However, none reported using that provision.⁹

Conclusion

As the national regulator for telecommunications, we have an ongoing interest in the availability and reliability of telecommunications information held by industry to support law enforcement and national security agencies charged with protecting our communities.

The ACMA has not had cause to undertake any investigations into compliance with the data retention obligations and does not have evidence that suggests any deficiencies in the effectiveness of the regime.

The ACMA notes that the Department of Communications and the Arts has policy responsibility for Part 13 and section 313 of the Act. The Information Commissioner is responsible for monitoring compliance with the record-keeping aspects of Part 13 of the Act.

⁷ See subsection 314(2) of the Act. Cost recovery arrangements are managed directly between the relevant carrier or carriage service provider and agency.

⁸ Department of Communications and the Arts, *Guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services*, available at: www.communications.gov.au/documents/guidelines-use-section-3133-telecommunications-act-1997-government-agencies-lawful-disruption-access

⁹ ACMA, *Communications report 2017-18*, available at: <https://www.acma.gov.au/theACMA/communications-report>