



Submission No 115

Inquiry into potential reforms of National Security Legislation

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The Secretary
Parliamentary Joint Committee on Intelligence and Security

By email

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Inquiry into Potential Reforms of National Security Legislation

The Attorney-General's Department ("**AGD**") has asked the Parliamentary Joint Committee on Intelligence and Security ("**PJCIS**") to consider a package of national security ideas. These ideas comprise proposals for reform regarding (i) telecommunications interception, (ii) telecommunications sector security and (iii) Australian intelligence community legislation. The AGD has promulgated a discussion paper which describes the reform proposals.¹

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the PJCIS. The security of Australia's telecommunications infrastructure and services is of fundamental national importance and it is essential that security arrangements are effective and efficient. As a carriage service provider and data centre operator, Macquarie's primary interest lies with the telecommunication sector security reforms as set out in the Discussion Paper. Accordingly, these proposed reforms are the focal point of this submission.

This submission is structured in three main parts:

- Macquarie's understanding of the telecommunication sector security reforms;
- Macquarie's concerns with the proposed reforms; and
- Macquarie's comments on other related matters.

Macquarie's Understanding of the Telecommunication Sector Security Reforms

Macquarie understands that the telecommunication sector security reforms have evolved from reform proposals that the AGD had promulgated and consulted with industry on earlier this year.² As set out in the Discussion Paper, the reform proposals involve legislative changes to better manage national security challenges to Australia's telecommunications infrastructure. Key elements of the reforms concern:

- an industry-wide obligation on all carriers / carriage service providers ("**C/CSPs**") to protect their infrastructure supported by assessments and audits to demonstrate compliance with this obligation;

¹ Attorney-General's Department, "Equipping Australia Against Emerging and Evolving Threats", Discussion Paper, July 2012 ("**Discussion Paper**")

² Attorney-General's Department, "Proposed regulatory scheme to enhance the security, integrity and resilience of Australia's telecommunications infrastructure", February 2012 ("**Consultation Paper**")



- a requirement for C/CSPs to provide Government, when requested, with information to assist in the assessment of national security risks to infrastructure; and
- powers of direction and a financial penalty regime to encourage compliance.

Macquarie's Concerns with the Telecommunication Sector Security Reforms

Macquarie notes that the telecommunication sector security reforms are less intrusive than the reforms first proposed by the AGD in its Consultation Paper. This softening of the AGD's original proposal is welcomed by Macquarie. However, some potential concerns remain including the following:

- justification of proposed reforms;
- proportionality of the proposed reforms; and
- reach of the proposed reforms.

Justification for Proposed Reforms

Macquarie is concerned that the proposed reforms may not be sufficiently justified. Any form of regulatory intervention necessarily involves an imposition of costs. Such costs include the direct costs incurred in the development, compliance and enforcement of the regulation and the opportunity cost of displacing Government and industry resources away from some other use. As such, it is essential that any regulatory intervention is properly and rationally justified.

Macquarie accepts that the security of Australia's telecommunications network infrastructure is important *per se* and to take action to protect it is in Australia's national interest. At the same time, C/CSPs and other players in the broader communications sector are highly motivated to ensure the security of their own network infrastructure, systems and data. With a clear alignment between the interests of industry players and the Government on the need for network infrastructure security, Macquarie believes a better outcome could be achieved with increased communication at a trusted level between industry and Government.

Proportionality of Proposed Reforms

Macquarie is concerned that even if the proposed reforms are justified they do not seem proportionate to the burden on industry. A key principle of effective regulation is that a balance is struck between the advantages that a regulation provides and the constraints that it imposes. In addition, the costs of complying with an administrative procedure must be proportionate to the benefits to society resulting from the new procedure.

Macquarie submits that there is a mutual interest between industry players and the Government on the necessity to protect the security of personnel, infrastructure and data relating to Australia's telecommunication networks. In this context, Macquarie is of the view that the proposal to introduce reforms which would be enforced by legislative provisions that enable the AGD to issue formal directions to, and to impose penalties on, C/CSPs do not seem proportionate overall.

Macquarie suggests that industry-led self-regulation would be a more proportionate alternative regulatory intervention to that proposed by the AGD in the Discussion Paper. Such self-regulation could involve, for example:

- a voluntary general obligation on C/CSPs to protect their telecommunications infrastructure, networks and systems;
- a voluntary commitment for C/CSPs to comply with an industry code concerning “competent supervision”; and
- promulgation by Government of guidelines to industry players regarding notifications on sensitive procurement and on infrastructure modifications.

The above measures may be enforced by an industry code or an accreditation scheme promulgated by a representative industry body, such as Communications Alliance or OzHub. Macquarie believes that this type of industry-led regulatory intervention would be more effective and less costly to implement than the scheme proposed by the AGD.

Reach of Proposed Reforms

Macquarie is concerned that the proposed reforms apply only to a limited range of industry players which may not be appropriate to effectively manage infrastructure security risks. In particular, it appears that the proposed reforms would apply only to C/CSPs. *Prima facie*, the infrastructure, data and services of pay TV, free to air TV, radio network, managed hosting and data centre operators would not be subject to the reform proposals. This would appear to leave a significant part of Australia’s communications infrastructure potentially exposed to higher security risk.

While advocating a broader reach of the proposed reforms, Macquarie would be concerned if the cost burden continued to fall upon C/CSPs. That is, an equitable sharing of costs is an essential requirement for reforming the security legislation.

Macquarie believes that the proposed reforms would be better matched with potential high impact security risks if the reforms focused on:

- operators / service providers of “sensitive” communications infrastructure, data and services irrespective of whether or not they are also C/CSPs; and
- Australian service providers that store “sensitive” data in data centres which are located outside Australia.

Macquarie’s Comments on Other Matters

Macquarie wishes to comment on two other matters arising from the Discussion Paper:

- absence of draft legislation;
- data retention; and
- tiered regulatory model.

Limited Details of the Proposed Reforms

Macquarie notes that while the Discussion Paper sets out a large number of proposed legislative reforms, there is no draft legislation *per se*. As such, there is a practical difficulty in making comments on reform proposals which are not set out in detail. Macquarie understands that draft exposure legislation will be available in a further round of industry consultation and looks forward to reviewing this and making comments as appropriate in due course.

Data Retention

Macquarie notes that as set out in the Discussion Paper, the AGD seeks the view of the PJCIS on

*“Applying tailored data retention periods for up to 2 years for parts of a data set ...”.*³

This is the latest iteration of the AGD’s proposal to introduce a data retention regime which was first raised with industry in 2008. The Discussion Paper does not, however, provide any elaboration on the details of the proposed data retention regime.

Macquarie accepts that data retention may enhance the capacity of government agencies to investigate crime and to protect national security. However, as the volume of data being created increases there is a significant and increasing cost in data storage and retrieval which *prima facie* would be borne by industry. Accordingly, Macquarie expresses its in principle concern about any data retention regime which would impose a significant additional cost to industry.

Macquarie also notes that there is a wide range of matters that need to be addressed before any proposal for a data retention regime can be seriously considered by industry. Such matters include:

- the scope of the data to be retained;
- how data is stored, secured, retrieved and delivered; and
- who has access to stored data and the terms on which access is provided.

Tiered Regulatory Model

Macquarie notes that the Discussion Paper raises a “tiered model” in which interception and delivery capability would be differentiation on the basis of the size of the C/CSP. Macquarie supports this approach as a principle on the basis that the burden of compliance is better matched to the security risk of the C/CSP and the capacity of the C/CSP to comply. Moreover, such a tiered model can equally be extended to the proposals concerning security obligations and data retention. That is, Macquarie advocates that a “one size fits all” approach to regulation is not appropriate in situations where there are significant differences between C/CSPs in the security risks that they pose and the extent to which they require regulatory supervision.

³ Discussion Paper, p 13

Closing

Macquarie appreciates the opportunity to make these comments on the proposals to reform Australia's national security legislation. Macquarie believes that the views of the AGD and of industry on the national importance of the security of Australia's communications infrastructure are broadly aligned. As such, in order for security reform proposals to be acceptable to industry they must be practical, effective and efficient. Macquarie would be pleased to elaborate on the matters raised in this submission. Please do not hesitate to contact me should you have any queries.

Yours sincerely

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