



**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

*Inquiry into the provisions of the  
Telecommunications (Interception) Amendment Bill 2006*

**March 2006**

## Summary of Recommendations

The Australian Competition and Consumer Commission recommends that the Committee consider:

1. Not restricting the ACCC's current lawful capacity to use section 155 of the TPA if the ACCC becomes aware of the availability of information intended for a person which may relate to a breach of the TPA, and to obtain that information from the Carrier without notice to the "intended recipient".
2. If the above recommendation (1) is not acceptable, the Bill be amended to permit law enforcement agencies to use their notice based powers to access stored communications from a Carrier using an objective test of notice to the intended recipient after provision of a statutory notice on a Carrier, which may be given to the intended recipient once the Carrier has secured the relevant stored communications, rather than the law enforcement agency having to establish that the intended recipient had knowledge of the approach.
3. If above recommendations at (1) or (2) are not acceptable, the Bill be amended to ensure that:
  - a. the ACCC is able to obtain a stored communications warrant in relation to an investigation of provisions of the TPA which are subject to pecuniary penalties where the threshold monetary equivalent of penalty units specified in the Bill is met; and
  - b. the ACCC be able to obtain a stored communications warrant in relation to an investigation of provisions of the TPA which are not subject to penalty units, pecuniary penalty or terms of imprisonment.

## 1. Introduction

The Australian Competition and Consumer Commission (ACCC) is a statutory body responsible for ensuring compliance with the competition and consumer protection provisions of the *Trade Practices Act 1974* (TPA).

The ACCC is concerned that the current formulation of the *Telecommunications (Interception) Amendment Bill 2006* (the Bill) limits the existing capacity of the ACCC to obtain stored communications from Carriers<sup>1</sup> under section 155 of the TPA and in the future, the proposed stored communications warrant regime set out in the Bill.

## 2. Structure of the Bill

Subsection 108(1) of the Bill makes it an offence for a person to access a stored communication without the knowledge of the intended recipient of the stored communication, with subsection 108(2) setting out exceptions to that general prohibition, allowing access in certain circumstances such as under a stored communications or interception warrant.

The definition of “stored communication” in subsection 5(1) of the Bill is a communication that:

- (a) has passed over a telecommunications system; and
- (b) is not passing over that or any other telecommunications system; and
- (c) is held on equipment operated by, and is in the possession of, a Carrier; and
- (d) is accessible to the intended recipient of the communication.

Section 6AA of the Bill defines “accessing a stored communication” as listening to, reading or recording such a communication, by means of equipment operated by a Carrier, without the knowledge of the intended recipient of the communication.

## 3. Section 155 of the TPA

The statutory notice regime under section 155 of the TPA enables the ACCC to require a person (individual or corporation) to produce documents and provide written answers to questions if the Commission, the Chairperson, or the Deputy Chairperson has reason to believe that person is capable of furnishing information, producing documents, or giving evidence relating to a matter that constitutes or may constitute a breach of the TPA.

At present the ACCC may seek to use section 155 of the TPA to require a Carrier to provide documentary material relating to an individual, such as webmail received or sent by that person, that is within the Carrier’s possession and without notice to the individual, if that material may disclose information relating to a breach of the TPA. If the Bill was implemented in its current form, the ACCC’s power to issue a notice under section 155 of the

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<sup>1</sup> “Carrier” is defined in the *Telecommunications (Interception) Act 1979*, s5. It is understood that Licensed Carriers (those entities which own infrastructure to supply telecommunications services to the public) and Carriage Service Providers (such as Internet Service Providers) fall within this definition.

TPA to obtain a stored communication from a Carrier without the knowledge of the intended recipient of the communication would be removed.

Examples of communications which are held on equipment operated by a Carrier, and in the possession of a Carrier, although accessible by the intended recipient may include:

- Webmail;
- Voicemail to mobile phones;
- Managed VoIP services where persons leave messages, VoIP applications; and
- SMS.

As more and more communications pass between people by email, SMS, voicemail or VoIP, the more important it is to the ACCC to be able to compel companies to retrieve such communications.

In most of the above circumstances the successful retrieval of information may depend upon the intended recipient of the stored communication not having knowledge of the intended access for reason that should the person delete say their SMS to defeat the ACCC's intended approach, the Carrier is unlikely to retain records of such communications except for a very short time and as such the request for information may be defeated.

While the ACCC does not believe its ability to use section 155 of the TPA should be curtailed if it becomes aware of the availability of information intended for a person which may relate to a breach of the TPA and is held by a Carrier, it recognises that should the underlying policy behind the Bill regarding access to stored communications, concern for privacy for persons,<sup>2</sup> require access by law enforcement agencies to be limited, it suggests the ability of law enforcement agencies to access stored communications be predicated upon whether use of a notice based power is overt.

#### **4. Requirements for “Knowledge” compared to “Notice”**

The ACCC requests the Committee consider whether the prohibition on access to a stored communication without the *knowledge* of the intended recipient in subsection 108(1) of the Bill is appropriate given the Explanatory Memorandum to the Bill advises that “notices to compel disclosure of information may still be utilised for access to stored communications by enforcement agencies such as the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission where the use of the notices is overt.”<sup>3</sup>

The ACCC believes that the requirement for knowledge raises two important issues that it wishes to draw to the attention of the Committee — the requirement to demonstrate the subjective belief of the intended recipient and the requirement of agencies to demonstrate knowledge providing the intended recipient with the opportunity to delete the stored communications whilst attempts are made to satisfy that requirement.

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<sup>2</sup> Explanatory Memorandum, *Telecommunications (Interception) Amendment Bill 2006*, page 7.

<sup>3</sup> Explanatory Memorandum, *Telecommunications (Interception) Amendment Bill 2006*, page 4.

Should the ACCC attempt to overtly use a section 155 notice, such as by notifying the intended recipient of a stored communication that it intends to approach a Carrier to obtain the stored communication via section 155, doubt could remain whether the ACCC had satisfied the requirements of the Bill as it may be unknown whether the intended recipient has actual knowledge of the potential approach to the Carrier (ie did the person open the letter, read the fax).

Demonstrating actual knowledge by the intended recipient may have the practical effect of precluding law enforcement agencies from seeking to use a notice based power upon a Carrier. While best efforts could be applied to act openly to inform the intended recipient of the proposed approach, the structure of the Bill may require that the intended recipient have actual knowledge, which is a subjective test and may be open to challenge, despite the best efforts of the agency to inform the intended recipient.

As previously noted, the likelihood of successful retrieval of information may depend upon the intended recipient of a stored communication not having sufficient warning of the intended access to the communication by the Carrier to avoid a situation of the communication being deleted and unrecoverable.

The ACCC is concerned that having to satisfy the knowledge requirement in the Bill, as currently drafted, may allow intended recipients to frustrate the retrieval of stored communications. One way in which the objectives of the Bill may be achieved whilst permitting timely access to stored communications is by relying on an objective test, such as whether the intended recipient of a stored communication had notice, including constructive notice, that the agency had sought access to the stored communication.

The ACCC considers that overt usage of a section 155 notice should be satisfied by the ACCC advising an intended recipient of a stored communication of its approach to a Carrier to obtain stored communications under section 155, and in providing copies of the communications so obtained.

Should the Committee consider the Bill needs to be amended so that law enforcement agencies be required to provide notice to the intended recipient of an approach to a Carrier, as distinct from the law enforcement agency having to establish that the intended recipient had knowledge of the approach, the ACCC recommends that the Bill should be framed so that notice can be given to the intended recipient after the provision of the statutory notice to the Carrier and once the Carrier has secured the relevant stored communications.

## **5. Stored Communications Warrants**

If the ACCC is unable to use its existing section 155 of the TPA as outlined above, to fill this information gathering void the ACCC must be able to access a stored communications warrant in order to facilitate investigation of the competition and consumer provisions of the TPA.

The ACCC's ability to obtain a stored communications warrant under the Bill appears however to be quite limited. The only Part of the TPA which would appear to meet the

threshold for the ACCC to make an application for a stored communications warrant is Part VC, which provides for criminal liability in consumer protection matters.

*i. TPA contraventions subject to pecuniary penalties*

A stored communications warrant can only be obtained in connection with the investigation of a serious contravention, defined in section 5E of the Bill as a contravention of a law of the Commonwealth or a State that is a “serious offence” or is punishable by a period of imprisonment of at least three years or 180 penalty units for individuals or 900 penalty units for a corporation. As noted in the Explanatory Memorandum, in accordance with section 4AA of the *Crimes Act 1914*, 900 penalty units is equivalent to \$99,000 and 180 penalty units, \$19,800.

Of concern is the operation of section 5E and in particular subsection 5E(3). It states:

(3) To avoid doubt, a reference in this section to a number of penalty units in relation to a contravention of a law of a State or a Territory includes a reference to an amount of a fine or pecuniary penalty that is equivalent, under section 4AA of the *Crimes Act 1914*, to that number of penalty units.

As the TPA is a Commonwealth statute, it appears that the ACCC will not be able to obtain a stored communications warrant when investigating conduct attracting pecuniary penalties as distinct from liability in the form of “penalty units”.

Of particular concern, especially in relation to investigation of cartel conduct, is that while it would appear that monetary penalties under the TPA are over the proposed threshold in the Bill, section 4AB of the *Crimes Act 1914* appears to expressly exempt section 76 of the TPA, which provides for pecuniary penalties under the competition provisions of the TPA,<sup>4</sup> from being considered as referable to a number of penalties units of the same monetary value.

The ACCC recommends that the Committee consider an amendment to the Bill to ensure that pecuniary penalties available under the TPA can be considered, for the purposes of the Bill, to be an amount equivalent to the monetary value of penalty units stipulated in section 5E.

*ii. TPA contraventions not subject to penalty units or pecuniary penalty*

An additional concern is that it appears the ACCC would be unable to obtain a stored communications warrant when a person is suspected of breaching provisions of the TPA which provide for injunctions, declarations and community service orders, such as Unconscionable Conduct (Pt IVA), Industry Codes (including franchising code of conduct – Part IVB) and Consumer Protection (Pt V).

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<sup>4</sup> Section 76 of the TPA provides that the maximum penalty under competition provisions of the TPA is \$10 million per corporate offence and \$500,000 per offence by an individual. Proposed amendments to the TPA provide for a maximum corporate fine of the greatest of \$10 million, three times the benefit from the cartel, or where the benefit cannot be readily determined, ten per cent of annual turnover of the body corporate and all of its related bodies corporate (if any). The foreshadowed criminalisation of cartel conduct would result in a maximum five year gaol term and a maximum fine of \$220,000 for individuals.

This raises a significant issue because it impacts on a large proportion of the ACCC's enforcement work. The Committee may wish to be aware that approximately 60% of complaints brought to the attention of the ACCC Infocentre, a telephone and email information and complaints service for consumers and businesses, relate to Part V of the TPA.<sup>5</sup>

Criminal sanctions are reserved for only the most blatant, harmful or dishonest conduct and are usually not the most appropriate option in consumer protection matters. The ACCC's focus is usually on stopping conduct quickly, limiting any harm likely to result from conduct that has already occurred, and pursuing consumer redress where possible. There are several aspects of criminal proceedings that mean these goals cannot always be achieved such as the significantly longer timeframe involved arising for example from greater resource requirements, stricter procedural requirements and the need to prove the contravention to the criminal standard of "beyond reasonable doubt".

As such, confining the ACCC's ability to seek stored communications warrants to criminal offences would preclude a significant portion of investigations from ever possibly having recourse to the stored communications warrant regime.

Despite not attracting terms of imprisonment, penalty units or pecuniary penalty, the ACCC regards a contravention of the unconscionable conduct, industry codes and consumer protection provisions of the TPA as being quite serious and would recommend that the Committee consider an amendment to the Bill to ensure that a stored communications warrant could be obtained in relation to an investigation of such provisions.

## **6. Summary and Recommendations**

In the ACCC's view it is imperative that for the purpose of its investigations it must have workable access to stored communications held by Carriers.

As such the ACCC recommends that the Committee consider:

1. Not restricting the ACCC's current lawful capacity to use section 155 of the TPA if the ACCC becomes aware of the availability of information intended for a person which may relate to a breach of the TPA, and to obtain that information from the Carrier without notice to the "intended recipient".
2. If the above recommendation (1) is not acceptable, the Bill be amended to permit law enforcement agencies to use their notice based powers to access stored communications from a Carrier using an objective test of notice to the intended recipient after provision of a statutory notice on a Carrier, which may be given to the intended recipient once the Carrier has secured the relevant stored communications, rather than the law enforcement agency having to establish that the intended recipient had knowledge of the approach.

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<sup>5</sup> Since 1 March 2005, there have been 30,221 Part V complaints out of a total of 48,910.

3. If above recommendations at (1) or (2) are not acceptable, the Bill be amended to ensure that:
  - a. the ACCC is able to obtain a stored communications warrant in relation to an investigation of provisions of the TPA which are subject to pecuniary penalties where the threshold monetary equivalent of penalty units specified in the Bill is met; and
  - b. the ACCC be able to obtain a stored communications warrant in relation to an investigation of provisions of the TPA which are not subject to penalty units, pecuniary penalty or terms of imprisonment.