Albert Ounapuu
[redacted]

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By email

Department of Communications and the Arts
Attorney-General's Department
CommunicationsSecurity@ag.gov.au

Dear Sir / Madam

Submission regarding access to telecommunications data in civil proceedings

I refer to the departments' consultation paper inviting submissions on the prohibition on the use of data retained under the data retention regime (**Retained Data**) in civil proceedings and the regulation-making power.

Executive summary

For the reasons below, I believe the prohibition on the use of Retained Data in civil proceedings is appropriate and the regulation-making power should be used sparingly, if at all, to permit Retained Data to be used in civil proceedings:

- use of Retained Data in civil proceedings would undermine recent attempts to contain and limit the proliferation of documents in civil proceedings;
- subpoenas issued to access Retained Data would be difficult to interpret and might potentially spawn costly and inefficient satellite litigation;
- Retained Data does not, by its nature, tend to disclose useful information in the same way that, for example, the metadata of a native Microsoft Word document might disclose; and
- access to Retained Data in civil proceedings represents an undue and disproportionate intrusion into the affairs of parties to civil proceedings which neither the courts nor the parties would be best placed to manage through existing case management techniques.

If the regulation-making power is to be used, I believe the use of Retained Data should be restricted to certain occasions in certain types of civil proceedings (for example, proceedings in the Family Court of Australia in which child abduction is alleged) so as to mitigate the risks discussed below which arise in the commercial context.

Background

I make this submission on my own behalf.

I am a senior associate in the dispute resolution and litigation department of a commercial law firm with offices in Melbourne and Sydney.

I am principally involved in civil proceedings in the Supreme Court of Victoria and Federal Court of Australia, acting for parties to commercial disputes, including proceedings brought by regulators.

I do not have experience of family law proceedings involving violence or international child abduction cases, which the Committee referred to in its *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*. I make this submission on the basis that Retained Data may be permitted to be used in civil proceedings (generally or otherwise) with consequences (intended or otherwise) for the sorts of proceedings in which I have experience.

Documents in civil litigation

It is trite that the proliferation of documents, particularly electronic documents, is a feature of modern civil litigation.

Significant steps have been taken in recent years to reduce the scope for documents to overwhelm both the parties and the courts and to enable civil litigation to be conducted in a just, efficient, timely and cost-effective way.

For example, the rules in relation to discovery in the Supreme Court of Victoria do not permit a party to routinely obtain what was previously described as "general discovery". Rather, discovery is usually limited to documents:

(a) on which a party relies;

(b) that adversely affect a party's own case;

(c) the adversely affect another party's case;

(d) that support another party's case,

which the party giving discovery is, after a reasonable search, aware at the time discovery is given.[1] Similar rules apply in other jurisdictions.[2]

In my experience, the effect of those rules, and the enactment of legislation like the *Civil Procedure Act 2010* (Vic), has been substantial.

However, discovery in modern civil litigation still consumes enormous resources. It is not unusual for the number of discovered documents in an ordinary case to run into the tens of thousands, to say nothing of the hundreds of thousands, and sometimes millions, of documents which must be reviewed prior to discovery being given to check for relevance and privilege.

The foregoing does not apply to documents obtained on subpoena, which is how Retained Data might ordinarily be obtained in civil proceedings, were parties permitted to do so. In my view, while subpoenas are an important part of civil litigation, the risk that subpoenas will spawn expensive satellite litigation, delaying the effective resolution of a proceeding, should always be closely managed. That risk is heightened in Victoria where there is no requirement for leave to issue a subpoena. In my experience, the process of issuing a subpoena, producing

[1] *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 29.01.1(3).
[2] See, eg, *Federal Court Rules 2011* (Cth), rr 20.14(1) and (2).

documents, hearing various parties' objections to production and/or inspection, implementing a regime for review for confidentiality / privilege and inspecting the documents produced can often take weeks, if not months, and consumes resources of the parties that might better be applied in resolving (or conducting) the relevant proceeding more generally.

Further, the test for relevance applicable to subpoenaed documents is generally very broad. The party receiving a subpoena is required to interpret the subpoena categories and assess the relevance of any documents in his, her or its possession. In circumstances where Retained Data does not, by its nature, tend to disclose the substance of a communication, there is a risk that a telecommunications service provider receiving a subpoena will be placed in an untenable position, which will either result in no documents being produced, or potentially, all documents potentially caught by the subpoena being produced, leading to wastage and duplication.

The recipient of a subpoena may recover their reasonable costs of compliance but the process is not always straightforward and can, in some cases, spawn further satellite litigation solely relating to the costs of compliance.

Use of metadata in civil litigation

The ability to access and review the metadata pertaining to a particular document can be critical in civil litigation.

For example, if a party discovers a document which appears to be exculpatory or dispositive of a particular issue, and that document has not previously been disclosed, review of the metadata of the native file-format version of the document (assuming it exists) will enable the other party to determine if the document is genuine, or a recent invention.

However, by its nature, Retained Data is unlikely to be able to be used in that way. That is because the data set required to be retained does not tend to disclose the substance of a communication. For that reason, in my experience, the prohibition on the use of Retained Data in civil proceedings has not affected, and will not affect, parties' ability to request, and where possible, inspect the metadata of a contentious document.

Risks of undue intrusion

It has been recognised that the process of civil litigation, and in particular disclosure of documents, is an intrusion into the affairs of the parties to litigation. That intrusion is traditionally justified on the basis that it is a necessary incident of the invocation of court processes to resolve disputes, and is proportionate - that is - it goes no further than is necessary to adjudicate the rights of the parties to the dispute.

Where disclosure may result in the loss of confidentiality of a particularly special or important piece of information, such as where parties to a proceeding are competitors in the market place and discovery may require sensitive pricing or market data to be disclosed, the courts can, and do, impose confidentiality regimes.[3]

[3] *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34.

The parties are also protected and bound by an implied undertaking not to use any information obtained by compulsory processes for any other purpose.[4] That undertaking ceases to apply once information has been received in evidence in open court.

If parties were permitted to use Retained Data in civil proceedings, in my view the balance might, in some cases, tip the other way and the limited protections (outlined above) might be insufficient. For example, one can imagine cases where, in pursuit of a legitimate civil remedy, one party uses the threat of disclosure of Retained Data (or actual disclosure) to coerce the other to resolve the dispute on unfavourable terms. One can also imagine cases where disclosure of Retained Data provides a party with information which, despite the implied undertaking, assists that party in some way unconnected with the litigation.

These are risks that a court might ordinarily be best placed to manage, by invocation of its case management powers.[5] However, because of the nature of Retained Data, I am concerned that neither the Court nor the parties will be able to identify and manage these risks until after disclosure of the Retained Data, by which time it will be too late.

Yours sincerely

Albert Ounapuu

[4] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
[5] By invoking, for example, the overarching obligations contained in Pt 2.3 of the *Civil Procedure Act 2010* (Vic).