

Dear sir/madam

Thank you for the opportunity to make a submission to the ministerial review into access to retained data in civil proceedings.

I am a software engineer working in the technology industry. While I do not currently work for an employer who is significantly impacted by the data retention legislation, in a prior position I was employed by a Sydney IT firm who provide business ISP services and objected strongly to the initial data retention legislation.

Are there particular kinds of civil proceedings or circumstances in which the prohibition in section 280(1B) of the Telecommunications Act 1997 should not apply?

No - I do not believe there are any particular kinds of civil proceedings in which the prohibition in s280(1B) should be lifted.

It is clear that the intention of Parliament was that the exemption provisions be used extremely sparingly and only with very strong justification. The Government's justification for the civil liberties burden caused by the introduction of the data retention regime focused strongly on investigation of national security offences - an objective that will not be aided in any way by any exemption to s280(1B).

It is unclear how safeguards can be implemented to ensure that appropriate protections are given to prevent mishandling of data once it is handed over to private litigants. Given the extremely sensitive nature of the data collected (as recognised by the existence of an offence punishable by imprisonment in s276), maintaining the security of the data is paramount (as recognised, albeit insufficiently, by s187BA of the TIA Act). In the current cyber security climate, it is hard to believe that expanding the access regime to civil litigants will not expand the potential attack surface for malicious actors wishing to unlawfully access this data. The consultation paper does not suggest any proposals for managing this very significant risk.

Furthermore, expansion of access to civil proceedings is likely to impose further burdens and costs to carriers and providers in order to cope with increased request workload and compliance complexities. Many service providers and industry groups have previously noted the costs involved with complying with the data retention regime (e.g. "Government Must Act on Data Retention Funding", Communications Alliance, 12 April 2016, <http://www.commsalliance.com.au/about-us/newsroom/Government-Must-Act-on-Data-Retention-Funding>).

Placing further regulatory costs on the industry is an unnecessary burden which will only hinder innovation and development of the industry.

In particular, it is inappropriate for the prohibition to be lifted in relation to copyright or intellectual property disputes. During public debate on the data retention legislation, major concerns were expressed regarding the potential for metadata use in civil copyright enforcement (see, for example, "Data Retention a boon for copyright trolls", Electronic Frontiers Australia, 31 October 2014, <https://www.efa.org.au/2014/10/31/data-retention-copyright-trolls/>).

Until recently, the Department's website specifically stated that the data retention legislation does not apply to copyright cases ("Frequently Asked Questions", Attorney-General's Department, retrieved 28 April 2016,

<https://web.archive.org/web/20160428205854/https://www.ag.gov.au/NationalSecurity/DataRetention/Pages/Frequentlyaskedquestions.aspx>).

It is clear that civil copyright and intellectual property cases fall well outside the situations where access to retained data would be appropriate, and any expansion of access to cover these cases would cause major public debate.

Regards

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