



FEDERAL CIRCUIT COURT OF AUSTRALIA

Federal Circuit Court of Australia
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13 January 2017

Ms Anne Sheehan
Assistant Secretary
Communications Security Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
CANBERRA ACT 2600

By email: CommunicationsSecurity@ag.gov.au

Dear Ms Sheehan,

Review - Access to Retained Data in Civil Proceedings - Section 280 *Telecommunications Act 1997*

I am responding to your letter of 29 November 2016 seeking views to contribute to the review being undertaken by the Department of Communications and the Arts and the Attorney-General's Department as a result of an amendment to section 280 of the *Telecommunications Act 1997*. The background material provided by way of a Consultation Paper highlights the relevant recommendation of the Joint Committee on Intelligence and Security. You note that the prohibition on the use of telecommunications data in civil proceedings as a result of the amendment to section 280 comes into effect from 13 April 2017. However, consistent with the recommendation, a review is being undertaken on possible exceptions to the prohibition by way of regulations.

The Consultation Paper includes the following questions:

- 1. In what circumstances do parties to civil proceedings currently request access to telecommunications data in the data set outlined in section 187AA of the TIA Act?**
- 2. What, if any, impact would there be on civil proceedings if parties were unable to access the telecommunications data set as outlined in section 187AA of the TIA Act?**
- 3. Are there particular kinds of civil proceedings or circumstances in which the prohibition in section 280(IB) should not apply?**

The Court does not have any statistics on the circumstances in which parties currently request access to telecommunications data. While such statistics are not available it is not apparent that subpoenas are being issued to produce records in respect of retained metadata.

The procedure of issuing subpoenas to require witnesses to attend and give evidence and or produce documents is relied upon by the Court and is common to courts across the Federal and State jurisdictions. Such procedures are prescribed by the Rules of Court. These rules include procedures for objecting and setting aside subpoenaed material. Rules of Court also prescribe what court records are restricted from public access.

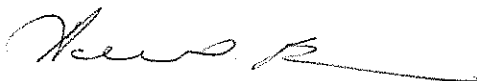
There are also a range of other powers that the courts can use to prevent the disclosure of sensitive information. As well as suppression and other powers, the courts have inherent powers to determine their own procedures and in exercising such powers need to have regard to the fairness of proceedings. In addition, specific statutory restrictions on public access to information apply in respect of certain classes of jurisdiction including family law/ child support and certain migration judicial review proceedings. In addition, the Court has certain jurisdiction in respect of national security and can issue control orders. In such proceedings the divulgence of information which might prejudice national security involves complex balancing of the public interest in keeping such information secret against the public interest in judicial fairness and open justice. Access to court records may also be affected by the *National Security Information (Criminal and Civil Proceedings) Act 2004* which was originally limited to the protection of information which could endanger national security if publicly disclosed in criminal proceedings, but subsequently amended to extend to public disclosure of such information in civil proceedings.

The countervailing public interest considerations in retained metadata being available for use in civil proceedings was highlighted in the Report and in the submissions made to the Joint Committee on Intelligence and Security. It would not be appropriate for the Court to comment on the policy position on whether or not access to telecommunications data without warrant should be limited to national security and serious criminal investigation. Various submissions made reference to potential risks associated with the absence of any restriction on access to such data in civil proceedings. Other submissions noted the potential benefit of such data being available in civil proceedings which are closely linked to a criminal matter. In this regard particular reference was made to international child abductions or family violence cases. The Recommendation contemplated *appropriate exceptions* by way of a regulation making power but did not go on to set out those exceptions. Feedback is sought on whether there are *particular kinds of civil proceedings or circumstances in which the prohibition in section 280 (1B) should not apply*.

While there are likely to be instances when access to such data will aid the Court in its determinative process, it is difficult to clearly enunciate these instances by way of particular classes of cases. An alternative approach may be to adopt a regime similar to that which applies in the *National Security Information (Criminal and Civil Proceedings) Act 2004* which regime is intended to allow parties to use sensitive information without potentially compromising national security. While this regime places statutory limitations on disclosure it also leave the court with some discretion to consider whether excluding sensitive information or witnesses would have a substantial adverse effect on the fairness of the hearing.

While the limited time frame has precluded more extensive consultation, I hope these comments are of some assistance to you in the review process.

Yours sincerely



Adele Byrne
Deputy Principal Registrar
Federal Circuit Court