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**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

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SYDNEY NSW 2000

4 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 of the
*Telecommunications Act 1997***

I refer to your letter (written jointly with Mr Brian Kelleher of the Department of Communications and the Arts) dated 29 November 2016 regarding the review of access to retained telecommunications data by parties to civil proceedings which is being undertaken by the Minister for Communications and the Attorney-General and the consultation paper which was attached. Your letter invites the Federal Court of Australia to make a submission to assist the Ministers in this review. The consultation paper identifies three questions on which the views of stakeholders with an interest in the civil justice system and privacy are particularly sought.

While it would be inappropriate for the Court to offer any view on what policy the Government might adopt on the issues being considered in this review, some information about the Court's relevant practices and procedures and experience may assist the review and any policy formulation which results.

The relatively short time available for comment, in combination with the timing of this request, has meant that my ability to consult widely within the Court in developing this response has been limited.

In the Federal Court all stages of all civil proceedings, whether at first instance (i.e. trial) or on appeal, are carefully case managed. This is generally by the Judge who will hear that proceeding or (particularly in appeals) who has been given responsibility for the case management of the proceeding.

The Court, parties and their legal representatives are each under a statutory duty to conduct proceedings to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. Cost sanctions (including against legal representatives personally) are available to redress any failure by parties and their representatives to comply with the obligations that are imposed on them in this regard.

Particular requirements have been imposed in regard to the pre-trial or pre-hearing disclosure processes in civil litigation through rules of court.

A subpoena can be issued only with the leave of the Court. A party seeking that leave bears the onus of demonstrating that the subpoena has a legitimate forensic purpose relevant to the issues in dispute in the proceeding. Draft subpoenas drawn in broad, imprecise or ambiguous terms or which appear to be “fishing” for evidence or documents may be denied leave.

In limited circumstances, “subpoena like” obligations can be created by a party to a proceeding serving on another party to that proceeding a Notice to Produce. Leave to serve a Notice to Produce is not required but production of documents in compliance can be required only at the trial or hearing of the proceeding and, in case law and Practice Notes issued by the Court, it has been made clear that, first, the party serving such a notice has the onus of establishing that the documents sought have an apparent relevance to the issues in the proceedings and, secondly, that this process should not be used either as an alternative to an application for discovery or for the purposes of “fishing” for evidence or documents.

Discovery, i.e. disclosure by a party in a proceeding or by a non-party of the identity of documents in his, her or its possession, custody or power which are directly relevant to the issues raised in that proceeding, and production of documents that have been discovered may not be given unless ordered by the Court. A party may only apply for an order for discovery if the making of that order will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

The Court’s objectives in its case management of civil proceedings and the controls it has imposed on pre-trial or pre-hearing disclosure are aimed squarely towards reducing cost and delay. Nevertheless, in the context of the Ministers’ review, the impact of these processes and controls is that an early screening mechanism is already in place in civil proceeding in the Federal Court of potentially unlawful disclosure or use of information – including any which may arise as a result of the operation from 13 April 2017 of the amendments to section 280 of the *Telecommunications Act 1997*.

Parties to civil proceedings in the Federal Court currently request access to telecommunications data collected and retained by service providers for their own purposes, primarily through the issue of subpoenas. As outlined above, the Court’s existing requirements impose an obligation on any party seeking leave to issue a subpoena to demonstrate that the subpoena has a legitimate forensic purpose relevant to the issues in dispute in the proceeding. A service provider served with a subpoena can apply to the Court to set aside that document if it is oppressive, too wide, ambiguous, “fishing” or conflicts with privilege.

The Court does not have available statistics about such subpoenas although, anecdotally, it is believed that the number per annum would be very low. Again anecdotally, from time to time information obtained as a result of the issue of such subpoenas has proven useful to

Judges of the Court in determining issues of fact or credit. For example, billing information might identify the location of a device when used at a particular time and corroborate (or not) one witness's evidence of his or her location at that time. Any reduction in access to telecommunications data which is currently available in civil litigation through the processes discussed above is likely to make it more difficult for Judges to determine issues of fact or credit in some matters.

I hope this information is of assistance in the review. If you require any clarification or have any questions about any of the matters mentioned above please contact me by phone or email.

Yours sincerely



John Mathieson
Deputy Principal Registrar