

# META DATA ACCESS FOR CIVIL CASES

A response in relation to the Consultation Paper – Access to Retained  
Data in Civil Proceedings issued by the Australian Government  
Department of Communications and the Arts

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## Overview

I am writing this submission to in response to your Consultation Paper – Access to Retained Data in Civil Proceedings and to protest the extension to the use data retained under the Telecommunications (Interception and Access) Act 1979, here in referred to as ‘the act’.

I will cover points that I believe to be key factors in the decision making process being undertaken and where possible expand on my explanations throughout.

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## Impact on the Civil Justice System

It has been noted in the consultation paper that the primary justification for considering exceptions to the prohibition of parties to civil cases accessing data retained under the aforementioned act, would be to forgo any adverse effect that the retained data may have on such cases.

As the data retained under the act has not previously been retained the subsequent enforcement of such prohibition should have no effect on the effective operation of the civil justice system, or the rights and interests of parties to civil proceedings.

Unnecessary access to data retained by the act could open the floodgates for prolonged and unruly proceedings in situations such as divorce, work disputes and alike. Wherein every phone call, chat, website visit or otherwise would be called into scrutiny whilst potentially adding very little the substance of such proceedings.

## Contravention of the Australian Privacy Principles

I bring to your attention Australian Privacy Principle #3:

*“the entity must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity’s functions or activities.”*

Whilst there exist a set of broad exemptions to the Australian Privacy Act in order to enable law enforcement and intelligence agencies to operate effectively to which the act is founded upon, they are not justifiable in the sense of a civil case.

Access to data retained under the act by parties to a civil case would be in my mind a serious breach of the Australian Privacy Act.

Where in the requirement to resolve such a case or dispute should not by virtue permit an involved party access to data retained under the act for scrutiny, with or without notice of disclosure.

Such a breach could be taken in liking to that of doctor patient confidentiality, where you would not expect your doctor to disclose to others the treatment or medication you may be receiving. Doing so would be a breach of the doctor’s obligations to an individual’s privacy.

## Mandatory Data Breach Notification Legislation

In relation to recommendations by the Parliamentary Joint Committee on Intelligence and Security, in its 2014 report into the data retention legislation the committee makes the following recommendation:

*Recommendation 38: The Committee recommends introduction of a mandatory data breach notification scheme by the end of 2015.*

Whilst the government committed to introduce such a scheme by the end of 2015 and on three separate occasions presented such legislation to do so to the parliament, this recommendation remains outstanding.

The Privacy Amendment (Notifiable Data Breaches) Bill 2016 that was introduced into the House of Representatives in October 2016 includes a tactfully placed level of discretion in relation to breaches that are suffered by an organisation in regards to data retained under the act.

Such discretion in my eyes undermines the very reason recommendation 38 was submitted to the government in the first place.

The government has in recent years shown little regard for the privacy of everyday Australian citizens in the pursuit of data retention. I believe that such discretions should be removed from the aforementioned bill and the bill be progressed in a prompt manner.

In my opinion failure to rectify these discretions and promptly pass the bill is a loud and clear sign to the Australian people that the Australian Government maintains a systematic lack of respect for privacy.

Furthermore, it questions the governments integrity in being fully transparent with the public on matters that effect every Australian citizen's right to privacy.

## Commitments from The Government

At the inception of the amendment to the act the government was publicly very clear with regards to the justification of the mandatory data retention scheme.

I point to comments made by the Attorney-General George Brandis on the ABC's Q & A program on the 3rd Of November 2014:

*"The mandatory metadata retention regime applies only to the most serious crime, to terrorism, to international and transnational organised crime, to paedophilia, where the use of metadata has been particularly useful as an investigation tool, only to as a tool, only to crime and only to the highest levels of crime. Breach of copyright is a civil wrong. Civil wrongs have nothing to do with this scheme."*

In addition to the comments made by the Attorney-General George Brandis, the Attorney-General's Department published answer to a series of Frequently Asked Questions on its own website which included the following question and answer:

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*Q: Will data retention be used for copyright enforcement?*

*A: The Telecommunications (Interception and Access) Act 1979 only allows access for limited purposes, such as criminal law enforcement matters. Breach of copyright is general a civil law wrong. The Act will preclude access to telecommunications data retained solely for the purpose of complying with the mandatory data retention scheme for the purposes of civil litigation.*

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This question and the subsequent response has since been conveniently and in my opinion hypocritically removed from the departments website. The removal of this information raises the very real question as to if the governments integrity and intentions in relation to the act are sound.

## Statements by Copyright Holders

In a very public statement recently made by Village Roadshow co-CEO Graham Bourke; they (and a number of other copyright holders) “plan to sue copyright infringers”.

Allowing access to the full two years of retained data, particularly source IP addresses, for the purpose of copyright enforcement will likely only be to the benefit of the legal profession itself.

In the Productivity Commission’s recent report into Australia’s Intellectual Property Arrangements published December 2016, the following solutions is provided in relation to online copyright infringement:

*Finding 19.1 — Timely and competitively-priced access to copyright-protected works is the most efficient and effective way to reduce only copyright infringement.*

With the aforementioned finding there is no reasonable justification for allowing access to retained telecommunications data for the purposes of copyright infringement.

This coupled with the known private use of Virtual Private Networks, which internally mask an end user’s IP address whilst accessing the internet (and possibly copyright infringing content) would only serve to further subjugate such proceedings.

## Privacy in Review

In recent years the government has stepped beyond its station and granted itself broad powers in relation to the interception and retention of telecommunications data. This is further enhanced by the fact that the Attorney-General of the day has (under the act) the power to almost freely grant access to the stored information.

Almost being that the Attorney-General of the day is only limited by the constraints imposed within the act itself.

Further extension of these powers away from criminal law enforcement and intelligence agencies would in my opinion be a grave violation of individual privacy in Australia.

Rather than seeking to further undermine said privacy of Australians, I strongly believe the government should be increasing the privacy protections available to them.

Australia remains one of the only advanced countries in the world which does not legally provide the right to sue individuals or agencies for breach of privacy.

While there have been numerous calls for such a right to be put into legislation, these calls have fallen on the deaf ears of the federal government.

Examples of such calls date as far back as 2008 where the Australian Law Reform Commission first recommended that such a right be introduced. Following that in 2014 the same commission released a report outlining how such a 'Privacy Tort' could be implemented at the federal level to enable individual citizens the ability to seek lawful redress when their privacy has been invaded or breached. Be it by private entity or the government itself.

Support for such a tort has been seen at the state level where last month the New South Wales Attorney-General Gabrielle Upton called for national action on a privacy tort. Additionally, to my knowledge she is concurrently leading a working group to progress the issue.

The benefits of having nationally-consistent legislation in this context are self-evident, that being said it is beyond belief that the federal government has not acted on these calls sooner.

## In Conclusion and Recommendation

In this submission I have endeavoured to provide outline and further context to the questions posed by the consultation paper rather than directly answering the questions posed.

Knowledge is empowerment and whilst I heartedly support the use of data for the prosecution of serious criminal offences, I do not believe that further expansion of power in relation to the act is justifiable.

It is one thing to seek out serious criminal injustice and prosecute offenders, it is another to use such a broad reaching set of data to intervene in the civil ongoing of the Australian people.

I tender the following recommendations:

1. There should be no expansion of access to retained telecommunications data for the purposes of any civil proceedings,
2. The government should in haste instigate an urgent review into the efficacy of the Mandatory Data Retention Scheme during 2017,
3. The government should ensure that a comprehensive and adequate data breach notification scheme is introduced without further delay,
4. The government should investigate a parliamentary committee to consider the introduction of a statutory cause of action for serious invasions of privacy (a 'privacy tort') as a matter of urgency.