

Martin Brice

[REDACTED]

Retained data in civil proceedings consultation  
Communications Security Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

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## Submission regarding access to metadata retention in civil proceedings

Just before Christmas, the Attorney-General's Department announced a consultation about whether access to telecommunications data (metadata) retained under the mandatory data retention scheme should be extended to include civil cases. The timing of this consultation, as announced the week before Christmas with an original submission deadline of 13th January (since extended to 27th January), suggests that the government is consciously seeking to "slip this through" while as few people as possible are paying attention!

### **1. Potential for adverse impact on the effective operation of the civil justice system**

As noted in the Consultation Paper, the primary justification for considering exceptions to the prohibition on using for civil cases data that is retained only due to the requirements of the mandatory data retention scheme, is:

"...to mitigate the risk that restricting parties to civil proceedings' access to such data could adversely impact the effective operation of the civil justice system, or the rights or interests of parties to civil proceedings."

As the data in question is data that has not before been retained, it has therefore never before been available to the civil justice system. As such, continuing with the prohibition on using such data for civil cases would simply maintain the status quo, and would therefore, by definition not adversely or otherwise impact the effective operation of the civil justice system, or the rights or interests of parties to civil proceedings.

### **2. Australian Privacy Principle #3.**

Any data that is being retained *only* due to the requirements of the mandatory data retention scheme is, *by definition*, in direct contravention of Australian Privacy Principle #3, from the Australian Privacy Act:

"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."

There are however a number of very broad exemptions from these rules that apply to law enforcement and intelligence agencies, and those exemptions are the basis on which the mandatory data retention scheme has been built.

While those exemptions may be justifiable in relation to law enforcement and intelligence activities, they most certainly are not in relation to civil cases.

It is therefore clear that allowing access to any such retained information for civil cases would represent a serious additional undermining of the privacy rights of all Australians.

### **3. Mandatory data breach notification legislation**

This inquiry was a recommendation (recommendation 23) of the Parliamentary Joint Committee on Intelligence and Security, in its 2014 report into the data retention legislation.

In that report, the Committee also made the following recommendation:

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

The government committed to introduce such a scheme by the end of 2015, however, and even though legislation to do so has been presented to the parliament on at least three previous occasions, this remains outstanding.

The Privacy Amendment (Notifiable Data Breaches) Bill 2016 that was introduced into the House of Representatives in October 2016 unfortunately involves the introduction of a significant element of discretion about reporting for organisations suffering breaches and is therefore unlikely to be effective in many cases.

I believe the government should remove this discretion and should move to pass this legislation promptly. Whether you believe such a scheme would be effective or not, the failure to progress this legislation is symptomatic of this government's lack of respect for the privacy rights of Australians.

### **4. Commitments from the Government**

The government was very clear at the time about the justifications for the introduction of the mandatory data retention scheme.

Attorney-General George Brandis told the ABC's Q&A program on 3rd November 2014 that:

“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 investigative 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.**” [Emphasis added]

Similarly, the Attorney-General's Department published the answers to a series of Frequently Asked Questions on its website, which included the following:

“Will data retention be used for copyright enforcement? The Telecommunications (Interception and Access) Act 1979 only allows access for limited purposes, such as criminal law enforcement matters. Breach of copyright is generally 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.”

Interestingly, this section has now been removed from the page.

## 5. A Privacy Tort

Rather than seeking to further undermine the privacy of Australians by expanding access to retained telecommunications data, the government should be increasing the privacy protections available to Australians.

Australia remains one of the only advanced countries without a right to sue for breach of privacy, and while there have been numerous calls for such a right to be introduced, the federal government is yet to show any interest in doing so. As far back as 2008, the Australian Law Reform Commission first recommended such a right be introduced, and then in 2014, they released a report outlining how such a 'Privacy Tort' could be implemented at the federal level, to give individuals the ability to seek redress when their privacy has been invaded.

There is however significant support for a privacy tort at the state level. Last month, the NSW Attorney-General, Gabrielle Upton called for national action on a privacy tort, and is leading a working group to progress the issue. The benefits of having nationally-consistent legislation in this context are self-evident so the federal government really needs to start moving on this issue.

### **There should be no expansion of access to retained telecommunications data for any civil proceedings.**

1. The government should instigate an urgent review into the efficacy of the Mandatory Data Retention Scheme during 2017.
2. The government should ensure that a comprehensive and adequate data breach notification scheme is introduced without further delay
3. The government should instigate 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.

This submission may be published in full.

Signed,

  
Martin Brice