



Crime and Corruption Commission
QUEENSLAND

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Access to retained data in civil proceedings

Submission by the
Crime and Corruption Commission



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Contents

- Invitation to make a submission 4
- Circumstances in which parties currently request access to telecommunications data and the impact on civil proceedings for the CCC 4
- Other kinds of civil proceedings or circumstances in which the prohibition in s.280(1B) of the *Telecommunications Act 1997* should not apply 5

Invitation to make a submission

By a letter dated 29 November 2016, the Crime and Corruption Commission was invited to make a submission to assist the Minister for Communications and the Arts and the Attorney-General in their review of the issue of access to retained telecommunications data in civil proceedings. The invitation to comment was contained in a consultation paper which sought the CCC's views on the review of the prohibition and regulation-making power contemplated by the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) 2015 advisory report.

Specifically, the assistance sought relates to the following questions:

1. In what circumstances do parties to civil proceedings currently request access to telecommunications data in the dataset outlined in s.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 outlined in section 187AA of the TIA Act?
3. Are there particular kinds of civil proceedings or circumstances in which the prohibition in s.280(1B) of the *Telecommunications Act 1997* should not apply?

Circumstances in which parties currently request access to telecommunications data and the impact on civil proceedings for the CCC

In its report, the Committee recommended that the Bill should be amended to include a prohibition on civil litigant access to telecommunications data retained for the purpose of complying with the mandatory data retention regime (see rec 23 on p.81). But the Committee considered that this prohibition should:

- only apply in respect of data retained solely for the purposes of the data retention regime; and
- not apply more broadly to telecommunications data retained for other purposes, such as '*data that is currently retained for the business needs of the service provider*'.

The particular meaning of this phrase was not described by the committee in its report. If, as the CCC suspects, it was intended to refer to billing records held by the carrier (which have historically been accessed by civil litigants under subpoena), then the status quo will remain. Telecommunications data is lawfully accessible to litigants in civil proceedings (s.280 *Telecommunications Act 1997* (Cth)), and we understand billing records of carriers are routinely accessed by private litigants in civil proceedings.

The CCC further understands that data contained in billing records is likely to be less detailed than that mandated by the data set, but there will be considerable overlap between the two.

Although the CCC's core business is criminal activity, experienced practitioners at the CCC have had personal involvement in civil trials in which billing records, which included mobile phone and landline location information (providing circumstantial evidence of the geographical location of the caller) were integral to the

resolution of important factual disputes. For this reason, the CCC considers access by civil litigants to such records to be aligned with the general public interest in the efficient disposition of litigation.

Data retention obligations are now enshrined in discrete legislation, for good national security and criminal investigative purposes. Quite separately, access to billing records by civil litigants has been the status quo for many years. The CCC considers that the introduction of a regime of data retention obligations for their stated purpose should not disturb ongoing lawful access to similar data in civil proceedings under subpoena. The requirement to retain the data set will not, in the CCC's view, impose any significant additional burden on service providers merely as a result of the retained data set gaining greater public awareness,¹ because the data contained in billing records is already widely and regularly sought from carriers.

Other kinds of civil proceedings or circumstances in which the prohibition in s.280(1B) of the *Telecommunications Act 1997* should not apply

One particular area of interest for the CCC in accessing retained data (in the form of billing records) is proceeds of crime. The CCC is heavily involved in this field. The CCC administers the scheme of restraint and confiscation of the proceeds of crime under the *Criminal Proceeds Confiscation Act 2002*. The proceedings commenced under that legislation are commenced in the name of the State of Queensland and are civil proceedings (s.8). The rules of evidence applying in civil proceedings apply to these matters (s.8(2)). The *Uniform Civil Procedure Rules 1999* apply (s.8(6)).

In order to obtain Supreme Court forfeiture orders, property restrained must be owned by or under the effective control of the respondent. The CCC's experience is that it is regularly necessary to establish that the respondent to the proceeding has the effective control² over certain real or personal property. 'Effective control' can be difficult to demonstrate in the absence of direct or circumstantial evidence.

However, telephone billing records can be useful in providing evidence of a respondent's location. For example, a respondent in a restraint proceeding may maintain he is resident in Brisbane. Billing records revealing regular calls being made by the respondent from the Kyogle area may well lead to a finding that he is in effective control of a Kyogle property, despite it being in another's name.

The AGD in its submission to the Committee submitted that access to telecommunications in civil and administrative proceedings is, and will continue to be important for plaintiffs to protect their interests and rights. They said data can be of particular importance where civil proceedings are closely linked to a criminal matter – such as proceeds of crime actions, civil child protection investigations, apprehended violence orders and actions involving incidents of stalking and harassment, which often involve the use of a carriage service. In

¹ As suggested by Telstra in its submission to the PJCS, Submission 112, p.5

² See, eg, *Criminal Proceeds Confiscation Act 2002*, ss.20, 87, 93D,

the AGD's view, there is a strong public interest in telecommunications data continuing to be accessible to plaintiffs. The CCC agrees with these views.

The Committee went further in recommendation 23 and suggested that the amendment to the Bill should include a regulation making power to enable provision for appropriate exclusions, such as family law proceedings relating to violence or international child abduction cases, and that the Minister for Communications and A-G review this measure. Whilst the CCC is not sufficiently familiar with those types of proceedings to usefully comment, it does support the exclusion, by regulation, of the following civil proceedings from the general prohibition on use of retained data:

- proceeds of crime actions
- civil child protection investigations
- apprehended violence order applications
- stalking/harassment actions



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