Communications Alliance
Australian Mobile Telecommunications Association (AMTA)
Internet Industry Association (IIA)

Response

to

The Senate
Standing Committee on Legal and Constitutional Affairs
Inquiry into Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010

27th October 2010

Introduction

1. Communications Alliance, the Australian Mobile Telecommunications Association and the Internet Industry Association ('the Associations') welcome the opportunity to comment on the Senate Standing Committee on Legal and Constitutional Affairs ('the Committee') Inquiry into Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 ('the Bill'). The Associations' combined membership represents all major organisations in the communications industry ('Industry'), including those operating in the mobile, fixed and internet spaces. For more information about the Associations and their membership, please see: www.communicationsalliance.com.au; www.amta.org.au and www.iia.net.au.

2. The Associations recognise that the assistance that Industry provides to law enforcement and security agencies ('Agencies), as embodied in legislation, contributes to the effectiveness and efficiency of those agencies and benefits the Australian community. Accordingly, Industry cooperates with and willingly provides a high level of assistance to Agencies.

3. The Associations also recognise that ongoing changes in technology and Industry structure mean that the legal interception regime may require adjustments from time to time. As such, Industry acknowledges the benefit of and welcomes many of the proposed Bill amendments contained in Schedules 1, 3, 4, 5, 6 and 7 as they enable Industry and Agencies to work even more efficiently and effectively together.

4. The Associations are concerned, however, about the proposed amendments in Schedule 2 of the Bill ('Schedule 2'). Schedule 2 establishes new procedures with which Carriers/Nominated Carriage Service Providers ('C/NCSP') must comply whereby the C/NCSP must notify the Communications Access Coordinator ('CAC') of network and system changes that may have an impact on interception capability.

5. Industry contends that the impact of these proposed requirements on Industry are substantial, for little if any apparent benefit to Agencies. Moreover, the Associations are concerned that Schedule 2 actually has the potential to create a situation in which Agencies will be less able to achieve their objectives, while also negatively impacting on Australian businesses and consumers. This is because the requirements as drafted will likely create a (more) uneven and non-technology-neutral playing field; increase costs; delay and restrict product availability and rollout; arbitrarily influence business partnership choices; and disadvantage Australian-based suppliers relative to overseas suppliers. This may force unregulated service providers (non C/NCSPs) to locate equipment outside of Australia, thereby not only disadvantaging C/NCSPs, the Australian Industry and consumers in a highly globalised environment but also resulting in a loss of current interception capabilities. This scenario thus implies an undesirable lose-lose situation.

6. This submission explores the issues raised by Schedule 2 in more detail, as this is the area of most concern. It goes on to suggest changes to the proposed approach that Industry believes would pave the way to more efficiently addressing the issues.

Executive summary

7. Industry recognises its obligation to assist law enforcement agencies and feels that it provides a high level of cooperation. Industry also understands that existing legislation requires amendment from time to time to incorporate the

changing structures of the market and the demands that evolving technologies might pose.

8. Whilst the Associations welcome the opportunity to comment on the Bill in this submission, they also express their concern and disappointment that Government endorsed regulatory development processes have not been followed and no Industry input has been sought in the drafting stage of this Bill.

9. This is even more the case as Schedule 2 has far reaching implications for Industry and Australian consumers alike. Specifically, Industry's concerns are that Schedule 2 has the effect or the potential to:

    - enable arbitrary limitation of partnerships and outsourcing by Australian based companies and place constraints on the operations of Australian subsidiaries of global companies;

    - create an uneven market place by applying requirements to Australian C/NCSPs in the content and applications markets that will not apply to other providers;

    - disadvantage Australian based suppliers relative to suppliers based in other countries;

    - delay or completely render impossible the rollout of innovative products and services thereby severely harm Industry and Australian consumers;

    - impose additional uncertainty and risk to business decisions;

    - add costs or limit existing C/NCSPs' ability to cut costs and, hence, increase costs for consumers; and

    - constrain C/NCSPs' ability to assemble competitive packages of Internet content, applications and services in the NBN environment.

10. Industry contends that the efficacy of the current regime in combination with Industry's ready assistance is, amongst others, reflected by the very sparing (if at all) use of Determinations under section 203 of the Telecommunications Interception Act ('TIA').

11. The Associations also point out that no demonstrated need exists for the far reaching proposed changes in Schedule 2. Instead minor amendments to the existing interception regime would constitute a more efficient and effective approach to a reasonable and sustainable interception regime.

12. The Associations therefore believe that Schedule 2 should not be progressed at this time and ought to be re-drafted to address the above concerns, using the Government's regulatory development process, including industry consultation.

The global nature of communication services

13. To appreciate Industry's concerns and understand the impact of the proposals in Schedule 2 on the Australian telecommunications industry, community and Agencies, it is important to consider the products and services in question, including how they are delivered, by whom and from where.

14. The virtual world – or cyberspace – is a world without national boundaries; provision of telecommunications and related services is a global business. Services, applications and content can be supplied (and to a large extent actually are supplied) to Australia from other countries – and they are equally

supplied to other countries from Australia. It is also standard Industry practice to locate call centres outside of Australia.

15. Change is constant and innovation the norm, with new communications services and applications constantly being developed and offered to international audiences. Well-known examples include Facebook, MySpace, Microsoft's MSN, Skype, Blackberry, Google, Yahoo and Thuraya Satellite. Cloud computing concepts are also growing in capability and popularity, with many applications hosted outside of Australia.

16. Even where products are hosted or physically located within Australia, the global nature of the industry impacts their design, capability and cost, i.e. telecommunications products are designed for international markets. Australia is a small market and is a 'standards taker'. It is not in a position to dictate product design to accommodate uniquely Australian interception capability requirements without potentially incurring significant costs and delaying or even preventing the launch of new products and services.

17. From a consumer's perspective, it makes little or no difference where their service is based. Their choice of service or application is likely to be based on cost, product or service features and availability.

18. Clearly, in the highly competitive telecommunications industry this means that cost, time-to-market issues and product features are critical factors in business success. C/NCSPs must be able to design or launch new and 'off-the-shelf' services and products, including those sourced from overseas, without undue delay if they are to remain competitive or even viable.

Objectives of the proposed Bill

19. The Associations understand that Agencies wish to maintain their interception capabilities. However, it is far from clear exactly what the problem is that Government is seeking to address in the drafting of Schedule 2; the Attorney-General's Department ('AGD') has not presented evidence of need, it has simply asserted that new legislation is necessary. It is unclear how Schedule 2 will practically assist or achieve any improvements over the status quo.

20. For example, currently, under Part 5-4 of the TIA, C/NCSPs are required to lodge an annual Interception Capability Plan ('ICP') with the CAC. They must then update the ICP if there are changes to business operations which mean that the ICP may no longer be adequate.

21. The Explanatory Memorandum for the Bill maintains that this current procedure is considered inadequate as it only provides for notification of changes after they happen. It goes on to state that Schedule 2 aims to ensure that the CAC and relevant enforcement agencies have notice of changes that C/NCSPs intend to make in advance, so that they can assess the likely impact on relevant interception capability.

22. This raises the question of why the current ICP provisions are not simply amended if they are deemed inadequate. Industry fails to recognise the justification for creating a whole new regime.

23. Similarly, industry notes that the proposed Schedule 2 strengthens and expands current requirements. Yet some of the powers that already exist appear to be little needed as evidenced by the already mentioned very sparing (if at all) use of Determinations under section 203 of the TIA.

24. The above raises questions of due process and consultation. These issues are covered later in this submission.

The practical implications: competitive disadvantage, delay, uncertainty, risk, increased prices and offshoring

25. The Bill will establish a new scheme under which a C/NCSP will be required to notify the CAC of proposed changes to any of its telecommunications service or systems as soon the C/NCSP "becomes aware [that those are] likely to have a material adverse effect on its capacity to comply with its obligations under (a) the [Telecommunications Interception] Act, or (b) section 313 of the *Telcommunications Act 1997*"[1] (which imposes certain general obligations on C/NCSPs to prevent their networks and services from being used to commit offences and to otherwise cooperate with law enforcement authorities). A notifiable change may include a change to the location of equipment, a decision to procure new equipment or a decision to enter into an outsourcing arrangement.

26. The Associations contend that these requirements are problematic. The new regime proposed in Schedule 2 will create delay, competitive disadvantage, uncertainty and regulatory risk to C/NCSPs as the regime effectively gives Agencies the right to determine what products or services a C/NCSP can deploy, and when.

27. In the global marketplace, this puts Australian-based C/NCSPs at a significant disadvantage when compared to other players in the information technology space and other vendors overseas who may be offering exactly the same or a very similar service but who are not subject to these requirements because they are not defined as C/NCSPs. For example, cloud computing services would trigger the notification requirement if offered by C/NCSPs but not if offered by non- C/NCSPs suppliers, even within Australia. It is also not in-keeping with the Government's objective of ensuring technology or platform-neutral legislation.

28. Further, as described earlier, in this highly competitive global industry, service opportunities arise rapidly and businesses must be ready to respond quickly. Mandated delays may result in Australian-based C/NCSPs being unable to participate in global product launches. Being late entrants in rapidly moving markets is a significant disadvantage, particularly when consumers can obtain the product or service from overseas. Delays also increase costs.

29. This unequal treatment of organisations depending on where they are based or how they are defined (C/NCSP versus non-C/NCSP) has the potential to allow Agencies to arbitrarily limit business partnerships and outsourcing by Australian-based companies and also places constraints on the operation of Australian subsidiaries of global companies. It is unclear how the various business interrelationships would be impacted by the requirements but it may well be that service supply via offshore providers is encouraged. Notwithstanding any attempts to prevent this, in a global market that allows consumers to obtain most products and services from outside of Australia, the fundamental question remains whether such moves would simply prevent Australian businesses from offering certain services and force consumers to obtain those services from overseas thereby creating a lose-lose situation for Agencies, Industry, consumers and Australia as a whole.

30. It also raises fundamental questions about the ability of companies to update their products and services, e.g.:

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[1] P13, LL3-9, 202B, Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010

- Will the proposal essentially bind C/NCSPs to maintain old or outdated equipment simply to meet Agency comfort levels about their interception capabilities (e.g., PSTN versus VOIP)?

- Similarly, will this amendment prevent service/product exits by C/NCSPs, i.e. require that Industry keeps legacy systems running?

- Is the underlying intention of this Bill to ensure that Agencies, via the CAC, will be given the power of veto such that all services supplied over telecommunications networks, including the Internet, must be supplied and fully supported within Australia? Or is this an unintended consequence of drafting that needs to be addressed before the Bill progresses?

The Associations suggest that, although maintaining capability in such a way may initially appear attractive, it would be short-sighted and ineffective. As noted above, customers are able to source products or services from overseas and would not hesitate in doing so.

Costs

31. Industry notes that the TIA requires C/NCSPs to develop install and maintain delivery capabilities (sections 204 and 205) and costs to be borne by the interception Agencies.

32. However, Industry's experience is that typically only 50 percent of the project costs incurred in specific delivery capability projects are reimbursed by Agencies. Costs associated with network reconfiguration to meet Agency demands, overhead costs and opportunity costs associated with use of capital and staff resources are not recovered.

33. Under Schedule 2, where a C/NCSP is prevented from realising cost savings through outsourcing or cheaper service or equipment supply, such costs will be borne by the C/NCSP. These costs will no doubt be passed on to the end user customer, resulting in higher overall costs to consumers, thus preventing an overall improvement in productivity and forcing Australians to bear a higher cost than may apply to equivalent services offered to overseas consumers.

Process and management issues

34. It is unclear at what point of a business process the requirement to notify the CAC about new products, the intention to implement changes or 'awareness' that a proposed change might impact interception capability applies? As currently worded, it is not clear whether even preliminary discussions, scoping exercises and casual conversations by employees of the C/NCSP or even its subsidiary or partner would already trigger the notification requirement.

35. Given that section 202B (3) requires the C/NCSP to provide written notice of its intent to implement a change, the Associations presume that this lack of clarity is just a drafting issue that can be reasonably easily addressed. The Associations suggest that it should be made clear that early discussions, including scoping exercises and feasibility studies and engineering trials (as opposed to customer trials), ought not to trigger notification requirements. Rather, the requirement would apply when senior management took the decision to implement a change.

36. It is also unclear who determines if the proposed change "is likely to have a materially adverse effect"?[2] In the absence of any clearer direction on this, Industry would assume that this is an objective assessment to be made by C/NCSPs.

37. Section 202B (5) sets out timeframes in which the CAC ought to respond to C/NCSPs notifications, essentially granting 'permission' for the C/NCSP to implement a change unless otherwise advised within a 30 day period (note: Industry assumes that this is to mean 30 calendar days). Ignoring for the moment the lack of technology/platform-neutrality of the proposal and the resulting unequal treatment of Australian-based companies, this provision only on first reading appears reasonable in that is seemingly provides a known timeframe and therefore certainty in business planning.

38. However, section 202B (5) provides false comfort as the certainty and reasonableness it purports to offer is completely undermined by section 202B (7) which gives the CAC the power to effectively disregard any timeframes previously set out in Schedule 2 and to make a Determination at any later point in time. Such Determinations by definition may occur at any time including well after a service or product has been launched and investments in infrastructure and support systems etc. have been made, even though the process of notification has been followed. Any resulting change would cause uncertainty and potentially delay and increased costs (which of course may be substantial). The Associations contend that this provision is most unreasonable and must be deleted or significantly amended to ensure a more balanced outcome and to ensure business certainty. The Associations believe it is the CAC's responsibility to ensure sufficient resources be provided to enable these timeframes to be adhered to. Following the same line of argument, the Associations contend that section 202B (6) provides for a sufficient timeframe and that any Determinations made after the lapse of the second set of 30 days (section 202B (6)(b)) cannot be retrospective. Agencies' subsequent requirements would need to be satisfied through normal commercial practice, i.e. upgrades etc.

39. The Associations are further concerned that there are no criteria specified as to how the CAC will assess proposals; no reporting measures to enable oversight of CAC actions; no exemption processes available to Industry; and no consideration required of risk and impact on Agency operations, e.g. Industry feels that services directed at the consumer market have higher potential to be of Agencies' interest than highly specialised business services. However, the current Schedule 2 does not provide for the ability of any differential treatment of services.

40. Finally, Industry is concerned that there is no mention of the need for the CAC or Agencies to ensure C/NCSP confidentiality. The CAC may notify other relevant Agencies likely to be interested in a notified change in which case the relevant Agencies must treat the proposed change as confidential. However, those Agencies do not owe a direct obligation of confidentiality to C/NCSPs. As proposed changes to C/NCSPs network may be commercially sensitive, C/NCSPs require greater confidence in Agencies' obligation to protect the confidentiality of any information contained in a proposal from C/NCSPs to the CAC. For example, C/NCSPs may want Agencies to restrict the internal circulation of this information, so that it is only made available to those employees directly responsible for liaising with C/NCSPs on interception issues and that the C/NCSPs proposed or actual activity must not be given in detail, in summary or by way of a product title or name to another C/NCSP.

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[2] P13, L6, 202B, Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010

Regulatory Development Processes

41. Industry is disappointed with the lack of consultation prior to the drafting of the Bill and feels that the regulatory development processes endorsed by the Federal Government have not been followed. This is even more the case as Industry members devote staff time and resources into participation in the ACMA's Communications Security and Enforcement Roundtable and the joint DBCDE/AGD Experts Group. Neither forum has been used to consult with Industry on this Bill.

42. Industry is equally concerned that the AGD increasingly seeks to impose additional obligations and associated costs on Industry, with limited consultation and little regard to analysis of the overall costs relative to the perceived or actual benefits to be obtained.

43. Industry has had no opportunity to consider whether there are alternative ways of meeting Agency needs.

44. As noted earlier, the AGD has not demonstrated that the there is a problem that requires addressing. No evidence has been presented of a security problem that requires new and expanded powers. As also noted earlier, a number of existing powers have not been shown to be needed – to the extent use is evidence of necessity. Where specific issues need to be addressed, it would appear that minor amendments to the current legislation would achieve the desired outcome.

45. Industry is further concerned that there are no objective criteria against which the assessment of proposals is to be made. Further, the Bill does not define any consultation, appeal or monitoring processes and is likely to result in a significant increase in administration activity for both C/NCSPs and Agencies.

    Industry believes that objectives are already being met through the current requirement for C/NCSPs to develop, install and maintain capabilities and more importantly, to submit and update ICPs. To the extent that the outcome of this inquiry is that changes to the current arrangements are necessary, then Industry believes any such changes should be based on incentives rather than penalties to Industry. For example, as an incentive to encourage the best outcomes for all concerned parties C/NCSPs providing very early notification (i.e. prior to the legal notification trigger) could be rewarded by receiving full compensation for any changes requested by Agencies (also refer to cost issues in paragraph 32 of this submission). Such a process of rewarding cooperation not only fosters cooperation between Industry and Agencies, it also ensures that Agency requests are moderated by the Agencies' own consideration of the associated benefits and costs. Whilst such an approach provided no specific advantage to Australian based suppliers, they will at least be on equal footing with suppliers based in other countries.

Conclusion

46. The proposed Bill, especially with regard to Schedule 2, has potentially significant adverse impacts on Industry and, as a result, on Australian consumers, that the AGD has either underestimated or not considered. Unfortunately the way the Bill has proceeded means that Industry was unable to highlight or address these impacts earlier in the drafting process. The risks to Industry are such that Industry contends that the Bill, with particular reference to Schedule 2, ought not to proceed in its current form. Those risks are even more pronounced as the benefits of the proposed Bill are questionable.

47. Industry therefore recommends that Schedule 2 not be progressed and, by means of the due regulatory development processes, be amended to address Industry's concerns of efficiency and efficacy.