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Review of Australian Privacy Law

Discussion Paper 72

September 2007

Supplementary submission to the Australian Law Reform Commission – Telecommunications

January 2008

This submission supplements our main submission on the ALRC's Discussion Paper 72, dated December 2007, and addresses the issues raised and proposals made in Part J on Telecommunications.

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PART J - Telecommunications	
Ch 63 – Part 13 of the Telecommunications Act	
Proposal 63–1 The Australian Government should initiate a review to consider the extent to which the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth) continue to be effective in light of technological developments (including technological convergence), changes in the structure of communications industries and changing community perceptions and expectations about communication technologies. In particular, the review should consider: (a) whether the Acts continue to regulate effectively technologies and the individuals and organisations that supply communication technologies and communication services; (b) how the Acts interact with each other and with other legislation; (c) the extent to which the activities regulated under the Acts should be regulated under	We agree that a further review is needed but this should not preclude some short term changes (as the ALRC goes on to recommend) The ALRC does not in our view adequately canvass the implications of the distinction between 'personal information' as defined in the Privacy Act and 'the affairs or personal particulars …. of another person' as used in the Telecommunications Act (s.276). We believe the latter definition is too narrow, and that the term 'personal information' (appropriately amended as suggested in our main submission) is a more

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general communications legislation or other legislation; and (d) the roles and functions of the various bodies currently involved in the regulation of the telecommunications industry, including the Australian Communications and Media Authority, the Australian Government Attorney-General's Department, the Office of the Privacy Commissioner, the Telecommunications Industry Ombudsman and Communications Alliance.	appropriate term for use in the TA. All of our submissions below that relate to the 'affairs or personal particulars' provisions of the TA should be read in the context of our overarching submission that this concept should be replaced by the term 'personal information' with the same meaning as in the Privacy Act. The protection provided by Part 13 of the TA does however extend beyond the 'affairs or personal particulars …' to other categories of information and it is important that this protection is not lost. We do not therefore suggest that Part 13 should *only* protect 'personal information' (even with an amended definition). It should continue to apply to personal information *and* the other categories currently covered. The ALRC also does not adequately address the point that much of the information about individuals held by telecommunications providers is not 'collected' in a way that will necessarily invoke the collection principles of the Privacy Act. We endorse the detailed analysis of these issues in the submission by Ms Irene Graham. We also refer to our comments on the collection principles in our main submission on DP 72 (Part D, the UPPs).
Question 63–1 Sections 279 and 296 of the *Telecommunications Act 1997* (Cth) permit the use or disclosure by a person of information or a document if the use or disclosure is made 'in the performance of the person's duties' as an employee or contractor. Is the exception too broadly	Yes, the exception in sections 279 and 296 exception is too broad and needs to be brought back to only the uses and disclosures necessary in order to provide the

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drafted? Is it resulting in the inappropriate use or disclosure of personal information? If so, how should the exception be confined?	particular service involved – not some wider context of business needs which telecommunications providers can interpret in their own interests and which may not coincide with the legitimate expectations of the individuals concerned.
Proposal 63–2 Sections 280(1)(b) and 297 of the *Telecommunications Act 1997* (Cth) should be amended to clarify that the exception does not authorise a use or disclosure that would be permitted by the proposed 'Use and Disclosure' principle under the *Privacy Act* if that use or disclosure would not be otherwise permitted under Part 13 of the *Telecommunications Act*.	We support this proposal, but also submit that sections 280(1)(b) and s297 should be amended to read '***specifically*** authorised' (consistent with our submission on the proposed UPPs).
Question 63-2 Does the Telecommunications (Interception and Access) Amendment Bill 2007 provide adequate protection of personal information that is used or disclosed for law enforcement purposes? For example, should the Bill be amended to: (a) define 'telecommunications data'?: (b) provide greater guidance on how the privacy implications of an authorisation should be considered and documented under proposed s 180(5); (c) include positive obligations on law enforcement agencies to destroy in a timely manner irrelevant material containing personal information and information which is no longer needed; and (d) provide that the Inspector-General of Intelligence and Security monitor the use of powers by the Australian Security Intelligence Organisation to obtain prospective telecommunications data?	We support the amendment of the TIAA in all the ways suggested.
Proposal 63-3 - Sections 287 and 300 of the *Telecommunications Act 1997 (Cth)* should be amended to provide that a use or disclosure by a person of information or a document is permitted if: (a) the information or a document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person;	We support this proposal provided it retains the qualifying word 'imminent' (see our detailed submission on this in relation to the UPPs in our main submission). Without this qualifier, the public health or safety part of the exception in particular could be too readily abused to justify routine, bulk disclosures. This exception must remain clearly one that is only

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(b) the person reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to: (i) a person's life, health or safety; or (ii) public health or safety.	for occasional ad hoc use.
Proposal 63–4 Section 289 of *Telecommunications Act 1997 (Cth)* should be amended to provide that a use or disclosure by a person of information or a document is permitted if the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person: and (a) the other person has consented to the use or disclosure; (b) if the use or disclosure is for a purpose other than the primary purpose for which the information was collected (the secondary purpose); (i) the secondary purpose is related to the primary purpose and, if the information or document is sensitive information (within the meaning of the *Privacy Act (Cth)*), the secondary purpose is directly related to primary purpose of collection; and (ii) the other person would reasonably expect the person to use or disclose the information.	We support the proposed exception (a) subject to our comments on 'consent' in our main submission. The proposed exception (b) is too broad. We endorse the analysis of this issue in the submission by Ms Irene Graham – the complexity of the provision of telecommunications services means that there can be no easily understood 'reasonable expectation'. Privacy protection in telecommunications must rest instead on a default presumption that only uses and disclosures 'necessary' for the provision of a particular service are permitted without consent (or where one of the other public interest exceptions apply).
Proposal 63-5 part 13 of the *Telecommunications Act 1997 (Cth)* should be amended to provide that 'consent' means express or implied consent.	There should only be a very limited role for 'implied' consent in telecommunications privacy. We discuss the general risks associated with the concept in our main submission on the UPPs, but there are clearly a range of uses and disclosures of telecommunications information which should require express consent (e.g. disclosure of unlisted/silent line information, and of mobile phone location information). This should be provided for in the legislation and not left to mere guidance. To the extent that guidance is desirable, there should be an express requirement for consumer organisation input – the Communications Alliance is

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	dominated by industry stakeholders.
Question 63–3 How does s 290 of the *Telecommunications Act 1997* (Cth) operate in practice? Is the exception resulting in the inappropriate use or disclosure of personal information? If so, how should the exception be confined?	We support the amendment of s.290 as suggested. In the absence of detailed statistics about the use of this exception, it is impossible to tell if it is being abused without more detailed stats – there should be a requirement for public reporting of the use of s.290 (see Proposal 63-14 below).
Question 63–4 Is the exception that permits the use or disclosure of information or a document for certain business needs of other carriers or service providers (s 291 and s 302 of the *Telecommunications Act 1997* (Cth)) resulting in the inappropriate use or disclosure of personal information? If so, how should the exception be confined? Should the exception be amended to provide that silent and other blocked calling numbers can only be used or disclosed with a person's consent?	This exception is clearly being abused – see Ms Graham's submission for examples. These sections should be amended to require free and informed consent unless a use or disclosure is actually necessary for the particular service being provided.
Proposal 63–6 Part 13 of the *Telecommunications Act 1997* (Cth) should be amended to provide that use or disclosure by a person [of] credit reporting information is to be handled in accordance with the *Privacy Act*.	We support this proposal.
Proposal 63–7 The Australian Government should amend the *Telecommunications (Integrated Public Number Database—Permitted Research Purposes) Instrument 2007 (No. 1)* to provide that the test of research in the public interest is met when the public interest in the relevant research outweighs the public interest in maintaining the level of protection provided by the *Telecommunications Act* to the information in the Integrated Public Number Database.	We support this proposal provided that an appropriate Ethics Committee is either clearly identified or established to make independent assessments of the balance of interests. The ALRC does not address the weakness of the definition of research in the IPND scheme, which includes such activities as political canvassing which should not be able to take advantage of the exception.
Proposal 63–8 The *Telecommunications (Integrated Public Number Database Scheme—Conditions for Authorisations) Determination 2007 (No 1)* should be amended to provide that an authorisation under the integrated public number database scheme is subject to a condition	We support this proposal which is consistent with the ALRC proposals in DP72 Chapter 47, which we also

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requiring the holder of the authorisation to notify the Office of the Privacy Commissioner, as soon as practicable after becoming aware: (a) of a substantive or systemic breach of security that could reasonably be regarded as having an adverse impact on the integrity and confidentiality of the protected information; and (b) that a person to whom the holder has disclosed protected information has contravened any legal restrictions	support in our main submission
Question 63–5 Should directory products that are produced from data sources other than the Integrated Public Number Database be subject to the same rules under Part 13 of the *Telecommunications Act 1997* (Cth) as directory products which are produced from data sourced from the Integrated Public Number Database?	We strongly support the application of the rules in the IPND scheme to all directory products, whether or not they are sourced from the IPND itself. The current limited application of the scheme is both inequitable as between different service providers and also results in an arbitrary and inconsistent level of privacy protection.
Proposal 63–9 The *Telecommunications Act 1997* (Cth) should be amended to prohibit the charging of a fee for an unlisted (silent) number on a public number directory	We strongly support this proposal.
Proposal 63–10 Before the proposed removal of the small business exemption from the *Privacy Act* comes into effect (Proposal 35–1), The Australian Government should make regulations under s 6E of the *Privacy Act* to ensure that the Act applies to all small businesses in the telecommunications industry, including internet service providers and public number directory producers.	We support a short term extension of the Privacy Act, by Regulations, to the entire telecommunications industry, pending the repeal of the small business exemption also proposed by the ALRC.
Question 63–6 Should a breach of Divisions 2, 4 and 5 of Part 13 of the *Telecommunications Act 1997* (Cth) attract a civil penalty rather than a criminal Penalty?	Yes – in our view breaches of the privacy protection provisions of the Telecommunications Act should attract civil rather than criminal penalties – the lower burden of proof is appropriate. The level of civil penalties must however be sufficient to act as a significant deterrent to calculated non-compliance.

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Proposal 63–11 The Australian Communications and Media Authority, in consultation with the Office of the Privacy Commissioner, Communications Alliance and the Telecommunications Industry Ombudsman, should develop and publish guidance that addresses issues raised by new technologies such as location-based services, Voice over Internet Protocol and Electronic Number Mapping.	We support further joint work on the implications of new communications technologies, but there must be an express requirement for consultation with consumer organisations – the Communications Alliance is dominated by industry stakeholders. Referral for further consideration does not remove the need for short term changes to the definition of personal information to ensure coverage of some telecommunications information that may currently not be regulated – see our comments above and on Part B of DP72 in our main submission. 63-161 – We support the ALRC's position in paragraph 63-161 concerning VOIP but this should be the subject of a formal 'proposal' or recommendation.
Proposal 63–12 Section 117(1)(k) of the *Telecommunications Act 1997* (Cth) should be amended to provide that the Australian Communications and Media Authority can only register a code that deals directly or indirectly with a matter dealt with by the *Privacy Act*, or an approved privacy code under the *Privacy Act*, if it has consulted with the Privacy Commissioner, and has been advised in writing by the Privacy Commissioner that he or she is satisfied with the code.	We support the proposed changes to the Code provisions in the Telecommunications Act to require, in effect, Privacy Commissioner approval.
Proposal 63–13 Section 134 of the *Telecommunications Act 1997* (Cth) should be amended to provide that the Australian Communications and Media Authority can only determine, vary or revoke an industry standard that deals directly or indirectly with a matter dealt with by the *Privacy Act*, or an approved privacy code under the *Privacy Act*, if it has consulted with the Privacy Commissioner, and has been advised in writing by the Privacy Commissioner that he or she is satisfied with the standard.	We support this proposal for, in effect, Privacy Commissioner approval of relevant industry standards
Proposal 63–14 Section 306 of the *Telecommunications Act 1997* (Cth) should be amended to provide that each exception upon which a decision to disclose information or a document is based is to be recorded when that decision is based on more than one of the exceptions in	We support this proposal for additional record-keeping, but there also needs to be express requirement for public reporting of the use of the

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Divisions 3 or 4 of Part 13 of the Act.	various exceptions.
Proposal 63–15 Part 13 of the *Telecommunications Act 1997* (Cth) should be redrafted to achieve greater logical consistency, simplicity and clarity.	We support a plain English re-draft of Part 13 of the Telecommunications Act, provided it is not used as an excuse fr not proceeding with some of the urgently needed amendments. To avoid unintended consequences, any re-draft of Part 13 should be issued as an exposure draft for public comment.
Ch 64 –Telecommunications Privacy Issues	
Question 64-1 Should ss 63B(1) and 135(3) of the *Telecommunications (Interception and Access) Act 1979* (Cth) be amended to clarify when an employee of a carrier may communicate or make use of lawfully intercepted or accessed information in the performance of his or her duties?	Yes – there is an urgent need to address this significant problem, but ss. 63B(2) and 135(4) should also be reviewed and amended as appropriate (see below).
Question 64-2 How should the provisions that permit an employee of a carrier to communicate to another carrier intercepted or accessed information (ss 63B(2) and 135(4) of the *Telecommunications (Interception and Access) Act*) be clarified?	The underlying principle should be 'only where actually necessary in relation to co-operation with a lawful request from an LEA'.
Question 64- 3 Should further restrictions apply in relation to the use and disclosure of information obtained by a B-party interception warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth)?	Yes – there should be further restrictions on B-party interception information.
Proposal 64-1 Section 79 of the *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to provide that the chief officer of an agency must cause a record, including any copy of a record, made by means of an interception	We support this proposal for improved destruction requirements. Similar requirements should apply to records made under s31B and Chapter 4.
Proposal 64-2 The Attorney-General's Department should provide guidance on when the chief officer of an agency must cause information or a record to be destroyed when it is no longer required for a permitted purpose under s 79 and s 150 of the *Telecommunications (Interception*	We support this proposal for further guidance on the improved destruction requirements, but submit that time limits should be specified in the legislation, as

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and Access) Act 1979 (Cth). This guidance should include time limits within which agencies must review holdings of information and destroy information as required by the legislation.	recommended in 2006 by the Senate Committee.
Proposal 64-3 Section 79 of the *Telecommunications (Interception and Access) Act 1979* (Cth) should be amended to expressly require the destruction of non-material content intercepted under a B-party warrant.	We support a specific destruction requirement for B-party interception information.
Question 64–4 Should the regime relating to access to stored communications under the *Telecommunications (Interception and Access) Act 1979* (Cth) be amended to provide further reporting requirements in relation to the use and effectiveness of stored communications warrants?	Yes – there should be better reporting on stored communications interception
Question 64–5 Should the *Telecommunications (Interception and Access) Act 1979* (Cth) be amended to provide for the role of a public interest monitor? If so, what should be the role of the monitor? Should its role include, for example, to: (a) appear at any application made by an agency for interception and access warrants under the *Telecommunications (Interception and Access) Act*; (b) test the validity of warrant applications; (c) gather statistical information about the use and effectiveness of warrants; (d) monitor the retention or destruction of information obtained under a warrant; (e) provide to the Inspector General of Intelligence and Security, or other authority as appropriate, a report on non-compliance with the *Telecommunications (Interception and Access) Act*; or (f) report to the Australian Parliament on the use of interception and access warrants?	Yes – current oversight is not adequate and we support the appointment of a Public Interest Monitor, with all of the functions listed.
Proposal 64–4 The Office of the Privacy Commissioner should be made a member of the Australian Communications and Media Authority's Law Enforcement Advisory Committee.	We strongly support the Privacy Commissioner becoming a member of the ACMA Law Enforcement Advisory Committee.

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Question 64–6 Should the *Spam Act 2003* (Cth) be amended to: (a) provide that the definition of 'electronic message' under s 5 includes Bluetooth messages; (b) provide that facsimile messages are regulated under the Act; (c) provide that an electronic message is required to include an unsubscribe message if the electronic message: (i) consists of no more than factual information; or (ii) has been authorised by a government body, a registered political party, a religious organisation, or a charity or charitable institution, and relates to goods or services; or (iii) has been authorised by an educational institution, and relates to goods or services; (d) remove the exception for registered political parties?	Yes to all – but re (a) there should be a technologically neutral way of bringing Bluetooth in without having to refer to a specific technology, and re (c) there is no good reason to limit (ii) and (iii) to 'relating to goods or services' - mandatory provision of a 'functional unsubscribe facility' (thereby allowing opt-out) should apply to *all* unsolicited electronic messages. The 'freedom of political communication' argument is a furphy – by opting out individuals would not be denying political parties etc the freedom to reach them by other means (e.g. general advertising) – just by this specific and highly intrusive means.
Question 64–7 Should the *Do Not Call Register Act 2006* (Cth) be amended to remove the exception for registered political parties, independent members of parliament and candidates in an election?	Yes - all these exemptions should be removed.
Proposal 64–5 The Office of the Privacy Commissioner, the Telecommunications Industry Ombudsman and the Australian Communications and Media Authority should develop memoranda of understanding, addressing: (a) the roles and functions of each of the bodies under the *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth), *Do Not Call Register Act 2006* (Cth) and the *Privacy Act*; (b) the exchange of relevant information and expertise between the bodies; and (c) when a matter should be referred to, or received from, the bodies.	We support Proposals 64-5, 6, 7 & 8 – concerning improved co-ordination and guidance, although experience does not give much confidence that these bodies will deliver. They should be given specific timeframes and held to account for delivery.
Proposal 64–6 The document setting out the Office of the Privacy Commissioner's complaint-handling policies and procedures (see Proposal 45–8), and its enforcement guidelines (see	Support – see 64-5 above

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Proposal 46–2) should address: (a) the roles and functions of the Office of the Privacy Commissioner, Telecommunications Industry Ombudsman and the Australian Communications and Media Authority under the *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth), *Do Not Call Register Act 2006* (Cth) and the *Privacy Act*; and (b) when a matter will be referred to, or received from, the Telecommunications Industry Ombudsman and the Australian Communications and Media Authority.	
Proposal 64–7 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority, Australian Communications Alliance and the Telecommunications Industry Ombudsman, should develop and publish guidance relating to privacy in the telecommunications industry. The guidance should: (a) outline the interaction between the *Privacy Act*, *Telecommunications Act 1997* (Cth), *Spam Act 2003* (Cth) and the *Do Not Call Register Act 2006* (Cth); (b) provide advice on the exceptions under Part 13 of the *Telecommunications Act*, *Spam Act* and the *Do Not Call Register Act*; and (c) outline what is required to obtain an individual's consent for the purposes of the *Privacy Act*, *Telecommunications Act, Spam Act* and the *Do Not Call Register Act*. This guidance should cover consent as it applies in various contexts, and include advice on when it is, and is not, appropriate to use the mechanism of 'bundled consent'.	Support – see 64-5 above
Proposal 64–8 The Office of the Privacy Commissioner, in consultation with the Attorney-General's Department, the Australian Communications and Media Authority, the Office of the Commonwealth Ombudsman, the Inspector General of Intelligence and Security and the Telecommunications Industry Ombudsman, should develop and publish educational material that addresses the: (a) rules regulating privacy in the telecommunications industry; (b) various bodies that are able to deal with a complaint in relation to privacy in the telecommunications industry, and how to make a complaint to those bodies.	Support – see 64-5 above