

Draft OPC Information Sheet 27 – Privacy and Part 13 of the Telecommunications Act 1997

Comments from Nigel Waters

– subsequently endorsed by Australian Privacy Foundation www.privacy.org.au

Unhelpful in limiting to Part 13 – demand is for guidance on interaction between privacy and telecommunications law and in that wider context it would be desirable to include more information about the Telecommunications Interception and Access Act; about the IPND provisions (of Pt 13); about relevant ACIF/CA Codes (some of which are mandatory) and about the complementary role of the TIO and ACMA in complaint handling.

An even wider context would cover the Spam and Do-not-Call Acts, but can accept decision to keep this separate – however a brief reference would be desirable.

Need consistent terminology/definitions – e.g. mostly 'telecommunications providers' but 'telecommunications organisations' on p.5 column 2.

Perhaps explain that the IS often paraphrases the text of laws to try to make often convoluted sections simpler, but should warn readers to refer back to actual text if unsure.

Suggest numbered paragraphs – would help readers refer when following up with queries

Key messages

Poor example at foot of page – credit introduces additional Part IIIA complexities covered later – best to use a non-credit example here.

Who is this IS for?

Could use this to define telecommunications providers, to also include other 'sections of industry' mentioned in the next column (under 'Who must comply: TA ' heading)

How does the PA apply to pi

In telco context would be helpful to cover at the end the uncertainty over whether telephone numbers, email addresses or IP addresses on their own can be pi.

Needs clearer explanation up-front of distinction between 'content or substance' ('c/s') and other information noting that tougher restrictions apply to 'c or s' (both in TA – some Pt 13 exceptions apply to 'c/s' while other do not - and in TIAA)

page 3 column 1 half way down - **explanation of 'affairs or personal particulars'** “This includes ... location of a person using a mobile phone whether or not that person is the actual account holder for the phone” may be technically incorrect – s.275A says 'person responsible for'?

Part A

In what circumstances is a TP authorised ...

Why no explanation of 'required' disclosures

The main exceptions include: - suggest reference to sections of the TA – at least in footnotes (also applies to other parts of the IS – more references to sections/subsections desirable for follow up by readers.

Suggest clearer explanation of which of these 'main exceptions' apply to 'c/s' and which don't – see above.

Second bullet point – replace 'prescribed' (which has legal meaning ie in regs) with 'specified' (already used on p7)

Fourth bullet point – too simplistic – stricter for enforcement agencies – although s.280 ambiguous as to whether under warrant applies to 'required' as well as to 'authorised'

Use and Disclosure with knowledge or consent

What does it mean to use ... knowledge

p.5 column 1 paras on reasonable expectation are misleading – this is imported from guidance on NPP 2.1(a) – the test in s.289(b)(i) is the IPP 11.1(a) test – awareness alone – no extra expectation test

Would be helpful to make it very clear *in this section* that awareness alone satisfies the (b)(i) exception and does not require consent, which is the next exception (b)(ii) (to deal with common confusion).

Is implied consent sufficient – last para on p.5 re good practice to seek express consent could usefully give example '.... e.g. ... by offering an opt-in facility'

Last para of section (second on p.6) – confusing as to whether this refers to PA or TA

Use and disclosure with implicit consent...

Needs to emphasise that consent must be from *both* sender and recipient if two parties to the communication – bullet points at bottom of column 1 should therefore say 'individuals' (plural)

Examples in the box (Column 2) are not of the s.290 issue – this scenario does not deal with c/s information – even if they used traffic information to judge Phuong's use and make him offers, this would still only be information about 'carriage services supplied' – not c/s

Use and disclosure for business needs ...

Should address issue raised by representative complaint (2003-06) about carrier provision of CLI to ISPs – major area of uncertainty concerning breadth of 'business needs'. (Corporate memory?!)

What obligations ... credit information

Bullet points pp7-8 should also mention disclosure allowed to credit reporting agencies

How does Part 13 interact with Part IIIA ..

Find better examples of other Part IIIA specific obligations – accuracy and security are also obligations under NPPs

Notice requirements ...credit information

Should also mention specific Part IIIA notice requirements

Good privacy practice on ...sharing

Express consent advice here jars with caution against bundling on p.5 – unlikely to be freely given in a credit situation – but this may be an unavoidable inconsistency given the unfortunate use of 'consent' in Part IIIA.

Direct marketing with the person's knowledge

Incorrect reference to expectation in context of s.289(b)(i) – see above

Collection and notice

Could usefully mention that there are some collection requirements in the TA e.g. customer ID etc for phone subscribers

Data security and retention

Typo in heading – 'Date'

Would be useful to mention current issue of retention/preservation of telco records – policy work ongoing in AGD – telcos will expect some advice on this.

How are complaints handled?

Reference to TIO and ACMA roles

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