Submission
to the
Department of Communications and the Arts
on the

Australian Government draft guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services

Communications Alliance
&
Australian Mobile Telecommunications Association
27 May 2016

INTRODUCTION

Communications Alliance and the Australian Mobile Telecommunications Association (Associations) welcome the opportunity to comment on the *Australian Government draft guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services* (Guidelines).

This submission follows the submissions on this matter that the Associations provided in August 2014 to the House of Representatives Standing Committee on Infrastructure and Communications, the statements given before the Committee's public hearing in March 2015, and the subsequent supplementary submission also provided in March 2015.

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, carriers, carriage and internet service providers, content providers, search engines, equipment vendors, IT companies, consultants and business groups. Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see http://www.commsalliance.com.au.

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. Its mission is to promote an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia, with members including the mobile Carriage Service Providers (CSPs), handset manufacturers, network equipment suppliers, retail outlets and other suppliers to the industry. For more details about AMTA, see http://www.amta.org.au.

SUBMISSION

Overall the Guidelines contain a range of useful material that Government agencies ought to take into account when using section 313(3) of the *Telecommunications Act 1997* (Act) for the lawful disruption of access to online services (subsequently also referred to as website blocking).

However, the Associations are concerned that the material comes in the form of Guidelines rather than being included in the legislation itself. In addition, State and Territory agencies are only "encouraged to follow these guidelines should they rely on section 313(3) to disrupt access to online services"[1] without being obliged to do so. The ability to depart from the Guidelines available to all (including Federal) agencies contributes to the weakening of the instrument.

The Associations believe that the use of s313(3) for website blocking is more appropriately dealt with within primary legislation rather than Guidelines, and that the certainty provided through the use of primary legislation constitutes better public policy as it is likely to increase community confidence that the means (blocking websites) is proportionate to the potential harm to the community. Therefore, the Associations reiterate their request to add a new section to the Act (similar to the current s315) specifically addressing agencies' requests to block websites.

The following comments are provided on the basis that the material is contained in the draft Guidelines and that requests would continue to be made on the basis of s313(3). Were the material to be contained in a new section in the primary legislation, additional provisions would be required to mirror provisions that are currently contained in s313 and s314, e.g. around limitation of liability and cost recovery.

Applicability:

The Guidelines apply to all Australian Government agencies. Currently there are over 190 Australian Government agencies, not counting Federal departments and State and Territory agencies and departments. The Associations contend that the range of agencies making use of s313 for the purpose of website blocking ought to be more limited than is currently the case.

Given the relatively wide scope of s313(3) (i.e. the enforcement of criminal law and laws imposing pecuniary penalties; the assistance in the enforcement of the criminal laws in force in a foreign country; the protection of public revenue or the safeguarding of national security), the technical expertise required to adequately assess the circumstances prior to requesting the blocking of websites and the severity of the measure as such, the Associations reiterate their support for a 'gating process' for agencies in relation to requests for website blocking. The Associations note that in September 2014 the Department made a similar recommendation in its *Submission to the House Standing Committee on Infrastructure and Communications Inquiry into the use of section 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services* (p.7, section 6.3).

Industry considers that the approval of an agency (permitted agency) that wishes to request blocking of websites ought to rest with the portfolio Minister (rather than the agency head). Once approval has been granted sign-off for individual requests rests with a senior officer of the permitted agency as suggested by the Guidelines.

Internal policies and procedures:

The Associations welcome the requirement for Australian Government agencies to develop and maintain policies and procedures for disruption requests. However, Industry is concerned that the ability to depart from the Guidelines "due to operational, security or other reasons" is unnecessarily wide and ought to be limited to a significantly more confined set of circumstances. Where an agency wishes to depart from the Guidelines on the basis of circumstances other than the more confined set, it first ought to seek approval from the portfolio Minister.

[1] p.2, *Australian Government draft guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services*, April 2016

We also note that in cases where it is not appropriate for agencies to publish their policies and procedures, there appears to be no process for scrutiny of those policies and procedures. While the portfolio Minister has to approve the fact the policies and procedures are not published, it is unclear whether the Minister would also exercise ongoing scrutiny of those policies and procedures. The Associations suggest including the original recommendation from the Department to subject those policies and procedures to examination in camera by a relevant Parliamentary committee.[2]

Limiting disruption:

The Associations commend the Department for the attempt to limit the use of s313(3) for website blocking and the inclusion of general factors that are to be considered by the agencies prior to making a request to block a website.

As stated in other submissions[3], website blocking does not completely prevent the access to the blocked website. Therefore, Industry requests the inclusion of effectiveness as a general factor for consideration. Considering the effectiveness of the proposed block would be even more important in cases where not all internet service providers are requested to block the website under consideration. Importantly, it should also be noted that a decision to request a block ought to be made only after all general factors have been considered in conjunction, i.e. they are used to arrive at an overall picture of the efficiency, effectiveness and proportionality of the proposed block.

Moreover, the Associations suggest strengthening the Guidelines by requiring consideration of the general factors be guided by the stated national objective to "champion an open, free and secure internet".[4] The inclusion of this overarching principle would pick up the Department's recommendation to "reflect Australia's positions and obligations which support an open internet. This includes the right to freedom of expression online which increases government transparency and enables innovation, international trade and economic prosperity."[5]

Public information:

The Guidelines correctly note that "providing timely and relevant information to the public about disruption requests improves transparency and will help to increase public awareness about section 313(3)"[6]. This measure will also help raise awareness of its use by agencies. Importantly, the provision of information about the reasons for the website blocking and where to direct potential queries is also key for internet service providers, who implement the blocking, as they are usually first to receive complaints from their customers who are unable to access a website.

Therefore, it is imperative that 'stop-pages' are implemented in all cases and that they contain as much information as required and can be given in the circumstances to enable impacted customers and website owners to contact the appropriate agency. Consequently, the Associations recommend the deletion of the first "where appropriate" at the top of p.5 of the Guidelines, i.e. agencies should always provide a 'stop page' and the information contained on the page should include the information listed in the Guidelines (and more, see below) unless it is absolutely unavoidable to omit some of the information.

Importantly, Industry requests that 'stop-pages' be developed, hosted, implemented and managed by the respective agency rather than internet service providers. It seems

[2] p.6 *Submission to the House Standing Committee on Infrastructure and Communications Inquiry into the use of section 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services*, September 2014

[3] e.g. refer to http://www.commsalliance.com.au/__data/assets/pdf_file/0006/52269/160310_Comms-Alliance_Submission_Senate-Inquriy-Children-Online-Access-to-Pornography_Final.pdf

[4] e.g. p.7, *Australia's Cyber Security Strategy*, April 2016

[5] p.6 *Submission to the House Standing Committee on Infrastructure and Communications Inquiry into the use of section 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services*, September 2014

[6] p.4, *Australian Government draft guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services*, April 2016

unreasonable and inefficient to expect internet service providers to undertake these tasks for each request.

With regard to the information on a 'stop page', the Associations request that "an agency contact point"[7] with a dedicated phone number and email address (rather than generic contact details or a mere link to an agency website) be required. This will avoid internet users unnecessarily contacting their internet service provider who cannot remedy the situation, but who will incur significant costs and reputational damage when having to deal with the consequences of insufficient information on 'stop pages'.

The Associations also note that, along with the other information described in the Guidelines or elsewhere, agencies ought to include information on departures from the Guidelines, if any, and the reasons for the departures in their report to the ACMA.

Moreover, the Associations suggest that, in cases where the publication of requests would jeopardise ongoing or planned investigations, agencies report the use of s313 to a Parliamentary committee on an in camera basis. This would again follow the Department's own original recommendation as put forward in its September 2014 submission.[8]

Complaints and review:

Industry welcomes the requirement for agencies to include a complaints and review process in their internal policies and procedures. We especially welcome the express requirement to direct affected parties to the relevant agency rather than the internet service provider.

However, the Associations propose the stipulation of a clear maximum timeframe for dealing with complaints and review procedures by agencies. Established agency timeframes may not be appropriate for dealing with the complaints/review of blocked websites which today are one of the most critical forms of communication used for conducting business. Accordingly, review timeframes may need to be measured in minutes and hours rather than days where the existence of a business or organisation hinges on the accessibility of a website.

Technical implementation:

The Associations appreciate the requirement for agencies to have or obtain the requisite level of technical expertise to help ensure that requests are effective and well targeted.

However, Industry notes that internet service providers use different methods to block websites and, consequently, request that the Guidelines be amended to allow internet service providers to use (and require agencies to stipulate their requests accordingly) URL and DNS blocking.

The Associations look forward to continued engagement with Government on the review of the use of subsection 313(3) for disrupting access to online services.

For any questions relating to this submission please contact:

Christiane Gillespie-Jones on 02 9959 9118, c.gillespiejones@commsalliance.com.au, or Lisa Brown on 02 6239 6555, lisa.brown@amta.org.au.

[7] p.5, *Australian Government draft guidelines for the use of section 313(3) of the Telecommunications Act 1997 by government agencies for the lawful disruption of access to online services*, April 2016

[8] p.9 *Submission to the House Standing Committee on Infrastructure and Communications Inquiry into the use of section 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services*, September 2014