20 February 2007

Jonathan Curtis
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Telecommunications & Surveillance Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Jonathan

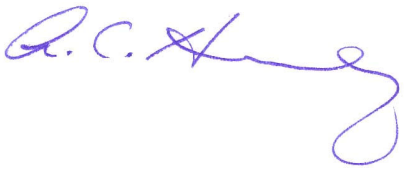
**Exposure Draft: Telecommunications (Interception and Access) Amendment Bill 2007**

Thank you for providing us with the opportunity to comment on the Exposure Draft of this Bill. Our comments are set out below.

Please let us know if you have any queries regarding these comments.

We look forward to working with you to ensure a practical and efficient outcome for the industry.

Yours sincerely



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# Submission to Attorney General's Department

## Exposure Draft of the Telecommunications (Interception and Access) Amendment Bill 2007.

February 2007

# Attorney General's Department Exposure Draft of the Telecommunications (Interception and Access) Amendment Bill 2007.

# Submission by Communications Alliance

Communications Alliance is pleased to have this opportunity to provide comments to the Attorney General's Department on the Exposure Draft of the Telecommunications (Interception and Access) Amendment Bill 2007 ('TIA Amendment Bill').

Communications Alliance Ltd represents over 100 members participating in the Australian telecommunications sector. Our membership includes telecommunications carriers, both large and small, ISPs and other carriage service providers, equipment manufacturers and organisations with close relationships to the sector, such as Standards Australia and the Department of Defence. Our mission is to promote the growth of the Australian communications sector and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance.

Our comments are set out below.

**Executive Summary**

1. The likely unintended consequences of an Australia-specific interception standard require significant further consideration and a thorough feasibility assessment. It will necessarily introduce a layer of duplication and cost which does not currently exist and which may erode the attraction and competitiveness of the Australian market.

2. If such a standard is to be introduced, it warrants considerable more legislative controls and consultation than are proposed in the Draft Exposure Bill.

3. For ten years, Australia's telecommunications industry has, in accordance with the policy objective of the *Telecommunications Act 1997* of the 'maximum use of industry self-regulation', successfully been developing industry-led solutions through the auspices of Communications Alliance. It is submitted that the strength and experience of the industry in this regard would best be harnessed to develop a technical solution to meet the objective of the *TIA Amendment Bill*. Communications Alliance would be pleased to further discuss how such a collaborative exercise of industry, agencies and other stakeholders to develop a technical solution would optimally proceed.

4. A "one size fits all" approach to a standard may introduce inequities, which need to be considered.

5. The issues of duplication by carriers and carriage service providers should be considered.

6. The Exposure Draft does not completely reflect the cost allocation provisions in the current legislation, as it intends, and should be amended to do so.

**Comments on the Exposure Draft**

## 1. Developing an Industry Standard

1.1 The prospect of an Australia-specific interception standard developed without industry consensus causes our members great concern. We note, in particular that:

- Most telecommunications technology vendors and many of the telecommunications carriers operating in Australia are part of global organisations. Australia is a small part of the global market for telecommunications equipment. It is overly optimistic to expect global manufacturers to allocate R&D, manufacturing support and investment priority to a product directed solely to the Australian market. Multinational organisations operating as carriers or carriage service providers in Australia may achieve economies of scale in their equipment purchasing and operational arrangements. These economies of scale would be lost as a consequence of Australia-specific standards.

- Many Australian carriers and carriage service providers compete regionally or globally. Imposing different or additional standards on their operations in Australia may cause them to question their commitment to the Australian market, if the additional investment is significant. Australian based service providers may have costs imposed that eliminate their ability to compete with services hosted in other countries.

- As international standards are developed, any Australian standard would need to be amended so it is not "*inconsistent*" with the international standard. This would require Australian carriers and carriage service providers to reinvest in interception technology, within an unknown timeframe. As noted at sections 1.1.13. and 1.1.15. of the Blunn Report: "*… increasingly the development and application of new communication technologies are determined outside Australia. Taking advantage of those technologies is critical to Australia's competitive position across a wide range of interests. … because most of Australia's telecommunications equipment is designed and manufactured overseas, and because of the need for compatibility, it is inevitable that Australia must adopt international standards.*".

- The key providers of network and service technologies are not Australian. An Australia-specific interception capability has not, to date, been required for the Australian market but the costs of generic interception capabilities have readily been absorbed by local carriers across global markets. This has meant that relatively small incremental costs are currently incurred for interception capability. As this will no longer be the case with Australia-specific requirements, there is a case for Australian carriers and carriage service providers to be reimbursed a "*fair contribution towards the costs incurred … in the circumstances of that person's case …*", including infrastructure costs, as in the UK (see section 14 *Regulation of Investigatory Powers Acts 2000* (UK)).

- Interception capability is required solely to support Governments' law enforcement and security functions. The considerable benefits of interception accrue to law enforcement and security agencies. The telecommunications industry should therefore not be required to make investments in interception capabilities above the incremental costs of standard solutions available from equipment vendors.

- For all these reasons, the imposition of Australia-specific requirements for interception capability is likely to lead to:

    (i) increased costs to Australian residential and business users of telecommunications, services and the attendant economic consequences;

    (ii) the delay or cancellation of new services or products from Australian service providers; and

    (iii) supply of an increased number of services from outside of Australia, with associated jurisdictional issues for agencies.

1.2 Before making a determination under section 192(1), the Minister must take into account the interests of the telecommunications industry and the objects of the *Telecommunications Act*. The reference in section 192(7)(d) of the Exposure Draft to the "*objects*" should refer to both the "*objects and regulatory policy*" of the *Telecommunications Act*. The regulatory policy is found in section 4 of the Act.

It notes that Parliament intends that telecommunications be regulated in a manner that:

"*(a) promotes the greatest practicable use of industry self-regulation; and*

*(b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry …*".

1.3 Section 192(7)(d) of the Exposure Draft requires the Minister to "*take into account*" the objects of the *Telecommunications Act*. For consistency with section 192(2) and to properly reflect the *Telecommunications Act* basis of these obligations, we consider that the Bill should require that a determination "*must not be inconsistent*" with the objects and regulatory policy of the *Telecommunications Act*.

1.4 The industry is extremely concerned that it may be presented with a standard on which it has little input, the implementation of which may be unaffordable for some or most and the timeframe for implementation of which is unknown. While we appreciate that Part 5-3 of the Exposure Draft mentions consultation, more rather than less consultation than is generally expected in the telecommunications sector, is warranted in the circumstances. This is particularly the case as the determination will be the responsibility of the Attorney-General, rather than the Minister for Communications, Information Technology & the Arts.

1.5 The proposed level of industry consultation contrasts markedly with that in the UK. Section 12(9) of the *Regulation of Investigatory Powers Act 2000* (UK) requires the Secretary of State to consult with persons likely to be subject to the obligation and with the Technical Advisory Board, which comprises balanced representation from service providers and agencies. Given the practice in the Australian telecommunications sector for wide consultation, the role that industry bodies such as the Communications Alliance play in this, and the potential that smaller carriers and carriage service providers will be impacted much more severely than larger ones, the suggestion in section 192(4) of the Exposure Draft that only two industry representatives (nominated by the Communications Access Co-ordinator) need be consulted, is of considerable concern.

1.6 As noted above, Australia has a well developed and accepted system of self-regulation in the telecommunications sector, which Parliament has said should be given the "*greatest practicable use*" (section 4: *Telecommunications Act*). Part 6 of the *Telecommunications Act* includes checks and balances so that if the industry fails to agree regulatory requirements acceptable to ACMA, the self-regulatory option is removed. This is similar to the practice adopted in the United States under the *Communications Assistance for Law Enforcement Act* of 1994. Section 103 of this Act requires the Attorney-General to determine the interception capabilities required of telecommunications carriers. The particular technical requirements or standards related to achieving such capabilities are left to the industry associations or standard setting organisations under section 107. Where the industry associations or standard setting organisations fail to produce the standard or requirement or it is otherwise deficient, the Federal Communications Commission may then be called upon to establish the requirement or standard. We see no reason why a similar process should not be inserted in the Exposure Draft. The industry would welcome the opportunity to draft an industry led solution to deliver Government requirements regarding interception e.g. codes, standards, specifications and/or associated documentation in collaboration with the Attorney-General's Department. Australia's telecommunications industry has achieved world's best practice in tackling difficult technical issues on an industry wide basis, such as mobile number portability. There is no reason such an outcome could not be achieved in this case.

## 2. Interception Capability

2.1 While the Minister has the power to make a determination in relation to interception capabilities applying to a particular "*telecommunications service*", some telecommunications services may be incapable of interception and some may be more easily intercepted than others. This may be the case with some services provided using equipment designed primarily for specialised business computing rather than mass market voice and data services. Interception possibilities may differ among services, applications, providers and even user set-ups: the issue of whether and how interception can be achieved may be extremely complex. The determination power in section 192(1) of the Exposure Draft does not take such issues into consideration. By contrast, the general order and subsequent notice process in the UK allows more flexibility.

2.2 It is unclear whether the determination will deal with how a carrier/carriage service provider must comply with the interception obligation, or whether it will only specify the required outcome, leaving the manner in which it is achieved to the individual carrier/carriage service provider. Part 6 of the *Telecommunications Act* prohibits most industry codes or industry standards, from requiring a telecommunications network or facility to have particular design features or meet particular performance requirements. We see no reason why the Minister would need to mandate design features or performance requirements, so long as the features chosen by the carrier/carriage service provider meet the required outcome. We suggest that similar provisions be included in Part 5-3 of the Bill to make this clear.

2.3 We note that the power of exemption in section 195 of the Exposure Draft allows a person to be exempted, rather than a class of persons, such as all persons providing a particular service. It is suggested that this exemption power be widened to provide more flexibility.

2.4 We note that the Minister may make one or more determinations relating to specific kinds of "*telecommunications services*". It appears that, subject to the use of the exemption mechanism, the circumstances of particular carriers or carriage service providers will not be considered. We understand that the cost of developing or procuring the required Australia-specific interception capability is more likely to involve high, fixed up-front costs. For this reason, smaller carriers and carriage service providers will bear a disproportionately high share of the total investment cost, even if they receive relatively few interception warrants. To avoid such an inequitable result, and help manage the inevitable need for exemptions, we recommend that the Attorney-General consider the process in sections 12 and 13 of the *Regulation of Investigatory Powers Act 2000* (UK). This process:

- enables the Secretary of State to make an order that persons who provide public telecommunications services comply with such obligations as it appears to him to be reasonable and practicable to enable them to assist with interception warrants;
- having released this general order, the Secretary of State is then entitled to give a notice to a particular person, that they take the steps specified in the notice necessary for compliance. Unless and until the notice is served on the person, the interception capability obligations do not apply;
- when a person receives a notice, they may refer the notice to a Technical Advisory Board, which considers, among other things, the technical requirements and financial consequences for the person making the reference. The Technical Advisory Board then reports to the Secretary of State who may choose to withdraw or retain their notice;
- the notice given by the Secretary of State must specify such implementation period as appears to the Secretary of State to be reasonable.

2.5 Under the UK procedure, the Minister retains the ultimate decision making right but telecommunications service providers are comforted by the fact that:

- the order does not apply to them until they are served with a notice to comply;
- their personal technical requirements and financial circumstances will at least be considered;
- the obligation is not imposed on them until their personal circumstances and requirements are considered; and
- they are entitled to a reasonable period to implement the requirements.

2.6 The Exposure Draft requires both carrier and carriage service providers to have interception capability. While this is not a change from the existing regime, as carriers and carriage service providers may now be required to make new and significant investments, the application of the obligation should be revisited. In many cases, the application of the obligation to both carriers and carriage service providers may impose unnecessary cost and duplication of infrastructure, which is inconsistent with the objects of the *Telecommunications Act*.

2.7 The use of the term "*telecommunications service*" in section 192(1) of the Exposure Draft contrasts with the term "*carriage service*" in the equivalent provision in

section 322 of the *Telecommunications Act*. Some of our members are concerned that the term "*telecommunication service*" may extend to applications carried by the service. This should be clarified, with specific reference to exclude:

(a) content services, as defined in section 15 of the *Telecommunications Act,*

(b) any service, that in itself, would not result in the provider being classified as a carriage service provider under the *Telecommunications Act*.

2.8 Some of our members are concerned that an absolute obligation to comply with an interception capability plan, as required by section 203 of the Exposure Draft, will be an onerous requirement, effectively requiring on-going audits. There is a concern that this will add considerable cost to compliance. For this reason, and particularly as the cost and lead-in times for compliance remain unclear, we ask that you consider the insertion of a "*reasonable steps*" defence.

2.9 Similarly, we query the value of an obligation to keep an interception capability plan updated at all times. It would be more practical to require a regular update and filing, perhaps several times a year.

2.10 We note that carriers and nominated carriage service providers cannot make changes to their business plans which necessitate changes to their interception capability, without providing revised plans to the Communications Access Co-ordinator. The revised plans cannot take effect until they have been approved by the Co-ordinator. For this reason, there needs to be a time limit for approval, after which approval will be deemed to have been provided.

## 3. Cost Issues

3.1 The Attorney-General has stated that the objective of the Exposure Draft is to implement the changes recommended by Blunn, which recommended that no changes be made to cost allocation. You have confirmed this as your intention. As section 314(3A) of the *Telecommunications Act* is to be deleted and not replaced, this has not occurred. The deletion of this provision means that:

- agreements with agencies or determinations by ACMA pursuant to section 314(3) of the *Telecommunications Act* are no longer required to reflect the principles set out in section 314(3A);
- while ACMA is required to have regard to the relative costs to the carrier and the interception agency of a delivery point under the new section 191(6), that provision reflects the old section 314A, not 314(3A); and
- while section 210 of the Exposure Draft notes that agencies meet the costs of "*maintaining*" a delivery capacity, maintaining a capacity and using it in actually delivering data are two different things.

The deletion of section 314(3A) means that the current cost arrangements are not fully reflected in the Exposure Draft. This section should be reinserted.

## 4. Other Issues

4.1 We note that section 185 of the Exposure Draft introduces email authorisations. Given the important nature of these communications, we ask that agencies be required to provide hard copies at the same time.

## 5. Telecommunications Industry Self-regulation and the role of Communications Alliance

Section 4 of the *Telecommunications Act 1997* contains the following statement of regulatory policy:

'The Parliament intends that telecommunications be regulated in a manner that:

(a) promotes the greatest practicable use of industry self-regulation; and
(b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications;
but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.'

The intent behind the policy is clear from the Explanatory Memorandum to the *Telecommunications Bill* when it was introduced into parliament. Minister Warwick Smith (representing Communications Minister, Senator Richard Alston in the lower house) said:

*"The government must progressively remove regulatory barriers and constraints on genuine competitive conduct; it also must increasingly shift responsibility for regulation to the industry itself. Significant efficiency gains can be achieved through greater reliance on self-regulation in networked industries such as telecommunications because regulatory structures and arrangements can be better designed to reflect industry and community needs".*

Part 6 of the *Telecommunications Act* sets out the provisions for a regime for the development and registration of industry codes of practice.

It is significant to note that while the Part contains provision for the regulator to request the development of an industry code, such a request has only been made on 2 occasions. All other code development since 1997 has been undertaken at the initiative of the industry.

It is also significant to note that the Part contains the 'reserve power' for the regulator to make an industry standard in the event that industry self-regulation is assessed to fall short of providing 'adequate community safeguards' or indicative targets for progress are not met. This reserve power has never had to be exercised in 10 years.

Part 21 of the *Telecommunications Act* also contains provisions for the making of technical standards. Under this part, the regulator is empowered to make or adopt a technical standard which has been developed by an industry association.

Communications Alliance has been taking a lead role in framing the industry self-regulatory environment since 1997 and is continuing to do so. Since we were formed in June 1997 under the name Australian Communications Industry Forum Ltd (ACIF), we have worked with all industry stakeholders to facilitate the collaborative development of concrete outputs such as the current suite of self-regulatory Codes and standards and agreed inter-operator processes.

The industry-developed outcomes include a significant number of codes which cover a broad range of operational issues ( dealing essentially with the relationships between service providers), technical issues (dealing with the technical operations of networks to ensure end to end connectivity) and consumer-related issues (regarding the relationship between service providers and their customers. Standards for customer equipment, cabling, networks and radiocommunications have also been developed.

Additional documents in the form of technical specifications and guidelines have also been developed to support the industry solution.

Many of the Codes are registered by ACMA as industry codes under Part 6, Division 5 of the *Telecommunications Act 1997*. At present there are 24 Communications Alliance developed codes or which have been registered with ACMA and two presently unregistered or pending registration.

The full suite of documents is available on our website at www.commsalliance.com.au.

We are fully accredited as an Australian Standards Development Organisation. This accreditation has been held since April 1998 when Communications Alliance's structures, procedures and documentation was rigorously assessed by the Standards Accreditation Board. This accreditation gives formal recognition of our competence to develop Australian and joint Australian/New Zealand Standards, confirming that our structures and procedures provide a level of transparency and openness equivalent to that of Standards Australia. The technical standards developed at Communications Alliance have been adopted by ACMA as technical standards under section 376 of the *Telecommunications Act*.

These industry-developed outcomes provide the framework for the provision of services by the industry. In some cases they add to and complement the requirements contained in the *Telecommunications Act* regulatory environment and other legislation including the *Trade Practices Act 1974*, the *Privacy Act*, and State Fair Trading legislation. In other cases they have been developed pro-actively by industry initiatives and chart the way for industry processes and behaviour.

The processes put in place to develop industry-led solutions are designed to achieve a timely consensus outcome. Membership of Working Committees is widely drawn and representative of those with a stake in the issue at hand. Project-management disciplines are applied to each project. These include up-front cost-benefit analysis and risk analysis, time frames and will often include an allowance for facilitation in the event of an impasse over a difficult issue.

On no occasion over the last 10 years has a Working Committee failed to achieve an outcome in a project which has been undertaken.

Through Communications Alliance's history, we have established an enviable track record of success, delivering new world benchmarks in a number of significant areas, including consumer participation and protection. The key to this success is our membership which comprises of a broad cross-section of industry stakeholders. By working together under the Communications Alliance umbrella, they build mutual trust and confidence in the self-regulatory model. In this way,

we have set new standards for consultation illustrated by a change in behaviours, increased compliance and improved cooperation between all parties.

For example, in 2004, we developed, in consultation with the telecommunications industry, the Consumer Contracts Industry Code, which utilised external drafting resources, facilitators and mediators to cut through the complex issues and reach agreement on a self-regulatory milestone that was a world first.

A further example of our self-regulatory success on a difficult and complex technical project is Mobile Number Portability (MNP). The MNP process in Australia is one of the fastest in the world as a result of the work of Communications Alliance's MNP working committee.

The time from establishment of the project to completion of the MNP framework was just under 2 years. Within this framework, Communications Alliance facilitated the development of more than 15 technical and operational documents: a Code, Plans, IT Specifications, Operations Manual, Guidelines, Test Strategy and Test Plans.

Once the code was in place and given some minor revisions, the MNP working committee disbanded in early 2005. It has been replaced by the MNP Administration Group (MAG), which comes together only when there is a need to solve specific problems or address particular issues. MNP is a great Australian success story and the ongoing role of MAG is a demonstration of industry self-regulation working at its best for the benefit of the community.

In working with the Australian telecommunications sector over this 10 year period, we have observed that the industry has clearly and consistently demonstrated its ability to embrace the self-regulatory model to develop industry standards.

With confidence in our success, we have taken the lead in bringing all of the stakeholders together to address sensitive problems like unexpectedly high consumer bills, credit management and customer expectations of Voice over Internet Protocol (VoIP) services. Some of these are problems requiring non-traditional remedies and that is why Communications Alliance has opted for consultation rather than controls, where appropriate. For example, we have established a VoIP Working Group, membership of which is drawn from interested sectors, including industry, consumer and regulatory organisations. The Working Group meets every month to monitor and address issues identified and to consider new issues in relation to the VoIP technology.

Communications Alliance therefore has actual experience of working with, creating and helping to implement the rules of the legal and policy environment created by the *Telecommunications Act 1997* and related legislative instruments. Communications Alliance understands that the rules-based work needs to be aligned with achievement of the policy objectives of that legal and regulatory framework.

It is submitted that Communications Alliance therefore is well placed to work with all stakeholders to develop the technical solution to achieve the policy objectives of the TIA Amendment Bill.

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