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Data Retention Scheme - Overview

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Purpose of this presentation

- The purpose of this presentation is to provide general information about some aspects of the mandatory data retention scheme under new Part 5-1A of the Telecommunications (Interception and Access) Act 1979. This presentation should not be relied on as legal advice. If you require any legal advice about any specific aspect of the data retention scheme, please contact:
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Structure of this presentation

This presentation will look at:

- The purpose of the data retention scheme
- The questions you need to ask yourself in order to identify if the data retention scheme applies to you
- What types of data must be retained
- How data must be retained and for how long
- Some interactions of the data retention scheme with the Privacy Act 1988 (**Privacy Act**) that are relevant to service providers
- Key dates for compliance
- Who administers and enforces the data retention scheme
- What funding is available to assist service providers in meeting their obligations under the data retention scheme

The purpose of the data retention scheme

The data retention scheme is contained in new Part 5-1A of the Telecommunications (Interception and Access) Act 1979 (**TIA Act**)

Key concept: **Telecommunications data** (used interchangeably with the term ‘meta data’) – information about a communication that does not include the content of the communication

Extract from the Revised Explanatory Memorandum to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015:

Currently, the TIA Act does not specify any types of data the telecommunications industry should retain for law enforcement and national security purposes or how long that information should be held. In lieu of any standardisation, individual carriers retain information based on business, taxation, billing and marketing requirements. This means there are significant variations across the telecommunications industry in the types of data available to law enforcement and national security agencies and the period of time that information is available. Agencies have publicly identified the lack of availability of data as a key and growing impediment to the ability to investigate and to prosecute serious offences.

The questions you need to ask yourself to identify if the data retention scheme applies to you

If an entity wants to know if the data retention scheme imposes data retention obligations on it, it should ask itself the following three questions. If the answer to all three questions is yes, the entity will be required to retain data under the data retention scheme. If the answer to one of the questions is no it will not have any obligations to retain data under the data retention scheme:

1. Are you a 'carrier', 'carriage service provider' or 'internet service provider'?
2. Do you operate at least one 'relevant service'?
3. Do you own or operate 'infrastructure' in Australia that enables the provision of at least one of your relevant services?

A service provider that satisfies all of these conditions will be referred to as a **Relevant Service Provider**.

To answer each question requires an understanding of the key terms underlined all of which are defined in the legislation. We will look at each question and the key terms within it in turn.

Are you a carrier, carriage service provider or internet service provider?

Carrier – the holder of a carrier licence (section 7 of the Telecommunications Act (**Telco Act**))

Carriage service provider – intricate definition that involves cross referencing to a number of related definitions in the Telco Act (starting point is section 87 of the Telco Act)

Internet service provider – the definition is contained in Schedule 5 of the Broadcasting Services Act 1992 (**Broadcasting Act**) – it is also an intricate definition that involves cross referencing with definitions in the Telco Act. There is a great deal of overlap between the definition of ‘internet service provider’ and ‘carriage service provider’ to the extent that the definition of ‘carriage service provider’ almost entirely (if not completely) subsumes the definition of ‘internet service provider’ - i.e. in the overwhelming majority of cases, if you are an ‘internet service provider’ that fact will also make you a ‘carriage service provider’.

Are you a carrier, carriage service provider or internet service provider? Cont..

For the purposes of this presentation it is sufficient to note that:

- It is beyond any doubt that an entity that supplies any of the following services to the public in Australia will be a carriage service provider (and in the case of internet access services an internet service provider also)
 - Voice telephone services (not including peer to peer VoIP) (fixed or mobile , wholesale or retail)
 - Internet access services (fixed or mobile , wholesale or retail)
- There is an element uncertainty as to whether a service provider that only provides over the top services (e.g. peer to peer VoIP or email services) comes within the definition of a 'carriage service provider'. This uncertainty arises from the fact that a central element of the definition of carriage service provider is that it is an entity that supplies '**a service for carrying communications**'. It has been argued that over the top services do not fit within this definition because they are not services for carrying communications but are, rather, services that **facilitate** or **enable** communications to be carried by the underlying carriage service

Are you a carrier, carriage service provider or internet service provider? Cont..

- If there is any uncertainty about whether you are a carriage service provider or internet service provider you should seek legal advice.

Do you operate at least one relevant service?

The central element of a relevant service is that it is a service “for carrying communications, **or enabling communications to be carried**, by means of guided and/or unguided electromagnetic energy”. Note the following types of services are specifically excluded:

- A ‘broadcasting service’ as defined under the Broadcasting Services Act 1992 – note the definition of ‘broadcasting service’ does not apply to on demand services that are provided on a point to point basis – therefore there is the potential for the data retention scheme to apply to services such as IPTV
- A service that is provided only to a person’s ‘immediate circle’ as defined under section 23 of the Teleco Act – the intention of this exception is to exclude entities such as Government Departments and universities that have their own infrastructure that they use for their own purposes
- A service that is only provided within the ‘same area’ as defined in section 36 of the Telco Act – the intention here is to exclude services that are confined to intra premises networks and also non telecommunications service providers who could potentially be caught – e.g. cafes that provide free WiFi to their customers

‘Do you operate at least one relevant service?’

Cont..

It is beyond any doubt that the definition of relevant service will apply to all of the following services that a Relevant Service Provider supplies to its customers the inclusion of the words ‘or enabling communications to be carried’ in the definition puts beyond any doubt whether an over the top service is a relevant service (this list is not intended to be exhaustive):

- Voice telephone services (including VoIP)
- Voice mail
- Video calls
- Text messaging and other types of messaging services
- Email
- Internet access services
- Any of the above whether fixed or mobile
- Any of the above whether wholesale or retail

Do you own or operate infrastructure in Australia that enables the provision of at least one of your relevant services?

The need for this requirement excludes overseas providers such as Skype who may otherwise have been subject to the data retention scheme

Infrastructure is defined broadly as: *any line or equipment used to facilitate communications across a telecommunications network*

This includes servers used in connection with over the top services

What types of data must be retained

Relevant Service Providers are required to retain a data set of six specified categories of data in relation to each communication carried by each relevant service that they operate.

Important note: it is necessary to apply the data set to each relevant service that a Relevant Service Provider operates

This data set is set out in a table in section 187AA(1) of the TIA Act

The specified data set includes two conceptually distinct categories of data:

- Specified subscriber, service and account data – item 1 of the table
- Telecommunications data – there are five different categories (items 2 to 6 of the table):
 - The source of the communication
 - The destination of the communication
 - The date, time and duration of the communication
 - The type of communication
 - Location information that is relevant to a communication

Some points to note about the data set

The following points should be noted at this stage:

- A Relevant Service Provider is only required to retain data as it relates to the specific service(s) it operates – e.g. a wholesale provider is not required to obtain and retain any subscriber information about the end user (although it will be required to retain subscriber information about its customer). Therefore, depending on the type of service, the Relevant Service Provider may not be required to retain data relating to all six categories in the data set.
- There are some specific exclusions (i.e. Relevant Service Providers are not required to retain these) – see section 187A(4) of the TIA Act:
 - The content of a communication
 - *Information that states an address to which a communication was sent on the internet, from a telecommunications device, using an **internet access service** provided by the service provider; and*
 - *was obtained by the service provider only as a result of providing the service*

‘Some points to note about the data set cont..

The intention is to ensure web browsing histories are excluded but the effect appears to be to exclude all destination addresses for internet access services (note this is limited to internet access services it does not apply to any over the top services).

- A Relevant Service Provider that provides a prepaid mobile service is not required to retain any information it uses to establish the identify of the customer that it is required to delete under the *Telecommunications (Service Provider – Identify Checks for Prepaid Mobile Carriage Services) Determination 2013* .
- The nature of some services means that they may involve individual communications as well as communications sessions – obligations to retain data may apply to either or both depending on the type of service.
- There are obligations to retain data relating to untariffed communications and also data about unsuccessful attempts to make communications in certain circumstances.

How data must be retained and for how long

The legislation requires that:

- The Relevant Service Provider protect the confidentiality of the retained data by:
 - Protecting it from unauthorised interference or access
 - Encrypting it
- Certain categories of subscriber information must be retained until two years after the date that the relevant account was closed – these categories are specified in paragraphs (a) and (b) in column 2 of item 1 of the table in section 187AA(1)
- All other data must be retained for a period of two years starting from when the data came into existence
- The data retention scheme does not require a Relevant Service Provider to destroy retained data after expiry of the retention period and the data may be retained for longer if it is required for a legitimate purpose but be aware that the Privacy Act requires the data to be destroyed or de-identified if the Relevant Service Provider no longer needs to keep it for any legitimate purpose
- The retained data must be reasonably accessible to relevant law enforcement agencies (use current timeframes as a benchmark)

Interactions with the Privacy Act

There has been some debate about whether telecommunications data comes within the scope of 'personal information' under the Privacy Act – the data retention legislation puts this beyond any doubt and establishes that all of the retained data is personal information for the purposes of the Privacy Act

The result of this is that the Australian Privacy Principles (APPs) apply to the retained data – some implications of this for Relevant Service Providers are (this is not intended to be an exhaustive list):

- Office of the Australian Information Commissioner has powers to investigate complaints and data breaches and to conduct audits
- Once the retention period has expired, there is an obligation to take reasonable steps to destroy or de-identify the retained data unless the Relevant Service Provider needs to continue to retain it for a permitted purpose under the APPs
- Individuals can request access to the retained data that relates to them and the Relevant Service Provider and subject to the requirements of APP 12 must provide access (subject to being able to recover the reasonable costs of providing access)
- Relevant Service Providers should update their privacy policies to make specific reference to the requirements of the data retention scheme

Key dates for compliance

The data retention scheme comes into force on **13 October 2015** - by this date Relevant Service Providers must:

- Be fully compliant; or
- If they are not fully compliant:
 - Have obtained approval of an implementation plan that provides a roadmap for full compliance by no later than 13 April 2017; or
 - Have obtained an exemption from the relevant obligations
- Applications for approval of implementation plans and exemptions must be decided within 60 days – so a key date for submission of an implementation plan and/or exemption request is **13 August 2015** (i.e. 60 days from when the scheme commences – although problems could arise if the application is rejected)

‘Key dates for compliance cont

- If you are subject to the data retention scheme and you haven’t yet worked out what your obligations are – **you need to get your skates on!!**

The data retention legislation imposes an immediate obligation on Relevant Service Providers that are currently storing data within the required data set. This obligation prohibits a Relevant Service Provider from reducing the retention period for that data (e.g. if a Relevant Service Provider is currently keeping voice telephone call logs (i.e. call logs that set out the A party number, B party number and duration of the call) for six months for billing purposes, the Relevant Service Provider has an immediate obligation not to reduce the period it keeps the voice telephone call logs for)

Who administers and enforces the data retention scheme

The Communications Access Coordinator (part of the Attorney General's Department) (**CAC**) is responsible for administering the data retention scheme – the Communications Access Coordinator's responsibilities include:

- Assessing applications for approval of implementation plans
- Assessing applications for exemptions
- Responding to queries about how to comply

A service provider who is in breach of obligations under the data retention scheme will be in breach of their carrier licence conditions (if relevant) and/or the service provider rules in the Telecommunications Act 1997 – the Australian Communications and Media Authority (**ACMA**) is responsible for enforcing these obligations – there are potentially very large financial penalties for breaching these obligations
A Relevant Service Provider can appeal any decisions of the CAC relating to implementation plans or exemptions to ACMA

Whether funding is available to assist service providers in meeting their obligations under the data retention scheme

According to information in the budget speech, the Government will make \$131.3m available over three years for a program of grants of government funding for Relevant Service Providers' capital costs of data retention. There is no detail yet as to how this is to be distributed or the process of applying for a grant. The \$131.3m is said to be 50% of the capital costs of data retention that are likely to be incurred by industry.

Conclusion

- In order to identify what obligations, if any, you have to retain data under the data retention scheme, you need to:
- Ask yourself the following three questions:
 - Are you a carrier, carriage service provider or internet service provider?
 - Do you operate at least one relevant service?
 - Do you own or operate infrastructure in Australia that enables the provision of at least one of your relevant services?
- If the answer to each question is yes you need to:
 - Identify all relevant services that you operate
 - Apply the data set to each relevant service