Privacy – what the new Act doesn't say

Plans to regulate the telecommunications industry with a new Privacy Act have gone by the wayside

When the government started drafting the privacy provisions of the *Telecommunications Act 1997*, the plan was to have telecommunications companies regulated as well by a new Privacy Act. So much for that plan. A new Privacy Act, covering not just the public sector agencies already affected, but private sector companies as well, was supposed to be heading towards the Parliament about now.

For the telecommunications industry and its customers, this was going to be a significant development. The industry had been subject to specific prohibitions on the disclosure of personal information, under the *Telecommunications Act 1991*. Its members' activities had also been regulated under the existing Privacy Act to the extent that they acted as 'credit providers'. But the broader obligations imposed on public sector agencies by the 'Information Privacy Principles' in the Privacy Act do not apply to telecoms companies. Following the government's backdown on the extension of the Privacy Act to the private sector, they still don't.

Having expected the 'industry specific' telecommunications privacy regime to get swept up in a regime applying to industries generally, it's now back to business, in some different forums, for advocates of greater levels of privacy protection for telecommunications consumers.

New forums

AUSTEL established a Privacy Advisory Committee (PAC) in 1994 at the request of the then Minister for Communications and the Arts, Michael Lee. It produced reports on Calling Number Display (January 1996) and Telemarketing (October 1995). PAC members were unable to agree the final text of the Committee's other report on Customer Personal Information, which was therefore not published before AUSTEL's replacement by the ACA at the beginning of July this year.

AUSTEL disbanded the PAC at its final meeting on 23 June, since it was felt that responsibility for the kinds of activities it performed would sit more appropriately with industry self-regulatory bodies after 1 July.

The changes

The *Telecommunications Act 1997* replicates many of the prohibitions on disclosure of personal information contained in the 1991 Act. It also replicates and expands the exemptions from these prohibitions, while introducing record-keeping requirements in some cases. Finally, it formalises the capacity for the industry to develop self-regulatory codes to address privacy issues. These are part of the broader scheme of 'consumer' codes to be developed, in the first instance, by the industry in conjunction with consumers and relevant public sector agencies such as the TIO and the Privacy Commissioner.

What this means is that the mechanism for developing for the telecommunications industry the more sophisticated elements of privacy protection set out in the Information Privacy Principles, will be 'consumer' codes under the Telecommunications Act, not an expanded Privacy Act. The place where this will occur will be predominantly the Consumer Codes Reference Panel of the Australian Communications Industry Forum (ACIF). That Reference Panel is currently considering the most appropriate way to deal with the range of priorities in the privacy area.

The new legislation

The *Telecommunications Act 1997* makes it an offence, punishable by two years imprisonment, for certain people to disclose information relating to:

- the contents of communications;
- services supplied; and
- the affairs or personal particulars of other persons [ss 276-278 TA].

The nature of this offence is the same as that applying under section 88 of the 1991 Act. However, the range of people it applies to has been extended beyond carrier employees, service providers and service provider employees, to carriers themselves, operators of public number databases (for example, directory assistance) and their employees, and contractors (and their employees) supplying services to carriers, carriage service providers and operators of public number databases. The offence can be committed in relation to information obtained while employed in one of these capacities even after that employment has ended.

There are several exceptions to this offence [Div 3]. These include where the disclosure:

- is made in the performance of a person's duties as an employee of a carrier, carriage service provider, public number database operator or contractor to one of these;
- is authorised by law, or is made as a witness to legal proceedings;
- is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue, or is made to the Australian Security Intelligence Organisation (ASIO). A significant change from the 1991 Act is that these exceptions may be established conclusively by a certificate from a senior officer of a criminal law enforcement, civil penalty enforcement or public revenue agency. This removes the need for carriers and carriage service providers to make for themselves a judgement about the 'reasonable necessity' of the disclosure;
- is made to the ACA, the ACCC or the TIO and would assist them in their work;
- is of limited kinds of information, made in the handling of a call to the emergency service number. Similar exceptions permit the disclosure of personal information, including a 'silent' number or address, where a person reasonably believes the disclosure is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of another person; and information about the location of a vessel at sea the disclosure of which is reasonably necessary to preserve human life at sea;
- is of information contained in a public number database where the disclosure is made for the purposes of providing a directory assistance service or for the production of a directory. This exception does not extend to silent numbers or to the contents of communications;
- is of personal information and has been consented to by the person. This includes a silent number. Consent can be implied if the person is reasonably likely to have been aware that such information is usually disclosed in similar circumstances. A related exception permits the disclosure of the contents of a communication where it might reasonably be expected that the parties to the communication would have consented to such disclosure if they had been aware of it; or
- is of customer information, between carriers and carriage service providers, made for the purpose of supplying services. This is intended to cover, for example, billing activities.

Further exceptions may be prescribed in regulations.

In some of the above circumstances (performance of a person's duties; authorisation under law, law enforcement and protection of the public revenue; assisting the regulatory agencies; a threat to life or health; maritime communications; and carriers or carriage service providers' business purposes), further disclosure for the same purpose may also be permitted [Div 4].

Where disclosures are made in reliance on some of the exceptions described above (performance of a person's duties; ASIO; aspects of directory assistance; implied consent; and carriers or carriage service providers' business purposes), a record of the disclosure must be made and kept for three years. Annual reports of such disclosures must be given to the ACA. The Privacy Commissioner is required to monitor compliance with this reporting requirement [Div 5].

Other provisions of the *Telecommunications Act 1997* require the ACA to have regard to the Information Privacy Principles in relation to billing [Cl 15, Sch 2, Part 5] and the provision of emergency services [s 265(2)(l)].

Self-regulation

The legislation includes, as examples of matters that might be dealt with by industry codes and standards:(f) privacy, and in particular:

(i) the protection of personal information; and

(ii) the intrusive use of telecommunications by carriers or service providers; and

(iii) the monitoring or recording of communications; and

(iv) calling number display; and

(v) the provision of directory products and services...[s113(3)].

It is the Consumer Codes Reference Panel's job to set a work program to develop codes in areas of priority. A 'Scoping Paper' has already been prepared and recommendations were being made to the ACIF Board for consideration at its meeting in early August.

Given the announcement of the roll-out of calling number display services by Vodafone and Telstra, it can be expected that this area will be a high priority. The PAC provided a concrete set of recommendations about appropriate protections in this area which are capable of rapid implementation. A huge amount of work has also been done on customer personal information, despite the PAC's inability to reach a final consensus on its draft report.

Finally, the PAC's report on telemarketing should not be left to rot, alongside AUSTEL's views about the inadequacy of the then regulator's powers in this crucial area of consumer and public interest.

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