The truth about conspiracy theories

Nigel Waters examines the boundary between civil liberties and the power of the state following the completion of two federal government reviews into the communications interception regime

Communications interception is not a high profile issue. And yet the extent to which we are potentially subject to surveillance marks a crucial boundary between our civil liberties and the power of the state, a boundary which is usually cloaked in secrecy and confused by conspiracy theories and speculative treatment in the entertainment media. Films such as *The Net, Sneakers, Gattaca* and *Enemy of the State* may serve a useful function in alerting the public to the potential of surveillance technology but they are a poor substitute for reasoned debate. The first six months of 1999, however, have seen the opening of a rare window of opportunity for such a debate.

Two official federal government reviews have been completed, with the resulting reports under consideration by the government. The reports will hopefully be made public for further discussion before any decisions are made. Unfortunately, some aspects of the review have been pre-empted by changes in the interception regime applying to ASIO, currently in the Parliament (1).

The first review was by the Australian Communications Authority, which looked at the cost effectiveness of the interception obligations on carriers and carriage service providers and the cost sharing arrangements (2). The second was a broader review of interception policy conducted by the Commonwealth Attorney-General's Department (3). Submissions to both reviews were invited by the end of February. Unfortunately, the AG's review was not widely publicised and details were only made available on request, which inevitably limited the number and breadth of inputs. But the draft report which was sent to interested parties on request did give an excellent account of the background and current issues.

This article summarises the submission made by the Australian Privacy Charter Council to both reviews.

Changes to the telecommunications law in the early 90s required the then limited number of carriers to provide an interception capability for the initially "un-interceptable" GSM mobile telephones. A major investment, assisted by the Commonwealth, was required to develop an interception capability for digital services.

Following industry de-regulation there are now more than 500 carriage service providers - mostly Internet Service Providers (ISPs) - with obligations to provide an interception capability and produce associated documentation including interception capability plans. It must be questioned how realistic these statutory requirements are, and their effect as a barrier to market entry.

The arrangements for cost sharing must also be in doubt, as some small ISPs may never have an interception warrant served on them, and therefore have no way of recovering their costs from agencies.

All of the costs of interception, whoever bears them, should be taken into account in the cost-benefit justification for the interception arrangements. If only the direct costs to law enforcement agencies are considered in this calculation, an artificially favourable benefit:cost ratio will result. Shifting the cost burden onto carriers and service providers also means that an inaccurate "price signal" is sent to agencies requesting intercepts, perhaps encouraging an overuse of intercepts relative to other investigative techniques.

More and more of the communications intercepted by law enforcement agencies are going to be encrypted in such as way that they are unintelligible. This will happen for legitimate commercial and personal reasons, and there is no realistic prospect of preventing it. The overall value of intercept product must inevitably decline, and this may change the benefit:cost ratio in a direction which makes it uneconomic to continue to insist on expensive interception capability. However undesirable this trend may be from a law enforcement perspective, it may be that sooner or later governments have to accept the inevitable and abandon the futile pursuit of universal interceptability.

In relation to the AGs review, other key issues include:

- The 1997 change whereby Administrative Appeals Tribunal

members rather than federal court judges will issue many interception warrants. While the reasons for this change seem justified, it means a potentially disturbing loss of independent scrutiny of warrant applications. ASIO interception warrants are already issued by the Attorney General with monitoring only by the Inspector General of Intelligence and Security.

• The breadth of the offences for which warrants may be issued, and the test which should apply for approval. There has been a steady broadening of the scope in recent years, and the current ASIO Legislation Amendment Bill initially threatened to relax the test.

• The adequacy of the accountability and reporting requirements applying to the interception regime. This includes a possible active monitoring role for the Privacy Commissioner to replace the current "passive" role played by the Ombudsman.

• The desirability of applying the warrant regime to call charge records held by carriers and ISPs (which in themselves can reveal a lot about the nature of a communication) and to stored communications such as email and pager messages.

• The value of a requirement for agencies to notify individuals whose communications have been intercepted "after the event" once any prejudice to the investigative purpose is absent.

• The urgent need for reform of the participant monitoring provisions of the Interception Act.

The reports of the reviews will hopefully not pre-empt further discussion of these issues. They go to the heart of the trade-off the community is prepared to make between freedom of communication and privacy on the one hand, and law enforcement and national security interests on the other.

Nigel Waters is a consultant in privacy and data protection

Footnotes

1. Australian Security Intelligence Organisation Legislation Amendment Bill 1999, passed by the Senate in May 1999.

2 Australian Communications Authority - Telecommunications Interception Review - Review into longer term cost effectiveness of arrangements for telecommunications interception, Discussion Paper December 1998 (on www.aca.gov.au).

3. Attorney-General's Department - Policy Review of the Telecommunications (Interception) Act 1979, announced on the Department's Window on the Law website December 1998, www.law.gov.au//aghome/legalpol/isld/tipr/Welcome.html

Authorised dealers and agents: participants in telecommunications?

The Australian Communications Authority (ACA) decided on April 29, 1999 to decline a request from the Australian Communications Industry Forum (ACIF) to determine authorised dealers and agents of telecommunications companies to be participants in a section of the industry. for purposes of industry developed codes of practice and industry standards. Under Part 6 of the *Telecommunications Act* , the ACA has power to determine additional sections of the industry to those already set out in the Act: carriers, carriage service providers, content service providers, cablers and equipment manufacturers.

ACIF is the prime industry forum for the development of industry codes. The objective of the request to the ACA was to provide for equal application of the rights and obligations of industry codes to parties with direct contact with end-users of telecommunications services whether they be carriers, dealers or agents.

The request to the ACA was prompted by the ACIF working committee developing the code on Customer Information on Prices, Terms and Conditions (PTC). The committee saw merit in using this approach to ensuring consistent treatment of customers as it would provide for dealers and agents to be code participants in their own right and to be subject to the regulatory safety net associated with codes registered by the ACA. Similar issues are relevant to other consumer codes of practice under development such as the code on the privacy of customer information.

The reasoning provided by the ACA was that it did not wish to take an administrative decision at this stage which would, in effect, extend the scope of application of the Act. Further, the ACA said that in its view, the objective underlying the request could be achieved by carriers and carriage service providers making compliance with industry codes a condition of their commercial contractual arrangements with dealers and agents. The ACA said it would review its decision in 12 months.

The PTC working committee will reconvene to consider the implications for the code arising from the ACA's decision.

Gary Smith, chairman, ACIF Working Committee on Customer Information on Prices, Terms and Conditions