

Who will be the gatekeeper?

Holly Raiche discusses the AUSTEL inquiry into privacy in telecommunications in Australia

AUSTEL has recently announced an inquiry into 'The Privacy Implications of Telecommunications Services'. The inquiry will examine two privacy issues: personal information and intrusion. Personal information issues arise when information is made available without the knowledge and/or consent of the person involved. Intrusion issues arise through, for example, unsolicited telephone calls by telemarketing agents.

The inquiry's terms of reference do not include determining where responsibility should lie for handling telecommunications privacy issues or how they will be enforced. Clearly, the Privacy Commissioner would not have jurisdiction over the private sector second carrier. However, the 1991 legislation has removed the new Australian and Overseas Telecommunications Corporation (AOTC) from the Commissioner's jurisdiction as well.

Section 6 of the Privacy Act, defines an agency (to which that Act applies) as:

"(c) a body ... or a tribunal established or appointed for a public purpose by or under a Commonwealth Enactment..."

When the AOTC Act 1991 is proclaimed, it will, under section 26, create an entity which will be taken for the purpose of Commonwealth, State or Territory laws as:

"(a) not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth."

The Government's rationale for removing AOTC from the jurisdiction of the Privacy Commissioner was the 'level playing field' argument. AOTC should not be put under restrictions which will not apply to the second carrier.

Licence Conditions

The only specific privacy protections required of the two carriers are in their licences. One licence condition requires the carriers (and any other mobile operator) to ensure that any raw directories data is provided only:

"(c) in accordance with the Information Privacy Principles set out in section 14 of the Privacy Act 1988 as if the licensee were an agency within the meaning of that Act..."

As well, in providing information to emergency services, a licensee must:

"(b) ... do whatever is necessary to comply with the Privacy Act 1988 (and, in particular, Information Privacy Principle

11 of that Act) as if the licensee were an agency within the meaning of that Act."

The storage and release of information which is not covered by the licence conditions is unprotected. Further, the licences do not mention how privacy principles will be enforced.

There are three options for locating responsibility for privacy issues: AUSTEL, the Privacy Commissioner (operating under an amended *Privacy Act*) or the proposed Telecommunications Industry Ombudsman.

A Role for AUSTEL

Under the *Telecommunications Act*, AUSTEL could assume responsibility for privacy issues as part of its general function of consumer protection against 'unfair practices'. AUSTEL would have to determine what carrier or service provider breaches of privacy principles amounted to 'unfair practices' and then use its powers of direction to enforce its decisions on privacy issues.

AUSTEL could also provide privacy protection through its enforcement of licence conditions. As discussed above, however, the licences require carrier adherence to privacy principles only on specific issues. Other privacy issues would have to be dealt with as 'unfair practices'.

The *Telecommunications Act* does provide AUSTEL with mechanisms for handling complaints and detailed provisions for the conduct of investigations. But it has not been determined what processes AUSTEL would use in protecting an individual's privacy. Certainly the part of the Act dealing with public inquiries does not now require an inquiry on privacy issues.

The concern with AUSTEL assuming responsibility for privacy protection springs from AUSTEL's stated terms of reference which seek comment on:

"the weight which should be given to privacy considerations in assessing the potential economic and social impacts of telecommunications services, taking into account the benefits and costs involved."

That looks very much like a trade off between an individual's right to privacy against cost. Nothing in the *Privacy Act* suggests such a trade off should be made.

The Privacy Commissioner

Another option is amending the *Privacy Act* to cover telecommunications carriers (and possibly other service providers)

similar to the way it was amended in 1990 to cover credit providers. Such an amendment would ensure that privacy issues across a range of areas are dealt with by one organisation with privacy as its prime focus.

Giving the Privacy Commissioner jurisdiction over telecommunications issues would also mean that all privacy issues are handled consistently.

Other advantages in extending the Privacy Commissioner's jurisdiction include:

- The principles are clearly spelled out for anyone to read and are enshrined in legislation;
- The process for public complaint is clearly spelled out and enshrined in legislation: anyone can complain and at no cost;
- The functions of the Commissioner are 'proactive', requiring him or her to "undertake research and monitor developments, promote an understanding and acceptance of privacy principles", and importantly, to "conduct audits of records of personal information maintained by agencies". Further, the Commissioner has strong investigative powers.

Industry Ombudsman

The third option is to incorporate privacy issues into the kinds of complaints handled by the proposed industry ombudsman.

The licences require carriers to establish an industry ombudsman but, at this stage, nothing further has been decided on the ombudsman's structure or functions. However, the proposed ombudsman could come to some arrangement about privacy issues, which could at the least, draw on the Privacy Commissioner's expertise and produce consistent results.

The processes of privacy protection in telecommunications are surely as important as the determinations about specific privacy issues. And clearly, those processes should be addressed as part of the public's response to AUSTEL's inquiry. Whatever approach is followed, an individual's right to privacy should have the same level of protection currently afforded by the Privacy Commissioner and the process should continue to genuinely open to the public.

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