

BUCHANAN LAW TELECOMMUNICATIONS UPDATE

MARCH 2008

2008: Moving Forward

Welcome to the second edition of Buchanan Law's Telecommunications Update. 2007 saw a range of developments in communications law and the communications industry. We offer a brief overview of some of the major developments of the past six months, many of which are likely to undergo further refinement over the coming year, and invite you to contact us if you have any queries as to how these developments will apply to your business.

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Telecommunications Consumer Protections Code



In September of last year Communications Alliance released the Telecommunications Consumer Protections Code (ACIF C628:2007) (“**the TCP Code**”) consolidating six Codes that govern the rights of residential and small business customers into a single consumer code.

The TCP Code replaces the following ACIF Codes:

- Customer Information on Prices, Terms and Conditions Industry Code (ACIF C521:2004)
- Credit Management Industry Code (ACIF C541:2006)
- Billing Industry Code (ACIF C542:2003)
- Customer Transfer Industry Code (ACIF C546:2007)
- Complaint Handling Industry Code (ACIF C547:2004)
- Consumer Contracts Industry Code (ACIF C620:2005)

The TCP Code, which was first proposed by Communications Alliance (in its former guise as the Australian Communications Industry Forum) in 2004, is the result of an extensive industry and consumer group consultation process.

The TCP Code applies to carriage service providers, as defined in section 87 of the *Telecommunications Act 1997*, and applies to a carriage service provider’s conduct and activities engaged in the course of carrying on business as a carriage service provider and supplying goods or services for use in connection with the supply of a listed carriage service, to residential and small business customers.

The primary impetus behind the development of the TCP Code was to clarify supplier obligations and residential and small business consumer rights. This has been achieved in two ways. Firstly, the TCP Code uses consistent language across all six previously separate Codes, and includes a glossary of terms that are used consistently throughout all ten chapters. Secondly, the TCP Code delineates between rules, exceptions and Code administration and compliance. The TCP Code is clearly formatted so that each of the previously separate Codes appears as a chapter of the TCP Code.

The consolidation of the six Codes was conducted by Communications Alliance without making any substantive changes to a supplier’s obligations under these Codes. The Communications Alliance Steering Committee that produced the TCP Code made note of certain supplier obligations and issues that they envisage will require revision in the near future.

The TCP Code is accompanied by the Telecommunications Consumer Protections Guidelines (G631:2007) which provides guidance in interpreting the TCP Code and includes examples of what constitutes supplier compliance and non-compliance, as well as suggesting alternate methods of compliance.

Communications Alliance has submitted the TCP Code to the Australian Communications and Media Authority for registration under section 117 of the *Telecommunications Act 1997*.



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Australian Law Reform Commission Review of Australian Privacy Law

In September 2007 the Australian Law Reform Commission (ALRC) released its Review of Australian Privacy Law Discussion Paper (“**the ALRC Paper**”). Consisting of close to 2000 pages, the ALRC Paper examines the relevance and scope of Australia’s Privacy Law in relation to recent technological developments, as well as the relationship between the Federal, State and Territory Privacy Acts and other statutory privacy protections.

Chapter 63 of the ALRC Paper focuses on the relevance of Part 13 of the *Telecommunications Act 1997* (“**the Telecommunications Act**”), which regulates the use and disclosure of information collected and held by telecommunications providers, and its interaction with the *Privacy Act 1988* (“**the Privacy Act**”). The Telecommunications Act, under Part 13, regulates the use and disclosure of a broad range of information obtained by carriage service providers (as well as other bodies) as a result of a supply of telecommunications services. The information protected under Part 13 includes information relating to the contents of a communication carried or being carried by a carrier or carriage service provider; carriage services supplied or to be supplied; and information relating to personal particulars of another person, including unlisted telephone numbers and billing information.

The ALRC formed the view that the Telecommunications Act provides protection to a broader category of information than the Privacy Act which provides protection only to personal information contained in a record. The ALRC concluded that the Telecommunications Act plays an important role in ‘filling the gaps’ that arise under the Privacy Act, and thus Part 13 of the Telecommunications Act should be retained.

The ALRC also recommended that the interaction of the two pieces of legislation should be clarified and where necessary aligned.

Chapter 7 of the ALRC Paper examined, albeit briefly, the application of Privacy Law to emerging technologies such as VoIP. In relation to VoIP, the ALRC Paper identified the current inability of Part 13 of the Telecommunications Act to regulate a VoIP service that does not connect with the PSTN. There is an argument that VoIP communications that do not connect with the PSTN fall within the scope of the Privacy Act. VoIP is an example of but one emerging technology that cannot be clearly ‘categorised’ under the existing Australian privacy regime. Accordingly, the ALRC has recommended that the Privacy Act be amended so that it is technologically neutral.

It seems inevitable that Australian Privacy Law, including privacy related provisions in the Telecommunications Act, will soon undergo amendment. A number of prominent figures are currently lobbying for the Government and regulatory bodies to update the Privacy Act so that it is in line with technological and cultural changes. In December of last year a public plea was made by the High Court’s Justice Michael Kirby and the Privacy Commissioner Karen Curtis for the immediate implementation of this recommendation.

It is envisaged by the ALRC that such changes will better protect the privacy of an individual from unwanted interference, regardless of what technology is used to store, communicate, transmit or otherwise manage that individual’s personal information. Further, adequately drafted, technologically neutral Privacy Law will be able to maintain relevance and validity in the face of future technological changes.



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Restricted Access Systems Declaration: New Rules For Mobile & Internet Content Service Providers

The Australian Communications and Media Authority in December 2007 released the *Restricted Access Systems Declaration* ("the Declaration") which places the onus on content service providers to verify that persons accessing age restricted content are of the appropriate age.

The Declaration forms part of 2007's reformation of the regulation of the provision of restricted content, lead by the *Communications Legislation Amendment (Content Services) Act 2007*. This legislation inserted a new Schedule 7 into the *Broadcasting Act 1992* with the objective of consolidating all regulations pertaining to content services delivered via carriage services, irrespective of the platform and whether they consist of user-generated content or otherwise. Schedule 7 and the Declaration commenced on 20 January of this year.

The Declaration requires restricted content services providers to implement access-control systems that require persons wish-

ing to access MA 15+ content to apply for access and to provide a declaration that the applicant is at least 15 years of age. Similarly, providers of R18+ content must also require persons wishing to access the restricted content to apply for access and to verify their age. The Declaration requires providers of R18+ content to keep records, in accordance with the *Privacy Act 1988*, to demonstrate how the age of the applicant has been verified in relation to each applicant who has been granted access to R18+ content.

In developing the Declaration, ACMA consulted with industry, community and consumer groups and received in total in excess of 30 submissions. The primary issue of contention was ACMA's inclusion of user-generated content in the scope of the new regime. ACMA recently indicated they plan to consult further with industry and community on this matter so it is likely that further developments will occur in 2008.

Customer Access to "000" from VoIP Services

ACMA has amended the *Telecommunications (Emergency Call Service) Determination 2002* ("the Determination") to ensure that all VoIP customers with both dial-in and dial-out functionality are provided with free of charge access to "000" and the emergency number "106" which is a text based service for hearing or speech impaired consumers.

The amendments are the result of a lengthy consultation process conducted by

ACMA during 2007, encompassing input from industry, consumer and emergency service organisations. ACMA and the Department of Communications, Information Technology and the Arts contacted over forty Australian VoIP service providers in an effort to overcome technological hurdles that prevent VoIP users from accessing emergency call services.

The Determination has introduced the new term "location independent communica-

tions service” to describe a carriage service that is not a fixed local service, a mobile service or a satellite service. A VoIP service that provides both dial-in and dial-out functionality, or a combination of services that together provide dial-in and dial-out functionality, falls within the definition of a location independent communications service and is thus required to provide access to emergency call services.

The obligations imposed on VoIP providers are broad and includes the obligation for a VoIP carrier who wholesales its network to VoIP service providers to do all things necessary to ensure that those VoIP service providers can meet their obligations under the Determination.

A location independent communications service provider is also required to provide the IPND Manager with information pertaining to the end user’s location, any alternative contact numbers for that end user, and to notify the IPND Manager that the service may not be at that location, or that an emergency call using the service may be of uncertain origin. This information is used by emergency call persons to ensure that they ask an emergency caller to provide the correct location of the emergency, so that the required emergency service can be dispatched to the correct address.

Buchanan Law is pleased to note that a number of recommendations made by us on behalf of a VoIP client were implemented by ACMA. One such recommendation was that VoIP services that offer dial-out only functionality be excluded from the requirement to provide emergency call services access. ACMA’s draft amendment to the Determination included dial-out only VoIP services within the definition of a location independent communications service. We contested this on the grounds that most VoIP providers who offer dial-out only services, use a virtual number to identify the end user. This virtual number is recognisable by the relevant service provider but is not recognisable by the IPND and may not be unique to that end user. We submitted that it would be impractical



to require these services to offer emergency services access as it may be impossible for the emergency call services person to accurately identify the location of the caller.

We also urged ACMA to remove references to dial-out only services as it was inconsistent with the telecommunications regulatory regime’s concept of a ‘standard telephone service’ (or STS). Australian telecommunications regulation applies to all providers of an STS, meaning a service passing the connectivity test of permitting an end user to ordinarily communicate with another end user who is provided with the same service for the same purpose. The threshold of whether a service falls within the ambit of the regulatory regime is traditionally dependent on whether that service constitutes an STS.

Dial-out only services are not an STS. Two end users who are both provided with a dial-out only service are not capable of communicating with one another using that service, as one end user cannot accept an inbound call from the second end user. We successfully argued that requiring a non-STS service to comply with the Determination was inconsistent with the existing body of telecommunications regulatory and legislative instruments.

In light of these recent amendments to the Determination, it is likely that once it is technologically possible for users of dial-out only VoIP services to be identified by the IPND, these obligations will be extended to dial-out only VoIP service providers. Buchanan Law invites any telecommunications providers to contact us should you have any queries in relation to emergency call services obligations and these recent changes.

Telecommunications (Interception and Access) Amendment Act 2007

Amendments to the *Telecommunications (Interception and Access) Act 1979* (“**the TIA Act**”) came into force in September and November of last year as a result of the *Telecommunications (Interception and Access) Amendment Act 2007* (“**the Amendments**”).

The Amendments transfer a number of provisions in Parts 13, 14 and 15 of the *Telecommunications Act 1997* to the TIA Act and refine a number of key definitions. By way of example, the defined term “authorised officer” is used to describe those persons within enforcement agencies who have the ability to authorise a disclosure of information or data under the TIA Act. An authorised officer now includes a person within an enforcement agency who is authorised by the enforcement agency head to issue authorisations. Although this creates greater flexibility for Australian law enforcement bodies, it will result in carriers and carriage service providers (“**C/CSPs**”) being in receipt of authorisations from a greater number of officers within those enforcement agencies.

An authorisation can be issued in respect of information contained in two different categories of communications: historic and prospective communications. Replacing sections 282 and 283 of the *Telecommunications Act 1997* (“**the Telecommunications Act**”), sections 178 and 179 of the TIA Act regulate the disclosure of historical data, being information or documents that are in existence up to and including the time that notification of the authorisation (issued under Part 4.2 of the TIA Act) is received by the relevant C/CSP. Prospective data, governed by section 180 of the TIA Act, refers to documents and information that has not yet come into existence. Authorisation for disclosure for prospective data comes into force once the C/CSP making the disclosure receives notification of the authorisation, and such authorisation cannot remain in force for a period in excess of 45 days. Authorisation to disclose prospec-

tive data can only be given where the investigation involves a criminal offence with a minimum penalty of 3 years imprisonment.

The amended TIA Act is not without its shortcomings. There is no obligation for C/CSPs to scrutinise the validity of notifications. This raises the question of what will be the consequences for a provider who relies on a notification and performs the intercept in good faith, only to later discover that the notification and associated authorisation were not issued in accordance with the TIA Act. Further, the TIA Act does not prescribe a standard form on which notifications are to be issued to C/CSPs.

Buchanan Law is currently seeking clarification from the Attorney-General’s Department (“**the Department**”) as to whether a carrier or carriage service provider would be afforded immunity in such circumstances. Although certain immunities against civil actions for damages are provided to C/CSPs under section 313(5) of the *Telecommunications Act*, it remains unclear whether C/CSPs would receive immunity for criminal as well as civil actions resulting from an unduly executed notification or authorisation.

Buchanan Law is also seeking guidance from the Department in relation to the level of assistance that must be provided by a C/CSP. Section 313(3) of the *Telecommunications Act* requires C/CSPs to provide government authorities with such assistance as is “reasonably necessary” to enforce the criminal law, protect public revenue and safeguard national security. It is not clear whether this standard of reasonableness accounts for a C/CSP’s size and resources. Preliminary responses from the Department indicated that reasonableness is assessed on a case by case basis. Buchanan Law endeavours to obtain from the Department a more objective measure for assessing a C/CSP’s compliance with this obligation.

Other Recent Developments

- Communications Alliance released new Guidelines for Quality of Service Parameters for networks using the Internet Protocol (December 2007).
- Communications Alliance released new Guidelines for Quality of Service Parameters for Voice Over Internet Protocol Services (December 2007).
- IPND Code ACIF C555:2008 published by Communications Alliance (January 2008).



Current Proposed Changes:

- Amendments to *Telecommunications (Emergency Call Services) Determination 2002* to block SIM-less calls.

BUCHANAN LAW

Buchanan Law is often described as a boutique firm because we are a specialist commercial law services provider with expertise for servicing the needs of clients with ICT and related interests. We regularly advise on a broad range of telecommunications, commercial, intellectual property, procurement and associated transactional matters.

Sectors & Services

Buchanan Law is organised along both sectors and service lines. We work this way to better reflect our clients and to provide a service where our lawyers can provide thorough industry expertise.

Sectors	Services
Telecommunications	Telco regulation
Information Technology	Information Technology
Advertising & marketing	Intellectual Property
Media	<ul style="list-style-type: none"> ➤ Commercialisation of IP ➤ Trade mark registration and opposition services ➤ Patent licensing ➤ Copyright
Digital services	
Sport, Events & Entertainment	
Internet & E-commerce	Corporate & commercial
Biotechnology	Privacy & Data protection
	Employment

The Buchanan Law Difference

Because Buchanan Law has a recognised focus and a small, specialist team, we are able to respond quickly and flexibly to the complex, technologically-driven issues that our clients so often refer to us.

Further Information

We invite you to contact anyone of our specialist team to discuss your legal requirements.

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