

# Australian Telecommunications Law

## Location based services and privacy

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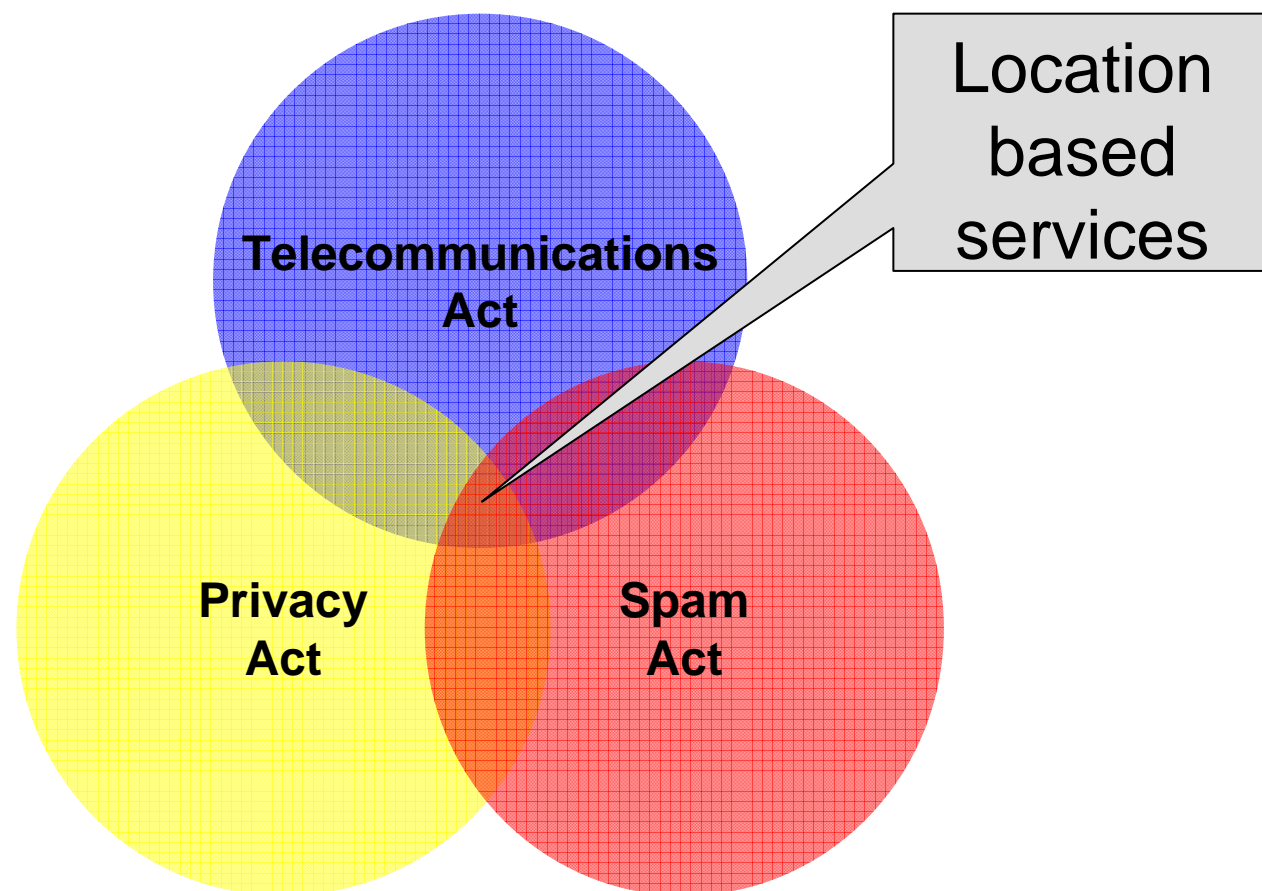
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## Issues

- Privacy Act
- Spam Act
- Telecommunications Act
- Future directions

## Intersecting legislation



## Privacy Act and National Privacy Principles (NPPs)

- Telcos regulated under Telco Act and Privacy Act (pre-NPPs) as credit providers (Part IIIA)
- Privacy Act introduced NPPs:
  - regulate how private sector organisations handle personal information
  - regulate how an organisation collects, uses, discloses, stores and handles personal information about its customers
- NPPs apply to personal information
- NPPs apply to telecommunications providers

## Personal Information

- *“information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion”*
- Basically any information which can identify a person
  - in isolation, some information may or may not be personal information
  - sometimes difficult to determine in isolation whether something is personal information (eg a mobile number)

## What do the NPPs cover?

- Collection (NPP 1)
- Use and Disclosure (NPP 2)
- Data Quality (NPP 3)
- Security (NPP 4)
- Openness (NPP 5)
- Access / Correction (NPP 6)
- Anonymity (NPP 7)
- Identifiers (NPP 8)
- Transborder data flows (NPP 9)
- Sensitive Information (NPP 10)

## Key exemptions to application of NPPs

- employee records
- media organisations
- small business with up to \$3 million turnover
- State and Territory government bodies
- political acts and practices

## Use and disclosure (NPP 2): direct marketing exemption

- Personal information can be used for the purpose of direct marketing if:
  - it is not practicable to seek the individual's consent before the use
  - the individual has not already “opted out”
  - the communication tells the individual they can “opt out”
  - there is no charge for opting out

## Spam Act (briefly)

- Spam Act applies to all commercial electronic messages, including SMS
- Can only market electronically (eg email, SMS) with consent
- Consent can be express or implied – but advisers recommend that express is better
- Messages must contain an unsubscribe facility that works and “Unsubscribes” must be respected
- ACMA enforces Spam Act strongly (no forbearance)

## Telco Act and privacy

- Part 13 of the Telecommunications Act 1997 has strict rules on the privacy of “information or documents” that relate to the “affairs or personal particulars” of other persons (similar to the definition of “personal information”)
- Relationship with the Privacy Act: if disclosure is permitted under the Telco Act, it is permitted under the Privacy Act

## Telco Act and privacy

- There is a general prohibition against use or disclosure of information related to telecommunications (s.276) except in a very limited range of specified circumstances, including:
  - the disclosure is necessary for the business needs of carriers (eg inter-carrier billing information)
  - assisting the ACMA or ACCC
  - disclosure is required or authorised under a warrant or under law

## Telco Act - location based services

- 2007 amendment to Telco Act calls out information or documents on the location of a mobile device as being related to the affairs of the customer responsible for the device (s.275A)
- Exception is consent (either express or implied) but having regard to the circumstances of disclosure (s.289)

## 2007 amendments and future directions

- Explanatory Memorandum identified risks in location information:
  - potential misuse to facilitate inappropriate contact, especially with children
  - the mobile content industry safety codes would be required to address concerns over LBS
  - emphasis on express consent of end users (especially in relation to 2<sup>nd</sup> handset)

## Future directions

- Likely that codes will be made by Communications Alliance on express consent for “passive” services where MNO initiates (similar to ‘Code of Practice for the use of passive location services in the UK’)
- Commercial problems with express consent
- Consent obtained by use of a service (click through consent – user originated) – “active” services where customer initiates (eg where is my nearest taxi, ATM, bar, restaurant, cinema?)

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