

## Submission in relation to the Public Consultation on the use of DPI

29 July 2009

I am writing in response to the invitation for comment on the use of DPI.

I oppose the use of DPI other than in accordance with restrictive amendments proposed below which are intended to apply to licensees under the ICTA Law.

My opposition to the use of DPI is based on the right to privacy and the potential for the abuse of private information which could arise from the misuse of DPI. I have come to this position having recognised that any commercial advantage which may be gained by licensees under the ICTA through their use of DPI was not part of the basis of their existing licensure, and in any event is outweighed by the fundamental right to privacy which is provided for in law having effect in the Cayman Islands. I have also noted that any perceived consumer advantage which may be derived from DPI can only be weighed on a case by case basis by fully informed individual consumers who are also informed in relation to the consequences of any and all loss of their personal privacy over time. To the extent that it might be permitted, any use of DPI offered by licensees to consumers should therefore be based on fully informed consent, individualized, optional, reversible, priced exclusively on the basis of cost recovery, and not a condition for the use of the services of any licensee.

I recommend that the ICTA Law should be amended so as to expressly restrict any use of DPI and related technologies to, and by, entities which are licensed under the ICTA Law. I also call for the amendment of the ICTA Law to ensure that the use of protocols and technologies which may be used to circumvent any restriction on the use of DPI in the Cayman Islands, whether by means of coherent routing of packets through a jurisdiction which permits DPI or otherwise, are prohibited.

In coming to this position I have noted the following.

DPI and related technologies could not have been within the contemplation of those drafting the ICTA Law or the legislators who enacted it. These technologies have the potential to undermine privacy. The present wording of the ICTA Law should therefore be updated to clarify the use of DPI and related technologies. By way of one example of the deficiency of the current legislation, it may be that a service provider could claim that the exception provided for in s.75 (2) (e) (iii) was one of the reasons (among many) for its use of DPI, but that this one reason is sufficient to make its use of DPI lawful. On the basis of that one arguably permitted use of DPI, the company could further argue that any and all other use of information derived from that application of DPI is purely incidental and also permitted, irrespective of the consequences for privacy.

It is suggested that in its deliberations, the ICTA may wish to look beyond the narrow scope of the ICTA Law as it currently is. The ICTA may wish to consider that the ICTA Law and conditions of licensure may be read in conjunction with The Computer Misuse

Law (TCML) and in particular s.3 of that law. Specifically, it is noted that the “information” in any relevant unauthorized “access to information” (within the meaning of s.3 of the TCML), is within an email message. This “information”, which in the context of DPI would be the target for the application of DPI, is not the property of the ISP. The ISP is the carrier of the information on behalf of the transmitter and without express authority to access that “information”. To the extent that licensees are obliged to comply with laws other than the ICTA Law as a condition of licensure, whether in compliance with the “fit and proper” criterion or otherwise, the provisions of the TCML may be relevant. No amendment of TCML is recommended.

The ICTA may also wish to consider the international obligations of the Cayman Islands, including The European Convention on Human Rights, and in particular Article 8 of that Convention, which now applies in the Cayman Islands. An act or a failure to act by a public authority, including the ICTA, which deprives a person of the privacy of his or her communications may constitute a contravention of that Convention. It is further noted that s.9 (1) of the Cayman Islands Constitution 2009 also provides for government respect for privacy in “correspondence” which is likely to be construed as including electronic communications.

In response to the question of whether the ICTA Law should be amended to expressly exclude or restrict the use of DPI, I would recommend amendment in order to update and clarify the ICTA Law. Any such amendment should be broad in scope and generic in nature, rather than technology specific. It should require that going forward, and in recognition of the inevitability of technological innovation, any technology which might compromise the right to privacy in communications could only be deployed by any licensee with the prior written consent of the ICTA, which consent would only be given following public consultation.

My recommendation is that the use of DPI and related technologies should be expressly identified as an interception of an electronic communication which is only lawful to the extent that it falls within the wording of what is at present ss. 75 (2) (a – d inclusive) of the ICTA Law, as further restricted by the provisions of the current TCML. For the avoidance of doubt, the exception set out in s.75(2)(e) should not be available in the context of DPI. The rationale for this restriction is to remove any discretion on the part of licensees in relation to the use of DPI. This amendment is warranted as a matter of public policy and in the interests of privacy in communications.

The use of DPI other than as proposed under the amendment set out above should be made a criminal offense punishable by fine, imprisonment and license forfeiture. As noted in the first paragraph of this submission, I also request that the ICTA Law be amended to expressly prohibit “creative compliance” in relation to restrictions on the use of DPI by any entity which is licensed under the ICTA Law. In that regard, I would request that any legislative amendment should be generic and sufficient to ensure that any protocol or technology which permits the circumvention of any prohibition or restriction on the use of DPI in the Cayman Islands, whether by means of coherent routing of packet traffic through a jurisdiction which permits DPI or otherwise, is prohibited.

I would like to thank the ICTA for bringing this matter to the attention of the public and for inviting submissions from the public. I would be happy to clarify any aspect of this submission which is not clear.

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