

Spam Regulations 2004 2004 No. 56

EXPLANATORY STATEMENT

Statutory Rules 2004 No. 56

Issued by the authority of the Minister for Communications, Information Technology and the Arts

Spam Act 2003

Spam Regulations 2004

Section 47 of the *Spam Act 2003* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act aims to reduce the prevalence of unsolicited commercial electronic messages, known as 'spam', by setting standards for commercial electronic messages, particularly in relation to the way in which a person's consent to receive such messages can be given or inferred, the way in which consent can be withdrawn through an unsubscribe facility and the need for the sender or authoriser of the message to be accurately identified.

Part 2 of the Act contains a prohibition on the sending of unsolicited commercial electronic messages (section 16). Part 2 of the Act also requires commercial electronic messages to include information about the individual or organisation who authorised the sending of the message (section 17), and provides that a commercial electronic message must contain a functional unsubscribe facility (section 18).

The purpose of the accompanying Regulations is to:

- (a) exclude facsimile electronic messages from the definition of 'commercial electronic message' in section 6 of the Act; and
- (b) specify a number of conditions to be complied with by the electronic address to which an unsubscribe message may be sent.

Exclusion of facsimile messages

Section 6 of the Act provides a definition of 'commercial electronic message' for the purposes of the Act. Subsection 6(7) of the Act allows specified kinds of electronic messages to be excluded from the meaning of 'commercial electronic message' by regulations. The accompanying Regulations exclude from the definition of 'commercial electronic message' all commercial electronic messages that are facsimile messages. This means that the penalty provisions in Part 2 of the Act do not apply to facsimile messages. The accompanying Regulations exclude facsimile messages because the original consultative process regarding spam (which occurred prior to the development of the Act) focussed on email and SMS spam, rather than facsimile spam. As a result, it is not clear whether

facsimile spam is a problem that needs to be addressed under the Act and it is also not known what impact it would have on business if the Act were to apply to facsimile messages. Further consultation would be required before proceeding with any regulation of facsimile spam under the Act.

Conditions of an electronic address for an unsubscribe facility

Section 18 of the Act provides that all commercial electronic messages, except 'designated commercial electronic messages' (which are essentially messages sent by governments, charities, religious organisations, and educational institutions or which consist of no more than factual information), that have an Australian link must contain a functional unsubscribe facility. The purpose of section 18 is to ensure that recipients of commercial electronic messages can opt out of receiving future messages. Paragraphs 18(1)(c) to (g) set out the conditions that must be met for a message to have a functional unsubscribe facility, including that the electronic address must comply with the condition or conditions (if any) specified in the regulations (paragraph 18(1)(g)).

Subsection 18(1) is a civil penalty provision. Consequently, if a commercial electronic message does not comply with the requirements in subsection 18(1), the Australian Communications Authority could apply to the Federal Court for an order requiring the person who sent or authorised the sending of the message to pay a pecuniary penalty to the Commonwealth.

The accompanying Regulations specify three conditions with which an electronic address must comply for the purposes of paragraph 18(1)(g). The conditions are that the use of an electronic address must not:

- require the recipient of the message to use a 'premium service' to send an unsubscribe message (regulation 3.2);
- cost more than the usual cost of using that kind of electronic address, using the same kind of technology that was used to receive the commercial electronic message (regulation 3.3); and
- require the recipient of the commercial electronic message to pay a fee or charge to the sender of the message or to a 'related person' (subregulation 3.4(1)).

The conditions would ensure that when someone is sent a commercial electronic message they are not required to pay any abnormal fees or charges, use high cost premium services or be diverted to a more costly medium in order to unsubscribe. This could otherwise serve to discourage people from unsubscribing or result in profits (directly or indirectly) for the sender of the original message.

Details of the accompanying Regulations are in the [Attachment](#).

Subsection 6(7), providing for the exclusion of certain messages from the definition of 'commercial electronic message' by regulation, is contained in

Part 1 of the Act. Part 1 of the Act commenced on 12 December 2003, being the day on which the Act received the Royal Assent. Paragraph 18(1)(g), providing for the specification of conditions by regulation in respect of the electronic address of an unsubscribe facility, is contained in Part 2 of the Act. Parts 2 to 6 of the Act are expressed to commence on the day after the end of the period of 120 days beginning on the day on which the Act received the Royal Assent. Parts 2 to 6 will therefore commence on 10 April 2004. Section 4 of the Acts Interpretation Act 1901 allows the accompanying Regulations to be made (but not to commence) before Parts 2 to 6 of the Act come into operation. The accompanying Regulations commence on the commencement of Parts 2 to 6 of the Act, effectively on 10 April 2004.

ATTACHMENT

DETAILS OF THE SPAM REGULATIONS 2004

Part 1 - Preliminary

Regulation 1.1 - Name of Regulations

Regulation 1.1 provides that the name of the Regulations is the *Spam Regulations 2004*.

Regulation 1.2 - Commencement

Regulation 1.2 provides that the Regulations commence on the commencement of Parts 2 to 6 of the *Spam Act 2003*. These Parts commence on 10 April 2004.

Regulation 1.3 - Definitions

Regulation 1.3 defines the terms 'Act', 'carriage service', 'carriage service provider', 'carrier' and 'premium service' for the purposes of the accompanying Regulations.

Part 2 - Commercial electronic messages

Regulation 2.1 - Facsimile messages

Regulation 2.1 provides that a facsimile message is a specified kind of electronic message for the purposes of subsection 6(7) of the Act. It is intended that the word 'facsimile' would have its ordinary meaning and would cover electronic messages which contain an exact copy of a document or image (that is not in an electronic form).

The effect of regulation 2.1 is that a facsimile message is not a commercial electronic message for the purposes of the Act.

Part 3 - Rules about sending commercial electronic messages

Regulation 3.1 - Conditions

Regulation 3.1 provides that Part 3 of the accompanying Regulations sets out, for the purposes of paragraph 18(1)(g) of the Act, the conditions with which an electronic address must comply.

Regulation 3.2 - Unsubscribe facility - premium service

Regulation 3.2 provides that the use of the electronic address contained in a commercial electronic message must not require the recipient of the message to use a premium service in order to send an unsubscribe message using the electronic address. The purpose of regulation 3.2 is to prevent an electronic address being set out in a commercial electronic message that would require the recipient of the message to pay premium rates to send an unsubscribe message using the address. This would also prevent the sender of a commercial electronic message from receiving a financial benefit from the use of a premium service by the recipient of the message.

Regulation 1.3 defines 'premium service' to have the same meaning as the definition of 'premium service' in paragraphs 3.12(1)(a), subparagraph 3.12(1)(b)(i) and paragraph 3.12(1)(c) of the *Telecommunications Regulations 2001*.

Paragraph 3.12(1)(a) of the *Telecommunications Regulations* provides that a carriage service or content service using a number with a prefix starting with '190' is a premium service. A telephone service or an Internet service is a form of carriage service. An on-line information service is a content service. Subparagraph 3.12(1)(b)(i) provides that a carriage service used to supply a content service using a number that includes an international access code (such as 0011) is a premium service and paragraph 3.12(1)(c) provides that the Minister may determine in writing another carriage or content service to be a premium service.

The definition of 'premium service' in regulation 1.3 does not refer to subparagraph 3.12(1)(b)(ii) of the *Telecommunications Regulations* because the services covered by that subparagraph would not be relevant to a condition under paragraph 18(1)(g) of the Act. Subparagraph 3.12(1)(b)(ii) includes in the definition of 'premium service' a carriage service used to supply a service (other than a content service) by way of a voice call (including a call that involves a recorded or synthetic voice) using a number that includes an international access code. However, subsection 5(5) of the Act excludes a message sent by way of a voice call made using a standard telephone service from the definition of 'electronic message'. This means that an unsubscribe facility that complies with section 18 could not contain an electronic address if the use of that address would result in the unsubscribe message being made by way of a voice call using a standard telephone service (see also the definition of 'voice call' in section 4 of the Act and the definition of 'standard telephone service' in section 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*).

Regulation 3.3 - Unsubscribe facility - usual cost

Regulation 3.3 provides that the use of the electronic address for an unsubscribe facility must not cost more than the usual cost of using that kind of electronic address, using the same kind of technology that was used to receive the commercial electronic message.

Regulation 3.3 is intended to prevent the sender of a commercial electronic message from specifying an address which would require the recipient of the message to use a higher-cost technology for an unsubscribe message than was used to send the message (eg. the sender of a message might specify an SMS unsubscribe address in an e-mail message). In addition, regulation 3.3 covers the situation where the sender of the message specifies an address which could be used by the same kind of technology that was used to receive the message but which requires the recipient of the message to pay higher than usual charges to use the address.

The determination of whether a particular address complies with regulation 3.3 requires consideration of the kind of technology that was used to receive the relevant commercial electronic message (for example, an e-mail service) and the usual cost of using that kind of technology to send a message to the kind of address provided in the message. This, in turn, requires consideration of the range of prices offered by providers of the relevant kind of technology at the time that the commercial electronic message is sent. Provided that the cost of using the electronic address would be within the range of prices being offered at the relevant time, the address would comply with the condition in regulation 3.3.

Regulation 3.4 - Unsubscribe facility - fees and charges

Subregulation 3.4(1) provides that the use of an electronic address must not require the recipient of the commercial electronic message to pay a fee or other charge to the sender of the message or to a 'related person'. The purpose of regulation 3.4(1) is to ensure that recipients of commercial electronic messages are not obliged to pay a processing fee charge, or any other type of fee or charge, to the sender of the message or a person who has an agreement or other informal arrangement in place with the sender in order to have an unsubscribe message received and processed.

A 'related person' is defined in regulation 1.3 as a person who receives or may receive payment of a fee or charge in relation to the use of an electronic address on the basis of an agreement, arrangement or understanding with the sender of the message. The reference to 'arrangement or understanding' in the definition is intended to cover situations which do not involve any contract or other agreement between the parties. The definition expressly excludes an agreement between the sender of a commercial electronic message and a carrier or carriage service provider under which a reduced fee or charge for sending a message to the electronic address would be payable by the recipient of a message. For example, if the sender of a SMS commercial electronic message has agreements in place with a number of carriers and/or carriage service providers whereby the sending of a SMS unsubscribe message to the electronic address provided in the sender's message will be charged at lower than usual rates, the relevant carriers and carriage service providers would not be related persons for the purposes of subregulation 3.4(1).

Subregulation 3.4(2) provides that, where the sender of the message is itself a carrier or carriage service provider, subregulation 3.4(1) does not apply to a fee or charge ordinarily imposed by the sender, in its capacity as carrier or carriage service provider, on a monthly or other agreed basis for the use of carriage services (regulation 1.3 provides that 'carrier', 'carriage service provider' and 'carriage service' have the same meaning as in the *Telecommunications Act 1997*). For example, if an Internet service provider (ISP), which is

a kind of carriage service provider, sent a commercial electronic message to a number of customers, and a customer used the Internet carriage service provided by the ISP to the customer to send an unsubscribe message to the electronic address, the ISP would be able to charge the customer for the use of the Internet carriage service in its usual bill to the customer.