

Explanatory Statement

Issued by the authority of the Australian Communications and Media Authority

FAX MARKETING INDUSTRY STANDARD 2011

Telecommunications Act 1997

Legislative Basis

Under subsection 125B(1) of the *Telecommunications Act 1997* (the Telecommunications Act), the Australian Communications and Media Authority (ACMA) must determine a standard that:

- (a) applies to participants in each section of the fax marketing industry; and
- (b) deals with the following matters relating to the fax marketing activities of those participants:
 - i. restricting the hours and/or days during which marketing faxes may be sent, or attempted to be sent, to an Australian number;
 - ii. requiring that a marketing fax sent to an Australian number must contain specified information about the person who authorised the sending of the fax;
 - iii. restricting the total number of marketing faxes sent, or attempted to be sent, by the relevant participant during a particular period to a particular Australian number;
 - iv. requiring that, if a marketing fax sent to an Australian number is authorised by a particular person (the *authorising person*), the fax must contain information about how the recipient of the fax may send a message to the effect that the recipient does not want to receive any marketing faxes authorised by the authorising person.

The standard is to be known as an *industry standard* and will commence on the day after it is registered.

Background

The Do Not Call Register (the register) was launched on 3 May 2007, and took effect on 31 May 2007 allowing individuals to list their home and mobile numbers (used primarily for private or domestic purposes) to opt-out of receiving unsolicited telemarketing calls.

The *Do Not Call Register Legislation Amendment Act 2010* (the Legislation Amendment Act) was made on 18 May 2010. The operative provisions of the Legislation Amendment Act came into effect on 30 May 2010. The Legislation Amendment Act amended the Telecommunications Act to insert a new section 125B, requiring the ACMA to determine a standard relating to the fax marketing industry (the Standard).

The Legislation Amendment Act also made changes to the *Do Not Call Register Act 2006* (the DNCR Act) to, among other things, extend the numbers eligible for registration on the register to include fax numbers, numbers used by government bodies and emergency service numbers. The Legislation Amendment Act also made provision for the Minister, by legislative instrument, to extend the period of time for which numbers may remain on the register.

The new arrangements relating to fax numbers responded to the increasing levels of community concern about the growing number of unsolicited marketing faxes and industry concerns about the inconsistency in current rules governing the sending of marketing faxes. In particular, the Standard establishes a national framework providing more consistent regulatory arrangements for the fax marketing industry and consumers.

The Standard sets out the minimum requirements for marketing faxes and will apply to all participants in the fax marketing industry, including some individuals and organisations that are not covered by the general prohibition contained in the DNCR Act against sending marketing faxes to numbers on the register (such as charities, political parties and market researchers).

Compliance with the Standard is required by section 128 of the Telecommunications Act and failure to comply may lead to civil penalties being imposed. Compliance is enhanced by section 139 of the Telecommunications Act, which has the effect of requiring all agreements for the carrying on of fax marketing activities to contain provisions requiring compliance with the Standard.

Objective of the Standard

The objectives of the development of the Standard are to:

- provide consumers with greater certainty regarding the minimum standards of conduct they can expect from unsolicited fax marketers;
- encourage best practice in fax marketing; and
- reduce compliance and administrative costs for industry and regulators through the introduction of greater consistency in national minimum faxing requirements.

Consultation

The ACMA commenced the development of the Standard with the release of a discussion paper, *Developing an industry standard for the fax marketing industry*, in June 2010 and invited comment on the four areas that must be regulated by the Standard.

The ACMA received 17 written submissions. Feedback on three of the required areas (the time at which marketers can contact consumers, the provision of contact information and the provision of opt out functionality) was generally supportive of regulation of these areas.

However, the fourth area – the inclusion of volume and frequency restrictions on marketing faxes to a number - was supported by only one submission and other submissions noted it would be difficult and costly to implement.

Following this consultation process, the ACMA has sought to strike a balance between consumer interests and commercial practicalities.

The proposed requirement for a fax marketer to make ‘reasonable efforts’ to meet the specified restriction is aimed at articulating and promoting best practice whilst not imposing unrealistic requirements on industry which would outweigh the level of benefit.

The ACMA then drafted a standard that deals with the four particular matters and released a second discussion paper to seek views on the draft standard.

The ACMA received ten written submissions in response to the second discussion paper. Several submissions from industry proposed the inclusion of some additional information on the fax. This would assist in reducing the number of complaints arising from faxes that were originally sent to numbers **not** on the register being redirected automatically to numbers that

are on the register. This is an emerging issue that has been identified by both the ACMA and fax marketers.

Requiring faxes to include a 'header line' that sets out the destination number that a fax is intended to be sent to as a standard requirement would assist fax marketers and the ACMA in identifying whether faxes were caused to be received on a registered fax number due to a call diversion, PABX call routing or receipt on a dual/phone fax connection from another fax number.

The inclusion of a header line in the information a fax should contain had not been canvassed in previous consultations. Accordingly, the ACMA sought industry and community views on this proposal.

The ACMA received three submissions and all supported the requirement for the inclusion of a header line, which has subsequently been included in the Standard.

Notes on the Sections and Subsections

Part 1 – Introduction

Section 1 – Name of Standard

Section 1 provides that the Standard is the *Fax Marketing Industry Standard 2011*.

Section 2 – Commencement

Section 2 sets out that the Standard commences on the day after it is registered.¹

Section 3 - Interpretation

Section 3 sets out the key definitions used in the Standard.

Some of the key definitions are discussed below:

consent has the same meaning as in Schedule 2 to the *Do Not Call Register Act 2006*.

Consent for these purposes includes both express consent and consent which can be reasonably inferred from the conduct and business and other relationships of the individual or organisation concerned.

fax advertiser means a participant in a section of the fax marketing industry that authorises the sending of a marketing fax.

fax recipient means a person who receives a fax from a sender, whether or not the fax recipient is a relevant account holder. It includes nominees for that service, persons who may not be an account holder or nominee but who commonly use the service and other persons who may use the service from time to time or on a one off basis.

nominee has the meaning given by section 39 of the *Do Not Call Register Act 2006*.

Nominations are made in relation to a number in writing by the relevant Australian number account-holder for a specified individual. For the purposes of this Standard, the concept of a nominee is mainly relevant to the giving of consent for the sending of a fax during prohibited faxing times.

opt-out address explains what is required to be provided as an opt-out address under subparagraph 6(1)(e)(ii). The effect of this is to require at a minimum that the opt-out address included on the fax must include a fax number to which an opt-out message may be sent and one other address (local or toll free phone number, an email address or a website) at which an opt-out message can be left.

opt-out message means a message to the effect that the fax recipient does not want to receive any faxes from the fax advertiser.

relevant account-holder has the meaning given by section 4 of the *Do Not Call Register Act 2006*. This means any individuals and/or organisations solely or jointly responsible for the relevant Australian number account. For example, an individual or organisation may be responsible for paying for the relevant account, or the account may be jointly held by more than one person in the household. In these cases the relevant account holder is any of these persons. This is relevant to the issue of consent to marketing faxes outside of the prohibited hours.

send has the meaning given by section 4 of the *Do Not Call Register Act 2006*, which includes attempts to send.

sender means a participant in a section of the fax marketing industry that sends, or proposes to send a marketing fax.

Section 4 – Persons to which this industry standard applies

Section 4 sets out that for the purposes of section 125B of the Telecommunications Act, the Standard applies to participants in each section of the fax marketing industry.

Section 5 – Prohibited calling times

Subsection 5(1) requires that a sender must not send, or cause to be sent, a marketing fax on:

- (a) a weekday before 9 am; or
- (b) a weekday after 8 pm; or
- (c) a Saturday before 9 am; or
- (d) a Saturday after 5 pm; or
- (e) a Sunday.

These times are generally consistent with the current allowable faxing hours specified in various State and Territory legislation.

Subsection 5(2) extends prohibited faxing times so that no marketing fax, may be sent on the listed national public holidays or a holiday on a weekday given in lieu of one of those national public holidays.

Subsection 5(3) allows for faxes to be sent or attempted to be sent outside the prohibited faxing times if the relevant account-holder or their nominee has given consent in advance to receiving a fax at the time or day at which the fax is sent or attempted to be sent. If required by ACMA, the fax advertiser must demonstrate that consent was obtained and the fax was sent on the day or at the time consented to.

For the purposes of this section, the relevant time or day to referred to is the time or day at the place of the usual address of the relevant account-holder.

Section 6 – Provision of information within a fax

Section 6 sets out the information which must be provided within a fax.

Information which must be provided includes:

6(1)(a) - the name of the fax advertiser

The fax advertiser must provide their name. This will usually be the name of the company or business that authorised the sending of the fax, but may include a sole trader's full name.

6(1)(b) the Australian Business Number (ABN) of the fax advertiser, or equivalent business number identification if the fax advertiser is a foreign company

The fax advertiser must provide their ABN or equivalent. This will assist consumers and the ACMA to accurately identify the entity authorising the fax.

6(1)(c) the contact details of the fax advertiser

The fax advertiser must provide their contact details. Under subsection 6(3), for the purposes of subsection 6(1), contact details must include a telephone or fax number suitable for receiving telephone calls or faxes during normal business hours at the location of the fax advertiser, and at least one of the following:

- a) street address;
- b) postal or business address, other than a street address;
- c) email address.

Fax advertisers consequently can choose whether to disclose their street address, business address or email address.

6(1)(d) the destination number that the fax is intended to be sent to

Requiring faxes to include a 'header line' that sets out the destination number that a fax is intended to be sent to will assist fax marketers and the ACMA in identifying whether faxes that were caused to be received on a fax number registered on the register, were received on that number due to a call diversion, PABX call routing or receipt on a dual/phone fax connection from another fax number.

This will assist in reducing the number of complaints arising from faxes that were originally sent to numbers not on the register being redirected automatically to numbers that are on the register.

6(1)(e) the details of how the fax recipient can communicate an opt-out message, including:

- (i) a statement to the effect that the fax recipient may opt-out of receiving any future faxes from the fax advertiser by conveying an opt-out message to an opt-out address; and*
- (ii) an opt-out address to which fax recipients can communicate an opt-out message.*

Requiring an opt-out address to be provided will assist recipients in 'opting out' of receiving future faxes from the fax advertiser. As defined in section 3 of the Standard, the opt out address required to be provided must include a fax number at which opt-out messages may be left as well as one other address at which an opt-out message may be sent (which must be either a toll-free or local phone number, an email address or a website).

Subsection 6(2) requires that the information required to be included in the fax must be set out in a clear, legible and conspicuous manner, included on the first page of the fax and displayed using a minimum 10 point font size. This is to ensure recipients can use the contact details if they wish to pursue a query or complaint.

Information provided under section 6 will assist faxed parties who wish to pursue a query or complaint relating to a particular marketing fax. It will also assist the ACMA in the investigation of any potential breach of the Standard and the DNCR Act.

Section 7 – Standard for providing fax recipient with facility to opt out from receiving further faxes

Subsection 7(1) requires that a fax recipient will be taken to have opted out of receiving fax messages if the person has sent, left at or otherwise communicated an opt-out message to the opt-out address provided in a marketing fax. Under paragraph 7(2)(b), once a fax recipient has opted-out of receiving fax marketing messages from a fax advertiser, the fax recipient must be removed from any list of Australian numbers used by the sender to arrange for the sending of faxes on behalf of the fax advertiser within 7 days .

Paragraph 7(2) (a) states that a sender must have in place processes to ensure that the opt-out address provided in the fax is reasonable likely to be capable of receiving opt-out messages at all times. This will help to ensure that opt-out messages are received and actioned appropriately.

Section 8 – Limit on number of faxes to be sent to a recipient in a period

Section 8 provides that a sender must make reasonable efforts to ensure it does not send more than 10 faxes in respect of the same fax advertiser, to a particular Australian number in any 24 hour period.

This is to ensure that a fax recipient is not inundated with marketing faxes but also provides some allowance for dialling errors.

Section 9 – Operation of State and Territory laws

This section provides that the Standard is not intended to exclude the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with the Standard. For example, a State or Territory may have laws setting out more restrictive faxing hours than those in subsections 5(1) or, 5(2). In those circumstances the State or Territory law will continue to operate to that extent and fax advertisers and senders must abide by those laws in addition to the Standard.