

Spam Regulations 2021

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Communications, Urban Infrastructure, Cities and the Arts

Spam Act 2003

Spam Regulations 2021

Purpose and operation

The *Spam Regulations 2021* (the Regulations) are made by the Governor-General under section 47 of the *Spam Act 2003* (the Act).

The purpose of the Regulations is to repeal and remake the *Spam Regulations 2004* in substance, noting that minor changes and additions have been made to reflect current drafting practice and to clarify and update conditions to be complied with by an electronic address used to send an unsubscribe message.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

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the way in which a person's consent to receive such messages can be given or inferred, the way in which consent can be withdrawn through an unsubscribe facility and the need for the sender or authoriser of the message to be accurately identified.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 Regulations is to:

- (a) exclude faxes 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 faxes

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 Regulations exclude from the definition of 'commercial electronic message' all commercial

electronic messages that are fax messages. This means that the penalty provisions in Part 2 of the Act do not apply to fax messages.

When the Regulations were first made in 2004, they specifically excluded facsimile spam from the definition of 'commercial electronic message', as the consultative process during the development of the Act had focussed on email and SMS spam only and it was not clear at that time whether facsimile spam was a problem that needed to be addressed under the Act. Subsequently, in 2010, the *Do Not Call Register Act 2006* was amended to encompass marketing faxes; and inserted new provisions into that Act that provided unsolicited marketing faxes must not be sent to a number registered on the Do Not Call Register (subject to certain exemptions), and agreements for the sending of marketing faxes require compliance with the *Do Not Call Register Act 2006*.

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, political parties, charities 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 and Media Authority (ACMA) 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 Regulations specify four conditions with which an electronic address must comply for the purposes of paragraph 18(1)(g) of the Act. The conditions are that the use of an electronic address must not:

- require the recipient of the commercial electronic message to use a 'premium service' to send an unsubscribe message (subsection 7(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 (subsection 7(3));
- 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' (subsections 7(4) and 7(5)); and
- require the recipient of the commercial electronic message to provide personal information other than the electronic address to which the commercial electronic message was sent, or require the recipient to log into an existing account or create a new account with the person who sent or caused to be sent the commercial electronic message, or the individual or organisation who authorised the sending of the commercial electronic message in order to unsubscribe (subsection 7(6)).

The conditions ensure that when someone is sent a commercial electronic message they are not required, in order to unsubscribe, to pay abnormal fees or charges, use a high cost premium service or medium, divulge personal information (other than the electronic address to which the commercial electronic message was sent) or log into or create an account. Such requirements could otherwise discourage people from unsubscribing or result in profits (directly or indirectly) for the sender or the person who authorised the sending of the original message.

Details of the Regulations are set out at Attachment A.

Consultation

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) has reviewed and assessed the performance of the Regulations. During the review, the Department conducted targeted consultation with key stakeholders, including regulators, consumer and industry groups to determine whether the Regulations remain fit for purpose.

The review and input received revealed the ongoing utility of the Regulations as well as the need for certain aspects of the Regulations to be clarified and updated. Both the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC) reported receiving complaints regarding unsubscribe processes. Consumers advised of being unable to unsubscribe from receiving commercial electronic messages unless they provided personal information, or logged into or created an account.

Accordingly, the Regulations have been amended to clarify and update requirements in relation to unsubscribe facilities and explicitly state that an entity cannot require a message recipient to provide personal information (other than the electronic address to which the commercial electronic message was sent), or log into or create an account with the entity who sent, caused to be sent or authorised the sending of the commercial electronic message in order to unsubscribe. This regulation will provide greater clarity to industry, ensure consumer protections are maintained and also provide greater certainty to the ACMA in its role regulating commercial electronic messages.

Regulatory impact assessment

The Department has certified that the Regulations contain minor amendments only and that a Regulation Impact Statement is not required. The Office of Best Practice Regulation has confirmed that this certification meets the Australian Government's Regulatory Impact Analysis requirements for the remaking of a sunset instrument (OBPR ID 26494).

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

Notes on Sections

Part 1 – Preliminary

Section 1 - Name

This section provides that the title of the Regulations is the *Spam Regulations 2021*.

Section 2 - Commencement

This section provides for the Regulations to commence on 1 April 2021.

Section 3 - Authority

This section provides that the Regulations are made under the *Spam Act 2003* (the Act).

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 – Definitions

This section provides definitions of terms used in the Regulations: 'Act', 'carriage service provider', 'carrier', 'premium service', 'related person', and 'unsubscribe message' for the purposes of the Regulations.

Part 2 – Commercial electronic messages

Section 6 – Messages that are not commercial electronic messages

Section 6 of the Regulations provides that, for the purposes of subsection 6(7) of the Act, a fax is not a ***commercial electronic message*** for the purposes of the Act. The word 'fax' is intended to have its ordinary meaning and to cover electronic messages which contain an exact copy of a document or image that is not in an electronic form.

The effect of section 6 is that a fax message is not a commercial electronic message for the purposes of the Act.

Part 3 – Rules about sending commercial electronic messages

Section 7 – Conditions for electronic address for receiving unsubscribe message

Subsection 18(1) of the Act requires a commercial electronic message that has an Australian link and is not a 'designated commercial electronic message' to include a statement to the effect that the recipient may use an electronic address set out in the message to send an

unsubscribe message to the individual or organisation who authorised the sending of the commercial electronic message (subparagraph 18(1)(c)(i)) or a statement to similar effect (subparagraph 18(1)(c)(ii)). Section 7 of the Regulations specifies conditions for an electronic address to be used to send an unsubscribe message.

‘Electronic address’ is not defined in the Act; however, subsection 5(1) of the Act gives an indication of what is intended by this term. Emails and telephone numbers are examples of electronic addresses. The term would also cover new types of electronic addresses developed in the future. It is intended that an address used for instant messaging is covered by the term electronic address.

Subsection 7(1)

Subsection 7(1) states that section 7 specifies the conditions to be complied with by an electronic address set out in a commercial electronic message as the electronic address to be used to send an unsubscribe message.

Subsection 7(2) – premium service

Subsection 7(2) of the Regulations 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. The purpose of subsection 7(2) is to prevent the recipient of the message from having to pay premium rates to send an unsubscribe message. It also prevents the sender of a commercial electronic message from receiving a financial benefit from the recipient’s use of a premium service.

Section 5 of the Regulations defines ‘premium service’ as a premium service within the meaning of the *Telecommunications Regulations 2021*, other than a service mentioned in subparagraph 9(2)(b)(ii) of that instrument. Subsection 9(2) of the *Telecommunications Regulations 2021* provides that a ***premium service*** is any of the following services:

- (a) a carriage service or content service using a number with a prefix starting with 190, 191, 193, 194, 195, 196, 197 or 199;
- (b) a carriage service used to supply: (i) a content service, or (ii) another service by way of a voice call (including a call that involves a recorded or synthetic voice); using a number that includes an access code that is, in the numbering plan, specified for use with an international service, international direct dial service or international ring back price service;
- (c) a public mobile telecommunications service that enables an end-user to access a proprietary network.

Subparagraph 9(2)(b)(ii) of the *Telecommunications Regulations 2021* is not relevant to the Regulations because the services covered by that subparagraph are not reasonably likely to be capable of receiving an unsubscribe message. Therefore, they could not be used to comply with paragraph 18(1)(e) of the Act. This is because an unsubscribe message must be an electronic message (per the definition of that term in subsection 18(9) of the Act), whereas a service referred to in subparagraph 9(2)(b)(ii) of the *Telecommunications Regulations 2021* is provided by way of a voice call. A message provided by way of a voice call is not an electronic message (per subsection 5(5) of the Act). This means that an unsubscribe facility that complies with section 18 could not rely on a premium service mentioned in subparagraph 9(2)(b)(ii) of the *Telecommunications Regulations 2021*.

Subsection 7(3) – usual cost

Subsection 7(3) of the Regulations 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 as was used to receive the commercial electronic message.

Subsection 7(3) is intended to prevent the sender of a commercial electronic message from specifying an address that would require the recipient of the message to use a higher-cost technology to unsubscribe than was used to receive the commercial electronic message (e.g. a sender of an email message specifying an SMS unsubscribe address). In addition, subsection 7(3) prevents the sender of the message specifying an address that 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 subsection 7(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 received. 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 subsection 7(3).

Subsections 7(4) and 7(5) – fees and charges

Subsection 7(4) of the Regulations provides that, subject to subsection 7(5), 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'.

A 'related person' is defined in section 5 of the Regulations 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, other than an agreement between the sender and a carrier or carriage service provider, and under which the fee or charge to be imposed by the carrier or carriage service provider in that capacity will be less than would otherwise be charged for the use of that kind of electronic address. 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 an SMS commercial electronic message has agreements in place with a number of carriers and/or carriage service providers whereby the sending of an 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 subsection 7(4).

The purpose of subsection 7(4) 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.

Subsection 7(5) provides that, where the sender of the message is also a carrier or carriage service provider, subsection 7(4) does not apply to a fee or charge ordinarily imposed for the use of carriage services by the sender in its capacity as carrier or carriage service provider, on a monthly or other periodic basis. (Section 5 of the Regulations provides that 'carrier' and 'carriage service provider' 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.

Subsection 7(6) – personal information and accounts

Subsection 7(6) of the Regulations provides that the use of the electronic address must not require the recipient of the commercial electronic message to provide personal information (within the meaning of the *Privacy Act 1988*) other than the electronic address to which the commercial electronic message was sent. Nor must the use of the electronic address require the recipient to log in to an existing account, or create a new account, with the person who sent the commercial electronic message or caused the commercial electronic message to be sent, or the individual or organisation who authorised the sending of the commercial electronic message.

The effect of paragraph 7(6)(a) is that requiring a recipient of a commercial electronic message to provide personal information (other than the electronic address to which the commercial electronic message was sent) in order to action an unsubscribe request is not compliant with section 18 of the Act.

Personal information is defined in the *Privacy Act 1988* as information or an opinion about an identified individual, or an individual who is reasonably identifiable (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.

Paragraph 7(6)(b) prohibits unsubscribe processes where consumers are required to log into or create accounts with an entity in order to unsubscribe. Paragraph 7(6)(b) applies to accounts with the person who sent the commercial electronic message, or caused the commercial electronic message to be sent, or the individual or organisation who authorised the sending of the commercial electronic message. Paragraph 18(1)(c) of the Act provides that the message must include a statement that the recipient may use an electronic address set out in the message to send an unsubscribe message to the individual or organisation who authorised the sending of the message, or a statement to similar effect. The functional unsubscribe facility must allow a message to be sent to the authoriser of the message, not necessarily the sender. For example, if an organisation gets a third party to send out messages on their behalf, the message must include an address which enables the recipient to send an unsubscribe message to the organisation itself, not the third party who sends the message. Accordingly, paragraph 7(6)(b) is designed to ensure that recipients of commercial electronic messages are not required to log in to an existing account, or create a new account with either

the person who sent the commercial electronic message or caused the message to be sent, or the individual or organisation who authorised the sending of the message.

In accordance with subsection 18(3) of the Act, the condition in subsection 7(6) of the Regulations does not apply to the extent to which it is inconsistent with the terms of a contract or other agreement between the individual or organisation who authorised the sending of the commercial electronic message and the relevant electronic account-holder.

Part 4—Application and transitional provisions

Section 8 – Electronic messages sent before, on or after 1 April 2021

Subsection 8(1) of the Regulations provides that the Regulations apply in relation to an electronic message sent on or after 1 April 2021.

Subsection 8(2) of the Regulations provides that despite the repeal of the *Spam Regulations 2004* by Schedule 1 to the Regulations, the *Spam Regulations 2004* continue to apply, in relation to an electronic message sent before 1 April 2021, as if that repeal had not happened. This means if an electronic message is sent before 1 April 2021, but the recipient doesn't attempt to use the included electronic address for unsubscribing until on or after that date, the condition in subsection 7(6) of the Regulations does not apply to the electronic address.

Schedule 1—Repeals

Schedule 1 repeals the *Spam Regulations 2004*, which are due to sunset on 1 April 2021, so they can be replaced with the Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Spam Regulations 2021

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The general purpose of the *Spam Act 2003* (the Act) is 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 and the way in which consent can be withdrawn through 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, political parties, charities 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.

The purpose of this Instrument is to support the operation of the Act. The Instrument excludes faxes from the definition of 'commercial electronic message' in section 6 of the Act, and specifies a number of conditions to be complied with by the electronic address to which an unsubscribe message may be sent.

Human rights implications

The Instrument engages the following rights:

- the right to privacy in article 17 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to freedom of opinion and expression in article 19 of the ICCPR.

Right to privacy

The Instrument engages the right to privacy in a limited way. Subsection 7(6) of the Instrument provides that the use of the electronic address must not require the recipient of a commercial electronic message to provide personal information (within the meaning of the *Privacy Act 1988*) other than the electronic address to which the commercial electronic message was sent, or log into an existing account or create a new account in order to unsubscribe.

Such practices can act as a specific barrier to consumers wishing to unsubscribe, as recipients receiving commercial electronic messages may be reluctant to provide personal information

or log into an account from a company with which they had not entered into a direct relationship. Consequently, the Instrument promotes the right to privacy by ensuring the recipient of a commercial electronic message is not required to provide personal information or log into an existing account or create a new account in order to unsubscribe.

Right to freedom of opinion and expression

The ICCPR enables people to enjoy a wide range of human rights, including those relating to freedom of opinion and expression. The right in Article 19(1) to hold opinions without interference cannot be subject to any exception or restriction. Article 19(2) of the ICCPR protects freedom of expression in any medium, for example written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

Section 7 of the Instrument specifies conditions to be complied with by the electronic address to which an unsubscribe message may be sent. These requirements engage the right to freedom of expression in a very limited way. However, these provisions of the Instrument are not designed to interfere with, or restrict, opinions contained in the content of a commercial electronic message but are directed towards ensuring that recipients of commercial electronic messages are not subject to any abnormal fees or charges or high cost premium services or diverted to a more costly medium in order to unsubscribe. Subsection 7(6) of the Instrument also provides that recipients of commercial electronic messages are not required to provide personal information other than the electronic address to which the commercial electronic message was sent, or log into an existing account or create a new account with the sender, or authoriser of the message in order to unsubscribe. These practices could otherwise discourage people from unsubscribing. This subsection of the Instrument therefore only restricts freedom of expression insofar as it prevents use of an electronic address from requiring a recipient to provide personal information and prevents the sender of the commercial electronic message, the person who caused the message to be sent or the authoriser of the commercial electronic message from requiring a recipient of the message to log into an existing account or create a new account to be able to unsubscribe. To the extent that this right is engaged, the limitations are reasonable, necessary and proportionate in order to protect the rights of message recipients.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.