

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Telecommunications Act 1997

Telecommunications (Fax Marketing) Industry Standard 2021

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Telecommunications (Fax Marketing) Industry Standard 2021* (**the instrument**) under subsection 125B(1) of the *Telecommunications Act 1997* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Under subsection 125B(1) of the Act, the 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.

Subsection 33(3) of the AIA provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Under subsection 125B(4) of the Act, the ACMA must ensure that a standard is in force at all times after the commencement of subsection 125B. The instrument repeals the *Fax Marketing Industry Standard 2011* (**2011 Standard**), which is due to sunset on 1 October 2021, and ensures continued compliance with subsection 125B(4) of the Act by determining a standard which meets the requirements of subsection 125B(1) of the Act.

Purpose and operation of the instrument

The instrument replaces the 2011 Standard which is due to sunset on 1 October 2021.

The instrument sets out the minimum requirements for sending marketing faxes and applies to all participants in the fax marketing industry. Compliance with the instrument is required by section 128 of the Act and failure to comply may lead to civil penalties being imposed. Further compliance measures are contained in section 139 of the Act, which has the effect of requiring all agreements for the carrying on of fax marketing activities to contain provisions requiring compliance with the instrument.

A provision-by-provision description of the instrument is set out in the notes at **Attachment A**.

The instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* (the LA).

Documents incorporated by reference

The instrument incorporates various definitions from the Act, the *Do Not Call Register Act 2006* (the DNCR Act) and the *Corporations Act 2001*. The instrument does not otherwise incorporate any document by reference.

Consultation

Before the instrument was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA and subsection 125B(3), and sections 132, 133, 134, 135 and 135A of the Act.

The ACMA undertook a public consultation process from 23 June until 25 July 2021, which included publishing a consultation paper and draft of the instrument on the ACMA's website– see link:

<https://www.acma.gov.au/consultations/2021-06/remaking-fax-marketing-industry-standard-2011-consultation-232021>

The ACMA was satisfied that there was no body nor association representing the fax marketing industry; therefore, on 23 June 2021, an e-bulletin was distributed to all fax marketing industry participants registered on the Do Not Call Register (the register), inviting submissions on the consultation paper and draft instrument. No submissions were received from industry participants.

On 25 June 2021, the ACMA published a notice in *The Australian* newspaper, inviting submissions on the draft instrument and advising that a copy of the draft instrument could be obtained via the ACMA's website.

The ACMA consulted directly with the Australian Competition and Consumer Commission (ACCC), the Office of the Australian Information Commissioner (OAIC), and a body representing the interests of consumers – the Australian Communications Consumer Action Network (ACCAN) – during the consultation period. Submissions were received from the ACCC and ACCAN.

The ACMA also invited submissions from each of the States and Territories. This was done by sending letters to the relevant regulator or consumer affairs entity in each State and Territory on 23 June 2021. A submission was received from South Australia. No other State or Territory entity submitted.

The consultation paper sought comment on certain matters included in the draft instrument as well as inviting general comments. The ACMA received 3 submissions in response to the consultation paper. The ACMA considered all relevant issues raised by the 3 submissions when finalising the form of the instrument.

Regulatory impact assessment

The ACMA considered whether a regulatory impact analysis process was required by undertaking a preliminary assessment and based on this preliminary assessment, the Office of Best Practice Regulation (OBPR) determined that the proposed regulatory changes were minor or machinery in nature. OBPR verified that no further regulatory impact analysis was required – OBPR reference number 44083.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

The instrument replaces the 2011 Standard, which is due to sunset on 1 October 2021. The anticipated outcome is the ongoing effective and efficient operation of the instrument which the ACMA is required, by subsection 125B(4), to have in place.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.

Notes to the *Telecommunications (Fax Marketing) Industry Standard 2021*

Part 1—Preliminary

Section 1 Name

This section provides for the instrument to be cited as the *Telecommunications (Fax Marketing) Industry Standard 2021*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision that authorises the making of the instrument, namely subsection 125B(1) of the *Telecommunications Act 1997* (the Act).

Section 4 Repeal of the Fax Marketing Industry Standard 2011

This section provides that the *Fax Marketing Industry Standard 2011* (F2011L00668) is repealed.

Section 5 Definitions

This section defines a number of key terms used throughout the instrument.

A number of other expressions used in the instrument are defined in the Act, the DNCR Act and the *Corporations Act 2001*.

Section 6 References to other instruments

This section has the effect that in the instrument, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force from time to time.

Section 7 Persons to whom this industry standard applies

This section provides that that for the purposes of section 125B of the Act, the instrument applies to participants in each section of the fax marketing industry.

Section 8 Prohibited times for the sending of faxes

Subsection 8(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.

Subsection 8(2) provides for additional prohibited 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 8(3) provides an exception to the prohibitions in subsections 8(1) and (2) for faxes 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, and, if required by ACMA, the fax advertiser demonstrates 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 referred to is the time or day at the place of the usual address of the relevant account-holder.

Failure to comply with an industry standard can result in a contravention of a civil penalty provision in section 128 of the Act, by either the fax marketing industry participant or a person who is an ancillary to such a contravention. The maximum civil penalty per contravention is \$250,000 for a body corporate and \$50,000 for persons other than a body corporate (see Part 31 of the Act).

Section 9 Provision of information within a fax

This section sets out the information that must be provided within a fax.

Information which must be provided includes:

9(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.

9(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.

9(1)(c) the contact details of the fax advertiser

The fax advertiser must provide their contact details. Under subsection 9(3), for the purposes of subsection 9(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.

9(1)(d) the destination number that the fax is intended to be sent to

The fax advertiser must include the destination number that a fax is intended to be sent to. This will assist fax advertisers and the ACMA in identifying whether faxes that were caused to be received on a fax number registered on the Do Not Call 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 the ACMA in identifying 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.

9(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.*

This paragraph requires an opt-out address to be provided as it will assist recipients in ‘opting out’ of receiving further faxes from the fax advertiser. As defined in section 5 of the instrument, 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 9(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, or can send an opt-out message.

Information provided under section 9 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 10 Providing fax recipient with facility to opt out from receiving further faxes

Subsection 10(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 10(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 10(2)(a) states that a sender must have in place processes to ensure that the opt-out address provided in the fax is reasonably likely to be capable of receiving opt-out messages at all times. This will help to ensure that opt-out messages are received and can be actioned promptly and appropriately.

Section 11 Limit on number of faxes to be sent to a recipient in a period

This section 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 12 Operation of State and Territory laws

This section provides that the industry 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 industry standard.