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Sent: Tuesday, June 13, 2000 4:19 PM
To: Cornish, Catherine (REPS)
Subject: Inquiry into provisions of the Privacy Amendment (Private Sector) Bill 2000

13 June 2000

The Secretary
Legal and Constitutional Affairs Committee
Parliament House
Canberra

Dear Ms Cornish

Subject: Inquiry into provisions of the Privacy Amendment (Private Sector) Bill 2000

In response to a question from the Committee Chair, Mr Kevin Andrews MP, during the hearing in Melbourne on Friday, I undertook to provide further information on EFA's views regarding the small business and direct marketing exemptions in the Privacy Amendment (Private Sector) Bill 2000 (the Bill).

Firstly, we reiterate our primary recommendations in relation to those matters that the small business exemptions be deleted and the provision for direct marketing be changed to opt-in. The Committee Chair enquired about EFA's secondary position, in the event that the Committee decided not to recommend the foregoing amendments. In particular, Mr Andrews asked whether EFA would prefer that:

- (a) the Bill remain as is in regard to direct marketing and small business exemptions, or
- (b) the Bill be amended to require businesses that engage in e-commerce comply with the Bill, i.e. that such businesses be excluded from the small business exemptions in relation to their business activities both online and offline.

(I trust the above is a fairly accurate paraphrasing of Mr Andrew's question, given I have not seen transcript).

We confirm that EFA considers Option (a) above unacceptable. We consider Option (b) above would be an improvement, although inadequate. Moreover, such a change does not address the direct marketing exemption which is of particular concern with regard to the sending of unsolicited E-mail advertising on the Internet ("spamming").

Our secondary recommendation therefore is that the Bill be amended to incorporate the following:

- businesses that engage in commercial activities using the Internet be

required to comply with the Bill, i.e. such businesses be excluded from the small business and small business operator exemptions in relation to their business activities both online and offline, and

- E-mail be excluded from the direct marketing exception to Privacy Principle 2.1, that is, specific prior consent of the individual (opt-in) be required prior to sending direct marketing communications by E-mail, and
- NPP 2.1(c)(iv) be amended to require a business/organisation to give the individual the opportunity to opt out of further contact at each and every contact, not only the first contact.

It should be noted that we specifically refer to "commercial activities using the Internet" above, rather than "e-commerce". The term "e-commerce" could be interpreted to refer to only Web-based commercial activities, thereby excluding commercial activities using E-mail.

The grounds for our secondary recommendation above are as follows:

- The Bill in its present form will cause Australia to quickly acquire a reputation internationally as a haven for organisations that can snub their nose at privacy obligations. That kind of reputation will damage legitimate Australian businesses' attempts to participate in the global economy. This is clearly not in Australia's interests and the Bill therefore needs provisions that discourage privacy breaches in relation to commercial Internet activities, including spamming.

- The direct marketing exemption in the Bill requires a consumer to be aware that they are permitting the use of their data (provided for the primary purpose of, eg. purchasing a specific product) to also be used for the secondary purpose of direct marketing unless they remember to specifically request not to receive direct marketing communications at the time of providing the information. We consider this to be an unfair information practice which inadequately protects an individual's fundamental right to privacy. Remembering to opt out of direct marketing is unlikely to be foremost in a purchaser's mind when transacting a purchase and what is "impracticable" for an organisation in terms of seeking an individual's consent (NPP 2.1(i)) is, to say the least, not clear and likely to be a matter of argument.

- While the Bill in its present form only permits direct marketing material be sent once (if the recipient then asks not to be contacted again), the NPPs only apply to "organisations" and the definition of an "organisation" excludes a "small business operator" (SBO), which is defined to be an entity that carries on one or more small businesses. Once one small business carried on by an SBO has collected an individual's E-mail address, each and every one of the other small business carried on by that SBO can send direct marketing material to the same individual who will, it appears,

have to opt out each time (and the SBO businesses are not required to comply with the NPPs in any case). The SBO does not lose its exemption from the definition of "organisation" in the Bill by disclosing the information to its small businesses nor by those businesses using the information for direct marketing. The exemption is only lost if the E-mail address is disclosed to "anyone else for a benefit, service or advantage". Disclosure to businesses within the SBO are not disclosures to "anyone else". Therefore, the collection of E-mail address by one small business can result in an individual receiving "once only" direct marketing E-mails from numerous other businesses as a result of the collection of the information by one small business. (For more detailed information in this regard, please refer to Professor Graham Greenleaf's submission.)

- There appears to be no impediment to an SBO business disclosing personal information collected by them and contained in a direct marketing lists to unrelated third parties. While such a business would lose its exemption from "organisation" if it received a "benefit, service or advantage" in return, the damage would already have been done prior to the exemption being lost. This appears to be contrary to Article 14 of the EU Directive which grants the data subject the right to be informed before personal data is disclosed for the first time to third parties or used on their behalf "for the purpose of direct marketing".

- The NPP 2.1 exception for direct marketing is the most damaging in relation to E-mail, and therefore E-mail direct marketing should be treated as a special case, because:

- E-mail direct marketing imposes most of the cost of delivery on the recipient/consumer, directly or indirectly (i.e. Internet Access Providers pay by data volume, and this cost is passed on to Internet users). Barriers to entry to use of E-mail for direct marketing are therefore low and a blanket exception as currently in NPP 2.1 is unacceptable. At least with the phone, postal (snail) mail and fax, the sender pays most of the cost, as it should be.

- The Internet Industry of Australia (IIA) Code of Practice and the Government's Best Practice E-commerce principles oppose spam as widely defined, i.e. it is only acceptable to send unsolicited commercial E-mail if the intended recipient has opted-in or there is an existing business relationship.

- The proposed exclusion of E-mail from the direct marketing exemption is unlikely to adversely affect reputable businesses. These generally do not send unsolicited advertising by E-mail because they know spam has an extremely negative impact on Internet users and is more likely to decrease than increase their customer base. (Many Internet users will

not purchase from businesses who spam, on principle).

- Most spammers seem to hit only once, or change their "from" address so that the E-mail appears to have originated from a different entity. Moreover, if an entity is going to send out a million or so E-mails, it is not a hardship to allow people to opt-out against second and subsequent messages.

- While it may appear that most spammers provide an opt-out option by way of an E-mail address to contact to be removed from the marketing list, requests to opt-out are often not honoured. Instead, the remove request is used to verify that there is a person reading the E-mail and the E-mail address is therefore regarded as more valuable data. A marketing list of known-to-be-read E-mail address has higher value in terms of sale of the list to third parties.

- While some Internet users do not receive very much spam, this should not be seen to indicate that unsolicited direct marketing by E-mail is rare. The quantity of spam received by any individual is to a large extent dependent on where an individual's E-mail address is available. Individuals who participate in discussions in public newsgroups, mailing lists and chat rooms, or who have a web site which provides their E-mail address for feedback etc, are significantly more likely to receive large amounts of spam E-mail than individuals who do not.

We hope the above is of assistance to the Committee. It has been prepared quite quickly in view of the short time frame until the Committee's reporting date. If any point is unclear or any member of the Committee or Secretariat would like further information, I will be pleased to discuss the matter further by telephone. I can be contacted during business hours on the phone numbers below.

Yours sincerely

Irene Graham
Executive Director - EFA