Coalition Against Unsolicited Bulk Email, Australia

(CAUBE.AU)

Submission for the Inquiry into the *Spam Bill 2003*

by the ECITA Legislation Committee

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Introduction

The Coalition Against Unsolicited Bulk Email, Australia is a grass-roots association established in 1999 and dedicated to dealing with the problems of spam. We are affiliated with similar organisations overseas, and a member of *i*CAUCE, the International Coalition Against Unsolicited Commercial Email. There are full affiliates covering the United States, Canada, India and Europe. *i*CAUCE is represented throughout the Asia-Pacific region by APCAUCE and by committees in several countries elsewhere. The jurisdictions covered thus represent approximately three-quarters of the population of the globe.

While there in our view are a number of improvements that could be made to the *Spam Bill 2003*, we support it in its present form – it goes most of the way in substantially the right direction.

Spam, and the Mechanism of the Spam Bill 2003

Spam, or unsolicited bulk email (UBE) is is any electronic mail message that is:

1. Transmitted to a large number of recipients; and
2. Some or all of those recipients have not explicitly and knowingly requested those messages.

The Spam Bill 2003 seeks to prohibit something slightly different to this by prohibiting unsolicited commercial email (UCE) – that is, email that:

1. Seeks to promote a product, service or commercial opportunity; and
2. Is transmitted to a person who has not explicitly or impliedly requested that message.

This difference exists primarily for practical reasons – if bulk is a part of the definition of the breach, it becomes necessary to define and then prove bulk, and this adds complexity.

The overlap between these two categories is large – by far the largest volume of UBE is also UCE. Thus, at least in the short term, banning UCE is a reasonable approximation to banning UBE. The fact that it is an approximation, however, requires some exceptions to allow for UCE in circumstances where it is unlikely to also be UBE. It also means that the provisions would allow spam that is not UCE.

In addition to the exemptions required to more narrowly target the mischief at hand, there are a number of groups exempted on policy grounds.

There is an additional advantage to UCE approach in this Bill – as a template for international adoption, it will be seen more favourably in jurisdictions where there are perceived free speech barriers and commercial speech is treated less favourably than non-commercial speech.

The most important feature of this Bill is that it sets an opt-in standard. This is essential, because opt-in is the only standard that gives the email recipient any true option at all.

The EFA Case Scenarios

Electronic Frontiers Australia has offered three "case scenarios" as examples of things they claim the Bill would ban, but that should not be banned.[1]

The Meaning of "Business Opportunity"

Two of the EFA examples rely on the inclusion of a business or investment opportunity in the indicators of a commercial email message[2] in order to claim that the scenario is within the prohibition. This makes it necessary to examine what would constitute a "business" opportunity.

"Business" is usually defined by reference to the "indicia of business". They generally require some sort of commercial endeavour.[3] The indicia include a profit-making purpose, repetition and regularity, organisation and system, size and scale of operations, and other factors of a business nature.[4] Other factors may include the type and quantity of goods traded[5] and the use of a company.[6]

The presence or absence of any one or more of the indicia is not conclusive – they are merely factors to be taken into account in determining whether an activity constitutes a business.

For the reasons given in Appendix 1, we are of the opinion that the statutory definition of "business"[7] does not materially alter the common law.

To constitute a business opportunity relevant for the purposes of the definition of commercial electronic message, the message would need to be promoting an opportunity for the recipient to enter into a transaction that would constitute a business activity of the recipient.

Case Scenario 1

Described

An individual has a personal (not business) web site and publishes their resume on it with their personal (not work-related) email address, for example: xybloggs@yahoo.com.au. The individual may, for example, be an unemployed person, or an employed person who is nevertheless interested in full or part-time contract, consultancy or job offers.

Another person (or organisation/company) wishes to email the individual to offer a business opportunity, for example, a contract for work that is directly relevant to the experience and skills set out in the individual's resume.

The message would be caught by the definition of "commercial electronic message" because its purpose is to offer a business opportunity. A contract for

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1 *Analysis of the Spam Bills 2003,* Electronic Frontiers Australia, 3 October 2003, <http://www.efa.org.au/Publish/spambills2003.html>

2 *Spam Bill 2003* (Cth) cl 6(1)(j)-(l)

3 *Commissioner of Taxation v Bivona* (1989) 89 ATC 4183

4 *Ferguson v FCT* (1979) 9 ATR 873; 79 ATC 4261

5 *Edwards v Bairstow* [1956] AC 14

6 *Lewis Emanuel & Son Ltd v White (H M Inspector of Taxes)* (1965) 42 TC 369; *London Australia Investment Co v FCT* (1977) 7 ATR 757

7 *Spam Bill 2003* (Cth) cl 4

work/consultancy or employment would constitute a "business opportunity" - if it would not, then neither would many messages that unquestionably are spam such as: "Work from home selling this or that"; "Make money advertising these porn sites on your own site"; etc, etc.

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*"Inferred consent" means consent that may reasonably be inferred from the conduct and the business **and** other (e.g. family) relationships of the individual or organisation concerned. Hence, unless there is a prior relationship between the sender (person or organisation) and recipient, consent as currently defined in the Bill cannot be inferred.*

Errors

This example has two problems. Firstly, it misunderstands the legal meaning of "business opportunity". Secondly, it misunderstands the nature and effect of the conjunction in clause 2(b) of schedule 2 relating to inferred consent.

Is This a Business Opportunity?

Service as an employee is not normally considered a business opportunity, and even if done by means of an independent contractor arrangement is unlikely to entail a business unless it exhibits some of the indicia – most notably repetition, regularity, organisation and system. On the other hand, if sufficient indicia are present, then it is likely that the recipient is conducting a business in circumstances where the business function exemption will most likely apply.

"Work from home" offers are likely to be in a different category. Several indicia are likely to be present: profit-making purpose; repetition and regularity; trading; organisation and system. EFA clearly recognises that there is a difference between an offer of employment and a "work from home" offer by indicating that the two should be treated differently.

Is There Consent?

While EFA note that inferred consent must be reasonably inferred from "(i) the conduct; **and** (ii) the business and other relationships" of the individual or organisation concerned,[8] their understanding of the conjunction is flawed. While an "and" conjunction in legal drafting normally means you examine each side of the conjunction independently and require both to be satisfied, where the conjunction is used to join factors to be considered, it means you consider all of the factors applicable to the case, taking into account the effect that each factor has on the others. See, for example, the *Contracts Review Act 1980* (NSW), as interpreted in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610.

In this case, the fact that the résumé has been published on the web site is such a powerful invitation to make a job offer that it is unlikely any part of the "business and other relationships" factor could override it. The EFA analysis recognises this by hilighting the presence of the résumé to which the email address is attached – what they have done, without realising it, is inferred consent in the way permitted by the Bill.

[8] *Spam Bill 2003* (Cth) sch 2, cl 2(a)

Conclusion

This case is unlikely to be within the term “business opportunity,” but quite clearly falls within the “inferred consent” exemption. The example is not even arguable.

Case Scenario 2

An individual has a personal web site containing a number of articles written by them about one or more topics.

A publisher of a magazine or author of a proposed book wishes to email the individual offering to pay them for the right to re-publish one of their articles in a magazine or book.

Such a message would be caught by the proposed law because the purpose of the message is to offer a business opportunity, and the same situation applies as in Case Scenario 1 above, irrespective that the particular individual would (most probably) want to receive that message and offer.

In law, this is what would be called a one-off sale of a capital asset. There is no profit making plan on the part of the author, no repetition or regularity, no system or organisation, no large scale operation, no trading, no corporation. That is, not one of the indicia normally used is present. There is therefore no business, and no business opportunity

EFA note that “the particular individual would (most probably) want to receive that message and offer.” What they have done is infer consent from conduct, as is permitted in this Bill.[9]

Like the previous example, this example is not even arguable. The conduct in question falls outside the term “business opportunity,” and even if it was within that term, consent can be inferred from conduct.

Case Scenario 3

An individual has a personal (not business) web site providing information about a particular topic and also publishes a list of recommended books on the same topic. The individual's personal (not work related) email address, for example: xybloggs@yahoo.com.au, is also available on the site.

A new book about exactly the same topic is published and the author's public relations company wishes to send the individual an email message offering the person a copy of the new book.

Such a message would be caught by the proposed law because the purpose of the message is clearly to promote a book (that is, a good as in "goods and services") and the same situation applies as in Case Scenario 1 above, irrespective that the particular web site owner would (most probably) want to receive that message and offer.

Once again, the conduct of the individual would bring this within the “inferred consent” exemption. Indeed the reason the example seems so objectionable if accurate is that common sense suggests it is within the inferred consent. They have published their email address on the web site associated with a particular topic and consequently must be expecting relevant messages related to that topic or to the web site.

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[9] *Spam Bill 2003* (Cth) sch 2, cl 2

This is probably the most arguable of the three examples, but it is still comfortably within the concept of inferred consent.

Summary of the Case Scenarios

None of these case scenarios holds up to close scrutiny. In each case, application of the techniques used in the Bill to constrain the ban on UCE to deal with only that subset of UCE that is also spam yields the correct result.

Regardless, it is possible that this approach may have unexpected consequences, and the Government has planned well for the possibility of unforeseen effects in this area. There is a regulation power which allows certain types of messages to be excluded from the definition of "commercial electronic messages".[10] Thus anything inadvertently caught can be quickly removed by regulation. Additionally there is a regulation power to make rules defining certain things to be inferred consent, and certain things not to be inferred consent.[11] As if that were not enough, the rules on consent themselves are in a schedule, which allows for them to be easily replaced if the present rules are found not to be workable.

The Exemptions

The exemptions are, broadly speaking, policy based exemptions. While CAUBE does not necessarily agree with all the exemptions, we note that they are placed in a schedule so they can be replaced easily in response to later developments.

Exempt Message Class – Factual Information

The description of this exemption[12] as an exemption for "factual information" is possibly misleading. The effect of the exemption is that certain types of information identifying the sender of the message do not, by themselves, render a message to be a commercial electronic message. The rule is conveniently summarised as applying when:

1. The message contains:
   (a) content; and
   (b) "additional information";
2. The content, without regard to the additional information, would not have made the message a commercial electronic message; and
3. The message complies with any additional regulations.

When banning UCE rather than UBE, an exemption of this general nature is essential. Without it, every message sent from a business would be a commercial electronic message. The effect of the exemption is that a message sent from a business will not be a commercial message merely because it includes aspects that identify the business and are customarily included in all messages. This includes the headers of the message, which may include the business name and domain name, and the signature portion of the message.

The description of the content as "factual information" is misleading, because the factual information must still be such as not to lead to the conclusion that the message is a

[10] *Spam Bill 2003* (Cth) cl 6(7)
[11] *Spam Bill 2003* (Cth) sch 2, cl 5
[12] *Spam Bill 2003* (Cth) sch 1, cl 2

commercial electronic message. If the factual information is information about a commercial product or service, the message will still be commercial, even though the content is factual.

While it is possible that this exemption could be abused, if the content of the message has no relevant purpose to the recipient, this may in itself tend to imply a commercial purpose, particularly if the content of the message relates to an area of commerce. In the case of any particular message it is necessary to ask what the purpose is behind a message – some purpose must be identified, and if no non-commercial purpose is identified, there is likely to be an inference of a commercial purpose. An unsuccessful attempt to disguise the commercial purpose of the message is a relevant factor in determining the enforcement action to be taken.

Due to the potential for abuse of this exemption, there is a need to provide for further rules that could make this exemption useless for the purposes of sending spam. It is not clear what the content of such further rules should be, and it is likely to be necessary to adjust the rules in response to the way in which spammers attempt to abuse this exemption. This makes this an appropriate matter for regulations adding such further rules, and provision has been made for this.[13]

The only alteration CAUBE would seek to make to this exemption is to remove sponsor information from the additional information.[14] It is difficult to see how a message could be relevantly sponsored if it is not being sent in bulk, and if it is being sent in bulk without consent, it is spam.

Exempt Senders – Government, Political Parties, Religious Organisations and Charities

While these organisations are exempted,[15] the impact of the exemption is likely to be minimal. We believe some or all of these exemptions will need to be removed at a later date, but that their inclusion at this stage is not fatal to the Bill.

Spam as a promotional technique proves to be an unmitigated disaster for organisations attempting to garner broad support and to grow. While there have been some cases in which political candidates in the United States have used spam, there has been no evidence that this has helped their campaigns. Spam is more likely to result in long-lasting backlash, cutting off a large portion of the recipients from the potential support base of the organisations. As political parties, governments (at least at the Ministerial level) and charities in particular rely on such broad support, they are unlikely to use spam unless as a result of seriously incompetent management.

Given the adverse impacts of spam on an organisation that requires broad support to meets its functional and growth goals, the exemption for such organisations entails some risk of giving a false impression to such groups that spamming is acceptable conduct. To this extent the presence of the exemption thus does a disservice to those groups. It would be better if the provision were to be divided into sub-clauses, with a new sub-clause stating that the clause is not intended to make conduct of the sender lawful that would not be lawful at common law, or ethical that would not be ethical absent the Act.

It is also worth noting that the kinds of things that such an organisation would, if so inclined, promote by spam, are things of a non-commercial nature that would not bring the message within the definition of "commercial electronic messages." These are groups

13 *Spam Bill 2003* (Cth) sch 1, cl 2(1)(c)

14 *Spam Bill 2003* (Cth) sch 1, cl 2(1)(a)(vi)

15 *Spam Bill 2003* (Cth) sch 1, cl 3

that rarely offer products or services of a nature that lends itself to spam. They in fact rarely spam. If and when this situation changes, the schedule can be replaced to remove the exemption.

We also note that there are special issues involved in imposing penalties on these organisations. In the case of government, the imposition of a financial penalty has no practical effect. In the case of charities, the burden of the penalty is likely to be on entirely innocent beneficiaries of the charity. In the case of a political party, the imposition of the penalty is especially susceptible to infringing on notions of free speech. In the case of religious groups, it is especially susceptible to infringing on notions of freedom of religion.

While CAUBE can accept these exemptions in the short term, we do not agree with them and we would be strongly opposed to extending the exemptions to cover any further organisations. There is never a situation in which it is acceptable to misappropriate the services of others to transmit messages in bulk promoting the interests of the sender.

Exempt Senders with Limited Target Audiences – Educational Institutions

This exemption[16] is limited in scope and has the effect of exempting messages sent to the household of a person who studies at that institution. It is useless for most spam, and the cases in which it might be used would normally involve an opportunity to obtain consent. This would effectively result in a requirement to obtain such consent under the *Privacy Act*.[17]

While CAUBE would not necessarily agree with this exemption, its impact is minimal and not something that should prevent the Bill from moving forward.

Consent by Conspicuous Publication

Consent by reason of conspicuous publication requires that:[18]

1. The address be that of a particular person filling a role in an organisation;
2. The address has been "conspicuously published" – mere publication is of itself insufficient;
3. There is a reasonable inference of agreement to the publication;
4. There is no notice of rejection of unsolicited commercial messages; and
5. The content of the message is relevant to the role.

For a spammer to use this exception, they would need to:

1. Visit the web site containing the address;
2. Ascertain if the publication is conspicuous publication rather than mere publication;
3. Infer that the recipient or their organisation, as the case may be, would have agreed to the publication in the relevant circumstances;
4. Determine if the person's role is relevant to the contents of the message; and

16 *Spam Bill 2003* (Cth) sch 1, cl 4

17 *Privacy Act 1988* (Cth) sch 3 cl 2.1(c)

18 *Spam Bill 2003* (Cth) sch 2, cl 4

5. Determine if there is a message indicating a desire not to receive unsolicited commercial messages – this need not be expressed in a particular form.

This exception is useless for bulk transmission. It requires a number of informed decisions to be made that could only be made in the case of web based data by a person physically visiting and viewing the web page. It could also be used in cases where an email address is published on a business card.

The only change CAUBE would make to this provision is to require that the inferral of consent was recent at the time of transmission of the message. This change would have two effects: it would better cope with the situation where a person fills a particular role for a time and then moves to a new role; and it would better prevent a cost-spreading strategy whereby one organisation spends time building lists of such addresses and then sells them to other organisations – such a strategy would make it difficult to stop the flow of messages once it had started.

Penalties

The penalties set out in the Bill,[19] including in the infringement notice scheme,[20] are appropriate and reflect the profit motive that lies behind acts constituting contraventions of the substantive provisions. This is backed up by a system of enforceable undertakings[21] and formal warnings.[22] The powers in relation to each of these enforcement mechanisms are discretionary.[23]

While a penalty of $440 for an individual for a first offence involving a single recipient may seem somewhat severe, the imposition of that penalty in such circumstances would give rise to administrative law challenges to the exercise of discretion. If it were a first and trivial offence, it would be likely that a decision to fine would be based on irrelevant considerations[24] or a failure to take into account relevant considerations,[25] or open to challenge on the grounds that the decision was unreasonable in a Wednesbury sense.[26]

Even without these administrative law challenges it is unlikely that the ACA would seek to issue an infringement notice on every first offence – the limits of its funding impose constraints on the volume of enforcement that can be pursued in the courts, thus rendering it ineffective to pursue trivial matters.

The Consequential Amendments Bill

The search powers created by the consequential amendments Bill[27] have come under criticism[28] for providing for an owner or occupier to consent to a search, and for providing for a theoretical search of the premises of a recipient of spam. While a power to search with valid consent might be thought superfluous, the federal executive power is

19 *Spam Bill 2003* (Cth) cl 25
20 *Spam Bill 2003* (Cth) sch 3, cl 5
21 *Spam Bill 2003* (Cth) Part 6
22 *Spam Bill 2003* (Cth) s41
23 *Spam Bill 2003* (Cth), cll 38 & 41, sch 3, cl 3
24 *Roberts v Hopwood* [1925] AC 578
25 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40 per Mason J
26 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
27 *Spam (Consequential Amendments) Bill 2003* (Cth) sch1 cll 67 & 71; *Telecommunications Act 1997* (NSW) s542
28 Note 1

frequently challenged[29] by reference to limits thought to stem from the *Constituton*. While such challenges appear to be rarely if ever successful, if the provisions are properly seen as merely ensuring that the executive is given the right to act on a consent given by somebody with the power to consent at common law, then the provisions lose their controversy as there is no substantial alteration of rights.

In his response to the debate on the second reading, the Minister for Communications, Information Technology and the Arts commented on the relevant provisions that:

> *This recognises that the owner or occupier is appropriately entitled to decide who may enter the premises. It gives them the opportunity to consent without wasting court resources, where they are willing to accede to the request*

This statement suggests an operation under the assumption that the person giving the consent is "appropriately entitled to decide who may enter the premises," rather than an intent to grant a new power of consent. What, then of the major controversies?

A person who is the occupier of premises is entitled at common law to give consent to any person to enter notwithstanding that another occupier would object. This applies because the co-occupiers are constituted the agents of one-another for the relevant purpose.[30] Thus a flatmate can legitimately consent to a search of this kind at common law. The provision thus does not alter rights at common law in relation to consent given by a co-occupier.

A conclusion that a landlord without a right to immediate possession or a relevant contractual right could consent would be of more concern. Such a landlord would not have the right to consent at common law, and if the provisions were interpreted to grant such a right there would be a substantial abridgement of the rights of the occupier.

There are, however, situations where an owner might be able to consent who is not also an occupier. This would be the case when there is no occupier at the time, and the owner, while not the occupier, holds a present estate in possession. It might be the case where the interest of the occupier is not a leasehold interest, properly so called. It might be the case where the owner has a contractual right to enter without the consent of the occupier, and a concurrent right to consent to the entry of others. Some of these situations are likely to arise in what might loosely be described as commercial leases.

The power to act on the consent of the owner is present in the same provision as that to act on the consent of the occupier, which is in the form of allowing a search with the consent of the "owner or occupier". As the provision does not empower the occupier to give a consent to entry, such empowerment being redundant, the reference to the consent of an owner would normally be taken to also refer to such consent, if any, as the owner is already empowered to give. An interpretation that diminished the rights of the occupier by allowing an otherwise powerless owner to consent would be one of those situations in which a legislative intention to do so would need to be clearer than that exhibited by the section.[31]

We would therefore interpret the relevant provisions as relying on the power to consent at common law, and not conferring a new power to consent. Thus construed, the provision to the extent that it deals with the consent of the owner or occupier does not reduce the rights of an occupier.

The second issue that has been taken with the search provisions is that a warrant might be issued to allow the ACA to enter the premises of a recipient of spam. While the

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29 See, for example, *Barton v The Commonwealth* (1974) 131 CLR 477

30 Pollock F, *Possession in the Common Law*, Clarendon Press, Oxford, 1888 at 21

31 *Coco v R* (1994) 179 CLR 427 at 435 per Mason CJ, Brennan, Gaudron and McHugh JJ

provisions, taken literally, would allow this, we would agree with the the Minister's response to this concern, which is in terms substantially the same as our initial thoughts on this criticism:

> *It would be a waste of time and resources when the act could target the origin of the messages. The only way the ACA would be aware of a recipient of spam would be if the recipient complained to the ACA of receiving spam or if they had network logs showing the person had received spam. In the first instance, the recipient is unlikely to impede the ACA's investigation. In the latter case there would be no reason for the ACA to seek further evidence.*

The powers regarding search warrants would also be subject to the common law rules regulating the issuance[32] and execution[33] of search warrants, which include requirements that the issue and scope of the warrant is necessary and reasonable. Most notably, it would be difficult to imagine a case in which such a warrant could issue against a recipient of spam where the exercise of power would not be open to challenge on grounds of improper purposes and bad faith.[34]

Concern that the warrant power might be used to raid the homes of recipients of spam are properly regarded as extreme and fanciful.

The CAUBE Position on the Bill

The Bill, as introduced, clearly bans the most common types of unsolicited bulk email transmitted today. The vast majority of spam is commercial within the definition in the Bill,[35] although there have been instances of spam promoting political, charitable and religious interests. The ban is achieved with minimal impact on non-bulk transmission through the mechanism of consent, including inferred consent, and through some of the exemptions. In order to limit the ability of spammers to spam within the rules, it includes numerous regulation-making powers to allow fine-tuning. These same regulation-making powers facilitate moderation of the rules to deal with any unforeseen adverse consequences. It is clearly an appropriate mechanism with minimal adverse impact.

This does not mean, however, that we do not believe there are areas that could be improved. The particular areas where it would be possible to improve the Bill are:

1. Remove the exemptions for specific organisations.[36]

   There is no reason of principle why these organisations should be exempted from a rule that unsolicited bulk email should not be used.

   The damage that spam does to the utility of email is the same regardless of who the sender is. It makes no more sense to us to give a limited license to spam than to give a limited license to spray paint a message on the private dwellings of others. Any argument of principle that is valid in the case of one will apply with equal force in the case of the other. Both may contain a message. Both diminish the value, utility or amenity of property. Both cost money to clean up.

   While the use of spam is uncommon among the organisations exempted, it has occurred in the past, and will occur in the future. There is a risk that some

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32 *George v Rockett* (1990) 170 CLR 104; *Ousley v R* (1997) 192 CLR 69 at 107 per McHugh J

33 *Arno v Forsyth* (1986) 65 ALR 125

34 *R v Toohey (Aboriginal Land Commissioner); ex parte Northern Land Council* (1981) 151 CLR 170

35 *Spam Bill 2003* (Cth) cl 6

36 *Spam Bill 2003* (Cth) sch 1, cl 3

organisations will mistake the exemption as encouragement to spam, despite this being manifestly contrary to their own interests.

2. Remove information regarding a sponsor from the "additional information" in the "factual information" exemption.[37]

   We can conceive of no reason why there would be sponsorship of a message that was not being sent in bulk. If it is unsolicited, bulk and email, it is spam.

3. Extend the ban to unsolicited bulk email that is not commercial.

   It is not the content of spam that causes the damage. Unsolicited bulk email has equal potential to clog up network links and obscure legitimate communications regardless of the fact that its content is not commercial.

   As an additional prohibition this would not do violence to the existing prohibition on UCE. The UCE provisions would still have an operation in cases where bulk is not able to be proven. Further, the practical difficulties of proving bulk might be overcome by deeming bulk in cases where:

   (a) the content, either:

      (i) in itself; or

      (ii) by reason of its lack of relevance to the recipient;

      suggests bulk; and

   (b) the sender fails to prove it was not bulk.

   A similar rule, providing for a defence against an infringement where the sender proves the message was not bulk, might be of some benefit in relation to the prohibition against UCE.

4. Add a freshness requirement for consent inferred by conspicuous publication.[38]

   A person who has had their email address conspicuously published at one time should not be subject to being bombarded with spam for an eternity as a result of data sharing arrangements.

5. Add a provision to make it clear that the Act should not render the transmission of a message lawful that would otherwise be unlawful, or diminish liability that would arise from that transmission, as a result of any other law.

   There is a possibility that the provisions in the Bill could be relevant as evidentiary matters going to the issue of consent at common law, thus creating unforeseen consequences. This could be improved by an avoidance of doubt provision explicitly precluding such a result.

Conclusion

The *Spam Bill 2003* sets the right base standard – opt-in. There are some types of spam that are excluded from the prohibition, but this can be adjusted as necessary and in line with that base standard. Specific examples seen to date of non-spam being caught do not hold up to scrutiny, and although it may be possible to identify non-spam that would be caught, there are extensive regulation-making powers that allow for this situation to be dealt with quickly.

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[37] *Spam Bill 2003* (Cth) sch 1, cl 2(1)(a)(vi)

[38] *Spam Bill 2003* (Cth) sch 2, cl 4

This is not a situation in which disputes at the periphery of the Bill should prevent the Bill going forward. While there is no doubt room for improvement, the Bill represents a forward step without significant adverse consequences. While there are some areas of policy, notably in the exemptions, where CAUBE would like to see adjustments, it is abundantly clear that the Bill as introduced is suitable for enactment.

Appendix 1 – The Bill's Definition of "Business"

The definition of "business" in the bill is a non-exclusive definition in the following terms:[39]

> ***business*** *includes a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis.*

This definition makes the indicia of "regular, repetitive or continuous basis" irrelevant when the activity is:

1. a venture or concern; and
2. in trade or commerce.

It should be noted that the excluded indicia are not always necessarily present for something to be a business in law – they are merely some of the indicia of a business. While they can be important factors, it is also possible for an isolated transaction to amount to a business.[40] If, after considering the elements of the inclusion, the activities included would be within the common law definition of business without these particular indicia, the inclusion must be taken to have no effect.

Venture or Concern

The word "venture", as defined by the Macquarie Dictionary,[41] requires in all of its relevant definitions some element of taking a risk to obtain a reward, and in two of the four refers back to the term "business". The taking of a risk to obtain a reward, done in trade or commerce, would be a powerful indication of the venture being a business even without the repetition and regularity indicia. Of the common indicia of business, there are the profit-making purpose, some sort of system or scheme, and likely other factors of a business nature.

The word "concern" has a number of definitions. In this context, however, the definition is that which is relevant to commerce – "a commercial or manufacturing firm or establishment". Of the common indicia, this would include repetition and regularity, organisation and system, and likely a profit-making purpose.

In Trade or Commerce

The legal meaning of the phrase "in trade or commerce" refers to activity that is "itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial nature", or are part of "the central conception" of trade or commerce.[42] Thus activities engaged in while pursuing a trading or commercial business are not themselves "in trade or commerce" unless themselves of a trading or commercial nature.

The dictionary[43] defines trade in various terms which have a connotation of business. It has been described in a similar context as meaning "the activity of acquiring, or supplying, goods or services in a commercial or business context,"[44] and "operations of a

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39 *Spam Bill 2003* (Cth) cl 4

40 *Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355

41 *Macquarie Concise Dictionary*, <http://www.macquariedictionary.com.au/>

42 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 602 per Mason CJ, Deane, Dawson and Gaudron JJ

43 Note 14

44 Corones S, *Consumer Protection and Product Liability Law*, 2nd ed., Lawbook Co., Sydney, 2002

commercial character by which the trader provides to customers for reward some kind of goods or services."[45]

The phrase "trade or commerce" imports a necessary commercial element.[46] The common law conception of business was itself recently used by a court to guide the interpretation of the phrase.[47]

Conclusion

It is difficult to imagine a situation that would be covered by the statutory inclusion that would not constitute a business at common law. It may be possible to find cases at the fringes that would be more clearly drawn into the ambit of the term "business", but it would appear that it is not possible to find a case that clearly falls outside the common law definition and falls within the definition in the Bill. The definition does not materially alter the common law, and its true character is as a doubt removal definition covering the case of isolated business transactions.

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45 *Re Ku-ring-gai Co-Operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 139 per Bowen CJ; *Ransom v Higgs* (1974) 1 WLR 1594

46 *Re Ku-ring-gai Co-Operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 142 per Bowen CJ

47 *Hearn v O'Rourke* [2003] FCAFC 78 at [12] per Finn and Jacobson JJ