



Australian Communications and Media Authority submission to the Senate Legal and Constitutional Committee review of the Telecommunications (Interception) Amendment Bill 2006

Summary

The Australian Communications and Media Authority (ACMA) is responsible for the regulation of broadcasting, radiocommunications, telecommunications and online content.

Among its statutory functions, ACMA enforces Australia's anti-spam law, the *Spam Act 2003* (the Spam Act). The Spam Act prohibits the sending of unsolicited commercial electronic messages (spam) and prohibits the use of address-harvesting software or harvested email addresses for the purpose of sending spam. Penalties for breaching the Act range up to \$1.1 million per day. There are also provisions for spammers to forfeit financial benefits of spam and pay compensation to spam victims.

ACMA supports the introduction of the Telecommunications (Interception) Amendment Bill 2006 (the Bill) which implements some recommendations of the *Report on the Review of the Regulation of Access to Communications* released in June 2005 by Mr Tony Blunn AO (the Blunn Report).

In particular, the development of overarching legislation to consolidate regulation of law enforcement and national security agencies' access to real time communications, stored communications and subscriber and call-associated information, is supported. Appropriate identification of provisions for transfer from the *Telecommunications Act 1997* to the *Telecommunications (Interception) Act 1979* is currently being considered by relevant parties, including ACMA.

Schedule 1 of the Bill, Stored Communications, as drafted creates some difficulties for ACMA's enforcement of the Spam Act. Of key concern is the disjunction between the definition of 'stored communication' in the Bill and the definition of 'unsolicited commercial electronic message' in the Spam Act.

ACMA and Attorney-General's Department staff are working co-operatively to develop a proposal for Government amendments to the Bill to address ACMA's concerns regarding its continued enforcement of the Spam Act.

ACMA is seeking the enforcement of the Spam Act to be exempted from the stored communications warrant regime envisaged in the Bill.

Spam Act 2003

The Spam Act sets up a scheme for regulating commercial email and other types of commercial electronic messages. Its key function, for the purposes of this

submission, is to prohibit the sending of spam. This prohibition is a civil penalty provision enforced by ACMA.

‘Stored communication’ vs ‘unsolicited commercial electronic message’

‘Stored communications’ as defined under the Bill is a narrower class of communications than the ‘electronic messages’ envisaged by the Spam Act. Not all spam will fit within the current definition of stored communications. This causes difficulties as the Spam Act envisages a broader range of material will be available to investigators, much of which falls outside the definition of stored communications.

The definition of stored communication in the Bill is made up of four elements, one of which is that the communication ‘is accessible to the intended recipient of the communication’. ACMA’s ability to enforce the Spam Act would be adversely affected by that definition in two respects – the concepts of ‘accessible’ and ‘intended recipient’.

Accessible

The Bill states that a communication is a stored communication when it is ‘accessible to the intended recipient’. It does not envisage that internet service providers (ISPs), carriers and individual recipients often either filter and/or block electronic messages. If an ISP, carriage service provider or the intended recipient blocks a message because its software filters have identified the message as spam, then the intended recipient would not be aware that he or she has received a message, and would not be able to access it.

Under the Bill as drafted, ACMA investigators would not have access to those spam messages that are not accessible to their intended recipients.

Intended recipient

The Spam Act also envisages that investigators will have access to stored communications which do not have an intended recipient.

The Spam Act is drafted broadly and encompasses electronic messages that may be sent but never received. A contravention of the Spam Act may still occur if the address that the spam is sent to does not exist, as senders of spam often use ‘dictionary attacks’ to generate electronic addresses in the hope that some genuine addresses may be found. That is, the Spam Act takes into account that while there may not always be an ‘intended recipient’ of a stored communication, spam will still adversely impact Australia’s telecommunications networks.

Under the Bill as drafted, ACMA investigators would not have access to those spam messages that for which there is not a genuine intended recipient.

Impact on ACMA’s enforcement activity

The difficulty caused by the drafting of the Bill is that any spam message that falls outside the definition of a stored communication will not be accessible by ACMA investigators under the proposed warrant regime and would therefore be unavailable to ACMA investigators in their enforcement of the Spam Act.

A range of communications sourced through the activities of ACMA staff, industry and other organisations relating to the detection of spam and enforcement may be inaccessible in this way. In particular:

- stored communications volunteered to ACMA by the telecommunications industry that demonstrate contravention of the Spam Act;
- stored communications volunteered to ACMA by organisations (such as Universities) that demonstrate contravention of the Spam Act;
- stored communications solicited by ACMA from the telecommunications industry and currently provided in accordance with the *Telecommunications Act 1997*.

Conclusion

It is envisaged that the issues raised in this submission will be remedied through minor amendments to the Bill. The ACMA is working with the Attorney-General's Department to develop a proposal for such amendment that would exempt investigations under the Spam Act from the stored communications warrant regime.