

SPAM ACT 2003 REVIEW: ISSUES PAPER ACIF SUBMISSION

1. Introduction

ACIF is pleased to have this opportunity to make a submission to the legislative review of the operation of the *Spam Act 2003* and related parts of the *Telecommunications Act 1997*.

ACIF operates on the central premise that the best outcomes for all stakeholders in Australian telecommunications can be achieved by co-operation. In this context, ACIF supports the policy objective of the *Telecommunications Act 1997* to promote the greatest practicable use of industry self-regulation without imposing undue financial and administrative burdens on industry.

Formed as a company limited by guarantee and a not-for-profit membership-based organisation, ACIF is ideally placed to reflect and respond to the dynamics of the telecommunications industry. Its membership comprises carriers/carriage service providers, business and residential consumer groups, industry associations and individual companies.

ACIF has opted for the approach of a general response to some of the matters in the Issues Paper, in particular matters related to the role of industry dealt with in Chapter 4, rather than responses to individual questions.

2. The Multi-layered Strategy: the role and initiatives of industry

The Issues Paper addressed the operation of the provisions of the legislation that deal with industry codes and standards, and outlined the actions of the industry bodies ADMA and IIA in the development of codes of practice to further the objectives of the Spam Act.

For the sake of completeness, it is relevant to include mention of the **ACIF Short Message Service (SMS) Issues Industry Code (Attachment 1)**. This Code was published in December 2002, prior to the enactment of the Spam Act 2003, and was withdrawn in December 2004 because of inconsistencies between the Code and the Act. The Code was developed to cover direct marketing by carriers and carriage service providers (suppliers), with the objectives of reducing the incidence of

unsolicited marketing messages received by customers and to promote the responsible use of SMS for marketing purposes.

The Code contained a rule that suppliers had to ensure that content originators with whom the suppliers had a commercial arrangement to send messages via SMS complied with the 'SMS Guideline for Commercial Message Originators', set out at Appendix B of the Code. The SMS Guideline required the content originators to comply with the same rules which apply to suppliers under the Code.

The Code rules largely reflected the National Privacy Principles, which allow for an opt-out approach. That is, suppliers could contact people with whom they have no prior relationship, as long as they provided an option for no further contact. Suppliers must also provide minimal information such that consumers receiving such marketing SMS can know how to opt out of further marketing approaches.

When the *Spam Act* came into effect, the rules in the SMS Code were inconsistent with the requirements of the Act. The Spam Act prohibits the sending of unsolicited commercial electronic marketing messages (i.e. requires an opt-in approach), and requires senders of commercial electronic marketing messages to provide more information about the sender than is required under the Code.

In light of these inconsistencies, ACIF withdrew the Code and requested the then-Australian Communications Authority to withdraw the Code from its register. At the present time, the Code is still on the ACMA register as ACMA sees benefit in preserving the requirement in the Code that suppliers ensure content originators comply with the Guideline. This current situation could be resolved if the scope of the Spam Act was amended to require content originators to comply with the same rules which apply to providers.

In the context of the role of industry, it is also relevant to note the requirements for the development of a self-regulatory scheme pursuant to the ***Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No 1)*** ('the Determination').

The Determination provides, among other things, that the self-regulatory scheme must, in respect of a 'mobile premium service'¹:

¹ That is, content services for which a specific fee is charged in addition to the basic carriage fee and includes SMS, MMS, chat room services, and portal services (a central

- require content suppliers to inform customers how to discontinue a subscription service when first using the service or at the time of accessing the service;
- require content suppliers to have facilities to enable premium SMS and MMS services to be discontinued by way of issuing a keypad command and without being charged a premium rate;
- a keypad command is specified for discontinuing premium SMS and MMS services.
- establish complaint handling procedures, including provisions for referral of complaints to a complaints handling review body;
- be binding on members of the scheme and on the complaints handling body

One of the key objectives of these provisions is to protect consumers from exposure to potentially high charges arising from mobile premium services including subscription services. Other provisions of the Determination relate to protections for the safety of children – in particular from access to adult services and potential dangers of chat rooms.

The self-regulatory scheme to give effect to the Determination is currently being finalized by industry and will be submitted to ACMA for approval.

Therefore, when the self-regulatory scheme comes into effect, there will be the following industry initiatives relating to matters under the Spam Act:

- The Mobile Premium Services Self-regulatory scheme, so far as it relates to premium mobile messages which constitute ‘unsolicited commercial electronic messages’ under the Spam Act. The escalated complaints handling body identified in the documents currently out for public comment is TISSC (the Telephone Information Services Standards Council);
- The ACIF Short Message Service (SMS) Issues Code, (withdrawn by ACIF because of inconsistencies with the Spam Act but is currently on the ACMA Register) which covers SMS marketing by carriers and CSPs and content providers (the latter by virtue of the Code’s Guideline). Complaints under this Code are handled by the TIO.

access point for multiple content services). Access to Internet content is not included in the Determination as it is covered by the Internet Industry Association Codes of Practice.

- The ADMA eMarketing Code, registered by ACMA in March 2005, which prohibits persons or organisations from authorising, sending or causing to be sent unauthorised commercial messages . The Issues Paper describes the industry-based complaints handling process under this Code, with ACMA as the complaints body of last resort.
- The IIA Spam Code of Practice, which is yet to be registered by ACMA, which applies to ISPs and email service providers. Complaints under this Code are expected to be handled by the TIO.

3. Additional ACIF initiatives

The policy intent of the Telecommunications Act 1997 of 'maximum use of industry self-regulation' is, in essence, a mandate for industry to take responsibility for its own outcomes. Industry has demonstrated its commitment to this task through its responses to furthering the objectives of the Spam Act.

ACIF and its members remain committed to industry leadership in addressing emerging issues to ensure their customers and the community are able to take advantage of new carriage and content services.

An ACIF Mobile Message Working Group has been established to examine issues arising in the area of 'mobile spam'. In particular it will be considering the Mobile Premium Services Self-Regulatory Scheme once it is finalized in order to identify whether there any additional actions which could or should be taken to comprehensively address matters such as subscription services.

ACIF has agreed to take ownership of the Mobile Premium Services Self-Regulatory Scheme once it has been approved. In this role, ACIF will lead initiatives for compliance with the Scheme, as well as promotional, educational and awareness-raising activities. ACIF has established a partnership with NetAlert to assist it in this role.

4. Consolidation of Spam Obligations into a Single Industry Spam Guideline

It is important to note that whilst the Spam Act covers all Spam delivery mechanisms and adopts a technology neutral approach, various Codes deal only with certain Spam delivery mechanisms (eg the IIA Code only

relates to email Spam). This 'inconsistency' can serve to 'confuse' Suppliers about their obligations to prohibit 'all' types of Spam.

ACIF considers that consumer and industry benefits would be gained by the development of an *ACIF Industry Spam Guideline*. Such a Guideline would help Suppliers comply with their legal and regulatory obligations by consolidating the various requirements contained in existing regulations and publications and capturing them in a single, user friendly Industry Guideline.

Whilst the Guideline would not be enforceable, replace legal advice, a comprehensive outline of all legal issues relevant to Spam in Australia, or the multiplicity of existing publications (eg IIA and ADMA Codes etc), it would ensure that Suppliers understood their various obligations relating to Spam.

The Guideline would adopt a streamlined approach by presenting a 'roadmap' of the multiple documents which currently exist in relation to Spam in Australia and advising Suppliers of their consumer information requirements, such as informing customers about their right to opt-out / unsubscribe, and lodge a complaint. It would enable Suppliers to access a single document which centralised and explained the obligations relevant to them contained in:

- The Spam Act;
- ADMA e and m Marketing Codes;
- IIA Code; and
- Mobile Premium Services Determination.

Accompanying the development of this Guideline would be a series of awareness raising initiatives, such as the provisions of ACIF industry workshops, website promotion, media releases, etc. Such initiatives would raise the profile of what Suppliers were doing in relation to the reduction or elimination of Spam. This would send a strong message to consumers and overseas players that Australian Suppliers will not tolerate their Networks being used for illegal purposes.

In addition to the Industry Guideline, a consumer brochure could also be developed to help Australian consumers know their rights in relation to the receipt of Spam and how they can opt-out/unsubscribe and with whom they can lodge a complaint.

In short, the development of an **ACIF Industry Spam Guideline** which consolidates all Spam related Supplier obligations; **Consumer Brochure** advising the Australian public about their rights and complaint recourse

avenues relating to Spam; and accompanying **awareness initiatives** to promote the industry Guideline and consumer brochure would provide a 'total package' approach to address Spam.

5. Other comments

The Issues Paper asks whether industry codes are useful and successful, and whether anything could be done to aid their success.

ACIF has a solid track record of developing industry codes which provide both inter-operator rules for the effective working of processes underpinning effective competition (such as the Mobile Number Portability Code) and rules providing protections for consumers.

From this experience, ACIF can comment that:

- As noted in the Issues Paper, the Telecommunications Act confers on ACMA a 'reserve power' under s 123 to make an industry standard in certain circumstances, including where ACMA refuses to register a Code (for example, because it considers that it does not contain appropriate safeguards). If a measure of success of industry codes is the number of occasions on which ACMA has had to exercise this power, then it would be concluded that industry codes developed under the Act are useful and successful as the power has not been exercised at all by ACMA.²
- Further, under the Telecommunications Act, ACMA has powers to give formal warnings, to direct compliance with registered Code provisions and to take enforcement action in the Federal Court for failure to comply with the direction. In ACIF's knowledge, ACMA has given 3 formal warnings, no directions to comply and has not taken enforcement action in relation to any of the Codes on its register.
- Whilst industry codes deal very effectively with rules for inter-operator arrangements and consumer protection, it does need to be recognised that there will still be behaviours engaged in by 'rogue' carriage or content providers for which the response should be regulation or the application of other laws. For example, SMS subscription scams.

² At the time of writing, ACMA has been developing an industry standard for rules relating to the IPND Database but it has not yet been finalized.

- Further, an effective industry response to an issue need not necessarily be in the form of a code and this is why we have suggested the development of an ACIF Industry Guideline.
- The development of a Code is a time-consuming and expensive exercise, and should be targeted at issues for which the need for a codified response has been identified. Other industry responses which focus on information dissemination, education, awareness-raising, agreed protocols between operators can be equally effective in achieving outcomes. In addition to taking responsibility for industry-led information programmes, ACIF would willingly participate in any Government information and awareness activities as identified in Chapter 6 of the Issues Paper.
- The development of industry codes is more effective when accompanied by publicity of the existence of the rules and information provision to both suppliers, who are subject to the obligations, and end-users. ACIF publicises the release of any new Codes and holds workshops to inform suppliers of their obligations. We would employ the same principles to the publicity of an Industry Spam Guideline.
- Consumers benefit from clear rules and a framework which is consistent and easily understood. As noted in section 4, there does appear to be scope for reviewing the overall coverage and approach of the industry initiatives identified in this paper with a view to a consolidated and streamlined approach. A particular feature which may well be considered is the different complaints-handling processes and bodies under each of the initiatives (involving ADMA, TISSC, the TIO and ACMA).

In addition to an increased focus on education and awareness raising, further research into the development of cost effective technical and filtering solutions to address the problem of spam, particularly as it relates to delivery of spam via mobiles, would be of benefit. Research may also usefully be directed as to means to facilitate carriers and CSPs meeting their obligations under s 313 of the Telecommunications Act.³ ACIF would

³ s. 313(1) and (2) require a carrier or CSP to 'do their best' to prevent their networks and facilities from being used in the commission of an offence against federal, state or territory law. Presumably, this would require their refusal to carry electronic communications they knew, or had reason to know, amounted to spam.

willingly participate in any initiatives funded by ACMA under s 42 of the Spam Act relating to its research function.