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Australian Communications & Media Authority
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ACMA CONSULTATION RE FAX MARKETING INDUSTRY STANDARD

This submission responds to the ACMA discussion paper regarding development of a draft fax marketing industry standard under the *Do Not Call Register Legislation Amendment Act 2010* (Cth).

In considering strong community endorsement of the pre-2010 Do Not Call regime – contrary to early forecasts by marketers that the regime would be unworkable, overly costly and unsupported by Australian households – the following paragraphs urge ACMA to actively foster a consumer-oriented Do Not Fax regime.

Such a regime will give effect to Parliament's intentions regarding the 2010 Act, will address anomalies in the pre-2010 legislation and will provide a regional example of best practice. That example is significant in dealing with unsolicited communications that emanate from overseas and that are increasing as marketers in for example India exploit VOIP connectivity. We cannot credibly chide our neighbours when our own practice is poor.

Basis

The following paragraphs are made as an individual and do not necessarily represent the views of the University of Canberra.

I teach information law in the Law Faculty of the University of Canberra. I have been an adviser to a range of Australian and overseas organizations, including government agencies, nongovernment bodies, major corporations and high-technology start-ups. I have served on working parties and committees of auDA (the Australian domain name regulator), ISOC-AU (the Australian chapter of the Internet Society) and the IIA (the Australian Internet Industry Association). My writing on telecommunications, marketing, regulation and other matters has been cited in major government reports and several hundred books and articles.

This submission draws on familiarity with Australian co-regulatory schemes in the telecommunications sector and over two decades of experience in examining claims by public/private sector advocacy groups.

A Do Not Fax Standard

The 2010 legislation represents a major step forward, recognizing that –

- unsolicited receipt of facsimile messages is not welcomed by many households and organizations, in particular small business but including universities, government agencies and major corporations
- unwelcome faxes impose a tangible cost on the recipient (eg consumption of paper and toner)
- unwelcome faxes impose a less tangible but significant cost on the recipient (eg delays in receipt of 'authorised' faxes, unavailability of shared voice/fax devices for incoming voice calls, disturbance of domestic enjoyment through faxes to shared devices at home outside business hours)
- organizations sending faxes have on occasion been egregiously slow or simply failed to respond to requests not to send further communications
- there are alternative mechanisms for marketers to contact potential consumers, commercial partners or donors.

The latter point should be borne in mind when considering submissions by fax industry advocates that seek a weak Standard, ie one weighted towards the needs of marketers rather than towards the needs of most Australians.

a) Hours and/or days during which marketing faxes should be permitted to be sent or attempted to be sent under the proposed standard

There is no justification for permitting transmission of unsolicited faxes outside standard business hours, ie 8:30 am to 5:00 pm in the place of receipt. If marketers are desirous of a relationship with the recipient they both should and can structure their operations so that faxes are only sent within that period.

The pre-2010 Do Not Call regime inhibits voice calls at night and at weekends. There is no reason why 'quarantining' cannot be instituted for fax messages, covering faxes sent by hand or by automated mechanisms (the 'robofaxing' counterpart of 'robocalling' voice calls). The nature of receipt of faxes (eg not instantaneous and excluding voice calls) means that unwelcome faxing to people at home outside business hours is a substantial imposition. It is an imposition that raises the ire of many householders and that should be stopped.

A current anomaly in the Do Not Call regime permits unsolicited calls over the weekend. Australia is a multi-cultural society, in which Saturday rather than Sunday is a day of religious significance for many people (eg adherents of Judaism and Islam).

Given the Government's stated commitment to enhancing human rights Saturday should be respected. The Standard should accordingly not permit unwelcome faxing on Saturday and on Sunday. Some fax marketing industry advocates will presumably offer specious claims about 'timeliness': there is no reason to believe that marketing communications cannot wait till Monday.

b) The nature and extent of information that a marketing fax should contain about the fax marketer or about the person who caused the fax to be made

See comments under d) below.

c) The number of marketing faxes that should be permitted to be sent, or attempted to be sent by a fax marketer during a particular period to a particular Australian number

There should be no restriction on 'welcome' marketing faxes, in the same way that there should be no ceiling on the number/frequency of welcome voice marketing calls. Some recipients, particularly people within large organizations where marketers are sending a targeted communication to each of numerous people on a database, may value and encourage that communication. Marketing *per se* is not bad. There is no need to set a ceiling on the number of faxes that are sought by recipients: marketers who wear out their welcome can be dealt with by recipients taking themselves off the particular marketer's database and enforcing that deletion through reference to the 2010 Act.

The issue instead is effective restriction of **un**welcome faxes –

- marketing communications that have not been sought by the recipient (and are not desired by that recipient)
- undesired 'repeat' messages (eg where the sender imposes unnecessary faxes on a recipient who may have initially accepted, even solicited a marketing fax, but no longer wishes to receive the communications)

The Standard should address unwelcome messaging by –

- assisting potential recipients to exclude marketing faxes *ab initio*, eg by having all marketers respect a number on the Do Not Call Register, as per ss 12A and 12B of the *Do Not Call Register Act 2006* (Cth)
- assisting actual recipients to alert the senders of marketing faxes that they do not wish to receive further faxes (eg by requiring those marketers to include the equivalent of an unsubscribe facility) **and** require marketers to respond to those alerts on a timely basis.

Those actions are independent of the volume of unwelcome marketing faxes, irrespective of whether the messages come from small organizations or large, nonprofit bodies (or their for-profit agents) seeking donations, colourful entrepreneurs inviting participation in Gold Coast property schemes or wine clubs or sure-thing horse betting schemes or discount toner cartridges or the plethora of other fax spam that appears in electronic fax boxes and in printouts across Australia. Volume is less significant than the timeliness with which requests to desist are heeded and compliance with those requests (ie that marketers do not, as in the past, 'forget', that a request has been made).

With respect to timeliness, a period of seven days from receipt of an alert to cessation of further faxes is reasonable. If organizations have the wherewithal to build (or simply acquire) databases they have the wherewithal to update those databases without undue delay.

A period of seven days will impose hardship on some marketers who will need to restructure their business practices. However that hardship is consistent with the hardship imposed by product safety law that for example penalizes enterprises which allow snails to get into ginger beer bottles or contaminants to injure purchasers of woollen clothing, ie basic Australian consumer protection and trade practices law. Arguments from the fax marketing industry about undue compliance costs should be examined critically and with an eye to community benefit, a benefit that contrary to statements by some advocates is not identical with the profitability of a few marketers.

d) The type of information which should be provided to a consumer to allow them to opt out of receiving faxes from a fax marketer and the form this information should take

Recipients of faxes have often experienced difficulty in getting marketers to stop sending unwelcome messages. That difficulty relates to recipients who have some relationship with the sender (eg have requested information in the past) and to recipients who have no relationship and have never sought a message from the marketer.

The difficulty may involve egregious delays in responding to requests not to send unwelcome faxes. (A typical response, once the complainant finally gets through to a contact, is that "it takes several months to process your request ... in the meantime you can throw the faxes away if you don't want them".). It may involve the absence of details about how to 'unsubscribe' or 'opt out', a concern given that many recipients have never 'subscribed' or 'opted in' and are reduced to chasing the sender's contact details, or ringing a number that is unattended or that is attended only by personnel in an offshore call centre with minimal command of English (ie cannot cope if dialogue moves outside their script). It may involve having to fax the sender with a response that supplies the recipient's name, fax number and contact number (often to a machine that is engaged, presumably because it is being used to send more fax spam).

The Australian spam legislation requires entities to include a functional unsubscribe facility in commercial email. The same model should and can be used for unwelcome faxes. Marketers who adhere to the Standard should be required to provide 'unsubscribe' contact information on their faxes, with that information including a voice contact number, fax number and email/web address, along with a legible and plain English indication that highlights the facility (ie ensures that the information can be easily read rather than being hidden in blurry fine print at the bottom of the page). They should also provide the Australian Business Number.

Additionally, it should be a given that unsolicited fax messages are not sent to **any** number that appears in the Do Not Call Register, irrespective of whether that number has been supplied as a voice or fax number. That restriction does not fundamentally inhibit marketing and, as with the existing Do Not Call regime, will not cause major job losses within Australia or a serious decline in donations to not-for-profit organizations. Fax is not the only way to build/maintain a relationship and from the perspective of national competitiveness we might ask whether unwelcome faxes are indeed a desirable practice.

Enforcement

As a final comment, any regulatory regime is meaningful only to the extent that it is embraced by the regulated and implemented by the regulator. The history of Australia's spam legislation demonstrates that there is value in regulatory activism, ie in ACMA being seen to respond quickly and effectively to abuse of the legislation.

Development of a Fax Marketing Industry Standard will be meaningful if ACMA is prepared to take action and has the resources to do so. Co-regulation should not mean indifference or incapacity on the part of the public sector regulator; a succession of serious failures in the health and finance sectors over the past decade is a reminder of what happens when key agencies lack the skills and/or will to make sure that private sector partners comply with the spirit of the law.

It is not enough for ACMA to endorse the Standard; it must ensure that Parliament's objectives regarding the *Do Not Call Register Legislation Amendment Act* are given effect.

Yours sincerely

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Full contact details supplied by covering email.