



**Australian
Privacy
Foundation**

p o s t: GPO Box 1196
Sydney NSW 2001
e m a i l: enquiries@privacy.org.au
w e b : www.privacy.org.au

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In response to the Department of Communications, Information Technology and the Arts' Discussion Paper on Unsolicited Commercial Faxes or 'Fax Spam'

Submission by the Australian Privacy Foundation

About the Australian Privacy Foundation

1. The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

General comments

2. The Australian Privacy Foundation welcomes this opportunity to comment on the issue of fax spam. At the same time, we find the tone of the Discussion Paper discouraging. The Department's statements such as that, "there would need to be a significant response to this discussion paper to justify a regulatory response" signal a strong preference for inaction.

3. The proper starting point of any discussion of fax spam should be the recognition that spam sent via all other similar forms of communication is subject to regulation. Thus, the starting question should be: *Bearing in mind that spam sent via all other similar forms of communication is subject to regulation, is there anything to justify fax spam being treated differently?* In other words, unless it is shown that fax spam has unique qualities that make it reasonable to treat it different to other forms of spam, fax spam must be regulated.

Why fax spam is a problem

4. As we have highlighted in earlier submissions (e.g. in relation to the Spam Act Review 2006), fax spam is associated with the same problems as other forms of spam are associated with. However, as is partly noted in the Discussion Paper, fax spam is different in four ways, none of which justify lesser regulation:

- First, the cost paid by the fax sender is higher (leading to some pressure for restraint of speculative and abusive mass transmissions); but this may be reducing as a disincentive, and can no longer be assumed to be an effective 'market forces' control, especially as many other forms of abusive non-consensual electronic marketing have been regulated, and there will thus be a potential substitution effect if fax spam is left as one form in relation to which the normal requirements of consent are not applicable;
- Second, the cost paid by the fax recipient is also much higher (as it is in some mobile phone/SMS etc. spam), in that there is printing tone, paper, power, ozone, heat, noise, wear and tear imposed on the recipient. Further, incoming faxes block the line, thereby preventing other business or personal faxes from getting through, perhaps interfering with time-critical transactions. All this is worse than email spam, and a stronger argument for why non-consensual fax marketing is an unacceptable cost for government and business, and that sub-set of consumers (often home based small business) who have a fax;
- Third, the fax sender can more easily be identified in many fax systems, even without CLI. A new requirement should be that all commercial electronic message senders using fax should be prohibited from doing anything to suppress the identification of the fax sending number. There are no grounds under privacy law for such a business to have a claim for anonymity, and it is a corollary of the email sender identification requirement. (This latter should also be applied to the Spam Act, which is at present is silent on this, in line with emerging principles requiring the sender/caller to properly explicitly identify themselves.); and
- Finally, most fax spam, due to the sender-cost difference mentioned above, does not originate from out of jurisdiction, and hence fax regulation will be a much quicker and more effective way of encouraging the fax marketing industry to accept permission based marketing as the modern standard. Email spam, being mostly international, is a more expensive and less effective area of regulation.

5. The Discussion Paper suggests that: “It is possible that many individuals and businesses either welcome unsolicited commercial faxes or feel neutral towards them.” While, as the saying goes, anything is possible, this cannot be the proper assumption. Rather, in light of the fact that most people feel strongly against e.g. e-mail spam, the assumption must be that people in general also feel strongly against fax spam. After all, fax spam is doubtlessly more intrusive and costly than e-mail spam.

The current regulatory environment

6 The Discussion Paper points to the *Privacy Act 1988* (Cth) (“*Privacy Act*”) as a possible source of protection against fax spam. However, in light of the unfortunate exception for organisations with an annual turnover less than \$3,000,000, the *Privacy Act* is likely to prove useless in most instances of fax spam.

7 In light of the *Spam Act 2003* (Cth) (“*Spam Act*”) and the *Do Not Call Register Act 2006* (Cth), the current approach to fax spam illustrates a gap in the regulatory framework. This gap needs to be closed, if not for any other reason, to maintain functional equivalence between how different technologies are regulated. Indeed, with e-mail and telephone spam being regulated, there is a risk we will witness a rise in fax spam as spammers seek alternative avenues of distribution.

What should be done?

8. Fax spam ought to be regulated in the same manner as e-mail spam. In other words, the *Spam Act* should be amended to include fax spam in its scope of application.

Consequences and issues

9. If the fax spam industry is as “contained” as indicated in the Discussion Paper, the concern about the cost to the Australian Government of monitoring and enforcing the legislation is not justified.

10. If fax spam, unlike e.g. e-mail spam, are so well targeted that most fax spam relates to the receiver’s industry, fax spam will generally be protected by reference to the special rules for so-called conspicuous publications. To use an example from the Department of Communications, Information Technology and the Arts’ legislative review of the operation of the *Spam Act 2003* and related parts of the *Telecommunications Act 1997*:

“[I]f a plumber advertises his email address [or fax number] in the Yellow Pages® or on his public website, then he could reasonably expect to receive emails [or fax] advertising plumbing supplies or offers of work, but not messages unrelated to his work, such as emails advertising discounted pharmaceuticals.”

11. Should there be a great concern that businesses and individuals in general will miss receiving fax spam when fax spam is regulated by the *Spam Act*, this can be dealt with. The regulation of fax spam could make clear that fax spam may be sent during a “sunset period”. During this period those engaged in sending fax spam could encourage their recipients to consent to receiving fax spam also after the end of the sunset period.

12. Finally, the Discussion Paper expresses concerns about the penalty scale found in the *Spam Act*. This concern is misguided as the penalty scale merely expresses an upper limit. Australian courts are perfectly capable to use their discretion in applying the penalty scale.

For further information contact:

Dr Dan Svantesson, (07) 5595 1418
Board Member
E-mail: enquiries@privacy.org.au
APF Web site: <http://www.privacy.org.au>