

**Senate Environment, Communications,  
Information Technology and the Arts  
Legislation Committee**

## **LABOR MINORITY REPORT**

### **Inquiry into the Spam Bill 2003 and the Spam (Consequential Amendments) Bill 2003**

#### **Introduction**

1. The *Spam Bill 2003* (Spam Bill) and the *Spam (Consequential Amendments) Bill 2003* (SCA Bill) create a new regime regulating the sending of commercial electronic messages – including emails and mobile phone short message services (SMS) – to, from, and within Australia.
  
2. The Spam Bill operates to prohibit the sending of unsolicited commercial electronic messages (commonly referred to as “spam”), and includes a series of remedies including civil penalties, injunctions, and enforceable undertakings.
  
3. The SCA Bill contains a series of amendments to the *Telecommunications Act 1997* and the *Australian Communications Authority Act 1997* which allow the Australian Communications Authority (ACA) to investigate breaches of the scheme.
  
4. Labor shares public concern over the rising incidence of spam and understands the necessity for undertaking this inquiry in such a short time-frame (three weeks). Labor notes that despite this short time-frame, the Committee eventually received 19 submissions, and thanks respondents for contributing to a constructive and necessary process.

5. Spam is widely acknowledged as having a significant negative impact on the Internet and email worldwide. The National Office for the Information Economy (NOIE) gave evidence to the Committee that “spam now constitutes over 50% of all the worldwide email”, adding that it is “seriously degrading the functionality of the Internet.”<sup>1</sup>

6. It is widely accepted that the regime proposed in these Bills alone will not result in a noticeable reduction in spam levels, and that the Government must take other steps. The general objectives of this Bill are seen as an essential element of a broader campaign against spam including international co-operation, business and consumer education, and work with industry. Generally, the Bills received widespread support from respondents to this Inquiry.

7. However, Labor believes that these Bills can be improved, and the Committee heard evidence from many submitters suggesting how this could be achieved. In addition to several minor concerns raised before the Committee, the main issues included:

- Concern about the provisions in the SCA Bill that empower the Australian Communications Authority (ACA) to enter premises for the purpose of the search and seizure of articles contained within, relating to alleged spam activity;
- The possible application of the regime to unsolicited commercial emails not usually considered to be “spam”;
- The nature and operation of the exemptions contained in Schedule 1 of the Spam Bill; and
- Concern about the operation of the “conspicuous publication” rule contained in Schedule 2 of the Spam Bill in determining consent.

8. Following Labor’s consideration of the Bills, and as a result of examining the submissions and evidence presented in the inquiry, Labor has determined several

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<sup>1</sup> Mr Keith Besgrove, *Proof Committee Hansard*, Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 23 Oct. 2003, p. 2.

specific recommendations on how these Bills can be improved and the proposed scheme strengthened.

## **Search and Seizure Provisions**

9. Several respondents, including Electronic Frontiers Australia, Inc. (EFA), the Australian Consumers' Association, the Australian Privacy Federation (APF), the Australian Computer Society (ACS), and to a limited extent, the Internet Society of Australia (ISOC-AU), raised concerns with search and seizure provisions in the SCA Bill. In two instances the Bill amends the Telecommunications Act to allow ACA inspectors to enter and search a property to investigate breaches of the Spam Bill without obtaining a warrant. First, under the amended section 542 of the Telecommunications Act, inspectors would be able to enter and search premises, including computer files and email accounts, with only the consent of the owner or an occupier of the physical premises in which the computer is located. Second, under the new section 457A inspectors would need the consent of the occupier. Labor is concerned that the owner or the occupier might not be the owner of the computer system or possessions being investigated.

10. Labor heard evidence that, because of the wording of the legislation, recipients of spam who were not suspected of breaching the spam regime could also have their computer searched and seized. Combined with the point above, Labor is concerned that recipients of spam could have their computer seized without their consent, or without a warrant being obtained, for example through the consent of their landlord.

11. NOIE has defended the operation of the amended section 542, stating that “[t]he search and seizure provisions relating to breaches of the Spam Bill are unaltered from the search and seizure provisions currently in the Telecommunications Act”.

12. However some respondents argued that when applied to breaches of the spam legislation these existing provisions were far more intrusive. Electronic Frontiers Australia noted that ACA inspectors' current powers:

“relate to investigating whether there are illegal telephones installed in commercial or residential premises and whether there is illegal telecommunications cabling installed ... Even if an inspector did believe that there were illegal telephones installed in a house, they would not need to go through a person’s computer and email messages to find out what the problem was—to find out whether the person was breaching the law”.<sup>2</sup>

13. The Australian Consumers’ Association also pointed out that:

“In the radio communications hardware environment there may be urgency in stopping the operation of illegal equipment, since there can be danger to life or health. Spam has many hazards, but direct threat to health or life is not one of them.”<sup>3</sup>

14. The Coalition Against Unsolicited Bulk Email, Australia (CAUBE.AU) also raised the point that landlords are not commonly granted the right to give consent to enter a tenant’s house, adding “if the provisions [in the SCA BILL] were interpreted to grant such a right there would be a substantial abridgement of the rights of the occupier.”<sup>4</sup>

15. The APF noted that the legislation uses a sledgehammer to crack a nut, arguing that it “imposes an uncertain and potentially onerous and intrusive regime on all Internet users in Australia to deal with a problem that is in terms of Australian origin Spam, only originating from a very small number of users.”<sup>5</sup> In relation to the search and seizure provisions of the legislation, Labor agrees with the sentiments in this statement. The intrusion into an individual’s privacy caused by these provisions outweigh the impact the Spam Bills will have on the intrusion

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<sup>2</sup> Ms Irene Graham, *Proof Committee Hansard*, Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 23 Oct. 2003, p. 5.

<sup>3</sup> Australian Consumers’ Association, *Submission No. 6*, p. 3.

<sup>4</sup> Coalition Against Unsolicited Bulk Email, Australia, *Submission No. 7*, p. 10.

<sup>5</sup> Australian Privacy Foundation, *Submission No. 10*, p. 1.

of spam emails, especially given the Government's own acknowledgement that this legislation will "not result in an immediate or dramatic reduction of the spam problem."<sup>6</sup>

16. Labor shares the concerns expressed in relation to the search and seizure provisions in the SCA Bill and recommends that search and seizure operations on private premises without a warrant are amended so that consent must be obtained from the individual whose property will be subject to such operations in the first instance. The Bill currently provides for a warrant to be obtained if consent is not given and Labor supports this action where an individual refuses consent.

17. Labor also recommends that the SCA Bill is amended to prevent search and seizure operations on the premises of spam recipients. The Committee heard evidence that this power would never be utilised by the ACA. If this is the case, Labor sees no reason for it to be included in the legislation as it represents an unacceptable intrusion on the privacy of the victims of spam. Labor notes that there is nothing in this Bill that would prevent victims of spam voluntarily assisting the ACA in its enquiries.

18. A related concern is the operation of the proposed Telecommunications Act section 547J, which would require any individual "reasonably suspected of having been involved in [a breach of the Spam Bill]" to disclose decryption keys and access codes. Failure to do so would result in a criminal penalty. The EFA, the Australian Consumers' Association, and the APF hold the view that this provision is unacceptable in its current form because the resulting criminal penalty is far harsher than the pecuniary penalties provided for under the Spam Bill and therefore "disproportionate". Labor concurs with these opinions and recommends that the application of section 547J is not subject to a test of strict liability and is tightened in its scope to affect a smaller class of people.

<b>Recommendations:</b>
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<sup>6</sup> *Spam Bill 2003 Explanatory Memorandum*, p. 1.

- The amendment of provisions in the *Spam (Consequential Amendments) Bill 2003* relating to search and seizure operations on private premises without a warrant so that consent must be obtained from the individual whose property will be subject to such operations;
- The amendment of the *Spam (Consequential Amendments) Bill 2003* to prevent search and seizure operations on the premises of spam recipients;
- The amendment of the proposed section 547J of the *Telecommunications Act 1997* to remove the existing strict liability test and to tighten its scope to affect a smaller class of people, and that its operation is not subject to a test of strict liability.

### **Application of regime to single commercial emails**

19. Several respondents to the Inquiry, including Mr Athol Yates, the EFA, the Australian Consumers' Association, the APF, and the ACS, noted that as currently drafted the Spam Bill prohibits some single unsolicited commercial electronic messages sent by individuals or organisations that genuinely believe that the intended recipient would want to receive it. The implication is that the Bill prohibits some emails currently not widely regarded as being "spam".

20. According to NOIE the drafting of the Bill to include single emails is intended to prevent the circumvention of various definitions of "bulk" email. NOIE also notes that "[t]he legislation provides the ACA a measure of discretion in enforcement to ensure that the response is proportional to the breach. In cases where a single unsolicited electronic message is sent, then a formal warning would generally be sufficient to cause a change in the contravening behaviour."<sup>7</sup>

21. The ACS proposes an amendment in paragraph 14 of their submission which would ensure that a single unsolicited commercial email, when distributed by a sender with a bona fide held view that the addressees would have an interest in

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<sup>7</sup> National Office for the Information Economy, *Submission No. 14*, p. 14.

receiving them, would not be subject to penalties<sup>8</sup>. Labor recommends that the Bill is amended to reflect this.

**Recommendation:**

- The amendment of the *Spam Bill 2003* to include a mechanism where single messages distributed by a sender with a bona fide held view that the addressees would have an interest in receiving them, would not incur a penalty. As an example, Labor notes the amendment in paragraph 14 of the ACS submission.

**Schedule 1 Exemptions – “designated commercial electronic messages”**

22. Labor concurs with the Explanatory Memorandum when it states that the reason for exempting “designated commercial electronic messages” from organisations listed in Schedule 1 Clause 3 is to avoid any:

“unintended restriction on government to citizen, or government to business communication, nor any restriction on religious or political speech.”<sup>9</sup>

23. However, it is unclear why the Government has chosen to apply this reasoning in an inconsistent fashion. Clearly an arbitrary decision has been made to protect the free speech of some classes of political, religious and charitable organisations, and not others. NOIE has stated that:

“Religious organisations and charities commonly reach beyond their congregations or membership to deal with broader elements of society that have no ongoing relationship with their organisation. The beneficial nature

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<sup>8</sup> Australian Computer Society, *Submission No. 13*, p. 2.

<sup>9</sup> *Spam Bill 2003 Explanatory Memorandum*, p. 107.

of the activities of these sectors has led to their exemption from the prohibition on sending of unsolicited commercial electronic messages, in order to ensure there are no unexpected or untoward impacts on the sector.”<sup>10</sup>

24. Labor agrees with this statement but believes that Schedule 1, Clause 3 should be expanded to include trade unions, and other not-for-profit political lobby groups, such as the Australian Council of Social Service, Amnesty International, or AusFlag. Labor does not agree that the exemptions applying to “designated commercial electronic messages” listed in Schedule 1 of the Spam Bill should be scaled back or removed, as argued by some respondents.

25. It is unclear whether charitable organisations which also engage in political lobbying would be covered by this exemption. Currently these types of organisations are unfairly disadvantaged by the measure. This point was raised in the submission from the Australian Council of Trade Unions which said:

“Unions should be able to send out mass e-mails to members, supporters and to other groups and individuals participating in our democratic society so long as an effective opt-out system is provided and maintained.

“The ACTU submits that unions should be exempted on the same basis as other non-profit community groups. If this is not done, it will be difficult to explain other than as reflecting the Government’s ideological bias against unions.”<sup>11</sup>

26. The argument that prohibiting unsolicited *commercial* emails from Clause 3 organisations would not pose any restriction on these forms of communication is noted, however, Labor is concerned that there may be instances where religious or political speech might overlap with some commercial activity. For example,

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<sup>10</sup> National Office for the Information Economy, *Submission No. 14*, p. 11.

<sup>11</sup> Australian Council of Trade Unions, *Submission No. 19*, p. 2.



where a charity combines a non-commercial message with a request relating to a fund-raising activity.

27. In contrast, Labor notes the claim by NOIE that “very few messages currently sent have been identified as falling squarely within the scope of these exemptions.”<sup>12</sup> For example, witnesses before the Committee only raised “a couple of isolated cases in which charities have spammed.”<sup>13</sup> In this context these exemptions, if applied consistently across all not-for-profit political groups, are an appropriate way to protect free political and religious expression.

28. Labor recommends that the exemption outlined in Clause 3 of Schedule 1 should be applied consistently, and therefore expanded to include Trade Unions and not-for-profit political lobby groups.

29. Labor also supports the insertion of a provision to require a functional unsubscribe facility to be placed in “designated commercial electronic messages”, to enable recipients to “opt-out”. Labor notes that National Privacy Principles are still applicable.

30. Labor recommends the removal of provisions of the Spam Bill exempting senders of “designated commercial electronic messages” from including a functional unsubscribe facility in such messages.

**Recommendations:**

- The amendment of the exemption outlined in Schedule 1, Clause 3, so that the exemptions are applied consistently, and expanded to include Trade Unions and not-for-profit political lobby groups.
- The amendment of the *Spam Bill 2003* to remove provisions that exempt

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<sup>12</sup> National Office for the Information Economy, *Submission No. 14*, p. 9.

<sup>13</sup> Mr Troy Rollo, *Proof Committee Hansard*, Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 23 Oct. 2003, p. 27.

senders of “designated commercial electronic messages” from including a functional unsubscribe facility in such messages.
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### **“Conspicuous Publication”**

31. EFA, the Australian Consumers’ Association, and CAUBE.AU raised concerns with the “conspicuous publication” exception to the rule in Schedule 2, Clause 4, that consent to receiving commercial electronic messages may not be inferred from the mere fact that an electronic address has been published.

32. EFA described this exception as “seriously flawed” and, along with the Australian Consumers’ Association, recommended that the inference should be reversed so that consent may only be inferred from conspicuous publication when a statement to this end accompanies the publication.<sup>14</sup>

33. The exception allows consent to be inferred if a work-related email address has been “conspicuously published” (on the Internet, or in an offline form, such as on a business card), the electronic message is work or business related, and the publication is not accompanied by a statement indicating an objection to being sent unsolicited commercial email.

34. NOIE has pointed out that a person who wished to receive only a certain class of message could modify this statement to suit themselves. For example: “no spam – but offers to sell antique jam tins always welcome”<sup>15</sup>. Given the existing hurdles accompanying this exception, Labor considers this to be appropriate.

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<sup>14</sup> Electronic Frontiers Australia, Inc., *Submission No. 5*, pp 19-21; and Australian Consumers’ Association, *Submission No. 6*, pp 2-3.

<sup>15</sup> National Office for the Information Economy, *Submission No. 14*, p. 7.

35. CAUBE.AU also expressed reservations about the exception, based on the absence of any time limit to which the exception can apply. Its submission stated that:

“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.”<sup>16</sup>

36. In relation to the “conspicuous publication” exception, Labor recommends that Clause 4 of Schedule 2 is amended to add a freshness requirement for consent inferred by conspicuous publication.

**Recommendation:**

- The amendment of Schedule 2 Clause 4 of the *Spam Bill 2003* to add a freshness requirement for consent inferred by “conspicuous publication”.

**Conclusion**

37. Labor believes that the growth of spam acts as a disincentive for citizens to use email, and therefore the Internet. This is a cause of grave concern, not least because so many essential government, business and community services are now online and use email to communicate. Email is the ubiquitous “killer application” of the Internet, and given that the cost of spam is borne by the recipient, spam is an unacceptable and unfair abuse of the medium. That is why Labor believes that the Government has a responsibility to act. Labor is pleased that the Government has

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<sup>16</sup> Coalition Against Unsolicited Bulk Email, Australia, *Submission No. 7*, p. 12.

finally and belatedly responded to Labor's call for a legislative response to the increasing incidence of spam.

38. Labor supports the general aims of these Bills. Based on a close examination of the concerns raised during the course of this Inquiry, Labor has identified important areas where these Bills can be improved.

39. Labor recognises that there may be unforeseen problems which have not come to light through this Inquiry. However Labor believes that Australians need a legislative response to spam. After waiting over 18 months for the Government to take action this worsening problem must be addressed.

40. Labor's recommendations address the weakest aspects of these Bills, and hopes that the Government will constructively consider amendments arising from them.

41. Labor notes the scheduled review of these Bills, as required by section 46 of the Spam Bill, will provide an opportunity to further improve the application and operation of the anti-spam regime.

42. Labor recognises that these Bills are only one part of an appropriate response to the rising incidence of spam, and recommends that the Government proceed with a concerted public education campaign involving consumer groups and industry to further assist internet users to protect themselves against the costly, frustrating and damaging effects of spam.

#### **43. Summary of Recommendations:**

- The amendment of provisions in the *Spam (Consequential Amendments) Bill 2003* relating to search and seizure operations on private premises without a warrant so that consent must be obtained from the individual whose property will be subject to such operations;
- The amendment of the *Spam (Consequential Amendments) Bill 2003* to prevent search and seizure operations on the premises of spam recipients;
- The amendment the proposed section 547J of the *Telecommunications Act 1997* to remove the existing strict liability test and to tighten its scope to affect a smaller class of people, and that its operation is not subject to a test of strict liability;
- The amendment of the *Spam Bill 2003* to include a mechanism where single messages distributed by a sender with a bona fide held view that the addressees would have an interest in receiving them, would not incur a penalty. As an example, Labor notes the amendment in paragraph 14 of the ACS submission;

- The amendment of the exemption outlined in Schedule 1, Clause 3, so that the exemptions are applied consistently, and expanded to include Trade Unions and not-for-profit political lobby groups.
- The amendment of the *Spam Bill 2003* to remove provisions that exempt senders of “designated commercial electronic messages” from including a functional unsubscribe facility in such messages;
- The amendment of Schedule 2 Clause 4 of the *Spam Bill 2003* to add a freshness requirement for consent inferred by “conspicuous publication”; and
- That the Government considers the non-legislative recommendations made by respondents to this Inquiry when implementing its broader approach to spam.

Senator Kate Lundy

Australian Labor Party

