

SPAM Act Explanatory Memorandum

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On 1 July 2009

SPAM (CONSEQUENTIAL AMENDMENTS) BILL 2003

2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SPAM (CONSEQUENTIAL AMENDMENTS) BILL 2003

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Communications,
Information Technology and the Arts, Senator the Hon. Richard Alston)

SPAM (CONSEQUENTIAL AMENDMENTS) BILL 2003

OUTLINE

The Spam (Consequential Amendments) Bill 2003 (the Bill) accompanies the Spam Bill 2003 (the Spam Bill).

The Spam Bill contains regulatory measures aimed at minimising Australia as a source of spam and minimising spam for Australian end-users. It contains a civil penalties regime which regulates the sending of commercial electronic messages. This Bill makes various consequential amendments to the Telecommunications Act 1997 (the Telecommunications Act) and the Australian Communications Authority Act

1997 (the ACA Act) to provide for an appropriate regulatory framework for the Australian Communications Authority (ACA) to investigate and enforce the scheme, and to enable the development of relevant industry codes and standards relating to commercial electronic messages.

The main elements contained in the Bill are:

- o a framework to enable industry to develop codes that relate to the sending of commercial electronic messages. Currently Part 6 of the Telecommunications Act provides for the development of codes by the telecommunications industry in relation to telecommunications activities. This is to be extended to enable the development of codes by the e-marketing industry in relation to e-marketing activities;
- o an investigation role and appropriate information gathering powers for the ACA to investigate complaints relating to breaches of the Spam Bill and regulations made under the Bill. Parts 26 and 27 of the Telecommunications Act give the ACA powers to gather information and investigate complaints relating to certain breaches of the Telecommunications Act. These powers will be extended to enable investigations of breaches of the Spam Bill and regulations; and
- o monitoring warrants to monitor compliance with the Spam Bill and regulations, and search warrant relating to breaches of the Spam Bill and regulations. Part 28 of the Telecommunications Act will be amended to extend the ACA's powers to seek a search warrant relating to Part 21 of the Telecommunications Act to include warrants relating to breaches of the Spam Bill and regulations. In addition it is granted powers to seek a monitoring warrant in relation to monitoring compliance with the Spam Bill

Clauses 1 to 3 of the Bill contain the introductory provisions. Schedule 1 contains the amendments to the ACA Act and the Telecommunications Act. Part 1 of Schedule 1 includes those amendments commencing on Royal Assent and Part 2 contains those amendments commencing at the same time as Part 2 of the Spam Bill (that is 120 days after Royal Assent).

FINANCIAL IMPACT STATEMENT

Implementation of the regulatory and legal measures proposed in this Bill and the Spam Bill will require an additional expenditure of \$0.3M in the 2003-4 financial year, \$1.5M in the 2004-5 financial year, and \$1.6M in the 2005-6 financial year ie. a total of \$3.4M over this period which will be fully offset from within the Communications, Information Technology and the Arts portfolio and agreed with the Minister for Finance and Administration. To establish an accurate baseline for the function, and to inform future proposals it is proposed to fund the ACA role initially only until June 2006. Before October 2005 the funding and function will be reviewed. The NOIE-coordinated educational program will be funded from the existing NOIE budget.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACA: Australian Communications Authority

ACA Act: Australian Communications Authority Act 1997

ACCC: Australian Competition and Consumer Commission

Bill: Spam (Consequential Amendments) Bill 2003

BSA: Broadcasting Services Act 1992

ISP: Internet service provider

Minister: Minister for Communications, Information Technology and the Arts

Spam Bill: Spam Bill 2003

TPA: Trade Practices Act 1974

NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides that the Bill, when enacted, may be cited as the Spam (Consequential Amendments) Act 2003.

Clause 2 - Commencement

Clause 2 sets out when each of the provisions in the Bill will commence. It provides that clauses 1 to 3 of the Bill, and anything else not covered by the table, will commence on the day on which the Bill receives the Royal Assent. Clauses 1, 2 and 3 of the Bill are the introductory provisions including the short title of the Bill, commencement provisions and the schedule application provision. Item 2 of the table provides that Part 1 of Schedule 1 of the Bill also commences on the day that the Bill receives the Royal Assent. Part 1 of Schedule 1 of the Bill provides for amendments to the industry codes and standards part of the Telecommunications Act. These provisions are

to commence on Royal Assent to enable industry to develop codes relating to commercial electronic messages immediately.

Item 3 of the table provides that Part 2 of Schedule 1 of the Bill will commence at the same time as Part 2 of the Spam Bill commences, that is 120 days after Royal Assent (see clause 2 of the Spam Bill). Part 2 includes amendments to the ACA's investigation and information-gathering powers, provisions providing for monitoring warrants and search and seizure warrants in relation to contraventions of the Spam Bill and other miscellaneous amendments. These provisions appropriately commence at the same time as the penalty provisions in the Spam Bill.

Subclause 2(2) makes it clear that column 3 of the table contains additional information that is not part of this Bill.

Clause 3 - Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other item in a Schedule has effect according to its terms. Schedule 1 to the Bill amends the ACA Act, and the Telecommunications Act.

Schedule 1 - Amendments

Part 1 - Amendments commencing on Royal Assent

This Part primarily amends Part 6 of the Telecommunications Act to enable additional industry codes and standards to be made relating to unsolicited commercial electronic messages. Part 6 of the Telecommunications Act sets out arrangements for industry codes and industry standards. It enables industry sections to develop codes and register them with the ACA. The ACA has safety net powers which may be used if self-regulation in an industry section has serious failings.

Currently the telecommunications industry has the ability to develop industry codes to deal with telecommunications activities. The Australian Communications Industry Forum (ACIF) has registered the SMS Issues Code under Part 6 of the Telecommunications Act, which relates to SMS spam. However, the provisions providing for the development of industry codes and standards are proposed to be extended to also enable the e-marketing industry (defined in item 5 of Schedule 1 to the Bill) to develop codes relating to e-marketing activities (defined in item 10 of Schedule 1 to the Bill). This would appropriately enable a body such as the Australian Direct Marketing Association (ADMA) to develop a code relating to commercial electronic messages.

These amendments commence on Royal Assent to enable industry to begin developing codes relating to commercial electronic messages as soon as possible.

Part 1 of Schedule 1 of the Bill also makes various other miscellaneous amendments to the Telecommunications Act, such as inserting necessary definitions.

Telecommunications Act 1997

Item 1 - At the end of subsection 3(2)

This item amends subsection 3(2) of the Telecommunications Act, which sets out the secondary objects of the Act, to include the promotion of responsible practices in relation to the sending of commercial electronic messages in the objects of the Act. Commercial electronic message is defined in item 4 of Schedule 1 to the Bill as having the same meaning as in the Spam Bill.

Item 2 - Section 5

Item 2 amends section 5 of the Telecommunications Act, which is the simplified outline for the Act. It amends the provision that states 'bodies and associations that represent sections of the telecommunications industry may develop industry codes', to include a reference to sections of the e-marketing industry being able to develop industry codes. This amendment is consequential upon amendments being made to Part 6 of the Telecommunications Act to enable the e-marketing industry to develop industry codes.

The e-marketing industry is defined in item 5 of the Bill.

Item 3 - Section 5

This item also amends the simplified outline to the Telecommunications Act in section 5 to reflect the ability of the e-marketing industry to develop industry codes. It amends the statement that 'compliance with an industry code is voluntary unless the ACA directs a particular participant in the telecommunications industry to comply with the code, to include a reference to a particular participant in the e-marketing industry. This amendment is consequential upon amendments being made to Part 6 of the Telecommunications Act to enable the e-marketing industry to develop industry codes.

Item 4 - Section 7

Item 4 inserts a new definition into the definition section, section 7, of the Telecommunications Act.

It defines a 'commercial electronic message' to have the same meaning

as in the Spam Bill. The Spam Bill defines a commercial electronic message in proposed section 6.

For the purposes of the Bill, whether an electronic message is a commercial electronic message will be determined by having regard to its purpose or one of its purposes as determined by the content of the message, the way it is presented and the content located at any associated links, such as links to other websites, or telephone numbers. Its purpose must be one of the purposes set out in paragraphs 6(d) to (p) relating to commercial electronic messages. An electronic message is defined in clause 5 of the Spam Bill. In essence an electronic message is a message sent using an Internet carriage service or other listed carriage service to an electronic address in connection with the relevant account. The terms 'Internet carriage service' and 'listed carriage service' are defined in clause 4 of the Spam Bill.

Electronic messages include e-mail messages and SMS messages.

The term 'commercial electronic message' is used in the definition of e-marketing activity in proposed new section 109A and in proposed new subsection 113(3) which sets out additional examples of things that a code may deal with, including matters relating to commercial electronic messages.

Item 5 - Section 7

This item inserts a new definition into the definition section, section 7, of the Telecommunications Act.

It defines the 'e-marketing industry' as an industry that involves carrying on an e-marketing activity. An 'e-marketing activity' is defined in proposed new section 109A of the Telecommunications Act (to be inserted by item 10 of Schedule 1 to this Bill). It is discussed in

greater detail below under this item.

Broadly speaking the e-marketing industry is that industry that uses commercial electronic messages to market, advertise or promote on the behalf of others, or who use commercial electronic messages as the principal means of marketing, advertising or promoting their own goods or services.

This definition is relevant to the proposed amendments to Part 6 of the Telecommunications Act to enable industry codes to be developed by the e-marketing industry.

Item 6 - Section 7

This item inserts a new definition into the definition section, section 7, of the Telecommunications Act.

It defines an 'Internet service provider' as having the same meaning as in the Broadcasting Services Act 1992. An 'Internet service provider' is defined in clause 8 of Schedule 5 to the BSA as a person who supplies, or proposes to supply an Internet carriage service to the public. An 'Internet carriage service' is defined to mean a listed carriage service that enables end-users to access the Internet (clause 3 of Schedule 5 to the BSA). A 'listed carriage service' has the same meaning as in the Telecommunications Act. Section 16 of the Telecommunications Act defines a listed carriage service as:

- o a carriage service between a point in Australia and one or more other points in Australia;
- o a carriage service between a point in Australia and one or more other points, at least one of which is outside Australia; and
- o a carriage service between a point outside Australia and one or more other points, at least one of which is in Australia.

Subsection 16(2) of the Telecommunications Act provides that a 'point' includes a mobile or potentially mobile point, whether on land, underground, in the atmosphere, in outer space, at sea or anywhere else. This would include, for example, points on vehicles, aircraft and ships.

Subsection 16(3) of the Telecommunications Act makes it clear that a point in the atmosphere, in or below the stratosphere and above Australia is taken to be in Australia. Accordingly, a point on an aircraft above Australia is taken to be a point in Australia for the purpose of this clause.

Subsection 16(4) of the Telecommunications Act provides that a point on a satellite that is above the stratosphere is taken to be a point outside Australia.

A 'carriage service' is defined in section 7 of the Telecommunications Act to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy. The reference to the carriage of communications by means of 'guided electromagnetic energy' includes the carriage of communications by means of a wire, cable, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with the carrying of the communication. The reference to the carriage of communications by means of 'unguided electromagnetic energy' includes communications by means of radiocommunications.

The term 'Internet service provider' is used in proposed new paragraph 113(3)(q), which sets out examples of matters which a code may deal with and includes procedures to be followed by ISPs and electronic messaging service providers in dealing with unsolicited commercial electronic messages.

Item 7 - Section 106

This item amends section 106 of the Telecommunications Act to include references to the 'e-marketing industry'. The term 'e-marketing industry' is proposed to be defined in section 7 of the Telecommunications Act (see item 5 above).

Section 106 of the Telecommunications Act provides a simplified outline of Part 6. It currently provides that:

- o bodies and associations that represent sections of the telecommunications industry may develop industry codes;
- o industry codes may be registered by the ACA;
- o compliance with an industry code is voluntary unless the ACA directs a particular participant in the telecommunications industry to comply with the code;
- o the ACA has a reserve power to make an industry standard if there is no industry codes or if an industry code is deficient; and
- o compliance with industry standards is mandatory.

These amendments are proposed to reflect that, in addition to the development of industry codes by the telecommunications industry, the amendments proposed in this Bill will enable the e-marketing industry to also develop industry codes.

Item 8 - After section 108

This item inserts new proposed sections 108A and 108B into the Telecommunications Act.

108A - Electronic messaging service provider

Proposed new section 108A defines an 'electronic messaging service provider' for the purposes of Part 6 of the Telecommunications Act.

An 'electronic messaging service provider' is defined as a person who supplies, or proposes to supply, an electronic messaging service to the public.

An 'electronic messaging service' is defined in subclause 108A(3) as a

service that enables any or all of the following electronic messages to be sent or received:

- (a) web-based e-mail;
- (b) instant messages;
- (c) text messages;
- (d) messages of a kind specified in regulations.

The terms 'electronic message' and 'message' are defined to have the same meaning as in the Spam Bill. The term 'electronic message' is defined in proposed section 5 of the Spam Bill. In essence it is a message sent using an Internet carriage service or other listed carriage service to an electronic address in connection with a particular account. The terms 'Internet carriage service' and 'listed carriage service' are discussed above under item 6.

A message is defined broadly to mean any information whether in the form of text, data, speech, music or other sounds, visual images, or any other form or combination of forms (see clause 4 of the Spam Bill).

The concept of the 'public' is defined in proposed subsection 108A(2) as a service supplied to the public if, and only if, at least one end-user of the service is outside the immediate circle of the supplier of the service. The concept of an immediate circle is defined in section 23 of the Telecommunications Act.

This definition is intended to cover bodies such as web mail providers, who do not provide access to the internet as a carriage provider or ISP, but still provide an online communications service.

The term 'electronic messaging service provider' is relevant to those sections of the telecommunications industry who may develop industry codes. Proposed new section 108B defines the telecommunications industry to include an industry that involves carrying on a business as an electronic messaging service provider.

The intent in defining the telecommunications industry as including electronic messaging service provider is to ensure coverage in terms of industry codes and standards of organisations who provide communication tools or facilities that operate in conjunction with services or facilities provided by other entities. The provider of an instant messaging facility that operates over the Internet would be considered to be an electronic messaging service provider, and could participate in an industry code, notwithstanding that they may be neither an ISP nor a carriage provider. Similarly, the provider of a web-based e-mail facility would fall into the sector. Such groups could implement spam filtering tools or policies that would materially affect the amount of unsolicited commercial messages in circulation, in the same way that ISPs could utilise such tools and policies in respect of their customer base.

108B - Telecommunications industry

Proposed new section 108B provides that for the purposes of Part 6, the telecommunications industry includes an industry that involves carrying on business as an electronic messaging service provider.

As discussed above under proposed new section 108A, this is relevant to the development of industry codes and standards.

Item 9 - At the end of section 109

This item inserts a new paragraph 109(g). Section 109 of the Telecommunications Act sets out for the purposes of Part 6 what a telecommunications activity is. This amendment provides that a telecommunications activity includes an activity that consists of carrying on business as an electronic messaging service provider.

An 'electronic messaging service provider' is defined above in proposed new section 108A.

The concept of telecommunications activity is relevant to the meaning of a section of the telecommunications industry, which in turn is central to the concept of who may develop industry codes.

Item 10 - After section 109

This item inserts a proposed new section 109A into the Telecommunications Act which defines an 'e-marketing activity' for the purposes of Part 6.

An e-marketing activity is defined as an activity that:

(a) is carried on by a person under a contract or arrangement (other than a contract of employment); and

(b) consists of using commercial electronic messages:

o to market, advertise or promote goods or services, or advertise or promote a supplier, or prospective supplier, of goods or services, where the first person is not the supplier or prospective supplier;

o to market, advertise or promote land or an interest in land, or advertise or promote a supplier, or prospective supplier, of land or an interest in land, where the first person is not the supplier or prospective supplier;

o to market, advertise or promote a business opportunity or investment opportunity, or advertise or promote a provider or prospective provider, of a business opportunity or investment opportunity, where the first person is not the provider or prospective provider.

These activities are essentially those as covered by the meaning of commercial electronic message in proposed section 6 of the Spam Bill.

Essentially an e-marketing activity is an activity that consists of using commercial electronic messages to market, advertise or promote on behalf of others.

In addition an e-marketing activity is an activity carried on by a

person if:

- o the activity consists of using commercial electronic messages to market, advertise or promote goods or services; and

- o the person is the supplier or prospective supplier of the goods or services; and

- o the activity is the sole or principal means of marketing, advertising or promoting the goods or services.

This would apply in circumstances where a person was marketing, advertising or promoting their own goods or services, rather than under contract. It would not apply where the e-marketing activity was not the main avenue through which such goods or services are promoted, therefore avoiding the circumstance where businesses for who e-marketing may only be a small portion of their marketing profile, being drawn into an industry category (and related codes) which is not appropriate in the circumstances.

These are the activities to which industry codes and industry standards under this Part may relate.

Proposed subsection 109A(4) provides that an expression used in this section and in proposed section 6 of the Spam Bill has the same meaning in this section as it has in that section. Proposed section 6 of the Spam Bill defines a commercial electronic message for the purposes of that Bill.

Item 11 - Subsection 110(4)

This item corrects a typographical error in the Telecommunications Act. It amends subsection 110(4) to insert the word `a' so that it reads `the section must be identified in the determination by a unique name and/or number'.

Item 12 - At the end of subsection 110(2)

This item amends subsection 110(2) to include a new paragraph

110(2)(i).

Subsection 110(2) sets out that certain groups are a section of the telecommunications industry for the purposes of Part 6. This amendment means that electronic messaging service providers are included as a section of the telecommunications industry, in addition to carriers and carriage service providers, including ISPs and other set out in subsection 110(2).

An 'electronic messaging service provider' is defined in item 8 of Schedule 1 to the Bill.

Bodies or associations that represent sections of the telecommunications industry may develop industry codes. This means that bodies or associations that represent electronic messaging service providers may develop industry codes under this Part.

Item 13 - After section 110

This item inserts a proposed new section 110A into the Telecommunications Act, which defines sections of the e-marketing industry for the purposes of Part 6.

The concept of industry sections is used in Part 6 relating to developing industry codes. Such sections are used so that codes will be developed by, and applied to, relevant sections, and so that requests for codes by the ACA (under section 118) may be directed to representatives of relevant sections. The definition of 'industry sections' is important in ensuring that it is clear for compliance and enforcement purposes to whom a particular code or standard applies.

Subclause 110A(2) indicates that if the ACA had not made a determination that determines persons to constitute a section of the e-marketing industry, then the whole e-marketing industry or industries, constitute a single section of the e-marketing industry for the purposes of this Part.

Subclause 110A(3) allows the ACA to determine that persons carrying on, or proposing to carry on, a specified e-marketing activity constitute a section of the e-marketing industry for this Part. The section must be identified by a unique name and/or number (subclause 110A(4)). The sections of the industry need not be mutually exclusive, may be formed of two or more sections, or may be subsets of sections (subclause 110A(6)). Subclause 110A(7) provides that subclause 110A(6) does not limit the ACA's options for determining sections under subclause 110A(3). An ACA determination made under subclause 110A(3) must be published in the Government Gazette (subclause 110A(8)).

Item 14 - After section 111

This item inserts proposed new sections 111A and 111B into the Telecommunications Act.

111A - Participants in a section of the e-marketing industry

Proposed new section 111A provides that a participant in a section of the e-marketing industry is a person who is a member of a group that constitutes a section of the e-marketing industry is a participant in that section for the purposes of this Part. The e-marketing industry is defined in item 5 of Schedule 1 to the Bill.

This provision establishes a link between persons and industry sections and is important for compliance and enforcement purposes.

111B - Unsolicited commercial electronic messages

This item inserts a new definition. It defines 'unsolicited commercial electronic message' as a commercial electronic message that is sent without the consent of the relevant electronic account-holder; or to a non-existent address.

Subclause 111B(2) provides that an expression used in the Spam Bill has the same meaning in this clause as it has in that Bill. The terms 'commercial electronic message' and 'relevant electronic

account-holder' are defined in the Spam Bill.

This term unsolicited commercial electronic messages is relevant to the matters which may be dealt with in industry codes (see proposed new paragraphs 113(3)(q), (r), (s) and (t)).

Item 15 - After subsection 112(1)

This item amends section 112 of the Telecommunications Act.

Section 112 is a statement of the Parliament's regulatory policy and provides important guidance to the ACA in performing its functions under Part 6.

Subsection 112(1) provides that it is the Parliament's intention that industry codes be developed by bodies or associations that the ACA is satisfied represent sections of the telecommunications industry. This reflects the self-regulatory objective of the code-standard regime. An industry body or association set up to represent an industry section does not need to be incorporated to develop a code.

This item inserts a similar statement of regulatory intent in relation to the e-marketing industry. It provides that the Parliament's intention is that industry codes be developed by bodies or associations that the ACA is satisfied represent sections of the e-marketing industry. These codes are to apply to participants in the sections of that industry in relation to their e-marketing activities.

The terms 'e-marketing industry' and 'e-marketing activity' are defined in items 5 and 10 of Schedule 1 to the Bill.

Item 16 - At the end of subsection 112(2)

This item amends subsection 112(2) of the Telecommunications Act to provide that it is the Parliament's intention that the ACA exercise specified powers in this Part in a manner that, in the opinion of the ACA, enables public interest considerations to be addressed without imposing undue financial or administrative burdens on

telecommunications, e-marketing industry participants or electronic messaging service providers. In forming its opinion the factors the ACA must have regard to are dependent upon the section of the industry. The powers specified in subsection 112(2) are those in sections 117, 118, 119, 123, 124 and 125 of the Telecommunications Act. These are powers to register industry codes, request codes, publish notices where no body or association represents a section of the industry, and determine industry standards.

Item 17 - Subsection 112(3)

This item amends subsection 112(3). Section 112 is a statement of the Parliament's regulatory policy and provides important guidance to the ACA in performing its functions under Part 6.

Subsection 112(3) sets out those matters that the ACA must have regard to in determining whether public interest considerations are being addressed in a way that does not impose undue financial or administrative burdens on participants in sections of the telecommunications industry.

This item amends this subsection to provide that it does not apply to electronic messaging service providers (which are included in the telecommunications industry, see item 12). Those matters which the ACA must have regard to in relation to the electronic messaging service providers are set out in proposed new subsection 112(3A), to be inserted by item 18 (see below).

Item 18 - After subsection 112(3)

This item inserts proposed new subsections 112(3A) and (3B). These provisions relate to those matters that the ACA must have regard to in determining whether public interest considerations are being addressed in a way that does not impose undue financial or administrative burdens on participants in the section of the telecommunications industry that

consists of electronic messaging service providers (112(3A)), and participants in sections of the e-marketing industry (112(3B)).

The matters to be taken into account are broadly similar to those matters to be taken into account in relation to the telecommunications industry.

In relation to the electronic messaging service providers the ACA must have regard to:

- o the number of end-users who would likely to benefit from the relevant code or standard;
- o the extent to which those end-users are residential or small business end-users; and
- o the legitimate business interests of electronic messaging service providers.

In relation to the e-marketing industry the ACA must have regard to:

- o the number of persons who would likely to benefit from the relevant code or standard;
- o the extent to which those persons are householders or small business operators; and
- o the legitimate business interests of participants in sections of the e-marketing industry.

Item 19 - Subsection 112(4)

This item makes a consequential amendment to subsection 112(4) of the Telecommunications Act to provide that subsections (3), (3A) and (3B) do not, by implication limit the matters to which the ACA may have regard in determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telecommunications industry.

This item is consequential upon amendments proposed in item 18 which

provides for what matters the ACA must have regard to in determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in the section of the telecommunications industry that consist of electronic messaging service providers and sections of the e-marketing industry (see discussion above).

Item 20 - Subsection 113(2)

This item amends subsection 113(2) of the Telecommunications Act to add in a reference to the e-marketing industry. The e-marketing industry is defined in item 5 of Schedule 1 to the Bill.

Subsection 113(2) gives examples of the matters that industry codes and industry standards may address, however, the applicability of a particular example will depend on the section of the industry concerned.

The list in subsection 113(3) consists of examples of matters for industry codes. Many may not be applicable to particular industry sectors and not all matters may need to be addressed in codes.

Moreover, codes and standards need not be limited to the matters identified.

Item 21 - At the end of subsection 113(3)

This item amends subsection 113(3) by inserting more examples which industry codes and industry standards may address, to address those matters which industry codes developed by the e-marketing industry may deal with.

Subsection 113(3) gives examples of the matters that industry codes and industry standards may deal with. This item adds to this list to provide that industry codes and standards may deal with:

- o procedures to be followed by Internet service providers and electronic messaging service providers in dealing with unsolicited

commercial electronic messages (including procedures relating to the provision or use of regularly updated software for filtering unsolicited commercial electronic messages);

- o giving customers information about the availability, use and appropriate application of software for filtering unsolicited commercial electronic messages;
- o action to be taken to assist in the development and evaluation of software for filtering unsolicited commercial electronic messages;
- o action to be taken in order to minimise or prevent the sending or delivery of unsolicited commercial electronic messages, including the configuration of servers so as to minimise or prevent the sending or delivery of unsolicited commercial electronic messages, and the shutdown of open relay servers;
- o action to be taken to ensure responsible practices in relation to the use of commercial electronic messages to market, advertise or promote goods or services to individuals who are under 18 years of age; and
- o procedures to be followed in relation to the giving of consent by relevant electronic account-holders to the sending of commercial electronic messages.

The list in subsection 112(3) consists of examples of matters for industry codes. Many may not be applicable to particular industry sectors and not all matters may need to be addressed in codes. Moreover, codes and standards need not be limited to the matters identified.

Item 22 - At the end of subsection 115(3)

Section 115 of the Telecommunications Act provides that industry codes and standards will not have effect to the extent that they require customer equipment or cabling or telecommunications networks or facilities to have particular design features or performance

requirements except as specified in subsection 115(2). This prevents industry codes and standards from being used for technical regulation purposes.

Subsection 115(2) provides a limited exception to subsection 115(1) for technical codes or standards that relate to the accuracy of billing of customers and the quality of the standard telephone service. This item amends subsection 115(3) to add in an exception where the code or standard deals with a matter referred to in paragraph 113(3)(t). This relates to action to be taken in order to minimise or prevent the sending or delivery of unsolicited commercial electronic messages, including the configuration of servers so as to minimise or prevent the sending or delivery of unsolicited commercial electronic messages, and the shutdown of open relay servers.

Item 23 - Paragraph 117(1)(a)

This item amends paragraph 117(1)(a) of the Telecommunications Act to insert a reference to the e-marketing industry to enable a body or association representing a section of the telecommunications industry or the e-marketing industry to submit a draft code, that applies to participants of the section and deals with one or more matters relating to the telecommunications activities or e-marketing activities of that section, to the ACA for registration.

The 'e-marketing' industry is defined in item 5 of Schedule 1 to the Bill.

Subsection 117(1) requires the ACA to register a code if the ACA is satisfied that:

o the code provides appropriate community safeguards or deals with the matters in an appropriate manner, depending on the nature of the matters;

o the body or association has published a draft code, and invited participants in that section and members of the public to make submissions within a period of at least 30 days (subsection 117(3)) and considered any submissions;

o the TIO has been consulted about the development of the code;

o where a code relates to privacy issues, the Privacy Commissioner has been consulted about the development of the code; and

o the ACCC does not object to the code.

The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process.

Subsection 117(4) provides that when a new code is registered under this Part and it is expressed to replace another industry code, the other code ceases to be registered.

A decision to refuse to register a code is subject to merits review under Part 29 of the Telecommunications Act (see Schedule 4).

Item 24 - Paragraph 117(1)(b)

This item makes consequential amendments to paragraph 117(1)(b) of the Telecommunications Act to include a reference to the e-marketing activities. The effect of section 117 is discussed above under item 23.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 25 - Subparagraph 117(1)(k)(iii)

This item makes consequential amendments to subparagraph 117(1)(k)(iii) of the Telecommunications Act to include a reference to the e-marketing industry. The effect of section 117 is discussed above under item 23.

The term 'e-marketing industry' is defined in item 5 of Schedule 1 to the Bill.

Item 26 - Section 118

This item amends section 118 of the Telecommunications Act to include references to the e-marketing industry as well as the telecommunications industry.

Section 118 performs the function of being a formal trigger for the development of an industry code. The failure to develop a code which has been requested provides a ground for the ACA to develop an industry standard (see section 123). That provision has the effect of preventing the ACA developing an industry standard before the industry has an opportunity to develop a code.

This section provides that if the ACA is satisfied that a body or association represents a particular section of the telecommunications industry or e-marketing industry, it may request them to develop a code that would apply to participants of the section and deals with one or more specified matters. The ACA must specify a period of at least 120 days for a code to be developed and a copy be given to it.

The ACA is not permitted to make a request under this section unless it is satisfied that the development of the code is necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of participants in that industry section, and it is unlikely that an industry code would be developed within a reasonable period without such a request.

The ACA may vary the request by extending the period (subsection 118(5)) and may specify indicative targets for progress in developing the code. The targets are binding and may be used to guide the timing of the development process (subparagraph 123(1)(b)(ii)).

Item 27 - Paragraph 118(1)(a)

This item makes a consequential amendment to paragraph 118(1)(a) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of section 118 is discussed above under item 26.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 28 - Subsection 119(1)

This item amends section 119 of the Telecommunications Act to include references to the e-marketing industry, as well as the telecommunications industry.

Section 119 provides that if the ACA is satisfied that there is no body or association in existence that represents a particular industry section, it may publish a notice in the Gazette to the effect that if such a body were to come into existence, the ACA would be likely to request it to develop a code under section 118 about the matters in the notice. The notice must set a period of at least 60 days for the section to develop a representative body.

This section supports section 118 by encouraging the formation of necessary industry bodies or associations to support the development and implementation of industry codes. If no such body or association is formed within the period set out in the notice, this would be a consideration in whether an industry standard would be made under section 124. Again, the provision has the effect of preventing the ACA developing an industry standard before industry has an opportunity to develop a code.

Item 29 - Paragraph 119(1)(b)

This item makes consequential amendments to paragraph 119(1)(b) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of

section 119 is discussed above under item 28.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 30 - Subparagraph 123(1)(a)(i)

This item amends subparagraph 123(1)(a)(i) of the Telecommunications Act to include references to the e-marketing industry as well as the telecommunications industry.

Section 123 enables the ACA to make a standard where it has requested industry to develop a code and it has failed to do so or to have made satisfactory progress. Industry standards provide a formal back-up to industry self-regulation by way of codes. It is intended that industry standards not be made unless industry self-regulation using codes fails.

The provision works in tandem with section 118. It prevents the ACA from making a standard before an industry section has had an appropriate opportunity to develop a code.

This section, as amended, provides that, if the ACA requests a code to be developed by a particular section of the telecommunications industry or e-marketing industry under subsection 118(1) and this request has not been complied with; indicative targets have not been met; or a code has been developed that the ACA subsequently refused to register, then the ACA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately that industry section.

Subsection 123(3) requires the ACA to consult the body or association to which it made the request before determining an industry standard.

A standard is a disallowable instrument for the purposes of the Acts Interpretation Act 1901 (subsection 123(4)).

Item 31 - Subparagraph 123(1)(a)(ii)

This item makes consequential amendments to subparagraph 123(1)(a)(ii) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of section 123 is discussed above under item 30.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 32 - Paragraph 124(1)(a)

This item amends paragraph 124(1)(a) of the Telecommunications Act to include a reference to the e-marketing industry, as well as the telecommunications industry.

Section 124 of the Telecommunications Act enables the ACA to make a standard where no industry representative body has been established. The provision works in tandem with section 119. It prevents the ACA from making a standard before an industry section has had an appropriate opportunity to develop a code.

If the ACA is satisfied that a particular section of the industry is not represented by a body or association, and has published a notice under subsection 119(1) and no such body or association comes into existence within the period in the notice, then the ACA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately that industry section.

A standard is a disallowable instrument for the purposes of the Acts Interpretation Act 1901 (see subsection 124(3)).

Item 33 - Subparagraph - 124(1)(c)(ii)

This item makes consequential amendments to subparagraph 124(1)(c)(ii) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of

section 124 is discussed above under item 32.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 34 - Section 125

Item 34 amends section 125 of the Telecommunications Act to include references to the e-marketing industry, as well as the telecommunications industry.

Section 125 of the Telecommunications Act enables the ACA to make a standard where a code has clearly failed. It prevents the ACA from making a standard before a code has proven to be ineffective.

If the ACA is satisfied that an industry code is deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ACA is satisfied that it is necessary or convenient to determine a standard, the ACA may determine an industry standard. This section only applies to codes registered for at least 180 days to ensure that the implementation of a code has had adequate time before its success is judged and is intended to reinforce the preference for successful industry self-regulation.

If the ACA is satisfied that a body or association represents that industry section, subsection 125(4) requires the ACA to consult with the body or association before determining an industry standard. The industry code ceases to be registered on the day the industry standard comes into force.

A standard is a disallowable instrument for the purposes of the Acts Interpretation Act 1901 (subsection 125(5)).

An industry code is deficient if, and only if, it is not operating to provide appropriate community safeguards or not otherwise operating to regulate adequately that industry section (subsection 125(7)).

Item 35 - Subparagraph 125(1)(a)(ii)

This item makes a consequential amendment to subparagraph 125(1)(a)(ii) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of section 125 is discussed above under item 34.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 36 - Subsection 125(7)

This item makes a consequential amendment to subsection 125(7) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of section 125 is discussed above under item 34.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 37 - Subsection 130(1)

This item amends subsection 130(1) of the Telecommunications Act to include references to the e-marketing industry, as well as the telecommunications industry.

Section 130 provides that the ACA may vary an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise adequately regulate participants.

A variation is a disallowable instrument for the purposes of the Acts Interpretation Act 1901 (subsection 130(2)).

Item 38 - Paragraphs 130(1)(a) and (b)

This item makes a consequential amendment to paragraphs 130(1)(a) and (b) of the Telecommunications Act to include a reference to the e-marketing activities, as well as telecommunications activities. The substance of section 130 is discussed above under item 37.

The term 'e-marketing activity' is defined in item 10 of Schedule 1 to the Bill.

Item 39 - At the end of Part 6

Item 39 inserts a new Division 7 into Part 6 of the Telecommunications Act.

Division 7 - Miscellaneous

137 - Protection from civil proceedings

Proposed new section 137 provides a limited protection from civil proceedings for Internet service providers or electronic messaging service providers in respect of anything done by the provider in connection with an industry code or standard in so far as the code or standard deals with procedures referred to in proposed paragraph 113(3)(q) (see item 21 of Schedule 1 to the Bill). This paragraph provides as an example of matters that an industry code or standard may deal with as procedures to be followed by Internet service providers and electronic messaging service providers in dealing with unsolicited commercial electronic messages (including procedures relating to the provision to users of regularly updated software for filtering unsolicited commercial electronic messages).

'Internet service provider' is defined in item 6 of Schedule 1 and

'electronic messaging service provider' is defined in item 8 of Schedule 1.

This will provide significant reassurance to these service providers regarding a common concern that they may attract civil liability for undertaking reasonable spam-filtering activity. It will provide an incentive for the development and the uptake of compliant code(s), in order to obtain the indemnity offered.

138 - Implied freedom of political communication

Proposed new section 138 provides that this Part does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

Item 40 - Transitional - sections 121 and 122 of the Telecommunications Act 1997

This amendment provides that ACA directions about compliance with industry codes (under section 121) and formal warnings about breaches of industry codes (under section 122) do not apply to a contravention of an industry code if the code deals with a matter referred to in proposed paragraphs 113(3)(q) to (v) of the Telecommunications Act (see item 21) or if the code relates to activities that consist of carrying on business as an electronic messaging service provider, where the contravention occurred before the commencement of Part 2 of the Spam Bill (which commences 120 days after the Spam Bill receives Royal Assent).

These paragraphs refer to codes which relate to commercial electronic messages and appropriately should not be subject to ACA directions about compliance with or warnings about breaches of such codes before the rules relating to sending commercial electronic messages in the Spam Bill come into effect.

Item 41 - Transitional - sections 128 and 129 of the Telecommunications Act 1997

This amendment provides that ACA directions about compliance with industry standards (under section 128) and formal warnings about breaches of industry standards (under section 129) do not apply to a

contravention of an industry code if the code deals with a matter referred to in proposed paragraphs 113(3)(q) to (v) of the Telecommunications Act (see item 21) or if the code relates to activities that consist of carrying on business as an electronic messaging service provider, where the contravention occurred before the commencement of Part 2 of the Spam Bill (which commences 120 days after the Spam Bill receives Royal Assent).

These paragraphs refer to codes which relate to commercial electronic messages and appropriately should not be subject to ACA directions about compliance with or warnings about breaches of such industry standards before the rules relating to sending commercial electronic messages in the Spam Bill come into effect.

Part 2 - Amendments commencing at the same time as Part 2 of the Spam Act 2003 commences

Part 2 of Schedule 1 to the Bill set out those amendments in the Bill that commence at the same time as Part 2 of the Spam Bill, that is 120 days after Royal Assent (see clause 2 of the Spam Bill). The provisions include amendments relating to:

- o monitoring warrants and search warrants;
- o investigations by the ACA;
- o the ACA's information-gathering powers;
- o miscellaneous amendments to the Telecommunications Act and the ACA Act.

These investigative powers are not necessary until the penalty provisions in the Spam Bill come into operation, that is 120 days after Royal Assent (see clause 2 of the Spam Bill).

Australian Communications Authority Act 1997

Item 42 - After subparagraph 6(j)(ia)

This item amends the meaning of the ACA's telecommunications functions as defined in section 6 of the ACA Act, to include its functions under the Spam Bill.

Item 43 - After paragraph 8(3)(aa)

This item makes a consequential amendment to paragraph 8(3) of the ACA Act to provide that functions conferred on the ACA under the Spam Bill are not additional ACA functions. This is because they come within the 'ACA's telecommunications functions', as provided for in item 42.

Telecommunications Act 1997

Item 44 - Section 7 (after paragraph (aa) of definition of ACA's telecommunications powers

This item makes a consequential amendment to the definition section of the Telecommunications Act, section 7, to include a reference to the ACA's powers under the Spam Bill in the definition of the ACA's 'telecommunications powers'.

Item 45 - Paragraph 121(1)(a)

Item 45 amends paragraph 121(1)(a) of the Telecommunications Act to include references to the e-marketing industry as well as the telecommunications industry.

It is intended that compliance with industry codes be voluntary or as determined by the industry section subject to the code. It is envisaged, however, that where a code is effective and being complied with by a majority of participants to whom it applies, it may be appropriate to direct non-compliant persons to comply with the code.

This may particularly apply when the person can give no good reason for non-compliance with the code. In this context, section 121 allows the ACA to direct the person to comply with a code. This provides a back-up to self-regulation by allowing a person who refuses to comply with otherwise successful self-regulatory arrangements to be directed to comply with a code; in effect, compliance with the code becomes mandatory for that person.

A decision to give or vary a direction, or refuse to revoke a direction, under this section is subject to merits review under Part 29 of the Telecommunications Act (see Schedule 4 of that Act).

Breaches of a direction are subject to pecuniary penalties under Part 31 of the Telecommunications Act.

Item 46 - Subsection 122(1)

This item amends subsection 122(1) of the Telecommunications Act to include references to the e-marketing industry as well as the telecommunications industry.

Section 122 provides that if an industry participant contravenes an industry code, the ACA may issue a formal warning to the industry participant. It is intended to enable the ACA to formally indicate its concerns about a contravention of a code to a person. Such a warning may be a precursor to making a compliance direction under section 121. However, in the case of a serious, flagrant or recurring breach, the ACA may decide to give a direction under section 121 without giving a prior formal warning.

Item 47 - Subsection 128(1)

This item amends subsection 128(1) to include references to the e-marketing industry as well as the telecommunications industry.

Section 128 provides that compliance with an industry standard developed by the ACA is compulsory for participants in the relevant

section of the industry. Contravention of an industry standard is subject to pecuniary penalties under Part 31.

Item 48 - Subsection 129(1)

This item amends subsection 129(1) of the Telecommunications Act to include references to the e-marketing industry as well as the telecommunications industry.

Section 129 provides that if an industry participant contravenes an industry standard, the ACA may issue it with a formal warning. It is intended to enable the ACA to formally indicate its concerns about a contravention of an industry standard, possibly as a precursor to considering seeking a sanction under section 128, if the person does not heed the warning. However, in the case of a serious, flagrant or recurring breach, the ACA may decide to take action under Part 30 or 31 without giving a prior formal warning.

Item 49 - Subsection 492(5) (definition of this Act)

This item amends subsection 492(5) of the Telecommunications Act to include a reference to the proposed Spam Act 2003 and regulations under that Act in the meaning of 'this Act' for the section.

Section 492 relates to the ACA conducting hearings under Part 25 of the Telecommunications Act. Part 25 enables the ACA to hold public inquiries about certain matters relating to telecommunications. As a general rule, hearings will be required to be held in public (subsections 492(1) and (2)). If the hearing is to be conducted in public, the ACA will be required to give reasonable public notice of the conduct of the hearing (subsection 492(4)).

A hearing, or part of a hearing, will, however, be able to be conducted in private if the ACA is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or

that hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Act (subsection 492(3)). Currently under this section, `this Act' is defined to include not only the Telecommunications Act, but also the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act. This amendment includes the Spam Bill and regulations under that Bill in this definition.

Item 50 - Subsection 502(5) (definition of this Act)

This item amends subsection 502(5) of the Telecommunications Act to include a reference to Spam Bill and regulations under that Bill in the meaning of Act for the section.

Section 502 relates to the ACCC conducting hearings under Part 25 of the Telecommunications Act. Part 25 enables the ACCC to hold public inquiries about certain matters relating to telecommunications. As a general rule, hearings will be required to be held in public (subsections 502(1) and (2)). If the hearing is to be conducted in public, the ACCC will be required to give reasonable public notice of the conduct of the hearing (subsection 502(4)).

A hearing, or part of a hearing, will, however, be able to be conducted in private if the ACCC is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or that hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Act (subsection 502(3)). Currently under this section, `this Act' is defined to include not only the Telecommunications Act, but also the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act. This amendment includes the Spam Bill and regulations under that Bill in this definition.

Item 51 - After paragraph 508(aa)

This item amends paragraph 508(aa) of the Telecommunications Act to refer to a contravention of the Spam Bill or regulations under that Bill.

Under Part 26 of the Telecommunications Act (which includes section 508), the ACA is able to investigate certain matters relating to telecommunications, such as suspected contraventions of the Act, on its own initiative or in response to written complaints made to the ACA. The ACA is required to investigate any matter concerning carriage services or the telecommunications industry if requested to do so by the Minister.

Section 508 specifies those matters that the ACA may investigate of its own volition and must investigate if so requested by the Minister.

These matters are as follows:

- o a contravention of the Telecommunications Act;
- o a contravention of an industry code registered under proposed Part 6 of the Act;
- o a failure by a carriage service provider to comply with an obligation, or discharge a liability, under proposed Part 9 of the Act dealing with performance standards to be complied with by carriage service providers in relation to customer service;
- o a matter relating to the supply of, or a refusal or failure to supply, a carriage service;
- o a matter relating to the connection of, or a refusal or failure to connect, customer equipment;
- o a matter relating to the performance of the ACA's telecommunications functions, or the exercise of the ACA's telecommunications powers.

To avoid any conflict with the operation of the BSA, the ACA will not, however, be able to investigate a matter to the extent to which it

relates to the content of a content service.

This proposed amendment will also enable the ACA to investigate a contravention of the Spam Bill or regulations under that Bill.

Item 52 - After paragraph 510(1)(aa)

This amendment enables the ACA to investigate a contravention of the Spam Bill or regulations made under that Bill where the ACA has reason to suspect that a person may have contravened the Act. This is in addition to those matters referred to in 508 where:

- o in the case of a contravention of the Act, the ACA has reason to suspect that a person may have contravened the Act;
- o a complaint is made to the ACA under section 509; or
- o the ACA thinks that it is desirable to investigate the matter.

The ACA is not able to conduct such an investigation if it thinks that the subject matter of the investigation would not be a matter relevant to the performance of any of its functions (subsection 510(2)).

If the Minister requests the ACA to investigate a matter of a kind referred to in section 508 or any other matter concerning carriage services or the telecommunications industry, the ACA is required to investigate that matter (subsection 510(3)).

Item 53 - At the end of subsection 512(1)

This item amends subsection 512(1) of the Telecommunications Act to limit the circumstances in which the ACA must inform the respondent about its upcoming investigation of a complaint relating to the respondent for possible breaches of the Spam Bill or regulations under that Bill.

Under section 512, before the ACA begins to investigate a matter to which a complaint relates, the ACA is required to inform the respondent identified by the complainant that the matter is to be investigated.

This item amends this requirement to provide that the ACA will not be

required to inform the respondent if the matter relates to possible breaches of the Spam Bill or regulations under that Bill where the ACA has reasonable grounds to believe that informing the respondent is likely to result in the concealment, loss or destruction of a thing connected with a breach of this Act.

The ACA is able to conduct an investigation under Part 26 in such manner as the ACA thinks fit (subsection 512(2)).

For the purposes of an investigation, the ACA is empowered to obtain information from such persons, and to make such inquiries, as it thinks fit (subsection 512(3)).

Item 54 - At the end of section 512

This item inserts a new subsection 512(6) into the Telecommunications Act to provide that the ACA is not required to give the respondent an opportunity to make submissions if the matter relates to a possible breach of the Spam Bill or regulations under that Bill, if the ACA has reasonable grounds to believe that doing so is likely to result in the concealment, loss or destruction of a thing connected with a breach of the Spam Bill.

As a general rule, the ACA is not required to give a complainant or a respondent an opportunity to appear before the ACA in connection with an investigation. The exception to this rule is if the ACA, as a result of an investigation, makes a finding that is adverse to a complainant or a respondent. In such a case, the ACA will be required to give the complainant or respondent an opportunity to make submissions about the matter to which the investigation relates, subject to the proposed new subsection 512(6), except if the matter relates to a possible breach of the Spam Bill and the ACA has reasonable grounds to believe that giving

the respondent such an opportunity is likely to result in the concealment, loss or destruction of a thing connected with the breach (subsections 512(4) and (5)).

Evidence of a contravention of the Bill will often be highly labile, in the sole possession of the alleged contravener, and readily destroyed, and it is therefore important it is provided a greater degree of protection than might otherwise be the case, from destruction by the contravener.

Item 55 - At the end of section 513

This item includes a proposed new subsection 513(2) which limits the requirement on the ACA to inform the complainant and respondent of its decision not to investigate a complaint.

Under section 513 of the Telecommunications, if the ACA decides not to investigate a matter to which a complaint relates, or not to investigate it further, it is required, as soon as practicable and in such manner as it thinks fit, to inform the complainant and the respondent of its decision and of the reasons for it.

Proposed new subsection 513(2) provides that the ACA is not required to inform the respondent of the decision and the reasons for the decision if the matter relates to a possible breach of the Spam Bill or regulations under that Bill and the ACA has reasonable grounds to believe that to do so is likely to result in the concealment, loss or destruction of a thing connected with a breach of the Spam Bill.

Overseas experience indicates that individual complaints may potentially be numerous, and identifying and establishing unlawful behaviour may be achieved through the examination of a series of apparently unrelated complaints over a period of time. Responding

individually to every complaint and advising those involved of its existence would both potentially risk the destruction of valuable evidence and be prohibitively resource intensive.

Item 56 - At the end of section 518

This item includes proposed new subsection 518(3) which limits the requirement on the ACA to give a person adversely affected by a report an opportunity to comment.

Under section 518 of the Telecommunications Act if the publication of a matter in a report or part of a report about an investigation would, or would be likely to, adversely affect the interests of a person, the ACA is not permitted to publish the report or the part of the report, as the case may be, until the ACA has given the person a reasonable period of up to 30 days to make representations in relation to the matter (subsections 518(1) and (2)).

Proposed new subsection 518(3) provides that the ACA is not required give the person a reasonable period to make representations to the ACA if the matter relates to a possible breach of the Spam Bill and the ACA has reasonable grounds to believe that to do so is likely to result in the concealment, loss or destruction of a thing connected with a breach of the Spam Bill.

Evidence of a contravention of the Bill will often be data that is readily amended or erased, in the sole possession of the alleged contravener, and readily destroyed, and it is therefore important it is provided a greater degree of protection than might otherwise be the case, from destruction by the contravener.

Item 57 - Division 1 of Part 28 (heading)

This item amends the heading to Division 1 of Part 28 of the Telecommunications Act.

Part 28 of the Telecommunications Act provides for the enforcement of the Act and sets out the powers of inspectors under the Act in relation to offences against Part 21 of the Telecommunications Act dealing with technical regulation. The amendments to be made in this Bill extend these enforcement powers to apply to enforcement of the Spam Bill and regulations under the Bill.

Searches relating to breaches of the Spam Bill will be able to be conducted under the authority of a search warrant or with the consent of the owner or occupier concerned. Searches to monitor compliance with the Spam Bill will be able to be conducted with the consent of the occupier concerned or under the authority of a monitoring warrant.

An inspector will be able to require the giving of certain information, and the production of certain documents, relevant to compliance with the Spam Bill.

Breaches of the Spam Bill will often involve sophisticated and determined efforts to obfuscate the identity of the person responsible and the location of the contravening behaviour. In many cases crucial evidence to establish a contravention will be in the sole possession of the contravener and the only way this evidence will be able to be obtained will be through an examination of the relevant premises and facilities.

Item 58 - Section 532

This item amends the simplified outline to Part 28 of the Telecommunications Act to reflect that the Part will provide for search

warrants and monitoring warrants in relation to breaches of the Spam Bill, including regulations under the Bill.

In particular, it provides that searches relating to breaches of the Spam Bill may be conducted under the authority of a search warrant, or with the consent of the owner or occupier concerned. This is the same as search warrants for a breach of Part 21 of the Telecommunications Act. It also provides that searches to monitor compliance with the Spam Act may be conducted under the authority of a monitoring warrant or with the consent of the occupier concerned.

Item 59 - Section 532

This item amends the simplified outline to Part 28 of the Telecommunications Act to reflect that the Part will provide for search warrants and monitoring warrants in relation to breaches of the Spam Bill, including regulations under the Bill.

In particular it provides that an inspector may require the giving of certain information and the production of certain documents relevant to compliance with the Spam Bill and regulations under that Bill as well as with Part 21 of the Telecommunications Act.

Item 60 - After section 532

This item inserts a new section 532A headed 'References to the Spam Act 2003'. It provides that in Part 28 of the Telecommunications Act references to the proposed Spam Act 2003 include regulations under the Act.

Item 61 - Division 3 of Part 28 (heading)

Division 3 of Part 28 of the Telecommunications Act currently provides for application for, and issue of, search warrants relating to offences

against Part 21 of the Telecommunications Act. This item amends the heading to this Division to include search warrants relating to breaches of the Spam Bill. This is consequential upon the amendments proposed below which extend this Division to also relate to breaches of the Spam Bill (and regulations).

Item 62 - Subparagraph 535(1)(a)(iii)

This item amends subparagraph 535(1)(a)(iii) of the Telecommunications Act, which in conjunction with amendments proposed in item 63, will expand the instances in which a magistrate may issue a warrant, to include the issue of warrants in relation to a breach of the Spam Bill (which is defined to include the regulations).

The proposed amendments to section 535 will enable a magistrate to issue a warrant that authorises an inspector (named in the warrant) to enter land, premises, a vessel, aircraft or vehicle; search those places; break open and search things; and examine and seize anything that the inspector has reasonable grounds for suspecting is connected with breach of the Spam Bill and regulations as well as an offence against Part 21 (subsection 535(1)) (see also subsections 542(2)(b), (c) and (d)). The magistrate may only issue a warrant in response to the laying of an information alleging that an inspector suspects on reasonable grounds that there may be, in the places covered by the warrant, anything: relating to an offence committed or breach; that may afford evidence relating to the commission of an offence or breach; or that was used, or is intended for use in relation to the commission of an offence or a breach (paragraph (1)(a)). The information must set out the grounds for the information (paragraph (1)(b)).

Item 63 - At the end of paragraph 535(1)(a)

This item inserts proposed new subparagraphs 535(1)(a)(iv) to (vi) into the Telecommunications Act.

The proposed amendments to section 535 will enable a magistrate to issue a warrant that authorises an inspector (named in the warrant) to enter land, premises, a vessel, aircraft or vehicle; search those places; break open and search things; and examine and seize anything that the inspector has reasonable grounds for suspecting is connected with an offence against Part 21, or a breach of the Spam Bill (subsection 535(1)). The magistrate may only issue a warrant in response to the laying of an information alleging that an inspector suspects on reasonable grounds that there may be, in the places covered by the warrant, anything: relating in respect of which a breach of the Spam Bill has happened; that may afford evidence relating to a breach of the Spam Bill; or that was used, or is intended for use in relation to breaching the Spam Bill (paragraph (1)(a)).

Item 64 - Paragraph 537(a)

This item amends paragraph 537(a) to refer to breaches as well as offences.

Section 537 sets out certain requirements in relation to what must be specified in a warrant issued under section 535. Included in the matters which must be specified, is the nature of the offence in relation to which the entry and search are authorised.

This amendment is consequential upon amendments proposed in item 63, which enable a magistrate to issue a warrant relating to a breach of the Spam Bill, as well as relating to offences against Part 21 of the Telecommunications Act. In these cases the warrant must state the nature of the breach.

Item 65 - Division 4 of Part 28 (heading)

This item amends the heading to Division 4 of Part 28 to refer to search and seizures relating to breaches of the Spam Bill, as well as breaches of Part 21 of the Telecommunications Act.

Division 4 - Searches and seizures relating to breaches of the Spam Act 2003 or Part 21 of this Act

This Division provides for the conduct of searches and seizures by inspectors in relation to offences against Part 21. The proposed amendments extend the application of this Division to breaches of the Spam Bill and regulations.

Item 66 - After section 541

This item inserts a new section 541A into the Telecommunications Act, which is an interpretative provision that makes it clear when a thing is to be taken to be connected with a breach of the Spam Bill for the purposes of Part 28 of the Telecommunications Act.

It provides that a thing is connected with a breach of the Spam Bill if it is:

- o a thing in respect of which the breach has happened;
- o a thing that may afford evidence about the breach; or
- o a thing that was used, or is intended to be used, for the purposes of the breach.

This term 'connected with a breach of the Spam Act' is relevant to determining when an inspector may undertake searches and seizures (under section 542) and when an inspector may seize evidence (under section 544).

This is similar to section 541 of the Telecommunications Act, which sets out when a thing is connected with an offence for the purposes of this Division.

Item 67 - At the end of subsection 542(1)

This item amends section 542 of the Telecommunications Act to provide for the conduct of searches and seizures where an inspector suspects on reasonable grounds that there is something in the place to be searched that is connected with a particular breach of the Spam Bill as well as

in relation to an offence against Part 21 of the Telecommunications Act (subsection 542(1)).

The note to this item also provides that the heading to section 542 is amended to refer simply to searches and seizures.

Subsection 542(3) of the Telecommunications Act allows an inspector to stop and detain a vessel, aircraft, or vehicle that the inspector is permitted to enter under subsection 542(2).

Item 68 - At the end of paragraph 542(2)(d)

This item amends paragraph 542(d) to allow an inspector to examine and seize things that the inspector has reasonable grounds for suspecting to be connected with a breach of the Spam Bill or an offence (paragraph (d)), where the inspector has the consent of the owner, or is authorised to do so by a warrant issued under Division 3 of Part 28.

This amendment enables an inspector to examine and seize things suspected on reasonable grounds to be connected with a breach of the Spam Bill, as well as an offence against Part 21 of the Telecommunications Act.

Item 69 - After subsection 544(1)

This item inserts a new subsection 544(1A) into the Telecommunications Act which is similar to section 544(1).

It allows an inspector to seize a thing found in the course of a search conducted under a warrant issued under Division 3 of Part 28, even if that thing is not specified in the warrant, if the inspector has reasonable grounds to believe that the thing is connected a breach of the Spam Bill, whether or not the warrant was issued in relation to the breach (paragraph 544(1A)(a)). This power to seize the thing may only be exercised if the inspector has reasonable grounds to believe the seizure is necessary in order to prevent the thing being concealed, lost, destroyed, or used in committing, continuing or repeating a

breach (paragraph 544(1A)(b)).

This amendment enables an inspector to seize things suspected on reasonable grounds to be connected with a breach of the Spam Bill, as well as an offence against Part 21 of the Telecommunications Act (which is provided for in subsection 544(1)).

The note to this item provides that the heading to section 544 is amended to take into account that the section now relates to evidence of commission of breaches of the proposed Spam Act 2003 as well as against Part 21 of the Telecommunications Act.

Item 70 - Paragraph 546(1)(b)

This item replaces paragraph 546(1)(b) of the Telecommunications Act to provide for the retention of things seized under this Division until the related proceedings are completed or until the proceedings for a breach of the Spam Bill are completed. This is consequential upon the proposed amendments that enable inspectors to seize evidence of breaches of the Spam Bill.

Section 546 allows things seized by an inspector under this Division to be retained by the ACA for 60 days following the seizure, or at the end of any proceedings for an offence to which the thing is connected (subsection 546(1)).

Subsection 546(2) allows the ACA to authorise the release of seized things to the owner of the thing, or to the person from whom the thing was seized. Such an authorisation must be in writing. The ACA may impose conditions on the release of the seized things including requiring the person to pay a security equal to the value of the thing, in case it is ordered to be forfeited by a court under section 551.

Item 71 - After Division 5 of Part 28

Item 71 inserts a new Division 5 of Part 28 into the Telecommunications Act. This new Division enables searches to monitor compliance with the Spam Bill (which is defined to include regulations under the Bill). Searches to monitor compliance may be conducted with the consent of the occupier of the premises or as authorised under warrant.

Monitoring warrants provide a potentially less intrusive form of warrant regime, more suited to confirming compliance where there is an existing industry standard or code, or where an individual undertaking is in place.

547A - Powers available to inspectors for monitoring compliance

Proposed new section 547A confers powers upon an inspector to enter any premises and to exercise any or all of the powers set out in section 547B for the purposes of establishing whether or not the Spam Bill or regulations are being complied with.

Subclause 547A(2) provides that an inspector may only enter premises under this clause if: he or she has the consent of the occupier of the premises; or where the inspector has obtained a warrant under clause 547D to make that entry.

Subclause 547A(3) provides that, before obtaining consent from a person to enter premises (under paragraph (2)(a)), the inspector must inform the person that he or she may refuse consent.

Subclause 547A(4) clarifies that any consent given by a person to enable entry to premises by the inspector must be voluntary.

547B - Monitoring powers

Proposed section 547B describes the monitoring powers that an inspector may exercise for the purposes of finding out whether the Spam Bill or regulations have been complied with.

This clause sets out the general powers inspectors may exercise under paragraph 547A(1)(b). These include the power to: search premises; to inspect and take photographs or make sketches of the premises or any substance or thing at the premises; to inspect any document kept at the premises, remove or make copies of any such document; and take onto the premises such equipment and materials as the inspector requires for the purposes of exercising powers in relation to the premises.

Paragraph 547B(1)(f) provides that an inspector may secure a thing (for example, certain equipment) by locking it up or guarding it, if he or she believes on reasonable grounds that evidential material may be accessible by operating the thing at the premises, but that expert assistance is needed to operate the thing and the evidential material may be destroyed or otherwise interfered with if the thing is not secured in the meantime. This is necessary to ensure that where, for example, the equipment is more sophisticated than expected and cannot be accessed or moved, the opportunity to obtain expert assistance and to preserve evidential material is not lost.

Subclause 547B(2) provides that an inspector may operate equipment at the premises to see whether the equipment, or a disk tape or other storage device contains information that is relevant to determining whether there has been compliance with the Spam Bill and regulations. If the inspector finds such information, the inspector may operate the equipment, in order to obtain the evidential material, or to copy such evidential material to another storage device, and remove it from the premises (subclause 547B(3)).

Subclause 547B(3) is intended to facilitate the seizure of printouts or

duplicate discs wherever possible, rather than the original material.

The note to this section refers to section 547J which relates to orders requiring persons to assist with access to computer data (see discussion below).

547C - Production of identity cards etc.

Proposed new section 547C makes it clear that an inspector (other than an uniformed member of the police force) cannot exercise any of the powers under this Part in relation to premises unless he or she produces his or her identity card for the occupier of those premises.

An inspector who is a member of the police force must produce written evidence that they are a member of the police force.

If an inspector does not produce an identity card or written evidence that he or she is a member of the police force, then he or she is not authorised to enter the premises.

547D - Monitoring warrants

This clause provides that an inspector may apply to a magistrate for a warrant in relation to premises (subclause 547D(1)).

The magistrate may issue a warrant if satisfied, by information on oath or affirmation, it is reasonably necessary that one or more inspectors should have access to the premises for the purposes of finding out whether the Spam Bill and regulations have been complied with (subclause 547D(2)).

The magistrate may require further information from the inspector or some other person regarding the grounds on which the warrant is being sought (subclause 547D(3)). The magistrate must not issue the warrant unless the inspector or other person has provided such information (if any) as requested by the magistrate.

This provision enables a monitoring warrant to be issued for residential premises in limited circumstances (see subclause 547D(4)). A magistrate must not issue such a warrant unless there has been a previous court finding (which has not been overturned on appeal) that the individual involved has previously breached the Spam Bill, using equipment located at that residence, the person ordinarily resides at the premises and the warrant is issued within 10 years of the court finding, or the individual has given an enforceable undertaking (under proposed section 38 of the Spam Bill) which is in force in respect of equipment located at the residence and the person ordinarily resides at the premises. These safeguards have been included to ensure that monitoring warrants for private residences are limited.

The power to seek a monitoring warrant to enter a residence has been included because of the nature of the spamming industry. Because the business of sending unsolicited commercial messaging may readily operate as a cottage industry, a number of spammers use their residence as a base for operations. Consequently such warrants would be necessary to ensure effective monitoring of the Spam Bill.

Subclause 547D(5) sets out that the warrant must:

- o authorise one or more inspectors to enter the premises (using such assistance and force as is necessary and reasonable) and exercise the monitoring powers (set out in proposed section 547B). The inspectors need not be named in the warrant;
 - o state the times at which the entry is authorised, or whether the entry is authorised to be made at any time of the day or night;
 - o specify the date at which the warrant ceases to have effect. This date must not be more than six months after the issue of the warrant;
- and
- o state the purpose for which the warrant is issued.

547E - Details of warrant to be given to occupier etc.

Proposed new section 547E provides that, if a warrant in relation to premises is being executed, a copy of the warrant must be made available to the occupier of the premises or another person who represents the occupier, where the occupier or their representative are present at the premises. The inspector responsible for the execution of the warrant must identify himself or herself (subclause 547E(2)).

Subclause 547E(3) provides that the copy need not include the signature of the magistrate who issued the warrant.

547F - Announcement before entry

Proposed new section 547F provides that, before an inspector enters premises under a warrant they must announce that they are authorised to enter and give any person at the premises an opportunity to allow entry to the premises, unless there are reasonable grounds to believe that immediate entry to the premises is required to ensure the safety of a person or to prevent serious damage to the environment, or so that the effective execution of the warrant is not frustrated.

547G - Compensation for damage to equipment

Proposed new section 547G provides that if damage is caused to a thing as a result of it being operated as mentioned in section 547B and the damage resulted from insufficient care being exercised by the inspector either in selecting the person to operate the equipment or by the person operating it, compensation is payable to the owner.

Compensation is payable out of money appropriated by the Parliament (subclause 547G(5)). In determining the amount payable, regard is to be

had as to whether the occupier (or his or her employees and agents) had provided any warning or guidance as to the operation of the thing (subclause 547G(4)). This is to minimise compensation in cases where there has been a deliberate programming of software to destroy or cause damage if not accessed in a particular manner, or where the occupier failed to mitigate damage by providing warning or guidance.

The amount payable is to be a reasonable amount for the damage or corruption as agreed between the owner and the user (subclause 547G(2)), or as determined by the Federal Court, where the parties cannot agree (subclause 547G(3)).

Damage in relation to data is defined to include damage by erasure of data or addition of other data.

547H - Occupier entitled to be present during search

Proposed new section 547H provides that occupiers or their representatives may choose to observe the searching of the premises providing they do not impede the conduct of the search in any way. The right to search does not preclude inspectors from searching two or more areas of the premises at the same time (subclause 547H(3)).

Division 5B - Access to computer data that is relevant to the Spam Act 2003

547J - Access to computer data that is relevant to the Spam Act 2003

Proposed new section 547J is based on section 3LA of the Crimes Act. The amendments are designed to provide inspectors with the necessary powers to detect and investigate breaches involving the use of computers by enabling inspectors to require a person with knowledge of

a relevant computer system to assist investigators to access encrypted information, where an order has been made.

This provision is designed to assist inspectors overcome the particular problems in investigating computer related penalty provisions where the large amount of data which can be stored on computer drives and disks and the complex security measures, such as encryption and passwords, which can be used to protect that information, present particular problems for investigators.

Proposed section 547J would enable an inspector to apply to a magistrate for an access order where a search warrant relating to the Spam Bill which authorises an inspector to enter particular premises is in force under Division 3 of Part 28 of the Telecommunications Act, or a monitoring warrant which authorises an inspector to enter particular premises is in force under Division 5A (subclause 547J(1) and (2)).

The magistrate may grant an access order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow the inspector to access data held in a computer on those premises; copy the data to a data storage device; or convert the data into documentary form (subclause 547J(2)). For example, a person could be required to explain how to access the system or to provide a password to enable access.

To grant the order, the magistrate would have to be satisfied (i) of the existence of reasonable grounds to suspect a computer on search premises contains evidence connected with a breach of the Spam Bill; (ii) that the subject of the order is reasonably suspected of having been involved in the breach, or is the owner or lessee of the computer, or a current employee of the owner or lessee of the computer; and (iii) that the subject of the order has relevant knowledge of the functioning of the computer or system or measures applied to protect the computer

or system (subclause 547J(3)).

The maximum penalty for non-compliance with the order would be 6 months imprisonment (subclause 547J(4)). This is in line with the penalty in section 3LA of the Crimes Act.

'Data' is defined in this section to include information in any form, and any program or part of program. 'Data held in a computer' is defined inclusively to include data held in any removable data storage device for the time being held in a computer; and data held in a data storage device on a computer network of which the computer forms a part. A 'data storage device' is defined to mean a thing containing, or designed to contain, data for use by a computer (subclause 547J(5)). Subclause 547J(6) provides that this section does not be implication affect the meaning of the expression 'data' when used in any other provision of this Act other Telecommunications (Consumer Protection and Service Standards) Act 1999.

Item 72 - After subsection 549(1)

This item inserts a proposed new subsection 549(1A) into the Telecommunications Act, which allows an inspector, who has entered a place under Division 4 or 5A of Part 28 of the Telecommunications Act to require a person to answer questions or produce documents (subsection 549(1)). The inspector may make such a requirement only to the extent that is reasonably necessary to ascertain whether the Spam Bill and regulations have been complied with. This is similar to subsection 549(1) of the Telecommunications Act, which relates to ascertaining whether Part 21 of the Telecommunications Act has been complied with.

Subsection 549(4) makes it clear that an individual who is required to comply with a requirement made under section 549 is excused from doing so if to do so might tend to incriminate the individual or expose the

individual to a penalty.

Item 73 - Subsections 549(2) and (3)

Item 73 amends subsections 549(2) and (3) of the Telecommunications Act to make it clear that an inspector may only exercise the power under proposed new subsection (1A) where he or she has produced his or her inspector identity card, or is wearing his or her uniform in the case of a member of a police force.

The relevant person is required to comply with a request from an inspector under subsection 549(1) or (1A) (subsection 549(3)). The maximum penalty for non-compliance is, in the case of an individual, 20 penalty units or, in the case of a body corporate, 100 penalty units (under s. 4AA of the Crimes Act 1914, a penalty unit is worth \$110 - see also s. 4B(3) of that Act).

Item 74 - Paragraph 550(a)

This item amends paragraph 550(a) of the Telecommunications Act to allow an inspector to retain possession of any document seized (under section 542, 547 or 547B) or produced to the inspector (under subsection 549(1) or (1A)). The inspector may only retain the document for as long as is reasonably necessary to ascertain whether Part 21 or the Spam Bill has been complied with. The inspector is also required to allow the person access to the document at all reasonable times.

Item 75 - At the end of paragraph 550(b)

This item amends paragraph 550(b) of the Telecommunications Act to allow an inspector to retain possession of any document produced to the inspector (under subsection 549(1) or (1A)).

Item 76 - Paragraph 550(c)

This item amends paragraph 550(c) of the Telecommunications Act to provide that an inspector may only retain the document for as long as is reasonably necessary to ascertain whether Part 21 or the Spam Bill

has been complied with. The inspector is also required to allow the person access to the document at all reasonable times (paragraph 550(d)).

Item 77 - Section 574A (definition of this Act)

Item 77 amends section 574A of the Telecommunications Act to include the Spam Bill and regulations under the Bill in the definition of 'this Act' for the purposes of Part 32 of the Telecommunications Act.

Part 32 deals with the proof of matters that involve directors of corporations, employees and agents in connection with civil and criminal proceedings under the Act.

The effect of this amendment is that if a corporation has breached a civil penalty provision in the Spam Bill and it is necessary in proceedings to establish the state of mind of the corporation, it will be sufficient to show that:

- o a director, employee or agent of the corporation, acting within the scope of his or her authority, engaged in that conduct; and
- o the director, employee or agent had that state of mind (subsection 575(1)).

For the purposes of this provision, the state of mind of a person will include the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose (subsection 575(3)).

If conduct is engaged in on behalf of a corporation by a director, employee or agent of the corporation and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Spam Bill, to have been engaged in by the corporation unless the corporation establishes that it took reasonable precautions and exercised due diligence to avoid the conduct (subsection 575(2)).

A reference in section 575 to a director of a corporation will include a reference to a constituent member of a body corporate incorporated for a public purpose by Commonwealth, State or Territory law (subsection 575(4)).

A reference in section 575 to 'engaging in conduct' includes a reference to refusing to engage in conduct (subsection 575(5)).

In addition, if in proceedings under the Spam Bill in respect of conduct engaged in by a person other than a corporation, it is necessary to establish the state of mind of the person, it is sufficient to show that the conduct was engaged in by an employee or agent of the person within the scope of his or her authority and the employee or agent had that state of mind (subsection 576(2)).

If conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Spam Bill to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct (subsection 576(3)).

For the purposes of section 576, the state of mind of a person will include the person's knowledge, intention, opinion, belief or purpose and the person's reasons for the intention, opinion, belief or purpose (subsection 576(5)).

A reference in section 576 to 'engaging in conduct' will include a reference to refusing to engage in conduct (subsection 576(6)).

Item 78 - Section 582

Item 78 amends section 582 of the Telecommunications Act to refer to the proposed Spam Act 2003 and regulations under that Act.

Section 582 provides a simplified outline of Part 35. The following

parts are amended to refer to the Spam Bill and regulations:

- o Partnerships are to be treated as persons for the purposes of the Act (section 585).

- o Instruments under the Act will be able to apply, adopt or incorporate the provisions of certain other instruments (section 589).

There are Constitutional protections to avoid invalidity on the basis of the operation of provisions of the Act in contravention of paragraph 51(xxxi) of the Constitution (sections 590 and 591).

Item 79 - Section 582

Item 79 similarly makes a consequential amendment to the simplified outline to reflect that section 589, which provides for instruments under the Act to apply, adopt or incorporate provisions of certain other instruments also applies to instruments under the Spam Bill and regulations under the Bill (see item 85).

Item 80 -Section 582

Item 80 similarly makes a consequential amendment to the simplified outline to reflect that section 591, which provides a constitutional safety net in the event that compensation is payable in the event that the operation of 'this Act', results in the acquisition of property otherwise than on just terms, is to be amended to extend to the Spam Bill and regulations (see item 86).

Item 81 - Section 582

Item 81 makes a consequential amendment to the simplified outline to reflect that section 592, which provides that this Act does not affect the performance of State or Territory functions, also applies to the Spam Bill and regulations under the Bill (see item 87).

Item 82 - Subsection 585(2)

Item 82 amends the definition of 'this Act' in subsection 585(2) of the Telecommunications Act to include the proposed Spam Act 2003 and

regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act.

It also defines an offence to include a breach of a civil penalty provision. A civil penalty provision includes a civil penalty provision within the meaning of the Spam Bill.

Section 585 is relevant to persons that are partnerships. It provides that the Spam Bill applies to a partnership as if the partnership were a person, with the following changes:

- o obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
- o any breach of a civil penalty provision in the Spam Bill that would otherwise be committed by the partnership is taken to have been breached by each partner who:

- aided or abetted, counselled or procured the relevant act or omission; or

- was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

Item 83 - Subsection 586(2) (definition of this Act)

Item 83 amends the definition of 'this Act' in subsection 586(2) of the Telecommunications Act to include the proposed Spam Act 2003 and regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act.

The effect of section 586 is that, for the purposes of the Spam Bill, if a document is delivered personally to the partner of a partnership or is left, or posted to, the partner's last known residential or business address, the document is taken to have been given to the

partnership.

Item 84 - Subsection 587(4) (definition of this Act)

Item 84 amends the definition of 'this Act' in subsection 587(4) of the Telecommunications Act to include the proposed Spam Act 2003 and regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act.

The effect of this amendment is that for the purposes of the Spam Bill a person may nominate an address in Australia for service in an application made by the person under the Act or any other document given by the person to the ACCC or the ACA. If this is done, a document may be given to the person for the purposes of the Act by leaving it at, or by posting it to, the nominated address for service. The document may also be delivered to the person personally or left at, or posted to, the person's last known residential or business address.

Item 85 - Subsection 589(6) (definition of this Act)

Item 85 amends the definition of 'this Act' in subsection 589(6) of the Telecommunications Act to include the proposed Spam Act 2003 and regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act, and Parts XIB and XIC of the TPA.

The effect of this amendment is that notwithstanding anything in the Acts Interpretation Act 1901 (see in particular section 49A of that Act), regulations or any other instrument made under the Spam Bill will be able to make provision in relation to a matter by applying, adopting, or incorporating (with or without modifications) provisions of any Commonwealth Act or of any regulations or rules under a Commonwealth Act as in force at a particular time or as in force from time to time (subsections 589(1), (5) and (6)).

In addition, notwithstanding anything in the Acts Interpretation Act, regulations or any other instrument made under the Act will be able to make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matter contained in any other instrument or writing whatever as in force or existing at a particular time or from time to time even if the other instrument or writing does not yet exist when the instrument under the Spam Bill is made (subsections 589(2), (5) and (6)). This power is essential for the ACA's delegated legislation making, including the making of standards. The reference in subsection 589(2) to 'writing' will include any mode of representing or reproducing words, figures, drawings or symbols in a visible form (see section 25 of the Acts Interpretation Act 1901).

A reference in subsection 589(2) to any other instrument or writing is defined widely to include a reference to an instrument or writing made by any person or body in Australia or elsewhere (including, for example, the Commonwealth, a State or Territory or one of its officers or authorities or an overseas entity) whatever its nature and whether or not it has legal force or effect. Examples will include:

- o regulations or rules under a Commonwealth Act;
- o a State Act, a Territory law or regulations or any other instrument made under such an Act or law;
- o an international technical standard or performance indicator; or
- o a written agreement such as a contract or an arrangement or an instrument or writing made unilaterally (subsection 589(3)).

Nothing in section 589 limits the generality of anything else in it (subsection 589(4)).

Item 86 - Subsection 591(3) (definition of this Act)

Item 86 amends the definition of 'this Act' in subsection 591(3) of the Telecommunications Act to include the proposed Spam Act 2003 and

regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards) Act 1999 and regulations under that Act.

The effect of this amendment is that if, apart from section 591, the operation of the Spam Bill would result in the acquisition of property from a person otherwise than on just terms in contravention of paragraph 51(xxxi) of the Constitution, the Commonwealth will be liable to pay reasonable compensation to the person in respect of the acquisition (subsections 591(1) and (3)). If the Commonwealth and the person cannot agree on the amount of the compensation, the person will be able to institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines (subsection 591(2)).

Item 87 - Subsection 592(2) (definition of this Act)

Item 87 amends the definition of 'this Act' in subsection 592(2) of the Telecommunications Act to include the proposed Spam Act 2003 and regulations under that Act, as well as the Telecommunications (Consumer Protection and Service Standards Act 1999 and regulations under that Act. The effect of this amendments is that section 592 provides that a power conferred by the Spam Bill must not be exercised in such a way as to prevent the exercise of the powers, or the performance of the functions, of government of a State, the Northern Territory, the Australian Capital Territory or Norfolk Island.
