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Commonwealth of Australia

THE SENATE

*Presented and read a first time*

## **Spyware Bill 2005**

**No.     , 2005**

*(Senator Greig)*

**A Bill for an Act to regulate the unauthorised installation of computer software, to require the clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for related purposes**

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**A Bill for an Act to regulate the unauthorised installation of computer software, to require the clear disclosure to computer users of certain computer software features that may pose a threat to user privacy, and for related purposes**

**Preamble**

Acknowledging that computer users increasingly are finding software installed on their computers that they did not know was installed and that they cannot uninstall.

Concerned that there is an increasing capacity and tendency for users of the Internet to have unauthorised software surreptitiously installed on their computers without their knowledge.

Aware that there is now freely available predatory and eavesdropping software which has the capacity to collect and transfer data from a user's computer to another computer without the knowledge of the user.

1 The Parliament of Australia enacts:

2 **Part 1—Preliminary**  
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4 **1 Short title**

5 This Act may be cited as the *Spyware Act 2005*.

6 **2 Commencement**

7 This Act commences on Royal Assent.

8 **3 Objects of the Act**

9 The objects of this Act are to:

- 10 (a) regulate the unauthorised or surreptitious installation of  
11 computer software;
- 12 (b) require the clear disclosure to computer users of certain  
13 computer software features that may pose a threat to a user's  
14 privacy or the speed or operation of their computer;
- 15 (c) give computer users the rights and capacity to:  
16 (i) know what software is being installed on their computer;  
17 (ii) refuse to have the software installed; and  
18 (iii) be able to uninstall any software.

19 **4 Definitions**

20 In this Act:

21 *ACMA* means the Australian Communications and Media  
22 Authority.

23 *advertisement* means a commercial promotion for a product or  
24 service, but does not include promotions for products or services  
25 that appear on computer software help or support pages that are  
26 displayed in response to a request by the user.

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1            **advertising feature** means a function of computer software that,  
2            when installed on a computer, delivers advertisements to the user of  
3            that computer.

4            **adware** means software which causes advertisements to be  
5            displayed on a user's computer.

6            **affirmative consent** means consent expressed through action by the  
7            user of a computer other than default action specified by the  
8            installation sequence and independent from any other consent  
9            solicited from the user during the installation process.

10          **authorised user**, when used with respect to a computer, means the  
11          owner or lessee of a computer, or someone using or accessing a  
12          computer with the actual or apparent authorisation of the owner or  
13          lessee.

14          **cause the installation**, when used with respect to particular  
15          software, means to knowingly provide the technical means by which  
16          the software is installed, or to knowingly pay or provide other  
17          consideration to, or induce, another person to do so.

18          **clear description** means a description that is clear, conspicuous,  
19          concise and in a font size that is at least as large as the largest  
20          default font displayed to the user by the software.

21          **computer software** means any program designed to cause a  
22          computer to perform a desired function or functions and does not  
23          include any cookie.

24          **cookie** means a text file:

- 25            (a) that is placed on a computer by an Internet service provider,  
26            interactive computer service or Internet website; and  
27            (b) the sole function of which is to record information that can be  
28            read or recognised by an Internet service provider, interactive  
29            computer service or Internet website when the user of the  
30            computer uses or accesses such provider, service or website.

31          **distributed computing feature** means a function of computer  
32          software that, when installed on a computer, transmits information

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1 or messages, other than personal or network information about the  
2 user of the computer, to any other computer without the knowledge  
3 or direction of the user and for purposes unrelated to the tasks or  
4 functions the user intentionally performs using the computer.

5 ***first retail sale*** means the first sale of a computer, for a purpose  
6 other than resale, after the manufacture, production or importation  
7 of the computer. For purposes of this definition, each lease and each  
8 subsequent lease of a computer is to be considered as a first retail  
9 sale.

10 ***information collection feature*** means a function of computer  
11 software that, when installed on a computer, collects personal or  
12 network information about the user of the computer and transmits  
13 such information to any other party on an automatic basis or at the  
14 direction of a party other than the user of the computer.

15 ***install*** means:

- 16 (a) to write computer software to a computer's persistent storage  
17 medium, such as the computer's hard disk, in such a way that  
18 the computer software is retained on the computer after the  
19 computer is turned off and subsequently restarted; or  
20 (b) to write computer software to a computer's temporary  
21 memory, such as random access memory, in such a way that  
22 the software is retained and continues to operate after the user  
23 of the computer turns off or exits the Internet service,  
24 interactive computer service or Internet website from which  
25 the computer software was obtained.

26 ***network information*** means:

- 27 (a) an Internet protocol address or domain name of a user's  
28 computer; or  
29 (b) a Uniform Resource Locator or other information that  
30 identifies Internet web sites or other online resources accessed  
31 by a user of a computer.

32 ***personal information*** means:

- 33 (a) a first and last name, whether given at birth or adoption,  
34 assumed or legally changed;

- 1 (b) a home or other physical address including street name, name  
2 of a city or town and postcode;  
3 (c) an electronic mail address or online username;  
4 (d) a telephone number;  
5 (e) any personal identification number;  
6 (f) a credit card number, any access code associated with the  
7 credit card or both;  
8 (g) a birth date, birth certificate number or place of birth; or  
9 (h) any password or access code.

10 ***settings modification feature*** means a function of computer  
11 software that, when installed on a computer:

- 12 (a) modifies an existing user setting, without direction from the  
13 user of the computer, with respect to another computer  
14 software application previously installed on that computer; or  
15 (b) enables a user setting with respect to another computer  
16 software application previously installed on that computer to  
17 be modified in the future without advance notification to and  
18 consent from the user of the computer.

19 ***user of a computer*** means a computer's lawful owner or an  
20 individual who operates a computer with the authorisation of the  
21 computer's lawful owner.

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## **Part 2—Prohibited practices in relation to software installation**

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### **5 Surreptitious installation of software**

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(1) It is unlawful for a person who is not an authorised user of a computer to cause the installation of software on the computer in a manner designed to:

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(a) conceal from the user of the computer the fact that the software is being installed; or

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(b) prevent the user of the computer from having an opportunity to knowingly grant or withhold consent to the installation.

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#### *Exception*

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(2) This section does not apply to:

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(a) the installation of software that falls within the scope of a previous grant of authorisation by an authorised user; or

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(b) the installation of an upgrade to a software program that has already been installed on the computer with the authorisation of an authorised user; or

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(c) the installation of software before the first retail sale of the computer.

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### **6 Notice, choice and removal of software**

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It is unlawful for any person who is not the user of a computer to install computer software on that computer, or to authorise, permit or cause the installation of computer software on that computer, unless:

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(a) the user of the computer has received notice that satisfies the requirements of section 8; and

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(b) the user of the computer has granted consent that satisfies the requirements of section 8; and

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- 1 (c) the computer software's removal procedures satisfy the  
2 requirements of section 8.

### 3 **7 Deceptive installation of software**

4 It is unlawful for any person who is not the user of a computer to  
5 install computer software on that computer, or to authorise, permit,  
6 or cause the installation of computer software on that computer, if  
7 the design or operation of the computer software is intended, or may  
8 reasonably be expected, to confuse or mislead the user of the  
9 computer concerning the identity of the person or service  
10 responsible for the functions performed or content displayed by such  
11 computer software.

### 12 **8 Notice, consent and removal of software requirements**

#### 13 *Notice*

- 14 (1) For the purposes of section 6, notice to the user of a computer must:
- 15 (a) include a clear notification, displayed on the screen until the  
16 user either grants or denies consent to installation, of the name  
17 and general nature of the computer software that will be  
18 installed if the user grants consent; and
- 19 (b) include a separate disclosure, with respect to each information  
20 collection, advertising, distributed computing and settings  
21 modification feature contained in the computer software, that  
22 remains displayed on the screen until the user either grants or  
23 denies consent to that feature; and
- 24 (c) in the case of an information collection feature, provides a  
25 clear description of:
- 26 (i) the type of personal or network information to be  
27 collected and transmitted by the computer software; and
- 28 (ii) the purpose for which the personal or network  
29 information is to be collected, transmitted and used; and
- 30 (d) in the case of an advertising feature, provides:
- 31 (i) a representative example of the type of advertisement  
32 that may be delivered by the computer software; and

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- 1 (ii) a clear description of the estimated frequency with which  
2 each type of advertisement may be delivered or the  
3 factors on which the frequency will depend; and  
4 (iii) a clear description of how the user can distinguish each  
5 type of advertisement that the computer software delivers  
6 from advertisements generated by other software,  
7 Internet website operators or services; and  
8 (e) in the case of a distributed computing feature, provides a clear  
9 description of:  
10 (i) the types of information or messages the computer  
11 software will cause the computer to transmit; and  
12 (ii) the estimated frequency with which the computer  
13 software will cause the computer to transmit such  
14 messages or information or the factors on which the  
15 frequency will depend; and  
16 (iii) the estimated volume of such information or messages,  
17 and the likely impact, if any, on the processing or  
18 communications capacity of the user's computer; and  
19 (iv) the nature, volume and likely impact on the computer's  
20 processing capacity of any computational or processing  
21 tasks the computer software will cause the computer to  
22 perform in order to generate the information or messages  
23 the computer software will cause the computer to  
24 transmit; and  
25 (f) in the case of a settings modification feature, provides a clear  
26 description of the nature of the modification, its function and  
27 any collateral effects the modification may produce, and  
28 procedures the user may follow to turn off such feature or  
29 uninstall the computer software.

30 *Consent*

- 31 (2) For purposes of section 6, consent means:  
32 (a) consent by the user of the computer to the installation of the  
33 computer software; and  
34 (b) separate affirmative consent by the user of the computer to  
35 each information collection feature, advertising feature,

1 distributed computing feature and settings modification  
2 feature contained in the computer software.

3 *Removal procedures*

- 4 (3) For purposes of section 6, computer software must:
- 5 (a) appear in the 'Add/Remove Programs' menu or any like  
6 feature, if any, provided by each operating system with which  
7 the computer software functions; and
  - 8 (b) be capable of being removed completely using the normal  
9 procedures for removing computer software provided by each  
10 operating system with which the computer software functions;  
11 and
  - 12 (c) in the case of computer software with an advertising feature,  
13 include an easily identifiable link clearly associated with each  
14 advertisement that the software causes to be displayed, such  
15 that selection of the link by the user of the computer generates  
16 an on-screen window that informs the user about how to turn  
17 off the advertising feature or uninstall the computer software.

18 **9 Misleading inducements to install software**

19 It is unlawful for a person who is not an authorised user of a  
20 computer to induce an authorised user of the computer to consent to  
21 the installation of software on the computer by means of a  
22 materially false or misleading representation concerning:

- 23 (a) the identity of an operator of an Internet website or online  
24 service at which the software is made available for download  
25 from the Internet; or
- 26 (b) the identity of the author or publisher of the software; or
- 27 (c) the nature or function of the software; or
- 28 (d) the consequences of not installing the software.

29 **10 Preventing reasonable efforts to remove software**

30 It is unlawful for a person who is not an authorised user of a  
31 computer to authorise or cause the installation of software on the  
32 computer if the software is designed to prevent reasonable efforts by

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1                    an authorised user of the computer to remove or disable the  
2                    software once it has been installed.

3                    **11 Limitation of ability to remove software**

4                    Software that enables an authorised user of a computer, such as a  
5                    parent or system administrator, to choose to prevent another user of  
6                    the same computer from uninstalling or disabling the software is not  
7                    to be considered to prevent reasonable efforts to uninstall or disable  
8                    the software within the meaning of this section, provided that at  
9                    least one authorised user retains the ability to uninstall or disable  
10                    the software.

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## **Part 3—Installing surreptitious information collection features on a user's computer**

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### **12 Surreptitious information collection unlawful**

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(1) It is unlawful for a person who is not an authorised user of a computer to authorise or cause the installation on that computer of software that collects information about the user of the computer or about the user's Internet browsing behaviour or other use of the computer and transmits such information to any other person on an automatic basis or at the direction of a person other than an authorised user of the computer, if the software's collection and transmission of such information is not functionally related to or in support of a software capability or function that an authorised user of the computer has chosen or consented to execute or enable, and either:

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(a) there has been no notification, prior to the software beginning to collect and transmit such information, to an authorised user of the computer explaining the type of information the software will collect and transmit and the types of ways the information may be used and distributed; or

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(b) notification pursuant to paragraph (a) was not provided in a manner reasonably calculated to provide actual notice to an authorised user of the computer; or

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(c) notification pursuant to paragraph (a) occurred at a time or in a manner that did not enable an authorised user of the computer to consider the information contained in the notification before choosing whether to permit the collection or transmission of information.

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#### *Exception—compliance with licence*

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(2) This section must not be interpreted as prohibiting a person from authorising or causing the installation of software that collects and transmits information that is reasonably needed to determine

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1                   whether or not the user of a computer is licensed or authorised to  
2                   use the software.

3                   **13 Intentional transmission of information by user**

4                   Information must not be construed as having been collected and  
5                   transmitted on an automatic basis or at the direction of a person  
6                   other than a user of the computer, within the meaning of this Act, if  
7                   the collection or transmission of the information is intentionally  
8                   initiated by an authorised user for the purpose of allowing the direct  
9                   or indirect access to the information by an intended recipient.

10                  **14 Adware that conceals its operation**

11                  It is unlawful for a person who is not an authorised user of a  
12                  computer to authorise or cause the installation on that computer of  
13                  software if:

- 14                  (a) the software causes advertisements to be displayed to the user:  
15                      (i) at a time when the user is not accessing an Internet  
16                      website or online service operated by the publisher of the  
17                      software; and  
18                      (ii) in a manner or at a time such that a reasonable user  
19                      would not understand that the software is responsible for  
20                      delivering the advertisements; and  
21                  (b) the advertisements referred to in paragraph (a) do not contain  
22                      a label or other reasonable means of identifying to the user of  
23                      the computer, each time such an advertisement is displayed,  
24                      which software is responsible for the advertisement's delivery.

25                  **15 Other practices that thwart user control of computer**

- 26                  (1) It is unlawful for a person who is not an authorised user of a  
27                  computer, knowingly and without the authorisation of an authorised  
28                  user of the computer:  
29                      (a) to utilise the computer to send unsolicited information or  
30                      material from the user's computer to other computers; or  
31                      (b) to divert an authorised user's Internet browser away from the  
32                      Internet website the user intended to view to one or more other

- 1 websites, unless such diversion has been authorised by the  
2 website the user intended to view; or
- 3 (c) to display an advertisement, series of advertisements or other  
4 content on the computer through windows in an Internet  
5 browser, in such a manner that the user of the computer  
6 cannot end the display of such advertisements or content  
7 without turning off the computer or terminating all sessions of  
8 the Internet browser, provided that this paragraph does not  
9 apply to the display of content related to the functionality or  
10 identity of the Internet browser; or
- 11 (d) to covertly modify settings relating to the use of the computer  
12 or to the computer's access to or use of the Internet, including:
- 13 (i) altering the default Web page that initially appears when  
14 a user of the computer launches an Internet browser; or
- 15 (ii) altering the default provider or Web proxy used to access  
16 or search the Internet; or
- 17 (iii) altering bookmarks used to store Internet website  
18 addresses; or
- 19 (iv) altering settings relating to security measures that protect  
20 the computer and the information stored on the computer  
21 against unauthorised access or use;
- 22 provided that this paragraph does not apply to any  
23 modification that restores settings previously changed without  
24 user consent; or
- 25 (e) to use software installed in violation of section 3 to collect  
26 information about the user or the user's Internet browsing  
27 behaviour; or
- 28 (f) to remove, disable, or render inoperative security or privacy  
29 protection technology installed on the computer.

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## **Part 4—Limitations on liability**

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### **16 Passive transmission, hosting or linking**

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A person does not commit an offence against any provision of this Act solely because the person provided:

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(a) the Internet connection, telephone connection or other transmission or routing function through which software was delivered to a computer for installation; or

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(b) the storage or hosting of software or of an Internet website through which software was made available for installation to a computer; or

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(c) an information location tool, such as a directory, index, reference, pointer or hypertext link, through which an authorised user of a computer located software available for installation.

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### **17 Network security**

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A provider of a network or online service that an authorised user of a computer uses or subscribes to has not committed an offence against this Act where the purpose of the provider's action is to:

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(a) protect the security of the network, service or computer; or

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(b) facilitate diagnostics, technical support, maintenance, network management or repair; or

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(c) prevent or detect unauthorised, fraudulent or otherwise unlawful uses of the network or service.

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**Part 5—Penalties**

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**18 Penalties**

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(1) A person who contravenes subsection 5(1), section 6, 7, 9, 10, subsection 12(1), section 14 or subsection 15(1) is guilty of an offence against that subsection or section, as the case may be.

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(2) An offence against subsection 5(1), section 6, 7, 9, 10, subsection 12(1), section 14 or subsection 15(1) is an indictable offence and, subject to this section, is punishable on conviction by imprisonment for a period of not exceeding 2 years.

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(3) Notwithstanding that an offence against subsection 5(1), section 6, 7, 9, 10, subsection 12(1), section 14 or subsection 15(1) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if, and only if:

(a) the proceedings are brought in the name of the

Attorney-General or the Director of Public Prosecutions; and

(b) the defendant and the prosecutor consent; and

(c) the court is satisfied that it is proper for the court to hear and determine proceedings in respect of the offence.

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(4) Where, in accordance with subsection (3), a court of summary jurisdiction convicts a person of an offence against subsection 5(1), section 6, 7, 9, 10, subsection 12(1), section 14 or subsection 15(1), the penalty that the court may impose is imprisonment for a period not exceeding 6 months.

**19 Exceptions**

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*Preinstalled software*

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(1) A person who installs, or authorises, permits or causes the installation of computer software on a computer before the first retail sale of the computer is deemed to be in compliance with this Act if the authorised user of the computer receives notice that would

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- 1 satisfy the requirements of section 8 and grants consent that would  
2 satisfy the requirements of section 8 prior to:
- 3 (a) the initial collection of personal or network information, in the  
4 case of any information collection feature contained in the  
5 computer software; and
  - 6 (b) the initial generation of an advertisement on the computer, in  
7 the case of any advertising feature contained in the computer  
8 software; and
  - 9 (c) the initial transmission of information or messages, in the case  
10 of any distributed computing feature contained in the  
11 computer software; and
  - 12 (d) the initial modification of user settings, in the case of any  
13 settings modification feature.

14 *Other exceptions*

- 15 (2) Sections 6 and 7 do not apply to any feature of computer software  
16 that is reasonably needed:
- 17 (a) to provide capability for general purpose online browsing,  
18 electronic mail or instant messaging, or for any optional  
19 function that is directly related to such capability and that the  
20 user knowingly chooses to use; and
  - 21 (b) to determine whether or not the user of the computer is  
22 licensed or authorised to use the computer software; and
  - 23 (c) to provide technical support for the use of the computer  
24 software by the user of the computer.