

**立法會**  
**Legislative Council**

LC Paper No. CB(1)399/06-07  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/4/05/2

**Bills Committee on Unsolicited Electronic Messages Bill**

**Minutes of the seventh meeting on  
Tuesday, 21 November 2006, at 10:45 am  
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Howard YOUNG, SBS, JP (Chairman)  
Hon SIN Chung-kai, JP  
Hon Andrew LEUNG Kwan-yuen, SBS, JP  
Hon WONG Ting-kwong, BBS  
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon James TO Kun-sun  
Hon Jasper TSANG Yok-sing, GBS, JP  
Hon Emily LAU Wai-hing, JP
- Public officers attending** : Mrs Marion LAI, JP  
Deputy Secretary for Commerce, Industry and Technology  
(Communications and Technology)
- Mr Tony LI  
Principal Assistant Secretary for Commerce, Industry and  
Technology (Communications and Technology) B
- Mr Franco KWOK  
Assistant Secretary for Commerce, Industry and  
Technology (Communications and Technology) B1
- Mr SO Tat-foon  
Assistant Director of Telecommunications (Support)
- Mr Jeffrey GUNTER  
Senior Assistant Law Draftsman  
Department of Justice

Miss Leonora IP  
Senior Government Counsel  
Department of Justice

**Clerk in attendance** : Ms Anita SIT  
Chief Council Secretary (1)4

**Staff in attendance** : Ms Connie FUNG  
Assistant Legal Adviser 3

Mr WONG Siu-yee  
Senior Council Secretary (1)7

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Action

- I Confirmation of minutes**  
(LC Paper No. CB(1)277/06-07 -- Minutes of meeting on 7 November 2006)

The minutes of the meeting held on 7 November 2006 were confirmed.

- II Paper issued since last meeting**  
(LC Paper No. CB(1)275/06-07(01) -- Issues requiring follow-up action/consideration by the Administration (Position as at 20 November 2006))

2. Members noted the paper issued since last meeting.

- III Meeting with the Administration**  
(LC Paper No. CB(3)735/05-06 -- The Bill  
LC Paper No. CB(1)2306/05-06(03) -- Marked-up copy of the relevant statutory provisions to be amended by the Bill  
LC Paper No. CB(1)202/06-07(01) -- Extracts of relevant statutory provisions  
LC Paper No. CB(1)2306/05-06(01) -- Letter dated 1 September 2006 from Legal Service Division to the Administration  
LC Paper No. CB(1)2306/05-06(02) -- Reply letter dated 22 September 2006 from the Administration to Legal Service Division

Action

- LC Paper No. CB(1)168/06-07(03) -- Letter dated 13 October 2006 from Legal Service Division to the Administration
- LC Paper No. CB(1)168/06-07(04) -- Reply letter dated 25 October 2006 from the Administration to Legal Service Division)

3. The Bills Committee deliberated (index of proceedings attached at **Annex**).
4. The Administration was requested to –
  - (a) report whether an attempt to send unsolicited commercial electronic messages, which were not sent in the end but the content of which was not in compliance with certain requirements stipulated in the Bill, would constitute a contravention under the Bill;
  - (b) report on the proposed amendment to clause 8 to add a provision similar to clause 7(1)(c) to provide that the unsubscribe facility must comply with the requirements specified in the regulations to be made by the Secretary for Commerce, Industry and Technology;
  - (c) review the appropriateness of including "recklessly" as an alternative *mens rea* to "knowingly" for offences proposed in Part 3 of the Bill; and
  - (d) review the appropriateness of regulating the sending of "multiple commercial electronic messages" vis-à-vis "commercial electronic messages" without prescribing any threshold in clause 19.

**IV Any other business**

5. The Chairman requested the Clerk to identify possible meeting dates in January 2007 for consideration.
6. Members noted that the next meeting would be held on Tuesday, 28 November 2006, at 10:45 am.
7. There being no other business, the meeting ended at 12:40 pm.

**Proceedings of the seventh meeting of the  
Bills Committee on Unsolicited Electronic Messages Bill  
on Tuesday, 21 November 2006, at 10:45 am  
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000324	Chairman	Confirmation of minutes of the meeting held on 7 November 2006 (LC Paper No. CB(1)277/06-07)	
000325 - 001319	Chairman Mr WONG Ting-kwong Administration	Continuation of clause-by-clause examination of the Bill  Clause 3  Seeking clarification on the meaning of "Hong Kong company" in clause 3(1)(b)  The Administration's explanation	
001320 - 001832	Mr SIN Chung-kai Administration Chairman	Enquiry on whether the access to commercial electronic messages by visitors in Hong Kong would be covered by the Bill and concern about the manpower requirement for enforcement if that was the case  The Administration's response that the situation would fall within the definition of Hong Kong link and therefore would be covered by the Bill. Australian experience indicated that the manpower requirement for enforcement under a targeted approach would not be significant	
001833 - 002322	Chairman Administration Mr WONG Ting-kwong	Clause 4  Enquiry on whether the sending of messages containing viruses would be regulated under the Bill  The Administration's response that the Bill would apply to commercial electronic messages only	

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		<p>Seeking clarification on the meaning of "commercial electronic message" in clause 4(2)</p> <p>The Administration's explanation</p>	
002323 - 002548	<p>ALA3 Chairman Administration</p>	<p>ALA3's reference to the use of the expression "unless the contrary is proved" in clauses 4(4) and 4(5)</p> <p>The Administration's clarification that the two clauses provided for presumption that telecommunications services providers or the owners or authorized users of telecommunications devices, services or networks had not sent or had not authorized to send the message unless the contrary was proved. The expression of "unless the contrary is proved" in the two clauses was considered appropriate</p>	
002549 - 004049	<p>Mr WONG Ting-kwong Administration Chairman Mr SIN Chung-kai</p>	<p>Enquiry on "cause to be sent" in clause 4(1)</p> <p>The Administration's response that the wording could cater for circumstances such as outsourcing of the sending of commercial electronic messages by one company to another company</p> <p>Enquiry on whether an attempt to send unsolicited commercial electronic messages, which were not sent in the end but the content of which was not in compliance with certain requirements stipulated in the Bill, would constitute a contravention under the Bill</p> <p>The Administration's response that clause 4(1) should be interpreted in the context of other provisions of the Bill; and it would provide a detailed response to the above enquiry</p>	<p>The Administration to provide a detailed response</p>

Time marker	Speaker	Subject(s)	Action required
004050 - 005100	Chairman Mr WONG Ting-kwong Administration	<p>Clause 5</p> <p>Enquiry on whether giving consent to the sending of commercial electronic messages to an applicant's electronic address through an application form, such as a credit card application form, would fulfil the requirements in clause 5(2)</p> <p>The Administration's response that if the application form included the relevant terms and conditions and the applicant had signed the form to indicate acceptance of the terms, express consent would be deemed to have been given by the applicant</p>	
005101 - 005655	Chairman Administration	<p>Clauses 6 to 7</p> <p>The Administration's advice that as reported at the last meeting, it might propose some amendments to Schedule 1 to clarify that certain forms of information provision, such as web traffic, would not be regulated under the Bill</p>	
005656 - 005912	Mr WONG Ting-kwong Administration	<p>Enquiry on clause 7(2)(b) in relation to "reasonable diligence"</p> <p>The Administration's explanation that the wording would cater for circumstances in which the sender did not know that a message had a Hong Kong link even though the sender had already exercised some caution in taking steps to ascertain whether the message had a Hong Kong link, such as checking the customers' records kept by the company</p>	
005913 - 010107	Chairman Administration	<p>Clause 8</p> <p>The Administration's advice that as reported at the last meeting, it would propose an amendment to shorten the</p>	

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		<p>retention period for unsubscribe requests to 3 years</p> <p>Reference to views of some deputations that users should be able to unsubscribe with ease</p> <p>The Administration's advice that it would propose an amendment to add to clause 8 a provision similar to clause 7(1)(c) to make it clear that contraventions to the regulation to be made for specifying the requirements for unsubscribe facility would also be subject to enforcement notice</p>	<p>The Administration to report</p>
010108 - 010650	<p>Chairman Mr WONG Ting-kwong Administration</p>	<p>Clauses 9 to 10</p> <p>Enquiry on clause 10(4)(b) in relation to "reasonable diligence"</p> <p>The Administration's response that similar to clause 7(2)(b), the same criteria would also be applicable to this clause, i.e. whether the sender had exercised some caution in taking steps to ascertain whether the message had a Hong Kong link</p>	
010651 - 010938	<p>Chairman Administration</p>	<p>Clause 11</p> <p>Enquiry on whether commercial electronic messages sent without a subject heading was covered by clause 11</p> <p>The Administration's response that those messages would not be covered by clause 11 and it would be up to the recipient to decide whether to read those messages under such circumstances</p> <p>Clause 12</p> <p>The Chairman's remark that members</p>	

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		<p>did not have a consensus on the scope of application of clause 12</p> <p>The Administration's advice that it would maintain its position of excluding person-to-person interactive telemarketing calls from the application of the Bill and would be prepared to review the situation after the Bill had come into operation for a period of time</p> <p>Clauses 13 to 14</p> <p>Enquiry on the circumstances under which the supply of "address-harvesting software" would be an offence</p> <p>The Administration's elaboration on clause 14 and advice that the sale of address-harvesting software <i>per se</i> would not be an offence under the Bill</p>	
010939 - 011047	ALA3	ALA3's reference to two types of offences (i.e. strict liability offence and full <i>mens rea</i> offence) under clauses 14(2) and 14(3) respectively	
011048 - 011500	Mr SIN Chung-kai Administration Chairman	<p>Enquiry on whether regulation of supply of address-harvesting software was a common practice in overseas jurisdictions</p> <p>The Administration's response that Australia and Singapore had similar provisions in their anti-spam legislation/bill</p>	
011501 - 011640	Mr SIN Chung-kai Administration	<p>Enquiry on whether address-harvesting from an internal database would be regulated under the Bill</p> <p>The Administration's reference to the definition of "address-harvesting software" in clause 13(1) and advice</p>	



Time marker	Speaker	Subject(s)	Action required
		that address-harvesting from an internal database would not be regulated under the Bill	
011641 - 011929	Chairman Mr SIN Chung-kai Administration	<p>Clause 15</p> <p>Enquiry on why a defence was provided in clause 15(4)</p> <p>The Administration's response that the defence would cater for circumstances in which the person who acquired a harvested-address list, even though he/she had taken all reasonable precautions and exercised all due diligence, might not be able to prevent the use of the list for sending commercial electronic messages that had a Hong Kong link without the consent of the registered users of the electronic addresses to which they were sent</p> <p>Clauses 16 to 17</p> <p>Enquiry on why imprisonment for 2 years was proposed in clause 17(2) for contravention of clause 17(1)</p> <p>The Administration's response that clause 17 regulated the sending of commercial electronic messages to electronic address obtained using automated means such as "dictionary attacks". As there was a clear intention of the sender to engage in illicit acts, an imprisonment provision was provided to serve as a deterrent</p>	
011930 - 012954	Chairman Mr Ronny TONG Administration	<p>Clause 18</p> <p>Enquiry on why clause 18(1) applied to "multiple commercial electronic messages" only and concern about spammers circumventing the requirements by registering electronic mail addresses and sending</p>	

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		<p>commercial electronic messages just below the threshold as proposed in clause 13(2)</p> <p>The Administration's response that the clause was drafted by making reference to the CAN-SPAM Act of the United States. Part 3 of the Bill specifically targeted at sophisticated spammers, and to ensure clarity with regard to the circumstances to which the provisions applied, it was necessary to specify the number of commercial electronic messages sent</p>	
012955 - 014007	Mr Ronny TONG Chairman Administration	<p>Enquiry on the need to include the concept of "recklessly" in the offence provisions in Part 3 of the Bill</p> <p>The Administration's response that there were two types of offences in Part 3 of the Bill, i.e. strict liability offences and full <i>mens rea</i> offences, and a defence was provided for the strict liability offences except for the offence under clause 18(2)</p> <p>View that the Administration should review the appropriateness of including "recklessly" as an alternative <i>mens rea</i> to "knowingly" for the offences proposed in Part 3 of the Bill</p> <p>The Administration's undertaking to review the matter</p>	The Administration to report
014008 - 014303	Mr SIN Chung-kai Administration Chairman	<p>Enquiry on which clause was aimed to regulate forging of email sender identification</p> <p>The Administration's response that clause 23 was aimed to regulate such an act</p>	

Time marker	Speaker	Subject(s)	Action required
014304 - 015059	Mr Ronny TONG Administration Chairman	<p>View that the word "multiple" in clause 19 should be removed. If there was the intent to deceive or mislead, the relaying or retransmission of even a single commercial electronic message should be an offence</p> <p>The Administration's response that clause 19 was aimed to regulate sending of multiple commercial electronic messages through open proxies/relays and it was drafted by making reference to the CAN-SPAM Act of the United States</p> <p>The Administration's undertaking to review the appropriateness of regulating the sending of "multiple commercial electronic messages" vis-à-vis "commercial electronic messages" without prescribing any threshold in clause 19</p>	The Administration to report
015100 - 015252	Chairman	<p>Completion of clause-by-clause examination of the Bill up to clause 19(2)(b)</p> <p>Schedule of meetings in January 2007</p>	The Clerk to consult the Chairman on possible dates