

**Submission of PCCW-HKT Telephone Limited
to the Bills Committee
on the Unsolicited Electronic Messages Bill**

3 October 2006

PCCW-HKT Telephone Limited (PCCW) commented on the Consultation Paper on the Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages (Consultation Paper) issued by the Commerce, Industry and Technology Bureau on 20 January 2006. PCCW has previously provided comments on the consultation (attached) and these comments only address the proposed changes and debate in Legislative Council as well as the Bill itself.

I Introduction

1. PCCW-HKT Telephone Limited (PCCW) welcomes the opportunity provided by the Legislative Council Bills Committee to comment on the Unsolicited Electronic Messages Bill published in the Gazette on 7 July 2006.
2. PCCW has read the amendments to the Consultation Paper, made after industry comments provided to the Government on 28 March 2006. The proposed Bill is an improvement on the initial proposals however PCCW does have several concerns that are set out below.

II General Issues

- 1 PCCW would like to respond to the debate, before the Bills Committee on 27 September 2006, in which it was suggested Government should consider including ‘cold-calling’ in the proposed legislation. PCCW cannot agree with this suggestion as it would be an unwarranted restriction on trade and would also be against the spirit of the current legislative proposals.
2. PCCW, with respect, supports the Commerce, Industry and Technology Bureau’s position that normal commercial telemarketing activities should not be covered by the legislation. Hong Kong is one of the final bastions of free trade in the world and its leading position has been established by the initiative, enthusiasm and hard work ethic that has made Hong Kong Asia’s World City. To restrict this free trade ethos would at this time send entirely the wrong signal to Hong Kong’s regional competitors and suppliers. In addition it is essential to note, as others have, that the limits Hong Kong can place on unsolicited electronic messages are restricted by the fact that much of the activity originates from outside Hong Kong.

III Comments on Changes to Initial Draft

1. Section 3(1)(c) of the Bill defines a commercial electronic message (CEM) as having a Hong Kong link if the telecommunications device that is used to access the message is located in Hong Kong. It is intended that the scope of the Bill will be expanded to include CEMs (without a Hong Kong connection) sent by overseas senders to overseas electronic addresses accessed by any telecommunications device in Hong Kong. As the senders, and mail servers of these electronic messages are overseas, the administration will need to rely heavily on the efforts and co-operation of overseas authorities to investigate complaints lodged with the Telecommunications Authority (TA).
2. A significant change from the original legislative proposal is that when sending a CEM, the sender is required to include accurate sender information and include an unsubscribe facility even if the sender and recipient have

agreed otherwise. This means that operators and their subscribers cannot contract out of these requirements (e.g. by amending the terms and conditions upon which they contract). It would be better for commercial operators if sub-sections 7(2) and 8(2) were amended so that the requirements do not apply where the recipients consent.

3. The original legislative proposals contemplated the unsubscribe facility listing out the types of CEMs that the recipients can choose not to receive (e.g. SMS, fax or e-mail or even by different product types). Sections 8 and 9 of the Bill contemplate the unsubscribe facility applying to all CEMs. Often subscribers only want to opt out of specific product direct marketing or via a particular electronic address and therefore this flexibility should be maintained in the legislation, consistent with the flexibility in the do-not-call registers that permit multiple lists for different kinds of electronic addresses in sub-section 30(3).
4. The Bill does not deal with the overlap between section 34 of the Personal Data (Privacy) Ordinance (PDPO) (direct marketing opt outs) and the requirements in section 8. This will lead to wasted public resources and other inconsistencies. For example, a breach of section 8 might lead to an Enforcement Notice (EN) being issued by the TA whereas the same conduct might be a criminal offence under section 34 of the PDPO.
5. It is good that the Appeal Board is given the discretion to suspend the operation of an EN issued by the TA (section 46(1)(i)). However there are no procedural provisions to make it practical for the Appeal Board to be in a position to suspend prior to when compliance is required for the EN and therefore procedures are required to provide certainty for operators as to how these sections will work (in practice).
6. The seven year retention of unsubscribe requests is unnecessarily long.
7. There is no provision made for compensating operators (or others) that provide assistance to OFTA in their investigations and there needs to be an adequate mechanism to allow operators to recover their costs of assisting government in its investigations.
8. The TA has extensive powers of making arrest without the need for a warrant. These powers should be curtailed and only be exercised with a warrant and make it mandatory that OFTA use the police when choosing to exercise these powers.

**Consultation Paper on the Legislative Proposals to
Contain the Problem of Unsolicited Electronic Messages**

Consultation Response

28 March 2006

*PCCW-HKT Telephone Limited (PCCW) comments on the Consultation Paper issued
by the Commerce, Industry and Technology Bureau on 20 January 2006*

I Introduction

1. PCCW-HKT Telephone Limited (PCCW) welcomes the opportunity to provide its comments on the *Consultation Paper on the Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages* (Consultation Paper) issued by the Commerce, Industry and Technology Bureau on 20 January 2006.
2. PCCW, as Hong Kong's largest supplier of telecommunications solutions, has a vested interest in supporting the reduction of unsolicited electronic messages (UEM). In recent years, Spam has grown from a significant annoyance to a major global concern that poses a real threat to e-communications reliability and e-commerce development. More importantly Spam is linked to a myriad of serious criminal activity including fraud, theft and other crimes. An appropriately drafted Unsolicited Electronic Message Bill is therefore necessary for the protection of all e-address users in Hong Kong and the region.
3. PCCW is Hong Kong's largest fixed network operator and ISP. PCCW is required to deal daily with the UEM problem, and the enormous expense that UEMs place on operators. These expenses may be reflected in greater network and filtering costs, as well as in increased customer care requirements. PCCW agrees with the steps suggested in the consultation and suggests that an even more comprehensive approach may in time be needed to combat UEMs. Enactment of the UEM Bill is an important first step in combating UEMs and, together with international partnerships with other like-minded jurisdictions, will form an important plank in combating the spread of UEMs.
4. As the government acknowledges in its consultation, legislation is only one of the steps in the process of reducing Spam and other measures are needed to ensure the most robust and coherent solution to stamping out UEM is effected. PCCW, and industry, are currently working closely with the Telecommunications Authority (TA) to develop industry codes to reduce the most prolific of UEMs, machine-generated unsolicited promotional telephone calls to fixed and mobile customers. Government may also consider sponsoring incentives to encourage software houses to develop better anti-spamming solutions. Educating the public is also pivotal to reducing Spam, as is working closer with overseas authorities to ensure a cohesive international solution.
5. In May 2005 the industry estimated that more than 99% of the email Spam received by Hong Kong email servers originated from overseas. The USA (19%) and South Korea (26%), notwithstanding their anti-spamming laws, accounted for 45% of the email Spams arriving in Hong Kong. The Mainland is now seen to be another major source of Spam. It is evident that legislation, at the national level alone, is not an effective means to reduce spamming. Effective bilateral or multilateral agreements must be established, fully supported by robust enforcement action, to supplement national legislation to clamp down cross-border spamming.

6. Globally inroads are being made in reducing Spam, and increasingly other countries are promulgating strong laws to outlaw spammers. Hong Kong's Ordinance must dovetail with these international measures and indeed the greater the symmetry among the statutes the greater the level of bilateral and multilateral co-operation there will be. Furthermore, the statutory framework should strike the right balance between the enforcement cost and the effectiveness of the legislation. Stakeholders need to be satisfied that development of e-marketing will continue unheeded, public annoyance will be reduced and affected parties, including network operators, are fairly compensated. PCCW's concerns, and specific comments (following the consultation numbering) are listed below.

II The Objectives and Guiding Principles; Scope and Application of the Proposed Legislation

7. PCCW supports the introduction of a statutory framework relating to the sending of unsolicited commercial electronic messages (CEM). Such a bill can strike the right balance between stakeholders while protecting both users and service providers. A bill that is pragmatic in its reach, promotes international co-operation, protects relevant rights and has sufficient enforcement powers is both timely and appropriate.
8. Following other economies that have introduced legislation to combat UEMs, Hong Kong policy-makers plan to introduce the UEM Bill. In order to catch any UEM with a Hong Kong link, the UEM Bill requires a Hong Kong nexus either by the UEM originating, terminating or passing through Hong Kong. PCCW supports this approach as it facilitates authorities ability to track spammers.¹ PCCW supports the erection of a Hong Kong nexus for messages that are sent through Hong Kong or otherwise have a connection to Hong Kong (see paragraphs 26(b) and (d) of the Consultation Paper). However, PCCW would note that for electronic messages using packet technology and multiple paths routing paths this may need to be more clearly defined (paragraph 26(b)). Similarly paragraph 26(d) needs to be more clearly defined as it involves UEMs that have no physical connection to Hong Kong.

III The Rules

9. PCCW supports the introduction of an opt-out regime as striking the right balance. While an opt-out regime may be of little actual utility for Spam e-mail, it will in the form of 'do-not-call' registers be a welcome and fair reaction to voice, fax and SMS Spam which is primarily local in origin. A functional unsubscribe facility which mirrors other jurisdictions should also be adopted, as this represents global best practice and will enhance international cooperation.

¹ 90% of worldwide Spam use offshore servers to disguise their identity and complicate the tracking process. Cross-border cooperation is necessary.

10. One issue not addressed by the Consultation Paper is the relationship between traditional voice Spam and VoIP voice Spam. That is, previously the use of voice (and fax) for Spam has been a local issue addressable by local do-not-call/fax lists. VoIP changes this and requires a response.
11. VoIP technology allows subscribers to make telephone calls using a data network such as the Internet which, as a global network, can disguise or hide the geographical/physical location of the VoIP user. The advent of VoIP means that the delivery platform for telephony is no longer restricted to the traditional location specific public switched telephone network.
12. The TA cannot currently trace or monitor the origins of VoIP calls including those with a Hong Kong nexus that would fall within the ambit of the UEM Bill. To ensure compliance with the UEM, and facilitate tracing, the Office of the Telecommunications Authority (OFTA) needs to mandate VoIP licensees and other licensees handling VoIP calls submit duly certified quarterly VoIP traffic reports (including traffic distribution between Hong Kong and overseas IP addresses), and that licensees be required to submit declarations that Hong Kong telephone number subscribers have physical Hong Kong addresses.

IV General Issues

Alignment with the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO)

13. The relationship between the PDPO and the UEM Bill must be clear and remove any inconsistency between the regulation of data for privacy reasons, and data used by spammers. Provision needs to be made, to make clear in what circumstances it may be appropriate to issue Enforcement Notices under both the UEM Bill and the PDPO.

Record Retention

14. The 7 year requirement is too long and places a substantial administrative burden on e-marketers. The TA is required under the Bill to take prompt action, which presumably includes seeking functional unsubscribe facility notification records. In contrast section 171 of the Securities and Futures Ordinance (Cap. 571) provides for a 1 year retention period for records of short selling orders. Considering the gravamen of the respective illicit conduct, a similar period for UEM retention of records may be appropriate.

Do-not-call Registers

15. PCCW supports the principal that e-marketers must not send CEMs to e-addresses on do-not-call registers. The exception to do-not-call registers is when the customer has consented to receive material. The form of consent should include those circumstances where a customer has asked their service provider to receive certain marketing material and thereby falls outside the scope of a UEM Bill. Licensees should be compensated for the cost of updating government registers and the Bill should make provision to allow such cost recovery from the TA. To

ensure the integrity of the register, when an e-address user changes address, the user must bear the onus of informing the TA.

Misleading Subject Heading

16. To avoid disputes over what amounts to what is misleading, and for easy identification of CEMs, the UEM Bill should follow best international practice (e.g. South Korea and Singapore) and require commercial emails to include the letters 'ADV' before the subject heading.

Address Harvesting

17. Telecommunications licensees use scripts or programs, of e-addresses from known data bases including previously assigned number blocks and their existing lists, for random or representative sampling marketing activities. These lists need to be excluded from the UEM Bill as they use information freely provided, as compared to Spam lists that use spamming software to harvest subscriber information from unknowing subscribers.

Fraud

18. The most damaging class of Spam is that which directly or indirectly obtains a customer's money/assets by way of fraud. It is therefore important that this type of fraud (e.g. hacking, harvesting and phishing) be fully included in the existing fraud and theft provisions of the criminal code.

V Specific Provisions

Paragraphs 19 and 20

19. The Consultation distinguishes between commercial and non-commercial electronic messages from government, political parties, religious groups, charities and the like. It is suggested that a cross reference of the definition of charity should be added for easy reference. A list of recognized charities is available under the Inland Revenue Ordinance (Cap. 112).

Paragraphs 23 and 29

20. The requirement to exclude calls with no pre-recorded elements may be too stringent. An increasing number of marketing calls includes some "pre-recorded" element (such as an Interactive Response System for keying in recipient's information) and it is useful that customers continue to receive these messages.

Paragraph 29

21. The Bill should clearly define the constituent words of a UEM including what constitutes an 'unsolicited' electronic message. Paragraph 29(d) and other relevant parts, should specify that 'solicited' CEMs are excluded from the UEM Bill. The Code of Practice for Handling Complaints against Senders of

Unsolicited Fax Advertisements (issued by the TA) ensures only 'unsolicited', are cause for concern.

Paragraph 50

22. The Consultation provides for first time offenders to receive a warning and the Bill needs to specify objective criteria as to what amounts to 'inadvertent' to ensure this provision is not abused. As part of any educational effort, efforts should be made to reach out to local voice, fax, SMS and email marketing companies.

Paragraphs 85(h) & (i)

23. The TA needs to be adequately resourced to fulfill his new functions. Currently the TA it is not equipped with the legal or investigative skills essential to make the UEM Bill successful and to enable OFTA to successfully work, on an equal footing, with its International partners in countering Spam. It is essential that OFTA be adequately resourced, including appropriate experts, to enable OFTA to better liaise with police and other local and international enforcement external agencies. To enhance the chances of full international cooperation, and because of criminal penalties, it may be appropriate to expand the role of the police and the courts in the investigative stage of any enforcement action.

Paragraph 85(j)

24. The Consultation proposes that the TA may be able to recover the whole or part of his investigation costs and expenses from a person convicted by the Court or through civil proceedings. Telecommunications operators should similarly be allowed to recover their costs incurred for assisting the TA in its investigation. The TA should make such funds available.

Paragraph 100 (a)

25. This provision is similar to s.64(9) of the PDPO except the UEM Bill in paragraph 100(a)(iv) requires a person to give the TA "any assistance that he may reasonably require". This "reasonable assistance" must be clearly defined with respect to the scope of the respective responsibility of the TA and the police.

Paragraph 100(e)

26. The defence in paragraph 100(e), the same as s.65 of the PDPO, should explicitly reference an employee and agent.

Paragraph 100(f)

27. It needs to be clear that a director and a partner liable are liable for the acts of his/her company and his/her partnership in connection with UEMs. The Bill should ensure that the veil of these companies would be lifted until the human directors are identified.

Paragraphs 100(g) & (h)

28. To protect telecommunications service providers' liability through the transmission process, including the sending, re-transmission, forwarding of the electronic messages, it is suggested that changes be made to the effect that "sent" be replaced by "transmitted or otherwise conveyed".

Paragraphs 100(k) and (l)

29. As a breach of a code of practice can be used as evidence to establish a matter that is in issue, formulation of the code of practice should be subject to transparent due process, including appropriate consultation. Due process, especially where criminal penalties may be imposed, must be fully protected.

Paragraphs 100(n)

30. PCCW welcomes this provision to clarify that s.24 of the Telecommunications Ordinance (Cap. 106) (TO) does not apply to acts done for the purposes of facilitating compliance with the UEM. To eliminate any potential liability under s.24(2)(b) of the TO, an additional subsection should be added:

"or (c) the proper and lawful operational management of a telecommunications service provider's network."

VI TO Sections

In order to ensure full licensee cooperation, sections of the TO may need to be amended. Otherwise, conflicting sections may exist. Further, all sections must be aligned with the Basic Law. These sections may include 23A, 24, 25, 27 and 27A.

VII Conclusion

PCCW looks forward to working with the Government and others in crafting appropriate legislation to combat UEMs.