



**Hong Kong CSL Limited and New World PCS Limited's joint
submission in response to the Unsolicited Electronic Messages
Bill introduced to the Legislative Council of the Hong Kong
Special Administrative Region of the People's Republic of China
6 October 2006**

1 Introduction

- 1.1 Hong Kong CSL Limited and New World PCS Limited (collectively “**CSL & NWM Group**”) are pleased to provide comments to the Bills Committee regarding the Unsolicited Electronic Messages (“**UEM**”) Bill as introduced to the Legislative Council of Hong Kong (“**the Bill**”).
- 1.2 The CSL & NWM Group have set out below an assessment of the Bill and its contents. Rather than discuss every section of the Bill, we have chosen to comment only on those sections of the Bill which are of concern.
- 1.3 The views of the CSL & NWM Group can be summarised as follows:
- 1.3.1 the definition of ‘commercial electronic messages’ needs to be to be carefully drafted to ensure that legitimate business communications are not improperly restricted;

- 1.3.2 the provisions of the Bill must be genuinely technology neutral in application;
- 1.3.3 the proposal to allow address harvesting software and harvested lists in connection with sending an UEM is not appropriate;
- 1.3.4 the Bill's provisions relating to 'do-not-call lists' needs to be re-drafted so as to provide certainty and clarity to the proposal;
- 1.3.3 the functional unsubscribe facility needs to be commercial viable and easily managed; and
- 1.3.4 the proposal relating to a director's personal liability should be re-examined so it is consistent with the common law standard.

2 General observations about the Bill

- 2.1 Having various interpretation provisions placed throughout the Bill makes it time consuming and cumbersome when referring to interpretations/ definitions. The CSL & NWM Group suggests that the Bill be redrafted to include all interpretation provisions under the one Part.
- 2.2 The Bill uses gender specific drafting which is inappropriate.

3 Section 2

- 3.1 The CSL & NWM Group agrees with the proposition that the Bill should only regulate commercial electronic messages (“**CEM**”) however; careful consideration must still be given as to how a CEM is defined to ensure that legitimate business communications are not improperly restricted.
- 3.2 Globally, one of the most important considerations and problems that have arisen from previously enacted UEM legislation is the need to arrive at an acceptable definition of what types of communications should be caught within the classification of a CEM.

3.3 The Bill must be re-drafted to ensure that a workable regime is created and its real purpose is achieved. If the Bill continues to adopt a broad definition of “*commercial electronic message*” it may capture legitimate service-related messages. The CSL & NWM Group believes that this may restrict some forms of legitimate and necessary customer communications. This is not nor should it be the aim of anti-spam enactments both in Hong Kong.

3.4 For example, service-related messages that the CSL & NWM Group believe are appropriate and important to send to customers which could, arguably, fall within the definition of a “*commercial electronic message*” and, therefore, be subject to restrictions under the Bill may include, but not be limited to:

3.4.1 “welcome” messages to a new customer explaining how to use the various features of their service;

3.4.2 messages which assist customers with their use of their service;

3.4.3 messages to thank customers for their custom and/or loyalty or provide them with a benefit at no extra charge or an invitation to events such as information nights;

3.4.4 messages notifying a customer of special offers and deals being offered on services they currently acquire or new functionality available for those services;

3.4.5 messages notifying a customer of new services which relate to services currently acquired by that customer. For example, where a customer is acquiring one service, we believe that notifying customers of bundled services incorporating the service already acquired would be appropriate;

3.4.6 factual messages that contain a link to a business website. For example, a message notifying a customer about price changes (increases and decreases) in

relation to the services currently acquired by that customer, and referring the customer to that business website for further details;

3.4.7 messages notifying a customer that their contracted service term is about to expire and explaining how they may extend this term; and

3.4.8 messages notifying a customer that they are approaching a usage limit that applies to their service and suggesting that they may wish to swap to a different plan with an increased usage limit (collectively hereinafter referred to as “**Acceptable Business Communications**”).

3.5 In our experience, failure to provide Acceptable Business Communications of this type can damage customer relationships and create frustration with the customer’s ongoing use and enjoyment of their service. Undoubtedly, similar customer experiences would occur in many other industries.

3.6 In particular, we understand many customers believe that loyalty to a particular service provider entitles them to be one of the first informed of special new offers, particularly for the types of services they currently acquire and related services. Unfortunately, the proposed Bill may restrict us in how it can notify customers of such new deals, services or service features.

3.7 The CSL & NWM Group again submits the way in which provision could be made for the above type of service related messages in the proposed Bill is to narrow the definition of “commercial electronic message” to exclude Acceptable Business Communications.

3.8 Businesses require prompt clarification regarding what forms of customer communication are permitted under the Bill. In the absence of further elucidation, businesses, under an improperly drafted Bill, might be hampered from sending customers many useful and necessary communications that would improve their

customers' use and enjoyment of their service and this will result in greater cost and time inefficiencies and consumer dissatisfaction.

3.9 As set out in its comments above, the CSL & NWM Group also believes that the Bill may place some undue restrictions on service-related messages sent by businesses to persons with whom they have an ongoing customer relationship. Further to its comments above, the CSL & NWM Group respectfully suggest that the definition of "commercial electronic message" also exclude messages:

3.9.1 sent by a business to persons with whom they have an existing business relationship; and

3.9.2 that relate to a service being provided by the business to that customer (whether or not they also contain additional promotional content).

3.10 Additionally, messages which are not related to the promotion of a commercial product or service (such as the sending of an invoice) or where the secondary or ancillary purpose of the message is to promote a commercial product or service (such as a message in an invoice about a new service) should be excluded from the definition of 'commercial electronic message'.

3.11 From paragraph 19 of the consultation paper released on 20 January 2006 by the Commerce, Industry and Technology Bureau ("**CITB**") on the "Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages" ("**Consultation Paper**") it appears that this is the intention of the CITB, however the 'primary purpose' element is missing from the definition of 'commercial electronic message' as set out in paragraph 29(c) of the Consultation Paper and from the definition of 'Commercial Electronic Message' in the Bill.

4 Section 8

- 4.1 The CSL & NWM Group proposes that the unsubscribe facility must be provided in the two official languages of Hong Kong (ie. in Chinese and English) and suggests that requiring businesses to ensure that no further UEM are sent to users who unsubscribe from receiving UEM 10 working days after the unsubscribe message is sent is too short a period given that businesses may have many systems which will need to be updated to effect the change. The CSL & NWM Group proposes that a period of 20 working days is stipulated as the relevant time period.
- 4.2 Additionally, the requirement of section 8(3) that the unsubscribe notices be kept for a period of seven years is extremely onerous and will place far too costly a burden upon operators. We respectfully suggest that this be shortened to 1 year.

5 Section 11

This section should include (in keeping with the terminology used in the Telecommunications Ordinance) a prohibition on ‘deceptive’ conduct as well as conduct that is likely to ‘mislead’.¹

6 Section 14

- 6.1 As previously stated at paragraph 4 of the submission of the CSL & NWM Group to the Consultation Paper, the CSL and NWM Group does not agree with the proposal to allow address harvesting software and harvested lists in connection with sending a UEM, as long as that software or list is used in compliance with the Bill.
- 6.2 It remains the opinion of the CSL & NWM Group that the provisions of the Bill legitimise and condone this practice, theoretically leading to an increase in the volume of UEM being sent within, to and from Hong Kong.

7 Section 31

- 7.1 It is not possible for the CSL & NWM Group to assess the practicality of this section as it does not provide details of the manner or mechanism via which the Telecommunications Authority (“TA”) must set up a do-not-call register.

8 Section 34

- 8.1 This section should be modified to clarify that in the event that the TA seeks an order pursuant to s.34(3), the resultant court proceedings must not be conducted on an *ex-parte* basis but rather the person named in the notice must have an opportunity to be present at the proceedings in which the order is sought.

9 Section 54

- 9.1 Regarding the Bill’s proposal on director’s personal liability as set out in section 54 it remains the opinion of the CSL & NWM Group that liability under civil actions should follow the common law standard, that is the liability attaches to an individual or corporation (or other entity eg. Partnership) where it can be reasonably shown (on the balance of probabilities) that they are the party responsible.
- 9.2 To create a situation where the liability is presumed to flow to a company director is untenable and would have the effect of adding a further burden to an already difficult and onerous role and is not conducive to commercial activity (ie. the destruction of the corporate veil) and may encourage industry participants to consider the registration of the entities offshore.
- 9.3 The presumption should be reversed so that a director is not to be held liable unless he or she has acted in a manner that suggests otherwise. Australia, which is regarded as having one of the toughest anti-spam legislative regimes in the world does not provide for the legislation to ‘lift the corporate veil’ as is now proposed in the Bill. The rationale behind adopting this approach is of particular importance culturally to a free market economy such as Hong Kong, and that is the preservation of the corporate veil is analogous to the promotion and growth of trade and commerce and so must be upheld.

¹ Section 7M, *Telecommunications Ordinance*, Cap. 106. See also s. 52, *Trade Practices Act 1974* (Aust.)

10 Confidentiality

- 10.1 The CSL & NWM Group does not regard any part of this submission as confidential and has no objection to it being published or disclosed to third parties.

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