

**Bills Committee on
Unsolicited Electronic Messages Bill**

**Administration's Response to the Issues
Raised at the Bills Committee meeting on 14 November 2006**

PURPOSE

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 14 November 2006.

ADMINISTRATION'S RESPONSE

Clause 8(3): Retention period for unsubscribe requests

2. This clause requires a sender of commercial electronic messages to keep a record of the unsubscribe requests received for at least 7 years. The original intent for prescribing a relatively long statutory retention period for unsubscribe requests is to facilitate victims of unsolicited electronic messages sent in contravention to the Bill to take civil action against the senders within 6 years after the contravention as permitted under the Limitation Ordinance (Cap. 347). The availability of records of unsubscribe requests would also facilitate law enforcement agencies to carry out investigations and may offer protection to the sender of commercial electronic messages who could provide a full record of such requests received, if it contends that the concerned unsubscribe request was never received. Nevertheless, we accept Member's argument that victims would unlikely take so long to initiate civil action, and that the requirement may impose too heavy a burden on businesses and e-marketers. Therefore, we agree to shorten the retention period to 3 years as suggested by the Bills Committee and would move the necessary committee stage amendments.

Schedule 2: Consequential amendment to section 24(2) of the Telecommunications Ordinance (Cap. 106)

3. The purpose of the proposed new section 24(2)(a) of the Telecommunications Ordinance (TO) is to make clear that telecommunications officers and service providers who undertake acts prohibited by the current section 24 of TO but for the purpose of complying with any law, including the Unsolicited Electronic Messages Bill (the Bill), would not be considered as having committed the offence. At the meeting of 7 November 2006, Members were concerned that the scope of application of this section would be too broad and suggested that it should be narrowed to apply to TO and the Bill only.

4. We have explained in our letter to LegCo's Assistant Legal Advisor dated 22 September that we currently do not envisage any specific laws other than TO and the Bill for which there might be a requirement for telecommunications officers to undertake activities that would contravene section 24 of the TO. The original purpose for referring to "any law" is to cover possible law which may need to be included for the same purpose in future. We agree to the Bill Committee's suggestion and would move the necessary committee stage amendments. Any future requirements for other laws to be covered would be dealt with in subsequent legislative exercises.

Clause 12: Application of requirement relating to calling line identification information to person-to-person telemarketing calls

5. A separate submission will be made on this item.

Australian Experience in Enforcement

6. In Australia, the Australian Communications and Media Authority (ACMA) is the enforcement agency of the Australian Spam Act 2003 (the Act) and the associated regulations. The focus of the Act is on

spam e-mail and short messages while voice calls and facsimile messages are not within the scope of the Act.

7. ACMA has set up an Anti-Spam Team (AST) comprising nine officers to handle complaints from the public and carry out investigation related to alleged contraventions of the Act, and to liaise with industry participants for the development of codes of practice. To make the best use of its resources and to maximize the effectiveness of the Act, ACMA has adopted a progressive and targeted approach to deal with contraventions with a view to identifying the major spammers and taking priority actions against them. When a report of spam is received, the AST will carry out initial screening. Follow-up actions will be taken on cases against which a number of complaints have been received and/or the contravention is continuing. Spams originating from outside Australia are not usually accorded high priority. For less serious cases, ACMA will issue informal e-mail warnings or warning letters.

8. Investigations will be carried out on the more serious cases, using a combination of forensic techniques and formal investigation standards. If there is sufficient evidence, the AST will recommend issuing enforceable undertaking¹, infringement notice², and/or taking other appropriate actions as provided for under the Act. Enforcement statistics of ACMA are set out at **Annex** for members' reference.

9. We understand that in the United States, the Federal Trade Commission, the enforcement agency of the CAN-SPAM Act, has adopted a similar approach to the handling of complaints and the initiation of investigations.

¹ Enforceable undertaking is an undertaking agreed by the party who contravened the law, often in smaller scale and/or is unlikely to continue the contravention. The party who signs the enforceable undertaking admits to the contravention and undertakes to ensure that it will not contravene the law again.

² An infringement notice would be issued to serious or persistent offenders. Apart from stating the contravention, the infringement notice also serves as a notice of fine to the offender. If the offender does not accept the infringement notice (and therefore the fine), the case can be brought to the court for settlement.

Exclusion of Web traffic and other mode of information provision in response to a request

10. It is the Administration's intention to clarify in the Bill that web traffic and other mode of information provision in response to a request (e.g. fax-back services) should be excluded from the application of the Bill. We will further report when the Bills Committee examines Schedule 1.

Clause 2: Definition of "Commercial electronic message"

11. LegCo's Assistant Legal Adviser suggested that an express provision should be provided in the Bill to clarify that, for the purpose of deciding whether an electronic message falls within the proposed definition of "commercial electronic message" in Clause 2, it is immaterial whether the goods, facilities, etc. existed and whether it is unlawful to acquire the goods, services etc. We agree in principle to this suggestion and will further report to the Bills Committee the proposed amendments in due course.

Communications and Technology Branch
Commerce, Industry and Technology Bureau
21 November 2006

Annex

**Australia Communications and Media Authority
Enforcement Statistics in respect of Spam Act 2003
(Apr 2004 to Dec 2005)**

Spams reported	740,000
Complaints received	3,870
Warning letters issued	9
Enforceable undertakings entered into	4
Fines imposed	5
Legal action initiated in the Federal Court	1