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22 September 2006

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Dear Ms FUNG,

Unsolicited Electronic Messages Bill

Thank you for your letter to our Tony LI dated 1 September 2006.

Set out below are our comments on your questions regarding the Unsolicited Electronic Messages Bill (the Bill).

Clause 2 – Proposed definition of "business"

The word "business" has a flexible meaning depending on the context. It can be used to refer to a type of occupation (hence the definition in this clause which defines it to include a trade or a profession). It is sometimes used to refer to a type of organization or economic unit. And it is sometimes used to refer to an activity having certain commercial characteristics. Drawing reference to the definition of "commercial electronic messages" and other provisions of the Bill where the word "business" is used and the explanatory Memorandum, it should be clear

that the Bill is intended to apply to activities that have a commercial aspect or purpose. However, we are aware that an activity which is conducted otherwise than for profits should not necessarily prevent it from being treated by the courts as a business for the purposes of the Bill[1]. We thus do not agree that interpreting the word "business" in the narrow sense of a "commercial transaction" should logically exclude "business conducted otherwise than for profit".

Clause 2 – Proposed definition of "commercial electronic message"

(a) Our intention is to focus on the nature of the content of the electronic message, i.e. whether it is of a commercial nature of not. The nature of the sending party is not relevant for our purpose. As such, an exemption list built upon the nature of sending party would not be applicable in our case.

(b) We consider that the ordinary meaning of the terms "goods", "investment" and "services" having regard to the context and purpose of the Bill should be sufficient and note that these terms are similarly not defined in the Singapore Spam Control Bill.

(c) Our intention is that it is immaterial whether the goods, and facilities exist or whether it is lawful to acquire the goods and services. We will further consider whether an express provision is required.

Clause 2 – Proposed definition of "organizations"

As explained in our comments on Clause 2 – Proposed definition of "business" above, the intention of the Bill is to focus on the contents of the electronic messages, regardless of the nature of the sending party. Therefore, organizations will be subject to regulation under the Bill if they send any electronic message which is a "commercial electronic message" as defined in the Bill.

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[1] In *Chan Yung Sing and Others V. Choi Chung Ching* (HCA4830/2002), the court ruled that although it is normally the case business is conducted with a view to profit, it is not a necessary requirement.

Clause 4

Our intention is to impose in clauses 4(4) and (5) an evidential burden to rebut the relevant presumption. We will review the wording of these clauses, as well as clause 29(3), to ensure consistency of the Bill.

Part 2 – Rules about sending commercial electronic messages

(a) Contraventions of the rules in Part 2 of the Bill are not offences *per se*, but those who contravened them could be subject to an enforcement notice issued by the Telecommunications Authority (TA) under clause 35 or civil proceedings initiated by those who suffer loss or damage by a contravention to the rules in Part 2 of the Bill initiated under clause 52. If there is an allegation of contravention of the rules in Part 2 of the Bill in any civil proceedings, or in the TA's consideration of issuing an enforcement notice, our preliminary view is that the burden of proving the relevant matter under the "non-application" provision should lie on the sending party according to the principle of balance of probabilities. We consider that an express provision may not be necessary. The Australian provision is not directly relevant because of their need to specify the burden of proof to a prosecution for a civil penalty.

(b) The policy intention is to adopt the ordinary meaning of the word "recipient" in the Bill, which covers whoever receives a commercial electronic message, including but not limited to the registered user of an electronic address to whom the message is sent. We do not consider a definition necessary.

(c) The purpose of clause 8(1)(c) is to require the sender of the commercial electronic message to provide a Hong Kong number instead of an overseas number, if the unsubscribe facility is a telephone or facsimile number, so that using such unsubscribe facility would not involve international telephone charges. Under the Telecommunications Ordinance (Cap. 106) (TO), the Telecommunications Authority (TA) is empowered to allocate or

assign telephone number (including facsimile number). However, other electronic addresses, such as e-mail addresses and instant message names, are not allocated or assigned by the TA. Usually, these e-mail addresses and instant message names are selected or created by the users themselves. As such, there is no question of specifying other electronic addresses allocated or assigned by the TA in the Bill.

(d) We are aware that unsubscribe statements etc. should be able to be understood by the recipients in order for them to take necessary action to unsubscribe from further messages. As such, there should be language requirements for such unsubscribe statements. To enable us to make necessary amendments quickly to such requirements in the light of technology development or rolling out of new telecommunications services, we propose to impose such requirements in the form of regulations under clause 56 to stipulate specific requirements for different forms of electronic messages having regard to their technologies and limitations. For example, for SMS messages which have a restricted capacity for displaying messages, they may not be able to display the unsubscribe statements bilingually which other type of messages can.

(e) Although not in a traditional/conventional form, the term "unsubscribe facility" is in effect defined in clause 8(1)(a)(i) of the Bill. This is not an unusual approach from the law drafting point of view.

Part 3 – Rules about address-harvesting and related activities

(a) The intention is that the offences which make express provision to "knowingly or recklessly" are full *mens rea* offences while the others, i.e. clauses 14(2), 15(2), 16(2), 17(2), and 18(2), are strict liability offences.

(b) The offence under clause 19(2) is not intended to be a strict liability offence. In clause 19(1), the expression *"with the intent*

to deceive or mislead recipients" is used with a view to creating a full *mens rea* requirement.

(c) The use of script or automated method to register for five or more email addresses, as described under clause 18(2), is a common technique employed by spammers. Such script or automated method has no use in common business environments except in circumstances as described in clause 18(4), and is not normally available commercially. We believe that anyone who has (i) equipped and used such tool of trade; (ii) sent out multiple commercial electronic messages and (iii) without the consent of the recipient can only be experienced spammer attempting to maximize the reach of their electronic messages, while at the same time trying to evade detection, tracing or correlation by spam filters or law enforcement agencies that all the messages are sent by the same person. We therefore consider that an offence of this nature should be a strict liability offence.

Clause 19(1) has already required the prosecution to prove the person's "intent" to deceive or mislead recipients. Therefore, clause 19(2) is not intended to be a strict liability offence and no defence provision is necessary.

(d) We are of the view that a person charged under clauses 14, 15, 16 or 17 can rely on the defence that he did not know or had no reason to suspect that an offence would be committed. What specific acts will constitute "all reasonable precautions" and "all due diligence" should be subject to determination by the court, having regard to the circumstances of individual cases. After all, those clauses concern address-harvesting software and harvested address lists. Given the potential damage caused by the mis-use of such software and/or lists, those who possess them should exercise caution.

(e) Our preliminary view is that the burden of proof should lie on the person seeking to avail himself of this exception. According to section 94A of the Criminal Procedure Ordinance (Cap. 221), the burden of proving "any exception or exemption from or

qualification to the operation of the law" lies on the person seeking to avail himself of the exception, exemption or qualification (i.e. negative averments). The standard of proof for negative averments under section 94A should be "on the balance of probabilities". In the light of Cap. 221, we consider that it may not be necessary to specifically provide for these matters in the Bill.

Part 4 – Fraud and other illicit activities related to transmission of commercial electronic messages

We consider that the word "procure" should be construed in its ordinary sense. This word is frequently used in other Hong Kong legislation, but it has never been defined in express terms. As regards the word "recipient", please see our comments in paragraph (b) of Part 2 - Rules about sending commercial electronic message above.

Part 5 – Administration and enforcement

(a) Since clause 28(10) already stipulated that a Code of Practice is not subsidiary legislation, it is our intention that the notices issued under clauses 28(3) and 28(7) relating to a Code of Practice should also not be subsidiary legislation. We will further consider if there is a need to make this clear in the Bill.

As a common practice, the Code of Practice issued by the TA will be published in the website of the Office of the Telecommunications Authority (OFTA). OFTA will, if necessary, consider making the Code of Practice available to the public through other channels. In addition, press releases could also be issued to announce issuing or cancellation of certain codes of practice, to facilitate wider community awareness.

We consider that the current formulation of clauses 28(3) and 28(7), which is modeled on sections 12(2) and 12(5) of the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO), has clearly reflected the legislative intent.

(b) It is our intention that the registered user of an electronic address will be able to check whether his/her electronic address has been included in the do-not-call register. The detailed design of the system for supporting the do-not-call registers will ensure that this feature will be present for use by the public. As it is an operational issue, we consider it inappropriate to include this requirement in the Bill.

(c) The offence under clause 32(3) is intended to be a strict liability offence. Similar to our comments on (d) of Part 3 above, we consider that what specific acts will constitute "all reasonable precautions" and "all due diligence" should be determined by the court, having regard to the circumstances of individual cases.

(d) We will consider adding new provisions in the Bill to sanction the telecommunications service provider who fails to comply with the direction issued by the TA under clause 33.

(e) Clause 34(2) is modeled on section 26 of the Broadcasting Ordinance (Cap. 562). It requires the TA to consider the representations made by the person who alleged he cannot or does not wish to comply with the notice served to him under clause 34(1). As a public body, the TA is under a public law duty to consider all relevant factors before making a decision. Since the person can allege any reasons as to why he cannot, or does not wish to comply with the notice, it is not feasible or appropriate to stipulate in the Bill the specific factors as this will confine the scope of the reasons that a person served with the notice may put forward in his representations. The TA will give reasons for his decision.

(f) The Bill does not prevent a magistrate from allowing a person to be heard at the hearing. You may wish to note that clause 34 is modeled on section 36D of the TO, whereby the right to be heard is not expressly stipulated.

(g) Given the cross boundary nature of spam, this clause is particularly important to enable our law enforcement agencies to exchange intelligence with their counterparts in other jurisdictions when necessary. This is similar to the approach provided under section 58(1)(a) of the PDPO.

(h) Currently, there is no anti-spamming international agreement imposing obligation on Hong Kong. In the light of rising concern over the problem of spam at the international level, we envisage that the scope of international cooperation will likely be strengthened in the future. This provision will provide clear and solid legal foundation for us to join any new international agreements under which signatories are required to exchange relevant information relating to spamming activities, including the prevention and detection of crime.

(i) Any recipient of the commercial electronic message can report to OFTA about the messages he has received if there is a suspected contravention of any of the rules about sending commercial message. Given the nature of unsolicited electronic message, experience in overseas anti-spam law enforcement agencies shows that there could be large numbers of reports, particularly on spam e-mail[2]. We understand that overseas law enforcement agencies would draw up suitable and targeted strategies to make best use of their resources to maximize the effectiveness of the law. Our tentative thinking is that OFTA should follow international practice and conduct analysis of all reports received in order to identify the major spammers for priority action. We are not aware that any overseas anti-spam legislation prescribing complaint handling procedures.

(j) The offence under clause 36(2) is intended to be a strict liability offence. We do not see it necessary to give any example in clause 36(3) since what specific acts will constitute "all due diligence" should be subject to determination by the court, having regard to the specific circumstances of individual cases.

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[2] For example, in Australia, about 740,000 complaints against spam were received during April 2004 to December 2005.

(k) As Clauses 38 and 34(3)(a) deal with substantially different matters, different thresholds have been applied. They are in line with the similar provisions in the TO, i.e. sections 35(2) and 36D(3).

Clause 52 – Claim for loss or damage

(a) Clause 52(1) has clearly prescribed that "a person who suffers loss or damage by reason of a contravention of any provision of this Ordinance" is entitled to bring proceedings to recover loss or damage. This includes contravention of rules under Part 2 of the Bill. The reference to "whether or not he has been convicted of an offence in relation to the contravention" further clarifies that the right of action is not dependent on whether that person has been convicted of an offence. We consider that the current formulation of this clause has clearly reflected our legislative intent.

(b) With the principles of "fair, just and reasonable" stipulated in clause 52(3), the court may take into account relevant factors that it thinks fit. We do not intend to stipulate the factors that the court may or may not consider in hearing a civil claim for loss or damage.

Clause 54 – Liability of directors, partners, etc

We will review the clause having regard to the deliberation of similar provisions in the Copyright (Amendment) Bill 2006.

Clause 56 - Regulations

The word "contemplates" is intended to refer to the regulations mentioned in clause 7(1)(c) of the Bill.

Schedule 2 – Proposed amendment to the Telecommunications Ordinance (Cap. 106)

(a) At present, e-mail service providers generally provide spam filtering service in order to block spam from reaching their customers. Section 24 of the TO is silent on whether such acts are permissible for the purpose of improving the performance of their networks or services, or whether such acts could be considered as breaching section 24 of the TO by virtue of blocking or filtering of telecommunications messages, even if it is requested by the recipient to do so. Since technical solution such as spam filtering is an essential component in the anti-spam campaign, we consider it necessary to make it crystal clear that such acts would not be considered as offences under section 24 of the TO.

(b) The proposed section 24(2)(a) is to make clear that telecommunications officers/service providers who undertake acts prohibited by the current section 24 but for the purpose of complying with any laws, including the Bill, would not be considered as having committed the offence. At this stage, we do not have in mind any other specific law the enforcement of which requires such exemption.

(c) An example in which section 24(2)(b) of Cap. 106 may be invoked is for an Internet Service Provider (ISP) to have an agreed terms of service condition with its subscribers to limit the number of email messages that can be sent per hour. If a spammer, using this ISP's service, sends out emails at a rate exceeding the limit, the ISP will simply block (or abstain from transmitting) the emails. Section 24(2)(b) is introduced to facilitate licensee to impose service conditions that can in effect provide protection to the recipients and Internet users in general.

Similarly email filtering service that intercepts spam messages according to content is an example for section 24(2)(c). Such service may be requested by an email recipient from an email service provider, as individual protection service for his email account.

Drafting matters

Although it is not common, the drafting practice adopted for the cross-references in the Bill is not entirely new. The same practice is adopted in the Copyright Ordinance (Cap. 528) and the Trade Marks Ordinance (Cap. 559). The purpose of this practice is to provide the reader with a brief description of the subject matter of the referenced section. The practice of adding such descriptive information to cross-references is followed in other jurisdictions such as Canada and the United States. The Department of Justice is currently considering whether to adopt the practice as the general norm for new Bills in the future.

Should you have further question on the above, please feel free to the contact the undersigned.

Yours sincerely,

(Franco KWOK)
for Secretary for Commerce,
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