

UPDATE: SPAM LEGISLATION

Bridget Edghill updates the developments in Spam Legislation in Australia and the United States of America

After the removal of amendments suggested by the Labor Party and Democrats, the Howard Government's *Spam Act* and *Spam (Consequential Amendments) Act* were passed unamended by the Senate on 2 December 2003.

As discussed by John Corker in "Spam Bill Almost Law", [Communications Law Bulletin](#), Vol 22, No 3 2003, a report of the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued on 31 October 2003 recommended that the Bills be agreed to without amendment.

THE PROPOSED AMENDMENTS

Both the Labor Party and Democrats had suggested amendments to the Bill. The amendments submitted by the Labor Party on 25 September 2003 and moved by Senator Kate Lundy most notably included:

- That not-for-profit political groups and trade unions be exempted from the legislation;
- That an electronic message is not a designated commercial message if the relevant electronic account holder has previously indicated that they do not wish to receive such messages;
- That a commercial electronic message is not unsolicited if at the time the message was sent, the sender had ascertained with reasonable diligence that the recipient had a specific commercial interest in receiving the message

The proposed amendments also sought to give new powers to the Australian Communications Authority (**ACA**), allowing them to search and seize computer equipment in the course of an inquiry.

The proposed amendments were removed by the House of Representatives and criticised by the Howard Government for weakening the legislation. The Democrats also criticised the proposed amendments, with Democrat Senator Brian Greig releasing a statement on 28 November 2003 claiming that, "loopholes in the legislation are big enough to drive a truck through."

THE MAIN FEATURES

With spam now accounting for approximately half of all e-mail worldwide, the new legislation seeks to combat spammers and the techniques they use, while at the same time protecting the right to free speech.

The main features of the new legislation include:

- A ban on the sending of unsolicited commercial electronic messages, to be enforced by the ACA;

- A prohibition on the sale, supply or use of electronic address harvesting software and lists generated from these for spamming purposes.

Also, in accordance with Part 2 of the Act, all commercial electronic messages must include:

- Accurate details of the sender's identity;
- An 'unsubscribe' function

Part 4 of the Act details the civil penalties that may be imposed for unlawful conduct under the legislation which include financial penalties and infringement notices.

A unique characteristic of the legislation is the provision for co-operation and negotiation with international organisations and the organisations of foreign countries to develop global guidelines and co-operative arrangements between countries. Such an agreement has already been created between the ACA and the Korea Information Security Agency with both parties signing a Memorandum of Understanding on 20 October 2003.

In addition to infringement notices for minor transgressions there are substantial penalties - including damages of up to \$1.1 million per day - in severe cases.

THE AMERICAN APPROACH

The United State has also recently adopted anti-spam legislation. The *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, also known as the CAN-SPAM Act (**CAN-SPAM**), was passed by the Senate on 25 November 2003 and agreed to by the House of Representatives on 8 December 2003.

There are some similarities between the Australian legislation and CAN-SPAM in that they both prohibit 'harvesting' e-mail addresses. CAN-SPAM also prohibits senders of commercial e-mail from:

- Disguising themselves;
- Using incorrect return e-mail addresses;
- Using misleading subject lines

People who contravene these provisions face criminal penalties. In addition CAN-SPAM contains unique provisions stipulating that spam be truthful. If an e-mail is found to breach these provisions, the government can fine the spammer US\$250 for each e-mail sent that was untruthful!

CAN-SPAM also leaves room for the creation of a "Do Not Spam Registry". This would be similar to the recent, and controversial, "Do Not Call Registry". A "Do Not Spam Registry" may in fact create greater controversy in the USA due to First Amendment Protection of commercial speech.

Both the Australian legislation and CAN-SPAM are very limited in their approach for the same reason – most spam, and in the case of the USA, most illegal or deceptive spam, comes from overseas.

Thus, without international co-operation and enforcement mechanisms, bringing international spammers to justice is likely to prove problematic, as will creating a global approach.