

# **Unsolicited Electronic Messages Bill**

Government Bill

As reported from the Commerce Committee

## **Commentary**

### **Recommendation**

The Commerce Committee has examined the Unsolicited Electronic Messages Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The bill implements the Government's decisions on the regulation of unsolicited electronic messages, commonly known as "spam". It aims to create a safe and secure environment in New Zealand for the use of information and communication technologies by minimising spam and the costs to the community and business that arise from it.

### **References to "promotional messages" deleted**

We recommend that all references to "promotional messages" be deleted. The bill as introduced provided different approaches to consent to the receipt of commercial and promotional electronic messages (opting in for commercial and opting out for promotional messages). We consider this would cause confusion and create uncertainty. Determining whether messages were primarily commercial or promotional would be problematic. We were also concerned that the distinction could be abused by people wishing to stretch the boundary between commercial and promotional messages in order to circumvent the opt-in requirement for commercial messages. We consider that the dual regime would unnecessarily

increase the complexity and costs of compliance for individuals and businesses, and is not necessary in the context of this legislation.

### **Requirement that complaints be directed to Internet service providers deleted**

We recommend amendments to clauses 23, 24 and 25 to remove the requirement that complaints from spam recipients be directed to Internet service providers. We were concerned that this requirement may have been seen as placing unreasonable burdens and significant enforcement costs on service providers. The intention is that service providers should carry out a good practice role in considering customer complaints as part of their existing contractual relationships. We expect that most users will continue, as a matter of practice, to first contact their service providers if they wish to complain about the receipt of unsolicited spam but we consider it inappropriate to require this as a legal obligation.

### **Role of enforcement agency expanded**

We recommend amendments to clauses 23 and 25 to expand and clarify the functions and powers of the central enforcement agency. Our recommendation to remove the requirement for complaints to be directed to Internet service providers (as discussed above) gives recipients of unwanted spam the ability to forward this directly to the enforcement agency. This addresses the concern of some submitters that the bill as introduced prevents the public from having access to the enforcement agency. So that a coordinated and centralised approach can be taken to dealing with these complaints, we recommend clarifying and expanding the role of the agency by giving it the functions of monitoring the industry (with respect to volumes and patterns of spam for example), taking public awareness and information dissemination action when required, and engaging in international cooperation and liaison. We consider these amendments would create a more workable and effective enforcement regime.

### **Gratuitous spam containing sexually oriented material**

We recommend amending clause 25 to further extend the functions of the enforcement department to allow it to monitor levels of gratuitous spam that contains sexually oriented material, whether or

not it is commercial in nature. We acknowledge that existing legislation already prohibits the sending of gratuitous spam containing material of a sexual and objectionable nature, and that the bill as introduced deals with spam of a sexual nature that has a commercial purpose. However, we remain concerned about unsolicited messages that are neither inherently commercial nor objectionable but that contain material of a sexual nature which might lure people into wanting to access further such material or into related activities. We believe that if the enforcement agency monitored the prevalence of this material it would be in a good position to contribute to future policy discussion, and give recipients a “user-friendly” means of making their concerns known to the agency.

### **Purpose clause amended**

We recommend amending the purpose clause to reflect the broad social and economic objectives of the bill. We consider that clause 3 as introduced does not accurately reflect the bill’s aim to create a safe and secure environment in New Zealand for the use of information and communication technologies by minimising the amount and cost of spam. Since this is a new piece of legislation dealing with unfamiliar concepts, clause 3 may be drawn upon to aid interpretation in the courts, and we consider that our amendment better reflects the purpose of the bill.

### **Messages containing links to websites**

We recommend amending the definition of “commercial electronic message” in clause 6 to capture messages that seek to market goods or services merely by providing links to other websites or messages. We consider it could be open to debate whether or not such messages have marketing or promoting as their purpose, and therefore whether or not they are included in the definition as introduced. We consider this amendment necessary to ensure the bill’s provisions extend to messages of this nature.

### **Transition period extended to six months**

We recommend amending clause 2 by extending the transition period before the bill takes effect from four to six months. Many submitters were concerned that four months is insufficient time for organisations to implement required changes. We agree with submitters, and consider a six-month transition period will ensure that

databases and software programmes can be properly checked and amended for compliance.

### **Unsubscribe facility at no cost via method of sending**

We recommend inserting 12(1)(ba) to require senders to provide an “unsubscribe” facility using the method by which the message was sent. We recommend inserting 12(1)(bb) to provide that recipients do not incur any costs in the process of unsubscribing. We consider these clauses necessary to ensure that the process of unsubscribing is simple and free of cost for the recipient.

### **Purposes of messages**

We recommend removing from clause 6 the requirement that marketing or promoting goods or services must be the primary purpose of the message. We are concerned that the requirement as introduced could lead to debate over exactly what constitutes the primary purpose of a message, and could inadvertently exempt some messages that are commercial in nature but can be interpreted as having another primary purpose. We consider the bill should catch all messages that seek to market or promote goods and services, and that our amendment provides clarity on the matter.

### **Timeframe included for removal of consent**

We recommend inserting new clause 9(1A) to provide that removal of consent to receive messages will take effect after five working days. The bill as introduced does not specify a timeframe within which “unsubscribe” requests become effective. We consider that the five day time-limit will provide certainty about compliance procedures to both senders and recipients.

### **Use of address-harvesting software**

We recommend deleting clauses 15 and 16 and inserting new clause 17A so that the bill refers only to the use of address-harvesting software, not to the supply or acquisition of that software. We consider the problematic activities are collecting, transferring and using electronic address information. We do not wish to prohibit lawful uses of such software, and our amendment makes it clear that the prohibition applies to the use of the software, rather than the software itself.

### **Search and seizure provisions amended**

We recommend several amendments to the search and seizure provisions in clauses 48 to 52. We understand there is some concern that generic search and seizure provisions currently used in legislation (and in this bill) are inadequate to cover the technical practicalities of searching computers, and that the Law Commission is working to update them. Our amendments align this bill with similar provisions in the Summary Proceedings Act 1957. We consider this necessary to ensure that search and seizure processes can be carried out effectively.

### **Enforcement officers**

We recommend amending clause 48(1) so that search warrants may be applied for by enforcement officers, rather than by the enforcement department. As a department of State, the enforcement department cannot apply for a warrant. Our amendment corrects this situation and gives effect to the policy intent. Consequentially, we recommend inserting a definition of enforcement officer in clause 4 and inserting provisions relating to the appointment, authority and powers of enforcement officers in new clauses 25A and 25B.

### **Appeals allowed on civil infringement notices**

We recommend inserting new clauses 33B and 33C to provide a right of appeal against civil infringement notices. We also recommend amending clause 54(f) to provide that the maximum penalty required by a civil infringement notice (to be specified in regulations) must not exceed \$2000. We were concerned that the bill does not give members of the public the right to object if they are dissatisfied with the decision of an enforcement officer regarding civil infringement notices, and that no upper limit on the penalty is specified. We consider our amendments will create a fairer enforcement regime.

### **District Court to hear matters under the legislation**

We recommend amendments to Part 3 to clarify when matters under the legislation should be heard by the District Court and when by the High Court. The bill as introduced provides that the High Court is the court to which matters are to be referred. We consider the District Court is the more appropriate court to hear such matters except when the amount claimed or the penalty sought exceeds

\$200,000, or if an injunction is being sought, in which case the High Court will have jurisdiction. We consider our amendments clarify this distinction.

### **Civil versus criminal enforcement regimes**

We decided to support a civil enforcement regime. However, it may be desirable for its efficacy to be reviewed at a future date, and consideration given to a criminal regime if necessary.

### **Industry should continue work to find a technical remedy to spam**

We welcome the contribution that this bill makes to combating spam but we note that it forms only one part of a multi-pronged approach that is necessary to tackle the problem. We do not consider that this bill in any way absolves the Internet service provider industry of responsibility for finding a solution. We encourage the industry to take a prominent and active role in working to reduce and eventually eliminate spam. We understand that a voluntary anti-spam code of practice has been developed by the industry for short messaging services to address concerns over marketing via this medium. The code establishes rules for suppliers relating to the sending of marketing messages. We also understand that the industry is intending to develop a similar code for email services. This code will not only establish rules for the sending of marketing messages but also procedures for dealing with complaints and appropriate software programmes and other technical remedies to filter spam.

### **Minor and technical amendments**

We recommend a number of minor and technical amendments to clarify and resolve issues that arose during the hearings of submissions and our consideration of the bill.

## **Appendix**

### **Committee process**

The Unsolicited Electronic Messages Bill was referred to the committee on 13 December 2005. The closing date for submissions was 31 March 2006. We received and considered 24 submissions from interested groups and individuals. We heard 10 submissions. We received advice from the Ministry of Economic Development.

### **Committee membership**

Katherine Rich (Chairperson)

Gordon Copeland (Deputy Chairperson)

Chris Auchinvole

Charles Chauvel (from 2 August 2006)

Shane Jones

Hon Luamanuvao Winnie Laban

Hon Mahara Okeroa (until 2 August 2006)

Maryan Street

Chris Tremain

Pansy Wong

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## Key to symbols used in reprinted bill

### As reported from a select committee

#### Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

#### New (unanimous)

Subject to this Act,

Text inserted unanimously

*(Subject to this Act,)*

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

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*Hon David Cunliffe*

# **Unsolicited Electronic Messages Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Unsolicited Electronic Messages Act **2005**.

**2 Commencement**

This Act comes into force (4) 6 months after the date on which it receives the Royal assent.

5

## Part 1

### Preliminary provisions

#### 3 Purposes of this Act

The purposes of this Act are to—

##### Struck out (unanimous)

- |     |  |    |
|-----|--|----|
| (a) | prohibit commercial electronic messages with a New Zealand link from being sent to people who have not given their prior consent to receiving those messages; and  | 5  |
| (b) | prohibit promotional electronic messages with a New Zealand link from being sent to a person who has withdrawn consent to receiving those messages; and  | 10 |
| (c) | require all commercial and promotional electronic messages to include accurate information about the person who authorised the sending of the message; and   | 15 |
| (d) | require all commercial and promotional electronic messages to contain a functional unsubscribe facility; and   | 20 |
| (e) | prohibit address-harvesting software and any electronic address list produced using that software from being supplied or acquired for use, or being used, in connection with sending unsolicited commercial electronic messages, or promotional electronic messages, in contravention of this Act. | 20 |

##### New (unanimous)

- |       |   |    |
|-------|---|----|
| (a)   | prohibit unsolicited commercial electronic messages with a New Zealand link from being sent, in order to—   |    |
| (i)   | promote a safer and more secure environment for the use of information and communications technologies in New Zealand; and                                  | 25 |
| (ii)  | reduce impediments to the uptake and effective use of information and communications technologies by businesses and the wider community in New Zealand; and | 30 |
| (iii) | reduce the costs to businesses and the wider community that arise from unsolicited commercial electronic messages; and                                      |    |

**New (unanimous)**

- (b) require commercial electronic messages to include accurate information about the person who authorised the sending of the message and a functional unsubscribe facility in order to enable the recipient to instruct the sender that no further messages are to be sent to the recipient; and 5
- (c) prohibit address-harvesting software or a harvested-address list from being used in connection with sending unsolicited commercial electronic messages in contravention of this Act; and 10
- (d) deter people from using information and communications technologies inappropriately.

**4 Interpretation**

- (1) In this Act, unless the context otherwise requires,—
- address-harvesting software** means software that is capable of, or marketed for use for,— 15
- (a) searching the Internet for electronic addresses; and
  - (b) collecting, compiling, capturing, or otherwise harvesting those electronic addresses

**New (unanimous)**

**chief executive** means the chief executive of the enforcement department 20

**civil liability event** has the meaning set out in **section 22**

**commercial electronic message** has the meaning set out in **section 6**

**consented to receiving—** 25

- (a) means—
  - (i) express consent, whether given by the relevant electronic address-holder or any other person who uses the relevant electronic address; or
  - (ii) consent that can reasonably be inferred from— 30
    - (A) the conduct and the business and other relationships of the persons concerned; and

- (B) any other circumstances specified in the regulations; or
- (iii) consent that is deemed to have been given when the following circumstances apply:
  - (A) an electronic address has been conspicuously published by a person in a business or official capacity; and 5
  - (B) the publication of the address is not accompanied by a statement to the effect that the relevant electronic address-holder does not want to receive unsolicited electronic messages at that electronic address; and 10
  - (C) the message sent to that address is relevant to the business, role, functions, or duties of the person in a business or official capacity; but 15
- (b) does not include the circumstances specified in the regulations from which consent cannot be inferred

**New (unanimous)**

**Court** means, as appropriate, the District Court, the High Court, or either of them 20

**electronic address** means an address used in connection with—

- (a) an email account; or
- (b) an instant messaging account; or
- (c) a telephone account; or 25
- (d) a similar account

**electronic message** has the meaning set out in **section 5**

**enforcement department** means the department of State that, with the authority of the Prime Minister, is responsible for exercising the (*enforcement*) powers in **Part 3** 30

**New (unanimous)**

**enforcement officer** means a person who is appointed as an enforcement officer under **section 25A**



**goods** has the same meaning as in section 2(1) of the (*Fair Trading Act 1986*) Consumer Guarantees Act 1993

**government body** means—

- (a) a department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975: 5
- (b) a Crown entity as defined in section 10(1) of the Crown Entities Act 2004

**harvested-address list** means—

- (a) a list of electronic addresses; or
- (b) a collection of electronic addresses; or 10
- (c) a compilation of electronic addresses,—

where the production of the list, collection, or compilation is, to any extent, directly or indirectly attributable to the use of address-harvesting software

**individual** means a natural person, other than a deceased natural person 15

**message** means information, whether in—

- (a) the form of text or writing; or
- (b) the form of data; or
- (c) the form of speech, music, or other sounds; or 20
- (d) the form of visual images (animated or otherwise); or
- (e) any other form; or
- (f) any combination of forms

**mistake** means a reasonable mistake of fact

**organisation** includes— 25

- (a) a corporation sole; and
- (b) a body corporate; and
- (c) an unincorporated body or association; and
- (d) a partnership; and
- (e) a government body; and 30
- (f) a court or tribunal

**person** means—

- (a) an individual; and
- (b) an organisation

**Struck out (unanimous)**

**promotional electronic message** means an electronic message— 35

**Struck out (unanimous)**

- (a) that is not a commercial electronic message; and
- (b) that has, as its primary purpose, the promotion or marketing of an organisation, or its aims or ideals

- recipient**, in relation to the sending of an electronic message to an electronic address, means— 5
- (a) the relevant electronic address-holder; and
  - (b) any other person who uses that electronic address
- regulations** means regulations made under this Act
- relevant electronic address-holder** means the person who is responsible for the relevant electronic address 10
- send** includes an attempt to send
- service provider** means a provider of a telecommunications service
- services** has the same meaning as in section 2(1) of the (*Fair Trading Act 1986*) Consumer Guarantees Act 1993 15
- telecommunication** has the same meaning as in section 5 of the Telecommunications Act 2001
- telecommunications service** means any goods, services, equipment, and facilities that enable or facilitate telecommunication 20
- unsolicited commercial electronic message** means a commercial electronic message that the recipient has not consented to receiving.
- (2) For the purposes of this Act, an electronic message has a **New Zealand link** if 1 or more of the following applies: 25
- (a) the message originates in New Zealand:
  - (b) the person who sent the message is—
    - (i) an individual who is physically present in New Zealand when the message is sent; or
    - (ii) an organisation whose central management and control is in New Zealand when the message is sent: 30
  - (c) the computer, server, or device that is used to access the message is located in New Zealand:
  - (d) the recipient is— 35
    - (i) an individual who is physically present in New Zealand when the message is accessed; or

- (ii) an organisation that carries on business or activities in New Zealand when the message is accessed:
- (e) if the message cannot be delivered because the relevant electronic address does not exist, assuming that the electronic address existed, it is reasonably likely that the message would have been accessed using a computer, server, or device located in New Zealand: 5
- (f) it is sent to an electronic address that— 10
  - (i) ends with “.nz”; or
  - (ii) begins with an international access code directly followed by “64”.

Compare: Spam Act 2003 ss 4, 7, Sch 2 (Aust); 2001 No 103 s 5

## 5 Meaning of electronic message

- (1) For the purposes of this Act, an **electronic message** is a message sent— 15
  - (a) using a telecommunications service; and
  - (b) to an electronic address.
- (2) However, the messages listed in **clause 1 of the Schedule** are not electronic messages. 20
- (3) For the purposes of **subsection (1)**, it is immaterial whether—
  - (a) the electronic address exists; or
  - (b) the message reaches its intended destination.

Compare: Spam Act 2003 s 5 (Aust)

## 6 Meaning of commercial electronic message

- For the purposes of this Act, **commercial electronic message**— 25
- (a) means an electronic message that *(has, as its primary purpose,)*—
    - (i) *(marketing)* markets or *(promoting)* promotes— 30
      - (A) goods; or
      - (B) services; or
      - (C) land; or
      - (D) an interest in land; or
      - (E) a business or investment opportunity; or 35
    - (ii) *(assisting or enabling)* assists or enables a person to obtain dishonestly a financial advantage or gain from another person; *(but)* or

**New (unanimous)**

<p>(iii) provides a link, or directs a recipient, to a message that does 1 or more of the things listed in <b>subparagraphs (i) and (ii)</b>; but</p>	
(b) does not include an electronic message that—	
(i) provides a quote or estimate for the supply of goods or services if that quote or estimate was requested by the recipient; or	5
(ii) facilitates, completes, or confirms a commercial transaction that the recipient previously agreed to enter into with the person who authorised the sending of the message; or	10
(iii) provides warranty information, product recall information, or safety or security information about goods or services used or purchased by the recipient; or	15
(iv) provides notification of factual information about a subscription, membership, account, loan, or similar relationship involving the ongoing purchase or use by the recipient of goods or services offered by the person who authorised the sending of the message, or the recipient's ongoing subscription, membership, account, loan, or similar relationship; or	20
(v) provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or	25
(vi) delivers goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously entered into with the person who authorised the sending of the message; or	30
(vii) provides the recipient with information about goods or services offered or supplied by—	35
(A) a government body; or	
(B) a court or tribunal; or	
(viii) has any other purpose set out in the regulations.	

Compare: Spam Act 2003 s 6 (Aust)

**7 Act binds the Crown**

This Act binds the Crown.

Compare: Spam Act 2003 s 12 (Aust)

**8 Application of Act outside New Zealand**

- (1) This Act extends to the engaging in conduct outside New Zealand by a relevant person to the extent that that conduct results in a civil liability event occurring. 5
- (2) In this section, **relevant person** means—
- (a) an individual who is a resident of New Zealand; or
  - (b) an organisation that carries on business or activities in New Zealand. 10

Compare: Spam Act 2003 s 14 (Aust)

**Part 2****Restrictions on electronic messages, address-harvesting software, and harvested-address lists 15**

Subpart 1—Commercial electronic messages (*and promotional electronic messages*)

**9 Unsolicited commercial electronic messages must not be sent**

- (1) A person must not send, or cause to be sent, an unsolicited commercial electronic message that has a New Zealand link. 20

**New (unanimous)**

- (1A) If a recipient uses an unsubscribe facility in accordance with **section 12(1)(a)**, the recipient's consent to receiving a commercial electronic message from the sender is deemed to have been withdrawn with effect from the day that is 5 working days after the day on which the unsubscribe facility was used. 25

- (2) A person who contends that a recipient consented to receiving a commercial electronic message has the onus of proof in relation to that matter.

Compare: Spam Act 2003 s 16(1), (2), (5), (6) (Aust) 30

**Struck out (unanimous)****10 Promotional electronic message must not be sent to person who opts out**

- (1) A person (the **sender**) must not send, or cause to be sent, a promotional electronic message that has a New Zealand link to any person (the **unwilling recipient**) who has opted out of receiving messages from that sender. 5
- (2) For the purposes of **subsection (1)**, an unwilling recipient opts out of receiving a promotional electronic message from a sender if—
- (a) 1 or more promotional electronic messages have been sent to the unwilling recipient's electronic address by or on behalf of the sender; and 10
  - (b) the unwilling recipient sends, delivers, or gives the sender a message to the effect that the unwilling recipient does not want to receive, at that electronic address, any further promotional electronic messages from or authorised by that sender. 15
- (3) Opting out of receiving promotional electronic messages takes effect at the end of a period of 5 working days beginning on— 20
- (a) the day on which the message was sent if the message referred to in **subsection (2)(b)** is an electronic message; or
  - (b) the day on which the message was given if the message referred to in **subsection (2)(b)** was given over the telephone; or 25
  - (c) the day on which the message would be delivered in the ordinary course of post if the message referred to in **subsection (2)(b)** was sent by post; or
  - (d) the day on which the message was sent, delivered, or given in any other case. 30

Compare: Spam Act 2003 s 16(1), Sch 2 cl 6 (Aust)

**11 Commercial electronic messages (and promotional electronic messages) must include accurate sender information**

A person must not send, or cause to be sent, a commercial electronic message (or a promotional electronic message) that has a New Zealand link unless— 35

- (a) the message clearly and accurately identifies the person who authorised the sending of the message; and
  - (b) the message includes accurate information about how the recipient can readily contact that person; and
  - (c) the information referred to in **paragraph (b)** complies with any conditions specified in the regulations; and 5
  - (d) the information referred to in **paragraph (b)** is reasonably likely to be valid for at least 30 days after the message is sent.
- Compare: Spam Act 2003 s 17(1) (Aust) 10

**12 Commercial electronic messages (and promotional electronic messages) must contain functional unsubscribe facility**

- (1) A person must not send, or cause to be sent, a commercial electronic message (*or a promotional electronic message*) (the **principal message**) that has a New Zealand link unless— 15
  - (a) the principal message includes a functional unsubscribe facility that the recipient may use to instruct the person who authorised the sending of the principal message (the **sender**) that no further commercial electronic messages (*or promotional electronic messages*) from or authorised by the sender should be sent to the electronic address at which the principal message was received; and 20
  - (b) the unsubscribe facility is expressed and presented in a clear and conspicuous manner; and 25

**New (unanimous)**

- |  |  |  |
|--|--|--|
|  | <ul style="list-style-type: none"> <li>(ba) the unsubscribe facility allows the recipient to respond to the sender using the same method of communication that was used to send the principal message; and</li> <li>(bb) there is no cost to the recipient if the recipient uses the unsubscribe facility; and 30</li> </ul> |  |
|--|--|--|
- (c) the unsubscribe facility is reasonably likely to be functional and valid for at least 30 days after the principal message is sent; and
  - (d) the unsubscribe facility complies with any conditions specified in the regulations. 35

- (2) **Subsection (1)** does not apply to the extent (if any) to which it is inconsistent with the terms of a contract, arrangement, or understanding between—
- (a) the person who authorised the sending of the principal message; and 5
  - (b) the recipient.

Compare: Spam Act 2003 s 18(1), (3), (9) (Aust)

### 13 Defences

- (1) A person who sends an electronic message, or causes an electronic message to be sent, in contravention of **section 9, (10,) 11, or 12** has a defence if— 10
- (a) that person sent the message, or caused the message to be sent, by mistake; or
  - (b) the message was sent without that person's knowledge (for example, because of a computer virus or a malicious software programme). 15
- (2) A person who wishes to rely on a defence in **subsection (1)** has the onus of proof in relation to that matter.

Compare: Spam Act 2003 ss 16(4), (5), 17(3), (4), 18(4), (5) (Aust)

## Subpart 2—Address-harvesting software and harvested-address lists 20

### Struck out (unanimous)

### 14 Application of sections 15 to 17

- (1) In **sections 15 to 17**, **person** means—
- (a) an individual who is physically present in New Zealand at the relevant time; or 25
  - (b) an organisation that carries on business or activities in New Zealand at the relevant time.
- (2) In **subsection (1)**, **relevant time** means, as appropriate, the time of—
- (a) the supply or offer; or 30
  - (b) the acquisition; or
  - (c) the use.

Compare: Spam Act 2003 ss 20(1), 21(1), 22(1) (Aust)



**Struck out (unanimous)**

- 15 Address-harvesting software and harvested-address lists must not be supplied**
- (1) A person (the **supplier**) must not supply, or offer to supply, to another person (the **customer**)—
- (a) address-harvesting software; or 5
  - (b) a right to use address-harvesting software; or
  - (c) a harvested-address list; or
  - (d) a right to use a harvested-address list.
- (2) **Subsection (1)** does not apply if the supplier had no reason to suspect that the customer, or another person, intended to use the address-harvesting software or the harvested-address list, as the case may be, in connection with sending—
- (a) unsolicited commercial electronic messages in contravention of **section 9**; or 10
  - (b) promotional electronic messages in contravention of **section 10**. 15
- (3) **Subsection (1)** does not apply if the supplier did not know, and could not, with reasonable diligence, have ascertained, that the customer was—
- (a) an individual who was physically present in New Zealand at the time of the supply or offer; or 20
  - (b) an organisation that carried on business or activities in New Zealand at the time of the supply or offer.
- Compare: Spam Act 2003 s 20(1), (2), (3) (Aust)
- 16 Address-harvesting software and harvested-address lists must not be acquired** 25
- (1) A person must not acquire—
- (a) address-harvesting software; or
  - (b) a right to use address-harvesting software; or
  - (c) a harvested-address list; or 30
  - (d) a right to use a harvested-address list.
- (2) **Subsection (1)** does not apply if the person did not intend to use the address-harvesting software or the harvested-address list, as the case may be, in connection with sending—
- (a) unsolicited commercial electronic messages in contravention of **section 9**; or 35

**Struck out (unanimous)**

- (b) promotional electronic messages in contravention of **section 10**.

Compare: Spam Act 2003 s 21(1), (2) (Aust)

- 17 Address-harvesting software and harvested-address lists must not be used** 5
- (1) A person must not use—
    - (a) address-harvesting software; or
    - (b) a harvested-address list.
  - (2) **Subsection (1)** does not apply in relation to the use of address-harvesting software or a harvested-address list, if the use was not in connection with sending— 10
    - (a) unsolicited commercial electronic messages in contravention of **section 9**; or
    - (b) promotional electronic messages in contravention of **section 10**. 15

Compare: Spam Act 2003 s 22(1), (2) (Aust)

**New (unanimous)**

- 17A Restriction on use of address-harvesting software and harvested-address lists**
- (1) A person must not use address-harvesting software or a harvested-address list in connection with, or with the intention of, sending unsolicited commercial electronic messages in contravention of **section 9**. 20
  - (2) In **subsection (1)**, **person** means—
    - (a) an individual who is physically present in New Zealand at the time of the use: 25
    - (b) an organisation that carries on business or activities in New Zealand at the time of the use.
  - (3) The prohibition in **subsection (1)** applies whether the unsolicited commercial electronic messages were sent by, or intended to be sent by,— 30

**New (unanimous)**

- (a) the person who used the address-harvesting software or harvested-address list; or
- (b) any other person.

Compare: Spam Act 2003 s 22(1), (2) (Aust)

- 18 Onus of proof** 5
- A person who (*wishes to rely on **section 15(2), 15(3), 16(2), or 17(2)***) contends that his or her use of address-harvesting software or a harvested-address list was not in connection with, or was not with the intention of, sending unsolicited commercial electronic messages in contravention of **section 9** 10
- has the onus of proof in relation to that matter.
- Compare: Spam Act 2003 s 20(4) (Aust)

## Subpart 3—Third party breaches of Act

- 19 Third party breaches of Act** 15
- A person must not—
- (a) aid, abet, counsel, or procure a breach of any of **sections 9 to 12 (or 15 to 17) and 17A**; or
  - (b) induce, whether by threats or promises or otherwise, a breach of any of **sections 9 to 12 (or 15 to 17) and 17A**; or
  - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a breach of any of **sections 9 to 12 (or 15 to 17) and 17A**; or
  - (d) conspire with others to effect a breach of any of **sections 9 to 12 (or 15 to 17) and 17A**. 20
- Compare: Spam Act 2003 ss 16(9), 17(5), 18(6), 20(5), 21(3), 22(3) (Aust) 25

## Subpart 4—Rules of general application throughout Act

- 20 Supplying message service** 30
- A service provider does not send an electronic message, or cause an electronic message to be sent, or contravene **section 19**, merely because the service provider provides a telecommunications service that enables an electronic message to be sent.
- Compare: Spam Act 2003 ss 9, 16(10), 17(6), 18(7) (Aust)

## 21 Person who authorises sending(, or sends,) of electronic messages

- (1) For the purposes of (*this Act*) **sections 6, 11, and 12**, if (*a relevant individual authorises the sending of*) person A sends an electronic message on behalf of (*an organisation*) person B, then—
- (a) (*the organisation*) person B is taken to authorise the sending of that message; and
- (b) (*the relevant individual*) person A is taken not to authorise the sending of that message.

### Struck out (unanimous)

- (2) For the purposes of this Act, a person (**A**) is taken to authorise the sending of an electronic message if—
- (a) that message is sent by A; and
- (b) the sending of the message is not authorised by any other person.
- (3) For the purposes of this Act, an organisation is taken to have sent an electronic message if—
- (a) an individual sent that message on behalf of that organisation; and
- (b) that organisation authorised the sending of that message.
- (4) For the purposes of **subsection (1)**, **relevant individual** means an individual—
- (a) who is a director, officer, employee, or contractor of the relevant organisation; or
- (b) in accordance with whose directions or instructions the relevant organisation is required or is accustomed to act.
- (5) **Subsection (2)** overrides **subsection (1)**.

### New (unanimous)

- (2) However, person A only sends an electronic message on behalf of person B if person A has the authority to do so.

Compare: Spam Act 2003 s 8 (Aust)

## Part 3 Enforcement provisions

### Subpart 1—Civil liability events

#### 22 Meaning of civil liability event

In this Part, a **civil liability event** is a breach of 1 or more of the following: 5

- (a) **section 9(1)** (unsolicited commercial electronic messages must not be sent):

**Struck out (unanimous)**

- (b) **section 10(1)**:

- (c) **section 11** (commercial electronic messages must include accurate sender information): 10

- (d) **section 12(1)** (commercial electronic messages must contain functional unsubscribe facility):

**Struck out (unanimous)**

- (e) **section 15(1)**:

- (f) **section 16(1)**: 15

- (g) **section 17A(1)** (restriction on use of address-harvesting software and harvested-address lists):

- (h) **section 19** (third party breaches of the Act).

Compare: Spam Act 2003 ss 16(11), 17(7), 18(8), 20(6), 21(4), 22(4) (Aust)

#### 23 Possible responses to civil liability event

If a civil liability event is alleged to have occurred,— 20

**Struck out (unanimous)**

- (a) any person affected by that event may do either or both of the following:

- (i) make a complaint to the relevant service provider: 25

- (ii) seek an injunction from the High Court under **section 37** or **section 39**; and

- (b) *(a person who suffers loss or damage as a result)* any person affected by that event may do 1 or more of the following:
- (i) seek an injunction from the High Court under **section 37 or (section) 39:** 5
  - (ii) make an application to the *(High)* Court for compensation or damages under **section 43:**
  - (iii) apply to join any Court action initiated by the enforcement department or any other person under **section 44;** and 10

**Struck out (unanimous)**

- (c) a service provider may do 1 or more of the following:
- (i) make a complaint to the enforcement department:
  - (ii) seek an injunction from the High Court under **section 37 or section 39:**
  - (iii) make an application to the High Court for compensation or damages under **section 43:** 15
  - (iv) apply to join any Court action initiated by the enforcement department under **section 44;** and
- (d) *(the)* an enforcement *(department)* officer may do 1 or more of the following: 20
- (i) issue a formal warning under **section 26:**
  - (ii) issue a *(contravention)* civil infringement notice under **section 27:**

**Struck out (unanimous)**

- (iii) accept an enforceable undertaking under **section 34** and seek an order in the High Court under **section 35** for a breach of that undertaking: 25
- (iv) seek an injunction from the High Court under **section 37 or section 39:**
- (v) make an application to the High Court for a pecuniary penalty under **section 42:** 30
- (vi) make an application to the High Court for compensation or damages under **section 43** on behalf of another person:
- (vii) apply to join any Court action initiated by any other person under **section 44:** 35

- (viii) apply for a search warrant under **section 48** and exercise the powers of search and seizure granted by the warrant; and

**New (unanimous)**

- |       |   |    |
|-------|---|----|
| (e)   | the enforcement department may do 1 or more of the following:   | 5  |
| (i)   | accept an enforceable undertaking under <b>section 34</b> and seek an order in the Court for a breach of that undertaking under <b>section 35</b> : |    |
| (ii)  | seek an injunction from the High Court under <b>section 37 or 39</b> :  | 10 |
| (iii) | make an application to the Court for a pecuniary penalty under <b>section 42</b> :  |    |
| (iv)  | make an application to the Court for compensation or damages under <b>section 43</b> :  |    |
| (v)   | apply to join any Court action initiated by any other person under <b>section 44</b> .  | 15 |

**Struck out (unanimous)**

Subpart 2—Obligations of service provider

**24 Service providers must consider complaints**

- |     |   |    |
|-----|---|----|
| (1) | A service provider must consider any complaint made to it under <b>section 23(a)(i)</b> .   | 20 |
| (2) | In considering a complaint, the service provider must have regard to any relevant, generally accepted industry code that applies to the service provider. |    |

Subpart 3—~~(Powers)~~ Functions and powers of enforcement department and enforcement officers

**25 (General obligations) Functions and powers of enforcement department**

The enforcement department—

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**Struck out (unanimous)**

- (a) must consider all complaints it receives from service providers concerning an alleged civil liability event, but must not consider any complaint it receives from any other person; and

- (b) may investigate, and take enforcement action ~~(on a complaint received from a service provider)~~ in relation to, an alleged civil liability event if it considers that an investigation or enforcement action is appropriate in the circumstances; and

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**Struck out (unanimous)**

- (c) may investigate and take enforcement action on its own initiative if it considers that an investigation or enforcement action is appropriate in the circumstances; and

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**New (unanimous)**

- (d) must make publicly available information concerning—

- (i) the functions and powers of the enforcement department and enforcement officers under this Act; and

20

- (ii) the purposes and provisions of this Act; and

- (iii) the rights and responsibilities of persons to whom this Act applies; and

25

- (e) must monitor information and communications technologies and the way in which they are utilised to send and receive unsolicited commercial electronic messages; and

- (f) must—

30



**New (unanimous)**

(i)	establish an electronic address to which a recipient may forward electronic messages containing sexual content that the recipient has not consented to receiving; and	
(ii)	make publicly available information about how people may use that electronic address; and	5
(iii)	if it considers it appropriate in the circumstances, make recommendations to government or non-government organisations about possible responses to the types of electronic messages forwarded to that electronic address; and	10
(g)	must endeavour to ensure that New Zealand complies with all international agreements and arrangements concerning unsolicited commercial electronic messages to which New Zealand is a party; and	15
(h)	may consult with, advise, and assist government and non-government organisations and other persons overseas, for the purpose of promoting and enforcing international procedures to prevent unsolicited commercial electronic messages being sent or received.	20
<b>25A</b>	<b>Chief executive may appoint enforcement officers</b>	
	The chief executive may appoint enforcement officers, on a permanent or temporary basis, to exercise the powers conferred on them by this Act.	
	Compare: 2003 No 51 s 330	25
<b>25B</b>	<b>Authority to act as enforcement officer</b>	
(1)	The chief executive must issue a warrant of appointment to every person appointed as an enforcement officer.	
(2)	A warrant of appointment must—	
(a)	be in the prescribed form; and	30
(b)	bear the photograph and signature of the holder; and	
(c)	contain any other particulars that may be prescribed.	
(3)	A warrant of appointment is, in the absence of evidence to the contrary, sufficient proof that the holder of the warrant may exercise the powers conferred on enforcement officers under—	35

**New (unanimous)**

- (a) **section 26** (formal warnings):
  - (b) **sections 27 to 33A** (civil infringement notices):
  - (c) **sections 48 to 52** (search and seizure).
  - (4) A person who ceases to be an enforcement officer must return the person's warrant of appointment. 5
  - (5) A person who fails to comply with **subsection (4)** commits an offence and is liable on summary conviction to a fine not exceeding \$1,000.
- Compare: 2003 No 51 s 331

*Formal warnings*

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**26 Formal warnings**

- (1) *(The) An* enforcement *(department)* officer may issue *(one)* 1 or more formal warnings to a person if the enforcement *(department)* officer has reasonable grounds to believe that that person has committed a civil liability event. 15
- (2) A formal warning must be—
  - (a) in the prescribed form; and
  - (b) issued in the manner specified in the regulations.

Compare: Spam Act 2003 s 41 (Aust)

*(Contravention) Civil infringement notices*

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**27 (Contravention) Civil infringement notices**

If *(the) an* enforcement *(department)* officer has reasonable grounds to believe that a person has committed 1 or more civil liability events, the enforcement *(department)* officer may issue a *(contravention) civil infringement* notice relating to those events to that person. 25

Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

**28 Issue of (contravention) civil infringement notices**

- (1) A *(contravention) civil infringement* notice must be issued within 12 months after the day on which the earliest civil liability event referred to in the notice is alleged to have occurred. 30
- (2) A *(contravention) civil infringement* notice may be issued—

- (a) by delivering it to the person alleged to have committed the civil liability event; or
  - (b) by post, addressed to that person's last known place of residence or business.
- (3) A **(contravention) civil infringement** notice issued to a person in accordance with **subsection (2)(b)** is deemed to have been issued on the day it was posted. 5

Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

## 29 **Form of (contravention) civil infringement notices** 10

A **(contravention) civil infringement** notice must—

- (a) contain sufficient particulars to inform the person issued with the notice of the time, manner, and nature of the alleged civil liability events; and
- (b) specify the penalty to be paid for each civil liability event alleged to have occurred, which must not exceed the amount specified in the regulations; and 15
- (c) specify the time within which the penalty must be paid; and
- (d) give an explanation of how payment of the penalty is to be made; and 20
- (e) contain a statement of the person's right to object to the notice; and
- (f) contain a statement of what may happen if the person neither pays the penalty nor objects to the notice; and
- (g) contain **(the) any further** information specified in the regulations. 25

Compare: Spam Act 2003 Sch 3, cl 4 (Aust)

## 30 **Objections to (contravention) civil infringement notices**

- (1) An objection to a **(contravention) civil infringement** notice— 30
- (a) may be made only on the grounds specified in the regulations:
  - (b) must contain all of the information specified in the regulations:
  - (c) must be made within the time and in the manner specified in the regulations. 35
- (2) **(The) An enforcement (department) officer**—
- (a) must consider every objection that is properly made under **subsection (1)**; and

- (b) may turn down the objection, alter the *(contravention) civil infringement* notice, or withdraw the *(contravention) civil infringement* notice in accordance with **section 31**; and
  - (c) must, as soon as reasonably practicable, notify the objector in writing—
    - (i) as to whether the objection has been turned down, upheld, or upheld in part; and
    - (ii) of the effect of the enforcement *(department's) officer's* decision.
- (3) A person may not object to a *(contravention) civil infringement* notice that has been altered by *(the) an* enforcement *(department) officer* under **subsection (2)(b)**.
- 31 Withdrawal of *(contravention) civil infringement* notice**
- (1) *(The) An* enforcement *(department) officer* may, by written notice (the **withdrawal notice**) given to a person who has been issued with a *(contravention) civil infringement* notice, withdraw the *(contravention) civil infringement* notice.
  - (2) To be effective, the withdrawal notice must be given to the person within (28) 20 working days after the later of the day on which—
    - (a) the notice was issued; or
    - (b) if applicable, the enforcement *(department) officer* issues *(its) his* or *her* final response to an objection to the *(contravention) civil infringement* notice.
  - (3) *(The) An* enforcement *(department) officer* must refund the penalty specified in a *(contravention) civil infringement* notice if—
    - (a) the penalty specified in the *(contravention) civil infringement* notice has been paid; and
    - (b) the *(contravention) civil infringement* notice is withdrawn after the penalty was paid.

Compare: Spam Act 2003 Sch 3, cl 6 (Aust)

**32 What happens if penalty is paid**

- (1) This section applies if—
  - (a) a *(contravention) civil infringement* notice relating to 1 or more alleged civil liability events is issued to a person, even if that notice is subsequently withdrawn; and

- (b) the penalty is paid in accordance with the *(contravention) civil infringement* notice, even if that penalty is subsequently refunded.
- (2) If **subsection (1)** applies,—
  - (a) any liability of the person for the alleged civil liability events to which the *(contravention) civil infringement* notice relates is discharged, except for the purposes of **section 43**; and 5
  - (b) proceedings under **section 42** (*or section 43*) may not be brought against the person for those alleged civil liability events. 10

Compare: Spam Act 2003 Sch 3, cl 7 (Aust)

### **33 Effect of *(contravention) civil infringement* notice on civil proceedings**

- (1) A *(contravention) civil infringement* notice issued to a person does not prevent proceedings under **section 42** (*or section 43*) being brought against the person for an alleged civil liability event if— 15
  - (a) the person does not pay the penalty specified in the *(contravention) civil infringement* notice for that event; or 20
  - (b) a *(contravention) civil infringement* notice relating to the event is issued to the person and subsequently withdrawn before the penalty specified in the notice is paid.

#### **New (unanimous)**

- (2) A civil infringement notice issued to a person does not prevent proceedings under **section 43** being brought against the person for an alleged civil liability event to which the notice relates. 25

Compare: Spam Act 2003 Sch 3, cl 8 (Aust)

#### **New (unanimous)**

### **33A Recovery of unpaid penalty**

- (1) The consequence specified in **subsection (2)** applies if a person— 30
  - (a) is issued with a civil infringement notice; and

- (b) fails to pay all, or any part, of the penalty specified in the notice by the time specified in the notice.
- (2) The consequence is that an enforcement officer may recover from the person, as a debt due to the enforcement department, in a District Court,—
  - (a) the unpaid portion of the penalty; and
  - (b) the actual and reasonable costs of recovery awarded against the person by that Court.
- (3) In any proceedings for the recovery of a debt under this section, the District Court must not enter judgment in favour of the enforcement department unless it is satisfied that the circumstances in **subsection (1)** exist.

- (1) A person may appeal to a District Court if the person is dissatisfied with a decision of an enforcement officer to—
  - (a) turn down the person’s objection to a civil infringement notice; or
  - (b) alter a civil infringement notice.
- (2) An appeal under **subsection (1)** must be brought within 20 working days after the date on which the notice under **section 30(2)(c)** is given.
- (3) An appeal under **subsection (1)** does not operate as a stay of the civil infringement notice.

- (1) A District Court must determine an appeal under **section 33B** by dismissing or allowing the appeal. 25
- (2) If the District Court dismisses an appeal, the dismissal must be taken to be an order for the payment of the penalty specified in the civil infringement notice to which the decision under appeal relates. 30
- (3) If the District Court allows an appeal, it may make an order that the penalty specified in the civil infringement notice to which the decision under appeal relates—
  - (a) is varied or cancelled; or

**New (unanimous)**

- (b) is to be refunded to the person, if the appeal is allowed after the penalty was paid to the enforcement department or was recovered as a debt due to the enforcement department under **section 33A**.

*Enforceable undertakings*

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**34 Enforceable undertakings**

- (1) The enforcement department may accept a written undertaking given by a person in connection with—
- (a) commercial electronic messages; or

**Struck out (unanimous)**

- (b) promotional electronic messages; or

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- (c) address-harvesting software; or
- (d) harvested-address lists.

- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the enforcement department.

Compare: Spam Act 2003 s 38 (Aust)

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**35 Enforcement of undertakings**

- (1) If the enforcement department considers that a person who gave an undertaking under **section 34** has breached 1 or more of its terms, the enforcement department may apply to the (*High*) Court for an order under **subsection (2)**.

20

- (2) If the (*High*) Court is satisfied that the person has breached 1 or more of the terms of the undertaking, the Court may make any or all of the following orders:

- (a) an order directing the person to comply with the relevant terms of the undertaking;

25

- (b) an order directing the person to pay to the enforcement department an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

- (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach:

30

- (d) any other order that the Court considers appropriate.

Compare: Spam Act 2003 s 39 (Aust)

### 36 Assessment of compensation for breach of undertaking

For the purposes of **section 35(2)(c)**, in determining whether another person (the **victim**) has suffered loss or damage as a result of the breach, and in assessing the amount of compensation payable, the (*High*) Court may have regard to the following:

- (a) the extent to which any expenses incurred by the victim are attributable to dealing with the (*messages*) breach: 10
- (b) the effect of (*dealing with the messages*) the breach on the victim's ability to carry on business or other activities:
- (c) any damage to the reputation of the victim's business that is attributable to dealing with the (*messages*) breach: 15
- (d) any loss of business opportunities suffered by the victim as a result of dealing with the (*messages*) breach:
- (e) any other matters that the Court considers relevant. 20

Compare: Spam Act 2003 s 40 (Aust)

## Subpart 4—Powers of (*High Court*) Courts

### New (unanimous)

#### *General*

### 36A Jurisdiction of District Courts

- (1) In accordance with this Act, District Courts may hear and determine the following matters: 25
  - (a) recovery of an unpaid penalty specified in a civil infringement notice under **section 33A**:
  - (b) appeals from civil infringement notices under **sections 33B and 33C**:
  - (c) applications for an order in relation to an undertaking under **sections 35 and 36**: 30
  - (d) applications for a pecuniary penalty under **section 42**:
  - (e) applications for compensation or damages under **section 43**:



**New (unanimous)**

- (f) applications for joining of parties or proceedings under **section 44:**
- (g) applications for a search warrant to search a place or thing under **section 48.**
- (2) In the exercise of its jurisdiction under this section, a District Court must not—
  - (a) make an order under **section 35** directing a person to pay a sum that exceeds \$200,000: 5
  - (b) make an order under **section 42** requiring a person to pay a pecuniary penalty that exceeds \$200,000: 10
  - (c) make an order under **section 43** requiring a person to pay compensation or damages that, in total, exceed \$200,000.

Compare: 1986 No 121 ss 38, 43(3)

**36B Jurisdiction of High Court** 15

In accordance with this Act, the High Court may hear and determine the following matters:

- (a) applications for an order in relation to an undertaking under **sections 35 and 36:**
- (b) applications for injunctions under **section 37 or 39:** 20
- (c) applications for a pecuniary penalty under **section 42:**
- (d) applications for compensation or damages under **section 43:**
- (e) applications for joining of parties or proceedings under **section 44.** 25

Compare: 1986 No 121 s 37

*Injunctions***New (unanimous)****36C Powers of High Court not affected**

The powers in **sections 37 to 41** are in addition to, and do not derogate from, any other powers of the High Court relating to the granting of injunctions. 30

Compare: Spam Act 2003 s 36 (Aust)

**37 Performance injunctions**

- (1) The High Court may, on the application of the enforcement department or any other person, grant an injunction requiring a person to do an act or thing if—
  - (a) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and 5
  - (b) the refusal or failure was, is, or would be a civil liability event.
- (2) The Court may rescind or vary an injunction granted under this section. 10

Compare: Spam Act 2003 ss 32, 34 (Aust)

**38 When High Court may grant performance injunctions**

- (1) The High Court may grant an injunction requiring a person to do an act or thing if— 15
  - (a) it is satisfied that the person has refused or failed to do that act or thing; or
  - (b) it appears to the Court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing. 20
- (2) **Subsection (1)(a)** applies whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing.
- (3) **Subsection (1)(b)** applies whether or not the person has previously refused or failed to do that act or thing or there is an imminent danger of substantial damage to any other person if that person refuses or fails to do that act or thing. 25

Compare: Spam Act 2003 s 35 (Aust)

**39 Restraining injunctions**

- (1) The High Court may, on the application of the enforcement department or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision of this Act. 30
- (2) The Court may rescind or vary an injunction granted under this section. 35

Compare: Spam Act 2003 ss 32, 34 (Aust); 2003 No 52 s 96

#### **40 When High Court may grant restraining injunctions and interim injunctions**

- (1) The High Court may grant an injunction restraining a person from engaging in conduct of a particular kind if—
  - (a) it is satisfied that the person has engaged in conduct of that kind; or 5
  - (b) it appears to the Court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind. 10
- (2) The Court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so. 10
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind. 15
- (4) **Subsections (1)(b) and (2)** apply whether or not the person has previously engaged in conduct of that kind or there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind. 20

Compare: Spam Act 2003 ss 33, 35 (Aust); 2003 No 52 ss 97, 98

#### **41 Undertaking as to damages not required by enforcement department**

- (1) If the enforcement department applies to the High Court for the grant of an interim injunction under this subpart, the Court must not, as a condition of granting an interim injunction, require the enforcement department to give an undertaking as to damages. 25
- (2) However, in determining the enforcement department's application for the grant of an interim injunction, the Court must not take into account that the enforcement department is not required to give an undertaking as to damages. 30

Compare: Spam Act 2003 s 33 (Aust); 2003 No 52 s 98

#### *Pecuniary penalties, compensation, and damages*

#### **42 Pecuniary penalties for civil liability event**

- (1) On the application of the enforcement department, the (*High*) Court may order a person (the **perpetrator**) to pay a pecuniary penalty to the Crown, or any other person specified by the 35

- Court, if the Court is satisfied that the perpetrator has committed a civil liability event.
- (2) Subject to the limits in **subsections (3) (to (5)) and (4)**, the pecuniary penalty that the *(High)* Court orders the perpetrator to pay must be an amount which the Court considers appropriate taking into account all relevant circumstances, including—
- (a) the number of commercial electronic messages sent:
  - (b) the number of electronic addresses to which *(an)* a commercial electronic message was sent:
  - (c) whether or not the perpetrator has committed prior civil liability events.
- (3) If the perpetrator is an individual, the *(High)* Court may order the perpetrator to pay a pecuniary penalty not exceeding \$200,000 in respect of the civil liability events*(, other than a breach of **section 10(1)**,)* that are the subject of the enforcement department's application.
- (4) If the perpetrator is an organisation, the *(High)* Court may order the perpetrator to pay a pecuniary penalty not exceeding \$500,000 in respect of the civil liability events*(, other than a breach of **section 10(1)**,)* that are the subject of the enforcement department's application.

**Struck out (unanimous)**

- (5) The High Court may order the perpetrator to pay a pecuniary penalty not exceeding \$50,000 in respect of the breaches of **section 10(1)** that are the subject of the enforcement department's application.

Compare: Spam Act 2003 ss 24, 25, 26 (Aust)

**43 Compensation and damages for civil liability event**

- (1) This section applies if the *(High)* Court is satisfied that—
- (a) a person (the **perpetrator**) has committed a civil liability event; and
  - (b) another person (the **victim**) has suffered either direct or consequential loss or damage as a result of that civil liability event.
- (2) The *(High)* Court may make a finding under **subsection (1)**—
- (a) on the application of the victim; or
  - (b) on the application of the enforcement department.

- (3) If this section applies, the (*High*) Court may make an order that the Court considers appropriate directing the perpetrator to pay to the victim either or both of the following:
- (a) compensation for any loss suffered by the victim as a result of the civil liability event: 5
  - (b) damages not exceeding an amount equal to the financial benefit obtained by the perpetrator as a result of the civil liability event.
- Compare: Spam Act 2003 ss 28, 29 (Aust)
- 44 Joinder of parties** 10
- (1) On the application of the enforcement department or any other person, the (*High*) Court may direct that—
- (a) an application for compensation or damages under **section 43** be heard together with an application by the enforcement department for a pecuniary penalty under **section 42**; or 15
  - (b) an application by the enforcement department for a pecuniary penalty under **section 42** be heard together with an application for compensation or damages under **section 43**; or 20
  - (c) 2 or more applications for compensation or damages under **section 43** be heard together.
- (2) The (*High*) Court may make a direction under **subsection (1)**—
- (a) at any stage of the proceedings; and
  - (b) upon any terms that it thinks fit; and 25
  - (c) according to the merits and equities of the circumstances.
- 45 Interrelationship of civil liability remedies**
- (1) A person may be liable for a pecuniary penalty, compensation, and damages for the same civil liability event. 30
- (2) However, in determining whether to order a person to pay a pecuniary penalty, or compensation, or damages (individually, a **civil liability remedy**), the (*High*) Court must have regard to—
- (a) whether that person has already paid another civil liability remedy for the same civil liability event; and 35
  - (b) if so, the amount and effect of that first civil liability remedy.

Compare: Spam Act 2003 ss 28(3), 29(2) (Aust)

- 46 Applicable rules, procedure, and standard of proof**  
The proceedings under **sections 42 and 43** are civil proceedings to which the usual rules of the (*High*) Court, rules of evidence, and procedure for civil proceedings apply (including the standard of proof). 5
- 47 Time limit for applying for pecuniary penalty, compensation, and damages**
- (1) An application for a pecuniary penalty may be made at any time within 2 years after the date on which the matter giving rise to the civil liability event was discovered or ought reasonably to have been discovered. 10
  - (2) The usual time limits apply to all applications for compensation or damages.  
Compare: Spam Act 2003 ss 26(2), 28(4), 29(3) (Aust)
- Subpart 5—Search and seizure 15
- 48 Search warrant**
- (1) (*The enforcement department*) An enforcement officer may apply for a search warrant to search a place or thing.
- New (unanimous)**
- |      |   |    |
|------|---|----|
| (1A) | An enforcement officer who applies for a search warrant must, having made reasonable inquiries, disclose on the application—  | 20 |
| (a)  | details of any other applications that the enforcement officer knows have been made within the previous 90 days in respect of the place or thing specified in the application in respect of the same or a similar matter; and | 25 |
| (b)  | the result of those applications.   |    |
- (2) The application must be made in writing and on oath to the District Court.
  - (3) The District Court may issue a search warrant if there are reasonable grounds for believing that— 30
    - (a) a civil liability event has been, or is being, committed at the place or involving the thing; or
    - (b) there is in, on, over, or under the place or thing, anything that is evidence of a civil liability event. 35

- (4) The District Court may issue the warrant to—

**Struck out (unanimous)**

- (a) a person authorised by the enforcement department in writing to execute the warrant; or

**New (unanimous)**

- (a) the enforcement officer; or

- (b) any member of the police; or  
(c) a member of the police by name.

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**49 Form and content of search warrant**

- (1) A search warrant must not be *(exercised)* executed later than 14 *(clear)* days after the day on which it was issued.
- (2) A search warrant must be in the prescribed form and must contain all of the following information: 10
- (a) the place or thing that may be searched; and
- (b) the civil liability event or events in respect of which the warrant is issued; and
- (c) a description of the kind of property or thing that may be seized; and 15
- (d) the period during which the warrant may be executed; and
- (e) any special conditions on which the warrant is issued.

**50 Powers conferred by search warrant**

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- (1) A search warrant may be executed by the person to whom it was issued or, if it was issued to the police in general, any member of the police.
- (2) Subject to any special conditions specified in the warrant, a search warrant may authorise the person executing the warrant to— 25
- (a) enter and search the place or thing specified in the warrant at any *(reasonable)* time by day or night; and
- (b) use the assistance that is *(reasonable)* necessary in the circumstances to enter and search the place or thing; and 30

- (c) use the force that is (*reasonable*) necessary in the circumstances to gain entry and to break open anything in, on, over, or under the place or thing searched; and
- (d) search any person found in or at the place or thing or who arrives at the place or thing while the warrant is being executed if, at any time while executing the warrant, the person executing the warrant reasonably believes that any property or thing referred to in the warrant may be on that person's body; and 5
- (e) search for and seize any property or thing referred to in **section 49(2)(c)**; and 10
- (f) take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant.

**Struck out (unanimous)**

- (g) require a person to reproduce, or assist any person executing the warrant to reproduce, in usable form, information recorded or stored in a document. 15

- (3) A person who is called to assist to execute a search warrant may exercise the powers described in **subsection (2)(c), (e), and (f)**. 20
- (4) The power to enter and search a place or thing under a search warrant may be exercised only once.

**New (unanimous)**

- (5) In this section, **document** means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes— 25
  - (a) any writing on any material:
  - (b) any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored: 30
  - (c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:
  - (d) any book, map, plan, graph, or drawing:



**New (unanimous)**

- (e) any photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

Compare: 1986 No 5 s 2(1)

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**50A Person with knowledge of computer or computer network to assist access**

- (1) A person executing a search warrant may require a specified person to provide information or assistance that is reasonable and necessary to allow the person to access data held in, or accessible from, a computer that is in or at the place or thing named in the warrant. 10
- (2) A **specified person** is a person who—
  - (a) is the owner or lessee of the computer, or is in possession or control of the computer, or is an employee of any of the above; and 15
  - (b) has relevant knowledge of—
    - (i) the computer or a computer network of which the computer forms a part; or
    - (ii) measures applied to protect data held in, or accessible from, the computer. 20
- (3) A specified person may not be required under **subsection (1)** to give any information tending to incriminate him or herself.
- (4) **Subsection (3)** does not prevent a person executing the search warrant from requiring a specified person to provide information that— 25
  - (a) is reasonable and necessary to allow the person executing the search warrant to access data held in, or accessible from, a computer that—
    - (i) is in or at the place or thing named in the warrant; and 30
    - (ii) contains or may contain information tending to incriminate the specified person; but
  - (b) does not itself tend to incriminate the specified person.
- (5) **Subsection (3)** does not prevent a person executing the search warrant from requiring a specified person to provide assistance that is reasonable and necessary to allow the person 35

**New (unanimous)**

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|---|--------------------|
| <p>executing the search warrant to access data held in, or accessible from, a computer that—</p> <p>(a) is in or at the place or thing named in the warrant; and</p> <p>(b) contains or may contain information tending to incriminate the specified person.</p> <p>(6) Every person commits an offence and is liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding \$2,000 who fails to assist a person executing a search warrant when requested to do so under <b>subsection (1)</b>.</p> <p>Compare: 1957 No 87 s 198B</p> | <p>5</p> <p>10</p> |
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**51 Requirements when executing search warrant**

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|---|---|
| <p>(1) The person who executes the warrant (<b>person A</b>) must carry the warrant with him or her, and produce it for inspection, with evidence of person A's identity,—</p> <p>(a) when person A first enters the place or thing specified in the warrant, to the person who appears to be in charge of that place or thing; and</p> <p>(b) whenever person A is subsequently required to do so at the place or thing specified in the warrant, by any other person who appears to be in charge of that place or thing or any part of it.</p> <p>(2) If the owner or occupier of the place or thing is not present at the time person A executes the search warrant, person A must leave at the place or thing, in a prominent location, a written statement that includes the following information:</p> <p>(a) the time and date of the search; and</p> <p>(b) person A's name; and</p> <p>(c) the address of the office of the enforcement department or (if person A is a member of the police) the police station to which inquiries should be made.</p> <p>(3) If any property or thing is seized in the execution of a search warrant, person A must leave in a prominent location at the place or thing, or deliver or send by registered mail to the owner or occupier within 10 working days after the search, a written inventory of all property or things seized.</p> | <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> |
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## 52 Disposal of property or thing seized under search warrant

### New (unanimous)

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| (1AA) | If any property or thing is seized under <b>section 50</b> , it must be retained under the custody of the person who executed the warrant, except while it is being used in evidence or is in the custody of a Court, until it is disposed of under this section.  | 5  |
| <hr/> |  |    |
| (1)   | In any proceeding for a civil liability event relating to any property or thing seized under a warrant <u>issued</u> under this Act, the <i>(High)</i> Court may order, either at the trial or hearing or on application, that—  | 10 |
| (a)   | the property or thing must be delivered to the person who, in the Court's view, appears to be entitled to it; or   |    |
| (b)   | the property or thing must otherwise be disposed of as the Court thinks appropriate.   |    |
| (2)   | The enforcement <i>(department)</i> officer or a member of the police may, at any time, unless an order has been made under <b>subsection (1)</b> , return the property or thing to the person from whom it was seized, or apply to a District Court Judge for an order for its disposal.  | 15 |
| (3)   | On an application under <b>subsection (2)</b> , the District Court Judge may make any order that the <i>(High)</i> <u>District</u> Court may make under <b>subsection (1)</b> .  | 20 |
| (4)   | <i>(If proceedings for a civil liability event relating to the property or thing are not brought within a period of 3 months from the date of seizure, any)</i> <u>Any</u> person claiming to be entitled to the property or thing may <i>(then)</i> apply to a District Court Judge for an order that it be delivered to that person. | 25 |
| (5)   | On an application under <b>subsection (4)</b> , the District Court Judge may—  |    |
| (a)   | adjourn the application, on any terms that he or she thinks are appropriate, for proceedings to be brought; or   | 30 |
| (b)   | make any order that the <i>(High)</i> <u>District</u> Court may make under <b>subsection (1)</b> .   |    |

## Part 4

### Miscellaneous provisions

#### 53 Alterations to Schedule

The Governor-General may, by Order in Council, amend the Schedule by, with respect to the list of messages that are not electronic messages,— 5

- (a) adding a type of message to the list and, if required, a description of that type of message: 5
- (b) omitting a type of message from the list and, if relevant, an associated description of that type of message: 10
- (c) amending a type of message on the list:
- (d) amending a description of a type of message.

#### 54 Regulations

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes: 15

- (a) specifying circumstances from which a recipient may or may not be inferred to have consented to receiving an electronic message: 15
- (b) setting out further purposes that exclude an electronic message from being a commercial electronic message under **section 6**: 20
- (c) specifying conditions for the purposes of **section 11(c)**:
- (d) specifying conditions for the purposes of **section 12(1)(d)**:

#### New (unanimous)

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| (da) prescribing the form of a warrant of appointment of an enforcement officer and any particulars that the warrant must contain for the purposes of <b>section 25B(2)</b> : | 25 |
|---|----|

- (e) prescribing the form of formal warnings and specifying the manner in which they must be issued under **section 26**: 30
- (f) specifying the maximum penalty, which must not exceed \$2,000 for each civil liability event alleged to have occurred, that may be required under a (*contravention*) civil infringement notice under **section 29(b)**: 30
- (g) specifying (*the*) any further information that must be contained in a (*contravention*) civil infringement notice under **section 29(g)**: 35
- (h) specifying, in accordance with **section 30**,—

- 
- (i) the grounds on which an objection to a (*contravention*) civil infringement notice may be made; and
  - (ii) the information that must be contained in an objection; and 5
  - (iii) the time within which, and the manner in which, an objection must be made:
- (i) prescribing the form of search warrants under **section 49(2)**;
  - (j) authorising the enforcement department to enter into agreements or arrangements with overseas enforcement agencies concerning international enforcement of anti-spam legislation, sharing of information between national enforcement agencies, and the pursuit of cross-border complaints concerning spam: 10 15
  - (k) providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.

Compare: Spam Act 2003 ss 45, 47 (Aust)

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**Schedule****Messages that are not electronic messages****1 Excluded messages**

The following messages are not electronic messages for the purposes of this Act:

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- (a) voice calls made using—
  - (i) a standard telephone service; or
  - (ii) voice-over internet protocol (IP);
- (b) facsimiles.

**2 Definition**

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In this Schedule, **voice call** means, whether or not a recipient responds by way of pressing buttons on a telephone handset, a keyboard, or similar thing,—

- (a) a voice call within the ordinary meaning of that expression; or
- (b) a call that involves a recorded or synthetic voice; or
- (c) a call that is equivalent to a call covered by either **paragraph (a) or (b)** if a call covered by either of those paragraphs is not practical for a particular recipient with a disability (for example, because the recipient has a hearing impairment).

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**Legislative history**

28 July 2005

Introduction (Bill 281–1)

13 December 2005

First reading and referral to Commerce Committee

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