

# **New Zealand- Unsolicited Electronic Messages Act 2007**

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Date of assent 5 March 2007

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#### **Messages that are not electronic messages**

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

- 1. Title**  
This Act is the Unsolicited Electronic Messages Act 2007.
- 2. Commencement**  
This Act comes into force 6 months after the date on which it receives the Royal assent.

## Part 1 Preliminary provisions

### 3. Purposes of this Act

The purposes of this Act are to—

- (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
  - (ii) reduce impediments to the uptake and effective use of information and communications technologies by businesses and the wider community in New Zealand; and
  - (iii) reduce the costs to businesses and the wider community that arise from unsolicited commercial electronic messages; and
- (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
- (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
- (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,—

- (a) searching the Internet for electronic addresses; and
- (b) collecting, compiling, capturing, or otherwise harvesting those electronic addresses

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

**civil liability event** has the meaning set out in section 18

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

**consented to receiving**—

- (a) means—

- (i) express consent, whether given by the relevant electronic addressholder or any other person who uses the relevant electronic address; or
- (ii) consent that can reasonably be inferred from—
  - (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
  - (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
  - (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
- (b) does not include the circumstances specified in the regulations from which consent cannot be inferred

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

**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
- (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 powers in Part 3

**enforcement officer** means a person who is appointed as an enforcement officer under section 21

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

**government body** means—

- (a) a department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975;
- (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
- (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

**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
- (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—

- (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
- (f) a court or tribunal

**person** means—

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

**recipient**, in relation to the sending of an electronic message to an electronic address, means—

- (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 **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 Consumer Guarantees Act 1993 **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 **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:
    - (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;
    - (c) the computer, server, or device that is used to access the message is located in New Zealand;
    - (d) the recipient is—
      - (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;
    - (f) it is sent to an electronic address that—
      - (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—
    - (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.
  - (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**—

- (a) means an electronic message that—
  - (i) markets or promotes—
    - (A) goods; or
    - (B) services; or
    - (C) land; or
    - (D) an interest in land; or
    - (E) a business or investment opportunity; or
  - (ii) assists or enables a person to obtain dishonestly a financial advantage or gain from another person; or
  - (iii) provides a link, or directs a recipient, to a message that does 1 or more of the things listed in subparagraphs (i) and (ii); but
- (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
  - (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
  - (iii) provides warranty information, product recall information, or safety or security information about goods or services used or purchased by the recipient; or
  - (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 recipients ongoing subscription, membership, account, loan, or similar relationship; or
  - (v) provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
  - (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

- (vii) provides the recipient with information about goods or services offered or supplied by—
    - (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.
  - (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.
- Compare: Spam Act 2003 s 14 (Aust)

### **Part 2**

## **Restrictions on electronic messages, address-harvesting software, and harvested-address lists**

### Subpart 1—Commercial 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.
  - (2) If a recipient uses an unsubscribe facility in accordance with section 11(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.
  - (3) 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)

## **10 Commercial electronic messages must include accurate sender information**

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

- (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
- (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)

**11 Commercial electronic messages must contain functional unsubscribe facility**

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

- (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 from or authorised by the sender should be sent to the electronic address at which the principal message was received; and
- (b) the unsubscribe facility is expressed and presented in a clear and conspicuous manner; and
- (c) 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
- (d) there is no cost to the recipient if the recipient uses the unsubscribe facility; and
- (e) the unsubscribe facility is reasonably likely to be functional and valid for at least 30 days after the principal message is sent; and
- (f) the unsubscribe facility complies with any conditions specified in the regulations.

(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
- (b) the recipient.

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

**12 Defences**

(1) A person who sends an electronic message, or causes an electronic message to be sent, in contravention of section 9, 10, or 11 has a defence if—

- (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).

(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**

**13 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.

(2) In subsection (1), **person** means—

- (a) an individual who is physically present in New Zealand at the time of the use:

- (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,—
  - (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)

#### **14 Onus of proof**

A person who 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 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

#### **15 Third party breaches of Act**

A person must not—

- (a) aid, abet, counsel, or procure a breach of any of sections 9 to 11 and 13; or
- (b) induce, whether by threats or promises or otherwise, a breach of any of sections 9 to 11 and 13; or
- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a breach of any of sections 9 to 11 and 13; or
- (d) conspire with others to effect a breach of any of sections 9 to 11 and 13.

Compare: Spam Act 2003 ss 16(9), 17(5), 18(6), 20(5), 21(3), 22(3) (Aust)

### Subpart 4—Rules of general application throughout Act

#### **16 Supplying message service**

A service provider does not send an electronic message, or cause an electronic message to be sent, or contravene section 15, 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)

#### **17 Person who authorises sending of electronic messages**

- (1) For the purposes of sections 6, 10, and 11, if person A sends an electronic message on behalf of person B, then—
  - (a) person B is taken to authorise the sending of that message; and
  - (b) person A is taken not to authorise the sending of that message.
- (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

**18 Meaning of civil liability event**

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

- (a) section 9(1) (unsolicited commercial electronic messages must not be sent):
  - (b) section 10 (commercial electronic messages must include accurate sender information):
  - (c) section 11(1) (commercial electronic messages must contain functional unsubscribe facility):
  - (d) section 13(1) (restriction on use of address harvesting software and harvested address lists):
  - (e) section 15 (third party breaches of the Act).
- Compare: Spam Act 2003 ss 16(11), 17(7), 18(8), 20(6), 21(4), 22(4) (Aust)

**19 Possible responses to civil liability event**

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

- (a) any person affected by that event may do 1 or more of the following:
  - (i) seek an injunction from the High Court under section 40 or 42:
  - (ii) make an application to the Court for compensation or damages under section 46:
  - (iii) apply to join any Court action initiated by the enforcement department or any other person under section 47; and
- (b) an enforcement officer may do 1 or more of the following:
  - (i) issue a formal warning under section 23:
  - (ii) issue a civil infringement notice under section 24:
  - (iii) apply for a search warrant under section 51 and exercise the powers of search and seizure granted by the warrant; and
- (c) the enforcement department may do 1 or more of the following:
  - (i) accept an enforceable undertaking under section 34 and seek an order in the Court for a breach of that undertaking under section 35:
  - (ii) seek an injunction from the High Court under section 40 or 42:
  - (iii) make an application to the Court for a pecuniary penalty under section 45:
  - (iv) make an application to the Court for compensation or damages under section 46:
  - (v) apply to join any Court action initiated by any other person under section 47.

Subpart 2—Functions and powers of enforcement department and  
enforcement officers

**20 Functions and powers of enforcement department**

The enforcement department—

- (a) may investigate, and take enforcement action in relation to, an alleged civil liability event if it considers that an investigation or enforcement action is appropriate in the circumstances; and
- (b) must make publicly available information concerning—
  - (i) the functions and powers of the enforcement department and enforcement officers under this Act; and
  - (ii) the purposes and provisions of this Act; and
  - (iii) the rights and responsibilities of persons to whom this Act applies; and
- (c) must monitor information and communications technologies and the way in which they are utilised to send and receive unsolicited commercial electronic messages; and
- (d) must—
  - (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
  - (iii) if it considers it appropriate in the circumstances, make recommendations to government or nongovernment organisations about possible responses to the types of electronic messages forwarded to that electronic address; and
- (e) 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
- (f) may consult with, advise, and assist government and nongovernment organisations and other persons overseas, for the purpose of promoting and enforcing international procedures to prevent unsolicited commercial electronic messages being sent or received.

## **21 Chief executive may appoint enforcement officers**

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

## **22 Authority to act as enforcement officer**

- (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
  - (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—
  - (a) section 23 (formal warnings):

- (b) sections 24 to 31 (civil infringement notices):
- (c) sections 51 to 56 (search and seizure).
- (4) A person who ceases to be an enforcement officer must return the person's warrant of appointment.
- (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*

#### **23 Formal warnings**

- (1) An enforcement officer may issue 1 or more formal warnings to a person if the enforcement officer has reasonable grounds to believe that that person has committed a civil liability event.
- (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)

### *Civil infringement notices*

#### **24 Civil infringement notices**

If an enforcement officer has reasonable grounds to believe that a person has committed 1 or more civil liability events, the enforcement officer may issue a civil infringement notice relating to those events to that person.  
Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

#### **25 Issue of civil infringement notices**

- (1) A 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.
- (2) A 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 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.  
Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

#### **26 Form of civil infringement notices**

A 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
- (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
  - (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 any further information specified in the regulations.
- Compare: Spam Act 2003 Sch 3, cl 4 (Aust)

## **27 Objections to civil infringement notices**

- (1) An objection to a civil infringement notice—
  - (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.
- (2) An enforcement officer—
  - (a) must consider every objection that is properly made under subsection (1); and
  - (b) may turn down the objection, alter the civil infringement notice, or withdraw the civil infringement notice in accordance with section 28; 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 officer's decision.
- (3) A person may not object to a civil infringement notice that has been altered by an enforcement officer under subsection (2)(b).

## **28 Withdrawal of civil infringement notice**

- (1) An enforcement officer may, by written notice (the **withdrawal notice**) given to a person who has been issued with a civil infringement notice, withdraw the civil infringement notice.
  - (2) To be effective, the withdrawal notice must be given to the person within 20 working days after the later of the day on which—
    - (a) the notice was issued; or
    - (b) if applicable, the enforcement officer issues his or her final response to an objection to the civil infringement notice.
  - (3) An enforcement officer must refund the penalty specified in a civil infringement notice if—
    - (a) the penalty specified in the civil infringement notice has been paid; and
    - (b) the civil infringement notice is withdrawn after the penalty was paid.
- Compare: Spam Act 2003 Sch 3, cl 6 (Aust)

## **29 What happens if penalty is paid**

- (1) This section applies if—
  - 1. a 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
  - 2. the penalty is paid in accordance with the 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 civil infringement notice relates is discharged, except for the purposes of section 46; and (b) proceedings under section 45 may not be brought against the person for those alleged civil liability events.

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

### **30 Effect of civil infringement notice on civil proceedings**

- (1) A civil infringement notice issued to a person does not prevent proceedings under section 45 being brought against the person for an alleged civil liability event if—
  - (a) the person does not pay the penalty specified in the civil infringement notice for that event; or
  - (b) a civil infringement notice relating to the event is issued to the person and subsequently withdrawn before the penalty specified in the notice is paid.
- (2) A civil infringement notice issued to a person does not prevent proceedings under section 46 being brought against the person for an alleged civil liability event to which the notice relates.

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

### **31 Recovery of unpaid penalty**

- (1) The consequence specified in subsection (2) applies if a person—
  - (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.

### **32 Right to appeal**

- (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 27(2)(c) is given.
- (3) An appeal under subsection (1) does not operate as a stay of the civil infringement notice.

### **33 Decision on appeal**

- (1) A District Court must determine an appeal under section 32 by dismissing or allowing the appeal.

- (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.
- (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
  - (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 31.

### *Enforceable undertakings*

#### **34 Enforceable undertakings**

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

#### **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 Court for an order under subsection (2).
- (2) If the 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;
  - (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;
  - (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 Court may have regard to the following:

- (a) the extent to which any expenses incurred by the victim are attributable to dealing with the breach:
  - (b) the effect of 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 breach:
  - (d) any loss of business opportunities suffered by the victim as a result of dealing with the breach:
  - (e) any other matters that the Court considers relevant.
- Compare: Spam Act 2003 s 40 (Aust)

## Subpart 3—Powers of Courts

### *General*

#### **37 Jurisdiction of District Courts**

- (1) In accordance with this Act, District Courts may hear and determine the following matters:
  - (a) recovery of an unpaid penalty specified in a civil infringement notice under section 31:
  - (b) appeals from civil infringement notices under sections 32 and 33:
  - (c) applications for an order in relation to an undertaking under sections 35 and 36:
  - (d) applications for a pecuniary penalty under section 45:
  - (e) applications for compensation or damages under section 46:
  - (f) applications for joining of parties or proceedings under section 47:
  - (g) applications for a search warrant to search a place or thing under section 51.
- (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:
  - (b) make an order under section 45 requiring a person to pay a pecuniary penalty that exceeds \$200,000:
  - (c) make an order under section 46 requiring a person to pay compensation or damages that, in total, exceed \$200,000.

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

#### **38 Jurisdiction of High Court**

- 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 40 or 42:
  - (c) applications for a pecuniary penalty under section 45:
  - (d) applications for compensation or damages under section 46:
  - (e) applications for joining of parties or proceedings under section 47.
- Compare: 1986 No 121 s 37

## *Injunctions*

### **39 Powers of High Court not affected**

The powers in sections 40 to 44 are in addition to, and do not derogate from, any other powers of the High Court relating to the granting of injunctions.

Compare: Spam Act 2003 s 36 (Aust)

### **40 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
    - (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.
- Compare: Spam Act 2003 ss 32, 34 (Aust)

### **41 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—
    - (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.
  - (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.
- Compare: Spam Act 2003 s 35 (Aust)

### **42 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.
  - (2) The Court may rescind or vary an injunction granted under this section.
- Compare: Spam Act 2003 ss 32, 34 (Aust); 2003 No 52 s 96

### **43 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
  - (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.
- (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.

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

#### **44 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.
- (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.  
Compare: Spam Act 2003 s 33 (Aust); 2003 No 52 s 98

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

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

- (1) On the application of the enforcement department, the Court may order a person (the **perpetrator**) to pay a pecuniary penalty to the Crown, or any other person specified by the Court, if the Court is satisfied that the perpetrator has committed a civil liability event.
- (2) Subject to the limits in subsections (3) and (4), the pecuniary penalty that the Court orders the perpetrator to pay must be an amount which the Court considers appropriate taking into account all relevant circumstances, including—  
the number of commercial electronic messages sent;  
the number of electronic addresses to which a commercial electronic message was sent;  
whether or not the perpetrator has committed prior civil liability events.
- (3) If the perpetrator is an individual, the Court may order the perpetrator to pay a pecuniary penalty not exceeding \$200,000 in respect of the civil liability events that are the subject of the enforcement department's application.
- (4) If the perpetrator is an organisation, the Court may order the perpetrator to pay a pecuniary penalty not exceeding \$500,000 in respect of the civil liability events that are the subject of the enforcement department's application.  
Compare: Spam Act 2003 ss 24, 25, 26 (Aust)

#### **46 Compensation and damages for civil liability event**

- (1) This section applies if the 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 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 Court may make an order that the Court considers appropriate directing the perpetrator to pay to the victim either or both of the following:
- compensation for any loss suffered by the victim as a result of the civil liability event;
  - 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)

#### **47 Joinder of parties**

- (1) On the application of the enforcement department or any other person, the Court may direct that—
- (a) an application for compensation or damages under section 46 be heard together with an application by the enforcement department for a pecuniary penalty under section 45; or
  - (b) an application by the enforcement department for a pecuniary penalty under section 45 be heard together with an application for compensation or damages under section 46; or
  - (c) 2 or more applications for compensation or damages under section 46 be heard together.
- (2) The 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
  - (c) according to the merits and equities of the circumstances.

#### **48 Interrelationship of civil liability remedies**

- (1) A person may be liable for a pecuniary penalty, compensation, and damages for the same civil liability event.
- (2) However, in determining whether to order a person to pay a pecuniary penalty, or compensation, or damages (individually, a **civil liability remedy**), the Court must have regard to—
- (a) whether that person has already paid another civil liability remedy for the same civil liability event; and
  - (b) if so, the amount and effect of that first civil liability remedy.
- Compare: Spam Act 2003 ss 28(3), 29(2) (Aust)

#### **49 Applicable rules, procedure, and standard of proof**

The proceedings under sections 45 and 46 are civil proceedings to which the usual rules of the Court, rules of evidence, and procedure for civil proceedings apply (including the standard of proof).

#### **50 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.

- (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 4—Search and seizure

### **51 Search warrant**

- (1) An enforcement officer may apply for a search warrant to search a place or thing.
- (2) An enforcement officer who applies for a search warrant must, having made reasonable inquiries, disclose on the application—
- (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
  - (b) the result of those applications.
- (3) The application must be made in writing and on oath to the District Court.
- (4) The District Court may issue a search warrant if there are reasonable grounds for believing that—
- (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.
- (5) The District Court may issue the warrant to—
- the enforcement officer; or
  - any member of the police; or
  - a member of the police by name.

### **52 Form and content of search warrant**

- (1) A search warrant must not be executed later than 14 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:
- (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
  - (d) the period during which the warrant may be executed; and
  - (e) any special conditions on which the warrant is issued.

### **53 Powers conferred by search warrant**

- (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—
- (a) enter and search the place or thing specified in the warrant at any time by day or night; and
  - (b) use the assistance that is necessary in the circumstances to enter and search the place or thing; and

- (c) use the force that is 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
  - (e) search for and seize any property or thing referred to in section 52(2)(c); and
  - (f) take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant.
- (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).
- (4) The power to enter and search a place or thing under a search warrant may be exercised only once.
- (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—
- (a) any writing on any material:
  - (b) any information recorded or stored by means of any taperecorder, computer, or other device; and any material subsequently derived from information so recorded or stored:
  - (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:
  - (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)

#### **54 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.
- (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
  - (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.
- (3) A specified person may not be required under subsection (1) to give any information tending to incriminate himself or herself.
- (4) Subsection (3) does not prevent a person executing the search warrant from requiring a specified person to provide information that—
- (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

- (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 executing the search warrant to access data held in, or accessible from, a computer that
  - (a) is in or at the place or thing named in the warrant; and
  - (b) contains or may contain information tending to incriminate the specified person.
- (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 subsection (1).  
Compare: 1957 No 87 s 198B

## **55 Requirements when executing search warrant**

- (1) The person who executes the warrant (**person A**) must carry the warrant with him or her, and produce it for inspection, with evidence of person A's identity,—  
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  
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.
- (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:
  - (a) the time and date of the search; and
  - (b) person A's name; and
  - (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.
- (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.

## **56 Disposal of property or thing seized under search warrant**

- (1) If any property or thing is seized under section 53, 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.
- (2) In any proceeding for a civil liability event relating to any property or thing seized under a warrant issued under this Act, the Court may order, either at the trial or hearing or on application, that—  
the property or thing must be delivered to the person who, in the Court's view, appears to be entitled to it; or

- the property or thing must otherwise be disposed of as the Court thinks appropriate.
- (3) The enforcement officer or a member of the police may, at any time, unless an order has been made under subsection (2), 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.
  - (4) On an application under subsection (3), the District Court Judge may make any order that the District Court may make under subsection (2).
  - (5) Any person claiming to be entitled to the property or thing may apply to a District Court Judge for an order that it be delivered to that person.
  - (6) On an application under subsection (5), 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
    - (b) make any order that the District Court may make under subsection (2).

#### **Part 4**

#### **Miscellaneous provisions**

##### **57 Alterations to Schedule**

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

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

##### **58 Regulations**

The GovernorGeneral may, by Order in Council, make regulations for all or any of the following purposes:

- (a) specifying circumstances from which a recipient may or may not be inferred to have consented to receiving an electronic message:
- (b) setting out further purposes that exclude an electronic message from being a commercial electronic message under section 6:
- (c) specifying conditions for the purposes of section 10(c):
- (d) specifying conditions for the purposes of section 11(1)(f):
- (e) prescribing the form of a warrant of appointment of an enforcement officer and any particulars that the warrant must contain for the purposes of section 22(2):
- (f) prescribing the form of formal warnings and specifying the manner in which they must be issued under section 23:
- (g) 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 civil infringement notice under section 26(b):

- (h) specifying any further information that must be contained in a civil infringement notice under section 26(g):
- (i) specifying, in accordance with section 27,—
  - (i) the grounds on which an objection to a civil infringement notice may be made; and
  - (ii) the information that must be contained in an objection; and
  - (iii) the time within which, and the manner in which, an objection must be made:
- (j) prescribing the form of search warrants under section 52(2):
- (k) authorising the enforcement department to enter into agreements or arrangements with overseas enforcement agencies concerning international enforcement of antispam legislation, sharing of information between national enforcement agencies, and the pursuit of crossborder complaints concerning spam:
- (l) 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)

## **Schedule s 5**

### **Messages that are not electronic messages**

#### **1 Excluded messages**

The following messages are not electronic messages for the purposes of this Act: voice calls made using—

- (i) a standard telephone service; or
- (ii) voiceover internet protocol (IP):  
facsimiles.

#### **2 Definition**

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).

#### **Legislative history**

28 July 2005	Introduction (Bill 2811)
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31 August 2006	Reported from Commerce Committee (Bill 2812)
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