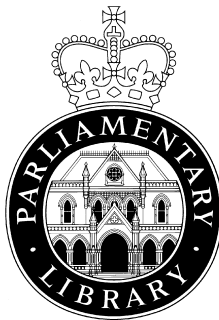


BILLS DIGEST

UNSOLICITED ELECTRONIC MESSAGES BILL 2005 (2006 No 281-2)

As reported from the Commerce Committee: 31 August 2006

Bills Digest No. 1421



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UNSOLICITED ELECTRONIC MESSAGES BILL 2005 (2006 No 281-2)

Date of introduction:	28 July 2005
Portfolio:	Information Technology
Select Committee:	Commerce
Date report presented:	31 August 2006

PURPOSE

The Bill seeks to regulate unsolicited electronic messages (commonly called “spam”) as part of a “multi-tiered strategy” to combat the growth of spam along with self-regulation in the form of industry codes of practice, education and awareness campaigns, improved technical measures, and international co-operation.

The Bill as introduced is described in [Bills Digest No 1309](#).

MAIN CHANGES TO THE BILL**Commencement extended**

The Select Committee has recommended that the Bill come into force six month (instead of four months) after the date on which it receives the Royal assent (*Clause 2*).

Purposes

The Bill as introduced provided in general that the purposes of the Bill are to:

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- prohibit promotional electronic messages that have a New Zealand link from being sent to a person who has withdrawn consent to receiving such messages;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

The Select Committee has recommended a redrafting of the purpose clause so that the purposes of the Bill would be to:

- prohibit unsolicited commercial electronic messages with a New Zealand link from being sent, in order to
 - promote a safer and more secure environment for the use of information and communications technologies in New Zealand,
 - reduce impediments to the uptake and effective use of information and communications technologies by businesses and the wider community in New Zealand, and
 - reduce the costs to businesses and the wider community that arise from unsolicited commercial electronic messages;
- 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;
- prohibit address-harvesting software or a harvested-address list from being used in connection with sending unsolicited commercial electronic messages in contravention of the Bill; and
- deter people from using information and communications technologies inappropriately (*Part 1, amending Clause 3*).

References to “promotional messages” deleted

The Bill provides that a person must not send, or cause to be sent, an “unsolicited commercial electronic message” that has a New Zealand link. An “unsolicited commercial electronic message” means a commercial electronic message that the recipient has not consented to receiving. This means that a “commercial electronic message” is not an “unsolicited commercial electronic message” if the recipient has consented to receive it (i.e. the recipient has “opted-in”). The Bill as introduced provided for the category of “promotional electronic message”¹. 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 the sender (i.e. unwilling recipients have to “opt out”).

The Select Committee has recommended that the Bill relate only to “commercial electronic messages” (for which a lack of consent to their reception (i.e. where there is no “opt-in”) makes them the “unsolicited commercial electronic messages” controlled by this Bill) and that the category of “promotional message” be removed from the Bill (*Part 1, Clause 4(1), deleting definition of “promotional electronic message”; Part 2, Subpart 1, deletion of Clause 10; Part 3, Clause 34(1), deletion of paragraph (b); cf. Clause 9(1) and Part 1, Clause 4(1), deleted definition of “promotional electronic message”*).

¹ The deleted definition of “promotional electronic message” was “... an electronic message ... that is not a commercial electronic message, ... and ... that has, as its primary purpose, the promotion or marketing of an organisation, or its aims or ideals (*Part 1, Clause 4 (1), deleted definition of “promotional electronic message”*).

Definition of “commercial electronic message”

The Select Committee has recommended amendments to the definition of “commercial electronic message” to capture messages that seek to market goods or services merely by providing links to other websites or messages (*Part 1, Clause 6(a), new subparagraph (iii)*).

Unsolicited commercial electronic messages forbidden and unsubscribe facilities

The Bill provides that a person must not send, or cause to be sent, an “unsolicited commercial electronic message” that has a “New Zealand link”. A person who contends that a recipient consented to receiving a commercial electronic message has the onus of proving that fact. The Bill also provides that every commercial electronic message that is sent, and that has a New Zealand link, must include a functional unsubscribe facility that allows the recipient of the message to instruct the person who authorised the sending of the message that no further messages authorised by the sender should be sent to the recipient’s electronic address, in the absence of agreement between the persons involved that this requirement does not apply to messages sent between them

The Select Committee has recommended if a recipient of a commercial electronic message uses an unsubscribe facility, 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 five working days after the day on which the unsubscribe facility was used. The Select Committee has also recommended that unsubscribe facilities must allow “... the recipient to respond to the sender using the same method of communication that was used to send the principal message” and that “there is no cost to the recipient if the recipient uses the unsubscribe facility” (*Part 2, Subpart 1, Clause 9, inserting new subclause (1A) ; Part 2, Subpart 1, Clause 12, inserting new subclauses (ba) and (bb)*).

Address-harvesting software and harvested-address lists

The Select Committee has recommended the redrafting of the provisions of the Bill as introduced relating to address-harvesting software and harvested-address lists. The general prohibition is redrafted (but not changed in substance) to read; “... 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 ...”. The term “person” is defined as “an individual who is physically present in New Zealand at the time of use” or “an organisation that carries on business or activities in New Zealand at the time of the use”.

The Bill as introduced provided that the general prohibition did not apply in two circumstances. First, if the supplier had no reason to suspect that the address-harvesting software or the harvested-address list was to be used in connection with sending unsolicited commercial electronic messages or promotional electronic messages in contravention of this Bill. And secondly, if the supplier did not know, and could not with reasonable diligence have ascertained, that the person to whom they supplied the software or list was either an individual who was physically present in New Zealand or an organisation that carried on business or activities in New Zealand.

The Select Committee has recommended the deletion of these two exceptions from the Bill. The onus of proving 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 lies with the “person who contends” such (*Part 2, Subpart 2, deleting Clauses 14 – 17, and inserting New Clause 17A, and amending Clause 18*).

Requirement that complaints be directed to Internet service providers deleted

The Select Committee has recommended the removal of the requirement that complaints from recipients be directed to Internet service providers and not the enforcement department (*Part 3, Subpart 1, amending Clauses 23, 24 and 25*).

Enforcement agency

The Bill as introduced provided that the enforcement department could only consider complaints from service providers and not any other person.

The Select Committee has recommended that the enforcement department be able to investigate and take enforcement action in relation to any alleged “civil liability event”² from whatever source. The enforcement department is given powers to publicise its enforcement role, monitor relevant technologies, monitor compliance by New Zealand with relevant international agreements and arrangements, advise government and non-government organisations, appoint enforcement officers, and to provide warrants for such enforcement officers (with particular powers under Clause 26 (formal warnings), Clauses 27 – 33A (civil infringement (formerly contravention notices) and Clauses 48 – 52 (search and seizure)) (*Part 3, Subpart 3, amending Clause 25 and inserting New Clauses 25A and 25B; Part 3, Subpart 1, amending Clause 23, especially by inserting new paragraph (e)*).

Recovery of unpaid penalties

The Select Committee has recommended that provision be made in the Bill in relation to the recovery of unpaid penalties (and “the actual and reasonable costs of recovery awarded against the person by the Court”) specified in infringement notices by enforcement officers in the District Court. A person may also appeal to the District Court where dissatisfied with the decision of an enforcement officer to turn down an objection to a civil infringement notice or to alter a civil infringement notice (*Part 3 of the Bill, inserting New Clauses 33A – 33C into the Bill*).

Search and seizure provisions

The Select Committee has recommended several amendments to the search and seizure provisions in the Bill to align it with similar provisions in the Summary Proceedings Act 1957³ as follows:

² Clause 22 of the Bill defines the term “civil liability event” as a breach of one or more of the following clauses of the Bill (as amended): Clause 9(1) (“unsolicited commercial electronic messages must not be sent”; Clause 11 (“commercial electronic messages must include accurate sender information”); Clause 12(1) (“commercial electronic messages must contain functional unsubscribe facility”); Clause 17A(1) (“restriction on use of address-harvesting software and harvested-address lists”); and Clause 19 (“third party breaches of the [Bill]”).

³ Unsolicited Electronic Messages Bill, 2006 No 281-2, As reported from the Commerce Committee, Commentary, p. 5.

- it is the enforcement officer not the enforcement department who applies for a warrant;
- the enforcement officer must have made reasonable enquiries and must disclose on the application for the warrant details of any other applications that he or she knows were made in the previous ninety days in respect of the place or thing specified in the application in respect of the same matter and the results of those applications;
- the power to search any person found at the place or thing will also include the power to search any person 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;
- a person executing a search warrant may require a "specified person" (broadly, the person who is the owner or lessee of the computer (or an employee), having relevant knowledge) 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;
- if any property is seized, 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 (*Part 3, Subpart 5, amending Clauses 48 – 50 and 52, and inserting New Clause 50A*).