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2008, No. 1

An Act relating to SPAM (Unsolicited commercial electronic messages)
and for related purposes

(14 February 2008)

BE IT ENACTED by the Parliament of the Cook Islands in session assembled, by the authority of the same, as follows:

PART 1
INTRODUCTION

1. Short title - This Act may be cited as the Spam Act 2008.
 2. Interpretation - In this Act, unless the context otherwise requires -
 - “account” includes -
 - (a) a free account; and
 - (b) a pre-paid account; and
 - (c) anything that may reasonably be regarded as the equivalent of an account;
 - “acquire” -
 - (a) in relation to goods - includes -
 - (i) acquire by way of gift, purchase or exchange; and
 - (ii) take on lease, hire or hire-purchase;
 - (b) in relation to services - includes accept; and
 - (c) in relation to interests in land, includes obtain by gift, purchase, exchange, lease or licence,
- and “acquisition” has a corresponding meaning;

"address-harvesting software" means software that is specifically designed or marketed for use for -

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

"agency" includes -

- (a) an armed force; and
- (b) a police force;

"authorise", when used in relation to the sending of an electronic message, has a meaning affected by section 8;

"business" includes a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis;

"civil penalty provision" means any of the following provisions:

- (a) sections 14 (1), (6) and (9);
- (b) sections 15 (1) and (5);
- (c) sections 16 (1) and (6);
- (d) sections 17 (1) and (5);
- (e) sections 18 (1) and (3);
- (f) sections 19 (1) and (3);
- (g) a provision of the regulations that is declared to be a civil penalty provision in accordance with section 43 (2) (c);

"commercial electronic message" has the meaning given by section 6;

"consent", when used in relation to the sending of an electronic message, has the meaning given by Schedule 2;

"Cook Islands link" has the meaning given by section 7;

"Cook Islands telecommunication service" has the meaning given by section 4;

"Court" means the High Court of the Cook Islands;

"data-processing device" means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device;

“dealing with”, when used in relation to a commercial electronic message, includes -

- (a) accessing the message; and
- (b) responding to the message; and
- (c) filtering the message;

“exempt commercial electronic message” has the meaning given by Schedule 1;

“director” includes a member of the governing body of an organisation;

“educational institution” includes -

- (a) a pre-school; and
- (b) a school; and
- (c) a college; and
- (d) a university;

“electronic address” includes an Internet Protocol or e-mail address and a telephone number;

“electronic message” has the meaning given by section 5;

“employee” includes an individual who is in the service of an armed force, a police force or a religious organisation;

“evidential burden”, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist;

“exempt commercial electronic message” has the meaning given by Schedule 1;

“goods” includes -

- (a) software, whether recorded on a physical medium or not;
- (b) ships, aircraft and other vehicles;
- (c) animals, including fish;
- (d) minerals, trees and crops, whether on, under or attached to land or not; and
- (e) gas and electricity;

“government body” means -

- (a) a ministry or department of the Government of the Cook Islands; or
- (b) an agency, authority or instrumentality of the Government of the Cook Islands; or

- (c) a department of the government of a foreign country; or
- (d) an agency, authority or instrumentality of the government of a foreign country; or
- (e) a department of the government of a part of a foreign country; or
- (f) an agency, authority or instrumentality of the government of a part of a foreign country,

but does not include a company in which a government has an interest, being an interest that does not entitle that government to control of the management and affairs of the company;

“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;

“international convention” means -

- (a) a convention to which the Cook Islands is a party or the Cook Islands is bound; or
- (b) an agreement between the Cook Islands and a foreign country;

“Internet telecommunication service” means a Cook Islands telecommunication service that enables end-users to access the Internet;

“investment” means any mode of application of money or other property for the purpose of gaining a return (whether by way of income, capital gain or any other form of return);

“logo” includes a trade mark;

“message” means information -

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

“Minister” means the Minister responsible for telecommunications;

“mistake” means reasonable mistake of fact;

“organisation” includes -

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

but express references in this Act to organisations do not imply that references in this Act to persons do not include bodies politic or corporate;

“political party” includes a branch or division of a political party;

“publish” includes -

- (a) publish on the Internet; and
- (b) publish to the public or a section of the public;

“relevant electronic account-holder”, in relation to the sending of an electronic message to an electronic address, means -

- (a) if the electronic address is an Internet Protocol or e-mail address - the individual or organisation who is responsible for the relevant e-mail account; or
- (b) if the message is sent to an electronic address in connection with an instant messaging service - the individual or organisation who is responsible for the relevant instant messaging account; or
- (c) if the electronic address is a telephone number - the individual or organisation who is responsible for the relevant telephone account; or
- (d) in any other case - the individual or organisation who is responsible for the relevant account;

“send” includes attempt to send;

“services” includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under -

- (a) a contract for or in relation to -
 - (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
 - (ii) the provision of, or the use or enjoyment of facilities for,

- accommodation, amusement, the care of persons or animals or things, parking, entertainment, recreation or instruction; or
- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
 - (b) a contract of insurance, including life assurance and life re-assurance;
 - (c) a contract between a bank and a customer of the bank; or
 - (d) any contract for or in relation to -
 - (i) the lending of money or granting of credit;
 - (ii) the making of arrangements for the lending of money or the granting of credit;
 - (iii) the buying or discounting of a credit instrument; or
 - (iv) the acceptance of deposits,

but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service;

“software” includes a combination of software and associated data;

“Supervisor” means the Supervisor of Internet Security referred to in section 3;

“supply” includes -

- (a) when used in relation to goods or services - supply (including re-supply) by way of gift, sale, exchange, lease, hire or hire-purchase; and
- (b) when used in relation to services - provide, grant or confer;

“telecommunication service” has the same meaning as in the Telecommunications Act 1989;

“use has a meaning affected by section 11;

“voice call” means -

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

whether or not the customer responds by way of pressing buttons on a telephone handset or similar thing.

3. Supervisor of Internet Security - (1) For the purposes of this Act there shall be a Supervisor of Internet Security, who shall be the person for the time being holding, or performing the duties of, an office in the Public Service designated for the purposes of this section by notice in writing signed by the Minister.

(2) The Supervisor -

(a) shall have an official name and seal; and

(b) is capable, in the corporate name specified in paragraph (a), -

(i) subject to the directions of the Minister, -

(A) of acquiring, holding and disposing of personal property (including, in particular, computer software) on behalf of the Government; and

(B) of entering into arrangements with other persons and organisations, both within and outside the Cook Islands, for the provision of services for the purposes of the effective administration of this Act; and

(ii) of suing and being sued.

(3) All courts, judges and persons acting judicially shall take judicial notice of the seal of the Supervisor affixed to a document and shall presume that it was duly affixed.

4. Cook Islands telecommunication services - (1) For the purposes of this Act, the following telecommunication services are Cook Islands telecommunication services -

(a) a telecommunication service between a point in the Cook Islands and

one or more other points in the Cook Islands;

(b) a telecommunication service between a point and one or more other points, where the first-mentioned point is in the Cook Islands and at least one of the other points is outside the Cook Islands;

(c) a telecommunication service between a point and one or more other points, where the first-mentioned point is outside the Cook Islands and at least one of the other points is in the Cook Islands.

(2) For the purposes of this section, "point" includes a mobile or potentially mobile point, whether on land, under ground, in the atmosphere, in outer space, under water, at sea or anywhere else.

(3) For the purposes of this section, a point that is -

(a) in the atmosphere; and

(b) in or below the stratosphere; and

(c) above the Cook Islands,

is taken to be a point in the Cook Islands.

(4) For the purposes of this section, a point that is:

(a) on a satellite; and

(b) above the stratosphere;
is taken to be a point outside the Cook Islands.

5. Electronic messages - (1) For the purposes of this Act, an electronic message is a message sent -

- (a) using -
 - (i) an Internet telecommunication service; or
 - (ii) any other local telecommunication service; and
- (b) to an electronic address in connection with -
 - (i) an e-mail account; or
 - (ii) an instant messaging account; or
 - (iii) a telephone account; or
 - (iv) a fax account; or
 - (v) a similar account.

(2) For the purposes of subsection (1), it is immaterial whether the electronic address exists.

(3) For the purposes of subsection (1), it is immaterial whether the message reaches its intended destination.

(4) Subsection (1) has effect subject to subsection (5).

(5) If a message is sent by way of a voice call, the message is not an electronic message for the purposes of this Act.

6. Commercial electronic messages - (1) For the purposes of this Act, a commercial electronic message is an electronic message, where, having regard to -

- (a) the content of the message; and
- (b) the way in which the message is presented; and
- (c) the content that can be located using the links, telephone numbers or contact information (if any) set out in the message,

it would be concluded that the purpose, or one of the purposes, of the message is -

- (d) to offer to supply goods or services; or
- (e) to advertise or promote goods or services; or
- (f) to advertise or promote a supplier, or prospective supplier, of goods or services; or
- (g) to offer to supply an interest in land; or
- (h) to advertise or promote an interest in land; or
- (i) to advertise or promote a supplier, or prospective supplier, of land or an interest in land; or
- (j) to offer to provide a business opportunity or investment opportunity; or
- (k) to advertise or promote a business opportunity or investment opportunity; or

- (l) to advertise or promote a provider, or prospective provider, of a business opportunity or investment opportunity; or
- (m) to assist or enable a person, by a deception, to dishonestly obtain property belonging to another person; or
- (n) to assist or enable a person, by a deception, to dishonestly obtain a financial advantage from another person; or
- (o) to assist or enable a person to dishonestly obtain a gain from another person; or
- (p) a purpose specified in the regulations.

(2) For the purposes of subsection (1) (d) to (l), the existence or otherwise of the goods, services, land, interest or opportunity is immaterial.

(3) For the purposes of subsection (1) (d) to (l), the lawfulness or otherwise of the acquisition of the goods, services, land or interest or of the taking up the opportunity is immaterial.

(4) Any of the following -

- (a) the supplier or prospective supplier mentioned in subsection (1) (f) or (i);
- (b) the provider or prospective provider mentioned in subsection (1) (l);
- (c) the person first mentioned in subsection (1) (m), (n) or (o),

may be the individual or organisation who sent the message or authorised the sending of the message.

(5) Paragraphs (d) to (p) of subsection (1) are to be read independently of each other.

(6) Subsection (1) has effect subject to subsection (7).

(7) The regulations may provide that a specified kind of electronic message is not a commercial electronic message for the purposes of this Act.

7. Cook Islands link - For the purposes of this Act, a commercial electronic message has a Cook Islands link if, and only if -

- (a) the message originates in the Cook Islands; or
- (b) the individual or organisation who sent the message, or authorised the sending of the message, is
 - (i) an individual who is physically present in the Cook Islands when the message is sent; or
 - (ii) an organisation whose central management and control is in the Cook Islands when the message is sent; or
- (c) the computer, server or device that is used to access the message is located in the Cook Islands; or
- (d) the relevant electronic account-holder is -
 - (i) an individual who is physically present in the Cook Islands when the message is accessed; or

- (ii) an organisation that carries on business or activities in the Cook Islands when the message is accessed; or
- (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 the Cook Islands.

8. Authorising the sending of electronic messages - (1) For the purposes of this Act (including subsection (2)), if -

- (a) an individual authorises the sending of an electronic message; and
- (b) the individual does so on behalf of an organisation, then -
- (c) the organisation is taken to authorise the sending of the electronic message; and
- (d) the individual is taken not to authorise the sending of the electronic message.

(2) For the purposes of this Act, if -

- (a) an electronic message is sent by an individual or organisation; and
- (b) the sending of the message is not authorised by any other individual or organisation,

the first-mentioned individual or organisation is taken to authorise the sending of the message.

9. Sending of electronic messages - telecommunication service providers - For the avoidance of doubt, it is declared that, for the purposes of this Act, a person does not send an electronic message, or cause an electronic message to be sent, merely because the person supplies a telecommunication service that enables the message to be sent.

10. Treatment of partnerships - (1) In its application to a partnership, this Act has effect subject to the following conditions -

- (a) a change in the composition of the partnership does not affect the continuity of the partnership;
- (b) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
- (c) any offence against this Act that would otherwise be committed by the partnership is taken to have been committed by each partner who -
 - (i) aided, abetted, counselled or procured the relevant act or omission; or
 - (ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

(2) In this section -

- “offence” includes a breach of a civil penalty provision;
- “this Act” includes regulations under this Act.

11. Extended meaning of "use" - Unless the contrary intention appears, a reference in this Act to the use of a thing is a reference to the use of the thing either -
- (a) in isolation; or
 - (b) in conjunction with one or more other things.
12. Crown to be bound - This Act binds the Crown.
13. Extra-territorial application - Unless the contrary intention appears, this Act extends to acts, omissions, matters and things outside the Cook Islands.

PART 2
RULES ABOUT SENDING COMMERCIAL ELECTRONIC MESSAGES

14. Unsolicited commercial electronic messages not to be sent - (1) A person must not send, or cause to be sent, a commercial electronic message that -
- (a) has a Cook Islands link; and
 - (b) is not an exempt commercial electronic message.
- (2) Subsection (1) does not apply if the relevant electronic account-holder consented to the sending of the message.
- (3) Subsection (1) does not apply if the person -
- (a) did not know; and
 - (b) could not, with reasonable diligence, have ascertained, that the message had a Cook Islands link.
- (4) Subsection (1) does not apply if the person sent the message, or caused the message to be sent, by mistake.
- (5) A person who wishes to rely on subsection (2), (3) or (4) bears an evidential burden in relation to that matter.
- (6) A person must not send, or cause to be sent, a commercial electronic message to a non-existent electronic address if -
- (a) the person did not have reason to believe that the electronic address existed; and
 - (b) the electronic message -
 - (i) has a Cook Islands link; and
 - (ii) is not an exempt commercial electronic message.
- (7) Subsection (6) does not apply if the person -
- (a) did not know; and
 - (b) could not, with reasonable diligence, have ascertained, that the message had a Cook Islands link.
- (8) A person who wishes to rely on subsection (7) bears an evidential burden in relation to that matter.

(9) A person must not -

- (a) aid, abet, counsel or procure a contravention of subsection (1) or (6); or
- (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1) or (6); or
- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1) or (6); or
- (d) conspire with others to effect a contravention of subsection (1) or (6).

(10) A person does not contravene subsection (9) merely because the person supplies a telecommunication service that enables an electronic message to be sent.

(11) Subsections (1), (6) and (9) are civil penalty provisions.

15. Commercial electronic messages to include accurate sender information - (1) A person must not send, or cause to be sent, a commercial electronic message that has a Cook Islands link unless -

- (a) the message clearly and accurately identifies the individual or organisation who authorised the sending of the message; and
- (b) the message includes accurate information about how the recipient can readily contact that individual or organisation; and
- (c) that information complies with the condition or conditions (if any) specified in the regulations; and
- (d) that information is reasonably likely to be valid for at least 30 days after the message is sent.

(2) Subsection (1) does not apply if the person -

- (a) did not know; and
- (b) could not, with reasonable diligence, have ascertained, that the message had a Cook Islands link.

(3) Subsection (1) does not apply if the person sent the message, or caused the message to be sent, by mistake.

(4) A person who wishes to rely on subsection (2) or (3) bears an evidential burden in relation to that matter.

(5) A person must not -

- (a) aid, abet, counsel or procure a contravention of subsection (1); or
- (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
- (d) conspire with others to effect a contravention of subsection (1).

(6) A person does not contravene subsection (5) merely because the person supplies a telecommunication service that enables an electronic message to be sent.

(7) Subsections (1) and (5) are civil penalty provisions.

16. Commercial electronic messages to contain a functional unsubscribe facility -

- (1) A person must not send, or cause to be sent, a commercial electronic message that -
- (a) has a Cook Islands link; and
 - (b) is not an exempt commercial electronic message, unless -
 - (c) the message includes -
 - (i) a statement to the effect that the recipient may use an electronic address set out in the message to send an unsubscribe message to the individual or organisation who authorised the sending of the first-mentioned message; or
 - (ii) a statement to similar effect; and
 - (d) the statement is presented in a clear and conspicuous manner; and
 - (e) the electronic address is reasonably likely to be capable of receiving -
 - (i) the recipient's unsubscribe message (if any); and
 - (ii) a reasonable number of similar unsubscribe messages sent by other recipients (if any) of the same message, at all times during a period of at least 30 days after the message is sent; and
 - (f) the electronic address is legitimately obtained; and
 - (g) the electronic address complies with the condition or conditions (if any) specified in the regulations.
- (2) Subsection (1) does not apply if the person -
- (a) did not know; and
 - (b) could not, with reasonable diligence, have ascertained, that the message had a Cook Islands link.
- (3) Subsection (1) does not apply to the extent (if any) to which it is inconsistent with the terms of a contract or other agreement between -
- (a) the individual or organisation who authorised the sending of the first-mentioned message; and
 - (b) the relevant electronic account-holder.
- (4) Subsection (1) does not apply if the person sent the message, or caused the message to be sent, by mistake.
- (5) A person who wishes to rely on subsection (2), (3) or (4) bears an evidential burden in relation to that matter.
- (6) A person must not -
- (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).

(7) A person does not contravene subsection (6) merely because the person supplies a telecommunication service that enables an electronic message to be sent.

(8) Subsections (1) and (6) are civil penalty provisions.

(9) For the purposes of the application of this section to a commercial electronic message, where the sending of the message is authorised by an individual or organisation, an unsubscribe message is -

- (a) an electronic message to the effect that the relevant electronic account-holder does not want to receive any further commercial electronic messages from or authorised by that individual or organisation; or
- (b) an electronic message to similar effect.

PART 3

RULES ABOUT ADDRESS-HARVESTING SOFTWARE AND HARVESTED-ADDRESS LISTS

17. Address-harvesting software and harvested-address lists not to be supplied -

(1) A person (the "supplier") must not supply or offer to supply -

- (a) address-harvesting software; or
- (b) a right to use address-harvesting software; or
- (c) a harvested-address list; or
- (d) a right to use a harvested-address list.

to another person (the "customer") if -

- (e) the supplier is -
 - (i) an individual who is physically present in the Cook Islands at the time of the supply or offer; or
 - (ii) a body corporate or partnership that carries on business or activities in the Cook Islands at the time of the supply or offer; or
- (f) the customer is -
 - (i) an individual who is physically present in the Cook Islands at the time of the supply or offer; or
 - (ii) a body corporate or partnership that carries on business or activities in the Cook Islands at the time of the supply or offer.

(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 commercial electronic messages in contravention of section 14.

(3) Subsection (1) does not apply if the supplier -

- (a) did not know; and
- (b) could not, with reasonable diligence, have ascertained, that the customer was -
 - (c) an individual who was physically present in the Cook Islands at the time of the supply or offer; or

- (d) a body corporate or partnership that carried on business or activities in the Cook Islands at the time of the supply or offer.
- (4) A person who wishes to rely on subsection (3) bears an evidential burden in relation to that matter.
- (5) A person must not -
 - (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).
- (6) Subsections (1) and (5) are civil penalty provisions.

18. Address-harvesting software and harvested-address lists not to be acquired -

- (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
 - (d) a right to use a harvested-address list,if the person is -
 - (e) an individual who is physically present in the Cook Islands at the time of the acquisition; or
 - (f) a body corporate or partnership that carries on business or activities in the Cook Islands at the time of the acquisition.
- (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 commercial electronic messages in contravention of section 14.
- (3) A person must not -
 - (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).
- (4) Subsections (1) and (3) are civil penalty provisions.

19. Address-harvesting software and harvested-address lists not to be used - (1) A person must not use -

- (a) address-harvesting software; or
- (b) a harvested-address list,

if the person is -

- (c) an individual who is physically present in the Cook Islands at the time of the use; or
- (d) a body corporate or partnership that carries on business or activities in the Cook Islands at the time of the use.

(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 commercial electronic messages in contravention of section 14.

(3) A person must not -

- (a) aid, abet, counsel or procure a contravention of subsection (1); or
- (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
- (d) conspire with others to effect a contravention of subsection (1).

(4) Subsections (1) and (3) are civil penalty provisions.

PART 4 CIVIL PENALTIES

20. Pecuniary penalties for contravention of civil penalty provisions - (1) If the Court is satisfied that a person has contravened a civil penalty provision, the Court may order the person to pay to the Government such pecuniary penalty, in respect of each contravention, as the Court determines to be appropriate.

(2) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including -

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct; and
- (e) if the Court considers that it is appropriate to do so - whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct.

21. Maximum penalties for contravention of civil penalty provisions - (1) The maximum penalty payable under section 20 (1) by a person in respect of a contravention of a civil penalty provision depends on -

- (a) whether the person has a prior record in relation to the civil penalty provision (as ascertained in accordance with subsection (2)); and
- (b) whether the person is a body corporate; and
- (c) whether the civil penalty provision is section 14 (1), (6) or (9).

(2) If -

- (a) on a particular day (the "first day"), the Court makes an order under subsection 20 (1) against a person in respect of a contravention of a particular civil penalty provision; and
- (b) that is the first occasion on which the Court makes an order under subsection 20 (1) against the person in respect of a contravention of the civil penalty provision.

then, for the purposes of determining the penalty payable under section 20 (1) by the person in respect of a contravention of the civil penalty provision that occurs after the first day, the person has a prior record in relation to the civil penalty provision.

(3) If a body corporate does not have a prior record in relation to a particular civil penalty provision -

- (a) the penalty payable under subsection 20 (1) by the body corporate in respect of a contravention of the civil penalty provision must not exceed -
 - (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$10,000; or
 - (ii) in any other case - \$5,000; and
- (b) if the Court finds that the body corporate has, on a particular day, committed 2 or more contraventions of the civil penalty provision - the total of the penalties payable under section 20 (1) by the body corporate in respect of those contraventions must not exceed -
 - (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$200,000; or
 - (ii) in any other case - \$100,000.

(4) If a person other than a body corporate does not have a prior record in relation to a particular civil penalty provision -

- (a) the penalty payable under subsection 20 (1) by the person in respect of a contravention of the civil penalty provision must not exceed -
 - (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$2,000; or
 - (ii) in any other case - \$1,000; and
- (b) if the Court finds that the person has, on a particular day, committed 2 or more contraventions of the civil penalty provision - the total of the

penalties payable under section 20 (1) by the person in respect of those contraventions must not exceed -

- (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$40,000; or
- (ii) in any other case - \$20,000.

(5) If a body corporate has a prior record in relation to a particular civil penalty provision -

- (a) the penalty payable under section 20 (1) by the body corporate in respect of a contravention of the civil penalty provision must not exceed -
 - (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$50,000; or
 - (ii) in any other case - \$25,000; and
- (b) if the Court finds that the body corporate has, on a particular day, committed 2 or more contraventions of the civil penalty provision - the total of the penalties payable under section 20 (1) by the body corporate in respect of those contraventions must not exceed -
 - (i) if the civil penalty provision is section 14 (1), (6) or (9) - \$1,000,000; or
 - (ii) in any other case - \$500,000.

(6) If a person other than a body corporate has a prior record in relation to a particular civil penalty provision -

- (a) the penalty payable under section 20 (1) by the person in respect of a contravention of the civil penalty provision must not exceed -
 - (i) if the civil penalty provision is subsection 14 (1), (6) or (9) - \$10,000; or
 - (ii) in any other case - \$5,000; and
- (b) if the Court finds that the person has, on a particular day, committed 2 or more contraventions of the civil penalty provision - the total of the penalties payable under section 20 (1) by the person in respect of those contraventions must not exceed -
 - (i) if the civil penalty provision is subsection 14 (1), (6) or (9) - \$200,000; or
 - (ii) in any other case - \$100,000.

22. Civil action for recovery of pecuniary penalties - (1) The Supervisor may institute a proceeding in the Court for the recovery on behalf of the Government of a pecuniary penalty referred to in section 20.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

(3) The Court may direct that 2 or more proceedings under subsection (1) are to be heard together.

23. Criminal proceedings not to be brought for contravention of civil penalty provisions - Criminal proceedings do not lie against a person only because the person has contravened a civil penalty provision.

24. Ancillary orders - compensation - (1) If -

(a) in one or more proceedings under section 22, the Court finds that a person (the "perpetrator") has contravened one or more civil penalty provisions; and

(b) the Court is satisfied that another person (the "victim") has suffered loss or damage as a result of any or all of those contraventions,

the Court may, on the application of the Supervisor or the victim, make an order that the Court considers appropriate directing the perpetrator to compensate the victim.

(2) In determining whether a person (the "victim") has suffered loss or damage as a result of one or more contraventions by another person of section 16 in relation to the sending of one or more commercial electronic messages, 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 messages;

(b) the effect of dealing with the messages 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;

(d) any loss of business opportunities suffered by the victim as a result of dealing with the messages;

(e) any other matters that the Court considers relevant.

(3) The Court may make an order under subsection (1), whether or not it makes an order under section 20.

(4) An application under subsection (1) may be made at any time within 6 years after the contravention concerned.

25. Ancillary orders-recovery of financial benefit - (1) If -

(a) in one or more proceedings under section 22, the Court finds that a person has contravened one or more civil penalty provisions; and

(b) the Court is satisfied that the person has obtained (whether directly or indirectly) a financial benefit that is reasonably attributable to any or all of those contraventions,

the Court may, on the application of the Supervisor, make an order directing the person to pay to the Government an amount up to the amount of the financial benefit.

(2) The Court may make an order under subsection (1), whether or not it makes an order under section 20.

(3) An application under subsection (1) may be made at any time within 6 years after the contravention concerned.

PART 5
INFRINGEMENT NOTICES

26. Object - The object of this Part is to set up a system of infringement notices for contraventions of civil penalty provisions as an alternative to the institution of proceedings in the Court.

27. Definitions - In this Part -

“authorised person” means -

- (a) the Supervisor; or
- (b) a person appointed under section 34;

“civil contravention” means a contravention of a civil penalty provision;

“infringement notice” means an infringement notice under section 28.

28. When an infringement notice can be given - (1) If an authorised person has reasonable grounds to believe that a person has, on a particular day, committed one or more contraventions of a particular civil penalty provision, the authorised person may give to the person an infringement notice relating to those contraventions.

(2) An infringement notice must be given within 12 months after the day on which the civil contraventions are alleged to have taken place.

(3) This clause does not authorise the giving of 2 or more infringement notices to a person in relation to contraventions of a particular civil penalty provision that allegedly occurred on the same day.

29. Matters to be included in infringement notice - (1) An infringement notice must -

- (a) set out the name of the person to whom the notice is given; and
- (b) set out the name of the authorised person who gave the notice; and
- (c) either -
 - (i) set out brief details of each of the alleged civil contraventions; or
 - (ii) be accompanied by one or more data-processing devices that contain, in electronic form, brief details of each of the alleged civil contraventions; and
- (d) contain a statement to the effect that the matter or matters will not be dealt with by the Court if the penalty specified in the notice is paid to the Supervisor, on behalf of the Government, within:
 - (i) 28 days after the notice is given; or
 - (ii) if the Supervisor allows a longer period - that longer period; and
- (e) give an explanation of how payment of the penalty is to be made; and
- (f) set out such other matters (if any) as are specified by the regulations.

(2) For the purposes of subsection (1) (c), the brief details must include the following information in relation to each alleged civil contravention -

- (a) the date of the alleged contravention;
- (b) the civil penalty provision that was allegedly contravened.

(3) Subsection (1) (c) (ii) does not authorise the inclusion of information in a data-processing device unless, at the time the infringement notice was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference.

30. Amount of penalty - The penalty to be specified in an infringement notice must be a pecuniary penalty in accordance with the following table:

<i>Item no.</i>	<i>Circumstance</i>	<i>Penalty applicable to a body corporate</i>	<i>Penalty applicable to a person other than a body corporate</i>
1	The notice relates to a single alleged contravention of section 14 (1), (6) or (9)	\$2,000	\$400
2	The notice relates to more than 1, but fewer than 50, alleged contraventions of section 14 (1), (6) or (9)	The amount obtained by multiplying \$2,000 by the number of alleged contraventions	The amount obtained by multiplying \$400 by the number of alleged contraventions
3	The notice relates to 50 or more alleged contraventions of section 14 (1), (6) or (9)	\$100,000	\$20,000
4	The notice relates to a single alleged contravention of a civil penalty provision other than section 14 (1), (6) or (9)	\$1,000	\$200
5	The notice relates to more than 1, but fewer than 50, alleged contraventions of a civil penalty provision other than section 14 (1), (6) or (9)	The amount obtained by multiplying \$1,000 by the number of alleged contraventions	The amount obtained by multiplying \$200 by the number of alleged contraventions
6	The notice relates to 50 or more alleged contraventions of a civil penalty provision other than subsection 14 (1), (6) or (9)	\$50,000	\$10,000

31. Withdrawal of infringement notice - (1) This section applies if an infringement notice is given to a person.

(2) An authorised person may, by written notice (the "withdrawal notice") given to the person, withdraw the infringement notice.

(3) To be effective, the withdrawal notice must be given to the person within 28 days after the infringement notice was given.

(4) If -

- (a) the penalty specified in the infringement notice is paid; and
- (b) the infringement notice is withdrawn after the penalty is paid, the Government is liable to refund the penalty.

32. What happens if penalty paid - (1) This clause applies if -

- (a) an infringement notice relating to one or more alleged civil contraventions is given to a person; and
- (b) the penalty is paid in accordance with the infringement notice; and
- (c) the infringement notice is not withdrawn.

(2) Any liability of the person for the alleged civil contraventions is discharged.

(3) Proceedings under Part 4 may not be brought against the person for the alleged civil contraventions.

33. Effect of this Part on civil proceedings - This Part does not -

- (a) require an infringement notice to be given in relation to an alleged civil contravention; or
- (b) affect the liability of a person to have proceedings under Part 4 brought against the person for an alleged civil contravention if -
 - (i) the person does not comply with an infringement notice relating to the contravention; or
 - (ii) an infringement notice relating to the contravention is not given to the person; or
 - (iii) an infringement notice relating to the contravention is given to the person and subsequently withdrawn; or
- (c) limit the Court's discretion to determine the amount of a penalty to be imposed on a person who is found in proceedings under Part 4 to have committed a civil contravention.

34. Appointment of authorised person - The Supervisor may, by writing, appoint a member of the public service who is subject to the direction of the Supervisor as an authorised person for the purposes of this Part.

35. Further provision by regulations - Regulations under section 44 may make further provision in relation to infringement notices.

PART 6
INJUNCTIONS

36. Granting of injunctions - (1) If a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of a civil penalty provision, the Court may, on the application of the Supervisor, grant an injunction -

- (a) restraining the person from engaging in the conduct; and
- (b) if, in the Court's opinion, it is desirable to do so - requiring the person to do something.

(2) If -

- (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
- (b) the refusal or failure was, is or would be a contravention of a civil penalty provision,

the Court may, on the application of the Supervisor, grant an injunction requiring the person to do that act or thing.

37. Interim injunctions - (1) If an application is made to the Court for an injunction under section 36, the Court may, before considering the application, grant an interim injunction restraining a person from engaging in conduct of a kind referred to in that section.

(2) The Court is not to require an applicant for an injunction under section 36, as a condition of granting an interim injunction, to give any undertakings as to damages.

38. Discharge etc. of injunctions - The Court may discharge or vary an injunction granted under this Part.

39. Certain limits on granting injunctions not to apply - (1) The power of the Court under this Part to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised -

- (a) if the Court is satisfied that the person has engaged in conduct of that kind - 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; or
- (b) if 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 - whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

(2) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised -

- (a) if the Court is satisfied that the person has refused or failed to do that act or thing - 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; or

- (b) if 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 - whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the person refuses or fails to do that act or thing.

40. Other powers of the Court unaffected - The powers conferred on the Court under this Part are in addition to, and not instead of, any other powers of the Court, whether conferred by this Act or otherwise.

PART 7 MISCELLANEOUS

41. Formal warnings - breach of civil penalty provision - The Supervisor may issue a formal warning if a person contravenes a civil penalty provision.

42. Additional functions of the Supervisor - The Supervisor has the following functions -

- (a) to conduct and/or co-ordinate community education programs about either or both of the following:
- (i) unsolicited commercial electronic messages;
 - (ii) address-harvesting software,
- in consultation with relevant industry and consumer groups and government agencies;
- (b) to conduct and/or commission research into issues relating to either or both of the following:
- (i) unsolicited commercial electronic messages;
 - (ii) address-harvesting software;
- (c) to liaise with regulatory and other relevant bodies overseas about co-operative arrangements for the prohibition or regulation of either or both of the following:
- (i) unsolicited commercial electronic messages;
 - (ii) address-harvesting software.

43. Giving effect to international conventions - (1) Regulations under section 44 may make provision for and in relation to giving effect to an international convention that deals with either or both of the following -

- (a) commercial electronic messages;
- (b) address-harvesting software.

(2) Regulations made for the purposes of subsection (1) may -

- (a) vest the Court with jurisdiction in a matter or matters arising under the regulations; and

- (b) prescribe penalties, not exceeding a fine of \$5,000, for offences against the regulations; and
- (c) declare that a specified provision of the regulations is a civil penalty provision for the purposes of this Act.

44. Regulations - The Queen's Representative may make regulations prescribing matters -

- (a) required or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

This Act is administered by the Office of the Prime Minister

SCHEDULE 1**EXEMPT COMMERCIAL ELECTRONIC MESSAGES*****Section 2***

1. Object - The object of this Schedule is to define the expression "exempt commercial electronic message".

2. Factual information - For the purposes of this Act, an electronic message is an exempt commercial electronic message if -

- (a) the message consists of no more than factual information (with or without directly-related comment) and any or all of the following additional information:
 - (i) the name, logo and contact details of the individual or organisation who authorised the sending of the message;
 - (ii) the name and contact details of the author;
 - (iii) if the author is an employee - the name, logo and contact details of the author's employer;
 - (iv) if the author is a partner in a partnership - the name, logo and contact details of the partnership;
 - (v) if the author is a director or officer of an organisation - the name, logo and contact details of the organisation;
 - (vi) if the message is sponsored - the name, logo and contact details of the sponsor;
 - (vii) information required to be included by section 15;
 - (viii) information that would have been required to be included by section 16 if that section had applied to the message; and
- (b) assuming that none of that additional information had been included in the message, the message would not have been a commercial electronic message; and
- (c) the message complies with such other condition or conditions (if any) as are specified in the regulations.

3. Government bodies, political parties, religious organisations and charities - For the purposes of this Act, an electronic message is an exempt commercial electronic message if -

- (a) the sending of the message is authorised by any of the following bodies:
 - (i) a government body;
 - (ii) a political party;
 - (iii) a religious organisation;
 - (iv) a charity or charitable institution; and
- (b) the message relates to goods or services; and

(c) the body is the supplier, or prospective supplier, of the goods or services concerned.

4. Educational institutions - For the purposes of this Act, an electronic message is an exempt commercial electronic message if -

- (a) the sending of the message is authorised by an educational institution; and
- (b) either or both of the following subparagraphs applies:
 - (i) the relevant electronic account-holder is, or has been, enrolled as a student in that institution;
 - (ii) a member or former member of the household of the relevant electronic account-holder is, or has been, enrolled as a student in that institution; and
- (c) the message relates to goods or services; and
- (d) the institution is the supplier, or prospective supplier, of the goods or services concerned.

5. Further provision by regulations - Regulations under section 44 may provide that a specified kind of electronic message is an exempt commercial electronic message for the purposes of this Act.

SCHEDULE 2

CONSENT

Section 2

1. Object - The object of this Schedule is to define the expression "consent", when used in relation to the sending of an electronic message.

2. Basic definition - For the purposes of this Act, "consent" means -

- (a) express consent; or
- (b) consent that can reasonably be inferred from -
 - (i) the conduct; and
 - (ii) the business and other relationships, of the individual or organisation concerned.

3. Users of account authorised to consent on behalf of relevant electronic account - holder - (1) For the purposes of this Act, if a person other than the relevant electronic account-holder uses the relevant account to send an electronic message about -

- (a) consent; or
- (b) withdrawal of consent; or
- (c) refusal of consent,

that person is taken to have been authorised to send that message on behalf of the relevant electronic account-holder.

(2) Subclause (1) does not, by implication, limit the circumstances in which a person other than the relevant electronic account-holder may -

- (a) consent; or
- (b) withdraw consent; or
- (c) refuse consent,

on behalf of the relevant electronic account-holder.

4. When consent may be inferred from publication of an electronic address - (1) For the purposes of this Act, the consent of the relevant electronic account-holder may not be inferred from the mere fact that the relevant electronic address has been published.

(2) However, if -

- (a) a particular electronic address enables the public, or a section of the public, to send electronic messages to -
 - (i) a particular employee; or
 - (ii) a particular director or officer of an organisation; or
 - (iii) a particular partner in a partnership; or
 - (iv) a particular holder of a statutory or other office; or
 - (v) a particular self-employed individual; or

- (vi) an individual from time to time holding, occupying or performing the duties of, a particular office or position within the operations of an organisation; or
 - (vii) an individual, or a group of individuals, from time to time performing a particular function, or fulfilling a particular role, within the operations of an organisation; and
- (b) the electronic address has been conspicuously published; and
 - (c) it would be reasonable to assume that the publication occurred with the agreement of -
 - (i) if paragraph (a) (i), (ii), (iii), (iv) or (v) applies - the employee, director, officer, partner, office-holder or self-employed individual concerned; or
 - (ii) if paragraph (a) (vi) or (vii) applies - the organisation concerned; and
 - (d) the publication is not accompanied by -
 - (i) a statement to the effect that the relevant electronic account-holder does not want to receive unsolicited commercial electronic messages at that electronic address; or
 - (ii) a statement to similar effect,

the relevant electronic account-holder is taken, for the purposes of this Act, to have consented to the sending of commercial electronic messages to that address, so long as the messages are relevant to -

- (e) if paragraph (a) (i), (ii), (iii), (iv) or (v) applies - the work-related business, functions or duties of the employee, director, officer, partner, office-holder or self-employed individual concerned; or
- (f) if paragraph (a) (vi) applies - the office or position concerned; or
- (g) if paragraph (a) (vii) applies - the function or role concerned.

5. Regulations about consent - Regulations under section 44 may provide that, for the purposes of this Act -

- (a) the consent of a relevant electronic account-holder may not be inferred in the circumstances specified in the regulations; and
- (b) the consent of a relevant electronic account-holder may be inferred in the circumstances specified in the regulations.

6. When withdrawal of consent takes effect - (1) For the purposes of this Act, if -

- (a) one or more electronic messages have been sent to the relevant electronic account-holder's electronic address; and
- (b) the relevant electronic account-holder has consented to the sending of those commercial electronic messages to that electronic address; and
- (c) an individual or organisation authorised the sending of those commercial electronic messages to that electronic address; and

- (d) the relevant electronic account-holder, or a user of the relevant account, sends the individual or organisation -
 - (i) a message to the effect that the account-holder does not want to receive any further commercial electronic messages at that electronic address from or authorised by that individual or organisation; or
 - (ii) a message to similar effect,

the withdrawal of consent takes effect at the end of the period of 5 business days beginning on -

- (e) if the message referred to in paragraph (d) is an electronic message - the day on which the message was sent; or
 - (f) if the message referred to in paragraph (d) was sent by post as a prepaid letter - upon delivery of the letter, which, unless the contrary is proved, shall be deemed to be the time at which the letter would be delivered in the ordinary course of post; or
 - (g) in any other case - the day on which the message was delivered.
- (2) For the purposes of subsection (1), a business day is a day that is not a Saturday, a Sunday or a public holiday -
- (a) if the message referred to in subsection (1) (d) is an electronic message - in the place to which the message was sent; or
 - (b) if the message referred to in subsection (1) (d) was sent by post - in the place to which the message was sent; or
 - (c) in any other case - in the place where the message was delivered.
-