

23 May 2004

IT and Telecommunications Policy Group
Resources and Network Branch
Ministry of Economic Development
PO Box 1473
WELLINGTON

Dear Sirs,

**Submissions
Legislating Against Spam
A Discussion Paper**

I attach my submissions on the above discussion paper. Where appropriate, these are in the form of answers to the questions posed in the Discussion Paper.

Please note that the only portion of my submissions that I wish to be withheld for privacy reasons in the event of any request under the Official Information Act is this covering letter, as this contains personal contact information provided for your purposes only.

Yours faithfully,



Rob W M Dowler

**Submissions from Rob Dowler on the paper dated May 2004 and
prepared by the Ministry of Economic Development titled
“Legislating Against Spam”**

1. Do you consider spam to be an important issue? Has it significantly affected you in any way?

Yes to both questions. The time spent cleaning out spam before dealing with genuine communication is wasted and the risks of failing to identify and deleting genuine communication are increased.

2. Do you think legislation has a role to play alongside other complementary measures?

Yes

3. Do you consider existing privacy protections in this area sufficient?

No

4. Do you agree that stand-alone anti-spam legislation is preferable to reliance on the Harassment Act?

Yes

5. What message mediums should be caught by the legislation (e.g. email, short message services using mobile phones, Internet instant messaging, faxes, telephones (telemarketing), physical mail delivery)?

All should be caught except physical mail delivery. I repeat below extracts from my submissions made to the Law Commission in April 2002 on a discussion paper entitled “Protecting Personal Information from Disclosure.”

Today, we face significant increases in electronic attempts to market products or services to us. Many of these attempts are very intrusive, particularly by telephone, as this requires the physical response of answering the instrument and responding verbally. The Securities

Commission in a recent discussion paper on Investment Advisor regulation specifically asked for comment on this issue.

The issue is serious and justifies addressing within the context of the use of lists of telephone or fax numbers or other public information such as e-mail address lists as a means of identifying and then bombarding an unknown individual with marketing or sales material. I believe that what I understand to be the USA approach of restricting such access to established client relationships in respect of investment advisors may be an appropriate benchmark to consider in determining an approach that might be adopted for both investment advisory or other product or service sales approaches by various means in this country.

My earlier Submission to the Securities Commission

“In my view, telephone solicitation and cold calling for investments should be restricted to those circumstances where there is an existing client relationship or account or where a member of the public has specifically requested or agreed by some means to be contacted.

Further (and as an aside) not only do I support an introduction of rules to restrict cold calling and telephone solicitation about investments, but I submit that the Government needs to consider introducing legislation to restrict cold calling and telephone solicitation for a whole range of purposes such as donations, surveys and other sales promotions that we all have to put with.

In general, I believe that there are other adequate and sufficient means of soliciting investment advisory business (or donations, surveys and sales) without using intrusive methods such as cold calling or telephone solicitation.”

I suggest that the Ministry of Economic Development review that earlier discussion paper from the Law Commission and the submissions received then as well as the work completed by the Securities Commission. In doing so, the Ministry might also wish to investigate why nothing ever eventuated from those earlier reviews and work to ensure that the work that the Ministry is now undertaking does result in some positive action. If those earlier efforts had resulted in action then, the incidence of spam in New Zealand may not have been as great as it now is. A missed opportunity?

6. Do the messages caught by the legislation have to be sent/conveyed to many recipients, and if so, how many?

Yes, the messages should be directed to many recipients to be caught but this does not mean necessarily that the messages must all be sent at the same time. It should be sufficient that there is a clear plan or intent to convey messages to a number of recipients, irrespective of whether the messages are despatched all at once or over a time period.

7. Should the messages caught by the legislation be of a commercial advertising and promotional nature only or should other types of messages be caught?

As noted earlier, other types of messages should be caught, including, for example, telephone surveys and solicitations for donations. How is one to know whether the telephone survey or solicitation for a donation is genuine or related to some criminal or fraudulent activity?

Should there be exceptions and if so what should be exempted?

There should be exceptions and these may include physical mail delivery and those circumstances where an existing client or business relationship exists and can be proven.

8. Should the legislation extend to coverage of acts done overseas? If so, what acts should be covered?

No submission

9. Should all parties involved in the act of spamming, such as the vendor sponsoring the spamming, be covered by the legislation? Should there be express exceptions such as for telecommunications companies and ISPs?

Yes to the first question.

Yes to the second question, unless the telecommunications company or ISP is the spammer.

10. Should New Zealand adopt an opt-in, double opt-in or opt-out approach in legislating against spam? Why?

Opt-in, as this clearly identifies that someone is prepared to accept the communication. Any other approach will not work effectively. As noted earlier, an exception may be appropriate where and existing client or business relationship exists and can be proven. In this circumstance, an opt out approach may be preferable.

11. If an opt-in or double opt-in approach was to be adopted, what should amount to express consent and what actions and/or relationships should amount to inferred consent to the sending of a “commercial” electronic message?

Express consent should be in writing including electronic means such as an e-mail. Verbal consent should not be acceptable as there can generally be no record of proof as to whether verbal consent has been granted.

12. How should the scope of any opt-in or double opt-in assent be framed?

No submission

13. Should there be a requirement for commercial electronic messages to accurately identify the sender of the message? If so, what constitutes accurate identification (e.g. name and physical address, name and email address)?

Yes. What constitutes accurate identification should be appropriate to the need of the recipient to be able to contact the sender.

14. Should there be a requirement for commercial electronic messages to include 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 sender, and to ensure that such electronic address is functional?

No. This should be optional only, as such a requirement may assist spammers seeking to confirm valid contact information such as an e-mail address.

15. Should there be a requirement that commercial electronic messages provide accurate header and subject information?

You can try, but unlikely to be effective. An obvious difficulty is what is sufficient. Probably a waste of time. Turn it around and make it an offence for the header and subject information to be inaccurate or misleading.

16. Should there be a requirement for the labeling of advertising or adult messages?

No. Sources of communication are so diverse, including geographically, that there is no point trying to include such detailed requirements that could never be met across multiple jurisdictions, each with their own particular quirky requirement as to how such material should be identified.

17. Should anti-spam legislation include rules against the supply, acquisition and use of address-harvesting software and harvested-address lists in connection with the unlawful sending of electronic messages?

Yes.

18. Who should be able to bring an action against an alleged spammer?

An individual, a legal entity or a government agency.

19. What agency should have the enforcement role under the legislation?

No submission

20. What should be the available penalties and remedies for breaches of antispyam legislation and what should be the maximum fine or pecuniary penalty?

No submission

21. Should contraventions give rise to criminal or civil penalties?

Both

22. Should the responsible enforcement agency be given the ability to obtain search warrants conferring powers of entry, search and seizure?

Everyone else seems to have them, so why not?

Thank you for the opportunity provided to make submissions.