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**Submission of the New Zealand Direct Marketing Association Inc. (DMA)
on the Discussion Document "Legislating Against Spam"**

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Background

1. The New Zealand Direct Marketing Association (DMA) is a business organisation with the objective of stimulating business growth through best-practice marketing.

Its membership numbers in excess of 400 corporate entities, comprising some 3,900 individuals. Members can be categorised as :

- corporates (both international and national, including Government Departments, SOE's, motor vehicle, oil, banking, insurance, telecommunications and utilities companies)
- suppliers (mail houses, listbrokers, telemarketing bureaux, printers, envelope, manufacturers etc.)
- agencies (direct marketing agencies, advertising agencies, online/electronic specialist agencies, marketing consultancies etc.)
- mail order/catalogue marketers
- practitioners (e.g. retailers, fundraisers, associations & societies)

The common factor for all these organisations is their use of one-to-one, database-driven communications to drive marketing and sales activities, via all types of media – television, mail, telephone, SMS, Internet, press, etc.

2. The DMA developed the Code of Practice for Direct Marketing in New Zealand in conjunction with the Ministry of Consumer Affairs. It also publishes best practice guidelines for email and online marketing and telemarketing. (see Appendix 1).
3. The DMA offers a free complaint resolution service for consumers. In the event that a complaint is made regarding a DMA member, the matter is resolved promptly. While the same result cannot be guaranteed when the complaint relates to a non-member, the DMA nonetheless endeavours to reach a satisfactory resolution on behalf of the complainant.
4. This submission is made by Keith W Norris, Chief Executive on behalf of the members of the DMA.

History

5. The DMA was formed in February 1974, with the first Code of Ethics being written as one of the first activities of the new organisation. This means that Direct Marketing in New Zealand has been successfully self-regulated for 30 years. The founding members of the DMA were mail order traders and mail houses. Membership has broadened over the years to encompass organisations involved in business-to-business and business-to-consumer marketing, agencies, service providers, and more recently, practitioners, consultants and agencies engaged in electronic/online advertising and marketing.
6. At its inaugural meeting on 14 February 1974, the objects of the DMA (at that time known as the Direct Mail Association) were established as :

"to foster mail order trading, and to preserve a good image, primarily from the standards set by members"
7. The current objects of the DMA are :
 - (a) **Education** : To promote an environment in which users of marketing and their suppliers will develop the necessary marketing skills, and to help identify and seize opportunities which will enable their business to flourish.
 - (b) **Ethics & Legal** : To assist Members to understand the marketing needs and concerns of consumers and business customers, and to confirm that Members respect and act on those needs and concerns.
 - (c) **Self-Regulation** : To promote a self-regulatory environment with government, legislators and other stakeholders, and uphold the Code of Practice adopted by the DMA, and the Codes of Practice of the Advertising Standards Authority.
 - (d) **Operations** : To establish the DMA as the leading resource for assistance in understanding and applying new technologies in the practice of marketing, and ensure the DMA itself is an advanced user of such new technologies.
 - (e) **Other** : To do all other acts and things which are reasonably necessary or desirable to provide value to the Members.
8. The DMA is a member of the Advertising Standards Authority (ASA). Jointly with the ASA, it runs the Electronic Marketing Standards Authority (EMSA), a complaints resolution service relating to online transactions.
9. The DMA is a founder member of the International Federation of Direct Marketing Associations (IFDMA) which was established in 1996.
10. The DMA runs a Name Removal Service free of charge to consumers to enable them to be removed from mail, telephone and fax lists. The Code of Practice for Direct Marketing requires all members undertaking marketing activities to generate additional business to ensure that names appearing on the Name Removal Register are not mailed, phoned or sent faxes.

Response to questions raised by the discussion paper :

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

For the purpose of this response, the DMA will define spam as "unsolicited commercial and promotional email where no prior permission or relationship exists".

This is an extremely important issue for our members. Email has the potential to be a legitimate and effective marketing communication medium, but its value is significantly eroded by the amount of spam currently being transmitted. The majority of this spam originates from outside New Zealand, and therefore a global solution needs to be implemented. Commercial communication is also under threat through the variety of anti-spam measures that block legitimate messages (false positives).

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

Fundamentally the DMA philosophy supports effective self-regulation rather than legislation. However, spam is a global problem and we therefore understand and support the concept of Government legislation. New Zealand must not be seen as a haven for unscrupulous spammers.

Legislation can be cumbersome, inflexible, slow and expensive to implement, so the model we would support would include an industry code of practice overlaid on the legislation. We believe that the speed of modern technological advance requires a regulatory solution that can be kept up to date - a code of practice would appear to fit the bill.

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

No. The Privacy Act deals adequately with the collection, storage and use of personal information on identifiable individuals, but it does not differentiate on the use of various media. The Privacy Act is now 11 years old and itself needs review to ensure that it meets current social and commercial standards.

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

Yes. By its very nature, harassment deals with repeated unacceptable behaviour against individuals. Spam is directed at email addresses rather than identifiable individuals.

5. What message mediums should be caught by the legislation?

Legislation should be framed to cover electronic communications such as email, SMS mobile messaging, MMS (multi media messaging) and texting.

We believe it is inappropriate to widen the legislation to include other media because the public expectations and standards of acceptability are clearly different. There is a danger of watering down legislation by trying to widen its scope. Refer also to point 2 above about the rate of change in electronic communications technology.

The standards governing outbound telemarketing are contained in the Code of Practice for

Direct Marketing in New Zealand (www.dma.co.nz/code), as are addressed and unaddressed direct mail. In respect of these media, the sender bears the cost whereas typically in electronic media, it is the receiver.

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

Spam is spam regardless of the numbers involved. We believe that the principal issue involved in spam relates to consent. The individual recipient is not necessarily concerned with how many other people receive a spam email. The issue of bulk could best be dealt with in the penalty provisions.

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

Emails of a commercial/promotional nature make up the vast majority of spam. The legislation should therefore cover any electronic communications which can be interpreted as commercial or promotional, except where there is an existing relevant relationship.

We do not support any exclusions or exemptions from the legislation. Unwanted promotional material from political parties, religious organisations, educational institutions and charities should be controlled in exactly the same manner as commercial email.

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

Yes. This is the major reason for our support of a legislative solution. Spam originating in New Zealand is contained by the current Code of Practice for Direct Marketing in New Zealand. The Government needs to signal New Zealand's commitment to control of spam which originates in New Zealand or internationally. The Government's endeavours in creating an enforcing anti-spam legislation in New Zealand will discourage international spammers from using New Zealand as a safe haven for unlawful activity.

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?

Senders of spam and any agents acting on their behalf should be covered by the legislation. ISPs, ASPs and telecommunication companies should be exempted from prosecution unless they are knowingly involved in the act of spamming (or could have been reasonably expected to know that spamming was occurring).

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

The DMA supports the opt-in approach to email communication. That is to say, unsolicited commercial/promotional email should only be acceptable where there is a relevant, existing relationship between sender and receiver. US legislation (the Can-Spam Act) has already proved that opt-out is an ineffective approach which can have the effect of increasing the amount of unsolicited emails transmitted. Double opt-in is totally impractical for small to medium sized businesses (95% of New Zealand's businesses fall

into this bracket) who have neither the people nor the technology resources to carry out this function.

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?

Consent should require both an existing and a relevant relationship. The Australian legislation allows for inferred consent, including ‘conspicuous publication’. The collection of individual email addresses in order to effect one-to-one business communication, e.g. to make an appointment, should be exempt from legislation.

Inferred consent should include :

- Written – permission via fax, email, letter/coupon
- Verbal – direct verbal permission
- Electronic Transaction – ticking a box on an online form

The email address should be collected, stored and used in the manner prescribed by Principle 3 of The Privacy Act 1993. It will be difficult to frame hard and fast rules in the legislation. These can, however, be covered by a Code of Practice – see the DMA eMarketing Network’s Standards for eMail Marketing – refer Appendix 1.

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

The current wording in the Code of Practice for Direct Marketing in New Zealand, Clause 5(c).2 appears consistent and logical.

”Spamming: As a general rule, email ‘spamming’ (the process of unasked for mass marketing by email) is regarded as a poor business practice. Unrequested marketing communications must not be sent by email unless they are relevant to the existing relationship between an organisation and its customer.”

The measure should be whether permission or consent can be reasonably inferred from the existing relationship.

13. Should there be a requirement for commercial electronic messages to accurately identify the sender of the message? If so, what constitutes accurate identification?

Header information should include the domain, IP address, and any other routing information that enables a user to determine the origin of the mail.

Email content should also include one or more of the following address details :

- * Sender’s company or trading name and website address
- * Sender’s company or trading name and physical address
- * Sender’s company or trading name and phone number

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?

Yes. Commercial email messages must include a mechanism for recipients to unsubscribe. The legislation should also make it mandatory for such requests to be honoured. The ability for the consumer to opt-out is the very cornerstone of responsible direct marketing.

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

Yes. See 13 above.

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

If the concept of a relevant existing relationship is embodied in the legislation as the minimum requirement for transmitting unsolicited commercial email, it will be unnecessary to label advertising or adult communications. The concept of opt-in supersedes the need for content identification.

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. We believe that the harvesting of email addresses with the intention of sending bulk unsolicited commercial emails should be prohibited. Similarly, the harvesting of email addresses for sale or lease to other parties for use in a spam campaign should be outlawed. The sale or lease of legitimately obtained, permission-based email address lists should, however, be exempted. There may be acceptable reasons for harvesting addresses, e.g. research, so it is important that the legislation does not preclude harvesting per se.

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

The answer to this will be closely linked to the enforcement agency given the task of administering the legislation. We believe that every individual should have the right to make a complaint as in the case of The Privacy Act.

There is an existing self-regulatory role model operating in New Zealand – the Advertising Standards Complaints Board.

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

The simple answer would be to appoint an existing Government agency such as the Commerce Commission. However, adequate resourcing seems to be a major issue with all such Government bodies.

We recommend an industry/Government partnership be considered. Under such a system, individuals could complain to a Government-funded, industry-run complaints body which could be given the power to adjudicate in all but the most serious cases. In this

way, only major breaches of the legislation need be referred to an authority empowered to impose punitive measures.

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

We favour the approach taken by the Australian authority which has an escalating scale of fines depending on the severity of the breach.

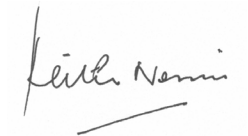
21. Should contraventions give rise to criminal or civil penalties?

Contraventions to the Act should give rise to civil penalties.

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

Yes. In the case of serious crime referred to the higher authority described in 19 above, the enforcement agency should be given full powers of entry, search and seizure of all material and equipment used in the course of the offence.

The DMA will be pleased to work with Ministry staff in formulating appropriate legislation. Thank you for giving us the opportunity to contribute.



Keith W Norris
Chief Executive
DMA



Standards for Email Marketing

Scope

The DMA's eMarketing Network (eMN) recognises that the adoption of industry-wide standards of best practice and ethical conduct regarding the use of email for marketing purposes will promote consumer confidence in eCommerce and ensure that proper account is taken of consumers' right to privacy.

This document outlines guiding principles for email marketing in New Zealand. By adopting the principles outlined in this document marketers should be considered ethical email marketers, in intent, in principle and in action.

It is intended that this document will be reviewed on a regular basis in the light of developments internationally and locally.

Updated: April 2004



Guiding Principles for Responsible email Marketers

The DMA's eMarketing Network have designed the 6 Guiding Principles for Responsible email Marketers to safeguard receivers from getting consistently unwanted, erroneously labeled, or intentionally deceptive email. Each of the resolutions complements the next and should be taken into consideration as a collective entity. In brief they are:

- 1 [Prior or existing relationship](#)
- 2 [Include an option to unsubscribe](#)
- 3 [Tell the recipient who you are](#)
- 4 [The basic truth in advertising doctrine applies](#)
- 5 [Do not abuse permission](#)
- 6 [Do not harvest email addresses](#)

Definitions

A full list of eMarketing terms can be found in the [Dictionary of Terms](http://www.emarketingnetwork.co.nz) section of <http://www.emarketingnetwork.co.nz>.

Guiding Principle One – Prior existing relationship

Unconditional best practice demands that marketing communication via email only be undertaken to a person/address with whom you have a relevant prior business, or personal/relationship or from whom you have obtained informed consent.

Key considerations:

- A relevant prior business or personal relationship
- Informed consent is defined as any of three forms of opt-in: single opt-in, confirmed opt-in and double opt-in
- Your intent
- Permission is not transferable - email addresses submitted by referees do not become permission addresses for your future use
- Best practice requires the development of an audit trail on how and when a recipient opted in/out

It is acceptable for marketers to email:

- customers who have supplied their email address yet have not previously expressed interest in receiving email, as long as [Principle 2](#) (opt out) & [Principle 5](#) (inform respondent) are upheld
- prospects who have entered a competition with the understanding (specified in the competition Terms & Conditions of entry) that they will be contacted by email, as long as [Principle 2](#) (opt out) & [Principle 5](#) (inform respondent) are upheld. [See 3rd party lists](#)
- customers to update the status of an order, privacy policy or relationship
- customers regarding invoices or receipts
- to acknowledge receipt of communications

It is NOT acceptable for marketers to email:

- a list of recipients whose email addresses have been harvested through traditional or non traditional means (see [Principle 6](#))

Third Party Lists

The DMA's Code of Practice for Direct Marketing in New Zealand makes specific reference to third party lists in Principle 4.

4(b). 5 Third party lists: Marketers using third party lists must ensure the list complies with the requirements of the Privacy Act 1993.

If you intend to make personal data available to third parties for inclusion on their lists, you must notify individuals of your intent at the time of collecting the data, and obtain their positive consent through opt-in.

Viral Marketing

This covers the practice of asking receivers of an online communication to forward it to other people. The DMA's Code of Practice for Direct Marketing in New Zealand makes specific reference to list referral in [Principle 4](#).

4(b).4 Marketing list referrals: Marketers must not allow individuals to sign others up without their permission to receive marketing offers.

If you are going to carry out viral marketing, you should notify the person who provides another person's email address, that their name will be advised to the person they have referred to you.

If you are provided with an individual's email address through the referral of another person, you are permitted to send the referred individual one email, which should:

- i. include the name of the person who provided that person's email address to you
- ii. invite that person to subscribe to a specified list or lists
- iii. clearly inform the person that their personal data will be removed from the file unless they opt in to receiving further emails

Guiding Principle Two – Option to unsubscribe

All email marketing messages should include an option for the recipient to unsubscribe from receiving future messages from you.

Key considerations:

- Commercial email messages must include a mechanism for recipients to unsubscribe from the mailing programme
- Always honour unsubscribe requests before re-mailing
- It's acceptable/recommended that marketers send an "unsubscribe confirmed" message

It is acceptable for marketers to:

- develop an unsubscribe strategy to gain an understanding as to why a customer has chosen to unsubscribe

It is NOT acceptable for marketers to:

- have poor compliance systems in place that do not allow the marketer to accurately and immediately (with 24 hours) unsubscribe a customer from their database
- ignore a customer's action to unsubscribe and thereby resend emails to that same email address

Guiding Principle Three – Tell the recipient who you are

You should not falsify your domain name or use a non-responsive Internet Protocol (IP) address.

Key considerations:

- Header information includes the domain, IP address, and any other routing information that enables a user to determine the origin of the email
- Email content must include one or more of the following address details:
 - Sender's company or trading name & website address
 - Sender's company or trading name & physical address
 - Sender's company or trading name & phone number

It is acceptable for marketers to:

- Use either an individual's email address, or a company's or company department's email address as the displayed "sender address"

It is NOT acceptable for marketers to:

- Hide or falsify the sender's - email address, website address, physical address or phone number

Guiding Principle Four – Basic truth in advertising doctrine applies

You should not falsify the subject line to mislead readers and deflect them from the content of the email message.

Key consideration:

- The basic truth in advertising doctrine applies.

It is acceptable for marketers to:

- Employ effective teaser copy within the subject line but not intentionally contain fraudulent information

It is NOT acceptable for marketers to:

- Use RE: or FW:

Considerations:

- If it is a one off email, pick a subject which highlights your business relationship with that person, or includes your business name so the identity of the sender is immediately clear.
- Avoid phrases like "Free offer". Some email programs can be set to filter incoming mail.

Guiding Principle Five – Do not abuse permission

You should inform the respondent at the time of collection of the email address of the purpose for which their email address will be used (Inform either online or via email).

Key considerations:

- Relevance is critical
- Respect the privacy of individuals

Considerations:

- Individuals Rights

You should have a published privacy policy to provide users with information about how they can exercise the following rights:

- the right to a copy of the personal data held about them. This should be supplied without excessive delay or expense, and in accordance with any statutory time limits
- a simple means for contesting, correcting or deleting inaccurate or incomplete personal data. It is the responsibility of the list owner to ensure that their list is accurate and up to date

Please visit <http://www.emarketingnetwork.co.nz> and download the recommended privacy statement.

- From a legal and industry standards point of view, most statutes do not require additional permission when a prior business relationship exists. However, from a successful email marketing perspective, gaining permission even from current customers is recommended.

Guiding Principle Six – Do not harvest email addresses

You should not harvest email addresses with the intention of sending bulk unsolicited commercial email. (Harvest is defined as compiling email addresses through anonymous collection procedures such as via a Web spider, through chat rooms, or other publicly displayed areas listing personal or business email addresses).

Key considerations:

- Refer to [Principle 1](#)
- Respect the privacy of individuals
- Harvest means to collect email addresses without the owner's consent.