

**VODAFONE NEW ZEALAND LIMITED  
SUBMISSION TO THE MINISTRY OF  
ECONOMIC DEVELOPMENT**



**Discussion Paper: *Legislating Against Spam***

**30 June 2004**

# 1. Introduction

1. This submission on the discussion paper “Legislating Against Spam” (the **Discussion Paper**) issued by the Ministry of Economic Development (the **Ministry**) in May 2004 is made by Vodafone New Zealand Limited (**Vodafone**).
2. Vodafone welcomes the opportunity to submit its views on the issues raised in the Discussion Paper.
3. The issue of spam is of increasing importance to Vodafone.
4. As you correctly observed in paragraph 2 of the Discussion Paper, spam causes a large number of problems to both consumers and businesses. While spam has traditionally been confined to the Internet, with the development of new network technologies and convergence of Internet and mobile services, spam is becoming an increasing problem in the mobile space.
5. One of the most important services that Vodafone offers to its customers is the ability to send and receive data messages (**data messaging services**), including SMS, MMS, web-to-text, email and other forms of data communications. Data messaging services have become significant and useful tools for mobile customers in both business and consumer markets around the world and are expected to become even more important in the future.
6. However, in many countries, data messaging services have begun to be misused with the emergence of spam to mobile, which is equivalent to email spam in the internet environment. This is becoming a significant problem at a number of levels:
  - customers are affected as they regard spam to mobile as an intrusion and an annoyance;
  - Vodafone is affected as bulk spam to mobile can cause congestion problems on its network, or contain network disrupting material (such as viruses). Also, if customers are badly affected by spam, they may seek to reduce or discontinue their use of data messaging services;
  - responsible marketers are affected as there may be consumer backlash against brands resulting in complaints and brand boycotting. Also the unchecked and irresponsible use of spam to mobile is likely to result in the loss to the marketing industry of a potentially valuable marketing channel (some observers point to email as a case in point); and
  - until recently, certain features of data messaging services in some countries have provided a natural barrier preventing spam to mobile from becoming as endemic as email spam.<sup>1</sup> However, as tariff structures and technology levels change, these natural barriers are

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<sup>1</sup> Such features include the costs to the sender of sending sms to mobile (in a calling-party-pays environment), whereas email is free; and also the difficulty in generating valid recipient addresses in the case of bulk and random spam to mobile (in some countries, no receipt notification is given due to application of the store and forward functionality of the technology).

becoming less and less effective in controlling the growth of spam to mobile.<sup>2</sup>

7. For these reasons, Vodafone is particularly interested in any potential legislative response to the problem of spam in New Zealand.

## **2. The approach taken in this submission**

8. In section 3 of this submission, we provide, in a broad way, our general views on the issues that are set out in the Discussion Paper as well as our reasoning behind these views.
9. In section 4 of this submission, we provide our views on the specific issues set out in the Discussion Paper that we consider are most relevant.
10. While Vodafone does not provide in this submission its views on all of the issues raised, we reserve the right to submit our views on any issues should it be necessary in the future.

## **3. General comments**

11. Vodafone is generally encouraged by the scope of the issues raised in the Discussion Paper and the initial comments set out by the Ministry in the paper.
12. Vodafone believes that:
  - the unchecked and irresponsible use of spam must be curtailed so that customers are not adversely affected and mobile networks are not disrupted; and,
  - data messaging services should be able to be used for marketing to customers in a controlled and responsible way.
13. Vodafone believes that the mobile industry has an important role in developing effective and workable solutions to the problem of spam. In developing these solutions, the mobile industry should seek to work alongside other interested parties, such as InternetNZ, the Government, the marketing industry and consumer groups, as they will also have a valuable role to play.
14. Any effective and workable solution needs to balance regulatory, self-regulatory, technical and consumer approaches. International experience suggests that any attempted solution that fails to balance these considerations, such as a simple ban on spam, will not work.
15. As monitoring and enforcement will be an important component in any effective and workable solution, regulation will be required by means of legislation.
16. Any solution adopted should be, where possible, technology neutral and should be consistent with approaches taken for dealing with similar problems

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<sup>2</sup> For example, increasingly in a 2.5G and 3G environment where emails can be received by a mobile terminal, as emails are considered "data" for billing purposes, it is the receiving party who pays and thus may be sent at no cost to the sender.

such as email spam in the Internet environment.<sup>3</sup> Vodafone is encouraged by the Ministry's approach as it indicates the Ministry is looking to adopt a common legislative solution that may apply in the same way to different types of networks.

#### *Vodafone's recommended approach*

17. Vodafone recommends an approach based on the following key principles:
  - Opt-in: The sender should ensure that the recipient has given their prior consent (i.e., the customer needs to "opt-in") to receiving spam from the sender.
  - Message requirements: Any messages sent to customers that have opted-in should meet the following requirements:
    - o it should provide the sender's accurate contact details; and
    - o it should provide the ability for the customer to easily "opt-out" of receiving future spam from the sender.<sup>4</sup>
  - Enforcement: If a sender fails to comply with the opt-in and message requirements, then an appropriate agency should have the power to send warnings and to impose penalties on the sender.
  - Consumer awareness: These measures should be supported by a consumer awareness campaign informing consumers of their rights associated with UCC to mobile.
18. Vodafone acknowledges that, despite best efforts, spam will not be completely eradicated. However, if effective and workable solutions are put in place that assist in resolving the problems associated with spam, then use of electronic communications services can continue to develop as a beneficial and productive tool for customers.

## **4 The issues raised in the Discussion Paper**

19. In light of the above, Vodafone sets out in this section its views on certain aspects of the issues set out in the Discussion Paper.
20. We do not, in this submission, provide a complete analysis of each issue. However, further analysis in relation to any or all of the responses in this submission is available if required.
21. We set out our responses to the issues below.

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<sup>3</sup> With 2.5G and 3G services, the Internet is an increasingly important element in mobile communications and distinctions between mobile data and Internet data are becoming irrelevant. Although spam on mobiles has not reached the endemic proportions of email spam in all countries, Vodafone believes that a consistent regulatory approach is necessary.

<sup>4</sup> An important element of the opt-out procedure is to require the inclusion in the UCC of a valid reply path to the sender and the provision of sending party information.

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

As discussed above, Vodafone believes that spam is an important issue in the fixed Internet environment and is becoming an increasingly important issue in the mobile environment. Mobile phones with MMS, video and internet capabilities will increase the range of spam messages which can be delivered to mobiles. Where spam has a visual component pornographic or illegal content may further disrupt customer's enjoyment and use of new services.

In New Zealand, Vodafone has experienced instances where our network has been used to send SMS spam. Vodafone takes measures to identify when issues of spamming arise. Vodafone works with other networks to identify where the spam has originated from and prevent further spamming activity to occur where possible.

Vodafone agrees with the Ministry that the issue is now of sufficient importance to warrant a legislative remedy.

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

Vodafone believes that appropriate legislation does have a role to play in combating the problems caused by spam. We also strongly believe that such legislation must be implemented alongside other measures, such as consumer education, in order to be effective.

**Do you consider existing privacy protections in this area sufficient?**

Vodafone agrees with the Ministry's analysis of the Privacy Act 1993 and its associated principles and submits that the provisions of the Privacy Act are insufficient to deal with the issue of spam.

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

The Harassment Act only imposes very indirect remedies, and it is uncertain whether they would be applicable in cases of spam. The Harassment Act is not sufficient to deal with the problem and accordingly stand-alone legislation is likely to be necessary.

**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)?**

Vodafone strongly believes that any legislative response should be limited to cover all forms of electronic media and be technologically neutral in nature.

The problems caused by spam are endemic in all electronic mediums over which spam is sent. Accordingly, spam should be addressed in terms of the characteristics of spam itself, and not the particular technology of the network on which the spam is communicated.

On this basis, Vodafone believes that all mediums which provide for electronic communication should be caught by the legislation. However, this view is subject to an exception from any form of liability for carrying spam in respect of network operators. This is discussed further below.

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

Vodafone believes that spam should be caught by the legislation whether it is sent in bulk or not. An individual spam recipient is not concerned whether the spam was sent to large numbers of people or not. This indicates that the real problems with spam are not necessarily inherent in its bulk nature.

To create legislation that requires a minimum of messages sent before action can be taken, may lead to potential legal loopholes that spammers could use to avoid prosecution.

Vodafone suggests that the quantity of spam sent could be used as a factor for determining the level of enforcement taken.

**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?**

We do note that there may be a requirement for exemptions relating to public health and safety notices. However we believe an exception for non-commercial messages may act as a potential legal loophole that spammers may utilise to continue spamming activity, for example, posing as a charity.

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

Putting jurisdictional issues aside, Vodafone believes that it would be of benefit for the legislation to extend to cover acts of spamming that are initiated outside of New Zealand. Due to the inherent nature of electronic communication, the geographic location of the spammer does not limit the spammer to only send spam to the persons in the country where he/she is located. It also means that a New Zealand vendor of a product or services that arranges for spam promoting or advertising that product or service to be sent from overseas would be captured by the proposed legislation.

The establishment of domestic legislation will allow New Zealand to set up agreements with other countries to enable enforcement of anti-spam legislation. Vodafone supports such measures.

**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?**

Vodafone notes that the general approach in overseas environments has been to provide exceptions for network operators who unwittingly carry spam. Vodafone supports such an approach.

Network operators should not be liable in any way for spam which is sent to or from customers on their networks. A network operator acts only as a provider of infrastructure and communications services, and does not monitor the content of communications.

The proposed legislation must not hold Vodafone accountable or liable for any spam which traverses its network.

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

Vodafone supports an opt-in approach in legislating against spam.

The very nature of spam is the fact that the messages sent are unsolicited. Accordingly, an opt-in approach would automatically outlaw all forms of unsolicited spam. Vodafone believes that an opt-in approach is the best approach from the customer's point-of-view, as the alternative would create a burden on the customer who would be obliged to opt-out any time he/she receives unwanted messages.

**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)?**

Vodafone supports a requirement for commercial electronic messages to accurately identify the sender of the message. Accurate identification would likely include name and at least one method by which the recipient could directly contact the sender.

**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?**

Vodafone believes there should be a requirement for commercial electronic messages to include an unsubscribe function. Whether the unsubscribe function is, for example, via an email address, or link through to a web site, the key is that the recipient has a simple and effective means of unsubscribing to messages.

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

Vodafone believes that the header and subject information should not be misleading or deceptive, in line with existing concepts and requirements that are well understood under the Fair Trading Act 1986.

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

In the case of an opt-in environment, Vodafone believes that such measures would not be required.

**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?**

Vodafone would support such a requirement. Address harvesting is a real problem and is not adequately dealt with by the Privacy Act. This is an underlying facilitator of spam. If distribution of email lists could be halted then this would make the sending of bulk spam a lot more difficult.

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

The Crown and the Network Operator whose network has been abused by spammers to send spam should be able to initiate action under the legislation. Potentially network issues may arise as a result of spam, and Network Operators should be able to take action against those that initiate spam.

In overseas environments the most damaging current form of spam for Mobile Network Operators is unsolicited SMS soliciting a premium rate response. These messages are designed to encourage customers to respond to a premium rate voice or SMS service.

Part of the charge of any premium response generated is then paid by Vodafone to an end company linked to the sender of the original unsolicited message. This payment is often via a number of intervening communications providers. For premium SMS, payment is made via an SMS aggregator who has a contract with Vodafone. To date we are not aware of this type of spam activity in New Zealand.

Vodafone believes that where a Network Operator ends up collecting payment from its customers on behalf of spammers, the legislation should include the ability for the Network Operator to withhold payments to spammers as a way of restricting spam.

**What agency should have the enforcement role under the legislation?**

Vodafone's view is that the enforcement of this legislation should be undertaken by the Department of Internal Affairs. We note that both the Commerce Commission and Ministry of Economic Development currently play enforcement roles in the ICT sector, however we believe that the skills for enforcing this particular area belong in the Department of Internal Affairs. In the event that this is not possible then the Commerce Commission may have a role to play.

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

Whatever penalties are chosen, they must act as a disincentive to spammers. There may be value in having escalating fines in relation to repeat offending, or provisions that allow for the seizure of all monies earned from the act of spamming.

**Should contraventions give rise to criminal or civil penalties?**

Vodafone believes that civil penalties are more appropriate when dealing with the issue of spam. In cases where the spam is fraudulent in nature, there is existing legislation that will deal with these cases.

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

It will be important that the enforcement agency be given the powers necessary to enforce the legislation.