

Update: Spam Legislation

Bridget Edghill updates the developments in spam legislation in Australia and the United States of America

After the removal of amendments suggested by the Labor Party and Democrats, the Howard Government's *Spam Act* and *Spam (Consequential Amendments) Act* were passed unamended by the Senate on 2 December 2003.

As discussed by John Corker in "Spam Bill Almost Law", *Communications Law Bulletin*, Vol 22, No 3 2003, a report of the Environment, Communications, Information Technology and the Arts Legislation Senate Committee issued on 31 October 2003 recommended that the Bills be agreed to without amendment.

THE PROPOSED AMENDMENTS

Both the Labor Party and Democrats had suggested amendments to the Bill. The amendments submitted by the Labor Party on 25 September 2003 and moved by Senator Kate Lundy most notably included:

- That not-for-profit political groups and trade unions be exempted from the legislation;
- That an electronic message is not a designated commercial message if the relevant electronic account holder has previously indicated that they do not wish to receive such messages;
- That a commercial electronic message is not unsolicited if at the time the message was sent, the sender had ascertained with reasonable diligence that the recipient had a specific commercial interest in receiving the message.

The proposed amendments also sought to give new powers to the Australian Communications

Authority (ACA), allowing it to search and seize computer equipment in the course of an inquiry.

The proposed amendments were removed by the House of Representatives and criticised by the Howard Government for weakening the legislation. The Democrats also criticised the proposed amendments, with Democrat Senator Brian Greig releasing a statement on 28 November 2003 claiming that, "loopholes in the legislation are big enough to drive a truck through."

THE MAIN FEATURES

With spam now accounting for approximately half of all e-mail worldwide, the new legislation seeks to combat spammers and the techniques they use, while at the same time protecting the right to free speech.

The main features of the new legislation include:

- a ban on the sending of unsolicited commercial electronic messages, to be enforced by the ACA;
- a prohibition on the sale, supply or use of electronic address harvesting software and lists generated from these for spamming purposes.

Also, in accordance with Part 2 of the Act, all commercial electronic messages must include:

- accurate details of the sender's identity;
- an 'unsubscribe' function.

Part 4 of the Act details the civil penalties that may be imposed for unlawful conduct under the legislation which include financial penalties and infringement notices.

A unique characteristic of the legislation is the provision for co-operation and negotiation with international organisations and the organisations of foreign countries to develop global guidelines and co-operative arrangements between countries. Such an agreement has already been created between the ACA and the Korea Information Security Agency, with both parties signing a *Memorandum of Understanding* on 20 October 2003.

In addition to infringement notices for minor transgressions there are substantial penalties - including damages of up to \$1.1 million per day - in severe cases.

THE AMERICAN APPROACH

The United State has also recently adopted anti-spam legislation. The *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, also known as the CAN-SPAM Act (CAN-SPAM), was passed by the Senate on 25 November 2003 and agreed to by the House of Representatives on 8 December 2003.

There are some similarities between the Australian legislation and CAN-SPAM in that they both prohibit 'harvesting' e-mail addresses. CAN-SPAM also prohibits senders of commercial e-mail from:

- disguising themselves;
- using incorrect return e-mail addresses;
- using misleading subject lines.

People who contravene these provisions face criminal penalties. In addition CAN-SPAM contains unique provisions stipulating that spam be truthful. If an e-mail is found to breach these provisions, the

government can fine the spammer US\$250 for each e-mail sent that was untruthful!

CAN-SPAM also leaves room for the creation of a “Do Not Spam Registry”. This would be similar to the recent, and controversial, “Do Not Call Registry”. A “Do Not Spam Registry” may in fact create greater controversy in the USA due to First

Amendment Protection of commercial speech.

Both the Australian legislation and CAN-SPAM are very limited in their approach for the same reason – most spam, and in the case of the USA, most illegal of deceptive spam, comes from overseas.

Thus, without international co-operation and enforcement mechanisms, bringing international spammers to justice is likely to prove problematic, as will creating a global approach.

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The ‘Ordinary Reasonable Person’ in Defamation Law

In the first of two articles, Roy Baker examines the way the law determines what is defamatory and asks what the law, and society generally, means by the ‘ordinary reasonable person’

INTRODUCTION

Sydney has been proclaimed ‘Defamation Capital of the World’. Despite serious competition for the title, the UK produces fewer writs per head of population and, on rough estimate, Australians start 35% more defamation actions than do the entire American population. Sydney alone sees a level of defamation litigation equivalent to 60% of that in the US.

This gulf between Australia and the US can be accounted for by the US’s Constitution, the First Amendment of which requires that ‘Congress shall make no law ... abridging the freedom of speech, or of the press’. In the 1960, the US Supreme Court determined that that English common law of defamation whereby, as a general rule, publishers can be required to prove the truth of any defamatory allegation they publish, that was inherited by the US resulted in a ‘chilling effect’ that was an impermissible infringement of free speech¹. Thus, the focus of US defamation law shifted from what publishers could prove to how they had behaved.

In contrast, Australia has largely retained the common law of defamation. The publishers’ success rate at trial of around 32% arguably

demonstrates that the system is hopelessly skewed in favour of plaintiffs. The expense and uncertainty involved in defending defamation proceedings is such that the media settle the bulk of defamation actions brought against them. Australia’s major newspaper publishers, who receive threats of defamation proceedings almost daily, bear millions of dollars of defamation pay-outs each year.

THE NATIONAL DEFAMATION RESEARCH PROJECT

In this climate of vigorous litigation, the Communications Law Centre at the University of New South Wales was awarded funding from the Australian Research Council to conduct extensive research into defamation law.

The project was grounded in social research and used quantitative and qualitative research methodologies to explore social attitudes to a range of issues relating to defamation law. A phone survey of several thousand, randomly selected Australians is to be supplemented with an extensive series of focus groups around the country as well as by interviews with journalists, defamation lawyers and judges.

Pure research will contribute popular opinion to the debate about reforms that would narrow the gap with America. For instance, we shall seek to measure the extent to which the public think the award of defamation damages should be contingent on a lack of care by the publisher, rather than publisher’s ability to prove truth.

Our social attitudes research, shall extend beyond contributing public attitudes to the law reform debate. We shall examine the public’s role in defamation law and how defamatory material is understood by the public.

IDENTIFYING WHAT IS DEFAMATORY

Throughout Australia, with the exception of South Australia and the Australian Capital Territory, a jury may be involved in defamation proceedings. In some states they will be asked to determine whether the publisher has proved all charges it has levelled against the plaintiff. To this extent the defamation jury functions much like the jury in a criminal court.

Defamation juries have another two unique functions:

- determining what, if anything, the publication being sued over imputes about the plaintiff;