

CAMLA 'International Electronic Marketing - Enforcement and Consent'

Seminar 18 May 2017

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It was the esteemed Monty Python that first associated the term 'Spam' with notions of being inundated with unwanted material. While their famous sketch, set in a humble British café, suitably demonstrated the comic and somewhat absurd frustration of being overwhelmed by low quality luncheon meat, the facts around what we've now come to define as Spam in the communications sector speaks to a much darker truth.

Spam presents a significant threat to the social and economic prosperity of the digital economy, and now makes up two thirds of global email volume. Almost ten percent is defined as malicious, with identity theft a significant driver behind its growth.

CAMLA's third seminar for 2017 'International Electronic Marketing - Enforcement and Consent' held at Ashurst in Sydney on 18 May 2017, presented a compelling and insightful overview of recent international efforts to redress the problem, with speakers including Jean-Pierre Blais, Chairman and Chief Executive Officer of the Canadian Radio-Television and Communications Commission (CRTC), Jeremy Fenton, Acting Executive Manager - Unsolicited Communications and Cyber Security Branch Australian Communications and Media Authority (ACMA), and Ashurst Partner, Andreas Mauroschat.

Richard Bean, Acting Chairman of the ACMA, introduced the seminar by speaking to the crucial nature

of international co-operation in addressing the complex, transnational nature of unsolicited communications. After highlighting the combined recent efforts of the ACMA and the CRTC, he informed seminar guests of the next day's announcement of the signing of the Memorandum Of Understanding by the two national regulators. Under the agreement, a framework is provided for Australia and Canada to exchange spam and telemarketing compliance and investigation information and intelligence, improving the enforcement capabilities of both countries, thereby reducing the impact of unsolicited messages on digital economies.

Jean-Pierre Blais was next to make his way to the podium, commencing with a brief overview of the functions and responsibilities of the CRTC. With a similar remit to the ACMA, the CRTC regulates and supervises Canadian broadcasting and telecommunication, their duties including the licensing of radio and television broadcasters, the encouragement of competition, and the enforcement of rules and regulations in the communications sector.

The CRTC enforces Canada's 'Anti-Spam Legislation', which given its rather cumbersome 54 word title, is colloquially known as CASL¹. Entering into effect in July 2014, the Act regulates conduct that impairs use, imposes additional cost, compromises privacy, or undermines confidence in Canadian electronic commercial activity.

The CRTC issued its first warrant under CASL in December 2015, as part of a co-ordinated international effort to disrupt the Dorkbot family of malware worms. Impacting potentially 100 million computers worldwide, Dorkbot spread through instant messaging, USB drives, websites or social media, allowing a remote attacker to block domains and websites, participate in Denial of Service attacks, harvest personal information for online banking services, and send Spam.

As part of its commitment to cross-jurisdictional regulation, the CRTC hosted a workshop on combating Spam, as part of the International Institute of Communications' 'Communication Policy and Regulation Week' in Bangkok in October 2016. Building on existing relationships between the CRTC, the ACMA, OfCom (Office of Communications, UK), and the FTC (Federal Trade Commission) in the US, the workshop created an opportunity to establish a truly international response to combating Spam.

Key issues in the conference included cross-jurisdictional problems in law enforcement, addressing high tech anonymity through the use of VOIP services and Caller ID Spoofing, and emerging economies lacking the resources to enforce the law, when many offending entities are based in their jurisdictions.

Mr Blais reiterated that no single organisation can advance the agenda unilaterally, and that policy makers and enforcement agencies must

¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010.

work together on an international basis, while also building robust domestic frameworks.

Jeremy Fenton from the ACMA was next to speak, and opened by echoing Mr Blais' comments in regards to the need for a collaborative international approach, before speaking more specifically to Australia's own, rather more efficiently titled anti-Spam legislation, the *Spam Act 2003* (Cth).

The core concepts underpinning the Act function similarly to those found in CASL, in that a Commercial Electronic Messages (CEM) with an 'Australian link' must only be sent if express or inferred consent has been obtained, the sender is clearly identified, and there is a working unsubscribe function. Mr Fenton stated that the ACMA sees some excellent examples of best practice from e-marketers in Australia, and that consumer-friendly approaches may entail more than meeting the minimum regulatory requirements.

For the purposes of the Act, a CEM is an email, instant message, or any other form of electronic message, that is broadly commercial in nature. A message has an 'Australian link' if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia.

Consent under the Act may be express or inferred. Mr Fenton explained that while not a legislative requirement, the 'double opt in' process represents the best practice for obtaining express consent. 'Double opt in' is a practice whereby consumers receive a message asking them to confirm their acceptance of marketing messages, after they have already supplied their electronic address. The benefit of 'double opt in' is that it provides the most clear and distinct evidence of consumer consent, and negates issues that arise in attempting to prove consent

in the context of 'bundled consent', or via the use of pre-ticked boxes. Mr Fenton noted that the Act places an evidential burden for proving consent upon those who send, or cause to be sent, commercial messages.

'Bundled consent' can be a problematic method for obtaining consent, on the basis that by using a single consent process for a wide range of applications, it may not be possible to show true consent to receiving marketing messages. Pre-ticked boxes can be similarly problematic, in that they may not show a deliberate act on the part of the consumer, in which they give clear consent to receiving marketing messages. The specific circumstances would be considered on a case-by-case basis if consent processes were the subject of investigation by the ACMA.

The Act also allows for consent to be inferred, on the basis of an ongoing relationship (such as a business relationship where a consumer may reasonably expect the communication), or in a circumstance where a person has conspicuously published their email address and there is a strong link between their occupational status and the content of the CEM.

Mr Fenton concluded with a brief review of the ACMA's enforcement powers in regards to breaches of the Act, such as the acceptance of enforceable undertakings, seeking injunctions to prevent a person from sending Spam, and prosecution of persons in the Federal Court. Penalties that may be imposed under the Act are very high, with penalty units equal to \$180 each, and maximum fines for corporations up to 10,000 penalty units per day, meaning up to \$1.8M daily.

Ashurst partner Andreas Mauroschat was the final formal speaker. He appeared on a video link from London, and

presented the legal practitioner's view on the challenges facing European businesses engaging in the transmission of CEMs. Mr Mauroschat spoke to the fractured nature of the regulatory landscape under the current European e-Privacy Directive², in which pre-ticked boxes represent an approved form of express consent in Italy, Portugal and Poland, yet in Germany the double opt-in method has been deemed the only safe approach.

Mr Mauroschat explained that the European community is soon to benefit from a more cohesive regulatory approach, with the European Commission having proposed a new *Regulation on Privacy and Electronic Communications*³ that will apply to all member states, without being required to be entered into local law.

Coming into effect 25 May 2018, the new Regulation is a case of evolution rather than revolution. While existing rules for CEMS will be harmonised across the European Union, privacy regulation will also be expanded to cover OTT applications such as WhatsApp, and with a view to the emergence of the Internet of Things, even communications between machines. Fines under the regime will be significant, with authorities entitled to impose fines up to €20M, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

The informative evening was rounded out by Chris Chapman, former Chairman of the ACMA, and now the President of the IIC, who reinforced the importance of a cohesive international approach, and announced an IIC Telecommunications and Media Forum in the planning for Sydney in 2018.

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

³ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, 10.1.2017 COM (2017) 10 final