Hong Kong CSL Limited's submission

in response to the consultation paper released on 20 January 2006 by the Commerce, Industry and Technology Bureau on the "Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages"

20 March 2006

1 Introduction

1.1 Hong Kong CSL Limited ("**CSL**") is pleased to provide its comments in response to the consultation paper titled "Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages" issued by the Commerce, Industry and Technology Bureau ("**CITB**") on 20 January 2006 ("**Consultation Paper**") and the proposed introduction of the Unsolicited Electronic Messages Bill ("**UEM Bill**").

1.2 CSL has previously raised concerns[1] that the Government has not provided valid reasons for the imposition of additional regulation on the mobile network operators or expanded on what it proposes to do regarding the combating of unsolicited electronic messages ("**UEM**") at an international level. This is of particular importance given that research indicates that most UEM originates outside of Hong Kong. This is also

[1] CSL submission dated 25 October 2004 in response to the "Proposal to Contain the Problem of Unsolicited Electronic Messages" issued by the Office of the Telecommunications Authority on 25 June 2004 ("**OFTA Spam Consultation**").

acknowledged by the CITB in Guiding Principle 3 of the Consultation Paper. The failure to provide this information means that it is difficult to ascertain whether this initiative will be effective in reducing the amount of UEM received by registered users.

1.3 However if the Government pursues a legislative option then, when drafting the UEM Bill, the CITB must be mindful of the real need for businesses to use electronic messages as a legitimate marketing and communications tool. Any regime designed to restrict their transmission must be workable, flexible, technology neutral and capable of being 'fine tuned' as necessary. CSL completely agrees with the remarks of the Telecommunications Authority ("**TA**") about this issue when he said:

"*we have to ensure that ordinary commercial communications are not inadvertently caught and the use of electronic messages as a legitimate marketing tool is not unduly restricted*"[2].

1.4 The introduction by many of the world's leading economies (regionally Japan, and Australia) of legislation governing UEMs and the cross border nature of this problem makes the introduction of workable, internationally compatible and relevant UEM legislation in Hong Kong of the utmost importance.

1.5 As a subsidiary of an Australian parent company, CSL is well positioned to understand what errors have been made, from a commercial perspective, by the Australian Government in its attempts to regulate UEM. CSL is pleased to pass on some of that knowledge in this submission.

1.6 Hong Kong's legislators are also well placed (in not having previously introduced UEM legislation), to assess the enactments in force in other jurisdictions and learn from the successes and failures of those regimes. Having said that, CSL is also firmly

[2] Au, M.H., 6 March 2005, "Anti-Spam Legislation Needs Careful Drafting" – see: http://www.ofta.gov.hk/en/dg_article/au_articles/20050306.html

of the view that Hong Kong policy-makers should first look to internal sources of intellectual input in formulating the UEM regime to ensure that the right system is enacted in Hong Kong.

1.7 Notwithstanding the comments above, CSL is of the opinion that without having seen the draft UEM Bill it is difficult to comment with precision and relevance on the proposed regime. Therefore the CITB is urged to release to industry stakeholders and the public a copy of the UEM Bill prior to its presentation to the Legislative Council for consideration and comment.

1.8 The views of CSL can be summarised as follows:

1.8.1 Hong Kong can learn from the mistakes of others;

1.8.2 extreme care and consideration needs to be given to the definition of 'commercial electronic messages' so as to ensure that legitimate messages (such as service-related messages) can continue to be sent by businesses to its customers;

1.8.4 consideration needs to be given as to how the Government will frame the legislation to be internationally effective to enable it to meet its obligations to tackle this global problem on the world stage;

1.8.5 the provisions of the UEM Bill must be genuinely technology neutral in application;

1.8.6 the functional unsubscribe facility needs to be commercial viable and easily managed; and

1.8.7 Corporations, as distinct entities with legal personality should be the responsible entity under the legislation, not corporate officers and employees

thus preserving the historical protection afforded by incorporation necessary to promote trade and commerce.

2 Part III Scope of Application[3]

Nature of electronic messages

2.1 CSL agrees with the proposition that the UEM Bill should only regulate commercial electronic messages ("**CEM**") however; careful consideration must be given as to how a CEM is defined to ensure that legitimate business communications are not improperly restricted. The Consultation Paper does not set out in sufficient detail what constitutes a CEM other than to state:

- "*It should cover messages the primary purpose of which is the commercial advertisement or promotion of a commercial product or service*"[4]; and
- "*...any electronic message at least one of the purposes of which is to offer, advertise, promote, or sponsor the provision of goods, facilities, services, land or a business or investment opportunity, etc., in the course of or in furtherance of any business*"[5],

2.2 Globally, one of the most important considerations and problems that have arisen from previously enacted UEM legislation is the need to arrive at an acceptable definition of what types of communications should be caught within the classification of a CEM. To answer this question it is helpful to examine why UEMs should be regulated in the first place. It is commonly accepted that the rationale behind introducing UEM legislation is to bring about, *inter alia*, a:

[3] For the ease of the CITB's review, CSL has used the same headings as employed in the Consultation Paper.
[4] Consultation Paper, paragraph 19.
[5] Consultation Paper, paragraph 29(c).

2.2.1 reduction in telecommunications infrastructure and network usage associated with UEM;

2.2.2 reduction in the time and effort taken to identify, answer, respond, delete, monitor, block and manage UEMs;

2.2.3 a reduction in the costs associated with identifying, answering responding, monitoring, deleting, blocking and managing UEMs; and

2.2.4 perhaps most important of all, restoration of consumer confidence in e-commerce, e-marketing and electronic communications which in turn will enable e-commerce to be used as a legitimate marketing tool.

2.3 When considered in light of the objectives outlined in paragraph 2.2 above, arriving at a meaningful definition becomes an easier task and leads to the conclusion that the ultimate aim of the regime is not to block all electronic commercial communications, but rather it is to filter out or block indiscriminate mass communications.

2.4 Keeping the conclusion reached at paragraph 2.3 above in mind, the UEM Bill must be drafted carefully to ensure that a workable regime is created and its real purpose is achieved. If the UEM Bill adopts a broad definition of "*commercial electronic message*" it may capture legitimate service-related messages. CSL believes that this may restrict some forms of legitimate and necessary customer communications. This is not nor should it be the aim of anti-spam enactments both in Hong Kong or elsewhere. Unfortunately, the Australian experience has shown that a broad definition of CEM can lead to the unwarranted restriction of legitimate business communications.

2.5 For example, service-related messages that CSL believes are appropriate and important to send to customers which could, arguably, fall within the definition of a "*commercial electronic message*" and, therefore, be subject to restrictions under the proposed UEM Bill may include, but not be limited to:

2.5.1 "welcome" messages to a new customer explaining how to use the various features of their service;

2.5.2 messages which assist customers with their use of their service;

2.5.3 messages to thank customers for their custom and/or loyalty or provide them with a benefit at no extra charge or an invitation to events such as information nights;

2.5.4 messages notifying a customer of special offers and deals being offered on services they currently acquire or new functionality available for those services;

2.5.5 messages notifying a customer of new services which relate to services currently acquired by that customer. For example, where a customer is acquiring one service, CSL believes that notifying customers of bundled services incorporating the service already acquired would be appropriate;

2.5.6 factual messages that contain a link to a business website. For example, a message notifying a customer about price changes (increases and decreases) in relation to the services currently acquired by that customer, and referring the customer to that business website for further details;

2.5.7 messages notifying a customer that their contracted service term is about to expire and explaining how they may extend this term; and

2.5.8 messages notifying a customer that they are approaching a usage limit that applies to their service and suggesting that they may wish to swap to a different plan with an increased usage limit (collectively hereinafter referred to as "**Acceptable Business Communications**").

2.6 In CSL's experience, failure to provide Acceptable Business Communications of this type can damage customer relationships and create frustration with the customer's

ongoing use and enjoyment of their service. Undoubtedly, similar customer experiences would occur in many other industries.

2.7 In particular, CSL understands many customers believe that loyalty to a particular service provider entitles them to be one of the first informed of special new offers, particularly for the types of services they currently acquire and related services. Unfortunately, the proposed UEM Bill may restrict CSL in how it can notify customers of such new deals, services or service features.

2.8 CSL submits the way in which provision could be made for the above type of service related messages in the proposed UEM Bill is to narrow the definition of "commercial electronic message" to exclude Acceptable Business Communications.

2.9 Businesses require prompt clarification regarding what forms of customer communication are permitted under the proposed UEM Bill. In the absence of further elucidation, businesses under an improperly drafted UEM Bill, might be hampered from sending customers many useful and necessary communications that would improve their customers' use and enjoyment of their service and this will result in greater cost and time inefficiencies and consumer dissatisfaction.

2.10 As set out in its comments above, CSL believes that the proposed UEM Bill may place some undue restrictions on service-related messages sent by businesses to persons with whom they have an ongoing customer relationship. Further to its comments above, CSL suggests that the definition of "commercial electronic message" also exclude messages:

2.11.1 sent by a business to persons with whom they have an existing business relationship; and

2.11.2 that relate to a service being provided by the business to that customer (whether or not they also contain additional promotional content).

2.11 CSL would like to draw the Government's attention to the fact that many thousands of its customers have elected to receive electronic invoices[6] both for reasons of efficacy and more importantly, for environmental reasons. CSL's concern is that an improperly drafted definition of 'commercial electronic message' under the proposed UEM Bill might prohibit the sending of invoices sent by 'electronic message' which by convention may also include a small 'commercial' element. It would be unfortunate if this important functional and environmentally-friendly initiative is prohibited by the UEM Bill and inconsistent given that CSL would be able to include such a commercial component in its paper invoices sent to customers. A simple solution to this problem is to make clear that the primary purpose of the message must be the commercial promotion of a commercial product or service in order for it to be classified as a 'commercial electronic message'.

2.12 Messages which are not related to the promotion of a commercial product or service (such as the sending of an invoice) or where the secondary or ancillary purpose of the message is to promote a commercial product or service (such as a message in an invoice about a new service) should be excluded from the definition of 'commercial electronic message'.

2.13 From paragraph 19 of the Consultation Paper it appears that this is the intention of the CITB (as set out in paragraph 2.1 above), however the 'primary purpose' element is missing from the definition of 'commercial electronic message' as set out in paragraph 29(c) of the Consultation Paper. .

2.14 The Government must also ensure that in drafting the UEM Bill care is taken to ensure that it properly defines, within the meaning of a CEM, that the CEM must have been actively 'transmitted' from one party to another to be caught by the legislation. The mischief created by getting this wrong is that the UEM Bill might catch unintended

[6] In excess of 70% in some product lines.

businesses. For example if the 'transmission' concept is not properly defined it might catch a business that has a website that contains marketing material when viewed by a user even though it is the user who sought to view that content. Theoretically, it might also catch a scenario where a user runs an internet search using a search engine such as Google or Yahoo and as a result of that search leads the user to a website containing marketing content. This is not in the spirit of the proposed enactment and so must be excluded.

Specific forms of electronic communications to be excluded

2.15 CSL agrees in principle with the proposal to exclude '*person-to-person… normal voice, or video, telephone calls that do not contain any pre-recorded elements from the application of the Bill*.' However, the blanket prohibition of 'pre-recorded' messages should exclude certain Acceptable Business Communications that are pre-recorded messages that (in CSL's opinion), should fall outside of the definition of a UEM. For example, the UEM Bill must not prohibit, among other things, pre-recorded 'customer wide' service announcements relating to events such as service interruptions or announcements which the Government has required the business send to all its customers.

Electronic messages with a Hong Kong nexus

2.16 CSL agrees in principle with the application of the UEM Bill to UEMs that have a 'Hong Kong nexus'.

2.17 However, following on from the 'nexus' concept, the Consultation Paper contains a notable absence of details regarding how the Government proposes to liaise with other governments in order to internationally combat UEMs. As previously mentioned, UEMs are an international problem. Failure to address it as an international problem will mean that the regime will fail. This is because uncoordinated and inconsistent

international regulatory efforts lead to the creation of UEM 'safe havens' where UEM originators exploit loopholes in their domestic legislation. It is theoretically possible that the UEM Bill might control the volume and abuse of domestically generated UEM, however, foreign experience has shown that originators of domestic UEM, when faced with a local 'crack-down' will merely either increase their efforts to mask their identity or simple move to a foreign uncoordinated or inappropriately unregulated jurisdiction. Failure to properly address this issue leaves Hong Kong exposed to the risk of becoming an inappropriately regulated jurisdiction.

2.18 In CSL's opinion, the UEM Bill must not only 'send a message' to overseas spammers but ensure that the framework established for Hong Kong is compatible with overseas legislative efforts to combat spam. This is particularly important when it is clearly recognised that Spam is a global problem.[7]

3 Part IV Rules About Sending Commercial Electronic Messages

The Opt-out regime

3.1 The CITB proposes to adopt the "opt-out" regime as that which is most appropriate for Hong Kong whereby a UEM may be sent to a customer who in turn may choose to 'unsubscribe' from receiving future UEM.

3.2 The problem with this is that recipients of UEMs are reluctant to 'unsubscribe' using this feature as the fear that it would signal to the UEM that the electronic address is legitimate, thus increasing the volume of future UEM. The fear is also that the sender

[7] The Australian Communications and Media Authority reports that 98% of all spam received in Australia originates from outside of Australia.

may either target that electronic address for further attention and/or pass on or sell that electronic address to other similar operators.

3.3 The question then becomes, how does the CITB ensure that people feel comfortable and safe to 'opt-out', knowing that without this level of comfort being instilled in the public, there cannot be any control of the number of UEMs being sent to Hong Kong residents. This issue remains inadequately addressed in the Consultation Paper.

3.4 In situations where there is an existing (or pending) business relationship, the parties to any contract should be able, under the UEM Bill, to contractually agree that they are able to send Acceptable Business Communications and CEM with minimal or no legislative interference.

Functional unsubscribe facility ("FUF")

3.5 In requiring businesses to provide a FUF, the UEM Bill must ensure that the sender of a UEM is able to designate the mechanism via which the FUF operates, ie. a sender could require that the FUF utilises an email address designated by the sender and that this is the only means via which the registered owner of an electronic address can unsubscribe from receiving further UEMs. The difficulty that would be faced by businesses in the event that the Government does not agree with this suggestion are that:

3.5.1 it would be extremely difficult for companies to provide a free FUF if that company is not able to direct how the user unsubscribes, for example it would be extremely difficult for a mobile network operator to reverse a short message service ("**SMS**") charge if the customer was to unsubscribe using SMS; and

3.5.2 it would be extremely time consuming and costly for the sender of the UEM to monitor, supply and store all 'un-subscriptions' if they are received via a myriad of mediums for seven years.

3.6 Additionally, if a user is desirous of unsubscribing from receiving UEM from a particular entity, the UEM Bill must clarify that once the user unsubscribes, whether or not that notice then serves as notice that they are not willing to receive any UEM from that entity by any means, not just the media via which they first received the UEM.

3.7 CSL proposes that the FUF must be provided in the two official languages of Hong Kong (ie. in Chinese and English) and suggests that requiring businesses to ensure that no further CEM are sent to users who unsubscribe from receiving UEM 10 working days after the unsubscribe message is sent is too short a period given that businesses may have many systems which will need to be updated to effect the change. CSL proposes that a period of 20 working days is stipulated as the relevant time period.

3.8 In addition to the point raised at paragraph 3.4 above, the UEM Bill must stipulate that once a user has contractually agreed and consented to receive CEM, it is not necessary for the party wishing to send a CEM to provide a FUF in CEMs sent thereafter. However, the contractual agreement can provide that the customer can opt-out at a later stage if they so require.

Do-not-call registers

3.9 The establishment of a 'do-not-call' register is problematic. In theory it appears a worthwhile objective. In practice it is, in the absence of protective measures, an ideal place from which an unscrupulous operator (most likely from outside Hong Kong) could easily obtain the electronic addresses of, potentially, many thousands of registered address owners (each one being a valid and functional address). The

Consultation Paper does not address how the regime would deal with this extremely serious issue and one which, if not addressed properly, would totally undermine the confidence of the public in such a registry and hence its utility.

3.10 Additionally, the 'do-not-call register' would place an additional financial burden on Hong Kong businesses engaged in sending legitimate CEM. Such a registry would require businesses (on a regular basis) to monitor the registry and to then correlate the result with its records in order to ensure that it is not sending a UEM to a registrant. The establishment of any such registry should be carefully considered and if it is deemed necessary, the provisions that relate to penalties for any breach must take into account the onerous nature of monitoring the registry and provide appropriate temporal flexibility in complying with the regulations governing its operation.

3.11 If the CITB is minded to set up such a registry, CSL believes that the registry should not be available to the public, however access must only be given to a closed user group, ie. registrants who are Hong Kong companies, whose identity has been confirmed, whose details have been provided to the TA and have received a password from the TA enabling them to access the registry. In this way, a 'do-not-email' registry could be established without the resultant fears as expressed in paragraph 45 of the Consultation Paper.

3.12 Added to this, CSL questions, in the face of the Government's commitment to the UEM Bill being technology neutral, why the registry might only apply to telephone numbers. This question is raised as it is not beyond technological comprehension (particularly in the era of convergence and the rise of voice over internet protocol or VoIP services), that a UEM originator would look to utilising alternate technologies for UEM delivery as a means of circumventing legislative loopholes created by unnecessarily narrow definitions.

3.13 CSL understands from paragraph 43 of the Consultation Paper that the Government is not intending to void private arrangements between two contracting parties and that such arrangements will take precedence over the proposed statutory provisions. As such, CSL assumes that if a user has agreed with a business to receive promotional communications from the business then even though the user may have registered their details on a 'do-not-call register', the business would still be able to send UEM to the user.

Accurate Sender Information

3.14 The requirement that the sender of a commercial electronic message must include accurate sender information to enable a sender to identify and contact the sender if necessary is an appropriate mandate. The UEM Bill should also make it clear that the provision of this information is not only to allow the sender to be identified by the receiver but also to allow easy identification of the sender by the regulator for enforcement purposes.

Misleading subject headings

3.15 The prohibition on misleading subject headers in CEM is an appropriate course of action. The definition must be extended from just prohibiting 'misleading' subject headers to include 'deceptive' headers. The common law (and statutory provisions) regulating this conduct have always grouped 'misleading or deceptive' together[8] given that whilst the two are often related, they cover different types of conduct. To include one without the other would be to weaken the intended effect of the UEM Bill.

[8] Section 7M, *Telecommunications Ordinance*, Cap. 106.; s. 52, *Trade Practices Act* 1974 (Aust.)

Enforcement notice

3.16 In relation to the establishment of an enforcement notice regime under the UEM Bill the UEM Bill must include a clearly articulated provision for the alleged transgressor to provide some explanation of its conduct, prior to the conclusion of the investigation and, if thereafter deemed appropriate, the issuance of an enforcement notice. The failure to provide this right of reply could lead to a substantiated claim based on a denial of natural justice.

3.17 In looking to establish an appropriate protocol under which to commence enforcement action under the UEM Bill, the Government need not 'reinvent the wheel' as it has already formulated a workable and appropriate protocol. This protocol can be found in the TA's guidelines that govern the manner in which the TA deals with complaints lodged regarding alleged transgressions of sections 7K-7N of the Telecommunications Ordinance[9].

4 Part V Rules About Address Harvesting

4.1 CSL does not agree with the proposal to allow address harvesting software and harvested lists in connection with sending a UEM, as long as that software or list is used in compliance with the UEM Bill. The problem with this proposal is that one of the key aims (as previously discussed) of the UEM Bill should be to cut down on the number of UEMs that are not aimed at a particular addressee but rather, through sheer bulk of numbers, attempt to obtain a response from the many thousands of unknown addressees. It is these kinds of UEMs that cause the bandwidth/traffic problems that are so often a cause for concern amongst ISPs and network managers. Additionally, it

[9] See '*How Complaints Related to Section 7k to 7N of the Telecommunications Ordinance are Handled by OFTA'*, http://www.ofta.gov.hk/en/c_bd/general/investigation.pdf

is exactly this kind of email that causes the most angst among consumers and is a fundamental cause of consumers' distrust of CEM as a legitimate marketing medium.

4.2 It is CSL's opinion that this proposal would legitimise and condone this practice, theoretically leading to an increase the volume of UEM being sent within, to and from Hong Kong.

5 Part VI

Offences Relating to the Sending of Commercial Electronic Messages

5.1 CSL agrees with the proposal to create as an offence, the use of dictionary attacks. Notwithstanding the foregoing and in keeping with the technology neutral approach of the UEM Bill, CSL poses the question that if a dictionary attack is to be made illegal (the purpose of which is to stop people obtaining addresses by illegitimate means) then should this offence, for consistencies' sake, also be extended to a person who uses a telephone book to obtain a telephone number for the purposes of transmitting a UEM?

5.2 Additionally, by restricting a dictionary attack (and by arriving at a definition of "multiple"), CSL assumes that the UEM Bill aim is to restrict bulk UEM that is sent to anonymous users who could not legitimately be argued to have an interest in the UEM content or a prior business relationship with the sender (or their affiliates). Using this assumption, CSL believes that the UEM Bill, as proposed, would be inconsistent given that an address that is harvested by software is no different from an address that is obtained through a dictionary attack. To provide that one is permissible whilst the other is not is, inconsistent.

Use of scripts or other automated means to register for multiple e-mail addresses

5.3 CSL objects to the proposal to prohibit the use of 'automatic throwaway accounts' used for the transmission of UEM, but only in circumstances where such usage is in contravention of the UEM Bill. The issue with this proposal is that again it encourages bulk UEM transmission and, it could be argued, allows the spammer an opportunity to hide their true identity as many 'automatic throwaway accounts' do not require the user to substantiate his or her identity.

Relay or re-transmission of commercial electronic message without authorisation

5.4 CSL's view regarding the relay or re-transmission of commercial electronic message without authorisation is the same as for paragraph 5.3 above.

Fraud and Related activities in connection with sending electronic messages

5.5 CSL agrees in principle with the initiatives proposed to prevent fraud under the UEM Bill but without access to the formal structure of that bill, CSL is unable to properly assess whether such an initiative is workable or adequate. CSL looks forward to receiving a copy of the UEM Bill as part of the continuing public consultation process.

6 Part VII Compensation

6.1 CSL supports the ability of a user to commence legal proceedings and seek injunctive and other relief/damages against the sender of a UEM in circumstances where that transmission has sufficiently directly caused loss to be suffered by that user.

6.2 CSL also suggests as UEM is a global problem, thought must be given as to the manner in which orders (and other relief or awards) given pursuant to or in connection with the UEM Bill might be enforced in overseas jurisdictions. Additionally the UEM

Bill should provide a reciprocal mechanism for the registration of similar foreign judgments within Hong Kong.

6.3 Any proposed defence as set out in paragraph 82(f) of the Consultation Paper must conform with the normal principles that apply to a defence in civil proceedings ie. the balance of probabilities test.

7 Part VIII Powers for Investigation

7.1 With regard to the specific powers that the CITB proposes be given to the TA under the UEM Bill for the enforcement thereof, CSL remains cautious as to the powers that are proposed to be given to the TA in that they are similar to those used presently by the Hong Kong Police Force ("**Police**"), which in the hands of a civil authority that does not have the same experience in using those powers as the Police, could possibly lead to an inappropriate use of the said powers.

7.2 It is for the reasons stated above that, in CSL's view, any warrant that the CITB proposes that the TA obtain should only be obtained on an *ex parte* basis in only the most exceptional of circumstances. As the CITB proposes to allow the Police to deal with fraud and related activities (whereby it is assumed that the normal powers afforded the Police to detect and prosecute would continue unchanged) it is difficult to rationalise the granting of such powers to the TA. Therefore before commenting further, CSL respectfully suggests that the CITB elaborate on the type of actions under which it might propose the TA to use these powers given the serious nature of the actions contemplated and the potential to contravene civil liberties. Additionally, the CITB might consider allowing the alleged transgressor an opportunity to present their defence at any application for a warrant.

7.3 In paragraph 85(b) the legislative proposal provides that a magistrate may make an order that a document etc. be provided to the TA if the possessor refuses to provide it to the TA. What is not clear is whether the magistrate, in making that order, would be required to first hear the reasons from the possessor as to why he or she has not delivered up that document to the TA. This is an omission which, in CSL's opinion, must be rectified, so that such a requirement to hear both parties (and hence affording natural justice to the proceedings) is complied with, prior to the making of an order.

8 Part IX Other Provisions

8.1 In commenting on paragraph 87 of the Consultation Paper, the UEM Bill should only allow for such transgressions and resultant penalties to be imposed by an officer of the court after fair and due process has been followed, particularly given the serious ramifications of failure to comply.

8.2 In commenting on paragraph 88, CSL states that the UEM Bill must allow, for any party who feels aggrieved by the TA's enforcement or other actions pursuant to the UEM Bill, to commence proceedings against the Government for any reasonably perceived abuse of his powers.

8.3 Regarding the CITB's proposal on personal liability as set out in paragraphs 89 and 90 of the Consultation Paper, it is CSL's opinion that the liable person (in the case of a successful prosecution) should be in accordance with the table provided below (this table is not exhaustive):

Liability Type:	**Liability Attached to:**
Criminal liability (fraud etc.)	Personal liability (criminal standard)
Civil liability	Attached to the entity or person responsible but with no presumption that another is responsible by virtue of their relationship to

	the transgressor.

8.4 The liability under civil actions should follow the common law standard, that is the liability attaches to an individual or corporation (or other entity eg. Partnership) where it can be reasonably shown (on the balance of probabilities) that they are the party responsible. Who is the appropriate defendant for a civil case is a question best decided by the plaintiff in accordance with the long established common law (and therefore should remain unregulated by the UEM Bill). In civil proceedings, to create a situation where the liability is presumed to flow to a director is untenable and would have the effect of adding a further burden to an already difficult and onerous role (ie. Company director) and is not conducive to commercial activity (ie. the destruction of the corporate veil) and may encourage industry participants to consider the registration of the entities offshore. The presumption should be reversed so that a director is not to be held liable unless he or she has acted in a manner that suggests otherwise. Australia, which is regarded as having one of the toughest anti-spam legislative regimes in the world does not provide for the legislation to 'lift the corporate veil' as the CITB proposes to do in paragraphs 89 and 90 of the Consultation Paper. The rationale behind adopting this approach is of particular importance culturally to a free market economy such as Hong Kong, and that is the preservation of the corporate veil is analogous to the promotion and growth of trade and commerce and so must be upheld.

8.5 In relation to paragraph 100(g) of the Consultation Paper, whilst CSL supports in part the concept that a telecommunications service provider is not liable under the UEM Bill for the conveyance of UEM, the Government must make it clear that if a telecommunications service provider is complicit in or is the originator of the UEM in question then it cannot escape liability by virtue of its status as a telecommunications service provider. This is particularly important when viewed in the light that the Government needs to address the issue of what it proposes to do about the issue of

UEM originating from a fixed line operator network ("**FTNS**") and terminating on a mobile network operator's ("**MNO")** network when it is the user who will pay to be 'spammed'. The practice has been correctly summarised by the TA when he said:

> *Most of the [unsolicited promotional] calls received by mobile customers are originated from the customers of a small number of fixed network operators. Why do these fixed network operators welcome these customers, particularly when the customers send calls to the mobile customers? That is because under the existing interconnection arrangement, for every call between a fixed network and a mobile network, the mobile network operator pays an interconnection charge to the fixed network operator. In other words, the more calls are made from a fixed network to a mobile network, the more revenue will be received by the fixed network operator. From the point of view of the fixed network operators, the additional source of revenue must be welcomed. However, the fixed network operators may be disregarding public interest by tolerating or encouraging their customers to cause a nuisance to the community.*[10]

8.6 This is a plainly ridiculous scenario and an issue that causes a great deal of consumer anger. CSL understands that the Office of the Telecommunications Authority plans to issue a code of practice to handle complaints against inter-operator unsolicited promotional telephone calls generated by machines on 27 March 2006, however this code of practice will only seek to regulate the way in which unsolicited promotional calls are handled by originating and terminating operators. It is not intended to discourage the practice of sending unsolicited promotional messages or create disincentives to the FTNS conveying unsolicited promotional messages to the customers of MNOs.

8.7 The Government must also consider allowing a prosecution of a telecommunications service provider who knowingly enters into arrangements with spammers who are in contravention of the UEM Bill.

9 Further Considerations

Legislative review

9.1 The CITB should consider including a requirement that any resultant legislation (and regulations) derived from this consultation process must be reviewed within two to three years. This requirement is similar to that which is currently being undertaken in Australia with the *Spam Act* and is a logical inclusion designed to eradicate any anomalous or unworkable elements of the enactment.

Education

9.2 CSL strongly believes that the issue of spam is a global problem and that it is not only the telecommunications and information technology industries that are able to combat this problem but also the public. The public must also be engaged and educated to combat spam and to equip them to inform and protect themselves. Following from this, CSL is supportive of any educational initiatives that might be undertaken by the Government aimed at educating the public in how to deal with spam.

Existing Regulatory Measures

9.3 In its submission[11] to the OFTA Spam Consultation, CSL raised the issue that the paper overlooked the effectiveness of the mobile carrier licences conditions as an existing measure anti-UEM measure. This failure is replicated in the Consultation Paper. Specifically, the CITB's attention is drawn to Special Conditions 21 and 22 of CSL's Mobile Carrier Licences No. 77 and 087 which state respectively:

> *The licensee shall not use the service, and shall endeavour to prevent the service from being used by any user, for the transmission of messages or communications comprised in any unsolicited advertising or unsolicited promotional information and comply with all codes of practice which may be issued by the Authority from time to time concerning unsolicited advertising or unsolicited promotional information.*

[10] Au, M.H., 29 May 2005, "Reducing the Nuisance caused by Unsolicited Promotional Calls" – see: http://www.ofta.gov.hk/en/dg_article/au_articles/20050529.html

[11] Paragraphs 4.1 an 4.2 of CSL submission dated 25 October 2004 to the OFTA Spam Consultation

9.4 The above Special Condition applies or will apply[12] to all licensed MNOs but the Consultation Paper does not acknowledge or assess the effectiveness of these conditions. In the absence of such an assessment, the question remains why it is necessary to provide a further regulatory framework.

9.5 Similarly, the provisions of the Personal Data (Privacy) Ordinance ("**PDPO**") which was also previously referred to by CSL[13] has also been overlooked as a potential source of existing regulation of UEM. CSL questions again why the PDPO has been overlooked in this fashion and asks whether there is really a need for the UEM Bill and if so, how it intends for the UEM legislation and the PDPO to co-exist.

9.6 With respect to paragraphs 29(d) and (e) of the Consultation Paper, CSL questions the need to extend the scope of the proposed 'schedule' to SMS given that since 2001 an industry code of practice entitled 'Handling of Unsolicited Promotional IOSMS under the Code of Practice for Inter-Operator Short Message Service' ("**CoP**") has been operating successfully. It is CSL's view that such an inclusion would be unnecessary at this point in time as the CoP is currently an adequate industry initiative to regulate unsolicited SMS. If at a later date the Government was of a view that SMS UEM was causing concern, this could be added to the 'schedule' with little or no effort.

9.7 No doubt the CITB is aware that the CoP has recently been extended to include 3G licensees, MVNOs and fixed line SMS providers which of course extends the scope of its influence. Again, CSL questions why the CITB believes that the CoP is not working.

[12] CSL understands that Special Condition 22 of its Mobile Carrier Licence 087 (or a substantially similar condition) will be included in the mobile carrier licences issued to public radiocommunication service ("**PRS**") licensees upon the expiry of their existing PRS licences in September 2006.

[13] Paragraph 4.3(d) of CSL submission dated 25 October 2004 to the OFTA Spam Consultation.

10 Confidentiality

10.1 CSL does not regard any part of this submission as confidential and has no objection to it being published or disclosed to third parties.

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