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LOCATION: G12
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REFERENCE: Y3322
SUBJECT: AUSTRALIA – THE SPAM ACT 2003
SUBJECT AREA(S): Legislative restrictions on the sending of unsolicited commercial electronic messages.
ACTION POINTS: **Underwriters and Brokers to note.**
DEADLINE: **Immediate**

The purpose of this Bulletin is to advise the Market of the introduction of the Spam Act 2003 (Cth). This Act and its Regulations came into effect on 10th April 2004 and prohibits the sending of “unsolicited commercial electronic messages”.

1. Brief overview of the requirements

- a) The Spam Act states that unsolicited commercial electronic messages must not be sent if it has an Australian link¹. This includes commercial electronic messages:
- **Originating in Australia** that are sent to any destination; and
 - **Originating overseas** that are sent to an address accessed in Australia.
- b) “Commercial electronic messages” covers emails, instant messaging, short message service and other mobile phone messaging. It does not cover facsimiles, non-electronic messages such as ordinary mail and paper flyers, voice-to-voice telemarketing and the majority of pop up windows that appear on the internet (i.e. those that are accessed from a web page and not via a message). The message must:
- be commercial in nature – for instance offering a commercial transaction, or directing the recipient to a location where a commercial transaction can take place.
 - have been sent **without** the recipient’s prior consent, either expressly given, or inferred.

¹ Refer to note 3 below for a link to the Spam Act. Section 7 of the Act expands on the term ‘Australian link’.

- c) The Spam Act makes no specific reference to bulk messaging – a single unsolicited commercial electronic message could be spam.
- d) Key issues to address in order to comply with the Act are:
- i) Consent* – only send commercial electronic messages with the addressee’s consent - either express or inferred consent will suffice.
 - ii) Identification* – include clear and accurate information about the person or business that is responsible for sending the commercial electronic message.
 - iii) Unsubscribe* – ensure that a functional unsubscribe facility is included in all commercial electronic messages and deal with unsubscribe requests promptly.

2. Enforcement and penalties

- The Spam Act specifies a number of options that are available to enforce the legislation, depending on which is the most appropriate response to the contravention that has occurred. The Australian Communications Authority (ACA) may issue a formal warning, issue an infringement notice (similar to a speeding ticket) or commence proceedings in the Federal Court.
- The maximum penalties under the Spam Act are substantial. A business that is found to be in breach of the Spam Act may be subject to a Court imposed penalty of up to \$220,000 for a single day’s contraventions. If, after that finding, the business contravenes the same provision, the business may be subject to a penalty of up to \$1.1 million.

3. Further Information

The Spam Act 2003 and its Regulations can be obtained using the following links:

Spam Act 2003:

<http://scaleplus.law.gov.au/html/pasteact/3/3628/pdf/1292003.pdf>

Spam Regulations 2004:

<http://scaleplus.law.gov.au/html/numrul/20/10084/pdf/2004No56.pdf>

A website for the Australian Communications Authority (ACA) can be obtained using the following link:

<http://www.aca.gov.au>

The ACA has also produced a number of documents, providing detailed information on the requirements the Spam Act 2003 places on businesses that send commercial electronic messages. Copies of these documents can be obtained using the following links:

Spam Act 2003: A Practical Guide for Business

http://www.aca.gov.au/consumer_info/frequently_asked_questions/spam_business_practical_guide.pdf

Spam Act 2003: An Overview for Business

http://www.aca.gov.au/consumer_info/spam/spam_overview_for%20business.pdf

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This bulletin has been sent to underwriters, Lloyd's brokers and the Compliance Officers of managing agents.

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