

NEWSLETTER

Legal Up-Date

April 2004

NEW ANTI-SPAM LEGISLATION – WHAT IT MEANS FOR YOU?

The Federal Government's much publicised Spam Act 2003 will come into force on 10 April 2004. The new law has many implications for businesses in Australia.

The Act introduces a new scheme for regulating, sending and receiving commercial emails and other types of commercial electronic messages. Specifically, it prohibits the sending of what is commonly called "spam". This generally covers unsolicited and unwanted emails. The Act only applies to commercial electronic messages that have an "Australian link".

All unsolicited commercial messages are prohibited under the Act. This means electronic messages which, having regard to their content, presentation and other information contained in them, are sent "for the purpose of offering and/or promoting the supply of goods, services, land or interests in land or businesses or investment opportunities to the consumer".

Essentially, the scheme makes the following regulations:

1. unsolicited commercial electronic messages must not be sent;
2. commercial electronic messages must include information about the individual or organisation who authorized their sending;
3. commercial electronic messages must contain a functional unsubscribe facility; and
4. address-harvesting software and harvested-address lists must not be supplied, acquired or used.

The Act will be administered by the (Australian Communications Authority ("ACA"). The main remedies for breaches of the Act are civil penalties and injunctions. The penalties vary depending on any prior record of contravention. The penalties

can be severe including a fine of up to \$1.1 million for a person or company with a prior record for sending unsolicited commercial electronic messages. In addition, other orders can be made by the Federal Court (e.g. orders for compensation and for recovery of financial benefits obtained as a result of the contravention).

For businesses this means that current systems of electronic communication should be revised in light of the new legislation. In particular, businesses should ensure that:

- consent from all addressees is obtained before sending out commercial electronic messages;
- all commercial electronic messages contain accurate sender information;
- all commercial electronic messages contain a clear and conspicuous unsubscribe statement;
- on receipt of an unsubscribe message, the email address of the sender must immediately be removed from the address list; and
- they comply with any anti-spam legislation applicable in countries to which the emails are sent.

We would be happy to discuss any questions or concerns you may have about specific provisions in the Act or any issues in relation to the implementation of the Act.

JUSTICE OF THE PEACE – NO LONGER FOR LIFE!

People appointed Justices of the Peace ("JPs") in NSW or contemplating applying for an appointment should know that appointments are no longer for life. Rather, appointments will be for five yearly terms and renewable thereafter. These changes became effective on 8 December 2003 under the Justices of Peace Act 2002.

All JPs should note that existing appointments will lapse after three years from the date of the commencement of the Act. This means that if you are a JP and wish to renew your appointment, you must do so before 8 December 2006.

To renew an appointment, an applicant must apply to the NSW Attorney General's Department. The applicant must be able to establish either an employment or community based need for their re-appointment. A check of criminal records will also be made for each applicant. The applicant will also be required to re-swear his or her Oath of Office.

No renewal fee is payable unless the applicant requires a certificate of appointment. Normally a certificate of appointment will not be issued unless it is specifically requested. Instead, the appointee will be allocated a registration number.

First time applicants must also obtain a nomination from a Member of Parliament or a Member of the Legislative Council.

The purpose of the new scheme is to ensure that regular probity and criminal checks are conducted on persons to be appointed JPs.

The Attorney General's website now maintains a page listing all JPs in NSW and their respective details to allow easy access by the public.

If you have further questions on the appointment of JPs or renewal of appointments, please do not hesitate to contact us.

TAXATION TREATMENT OF PARTNERSHIPS

In the January 2004 edition of Legal Up-Date, we examined the taxation treatment of a sole proprietor. In this edition, we look at the taxation treatment of partnerships of individual persons.

The tax treatment of partnerships of two or more people is essentially the same as for sole proprietors. The major advantage of a partnership is the possibility of income splitting between the adult members of the partner's family.

Further, any tax losses incurred by the partnership may be distributed to individual partners, to be offset against the individual partners' taxable income. In this way, tax losses do not become trapped in the partnership but may be utilized

immediately by the individual partners to reduce the amount of their overall tax liability.

A partnership itself is not required to pay tax although it must lodge a tax return for each financial year. The tax liability then passes to each individual partner who is required to pay tax in accordance with the proportion of tax liability allocated to him or her. As partners in a partnership are taxed as individuals, the personal tax rate for each partner would apply. Further, as individuals, partners in a partnership may also claim the normal tax concessions available to individuals, such as certain CGT exemptions and the small business concession.

At the outset, it is important to ensure that the structure of the partnership caters for changes in circumstances, to allow flexibility in varying the amount of profit and losses to be distributed to the partners in each financial year. It is imperative that this mechanism is established at the beginning of the partnership in order to avoid the Commissioner of Taxation applying various anti-avoidance provisions in the legislation.

The most significant disadvantage of partnership is that each partner is jointly and severally liable for the debts of the partnership. Further, there may be certain CGT and stamp duty disadvantages, in that ownership of an asset in a partnership is notionally allocated to the partners. This means that when the asset is disposed of, then the law would treat each partner as having disposed of his or her share in that asset. This means that on each occasion a new partner is admitted into the partnership or if a partner retires, there could not only be CGT but also stamp duty implications. (Retirement or admission of a partner on each occasion is treated by law as a simultaneous disposal and acquisition of the partnership.)

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interest you covered, please drop us a line at:

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