



Express law fast track information for clients

16 November 2006

Federal Court awards \$5.5 million in pecuniary penalties in Australia's first Spam Act case

On 27 October 2006, the Federal Court ordered Clarity1 Pty Ltd to pay a \$4.5 million pecuniary penalty and its director, Wayne Mansfield, to pay a \$1 million pecuniary penalty for contravening various provisions of the *Spam Act 2003 (Cth)* concluding the first proceedings brought by the Australian Communications and Media Authority (ACMA) under the Spam Act.

Earlier findings

ACMA v Clarity1 Pty Ltd [2006] FCA 410

In the court's earlier decision, Nicholson J found that between 10 April 2004 (the commencement of the Spam Act) and 13 April 2006 (the date of the decision), Clarity1 contravened section 16(1) of the Spam Act by sending at least:

- 213 million commercial electronic messages (41.7 million successfully) to over 5.6 million unique electronic addresses, and
- 56.8 million commercial electronic messages (33.1 million successfully) to over 2.2 million unique electronic addresses.

Nicholson J further found that a majority of the unique electronic addresses referred to above had been obtained from harvested-address lists or were compiled using address-harvesting software prior to the commencement of the Spam Act. By sending commercial electronic messages to electronic addresses obtained in such ways, Clarity1 contravened section 22(1) of the Spam Act.

Nicholson J found Mr Mansfield aided and abetted, counselled and procured, and was directly or indirectly knowingly concerned in or party to the Clarity1's contraventions of the Spam Act, thereby contravening sections 16(9) and 22(3) of the Spam Act.

Decision on relief

ACMA v Clarity1 Pty Ltd [2006] FCA 1399

Nicholson J's decision on relief followed his earlier findings on contravention that Clarity1 and Mr Mansfield had breached specified sections of the Spam Act by sending millions of commercial electronic messages without the recipients' prior consent, many of which had been obtained by using address-harvesting software or from harvested-address lists.

The orders

The Federal Court ordered:

- that Clarity1 pay the Commonwealth a pecuniary penalty of \$4.5 million
- that Mr Mansfield pay the Commonwealth a pecuniary penalty of \$1 million
- declarations stating how and why Clarity1 and Mr Mansfield contravened the Spam Act
- injunctions restraining Clarity1 and Mr Mansfield from engaging in such conduct in the future
- that Clarity1 and Mr Mansfield pay ACMA's costs.

While the pecuniary penalties imposed are considerable, the court acknowledged that 'the innovative character of the legislation, the boundaries of which the respondents were at liberty to contest on its first application' was also a factor, suggesting that higher penalties may be imposed for similar conduct in the future.

Implications for agencies

As the first decision made under the Spam Act, the decision demonstrates the importance of complying with the Act. Agencies that are subject to the Spam Act need to ensure that they have the consent of everyone in their email database before sending any commercial electronic messages, even if that email database was compiled prior to the commencement of the Spam Act. Contraventions of the Act can result in substantial penalties being imposed.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1399.html

Justin Jones of AGS appeared as junior counsel with Stephen Owen-Conway QC on behalf of the Australian Communications and Media Authority. Justin is a lawyer in AGS Perth's commercial and trade practices teams.

For further information please contact:

Justin Jones
Lawyer
T 08 9268 1125 F 08 9268 1771
justin.jones@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>. If you do not wish to receive similar messages in the future, please reply to: <mailto:unsubscribe@ags.gov.au>