

# Largest Spam Act fine for Splash Mobile

**ACMA has fined the Pitch Entertainment Group, which trades as Splash Mobile in Australia, \$11,000 for extensive breaches of the *Spam Act 2003*. This is the largest fine imposed by ACMA to date under the Spam Act. Pitch and its directors have also entered into an enforceable undertaking that requires future compliance with the Spam Act and has stringent compliance reporting and staff education obligations.**

ACMA found that Pitch sent more than one million commercial electronic messages without a functional 'unsubscribe' facility to mobile phones, promoting its ring-tone club.

In an unrelated investigation, ACMA has fined International Machinery Parts Pty Ltd (IMP Mobile) \$4,400 for breaches of the Spam Act. IMP Mobile also failed to provide a functional unsubscribe facility when sending messages to mobile phones. IMP Mobile sent SMS messages promoting a 'secret admirer' service between January and May 2006 that did not incorporate an unsubscribe facility.

The Spam Act requires every commercial electronic message to have clear and simple instructions on how consumers can opt out of receiving further messages. All commercial electronic messages must be sent with the recipient's consent, clearly identify who the message was sent by and provide instructions on how to unsubscribe from receiving further messages.

With potential penalties of up to \$1.1 million per day for repeat offenders, non-compliance with the Spam Act can prove costly for businesses.

Pitch has advised ACMA that, since mid-2006, it has included instructions on how to opt out of receiving its commercial electronic messages and that it took this action when it became aware of being in breach of the Spam Act.

ACMA warned all businesses sending commercial electronic messages to make sure they and their staff fully understand the requirements of the Spam Act, particularly businesses like Pitch that

are involved in mass marketing campaigns.

Pitch, in its enforceable undertaking, has agreed to ensure that:

- all future messages contain a functional unsubscribe facility
- it is capable of receiving unsubscribe requests
- its staff receive training in the Spam Act and are informed of the undertaking
- its systems and processes comply with the Spam Act and
- it will audit its messages and report to ACMA on the number of messages sent with an unsubscribe facility, the number of unsubscribe requests received and the steps it has taken to act on unsubscribe requests.

If a person breaches an enforceable undertaking, the Federal Court can order compliance with it, payment to be made to the Commonwealth of an amount up to the total financial benefit from the breach and compensation to be paid to any person who suffers loss, or any other appropriate measure.

The Spam Act regulates unsolicited commercial electronic messaging in Australia. Commercial electronic messages can be emails, SMS messages, MMS messages, instant messaging messages or any other similar messages. Commercial electronic messages must have the following features:

- consent—it must be sent with the recipient's consent—they may give express consent, or consent may be inferred from their conduct and 'existing business or other relationships'
- identity—it must contain accurate

information about the person or organisation that authorised the sending of the message

- unsubscribe—it must contain a functional unsubscribe facility to allow the recipient to opt out from receiving messages from that source in the future.

When the penalty provisions of the legislation came into force in 2004, Australia was 10th in the ranking of spam-relaying countries for email spam, but had fallen to 28th in this list by 2006. This reflects the success ACMA has had pursuing spammers, most recently with the October 2006 decision of Justice

Nicholson in the Federal Court in Perth to award a pecuniary penalty of \$4.5 million against Clarity1 Pty Ltd and \$1 million against its managing director, Mr Wayne Mansfield, for contravening the Spam Act.

The Spam Act covers advertisements for services sent by SMS, but premium mobile phone content that is paid for by consumers is regulated by the Mobile Premium Services Industry Scheme. The Telecommunications Industry Ombudsman handles disputes about billing that cannot be successfully resolved by the content provider or the customer's mobile phone service provider.

More information about the Spam Act and making complaints about spam is on the ACMA website at [www.spam.acma.gov.au](http://www.spam.acma.gov.au).

