



**PDPC's Public Consultation on Managing Unsolicited
Commercial Messages and the Provision of Guidance to
Support Innovation in the Digital Economy**

CONTRIBUTORS



Chia Ling Koh

Director, OC Queen Street LLC

Telephone Number: +65 6350 4380

Email Address: chialing.koh@osborneclarke.com

Chia Ling is a digital business lawyer supporting digital innovation protection and commercialisation, investments and critical infrastructural transformation. He advises companies and government bodies on both contentious and non-contentious matters, including cyber security issues, data protection, intellectual property, telecommunications and media regulations, competition, FinTech, artificial intelligence, payments and financial regulations.

For his work on FinTech, Chia Ling was included in the inaugural Fintech chapter of *Who's Who Legal: Banking 2018*. He also regularly speaks on amongst others, artificial intelligence, fintech, cybersecurity and data protection, with the most recent one at Silicon Valley where he presented on Cybersecurity & Privacy trends in APAC to the Silicon Valley Association of General Counsel. Chia Ling is also a honorary expert panel member at the Centre for Cross-Border Commercial Law in Asia, School of Law, Singapore Management University.

DEFINED TERMS

Term	Meaning
Australian DNCRA	Australian Do Not Call Register Act 2006
B2B	Business-to-business
Canadian UTR	Canadian Unsolicited Telecommunications Rules 2008.
Consultation Paper	Public Consultation for Managing Unsolicited Commercial Messages and the Provision of Guidance to Support Innovation in the Digital Economy (PDPC, 27 April 2018)
DNC Provisions	PDPA, Part IX
DNCR	Do-Not-Call Registry
EPG	Enhanced Practical Guidance
Hong Kong UEMO	Hong Kong Unsolicited Electronic Messages Ordinance 2007
IM	Instant messaging
IP	Internet Protocol
PDPA	Personal Data Protection Act (Act No. 26 of 2012)
PDPC	Personal Data Protection Commission
SCA	Spam Control Act (Cap. 311A)
Spam Control Provisions	SCA, Part III
Victorian PDPA	Victorian Privacy and Data Protection Act 2014

Question 1. What are your views on the proposed scope and applicability of the DNC Provisions and the Spam Control Provisions?

- 1.1. The PDPC has proposed to make the following changes to the scope and applicability of the DNC Provisions and the Spam Control Provisions:
- (a) the DNC Provisions will apply to unsolicited marketing text messages which are sent to Singapore telephone numbers, regardless of whether they are sent in bulk; and
 - (b) to expand the scope of the Spam Control Provisions to apply to unsolicited commercial text messages, where they are addressed to IM identifiers and are sent in bulk.
- 1.2. We welcome the proposed changes, subject to our comments to Question 2 below.

Question 2. What are your views on including commercial text messages sent using IM identifiers under the Spam Control Provisions?

- 2.1. In principle, we agree that the regulation of messages sent to IM identifiers will address a lacuna in the laws as they are currently drafted. The proposed changes are consistent with the practices of other jurisdictions such as Hong Kong and Malaysia.
- 2.2. However, there are a number of issues which the PDPC should consider.
- 2.3. First, the PDPC should clarify whether it intends for these provisions to apply to all IM programs. There are some IM programs where it is not possible to send messages to other users unless the recipient has added the sender as a contact – in such situations, the recipient has control over who is able to send messages.
- 2.4. Further, the availability of in-app or operating system-level filters which permit users to mute, delete or block the senders may suffice to protect the recipient. For example, WhatsApp provides a "report spam and block" feature. The PDPC may wish to consider whether the availability of such a feature is sufficient to amount to an "unsubscribe" facility within the current scope of the SCA.
- 2.5. Finally, mobile push notifications which are sent from within mobile apps, instead of being tied to IM identifiers, are not covered in the scope of the provisions. This is another area which the PDPC may wish to regulate as well.

Question 3. What are your views on the proposed reduction of the period for effecting withdrawal of consent to 10 business days, in line with the period to effect an unsubscribe request under the Spam Control Provisions?

- 3.1. We have no views on the PDPC's proposal to reduce the period for effecting a withdrawal of consent under the DNC Provisions.

Question 4. What are your views on prohibiting the use of dictionary attack and address harvesting software for sending of commercial messages to all telephone numbers, IM identifiers and email addresses?

- 4.1. We note that section 9 of the Spam Control Act is brief, and prohibits only the use of electronic addresses generated or obtained through the use of a dictionary attack, or an address harvesting software.

- 4.2. The Hong Kong UEMO is more comprehensive and nuanced than the current provisions in the SCA. The Hong Kong UEMO also prohibits the use of harvesting software and dictionary attacks, including for IM applications, email addresses, IP addresses, and phone numbers. It does so by regulating the supply, acquisition and use of harvesting software and harvested lists.¹ It also provides for tiered penal sanctions, and the defences of ignorance and due diligence.² Section 9 of the SCA does not have a similarly-nuanced approach towards dictionary attack and address harvesting software.
- 4.3. It is also unclear why the PDPC intends to prohibit the use of harvested telephone numbers, even if the sender has already checked the DNCR. If the potential recipient has not registered his telephone number with the DNCR, there is in principle nothing objectionable about the sender sending the message, provided that the telephone number was obtained lawfully³ apart from the proposed provisions here.

Question 5. Should B2B marketing messages be subject to the requirements under the DNC Provisions, in alignment with the coverage under the Spam Control Provisions?

- 5.1. The PDPC has proposed to extend the DNC Provisions to B2B marketing messages. The PDPC takes the view that doing so would align the coverage of the DNC Provisions with the Spam Control Provisions, and would eliminate uncertainty and risks for persons sending marketing messages to a DNC-registered Singapore telephone number that may be an individual's personal mobile number.
- 5.2. In our view, the DNC Provisions should not include B2B marketing messages within its scope – i.e. B2B marketing messages should be permitted.
- 5.3. This would accord with commercial realities. For business purposes, a company may either issue a new handset to the employee for business purposes or offer a mobile subsidy to the employee if he uses his personal number for business purposes. Not infrequently, an employee is given a choice between the two.
- 5.4. Where the employee has elected for the latter in such cases, it is a deliberate choice and the employee should expect to receive B2B marketing messages on his personal number. The same rationale applies where the employee chooses to use his company-issued handset for personal purposes.
- 5.5. Further, we observe that B2B marketing messages are generally permitted in Australia and Canada.
- (a) An Australian number is eligible for registration under the Australian DNCRA only if it is used or maintained primarily for private or domestic purposes⁴ (unless it is a number maintained exclusively for faxes⁵).

¹ Hong Kong UEMO, sections 15 to 17.

² Hong Kong UEMO, sections 15 to 18.

³ E.g. The manner in which the telephone numbers were obtained does not violate the PDPA, or the Computer Misuse and Cybersecurity Act.

⁴ Australian DNCRA, s 14(a).

⁵ Australian DNCRA, s 14(b).

- (b) In Canada, the National DNCL Rules under the Canadian UTR do not apply to a “business consumer.”⁶ A person is not liable for violating the UTR if he shows that the recipient whose number was on the do-not-call list, was a business.⁷
- 5.6. Nonetheless, we recognise that B2B marketing messages presently fall within the scope of the Spam Control Provisions,⁸ and that other jurisdictions such as the United Kingdom and Hong Kong do not permit B2B marketing.
- 5.7. If such an extension were considered necessary, its coverage should only extend to mobile numbers, as opposed to landlines. This is because the distinction between personal-use and business-use landlines would generally be clearer, whereas it would be more common to use a single mobile number for personal and business purposes.

Question 6. What are your views on the proposal for the DNC Provisions to be enforced under an administrative regime?

- 6.1. We agree with the PDPC's proposal to permit a private right of action for breaches of the DNC Provisions, similar to what is provided for in the SCA. We also agree with the PDPC's proposal to enforce the DNC Provisions under an administrative regime, rather than as criminal offences as is the current practice under the PDPA. Both proposals are in line with the practice of other jurisdictions, which enforce similar DNC provisions under a combination of an administrative regime and civil actions for the recovery of compensation.
- 6.2. Separately, at present, the SCA is limited to a right of civil action,⁹ without a similar administrative regime. It is unclear whether the PDPC intends for the Spam Control Provisions and the DNC Provisions to be enforced in different manners, and this should be clarified.

Question 7. What are your views on the proposed obligation to communicate accurate DNCR results, and liability on third-party checkers for any infringements of the DNC Provisions resulting from inaccurate information they provided?

- 7.1. Senders should remain primarily responsible for the accuracy and use of the results, even if senders use a third-party checker's services. If the third-party checker provides inaccurate results, this ought to be a matter of contract as between the sender and the third-party checker, assuming that it is not against public policy to obtain an indemnity from the third-party checker for any penalties which the PDPC may impose on the sender.
- 7.2. If, however, it is against public policy for the sender to obtain an indemnity from the third-party checker for any penalties which the PDPC may impose, we would agree with the PDPC's proposal.
- 7.3. Further, the nature of the obligations, and the circumstances under which the third-party checkers will be liable, are unclear. For example:

⁶ Canadian UTR, Part II, section 2 (“The National DNCL Rules do not apply to a telemarketing telecommunication made to a business consumer.”).

⁷ Canadian UTR, Part VII, section 1(b)(iii).

⁸ SCA, section 7(2)(d)(ii) (the electronic message is deemed to have a Singapore link if the recipient is “an entity that carries on business or activities in Singapore when the message is accessed”).

⁹ SCA, sections 13 to 15.

- (a) whether liability will be imposed on the third-party checkers for the organisation's misuse of the DNCR results provided by the third-party checkers, e.g. because the organisation continues to re-use the results after the 30-day period; and
- (b) whether it is a defence to have provided DNCR results, under a good faith belief that the information provided was accurate.

Question 8. What are your views on the proposed prohibition of resale of results of telephone numbers checked with the DNCR?

- 8.1. We disagree with the PDPC's proposed prohibition on the resale of results.
- 8.2. Permitting the resale of results would lower compliance costs. Third party checkers can aggregate and re-use their search results across multiple organisations, which would lower the overall costs of retrieving such results for individual organisations.
- 8.3. The PDPC has identified the integrity and accuracy of results of checks as its central concern. However, in our view, this concern can be adequately mitigated in two ways.
 - (a) First, each data set obtained by the third party checker should have a validity date, beyond which the third party checker will not be permitted to provide these results.

We note that the DNCR results are valid for up to 30 days. Therefore, so long as the validity date has not passed, the third-party checker should be permitted to aggregate and provide these results to organisations, on the basis that the organisations should not use these results past the validity date.
 - (b) To the extent that the PDPC will impose obligations on third party checks to communicate accurate DNCR results, and to impose penalties on these third party checkers, this will ensure that the third party checkers are incentivised to ensure the accuracy and currency of their checks.
- 8.4. In our view, permitting the resale of DNCR results, in a time-limited manner, strikes a balance between the need to lower compliance costs, and the need to ensure the accuracy of the DNCR results.

Question 9. What are your views on the proposed deeming provision?

- 9.1. We are not aware of other jurisdictions where a similar position has been taken – jurisdictions such as the United Kingdom, Hong Kong and Australia do not provide for a similar presumption.
- 9.2. In fact, the Hong Kong UEMO specifically provides for the reverse – where a telecommunications device was controlled by a person without the knowledge of the owners or authorized users, the owners or authorized users shall be presumed not to have sent the message or authorized the sending.¹⁰
- 9.3. Further, we would also highlight that there is no such presumption in local copyright infringement cases.

¹⁰ Hong Kong UEMO, section 4(5).

- (a) In the unreported decision concerning the downloading of the movies "Fathers & Daughters" and "Queen Of The Desert", the movie studio, commenced an action against Singtel, StarHub and M1 to obtain the names, IC numbers and addresses of alleged illegal downloaders. The movie studio attempted to link the individual subscribers to the IP addresses which had downloaded the movies.
- (b) The Singapore High Court dismissed the action. The Attorney-General's Chambers and the Intellectual Property Office of Singapore reportedly highlighted to the court that there was insufficient evidence to show a link between the IP addresses and the alleged illegal downloaders.¹¹

9.4. In a similar vein, we do not think it is appropriate to create a deeming provision to the effect that the subscriber of the Singapore telephone number is presumed to have sent the specified message. This would in effect reverse the burden of proof.

Question 10. What are your views on the proposed Enhanced Practical Guidance framework?

- 10.1. The PDPC has proposed that it will be empowered to determine, based on information provided by the organisation, whether a specific business activity or course of action, in the given circumstances, complies with the Data Protection Provisions under the PDPA.
- 10.2. We support the PDPC's proposal to introduce an EPG framework. However, we query certain criteria and exclusions in the proposed EPG framework.
- 10.3. In relation to the applicability of the EPG determination, the PDPC has indicated that there will be a narrow criteria for requests for determination under the EPG framework, i.e.:¹²
 - (a) the query relates to a complex or novel compliance issue for which there is currently no clear position for its treatment under the PDPA;
 - (b) the query cannot be addressed by PDPC's general guidance and existing published resources; and
 - (c) the query does not amount to a request for legal advice.
- 10.4. It is not clear to us why the PDPC has included the last requirement that the query does not amount to a request for legal advice. To the extent that the query relates to a "complex or novel compliance issue" where there is no clear position for its treatment, the utility of any legal advice would necessarily be limited.
- 10.5. Further, it is also unclear why the PDPC has excluded EPG applications relating to compliance with the protection obligation under the PDPA.¹³ Although professional data protection and IT security service providers are able to assess and implement security arrangements, whether such security arrangements are sufficient to comply with the

¹¹ See Irene Tham, "High Court throws out Hollywood movie piracy case" (Straits Times, 20 April 2017) <<https://www.straitstimes.com/singapore/high-court-throws-out-hollywood-movie-piracy-case>> (last accessed 4 June 2018).

¹² Consultation Paper, paragraph 6.2.

¹³ Consultation Paper, fn. 27.

protection obligations may be called into question, particularly where the issues are complex or novel.

- 10.6. We seek clarification on how the EPG framework operates, and what the legal value of an EPG determination is, vis-à-vis the organisation itself and for other organisations.
- (a) In relation to the organisation seeking the determination, the PDPC has indicated that the determination should generally remain valid, including when the organisation is subsequently being investigated for a matter related to the subject matter of the EPG determination.¹⁴ It is unclear what it means for the EPG determination to be valid – whether compliance with the EPG determination is sufficient to exempt the organisation from liability in relation to the subject matter of the EPG determination, or whether the EPG determination only has probative value in any enforcement proceedings.
 - (b) In relation to other organisations, the PDPC has indicated that it intends to publish a redacted version of its determination.¹⁵ It is unclear whether other organisations, in a similar position and with similar concerns to that of the organisation seeking the determination, can rely on the PDPC's EPG determination, and how the EPG determination can be relied on. For example, whether compliance with the EPG determination *per se* is sufficient to exempt the organisation from liability, or whether the EPG determination has probative value in any enforcement proceedings.
- 10.7. We also note that the Victorian PDPA provides for a "public interest determination", which bears similarity to the proposed EPG framework.¹⁶ Under the Victorian PDPA's public interest determination provisions, other parties are permitted to make representations where their interests would be affected by the determination.

¹⁴ Consultation Paper, paragraph 7.1.

¹⁵ Consultation Paper, paragraph 6.7.

¹⁶ Victorian PDPA, Part 3, Division 5.