



**Te Tari Taiwhenua
Internal Affairs**

Memorandum of Understanding
between
Australian Communications and Media Authority
and
New Zealand Department of Internal Affairs

1. BACKGROUND

1. The Australian Communications and Media Authority (the ACMA) is a statutory agency established under section 6 of the *Australian Communications and Media Authority Act 2005* (Cth). The ACMA regulates broadcasting services, radiocommunications, telecommunications, unsolicited communications and certain internet content in Australia.
2. The ACMA is responsible for the regulation and enforcement of, among other things, the sending of commercial electronic messages under the *Spam Act 2003* (Cth) and telemarketing within the meaning of, and in accordance with, the *Do Not Call Register Act 2006* (Cth).
3. The ACMA is authorised to disclose information gathered while exercising its powers to an institution of the government of a foreign state in specified circumstances and under certain conditions under the *Australian Communications and Media Authority Act 2005*.
4. The New Zealand Department of Internal Affairs (the Department), through the Digital Messaging Systems team of the Digital Safety unit, is responsible for the enforcement of the *Unsolicited Electronic Messages Act 2007*, in accordance with section 20 of that Act.

2. DEFINITIONS

5. In this Memorandum, the ACMA and the Department agree to the definition of the terms used in the operative clauses as follows, unless the context otherwise requires:
 - a. **adverse information** means any information which is not publicly available, and which relates to a person (other than an Agency as defined in this Memorandum) and which has the potential, if publicly disclosed, to adversely affect the reputation, standing, interests or rights (legal, beneficial, legitimate or other) of that person;
 - b. **Agency** means either the ACMA or the Department as the context allows, and Agencies means both the ACMA and the Department;
 - c. **confidential information** means information provided in circumstances where an Agency is subject to a duty of confidence, whether arising by the application of statute, common law or equity;
 - d. **Memorandum** means this Memorandum of Understanding;
 - e. **Minister** means the Minister responsible for administering the enactment by which the Agency is established;
 - f. **person** includes an individual, a natural person, a body corporate, an unincorporated association, a partnership, a statutory authority or instrumentality of a government;
 - g. **requested agency** means the Agency to which a request has been made under this Memorandum; and
 - h. **requesting agency** means the Agency making a request under this Memorandum.
 - i. **Spam Intelligence Database (SID)** means the bespoke ACMA database used to collect, collate and store reports of potentially unsolicited commercial electronic messages in the form of email and SMS.

3. PURPOSE AND SCOPE

6. The Agencies recognise that mutual co-operation is desirable to assist in the discharge of their respective functions in Australia and New Zealand.
7. The purpose of this Memorandum is to promote and facilitate co-operation and assistance, as well as the exchange of information, including confidential information, relevant to the regulatory functions of each Agency, while recognising the legal, policy and administrative limits on the powers of each Agency to exchange such information.
8. This Memorandum aims to establish channels of communication between the Agencies and to exchange information for the purpose of enforcing and securing compliance with the laws the Agencies administer.

Part I: Framework for consultations regarding matters of mutual interest

4. STATEMENT OF INTENT

9. This Memorandum is a voluntary statement of intent for each Agency to co-operate and provide mutual assistance, and accordingly, it does not establish legally enforceable rights or impose legally binding obligations on either Agency.
10. This Memorandum does not prohibit either Agency from taking other measures which conform to domestic or international law, to achieve the Purpose outlined in section 3 of this Memorandum.
11. This Memorandum does not affect the right or ability of either Agency to obtain information from any persons to ensure compliance with, or to enforce the laws or regulations of the country of either Agency. In particular, this Memorandum does not affect any right of either Agency to communicate with, or obtain information or documents from, any person, on a voluntary basis or otherwise, in the country of the other Agency.
12. This Memorandum does not affect the ability of the Agencies to exchange non-confidential information.

Part II: Provision of information, documents and assistance

5. EXCHANGE OF INFORMATION

13. The Agencies will use their best efforts to comply with the terms of this Memorandum.
14. The Agencies agree that, subject to their respective laws and regulations, information available to one Agency will be shared as requested, provided that compliance with the request will not adversely affect the operations of the requested Agency.
15. When exchanging confidential information, the Agencies acknowledge the confidentiality and secrecy requirements of the laws and regulations under which each Agency operates. The requesting Agency will comply with any such conditions placed on the exchange of information and will not release or disclose this information to a third party, other than its legal advisers, without the express consent of the requested Agency or as specified in the request or in accordance with section 11 of this Memorandum.
16. The requested Agency may deny a request under this Memorandum on the grounds that:
 - a. the request is not made in accordance with the provisions of this Memorandum;
 - b. giving effect to the request would:
 - i. be contrary to the national or public interest or the law of the country of the requested Agency;
 - ii. go beyond the statutory powers of the requested Agency;
 - iii. relate to the administration of a law, regulation or requirement that does not exist, and has no parallel, within the jurisdiction of the requested Agency;
 - iv. put the requested Agency in breach, or at risk of being in breach, of a legal or equitable duty owed to any person, particularly relating to confidentiality, privacy and procedural fairness;
 - v. expose the requested Agency to the threat of legal proceedings, however unjustified those proceedings may be;
 - vi. be contrary to, or incompatible with, the requested Agency's aims or its policies or internal guidelines, whether such aims, policies or internal guidelines are set out in writing; or
 - vii. in the requested Agency's opinion, place too great a strain on its resources or substantially or unreasonably divert its resources.
17. Where the requested Agency denies or opposes a request for assistance, it will provide reasons for the denial or opposition within 28 days of receiving the request. The Agencies may consult on other possible means of dealing with the request.

6. UNSOLICITED INFORMATION

18. The Agencies may, without any prior request for assistance, provide to each other information they hold which they consider useful to the other Agency in the performance of its functions or

for purposes that may be specified in the provision of the information, including (but not limited to) intelligence about:

- a. scam email and/or SMS
- b. phishing activity
- c. modifications and enhancements to the Spam Intelligence Database (SID) Software
- d. other matters as may arise in relation to the exercise of each Agency's powers and functions.

19. In such cases, the terms and conditions of this Memorandum will apply if the providing Agency specifies that the information is given under this Memorandum.

20. Where either Agency is considering or undertaking an investigation in relation to a matter within the jurisdiction of the other Agency, the Agencies agree to notify each other:

- a. upon commencement of an investigation; and
- b. prior to finalising an investigation and taking relevant enforcement action.

7. REQUESTS FOR INFORMATION AND/OR ASSISTANCE ON COMPLIANCE AND ENFORCEMENT MATTERS

21. Requests for assistance in relation to compliance and enforcement matters must be made in writing and addressed to the appropriate contact specified in the principal points of contact set out in Annex A.

22. The request for assistance must specify the following:

- a. a description of the assistance, documents or information sought by the requesting Agency;
- b. the purpose(s) for which the assistance, information or documents are sought;
- c. a brief description of the facts giving rise to the request, including details of the rule or law to which the subject matter of the request relates;
- d. whether the information is sought as part of an investigation into suspected breaches of the law or for compliance purposes;
- e. the link between the specified rule or law and the regulatory functions of the requesting Agency;
- f. a suggested time-period for reply and if appropriate, the urgency of the request;
- g. to whom, if anyone, onward disclosure of information is likely to be necessary and the reason for such disclosure; and
- h. any requirements for confidentiality in respect of the request.

23. If the matter is urgent, such requests may be submitted in summary form or in another manner, agreed between the Agencies, provided that any such request is confirmed in writing in the manner set out in paragraphs 20 and 21 within 14 days.

8. PROCEDURE FOR THE PROVISION OF ASSISTANCE, INFORMATION OR DOCUMENTS

24. The requested Agency will consider each request on a case-by-case basis to determine whether the request can be complied with under the terms of this Memorandum.
25. The requested Agency will use its best efforts to advise the requesting Agency, within 28 days of receipt of the request, as to its decision on the request and a timeframe for responding to the request, provided that:
 - a. where the requested Agency requires the consent of a person, or is required to advise a person of the request before complying with such a request, the requested Agency will advise the requesting Agency of this fact before contacting that person; or
 - b. where the request cannot be complied with in whole or in part, the requested Agency may at its discretion consider whether other assistance can be given, or whether another person or body within its jurisdiction can assist the requesting Agency.
26. The requested Agency may provide information or documents to the requesting Agency subject to the following conditions:
 - a. with written restrictions or limitations as to the use, access or storage of the requested information or documents;
 - b. any confidentiality requirements relating to the information or documents provided, which may include releasing the information subject to an undertaking of confidentiality;
 - c. if the requested Agency is likely to incur significant costs and expenses in obtaining the information, it may provide the requesting Agency with an estimate of costs and expenses and seek agreement as to a contribution to the costs and expenses before providing that information; and
 - d. such other conditions the requested Agency considers appropriate.

9. PERMISSIBLE USE OF THE INFORMATION

27. The requesting Agency shall use the documents or information provided pursuant to this Memorandum solely for the purposes stated in the request.
28. Where the request was made under section 7, the information or documents furnished shall be used solely for purpose(s) stated in the request with a view to ensuring compliance with, or enforcement of, the laws and regulations specified in the request, and for any criminal, civil or administrative proceeding dealing with the purported contravention of the provisions specified in the request.
29. If the requesting Agency wishes to use the information provided for any purpose other than those stated in the request:
 - a. the requesting Agency must ask the requested Agency for its consent to use the information or documents for another purpose; and
 - b. the requested Agency must, within 28 days of receipt of such request, indicate in writing, or verbally followed by written confirmation, whether it consents to such use.

30. The requested Agency may agree to the use of such information, subject to any conditions as specified in writing.

10. CONFIDENTIALITY OF REQUESTS

31. Both agencies will ensure that requests for the exchange and/or provision of information accord with the exercise of their respective powers and functions and include compliance with:

- a. the authorised disclosure provisions under their respective enabling legislation
- b. other applicable laws, including the Australian *Privacy Act 1988* and New Zealand *Privacy Act 2020*.

32. The requesting Agency shall take every precaution to keep confidential all requests for information made under this Memorandum, the content of such requests, and any other matters arising from consultation about the requests.

33. In all cases, the requesting Agency shall endeavour to keep confidential any information or documents received pursuant to this Memorandum if requested to do so by the requested Agency, unless a law, including a court order, of the country of the requesting Agency requires disclosure of the documents.

34. Nothing in this section will prevent the flow of information to relevant Government Ministers and their agents under any reporting requirements that affect the relevant Agency, provided that the Ministers and their agents agree to keep the information confidential.

35. If information provided under this Memorandum becomes the subject of a subpoena, freedom of information request, or other legal demand for access, the requesting agency will immediately notify the requested agency to enable the providing agency to advise on any intended action relating to the release, disclosure, publication or production of such information.

36. If information provided under this Memorandum becomes the subject of any inadvertent or unauthorised disclosure, the requesting agency will notify the requested agency of the details as soon as it is practicable, in addition to any legal obligations the requesting agency may have in relation to the matter.

Part III: Miscellaneous provisions

11. CONTACT POINTS AND FACILITATION OF CONTACT WITH OTHER BODIES

37. All communications between the Agencies should be between:
- a. the principal points of contact as nominated in writing by each Agency, which may be amended by written notice from either Agency from time-to-time; or
 - b. an officer of an Agency authorised to perform the usual duties of a principal point of contact during an absence from duty; or
 - c. any officer of an Agency nominated by a principal point of contact to communicate on their behalf for the purposes of this Memorandum.
38. Each Agency may, at its discretion, refer the other Agency to another body in its jurisdiction where that body is likely to have information or be able to assist the other Agency in respect of a request for information or documents. Each agency reserves the right to decide whether to provide the requested assistance.

12. EFFECTIVE DATE, TERM, REVIEW, AND TERMINATION OF MEMORANDUM

39. This Memorandum will be effective from the date of its signature by the latter of the two Agencies and will be ongoing, unless terminated in accordance with paragraph 42.
40. The Agencies will review the operation of this Memorandum every 5 years and will consult with a view to improving its operation or making amendments to give effect to its intent.
41. Any term of this Memorandum may be amended or waived by the Agencies' mutual consent in writing and signed by an appropriate officer of both Agencies.
42. Either Agency may terminate this Memorandum by giving 28 days' written notice to the other Agency. Where an Agency gives such notice, this Memorandum will continue to have effect with respect to all requests for assistance made before the termination date.
43. On discontinuation of this Memorandum, the Agencies are expected to maintain the confidentiality of any information communicated to them by the other Agency under this Memorandum, and return or destroy, consistent with any methods prescribed by the Agency, information obtained from the other Agency consistent with this Memorandum.

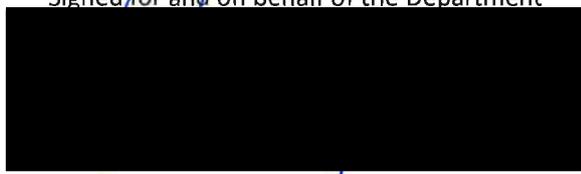
Signed for and on behalf of ACMA



Nerida O'Loughlin
Agency Head and Chair

22/4/2022

Signed for and on behalf of the Department



Paul James
Chief Executive

11/4/2022

