

The logo features a series of three overlapping, dashed, curved lines in a light grey color, resembling a stylized wave or a series of arches, positioned to the left of the company name.

Wigley & Company

BARRISTERS *and* SOLICITORS

## **Can ISPs Read Customer's Emails?**

**PAPER PRESENTED FOR  
NEW ZEALAND COMPUTER SOCIETY  
"THE LAW OF IT" SEMINARS**



**Wellington  
April 2003**

An ISP that read its customer's emails ended up in court and the case shows the risks that are faced.

The ISP, SecureNet, provided internet services to Woolworths. This included electronic scanning for viruses, spam, fraud, unauthorised access to the Woolworths system and unauthorised usage by Woolworths staff. Woolworths pulled out of their 6 year agreement which started in 2000. SecureNet went to court to ask for an interim injunction. The injunction, in effect, would force Woolworths to continue using the SecureNet services until the full Court trial is held (often this would a year or 2 away).

To get such an injunction pending a full trial was always going to be a difficult ask. The courts are very reluctant to force parties to continue to contract with each other. There is the difficulty of working out what the terms are and how to enforce them. And very often an adequate remedy is available at trial (namely, damages for breach of contract). That is what happened here. SecureNet did not get their injunction.

But SecureNet made their case a darn sight harder for themselves. When they thought Woolworths would pull out, they started checking the emails of relevant Woolworths managers to see what they were saying. They claimed they could do this, as an extension of the rights they claimed they had under the contract. They said they could manually open and check emails which were flagged in the electronic screening process noted above. So they could look at other emails too.

The court was quick to jump on that, by saying that any right to look at the mail extended only to fulfilment of that contract (and maybe to protect SecureNet's own systems).

It's important to emphasise that the Court's decision is based on incomplete evidence (before trial) and things could change.

Two experts who gave evidence for SecureNet said that SecureNet's:

*“conduct in intercepting and copying Woolworths communications in the circumstances of this case accorded with general and acceptable practice for internet service providers. The expert for Woolworths, ..... disagreed”.*

If this is what ISPs do (whether or not they are providing electronic screening services), it is clearly legally unacceptable and wrong. That is so unless the customer has very clearly (and in an “in your face” manner) agreed to the ISP reading the customer's email outside very narrow confines. Just having this in an Acceptable Use Policy sitting on a website (or even lurking in an agreement which is on-line) simply wouldn't be enough.

For Woolworths, the general law of confidentiality is enough to confirm this is so. And if individuals are involved, the Privacy Act kicks in as well and makes it clear

that someone in the place of SecureNet cannot look at email in this way. As the judge pointed out:

*“customers would scarcely allow their telecommunications providers to secretly tap their phones for debt collection purposes or their courier companies to secretly read their letters to secure a commercial advantage. I very much doubt whether corporate customers would want to expose themselves to internet service providers if they knew that that was the way in which the providers intended to conduct themselves.”*

Of course ISPs can (and should) do some things which reduce the risk of denial of service attacks, security breaches, and so on. Almost always this won't require the reading of emails. Checking addresses and other “external” information will usually be enough. If what the 2 SecureNet-appointed experts say reflects general industry practice, the industry better fix things up quickly. Quite apart from the legal issues involved, the confidence of the public in their services will greatly erode if there is a belief that ISPs are reading mail in this way.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on “both sides of the fence”, and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector.

While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

*We welcome your feedback on this article and any enquiries you might have in respect of its contents. Please note that this article is only intended to provide a summary of the material covered and does not constitute legal advice. You should seek specialist legal advice before taking any action in relation to the matters contained in this article.*