

# Are You Spamming Your Clients?!

The Unsolicited Electronic Messages Act affects those of you who use electronic means, such as email or SMS texts, to market to current and potential customers. The Act came into force in September 2007. You need to have the consent of the receiver before sending any "commercial electronic messages" by electronic means.

## What are Commercial Electronic Messages?

"Commercial Electronic Messages" are those messages that are sent using a telecommunication service to an electronic address to market goods, services, land or business/investment opportunities. These include emails, SMS texts and instant messages but standard telephone service voice calls, voice over internet protocols, and facsimiles are excluded.

The Act provides a number of exceptions to what may otherwise be commercial electronic messages. These include messages that:

- provides a quote for the goods or services at the request of the recipient.
- facilitates, completes, or confirms a commercial transaction that the recipient previously agreed to enter into with sender.
- provides warranty information, product recall information, or safety or security information about goods or services used or purchased by the recipient.
- provides notification of factual information about the recipient's subscription, membership, account, loan, or similar relationship.
- provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved.
- delivers goods or services, including product updates or upgrades, that the recipient is entitled to receive as agreed with the sender.
- provides the recipient with information about goods or services offered or supplied by a government body (a government department or a crown entity) or a court.

## When is it Okay to Send Commercial Electronic Messages?

Your message will be okay if it:

- is first consented to by the recipient before the message is sent;
- has accurate sender information;
- contains a functional unsubscribe facility.

## Consent

There are three basic types of consent express, inferred and deemed. **Express** consent requires a positive indication that the recipient wishes to receive the messages. This means that a "tick the box if you don't want to receive further information" type of unsubscribe facility will not be enough.

Where there is no express consent, consent can also be **inferred** from circumstances, ie the conduct, business or the relationship you have with the recipient.

Consent is **deemed** to have been given if the electronic address of the recipient is published without a "no spam" type of statement and your message is relevant to that person's business, work or duty.

## Sender Information

The message will also need to accurately set out the details of the person who authorised the sending of the message and how that person can be contacted. The contact details provided in your message must also be valid for at least 30 days after the message is sent.

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## Unsubscribe Facility

You must have a clear unsubscribe facility built into the message you send. This facility must allow the recipient to unsubscribe by sending a message back to the sender, using the same method used by the sender to send the original message. Note also the requirement that unsubscribing should not cost the recipient. Therefore, if your message is sent in a SMS text, then the recipient should be able to unsubscribe by sending a SMS text back to the sender at no cost. Again, the 30 day period applies to all unsubscribe facilities.

## When Are You In Breach Of The Act?

A person may be found in breach of the Act for:

- sending uninvited commercial electronic messages, or being otherwise involved in the sending of such messages;
- not including accurate sender information in the messages;
- not including a functional unsubscribe facility;
- using address-harvesting software and harvested-address lists.

There are different levels of remedies and penalties, including a maximum fine of up to \$200,000.

## How Do You Comply With The Act?

Marketers will need to consider taking the following steps:

- Ensure all those on the marketing lists used for electronic messages have provided consent (express, inferred or deemed) to receiving messages. If you are not sure, ask for consent in your next message, explaining the need to do so under the Act;
- Consider current procedures for adding people to lists. Include on your initial client/customer contact form a provision giving consent to receiving marketing messages;
- If you have an electronic message template (such as those for creating html email newsletters), ensure you include authorisation, contact details and unsubscribe facility on that template;
- Establish rules or protocols as to who may send marketing messages from your organisation;
- Educate the enthusiastic amateur marketers in your organisation. Sometimes people want to send their own marketing information for their own private area and they may not be aware of all aspects of compliance. Make it clear that they need to check with someone who knows what they are doing first.
- If your email addresses are published on the business website, consider including a "no spam" statement that you do not wish to receive marketing messages.

## What Else Should You Look Out For?

Even if your message does not contain marketing content, it may still be regarded as a commercial electronic message if it provides a link or otherwise directs the recipient to promotional or marketing messages. Therefore be extremely wary about including in your messages links that may contain marketing material.

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