

COWLEY HEARNE LAWYERS



GLOBAL ADVERTISING LAWYERS ALLIANCE

Regulation of Spam in Australia - Electronic Marketing and Commercial Messaging for Foreign Businesses

Legislation was introduced last year in Australia to regulate spam, although it will not cover all spam because it concerns only messages with an Australian link. Despite this limitation, Australian businesses *and some businesses outside Australia* are required to comply with the new legislation concerning spam. The Spam Act 2003 (the *Act*) became law on 12 December 2003, although the penalty provisions did not take effect until 10 April 2004.

Businesses outside Australia firstly need to consider if there is an Australian link in relation to spam which they are responsible for sending.

What is an Australian link?

The prohibition on spam only applies if the message has an Australian link. However, this is defined in very broad terms so that only one of a number of Australian links is required – including when a message:

- *is sent from Australia;*
- *is sent to an address in Australia;*
- *is accessed in Australia;*
- *its recipient is located in Australia; or*
- *its sending is authorised in Australia (in the case of a business that includes authorisation where the business has its central management or control in Australia).*

Most importantly, it does not matter where the business sending (or authorising the sending) of a message is located if the message is accessed or received in Australia.

Australian Industry Code

The Australian Direct Marketing Association (ADMA) is developing an E-Marketing Code of Practice to provide further guidance and regulation in this area, and this Code will come into effect once approved by the Australian Communications Authority (the government body that administers the Act). This Code is currently in draft form and can be accessed on the ADMA website at www.adma.com.au.

What is Spam?

Under the Act, spam is “unsolicited commercial electronic messaging”.

What is an electronic message?

An electronic message includes:

- e-mail messages;
- Short Message Services (SMS) text messages;
- Multimedia Message Services (MMS) messages; and
- Instant Messaging.

It does not include ordinary voice to voice telephone calls, so that telemarketing is not directly affected by the Act.

What is a commercial electronic message?

An electronic message is a *commercial* electronic message if the content of the message (including the presentation of the message, and links or email links in the message) contains an invitation to do business or has any one of the 13 commercial purposes set out in the Act. Those purposes are broadly defined to cover offers to supply goods and services, as well as, amongst other things, advertising or promoting interests in land or business and investment opportunities. It does not matter whether what is being promoted is illegal, or does not exist - if the message contains an invitation to do business then it is caught by the Act.

If the message is purely factual, or does not contain an invitation to do business (such as sending a computer program, even if it includes a virus) it would not come within the definition of a commercial electronic message.

What messages are exempt?

A special class of “designated commercial electronic messages” can be sent to recipients without their consent, although the messages still need to contain specific information about the organisation or individual who authorised the sending of the message. The Act states that this class includes any message that:

- only contains factual information; or
- is authorised by a government body, registered political party, religious organisation or charity or charitable institution; or
- is from an educational institution with which the account holder has a relationship as a past or present student, or as a family member of that student.

Prohibition on Address Harvesting

The Act also prohibits the use, supply or acquisition of address harvesting software, or any list created using address harvesting software. Address harvesting software is software which is designed for searching the Internet for electronic addresses and collecting or in any way harvesting those addresses.

What steps should I take to comply with the Act?

1. Obtain Consent

Commercial messages should only be sent when you have consent. This may be express consent from the person you wish to contact, providing you with a direct indication that it is acceptable to send the message, or messages of that nature. It is also possible to infer consent based on a business or other relationship with the person, and their conduct.

When can I rely on “conspicuous publication”?

In certain cases, consent to receive a commercial electronic message can be inferred if the recipient has ‘conspicuously published’ their work-related electronic address, and the message you want to send them is directly related to their line of work.

‘Conspicuous publication’ means published in such a way that the public, or a section of the public, can send messages to a particular email address or mobile phone number – for example, it appears on a website, a telephone directory or a brochure.

You can only infer consent via conspicuous publication if the following conditions are met:

- the electronic address is not accompanied by a statement that commercial messages are not wanted
- the subject matter of the message you are sending is directly relevant to the principal role or function of the recipient (the electronic account holder)

Can I use pre-checked tick boxes to gain express consent?

Pre-checked tick boxes, such as those often used on a website as a sign-up facility to a mailing list, are not acceptable for the purpose of obtaining consent. The individual must actively and deliberately give their consent to receiving commercial electronic messages, either by checking the tick-box themselves or by providing consent in some other clear and transparent manner, for example entering their email address into the 'consent' section of a web form.

What about purchased address lists?

Where purchased lists are used, it is the responsibility of your business (as the message sender) to ascertain whether consent has been obtained.

2. Identification

Commercial messages should always contain clear and accurate identification of who is responsible for sending the message, and how they can be contacted. Details that are provided must be reasonably likely to be accurate for a period of 30 days after the message is sent.

Can I use a third party to send electronic messages?

Sometimes you might use another organisation to send commercial electronic messages on your behalf. The third party must include accurate information about you, as the individual or organisation authorising the sending of the message; you should provide your sender information and ensure its inclusion in electronic messages. You do not need to include the third party's contact details in the message.

3. Unsubscribe or Opt Out Facility

Commercial messages should contain an unsubscribe facility, allowing people to indicate that such messages should not be sent to them in future.

All commercial electronic messages must contain a functional unsubscribe facility, allowing people to opt-out from future messages. Any such opt out request must be complied with.

The Act specifies that, where an individual opts out, that person's consent has been withdrawn within five working days from the date that the unsubscribe request was sent where the request was an electronic unsubscribe message, or five working days from the date that the unsubscribe request was delivered by post or some other means.

The unsubscribe facility must also be reasonably likely to remain accurate and functional for a 30 day period.

*If you have any questions in relation to the Spam Act or associated privacy issues, please contact **Peter Kite** on direct line +61 2 9956 2128 or via email at pkite@cowleyhearne.com.au or **Peter Le Guay** on direct line +61 2 9956 2147 or via email at pleguay@cowleyhearne.com.au.*