

**March 2004**

## **Spam Act 2003 (Cth) - Implications for Direct Marketing**

**Business needs to prepare for the new *Spam Act 2003* (Cth) which comes into effect on the 10<sup>th</sup> April 2004**

The *Spam Act* will impact on any individual or organisation using email, SMS, MMS and iM to send commercial information.

Failure to comply with the *Spam Act* provisions can result in severe pecuniary penalties for both individuals and organisations.

**If you are involved in the following types of direct marketing activity the Act applies to you:**

- Offers to supply goods or services or land or an interest in land;
- Advertising or promotion of goods or services or land;
- Advertising or promotion of suppliers or prospective suppliers of goods or services or land or an interest in land;
- Advertising or promotion of business or investment opportunities.

**The Act is designed to restore Consumer confidence and clear the way for legitimate electronic commercial communication by:**

1. prohibiting the sending of SPAM (Unsolicited Commercial Electronic Messages) without consent; and
2. requiring that every Commercial Electronic Message include the name and contact address for the individual or organisation who authorised the sending of the message; and
3. requiring that every Commercial Electronic Message include a Functional Unsubscribe Facility; and
4. prohibiting the acquisition, use or supply or offer to supply of Address Harvesting Software and Address lists created by this software if they are to be used in connection with sending Unsolicited Commercial Electronic Messages.

**For further information relating to the Act and the implications on your business Read On:**

### ***Spam Act 2003* (Cth) - Implications for Direct Marketing**

The *Spam Act 2003* comes into effect on the 10<sup>th</sup> April 2004.

The *Spam Act* encompasses a scheme for regulating commercial email and other types of Commercial Electronic Messages.

The Act applies to any business or individual who sends or authorises or assists others to send Commercial Electronic Messages [\[1\]](#) with an Australian link to an email account, instant messaging, telephone or similar account.

A Business **or individual** will contravene the Act if they:

- send Unsolicited Commercial Electronic Messages ( *Section 16*); and/or
- send Commercial Electronic Messages without the name and contact address for the individual or organisation who authorised the sending of the message ( *Section 17* ) ; and/or
- send Commercial Electronic Messages without a Functional Unsubscribe Facility ( *Section 18*); and/or
- supply, offer for supply, acquire or use Address Harvesting Software, or address lists created using this software, to send unsolicited Commercial Electronic Messages ( *Sections 19-22*).

### *Commercial Electronic Messages*

The following types of messages are **Commercial Electronic Messages** under the *Spam Act*:

- A message that offers to supply or to advertise goods or services, land or investment opportunities ( *Section 6*) or
- A message that advertises suppliers of goods and services, land or investment opportunities ( *Section 6*) or
- A message that enables or assists a person by deception to dishonestly obtain property, a financial advantage or a gain from another person ( *Section 6*); and
- A message sent using an internet or other carriage service, to an electronic address in connection with (i) an email account (ii) an instant messaging account (iii) a telephone account or (iv) a similar account ( *Section 5*).

See information below on ' **How to Comply** '

### *Designated Commercial Electronic Messages - Messages Your Business Can Send Under The Spam Act*

Schedule 1 of the Act provides that certain Commercial Electronic Messages do not require an unsubscribe facility and may be sent without consent.

These are described as Designated Commercial Electronic Messages and include:

- Electronic messages that consist mostly of factual information, with only minor commercial content, such as the name and logo of a company; or
- Electronic messages sent by Government bodies, political parties, religious organisations and charities that relate to goods and services which are provided by the sender; or
- Electronic messages sent by Educational Institutions that relate to goods and services which are provided by the sender. However, the receiver of the message must be a current or former student of that Educational Institution.

### *Australian Link*

A Commercial Electronic Message must have an Australian link to fall within the operation of the *Spam Act*. An Australian link is one:

- where the message originates in Australia; or
- where the individual or organisation who sends or authorises the sending of the message is present in Australia or has their central management and control in Australia at the time the message is sent; or
- where the computer, server or device accessing the message is located in Australia; or
- where the receiver of the message is an individual present in Australia or an organisation that carries on business or activities in Australia at the time the message is accessed ( *Section 7*).

This requirement has been a source of criticism of the *Spam Act* in Australia as it fails to protect electronic message account holders from Commercial Electronic Messages that originate from outside of Australia.

How to Comply with the Spam Act

### ***1. Obtain Consent before sending Commercial Electronic Messages***

It is an offence to send unsolicited Commercial Electronic Messages under section 16 of the *Spam Act*. However, Commercial Electronic Messages may be sent if consent has been obtained from the recipient of the message.

Consent may be express or implied and can be inferred from the business and other relationships of the individual or organisation concerned ( *Schedule 2 Clause 2*). Where the relationship between the parties is such that there is a reasonable expectation that the message will be sent, it is likely that consent has been implied or inferred.

Consent of the relevant electronic account holder may not be inferred from the mere fact that the relevant electronic address has been published. However, Schedule 2 of the Act provides the exception that consent may be inferred where an electronic address is published conspicuously.

Conspicuous publication occurs where a published electronic address allows the public to send messages directly to an individual within a business, or an organisation in circumstances where the individual or organisation would have agreed to the publication of the electronic address. The publication must not include a statement to the effect that the address holder does not want to receive Unsolicited Commercial Electronic Messages at that electronic address. In addition, the Commercial Electronic Message must relate to the office, position, function or role of the addressee ( *Schedule 2 Clause 4* ).

Consent may be withdrawn at any time by sending a message to the individual or organisation that authorised the sending of the Commercial Electronic Message, stating the account holder does not want to receive any further messages. This retraction of consent takes effect at the end of five business days. ( *Schedule 2 Clause 6*).

The National Office for the Information Economy in its publication "*Better Draft Guidelines on Spam*" recommend businesses obtain explicit consent before sending Commercial Electronic Messages, to protect against liability.

### ***2. Every Commercial Electronic Message must contain the Name and Address of the organisation or individual who authorises the message to be sent***

Each time a Commercial Electronic Message is sent out to clients, the name, ABN where applicable and address of the organisation or individual who authorised the message must be included. If a third party has sent the message, the name and address of the authorising party is required. This information must be accurate for at least 30 days after the message is sent ( *Section 17*).

### ***3. Provide a Functional Unsubscribe Facility with every Commercial Electronic Message***

Each separate message must contain a Functional Unsubscribe Facility which will operate for at least 30 days from the day the message is sent.

There must be a clear and conspicuous statement that the receiver can send an unsubscribe message to an address which will take effect within 5 working days ( *Section 18*).

Examples that would satisfy this requirement are:

- in the case of an e-mail message - 'If you no longer want to receive notification simply reply to this e-mail' or 'If you no longer want to receive these messages please hit the unsubscribe button below' [\[2\]](#) ;
- in the case of an SMS message - 'please ring this number if you no longer want to receive these messages' or 'please register at this website if you no longer wish to receive these messages' [\[3\]](#) .

#### *Functional Unsubscribe Facility Exception*

A Functional Unsubscribe Facility does not need to be included in a Commercial Electronic Message where it is inconsistent with the terms of a contract between an organisation that authorises the sending of the message and the account holder who receives it ( *Section 18(3)*). An example is where a telecommunication provider sends regular updates to their clients as part of their agreement. [\[4\]](#)

### ***4. Do not acquire, use, supply or offer to supply Address Harvesting Software or address lists made using this software for the purpose of sending Unsolicited Commercial Electronic Messages***

Section 4 of the Spam Act defines Address Harvesting Software as software specifically designed or marketed for use to search the Internet for electronic addresses and collecting or harvesting those electronic addresses.

Address Harvesting Software, and address lists compiled using this software, cannot be used, acquired, supplied or offered for supply, for the purpose of sending Unsolicited Commercial Electronic Messages ( *Sections 19-22*).

#### *Exceptions to the Use of Address Harvesting Software*

Address Harvesting Software or address lists created by this software can be supplied, offered for supply, acquired or used to send Designated Commercial Electronic Messages (see below) or Commercial Electronic Messages where consent has been obtained from the account-holder of the electronic address ( *Section 16*).

Where a supplier of Address Harvesting Software, or address lists created by this software had no reason to suspect that the customer, or another person, intended to use the address harvesting software or the address list to send Unsolicited Commercial Electronic Messages, it is not a contravention of the Act supply Address Harvesting Software ( *Section 20(2)*).

#### *Defences & Penalties Defences*

There are a number of defences to sending unsolicited Commercial Electronic Messages, which include consent, mistake and situations where a party did not know that the addressee was linked to Australia and could not have ascertained this with reasonable diligence.

## *Penalties*

The *Spam Act* contains severe penalties for all contraventions of the Act. A single Commercial Electronic Message sent to one electronic address is sufficient to attract pecuniary penalties.

Multiple breaches of the Act may be committed within a single Commercial Electronic Message. For example, the sending of a message without consent and without the contact name and address of the sender, comprise two breaches of the Act and would result in the imposition of two pecuniary penalties.

There is a limit to the total penalties payable in one day for contraventions of the Act. The total amount of penalties payable for breaches of the Act is limited to \$220,000 per day. (*Section 25(3)*)

However, an individual or organisation with a prior record of breach can be charged up to five times more than the prescribed penalties ( *Section 25(5)* ). The Act imposes a limit of up to \$1.1 million per day in fines for organisations and \$220,000 for individuals where there is a prior record of breach.

The Court can also make orders to compensate victims ( *Section 28*) and can compel a person who has contravened the Act to pay the Commonwealth an amount up to the amount of financial benefit gained by that person from the message (*Section 29*).

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[\[1\]](#) Messages sent by voice call using a standard telephone service are not Commercial Electronic Messages ( *Section 5(5)*).

[\[2\]](#) Spam Bill 2003 Explanatory Memorandum

[\[3\]](#) Spam Bill 2003 Explanatory Memorandum

[\[4\]](#) Spam Bill 2003 Explanatory Memorandum