

# FAQs: Anti-Spam Legislation and Direct Marketing

May 2006

Here we endeavour to answer some Frequently Asked Questions regarding the timing, scope, and application of the proposed anti-spam legislation.

## When does it take effect?

Late 2006 is the earliest the Act is expected to come into force, with a 4-month grace period.<sup>1</sup> So the best guess is a go-live date in the first half in 2007. There will probably be some tweaking of the Unsolicited Electronic Messages Bill, but major changes are unlikely.

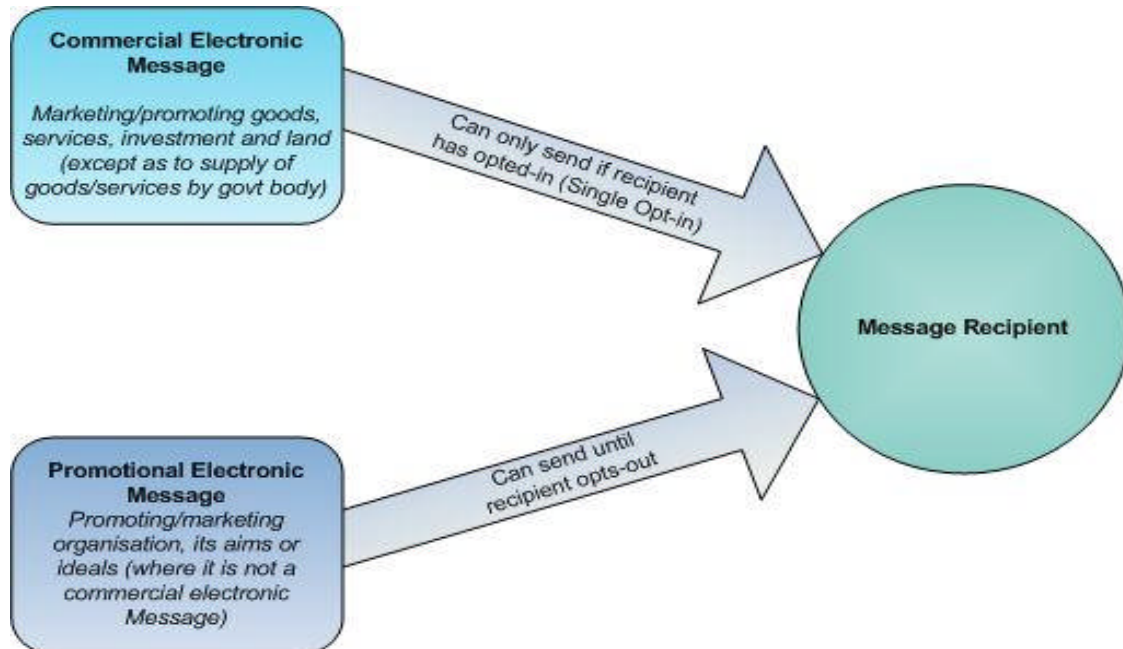
## What electronic messages are covered?

Emails, mobile text messages etc are covered.<sup>2</sup>

Faxes and phone calls (including automated phone call messages) are excluded.<sup>3</sup>

## What's the difference between "commercial" and "promotional" electronic messages?

Generally, unsolicited "commercial" electronic messages can't be sent (opt-in applies). Unsolicited "promotional" messages can be sent (opt-out applies). The difference between the two is outlined in the following diagram. "Commercial" messages market goods, services, investments and land. "Promotional" messages promote an organisation, its aims and ideals.



<sup>1</sup> Like many matters in this note, this assumes that the Act stays in largely the same form as the Bill.

<sup>2</sup> It's possible this list will change in the final legislation.

<sup>3</sup> At this stage there is a definitional question as to whether cellphone calls are in or out: that may be clarified in the final legislation.

**Are there requirements that apply to both “commercial” and “promotional” electronic messages?**

Yes. The message must clearly identify the person who authorised its sending, contain information on how to contact that person, and have a functional unsubscribe facility. This is easily done for emails but is a real squeeze, if not practically impossible, for text messages.<sup>4</sup>

**What is required to meet the “opt-in” requirement for “commercial” electronic messages?**

Consent can be expressly stated (eg, by a website “click accept” or the recipient sending an email asking for the information to be sent). Or it can be inferred from the relationship between the parties.

As to the latter (and anyway in relation to all of electronic direct marketing), the Privacy Act applies. The Marketing Association has a useful summary:

*“Principle 3 of the Privacy Act 1993 deals with the collection of information directly from the individual concerned, and says that reasonable steps must be taken to make known:*

- *that the information is being collected*
- *the purpose for which it is being collected*
- *who is going to receive, store and use the information, and*
- *the rights of access and correction to that information by the individual concerned*

*“This doesn’t concern me”, you may be thinking. “We haven’t collected any new names recently.” Maybe not ... but have you gained any new customers? If so, you cannot assume simply because you sold a Widget Mkl to Mr A Buyer that you can save the information collected on that order form, unless you have complied with the steps above.*

<sup>4</sup> Vodafone and Telecom require those commercial text messages to have 0800 callback numbers anyway.

*The same applies to competitions and promotions where you collect names and addresses etc.”<sup>5</sup>*

There is a special case: consent is deemed to be given when someone provides an electronic address in a “business or official” capacity (that would be on a website, a business card, etc), so long as the message is relevant to the business or official capacity.

**What about viral marketing?**

Unless the Bill is changed, viral marketing may not be acceptable unless a work-around can be effected under the final form of the legislation. A scheme such as an “introduce a friend” promotion could be an unsolicited commercial electronic message. This couldn’t be sent to the target, either by the referrer or the supplier, in view of the “opt-in” requirement. As the legislation stands, a possible solution would be for the supplier to telephone the target before an email is sent (this is clunky but such solutions may be the only thing that is available). There may be other solutions depending on the final form of the legislation.

**How does this fit with Marketing Association policy?**

The Association’s Codes of Practice<sup>6</sup> meet the requirements of the Bill in some respects but in others (for example, the approach to viral email marketing) the Codes wouldn’t comply. In some respects the Association sets higher compliance levels. For example, the Association’s standards require opt-in for all email messages (including promotional messages for which the Act will require only opt-out). Note that, just like the proposed Act, the Association requires only single opt-in as a minimum. The email Code gives double opt-in as an alternative, more stringent option.

Some marketers of course may decide to exceed the requirements of the Act (for example, to have opt-in for promotional electronic messages).

<sup>5</sup> <http://www.marketing.org.nz/cms/Resources/105>.

<sup>6</sup> See in particular the Standards for Email Marketing at <http://www.marketing.org.nz/cms/lib/333.pdf>.

## How does the legislation apply to direct marketing by or on behalf of Government bodies?

There's special provision for "Government bodies" which includes Ministries, Departments and Crown Entities but does not include local authorities and related organisations. Where the Government body "provides the recipient with information about goods or services offered or supplied by a Government body", it is not a "commercial electronic message" and so the opt-in requirement does not have to be met. Often for local government and Government body entities, it may be arguable that the particular message falls outside the legislation. For example, an email campaign encouraging safe driving is outside the Act.

However, given that Government Departments are likely to want to follow best practice, including clearly identifying the party sending the email, contact address details and an unsubscribe facility, this may not be an issue of practical concern.

## What about address harvesting?

Harvested-address lists cannot be acquired or used in connection with sending unsolicited **commercial** electronic messages. The position is not so strong in relation to **promotional** electronic messages; done carefully (and subject to Privacy Act compliance) acquiring and using harvested-address lists for promotional messages is acceptable.

## Can lists created before the Act be used after it comes into force?

Strictly speaking an existing list containing potential recipients of unsolicited commercial electronic messages could not be used. However, a long-established database may well have weeded out the great majority if not all of the unsolicited recipients. Each situation needs to be checked but there may be sufficient confidence to simply continue using existing databases, adopting the new practices from the Act's go-live date. It's possible the Act will change anyway to specifically cover the transitional situation.

Like all of this area, there are overriding Privacy Act considerations anyway.

## What happens if a disaffected recipient wants to complain?

There are a number of steps that someone can take including suing for damages or an injunction, etc. This would be extremely rare. Much more likely is a complaint to the recipient's ISP, which is required to handle that complaint and in appropriate circumstances escalate the complaint to the Department of Internal Affairs. That Department in turn has a number of remedies including a warning notice, and also a contravention notice by which the sender of the messages receives a monetary penalty (the amount of which is yet to be set). The Department is likely to exercise pragmatic restraint and matters will probably advance only exceptional circumstances, particularly where there is repeated breach.

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*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

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