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FEATURE ARTICLE

## No, ma'am, this ain't spam

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The new *Unsolicited Electronic Messages Act 2007* comes into force in September 2007. The new legislation affects everyone who wants to send out commercial electronic messages — think promotional email and text messages. You've only got four-and-a-bit months before the legislation kicks in, so now's the time to get your head around what it'll mean for your organisation.

### *What sorts of messages are covered by the Act?*

The Act applies to all commercial electronic messages. So, if your message is in electronic form (email, text messages, instant messaging, etc) and it markets or promotes goods, services, land, or a business or investment opportunity, then it will be caught by the Act.

### *Does the Act cover messages that we send to our overseas customers?*

Yes. All messages with a "New Zealand link" are covered by the Act. A message has a New Zealand link if the sender or the recipient is in New Zealand, the computer or device that does the sending is in New Zealand, or if the message is sent to a ".nz" address or a "+64" phone number.

A number of other countries have spam legislation, so if you're marketing offshore ideally you should learn about their anti-spam laws too. However, often there's a good chance that if you're complying with the New Zealand legislation you'll be in compliance with the foreign laws too.

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The Australians have similar legislation to us. Last year an Australian marketer was successfully prosecuted under the Australian *Spam Act 2003* for spamming UK email addresses.

### *So, when can we send commercial messages?*

You can send commercial messages as long as you:

1. have the recipient's consent
2. identify yourself in the message as the sender and provide your contact details, and
3. include an unsubscribe facility.

### *We send our customers different types of messages. If we get their consent for one type of message, are we free to send them other types of commercial messages too?*

Sure. Once you've got their consent you're good to go. Just make sure that you get a wide consent in the first place. You'll have a problem sending emails if your consent request originally read: ''tick the box to receive our offers by text message''.

### *How do we obtain express consent to send commercial messages? What would be best practice?*

At its most basic level, you just need to ask people for their consent. It doesn't matter how you do this. This could be by ticking a box on a form, asking them face to face, by letter, or over the phone. (Be careful about using email or text message to get the consent — that request could itself be considered spam!) You'll want to keep a record of how and when you got the consent.

If you want to follow best practice then we suggest you don't hide the consent request in the fine print, pre-tick any boxes, or set up a default right to send messages (eg we'll send it unless you tick the box saying you don't want it). For other best practice guidelines see the Marketing Association's website at *www.marketing.org.nz*.

### *How should we word a request to obtain express consent?*

You want to make the consent request wide enough to give yourself flexibility down the track. So, don't just ask if you can send emails if you think there's a good chance you want to use text marketing later on. You can say something like: ''Tick the box if you'd like to receive news of our exciting offers electronically. Usually we'll email these to you, but we might text you too.''

### *Once we've got consent, do we have to keep a record of it? Do we have to prove we have consent?*

You should keep a record of the consent you get because it's your responsibility to prove that you have it if the recipient complains. Also, you'll want to put in place a system for recording when they withdraw consent (ie when your customer uses the unsubscribe facility) and for removing them from the mailing lists within five working days.

### *Can we use lists that we haven't compiled ourselves, say that we've bought from a list provider? What if that provider didn't get consent when they compiled the list?*

If you want to use another person's list you'll need to carefully check whether they got consent in the first place, and whether the consent they got is wide enough for you to do what you want. If the people on the list only consented to receiving messages about book offers from Company X, then you won't be able to use the list to send promotional emails about holidays to Queenstown. It's always your responsibility to ensure you have the necessary consent so be careful when using other people's lists.

### *We sponsored a conference and now want to email all of the conference delegates. Do we have to get their consent? What if the delegates gave their consent to the conference organiser?*

Yes, you need to get the delegates' consent for your messages before you can email them; it's not enough to use the consent they gave to the organiser. If the conference organiser already has a process for getting consent, you can piggy-back on that. Just ask the organiser to put your consent request box onto the registration form next to theirs.

### *Do we have to get consent from our existing customers?*

If you've already got a genuine, existing business relationship with your customers then you can rely on the ''inferred consent'' provision in the Act. Don't abuse this inferred consent though. If your customer is used to buying office furniture from you, you can't start emailing them with wine club offers, although it would probably be okay to tell your customers that you're expanding your business into office stationery as well as furniture.

Also, if someone gives you their business card they're deemed to have given consent to receive messages from you if your messages relate to the type of work they do. So, if you meet a plumber at the pub who gives you his business card, you're allowed to email him with details of the bathroom fittings you sell, but you can't email him with details of your cat food specials.

### *What's the unsubscribe facility all about?*

The requirement to include a "functional unsubscribe facility" just means you have to tell your recipients, in the message, how they can remove themselves from your mailing lists. It doesn't have to be an automated facility; it could be as simple as saying: "If you no longer wish to receive emails from us reply to this email and we'll take you off our list." You must comply with their request within five working days.

Note that the recipient must be able to unsubscribe the same way they received your message. For example, if you emailed them, then the unsubscribe facility must at least be offered by email. It's not enough just to say: "Ring us to unsubscribe from our emails."

### *We want to run a text-marketing campaign. Does the unsubscribe facility have to be free of charge?*

The default rule in the Act provides that even text messages must contain an unsubscribe facility and, as with all unsubscribe facilities, it must be free of charge to use. Without arranging something with the phone companies in advance, it may be difficult to ensure that a recipient doesn't incur any charge for their reply text.

Fortunately, the legislation permits you to avoid the requirement to include an unsubscribe facility (and to make it free) if you've got the recipient's agreement, or if you've made recipients aware of what you won't be doing. Consider making it clear in the consent request that you either won't be including an unsubscribe facility, or if you do, it won't be free to reply. For example, your consent request could say: "Tick here to receive our offers by text message. Note that if you want to unsubscribe from our messages by text you'll need to pay your phone company's standard charge for sending the unsubscribe text."

### *Our client has approached us with a list of customer names. Am I liable if the client hasn't got the customer's consent?*

Yes. As the ultimate sender of the message it's your responsibility to be sure that there's been consent. In practice this means you should talk to your clients beforehand about how they compiled their list and what their consent request looked like (ie did they get a wide consent or just a narrow one?). Be careful of clients who you suspect may be using address-harvested lists; the Act specifically prohibits the use of addressed-harvested lists.

### *What is the process of reporting offending and who do I talk to?*

Anyone who's been affected by spam (this could be the recipient themselves or their employer or ISP) can complain directly to either the sender or to the Department of Internal Affairs (DIA). As September approaches DIA will conduct a public awareness campaign which will explain how people can lay complaints with them about spam.

### *What are the penalties under the Act?*

DIA itself has a number of enforcement options available to it; these range from formal warnings to fines up to $2,000. Also, DIA and anyone who was affected by the message can take the sender to court. The courts can impose injunctions and award damages up to $500,000.

### *Where can we go if we have more questions?*

Keep an eye out for DIA's guidelines on their website (*www.dia.govt.nz*), they'll come out before September. Also, check out the Marketing Association's website (*www.marketing.org.nz*) for their best practice guidelines. If your organisation is a member of the Marketing Association you can take advantage of their free advisory service. To see the exact wording of the Act go to *www.legislation.govt.nz*. If you still need help there are a number of law firms that specialise in marketing and IT law that will be able to provide you with advice.

### *Is there a grace period to get any systems changed to handle the new Act? What can we do to prepare in the meantime?*

The Act doesn't kick in until early September 2007. There's much that you can do now to be ready. Use the time to:

1. review your existing process for adding people to your mailing list
2. identify the points in that process where you could get consent (eg including a tick box on an entry form)
3. create a system for keeping track of consents and processing unsubscribe requests, and
4. make your existing lists compliant.

### *What about our existing lists? Can we still use these once the Act comes into force in September?*

If you got consent when you first compiled those lists, the answer is "yes". If you didn't get consent originally, now's your opportunity to do so, before the Act comes into force. You've got some options: you could email everyone and ask if they still want to be on the list, saying you'll remove them if they don't reply (expect to lose a few this way). Alternatively, you could take a less strict approach by emailing people saying you just want to let them know they can always unsubscribe if they want to, but that you'll leave them on the list until they do so. Note that it's not clear that this second option doesn't breach the new Act (because lots of people have been warned not to unsubscribe to spam, even if they don't want your emails). So it's a risk to take this approach.

If you have a large database and it is important to your business you should get legal advice on this important issue of how to transition it to the new Act.

### *Why is the Privacy Act important?*

The *Privacy Act 1993* cuts right across this whole area because it restricts what you can do with people's personal information (in this case, their email addresses and phone numbers). When you collect an email address or cell phone number from your customer you must let them know what you're going to use it for. Now's a good time to update your privacy policy to make sure that you're telling your customers that you intend to use their email address (and cell phone number) to send them advertising material.

See the Unsolicited Messages Act commentary from ¶6-170 onwards.

## CASES OF INTEREST

## Oz rules on inferred consent

The Federal Court of Australia has considered what can be considered "inferred consent" under their *Spam Act 2003*. The case will be of interest in interpreting our own spam legislation, as New Zealand's *Unsolicited Electronic Messages Act 2007* shares many similarities with the Australian Act.

Clarity1 sent out thousands of emails, which qualified as "commercial electronic messages" under the Spam Act. The list of addresses it used was harvested from the internet using address-harvesting software.

Amongst other allegations, the Australian Communications and Media Authority claimed that Clarity1 had breached the Spam Act because it had failed to obtain the consent of the email account-holders prior to sending the messages. Clarity1 claimed that consent could be inferred from the business relationship between Clarity1 and the individual or the organisation concerned. 182 of the recipients had previously placed email orders with Clarity1.

The court was prepared to accept that the recipients of these 182 emails had given the requisite consent. It said that sending in an email order created a business relationship between the parties. The court said that it was reasonable to infer that a person who had shown an interest in Clarity1's products on one occasion would wish to be informed of future offers, unless there was evidence to the contrary.

See *Australian Communications and Media Authority v Clarity1 Pty Ltd* [2006] FCA 410, noted at ¶6-180.

## Agents keep silent at their peril

The High Court and the Commerce Commission have both made clear that where a real estate agent knows of information that is relevant to a purchaser's decision, it may be misleading or deceptive for the agent to withhold that information.

### *Let the seller beware*

A real estate agent's silence about her previous dealings with the buyer of an elite property was found to be misleading and deceptive conduct. The Stevens sold their home for $2.575m. The buyer onsold the property five months later for $3.555m. Premium Real Estate Ltd (Premium) was the agent on both sales.

When the Stevens sold their house, they did not know that the buyer was a property speculator for whom Premium's agent was already acting in relation to other properties.

The Stevens believed that their property had been sold at an undervalue, and took their case to the High Court. They claimed that Premium's failure to disclose the relationship between the buyer and the agent caused or contributed to their belief that their property was worth far less than the market was willing to pay, and was therefore misleading and deceptive conduct under s 9 of the *Fair Trading Act 1986*.