

Spam Act: Understanding Consent

Spam Act Overview

Under Australian law, spam is defined as 'unsolicited commercial electronic messaging'.

The *Spam Act 2003* (Spam Act) covers email, mobile phone messages (SMS, MMS) and instant messaging. It is enforced by the Australian Communications and Media Authority (the ACMA). The Spam Act does not cover faxes, voice telemarketing or internet pop-ups.

The Spam Act is based around three key conditions or rules that govern the sending of all commercial electronic messages:

- Consent
- Identify
- Unsubscribe.

Tip: Information about **consent, identify** and **unsubscribe** is also available at www.spam.acma.gov.au

The two forms of consent

Whether you are targeting new customers, managing existing databases, or purchasing contact lists, you always need a person's consent before you can send them commercial electronic messages. There are two types of consent: **express** and **inferred**.

What is "express consent"?

When an individual or organisation provides their email address or mobile telephone number, and you plan to send them a commercial electronic message, you must first get their express consent.

Express consent can be gained in a variety of ways - for example by filling in a form, ticking a box on a website, over the phone, face-to-face or by swapping business cards - as long as the recipient is clearly aware that he or she may receive commercial messages in the future. You cannot send an electronic message to seek consent: this is in itself a commercial message, because it seeks to establish a business relationship.

Businesses should keep a record of all instances where consent is given, including who gave the consent and how. **Under the Spam Act, it is up to the sender to prove that consent exists.**

When can consent be inferred?

Inferred consent can come about in two ways, through an **existing business or other relationship** or through

conspicuous publication of a work-related electronic address.

If an organisation has a strong business relationship with the holder of an electronic address - for example, the address holder is a member of a club, a subscriber to a service, or a client it deals with on an ongoing basis - consent to receiving messages from that organisation may be inferred.

If you are not confident that the existing business relationship is strong enough to infer consent, or are unsure that the recipient will want your messages, you will need to obtain express consent. You can do this by phoning the person and asking them for their consent.

Consent may also be inferred when someone **conspicuously publishes their work-related electronic address** (for example, on a website, brochure or magazine); and your business wants to send them a commercial electronic message that relates directly to that person's line of work. However, if a publication includes a statement that the person does not want to receive unsolicited commercial electronic messages at that address, you can not infer consent.

Can I use purchased contact lists?

You may use a purchased or rented list of contacts, but you should be careful to ensure that consent has been obtained. If your business is using purchased address lists, it is your responsibility to find out whether consent has been obtained from each recipient on the list. You may wish to seek written assurance from your list provider that consent has been obtained.

Tip: The message authoriser is legally responsible for proving that consent exists.

Cold calling: can I send messages to prospective customers?

You cannot email or SMS prospective customers unless express or inferred consent already exists. Unsolicited commercial electronic messages include messages that aim to 'test the water', or gauge the recipient's interest in receiving future commercial messages. These kinds of messages are in themselves commercial, as they seek to establish a commercial relationship. You need to gain consent through other means, such as a letter, a phone call or a face-to-face conversation.

Tip: Telephoning consumers for consent may be prohibited under the *Do Not Call Register Act 2006*. Visit www.donotcall.gov.au to find out more.

If recipients don't object, is that consent?

No, silence does not constitute consent. Just because a person does not actively unsubscribe from your mailing list does not mean they consent to receiving commercial electronic messages from you. You must have either express or inferred consent before you send such messages.

Can someone subscribe, or give consent, on another person's behalf?

No, not unless they do so using that person's email account. In general, consent to receive commercial electronic messages must be given by the relevant electronic account-holder – the person responsible for that account. This is normally the addressee.

However, if a second person (for example, an executive assistant, supervisor or family member) has access to that account, any consent given by that second person is taken to have come from the account-holder. If consent is mistakenly given, the account-holder can withdraw it by unsubscribing.

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

No. Pre-checked tick boxes – for example, on a website where people can join a mailing list – are not an acceptable way of gaining consent. For express consent to exist, a person must *actively and deliberately* give consent to receiving commercial electronic messages, either by checking the tick box themselves or by giving consent in some other clear and transparent way (for example, typing their email address into the 'consent' field of a web form).

Responding to a customer enquiry: do I have consent?

If you are replying to a customer enquiry, you have that person's consent to send them a commercial electronic message *related to their enquiry*. You may also include extra information (such as price lists and a link to your website) if the customer could *reasonably expect* to receive such information as a result of their enquiry.

Every commercial electronic message must contain an unsubscribe facility, even if it is a one-off communication in response to an enquiry. It may be easier to make the unsubscribe facility part of your corporate signature, so that it is included on every email your business sends.

Generally, you cannot add a person to a mailing list on the basis of a one-off enquiry. You need to determine whether they would have a reasonable expectation of receiving your commercial electronic

messages. This will relate to the nature of their initial enquiry.

Using third parties to send messages

As the body authorising the sending of the message, you must be certain that consent exists for every recipient. The third party cannot send the message unless this consent exists. To ensure that they do not breach the Spam Act by assisting with the sending of spam, the third party should also take steps to ensure that your database is clean and that consent exists. It may do so by seeking your written assurance. The message authoriser is legally responsible for proving that consent exists.

Unsubscribing – withdrawing consent

Businesses must make it easy for people to unsubscribe from electronic mailing lists. An unsubscribe facility must satisfy the following conditions:

- it must remain functional for at least 30 days after the original message was sent
- it must allow the unsubscribe message to be sent to whoever authorised the sending of the message, not necessarily any third party that sent it on their behalf
- unsubscribe instructions must be presented in a clear and conspicuous way
- a request to unsubscribe must be honoured within five working days
- unsubscribing must be at low cost, or no cost, to the user (for example, in the case of SMS unsubscribe facilities, a 1800- telephone number would be acceptable).

What about address-harvesting software?

The legislation bans the use of *address-harvesting software* and *harvested-address lists*, for the purpose of sending spam. You should ensure that the use of such software and lists are for purposes other than for sending *unsolicited commercial electronic messages*.

Lists generated manually (for example, by reviewing websites) are not prohibited. However, if addressees have included a statement adjacent to their *electronic address* indicating the addressee does not wish to receive commercial messages, this must be respected.

Where can I find out more?

For more consent-related information, including frequently asked questions, information for market researchers and what to do when you have purchased a business from someone else, visit the ACMA website at www.spam.acma.gov.au.

Please note: this document is intended as a guide only and should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases.