

ANTI-SPAM LEGISLATION

2004

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The Federal Government's much publicised Spam Act 2003 came into force on 10 April 2004. The legislation has many implications for businesses in Australia. If you conduct a business in Australia, a thorough understanding of the operation of the Act is imperative, especially since contravention of the Act attracts hefty penalties of up to \$1.1 million!

How Does The Act Operate?

The Act introduced a new scheme for regulating, sending and receiving commercial emails and other types of commercial electronic messages. Specifically, it prohibits the sending of what is commonly called "spam" which is referred to as "unsolicited commercial electronic messages" in the Act.

1. Unsolicited Commercial Electronic Messages Are Prohibited

Under the legislation, an "unsolicited commercial electronic message" is a commercial electronic message or an email which was sent without the consent of the recipient. A "commercial electronic message" is defined as an electronic message, the purpose of which is or may be to offer to supply, advertise or promote the supply of any of the following:

- goods and services;
- an interest in land; or
- a business or investment opportunity.

An "unsolicited commercial electronic message" also includes an email which is intended to deceive or mislead someone in order to obtain a financial benefit or gain.

In order not to be caught by the prohibition in the Act (and accordingly avoid prosecution under the Act), consent to sending a commercial electronic message must be obtained before the message is sent. A person or a corporation cannot avoid liability by sending an email with a message to the effect that, unless the recipient notifies the sender otherwise, consent is assumed to be given. This is not the meaning of "consent" under the Act.

2. Designated Commercial Electronic Messages Are Not Prohibited

"Designated commercial electronic messages" are excluded from the definition of "unsolicited commercial message" and are therefore not prohibited under the Act. A "designated commercial electronic message" is an electronic message which contains only factual information and certain limited details regarding the identity of the sender. The message must not contain any form of solicitation for provision of goods or services.

A "designated commercial electronic message" may be sent by any person. However, if it is sent by a government authority, religious body, charitable organisation or an educational institution, then certain specific requirements apply. For example, if the message is sent by or authorised by an educational institution, then the message is only a "designated commercial electronic message" if the message is sent to a student or a household member of the student enrolled in that educational institution. The message in this instance may relate to goods and services supplied or to be supplied by the educational institution.

3. Commercial Electronic Messages Must Have An Australian Connection

The Act only applies to commercial electronic messages that have an "Australian link". However, the Act casts a very wide net in terms of what falls within the requirement of an "Australian link". Essentially, any emails originating in Australia or intended to be received by a person or entity in Australia, are caught by the Act.

Accordingly, an “Australian link” will be established if:

- the message originates in Australia;
- the person who sends or authorises the sending of the message is physically present in Australia at the time the message is sent or, if an organisation sends or authorises the message, then the central management and control of the organisation is in Australia when the message is sent;
- the computer, server or device that is used to access the message is located in Australia;
- the message is received by a person in Australia or by an organisation that carries on business or activities in Australia when the message is accessed; or
- if the message cannot be delivered because the email address does not exist, the message would have been accessed using a computer, server or device located in Australia had the email address existed.

4. Commercial Electronic Messages Sent With Consent of Recipient Must Comply With Certain Requirements

If the sending of the commercial electronic message is authorised under the Act, then the message must also comply with certain other requirements. These include:

1. the message must incorporate information about the individual or organisation who sent or authorised the sending of the message; and
2. the message must also incorporate a functional unsubscribe facility to enable the recipient to opt out of the service.

5. Address Harvesting Also Prohibited

The Act also prohibits the supply, acquisition or usage of address-harvesting software and harvested address lists.

Address harvesting software is software which is designed or marketed for use for:

- searching the internet for electronic addresses; and
- collecting, compiling, capturing or otherwise harvesting electronic addresses.

A harvested address list may either be a list, collection or a compilation of electronic addresses produced, either directly or indirectly, by the use of address harvesting software.

Contravention Of The Act – What Are The Penalties?

The Act is administered by the Australian Communications Authority (“ACA”). The main remedies for breaches of the Act are civil penalties and injunctions. The penalties vary depending on whether or not the offender has any prior record of contravention. The penalties can be severe and include a fine of up to \$1.1 million for a person or company with a prior record for sending unsolicited commercial electronic messages. In addition, other orders can be made by the Federal Court (e.g. orders for compensation and for recovery of financial benefits obtained as a result of the contravention).

Conclusion

For businesses, the legislation means that their current systems of electronic communication should be revised in light of the Act. In particular, businesses should ensure that:

- consent from all addressees is obtained before sending out commercial electronic messages;
- all commercial electronic messages contain accurate sender information;
- all commercial electronic messages contain a clear and conspicuous unsubscribe statement; and
- on receipt of an unsubscribe message, the email address of the sender must immediately be removed from the address list.

As a matter of caution, businesses should also ensure that they comply with any anti-spam legislation applicable in countries to which their emails are sent.

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