

ELECTRONIC MESSAGES ACT

Following the enactment of the Unsolicited Electronic Messages Act 2007 (Act), businesses have scrambled to get their client databases in order, to ensure their compliance with the new rules regarding the sending of unsolicited commercial electronic messages.

One of the integral features of the Act is ensuring the consent of the recipient of the message is obtained. Since coming into force, many businesses have experienced confusion over whether the requisite consent has been sought from recipients of electronic messages.

The Act provides for three types of consent – express, inferred or deemed consent.

Express consent is given by the recipient's direct confirmation that they wish to receive certain electronic messages.

Inferred consent is when the recipient has not directly said they wish to receive messages, but where there is a reasonable expectation that the message will be sent.

Deemed consent is said to occur where (provided the regulations do not stipulate otherwise):

- 1 An electronic address has been conspicuously published by a person in a business or official capacity; and
- 2 The publication of the address is not accompanied by an anti-SPAM statement; and
- 3 The message that is sent is relevant to the business, role, functions or duties of a person in their business or official capacity.

In the lead up to the Act coming into force, emailaccounts around New Zealand have been flooded with messages requesting recipients to consent to continue receiving various types of electronic messages.

It was initially thought that a distinction should be made between commercial messages and promotional noncommercial messages, but this distinction has since been rescinded, in order to avoid confusion in having to distinguish between the types of electronic messages being sent.

Accordingly, under the Act, only commercial electronic messages that market or promote goods, services, land, interests in land or business, or investment opportunities will fall within the definition of "commercial electronic messages" and will require the recipient's consent prior to sending the message.

Since its enactment, one of the key areas of interest in the Act has been establishing when the exceptions regarding consent apply.

This is especially so where messages are sent to individuals or businesses, which have an ongoing relationship with the sender but where consent has not been expressly provided.

Section 6 of the Act provides for exceptions where electronic messages will not be regarded as contravening the Act, including where they:

1. Provide notification or factual information about a subscription, membership, account or loan or similar relationship involving the ongoing purchase or use by the recipient of goods or services offered by the person who authorised the sending of the message, or the recipient's ongoing subscription, membership, account, loan or similar relationship;
or
2. Provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating or enrolled.

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One of the difficulties being experienced by businesses with regards to the above is messages frequently contain information, which falls outside the employment or membership relationship and as such contravenes the Act. This is further complicated where such content is intermingled with information which does fall within exceptions under section 6 of the Act.

As such, senders of unsolicited electronic messages should exercise caution when sending out electronic messages. If there is any uncertainty as to the content of the messages being sent, consent of the recipient should be obtained.

Because the Act has only just come into force, its application gives rise to some uncertainty. However, the Act does provide a six month grace period in order to allow businesses and organisations to get their houses in order, in which case it is hoped many of the initial kinks will be ironed out.

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