

### **1.3 Main Features of the Spam Act**

The Spam Act prohibits the sending of spam, which is identified as a commercial electronic message sent without the consent of the addressee via email, short message service (SMS), multimedia message service (MMS) or instant messaging. The requirements under the Spam Act apply to all commercial electronic messages, including both bulk and individual messages.

Normal voice-to-voice communication by telephone is not covered by the Act. Messages sent by facsimile are, at present, excluded from coverage by regulation.

#### ***What is a commercial electronic message?***

Commercial electronic messages are messages that: -

- offer to supply goods or services,
- which advertise goods and services, land or business or investment opportunities,
- which direct the recipient to a location where goods and services are sold or advertised,
- which are to assist or enable a person to dishonestly obtain property, financial advantage or a gain from another person.

#### ***Australian link***

The requirements created by the Spam Act only apply to electronic messages that have an 'Australian link'. This means the legislation applies to:

- Messages that originate or are commissioned in Australia being sent to any destination;
- Messages that originate or are commissioned overseas being sent to an address accessed in Australia.

#### ***Three main requirements***

There are three main requirements for sending commercial electronic messages.

##### ***Commercial electronic messages must be sent with consent***

Commercial electronic messages must only be sent with the addressee's consent. Consent may be expressly given by the recipient, or under certain restricted circumstances it may be inferred from the conduct or business relationships of the recipient.

##### ***Information to identify the sender***

The Spam Act requires all commercial electronic messaging with an Australian link to contain accurate information which identifies the sender of the message. This will be the person or organisation that authorised the sending of the message, regardless of whether they actually sent the message themselves or arranged for someone to do it on their behalf. The information must be reasonably likely to remain correct for a period of 30 days after the sending of the message.

### Functional unsubscribe facility

A functional unsubscribe facility must be included in all commercial electronic messages sent. This facility allows people to opt out from receiving messages from that source in the future. This facility may be a statement that the message may be replied to with a request to opt out from future communications. The Act requires that a request to unsubscribe must be honoured within five working days. The unsubscribe facility must be reasonably likely to be able to receive and act on unsubscribe messages for a period of 30 days after the sending of the message.

### ***Additional requirements***

In addition to these three main requirements, the Spam Act also prohibits the sending of a commercial electronic message to a non-existent address that would have an Australian link if the address existed.

Further, it is prohibited to aid, abet or otherwise be party to a contravention of the legislation.

The Spam Act also prohibits the supply, acquisition or use of software that "harvests" electronic addresses from the Internet for the purpose of sending spam. Similarly, the provision, acquisition or use of harvested address lists to send spam is prohibited.

### ***Exclusions – ‘Designated Commercial Electronic Messages’***

Some limited exceptions from the Spam Act requirements apply to certain types of electronic messages, known as ‘designated commercial electronic messages’.

These are messages that are sent by:

- government bodies;
- registered political parties;
- charities;
- religious organisations; or
- educational institutions in certain circumstances.

To be considered a designated commercial electronic message, it is necessary for the message to be in respect of goods or services that are being supplied by one of the organisations listed above. Purely factual messages, such as a product recall notice, are also classed as designated commercial electronic messages.

Designated commercial electronic messages are not required to have the addressee’s consent, but they must still carry accurate information to identify the organisation or individual that authorised the sending of the message.

### ***Industry codes and standards***

As the agency responsible for enforcing the Spam Act, ACMA is responsible for facilitating and supporting the development of industry codes that complement the Spam Act. Industry codes provide relevant and achievable standards and procedures to assist compliance with the legislation, as well as procedures for the handling of complaints.

### ***Enforcement of the Spam Act***

ACMA commenced the enforcement of the Spam Act on April 10, 2004, when the penalty provisions of the Act came into effect. ACMA developed a means of reporting Spam Act breaches by direct contact, email and web form in early 2004.

In October 2005 ACMA launched its new spam reporting tool. The SpamMATTERS software allows the public to report spam emails directly from their email software. The software uses a one-click process which sends spam mails direct and intact to ACMA via a plug-in for Microsoft Outlook which can be downloaded from the ACMA site ([www.acma.gov.au](http://www.acma.gov.au)). The forensic data gathered from complaints submitted in this way will assist ACMA to present evidence for cases in court. A component allowing for the submission of bulk spam complaints will be made available subsequently. Complaints and reports of spam may continue to be lodged directly via the ACMA website.

A range of powers have been provided to ACMA through amendments made to the Telecommunications Act, which allow it to enforce the Spam Act.

A breach of the Spam Act can lead to a formal warning, infringement notice (carrying lesser penalties), enforceable undertaking, injunction or prosecution.

Breaches carry civil, rather than criminal, penalties. The Government intended that the legislation would modify existing behaviours, and not punish spamming with imprisonment. Civil penalties are also considered to be more proportionate to the nature of the spam problem - financial fines help counter the financial motive associated with most spam.

### ***International perspective***

Anti-spam laws vary from country to country. The Spam Act includes provisions that provide for Australia's participation in multilateral arrangements with other countries concerned with the regulation of spam.