

## E-mail marketing and the *Privacy Act 1998 (Cwlth)*

E-mail marketing is a form of direct marketing whereby electronic mail is used by businesses to advertise their products and services.

### Why use E-mail marketing?

E-mail marketing can be an extremely cost effective method of advertising your business. Unlike other methods of direct marketing such as sending letters, pamphlets and brochures, there are no printing or postage costs associated with E-mail marketing. There are also less staff costs incurred than with personal selling and less upfront costs than advertising in the media or by signage.

E-mail marketing also allows businesses to get their messages across to customers, without having to wait for the customer to attend its business or visit its website. Businesses are able to communicate quickly and effectively by E-mail. Messages are delivered instantly to your customer's inbox and cannot get lost in the post.

On the other hand, customers may become aggravated should they receive E-mail marketing without their consent. For the purposes of E-mail marketing the law encourages senders to expressly seek to obtain customers' consent.

### How is E-mail marketing regulated?

#### *Spam Act 2003 (Cwlth)*

The *Spam Act 2003 (Cwlth)* sets up a scheme for regulating commercial E-mail and other types of commercial electronic messages which are sent for purposes including offers to supply or advertisements for goods or services, offers to purchase land or business or investment opportunities.

The *Spam Act 2003 (Cwlth)* makes the following rules about the sending of commercial electronic messages:

- They must not be sent without the consent of the intended recipient. This consent can be expressed, or reasonably inferred from how the individual or organisation concerned has behaved (that is, does their behaviour indicate that they would be happy to receive your E-mails).
- They must include accurate information about the sender, including contact details.
- They must contain a functional unsubscribe facility (or the ability for the recipient to simply reply to stop further Email marketing).

However, the *Spam Act 2003 (Cwlth)* prohibits the acquisition, supply or use of 'address-harvesting software', that is, software that is specifically designed or marketed for use for searching the Internet for E-mail addresses and collecting, compiling, capturing or otherwise harvesting those electronic addresses.

As fines of up to \$110,000 may be payable for contraventions of the *Spam Act 2003 (Cwlth)*, it is important that businesses keep its provisions in mind.

## Privacy Act 1988 (Cwth)

The *Privacy Act 1988 (Cwth)* establishes 10 National Privacy Principles ("NPPs") which apply to some private sector organisations and establish the minimum privacy standards that these organisations must comply with. The provisions apply to organisations with an annual turnover of more than \$3 million as well as small businesses with annual turnover less than this figure but who:

- Are related to a business that has an annual turnover of greater than \$3 million
- Provide a health service and hold health information other than in an employee record
- Disclose personal information about another individual to anyone else for benefit, service or advantage
- Provide a benefit or service or obtain an advantage to collect personal information about another individual from anyone else
- Are contracted service providers for a commonwealth contract or
- Opt-in to have their business covered by the Act.

Businesses therefore need to assess whether the NPPs apply to them and, even if they do not, whether they should adopt the NPPs anyway by opting-in and making a public commitment to good privacy practice. The important NPPs to follow during E-mail marketing are:

- NPP 1: this concerns the collection of personal information, which must only be done by lawful and fair means and not in an unreasonably intrusive way. The organisation must take reasonable steps to ensure that the individual whom the information is collected from is aware of (amongst other things) the identity of the organisation, its contact details and the purposes for which the information is collected.
- NPP 2: this outlines the use and disclosure of personal information, which is authorised for the purposes of E-mail marketing if the individual has consented to the use or disclosure. If the information is not sensitive information and it was impracticable for the organisation to seek the individual's consent before it is used, the individual can be sent E-mail marketing material, provided that sufficient contact details are given and there is a clear opportunity to opt-out of future contact (without charge).

## Australian Direct Marketing Code of Practice

The Australian Direct Marketing Association ("ADMA") is a national non-profit marketing association that represents over 500 member organisations, who are responsible for over 80% of the \$9.4 billion that is spent annually on direct marketing in Australia. The Association has developed the ADMA Direct Marketing Code of Practice which is a self-governing Code governing all aspects of direct and data-driven marketing. This Code has been authorised under the *Trade Practices Act 1974 (Cwth)* by the Australian Competition and Consumer Commission.

The Code is only binding on members of the Association but is intended to serve as a point of reference for all organisations to ensure they comply with all applicable state and commonwealth laws.



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The key features of the Code are outlined by ADMA as:

- Privacy protection, incorporating the NPPs.
- A service that allows consumers to register and indicate that they do not wish to be approached.
- A mandatory cooling off period for contracts formed with direct marketers.
- Members are responsible for the conduct of their agents, subcontractors and suppliers.
- Telemarketing standards of practice.
- Adoption of the Guidelines for Consumer Protection in Electronic Commerce (developed by the Organisation for Economic Co-operation and Development as representing international best practice).
- The establishment of The Code Authority, an independent complaints body.

As was the case with the NPPs, businesses may need to assess whether the best interests of their business would be served by becoming a member of the Association, or even just by adopting the principles of the ADMA Code of Practice.

## Further information

For further information on E-mail marketing and the *Privacy Act 1998 (Cwlth)* see the following websites:

- Australian Direct Marketing Association [www.adma.com.au](http://www.adma.com.au)
- Australian Government - Officer of the Privacy Commissioner [www.privacy.gov.au](http://www.privacy.gov.au)
- Organisation for Economic Co-operation and Development [www.oecd.org](http://www.oecd.org)

The following fact sheets provide further information on these issues:

- Direct marketing – introduction
- Marketing plan