

SMS and the Law

With almost 6 billion mobile phone subscriptions currently in operation across the world, covering 87% of the globe, SMS and text messaging services are now a common aspect of our lives. It's therefore not surprising that businesses use the service to contact clients, suppliers and potential customers.

With such a large proportion of people using SMS across Australia and the rest of the world, these services are often seen as invaluable to businesses. The nature of SMS means that there are strict laws about the use of the practice for business, communication and marketing purposes. These are stipulated in the Spam Act 2003, which outlines regulations for the use of marketing SMS messages.

Shared responsibility

Those responsible for enforcing the Spam Act 2003 are:

- Australian Communications and Media Authority (ACMA)
- The Australian Government Information Management Office

Whilst the Spam Act 2003 is enforced by the Australian Communications and Media Authority, all businesses are responsible for ensuring their own practices are in accordance with the regulations.

Breaching the Spam Act 2003 is considered a criminal offence and, therefore, the penalties for this are severe. A charge of up to \$220,000 is made for a single day's breaches whilst businesses found to be repeat offenders could face increased penalties of as much as \$1.1 million.

The ACMA may issue a formal warning rather than an infringement notice, but this will depend on the nature and scale of the contraventions.

It is, therefore, highly important that businesses follow the rules of the act closely to avoid these penalties.

Not only could the sending of spam SMS result in large fines, but it is also highly unsuccessful in terms of obtaining customers, meaning that customers are unlikely to see a decent return on their investment.

The act covers all forms of commercial electronic mail, including e-mail, SMS, MMS and IM. Both messages which originate in Australia and those which are sent from overseas locations to addresses within Australia are covered.

This means that there are a number of factors which businesses must consider when using SMS and consent is perhaps the main example of this.

The legislation is clear on the regulations surrounding this issue:

- **Consent must be obtained** prior to the sending of commercial messages. This can be either express consent (where the intended recipient clearly states their wish to receive messages of this nature) or inferred consent (where their relationship with the business or prior communication indicates consent).
- The use of **electronic address harvesting software is strictly prohibited**.
- Commercial electronic messages must **contain accurate information** about the sender.
- A **functional opt-out clause** must be provided and included within messages to allow users to unsubscribe from the service.

Simple practices equal safe and successful communication

Businesses interested in using SMS for marketing or communication will need to abide by these rules.

The ACMA named three main steps for businesses to follow when implementing SMS – consent, identify, unsubscribe.

Simple processes can be used within each of these steps to establish safe and successful communication between businesses and others, helping to keep all investments and individuals protected.

Consent: as stated above, this can be **either express or inferred, but must be obtained prior to the sending of messages**. Previous relationships are used to establish inferred consent and businesses should be aware of what this covers.

The definition of this is covered by the National Privacy Principles (Privacy Principle 2 in particular). Inferred consent can be taken from existing relationships in cases such as those listed below:

- Goods which have been purchased by the individual involve an on-going warranty/service.
- Subscribers to magazines, other publications or specific services.
- Members of frequent flyer clubs, registered users of online services, financial members or shareholders.
- Employees, employers or contractors of a service.

Those who are unsure about the situation regarding consent should seek advice and **provide a double opt-in process**. This system will confirm whether users want to receive the messages, ensuring that you have the necessary consent to continue.

Identify: this refers to the regulations regarding the information you provide about yourself. All businesses should ensure any SMS messages which they send to clients, customers or other contacts

include accurate and clear information about who they are.

The **company name and communication/contact details are typical requirements** for this. The information which is provided should be likely to **remain accurate for at least 30 days** and changes to information should be immediately updated within these messages.

Unsubscribe: all **contacts must be given the option to unsubscribe** from the service and thus stop receiving messages. What system is used to provide this service can vary, but it must be provided as a clear and fully functional option.

The unsubscribe option must also be likely to **remain active and functional for a minimum of 30 days** and the request to opt-out from the service must have been processed and **completed within 5 working days**.