

Are Your Emails Spam?

Spam. In New Zealand, spam is the generic term for any unrequested commercial emails, text messages or faxes (yes, some businesses still have faxes!) and there are strict laws governing permission and consent around these messages.

It's a modern day problem that can have serious consequences for any business engaging in email marketing (include link to email marketing blog here).

How serious is the Email Spam Problem?

Some sources estimate the volume of spam at around 55% of all email traffic worldwide with the most common types of spam relating to healthcare and dating.

The problem in New Zealand is just as severe as internationally - Vodafone recently made the decision to shut down its email services after continued problems with high levels of spam.

To ensure you don't get the dreaded call from the Department of Internal Affairs, ensure you know your obligations under the Unsolicited Electronic Messages Act 2007 (UEM).

While no one wants to think of their email marketing efforts as spam, the reality is that you must have consent from your email recipients.

What is Consent?

Consent can be obtained directly from the person you are emailing or can be assumed to a degree by the nature of your business and how relevant it is to the recipient.

There are 3 levels of acceptable consent in New Zealand:

- Express - go ahead without a second thought.
- Inferred - proceed but look carefully for reasons why you might need to stop.
- Deemed - stop, look and think hard before you proceed.

N.B. There's no innocent until proven guilty here. The UEM Act is civil law not criminal which means you have to prove you are innocent if the Department of Internal Affairs ask you to. To prove consent make sure the source is recorded when you collect it.

Express Consent

When the recipient has asked you to send these types of messages.

To have express consent you will have asked them to register, usually online or in store for the specific message type. Other terms used for express consent include Opt-In, sign-up, permission, registration etc. Best practise includes giving recipients the ability to choose which communications they receive and how often in a preference centre so they can update their account at any time.

Verbal consent is okay although hard to prove. Although there is no obligation in the UEM Act for the consent to be in writing, it's a good idea to keep a written record of verbal consent.

Inferred Consent

When your communications make logical sense based on the relationship you have with the recipient.

The requirement for inferred consent is that you have a prior business relationship with the recipient. You don't have express consent but based on your relationship, permission can be inferred as the information is relevant e.g. customer service notifications, invoices, reminders, offers to lapsed customers to reconnect.

And remember, there is an expiry date on business relationships – use your common sense, if too much time has lapsed and the customer is unlikely to remember the relationship you had, don't send the email.

For example: If they bought a sofa from you three years ago, from the customer's perspective it doesn't make sense to start emailing them now.

But if they buy a car from you every three years, then you could email them to check if they are ready to test drive the newest model.

Deemed Consent

When you do not have an existing relationship with the recipient – they may not have heard of you or done business with you before. However, you think that your message or offer is useful, important and relevant to them and their business. This is similar to a cold call.

You need to ensure your message is relevant to the business of the recipient, for example, if you sell commercial kitchen equipment you can email restaurants. If you sell gardening supplies you

can't. The copy and tone of your emails are especially important here as you are in the danger zone in terms of consent.

Under deemed consent, you are able to send messages to an email address that is available in an official capacity, for example, on a company website.

To do this and not get prosecuted you'll need to be able to show how you got the address, so record where you sourced the email address from. This may sound like hard work but it is the law.

I've got consent, can I hit send now?

Getting consent right is a major part of staying on the right side of the legal requirements, but there are several other provisions you need to comply with too.

In addition to having consent from your recipients, you must also follow these guidelines to ensure email compliance:

- You must have an obvious and functional unsubscribe process that results in the recipient's details being removed from your database within five working days. An unsubscribe option must be included with every message you send. This could be an unsubscribe button or a line instructing recipients to reply to the message with unsubscribe in the subject line of their email.
- Always check the source of the data you use - do not use harvested data. Harvested data is obtained by software that goes through the internet getting email addresses from websites and blogs.
- All messages must contain your contact details and have a clear subject line that is not misleading. Recipients must also be able to easily contact you – best practise is having your contact details in the email itself or a link to your website contact page (make sure you test the link first!)
- Ensure your team is aware of the UEM Act and the provisions contained within it. The sender is responsible for showing consent and good intentions if a complaint has been laid with the Department of Internal Affairs. The best way to do this is by having good processes and record keeping systems in place.

Are there Consequences if I don't follow the Rules?

It may seem like there are too many things to keep track of and you may think that the chances of anyone complaining about your messages are low. However, it is best to take your obligations under the UEM Act seriously - in the event of a complaint, the onus of proof is on you, the sender.

Breaches of the Act can result in formal warnings or civil infringement notices and financial penalties of up to \$200 per event being issued.

On the Department of Internal Affairs' website, there are many examples of companies being penalised under the UEM Act including:

- The Print Company and Ray White City Apartments were issued Formal Warnings for breaching Section 9 of the Act which states that unsolicited commercial messages must not be sent. This section of the Act also covers ensuring unsubscribed email addresses are removed from your database within five working days and the sender bearing responsibility for proof of consent.
- Smith Sports Shoes was issued a Formal Warning for breaching Section 10 of the Act which states that electronic messages must contain a working unsubscribe option.
- Quality Meats and Encore Cabaret were both issued Civil Infringement notices for breaching Section 9 of the Act.

The largest fine ever imposed on a company in New Zealand was \$120,000 in a civil case against Image Marketing Group, an Auckland based marketing company. Over 500 complaints were lodged with the Department of Internal Affairs after they sent more than half a million emails and almost 45,000 text messages to New Zealanders in a single month. Although Image Marketing Group initially stated they believed the recipients had agreed to receive electronic marketing emails, as part of a pre-trial settlement they admitted that the messages sent were indeed spam.

I'm Still Not Sure...

We often get questions about email marketing and consent from clients, here we run through some of the more common scenarios that people ask about.

Can I send someone a marketing email if I get their address from their business card?

Yes, under inferred consent. But only if they have given you their business card with the expectation that you will use it to contact them.

HOWEVER, it is important to ensure that the information you send them is relevant to your business relationship and that the relationship is still current – ensure that there has not been a big time lapse between getting their business card and the email you send out.

What if I get their email address from their website?

You are able to send marketing emails to addresses you have obtained from websites under deemed consent.

HOWEVER, some websites contain notifications that contact details on them cannot be used for unsolicited marketing communications. Make sure you check for this before sending your emails. You must ensure that the content of your message is relevant to the business of the recipient. Ensure the tone and manner of your copy is right – you are in the danger zone of consent here and if there is a complaint to the Department of Internal Affairs, the onus is on you to prove consent.

Can I buy an email list and market to that list?

This is a tricky one. The UEM Act states that under deemed consent, email addresses must be conspicuously published. Email addresses on a commercially purchased list may not meet this stipulation.

If you do want to go down the road of purchasing lists and marketing to them, ensure that you only purchase lists where everyone on it has given consent to receive unsolicited marketing communications.

I can access email addresses on an industry website that I belong to – am I allowed to send a marketing email to these people?

Yes, this is acceptable under deemed consent.

HOWEVER, you must ensure that the information you send is relevant to the business of the recipient. Even though you are in the same industry, it is still important to make sure the tone and manner of your copy is correct and the information you send is relevant to the business or person as there has been no opt in process. Some websites will expressly state whether you are able to send marketing emails to the addresses on them – make sure you check for this as well.

Still have questions?

Email marketing consent under the UEM Act can be confusing. If you're still not sure exactly where you stand under the Act, our experienced marketing consultants can help ensure you stay on the right side of the law.

We've worked with several clients on digital strategies and email campaigns, and we've helped clients who were not compliant change their communication strategies to be within the law

Contact us to see how we can help with creating and delivering your next email campaign – one that is not only going to generate the right results, but one that is in no danger of being spam.

Rosina Webb is founder and Marketing Director of Energise. Visit us at www.energise.net.nz