

Version
as at 28 October 2021



Unsolicited Electronic Messages Act 2007

Public Act 2007 No 7
Date of assent 5 March 2007
Commencement see section 2

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Note

The Parliamentary Counsel Office has made editorial and format changes to this version using the powers under subpart 2 of Part 3 of the Legislation Act 2019.

Note 4 at the end of this version provides a list of the amendments included in it.

This Act is administered by the Ministry of Business, Innovation, and Employment.

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1 Title

This Act is the Unsolicited Electronic Messages Act 2007.

2 Commencement

This Act comes into force 6 months after the date on which it receives the Royal assent.

Part 1

Preliminary provisions

3 Purposes of this Act

The purposes of this Act are to—

- (a) prohibit unsolicited commercial electronic messages with a New Zealand link from being sent, in order to—
 - (i) promote a safer and more secure environment for the use of information and communications technologies in New Zealand; and
 - (ii) reduce impediments to the uptake and effective use of information and communications technologies by businesses and the wider community in New Zealand; and
 - (iii) reduce the costs to businesses and the wider community that arise from unsolicited commercial electronic messages; and
- (b) require commercial electronic messages to include accurate information about the person who authorised the sending of the message and a functional unsubscribe facility in order to enable the recipient to instruct the sender that no further messages are to be sent to the recipient; and
- (c) prohibit address-harvesting software or a harvested-address list from being used in connection with sending unsolicited commercial electronic messages in contravention of this Act; and
- (d) deter people from using information and communications technologies inappropriately.

4 Interpretation

- (1) In this Act, unless the context otherwise requires,—

address-harvesting software means software that is capable of, or marketed for use for,—

- (a) searching the Internet for electronic addresses; and
- (b) collecting, compiling, capturing, or otherwise harvesting those electronic addresses

chief executive means the chief executive of the enforcement department

civil liability event has the meaning set out in section 18

commercial electronic message has the meaning set out in section 6
consented to receiving—

- (a) means—
 - (i) express consent, whether given by the relevant electronic address-holder or any other person who uses the relevant electronic address; or
 - (ii) consent that can reasonably be inferred from—
 - (A) the conduct and the business and other relationships of the persons concerned; and
 - (B) any other circumstances specified in the regulations; or
 - (iii) consent that is deemed to have been given when the following circumstances apply:
 - (A) an electronic address has been conspicuously published by a person in a business or official capacity; and
 - (B) the publication of the address is not accompanied by a statement to the effect that the relevant electronic address-holder does not want to receive unsolicited electronic messages at that electronic address; and
 - (C) the message sent to that address is relevant to the business, role, functions, or duties of the person in a business or official capacity; but
- (b) does not include the circumstances specified in the regulations from which consent cannot be inferred

court means, as appropriate, the District Court, the High Court, or either of them

electronic address means an address used in connection with—

- (a) an email account; or
- (b) an instant messaging account; or
- (c) a telephone account; or
- (d) a similar account

electronic message has the meaning set out in section 5

enforcement department means the department of State that, with the authority of the Prime Minister, is responsible for exercising the powers in Part 3

enforcement officer means a person who is appointed as an enforcement officer under section 21

goods has the same meaning as in section 2(1) of the Consumer Guarantees Act 1993

government body means—

- (a) a department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975;
- (b) a Crown entity as defined in section 10(1) of the Crown Entities Act 2004

harvested-address list means—

- (a) a list of electronic addresses; or
- (b) a collection of electronic addresses; or
- (c) a compilation of electronic addresses,—

where the production of the list, collection, or compilation is, to any extent, directly or indirectly attributable to the use of address-harvesting software

individual means a natural person, other than a deceased natural person

message means information, whether in—

- (a) the form of text or writing; or
- (b) the form of data; or
- (c) the form of speech, music, or other sounds; or
- (d) the form of visual images (animated or otherwise); or
- (e) any other form; or
- (f) any combination of forms

mistake means a reasonable mistake of fact

organisation includes—

- (a) a corporation sole; and
- (b) a body corporate; and
- (c) an unincorporated body or association; and
- (d) a partnership; and
- (e) a government body; and
- (f) a court or tribunal

person means—

- (a) an individual; and
- (b) an organisation

recipient, in relation to the sending of an electronic message to an electronic address, means—

- (a) the relevant electronic address-holder; and
- (b) any other person who uses that electronic address

regulations means regulations made under this Act

relevant electronic address-holder means the person who is responsible for the relevant electronic address

send includes an attempt to send

service provider means a provider of a telecommunications service

services has the same meaning as in section 2(1) of the Consumer Guarantees Act 1993

telecommunication has the same meaning as in section 3 of the Telecommunications (Interception Capability and Security) Act 2013

telecommunications service means any goods, services, equipment, and facilities that enable or facilitate telecommunication

unsolicited commercial electronic message means a commercial electronic message that the recipient has not consented to receiving.

- (2) For the purposes of this Act, an electronic message has a **New Zealand link** if 1 or more of the following applies:
- (a) the message originates in New Zealand:
 - (b) the person who sent the message is—
 - (i) an individual who is physically present in New Zealand when the message is sent; or
 - (ii) an organisation whose central management and control is in New Zealand when the message is sent:
 - (c) the computer, server, or device that is used to access the message is located in New Zealand:
 - (d) the recipient is—
 - (i) an individual who is physically present in New Zealand when the message is accessed; or
 - (ii) an organisation that carries on business or activities in New Zealand when the message is accessed:
 - (e) if the message cannot be delivered because the relevant electronic address does not exist, assuming that the electronic address existed, it is reasonably likely that the message would have been accessed using a computer, server, or device located in New Zealand:
 - (f) it is sent to an electronic address that—
 - (i) ends with “.nz”; or
 - (ii) begins with an international access code directly followed by “64”.

Compare: 2001 No 103 s 5; Spam Act 2003 ss 4, 7, Sch 2 (Aust)

Section 4(1) **telecommunication**: replaced, on 13 November 2018, by section 40 of the Telecommunications (New Regulatory Framework) Amendment Act 2018 (2018 No 48).

5 Meaning of electronic message

- (1) For the purposes of this Act, an **electronic message** is a message sent—
 - (a) using a telecommunications service; and
 - (b) to an electronic address.
- (2) However, the messages listed in clause 1 of the Schedule are not electronic messages.
- (3) For the purposes of subsection (1), it is immaterial whether—
 - (a) the electronic address exists; or
 - (b) the message reaches its intended destination.

Compare: Spam Act 2003 s 5 (Aust)

6 Meaning of commercial electronic message

For the purposes of this Act, **commercial electronic message**—

- (a) means an electronic message that—
 - (i) markets or promotes—
 - (A) goods; or
 - (B) services; or
 - (C) land; or
 - (D) an interest in land; or
 - (E) a business or investment opportunity; or
 - (ii) assists or enables a person to obtain dishonestly a financial advantage or gain from another person; or
 - (iii) provides a link, or directs a recipient, to a message that does 1 or more of the things listed in subparagraphs (i) and (ii); but
- (b) does not include an electronic message that—
 - (i) provides a quote or estimate for the supply of goods or services if that quote or estimate was requested by the recipient; or
 - (ii) facilitates, completes, or confirms a commercial transaction that the recipient previously agreed to enter into with the person who authorised the sending of the message; or
 - (iii) provides warranty information, product recall information, or safety or security information about goods or services used or purchased by the recipient; or
 - (iv) provides notification of factual information about a subscription, membership, account, 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
- (v) provides information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
 - (vi) delivers goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously entered into with the person who authorised the sending of the message; or
 - (vii) provides the recipient with information about goods or services offered or supplied by—
 - (A) a government body; or
 - (B) a court or tribunal; or
 - (viii) has any other purpose set out in the regulations.

Compare: Spam Act 2003 s 6 (Aust)

7 Act binds the Crown

This Act binds the Crown.

Compare: Spam Act 2003 s 12 (Aust)

8 Application of Act outside New Zealand

- (1) This Act extends to the engaging in conduct outside New Zealand by a relevant person to the extent that that conduct results in a civil liability event occurring.
- (2) In this section, **relevant person** means—
 - (a) an individual who is a resident of New Zealand; or
 - (b) an organisation that carries on business or activities in New Zealand.

Compare: Spam Act 2003 s 14 (Aust)

Part 2

Restrictions on electronic messages, address-harvesting software, and harvested-address lists

Subpart 1—Commercial electronic messages

9 Unsolicited commercial electronic messages must not be sent

- (1) A person must not send, or cause to be sent, an unsolicited commercial electronic message that has a New Zealand link.
- (2) If a recipient uses an unsubscribe facility in accordance with section 11(1)(a), the recipient's consent to receiving a commercial electronic message from the sender is deemed to have been withdrawn with effect from the day that is 5 working days after the day on which the unsubscribe facility was used.

- (3) A person who contends that a recipient consented to receiving a commercial electronic message has the onus of proof in relation to that matter.

Compare: Spam Act 2003 s 16(1), (2), (5), (6) (Aust)

10 Commercial electronic messages must include accurate sender information

A person must not send, or cause to be sent, a commercial electronic message that has a New Zealand link unless—

- (a) the message clearly and accurately identifies the person who authorised the sending of the message; and
- (b) the message includes accurate information about how the recipient can readily contact that person; and
- (c) the information referred to in paragraph (b) complies with any conditions specified in the regulations; and
- (d) the information referred to in paragraph (b) is reasonably likely to be valid for at least 30 days after the message is sent.

Compare: Spam Act 2003 s 17(1) (Aust)

11 Commercial electronic messages must contain functional unsubscribe facility

- (1) A person must not send, or cause to be sent, a commercial electronic message (the **principal message**) that has a New Zealand link unless—

- (a) the principal message includes a functional unsubscribe facility that the recipient may use to instruct the person who authorised the sending of the principal message (the **sender**) that no further commercial electronic messages from or authorised by the sender should be sent to the electronic address at which the principal message was received; and
- (b) the unsubscribe facility is expressed and presented in a clear and conspicuous manner; and
- (c) the unsubscribe facility allows the recipient to respond to the sender using the same method of communication that was used to send the principal message; and
- (d) there is no cost to the recipient if the recipient uses the unsubscribe facility; and
- (e) the unsubscribe facility is reasonably likely to be functional and valid for at least 30 days after the principal message is sent; and
- (f) the unsubscribe facility complies with any conditions specified in the regulations.

- (2) Subsection (1) does not apply to the extent (if any) to which it is inconsistent with the terms of a contract, arrangement, or understanding between—

- (a) the person who authorised the sending of the principal message; and

(b) the recipient.

Compare: Spam Act 2003 s 18(1), (3), (9) (Aust)

12 Defences

- (1) A person who sends an electronic message, or causes an electronic message to be sent, in contravention of section 9, 10, or 11 has a defence if—
- (a) that person sent the message, or caused the message to be sent, by mistake; or
 - (b) the message was sent without that person's knowledge (for example, because of a computer virus or a malicious software programme).
- (2) A person who wishes to rely on a defence in subsection (1) has the onus of proof in relation to that matter.

Compare: Spam Act 2003 ss 16(4), (5), 17(3), (4), 18(4), (5) (Aust)

Subpart 2—Address-harvesting software and harvested-address lists

13 Restriction on use of address-harvesting software and harvested-address lists

- (1) A person must not use address-harvesting software or a harvested-address list in connection with, or with the intention of, sending unsolicited commercial electronic messages in contravention of section 9.
- (2) In subsection (1), **person** means—
- (a) an individual who is physically present in New Zealand at the time of the use;
 - (b) an organisation that carries on business or activities in New Zealand at the time of the use.
- (3) The prohibition in subsection (1) applies whether the unsolicited commercial electronic messages were sent by, or intended to be sent by,—
- (a) the person who used the address-harvesting software or harvested-address list; or
 - (b) any other person.

Compare: Spam Act 2003 s 22(1), (2) (Aust)

14 Onus of proof

A person who contends that his or her use of address-harvesting software or a harvested-address list was not in connection with, or was not with the intention of, sending unsolicited commercial electronic messages in contravention of section 9 has the onus of proof in relation to that matter.

Compare: Spam Act 2003 s 20(4) (Aust)

Subpart 3—Third party breaches of Act

15 Third party breaches of Act

A person must not—

- (a) aid, abet, counsel, or procure a breach of any of sections 9 to 11 and 13; or
- (b) induce, whether by threats or promises or otherwise, a breach of any of sections 9 to 11 and 13; or
- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a breach of any of sections 9 to 11 and 13; or
- (d) conspire with others to effect a breach of any of sections 9 to 11 and 13.

Compare: Spam Act 2003 ss 16(9), 17(5), 18(6), 20(5), 21(3), 22(3) (Aust)

Subpart 4—Rules of general application throughout Act

16 Supplying message service

A service provider does not send an electronic message, or cause an electronic message to be sent, or contravene section 15, merely because the service provider provides a telecommunications service that enables an electronic message to be sent.

Compare: Spam Act 2003 ss 9, 16(10), 17(6), 18(7) (Aust)

17 Person who authorises sending of electronic messages

- (1) For the purposes of sections 6, 10, and 11, if person A sends an electronic message on behalf of person B, then—
 - (a) person B is taken to authorise the sending of that message; and
 - (b) person A is taken not to authorise the sending of that message.
- (2) However, person A only sends an electronic message on behalf of person B if person A has the authority to do so.

Compare: Spam Act 2003 s 8 (Aust)

Part 3

Enforcement provisions

Subpart 1—Civil liability events

18 Meaning of civil liability event

In this Part, a **civil liability event** is a breach of 1 or more of the following:

- (a) section 9(1) (unsolicited commercial electronic messages must not be sent):

- (b) section 10 (commercial electronic messages must include accurate sender information):
- (c) section 11(1) (commercial electronic messages must contain functional unsubscribe facility):
- (d) section 13(1) (restriction on use of address-harvesting software and harvested-address lists):
- (e) section 15 (third party breaches of the Act).

Compare: Spam Act 2003 ss 16(11), 17(7), 18(8), 20(6), 21(4), 22(4) (Aust)

19 Possible responses to civil liability event

If a civil liability event is alleged to have occurred,—

- (a) any person affected by that event may do 1 or more of the following:
 - (i) seek an injunction from the High Court under section 40 or 42:
 - (ii) make an application to the court for compensation or damages under section 46:
 - (iii) apply to join any court action initiated by the enforcement department or any other person under section 47; and
- (b) an enforcement officer may do 1 or more of the following:
 - (i) issue a formal warning under section 23:
 - (ii) issue a civil infringement notice under section 24:
 - (iii) apply for a search warrant under section 51 and exercise the powers of search and seizure granted by the warrant; and
- (c) the enforcement department may do 1 or more of the following:
 - (i) accept an enforceable undertaking under section 34 and seek an order in the court for a breach of that undertaking under section 35:
 - (ii) seek an injunction from the High Court under section 40 or 42:
 - (iii) make an application to the court for a pecuniary penalty under section 45:
 - (iv) make an application to the court for compensation or damages under section 46:
 - (v) apply to join any court action initiated by any other person under section 47.

Subpart 2—Functions and powers of enforcement department and enforcement officers

20 Functions and powers of enforcement department

The enforcement department—

- (a) may investigate, and take enforcement action in relation to, an alleged civil liability event if it considers that an investigation or enforcement action is appropriate in the circumstances; and
- (b) must make publicly available information concerning—
 - (i) the functions and powers of the enforcement department and enforcement officers under this Act; and
 - (ii) the purposes and provisions of this Act; and
 - (iii) the rights and responsibilities of persons to whom this Act applies; and
- (c) must monitor information and communications technologies and the way in which they are utilised to send and receive unsolicited commercial electronic messages; and
- (d) must—
 - (i) establish an electronic address to which a recipient may forward electronic messages containing sexual content that the recipient has not consented to receiving; and
 - (ii) make publicly available information about how people may use that electronic address; and
 - (iii) if it considers it appropriate in the circumstances, make recommendations to government or non-government organisations about possible responses to the types of electronic messages forwarded to that electronic address; and
- (e) must endeavour to ensure that New Zealand complies with all international agreements and arrangements concerning unsolicited commercial electronic messages to which New Zealand is a party; and
- (f) may consult with, advise, and assist government and non-government organisations and other persons overseas, for the purpose of promoting and enforcing international procedures to prevent unsolicited commercial electronic messages being sent or received.

21 Chief executive may appoint enforcement officers

The chief executive may appoint enforcement officers, on a permanent or temporary basis, to exercise the powers conferred on them by this Act.

Compare: 2003 No 51 s 330

22 Authority to act as enforcement officer

- (1) The chief executive must issue a warrant of appointment to every person appointed as an enforcement officer.
- (2) A warrant of appointment must—
 - (a) be in the prescribed form; and

- (b) bear the photograph and signature of the holder; and
 - (c) contain any other particulars that may be prescribed.
- (3) A warrant of appointment is, in the absence of evidence to the contrary, sufficient proof that the holder of the warrant may exercise the powers conferred on enforcement officers under—
- (a) section 23 (formal warnings);
 - (b) sections 24 to 31 (civil infringement notices);
 - (c) sections 51 to 56 (search and seizure).
- (4) A person who ceases to be an enforcement officer must return the person's warrant of appointment.
- (5) A person who fails to comply with subsection (4) commits an offence and is liable on conviction to a fine not exceeding \$1,000.

Compare: 2003 No 51 s 331

Section 22(5): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).

Formal warnings

23 Formal warnings

- (1) An enforcement officer may issue 1 or more formal warnings to a person if the enforcement officer has reasonable grounds to believe that that person has committed a civil liability event.
- (2) A formal warning must be—
 - (a) in the prescribed form; and
 - (b) issued in the manner specified in the regulations.

Compare: Spam Act 2003 s 41 (Aust)

Civil infringement notices

24 Civil infringement notices

If an enforcement officer has reasonable grounds to believe that a person has committed 1 or more civil liability events, the enforcement officer may issue a civil infringement notice relating to those events to that person.

Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

25 Issue of civil infringement notices

- (1) A civil infringement notice must be issued within 12 months after the day on which the earliest civil liability event referred to in the notice is alleged to have occurred.
- (2) A civil infringement notice may be issued—

- (a) by delivering it to the person alleged to have committed the civil liability event; or
 - (b) by post, addressed to that person's last known place of residence or business.
- (3) A civil infringement notice issued to a person in accordance with subsection (2)(b) is deemed to have been issued on the day it was posted.

Compare: Spam Act 2003 Sch 3, cl 3 (Aust)

26 Form of civil infringement notices

A civil infringement notice must—

- (a) contain sufficient particulars to inform the person issued with the notice of the time, manner, and nature of the alleged civil liability events; and
- (b) specify the penalty to be paid for each civil liability event alleged to have occurred, which must not exceed the amount specified in the regulations; and
- (c) specify the time within which the penalty must be paid; and
- (d) give an explanation of how payment of the penalty is to be made; and
- (e) contain a statement of the person's right to object to the notice; and
- (f) contain a statement of what may happen if the person neither pays the penalty nor objects to the notice; and
- (g) contain any further information specified in the regulations.

Compare: Spam Act 2003 Sch 3, cl 4 (Aust)

27 Objections to civil infringement notices

- (1) An objection to a civil infringement notice—
- (a) may be made only on the grounds specified in the regulations;
 - (b) must contain all of the information specified in the regulations;
 - (c) must be made within the time and in the manner specified in the regulations.
- (2) An enforcement officer—
- (a) must consider every objection that is properly made under subsection (1); and
 - (b) may turn down the objection, alter the civil infringement notice, or withdraw the civil infringement notice in accordance with section 28; and
 - (c) must, as soon as reasonably practicable, notify the objector in writing—
 - (i) as to whether the objection has been turned down, upheld, or upheld in part; and
 - (ii) of the effect of the enforcement officer's decision.

- (3) A person may not object to a civil infringement notice that has been altered by an enforcement officer under subsection (2)(b).

28 Withdrawal of civil infringement notice

- (1) An enforcement officer may, by written notice (the **withdrawal notice**) given to a person who has been issued with a civil infringement notice, withdraw the civil infringement notice.
- (2) To be effective, the withdrawal notice must be given to the person within 20 working days after the later of the day on which—
- (a) the notice was issued; or
 - (b) if applicable, the enforcement officer issues his or her final response to an objection to the civil infringement notice.
- (3) An enforcement officer must refund the penalty specified in a civil infringement notice if—
- (a) the penalty specified in the civil infringement notice has been paid; and
 - (b) the civil infringement notice is withdrawn after the penalty was paid.

Compare: Spam Act 2003 Sch 3, cl 6 (Aust)

29 What happens if penalty is paid

- (1) This section applies if—
- (a) a civil infringement notice relating to 1 or more alleged civil liability events is issued to a person, even if that notice is subsequently withdrawn; and
 - (b) the penalty is paid in accordance with the civil infringement notice, even if that penalty is subsequently refunded.
- (2) If subsection (1) applies,—
- (a) any liability of the person for the alleged civil liability events to which the civil infringement notice relates is discharged, except for the purposes of section 46; and
 - (b) proceedings under section 45 may not be brought against the person for those alleged civil liability events.

Compare: Spam Act 2003 Sch 3, cl 7 (Aust)

30 Effect of civil infringement notice on civil proceedings

- (1) A civil infringement notice issued to a person does not prevent proceedings under section 45 being brought against the person for an alleged civil liability event if—
- (a) the person does not pay the penalty specified in the civil infringement notice for that event; or

- (b) a civil infringement notice relating to the event is issued to the person and subsequently withdrawn before the penalty specified in the notice is paid.
- (2) A civil infringement notice issued to a person does not prevent proceedings under section 46 being brought against the person for an alleged civil liability event to which the notice relates.

Compare: Spam Act 2003 Sch 3, cl 8 (Aust)

31 Recovery of unpaid penalty

- (1) The consequence specified in subsection (2) applies if a person—
 - (a) is issued with a civil infringement notice; and
 - (b) fails to pay all, or any part, of the penalty specified in the notice by the time specified in the notice.
- (2) The consequence is that an enforcement officer may recover from the person, as a debt due to the enforcement department, in the District Court,—
 - (a) the unpaid portion of the penalty; and
 - (b) the actual and reasonable costs of recovery awarded against the person by that court.
- (3) In any proceedings for the recovery of a debt under this section, the District Court must not enter judgment in favour of the enforcement department unless it is satisfied that the circumstances in subsection (1) exist.

Section 31(2): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

32 Right to appeal

- (1) A person may appeal to the District Court if the person is dissatisfied with a decision of an enforcement officer to—
 - (a) turn down the person's objection to a civil infringement notice; or
 - (b) alter a civil infringement notice.
- (2) An appeal under subsection (1) must be brought within 20 working days after the date on which the notice under section 27(2)(c) is given.
- (3) An appeal under subsection (1) does not operate as a stay of the civil infringement notice.

Section 32(1): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

33 Decision on appeal

- (1) The District Court must determine an appeal under section 32 by dismissing or allowing the appeal.

- (2) If the District Court dismisses an appeal, the dismissal must be taken to be an order for the payment of the penalty specified in the civil infringement notice to which the decision under appeal relates.
- (3) If the District Court allows an appeal, it may make an order that the penalty specified in the civil infringement notice to which the decision under appeal relates—
 - (a) is varied or cancelled; or
 - (b) is to be refunded to the person, if the appeal is allowed after the penalty was paid to the enforcement department or was recovered as a debt due to the enforcement department under section 31.

Section 33(1): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Enforceable undertakings

34 Enforceable undertakings

- (1) The enforcement department may accept a written undertaking given by a person in connection with—
 - (a) commercial electronic messages; or
 - (b) address-harvesting software; or
 - (c) harvested-address lists.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the enforcement department.

Compare: Spam Act 2003 s 38 (Aust)

35 Enforcement of undertakings

- (1) If the enforcement department considers that a person who gave an undertaking under section 34 has breached 1 or more of its terms, the enforcement department may apply to the court for an order under subsection (2).
- (2) If the court is satisfied that the person has breached 1 or more of the terms of the undertaking, the court may make any or all of the following orders:
 - (a) an order directing the person to comply with the relevant terms of the undertaking;
 - (b) an order directing the person to pay to the enforcement department an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach:

- (d) any other order that the court considers appropriate.

Compare: Spam Act 2003 s 39 (Aust)

36 Assessment of compensation for breach of undertaking

For the purposes of section 35(2)(c), in determining whether another person (the **victim**) has suffered loss or damage as a result of the breach, and in assessing the amount of compensation payable, the court may have regard to the following:

- (a) the extent to which any expenses incurred by the victim are attributable to dealing with the breach:
- (b) the effect of the breach on the victim's ability to carry on business or other activities:
- (c) any damage to the reputation of the victim's business that is attributable to dealing with the breach:
- (d) any loss of business opportunities suffered by the victim as a result of dealing with the breach:
- (e) any other matters that the court considers relevant.

Compare: Spam Act 2003 s 40 (Aust)

Subpart 3—Powers of courts

General

37 Jurisdiction of District Court

- (1) In accordance with this Act, the District Court may hear and determine the following matters:
 - (a) recovery of an unpaid penalty specified in a civil infringement notice under section 31:
 - (b) appeals from civil infringement notices under sections 32 and 33:
 - (c) applications for an order in relation to an undertaking under sections 35 and 36:
 - (d) applications for a pecuniary penalty under section 45:
 - (e) applications for compensation or damages under section 46:
 - (f) applications for joining of parties or proceedings under section 47:
 - (g) applications for a search warrant to search a place or thing under section 51.
- (2) In the exercise of its jurisdiction under this section, the District Court must not—
 - (a) make an order under section 35 directing a person to pay a sum that exceeds \$350,000:

- (b) make an order under section 45 requiring a person to pay a pecuniary penalty that exceeds \$350,000:
- (c) make an order under section 46 requiring a person to pay compensation or damages that, in total, exceed \$350,000.

Compare: 1986 No 121 ss 38, 43(3)

Section 37 heading: amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 37(1): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 37(2): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 37(2)(a): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 37(2)(b): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

Section 37(2)(c): amended, on 1 March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

38 Jurisdiction of High Court

In accordance with this Act, the High Court may hear and determine the following matters:

- (a) applications for an order in relation to an undertaking under sections 35 and 36:
- (b) applications for injunctions under section 40 or 42:
- (c) applications for a pecuniary penalty under section 45:
- (d) applications for compensation or damages under section 46:
- (e) applications for joining of parties or proceedings under section 47.

Compare: 1986 No 121 s 37

Injunctions

39 Powers of High Court not affected

The powers in sections 40 to 44 are in addition to, and do not derogate from, any other powers of the High Court relating to the granting of injunctions.

Compare: Spam Act 2003 s 36 (Aust)

40 Performance injunctions

- (1) The High Court may, on the application of the enforcement department or any other person, grant an injunction requiring a person to do an act or thing if—
 - (a) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and
 - (b) the refusal or failure was, is, or would be a civil liability event.

- (2) The court may rescind or vary an injunction granted under this section.

Compare: Spam Act 2003 ss 32, 34 (Aust)

41 When High Court may grant performance injunctions

- (1) The High Court may grant an injunction requiring a person to do an act or thing if—

- (a) it is satisfied that the person has refused or failed to do that act or thing;
or
(b) it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing.

- (2) Subsection (1)(a) applies whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing.

- (3) Subsection (1)(b) applies whether or not the person has previously refused or failed to do that act or thing or there is an imminent danger of substantial damage to any other person if that person refuses or fails to do that act or thing.

Compare: Spam Act 2003 s 35 (Aust)

42 Restraining injunctions

- (1) The High Court may, on the application of the enforcement department or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision of this Act.

- (2) The court may rescind or vary an injunction granted under this section.

Compare: 2003 No 52 s 96; Spam Act 2003 ss 32, 34 (Aust)

43 When High Court may grant restraining injunctions and interim injunctions

- (1) The High Court may grant an injunction restraining a person from engaging in conduct of a particular kind if—

- (a) it is satisfied that the person has engaged in conduct of that kind; or
(b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.

- (2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so.

- (3) Subsections (1)(a) and (2) apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.

- (4) Subsections (1)(b) and (2) apply whether or not the person has previously engaged in conduct of that kind or there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind.

Compare: 2003 No 52 ss 97, 98; Spam Act 2003 ss 33, 35 (Aust)

44 Undertaking as to damages not required by enforcement department

- (1) If the enforcement department applies to the High Court for the grant of an interim injunction under this subpart, the court must not, as a condition of granting an interim injunction, require the enforcement department to give an undertaking as to damages.
- (2) However, in determining the enforcement department's application for the grant of an interim injunction, the court must not take into account that the enforcement department is not required to give an undertaking as to damages.

Compare: 2003 No 52 s 98; Spam Act 2003 s 33 (Aust)

Pecuniary penalties, compensation, and damages

45 Pecuniary penalties for civil liability event

- (1) On the application of the enforcement department, the court may order a person (the **perpetrator**) to pay a pecuniary penalty to the Crown, or any other person specified by the court, if the court is satisfied that the perpetrator has committed a civil liability event.
- (2) Subject to the limits in subsections (3) and (4), the pecuniary penalty that the court orders the perpetrator to pay must be an amount which the court considers appropriate taking into account all relevant circumstances, including—
 - (a) the number of commercial electronic messages sent:
 - (b) the number of electronic addresses to which a commercial electronic message was sent:
 - (c) whether or not the perpetrator has committed prior civil liability events.
- (3) If the perpetrator is an individual, the court may order the perpetrator to pay a pecuniary penalty not exceeding \$200,000 in respect of the civil liability events that are the subject of the enforcement department's application.
- (4) If the perpetrator is an organisation, the court may order the perpetrator to pay a pecuniary penalty not exceeding \$500,000 in respect of the civil liability events that are the subject of the enforcement department's application.

Compare: Spam Act 2003 ss 24, 25, 26 (Aust)

46 Compensation and damages for civil liability event

- (1) This section applies if the court is satisfied that—
 - (a) a person (the **perpetrator**) has committed a civil liability event; and
 - (b) another person (the **victim**) has suffered either direct or consequential loss or damage as a result of that civil liability event.
- (2) The court may make a finding under subsection (1)—
 - (a) on the application of the victim; or
 - (b) on the application of the enforcement department.

- (3) If this section applies, the court may make an order that the court considers appropriate directing the perpetrator to pay to the victim either or both of the following:
- (a) compensation for any loss suffered by the victim as a result of the civil liability event;
 - (b) damages not exceeding an amount equal to the financial benefit obtained by the perpetrator as a result of the civil liability event.

Compare: Spam Act 2003 ss 28, 29 (Aust)

47 Joinder of parties

- (1) On the application of the enforcement department or any other person, the court may direct that—
- (a) an application for compensation or damages under section 46 be heard together with an application by the enforcement department for a pecuniary penalty under section 45; or
 - (b) an application by the enforcement department for a pecuniary penalty under section 45 be heard together with an application for compensation or damages under section 46; or
 - (c) 2 or more applications for compensation or damages under section 46 be heard together.
- (2) The court may make a direction under subsection (1)—
- (a) at any stage of the proceedings; and
 - (b) upon any terms that it thinks fit; and
 - (c) according to the merits and equities of the circumstances.

48 Interrelationship of civil liability remedies

- (1) A person may be liable for a pecuniary penalty, compensation, and damages for the same civil liability event.
- (2) However, in determining whether to order a person to pay a pecuniary penalty, or compensation, or damages (individually, a **civil liability remedy**), the court must have regard to—
- (a) whether that person has already paid another civil liability remedy for the same civil liability event; and
 - (b) if so, the amount and effect of that first civil liability remedy.

Compare: Spam Act 2003 ss 28(3), 29(2) (Aust)

49 Applicable rules, procedure, and standard of proof

The proceedings under sections 45 and 46 are civil proceedings to which the usual rules of the court, rules of evidence, and procedure for civil proceedings apply (including the standard of proof).

50 Time limit for applying for pecuniary penalty, compensation, and damages

- (1) An application for a pecuniary penalty may be made at any time within 2 years after the date on which the matter giving rise to the civil liability event was discovered or ought reasonably to have been discovered.
- (2) The usual time limits apply to all applications for compensation or damages.

Compare: Spam Act 2003 ss 26(2), 28(4), 29(3) (Aust)

Subpart 4—Search and seizure

51 Search warrant

- (1) An enforcement officer may apply in the manner provided in subpart 3 of Part 4 of the Search and Surveillance Act 2012 for a search warrant to search a place or thing.
- (2) *[Repealed]*
- (3) The application must be made to an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012).
- (4) The issuing officer may issue a search warrant if there are reasonable grounds for believing that—
 - (a) a civil liability event has been, or is being, committed at the place or involving the thing; or
 - (b) there is in, on, over, or under the place or thing, anything that is evidence of a civil liability event.
- (5) The provisions of Part 4 of the Search and Surveillance Act 2012 apply.
- (6) Despite subsection (5), sections 118 and 119 of the Search and Surveillance Act 2012 apply only in respect of a constable.

Section 51(1): amended, on 1 October 2012, by section 304(2) of the Search and Surveillance Act 2012 (2012 No 24).

Section 51(2): repealed, on 1 October 2012, by section 304(3) of the Search and Surveillance Act 2012 (2012 No 24).

Section 51(3): amended, on 1 October 2012, by section 304(4) of the Search and Surveillance Act 2012 (2012 No 24).

Section 51(4): amended, on 1 October 2012, by section 304(5) of the Search and Surveillance Act 2012 (2012 No 24).

Section 51(5): replaced, on 1 October 2012, by section 304(6) of the Search and Surveillance Act 2012 (2012 No 24).

Section 51(6): inserted, on 1 October 2012, by section 304(6) of the Search and Surveillance Act 2012 (2012 No 24).

52 Form and content of search warrant

[Repealed]

Section 52: repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

53 Powers conferred by search warrant*[Repealed]*

Section 53: repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

54 Person with knowledge of computer or computer network to assist access*[Repealed]*

Section 54: repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

55 Requirements when executing search warrant*[Repealed]*

Section 55: repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

56 Disposal of property or thing seized under search warrant*[Repealed]*

Section 56: repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

Part 4**Miscellaneous provisions****57 Alterations to Schedule**

- (1) The Governor-General may, by Order in Council, amend the Schedule by, with respect to the list of messages that are not electronic messages,—
- (a) adding a type of message to the list and, if required, a description of that type of message:
 - (b) omitting a type of message from the list and, if relevant, an associated description of that type of message:
 - (c) amending a type of message on the list:
 - (d) amending a description of a type of message.
- (2) An order under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Legislation Act 2019 requirements for secondary legislation made under this section

Publication	PCO must publish it on the legislation website and notify it in the <i>Gazette</i>	LA19 s 69(1)(c)
Presentation	The Minister must present it to the House of Representatives	LA19 s 114, Sch 1 cl 32(1)(a)
Disallowance	It may be disallowed by the House of Representatives	LA19 ss 115, 116

This note is not part of the Act.

Section 57(2): inserted, on 28 October 2021, by section 3 of the Secondary Legislation Act 2021 (2021 No 7).

58 Regulations

- (1) The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:
- (a) specifying circumstances from which a recipient may or may not be inferred to have consented to receiving an electronic message;
 - (b) setting out further purposes that exclude an electronic message from being a commercial electronic message under section 6;
 - (c) specifying conditions for the purposes of section 10(c);
 - (d) specifying conditions for the purposes of section 11(1)(f);
 - (e) prescribing the form of a warrant of appointment of an enforcement officer and any particulars that the warrant must contain for the purposes of section 22(2);
 - (f) prescribing the form of formal warnings and specifying the manner in which they must be issued under section 23;
 - (g) specifying the maximum penalty, which must not exceed \$2,000 for each civil liability event alleged to have occurred, that may be required under a civil infringement notice under section 26(b);
 - (h) specifying any further information that must be contained in a civil infringement notice under section 26(g);
 - (i) specifying, in accordance with section 27,—
 - (i) the grounds on which an objection to a civil infringement notice may be made; and
 - (ii) the information that must be contained in an objection; and
 - (iii) the time within which, and the manner in which, an objection must be made;
 - (j) *[Repealed]*
 - (k) *[Repealed]*
 - (l) providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.
- (2) Regulations under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

Compare: Spam Act 2003 ss 45, 47 (Aust)

Legislation Act 2019 requirements for secondary legislation made under this section

Publication	PCO must publish it on the legislation website and notify it in the <i>Gazette</i>	LA19 s 69(1)(c)
Presentation	The Minister must present it to the House of Representatives	LA19 s 114, Sch 1 cl 32(1)(a)
Disallowance	It may be disallowed by the House of Representatives	LA19 ss 115, 116

This note is not part of the Act.

Section 58(1)(j): repealed, on 1 October 2012, by section 304(7) of the Search and Surveillance Act 2012 (2012 No 24).

Section 58(1)(k): repealed, on 5 December 2013, by section 4 of the Unsolicited Electronic Messages Amendment Act 2013 (2013 No 137).

Section 58(2): inserted, on 28 October 2021, by section 3 of the Secondary Legislation Act 2021 (2021 No 7).

Schedule

Messages that are not electronic messages

s 5

1 Excluded messages

The following messages are not electronic messages for the purposes of this Act:

- (a) voice calls made using—
 - (i) a standard telephone service; or
 - (ii) voice-over Internet protocol (IP).
- (b) *[Repealed]*

Schedule clause 1(b): repealed, on 21 October 2011, by clause 3 of the Unsolicited Electronic Messages Order 2011 (SR 2011/326).

2 Definition

In this Schedule, **voice call** means, whether or not a recipient responds by way of pressing buttons on a telephone handset, a keyboard, or similar thing,—

- (a) a voice call within the ordinary meaning of that expression; or
- (b) a call that involves a recorded or synthetic voice; or
- (c) a call that is equivalent to a call covered by either paragraph (a) or (b) if a call covered by either of those paragraphs is not practical for a particular recipient with a disability (for example, because the recipient has a hearing impairment).

Notes

1 *General*

This is a consolidation of the Unsolicited Electronic Messages Act 2007 that incorporates the amendments made to the legislation so that it shows the law as at its stated date.

2 *Legal status*

A consolidation is taken to correctly state, as at its stated date, the law enacted or made by the legislation consolidated and by the amendments. This presumption applies unless the contrary is shown.

Section 78 of the Legislation Act 2019 provides that this consolidation, published as an electronic version, is an official version. A printed version of legislation that is produced directly from this official electronic version is also an official version.

3 *Editorial and format changes*

The Parliamentary Counsel Office makes editorial and format changes to consolidations using the powers under subpart 2 of Part 3 of the Legislation Act 2019. See also PCO editorial conventions for consolidations.

4 *Amendments incorporated in this consolidation*

Secondary Legislation Act 2021 (2021 No 7): section 3

Telecommunications (New Regulatory Framework) Amendment Act 2018 (2018 No 48): section 40

District Court Act 2016 (2016 No 49): section 261

Unsolicited Electronic Messages Amendment Act 2013 (2013 No 137)

Search and Surveillance Act 2012 (2012 No 24): section 304

Criminal Procedure Act 2011 (2011 No 81): section 413

Unsolicited Electronic Messages Order 2011 (SR 2011/326)