

Investigation report

Summary	
Entity	Latitude Finance Australia
Australian Company Number	008 583 588
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003</i>
Findings	<p>2,100 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p>At least 3 million contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]</p>
Date	25 July 2022

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Latitude Finance Australia's (**Latitude**) compliance with the *Spam Act 2003* (**Spam Act**) on 23 March 2022, following consumer complaints.
2. Complainants allege that Latitude sent SMS and email messages without the ability to unsubscribe, and without consent after complainants made attempts to unsubscribe.
3. The investigation focused on 2 categories of commercial electronic messages (**CEMs**) sent by Latitude to:
 - a. specific electronic addresses which were the subject of complaints to the ACMA (alleged to have been sent between 1 June 2021 and 23 March 2022), and
 - b. any electronic addresses during the following periods (**investigation periods**):
 - (i) 12 to 25 October 2021
 - (ii) 3 to 16 December 2021
 - (iii) 29 January to 11 February 2022.
4. The ACMA's findings are based on information provided by Latitude between 19 April and 13 July 2022, including:
 - a. in response to a notice dated 23 March 2022, given to it by the ACMA under section 522 of the *Telecommunications Act 1997*, and
 - b. submissions made by Latitude on 29 June and 13 July 2022.
5. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
 - a. 2,100 CEMs comprising 50 CEMs sent per day during the investigation periods, in contravention of subsection 16(1) of the Spam Act, and
 - b. at least 3 million CEMs sent between 1 June 2021 and 23 March 2022, in contravention of subsection 18(1) of the Spam Act.

6. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

Relevant legislative provisions

Consent – subsection 16(1)

7. Under subsection 16(1) of the Spam Act, a person must not send, or cause to be sent, a CEM that has an Australian link and is not a designated CEM.
8. Exceptions apply to this prohibition. Specifically, a person will not contravene subsection 16(1) of the Spam Act where:
 - a. the relevant electronic account-holder consented to the sending of the CEM (subsection 16(2))
 - b. a person did not know, or could not have ascertained, that the CEM has an Australian link (subsection 16(3)), or
 - c. a person sent the message, or caused the message to be sent, by mistake (subsection 16(4)).
9. Clause 6 of Schedule 2 to the Spam Act sets out when a person withdraws consent to receive CEMs. Paragraph 6(1)(d) provides that withdrawal of consent takes effect 5 business days after the unsubscribe request was sent where:

(d) the relevant electronic account-holder, or a user of the relevant account, sends the individual or organisation:

(i) a message to the effect that the account-holder does not want to receive any further commercial electronic messages at that electronic address from or authorised by that individual or organisation; or

(ii) a message to similar effect.

Unsubscribe function in CEMs – subsection 18(1)

10. Under subsection 18(1) of the Spam Act, CEMs which have an Australian link and are not designated CEMs, must contain a functional unsubscribe facility.
11. Exceptions apply to this prohibition. Specifically, a person will not contravene subsection 18(1) of the Spam Act where:
 - a. a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 18(2))
 - b. including an unsubscribe facility would be inconsistent with the terms of a contract or other agreement (subsection 18(3)), or
 - c. a person sent the CEM, or caused the CEM to be sent, by mistake (subsection 18(4)).

Evidential burden for exceptions

12. Under subsections 16(5) and 18(5) of the Spam Act, if an entity wishes to rely on any of the above exceptions, it bears the evidential burden in relation to that matter. This means that it needs to produce or point to evidence that suggests a reasonable possibility that the exception applies.

Reasons for findings

Issue 1: CEMs must not be sent – section 16

13. To determine Latitude's compliance with section 16 of the Spam Act, the ACMA must address the following:
 - a. Is Latitude a 'person' to which section 16 of the Spam Act applies?

- b. If so, did Latitude send or cause the investigated messages to be sent?
 - c. If so, were the messages commercial?
 - d. If so, did the CEMs have an Australian link?
 - e. If so, were the CEMs designated as exempt from the prohibition on sending unsolicited messages?
 - f. If not, did Latitude claim that the investigated messages were subject to any exceptions?
 - g. If so, did Latitude meet the evidential burden in relation to these claims?
14. If these conditions or elements of the offence are met (and the person has not raised an exception which is supported by evidence) then contraventions are established.

Is Latitude a 'person' to which section 16 of the Spam Act applies?

15. Latitude is a company registered under the *Corporations Act 2001* and is therefore a 'person' for the purposes of the Spam Act.

Did Latitude send, or cause to be sent, CEMs?

16. Latitude sent each of the investigated messages. Latitude sent 50 messages per day during the investigation periods (totalling 2,100 messages).

Were the electronic messages commercial?

17. Section 6 of the Spam Act defines a CEM as an electronic message where the purpose of the message is to offer to supply, advertise or promote goods and services, having regard to:
- a. the content of the message
 - b. the way in which the message is presented, and
 - c. the content located using links set out in the message.
18. At least one of the purposes of each investigated message was to promote the features of Latitude's credit cards or other products and services to its existing credit card holders. Examples are contained at **Attachment A**.
19. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

20. Latitude's central management and business registration was in Australia when it sent the investigated messages. Therefore, the investigated messages had an Australian link.

Were the CEMs designated?

21. Latitude stated it believed the messages consisted of merely factual information that was relevant to their customers who were the relevant electronic account holders. However, at least one of the purposes of each investigated message was to promote the features of its credit cards or other products and services to its existing credit card holders. To the extent the messages also contained factual information, the overriding purpose of each message was to advertise or promote Latitude's goods and services.
22. Accordingly, the investigated messages were not designated CEMs because:
- a. they consisted of more than factual information and were commercial in nature (clause 2 of Schedule 1 to the Spam Act), and
 - b. Latitude is not an entity of a type set out in clauses 3 or 4 of Schedule 1 to the Spam Act; i.e., a government body, registered charity, registered political party or an educational institution.

Did Latitude claim that any of the investigated messages were subject to any exceptions?

23. Subsection 16(2) of the Spam Act provides that, if Latitude had the consent of the relevant electronic account-holders, it would not have contravened subsection 16(1) of that Act.
24. Latitude sent the investigated messages to the electronic addresses more than 5 business days after account-holders made an unsubscribe attempt. Each account-holder effectively withdrew consent to receive CEMs under clause 6 of Schedule 2 to the Spam Act.
25. Latitude admitted the contraventions, noting they arose because it mischaracterised certain messages as designated CEMs, when the messages were commercial in nature.
26. Therefore, the consent exception in subsection 16(2) of the Spam Act is not satisfied.

Issue 2: CEMs must contain a functional unsubscribe facility – section 18

27. To determine Latitude's compliance with section 18 of the Spam Act, the ACMA must address the following:
 - a. Is Latitude a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did Latitude send or cause the investigated messages to be sent?
 - c. If so, were the messages commercial?
 - d. If so, did the CEMs have an Australian link?
 - e. If so, were the CEMs designated as exempt from the prohibition on sending unsolicited messages?
 - f. If not, did the CEMs include a functional unsubscribe facility?
 - g. If not, did Latitude claim that the investigated messages were subject to any exceptions?
 - h. If so, did Latitude meet the evidential burden in relation to these claims?
28. The matters from 27 a. to e. are established under issue 1 (above).

Did Latitude send, or cause to be sent, CEMs without a functional unsubscribe facility?

29. The investigated messages did not include an unsubscribe facility, in contravention of subsection 18(1) of the Spam Act. Specifically, they did not include the following information required under paragraph 18(1)(c):
 - a. a statement to the effect that the recipient may use an electronic address set out in the message to send an unsubscribe message to the individual or organisation who authorised the sending of the first-mentioned message, or
 - b. a statement to similar effect.

Did Latitude claim that any of the investigated messages were subject to any exceptions?

30. Latitude admitted that it sent more than 3 million CEMs without including a functional unsubscribe facility between 1 June 2021 and 23 March 2022, because it mischaracterised the messages as designated CEMs (as set out above). Due to this mischaracterisation, Latitude admitted it sent these messages in contravention of subsection 18(1) of the Spam Act.
31. Latitude did not provide any information or make claims to suggest that the investigated messages were subject to any exceptions.

Conclusion

32. The ACMA finds that there are reasonable grounds to believe that Latitude has contravened:
- a. subsection 16(1) of the Spam Act in relation to 2,100 CEMs sent without consent, and
 - b. subsection 18(1) of the Spam Act in relation to at least 3 million CEMs sent without a functional unsubscribe facility.




Attachment

Attachment A – examples of Latitude CEMs

Attachment B – subsection 16(1) Spam Act contravention details

Attachment A – Examples of Latitude CEMs

Example 1: Email promoting adding an additional cardholder






Share the love.

Add an additional cardholder today!

Hi [REDACTED]

Sharing your Latitude Gem Visa has never been easier. Get together with a friend or loved one and you can both enjoy the convenience of having one account with two cards. So form the ultimate shopping team today!

Here's what you need to know

 <p>Two cards, one account, one statement</p>	 <p>Long term interest free plans at thousands of retailers*</p>	 <p>6 months interest free on purchases \$250 and over</p>
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[Add additional cardholder](#)

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As with all products and services, please ensure this product is right for you. We encourage you to learn more about borrowing and credit by visiting the government's [Money Smart website](#). Our [hardship](#) page is also a valuable resource, should you be experiencing financial difficulty.

*Extended Interest Free terms may vary. Available at participating retailers to approved applicants only. Conditions, [fees and charges](#) apply.

Visa and the Visa brand are registered trademarks of Visa International.

This email was sent to [REDACTED]@latitudefinancial.com which you provided when you applied for a Latitude Gem Visa card or registered for our Online Service Centre. If this email has been sent in error, please let us know.

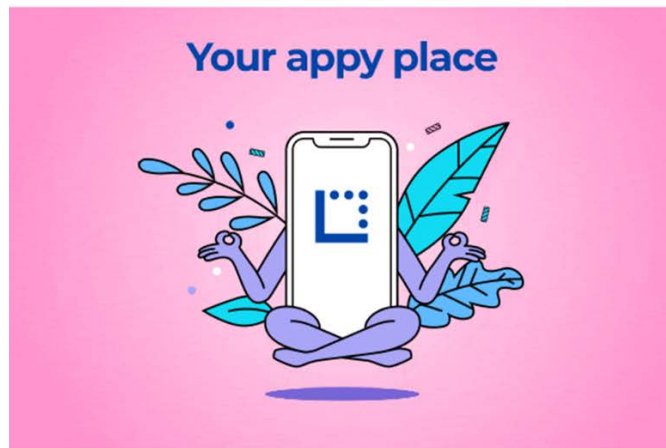
To update your email address, simply visit our [Online Service Centre](#). This email was sent from an unmonitored mailbox, so please don't reply. If you'd like to speak to someone about your account, please call us on 1300 630 977 and have your card or account number ready.

Latitude Gem Visa is a credit facility provided by Latitude Finance Australia ABN 42 008 583 588 Australian Credit Licence number 392145.

Example 2: Email promoting the Latitude App



LATITUDE
GEM VISA



Hi ,

Sorting your money admin has never been easier, thanks to the Latitude App! The app is designed to put all your credit balances, transactions and admin in one place.



Summary Balances

See how much you've paid off and how much you've got left in your Latitude accounts, with our simple summary home screen.



Payment Info

Keep an eye on the minimum amount you need to pay off, so you're always on top of your credit.



Explore More

The Explore tab keeps you up to date with insights, special offers and any other updates you need to know, when you need to know it.



Plus, more great stuff coming

We'll keep you updated on more helpful features coming to our app in the future.

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All the best,
The Latitude Gem Visa Team

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As with all products and services, please ensure this product is right for you. We encourage you to learn more about borrowing and credit by visiting the government's [Money Smart website](#). Our [hardship](#) page is also a valuable resource, should you be experiencing financial difficulty.

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This email was sent to [REDACTED]@latitudefinancial.com which you provided when you applied for a Latitude Gem Visa card or registered for our Online Service Centre. If this email has been sent in error, please let us know.

To update your email address, simply visit our [Online Service Centre](#). This email was sent from an unmonitored mailbox, so please don't reply. If you'd like to speak to someone about your account, please call us on 1300 630 977 and have your card or account number ready.

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