

## Investigation report

<b>Entity</b>	Commonwealth Bank of Australia
<b>Australian Business Number</b>	123 123 124
<b>Type of activity</b>	Commercial electronic messaging
<b>Relevant Legislation</b>	<i>Spam Act 2003</i>
<b>Findings</b>	<p><b>5,949</b> contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p><b>65,788,949</b> contraventions of subsection 18(1) [CEMs must contain a functional unsubscribe facility]</p>
<b>Date</b>	6 March 2023

### Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Commonwealth Bank of Australia's (**CBA**) compliance with the *Spam Act 2003* (**Spam Act**) on 18 October 2022 following consumer complaints.
2. CBA indicated to the ACMA that it failed to comply with the Spam Act by sending commercial electronic messages (**CEMs**) that contained an unsubscribe facility that did not work or required the recipient to log into their account to unsubscribe from further electronic marketing.
3. Complaints to the ACMA allege that CBA's unsubscribe facility required consumers to log-in to their account to opt-out of receiving further electronic marketing and/or that they were sent electronic marketing after they made attempts to unsubscribe.
4. The investigation focused on 3 categories of CEMs:
  - a. CEMs sent to any electronic address between 8 September 2021 and 18 November 2022, where the unsubscribe facility did not work,
  - b. For recipients who clicked on the CEM unsubscribe facility that did not work at paragraph 4.a., CEMs sent to those electronic addresses more than 5 business days after the unsubscribe attempt between 8 September 2021 and 30 November 2022, and
  - c. CEMs sent to any electronic addresses between 30 November 2021 and 5 August 2022, where the unsubscribe facility required the recipient to log-in to an account to unsubscribe.
5. The ACMA's findings are based on submissions provided by CBA between 5 and 21 December 2022, in response to an ACMA information request.
6. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
  - a. 5,949 CEMs sent between 27 May 2022 and 30 November 2022, in contravention of subsection 16(1) of the Spam Act (refer to **Attachment A** to this report).
  - b. 65,788,949 CEMs sent between 30 November 2021 and 11 August 2022, in contravention of subsection 18(1) of the Spam Act (refer to **Attachment B** to this report).
7. 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)**

8. 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.
9. 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 by mistake (subsection 16(4)).
10. Clause 6 of Schedule 2 to the Spam Act sets out when a person withdraws consent to receive CEMs. Relevantly, paragraph 6(1)(d) provides:

*(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.*

11. Clause 6 of Schedule 2 to the Spam Act states that withdrawal of consent takes effect at the end of the period of 5 business days beginning on the day the unsubscribe request was sent (if the unsubscribe request was sent as an electronic message).

### **Unsubscribe function in CEMs – subsection 18(1)**

12. Under subsection 18(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 unless the message includes 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 (subparagraph 18(1)(c)(i)).
13. Paragraph 18(1)(c)(g) of the Spam Act sets out that the electronic address used in the unsubscribe must comply with the conditions specified in the Spam Regulations. Paragraph 7(6) of the Spam Regulations, in turn, sets out that:

*The use of the electronic address must not require the recipient of the commercial electronic message to:*

*(a) provide personal information (within the meaning of the Privacy Act 1988) other than the electronic address to which the commercial electronic message was sent; or*

*(b) log in to an existing account, or create a new account, with:*

*(i) the person who sent the commercial electronic message or caused the message to be sent; or*

*(ii) the individual or organisation who authorised the sending of the commercial electronic message.*

14. Subsection 18(1) does not apply if:
  - 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***

15. Under subsection 16(5) of the Spam Act, if an entity wishes to rely on any of the 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.

## **Reason for findings**

### **Issue 1: CEMs must not be sent**

16. To determine CBA's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
  - a. Is CBA a 'person' to which section 16 of the Spam Act applies?
  - b. If so, did CBA 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 (designated messages are exempt from certain Spam Act obligations)?
  - f. If not, did CBA claim that the CEMs were subject to any exceptions?
  - g. If so, did CBA meet the evidential burden in relation to these claims?
17. 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 CBA a 'person' to which section 16 of the Spam Act applies?***

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

### ***Did CBA send, or cause to be sent, electronic messages?***

19. CBA sent each of the investigated messages. CBA admitted it sent the messages on each date during the periods investigated.

### ***Were the electronic messages commercial?***

20. 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.
21. CBA stated that the purpose of each investigated message was to promote or offer CBA's products and services, such as its personal and home loans, credit card loyalty program and newsletters with a commercial purpose. Examples of indicative messages are at **Attachment C**.
22. Therefore, the investigated messages are CEMs.

### ***Did the CEMs have an Australian link?***

23. CBA'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?***

24. The investigated messages were not designated CEMs for the purposes of paragraph 16(1)(b) of the Spam Act because:
- a. they consisted of more than factual information and were commercial in nature, and
  - b. CBA 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, political party or educational institution.

### ***Did CBA claim that any of the CEMs were subject to any exceptions?***

25. CBA did not provide evidence or make claims to suggest that the investigated messages were subject to any exceptions in the Spam Act.

### ***Respondent submissions for Issue 1***

26. CBA provided information that it sent 5,949 investigated messages to electronic addresses more than 5 business days after the account-holders made an unsubscribe attempt. Therefore, each account-holder effectively withdrew consent to receive CEMs under clause 6 of Schedule 2 to the Spam Act.
27. CBA acknowledged the electronic address account-holders attempted to unsubscribe, yet it continued sending CEMs more than 5 days after the unsubscribe requests. CBA claimed this was caused by a technical issue where customers attempted to unsubscribe using an unsubscribe facility in its email CEMs that did not work. Details of these contraventions are set out in **Attachment A**.

### ***Issue 1: Conclusion***

28. As the elements to establish contraventions are met, the ACMA is of the view that CBA has contravened section 16(1) of the Spam Act on 5,949 occasions between 27 May 2022 and 30 November 2022.

### ***Issue 2: CEMs must contain a functional unsubscribe facility***

29. To determine CBA's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is CBA a 'person' to which section 18 of the Spam Act applies?
  - b. If so, did CBA 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 CBA claim that the CEMs were subject to any exceptions?
  - h. If so, did CBA meet the evidential burden in relation to these claims?
30. CBA made admissions to the matters from paragraph 29 a. to e. for all investigated messages. These were established above for a subset of the investigated messages under Issue 1 (above) and are relevant to Issue 2.

### ***Did the CEMs include a functional unsubscribe facility?***

31. CBA sent **65,788,949** investigated messages without a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act, consisting of:

- a. 4,015,407 email CEMs sent to electronic account-holders with an unsubscribe link that did not work, and
- b. 61,773,542 email CEMs where the unsubscribe facility required the recipient to log-in to an existing account, which does not satisfy paragraph 18(1)(g) of the Spam Act.

32. Details of these contraventions are set out in **Attachments B** of this report.

***Did CBA claim that any of the CEMs were subject to any exceptions?***

- 33. CBA admitted that the investigated messages were sent without including a functional unsubscribe facility due to human error or oversight.
- 34. CBA did not provide evidence or make claims to suggest that the investigated messages were subject to any exceptions in the Spam Act.

***Issue 2: Conclusion***

- 35. As the elements to establish contraventions are met, the ACMA is of the view that CBA has contravened section 18(1) of the Spam Act on 65,788,949 occasions between 30 November 2021 and 11 August 2022.

**Conclusion**

- 36. The ACMA finds that there are reasonable grounds to believe that CBA has contravened:
  - a. subsection 16(1) of the Spam Act in relation to **5,949** CEMS sent after consent had been withdrawn from 27 May to 30 November 2022, and
  - b. subsection 18(1) of the Spam Act in relation to **65,788,949** CEMs sent without a functional unsubscribe facility from 30 November 2021 to 11 August 2022.

Details of the investigated messages are set out in **Attachment A and B**.

**Attachments**



Attachment A – Section 16 Spam Act contravention details

Attachment B – Section 18 Spam Act contravention details

Attachment C – Examples of commercial electronic messages sent

**Attachment C – Examples of commercial electronic messages sent**

*Email example 1: Get an extra 20% cash back into your account*




██████████ member    Points balance: ██████████

Your points balance value:

★ Myer & Flight Centre value ██████████    Gift Card value \$ ██████████

💰 Cash back value \$ ██████████

Balance as at ██████████



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The banner features an illustration of a blue envelope with colorful banknotes (10, 20, 50, 100) spilling out. To the left, there are four credit cards (Visa, Mastercard, American Express) arranged in a 2x2 grid.

██████████

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**9.90%** P.A.  
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(Based on a \$30,000  
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\* The comparison rate is based on a \$30,000 unsecured loan over 5 years. WARNING: This comparison rate applies only to the example or examples given. Different amounts and terms will result in different comparison rates. Costs such as redraw fees or early repayment fees, and cost savings such as fee waivers, are not included in the comparison rate but may influence the cost of the loan.

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