

## Investigation report

Summary	
Entity	DOORDASH Technologies Australia Pty Ltd
Australian Company Number	634 446 030
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003 (Spam Act)</i>
Findings	566,547 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]  Approximately 515,651 contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]
Date	2 June 2023

### Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into DOORDASH TECHNOLOGIES AUSTRALIA PTY LTD'S (**DOORDASH**) compliance with the Spam Act on 13 October 2022 following receipt of consumer complaints.
2. Complainants allege that DOORDASH sent SMS and email messages without consent or the facility for recipients to unsubscribe, including to both consumers of DOORDASH's services, and to prospective independent contractors (Prospective Dashers). Complainants expressed frustration at the absence of any unsubscribe facility in messages sent by DOORDASH, making it difficult for them to unsubscribe.
3. The investigation originally focused on 2 categories of commercial electronic messages (**CEMs**) sent to:
  - a. specific electronic addresses which were the subject of complaints to the ACMA (alleged to have been sent between 1 February and 13 October 2022 and
  - b. any electronic addresses during the following periods (investigation periods):
    - i. 4 to 10 April 2022 and 2 to 9 May 2022 to consumers, and
    - ii. 1 March to 13 October 2022 to Prospective Dashers.
4. DOORDASH provided further information beyond the original assessment period on 9 December 2022. This related to email CEMs sent to consumers from 4 April to 7 December 2022 more than 5 business days after consumers submitted an unsubscribe request during the period 1 April to 31 May 2022.
5. The ACMA's findings are based on information obtained from DOORDASH, including in response to a notice dated 13 October 2022 given to it by the ACMA under section 522 of the *Telecommunications Act 1997 (Notice)*.
6. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
  - a. 566,547 CEMs sent between 4 April and 7 December 2022 in contravention of subsection 16(1), and

- b. approximately 515,651 CEMs sent between 1 March and 13 October 2022 in contravention of subsection 18(1).
7. The reasons for the ACMA's preliminary findings, including the key elements which establish the contraventions, are set out below. [REDACTED].
8. For clarity, 'investigated messages' does not include any messages which were excluded from the ACMA's findings on the basis that they were not CEMs and refers only to the messages which were found to contravene one or more provisions of the Spam Act.

### **Submissions by DOORDASH**

9. DOORDASH provided a submission on 6 April 2023 in response to the ACMA's preliminary findings on this matter. This submission:
  - a. sought further clarity about the ACMA's findings in relation to messages determined by the ACMA to be CEMs in contrast to those determined to be designated CEMs
  - b. sought to exclude some CEMs from findings made under subsection 16(1) which may not have had a commercial purpose
  - c. requested reassessment of the findings made under s18(1) in relation to 12 CEMs sent to specific account-holders who made complaints to the ACMA
  - d. highlighted claimed remediation actions taken by DOORDASH to address the root causes of some of the contraventions, and other mitigating factors it felt were relevant to the seriousness of the contraventions.

### **Relevant legislative provisions**

#### ***Consent – subsection 16(1)***

10. 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.
11. 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)).
12. 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.*

Withdrawal of consent takes effect 5 business days after the unsubscribe request was sent.

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

13. Under subsection 18(1) of the Spam Act, CEMs which have an Australian link must contain a functional unsubscribe facility.

14. Subsection 18(1) does not apply if:
- the message is a 'designated commercial electronic message' (paragraph 18(1)(b))
  - a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 18(2))
  - including an unsubscribe facility would be inconsistent with the terms of a contract or other agreement (subsection 18(3)), or
  - a person sent the CEM, or caused the CEM to be sent, by mistake (subsection 18(4)).

***Evidential burden for exceptions***

15. Under subsections 16(5), 17(4) 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.

**Reason for findings**

**Issue 1: CEMs must not be sent – section 16**

16. To determine DOORDASH's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
- Is DOORDASH a 'person' to which section 16 of the Spam Act applies?
  - If so, did DOORDASH send or cause the investigated messages to be sent?
  - If so, were the messages commercial?
  - If so, did the CEMs have an Australian link?
  - If so, were the CEMs designated as exempt from the prohibition on sending unsolicited messages?
  - If not, did DOORDASH claim that the CEMs were subject to any exceptions?
  - If so, did DOORDASH 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 DOORDASH a 'person' to which section 16 of the Spam Act applies?***

18. DOORDASH is a company registered under the *Corporations Act 2001* and is therefore a 'person'. DOORDASH is the Australian subsidiary of the parent company DoorDash Inc., based in the United States of America.

***Did DOORDASH send, or cause to be sent, the investigated messages?***

19. DOORDASH has stated it generally does not outsource the sending of electronic messages to any third party. The ACMA obtained information from DOORDASH that it sent the 566,547 investigated messages. The ACMA is satisfied that DOORDASH sent the investigated messages.

***Were the messages commercial?***

20. Section 6 of the Spam Act defines a CEM as an electronic message where, having regard to:
- the content of the message
  - the way in which the message is presented, and
  - the content located using links set out in the message.

21. The ACMA is satisfied that the investigated messages are CEMs based on evidence obtained from DOORDASH categorising the messages sent as:
  - a. Store Promotions
  - b. Customer Research
  - c. News + Updates
  - d. Special Offers
  - e. Recommendations
  - f. DoorDash for Work – Special Offers
22. The ACMA is further satisfied about the commercial nature of the messages based upon:
  - a. the messages provided by DOORDASH in its submission of 6 April 2023, and
  - b. review of the content of messages reported to the ACMA by consumers, which shows **promotional content contained in a banner in the footer of each message.**
23. The presence of the banner noted above, which promotes employment opportunities with DOORDASH and a paid membership program, render the messages commercial in nature, regardless of any other purpose.

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

24. DOORDASH's central management and business registration was in Australia when it sent the investigated messages to Australian account-holders. Therefore, the investigated messages had an Australian link.

***Were the CEMs designated?***

25. The ACMA is satisfied the investigated messages were not designated CEMs because:
  - a. DOORDASH 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.
  - b. DOORDASH provided evidence categorising the messages sent more than 5 business days after an unsubscribe request as CEMs.
26. The ACMA notes that DOORDASH claimed a proportion of the messages were designated commercial electronic messages. The ACMA excluded messages from its findings that were categorised as:
  - a. Notifications + Reminders
  - b. DoorDash for Work – Notifications + Reminders
  - c. Account Messages
  - d. Order Confirmation Message
  - e. Support - Transactional

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

27. DOORDASH did not claim that the investigated messages were subject to any exceptions.

***Conclusion – Issue 1***

28. As the above elements are met, DOORDASH has contravened section 16(1) of the Spam Act on 566,547 occasions between 4 April 2022 and 7 December 2022.

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

29. To determine DOORDASH's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is DOORDASH a 'person' to which section 18 of the Spam Act applies?
  - b. If so, did DOORDASH 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 DOORDASH claim that the CEMs were subject to any exceptions?
  - h. If so, did DOORDASH meet the evidential burden in relation to these claims?
30. The matters from 29 a, b, and d are established under issue 1 (above).

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

31. Section 6 of the Spam Act defines a CEM as an electronic message where, 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.
32. The purpose of the 515,651 investigated messages sent to Prospective Dashers was to offer a business opportunity to earn money as an independent contractor (Dasher) by completing a sign-up process. The ACMA found that the investigated messages contained language that:
- a. urged a person to complete the process of becoming a Dasher
  - b. offered an incentive to complete the application process
  - c. promoted the possible earnings and benefits for working as a Dasher.
33. The ACMA considers the investigated messages to be CEMs as defined under subsection 6(1)(j) as the messages provided an offer of a business opportunity to Prospective Dashers. Refer to **Attachment B** for examples of the investigated messages.

### ***Were the CEMs designated?***

34. 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. DOORDASH 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 DOORDASH send, or cause to be sent, CEMs without a functional unsubscribe facility?***

35. DOORDASH sent approximately 515,651 SMS CEMs without a functional unsubscribe facility between 22 April 2022 and 13 October 2022. These messages were sent to Prospective Dashers who had commenced the process for registration as a delivery contractor for DOORDASH.
36. The 515,651 CEMs comprise:
- a. 12 CEMs sent to electronic account holders that were the subject of complaints to the ACMA, between 24 April 2022 to 25 May 2022.

- b. 515,639\* CEMs sent to electronic holders between 1 March 2022 to 13 October 2022.

*\* Note: This figure comprises of 511,146 contraventions calculated from the daily average number of messages sent on each working day in the assessment period, based on the average figures provided by DOORDASH. The average daily figures were adjusted to include only the proportion of total messages sent which were assessed by the ACMA as commercial in nature (55%). These messages were referred to by DOORDASH as 'Trigger Campaign' messages.*

*The remaining 4,493 contraventions have been found based on the actual number of CEMs sent between 2 March to 7 October 2022 as per evidence provided by DOORDASH. These messages were referred to by DOORDASH as 'Blast Campaign' messages.*

37. These CEMs 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) of the Spam Act:
- 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 DOORDASH claim that any of the investigated messages were subject to any exceptions?**

39. DOORDASH did not claim that the investigated messages were subject to any exceptions.

#### **Conclusion - Issue 2**

40. As the above elements are met, DOORDASH has contravened section 18(1) of the Spam Act on approximately 515,651 occasions between 1 March and 13 October 2022.

#### **Conclusion**

41. The ACMA finds that there are reasonable grounds to believe that DOORDASH has contravened:
- a. subsection 16(1) of the Spam Act for **566,547** CEMs it sent without consent between 1 April and 7 December 2022
  - b. subsection 18(1) of the Spam Act for approximately **515,651** CEMs it sent between 1 March and 13 October 2022 without a functional unsubscribe facility.

## **Attachments**

**Attachment B** - Indicative examples of investigated messages

## Attachment B – Indicative examples

### Indicative examples of investigated messages sent to Prospective Dashers

- 🤖 Only a couple of steps to go to start earning `{{#catalog "avghourlyearnings" dx_initial_submarket_id_string as |avgearnings|}}`an average of `${{avgearnings.pay_per_hr_avg}}` per hour in `{{avgearnings.submarket}}` this week. `{{else}}` your way! `{{/catalog}}` ① Finish Your Profile ② Complete Your FREE Background Check ③ Start Dashing! Just tap this link to continue your signup and you will be Dashing in no time: → [https://www.doordash.com/dasher/application/{{unique\\_link}}](https://www.doordash.com/dasher/application/{{unique_link}}) Need Some Help? → <https://drd.sh/xkAFG9KwcHTVP5jR/>
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**Indicative examples of investigated messages sent to consumers**

**Knock knock**  
**Here's 25% off**

Don't you miss the sound of a delicious meal arriving at your door? Bring those good times back with the code: **GUESSWHOSBACK** to save 25% (up to \$5) on your next delivery or pickup.

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Well no, but with 40% off burger joints TODAY ONLY, it's time to throw out all the "should /shouldn't" questions and dig into your favourites.

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**DOORDASH**

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