



Infringement Notice

Spam Act 2003

I, Tanya Farrell, an authorised person for the purposes of clause 9 of Schedule 3 to the *Spam Act 2003* (**Spam Act**), having reasonable grounds to believe that Kmart Australia Limited ACN 004 700 485 (**Kmart**) has committed one or more contraventions of a particular civil penalty provision,

HEREBY give an infringement notice (**the Notice**) under subclause 3(1) of Schedule 3 to the Spam Act to:

Kmart Australia Limited

at

690 – 764 Springvale Road, Mulgrave VIC 3170

Details of Alleged Civil Contraventions

It is alleged that Kmart contravened subsection 16(1) of the Spam Act by sending or causing to be sent commercial electronic messages (**CEMs**) that had an Australian link and which were not designated CEMs, without the consent of the relevant electronic account holder. Schedule 1 to this Notice sets out brief details of the alleged civil contraventions.

Amount of Penalty

The total pecuniary penalty (**the penalty**) for the alleged civil contraventions is \$1,303,500. The penalty is calculated in accordance with item 2 of the table under subclause 5(1) of Schedule 3 to the Spam Act, as set out in paragraph 4.1 of Schedule 1 to this Notice.

Payment of Penalty

The penalty should be paid to the Australian Communications and Media Authority (ACMA), on behalf of the Commonwealth, into the following account within 28 days of receipt of the Notice. Please include the narration “Kmart–UCES” with your payment:

ABN:
Financial Institution:
Branch:
BSB:
Account No:
Account Name:



If the penalty is paid

If the penalty specified in the Notice is paid to the ACMA, on behalf of the Commonwealth, within 28 days after the Notice is given to Kmart, the matters outlined in this Notice will not be dealt with by the Federal Court of Australia and any liability for the alleged contraventions that are the subject of this Notice is discharged.

If the penalty is not paid

If you do not pay the penalty by **24 October 2023**, the ACMA may take action for the alleged contraventions.

That action may include the institution of civil penalty proceedings in the Federal Court. The penalties that the Court can impose are potentially significantly higher than that in an Infringement Notice (see section 570 of the *Telecommunications Act 1997*).

Withdrawal of the infringement notice

The ACMA may withdraw this Notice. It may do so of its own volition or upon your request. To be effective the withdrawal must occur within 28 days after the Notice was given.

If you wish to apply for withdrawal of the Notice, you should write as soon as practicable setting out the basis/reasons for the request. Your application should be addressed to me in the first instance.

If the Notice is withdrawn after the penalty is paid, the penalty will be refunded.

DATE: 26 September 2023.

A black rectangular redaction box covering the signature of Tanya Farrell.

Tanya Farrell
A/g Executive Manager
Unsolicited Communications and Scams Branch
Australian Communications and Media Authority

SCHEDULE 1

In accordance with Clause 4 of Schedule 3 to the Spam Act, brief details of each of the alleged civil contraventions are set out below.

1. Background

- 1.1. Kmart is a registered company under the *Corporations Act 2001*, with a registered office at 690 – 764 Springvale Road, Mulgrave VIC 3170.
- 1.2. On 4 May 2023, the ACMA commenced an investigation into whether Kmart had contravened the Spam Act.
- 1.3. Prior to commencing the investigation, the ACMA had received complaints from consumers alleging that Kmart sent marketing messages without consent and/or after consumers had made attempts to unsubscribe.

2. Matters giving rise to the Infringement Notice

- 2.1. During the period 8 July 2022 and 5 May 2023 (investigation period) Kmart sent email messages without consent and/or after consumers had made attempts to unsubscribe.
- 2.2. At least one of the purposes of each investigated message was to advertise or promote Kmart's products and services such as homewares, clothing and toys. Therefore, the messages described at paragraph 2.1 were commercial electronic messages (CEMs), as defined in section 6 of the Spam Act.
- 2.3. The CEMs were not 'designated' commercial electronic messages as described in Schedule 1 to the Spam Act.
- 2.4. The CEMs had an Australian link as defined in section 7 of the Spam Act. They were sent by Kmart, an organisation whose central management and control is in Australia.
- 2.5. The CEMs were sent after the relevant electronic account-holders had withdrawn consent in accordance with clause 6 of Schedule 2 to the Spam Act.

3. Relevant civil penalty provisions of the Spam Act

- 3.1. Section 16(1) of the Spam Act provides that a person must not send, or cause to be sent, a commercial electronic message that has an Australian link and is not a designated message.
- 3.2. Section 16(2) of the Spam Act provides that subsection (1) does not apply if the relevant electronic account-holder consented to the sending of the message.
- 3.3. For the purposes of the Spam Act, consent is defined in Schedule 2 of that Act.
- 3.4. The CEMs sent by Kmart to electronic addresses during the relevant period were sent after the relevant electronic account-holders had withdrawn consent in accordance with subclause 6(1) of Schedule 2 of the Spam Act.
- 3.5. The ACMA has reasonable grounds to believe that Kmart contravened subsection 16(1) of the Spam Act during the relevant periods, as set out in this Infringement Notice.
- 3.6. Subsection 16(1) of the Spam Act is a civil penalty provision (see subsection 16(11)).

4. The amount of the penalty

4.1. The total penalty specified in this Notice is \$1,303,500, calculated in accordance with the table in clause 5(1) of Schedule 3 to the Spam Act, as shown in the table below.

Penalties for contraventions of subsections 16(1) of the Spam Act

Date of contravention	Number of contraventions of subsection 16(1)	Penalty units¹	Penalty imposed
1/5/2023	50	1000	\$275,000
2/5/2023	50	1000	\$275,000
3/5/2023	50	1000	\$275,000
4/5/2023	50	1000	\$275,000
5/5/2023	37	740	\$203,500
Total	237	4,740	\$1,303,500

¹ At the time of the alleged contraventions, the amount of a penalty unit was \$275, as set by section 4AA of the *Crimes Act 1914*.