

**Enforceable Undertaking given to the Australian Communications and Media
Authority by Wine Collective Holdings Pty Ltd ACN 003 409 603 under
section 38 of the *Spam Act 2003***

1 Definitions

In this undertaking:

- (a) **ACMA** means the Australian Communications and Media Authority.
- (b) **board** means the business' board of directors.
- (c) **business** means Wine Collective Holdings Pty Ltd ACN 003 409 603.
- (d) **CEM** means commercial electronic message.
- (e) **CEM complaint** means a complaint received by the business involving, alleging or inferring non-compliance with the Spam Act and that relates to a CEM sent, or alleged to have been sent, by the business and includes complaints notified to the business by the ACMA.
- (f) **commencement date** has the meaning given in paragraph 2.1.
- (g) **compliance manager** means the person appointed under clause 6(a).
- (h) **compliance manager's report** means the report referred to in paragraph 6(a)(ii).
- (i) **commercial electronic message** means the same as in the Spam Act.
- (j) **current consent** means consent (within the meaning of Schedule 2 of the Spam Act) that is not subject to a withdrawal (within the meaning of section 6 of Schedule 2 of the Spam Act) that has taken effect (in accordance with paragraphs 6(e), (f) and (g) of the Spam Act).
- (k) **event** means the matters in paragraphs 3.1(a) and (b).
- (l) **first report** means the report referred to in paragraph 5(c).
- (m) **independent consultant** means a qualified and independent consultant with knowledge of the Spam Act and expertise relating to computers, automated systems, databases, data extraction and data security.
- (n) **mail out** means delivery of CEMs by email.
- (o) **marketing platform** has the meaning given by paragraph 3.1(a).
- (p) **relevant day** means 10 January 2023.
- (q) **report** has the meaning given by paragraph 5(b).
- (r) **review** has the meaning given by paragraph 5(a).
- (s) **Senior Executive Service** means the Senior Executive Service constituted by section 35(1) of the *Public Service Act 1999* (Cth).
- (t) **Spam Act** means *Spam Act 2003* (Cth).
- (u) **staff** means employee/s or contractors of the business who are involved in operating the marketing platform.
- (v) **subscriber** has the meaning given by paragraph 3.1(a).
- (w) **systemic problem** means a systemic or recurring issue or circumstance that impairs the business' compliance with the Spam Act.
- (x) **undertaking** means this undertaking.
- (y) **unsubscribe** has the meaning given by paragraph 3.1(a).

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2 Commencement and end of undertaking

2.1 Commencement

This undertaking commences on the day (**commencement date**) when:

- (a) it has been executed by the business; and
- (b) so executed, it has been accepted by the ACMA; and
- (c) the business has received written notification of the ACMA's acceptance.

2.2 End

This undertaking ends:

- (a) at midnight at the start of the second anniversary of the commencement date;
or
- (b) when it is withdrawn by the business, with the approval of the ACMA, pursuant to section 38 of the Spam Act –
whichever is earlier.

3 Background

3.1 Chronology

- (a) The business operates a computer marketing database (**marketing platform**) including persons who have consented to receive CEMs from the business (**subscribers**) and persons who have consented but subsequently withdrawn that consent (**unsubscribers**).
- (b) On 10 January 2023, staff set up a mail out, intended for subscribers only. Inadvertently, staff issued a mistaken instruction to the marketing platform, with the result that unsubscribers were included in the mail out.
- (c) On 10 January 2023, the business became aware of the mistake described in paragraph 3.1(b).
- (d) On 23 January 2023, the business apologised by email to all unsubscribers who had received a CEM as a result of the mistake.
- (e) Before 13 February 2023, the business reviewed and upgraded its processes for sending CEMs.
- (f) On 13 February 2023, the ACMA notified the business that the ACMA had received complaints about CEMs sent by the business.
- (g) On 22 February 2023, the business made voluntary disclosure of the matters in paragraphs 3.1(a) to (e) above.
- (h) On 3 April 2023, the ACMA requested further information about the event. On 6 April 2023, the business voluntarily complied with that request.

3.2 ACMA compliance notification

On 29 June 2023, the ACMA notified the business that the ACMA has reasonable grounds to believe that, on the relevant day, the business sent, or caused to be sent, commercial electronic messages without consent, in contravention of subsection 16(1) of the Spam Act.

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3.3 *Business' acknowledgement*

The business acknowledges the ACMA's findings, and in response to the ACMA's concerns regarding the business' compliance with the Spam Act, offers this Undertaking to the ACMA aimed at addressing future compliance with the Spam Act.

3.4 *ACMA acknowledgement*

The ACMA acknowledges that:

- (a) The known non-compliance arose from a single event and occurred on a single day;
- (b) the event was inadvertent;
- (c) following the event, the business acted promptly and pro-actively to address it and its consequences; and
- (d) the business has fully cooperated with the ACMA in relation to its enquiries about the event.

4 **Undertaking**

The business undertakes to take the following specified actions to ensure the business complies with the Spam Act and does not contravene the Spam Act in the future.

5 **Independent Consultant**

5.1 *Review and report*

- (a) **review** means a review of the business' current practices, processes, policies and training in relation to the marketing platform and its use, and identifying any deficiencies and/or improvements to ensure that non-compliance with section 16 of the Spam Act does not recur.
- (b) **report** means a report outlining the results of a review and making recommendations as to:
 - (i) addressing non-compliance with section 16 of the Spam Act;
 - (ii) avoiding mistakes in the use of the marketing platform that may result in failure to achieve the compliance outcome;
 - (iii) ensuring that staff who operate the marketing platform are and remain adequately trained to do so;
 - (iv) ensuring that the business takes reasonable steps to address any identified systemic problems in connection with the operation of the marketing platform.
- (c) The business undertakes to appoint an independent consultant to conduct a review and produce a report (**first report**).
- (d) The business undertakes to seek written approval from the ACMA for the appointment of the proposed independent consultant within 20 business days after the commencement date. If the ACMA does not approve the choice of independent consultant, the business will repeat this process until it has the ACMA's written approval.

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- (e) The business undertakes to appoint the independent consultant, and to provide written notification of that appointment to the ACMA, within 10 business days after the ACMA has given its written approval.
- (f) The independent consultant will provide the first report to the business' board, and at the same time to the ACMA, within three months of their appointment.
- (g) The ACMA may, at its discretion, require the independent consultant to conduct a subsequent review of the business' procedures, policies, training and systems relating to its Spam Act compliance, if it deems necessary, and provide a second report to the business' board and at the same time the ACMA.
- (h) Subject to the ACMA's written agreement, the business may remove the independent consultant at any time and replace the independent consultant with a new independent consultant approved by ACMA. If the ACMA does not approve the choice of independent consultant, the business will repeat this process until it has the ACMA's approval.

5.2 Implementation plan & reporting

- (a) Within 40 business days of receiving a report, the business will:
 - (i) develop an implementation plan setting out the steps the business has taken, or will take, to implement all recommendations made by the independent consultant in the report (unless the ACMA specifically agrees that any recommendation need not be implemented) including timeframes; and
 - (ii) provide a copy of the board-approved implementation plan to the ACMA.
- (b) The business undertakes to comply with the approved implementation plan in accordance with the timeframes specified in the plan.
- (c) The implementation plan may be modified at any time subject to the ACMA's written approval.
- (d) For the duration of the Undertaking, every 6 months from the date the board-approved implementation plan is provided to the ACMA, the business will provide to the ACMA a board-approved compliance report that covers the previous 6 months that includes:
 - (i) the status of actions it will take under the implementation plan;
 - (ii) a report of all de-identified CEM complaints received by the business, including the date of the complaint and a unique identifier for each complaint;
 - (iii) action the business has taken on each CEM complaint.
- (e) The business will report to the ACMA all identified instances of non-compliance with the Spam Act within 10 business days of identifying an instance of non-compliance, including the cause of any identified compliance issues and remedial action taken or proposed to be taken and a timeframe.

6 Compliance manager's review

- (a) Within 20 business days after the commencement date, the board will appoint a

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senior member of staff, with appropriate skills and experience to conduct compliance reviews as compliance manager to:

- (i) review the business' current procedures, policies, training and systems relating to its compliance with the Spam Act and identify any deficiencies and/or improvements to ensure that:
 - (A) all CEMs are sent, or caused to be sent, by the business with the consent of the relevant account holder;
 - (B) the business receives, records and actions all unsubscribe requests within the periods specified in Schedule 2 to the Spam Act for when withdrawal of consent takes effect;
 - (C) all CEMs sent, or caused to be sent, by the business contain the information required by paragraphs 17(1)(a) and (b) of the Spam Act;
 - (D) all CEMs sent, or caused to be sent, by the business contain a functional unsubscribe facility as required by subsection 18(1) of the Spam Act; and
 - (E) the business classifies and analyses its records of CEM complaints to identify systemic problems;
- (ii) produce a report (**compliance manager's report**) making recommendations as to:
 - (A) ensuring the business' systems receive, record and action unsubscribe requests;
 - (B) improvements to policies and procedures that ensure compliance with the Spam Act, including but not limited to:
 - quality assurance procedures for ensuring the ongoing integrity and functionality of relevant systems;
 - procedures for ensuring business' personnel comply with policies and procedures;
 - procedures for ensuring continued compliance when process or system changes are implemented;
 - (C) ongoing training for the business' staff on Spam Act compliance
 - (D) ongoing monitoring of Spam Act compliance measures; and
 - (E) ensuring the business takes reasonable steps to address any identified systemic problems.
- (b) The business will ensure that the compliance manager has access to external legal advice, if and when they consider it desirable in connection with their activities under paragraph 6(a).
- (c) Within 120 days after their appointment, the compliance manager will provide the compliance manager's report to the board.
- (d) Within 30 business days after receiving the compliance manager's report:
 - (i) the board will consider it and determine (and minute in writing) any actions to be taken in response to it; and

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- (ii) the business will give the ACMA:
 - (A) the compliance manager's report; and
 - (B) the board's minutes.

7 Training

- (a) Within 30 business days of the commencement date, the business undertakes to train all personnel that may be, or are currently responsible for creating or sending CEMs, and their direct line manager, to ensure compliance with the Spam Act.
- (b) The business undertakes to provide training similar to that described in paragraph 7(a), for all new personnel that may be, or are currently responsible for creating or sending CEMs within 6 weeks of their commencement in such roles.
- (c) The business undertakes to repeat the training, every 12 months after the business has undertaken the training referred to in paragraph 7(a) for the term of this undertaking.
- (d) The business undertakes to provide the ACMA with written notice when it has undertaken training referred to in paragraphs 7(a) and 7(b).

8 Record-keeping

The business undertakes to:

- (a) keep accurate records of the express and/or inferred consent given by electronic account-holders to the sending of CEMs by the business to those account-holders, including any terms and conditions associated with that consent;
- (b) keep accurate records of withdrawal of consent requests;
- (c) keep accurate records of CEM complaints; and
- (d) provide copies of records referred to in this paragraph 8 to the ACMA upon request by the ACMA.

9 Variation

This undertaking may be varied by the business, with the consent of the ACMA, pursuant to subsection 38(2) of the Spam Act.

10 ACMA notices

Any notice or approval required or permitted to be given by the ACMA under this undertaking must be in writing and may be given by any ACMA Authority member or by any ACMA staff member who is a member of the Senior Executive Service.

11 Acknowledgement

This undertaking is offered by the business on the understanding that the ACMA may publish this undertaking.

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Signed for and on behalf of
Wine Collective Holdings Pty Ltd ACN 003 409 603
by its authorised representative

Mark Fogarty
Director

12 September 2023

Name & title

Signature

Date

Signed for and on behalf of the
Australian Communications and Media Authority
by its authorised representative

Tanya Farrell
Acting Executive Manager
Consumer, Consent and
Numbers Branch

15 September 2023

Name & title

Signature

Date