

**ENFORCEABLE UNDERTAKING  
GIVEN TO THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY  
BY KMART AUSTRALIA LIMITED (ACN 004 700 485)  
UNDER SECTION 38 OF THE SPAM ACT 2003**

**1. Definitions**

- 1.1. In this Undertaking:
- 1.1.1. **ACMA** means the Australian Communications and Media Authority.
  - 1.1.2. **Assessment Report A** means the report produced by the independent consultant referred to in clause 5.1.2
  - 1.1.3. **Assessment Report B** means the report produced by the independent consultant referred to in clause 5.5.
  - 1.1.4. **Board** means Kmart Directors or equivalent management body.
  - 1.1.5. **CEM** means commercial electronic message and has the same meaning as defined in section 6 of the *Spam Act 2003*.
  - 1.1.6. **CEM complaint** means a complaint received by Kmart through an applicable complaint channel that relates to a CEM sent, or alleged to have been sent, by Kmart and includes complaints that the ACMA notified to Kmart.
  - 1.1.7. **Commencement date** has the meaning given in clause 2.1.
  - 1.1.8. **Compliance Report A** means the report produced by Kmart referred to in clause 6.4 and 6.5.1.
  - 1.1.9. **Compliance Report B** means the report produced by Kmart referred to in clause 6.4 and 6.5.2.
  - 1.1.10. **independent consultant** means a qualified and independent consultant with expertise in audits relating to risk and compliance, processes, procedures, systems, governance and controls.
  - 1.1.11. **Kmart** means Kmart Australia Limited (ACN 004 700 485).
  - 1.1.12. **relevant period** means 1 July 2022 to 4 May 2023.
  - 1.1.13. **Spam Act** means *Spam Act 2003* (Cth).

**2. Term of the Undertaking**

- 2.1. This Undertaking commences when:
- 2.1.1. it has been executed by Kmart; and
  - 2.1.2. once executed, it has been accepted by the ACMA and written notification of that acceptance has been provided to Kmart (**Commencement date**).
- 2.2. This Undertaking continues until 17 October 2025 or until it is withdrawn by Kmart, with the approval of the ACMA, pursuant to section 38 of the Spam Act, whichever is earlier.
- 2.3. This Undertaking may be varied by Kmart, with the consent of the ACMA, pursuant to subsection 38(2) of the Spam Act.
- 2.4. 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.

### 3. Background

- 3.1. On 4 May 2023, the ACMA commenced an investigation into Kmart's compliance with the Spam Act during the relevant period.
- 3.2. On 11 September 2023, the ACMA notified Kmart that the ACMA had found that, during the relevant period, Kmart sent, or caused to be sent, CEMs without consent, in contravention of Section 16(1) of the Spam Act
- 3.3. Kmart acknowledges the ACMA's findings and, in response to the ACMA's concerns regarding Kmart's compliance with the Spam Act, offers this Undertaking to the ACMA aimed at addressing future compliance with the Spam Act.

### 4. Undertaking

- 4.1. Kmart undertakes to take the following actions to ensure Kmart complies with the Spam Act and does not contravene the Spam Act in the future.

### 5. Independent Consultant

- 5.1. Kmart undertakes to appoint an independent consultant to:
  - 5.1.1. review Kmart's 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 Kmart with the consent of the relevant account holder;
    - b. Kmart 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 Kmart 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 Kmart contain a functional unsubscribe facility as required by subsection 18(1) of the Spam Act;
    - e. Kmart classifies and analyses its records of CEM complaints to identify systemic and recurring problems and trends (**systemic problems**); and
    - f. the root cause of CEM complaints is addressed; and
  - 5.1.2. produce a report (**Assessment Report A**) making recommendations to ensure compliance with the Spam Act as to:
    - a. ensuring Kmart's 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:
      - i. quality assurance procedures for ensuring the ongoing integrity and functionality of relevant systems;
      - ii. procedures for ensuring Kmart's personnel comply with policies and procedures; and
      - iii. procedures for ensuring continued compliance when process or system changes are implemented;

- c. ongoing training for Kmart's personnel on Spam Act compliance;
  - d. ongoing monitoring of Spam Act compliance measures; and
  - e. ensuring Kmart takes reasonable steps to address any identified systemic problems.
- 5.2. Kmart undertakes to seek written approval from the ACMA for the appointment of the proposed independent consultant by 16 February 2024. If the ACMA does not approve the choice of the independent consultant, Kmart will repeat this process until it has the ACMA's written approval.
  - 5.3. Upon the ACMA giving written approval by 23 February 2024, Kmart undertakes to appoint the independent consultant and to provide written notification of that appointment to the ACMA by 8 March 2024.
  - 5.4. Kmart undertakes to instruct the independent consultant to provide Assessment Report A to Kmart, including the Board, and, at the same time, to the ACMA, by 14 June 2024.
  - 5.5. Kmart undertakes to instruct the independent consultant to review Kmart's procedures, policies, training and systems relating to its Spam Act compliance again by 7 March 2025 (**Assessment Report B**).
  - 5.6. Kmart undertakes to instruct the independent consultant to provide Assessment Report B in writing to Kmart, including the Board, and, at the same time, the ACMA by 13 June 2025, including a statement about whether they are satisfied that Kmart's procedures, policies, training and systems are effective in ensuring compliance with the Spam Act.
  - 5.7. Subject to the ACMA's written agreement, Kmart may remove the independent consultant at any time and replace the independent consultant with a new independent consultant approved by the ACMA. If the ACMA does not approve the choice of independent consultant, Kmart will repeat this process until it has the ACMA's approval.
  - 5.8. Should there be delays in the deployment of Kmart's new consent management and marketing automation platform in early 2024 which means the independent consultant's appointment or audit must be delayed to ensure a fulsome audit is conducted, the term of this EU is extended by a period equivalent to the period of the delay.

## 6. Implementation Plan & Reporting

- 6.1. By 9 August 2024, after receiving Assessment Report A, Kmart will:
  - 6.1.1. develop an implementation plan setting out the steps Kmart has taken, or will take, to implement all recommendations made by the independent consultant in Assessment Report A, including timeframes (unless the ACMA agrees that any recommendation need not be implemented); and
  - 6.1.2. provide a copy of the Board-approved implementation plan to the ACMA.
- 6.2. Kmart will comply with the approved implementation plan in accordance with the timeframes specified in the plan.
- 6.3. The implementation plan may be modified at any time subject to the ACMA's written approval.
- 6.4. Kmart will provide a compliance report, approved by the Board, to the ACMA, two months after the date the Board approved implementation plan is provided to the ACMA (**Compliance Report A**), and again 2 months after the Independent Consultant provides Assessment Report B (**Compliance Report B**).

- 6.5. The period to be covered by each compliance report prepared under clause 6.4 will be:
  - 6.5.1. for Compliance Report A, the previous 6 months
  - 6.5.2. for Compliance Report B, the period since Compliance Report A was prepared under clause 6.4.
- 6.6. Compliance Reports A and B will address the following matters in respect of the period determined under clause 6.5:
  - 6.6.1. the status of actions Kmart has taken to comply with the implementation plan and, where relevant, any recommendations made by the Independent Consultant in Assessment Report B;
  - 6.6.2. a report of all de-identified consumer complaints made to Kmart about alleged non-compliance with the Spam Act, including the date of the complaint and a unique identifier for each complaint;
  - 6.6.3. action Kmart has taken on each complaint the ACMA has notified Kmart about or Kmart has received directly from consumers;
  - 6.6.4. records of training for all staff trained in accordance with the requirements set out at clause 7;
  - 6.6.5. all instances of identified non-compliance with the Spam Act, including the cause of any identified compliance issues and remediation action taken or proposed to be taken and applicable dates.

## **7. Training**

- 7.1. For the term of this Undertaking, Kmart will conduct training (**training**) for personnel that are currently responsible for creating or sending CEMs and their direct line manager to ensure compliance with the Spam Act (**personnel**).
- 7.2. Kmart will provide the training within 3 months of the date of this Undertaking coming into effect. Personnel will repeat the training after 12 months.
- 7.3. Kmart will schedule training every 3 months to ensure that new personnel commencing in a relevant role receive the required training for the term of the Undertaking.
- 7.4. If personnel have undertaken training within the previous 6 months, this clause does not require Kmart to train personnel for 12 months from their last training.
- 7.5. Kmart will retain records of all staff trained in accordance with clause 7 for the duration of the EU.

## **8. Record-keeping**

- 8.1. Kmart undertakes to:
  - 8.1.1. keep accurate records of the consent given by electronic account-holders to the sending of CEMs by Kmart to those account-holders, including any terms and conditions associated with that consent;
  - 8.1.2. keep accurate records of withdrawal of consent requests;
  - 8.1.3. keep accurate records of CEM complaints; and
  - 8.1.4. provide copies of records referred to in this clause 8 to the ACMA upon request by the ACMA.

## **9. Acknowledgment of publication**

- 9.1. Kmart acknowledges that the ACMA may publish these undertakings.

**Attachment A – Timeline of obligations**

<b>Clause</b>	<b>Description</b>	<b>Due date</b>
5.2	Seek written approval from the ACMA for the appointment of proposed independent consultant	16 February 2024
5.3	ACMA to give written approval of independent consultant to Kmart	23 February 2024
5.3	Kmart to appoint independent consultant and provide written notification of that to the ACMA	8 March 2024
5.4	Independent consultant to provide <b>Assessment Report A</b> to Kmart and the ACMA	14 June 2024
6.1	Kmart to provide Board approved implementation plan to ACMA	9 August 2024
6.4	Kmart to provide <b>Compliance Report A</b> to ACMA covering previous 6 months	9 October 2024
5.5	Independent consultant to review Kmart's Spam Act compliance for a second time	7 March 2025
5.6	Independent consultant to <b>Assessment Report B</b> to Kmart and the ACMA	13 June 2025
6.4	Kmart to provide <b>Compliance Report B</b> to ACMA covering period to date of Compliance Report A onwards	13 August 2025
7.3	Kmart to schedule training every 3 months for new personnel (to be reported to the ACMA in Compliance Reports A and B)	For the term of EU

**Attachments**

Attachment A – Timeline of obligations

**Execution**

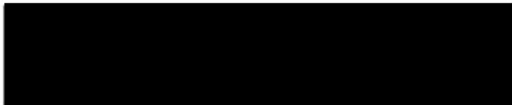
**Signed** for and on behalf of **Kmart Australia Limited** by its authorised representative:

**Catherine Nicholls**

\_\_\_\_\_  
Name of authorised representative

**General Manager Finance Kmart and Target**

\_\_\_\_\_  
Title of authorised representative



\_\_\_\_\_  
Signature of authorised representative

19/10/23

\_\_\_\_\_  
Date of signing

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

*TANYA FARRELL*

\_\_\_\_\_  
Name of authorised representative

*Hq EXECUTIVE MANAGER, UNSOLICITED COMMUNICATIONS BRANCH*

\_\_\_\_\_  
Title of authorised representative



\_\_\_\_\_  
Signature of authorised representative

*23/10/23*

\_\_\_\_\_  
Date of signing