

Revised investigation report

Summary	
Entity	Kmart Australia Limited
Australian Company Number	004 700 485
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003 (Spam Act)</i>
Findings	212,471 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]
Date	11 September 2023

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Kmart Australia Limited's (**Kmart's**) compliance with the *Spam Act 2003 (Spam Act)* on 4 May 2023 following consumer complaints received between 7 July 2022 and 13 April 2023.
2. Complainants allege that Kmart sent email messages without a functional unsubscribe facility, and that Kmart continued to send marketing messages after complainants had withdrawn consent to receive marketing. Complainants expressed frustration and dissatisfaction that their requests to unsubscribe were unsuccessful or not honored, and marketing messages continued to be received.
3. From 18 August 2022 to April 2023, prior to the Notice, the ACMA issued five compliance alerts to Kmart relating to a total of 8 specific consumer electronic addresses.
4. The investigation focused on commercial electronic messages (CEMs) sent to electronic addresses between 1 July 2022 and 4 May 2023. Kmart provided information beyond this assessment period to 5 May 2023.
5. The ACMA's findings are based on information obtained from Kmart between 16 May 2023 and 7 August 2023, that is:
 - a. on 16 May and 14 June 2023, in its response to the Notice given to it by the ACMA under section 522 of the *Telecommunications Act 1997 (Notice)*;
 - b. on 21 July 2023, in its response to an ACMA request for further information; and
 - c. on 7 August 2023, in its provision of new information which removed data errors in its initial response to the Notice.
6. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically 212,471 CEMs sent between 8 July 2022 and 5 May 2023, in contravention of subsection 16(1) of the Spam Act.
7. The investigated messages were sent to electronic addresses without consent. Specifically, the messages were sent more than 5 business days after the relevant electronic account-holders made an unsubscribe attempt (refer to [REDACTED] to this report).
8. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

Submission by Kmart

9. On 14 June 2023, Kmart's submitted information in response to a Notice. In its submission, Kmart stated it sent CEMs more than 5 business days after the relevant electronic account-holders made an unsubscribe attempt due to:
 - a. *the customer requested to unsubscribe via human means and the request was not processed within five business days.*
 - b. *[Due to system issues], the customer was unsubscribed successfully but was later opted back in.*
 - c. *[Due to system issues], the customer made an automated unsubscribe request, but the customer was not opted-out.*
10. On 21 July 2023, Kmart submitted information in response to an ACMA request for further information. Kmart advised it had identified errors in the data it provided in response to the Notice about CEMs sent after consumers had made unsubscribe requests. Kmart reported it had not assessed whether consumers had given new consent to receive CEMs after making the unsubscribe request.
11. On 7 August 2023, Kmart provided new data that corrected data about CEMs sent after consumers made unsubscribe requests. Kmart's new data removed 39,443 CEMs where the customer had '*expressly reconcented*' prior to the CEM being sent.

Relevant legislative provisions

Consent – subsection 16(1)

12. 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.
13. 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)).
14. 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.*
15. Where an electronic account-holder sends an unsubscribe request to an entity, CEMs sent more than 5 business days after that request are sent without consent and in breach of subsection 16(1).

Evidential burden for exceptions

16. Under subsections 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 – section 16

17. To determine Kmart's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
 - a. Is Kmart a 'person' to which section 16 of the Spam Act applies?
 - b. If so, did Kmart 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 Kmart claim that the CEMs were subject to any exceptions?
 - g. If so, did Kmart meet the evidential burden in relation to these claims?
18. 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 Kmart a 'person' to which section 16 of the Spam Act applies?

19. Kmart is a company registered under the *Corporations Act 2001* and is therefore a 'person'.

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

20. Kmart admitted it sent the messages in its submission dated 14 June 2023. Details are provided at [REDACTED].

Were the investigated messages commercial?

21. Section 6 of the Spam Act defines a CEM as an electronic message where the purpose, or one of the purposes, 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.
22. The purpose, or one of the purposes, of the investigated messages was to offer and/or promote Kmart's goods and services, such as homewares, clothing and toys. Examples of messages are at [REDACTED].
23. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

24. Kmart'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. they consisted of more than factual information and were commercial in nature, and
 - b. Kmart 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 Kmart claim that any of the investigated messages were subject to any exceptions?

26. Kmart did not provide evidence or make claim that the investigated messages were subject to any exceptions, including that Kmart had the consent of the relevant electronic account-holders.

Conclusion

27. As the above elements to establish contraventions are met, the ACMA finds there are reasonable grounds to believe that Kmart has contravened subsection 16(1) of the Spam Act in relation to 212,471 CEMs sent after consent had been withdrawn between 8 July 2022 and 5 May 2023.

Attachments

