

Revised Investigation report

Summary	
Entity	Uber Australia Pty Ltd
Australian Company Number	160 299 865
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003 (Spam Act)</i>
Findings	<p>501,164 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p>2,035,640 contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]</p>
Date	26 September 2023

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into **UBER AUSTRALIA PTY LTD'S (Uber)** compliance with the *Spam Act 2003 (Spam Act)* on 4 May 2023 following consumer complaints received from 28 August 2022 to 20 January 2023.
2. Complainants allege that Uber sent email messages without a functional unsubscribe facility, and that Uber continued to send marketing messages after complainants had withdrawn consent to receive marketing.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. The investigation focused on commercial electronic messages (**CEMs**) sent to electronic addresses between 1 August 2022 and 4 May 2023.
4. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
 - a. 501,164 CEMs sent on 18 January 2023 in contravention of subsection 16(1) of the Spam Act, and
 - b. 2,035,640 CEMS sent on 18 January 2023 in contravention of subsection 18(1) of the Spam Act.
5. The ACMA's findings are based on submissions obtained from Uber on 2 June 2023, in response to a notice dated 4 May 2023 given to it by the ACMA under section 522 of the *Telecommunications Act 1997 (Notice)*.
6. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

Submissions by Uber

7. Uber provided a submission on 2 June 2023 stating '[...] As a result of this isolated human error, Uber inadvertently sent "Bar in a Car" marketing emails to 501,164 email accounts (237,435 in Sydney and 263,729 in Melbourne) for which Uber had previously received an

unsubscribe request. These emails would not have otherwise been sent to those accounts if this campaign had been properly classified.

8. Uber further stated *'Due to the misclassification of the "Bar in a Car" campaign as a transactional message/designated CEM, Uber sent the relevant emails without an unsubscribe facility to 2,035,640 email accounts. If this "Bar in a Car" campaign had been properly classified as a non-designated CEM, the relevant emails would have contained Uber's usual unsubscribe facility*'.
9. Uber provided further submissions on 7 July 2023 noting it offers its users the ability to exclude themselves from being able to view or order alcoholic items on the Uber app, separate to the unsubscribe facility provided for Spam Act compliance. This is offered in accordance with the 'Retail Drinks Australia Online Alcohol Sale & Delivery Code of Conduct'. Uber confirmed the investigated 'Bar in a Car' messages were not sent to any users who had excluded themselves from being able to view or order such items.

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.*
13. 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).

Unsubscribe function in CEMs – subsection 18(1)

14. Under subsection 18(1) of the Spam Act, CEMs which have an Australian link must contain a functional unsubscribe facility.
15. Under paragraph 18(1)(e), an unsubscribe link / function in a CEM must be capable of receiving a recipient's unsubscribe message.
16. Subsection 18(1) does not apply if:
 - a. the message is a 'designated commercial electronic message' (paragraph 18(1)(b))
 - b. a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 18(2))

- c. including an unsubscribe facility would be inconsistent with the terms of a contract or other agreement (subsection 18(3)), or
- d. a person sent the CEM, or caused the CEM to be sent, by mistake (subsection 18(4)).

Evidential burden for exceptions

17. Under subsections 16(5) and 18(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

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

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

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

21. Uber admitted it sent the messages in its submission. [REDACTED].

Were the investigated messages commercial?

22. Section 6 of the Spam Act defines a CEM as an electronic message where the purpose 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.
23. The purpose of the investigated messages was to offer and/or promote a service, namely booking Uber's "Bar in a Car" service; a service whereby alcoholic cocktail beverages are offered outside a person's home. Examples of messages are at **Attachment B**.
24. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

25. Uber 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?

26. 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. Uber 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 Uber claim that any of the investigated messages were subject to any exceptions?

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

Conclusion – Issue 1

28. As the above elements to establish contraventions are met, the ACMA is of the view that Uber contravened subsection 16(1) of the Spam Act on 501,164 occasions on 18 January 2023.

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

29. To determine Uber's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is Uber a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did Uber 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 Uber claim that the CEMs were subject to any exceptions?
 - h. If so, did Uber meet the evidential burden in relation to these claims?
30. Uber has made admissions to the matters from paragraph 28 a. to e. for all investigated messages. These were established for the investigated messages under Issue 1 (above) and are relevant for Issue 2.

Did the CEMs include a functional unsubscribe facility?

31. Uber sent 2,035,640 investigated messages without a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act. Uber admitted in its submission the investigated messages were sent without including a functional unsubscribe facility due to human error whereby the investigated messages were categorised as designated commercial electronic messages (which would be exempt from unsubscribe requirements).
32. The ACMA is satisfied based on the admissions made by Uber that the CEMs did not include a functional unsubscribe facility.

Did Uber claim that any of the CEMs were subject to any exceptions?

33. Uber did not provide evidence or make claims to suggest that the investigated messages were subject to any exceptions.

Conclusion – Issue 2

34. As the elements to establish contraventions are met, the ACMA is of the view that Uber has contravened section 18(1) of the Spam Act on 2,035,640 occasions on 18 January 2023.

Conclusion

35. The ACMA finds that there are reasonable grounds to believe that Uber has contravened:

- a. subsection 16(1) of the Spam Act in relation to **501,164** CEMs sent after consent had been withdrawn on 18 January 2023, and
- b. subsection 18(1) of the Spam Act in relation to **2,035,640** CEMs sent without a functional unsubscribe facility on 18 January 2023.

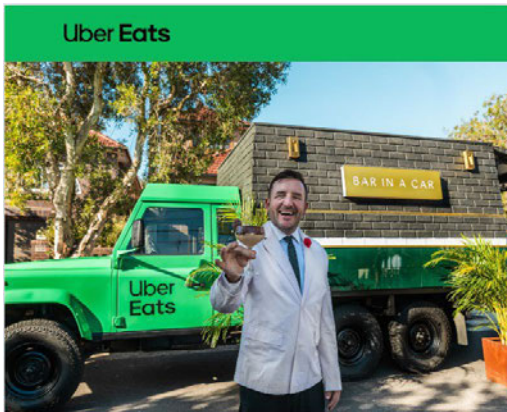
Attachments



Attachment B – Examples of 'Bar in a Car' CEMs

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CEMs sent to customers in Sydney – 18 January 2023



Uber Eats

Let the bar come to you 🍹

For a limited time only, and exclusively on Uber Eats, you can book a VIP cocktail experience in the Bar in a Car, a unique vehicle designed to bring the bar to you!

The Bar in a Car will be parked outside your home (a driveway or off-street parking space is required), and you and 3 guests will enjoy.

- 🍹 A 30-minute VIP cocktail masterclass with award-winning mixologist Stefano Catino (from Maybe Sammy);
- 🍷 Some delicious nibbles;
- 🍷 Limited edition goodies;
- 🍹 And a cocktail kit of your choice to make at home.

Drink safe, Drink Responsibly

We're working with our partners to help shape safe and responsible alcohol delivery and remind adults planning to use the service that any alcohol purchased should be consumed in moderation. Here are some things you need to know before you get started.

1. You must be 18 years or over to order alcohol with the Uber Eats app. Delivery persons will be scanning your evidence of age document with their Uber Driver app to verify your age.

Please note that alcohol deliveries cannot be left unattended at your door as your evidence of age document and your sobriety must be checked before the delivery can be completed.

2. If the delivery person observes that you are intoxicated, they are not permitted by law to hand over your order to you. They will be prompted by their Uber Driver app to return the order to the store.

Don't want the option for alcohol delivery?

You can choose to opt out of alcohol delivery, by clicking on the link below.

[Opt me out of alcohol delivery →](#)

The Bar in a Car experience is only available for limited bookings in select suburbs, so get in quick:

- Thursday 19 and Friday 20 January: Manly
- Saturday 21 and Sunday 22 January: Bondi
- Monday 23 January: Summer Hill
- Tuesday 24 January: Parramatta

To book, search for 'Bar in a Car' in-app, and select your preferred timeslot (bookings are restricted to users in these suburbs).

All participants must be 18+ with ID. See TsCs below.

[Book now →](#)

Can't book? You can still get 30% off bevies



Enjoy 30% off select drinks until 29 January from Liquorland, Vintage Cellars and First Choice Liquor market. TsCs apply.

[Order now >](#)

Bar in a Car is operated by Sweet & Chilli Pty Ltd (NSW licence no. LIQP770017023) (S&C). The cocktail experience is for you and 3 guests to experience the Bar in a Car for 30 minutes, where you will attend a mixology masterclass and receive a take home cocktail kit for 5 people. Your booking request is only confirmed when you receive an email confirmation. All occupants must be 18+ with ID, not be intoxicated, not take or consume any alcohol or illegal substances inside the Bar in a Car, and follow S&C's directions. You must have an available driveway or other private parking space (and easy access to that space) for the Bar in a Car to park on. 1 booking per user and address. Limited availability and locations. S&C may refuse entry, cancel or end your booking early (and/or remove you and your guests) without providing a refund, if you or a guest breach these terms. S&C may reschedule, or cancel and refund, your booking for any reason, including if the Bar in a Car cannot operate as planned due to adverse weather conditions or unavailability of Bar in a Car personnel. To the extent permitted by law, you and each guest accept all risks associated with the Bar in a Car, and S&C and Uber are not liable for any loss or damage (including personal injury, death or property damage) arising in connection with the Bar in a Car. Drink responsibly.

User must be 18+ to order. ID required. This offer is for 30% off selected items ordered from a First Choice Liquor Market, Liquorland or Vintage Cellars store via the Uber Eats app (Offer). Delivery Fee applies. Service Fee applies to orders delivered by Uber Eats and is based on order value (after promotion). Other fees may apply. An amount equal to 30% off the selected items will be applied as a promotion at checkout. 30% off does not apply to Fees. To redeem this Offer, open the Uber Eats app, search for a First Choice Liquor Market, Liquorland or Vintage Cellars store, add 1 or more selected items to your cart, check the Offer has been applied at checkout, and then place your order. To accept this Offer, you must successfully complete an order redeeming the Offer in accordance with these terms. Subject to operating hours and availability of participating merchants in your area via the Uber Eats app. Offer cannot be used in conjunction with any other offer or promotion (excluding \$0 Delivery Fee on eligible orders with Uber One). Offer may be withdrawn at any time. Valid only in Australia where Uber Eats is available. Offer is available 10:00AM AEDT 19 January - 11:59PM AEDT on 29 January 2023, unless withdrawn earlier. See app for merchants' liquor licence details.

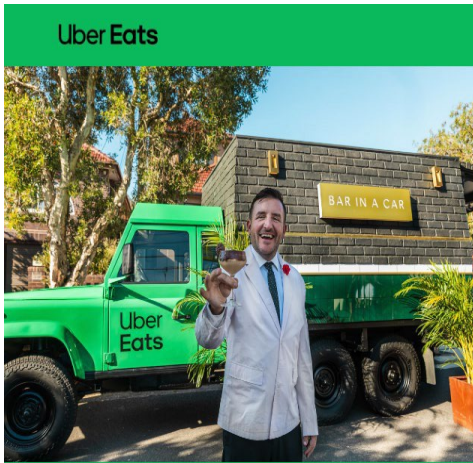
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Uber BV.



Uber Eats

The Bar in a Car experience is only available for limited bookings in select suburbs, so get in quick:

- Saturday 28 January: Richmond
- Sunday 29 January: St Kilda

To book, search for 'Bar in a Car' in-app, and select your preferred timeslot (bookings are restricted to users in these suburbs).

All participants must be 18+ with ID. See TsCs below.

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