

## Revised Investigation Report

Summary	
Entity	Outdoor Supacentre Pty Ltd
Australian Company Number	609 212 624
Type of Activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003</i>
Findings	<b>83,273</b> contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]
Date	24 November 2023

### Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Outdoor Supacentre Pty Ltd's (**OSC**) compliance with the *Spam Act 2003* (**Spam Act**) on 4 May 2023 following a marked increase in consumer complaints received between 3 June 2022 and 11 April 2023.
2. Complainants allege that OSC sent SMS messages without a functional unsubscribe facility, and that OSC continued to send marketing messages after complainants had withdrawn consent to receive marketing.
3. From June 2022 to April 2023, prior to the Notice, the ACMA issued 5 compliance alerts to OSC relating to a number of consumer complaints. The alerts notified OSC that the receipt of the complaints indicated they may have issues with non-compliance with the Spam Act.
4. The investigation focused on commercial electronic messages (**CEMs**) sent to electronic addresses between 1 December 2022 and 4 May 2023 (**Relevant Period**).
5. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically,
  - a. 83,273 CEMs sent during the Relevant Period, in contravention of subsection 16(1) of the Spam Act.
6. The ACMA's findings are based on submissions obtained from OSC on 23 June 2023 and 31 August 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**) and an ACMA request for further information dated 15 August 2023.
7. In making these findings, the ACMA has also taken into consideration further submissions made by OSC on 10 October 2023 and 7 November 2023.
8. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

### Submissions by OSC

9. OSC provided a submission to the ACMA on 23 June 2023 stating it sent 12,387,934 CEMs to over 839,000 unique mobile phone numbers during the Relevant Period.
10. OSC admitted 1,575 CEMs were sent more than 5 business days after an unsubscribe request was received from the relevant account holder.

11. In response to a request from the ACMA about the CEMs sent without consent, OSC provided a second submission on 31 August 2023 admitting that 81,698 CEMs were sent to account holders who either did not provide consent (76,994 CEMs) or whose consent cannot be verified (4,704 CEMs). This is in addition to the previous admission of 1,575 CEMs sent after the consent had been withdrawn.
12. OSC made a third submission on 10 October 2023 after receiving the ACMA's preliminary findings on 28 September 2023. OSC submitted that pursuant to section 16(4) of the Spam Act, 79,237 of the 83,273 CEMs did not contravene subsection 16(1) as they were sent by mistake.
13. OSC submitted that during a previous data migration between service providers some data was not migrated successfully. OSC has since taken action to remove account holders who did not provide consent or whose records of consent cannot be verified from their marketing database to ensure they would not be contacted by OSC. OSC reported it put in place a manual fix to resolve issues relating to duplicate profiles.

## Relevant legislative provisions

### **Consent – subsection 16(1)**

14. 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.
15. 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)).
16. 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.*
17. 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**

18. Under subsection 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

### **CEMs must not be sent – section 16**

19. To determine OSC's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
  - a. Is OSC a 'person' to which section 16 of the Spam Act applies?

- b. If so, did OSC 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 OSC claim that the CEMs were subject to any exceptions?
  - g. If so, did OSC meet the evidential burden in relation to these claims?
20. 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 OSC a 'person' to which section 16 of the Spam Act applies?***

21. OSC is a company registered under the *Corporations Act 2001* and is therefore a 'person'. It operates an online store as well as more than twenty retail stores across Australia.

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

22. OSC admitted sending the investigated messages with the assistance of third-party service providers in its submissions. Details are provided at **Attachment A**.

***Were the investigated messages commercial?***

23. 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.
24. The purpose of the investigated messages was to offer and/or promote products for sale. Sample messages sent to consumers included sales events such as "1 Day Only New Knockout Deals" and "Lowest Ever Price Sale". Examples of messages are at **Attachment B**.
25. Therefore, the investigated messages are CEMs.

***Did the CEMs have an Australian link?***

26. OSC's central management and business registration were in Australia when it sent the investigated messages to Australian account-holders, therefore, the investigated messages had an Australian link.

***Were the CEMs designated?***

27. 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. OSC 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 OSC claim that any of the investigated messages were subject to any exceptions?***

28. Pursuant to subsection 16(4) of the Spam Act, it is not a contravention of subsection 16(1) if a person sent the message, or caused the message to be sent, by mistake.
29. In its October submission, OSC made claims that 79,237 of the investigated messages were sent by mistake, therefore not in contravention of subsection 16(1), including:

- a. for 76,994 CEMs sent, OSC “held a reasonable belief that customers who had provided their contact details through an ‘abandoned cart’ transaction would not be sent CEMs and was not aware that these CEMs were being sent”.
  - b. For 2,243 CEMs sent, the “CEMs were sent to customers that had expressed an intention to consent to receiving CEMs, however they provided a false phone number when purporting to provide that consent”.
30. Section 4 of the Spam Act defines a mistake as being a “reasonable mistake of fact”. The explanatory memorandum to the Act explains the defence is only available if the mistake was reasonable and it removes any possible argument the defence is available if the person has made a mistake as to the law.
  31. The ACMA considers the messages were meant to be sent, albeit the messages were sent to account holders who had not provided their consent to receive CEMs from OSC. OSC has not provided evidence of any quality assurance processes or compliance checks undertaken to prevent such CEMs from being sent. A mere lack of knowledge or an assumption of normality is not enough to establish a defence of a reasonable mistake of fact.
  32. The ACMA does not consider sending 79,237 of the investigated messages over a 5-month period is a reasonable mistake of fact.

***Did OSC meet the evidential burden in relation to these claims***

33. Pursuant to subsection 16(5), OSC is required to bear the evidential burden in relation to its claims that 79,237 of the investigated messages were sent by mistake.
34. OSC has not provided evidence to demonstrate that the 79,237 CEMs were sent as a result of a reasonable mistake of fact.
35. As such, OSC has not provided sufficient evidence to satisfy the evidential burden.

**Conclusion**

36. As the elements to establish contraventions are met, the ACMA is of the view that OSC contravened subsection 16(1) of the Spam Act on 83,273 occasions between 1 December 2022 and 4 May 2023.

**Attachments**

**Attachment A** – Spam Act contravention details

**Attachment B** – Indicative examples of the investigated messages

## Attachment B – Indicative examples of the investigated messages sent without consent

- Example 1: CEM sent to customers via SMS on 30 January 2023:
  - 1 Day Only New Knockout Deals + Xclusive Store Specials From 8am - Must See  
<https://insdr.in/dlvsqeC> 1800883964 4WDSupacentre Reply STOP to +61482085392
  
- Example 2: CEM sent to customers via SMS on 2 February 2023:
  - Lowest Ever Price Sale - Up to 66% off Daily Deals - No Inflation Here!  
<https://insdr.in/evnlygn> 1800883964 4WDSupacentre Reply STOP to +61482085392