

Investigation report

Summary	
Entity	Luxottica Retail Australia Pty Ltd
Australian Company Number	000 025 758
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003 (Spam Act)</i>
Findings	<p>112,348 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p>91,231 contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]</p>
Date	7 December 2023

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Luxottica Retail Australia Pty Ltd's (Luxottica) compliance with the *Spam Act 2003 (Spam Act)* on 5 May 2023 following consumer complaints.
2. Complainants allege Luxottica sent messages without a functional unsubscribe facility, and after they had withdrawn consent to receive marketing.
3. The investigation focused on commercial electronic messages (CEMs) sent to electronic addresses between 1 November 2022 and 16 May 2023, sent by three of Luxottica's brands, OPSM, Oakley and Sunglass Hut.
4. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
 - a. 112,348 CEMs (email and SMS) sent between 8 November 2022 and 5 May 2023 in contravention of subsection 16(1) of the Spam Act, and
 - b. 91,231 CEMs (email) sent between 1 November 2022 and 16 May 2023 in contravention of subsection 18(1) of the Spam Act.
5. The ACMA's findings are based on submissions obtained from Luxottica on:
 - a. 31 May, 9 June and 19 June 2023 in its response to the Notice given to it by the ACMA under section 522 of the *Telecommunications Act 1997 (Notice)*
 - b. 4 October 2023, in its response to an ACMA request for further information
 - c. 26 October 2023, in anticipation of the ACMA making preliminary findings.
6. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

Submissions by Luxottica

7. In its 19 June 2023 submission, Luxottica acknowledged that from September 2022, during a period of system migration '*its systems have encountered unfortunate unintended errors which has resulted in marketing campaign commercial electronic messages (CEMs) being sent to recipients more than 5 business days after the recipient raised an unsubscribe request.*' Luxottica submitted it had identified 15 root causes for non-compliance arising from systems and procedural issues, including:
 - a. problems with the migration of data between platforms resulting in failed synchronisation of customer unsubscribe records
 - b. limitations in the synchronisation of systems used across Luxottica's retail stores, with centralised systems
 - c. subscription data refresh delays
 - d. data mapping failures
 - e. the absence of a process to synchronise unsubscribe requests received by contracted third parties with Luxottica's central records.
8. In its 4 October 2023 submission, Luxottica acknowledged '*there is room for improvement in the content, appearance and presentation of its DCEMs.*' [The ACMA understood this to be in the context of ensuring that messages intended to be designated commercial electronic messages (DCEMs) did not contain commercial content, including links to such content.]
9. Luxottica made further submissions on 26 October 2023 outlining steps it has taken to remediate issues which have led to admitted non-compliance. These include:
 - [REDACTED]
 - [REDACTED]
 - c. review of DCEM templates to ensure compliance with the Spam Act
 - d. deploying spam compliance training
 - [REDACTED]
 - [REDACTED].

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 Luxottica's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
- a. Is Luxottica a 'person' to which section 16 of the Spam Act applies?
 - b. If so, did Luxottica 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 (designated messages are exempt from certain Spam Act obligations)?

- f. If not, did Luxottica claim that the CEMs were subject to any exceptions?
 - g. If so, did Luxottica 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 Luxottica a 'person' to which section 16 of the Spam Act applies?

20. Luxottica is a company registered under the *Corporations Act 2001* and is therefore a 'person'. Luxottica is a wholly-owned subsidiary of Luxottica Group S.p.A. which operates from Luxottica's global headquarters in Milan, Italy.

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

21. Luxottica admitted it sent the messages in its submissions. Details are provided at [REDACTED]
22. In relation to 9,419 CEMs sent to consumers via the [REDACTED] platform more than 5 business days after an unsubscribe request was received by Luxottica, the ACMA is satisfied that Luxottica caused the messages to be sent. This is by virtue of the commercial agreement that exists between Luxottica and [REDACTED] for the use of its platform to send 'abandoned cart' notification to users of Luxottica's website. It is further noted that Luxottica has admitted it is the person who caused the messages to be sent via the [REDACTED] platform in its submission of 4 October 2023.
23. On this basis, the ACMA is satisfied that Luxottica sent, or caused to be sent, the investigated messages.

Were the investigated messages commercial?

24. 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.
25. The purpose of the investigated messages was to offer and/or promote a service, namely goods and services associated with eye care.
26. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

27. Luxottica's central management and business registration was in Australia when it sent the investigated messages, therefore, the investigated messages had an Australian link.

Were the CEMs designated?

28. 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. Luxottica 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 Luxottica claim that any of the investigated messages were subject to any exceptions?

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

Conclusion – Issue 1

30. As the above elements to establish contraventions are met, the ACMA is of the view that Luxottica contravened subsection 16(1) of the Spam Act on 112,348 occasions between 8 November 2022 and 5 May 2023, by sending, or causing to be sent, CEMs to customers more than 5 business days after they had unsubscribed.

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

31. To determine Luxottica's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is Luxottica a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did Luxottica 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 Luxottica claim that the CEMs were subject to any exceptions?
 - h. If so, did Luxottica meet the evidential burden in relation to these claims?
32. Where a matter at paragraph 31 has not been considered below, the ACMA considers it has already been established under Issue 1.

Were the messages commercial?

33. The definition of a CEM is outlined at paragraph 24 above.
34. Luxottica has admitted in its submissions that 45,685 messages sent without a functional unsubscribe facility were commercial (refer [REDACTED]).
35. Luxottica submitted that an additional 45,546 of the investigated messages are transactional and therefore not commercial as their purpose was to provide its customers with information about an order, or to reset their account password. On analysis of the content of the message, the ACMA is satisfied that whilst these messages had a primary purpose of providing transactional information to account holders, they also had a commercial purpose by including links to material which advertised and promoted goods for sale and promoted an offer. Namely:
- a. 43,534 'Oakley' branded order confirmation messages which included links labelled 'Eyewear', 'Custom', 'Apparel' and 'Accessories' which link to pages on the Oakley website where products, in those categories, could be directly

viewed and purchased. The messages also included information promoting a free shipping offer (DCEM 3.4 – see [REDACTED])

- b. 2,012 'Oakley' branded password reset messages which included the same links and free shipping offer described above (DCEM 3.5 – see [REDACTED]).

36. The ACMA is satisfied that one of the purposes of each these messages was to advertise or promote Luxottica's products and services for its eyewear brands. Therefore, these messages are CEMs. Examples of the messages are contained at **Attachment C**.

Were the messages designated?

37. In relation to the 45,546 investigated messages referred to at paragraph 35, one of the purposes of these messages was to provide information to customers, namely order confirmation details or information about resetting an account password. The ACMA is satisfied the messages served a further purpose to promote Luxottica's products and services by way of the links and promotional material contained in the messages.

38. Accordingly, these messages were not designated CEMs for the purposes of paragraph 18(1)(b) because:

- a. There were two purposes to the messages, the first being factual information about a customer's order or their password, and the second being to promote and advertise goods (Oakley products) and services (a free shipping offer) which is commercial in nature.

Did the CEMs include a functional unsubscribe facility?

39. For all 91,231 investigated messages sent between 1 November 2022 and 16 May 2023 Luxottica did not include a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act. Luxottica admitted it sent:

- a. 45,685 investigated messages without a functional unsubscribe facility due to an outdated marketing campaign email being used.
- b. 45,546 investigated CEMs without a functional unsubscribe facility which did not include an unsubscribe statement as it had categorized the messages as DCEMs and as such, did not believe these required an unsubscribe facility.

40. On the basis of the above, the ACMA is satisfied the messages did not contain a functional unsubscribe facility.

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

41. Luxottica did not provide evidence or make claims to suggest that these CEMs were subject to any exceptions.

Conclusion – Issue 2

42. As the elements to establish contraventions are met, the ACMA is of the view that Luxottica has contravened section 18(1) of the Spam Act on 91,231 occasions between 1 November 2022 and 16 May 2023.

Conclusion

43. The ACMA finds that there are reasonable grounds to believe that Luxottica has contravened:
- a. subsection 16(1) of the Spam Act in relation to 112,348 CEMs sent after consent had been withdrawn between 8 November 2022 and 5 May 2023, and
 - b. subsection 18(1) of the Spam Act in relation to 91,231 CEMs sent without a functional unsubscribe facility between 1 November 2022 and 16 May 2023.

Attachments



Attachment C – Indicative examples of contravening messages (s18)

Attachment C – Examples of contravening messages (s18 of the Spam Act)

Example 1 - Message DCEM 3.4 – Message sent without a functional unsubscribe facility

The screenshot shows an email from Oakley with a navigation menu (EYEWEAR, CUSTOM, APPAREL, ACCESSORIES) and a 'Thank You For Your Order!' header. It includes order details (Order Number, Order Date: 18 May 2023) and a greeting. The main body contains instructions to provide an eyewear prescription, a link to 'Search for a doctor', and a reminder to keep the email for records. A grey box highlights a section with the heading 'When will your order be ready?' and text stating 'Prescription eyewear will be delivered 8-10 days after we receive your prescription.' Below this is another reminder to submit the prescription within 10 days, a blue 'UPLOAD YOUR PRESCRIPTION' button, and a warning that the order will be canceled if the prescription is not submitted. A link to 'Search for a doctor' is provided. The bottom section, '1 Product In Your Order', features a placeholder image for glasses, a large black redaction box, and a 'Product Status: Prescription Uploaded' indicator. A 'Lens:' label is followed by another black redaction box.

OAKLEY

EYEWEAR CUSTOM APPAREL ACCESSORIES

Thank You For Your Order!

Order Number: [REDACTED] Order Date: 18 May 2023

H: [REDACTED]

Thanks for shopping with us. Before your order can be completed, we need you to provide your eyewear prescription. This email explains how you can get it over to us.

If you need to renew your prescription, you can also [Search for a doctor](#).

Please be sure to keep this email for your records.

Thank you!

Team Oakley

When will your order be ready?
Prescription eyewear will be delivered 8-10 days after we receive your prescription.

Remember to submit your prescription in the next 10 days
Scan or take a picture of your prescription and upload it digitally.

UPLOAD YOUR PRESCRIPTION

If you don't submit your prescription within 10 days, your order will be automatically canceled. Also, make sure your prescription is up to date.

Need to renew your prescription? [Search for a doctor](#)

1 Product In Your Order

IMAGE NOT AVAILABLE

Product Status:
Prescription
Uploaded

Lens: [REDACTED]

Subtotal:

Discounts:

Shipping:

Total:

Delivery Details

Shipping To

Shipping Method
8-10 business days after
receiving your prescription

Billing To

Payment Method

[Check Order Status](#)

Frequently Asked Questions

[How to do a return](#)

[How to cancel an order](#)

[Shipping time & rates](#)

[Track an order](#)

[Replacement parts](#)

Get Help

Call Oakley Customer Care on number listed below. Just remember, have your order number ready.

Our Email: customercare@oakley.com.au

Customer Care: [1800 414 011](tel:1800414011) Monday-Friday from 10 am to 7 pm

Oakley customised, prescription and engraved products are made to the customer's exact specifications. No refunds or exchanges are available to customers for a change of mind.

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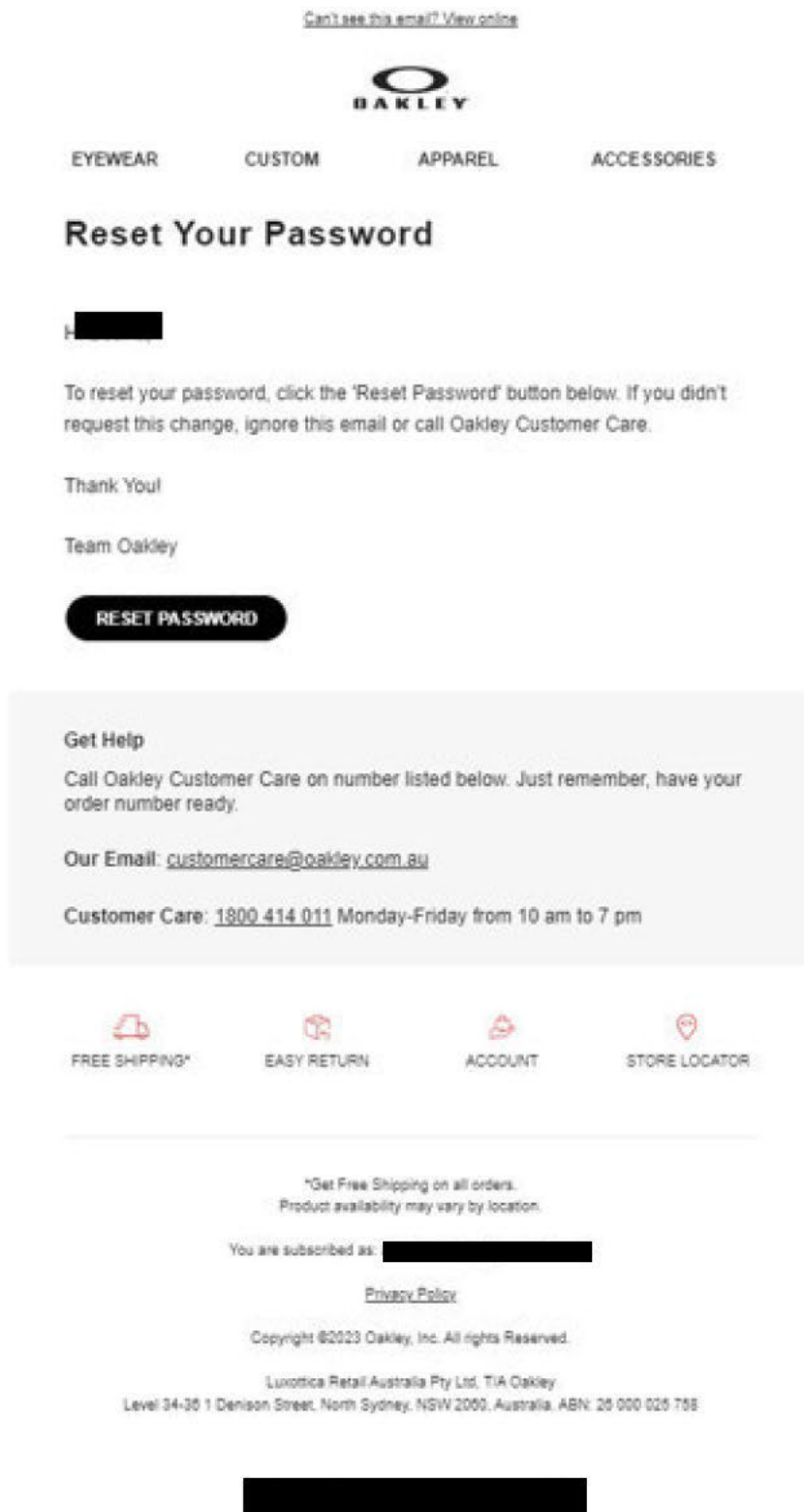
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Example 2 - Message DCEM 3.5 – Message sent without a functional unsubscribe facility



Example 3 – Message CEM 5.1 – Message sent without a functional unsubscribe facility

