

Enforceable Undertaking

This enforceable undertaking (**Undertaking**) is given by BIG MOBILE PTY LTD (ACN 119 902 966) to the Australian Communications and Media Authority (**the ACMA**) pursuant to section 38 of the *Spam Act 2003* (Cth).

1. Definitions and interpretation

In this Undertaking:

- a. **The ACMA** means the Australian Communications and Media Authority.
- b. **Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne or Sydney.
- c. **Company** means BIG MOBILE PTY LTD (ACN 119 902 966) of Suite 905, Level 9, MLC Centre, 19 Martin Place, SYDNEY NSW 2000.
- d. **MMS** means Multimedia Messaging Service.
- e. **Person** means a natural person, a company or an incorporated or unincorporated entity of any nature.
- f. **SMS** means Short Message Service.
- g. **Spam Act** means the *Spam Act 2003* (Cth).

Words and expressions defined in the Spam Act have the same meaning in this Undertaking, unless otherwise specified.

A reference to legislation includes any modification or re-enactment of it, and any regulations made under it.

2. Commencement Date

This Undertaking commences when:

- a. it has been executed by the Company, and
- b. so executed, it has been accepted by the ACMA and written notification of the acceptance has been given to the Company.

3. Background

3.1 The Company

The Company was incorporated in New South Wales on 26 May 2006. The Company is a mobile marketing agency. One of the services offered by the Company is the use of its proprietary technology platforms to broadcast SMS and MMS to customers of clients who had opted in to receive marketing messages as part of a media strategy for a given campaign.

3.2 The ACMA's Investigation

- a. On 18 May 2009 the ACMA commenced an investigation into complaints about commercial electronic messages alleged to have been sent or caused to have been sent by the Company and other Persons as a result of a consumer marketing campaign that commenced in October 2008.
- b. The Company's role in the marketing campaign was to send SMS messages to mobile numbers supplied by another Person. The Company selected consumers matching client criteria to receive the SMS messages, and then sent the SMS messages to the mobile telephone numbers for those customers using the Company's technology platform. The content of the SMS messages was drafted by a different Person.
- c. A total of 100,000 SMS messages (that is, commercial electronic messages) were sent as part of the marketing campaign. The ACMA alleges that the commercial electronic messages were sent in contravention of the Spam Act because:
 - i. the content of the messages did not contain accurate information about how the recipient of the message could readily identify and contact the organisation that authorised the message as required by section 17 of the Spam Act; and
 - ii. the content of the messages did not contain a functional unsubscribe facility as required by section 18 of the Spam Act.
- d. The ACMA provided the Company with details of the alleged contraventions of the Spam Act on 18 May 2009 and 17 August 2009. The Company provided a response to the ACMA in relation to the alleged contraventions and also held extensive discussions with the ACMA in order to understand its concerns and the reasons why, in the circumstances of sending SMS messages on behalf of another Person, the ACMA considered that the Company had caused the 100,000 commercial electronic messages to be sent in contravention of the Spam Act.
- e. Whilst the Company did not create or approve the content of the 100,000 commercial electronic messages in question, and believed that the message did not require a functional unsubscribe facility, the Company accepts that it did actually send the messages in question using its proprietary technology platform.
- f. On this basis and on the basis of the documents and information obtained during the course of the investigation, the ACMA is of the view that the Company contravened sections 17 and 18 of the Spam Act on a number of occasions.

- g. The Company is constantly endeavouring to improve its services, particularly with regard to improving regulatory compliance. This is of benefit to the Company, its clients and consumers. The Company is committed to working with the ACMA to improve its internal processes so as to ensure Spam Act compliance.

4. Undertaking to make payment in certain circumstances

- a. In the event that the Company is made aware by its internal processes, clients or the ACMA of possible breaches of section 17 or 18 of the Spam Act, or any of the provisions in this Undertaking with respect to sections 17 and 18 of the Spam Act during a period of 12 months after the Commencement Date, and as a result of such possible breach recipients receive commercial electronic messages with content that does not:
 - i. contain accurate information about how the recipient of the message could readily identify and contact the organisation who authorised the message as required by section 17 of the Spam Act; and / or
 - ii. contain a functional unsubscribe facility as required by section 18 of the Spam Act;

then the Company agrees to pay 25 cents to each recipient by way of compensation.

- b. The Company undertakes to accept the administrative costs for issuing the compensation stated in this section 4 to recipients. The Company also agrees to ensure that the compensation is paid as soon as practicable in the circumstances, but no later than 4 months after the Company becomes aware that a contravention of the Spam Act has occurred or such later time with the consent of the ACMA.
- c. The Company undertakes to advise the ACMA of its process for identifying breaches of section 17 or 18 of the Spam Act and for organising and actioning payments to the recipients of the relevant commercial electronic messages within 2 months after the Commencement Date. The Company also undertakes to advise the ACMA, within 1 month of a possible contravention occurring, of details of that possible contravention and of the payments to be made as a consequence of this undertaking.

5. Undertaking regarding conduct

5.1 Undertaking with respect to training

- a. Within 3 months after the Commencement Date the Company undertakes to develop and submit to the ACMA for approval a training program that will outline the requirements of all relevant provisions of the Spam Act upon the business of the Company, including Part 2.
- b. Within 3 months after receiving notification of the ACMA's approval of the training program, the Company undertakes to provide the approved training program to all its directors, employees and contractors who are involved in any activity for the Company that results, or is likely to result in, the sending of commercial electronic messages (as defined in the Spam Act) after the Commencement Date.

- c. The Company undertakes to provide the approved training program to any new directors, employees and contractors who are involved in any activity for the Company that results, or is likely to result in, the sending of commercial electronic messages (as defined in the Spam Act) within 2 months of that new director, employee or contractor commencing their duties with the Company.
- d. The training program will incorporate a requirement that all directors, employees and contractors that are required to complete the training program are provided with a copy of this Undertaking.

5.2 Undertaking with respect to quality assurance

- a. Within 2 months after the Commencement Date, the Company undertakes to develop and submit to the ACMA for approval quality assurance processes to ensure that services provided by the Company to its clients that involves or is likely to involve the sending of commercial electronic messages, comply with sections 16, 17 and 18 of the Spam Act.
- b. The quality assurance process will include a requirement that the Company, as part of its client engagement process and during the course of providing its services, ensures that it:
 - i. complies with section 16 of the Spam Act by using all best commercial endeavours to ensure that the Company is provided with reasonable objective evidence from each client, media owner or list provider that confirms that each relevant electronic account-holder within the list of proposed recipients of commercial electronic messages has consented to the receipt of the proposed message from the authoriser of the message;
 - ii. complies with section 17 of the Spam Act by ensuring that the Company critically reviews the proposed message to be sent by the authoriser of the message to ensure that the content of the message does contain accurate information about how the recipient of the message could readily identify and contact the organisation who authorised the message; and
 - iii. complies with section 18 of the Spam Act by ensuring that the Company critically reviews the proposed message to be sent to ensure that the content of the message does contain a functional unsubscribe facility.
- c. Within 1 month after receiving notification of the ACMA's approval of the Company's proposed quality assurance processes, those processes must be implemented by the Company.
- d. The Company undertakes to provide to the ACMA, within 5 Business Days after the implementation of the approved quality assurance processes, written confirmation of that implementation.

5.3 Undertaking with respect to complaints handling

- a. In respect of services provided by the Company to its clients that involves or is likely to involve the sending of commercial electronic messages, the Company undertakes to

ensure that it informs its clients in writing that it is best practice to have an electronic messages complaints handling policy which complies with the Australian Standard ISO 100002 – 2006 (Customer satisfaction – Guidelines for complaints handling in organisations).

- b. The Company will start informing all applicable existing clients of this within 10 Business Days after the Commencement Date and all applicable future clients at the time of engagement with the client.
- c. For a period of 12 months after the Commencement Date, the Company shall provide to the ACMA a 3 monthly report which details any complaints received by the Company or the Company's clients (of which the Company has become aware during the preceding 3 months) in respect of commercial electronic messages sent after the Commencement Date by the Company's clients (or on their behalf) and resulting from services provided by the Company to its clients, including any response to those complaints of which the Company is made aware.
- d. The Company undertakes to provide each report to the ACMA no later than 10 Business Days after the end of the applicable reporting period. If the Company is not aware of any complaints during the applicable reporting period, the Company is not required to provide a report to the ACMA for that particular period, but must notify the ACMA in writing that this is the case no later than 10 Business Days after the end of the applicable reporting period.

5.4 Undertaking with respect to auditing

- a. The Company undertakes from the Commencement Date, during the course of providing its services that involve or are likely to involve the sending of commercial electronic messages, to audit all commercial electronic messages proposed to be sent by, or on behalf of, the Company's clients for compliance with sections 16, 17 and 18 of the Spam Act.
- b. The audit for compliance will occur in accordance with the quality assurance process outlined in paragraph 5.2 above.
- c. For a period of 12 months after the Commencement Date, the Company will make available to the ACMA the results of the audit.

5.5 Undertaking with respect to Unsubscribe Facility

- a. The Company undertakes from the Commencement Date, during the course of providing its services that involve or are likely to involve the sending of commercial electronic messages, to use all best commercial endeavours to advise the Company's clients of the requirement to action and implement procedures to ensure that any person who indicates a desire to unsubscribe or otherwise withdraws their consent from receiving commercial electronic messages does not receive any further commercial electronic message from the client of the Company.
- b. Implementation of this undertaking will occur in accordance with the quality assurance process outlined in paragraph 5.2 above.

5.6 General Undertakings

In addition to the specific obligations set out in this Undertaking, the Company undertakes to do all things reasonably necessary to give effect to this Undertaking.

6. Expiration of this Undertaking

Unless otherwise stated above with respect to particular undertakings, this Undertaking continues for a period of 12 months from the Commencement Date (paragraph 4) or until it is withdrawn or varied by the Company, with the consent of the ACMA, pursuant to section 38(2) of the Spam Act, whichever is the earlier.

7. Acknowledgements of the Company

The Company acknowledges that:

- a. the ACMA may make this Undertaking available for public inspection; and
- b. acceptance by the ACMA of this Undertaking does not derogate from any rights and remedies available to any other Person arising from the conduct described in this Undertaking.

Date Accepted by BIG MOBILE PTY LTD: 29 September 2009

Name & Position of Big Mobile Pty Ltd representative authorised to sign this Undertaking:

[insert name & Position] **GRAHAM CHRISTIE**
COMMERCIAL DIRECTOR

Signature of Big Mobile Pty Ltd representative authorised to sign this Undertaking:

HUGH SPEAR
MANAGING DIRECTOR

The Undertaking offered by Big Mobile Pty Ltd is accepted by the Australian Communications and Media Authority pursuant to Section 38 of the Spam Act 2003 (Cth)

Date Accepted by ACMA:

Name & Position of ACMA representative authorised to sign:

Signature of ACMA representative authorised to sign:

Grant Symons
Executive Manager, Converging Services Branch
Australian Communications and Media Authority

Witness

Melinda Soto