

**Enforceable Undertaking
under section 38 of the
Spam Act 2003 (Cth)**

**Virgin Blue Airlines Pty Limited
ACN 090 670 965**

Australian Communications and Media Authority

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Enforceable Undertaking under section 38 of the Spam Act 2003 (Cth)

This undertaking is given by Virgin Blue Airlines Pty Limited ACN 090 670 965 to the Australian Communications and Media Authority under section 38 of the *Spam Act 2003* (Cth).

1 Definitions and interpretation

In this undertaking:

the ACMA means the Australian Communications and Media Authority;

ACMA Investigation has the meaning given to that term in clause 4.3(a) of this Undertaking;

August 2010 Training has the meaning given to that term in clause 4.3 (b) of this Undertaking;

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney or in Brisbane;

CEM means a Commercial Electronic Message as that term is defined in the Spam Act;

CEM Campaign means a group of CEMs sent with the same content in response to one request or an instruction to send CEMs, on behalf of or at the request of one or more persons, whether or not sent at the same time;

Commencement Date means the date on which the Company receives written notification of the ACMA's acceptance of the Undertaking in accordance with clause 2 of this Undertaking;

Company means Virgin Blue Airlines Pty Limited ACN 090 670 965 of 56 Edmondstone Road, Bowen Hills Qld 4006;

E-Marketing Activity has the meaning given in section 109A of the Telecommunications Act;

Final Implementation Plan has the meaning given in clause 5.2(l) of this Undertaking;

Final Recommendation has the meaning given in clause 1(d) of the Terms of Reference set out in Appendix A of this Undertaking;

Implementation Plan has the meaning given in clause 5.2(h) of this Undertaking;

Independent Consultant has the meaning given to that term in clause 5.2(a) of this Undertaking;

Key Processes means the processes described in the Terms of Reference set out in Appendix A to this Undertaking;

Report on the Implementation Plan has the meaning given to that term in clause 5.2(i) of this Undertaking.

Spam Act means the *Spam Act 2003* (Cth);

Telecommunications Act means the *Telecommunications Act 1997* (Cth);

Terms of Reference means the terms set out in Appendix A; and

Undertaking means this undertaking.

Words that are defined in the Spam Act have the same meaning in this Undertaking as they have in the Spam Act, unless otherwise specified.

2 Commencement of Undertaking

This Undertaking commences when:

- (a) it has been executed by the Company;
- (b) so executed, it has been accepted by the ACMA; and
- (c) written notification of the ACMA's acceptance of the Undertaking has been given to the Company.

3 Expiration of this Undertaking

This Undertaking will expire 24 months after the Commencement Date unless it is withdrawn or varied at an earlier date with the ACMA's consent in accordance with section 38(2) of the Spam Act.

4 Background

4.1 ACMA's Role

Under section 8 of the *Australian Communications and Media Authority Act 2005*, the ACMA is, among other things, responsible for performing functions under the Spam Act and the Telecommunications Act including, but not limited to, conducting investigations and taking civil action for the recovery of pecuniary penalties.

4.2 The Company

The Company operates an airline business. In the course of its business, the Company sends CEMs to people who have consented to receive CEMs from the Company.

4.3 The ACMA's Investigation

- (a) On 19 November 2009, the ACMA commenced an investigation into alleged breaches of the Spam Act by the Company (**ACMA Investigation**).
- (b) In response to the ACMA Investigation, the Company commenced its own internal investigation and engaged an independent consultant to assist the Company improve its arrangements for compliance with the Spam Act. The Company also conducted spam compliance training for personnel involved in sending CEMs (**the August 2010 Training**).
- (c) The Company has been cooperative throughout the course of the ACMA Investigation and has been responsive to the ACMA's requests. The openness and pro-activity with which the Company has responded to these matters is recognised by the ACMA.

4.4 Acknowledgement of the ACMA's concerns

- (a) The Company acknowledges that, on the basis of the documents and information obtained during the course of the ACMA Investigation, the ACMA believes that the Company has contravened the Spam Act.
- (b) The Company believes that a number of the CEMs that were the subject of the ACMA's Investigation were sent by mistake within the meaning of section 16(4) of the Spam Act.
- (c) The Company acknowledges that the ACMA's view is that the Company ought to have become aware of the mistake sooner than it did, and that therefore some of the CEMs may not have been sent by mistake within the meaning of section 16(4) of the Spam Act.
- (d) The Company notes that the ACMA has a number of enforcement options in response to alleged contraventions of section 16 of the Spam Act, including the giving of an infringement notice and applying to the Federal Court for civil penalty orders.
- (e) In response to the ACMA's concerns regarding the Company's compliance with the Spam Act and in the spirit of cooperation, the Company offers this Undertaking to the ACMA.

5 Undertakings

Under section 38 of the Spam Act, the Company has given, and the ACMA has accepted, the following undertakings to ensure compliance with the Spam Act.

5.1 Undertakings to make payment

- (a) The Company undertakes to pay the ACMA \$110,000 in full and final settlement for all alleged breaches of the Spam Act which were subject of the ACMA Investigation.
- (b) The total amount is to be paid no later than 30 days after the receipt of a payment statement from the ACMA.

5.2 Independent Consultant and implementation plan

- (a) The Company will appoint an independent consultant (**Independent Consultant**) to review and assess the effectiveness of, and identify any deficiencies in the Company's current E-Marketing Activities to the extent that those activities affect the Company's compliance with the Spam Act.
- (b) The Company may invite parties to tender for the role of independent consultant and the Company may evaluate the tenders using its own criteria. The Company will appoint the Independent Consultant on terms which include the Terms of Reference. The Company will not appoint the Independent Consultant without first seeking the ACMA's written approval.
- (c) The Company will seek the ACMA's approval by providing to the ACMA the Company's preferred Independent Consultant within 15 Business Days of the Commencement Date. If the ACMA does not give its written approval or refusal in respect of the preferred Independent Consultant within 10 Business Days of the Company providing the name of the preferred Independent Consultant, the ACMA will be deemed to have given its written approval in respect of that preferred Independent Consultant at the expiry of that period.
- (d) The Company will appoint an approved Independent Consultant within 1 month of the ACMA's approval under clause (c).
- (e) The Company may require the Independent Consultant to keep confidential the specific contents of the Company's marketing and advertising materials and activities, but not such that this adversely affects the Independent Consultant's ability to carry out its activities in compliance with this Undertaking and the Terms of Reference.
- (f) Subject to the ACMA's agreement, the Company may remove and replace the Independent Consultant at any time with another potential Independent Consultant who has been approved by the ACMA.
- (g) The Company will provide to the ACMA a copy of the Final Recommendations prepared by the Independent Consultant within 5 Business Days of the date on which the Company receives it.
- (h) Within 2 months of receiving the Final Recommendations, the Company will draft a written implementation plan detailing the steps that the Company has taken or intends to take to implement the Final Recommendations, or to rectify the issues which are the subject of the Final Recommendation (with an estimated timeframe) (**Implementation Plan**).
- (i) The Company will submit the Implementation Plan to the Independent Consultant for comment. After receipt of the Implementation Plan from the Company, the Independent Consultant will be required to notify the Company in writing as to whether the Implementation Plan is acceptable in its current form, or if further amendment is recommended (**Report on the Implementation Plan**).
- (j) The Company will provide both the Implementation Plan and the Report on the Implementation Plan to the ACMA within 5 Business Days of receipt of the Report on the Implementation Plan. Unless otherwise agreed by the ACMA, and subject to clause (l), the Implementation Plan will address all of the recommendations made in the Final Recommendations.

- (k) After receipt of the Implementation Plan from the Company, the ACMA may notify the Company in writing as to whether the Implementation Plan is approved in its current form, or requires further amendment.
- (l) If, within 10 Business Days of receipt, the ACMA notifies the Company that the Implementation Plan received pursuant to clause (h) requires amendment, the Company will meet with the ACMA to discuss the further amendments. The ACMA and the Company will use reasonable endeavours to finalise the Implementation Plan within 20 Business Days of the ACMA notification pursuant to this clause (l). Once finalised, the Implementation Plan will be the final implementation plan (**Final Implementation Plan**).
- (m) The provisions in the Implementation Plan must be:
 - (i) limited to the implementation of the Final Recommendations, or to the rectification of the issues which are the subject of the Final Recommendations;
 - (ii) limited to measures directly relating to compliance with the Spam Act by the Company;
 - (iii) practicable and reasonable having regard to the legal status and responsibilities of the Company; and
 - (iv) practicable and reasonable having regard to the nature and volume of CEMs handled and sent by the Company, and the manner in which relevant CEMs are handled by the Company's systems.
- (n) If the ACMA does not notify the Company, within 10 Business Days of receipt, that the Implementation Plan requires amendment, the Implementation Plan will be the Final Implementation Plan.
- (o) The Company will carry out the Final Implementation Plan in accordance with the timelines set out in the Final Implementation Plan. The Company will update the ACMA in writing by the 15th of each month during the period of this Undertaking on the Company's progress on the Final Implementation Plan, for the duration of the Final Implementation Plan. If any items in the Final Implementation Plan have not been implemented at the expiry of this Undertaking, the Company will continue to provide monthly updates to the ACMA in respect of those items until they are implemented.

5.3 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 detailed written version of its training program which will provide training on the requirements of provisions of the Spam Act which are relevant to the business of the Company.
- (b) After receiving notification of the ACMA's approval of the training program, the Company undertakes within 45 Business Days of that approval to provide the approved training program to its existing employees and contractors who are involved in sending CEMs, or dealing with enquiries and complaints about CEMs, and to provide those employees with a copy of this Undertaking.
- (c) The Company undertakes to provide the approved training program annually for the duration of this Undertaking.
- (d) The Company undertakes to provide the approved training program to any new employees and contractors of the Company who are involved in sending CEMs, or dealing with enquiries and complaints about CEMs, within 2 months of that new employee or contractor commencing their duties with the Company.

5.4 Complaints handling policy

- (a) The Company undertakes to establish and maintain a complaints handling policy which complies with Australian Standard ISO 10002-2006 (Guidelines for complaints handling in organisations) and the Final Implementation Plan.
- (b) The complaints handling policy will, at a minimum, include:
 - (i) a process for responding to complaints to the Company with regards to Spam Act compliance, including the provision of the Company's contact details; and
 - (ii) a record keeping requirement which provides for records of complaints and the response to complaints to be retained by the Company for a period of 24 months following the complaint.
- (c) The Company undertakes to provide to the ACMA a written plan specifying the changes to be made and the process for implementing those changes and for implementing the complaints handling policy within 3 months from the Commencement Date.
- (d) The Company undertakes to have its complaints handling policy approved by the Independent Consultant as being compliant with Australian Standard ISO 10002-2006 (Guidelines for complaints handling in organisations).
- (e) The Company will provide a copy of its complaint handling policy to the ACMA within 10 Business Days of its finalisation.

5.5 Auditing

- (a) The Company undertakes to audit on a monthly basis 10% of CEM Campaigns sent by the Company for a period of 12 months from the Commencement Date to monitor compliance with sections 16, 17 and 18 of the Spam Act. The Company will also audit each CEM Campaign in respect of which the Company receives a complaint (other than a vexatious complaint) alleging contravention of the Spam Act.
- (b) The audit must include, at a minimum, an audit of the selected CEM Campaigns sent in the relevant month to determine:
 - (i) whether the selected CEM campaigns contained accurate sender identification;
 - (ii) whether the selected CEM Campaigns contained a functional unsubscribe facility in accordance with section 18 of the Spam Act. For the avoidance of doubt, a CEM will be deemed to comply with section 18 of the Spam Act if an omission of a functional unsubscribe facility is exempted by section 18(3) of the Spam Act or other applicable provisions or laws; and
 - (iii) whether the recipient of the selected CEM Campaigns had consented to receiving the relevant CEM.
- (c) The Company undertakes to conduct each audit no later than 10 Business Days after the end of the relevant month. The first audit will be in respect of the calendar month January 2011.

5.6 Quarterly reports

- (a) The Company undertakes to provide the ACMA with quarterly reports, during the period of 12 months from the Commencement Date, in a format, and with content, agreed with the ACMA, detailing:
 - (i) the results of audits undertaken;
 - (ii) any complaints received about CEMs sent after the Commencement Date, and the response to those complaints; and
 - (iii) the training given to all employees and contractors who are involved in sending CEMs,

during the relevant quarter.

- (b) The Company undertakes to provide each report to the ACMA no later than 20 Business Days after the end of the applicable reporting period. The first report will be in respect of the quarter ending on 31 March 2011.

6 Acknowledgments

- (a) The Company acknowledges that the ACMA may:
- (i) issue a media release on execution of this Undertaking referring to its terms;
 - (ii) publish this Undertaking or make this Undertaking available for public inspection; and
 - (iii) refer to this Undertaking publicly from time to time.
- (b) The Company acknowledges that acceptance by the ACMA of this Undertaking does not affect the rights and remedies available to third parties arising from any conduct described in this Undertaking.

Dated this 30 day of November 2010

Executed by Virgin Blue Airlines Pty Limited
(ACN 090 670 965) in accordance with
subsection 127(1) of the *Corporations Act 2001*
(Cth)



Merren McArthur, Company Secretary

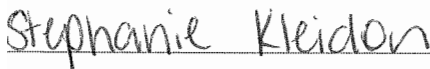


Keith Neate, Director

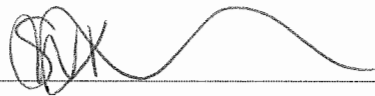
Witness

Name

In the presence of:



(Specify name of witness)



(Signature of witness)

and

This undertaking, offered by the Company, is accepted by the Australian Communications and Media Authority pursuant to section 38 of the Spam Act 2003, by its delegate.

Date Accepted by the ACMA:

3 December, 2010

C. Boyer

Delegate of the Australian Communications and Media Authority

In the presence of:

Sue Gabor

(Name of Witness)

Shabo

(Signature of Witness)

Appendix A - Independent Consultant Terms of Reference

1 Outline of Terms of Reference

Under these Terms of Reference:

- (a) the Company will at its own cost appoint the Independent Consultant in accordance with these Terms of Reference;
- (b) the Independent Consultant will review the Key Processes of the Company to determine whether those Key Processes are appropriate to ensure compliance with the Spam Act by the Company;
- (c) based on the review, the Independent Consultant will prepare draft recommendations for the rectification or avoidance of any deficiencies identified in the course of the review;
- (d) the Company will consult the ACMA regarding the recommendations and the Independent Consultant will finalise the recommendations taking into account any input from the ACMA (the **Final Recommendations**);
- (e) the Company will prepare a draft Implementation Plan regarding the implementation of the Final Recommendations;
- (f) the Company will submit the Implementation Plan to the Independent Consultant for approval and the Independent Consultant will prepare a Report on the Implementation Plan;
- (g) the Company will provide the Implementation Plan and the Report on the Implementation Plan to the ACMA; and
- (h) the Company will finalise the Implementation Plan in a form approved by the ACMA,

in accordance with these Terms of Reference and clause 5.2 of the Undertaking.

References to the Key Processes of the Company in these Terms of Reference means the Key Processes of the Company described in clauses 2.2 to 2.5 to the extent that the Key Processes relate to E-marketing Activities in Australia.

2 Main duties of Independent Consultant

2.1 Review of Key Processes

- (a) The Independent Consultant will review and assess the effectiveness of, and identify any deficiencies in the Key Processes of the Company in accordance with these Terms of Reference.
- (b) The review by the Independent Consultant under these Terms of Reference will be solely in relation to whether the Company's Key Processes:
 - (i) comply with, or are consistent with the Spam Act; and
 - (ii) are sufficient to ensure that the Company will continue to comply with the Spam Act.

2.2 Key Process: Quality Assurance

The Company's quality assurance processes for:

- (a) reviewing automated programs used to create lists of recipients of CEMs (including the logic used in creating the lists and the resulting lists);
- (b) minimising the possibility for human error by the Company staff in creating and managing these lists;

- (c) monitoring the currency and expiry dates of the lists;
- (d) keeping records documenting the creation, checking and disposal of lists; and
- (e) periodically reviewing CEMs sent by the Company for compliance with the Spam Act.

2.3 Key Process: Complaints handling

The Company's complaint handling processes to deal with complaints received by the Company involving alleged contraventions of the Spam Act, whether the complaint is made to the Company directly or to a third party supplier, including:

- (a) the processes for recording, reviewing and actioning those complaints;
- (b) staff training in handling complaints;
- (c) the processes for reporting on these complaints; and
- (d) the processes for identifying emerging compliance issues from the complaints data and taking steps to swiftly remedy identified issues.

2.4 Key Process: Education and training

The Company's training processes to educate and train staff on compliance with the Spam Act.

2.5 Key Process: Third party supervision

The Company's processes for monitoring the compliance of third party suppliers with the Spam Act.

3 Independent Consultant to comply with timeframes

The Independent Consultant will be required to meet all the timeframes set out in the Undertaking which includes these Terms of Reference (where applicable to the Independent Consultant).

4 Preparation of draft recommendations

- (a) The Independent Consultant will produce draft recommendations regarding the Key Processes and will provide the draft recommendations to the Company within 60 Business Days of its appointment by the Company.
- (b) The Company will review the draft recommendations within a period of 20 Business Days. During that period, if the Company considers that the draft recommendations require amendment, the Company will consult with the Independent Consultant in relation to the amendments and issues raised by the Company. If the Company and the Independent Consultant disagree on any recommendation and are unable to resolve that disagreement, the Company and the Independent Consultant will refer the matter to the ACMA for adjudication. The determination made by the ACMA will be binding. For the purposes of the time-frames set out in this Terms of Reference, the period of 20 Business Days under this clause 4(b) will be extended by the period of time taken by the ACMA to provide the Company and the Independent Consultant with its determination.
- (c) The Independent Consultant will finalise the draft recommendations within 5 Business Days after the expiry of the review period specified in clause 4(b) of these Terms of Reference. Nothing in these Terms of Reference prevents further consultation between the Independent Consultant and the Company during this period.
- (d) The Independent Consultant will ensure that the draft recommendations and the Final Recommendations are in accordance with clause 4(e) of these Terms of Reference. For the avoidance of doubt, the Company may require the deletion or amendment of any draft recommendation which is not in accordance with clause 4(e) of these Terms of Reference. Once finalised, the draft recommendations will be the Final Recommendations.
- (e) The recommendations in the Final Recommendations must be:

- (i) limited to rectification of the issues which are identified by the Independent Consultant in the course of carrying out these Terms of Reference;
- (ii) limited to measures directly relating to compliance with the Spam Act by the Company;
- (iii) practicable and reasonable having regard to the legal status and responsibilities of the Company; and
- (iv) practicable and reasonable having regard to the nature and volume of CEMs handled and sent by the Company, and the manner in which relevant CEMs are handled by the Company's systems.

5 Final Recommendations

The Independent Consultant will provide the Final Recommendations to the Company in printed and electronic forms.

6 Independent Consultant must be independent

By agreeing to the appointment in accordance with these Terms of Reference, the Independent Consultant warrants that the Independent Consultant and the individuals who assist the review and assessment of the Company's systems, processes and procedures are independent of the Company and its related companies, and will at all times be able to exercise objective and impartial judgement in the review, assessment and preparation of recommendations.

7 Independent Consultant may report to the ACMA

The Independent Consultant may report to the ACMA at any time about any matter relating to their appointment under the Undertaking. The Independent Consultant will provide to the Company a copy of all such written communications with the ACMA. The Independent Consultant must report to the ACMA about any matter that is reasonably likely to adversely affect their independence as soon as practicable after becoming aware of the matter and the potential effect on their independence.

8 Independent Consultant not responsible for future compliance

In carrying out the obligations under these Terms of Reference and the Undertaking, the Independent Consultant does not warrant or represent that the compliance systems and processes implemented by the Company will avoid all future contraventions of the Spam Act.

9 Interpretation

Words and phrases used in these Terms of Reference have the same meaning as in the Undertaking.