



Infringement Notice

Spam Act 2003

I, Jeremy Fenton, an authorised person under clause 9 of Schedule 3 to the *Spam Act 2003* (**Spam Act**), having reasonable grounds to believe that Kogan Australia Pty Ltd ACN 152570351 (**Kogan**), has committed one or more contraventions of a particular civil penalty provision,

HEREBY give an infringement notice (**the notice**) under subclause 3(1) of Schedule 3 to the Spam Act to:

Kogan Australia Pty Ltd

at

Level 10
530 Collins Street
Melbourne VIC 3000

Details of Alleged Civil Contraventions

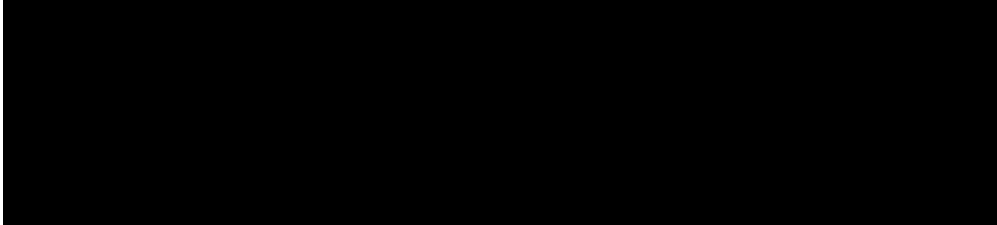
It is alleged that Kogan contravened subsection 18(1) of the Spam Act by sending commercial electronic messages which had an Australian link and were not designated commercial electronic messages, and which did not contain a functional unsubscribe facility. Schedule 1 of this infringement notice set out brief details of the alleged civil contraventions.

Amount of Penalty

The total pecuniary penalty (**the penalty**) for the alleged civil contraventions is **\$310,800**. The penalty is calculated in accordance with items 5 and 6 of the table under subclause 5(1) of Schedule 3 to the Spam Act, as set out in Schedule 2 to the notice.

Payment of Penalty

The penalty should be paid to the Australian Communications and Media Authority (ACMA), on behalf of the Commonwealth, into the following account by 7 January 2021. Please include the narration “Kogan –UCES” with your payment:



If the penalty is paid

If the penalty is paid to the ACMA, on behalf of the Commonwealth, by 7 January 2021, this matter will not be dealt with by the Federal Court of Australia.

Any liability of Kogan for the alleged civil contraventions that are the subject of the notice is discharged.

If the penalty is not paid

If you do not pay the penalty by 7 January 2021, the ACMA may take action for the alleged contraventions.

That action may include the institution of civil penalty proceedings in the Federal Court of Australia. The penalties that the Court can impose are potentially significantly higher than those that can be specified in an Infringement Notice (see Part 4 of the Spam Act).

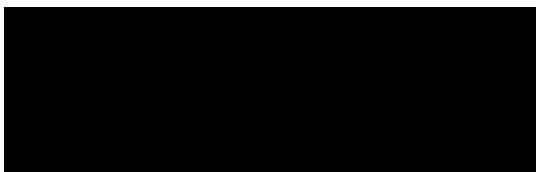
Withdrawal of the notice

The ACMA may withdraw the notice. To be effective, the withdrawal must occur within 28 days after the notice was given.

If you believe that the notice should be withdrawn, you should write by 7 January 2021 setting out the basis/reasons for this position. This should be addressed to me in the first instance. The ACMA may take this written request into consideration when deciding whether or not to withdraw the notice.

If the notice is withdrawn after the penalty is paid, the penalty will be refunded.

DATE: 10 December 2020



Jeremy Fenton
Executive Manager
Consumer, Consent and Numbers Branch
Australian Communications and Media Authority

SCHEDULE 1

In accordance with clause 4 of Schedule 3 to the Spam Act, brief details of each of the alleged civil contraventions are set out below.

1. Background

- 1.1. Kogan is a registered company under the *Corporations Act 2001*, with a registered office at Level 10, 530 Collins Street, Melbourne VIC 3000.
- 1.2. On 31 March 2020, the ACMA commenced an investigation into Kogan's compliance with the Spam Act.
- 1.3. Before commencing the investigation, the ACMA had received complaints from consumers claiming to have received commercial electronic messages from Kogan which did not contain a functional unsubscribe facility.

2. Matters giving rise to the Infringement Notice

- 2.1. Between 13 December and 15 December 2019, Kogan sent electronic messages to electronic addresses.
- 2.2. Information provided by Kogan showed that the purpose of the messages was to offer to supply, or to advertise or promote products sold by Kogan. Therefore, the messages described at paragraph 2.1 were commercial electronic messages, as defined in section 6 of the Spam Act.
- 2.3. Kogan is not an entity of a type referred to in Schedule 1 to the Spam Act, i.e. a government body, registered political party or registered charity. Therefore, the messages were not designated commercial electronic messages.
- 2.4. The commercial electronic messages had an Australian link as defined in section 7 of the Spam Act. This is because they were sent by Kogan, an organisation whose central management and control is in Australia.
- 2.5. The commercial electronic messages did not contain a functional unsubscribe facility as required by subsection 18(1) of the Spam Act.

3. Relevant civil penalty provisions of the Spam Act

- 3.1. Subsection 18(1) of the Spam Act provides that a person must not send, or cause to be sent, a commercial electronic message that:
 - a) has an Australian link; and
 - b) is not a designated commercial electronic message;unless the requirements in paragraphs 18(1)(c) to (g) are met.
- 3.2. Subsection 18(8) of the Spam Act provides that subsection 18(1) of the Spam Act is a civil penalty provision.
- 3.3. Kogan sent commercial electronic messages which had an Australian link and were not designated commercial electronic messages, and which did not contain a functional unsubscribe facility.
- 3.4. There are reasonable grounds to believe that Kogan contravened subsection 18(1) of the Spam Act, between 13 December and 15 December 2019, in relation to commercial electronic messages it sent, or caused to be sent, to recipients who had not set a password with Kogan. This meant these recipients could not unsubscribe unless they took additional action to register an account with Kogan, set a password and login to the Kogan account. Accordingly, Kogan contravened subsection 18(1) of the Spam Act because:

- > for recipients who had not previously set a password with Kogan, the unsubscribe statement in the CEMs did not link to an electronic address that the recipient could use to send an unsubscribe message to Kogan (paragraph 18(1)(c) of the Spam Act); and
- > the electronic address to which a recipient was directed by the unsubscribe statement in the CEMs was not, at all times during a period of at least 30 days after the message was sent, reasonably likely to be capable of receiving the recipient's unsubscribe message (paragraph 18(1)(e) of the Spam Act).

4. The amount of the penalty

- 4.1. The total penalty specified in the notice is **\$310,800**, calculated in accordance with the table in subclause 5(1) of Schedule 3 to the Spam Act, as shown in Schedule 2 to this infringement notice.

SCHEDULE 2

Penalties for alleged contraventions of subsection 18(1) of the Spam Act

Dates of alleged contravention	Civil penalty provision allegedly contravened	Number of contraventions of subsection 18(1)	Penalty units¹	Penalty imposed
13/12/2019	Subsection 18(1)	48	480 ²	\$100,800
14/12/2019	Subsection 18(1)	5,595,778	500 ³	\$105,000
15/12/2019	Subsection 18(1)	35,423	500	\$105,000
Total		5,631,249		\$310,800

¹ At the time of the alleged contraventions, the amount of a penalty unit was \$210, as set by section 4AA of the *Crimes Act 1914*.

² For the calculation of the number of penalty units for the alleged contraventions occurring on 13 December 2019, refer to item 5 in the table at subclause 5(1) of Schedule 3 to the Spam Act.

³ For the calculation of the number of penalty units for the alleged contraventions occurring on 14 and 15 December 2019, refer to item 6 in the table at subclause 5(1) of Schedule 3 to the Spam Act.