

**ENFORCEABLE UNDERTAKING GIVEN TO THE AUSTRALIAN COMMUNICATIONS AND
MEDIA AUTHORITY BY KOGAN AUSTRALIA PTY LTD (ACN 152 570 351) UNDER SECTION
38 OF THE SPAM ACT 2003**

1. Definitions

- 1.1. **Board** means Kogan's Board of Directors.
- 1.2. **CEM** means commercial electronic message and has the same meaning as in the Spam Act.
- 1.3. **CEM Complaint** means a complaint to Kogan that relates to a CEM sent, or alleged to have been sent, by Kogan and includes complaints notified to Kogan by the ACMA.
- 1.4. **Independent Consultant** means a qualified and independent compliance consultant or legal practitioner with experience in auditing, compliance or e-marketing processes, procedures and systems.
- 1.5. **Kogan** means Kogan Australia Pty Ltd (ACN 152 570 351).
- 1.6. **Spam Act** means *Spam Act 2003* (Cth).
- 1.7. **Relevant period** means the period beginning on 9 December 2019 and ending on 15 December 2019 (inclusive).

2. Terms of the Undertaking

- 2.1. This Undertaking commences when:
 - 2.1.1. it has been executed by Kogan.
 - 2.1.2. so executed, it has been accepted by the ACMA and written notification of that acceptance has been provided to Kogan (**Commencement date**).
- 2.2. This Undertaking continues for a period of 36 months from the Commencement date or until it is withdrawn or varied by Kogan, with the approval of the ACMA, pursuant to section 38 of the Spam Act, whichever is earlier.
- 2.3. This Undertaking may be varied by Kogan, with the consent of the ACMA, pursuant to subsection 38(2) of the Spam Act.

3. Background

- 3.1. On 10 November 2020, the ACMA notified Kogan that the ACMA has reasonable grounds to believe that, during the Relevant period, Kogan sent or caused to be sent commercial electronic messages without a functional unsubscribe facility, in contravention of subsection 18(1) of the Spam Act.
- 3.2. Kogan acknowledges that during the Relevant period, its systems, processes and practices required certain recipients of commercial electronic messages it sent, to verify accounts and set passwords with Kogan as a precondition to these recipients being able to unsubscribe from receiving such messages.
- 3.3. Kogan acknowledges the ACMA's findings, and in response to the ACMA's concerns regarding Kogan's compliance with the Spam Act, offers this Undertaking to the ACMA aimed at addressing future compliance with the Spam Act.

4. Undertaking

- 4.1. Kogan undertakes to take the following specified actions to ensure Kogan complies with the Spam Act and does not contravene the Spam Act in the future.

5. Independent Consultant

- 5.1. Kogan undertakes to appoint an Independent Consultant to:
 - 5.1.1. review Kogan's current procedures, policies, training and systems relating to its compliance with the Spam Act and identify any deficiencies and/or improvements to ensure that:
 - a. as per section 16(2) of the Spam Act, all CEMs are sent, or caused to be sent, by Kogan with the consent of the relevant account holder
 - b. Kogan receives, records and actions all unsubscribe requests within the periods specified in Schedule 2 to the Spam Act for when withdrawal of consent takes effect
 - c. all CEMs sent, or caused to be sent, by Kogan contain the information required by sections 17(1)(a) and (b) of the Spam Act
 - d. all CEMs sent, or caused to be sent, by Kogan contain a functional unsubscribe facility as required by section 18(1) of the Spam Act.
 - e. Kogan classifies and analyses its records of CEM Complaints to identify systemic and recurring problems and trends (**systemic problems**).
 - 5.1.2. produce a report (**the report**) making recommendations as to:
 - a. ensuring Kogan's systems receive, record and action unsubscribe requests
 - b. improvements to policies and procedures that ensure compliance with the Spam Act, including but not limited to:
 - i. quality assurance procedures for ensuring the ongoing integrity and functionality of relevant systems
 - ii. procedures for ensuring Kogan's personnel comply with policies and procedures
 - iii. procedures for ensuring continued compliance when process or system changes are implemented
 - c. ongoing training for Kogan personnel on Spam Act compliance
 - d. ongoing monitoring of Spam Act compliance measures
 - e. ensuring Kogan takes reasonable steps to address any identified systemic problems.
- 5.2. Kogan undertakes to seek written approval from the ACMA for the appointment of the proposed Independent Consultant within 20 business days after the Commencement date. If the ACMA does not approve the choice of Independent Consultant, Kogan will repeat this process until it has the ACMA's written approval.
- 5.3. Kogan undertakes to appoint the Independent Consultant within 10 business days after the ACMA has given its written approval.
- 5.4. Subject to the ACMA's written agreement, Kogan may remove the Independent Consultant at any time and replace the Independent Consultant with a new Independent Consultant approved by the ACMA. If the ACMA does not approve the choice of Independent Consultant, Kogan will repeat this process until it has the ACMA's written approval.
- 5.5. The Independent Consultant will provide the report to Kogan, and at the same time to the ACMA, within six months of their appointment.
- 5.6. The Independent Consultant will again review Kogan's procedures, policies, training and systems relating to its Spam Act compliance every 12 months, after they provide their report to Kogan and the ACMA for the duration of this Undertaking.

- 5.7. The Independent Consultant will provide the results of each of their reviews in writing to Kogan, including the Board, and the ACMA within 40 days of the finalisation of each review, including a statement about whether they are satisfied that Kogan's procedures, policies, training and systems are effective in ensuring compliance with the Spam Act.

6. Implementation Plan, Audit & Reporting

- 6.1. Within 40 business days after receiving the report:
 - 6.1.1. unless the ACMA informs Kogan that any recommendation need not be implemented, Kogan will develop an implementation plan setting out the steps Kogan has taken, or will take, to implement all recommendations made by the Independent Consultant in the report, subject to Board acceptance. If the Board does not accept a recommendation, the implementation plan will explain the reasons why, despite not accepting the recommendation, Kogan believes that the steps taken in the implementation plan will ensure Kogan's compliance with the Spam Act.
 - 6.1.2. Kogan will provide a copy of the Board-approved implementation plan to the ACMA.
- 6.2. Kogan undertakes to comply with the approved implementation plan in accordance with the timeframes specified in the plan.
- 6.3. The implementation plan may be modified by Kogan at any time subject to the ACMA's written approval.
- 6.4. Every twelve months from the date the Board approved implementation plan is provided to the ACMA, Kogan will provide a compliance report, approved by the Board, to the ACMA that covers the previous 12 months and that includes:
 - 6.4.1. the status of actions Kogan has committed to take under the implementation plan
 - 6.4.2. a report of all de-identified consumer complaints made to Kogan about alleged non-compliance with the Spam Act, including the date of the complaint and a unique identifier for each complaint
 - 6.4.3. action Kogan has taken in relation to all complaints the ACMA has notified Kogan about or that Kogan has received directly from consumers.
- 6.5. Where Kogan has identified non-compliance with the Spam Act, it will report the identified instance(s) of non-compliance to the ACMA within 10 business days of identification, including the cause of the identified compliance issue(s) and remediation action taken or proposed to be taken.

7. Training

- 7.1. Within 45 business days of the Commencement date, Kogan undertakes to train all personnel that may be, or are currently responsible for creating or sending CEMs, and their direct line manager, to ensure compliance with the Spam Act.
- 7.2. Kogan undertakes to repeat the training, described in clause 7.1, every 12 months after Kogan has undertaken the training referred to in clause 7.1 for the duration of this Undertaking.
- 7.3. Kogan undertakes to provide the ACMA with written notice when it has undertaken each training referred to in clauses 7.1 and 7.2.

8. Acknowledgment of Kogan

- 8.1. Kogan acknowledges that the ACMA may publish these undertakings.

SIGNED by Kogan Australia Pty Ltd



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Signature

David Shafer

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Print name

Capacity: Authorised representative


22 December 2020

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Date of signing

The Undertaking offered by Kogan Australia Pty Ltd is accepted by the Australian Communications and Media Authority pursuant to section 38 of the *Spam Act 2003* (Cth) by the ACMA's delegate:

Date accepted by ACMA: 5 January 2021

Name and position of ACMA delegate: Paul Miszalski, Acting Executive Manager



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Signature of ACMA delegate