

Investigation report

Summary	
Entity	The Wine Group Pty Ltd
Australian Company Number	ACN 613 076 734
Types of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003</i>
Revised findings	59 contraventions of subsection 16(1) of the <i>Spam Act 2003</i> [Unsolicited commercial electronic messages must not be sent]
Date of findings	11 March 2022

Background

- On 18 May 2021, the Australian Communications and Media Authority (**ACMA**) commenced an investigation into the compliance of The Wine Group Pty Ltd (**The Wine Group**) with the *Spam Act 2003* (**Spam Act**) under the *Telecommunications Act 1997* (**Telecommunications Act**), following consumer complaints.
- The investigation focused on two categories of commercial electronic messages (**CEMs**) sent by The Wine Group:
 - those sent to specific electronic addresses which were the subject of complaints to the ACMA (alleged to have been sent between 2 February and 18 May 2021), and
 - all those sent during the period 8 March 2021 to 21 March 2021.
- The ACMA's findings are based on complaints from members of the public and information provided by The Wine Group between 17 June 2021 and 9 March 2022, including in response to:
 - a notice dated 18 May 2021, given to it by the ACMA under section 522 of the *Telecommunications Act 1997* (**the Notice**)
 - a letter dated 21 July 2021 from the ACMA requiring compliance with the Notice
 - a compliance alert dated 22 June 2021 from the ACMA providing information about complaints the ACMA received alleging The Wine Group may have contravened the Spam Act
 - the ACMA's preliminary findings of 8 December 2021, and
 - the ACMA's findings made on 22 February 2022.
- The CEMs subject to the contravention findings are referred to as the 'investigated messages', specifically **59** CEMs sent to 4 electronic addresses more than 5 business days after TWG had received unsubscribe requests from the relevant account-holder.
- The reasons for the ACMA's revised findings, including the key elements which establish the contraventions, are set out below.

Relevant legislative provisions

- 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.

7. 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 CEM, or caused the CEM to be sent, by mistake (subsection 16(4)).
 8. Under subsection 16(5) of the Spam Act, if The Wine Group wishes to rely on any of the above exceptions, it bears the evidential burden in relation to that matter. This means that it needs to provide or point to evidence that suggests a reasonable possibility that the exception applies.
 9. 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 that consent is withdrawn if:
 - (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.*
10. Clause 6 of Schedule 2 to the Spam Act states that withdrawal of consent takes effect at the end of the period of 5 business days beginning on the day the unsubscribe request was sent (if the unsubscribe request was sent as an electronic message).

Reasons for findings

Unsolicited commercial electronic messages must not be sent

11. To determine The Wine Group's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
 - a. Is The Wine Group a 'person' to which section 16 of the Spam Act applies?
 - b. If so, did The Wine Group send or cause the investigated messages to be sent?
 - c. If so, were the investigated messages commercial?
 - d. If so, did the investigated messages have an Australian link?
 - e. If so, were the investigated messages 'designated CEMs' and therefore exempt from the prohibition on sending unsolicited CEMs in section 16?
 - f. If not, did the person claim that the investigated messages were subject to any exceptions?
 - g. If so, did The Wine Group meet the evidential burden in relation to the claimed exception?
12. If the conditions in paragraph 11 are met (and an exception has not been raised which is supported by evidence) then The Wine Group has contravened section 16 of the Spam Act for the investigated messages.

Is The Wine Group a 'person' to which section 16 of the Spam Act applies?

13. The Wine Group is a company registered under the *Corporations Act 2001* and is therefore a 'person' for the purposes of subsection 16(1) of the Spam Act.

Did The Wine Group send, or cause to be sent, the investigated messages?

14. The Wine Group sent each of the investigated messages. The Wine Group provided details of the messages it sent, including the date, time and content of the messages sent.

15. Therefore, The Wine Group sent the investigated messages for the purposes of the subsection 16(1) of the Spam Act.

Were the investigated messages commercial?

16. Section 6 of the Spam Act defines a CEM as an electronic message where, having regard to the content of the message, the purpose includes to offer to supply, advertise or promote goods and services.

17. The purpose of each investigated message was to offer The Wine Group's products to consumers.

18. Therefore, the investigated messages are CEMs for the purposes of paragraph 16(1)(a) of the Spam Act.

Did the investigated messages have an Australian link?

19. The Wine Group's central management and business registration was in Australia when it sent the investigated messages. Therefore, the investigated messages had an Australian link for the purposes of paragraph 16(1)(a) of the Spam Act.

Were the investigated messages designated CEMs?

20. The investigated messages were not designated CEMs for the purposes of paragraph 16(1)(b) of the Spam Act because:

- a. the CEMs consisted of more than factual information and were commercial in nature (refer to clause 2 of Schedule 1 to the Spam Act), and
- b. The Wine Group 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 The Wine Group claim the investigated messages were subject to any exceptions to subsection 16(1) of the Spam Act?

21. The effect of subsection 16(2) of the Spam Act is that if The Wine Group had the consent of the relevant electronic account-holders, it will not have contravened subsection 16(1) of that Act (**the consent exception**). Under subsection 16(5) of the Spam Act, The Wine Group has the evidential burden of providing or pointing to evidence that suggests a reasonable possibility that it had consent to send the investigated messages.

22. The Wine Group sent 59 CEMs to electronic addresses, more than 5 business days after the relevant electronic account-holder sent it an unsubscribe request. That is, each of these relevant electronic account-holders had withdrawn their consent to receiving CEMs from the Wine Group and that withdrawal had taken effect under clause 6 of Schedule 2 to the Spam Act. This means that The Wine Group sent these 59 CEMs to relevant electronic account-holders without their consent (i.e. the consent exception in subsection 16(2) of the Spam Act did not apply to the sending of these CEMs).

23. The Wine Group claimed it made a mistake in relation to the failure to identify a technical error responsible for 59 investigated messages it sent more than 5 business days after it had received unsubscribe requests from the relevant account-holders.

24. The ACMA has separately considered the mistake exception matters below.

Did The Wine Group provide evidence that the investigated messages were subject to any exceptions to subsection 16(1) of the Spam Act?

Mistake exception not substantiated

25. The ACMA has assessed whether it was possible, as claimed, that The Wine Group sent the investigated messages by mistake.

26. Under subsection 16(4) of the Spam Act, a person will not contravene subsection 16(1) of that Act where the person sent, or caused to send, the CEM by mistake. 'Mistake' is defined to mean a 'reasonable mistake of fact'.
27. In relation to **59** investigated messages sent to 4 unique electronic addresses more than 5 business days after it had received unsubscribe requests from the relevant account-holders, The Wine Group claimed that it sent these messages due to a processing error that was rectified around June 2021. The Wine Group indicated that the error affected its unsubscribe facilities and resulted from its use of 2 SMS unsubscribe numbers. Specifically, recipients who sent 'STOP' in reply to an SMS CEM were only unsubscribed from CEMs sent from the same SMS number.
28. These circumstances do not constitute a mistake within the meaning of section 16(4) of the Spam Act. This is because The Wine Group intended to send the investigated messages, albeit a processing error resulted in the messages being sent to recipients who had attempted to unsubscribe from the relevant CEMs.
29. While The Wine Group claimed it ran six-monthly tests to check the functionality of its opt-out system, it was not reasonable for The Wine Group to continue to hold a mistaken belief that its systems were working in compliance with the Spam Act. These infrequent checks were inadequate given such compliance issues are reasonably foreseeable (noting the ACMA had alerted The Wine Group to potential issues in the months prior via compliance alerts).
30. Accordingly, by sending **59** investigated messages to 4 electronic addresses more than 5 business days after it had received an unsubscribe message, The Wine Group contravened subsection 16(1) of the Spam Act as the consumers had not consented to receive the messages.

Conclusion

31. The ACMA finds that there are reasonable grounds to believe that The Wine Group has contravened subsection 16(1) of the Spam Act in relation to **59** CEMs it sent to the relevant electronic addresses during the period 1 February to 17 May 2021. The contravention details are set out in **Attachment A**.

Attachments

Attachment A – Spam Act contravention details.

PUBLICATION NOTE: This attachment has been redacted to remove personal information in the form of contact details of consumers.