

## Investigation report

Summary	
<b>Entity</b>	Investbybit Pty Ltd
<b>Australian Company Number</b>	621 652 579
<b>Type of activity</b>	Commercial electronic messaging
<b>Relevant Legislation</b>	<i>Spam Act 2003 (Spam Act)</i> <i>Spam Regulations 2001 (Spam Regulations)</i>
<b>Findings</b>	<b>25</b> contraventions of subsection 16(1) of the Spam Act [Unsolicited commercial electronic messages must not be sent] <b>5,778,271</b> contraventions of subsection 18(1) of the Spam Act [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]
<b>Date</b>	21 October 2022

### Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Investbybit Pty Ltd's (**IBB**) compliance with the Spam Act on 3 May 2022, following consumer complaints.
2. Complainants alleged that IBB sent ongoing marketing messages after attempting to unsubscribe on one or more occasions via multiple methods.
3. The investigation focused on 2 categories of commercial electronic messages (**CEMs**) sent to:
  - a. specific electronic addresses which were the subject of complaints to the ACMA (alleged to have been sent from 1 October 2021 and 3 May 2022), and
  - b. any electronic addresses during the following periods (**investigation periods**):
    - (i) 1 to 20 February 2022, and
    - (ii) 1 to 20 March 2022.
4. The ACMA's findings are based on information provided by IBB between 7 June and 4 October 2022, including in response to:
  - a. a notice dated 3 May 2022 given to it by the ACMA under section 522 of the *Telecommunications Act 1997 (Notice)*, and
  - b. the ACMA's preliminary investigation findings dated 15 September 2022.
5. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
  - a. 25 CEMs sent between 1 October 2021 to 3 May 2022 in contravention of subsection 16(1) of the Spam Act (refer to **Attachment A** of this report)
  - b. 5,778,271 CEMs sent during the investigation periods in contravention of subsection 18(1) of the Spam Act (refer to **Attachments A** and **B** to this report).

6. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below.

## Relevant legislative provisions

### **Consent – subsection 16(1)**

7. 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.
8. Exceptions apply to this prohibition in 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. the person sent, or caused the message to be sent, by mistake (subsection 16(4)).
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:

*(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).

### **Unsubscribe function in CEMs – subsection 18(1)**

11. Under subsection 18(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 unless the message includes a statement to the effect that the recipient may use an electronic address set out in the message to send an unsubscribe message to the individual or organisation who authorised the sending of the first-mentioned message (subparagraph 18(1)(c)(i)).
12. Paragraph 18(1)(c)(g) of the Spam Act sets out that the electronic address used in the unsubscribe must comply with the conditions specified in the Spam Regulations. Paragraph 7(6) of the Spam Regulations, in turn, sets out that:

*The use of the electronic address must not require the recipient of the commercial electronic message to:*

  - (a) provide personal information (within the meaning of the Privacy Act 1988) other than the electronic address to which the commercial electronic message was sent; or*
  - (b) log in to an existing account, or create a new account, with:*
    - (i) the person who sent the commercial electronic message or caused the message to be sent; or*
    - (ii) the individual or organisation who authorised the sending of the commercial electronic message.*
13. Subsection 18(1) does not apply if:
  - a. a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 18(2))
  - b. including an unsubscribe facility would be inconsistent with the terms of a contract or other agreement (subsection 18(3)), or

- c. a person sent the CEM, or caused the CEM to be sent, by mistake (subsection 18(4)).

### ***Evidential burden for exceptions***

14. Under subsections 16(5) and 18(5) of the Spam Act, if any entity wishes to rely on any of the above exceptions concerning the sending of investigated messages, it bears the evidential burden. This means that it needs to adduce or point to evidence that suggests a reasonable possibility that the evidence exception applies.

## **Reason for findings**

### **Issue 1: CEMs must not be sent**

15. To determine IBB's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
  - a. Is IBB a 'person' to which section 16 of the Spam Act applies?
  - b. If so, did IBB 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 (designated investigated messages are exempt from certain Spam Act obligations)?
  - f. If so, did IBB provide evidence that any of the investigated messages were subject to any exceptions?
  - g. If so, did IBB meet the evidential burden in relation to these claims?
16. If these conditions or elements of the offence are met (and the person has not raised an exception which is supported by evidence) then contraventions are established.

### ***Is IBB a 'person' to which section 16 of the Spam Act applies?***

17. IBB is a company registered under the *Corporations Act 2001* and is therefore a 'person' for the purposes of the Spam Act.

### ***Did IBB send, or cause to be sent, the investigated messages?***

18. IBB caused 25 electronic messages to be sent to relevant electronic addresses during the period 1 October 2021 to 3 May 2022 (see **Attachment A** – contravention details).

### ***Were the investigated messages commercial?***

19. Section 6 of the Spam Act defines a CEM as an electronic message where the purpose of the message is to offer to supply, advertise or promote goods and services, having regard to:
  - a. the content of the message
  - b. the way in which the message is presented, and
  - c. the content located using links set out in the message.
20. At least one of the purposes of each investigated message was to offer IBB products, services, or financial incentives to consumers for using IBB services. Examples are contained in **Attachment C**.
21. Therefore, the investigated messages are CEMs.

### ***Did the CEMs have an Australian link?***

22. IBB's central management and business registration was in Australia when it sent the

investigated messages. Furthermore, messages sent by the Binance group's central marketing division located offshore were sent to consumers in Australia with the authorisation of the Australian entity. Therefore, the investigated messages had an Australian link.

***Were the CEMs designated?***

23. The investigated messages were not designated CEMs for the purposes of paragraph 16(1)(b) of the Spam Act because:
- a. they consisted of more than factual information and were commercial in nature, and
  - b. IBB 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 IBB claim that any of the investigated messages were subject to any exceptions?***

24. In relation to the 25 CEMs sent to 2 specific complainant electronic addresses, IBB did not claim or provide evidence to suggest those investigated messages were subject to exceptions in the Spam Act.
25. IBB has acknowledged the relevant electronic address account holders attempted to unsubscribe and, as protocols were not followed by the customer service team, IBB continued sending CEMs 5 business days after the unsubscribe requests.

**Issue 2: CEMs must contain a functional unsubscribe facility**

26. To determine IBB's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is IBB a 'person' to which section 16 of the Spam Act applies?
  - b. If so, did IBB send or cause the investigated messages to be sent?
  - c. If so, were the messages commercial?
  - d. If so, did the CEMs have an Australian link?
  - e. If so, were the CEMs designated as exempt from the prohibition on sending unsolicited messages?
  - f. If not, did the CEMs include a functional unsubscribe facility?
  - g. If not, did IBB claim that the CEMs were subject to any exceptions?
  - h. If so, did IBB meet the evidential burden in relation to these claims?
27. The matters from paragraph 24 a. to e. are established under Issue 1 (above).

***Did the CEMs include a functional unsubscribe facility?***

28. IBB sent 5,778,271 CEMs without a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act, consisting of:
- a. 214 CEMs sent to complainant electronic account-holders in the period 1 October 2021 to 3 May 2022. While those CEMs contained a link to 'manage email preferences', that does not satisfy the requirement under paragraph 18(1)(g) of the Spam Act that, in turn, references paragraph 7(6)(b) of the Spam Regulations. Paragraph 18(1)(g) of the Spam Act specifies that *the electronic address must comply with the condition or conditions (if any) specified in the regulations*. In turn, paragraph 7(6)(b) of the Spam Regulations specifies that account-holders must not be required to log in to an account to unsubscribe. Details of the contraventions are set out at **Attachment A**.
  - b. 5,778,057 CEMs sent to electronic account-holders during the investigation periods:

- (i) 5,777,059 CEMs contained a link to 'manage email preferences', which does not satisfy paragraph 18(1)(g) of the Spam Act, and
  - (ii) 998 CEMs did not contain any unsubscribe statement, which does not satisfy the requirement of paragraph 18(1)(c) of the Spam Act.
- c. Details of these contraventions are set out in **Attachments A and B** of this report.

***Did IBB claim that any of the CEMs were subject to any exceptions?***

29. In its response, IBB admitted that the investigated messages were sent without a functional unsubscribe statement due to human error or oversight. IBB did not provide evidence to suggest that the investigated messages were subject to any exceptions in the Spam Act.

## **Conclusion**

30. The ACMA finds that there are reasonable grounds to believe that IBB has contravened:
- a. subsection 16(1) of the Spam Act for 25 CEMs it sent without consent from 1 October 2021 to 3 May 2022, and
  - b. paragraph 18(1)(g) of the Spam Act for 5,777,273 (214 + 5,777,059) CEMs it sent from 1 October 2021 to 3 May 2022, and within the investigation periods.
  - c. paragraph 18(1)(c) of the Spam Act for 998 CEMs it sent without any unsubscribe statement within the investigated periods.

## **Attachments**

**Attachment A** – contravention details for subsection 16(1) 1 October 2021 to 3 May 2022 and subsection 18(1) from 1 October 2021 to 20 February 2022

**Attachment B** – contravention details for subsection 18(1) from 1 to 20 March 2022

**Attachment C** – examples of IBB CEMs

## Attachment C – Examples of IBB CEMs

Example 1: Email Binance Australia: REGISTER. REFER. TRADE - Win a Trip to Dubai!



### REGISTER. REFER. TRADE

Join our **referral campaign** by referring friends, share a prize pool of **25000 BUSD**, and get a chance to win special prizes from **PS5** to a **Trip to Dubai** for **Binance Blockchain Week**.

*Activity Period: 2022-02-18 10.00 AM (UTC) to 2022-03-15 11.59 PM (UTC)*

[JOIN NOW!](#)

Simply Refer 5 or more friends and make them trade \$10 or more on Binance for a chance to win top prizes, including an All expenses Paid Trip to Dubai, PS5, and BUSD tokens!

A list of prizes waiting to be won:

- **An all expenses paid Trip to Dubai for Blockchain Week 2022**
- **Sony Playstation 5**
- **25000+ BUSD Prize Pool for the first 400 referrers with 5 or more referrals.**

[LET'S GET STARTED!](#)

#### Stay connected!



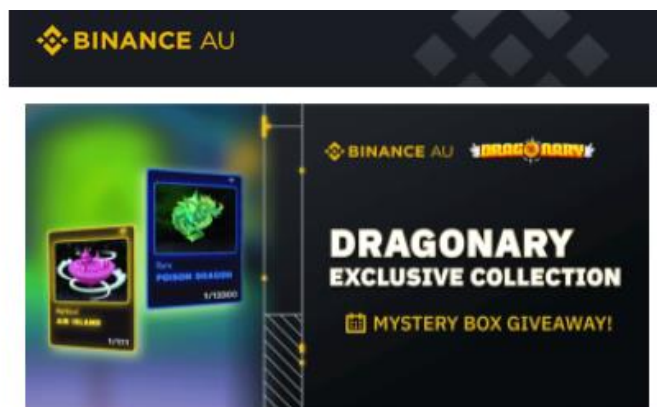
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## Example 2: Email Binance Australia: Win an Exclusive NFT Mystery Box



To celebrate our most recent AMA - we are giving away 2 exclusive Dragonary NFT Mystery Boxes to our amazing Binance Australia users!

Dragonary is an IGO (Initial Game Offering) that has been listed on the Binance NFT Marketplace. Dragonary offers players the opportunity to get rewarded for just participating in the game! **It is a free game**, and you can access it easily now on a PC, laptop, Mac, or any Android mobile device.

To learn more about Dragonary - watch our AMA with CEO Alejo Chababo [HERE!](#)

Participants who complete all the following tasks via Gleam will be entered into the draw:

1. Follow the official Binance Australia Twitter
2. Follow the official Dragonary Twitter
3. Like our recent AMA with CEO of Dragonary Alejo Chabado on YouTube
4. Fill in your Binance user ID (For a guide on where to find your Binance user ID)

**Activity Period:** 27/1/2022, 01:00 PM - 31/1/2022, 11:59 PM AEDT

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