

Investigation report

Summary	
Entity	Noah Rose trading as BetDeluxe
Australian Business Number	66 578 068 647
Type of activity	Commercial electronic messaging
Relevant Legislation	<i>Spam Act 2003</i>
Findings	<p>2 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p>822,549 contraventions of paragraph 17(1)(b) [Unsolicited commercial electronic messages must contain the contact details of the sender of the message]</p> <p>104,567 contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]</p>
Date	21 September 2022

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into BetDeluxe's (**BetDeluxe**) compliance with the *Spam Act 2003* (**Spam Act**) on 1 April 2022 following consumer complaints.
2. Complainants allege that BetDeluxe sent electronic marketing without consent and/or after they made attempts to unsubscribe. They also allege marketing was sent without including information about how to contact the sender and without the ability to unsubscribe.
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 between 22 December 2021 to 1 April 2022), and
 - b. any electronic addresses during the following periods (**investigation periods**):
 - (i) 22 to 29 December 2021
 - (ii) 4 to 17 January 2022, and
 - (iii) 3 to 11 February 2022.
4. The ACMA's findings are based on information obtained from BetDeluxe between 6 May and 30 November 2022, including in response to notices given to it by the ACMA under section 522 of the *Telecommunications Act 1997* dated 1 April and 20 June 2022.
5. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
 - a. 2 CEMs sent between 22 December 2021 and 15 January 2022, in contravention of subsection 16(1) of the Spam Act (refer to **Attachment A** of this report)

- b. 822,549 CEMs sent between 22 December 2021 and 11 February 2022, in contravention of paragraph 17(1)(b) of the Spam Act (see **Attachment B**), and
 - c. 104,567 CEMs sent between 22 December 2021 and 11 February 2022, in contravention of subsection 18(1) of the Spam Act (see **Attachment C**).
6. The reasons for the ACMA's findings, including the 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. 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 message 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. Paragraph 6(1)(d) provides that withdrawal of consent takes effect 5 business days after the unsubscribe request was sent where:

(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.

Sender contact information – paragraph 17(1)(b)

- 10. Under subsection 17(1) of the Spam Act, a person must not send, or cause to be sent, a CEM that has an Australian link unless the message includes accurate information about how the recipient can readily contact that individual or organisation (paragraph 17(1)(b)).
- 11. Subsection 17(1) does not apply if:
 - a. a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 17(2)), or
 - b. a person sent the CEM by mistake (subsection 17(3)).

Unsubscribe function in CEMs – subsection 18(1)

- 12. Under subsection 18(1) of the Spam Act, CEMs which have an Australian link and are not designated CEMs must contain a functional unsubscribe facility.
- 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)), or
 - 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 by mistake (subsection 18(4)).

Evidential burden for exceptions

14. Under subsections 16(5), 17(4) and 18(5) of the Spam Act, if an entity 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 produce or point to evidence that suggests a reasonable possibility that the exception applies.

Reason for findings

Issue 1: CEMs must not be sent

15. To determine BetDeluxe's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
 - a. Is BetDeluxe a 'person' to which section 16 of the Spam Act applies?
 - b. If so, did BetDeluxe 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 BetDeluxe claim that the CEMs were subject to any exceptions?
 - g. If so, did BetDeluxe 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 BetDeluxe a 'person' to which section 16 of the Spam Act applies?

17. Noah Rose operates BetDeluxe as a sole trader and is therefore a 'person' for the purposes of the Spam Act.

Did BetDeluxe send, or cause to be sent, electronic messages?

18. BetDeluxe sent each of the investigated messages. BetDeluxe provided details of the messages it sent, including the date, time, and content.

Were the electronic 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. The purpose of each investigated message was to offer BetDeluxe's online gambling products and services to consumers. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

21. BetDeluxe's central management and business registration was in Australia when it sent the investigated messages. Therefore, the investigated messages had an Australian link.

Were the CEMs designated?

22. 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. BetDeluxe 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, political party or educational institution.

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

23. BetDeluxe sent 2 CEMs to 2 unique electronic addresses more than 5 business days after it received an unsubscribe message from relevant account-holders. Each account-holder effectively withdrew consent to receive CEMs under clause 6 of Schedule 2 to the Spam Act.
 - a. Electronic address 1 [REDACTED]: BetDeluxe initially provided information to the ACMA that it received an unsubscribe request from the account-holder on 26 December 2021. BetDeluxe subsequently claimed no unsubscribe request was made. The account-holder stated they sent an unsubscribe request to BetDeluxe by email on 26 December 2021 and BetDeluxe sent a reply email acknowledging that the customer had been opted out. On balance, the statements and evidence provided by the complainant and BetDeluxe support a view that BetDeluxe received an unsubscribe request on 26 December 2021. It then sent a CEM more than 5 business days after consent should have been withdrawn.
 - b. Electronic address 2 [REDACTED]: BetDeluxe claimed an integration error between two of its databases caused the relevant account-holder's data to be transferred from one database to another without the correct deactivated status. This resulted in an automated welcome email with a clear commercial purpose being sent to this electronic address, more than 5 business days after consent was withdrawn.

Did BetDeluxe meet the evidential burden in relation to the claim?

24. Under section 4 of the Spam Act, 'mistake' means a 'reasonable mistake of fact'. To establish a claim of mistake, BetDeluxe must point to evidence to suggest that a reasonable mistake of fact occurred.
25. BetDeluxe knew a technical issue occurred over a 4-day period that impacted status updates to customer accounts. After the integration issue was resolved, BetDeluxe did not take appropriate steps to check whether the data that was transferred included the correct deactivated status for the relevant account-holder before it sent a CEM to this electronic address. Therefore, the ACMA does not accept BetDeluxe's claim of mistake and the exception under subsection 18(4) does not apply.
26. Details of these contraventions can be found at **Attachment A**.

Issue 2: CEMs must contain the sender's contact information

27. To determine BetDeluxe's compliance with section 17 of the Spam Act, the ACMA must address the following:
 - a. Is BetDeluxe a 'person' to which section 17 of the Spam Act applies?
 - b. If so, did BetDeluxe 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 not, did the CEMs include the sender's contact information?
 - f. If not, did BetDeluxe claim that the CEMs were subject to any exceptions?
 - g. If so, did BetDeluxe meet the evidential burden in relation to these claims?
28. The matters from paragraph 27 a. to d. are established under Issue 1 (above).

Did BetDeluxe send CEMs without accurate information about how the recipient can readily contact the sender?

29. For 822,549 investigated messages sent between 22 December 2021 and 11 February 2022, BetDeluxe did not include accurate information about how the recipient could readily contact BetDeluxe, in contravention of paragraph 17(1)(b) of the Spam Act. BetDeluxe sent:
- a. 4,536 messages where the SMS content did not include BetDeluxe's contact information and the Sender ID could not be used for return contact as it displayed 'BetDeluxe' (not, for instance, a return phone number upon which it was contactable). For example:

Good work! You can now fully enjoy everything BetDeluxe has to offer. Enjoy the VIP service, incredible daily specials and a huge range of markets! Gamble Responsibly.

- b. 818,013 SMS messages where the Sender ID could not be used to contact the sender as it displayed 'BetDeluxe'. The messages also included short-form Uniform Resource Locators (**URLs**), but these did not indicate to a recipient that they could be used to readily contact BetDeluxe. Other short-form URLs allowed a recipient to unsubscribe, but the landing page for those URLs did not include accurate information about how the recipient could readily contact BetDeluxe.

Example SMS CEM:

*Hey [name], Fancy a cheeky punt? At BetDeluxe get a 100% DEPOSIT MATCH up to \$100 in BonusBets! *NEW - RUN 2-12th get up to \$50 in BonusBets-select races! Learn More: <https://nxt.to/██████████> No code needed. VIC Only. T&Cs apply. Gamble Responsibly 18+. To unsubscribe, tap <https://nxt.to/██████████>*

30. Details of these contraventions can be found at **Attachment B**:
- a. See tab 'Welcome CEMs' for messages at paragraph 29 a.
 - b. See tabs 6A to 57A for messages at paragraph 29 b.

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

31. BetDeluxe claimed that the 4,536 messages were welcome messages sent to its customers who recently created accounts with BetDeluxe. BetDeluxe argued that the message recipients were therefore in recent direct contact with it and would know how to contact BetDeluxe.
32. We do not accept this argument when applying the elements of a contravention under paragraph 17(1)(b) of the Spam Act. The messages did not contain any information about how the recipient could readily contact BetDeluxe, such as a phone number, email address or direct link to the Contact Us page of BetDeluxe's website.
33. BetDeluxe made submissions that recipients of the 818,013 messages could find its contact details by clicking the URL that lands on Apple Inc.'s App Store. BetDeluxe argued that the App Store landing page contained a link to the BetDeluxe website homepage where a message recipient could then find a link to its 'Contact Us' page.
34. We do not accept that requiring the recipient to click on a series of links to find contact information satisfies the requirement that *messages contain* accurate information about how recipients can readily contact the sender of the message.

Issue 3: CEMs must contain a functional unsubscribe facility

35. To determine BetDeluxe's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is BetDeluxe a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did BetDeluxe 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 BetDeluxe claim that the CEMs were subject to any exceptions?
- h. If so, did BetDeluxe meet the evidential burden in relation to these claims?

36. The matters from paragraph 35 a. to e. are established under Issue 1 (above).

Did BetDeluxe send, or cause to be sent, CEMs without a functional unsubscribe facility?

37. For 104,567 investigated messages sent between 22 December 2021 and 11 February 2022, BetDeluxe did not include a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act. Details of these contraventions are set out in **Attachment C**. BetDeluxe sent:

- a. 5,215 'Welcome offer' messages that did not include a functional unsubscribe facility. The CEMs consisted of more than factual information and were commercial in nature as they promoted BetDeluxe's online betting services by offering 'bonus bets'. For example:

Welcome to the home of serious betting for serious punters - BetDeluxe! We're excited to be your punting partners.

To celebrate enjoy this deposit offer: Deposit \$400 and get 50% Match in Bonus Bets (Max Bonus \$200). Offer expires midnight tomorrow!

No Code Required! Deposit now - <https://betdeluxe.com.au>

Don't forget to complete your account verification. Gamble Responsibly

- b. 99,352 'Moneyback Mayhem' campaign messages sent on 26 December 2021 that did not include a functional unsubscribe facility. Specifically, the electronic address which sent those messages was not reasonably likely to be capable of receiving a recipient's unsubscribe message as required by paragraph 18(1)(e) of the Spam Act as the sender ID displayed 'BetDeluxe' and could not receive incoming messages. The message recipients were therefore unable to send a stop message to unsubscribe. For example:

G'day [NAME], Bring in the New Year with BetDeluxe! Enjoy our Money Back Mayhem! Run 2nd-12th get money back in bonus bets up to \$50! Plus a massive \$2 Ashes special! Get Serious Now: [https://nxt.to/\[URL\]](https://nxt.to/[URL]) *Select Races T&Cs Apply. Gamble Responsibly. Reply Stop to opt out*

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

38. BetDeluxe claims that the 5,215 'Welcome Messages' did not contain an unsubscribe facility as it would be inconsistent with an agreement with its customers to ensure they verify their identity, claiming an exception under subsection 18(3) of the Spam Act.

39. BetDeluxe claims that it sent the 99,352 'Moneyback Mayhem' campaign by mistake, an exception under subsection 18(4) of the Spam Act.

40. BetDeluxe argues that when sending an SMS campaign via a third-party SMS platform provider (Message Media), a mistake resulted in the non-functioning unsubscribe facility. BetDeluxe claims it was not aware that having its name displayed as the sender ID would result in disabling the function for it to receive reply messages.

Did BetDeluxe meet the evidential burden in relation to these claims?

Exception under subsection 18(3) of the Spam Act

41. There is nothing in the terms and conditions relevant to the consent to send the investigated messages that would constitute an agreement between BetDeluxe and the relevant account holders that BetDeluxe can send messages without an unsubscribe facility. Additionally, the ACMA notes that any obligations BetDeluxe has to verify users' accounts are unrelated to its Spam Act obligations.
42. Therefore, the ACMA does not accept that there is satisfactory evidence to support the claim that the exception under subsection 18(3) of the Spam Act applies.

Claim of mistake under subsection 18(4) of the Spam Act

43. Please refer above to paragraph 24 for the definition and evidential burden for 'mistake'.
44. BetDeluxe submits that the error was limited to one SMS campaign sent on 26 December 2021.
45. The mistake claim is unreasonable in the circumstances. Prior to sending a large CEM campaign to 99,352 consumers, BetDeluxe did not appear to take appropriate due diligence and check whether the campaign complied with the unsubscribe requirements. Such errors were reasonably foreseeable. Non-compliance resulting from a reasonably foreseeable or preventable error does not constitute a mistake.
46. Therefore, the ACMA does not accept that there is satisfactory evidence to support the claim of mistake by BetDeluxe and the exception under subsection 18(4) does not apply.

Conclusion

47. The ACMA finds that there are reasonable grounds to believe that BetDeluxe has contravened:
 - a. subsection 16(1) of the Spam Act in relation to **2** CEMs sent without consent,
 - b. paragraph 17(1)(b) of the Spam Act in relation to **822,549** CEMs, sent without accurate information about how the recipient can readily contact the sender, and
 - c. subsection 18(1) of the Spam Act in relation to **104,567** CEMs it sent without a functional unsubscribe facility.

Details of the investigated messages are set out in **Attachment A, B, and C**.

Attachments



[Note: Attachments are not published]