

Investigation report

| Summary | |
|---------------------------|---|
| Entity | Pizza Pan Group Pty Ltd |
| Australian Company Number | 614 499 213 |
| Type of activity | Commercial electronic messaging |
| Relevant Legislation | <i>Spam Act 2003 (Spam Act)</i> |
| Findings | <p>5,941,109 contraventions of subsection 16(1) [Unsolicited commercial electronic messages must not be sent]</p> <p>4,364,971 contraventions of subsection 18(1) [Unsolicited commercial electronic messages must contain a functional unsubscribe facility]</p> <p>100 contraventions of subsection 17(1)(b) [Unsolicited commercial electronic messages must include accurate information about how the recipient can readily contact that individual or organisation]</p> |
| Date | 30 October 2023 |

Background

1. The Australian Communications and Media Authority (**ACMA**) commenced an investigation into Pizza Pan Group Pty Ltd (**Pizza Hut**)'s compliance with the *Spam Act 2003 (Spam Act)* on 4 May 2023 following consumer complaints received between December 2022 and April 2023. It gave a notice to Pizza Hut on 4 May 2023 under section 522 of the *Telecommunications Act 1997 (Notice)* requiring it to provide information and documents relevant to the investigation.
2. Complainants allege that Pizza Hut sent messages without a functional unsubscribe facility, and that Pizza Hut continued to send marketing messages after complainants had withdrawn consent to receive marketing messages.
3. From February 2021 to April 2023, prior to the Notice, the ACMA issued 15 compliance alerts to Pizza Hut relating to 39 consumer complaints. The alerts notified Pizza Hut about the receipt of complaints and indicated it may have issues with non-compliance with the Spam Act.
4. The investigation focused on commercial electronic messages (**CEMs**) sent to electronic addresses between 1 January 2023 and 4 May 2023 (**Relevant Period**).
5. The CEMs subject to contravention findings are collectively referred to as the 'investigated messages', specifically:
 - a. 5,941,109 CEMs sent between 1 January 2023 and 4 May 2023, in contravention of subsection 16(1) of the Spam Act;
 - a. 4,364,971 CEMs sent between 1 January 2023 and 4 May 2023, in contravention of subsection 18(1) of the Spam Act.
 - b. 100 CEMs sent on 3 January 2023, in contravention of subsection 17(1)(b) of the Spam Act.

6. The ACMA's findings are based on submissions obtained from Pizza Hut on 2 and 9 June in response to the Notice and 9 October 2023 in response to an ACMA request for further information dated 4 September 2023 (September request).
7. The September request sought further information about consent and sample SMS messages to examine the sender information included and test compliance with section 17 of the Spam Act.
8. The reasons for the ACMA's findings, including the key elements which establish the contraventions, are set out below. [REDACTED]

Submissions by Pizza Hut

9. In its submission on 2 June 2023, Pizza Hut provided a summary of their internal investigation, admitting that during the Relevant Period, there were email CEMs sent by Pizza Hut to unique electronic account holders:
 - a. more than 5 business days after an unsubscribe request was received from the relevant account holder
 - b. that had only opted into receiving marketing communication via SMS, or
 - c. without a functional unsubscribe facility included in the CEM.
10. Pizza Hut admitted 490,739 CEMs were sent more than 5 business days after an unsubscribe request was received from the relevant account holder.
11. Pizza Hut further admitted 4,338,227 CEMs were sent between 6 to 11 March 2023 without an unsubscribe facility. It revised this figure to 4,364,971 in its 9 June submission to include 26,744 CEMs sent without an unsubscribe facility in the period 1 January to 4 May 2023.
12. In its submission on 9 October 2023, Pizza Hut admitted 5,941,109 CEMs were sent without consent to 116,010 unique account holders. Pizza Hut confirmed this included the CEMs sent after consent had been withdrawn already admitted in its submission of 2 June 2023 (see paragraph 10).
13. In response to the September request, Pizza Hut provided samples of the first 100 SMS CEMs sent during the Relevant Period, all being sent on Tuesday 3 January 2023. Pizza Hut confirmed all messages were sent with a sender ID of "Pizza Hut".
14. Pizza Hut's submissions identified the causes for sending communications to its customers without the relevant consent or unsubscribe facility, including:
 - a. misuse of filters arising from migration to a multi-channel marketing tool
 - b. third-party service provider system error resulting in reversed user subscription status
 - c. process breakdown including human errors and deficiency in approval processes.

Relevant legislative provisions

Consent – subsection 16(1)

15. 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.
16. 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, or caused the message to be sent, by mistake (subsection 16(4)).
17. 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.*
18. Where an electronic account-holder sends an unsubscribe request to an entity, CEMs sent more than 5 business days after that request are sent without consent and in breach of subsection 16(1).

Unsubscribe function in CEMs – subsection 18(1)

19. Under subsection 18(1) of the Spam Act, CEMs which have an Australian link must contain a functional unsubscribe facility.
20. Under paragraph 18(1)(e), an unsubscribe link / function in a CEM must be capable of receiving a recipient's unsubscribe message.
21. Subsection 18(1) does not apply if:
- a. the message is a 'designated commercial electronic message' (paragraph 18(1)(b))
 - b. a person did not know, or could not have ascertained, that a CEM has an Australian link (subsection 18(2))
 - c. including an unsubscribe facility would be inconsistent with the terms of a contract or other agreement (subsection 18(3)), or
 - d. a person sent the CEM, or caused the CEM to be sent, by mistake (subsection 18(4)).

Accurate sender information in CEMs – subsection 17(1)

22. Under subsection 17(1) of the Spam Act, CEMs which have an Australian link must (a) clearly and accurately identify the individual or organisation who authorised the sending of the message; and (b) include accurate information about how the recipient can readily contact that individual or organisation.
23. Subsection 17(1) does not apply if the person did not know, and could not, with reasonable diligence, have ascertained that the message had an Australian link (subsection 17(2)); or the person sent the message, or caused the message to be sent, by mistake (subsection 17(3)).

Evidential burden for exceptions

24. Under subsections 16(5), 18(5) and 17(4) of the Spam Act, if an entity wishes to rely on any of the 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 – section 16

25. To determine Pizza Hut's compliance with section 16 of the Spam Act, the ACMA has addressed the following:
- a. Is Pizza Hut a 'person' to which section 16 of the Spam Act applies?
 - b. If so, did Pizza Hut 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 Pizza Hut claim that the CEMs were subject to any exceptions?
 - g. If so, did Pizza Hut meet the evidential burden in relation to these claims?
26. 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 Pizza Hut a 'person' to which section 16 of the Spam Act applies?

27. Pizza Hut is a company registered under the *Corporations Act 2001* and is therefore a 'person'. It operates as the franchisor of the Pizza Hut franchise system in Australia.

Did Pizza Hut send, or cause to be sent, the investigated messages?

28. Pizza Hut admitted in its submission that it sent the investigated messages.

Were the investigated messages commercial?

29. 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.
30. The purpose of the investigated messages was to offer and/or promote a food service.
31. Therefore, the investigated messages are CEMs.

Did the CEMs have an Australian link?

32. Pizza Hut central management and business registration were in Australia when it sent the investigated messages to Australian account-holders, therefore, the investigated messages had an Australian link.

Were the CEMs designated?

33. The ACMA is satisfied the investigated messages were not designated CEMs because:
- a. they consisted of more than factual information and were commercial in nature, and
 - b. Pizza Hut 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 Pizza Hut claim that any of the investigated messages were subject to any exceptions?

34. Pizza Hut did not provide evidence or make claim that the investigated messages were subject to any exceptions, including that Pizza Hut had the consent of the relevant electronic account-holders.

Conclusion – Issue 1

35. As the above elements to establish contraventions are met, the ACMA is of the view that Pizza Hut contravened subsection 16(1) of the Spam Act on 5,941,109 occasions between 1 January 2023 and 4 May 2023 by sending:
- a. 490,739 CEMs more than 5 business days after an account holder made a request to unsubscribe.

- b. 5,450,370 CEMs without the consent of the account holder.

Issue 2: CEMs must contain a functional unsubscribe facility – section 18

36. To determine Pizza Hut's compliance with section 18 of the Spam Act, the ACMA must address the following:
- a. Is Pizza Hut a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did Pizza Hut 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 Pizza Hut claim that the CEMs were subject to any exceptions?
 - h. If so, did Pizza Hut meet the evidential burden in relation to these claims?
37. Pizza Hut has made admissions to the matters from paragraph 36 a. to e. for all investigated messages. These were established for the investigated messages under Issue 1 (above) and are relevant for Issue 2.

Did the CEMs include a functional unsubscribe facility?

38. Pizza Hut sent 4,364,971 investigated messages without a functional unsubscribe facility in contravention of subsection 18(1) of the Spam Act. Pizza Hut admitted in its submissions of 2 and 9 June 2023 the investigated messages were sent without including a functional unsubscribe facility due to a procedural error, whereby the unsubscribe hyperlink was omitted from the template used to send the messages.
39. The ACMA is satisfied based on the admissions made by Pizza Hut that the CEMs did not include a functional unsubscribe facility. Examples of the messages are contained at **Attachment B**.

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

40. Pizza Hut did not provide evidence or make claims to suggest that the investigated messages were subject to any exceptions.

Conclusion – Issue 2

41. As the elements to establish contraventions are met, the ACMA is of the view that Pizza Hut contravened section 18(1) of the Spam Act on 4,364,971 occasions between 1 January and 4 May 2023.

Issue 3: CEMs must contain accurate sender information – section 17

42. To determine Pizza Hut's compliance with section 17 of the Spam Act, the ACMA must address the following:
- a. Is Pizza Hut a 'person' to which section 18 of the Spam Act applies?
 - b. If so, did Pizza Hut 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 accurate sender information?

- g. If not, did Pizza Hut claim that the CEMs were subject to any exceptions?
 - h. If so, did Pizza Hut meet the evidential burden in relation to these claims?
43. Pizza Hut has made admissions to the matters from paragraph 42 a. to e. for all investigated messages. These were established for the investigated messages under Issue 1 (above) and are relevant for Issue 3.

Did the CEMs include accurate sender information?

44. Pizza Hut provided a sample of 100 CEMs sent on 3 January 2023. The CEMs do not include contact details for the sender other than the link to the promotion described in the CEM, or the unsubscribe link. Neither link indicated that they could be used to readily contact the sender. The 100 investigated messages do not include accurate information about how the recipient can readily contact the sender.
45. The ACMA is satisfied based on the information provided by Pizza Hut that the sample of 100 CEMs did not include accurate sender information. Examples of the messages are contained at **Attachment C**.

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

46. Pizza Hut did not provide evidence or make claims to suggest that the investigated messages were subject to any exceptions.

Conclusion – Issue 3

47. As the elements to establish contraventions are met, the ACMA is of the view that Pizza Hut contravened section 17(1)(b) of the Spam Act on 100 occasions on 3 January 2023.

Conclusion

48. The ACMA finds there are reasonable grounds to believe that Pizza Hut has contravened:
- a. subsection 16(1) of the Spam Act in relation to 5,941,109 CEMs without consent, including CEMs sent after consent had been withdrawn, between 1 January 2023 and 4 May 2023
 - b. subsection 18(1) of the Spam Act in relation to 4,364,971 CEMs sent without a functional unsubscribe facility between 1 January 2023 and 4 May 2023, and
 - c. subsection 17(1)(b) of the Spam Act in relation to 100 CEMs sent without including accurate sender information on 3 January 2023.

Attachments

Attachment B – Indicative example of email messages without unsubscribe facility

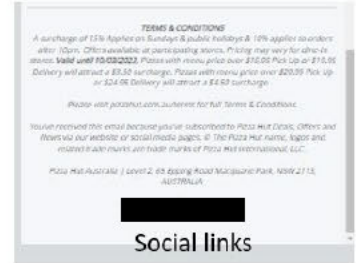
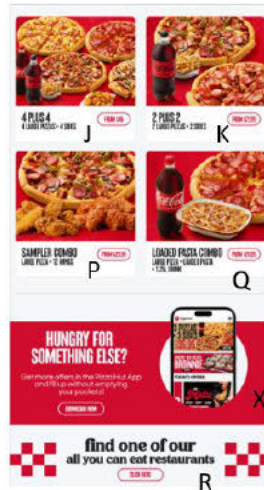
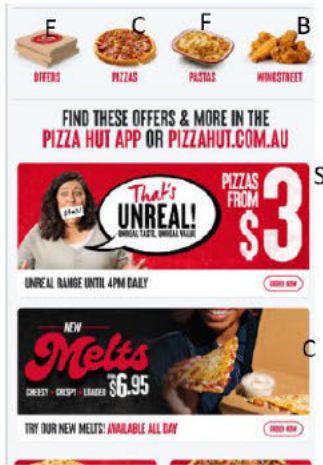
Attachment C – Indicative example of SMS message without accurate sender information

Attachment B – Indicative examples of email CEMs sent without unsubscribe facility

(Contravention of section 18(1) of Spam Act 2003 – message must contain functional unsubscribe facility)

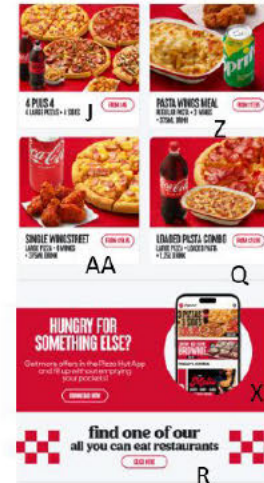
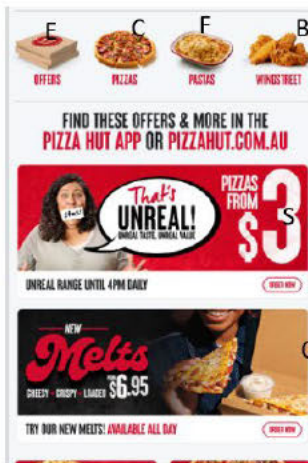
Example 1:

From: Pizza Hut Australia <deals@deals.pizzahut.com.au>
 Subject: Start your week with your favorite food delivered to your doorstep! 🍕



Example 2:

From: Pizza Hut Australia <deals@deals.pizzahut.com.au>
 Subject: Have your pizza night doubled up! Get 2 FOR 1 Large Pizzas 🍕🍕



Attachment C – Example of SMS CEM sent without accurate sender information

(Contravention of section 17(1)(b) of Spam Act 2003 - message must include accurate information about how the recipient can readily contact that individual or organisation)

Example 1:

