

FOCUS

TELECOMMUNICATIONS



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TELEMARKETING LAWS

The creation of a Do Not Call Register scheme last year has major repercussions for the telemarketing industry and all businesses that use phone marketing techniques. Special Counsel Karin Clark, Lawyer Andrew Ailwood and Law Graduates Claire Bourke and Valeska Bloch outline the legislative components establishing the scheme and examine its implications.

HOW DOES THIS AFFECT YOU?

- Australian numbers used primarily for private or domestic purposes can be listed on the Do Not Call Register.
- It will be an offence for unsolicited telemarketing calls to be made (or caused to be made) to a number on the Register, subject to limited exceptions. As a result, telemarketers will need to have their proposed call lists checked against the Register and will be able to do this for a fee.
- Agreements relating to telemarketing calls will need to contain a clause requiring compliance with the new laws. This will cover situations where an Australian business outsources their telemarketing overseas.
- The new laws are expected to commence on 31 May, at the same time as a new telemarketing standard, which will establish new national minimum standards for all marketing and research calls.

INTRODUCTION

Legislation to establish a Do Not Call Register scheme was introduced in response to increasing consumer complaints about unsolicited and unwanted telemarketing calls and has broadly been modelled on similar schemes in the UK, Canada, and particularly the US, which have proved to be successful.

The main components of the legislation are:

- the *Do Not Call Register Act 2006* (Cth) (the **DNCR Act**), together with;
- the *Do Not Call Register Regulations 2006* (Cth) (the **DNCR Regulations**); and.
- the *Do Not Call (Consequential Amendments) Act 2006* (Cth) (the **CA Act**).

The DNCR Act and DNCR Regulations establish the Do Not Call Register scheme, to be administered by the Australian Communications and Media Authority (**ACMA**), while the CA Act makes amendments to the *Telecommunications Act 1997* (Cth), the *ACMA Act 2005* (Cth) and the *Telecommunications (Carrier Licence Charges) Act 1997* (Cth) to allow ACMA to enforce the Do Not Call Register scheme and to develop industry codes and standards relating to telemarketing.

The Do Not Call regime will deliver protection to consumers but at a potentially high compliance cost for telemarketers and the businesses that use them



Importantly, the definition of a 'telemarketing call' is broader in the CA Act than in the DNCR Act. It includes calls with a non-commercial purpose, such as opinion polling and standard questionnaire-based research, as well as calls made by bodies who are exempt from the DNCR Act regime. This has allowed the making of the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* (the **Telemarketing Standard**) of 22 March 2007, which will establish new national minimum standards for all marketing and research calls.

DO NOT CALL REGISTER

THE GENERAL OPERATION OF THE REGISTER

The Do Not Call Register will give Australian phone users the right to opt out of receiving unsolicited telemarketing calls. The Register is expected to be operational by 31 May 2007.

The numbers that may be registered are any home or mobile numbers used for private or domestic purposes. The Register does not apply to fax numbers. A listing on the Register expires after three years if it is not renewed.

THE OFFENCES

Once the Register is operational, it will be illegal, in the absence of consent from the account holder, for any non-exempt telemarketer in Australia and overseas to make or to authorise someone to make an unsolicited telemarketing call to a number on the Register.

A 'telemarketing call' includes a 'voice call' made for a 'commercial purpose'. A 'commercial purpose' includes a 'purpose' to solicit donations or to offer, supply, provide, advertise or promote:

- goods or services;
- an interest in land; or
- a business opportunity or investment opportunity.

A 'commercial purpose' will be determined from the content of the call, its presentational aspects, the content obtained by using the contact details in the call and from information obtained by calling back the number (in the case of missed call techniques).

There are four exceptions to infringement:

- consent – express or implied;
- the caller has 'washed' their lists in the past 30 days and the Register Operator has said that the number was not on the Register;
- mistake (eg incorrectly dialled number); and
- reasonable precautions were taken to avoid calling listed numbers and due diligence was exercised.

Businesses that wish to rely on the ability to call a number listed on the Register on the basis that the person called has 'consented' will have to consider carefully whether the consent can be reasonably inferred from their ongoing business relationship with that person or whether the person has given an express consent to be called. Importantly, if the express consent was not for a specified period or expressed to be indefinite, then it will be taken to expire after three months.

It will also be illegal to aid, abet, counsel, procure, induce, or be knowingly concerned in or conspire with others to contravene the DNCR Act.

Persons entering into agreements relating to telemarketing calls are also required to comply with the DNCR Act. If, for example, an organisation contracts out the making of telemarketing calls, it will need to include an express provision regarding compliance with the DNCR Act. This requirement will also cover the situation where an Australian business contracts with an overseas telemarketing business, and this circumvents the jurisdictional issues associated with off-shoring call centre facilities. The relevant provision does not operate retrospectively and so only relates to future telemarketing contracts. A failure to include this requirement in a contract does not affect the validity of the contract.

DO NOT CALL REGISTER REGULATIONS

The DNCR Regulations were made on 13 December 2006 to accompany the DNCR Act. They carve out the kinds of voice calls that are not telemarketing calls for the purposes of the DNCR Act. In order not to qualify as a telemarketing call, the primary purpose of the call must be in one of the defined categories. These include:

- product recall calls;
- fault rectification calls;
- appointment rescheduling calls;

- appointment reminder calls;
- calls relating to payments;
- solicited calls made in response to an order, request or inquiry; and
- calls not answered by the person to whom the call is made (that is, if the call is answered by an answering service or by a person other than the person to whom the call was intended to be made).

EXEMPTIONS

Certain public interest entities are exempt from the provisions of the DNCR Act. These entities include:

- government bodies, religious organisations and charities;
- political parties, independent MPs and candidates; and
- educational institutions.

However, an entity can only use an exemption for calls regarding its own goods or services. It cannot, for example, use an exemption to sell another business's goods for commission.

PENALTIES FOR CONTRAVENTION OF THE ACT

If ACMA believes that the DNCR Act has been contravened, it can apply to the Federal Court or the Federal Magistrates Court.

An offence under the DNCR Act can result in substantial fines for an individual or a corporation. A corporation with no prior record of contravention may be liable to pay up to \$11,000 for a single offence and up to \$220,000 for multiple contraventions on one day. For a corporation with a prior record, the maximum penalty for multiple contraventions on one day is \$1.1 million.

The court also has the power to order compensation to the victim of the contravention and to recover for the Commonwealth any financial benefit made as a result of the contravention. The court may grant restraining, performance and interim injunctions in addition to the civil proceedings above.

Infringement notices for minor breaches specifying a penalty to be paid by a certain date may be issued by ACMA as an alternative to court proceedings. ACMA also has the power to issue formal warnings for breach of the DNCR Act.

ACCESS TO THE REGISTER

Once the Do Not Call Register is established, an access seeker can submit a list of telephone numbers and pay a fee to whoever is maintaining the Register (the **Registrar**). The Registrar will either 'wash' the access-seeker's list and return it to them with the numbers on the DNCR removed or provide a list of those numbers on the access-seeker's list that must be deleted. This ensures greater protection of the privacy of those on the Register, rather than if access were given to the entire Register. However, telemarketers will need to ensure their call centre software is able to manage their database in compliance with this method.

THE NEW TELEMARKETING STANDARD

The new Telemarketing Standard will establish new minimum standards in the following four main areas: prohibited calling times, provision of information during a call, terminating a call, and call line identification. Telemarketers will also need to keep in mind that they need to comply with the new Telemarketing Standard **as well as** all applicable state and territory laws that affect telemarketing.

PROHIBITED CALLING TIMES

Under the Standard, a caller must not make or attempt to make a call on:

- a Saturday before 9am or after 5pm;
- a Sunday or national public holiday;
- for research calls, a weekday before 9am or after 8.30pm; or
- for other telemarketing calls, a weekday before 9am or after 8pm.

PROVISION OF INFORMATION DURING A CALL

The Telemarketing Standard prescribes that certain information must be given in the course of a marketing or research call.

For example, when making a marketing call, a call operator must immediately, and without being asked, give the call operator's given name, the name of the person causing the call to be made and the purpose of the call. If asked for it, the caller must also immediately give certain other information, such as the name and

contact details of the call operator's employer, the call operator's full name or staff identifier, and the name and contact details of the person responsible for dealing with consumer inquiries and complaints about the call.

After 1 July, if the caller is asked for certain other information, such as the source from which the caller obtained the telephone number, the caller must, within a reasonable time of being asked (not exceeding 30 days), disclose the source (if the contact details were disclosed to the caller after 1 July) or make a statement that the source is a private individual (if this is applicable).

Telemarketers must also keep in mind that these requirements are in addition to the notice requirements of the *National Privacy Principles* under the *Privacy Act 1988*.

TERMINATING A CALL

A caller must immediately terminate a call or ensure that a call is immediately terminated if:

- the call recipient asks for the call to be terminated or indicates that they do not want the call to continue; or
- the caller becomes aware that the call recipient is not at their usual residential address or the day or time at which the call is received at that location would be a prohibited day or time at that residential address and the call recipient has not expressly said that they would like the call to be continued.

CALL LINE IDENTIFICATION

A caller must ensure that calling line identification is enabled at the time that the caller makes or attempts to make a call.

LOOKING AHEAD – FUNDING AND FEES

The government has announced funding of \$33.1 million over four years for developing and implementing the Do Not Call Register scheme, of which approximately \$15.9 million was anticipated to be recovered from the telemarketing industry through the payment of fees to access the register.¹

A discussion paper on the fees telemarketers will be charged to access the Do Not Call Register was released on 26 March 2007 and the period for consultation closed on 5 April. In the discussion paper, industry was invited to comment on two possible access fee pricing options, both based on an annual subscription fee and excess usage charge model. Under each option, there was a subscription type that allowed telemarketers to check up to 500 numbers per year at no cost. A determination about fees is expected to be made shortly.

CONCLUSION

Overall, the Do Not Call regime will deliver significant protection to consumers but at a potentially high compliance cost for telemarketers and the businesses that use them. The industry and the businesses that depend on it must ensure that they are technically and functionally equipped to both comply and monitor their compliance with the regime.

¹ http://www.acma.gov.au/WEB/STANDARD/pc=PC_310098



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