

# The New National Do Not Call Register

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## 1 Introduction

Individuals have continually expressed concern and annoyance over having to receive unsolicited telephone calls from telemarketers. The number of such calls is likely to grow in future, especially with the availability of cheaper telephone calls provided by the emergence of voice-over-IP technology. In response to this, the Department of Communications, Information Technology and the Arts (“DCITA”) released a discussion paper in October 2005 on the subject of the introduction of a national Do Not Call Register (“Register”), proposing a variety of models that such a Register could adopt. On 25 May 2006, DCITA then released the Do Not Call Register Bill 2006 which was subsequently passed by the House of Representatives on 15 June 2006 and the Senate on 22 June 2006. The arrival of the *Do Not Call Register Act 2006* (Cth) (“Act”) will see the introduction of a Register, administered by the Australian Communications and Media Authority (“ACMA”), based on an opt-out model which will prohibit the making of certain unsolicited telemarketing calls to individuals’ telephone numbers listed on the Register. Some telemarketing calls are exempted from complying with that prohibition, such as those telemarketing calls authorised by a government body, religious organisation, charity, educational institution or registered political party. This article looks at some specific issues raised by the Act as well as providing a brief summary of how other countries have approached the idea of a Do Not Call Register.

## 2 Types of numbers on the Register

Account-holders or their nominees (who must be nominated in writing by an account-holder) may apply to have

their Australian telephone numbers added to the Register. Only Australia telephone numbers (for fixed and mobile lines) which are primarily used for private or domestic purposes may be added to the Register. The Register will not contain business telephone numbers, so telemarketing calls made to businesses will not be affected by the Register. The Register will not contain telephone numbers of fax lines.

Where a telephone number is used for both business and private purposes, such as in a small office/home office scenario where an individual or family run a business from their home, whether such a number may be added to the register depends on what the telephone number is primarily used for.

## 3 Outsourcing telemarketing activities

The Act covers situations where a person outsources telemarketing work to a third party. Contracts which govern the outsourcing arrangement must contain an express provision that the third party must comply with the provisions set out in the Act. An extended definition given to the word “cause” also means that a person contracting out telemarketing work will be considered to have caused the telemarketing calls made by the third party to have been made. In addition to the above, aiding, abetting, counselling, procuring or conspiring with others to make illegal telemarketing calls is prohibited.

The Act also has extra-territorial application. Therefore, it covers telemarketers who call from overseas, although there may be enforcement difficulties in such situations. Nonetheless, an Australian company that outsources its telemarketing calls to an overseas company will be liable

(along with the entity performing the outsourced work) for any telemarketing calls made in contravention of the Act.

Organisations that outsource telemarketing functions offshore should ensure that they take reasonable precautions and exercise due diligence in ensuring the entity to which telemarketing work has been outsourced complies with telemarketing obligations. At a minimum, this involves placing a contractual obligation on the other entity to comply with Australian telemarketing laws.

## 4 Obtaining consent

One exception to the prohibition against making a telemarketing call to a telephone number on the Register is where the telephone account-holder or their nominee consented to the call.

“Consent” is given an extended definition which is largely similar to its definition in the *Spam Act 2003* (Cth). In addition to express consent, consent can be reasonably inferred from the conduct and the business (or other) relationships between the individual called and the person making the telemarketing call. Therefore, even if an individual’s telephone number is listed on the Register, if a business organisation has had previous dealings with that individual, they may still be entitled to make an unsolicited telemarketing call to them.

In *ACMA v Clarity1*, the Court noted that:

“In the absence of [evidence to the effect that a particular purchaser only wanted to have a relationship in respect of the particular product purchased], it is a reasonable inference that a person having displayed interest

in the wares of the vendor on one occasion, wishes to be kept in touch with future opportunities for purchase of products marketed by the same vendor unless indicating to the contrary. To construe the reference to such relationships too strictly would not acknowledge commercial realities. Vendors would be left in doubt whether they could communicate with their clientele (that is, persons who have purchased goods from them) unless having from them express consent. I do not consider the provisions of the Spam Act are intended to bring about such a strict regime.”<sup>1</sup>

Although that case was concerned with inferring consent under the *Spam Act 2003* (Cth), it would appear that the same reasoning could apply to inferring consent under the Act.

Express consent may expire, and if the expiry period is not expressly stipulated, it will be deemed to have expired after three months. As a practical matter, entities obtaining express consent from customers may wish to specify that such consent will be valid until withdrawn, or the customer ceases to be a customer of the organisation (whichever event occurs first). Consent may not be inferred from an individual just because an individual’s phone number has been published (eg, in a phonebook).

In all cases, the evidential burden is on the telephone caller to prove that consent existed.

It appears that although a caller for a commercial purpose may have the consent of a household member to call, if that household member is not the telephone account-holder or a nominee, then the caller will be engaging in a prohibited act if the telephone number being called is on the Register. This may be the case where several people live in a household but only one of those people is the account-holder. The requirement for nominees to be appointed in writing by the account-holder also means that it should not be assumed that a person (who is not an account-holder) is a nominee simply because they live at the place whose telephone number is being called.

The explanatory memorandum for the Act also notes that a telephone call made with the purpose of discovering if an individual is willing to consent to receiving telemarketing calls in the future is itself a telemarketing call even though that specific call is not to offer goods, services or so on. Consent cannot be obtained in this manner.

## **5 How telemarketers access the Register**

The personal information stored on the Register will be subject to the *Privacy Act 1988* (Cth). Consequently, telemarketers will not have direct access to the Register, but instead must submit a list of one or more telephone numbers to ACMA (or, if a contractor is used, the contractor). After a fee is paid by the telemarketer, its list is then “washed” and returned to the telemarketer - either listing those telephone numbers which appear on the Register, or those which do not appear on the Register.

The amount of the fee payable will be determined by ACMA once the Register is set up. Exemptions from paying fees may be introduced via an ACMA or Ministerial determination. For example, a determination could help small businesses by allowing them to access the Register to wash up to 50 numbers without charge.

The Government expects that it will cost \$33.1 million over four years to implement the Register. About \$15.9 million of this will be recovered from the telemarketing industry through fees paid by them to access the Register. It is envisaged that the compliance costs for the telemarketing industry will be partially offset by money saved through no longer having to call people who do not want to be called.

## **6 Enforcement**

Individuals can first complain about contraventions of prohibitions in the Act to ACMA. ACMA has investigative powers, such as aiding a complainant in identifying the caller. ACMA may also issue formal warnings, accept enforceable undertakings and issue infringement

notices (where, in exchange for avoiding court proceedings, a contravener can pay ACMA a penalty).

Alternatively, ACMA may apply to the courts for an order of payment of a pecuniary penalty. Contraventions are handled by either the Federal Court or the Federal Magistrates Court. The prohibitions are classified as civil penalty provisions which means that contraventions incur pecuniary penalties. A table listing maximum pecuniary penalties is at the end of this article.

On application by ACMA or an affected person, the Court may also order that compensation be paid by a contravener to a person who has suffered loss or damage as a result of a contravention.

If a contravener has obtained a financial benefit (whether directly or indirectly) attributable to a contravention, the court may order the contravener to pay the financial benefit obtained to the Commonwealth.

Restraining and performance injunctions are also able to be ordered by the Court.

## **7 Other Countries’ Do Not Call Registers**

Other countries have adopted opt-out models which have been quite successful.

**United States:** The US’ Do Not Call Registry (“**Registry**”) was established by the Federal Trade Commission in 2003. The Australian model is based primarily on the US model, and is therefore quite similar. Individuals can register up to three telephone numbers each, either online or by telephoning a toll free number. Numbers remain on the Registry for up to five years (as opposed to the three years set out in the Act). Similar exemptions exist for charities, political organisations, etc. Unlike Australia, telemarketers have the ability to directly access the US Registry, instead of submitting a list to be washed as is planned for the Australian Register. By July 2005,

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more than 98 million telephone numbers were registered.

**United Kingdom:** The UK has operated a Telephone Preference Service ("TPS") since 1999 and a Corporate Telephone Preference Service ("CTPS") since 2004. The TPS contains individuals' telephone numbers, whereas the CTPS is used by corporations, partnerships and public bodies. Charities and political organisations are not exempted from calling telephone numbers on the TPS and CTPS. Both registers are updated four times a year. By June 2005, there were approximately 8 million telephone numbers registered.

**Canada:** In Canada, the Canadian Radio-television and Telecommunications Commission ("CRTC") has been authorised to set up a national Do Not Call List. The CRTC is currently considering what telemarketing rules should be implemented in connection with its Do Not Call List.

**New Zealand:** There is no Do Not Call Register in New Zealand. Telemarketing activities are essentially self-regulated by the direct marketing industry. The New Zealand Direct Marketing Association promotes a voluntary code of practice which mainly restates, and does not

differ substantially from, New Zealand consumer law.

### 8 Status of the Register

ACMA is currently in the process of setting up the Register. The Register is planned to be operational in 2007.

<sup>1</sup> *Australian Communications and Media Authority v Clarity1 Pty Ltd* [2006] FCA 410, [97]. This is the only case to date under the *Spam Act 2003* (Cth).

		Section contravened	Maximum penalty for a corporation (penalty units)	Maximum penalty for a person other than a corporation (penalty units)
First offence	Single contravention	11(1) or 11(7)	100	20
		Other	50	10
	Multiple contraventions on the same day	11(1) or 11(7)	2000	400
		Other	1000	200
Subsequent offences	Single contravention	11(1) or 11(7)	500	100
		Other	250	50
	Multiple contraventions on the same day	11(1) or 11(7)	10000	2000
		Other	5000	1000

Notes: One penalty unit is currently \$110. Section 11(1) prohibits the making of an unsolicited telemarketing call to a number on the Register (which is not a designated telemarketing call or otherwise excepted from complying with section 11(1)). Section 11(7) prohibits aiding, abetting, counselling, procuring or conspiring with others to make illegal telemarketing calls. The primary "other" prohibition is in section 12, which prohibits entering into a contract with a telemarketer if that contract does not contain terms that require the telemarketer to take reasonable steps to comply with the Act.