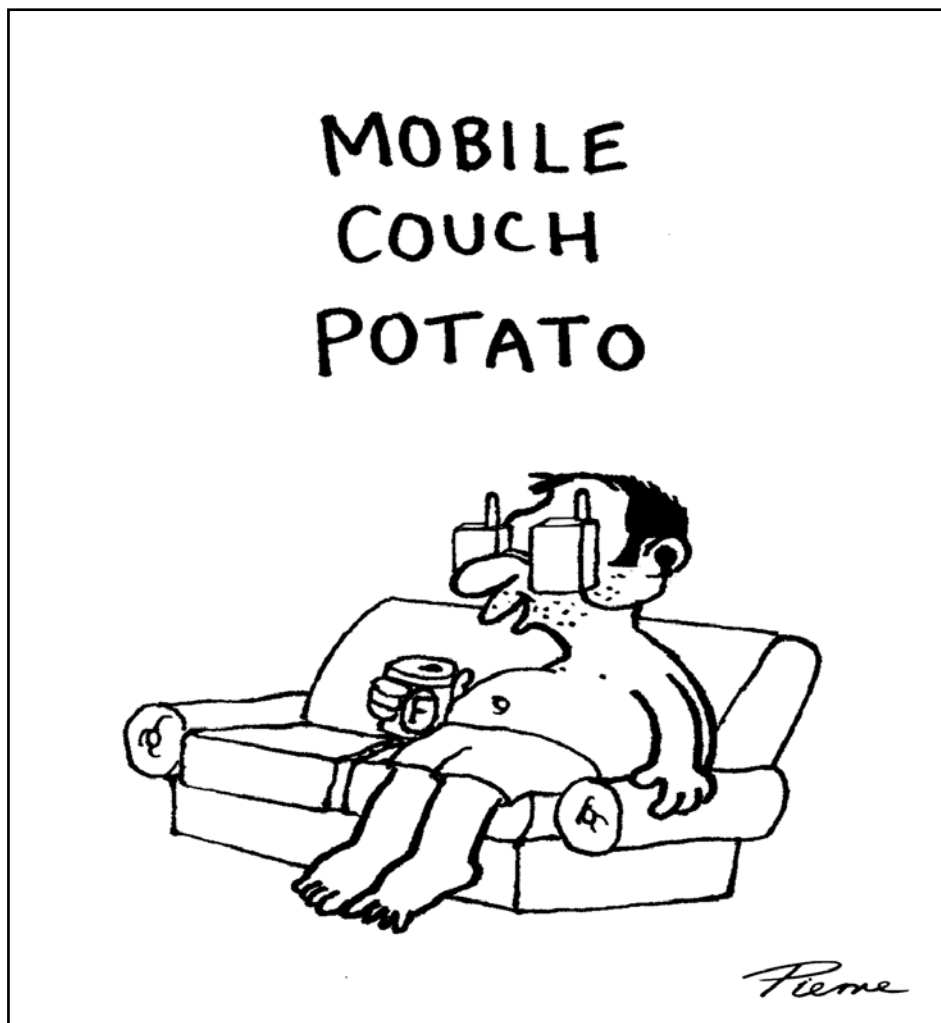


speeches by the competition regulator who has said the ACCC are interested in ensuring that mobile phone companies do not wrap up exclusive deals on content.

As the authors noted in their Communications Law Bulletin article earlier this year examining the regulatory issues surrounding IPTV⁵, the demarcation between content accessible via traditional means and through new technology is diminishing. Consequently traditional models of content regulation are constantly being challenged. Mobile TV is certainly inevitable. As to whether Mobile TV content suppliers will be required to comply with the same regulatory obligations as the free-to-air broadcasters, will no doubt be a hot topic in the lead up to any spectrum auction.

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1. "Mobile Model Mania", Jennifer Dudley, The Courier Mail, 5 April 2006.
2. "Its an on-off start for TV on the move", Agence French Presse, 9 April 2006.
3. "Mobile TV is on the Move", Brian Buchanan, The Australian, 18 April 2006.
4. The discussion paper related to "Future use of unassigned television channels"
5. "Legal Issues Arising from IPTV", Communications Law Bulletin, December 2005.



Do Not Call Register: Telemarketers Beware

Matthew McMillan analyses the Federal Government's new legislation on the establishment of a national Do Not Call Register and minimum contact standards for the telemarketing industry.

Introduction

On 30 June 2006, the *Do Not Call Register Act 2006* and *Do Not Call Register (Consequential Amendments) Act 2006* (the **Acts**) received Royal Assent. The Acts will see the establishment and maintenance of a national Do Not Call Register (**Register**) under which telemarketers will be prohibited from contacting telephone numbers listed on the Register, subject to certain exemptions.

The Acts follow the announcement by the Minister for Communications, Information Technology and the Arts, Senator the Hon Helen Coonan, on 4 April 2006, that

Australia would see the introduction of a do not call register as a means to address intrusive telemarketing practices. The announcement, in turn, follows a discussion paper released by the government in October 2005 considering an Australian model in light of already existing international models in the United Kingdom and United States¹.

The Government has pledged \$33.1 million over the next 4 years for the establishment and maintenance of the Register².

The legislation comes as a relief to consumers who are subject to an estimated 1 billion telemarketing calls a year – an average

of almost 3 per week for each Australian household³. The government is predicting at least 1 million registrations in the first week of the Register's operation and 4 million in its first year⁴.

Such predictions have caused angst amongst the 250,000-person strong telemarketing industry in Australia, with concerns raised that the reforms will stifle legitimate direct marketing business practices, result in regional call centres closing down (bringing about higher unemployment in areas where unemployment is already high) and leave telemarketing companies with little choice but to relocate to low-cost offshore locations such as India⁵.

This article reviews the new legislation and what it means for telemarketers, with emphasis on the key areas of contention within the industry.

Goodbye to Self-Regulation

The introduction of the Register will mark the end of self-regulation by the telemarketing industry in Australia. To date, the telemarketing industry has sought to manage direct marketing practices through industry codes, such as the Australian Direct Marketing Association's (ADMA) Direct Marketing Code of Practice⁶. The ADMA also runs its

own "do not contact" service, incorporating "do not mail" and "do not call" registers.

The problem with the Code and the registers is that they do not apply across the whole telemarketing industry, only to companies which are ADMA members. In recognition of this limitation, the ADMA itself has welcomed a national legislative initiative which will address inconsistencies within the industry and create a unified approach to direct marketing in Australia⁷.

Time to Legislate

The tables below summarise the key provisions of the Acts, including:

- the nature of the Register and how it will operate;
- the exemptions; and
- the minimum national contact standards.

Do Not Call Register Act⁸	
What does it do?	It establishes a single national Register which will allow individuals to register not to receive "telemarketing calls" on their land lines or mobile phones.
What constitutes a "telemarketing call" (section 5)	<p>A "telemarketing call" is a voice call to a telephone number where the purpose (or one of the purposes) of the call is:</p> <ul style="list-style-type: none"> • to offer to supply: (i) goods or services; or (ii) land or an interest in land; • to offer to provide a business opportunity or investment opportunity; • to advertise or promote: (i) goods or services; (ii) land or an interest in land; or (iii) a business opportunity or investment opportunity; • to advertise or promote a supplier (or prospective supplier) of: (i) goods and services; or (ii) land or an interest in land; • to advertise or promote a provider (or prospective provider) of a business opportunity or investment opportunity; • to solicit donations; or • for another purpose specified in the regulations.
Prohibition on telemarketing calls (section 11(1))	Generally speaking, telemarketers will not be allowed to make (or cause to be made) telemarketing calls to individuals whose numbers are registered on the Register <i>unless</i> the call is a "designated telemarketing call".
What is a "designated telemarketing call" (schedule 1)	<p>A "designated telemarketing call" is a telemarketing call which is authorised by:</p> <ul style="list-style-type: none"> • a government body, religious organisation or charity; • a registered political party, a member of parliament or a government body, or a political candidate where the purpose (or one of the purposes) of the call is to conduct fund-raising for electoral or political purposes; or • an educational institution where the call is made to a current or previous student's household or workplace. <p>In each case, the call must relate to goods or services and must not be of a kind specified in the regulations.</p>
What exceptions apply? (sections 11(2), (3), (4) and (5))	<p>The prohibition on making telemarketing calls does not apply if:</p> <ul style="list-style-type: none"> • the individual (or its nominee) consents to the making of the call; • the telemarketer has accessed the Register and has received information in the 30 day period prior to the making of the call that the number was not listed on the Register; • the telemarketer has made (or caused to be made) the call by mistake; or • the telemarketer has taken reasonable precautions, and exercised due diligence, to avoid the contravention. <p>The telemarketer will bear the evidential burden if it wishes to rely on any of the above exceptions.</p>

Who will administer the Register? (section 13)	The Australian Communications and Media Authority (ACMA) will be responsible for either directly administering the Register or appointing an appropriate body to administer the Register.
What numbers can be registered? (section 14)	Registration will be open to telephone numbers which are: <ul style="list-style-type: none"> • Australian; • used or maintained exclusively or primarily for private or domestic purposes; and • not used or maintained exclusively for transmitting or receiving faxes.
Who can register? (section 15)	Applications for registration can be made by the telephone account-holder or a nominee. This requires the telephone account-holder or nominee to take active steps to “opt out” in order to be recorded on the Register.
No registration fees	Subscribers will pay no fee to list their numbers on the Register.
How long will the registration last? (section 17)	The registration of a telephone number will remain in force for 3 years (after which it can be re-registered).
How can the Register be accessed? (section 19)	A telemarketer who wishes to access the Register may submit a list of telephone numbers to the ACMA (or its contracted service provider). The telemarketer will have to pay a fee. The ACMA (or its contracted service provider) must then check the numbers on the telemarketer’s list against the numbers recorded on the Register and inform the telemarketer of those numbers which are (or are not) listed on the Register.
What are the penalties?	Telemarketers that contact persons listed on the Register are subject to a range of enforcement options including formal warnings, civil penalties and injunctions. Fines range from \$1,100 to \$1.1 million.
Do Not Call (Consequential Amendments) Act 2006⁹	
What does it do?	It amends the <i>Telecommunications Act 1997</i> and the <i>Australian Communications and Media Authority Act 2005</i> to enable the ACMA to develop standards and industry codes for the operation of the telemarketing industry.
ACMA to determine minimum contact standards (section 36)	The ACMA must determine a standard for the telemarketing industry dealing with the following matters: <ul style="list-style-type: none"> • restricting the hours and days during which telemarketing calls may be made; • requiring the disclosure of certain basic information when making telemarketing calls (such as the name and address of the organisation calling or the organisation on whose behalf the call is being made); • a requirement to terminate the call immediately upon a specified event (eg at the request of the person being called); and • requiring the telemarketer to ensure that calling line identification is enabled.

The "Opt Out" Approach

In order to "opt out" of receiving telemarketing calls, an individual must make an application to the ACMA (or its contracted service provider) in accordance with section 15 of the legislation.

Interestingly, the "opt out" approach contrasts with the approach taken by the government under the *Spam Act 2003 (Spam Act)*. The Spam Act prohibits the sending of unsolicited commercial electronic messages unless the recipient's consent (either express or inferred) has been obtained. At the time the Spam Act was introduced, it was considered that this "opt in" approach was necessary in light of the exponential growth in spam and the threat it posed on an international scale.

In the Government's view, telemarketing does not pose the same type of threat. To subject the telemarketing industry to a restrictive "opt in" approach would have dire consequences for the industry and negate the fact that telemarketing still has a legitimate role to play in the Australian economy, providing consumers with easy access to the marketplace for goods and services¹⁰. An "opt out" model, on the other hand, allows consumers to express their preference not to be contacted. Indeed, this is an approach which has been favoured by both the United Kingdom and the United States.

That being said, the adoption of an "opt out" approach has still been met with criticism from within the telemarketing industry.

Compliance Costs

The financial penalties for contravening the legislation are significant, with fines ranging from \$1,100 to \$1.1 million. This means that it will be prudent for telemarketers to maintain up-to-date lists of the individuals which they are prohibited from contacting. Opt out lists will not be provided by the ACMA. Rather, telemarketers will be required to pay an annual subscription fee in order to access the Register and require the ACMA (or its contracted service provider) to check the numbers on the telemarketer's list against the numbers recorded on the Register.

Section 21 of the legislation enables the ACMA to set the amount of any fee for accessing the Register. In this way, the government expects to recover \$15.9 million of the \$33.1 million establishment costs over the first 4 years¹¹. Provision is also

made for the ACMA to provide exemptions from the fees.

Whilst the access fee regime is still to be finalised, it has been suggested by one source that the fees will be somewhere between \$3,000 and \$8,000 per annum¹², with the larger telemarketing companies expected to pay towards the higher end¹³.

The extent to which industry will be able to fund these costs has been questioned by the ADMA. In particular, the view has been expressed that the costs are prohibitive for smaller telemarketing companies¹⁴.

Offshore Telemarketers

Concern has also been raised that, whilst the Register will significantly affect the Australian telemarketing industry, it will do little to curtail the increasing number of calls being received from offshore locations¹⁵.

The government has sought to address this by giving the legislation extraterritorial application. Part 2 of the legislation is wide enough to capture persons calling from overseas locations - the test simply being whether or not a call has been made to an "Australian number" - whilst section 9 specifically confirms the intention of the legislation to apply "to acts, omissions, matters and things outside of Australia".

Section 12 is also useful in this regard. It puts a positive obligation on persons entering into telemarketing contracts to include a requirement obliging the telemarketer to comply with the legislation. In particular, section 12(1) prohibits a person from entering into a contract, arrangement or understanding if:

- the agreement relates to the making of telemarketing calls to numbers eligible to be registered on the Register; and
- the agreement does not contain an express provision to the effect that the person will comply with the legislation and take all reasonable steps to ensure that its employees and agents will comply with the legislation, in relation to the making of telemarketing calls.

An organisation cannot, therefore, attempt to escape the reach of the legislation by simply outsourcing its telemarketing activities to offshore locations such as India or the Philippines.

The practicalities of enforcing Australian law in offshore jurisdictions, however, continue to pose difficulties and the legislation offers only a partial solution to the problem. This is particularly so in respect of telemarketers that do not have a physical presence in Australia. In such circumstances, prosecution would involve Federal Court proceedings which would require enforcement by overseas jurisdictions. The Government has acknowledged that the problem of "rogue" offshore telemarketing remains an issue which requires further investigation¹⁶.

Small Businesses

In its discussion paper of October 2005, the Government proposed giving small businesses (in addition to individuals) the opportunity to "opt out" of receiving direct marketing calls. The Government defined a "small business" as a business employing 20 or less people, in line with the definition used by the Australian Bureau of Statistics¹⁷.

Although intended to address the concerns raised by the small business community, the Government's proposal met with much criticism from the ADMA which considered that business-to-business marketing would be jeopardised if small businesses were allowed to register¹⁸.

Following further consultation with industry, the Government has decided to exclude small businesses from being able to register.

Social Research Exemption

Another area of contention within the industry was the proposed exemption regarding "market researchers undertaking social research". This exemption was first raised in the Government's discussion paper of October 2005. The rationale behind this exemption was that social research provides valuable information which helps to drive policy decisions.

The intended breadth of this exemption, however, caused much confusion with advocates from the Association of Market and Social Research Organisations and the Australian Market and Social Research Society voicing concerns that the exemption did not factor in legitimate market research. The argument being put forward was that the public does not generally differentiate between social and market research and, provided such research is not linked to selling activities, there should be no need to differentiate the two¹⁹.

Again, this is an area where the Government appears to have taken heed. It has been careful to define "telemarketing calls" by reference to selling activities in section 5. This means that an organisation making a call solely for research purposes will not fall foul of the legislation.

Conclusion

Needless to say, the regime established by the new legislation is not going to suit everyone. The Acts are the government's attempt at a model that balances, as best it can, the rights of individuals to be free of nuisance calls with the rights of businesses to access the community for legitimate purposes²⁰. It is expected that the Register will be up and running in 2007.

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1. Department of Communications, Information Technology and the Arts, Introduction of a Do Not Call Register: Possible Australian Model, Discussion Paper (October 2005). The paper draws on recommendations relating to telemarketing arising from the Office of the Federal Privacy Commissioner, Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988, and the Senate Legal and Constitutional References Committee, The Real Big Brother: Inquiry into the Privacy Act 1988.

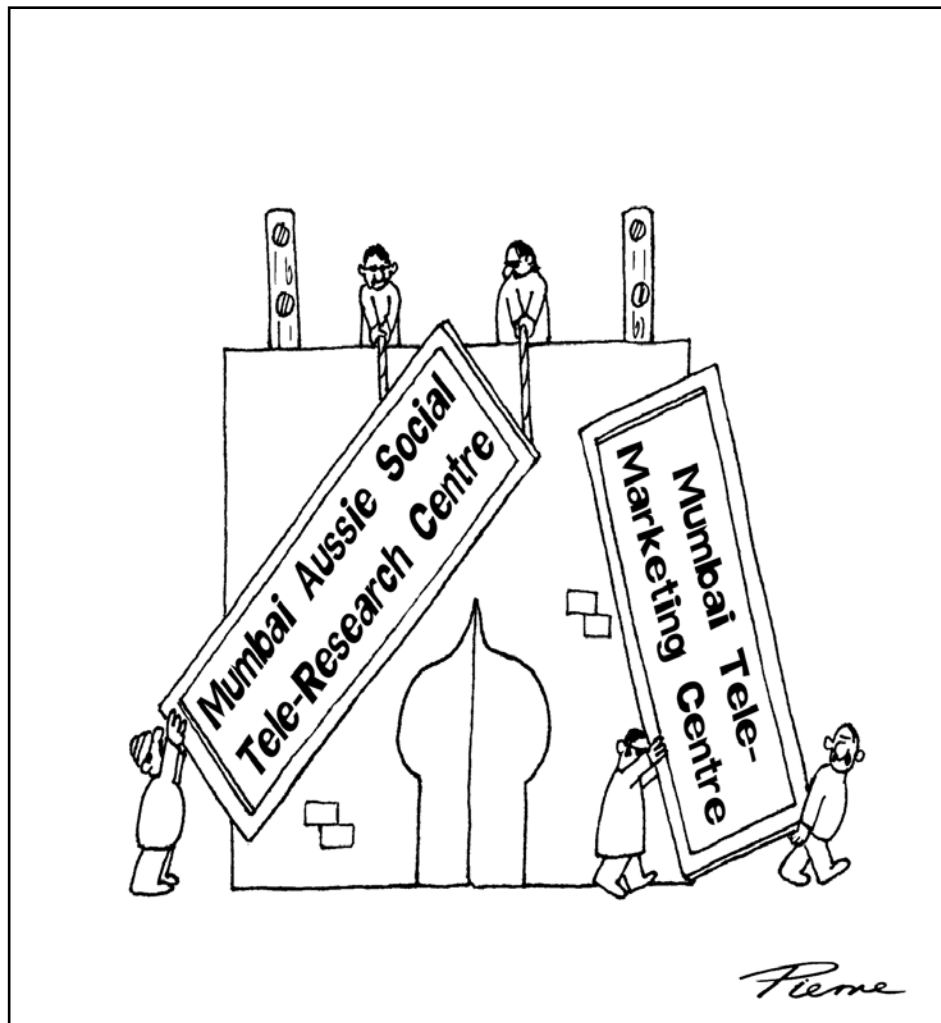
2. Budget Paper No.2, Part 2: Expense Measures, Communications, Information Technology and the Arts at http://www.budget.gov.au/2006-07/bp2/html/bp2_expense-03.htm. Expenses for this measure will be partially recovered by ACMA from industry to a total of \$15.9 million over 4 years.

3. The Sydney Morning Herald, 'Throw out the baby with the bathwater, and every other excuse', 5 April 2006. In October 2005, information research company CEASA (Commercial Economic Advisory Service of Australia) estimated that telemarketing companies were responsible for 1.065 billion calls in Australia in 2004, an average of 53 calls per person or 2.7 per household per week.

4. ABC News Online, 'Government plans 'Do Not Call' register', 4 April 2006 at <http://www.abc.net.au/news/newsitems/200604/s1607923.htm>.

5. The Age, 'Telemarketers disturbed by 'do not call' plan', 15 April 2006 at <http://www.theage.com.au/news/business/telemarketers-disturbed-by-do-not-call-plan.htm>.

6. ADMA, Direct Marketing Code of Practice, November 2001. This code was authorised under section 88(1) of the Trade Practices Act 1974 by the ACCC. It is based on the



provisions of the Model Code released by the MCCA in 1997.

7. The Age, above note 5.

8. This table is based on the Do Not Call Register Act 2006.

9. This table is based on the Do Not Call Register (Consequential Amendments) Act 2006.

10. Department of Communications, Information Technology and the Arts, above note 8, pp.11-12.

11. Above note 1.

12. The Age, above note 5.

13. ABC, 'Do not call register', 6 April 2005 at <http://www.abc.net.au/goulburnmurray/stories/s1610141.htm>.

14. The Age, above note 5.

15. InfoQuorum, 'Proposed Do Not Call Register is dubious in achieving its goals', 21 April 2006 at <http://www.crm magazine.com/DesktopDefault.aspx>.

16. Department of Communications, Information Technology and the Arts, above note 8, pp.15-16.

17. Department of Communications, Information Technology and the Arts, above note 8, p.13.

18. The Age, above note 5.

19. 'Do Not Call' register announced', 12 May 2006 at <http://www.mrsa.com.au/print.cfm?i=2139&e=122>.

20. Department of Communications, Information Technology and the Arts, above note 8, pp.5-6.