

# Telemarketing and the Do Not Call Register

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## 1 INTRODUCTION

The Commonwealth Parliament has passed Do Not Call Register legislation which commenced on 30 June 2006. The legislation contains rules that apply to the making of telemarketing calls. The legislation also requires the Australian Communications and Media Authority to establish a Do Not Call Register and to develop a national industry standard that applies to telemarketing calls. All organisations which make telemarketing calls will need to comply with the legislation. The legislation is available from <http://www.comlaw.gov.au>. This article outlines the background to the introduction of the legislation and provides an overview of the requirements of the legislation.

## 2 BACKGROUND

The significant rate of growth of unsolicited telemarketing calls in Australia over recent years has raised community concerns about the inconvenience and intrusiveness of telemarketing on Australians. The Commonwealth Government made a decision to establish a Do Not Call Register (Register) as a result of submissions it received in response to the Do Not Call Register Discussion Paper which it released in October 2005.

The Commonwealth Parliament has recently passed the Do Not Call Register Act 2006 (Cth) and Do Not Call Register (Consequential Amendments) Act 2006 (Cth) to give effect to its decision to establish the Register. The establishment of the Register is intended to strike an appropriate balance between the rights of consumers to privacy and the rights of businesses to promote their products and services.

## 3 DO NOT CALL REGISTER ACT 2006

The Do Not Call Register Act 2006 (Cth) (DNCR Act) is intended to regulate and minimise unsolicited telemarketing calls made to Australian telephone numbers from Australian and overseas numbers. The DNCR Act requires the establishment of the Register so that individuals with an Australian number may register their number if they wish to opt out of receiving unsolicited telemarketing calls.

### 3.1 Do Not Call Register

Part 3 of the DNCR Act requires that as soon as practicable the Australian Communications and Media Authority (ACMA) keep, or arrange for another person (Service Provider) to keep on its behalf, the Register. It is expected that the Register will be established by early 2007. A telephone number may be registered on the Register without charge if it is:

- an Australian number (fixed or mobile),
- used or maintained exclusively or primarily for private or domestic purposes, and
- not used or maintained exclusively for transmitting and/or receiving faxes.

A telephone account-holder or their nominee (who has been nominated in writing) may make an application to the ACMA or, where the Register is not kept by the ACMA, the Service Provider, for entry of the account-holder's telephone number on the Register. The registration of a number on the Register takes effect when it is entered and remains in force for 3 years unless removed earlier in

accordance with an ACMA determination. After the expiry of the 3 year period a number may be re-registered on the Register.

A person (Access Seeker) may seek access to the Register by submitting a list of telephone numbers to the ACMA or, where the Register is not kept by the ACMA, the Service Provider. If the Access Seeker has paid any applicable fee determined by the ACMA, then the ACMA or Service Provider must inform the Access Seeker whether or not the numbers are registered on the Register.

### 3.2 Telemarketing Call Rules

Part 2 of the DNCR Act (which commences on a day to be fixed by Proclamation) prohibits a person making, or causing to be made, a telemarketing call to a number registered on the Register unless:

- the call is a designated telemarketing call,
- the relevant telephone account holder or their nominee consented to the making of the call,
- within the previous 30 days the person received information from the ACMA that the number was not registered on the Register,
- the call was made by mistake, or
- the person took reasonable precautions and exercised due diligence to avoid making such a call.

A "telemarketing call" is defined to mean a voice call made for the

purpose of, relevantly, among other things, offering to supply or provide, advertising or promoting goods, services, land or a business or investment opportunity.

A “designated telemarketing call” is defined to mean a call authorised in specified circumstances by a government body, religious organisation, charity, registered political party, independent member of parliament, parliamentary election candidate or educational institution (calls to current and former students only).

Consent may be given expressly or inferred from the conduct and business or other relationships between the person and organisation concerned. However, if express consent is given which is not expressed to be for a specified period or for an indefinite period, then the consent is taken to have been withdrawn 3 months after it was given. Consent may not be inferred merely by the publication of a telephone number.

A person is deemed to have “caused a telemarketing call to be made” if they enter into a telemarketing contract with another person under which the other person makes the call in accordance with the contract.

Part 2 of the DNCR Act also prohibits a person entering into a contract with another person to make telemarketing calls where:

- there is a reasonable likelihood that some or all of those calls will be made to telephone numbers that are eligible to be entered on the Register, and
- the contract does not contain an express provision requiring the person to comply with the provisions of the DNCR Act.

### 3.3 Civil Penalties and Enforcement

Where a person breaches Part 2 of the DNCR Act then the ACMA may apply to the Federal Court or Federal Magistrates Court under Part 4 for an order that the person pay a pecuniary penalty to the Commonwealth. The maximum penalty payable by a person

for breaching Part 2 ranges from \$1,100 to \$1.1 million depending on:

- whether the person has a prior record,
- whether the person is a body corporate, and
- the provision breached.

If the Court is satisfied that a person has suffered loss or damage as a result of a breach of Part 2 then the Court may, on the application of the ACMA or such person, order that the perpetrator compensate such person.

If the Court is satisfied that a person has obtained a financial benefit that is reasonably attributable to a breach of Part 2 then the Court may, on the application of the ACMA, order the person to pay the Commonwealth an amount up to the value of such benefit.

The ACMA may also apply to the Federal Court or Federal Magistrates Court for an injunction to restrain a person from breaching Part 2.

As an alternative to the institution of proceedings in the Federal Court or Federal Magistrates Court an authorised officer of the ACMA may give a person an infringement notice requiring payment of a specified amount where the officer has reasonable grounds to believe that the person has breached Part 2.

## 4 DO NOT CALL REGISTER (CONSEQUENTIAL AMENDMENTS) ACT 2006

The Do Not Call Register (Consequential Amendments) Act 2006 (Cth) (Consequential Amendments Act) amends the Telecommunications Act 1997 (Cth) (Telecommunications Act) by inserting a provision in Part 6 which requires the ACMA to determine a national industry standard that applies to the telemarketing industry and deals with the following:

- the hours and/or days during which telemarketing calls may be made,

- specified information that must be contained in a telemarketing call,
- termination of a telemarketing call in specified circumstances, and
- enabling calling line identification in respect of a telemarketing call.

The Consequential Amendments Act also amends Part 6 of the Telecommunications Act by inserting provisions which allow for the development of industry codes by the telemarketing industry in relation to telemarketing activities. An industry code may not deal with a matter dealt with by an industry standard determined by the ACMA.

In addition, the Consequential Amendments Act will amend Part 6 of the Telecommunications Act (on a day to be fixed by Proclamation) by inserting a provision which prohibits a person entering into a contract with another person where:

the other person undertakes to carry out telemarketing activities under the contract, and

the contract does not expressly require the other person to comply with Part 6 in relation to such activities.

## 5 CONCLUSION

The Do Not Call Register legislation will apply not only to telemarketers but also to other organisations which themselves make, or enter into contracts with telemarketers to make, telemarketing calls. All organisations which make telemarketing calls will need to comply with the new telemarketing call rules when they come into force to avoid being exposed to liability for significant pecuniary penalties. It would be prudent for all such organisations to consider the practical effects that the Do Not Call Register legislation will have on their activities and to take steps to establish an appropriate compliance program.

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