



Australian Government

**Department of Broadband,
Communications and the Digital Economy**

Report on the Do Not Call Register Statutory review

May 2010

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Introduction

The *Do Not Call Register Act 2006* (the Act) established the Do Not Call Register (Register), which enables Australians to opt out of unsolicited telemarketing calls by listing their telephone number on the Register. The Register commenced in May 2007. The Australian Communications and Media Authority (ACMA) is responsible for overseeing its operation.

Section 45 of the Act requires a review of that Act and the relevant provisions of the *Telecommunications Act 1997* (Telecommunications Act) before or as soon as possible after the third anniversary of the commencement of the Register (May 2010) and that the review report be tabled in parliament within 15 sitting days of its completion.

On 6 October 2009 the Department released a discussion paper seeking community views on the Register. Submissions closed on 4 November 2009. The Department received 77 submissions responding to the discussion paper. In addition, the Department conducted a number of meetings with key stakeholders.

This report sets out the findings from the statutory review, including issues that were raised during the consultative process.

Summary of findings

Opt-out

1. The current opt-out structure of the Register appears to operate effectively and meet the objectives of the Do Not Call Register Scheme by giving individuals choice about whether to receive telemarketing calls.

Exemptions

2. Exemptions applying to political parties, candidates and independent members of parliament, government bodies, educational institutions and religious organisations were, for the most part, not supported by respondents. There was a view among many respondents that the exemption for charities should be discontinued but some respondents recognised the importance of telemarketing as a means of fundraising. On balance, the exemption for charities should be retained on public interest grounds. Removing the other exemptions would have a minimal effect as these exemptions do not represent a substantial proportion of calls.

Consent provisions

3. Greater protection may be provided for consumers if express consent is more clearly defined in the legislation.

4. Indefinite express consent is inappropriate and, if no specific period is agreed, a default period of three months would be appropriate.
5. It is inappropriate for a telemarketer to pass on a consumer's express consent to a third party. Express consent should be limited to the organisation or business to which consent is specifically given.
6. It is important to provide adequate and appropriate educational resources for consumers and telemarketers on the consent provisions, including the circumstances in which consent is inferred. The ACMA could consider developing additional educational materials with this focus.

Registration period

7. The majority of submissions argued that the registration period should be longer than three years but this view was not supported by those industry respondents that commented on the issue.
8. Research into alternative ways to ensure the accuracy of the Register should be considered to reduce or eliminate the need to re-register.
9. The ACMA is undertaking a comprehensive education initiative in the lead-up to May 2010 and beyond to increase awareness among existing registrants of the need to re-register within three years of their initial registration in order for their number(s) to remain on the Register.

Research calls

10. It may be beneficial to users of the scheme to provide them with further information about the distinction between telemarketing and research calls. However, the inclusion of a definition of research calls in the legislation does not seem warranted.

Registration process

11. The registration process is working well.

Washing process

12. The washing process is working well.

Compliance

13. The general approach to compliance used by the ACMA appears effective.

Education and awareness

14. Many respondents commented favourably on the information provided by the ACMA through its website, and the ACMA is to be commended for the quality and effectiveness of this information. A strong need was identified for substantial publicity, particularly in the period leading up to May 2010, about the need to re-register after three years, and for this purpose the ACMA is conducting a comprehensive education initiative in the period leading up to May 2010.

Industry codes and standards

15. The review found that regulation should be introduced to set appropriate limitations on the abandonment rates for silent calls and the number of calls that a telemarketer can make to a particular number during a particular period. There should be consultation with stakeholders in the development of such regulation.

Background

Do Not Call Register

The Do Not Call Register was established under the Act in response to community concerns about unsolicited telemarketing calls.

The Act requires the ACMA to establish and maintain a Do Not Call Register. The key objectives of the Act are to:

- reduce the inconvenience and intrusiveness of telemarketing calls by enabling Australians to list fixed line and/or mobile phone numbers used primarily or exclusively for private or domestic purposes on the Register
- provide a consistent and efficient operating environment for the telemarketing industry through a national scheme that requires that a telemarketer not call a number listed on the Register
- establish an effective complaints handling mechanism for consumers to report complaints about unsolicited and unwanted telemarketing calls.

The ACMA is responsible for overseeing the operation of the Register, including education activities and enforcement. On 1 February 2007, the ACMA contracted Service Stream Solutions Pty Ltd (the Register Operator) to build and operate the Register until February 2011. The Register became operational in May 2007 and as at 10 March 2010, 4.42 million telephone numbers were registered¹.

Telemarketing is broadly defined in the Act. In general terms, the Act provides that a telemarketing call is a voice call made to a telephone number where the purpose or one of the purposes of the call is to:

- offer, supply, provide or advertise goods or services
- offer, supply, provide or advertise land or an interest in land

¹ Registrations between 3 May 2007 and 10 March 2010 according to advice from the ACMA.

- offer, supply, provide or advertise a business opportunity or investment opportunity
- solicit donations.

The Register enables Australians to opt out of receiving unsolicited commercial telemarketing calls by listing their fixed line, VOIP, satellite and mobile telephone numbers that are used or maintained exclusively or primarily for private or domestic purposes.

The Act provides that the purpose of a call may be determined by the content and the presentational aspects of the call, or the content that can be obtained using the contact information mentioned in the call. Fax numbers are specifically excluded from inclusion on the Register and fax communications are not covered by the definition of a telemarketing call.

The Australian Government announced in the 2009–10 Budget that the Register would be extended to allow the registration of all Australian telephone and fax numbers, including those used by businesses, government bodies and emergency services. Implementation of the changes will require legislative amendment. Legislation to amend the Act for this purpose was introduced into parliament on 26 November 2009.

Statutory review

Section 45 of the Act requires that a review of the legislation and the relevant provisions of the *Telecommunications Act 1997* (Telecommunications Act) be conducted before or as soon as possible after the third anniversary of commencement, which is May 2010. A report is required to be tabled in parliament within 15 sitting days of the completion of the report.

To commence the review, on 6 October 2009 the Department released a discussion paper seeking community views on the Register. The discussion paper was released on the Department's website and was emailed to key stakeholders and previous respondents. The Department ran advertisements in major newspapers. Representatives of the Department held meetings with key stakeholders in Sydney, Melbourne and Canberra.

The discussion paper considered the key elements of the legislation and the key operational aspects of the scheme.

Submissions closed on 4 November 2009. A total of 77 submissions were received, comprising:

- 56 from individuals and small businesses
- four from consumer or privacy organisations
- four from industry associations
- 10 from businesses involved in the telemarketing industry
- three from other organisations.

A list of respondents to the discussion paper, excluding those who asked that their submissions remain confidential, is at Appendix 1. Non-confidential submissions are published on the Department's website at www.dbcde.gov.au/donotcall.

The statutory review did not consider the cost-recovery arrangements that are currently in place, under which the telemarketing industry meets the full direct costs of operating the Register. This issue was addressed in a review of the policy underlying the cost-recovery arrangements of the scheme that was undertaken in March 2008.

In addition, the discussion paper specifically stated that it would not cover the extension of the Register to all telephone and fax numbers, as announced in the 2009–10 Budget. Nevertheless a number of submissions from individuals and small businesses supported the extension of the Register to all telephone and fax numbers. This was the sole issue raised in some of the submissions. In contrast, some business and industry association respondents noted their opposition to extending the Register to businesses. Submissions from some businesses involved in the telemarketing industry raised concerns about the potential negative impact of the extension on businesses, including the regulatory impact on small-to-medium businesses and the possible anti-competitive effect.

The Department has developed this report taking into account the submissions received, consultation undertaken and current research available.

Other reviews of the Do Not Call Register

In March 2008 the ACMA undertook a review of the cost-recovery arrangements for the scheme, consistent with the Government's election commitment that the full direct costs of the scheme would be met by industry.

In August 2008 the Department undertook a review of the eligibility requirements for listing a number on the Register. Following public consultation on the proposal, the Government detailed plans in the 2009–10 Budget to extend the Register to all Australian telephone and fax numbers.

In 2009 the Australian National Audit Office (ANAO) undertook an audit of the scheme 'to assess the ACMA's effectiveness in operating, managing and monitoring the Register, including compliance with legislative requirements'².

Overview of telemarketing in Australia

Telemarketing is a form of direct marketing where goods or services, business opportunities or interests in land are offered, promoted or advertised over the telephone. Unsolicited telemarketing or 'cold calling' occurs where the recipient has not requested the call. As a direct marketing tool, telemarketing is used by many industries and in a variety of ways, including in-house telemarketing and the use of contracted contact centres. This makes it difficult to draw conclusions about the degree and extent of telemarketing in Australia.

² www.anao.gov.au/uploads/documents/2009-10_Audit_Report_No16.pdf

The contact centre industry, which includes some telemarketing, is a significant part of the Australian economy. It was reported that the entire call centre industry generated \$13.7 billion revenue in 2009 and had more than 192 800 seats in Australia. Outbound sales activity represents eight per cent of total activity.³ The average contact centre manages 24 000 calls each week.⁴

While it is difficult to estimate the cost of unsolicited telemarketing calls, research undertaken by the Australia Institute in December 2008 estimated the value of time wasted on unsolicited telemarketing calls in Australia at \$1.58 billion per year⁵. This amount was calculated on the basis of an average 8.5 unsolicited telemarketing calls received each month, lasting 1.45 minutes on average leading to approximately 12.3 minutes per month in answering telemarketing calls, or 147 minutes per year. The value of the time taken to answer telemarketing calls was calculated using average weekly ordinary time earnings for full-time workers.

Research has indicated that many Australians are unsupportive of unsolicited telemarketing calls. In response to a departmental discussion paper released on 15 August 2008, approximately 78 per cent of respondents indicated that they were 'very unsupportive' of the telemarketing industry⁶. A survey of 1000 respondents commissioned by the Australia Institute showed that 63 per cent of respondents thought telemarketing should be banned⁷.

However, individuals and businesses continue to purchase goods and services over the telephone, making telemarketing an attractive means for businesses to market their products. The low cost of making telemarketing calls makes it a cost-effective method for businesses to communicate with potential and existing customers, with estimates that between two and 24 per cent of calls lead to a sale.⁸

³ Australian Direct Marketing Association, Submission to Senate Standing Committee on the Environment, Communications and the Arts on the Do Not Call Register Amendment Bill 2009 quoting callcentres.net *2009 Australian Contact Centre Industry Benchmarking Report*.

⁴ callcentres.net, *Contact Centre Industry Benchmarking Report 2008*.

⁵ J Fear, 'Go Away, Please: the social and economic impact of intrusive marketing', Australia Institute, Australia, December 2008, p.6.

⁶ Department of Broadband, Communications and the Digital Economy, Eligibility Requirements for Registration on the Do Not Call Register, August 2008.

⁷ J Fear, 2008, p.6.

⁸ Access Economics, in a January 2010 report for ADMA, and quoted by ADMA in its submission to the Senate Environment, Communications and the Arts Legislation Committee, claimed a telemarketing call conversion rate (i.e. the percentage of calls that result in sales) of 24 per cent. This was based on its own survey but was backed up by an Australian contact centre report (callcentres.net, 2009). However, this figure was challenged by the Director of Galexia, Mr Chris Connelly, in his presentation to the Senate Environment, Communications and the Arts Legislation Committee on 5 February 2010. He stated that 'there appears to be a well-expressed and well-known rule of thumb in the call centre industry itself that two per cent is the average. In all of the case studies submitted to you by industry, the highest conversion rate quoted is five per cent. So...the conversion rate is between two and five per cent'.

Part 1—The legislation

Opt-out

The Act gives individuals the choice of whether or not to receive telemarketing calls by enabling them to opt out by listing their telephone number on the Register. Individuals who are happy to receive unsolicited telemarketing calls can continue to do so.

The opt-out scheme attempts to balance the privacy concerns of individuals with the ability of telemarketers to continue to market their goods and services.

The discussion paper considered an alternative option to the opt-out scheme, which is an opt-in regime. Such a regime could operate in a similar way to the *Spam Act 2003*, by requiring that telemarketing calls can only be made where there is consent, either express or inferred. Alternatively, those people who wish to receive telemarketing calls could be required to list their number on an opt-in register. The paper noted that such a regime could have a significant impact on the telemarketing industry in Australia by decreasing the pool of potential customers. It is anticipated that few people would take the time to opt in to receive calls.

Issues raised in the submissions

Submissions from industry associations and businesses involved in the telemarketing industry supported the current opt-out regime, noting the impact that an opt-in regime could have on businesses that use telemarketing as a means to market their goods and services.

The Australian Direct Marketing Association (ADMA) stated:

A change to an opt-in scheme would have significant adverse consequences for Australian business. A change to an opt-in regime would significantly limit businesses' ability to operate properly using this important channel and will most likely have an adverse impact on Australian jobs.

Telstra's submission noted that:

There is no evidence to suggest such a change is warranted, considering the severe impact it would have on business. The change is also unnecessary given the present scheme provides individuals with ample opportunity to exclude themselves from telemarketing calls if they do not wish to receive them.

A submission from BoysTown, which referenced a previous submission made at the inception of the Register, noted the potential for those who opt in to receive increased calls and retract their opt-in as a result.

Submissions from individuals and small businesses strongly supported an opt-in approach to the Register. These submissions considered that an opt-in regime would be simpler and would create less inconvenience for consumers, while still allowing those who wish to receive telemarketing calls to exercise their choice.

In addition, there was support for an opt-in regime from consumer and privacy organisations, Galexia and the Australia Institute. The Australia Institute released a paper entitled 'Go Away Please: the social and economic impact of intrusive marketing' in December 2008, which proposed a three-tiered approach to address unsolicited telemarketing calls. This would require a person to opt out to receive no unsolicited telemarketing calls, opt in to receive any telemarketing calls and do nothing to receive telemarketing calls from exempt organisations.

Galexia called for an opt-in regime, but noted that if the opt-out approach continues, the other provisions in the legislation should be enhanced for consumer protection.

The Australian Communications Consumer Action Network (ACCAN) argued that the opt-out structure of the scheme imposes an unnecessary burden on consumers, particularly low income and vulnerable consumers. ACCAN stated that the strong level of community objection to unsolicited telemarketing calls indicated that an opt-in structure similar to the *Spam Act 2003* would be better for consumers. In support of this view, ACCAN noted the survey result that three out of four Australians are interested in registering and argued that the 'hassle' of registering may prevent a larger number of registrations.

Findings

The current opt-out structure of the Register appears to operate effectively and meet the objectives of the scheme by giving individuals choice about whether or not to receive unsolicited telemarketing calls.

Although the concerns raised by individuals and consumer and privacy groups were mainly about the opt-out structure, it appears to strike an appropriate balance between the rights of individuals in limiting the unsolicited telemarketing calls received and the ability of telemarketers to continue to market goods and services via the telephone.

The opt-out nature of the scheme helps to ensure that telemarketing remains a viable means for businesses to communicate information about their products and services to existing and potential customers who are willing to receive telemarketing calls. Telemarketing has a place in the Australian economy, demonstrated by the sales achieved through this form of marketing, and on the whole it is an effective and legitimate means of promoting goods and services.

It appears that the opt-out structure of the scheme has had the effect of raising community awareness about unsolicited telemarketing calls by requiring individuals to take proactive steps to reduce the calls they receive.

1. The current opt-out structure of the Register appears to operate effectively and meet the objectives of the scheme by giving individuals choice about whether or not to receive telemarketing calls.

Exemptions

Under the Act, telemarketing calls from certain organisations are considered ‘designated telemarketing calls’ which are not subject to compliance with the Act.

This includes calls authorised by charities, religious organisations, government bodies and agencies, political parties, candidates for election, independent members of parliament, and educational institutions. To be subject to the exemption, the call must relate to goods or services supplied by the exempt organisation. This prevents an exempt organisation agreeing to undertake telemarketing on behalf of a non-exempt organisation.

In some cases the calls made will not fall within the definition of telemarketing calls. As such, the exemptions provide clarity to organisations, ensuring that there is no unintended restriction on the work they undertake.

Exempt organisations making telemarketing calls are still required to comply with the provisions set out in the national industry standard on telemarketing⁹, including certain prohibited calling times and information that must be disclosed in the course of a telemarketing call.

The categories of exemption are in line with those in the *Spam Act 2003*.

The discussion paper sought community views on whether the exemptions are appropriate.

Government bodies, religious organisations and charities

These exemptions are based on ‘public interest’ as calls from these groups are considered to promote charities or enhance community knowledge, rather than have a commercial purpose. Charities and religious organisations, in particular, are seen to benefit the Australian community through the support and services they provide.

Research undertaken by the Fundraising Institute Australia (FIA), the national peak body for fundraising in Australia, indicates that approximately 100 million charitable telemarketing calls are made each year¹⁰. One-third of charitable telemarketing calls are made to people with an existing relationship with the charity. One-third of charitable telemarketing calls are cold calls made to solicit donations or sponsorship, recruit volunteers, or raise community awareness. Half of those surveyed did not make cold calls, a quarter of respondents received less than 40 per cent of their revenue from cold calls, and approximately 12.5 per cent received up to 60 per cent of their revenue from cold calls.

According to the FIA, telemarketing is highly valued by charities as a cost-effective way to solicit donations and engage directly with the community. This may be

⁹ Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007.

¹⁰ FIA submission to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts inquiry on the Do Not Call Register Bill 2006.

particularly so among small or new entrants to the charitable sector, as they may not have the national recognition of larger, more established charities. For these entities telemarketing presents a more efficient and cost-effective means of fundraising.

The FIA produces a range of professional standards for its members, including a standard of charitable telemarketing practice setting out requirements on those undertaking telemarketing.

The exemption for government bodies provides for unrestricted communications from government bodies to individuals. Most communications from government bodies will not be commercial in nature and will, therefore, not be considered telemarketing. However, it is possible that local government may provide some services on a fee-for-service basis that would be captured by the legislation if not for the exemption. The exemption seeks to avoid an unintended consequence in limiting these communications.

Political parties, candidates and independent members of parliament

Political parties, candidates and independent members of parliament are exempted from compliance with the legislation. This exemption recognises the public interest in allowing unrestricted communications from political parties, candidates and independent members of parliament. These groups can make calls with a fundraising or membership purpose, which may have a commercial element.

Educational institutions

The exemption for educational institutions recognises the importance of educational institutions in the community. However, the exemption is only available to educational institutions in certain circumstances. An educational institution is exempt from compliance with the Act where a call is made to a telephone account-holder who is a current or former student of the institution or where a member of the telephone account-holder's household is a current or former student.

As such, this is effectively a form of inferred consent which applies specifically to educational institutions and their students, in that there must be some existing relationship for the exemption to apply.

Issues raised in submissions

Submissions from businesses that undertake telemarketing supported the current exemptions or provided no specific comment on the exemptions.

BoysTown made a submission that charities should remain exempt from the requirements of the legislation. BoysTown cited the submission it made at the inception of the Register, that the Register would have a negative impact on charities providing community services by increasing the costs of operating.

Individuals and small business respondents held a very strong view that calls from exempt organisations can be just as frustrating as those from telemarketers. A particular concern was calls from persistent telemarketers seeking donations to

charities. In addition, some submissions noted an objection to the exemptions for political parties or religious organisations. Many individual and small business respondents supported the removal of exemptions or the ability to opt out of all calls and to opt in to calls from specific organisations.

The Australian Privacy Foundation, ACCAN, the Australia Institute and Galexia supported a nomination approach to telemarketing calls from exempt organisations, enabling registrants to select the call types (or calls from organisations) they wish to receive.

The Consumer Credit Legal Centre stated:

The exemptions should be revoked immediately so consumers can choose to have comprehensive cover from intrusive calls or, at a minimum consumers should at least have the option to nominate one or more of the current exemptions to be included..

The Office of the Privacy Commissioner noted:

Overall the Office believes that the exemptions should only be maintained where there is a clear and demonstrable public interest which reflects community standards and values’.

The National Emergency Communications Working Group noted concerns with the application of the exemptions to emergency service telephone numbers following the inclusion of all telephone and fax numbers on the Register.

Findings

Despite the concerns raised by many individuals and small businesses, the existing exemptions for charities and charitable organisations are based on a clear public interest and benefit to the broader community. This form of exemption enables charities to carry on work that is of importance to the community and is not of a commercial nature. Removal of this exemption is not supported as it would have a significant impact on the work of charities by increasing their operating costs and reducing the pool of available donors.

The Department is not aware of telemarketing undertaken by government bodies, which generally contact citizens through other means. Therefore, while removing the government exemption is unlikely to adversely impact on contact between government bodies and citizens, there is no compelling reason for its removal.

With regard to the exemption for educational institutions, there is scope for such institutions to rely on inferred consent to contact their existing and previous students. The regulations provide for ‘deemed nominees’, enabling a person to be deemed a nominee of another for the purposes of giving consent where they provide the contact telephone number of the account-holder to a person or organisation. For example, a student who provides an educational institution with a contact telephone number for which another person is an account-holder may be deemed to have consented to calls

on behalf of the account-holder. Therefore, the exemption appears to have little purpose, but again there is no compelling reason for its removal.

The majority of calls from political parties, candidates and independent members of parliament would not be considered telemarketing calls as defined in the Act and therefore would not be subject to the scheme. Only those calls with a commercial purpose, for example fundraising or membership calls, may be subject to the Act. Therefore, the removal of this exemption would similarly have little effect.

With regard to religious organisations exemption, calls which relate to religious services—such as the promotion of a particular religion or church or information about the times of church services—would not generally fall within the definition of a commercial telemarketing call. As such, it is unlikely that the removal of the exemption would lead to any restrictions on religious freedom. However, as with other exemptions above, there seems no compelling reason to remove it.

In summary, the exemption applying to charities should be retained on public interest grounds. The practical effect of removing the exemptions applying to political parties, candidates and independent members of parliament, educational institutions and religious organisations is minimal. They could be removed with little negative effect but there are no compelling reasons to remove them as these organisations rarely make telemarketing calls and complaints are rarely received about them.

2. Exemptions applying to political parties, candidates and independent members of parliament, government bodies, educational institutions and religious organisations were for the most part not supported by respondents. There was a view among many respondents that the exemption for charities should be discontinued but some respondents recognised the importance of telemarketing as a means of fundraising. On balance, the exemption for charities should be retained on public interest grounds. Removing the other exemptions would have a minimal effect as these exemptions do not represent a substantial proportion of calls.

Consent provisions

The scheme covers unsolicited telemarketing calls. Telemarketing calls may be made to the telephone numbers of account holders or nominees have consented to receive telemarketing calls.

Express consent may be given, for example, by ticking a box on a form agreeing to receive telemarketing calls. Consent may also be inferred if there is a business or other relationship with the relevant business or organisation making the call or causing the call to be made. For example, a business may call its existing or previous customers where it is reasonable to infer that they are willing to receive calls about its other products and services.

Individuals may withdraw their consent at any time by contacting the business or organisation directly.

The discussion paper sought community views on whether the consent provisions are appropriate and specifically whether:

- express consent should be more clearly defined in the legislation
- the indefinite period that applies to express consent should be removed
- inferred consent should be subject to a default period
- the circumstances in which inferred consent can apply should be limited by the legislation.

Issues raised in submissions

Express consent

Submissions from businesses involved in the telemarketing industry expressed a concern that changes to the consent provisions could increase the complexity of the Register scheme.

Telstra stated that that further definition of express consent would limit the existing flexibility provided by the legislation, which allows consumers to ‘communicate their willingness to receive telemarketing calls via a variety of means’.

In relation to the issue of an indefinite period for express consent, submissions indicated that there may be a range of situations in which indefinite consent is reasonable and convenient, and may vary according to the product or service in question.

ADMA’s submission stated:

Many individuals benefit from being able to provide indefinite consent to organisations from whom they want to receive contact. The fact that some individuals may forget they have provided indefinite consent should not prejudice other individual’s rights to provide express consent on an indefinite basis.

Some submissions from small businesses supported a timeframe for express consent, but there was no consensus about the timeframe that should apply. A number of submissions indicated that consent must be clear and unambiguous.

Inferred consent

Submissions from businesses that undertake telemarketing expressed concern that changes to consent provisions would limit the ability of businesses to market effectively to existing and former customers.

Unlimited inferred consent, or a longer timeframe (12–18 months) was preferred by most businesses involved in the telemarketing industry. Submissions argued that it was not necessary to have a limitation on inferred consent as it can be withdrawn at any time. A submission by Foxtel indicated that the current consent provisions provide flexibility for the circumstances in which inferred consent will apply, which is preferable as it reflects commercial reality.

On the other hand, Westpac was concerned about the ‘narrow’ interpretation taken by the ACMA that a related entity within a corporate group cannot rely on inferred consent to make calls to a customer of another entity within that group.

ADMA supported a certain and specified period of time for expiry of consent based on an existing relationship, noting that such period should be appropriate to the nature of the product or service. There was support from other organisations for greater certainty in the consent provisions.

Individuals, consumer and privacy organisations indicated that consent, particularly inferred consent, can cause difficulty for consumers. Some individual and small business respondents thought that there should not be provision in the legislation for inferred consent. Others indicated that there may be various interpretations about when inferred consent should apply.

ACCAN raised concerns about telemarketers relying on consent, particularly inferred consent, to override inclusion on the Register. A similar view was outlined by Galexia in its submission.

ACCAN supports the removal of inferred consent, as it considers an individual’s registration to be more meaningful than a relationship with a business. ACCAN noted the results of its August 2009 report *Informed Consent in the Telecommunications Sector*, which indicated that there is inconsistency in approaches to consent across the sector and there are significant complaints each year about consent.

ACCAN stated:

The test for express consent should therefore be further strengthened by the inclusion of the following additional requirements:

- Express consent should require specific consent to the receipt of telemarketing calls (general consent to ‘marketing’ should not be acceptable).
- The telemarketing consent clause should be prominent.
- The telemarketing consent clause should be separate from other consent requirements, so that a person can consent to other uses of their information without consenting to telemarketing.
- Consent requirements should recognise the challenges in ensuring that some vulnerable consumers have the capacity to consent.
- Consent must be recorded and demonstrable.

TrueLocal suggested that the legislation should contain a ‘conspicuous publication’ provision, similar to that contained in the *Spam Act 2003* to enable telemarketing calls to a telephone number that was ‘conspicuously published’.

The National Emergency Communications Working Group considered that there should be an option for ‘no consent—ever’ available to emergency service organisations to ensure that neither the consent provisions nor the exemptions can override the registration of an emergency service number.

Findings

The consent provisions enable a telemarketer to make telemarketing calls to individuals that have expressly agreed to contact or where the circumstances of a business or other relationship make it reasonable to infer an individual's consent. These provisions provide flexibility that reflects the commercial reality of arrangements between individuals and businesses. However, this flexibility must be balanced to ensure that the Register is effective in reducing the number of telemarketing calls received.

While individuals can withdraw their consent to receive telemarketing calls at any time, some registrants may be unaware of the circumstances in which consent applies or of the ability to withdraw consent.

From the evidence of the submissions received, it seems that the level of awareness of the consent provisions is relatively low among individuals.

In addition, the Department is aware of a number of different means used by telemarketers to obtain express consent for telemarketing calls. In some of these circumstances it may be unclear to consumers that they are giving express consent to receive telemarketing calls. As such, a clearer definition of express consent which specifies a clear, informed and positive decision on the part of the individual, and also specifies to whom it applies, may enhance the protections offered by the Register. This would ensure that consent can only override a person's registration where they have taken clear, informed and proactive steps to give consent to receive telemarketing calls.

It is also considered that express consent should apply only to the business or organisation which has directly received consent. This would prevent a telemarketer from providing details of telephone numbers it has received—for example, through a competition entry—to a third party to use for telemarketing calls.

In addition, express consent should not be subject to an indefinite period and should only be valid for a specified time. If no period has been specified for express consent, the existing default period of three months should apply. The removal of the indefinite period that currently applies to express consent would prevent consumers from inadvertently consenting to receive telemarketing calls for an indeterminate time, potentially years after originally providing consent for the calls.

In summary, it may be appropriate to define express consent more clearly in the Act and to remove the option of express consent for an indefinite period where no particular period of consent has been specified.

Inferred consent is an area of concern for individuals. Also, some telemarketers are concerned at the lack of certainty provided by the inferred consent provisions and may prefer to wash their calling lists against the Register rather than rely on inferred consent. On balance it is considered that the current arrangements provide flexibility in the application of inferred consent by providing that consent can be inferred where it is reasonable in the circumstances. Given the multitude of possible commercial arrangements, it is not proposed to remove this flexibility but telemarketers should only infer consent to make telemarketing calls where it is reasonable to do so in the

circumstances. Telemarketers are best placed to determine whether the relationship and circumstances make it reasonable to infer consent.

Finally, given the importance of this issue, it may be advantageous for the ACMA to develop additional educational resources for consumers and telemarketers on the consent provisions, including the circumstances in which consent can be inferred.

3. Greater protection may be provided for consumers if express consent is more clearly defined in the legislation.
4. Indefinite express consent is inappropriate and, if no specific period is agreed, a default period of three months would be appropriate.
5. It is inappropriate for a telemarketer to pass on a consumer's express consent to a third party. Express consent should be limited to the organisation or business to which consent is specifically given.
6. It is important to provide adequate and appropriate educational resources for consumers and telemarketers on the consent provisions, including the circumstances in which consent is inferred. The ACMA could consider developing additional educational materials with this focus.

Registration period

The Register is currently subject to a three-year period from the date of registration, so that telephone numbers are periodically revalidated. Telephone numbers that are no longer valid will be removed every three years. At the inception of the Register, research indicated that approximately 17 per cent of the population moves house each year. Many people who move house acquire a different telephone number and many of these would not update their registration details.

The first registrations on the Register will expire in May 2010. Research undertaken by the ACMA indicates that there is a low level of public awareness about the need to re-register, and the ACMA is undertaking an education and awareness initiative to address this issue in the lead-up to May 2010. However, some people may either not be aware of the need to re-register, or will neglect to re-register, resulting in the removal of their numbers from the Register.

The discussion paper raised options for addressing the issue of registration, including a longer period, such as five years or unlimited registration.

Issues raised in submissions

Submissions from individuals and small businesses strongly supported a longer period of registration, such as five years or an indefinite registration period. The submissions also indicated that there is a low level of awareness of the need to re-register a number after three years and that re-registration can be done at any time. Some submissions noted that a three-year registration period is appropriate provided that the need to re-register is effectively publicised to registrants.

Businesses involved in the telemarketing industry generally supported the current three-year registration period, noting that the need to maintain the accuracy of the Register was a significant issue. Many of these submissions also highlighted the need for adequate education about the requirement to re-register and the re-registration process. The submission from TrueLocal called for a one-year registration period, arguing that 40 per cent of the population changed the place of residence between 2001 and 2006.

In August 2009 Galexia released a report on best practice for do not call schemes, which included a recommendation that the registration period should be unlimited as registrants are unlikely to change their preferences regarding telemarketing. Similarly, ACCAN argued that the registration period is unnecessary and risks the efficiency and popularity of the Register. ACCAN was particularly concerned about the resources that could be wasted in May 2010 as a result of the re-registration process.

Findings

There is a clear need for an effective education and awareness program to publicise the need for people to re-register their numbers in order to remain registered after three years. Failure to re-register will lead to those people again receiving telemarketing calls. The ACMA is undertaking an education and awareness initiative in the lead-up to May 2010.

It is important to keep the Register up-to-date, and the rationale for the three-year registration period was to assist in keeping the Register current. If an effective mechanism can be identified and implemented to ensure the long-term accuracy of the Register without the need for people to re-register their numbers, then an unlimited registration period would be the most appropriate way forward.

From a consumer's viewpoint, this would obviate the need to re-register and also eliminate the unintended removal of numbers from the Register. It is reasonable to assume that people who have chosen to register will overwhelmingly wish to remain on the Register in the longer term, while those who do not could remove their numbers from the Register. From an administrative viewpoint it would be far more efficient as the current re-registration process and associated publicity requirement is resource-intensive.

However, at present no such mechanism exists and further research on possible mechanisms for ensuring the accuracy of the Register would be highly desirable.

7. The majority of submissions argued that the registration period should be longer than three years but this view was not supported by those industry respondents that commented on the issue.

8. Research into alternative ways to ensure the accuracy of the Register should be considered to reduce or eliminate the need to re-register.

9. The ACMA is undertaking a comprehensive education initiative in the lead-up to May 2010 and beyond to increase awareness among existing registrants awareness of the need to re-register within three years of their initial registration in order for their number(s) to remain on the Register.

Research calls

The legislation applies to telemarketing calls, which are calls with a commercial type purpose. Genuine research calls, which do not have a commercial purpose, are not covered by the definition of a telemarketing call.

The discussion paper considered whether there should be a clearer distinction between commercial telemarketing calls and research calls, through the inclusion of a definition of 'research call'.

Issues raised in submissions

The Association of Market and Social Research Organisations (AMSRO) supported the inclusion of a definition for research calls to provide clarity that they are not covered by the Act and to draw a clear distinction between research calls and telemarketing calls. AMSRO also proposed the inclusion of definitions of 'researcher' and 'research organisation' for further clarity.

Some of the submissions received from individuals raised concerns about the intrusiveness of research calls, particularly those that are seen as having a commercial purpose masked by a research purpose. The majority of submissions from individuals and small businesses supported a definition of research calls to clearly establish that dual purpose calls with a commercial and research purpose would be covered by the legislation.

There were also a small number of submissions that called for inclusion of research calls within the scope of the Act, preventing research calls from being made to numbers on the Do Not Call Register.

Findings

Some individuals are concerned about unsolicited research calls, particularly calls with a dual purpose of telemarketing and research. However, genuine research calls provide beneficial outcomes for the community and do not have a commercial purpose so should not be classed as telemarketing calls for the purposes of the Act.

The ACMA may wish to consider whether sufficient information is available about the types of calls that are covered under the scheme, and, if considered necessary, provide users with further information about the distinction between telemarketing and research calls. However, the inclusion of a definition of research calls in the legislation does not seem warranted and could lead to the unintended consequence of confusing users about the coverage of the scheme.

10. It may be beneficial to users of the scheme to provide them with further information about the distinction between telemarketing and research calls. However, including a definition of research calls in the legislation does not seem warranted.

Part 2—Operation of the scheme

Registration process

Between 3 May 2007 and 10 March 2010, 4.42 million telephone numbers were listed on the Register.

Listing a telephone number on the Register can be done online, by telephone or by completing an application form and posting it to the Register Operator. Registrations may take up to 30 days to become effective. The majority of registrations, 83 per cent, are completed online.

The vast majority (95 per cent) of respondents to the Community Attitudes to Unsolicited Communications survey commissioned by the ACMA claimed the registration was either ‘very easy’ (72 per cent) or ‘somewhat easy’ (24 per cent). Only one per cent considered the process was ‘not very easy’.

As a follow-up to the ACMA survey, the discussion paper sought feedback on the ease and effectiveness of the registration process.

Issues raised in submissions

Consistent with the ACMA survey, the large majority of respondents who commented on the registration process were satisfied with it.

Some respondents raised specific issues of concern, including:

- the 30 day maximum period between registration and implementation could be shortened
- some elderly people, computer-challenged and vision-impaired people may need assistance
- it was inappropriate that a person could register someone else’s number.

Findings

Based on the positive response to both the discussion paper and the earlier ACMA survey, it seems that people generally find the registration process simple and easy to use.

A 30-day period to allow registrations to take effect is appropriate as it requires telemarketers to wash their lists at least every 30 days but does not impose a significant burden on telemarketers.

The ability to register by telephone negates the concern that some older people or people with limited computer skills or without internet access may have some difficulty in registering.

The concern about someone registering another person’s number is based on telemarketers’ perceptions that numbers could be registered by third parties even

though the account holders might wish to receive telemarketing calls. However, the Department is not aware of cases of people registered by others against their will and no action is considered necessary to address the issue.

Many submissions reinforced the point that the need to re-register should be made very clear at the point of initial registration.

11. The registration process is working well.

Number checking (or 'washing') process

The 'washing' process enables organisations that wish to make unsolicited telemarketing calls to check their calling lists against the Register to remove those numbers that are listed. Telemarketers are required to submit a list of numbers they plan to call to the Register Operator to check or 'wash' against the Register. The Register Operator advises which of the numbers are on the Register, are not on the Register or are invalid numbers.¹¹ Depending on the size of the calling list submitted, this process generally takes less than a minute. By checking calling lists in this way, telemarketers cannot learn of new numbers on the Register that were not included in their contact lists in the first place.

A telemarketing call list that has been through the washing process is valid for 30 days, after which the telemarketer must wash the list again to continue making telemarketing calls to those numbers. This enables the removal from their calling lists of numbers registered in the last 30 days.

Between 25 May 2007 and 31 December 2009, over 2.6 billion telephone numbers were submitted for washing against the Register.

In July 2009, the ACMA undertook a survey of telemarketers about the washing process¹². A total of 180 responses were received. Approximately 72 per cent of respondents indicated that the washing process was either 'excellent' or 'good' and approximately 79 per cent of respondents thought the turnaround times for the washing service were either 'excellent' or 'good'.

From 1 July 2008, the full direct costs of operating the Register are recovered from industry through annual washing fees to access the Register. The ACMA undertakes annual cost-recovery reviews to determine the washing fees for the following financial year, in line with the Australian Government's Cost Recovery Guidelines.

The discussion paper sought feedback on the ease and effectiveness of the washing process.

¹¹ 'Invalid numbers' are numbers of a type not eligible to be on the Register. For example, smart numbers, 1300xx, 1800xx, 1900xx, or numbers that are formatted incorrectly.

¹² The survey undertaken by the ACMA was of users of the washing system that have registered via the telemarketer access portal.

Issues raised in submissions

Feedback on the number checking or washing process was generally positive, although relatively few individuals commented on the process, presumably because they neither need to use it, nor know how it works.

Businesses involved in the telemarketing industry suggested some changes, including that:

- the washed data should include the date that the number was included on the Register
- the full list of numbers on the Register could be provided to telemarketers on a monthly basis to allow them to establish processes that reduce the risk of non-compliance and improve their ability to record washed numbers internally
- numbers should remain washed for longer than the current 30 days
- it should be possible to check up to five numbers against the Register via the web without having to establish an account.

One respondent, the Energy Retailers Association of Australia, recommended two new subscription levels, namely 500 000 records for a charge of \$1600 and five million records for a charge of \$15 000.

Findings

The washing process is effective and is working well, so no changes are warranted.

The respondents' suggestions outlined above could, if implemented, cause integrity problems for the Register. For example, there are privacy reasons for not allowing telemarketers to access the full list of numbers on the Register. The Department is aware of concerns with this approach in relation to the Canadian Do Not Call List.

In relation to the subscription levels, it should be noted that these are set by the ACMA annually following consultation with the industry. As such, suggestions relating to the subscription levels could be taken up with the ACMA during one of its reviews.

<p>12. The washing process is working well.</p>
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Compliance

The ACMA is responsible for investigating breaches of the Act and the Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007. The ACMA can undertake a range of enforcement actions which can result in significant penalties being imposed.

The ACMA has combined ongoing education and information activities with enforcement action against those businesses that fail to comply with the Act. According to the ACMA, during the second year of operation there was a 60 per cent drop in complaints about calls to numbers on the Register, indicating a significant improvement in compliance by telemarketers.

As pointed out in the discussion paper, a complaint can be lodged on the Register website or by telephone to the Register Operator. The Register Operator addresses those complaints that do not raise potential breaches of the legislation. Complaints that involve a potential breach of the Act or the Industry Standard are referred to the ACMA. The ACMA considers the complaint to determine if it appears to be a breach and writes to the complainant to advise of the proposed action.

The ACMA's general approach to compliance is to seek to resolve a matter, where appropriate, without resorting to formal procedures. It generally issues an advisory letter to the relevant business and provides it with an opportunity to review its compliance processes and address the apparent issues. If further complaints are received, a more detailed warning letter is sent to the business.

The ACMA has broad powers under the Telecommunications Act to investigate breaches of the Act and the Industry Standard. Where an informal approach to a business is not effective in addressing any apparent compliance issues, the ACMA may decide to undertake a formal investigation into the matter. The ACMA will generally investigate a business where there has been a serious breach, multiple breaches or ongoing non-compliance. An investigation may involve obtaining call records, searching database records and seeking information from the parties involved.

Following an investigation into an alleged breach of the Act or the Industry Standard, the ACMA may decide to undertake enforcement action against the telemarketer. There are a number of enforcement options available to the ACMA, which include:

- issuing a formal warning
- having the telemarketer accept an enforceable undertaking
- issuing an infringement notice, which specifies a financial penalty
- commencing proceedings in the Federal Court or Federal Magistrates Court, to seek injunctive relief and/or the imposition of financial penalties.

During the Register's first two years of operation, the ACMA issued eight formal warnings, accepted eight enforceable undertakings and collected more than \$300 000 in penalties from businesses that called telephone numbers on the Register.

The 2009 audit of the scheme undertaken by the ANAO identified that:

... while consumers' general awareness and interest levels in the Register are relatively high, the ACMA's data shows awareness of how they should make a complaint is low; with there being a relatively high number of registrants who do not make a complaint when they potentially have a valid reason to do so.

It suggested that the ACMA would benefit from including minimum standards in its procedures for escalating regulatory action. It also indicated that improved annual reporting of complaints and compliance enforcement outcomes, how many of those complaints established on reasonable grounds that companies had contravened the Act, and how many were resolved through compliance enforcement action, would provide greater information and further increase confidence in the ACMA's enforcement of the Act.

The discussion paper specifically sought comments on whether there are ways that the complaints handling process could be improved and whether the penalties in the Act are appropriate and a sufficient deterrent.

Issues raised in submissions

Submissions from some individuals and small businesses suggested that there should be greater publication of enforcement action under the legislation. Some submissions also called for an easier process for lodging a complaint about the scheme, including ease of finding contact information for the ACMA.

Respondents including Telstra, Westpac and ADMA raised concerns about the current complaints handling process managed by the ACMA. These submissions suggested that the ACMA did not give sufficient information about complaints to telemarketers during investigations. One suggestion was that the ACMA should encourage complainants to contact the business that is the source of the complaint directly to try to resolve the issue in the first instance. Another suggestion was that the ACMA should undertake more thorough checking of the complaint before it is referred to an organisation to ascertain whether there is a relevant exception, such as express or inferred consent. ADMA suggested that the ACMA should have a broader discretion not to investigate complaints, similar to that exercised by the Commonwealth Ombudsman.

Telstra highlighted concerns it has over the current infringement notice regime, which it considers difficult for businesses to defend. A financial institution sought a formal response from the ACMA once an investigation has been finalised.

In terms of the current penalty regime, submissions from some telemarketers stated that the penalties are an appropriate deterrent, while others felt that they are too strict. Submissions from some individuals and small businesses supported stricter penalties for breaches of the legislation.

Findings

The general approach used by the ACMA appears effective, particularly given that there was a substantial drop in the number of complaints received after the first year and that the ACMA is working with industry to address areas of concern.

The Department is aware of claims by Telstra and ADMA that insufficient detail about complaints is given to telemarketers by the ACMA, but the ACMA has advised that its practice is to provide details of complaints to telemarketers, except during a

formal investigation where there may be appropriate reasons not to advise the telemarketer investigated about the specific complaints.

No changes are considered necessary to the complaints handling process and the recent audit undertaken by the ANAO, in its recent review of the Do Not Call Register, appeared broadly supportive of the regulatory approach used by the ACMA.

13. The general approach to compliance used by the ACMA appears effective.

Education and awareness

The ACMA has undertaken a number of activities to inform and educate individuals and industry about the Act and the operation of the Do Not Call Register. The ACMA started the education campaign prior to the launch of the Register in 2007. The campaign was split into two streams—one for industry and another for individuals. Promotion of the Register through media releases and advertising was included in print, radio, television and industry specific media.

Since the Register's inception, the ACMA has continued its education activities and has developed a range of fact sheets for both individuals and industry. On 14 July 2009 the ACMA launched a compliance guide for industry including practical measures telemarketers can take to comply with the Act. The guide was developed in consultation with a broad cross-section of the telemarketing industry. The compliance guide has also drawn on knowledge gained from investigations that the ACMA has conducted. The ACMA's fact sheets and compliance guide are available at www.acma.gov.au/donotcall.

A survey of telemarketers conducted by the ACMA in July 2009 indicated that approximately 60 per cent of respondents found the information on the Do Not Call website was 'useful' and approximately 46 per cent of respondents found the information on the ACMA's website was 'useful'. Approximately 33 per cent of respondents 'never refer' to the information on the Do Not Call website and approximately 45 per cent 'never refer' to the information on the ACMA's website.

The discussion paper sought comments on the education and awareness activities undertaken by the ACMA and asked whether the information in the Register is easy to find and understand. As set out below, the findings were consistent with the earlier survey.

Issues raised in submissions

Individuals and small businesses asked for more education about the Register for consumers and the telemarketing industry. Comments received from individuals and small businesses indicated a lack of understanding about particular aspects of the Register, including consent, the definition of a 'telemarketing call', the duration of registration and the Industry Standard. This was supported by submissions from businesses involved in the telemarketing industry, which noted that there is some misconception among consumers about the types of telemarketing calls that are

covered by the scheme. In particular, telemarketers highlighted complaints that have arisen from a lack of understanding by consumers about the organisations that are still entitled to call them.

The comments from individuals and small businesses about the information on the Register website and the ACMA website were divided. Some respondents considered the information to be easy to find and adequate, while others had difficulty accessing the information they were looking for.

TrueLocal noted apparent widespread awareness of the Register within the telemarketing industry, but that further education is required within the wider business community, particularly among small to medium businesses.

Both ACCAN and Galexia raised concerns about the low profile of the ACMA. ACCAN called for more prominent coverage of the need and process for re-registering and the exemptions that apply to the Register. Galexia noted that, despite the low profile of awareness about the Register, registrations are higher than the international average for do not call schemes. In addition, consumer and privacy groups and many individuals identified the need for effective advice from the ACMA leading up to the re-registration period.

Findings

Many respondents provided favourable comments about the information provided by the ACMA through its website, and the ACMA is to be commended for the quality and effectiveness of this information.

A strong need was identified for substantial publicity, particularly in the period leading up to May 2010, about the need to re-register after three years. Consequently, the ACMA is conducting a comprehensive education and awareness initiative in the period leading up to May 2010.

It would be appropriate for the ACMA to continue to develop education materials on the Register, focussing on the consent provisions, the registration period and need to re-register, the complaints handling process and the Industry Standard. In this context it is noted that the ANAO made a recommendation in the report of its 2009 audit of the scheme about the complaints-handling process from the point of view of consumers. This included enhancing the information provided to consumers about making a complaint. Further detail is provided on page 25.

14. Many respondents provided favourable comments about the information provided by the ACMA through its website. A strong need was identified for substantial publicity, particularly in the period leading up to May 2010, about the need to re-register after three years, and for this purpose the ACMA is conducting a comprehensive education initiative in the period leading up to May 2010.

Industry codes and standards

The Telecommunications Act gives the ACMA the power to develop national industry codes and standards that relate to the telemarketing industry.

Under the Telecommunications Act the ACMA was required to make an industry standard dealing with certain aspects of telemarketing. The Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 commenced on 31 May 2007 and applies to all organisations making telemarketing calls and research calls, including exempt organisations. The Industry Standard directs when and how telemarketers and research callers can contact individuals, including:

- the times at which telemarketing and research calls cannot be made
- the information that must be provided by the caller including their name and business
- the termination of telemarketing and research calls
- the display and identification of the telephone number that is calling the recipient (caller line identification).

Industry codes and standards apply to businesses within the telemarketing industry, but not to those outside the industry. This means that businesses that are engaging other businesses to make calls on their behalf are not bound by the Industry Standard.

The ACMA intends to undertake a review of the Industry Standard in 2010.

The discussion paper considered the current process under the Telecommunications Act for making industry codes and standards that apply to telemarketing and sought views on whether:

- industry codes and standards should apply to organisations outside the telemarketing industry that are generating telemarketing
- the process for making industry codes and standards should be faster, more flexible and more responsive to community needs
- there should be additional rules under the Do Not Call Register scheme requiring telemarketers to keep records of their calls, keep internal call lists, and limit the number and frequency of silent calls, as discussed below.

Record keeping rules

There is no specific requirement to keep records under the Act or the Industry Standard. Record keeping is a best practice guideline in the ACMA's compliance guide. The survey of the washing process undertaken by the ACMA in July 2009 indicated that approximately 66.3 per cent of respondents currently keep records on the outbound calls they make.

Records kept could include information on calls made or attempted, the product, campaign or client, and the outcomes.

Internal do not call lists

Internal do not call lists are included in the compliance guide released by the ACMA as a best practice guideline. An internal list, where the telemarketer keeps a record of those individuals who do not wish to receive further calls, is a useful way to ensure individuals are no longer contacted.

Silent calls and missed call marketing

In relation to telemarketing, a silent call is a telephone call that, when answered, results in silence over the telephone line. A missed call is a call that is unanswered and may result in the telephone number of the caller being displayed. These calls are usually generated through predictive dialling equipment that is used to call telephone numbers at random. The equipment calculates how long it will take for an operator to become available and dials telephone numbers in anticipation. If no operators are available, the predictive dialler may terminate the call leading to a missed call or silent call for the recipient.

Silent calls may cause concerns as some individuals may believe they are receiving harassing or threatening calls. It can also lead to frustration where there is no number to return the call because caller line identification (CLI) was not enabled (display of the telephone number that is calling the recipient) or the CLI number did not connect to a live operator.

Missed call marketing may also occur when a telemarketer makes a call but abandons the call after one ring. The recipient's telephone may indicate that a call was missed and display the telephone number of the caller. In returning the call the recipient will typically hear a recorded message in which goods and services are offered, advertised or promoted. Alternatively, the message may claim that the recipient has won a prize and must call a premium service number charged at a high rate. By returning the missed call, an individual is paying for the marketing call.

There is regulation of abandoned calls in other jurisdictions. In the United Kingdom telemarketers must ensure that abandoned calls do not exceed three per cent of all live calls made on each individual campaign over a 24-hour period. Those calls that cannot be answered by a live operator must play a recorded message providing details about the call. If a telemarketer has made a telemarketing call to a number that has been abandoned, other calls made to that number within a 72-hour period must result in live calls, meaning there must be the guaranteed presence of a contact centre agent.

A limit of three per cent is also imposed in the United States. A call is considered 'abandoned' if it is not transferred to a live sales agent within two seconds of the recipient's greeting.

In Australia the Fundraising Institute Australia has introduced regulation relating to silent calls for its members to follow. Fundraisers must not use sequential or random dialling equipment to make telemarketing calls. They must ensure that the dialling equipment they use does not abandon more than five per cent of connected telemarketing calls within a period of 24-hour period for each fundraising activity. Additionally, fundraisers must ensure that, where a number has received a silent call,

any further telemarketing calls made to that number within the following 72-hour period are handled by a live operator.

Issues raised in submissions

The questions about industry codes and standards were answered by only a small number of individual and small business respondents.

Individuals and small businesses supported the application of industry codes and standards to organisations that are causing telemarketing calls to be made. Most of the submissions from businesses and industry associations did not support broadening the reach of industry codes and standards, however, Westpac considered that this would create a level-playing field for those businesses engaging in telemarketing either directly or indirectly.

Submissions generally supported a faster and more flexible process for making codes and standards. ACCAN noted its concerns with the current code-making processes in the Telecommunications Act, and indicated that this should be reviewed in a broader context and not be limited to telemarketing industry codes and standards. There were other submissions that also advocated a broader consideration of code-making processes in the telecommunications sector.

Submissions from businesses that undertake telemarketing highlighted the negative impact of additional regulation through an industry code or standard, such as record keeping rules and internal do not call lists. Submissions also noted there was no explanation of how the existing regulation in this area had failed—that is, the compliance guide released by the ACMA in July 2009 recommends best practice by telemarketers keeping records of calls and internal do not call lists. ADMA also stated that many telemarketers currently keep records, making an explicit requirement unnecessary in its opinion.

Some of these submissions supported record keeping and internal do not call lists, while others indicated that these approaches would be unnecessary if the scheme was opt-in.

The issue of silent calls was identified as an area of concern for consumers, particularly vulnerable consumers. Submissions from individuals and small businesses generally sought a ban on silent calls and missed call marketing. ACCAN supported prohibiting silent calls and missed call marketing or, at the very least, introducing regulation, such as a target of one to two per cent in a 72-hour period. However, businesses involved in the telemarketing industry noted that the regulation of silent calls could be quite technical and, therefore, that input should be sought from industry to determine an appropriate level of regulation. ADMA offered assistance to the ACMA in developing guidelines to address the issue of silent calls.

Findings

Any concerns about industry codes and standards pertaining specifically to telemarketing should be considered more broadly, in the context of industry codes and standards as a whole, as proposed by a number of submissions. Therefore it would not

be appropriate to extend the scope of industry standards or industry codes to businesses outside the telemarketing industry at this stage.

Record keeping is an implied requirement of the existing regime and is encouraged through the best practice principles issued by the ACMA. As a formal record keeping requirement (including a requirement to keep internal do not call lists) would place significant imposts on telemarketers, it is considered appropriate to continue to address record keeping under a best practice guideline rather than more formally. This is a matter the Department will keep under review.

Finally, the view of many of the respondents that some form of regulation is necessary in respect of silent calls and missed calls is accepted, noting that it would be beneficial to consult with industry to develop the appropriate regulatory arrangements. There is greater protection for consumers in limiting the number of calls a telemarketer can make to a particular number during a particular period.

15. The review found that regulation should be introduced to set appropriate limitations on the abandonment rates for silent calls and the number of calls that a telemarketer can make to a particular number during a particular period. Development of such regulation should involve consultation with stakeholders.

Appendix 1: List of respondents

Individuals and small business

1. Alan Ray
2. Andrew McNamara
3. Anita Goodgame
4. Astrid Herlihy
5. Breda Kelly
6. Brett Cupitt
7. Chris Page
8. Daniel Vliegen
9. David Craft
10. David Karr
11. Denis Matthews
12. Denise Crane
13. Diane Wills
14. Douglas McAllester
15. Douglas Steley
16. Felicity Bloch
17. Gavin Imhof
18. Graeme Melville
19. Graham Byass
20. Hugh Webster
21. JC Atkinson
22. JM Bennett
23. Jennie Kane
24. John Clingeffer
25. John Jennings

26. Judith Campbell
27. Julie Emery
28. Julie Lever
29. Juliet Flesch
30. Kerie Jedrzejczyk
31. Kiwa Fisher
32. Law Somerville Industries
33. Liora Claff
34. M Guthrie
35. m@c services
36. Mike Doherty
37. Nellie Hewat
38. Nick Hodgman
39. Reginald Schwarze
40. Rex Maddock
41. Richard Campbell
42. Robert Timms
43. Ron Johnson
44. Shelley Harvey
45. T Page
46. Traralgon Collection Agency
47. Ulla Svensson
48. Wayne Poulton
49. Australian Communications Consumer
Action Network (ACCAN)
50. Australian Privacy Foundation
51. Consumer Credit Legal Centre

**Consumer and privacy
organisations**

- Industry associations**
- 52. Office of the Privacy Commissioner
 - 53. Australian Association of National Advertisers (AANA)
 - 54. Australian Direct Marketing Association (ADMA)
 - 55. Association of Market and Social Research Organisations (AMSRO)
 - 56. Energy Retailers Association of Australia (ERAA)
- Businesses/organisations involved in the telemarketing industry**
- 57. Accor Advantage
 - 58. BoysTown
 - 59. Foxtel
 - 60. National Hearing Care
 - 61. Telstra
 - 62. Toyota Finance
 - 63. TrueLocal
 - 64. Westpac
- Other**
- 65. Australia Institute
 - 66. Galexia
 - 67. National Emergency Communications Working Group

Appendix 2: Abbreviations

The following abbreviations are used in this discussion paper:

Act:	<i>Do Not Call Register Act 2006</i>
ACCAN:	Australian Communications Consumer Action Network
ACMA:	Australian Communications and Media Authority
ADMA:	Australian Direct Marketing Association
CLI:	Caller line identification
Department:	The Department of Broadband, Communications and the Digital Economy
FIA:	Fundraising Institute Australia
Industry Standard:	Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007
Minister:	Minister for Broadband, Communications and the Digital Economy
Register:	Do Not Call Register
Register Operator:	Service Stream Solutions Pty Ltd
Scheme:	Do Not Call Register Scheme
Telecommunications Act:	<i>Telecommunications Act 1997</i>