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Do not call (until you've read this)...

Now that the Do Not Call Register is in operation, telemarketers need to take note of how it affects them. **Jodie Sangster** outlines some of the main issues to be aware of.

On 3 May, Senator Helen Coonan launched the much-anticipated Do Not Call Register. The register allows individuals to list their home and mobile numbers (providing they are used primarily for private or domestic purposes) in order to opt out of receiving a range of unsolicited telemarketing calls.

The overwhelming public response to the register's launch indicates that Australians are obviously keen to see their telemarketing calls reduced, with more than 500,000 registrations taken via the website (www.donotcall.gov.au) within the first week.

Under the *Do Not Call Register Act 2006*, which was passed in June of last year, the Australian Communications and Media Authority (ACMA) was given the task of establishing and overseeing the operations of the Do Not Call Register.

WHERE DO TELEMARKETERS STAND?

From 25 May 2007, telemarketers began submitting their calling lists for checking against the register and, from 31 May, it became illegal for telemarketers to call a number listed on the register. To avoid penalties, telemarketers are able to submit their calling lists to the register operator for checking or 'washing' against the register. Telemarketers must wash their call lists prior to calling. The cleaned lists are valid for a period of 30 days. Any new calling lists must also be washed against the register.

On 31 May 2007, it became illegal, in the absence of consent, for any non-exempt telemarketer in Australia and overseas to contact a

number listed on the register. The legislation permits a number of limited exemptions to the prohibition to enable certain public interest organisations to make telemarketing calls. These include:

- ◆ charities
- ◆ educational or religious organisations
- ◆ government bodies
- ◆ registered political parties
- ◆ independent members of parliament, and
- ◆ electoral candidates.

Market and social researchers are also permitted to call when conducting opinion polling and standard questionnaire-based research. These calls are, however, subject to the national industry standard for telemarketing and research calls, which also came into effect on 31 May. Details of the industry standard are on ACMA's website at acma.gov.au/donotcall. This standard determines the hours within which these calls can be made, establishes a minimum set of requirements for making telemarketing and research calls and attempts to balance community and industry expectations.

Any business that makes telemarketing and research calls, or arranges for such calls to be made, needs to be aware of the regulations it must follow under the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2006*.

Among other regulations, the standard states that:

- ◆ telemarketing calls are not permitted after 8pm on weekdays
- ◆ research calls are not permitted after 8.30pm on weekdays, and
- ◆ no calls are permitted before 9am on any

day, after 5pm on weekends or at any time on national public holidays.

Generally, the standard applies to:

- ◆ all telemarketing and research calls made to an Australian number to market, advertise or promote goods and services, conduct opinion polling or to carry out standard questionnaire-based research, and
- ◆ all telemarketers including those who will be exempt from the Do Not Call Register (such as charities, registered political parties and religious organisations).

A MATTER OF CONSENT

One point that telemarketers need to be aware of is the issue of consent. While the register provides Australians with the opportunity to 'opt out' of receiving certain telemarketing calls, a person is still permitted to call a number on the register if the telephone account holder or nominee has consented to receiving the call.

Consent may be either express or inferred, but in carrying out telemarketing activity under the assumption of consent it is important to remember that the telemarketer has the evidential burden in relation to proving consent. This means that if a telemarketer makes a call to a number on the register on the basis that the consumer 'consented' to receive the call and the consumer does not believe they consented to receive the call the telemarketer must be able to produce evidence that suggests a reasonable probability that the consumer did actually consent to receiving the call.

EXPRESS CONSENT

Express consent is where a person clearly tells, or indicates to, a telemarketer that he or she is

happy to receive calls from them, and directly provides his or her telephone number to the telemarketer for that purpose. For example, express consent is provided where a person:

- ◆ ticks a box on a form, agreeing to receive future telemarketing calls from a particular business, or
- ◆ phones a business seeking information on a particular product, and requests that someone from the business call them back about it.

To provide express consent, a person must positively and clearly tell, or indicate to, a telemarketer that they consent to receiving telemarketing calls.

Express consent lasts for three months unless otherwise specified. If you wish to be able to contact your customers at any time in the future, you need to gain their consent, and the best way to do this is with a document that overtly states that they consent to receiving calls from you for an 'indefinite' period of time. An example of what may not amount to express consent is where a person completes a competition form, and fails to tick a box advising that they do not wish to receive future telemarketing calls.

INFERRED CONSENT

Inferred consent is where a telemarketer has reason to believe that a person is willing to receive a call, based on the conduct of the person and the business (or other) relationship that exists between the person and the telemarketer.

Firstly, there must be an existing relationship between the telemarketer and the person called. Such relationships may be:

- ◆ existing business relationships; for example, the relationship between a bank and a person who holds an account with that bank, or a person who purchases a car from a dealer with a three-year warranty (a business relationship may continue to exist in the absence of ongoing monetary transactions), or
- ◆ existing relationships of a non-business kind, such as with a friend or family member.

Consent may not, however, always be inferred simply because there is an existing relationship between the telemarketer and the person called. It is necessary to look at the nature of the consent on a case-by-case basis, and assess what sort of telemarketing calls a person would reasonably expect to receive under those circumstances.

SUBMITTING CALLING LISTS FOR 'WASHING'

In order to access the washing service provided in conjunction with the register, telemarketers

are required to pay a subscription fee. The fee you will pay depends on how many numbers you need to wash. The annual subscription fees range from \$71 (to wash up to 20,000 numbers) to \$80,000 (to wash up to 100 million numbers). There is also a subscription option that allows telemarketers to check up to 500 numbers per year at no cost.

It's very important to prepare for the register by formatting all calling lists correctly. Lists must be formatted in CSV format in order to be washed and numbers need to be sent in a single column without any other information, e.g. names or addresses.

Dashes, brackets or other punctuation marks may be included in the number, and will be stripped out by the washing process. All numbers must be 10 digits and must begin with a zero.

The table below provides some examples of acceptable and unacceptable numbers.

Accepted	Not accepted
02 5550 5555	+61 2 5550 5555
02-7010 5555	7010 5555
(04) 91 570 156	1800 160 401
(05) 5550 5556	0A 5550 5555
(VoIP numbers)	

A list can be submitted by either uploading it to the website, using the Quick Check option on the website (which allows you to check up to 10 numbers at a time), by CD ROM sent by certified mail to the register operator or by using the automated washing service.

OFFSHORE CALLS

One point that has attracted much attention is the issue of policing offshore telemarketing calls, such as calls originating from India. The majority of international telemarketing calls are driven by Australia-based companies and ACMA is actively engaging local industry in a bid to familiarise companies with the Do Not Call Register and assist them in complying with the legislation.

While ACMA has jurisdiction to investigate and prosecute international organisations making illegal telemarketing calls, it is likely to prove more practicable for ACMA to direct its attention to those in Australia associated with, or responsible for, the calls.

BREACHES AND PENALTIES

Recognising that industry was always going to take time to adjust to the legislation and regis-

ter, ACMA has put in place arrangements that, in the early days, focus on providing assistance to industry in complying with the new rules, rather than emphasising enforcement. The Act provides ACMA with flexible enforcement options and provides an appropriate mechanism for a reasonable 'settling in' period.

ACMA will investigate complaints made concerning breaches to the legislation and the industry standard. Types of breaches include:

- ◆ making unsolicited calls to numbers on the register
- ◆ failing to include compliance provisions in agreements for the making of telemarketing calls, and
- ◆ failing to comply with the industry standard.

Depending on the contravention, ACMA may penalise breaches of the Act in a number of ways. Penalties are civil, rather than criminal, and include formal warnings, infringement notices and court actions.

FURTHER INFORMATION

ACMA has developed a Guide for Telemarketers which can be found at www.acma.gov.au/donot-call along with downloadable information sheets. ACMA is also encouraging companies, or individuals undertaking telemarketing activity, to seek independent legal advice in considering whether their particular business practices comply with the legislation and other telemarketing requirements.

Information sessions to raise awareness of the requirements of the Do Not Call Register have been held in Brisbane, Sydney and Melbourne. If you missed these sessions you can download ACMA's presentation, notes and questions from industry members (with answers) from the ACMA website.

Consumer brochures are available from Australia Post outlets, local MP and state consumer affairs offices and for download from the web.

Further information about the register and industry responsibilities can be found at:

- ◆ the Do Not Call Register website: www.donotcall.gov.au, or
- ◆ the ACMA website: www.acma.gov.au/donotcall (where you can also sign up to receive regular industry newsletters about the register).

You can also contact the Do Not Call Register via the following website: donotcall-taskforce@donotcall.gov.au, or call the industry assistance line on 1300 785 749. ■