



**Australian Government**

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**Department of Communications,  
Information Technology and the Arts**

# **Introduction of a Do Not Call Register**

## **Possible Australian model Discussion Paper**

**October 2005**

## Purpose and structure of paper

This paper considers issues identified by the Department of Communications, Information Technology and the Arts as relevant in the development of a national strategy to address intrusive telemarketing practices. It does not represent Australian Government policy. Rather, it is intended to seek views from interested parties on this issue.

This paper has been prepared in response to concerns expressed by the general public about telemarketing. It also draws on recommendations relating to telemarketing arising from reviews of the *Privacy Act 1988* by the Office of the Federal Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, and the Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988*.

Both the Privacy Commissioner and Senate Legal and Constitutional References Committee reports included recommendations relating to development of a ‘do not contact’ register as a means to address intrusive direct marketing by telemarketers.

This paper explores the alternative option of establishing a ‘do not call’ register, as legislation that focuses on unwanted commercial electronic communications and arrangements for junk mail are already in place.

A number of issues that are critical in establishing a do not call register are considered. It is the intention that a broader community consideration will identify new issues and options.

Under the possible model, consumers would be able to register to ‘opt out’ of receiving unsolicited phone calls except for calls from a limited number of exempt organisations in limited circumstances.

Companies making calls would be required to maintain lists of numbers they are prohibited from contacting and to update these regularly. Companies that contravene the register provisions could be fined.

Sections one to three of this paper deal with these and other relevant issues in detail and include preferred options and questions to facilitate comment. Comments are invited either on individual questions, the model as a whole or on any other issues. Appendices to the paper outline international models and provide details on current Commonwealth and state and territory legislation.

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# 1 Introduction

## 1.1 Purpose

This paper provides information to facilitate discussion in relation to the possible establishment of a national ‘do not call’ register for Australia. The paper is intended to contribute only to discussion; it does not represent Australian Government policy.

## 1.2 Making a submission

The paper invites comments from interested stakeholders on a possible do not call register model. Submissions in relation to alternative models or aspects of the model are also welcome.

Submissions must identify the names of the parties making the submissions or comments and organisations they represent, if relevant, as well as contact details, including email addresses, if applicable.

Submissions are to be forwarded to:

Do Not Call Register Discussion Paper Submissions  
Department of Communications, Information Technology and the Arts  
GPO Box 2154  
CANBERRA ACT 2601

Or lodged electronically at:

[donotcall@dcita.gov.au](mailto:donotcall@dcita.gov.au)

All submissions and comments, or parts thereof, will be treated as non-confidential information unless specifically requested and acceptable reasons accompany requests. Note that submissions or comments will generally be subject to freedom of information provisions. Email disclaimers will not be considered sufficient confidentiality requests.

Persons making submissions should be aware that submissions will be made publicly available on the Department of Communications, Information Technology and the Arts website. Those persons who do not wish their submissions to be made public will need to clearly mark their submissions “in confidence”.

However, the Department reserves the right not to publish any submission, or part of a submission, which in the view of the Department contains potentially defamatory material.

The closing date for comments and submissions is **5:00pm (Australian Eastern Summer Time), Wednesday 30 November 2005.**

## 2 Background

### 2.1 Perceptions

It can be argued that direct marketing fulfils the desire of consumers to widen their choices in purchasing goods and services and that it provides them with easy access to the marketplace. Direct marketing can also reduce search costs for consumers in finding suitable goods and services and transaction costs associated with purchasing those goods and services. Sales figures in Australia can be used to support this view, with expenditure on goods and services resulting from direct marketing exceeding \$9 billion per annum.<sup>1</sup>

This paper has taken a broad definition of “telemarketing calls” as being all unsolicited telephone calls from companies and organisations. However, it is recognised that there are many categories of unsolicited calls. There are those for “commercial purposes” such as encouraging sales and “non commercial purposes” such as research, encouraging charitable donations and for the provision of information. The boundaries between these categories are not clear and one of the purposes of this paper is to seek a community view on where the lines might be drawn.

Some studies have claimed that many consumers, particularly younger people, are receptive to direct marketing. Other studies maintain that consumers with sophisticated understanding and usage of new technologies:

- are comfortable with this form of marketing;
- feel they have more control over how and when they engage directly with companies; and
- do not mind direct marketing companies using information about them in a targeted way. They see this marketing technique as beneficial in terms of managing their time and providing them with a customer service.<sup>2</sup>

However, not all forms of direct marketing are acceptable to all individuals. Some attract considerable criticism. Telemarketing, that is direct marketing by phone, in particular has been seen by some commentators as intrusive and annoying.<sup>3</sup>

Telemarketing is sometimes linked with legitimate social research because of the tendency of some telemarketers to preface sales proposals with questions about

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<sup>1</sup> Ministerial Council on Consumer Affairs. Review discussion paper. \$9 billion sales figure is quoted by the Ministerial Council for 1998. [www.consumer.gov.au/htm/direct\\_marketing/html/5operation/html](http://www.consumer.gov.au/htm/direct_marketing/html/5operation/html)

<sup>2</sup> Australian Direct Marketing Association, ‘Businesses Urged to Communicate in the Right Way to Attract the Sophisticated New Consumer’. News Release. 31 May 2005

<sup>3</sup> Redmond, W. ‘Intrusive Promotion as Market Failure: How Should Society Impact Marketing?’ *Journal of Macromarketing*, 25, 1 June 2005.

consumer preferences.<sup>4</sup> Calls which have any intention of selling goods or services are not generally grouped with social research calls.

Genuine research calls, while unsolicited, differ from telemarketing in a number of ways. The most obvious difference being that these calls do not actually offer any goods or services for sale.

It appears that complaints about telemarketing are made for a number of reasons. For example, people may be irritated that they have been called during dinner, or in the middle of their favourite television programs. People also complain about telemarketing because they see it as an invasion into their privacy.<sup>5</sup>

Recent studies have shown that some consumers welcome direct contact from companies, particularly companies they know and trust.<sup>6</sup> Other people may be worried about the extent to which direct marketers in general, and telemarketers specifically, have control or access to their personal information.

These differing views of direct marketing have highlighted the need for governments to find solutions that balance two important sets of rights: an individual's right to privacy, and the rights of legitimate businesses and organisations to access the community for commercial and non commercial reasons.

## **2.2 A regulatory approach?**

Addressing intrusive telemarketing practices can take either a regulatory or non regulatory approach.

Non regulatory schemes are those that employ devices such as telephone directory entries to indicate subscribers' agreement to receive telemarketing calls, or the use of distinctive ring technology to indicate the calls subscribers wish to answer.

Regulatory solutions can involve self regulatory, co regulatory or government regulatory schemes. Industry regulation, involving voluntary codes of practice for organisations which undertake telemarketing activities, effectively represents the status quo in Australia. It is also currently the system of regulation favoured by New Zealand.<sup>7</sup>

The United Kingdom, in response to complaints about telemarketing, adopted a mandatory code of practice through a co regulatory scheme where a peak industry body operates a do not call register under contract from the government. Enforcement of the register provisions are the responsibility of a government body.

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<sup>4</sup> For example, a sales 'pitch' for a particular brand of soft drink, could be prefaced by questions about how often does the consumer drink soft drink, does the consumer prefer diet or full strength drinks, what size can or bottle does the consumer prefer, etc before leading into the sales promotion.

<sup>5</sup> Findings of Roy Morgan Research. *Privacy and the Community*. July 2001. Research prepared for the Office of the Federal Privacy Commissioner.

<sup>6</sup> Australian Direct Marketing Association. 'New Research Shows Australian Consumers' Expect Relevant Direct Contact from Organisations'. News Release. 30 March 2005.

<sup>7</sup> A summary of the New Zealand system is at Appendix B.

Complaints about telemarketing also led the United States to introduce a mandatory regulatory code in 2003, which is administered and enforced primarily by the country's consumer watchdog. Canada is currently considering legislation to introduce a do not call register similar to that adopted in the United States.<sup>8</sup>

The current self regulatory system relating to telemarketing in Australia has been criticised because it imposes only limited and ineffective restrictions and sanctions for infringements and does not represent all telemarketers. Complaints about the extent and nature of telemarketing are also increasing.<sup>9</sup>

It may be possible to develop a revised industry self regulation scheme that covers all telemarketers, similar to that in New Zealand, although such a scheme may have limited ability to deal with offshore telemarketing issues. For that reason, a regulatory approach may be required.

Aspects of these established do not call schemes are explored in this paper with the intention of developing a possible model that can reflect a workable outcome and meet the needs of both Australian consumers and the local telemarketing industry.<sup>10</sup> Comments on this model and alternative approaches will be used in providing further advice to the Government.

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<sup>8</sup> See Appendix B for summary.

<sup>9</sup> Privacy Advisory Commission. *Telemarketing and the Protection of the Privacy of Individuals*. 1995.

<sup>10</sup> The Hon Daryl Williams MP, Minister for Communications, Information Technology and the Arts undertook to consult with stakeholders to this end in a press release issued 1 July 2004.

## 3 Possible model

### 3.1 Introduction

The current Australian telemarketing environment is primarily self regulated and consists of voluntary codes instituted by the Ministerial Council on Consumer Affairs and the direct marketing industry.<sup>11</sup>

This does not mean that some regulation does not affect the operation of telemarketers. Sections of Commonwealth legislation under the *Telecommunications Act 1997* and the *Privacy Act 1988* are relevant, however there have been claims that these Acts need revision to accommodate new operating situations and technological innovations.<sup>12</sup>

Legislation in states and territories also regulates aspects of direct marketing. However, the issue is complex. Legislation is not consistent across Australia, and is not generally specifically targeted to address telemarketing activities.<sup>13</sup>

While a national awareness campaign could possibly improve public consciousness of the existing codes and legislation, this would not address concerns about the inconsistency of regulation. Importantly, increasing consumer awareness cannot address the fact that existing mechanisms involve action taken after telemarketing approaches have been made. A do not call register could deal with this by allowing consumers to express their preferences not to receive telemarketing approaches.

A national do not call register could:

- provide a more consistent and efficient operating environment for the telemarketing industry;<sup>14</sup>
- allow people who do not wish to participate in telemarketing the opportunity to act proactively to avoid telemarketing calls; and
- establish an enforcement mechanism to deal with complaints about telemarketing.

### 3.2 Issues

In developing a possible do not call register model, issues in relation to the scope and type of scheme have been examined. Existing models in the United Kingdom and the United States have also been examined and considered from the perspectives of comparison and appropriateness in the Australian context.

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<sup>11</sup> The Ministerial Council on Consumer Affairs is comprised of Commonwealth, State and Territory and New Zealand Government ministers responsible for fair trading, consumer protection, trade measurement and credit laws.

<sup>12</sup> Office of the Federal Privacy Commissioner. *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*. March 2005.

<sup>13</sup> See Appendix C for a summary of Australian legislation.

<sup>14</sup> Documents on the ADMA website confirm this view. [www.adma.com.au](http://www.adma.com.au)

### 3.2.1 Type of Scheme

#### Do not contact / Do not call

Possible approach:

*That an Australian do not call register is established under legislation to allow individuals to register not to receive telemarketing calls.*

- 1.1 Do you support the establishment of a do not call register?
- 1.2 Why do you support the establishment of a do not call register?
- 1.3 Why do you not support the establishment of a do not call register?
- 1.4 Could a self regulatory scheme provide a suitable solution?

In a report released in May 2005, the Federal Privacy Commissioner recommended that the Government investigate options for establishing a national do not contact register. A Senate Legal and Constitutional Affairs Committee report, released in June 2005, supported the Commissioner's recommendation.<sup>15</sup>

A do not contact register could allow people to express their preference not to be contacted by direct marketers by mail, telephone, door to door or on their mobile phone.

The benefit for consumers of this type of register would be that the broad range of direct marketing approaches and practices could be dealt with through a single register. A do not call register, on the other hand, only allows people to express their preference not to be contacted by telemarketers on their telephone land lines or mobile phones.

National regulation is already in place to deal with other aspects of direct marketing. Direct mail is regulated by an independent code of practice established by the Distribution Standards Board, and the *Spam Act 2003* (Spam Act) prohibits the sending of unsolicited commercial electronic messages. It can be argued that, as the circumstances surrounding the different types of marketing vary, specific rules need to be developed for each type. On this basis, having a single do not contact register would not necessarily provide greater efficiency or better outcomes.

The Spam Act was developed in response to concerns that increasing volumes of spam could threaten the viability and efficiency of electronic messaging by damaging consumer confidence, obstructing legitimate business activity and imposing costs on users.<sup>16</sup>

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<sup>15</sup> Senate Legal and Constitutional References Committee. *The Real Big Brother: Inquiry into the Privacy Act 1988*. June 2005.

<sup>16</sup> National Office for the Information Economy. *Spam Act 2003: A Practical Guide for Business*. February 2004.

The Spam Act deals comprehensively with commercial electronic messaging, requiring businesses and individuals to:

- obtain consent (either explicit or inferred), before sending commercial electronic messages;
- include contact information about persons or businesses responsible for messages;
- ensure that an ‘unsubscribe’ facility is included in all messages that allows consumers to indicate they no longer wish to receive messages from that source; and
- ensure that unsubscribe requests are dealt with promptly.

Unsolicited commercial electronic messages are those:

- sent without the consent of the addressee;
- that have a ‘commercial purpose’ such as an offer to supply, advertise or promote something; and
- sent by email, SMS, multimedia message or instant messaging.

#### *United Kingdom/United States*

The United Kingdom and the United States have adopted do not call registers, believing that these are not only more amenable to business, but that they will allow individuals to decide what advertising or sales promotion they accept.

Apart from instituting a do not call list, the United Kingdom has also established separate contact lists for mail (the Mail Preference Service, which is an industry initiative), facsimile (the Facsimile Preference Service, a statutory ‘do not call’ list) and spam (the Email Preference Service, an industry initiative), all based on its obligations as a member of the European Union.

In the United States, people are able to opt out of telemarketing while remaining on distribution lists for commercial email.

#### **Inclusion of facsimile**

Possible approach:

*That an Australian do not call register would not apply to direct marketing approaches by facsimile transmission.*

2.1 Should a do not call register address direct marketing approaches by facsimile?

As a result of objections raised by business, the Spam Act does not cover commercial messages sent via facsimile but has the capacity to do so.<sup>17</sup> A review of the Act to be undertaken before April 2006 will reconsider whether facsimile transmissions should

<sup>17</sup> See regulation 2.1 of the *Spam Regulations 2004*.

be covered by the legislation. For this reason, discussion of a 'do not call' register will not address telemarketing by facsimile.

### **Opt in / Opt out**

Possible approach:

*That individuals and small businesses who do not wish to receive telemarketing calls would be able to register not to receive these calls, that is, they would 'opt out' of receiving telemarketing calls.*

3.1 Should individuals and small businesses be able to 'opt in' to receive telemarketing calls?

3.2 Should individuals and small businesses be able to 'opt out' if they wish not to receive telemarketing calls?

Do not call registers can adopt either an opt in or opt out approach. An opt out approach allows consumers to express their preference not to be contacted by direct marketers and assumes that most consumers have no fundamental objection to direct marketing. An opt in approach assumes that most consumers will not welcome direct marketing approaches and requires those who wish to receive these approaches to register to do so.

It has been claimed that an opt in approach for Australia could be potentially disastrous for the local telemarketing industry with one commentator remarking that telemarketers would be decimated and many would choose to move offshore if it were adopted.<sup>18</sup> In addition, those consumers who do opt in are likely to receive more calls.

The Spam Act adopts an opt in approach, which prohibits the sending of unsolicited commercial electronic messages, unless express or inferred consent has been obtained from addressees. Express consent means that addressees have specifically requested messages from senders. Inferred consent means that, while the addressees have not directly indicated their consent to receive messages, there is a reasonable expectation messages will be sent. Under the Act there are a number of circumstances in which inferred consent applies, based on the conduct of the potential message recipients and their relationship with senders.<sup>19</sup>

An opt in approach to regulate spam was adopted because its exponential growth was threatening the effectiveness and efficiency of electronic communication internationally. However, to date, telemarketing can not be labelled as the same type of international threat. While failure to effectively regulate use of automated dialling equipment, recorded commercial messages and call abandonment practices may

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<sup>18</sup> Lloyd, S. 'Call Waiting' in *Business Review Weekly*. 15–21 July 2004.

<sup>19</sup> Business relationship refers to the relationship established when people purchase goods or services, as well as to shareholder relationships, registered use of online service user relationships and professional association relationships, amongst others.

exacerbate concerns about telemarketing in the future, adopting the more restrictive opt in approach at present would only limit the telemarketing industry excessively and without delivering commensurate benefits to consumers.

It seems likely that the rights of individuals can be better balanced with the rights of legitimate businesses to conduct their affairs by the adoption of an 'opt out' model.

#### *United Kingdom/United States*

Do not call registries in the United Kingdom and the United States have adopted 'opt out' approaches.

An opt out approach was defended in the United Kingdom on the grounds that, while the UK Government wanted to protect the rights of individuals, it saw a legitimate role for telemarketing in the economy. The objective of the legislation was therefore to encourage responsible business practices.<sup>20</sup>

Similarly, the Federal Communications Commission (FCC) noted in relation to the United States' Do Not Call Registry, that the privacy of individuals needed to be balanced with commercial freedoms of speech and trade.<sup>21</sup>

Both jurisdictions rejected an opt in approach, with the United Kingdom arguing it would be unacceptable to business, and the United States noting it would be 'overly restrictive on the telemarketing industry'.<sup>22</sup>

### **3.2.2 Registration**

#### **Individuals / Others**

Possible approach:

- *That individuals and small businesses could register their land and mobile phone lines on a do not call register.*
- *That there would be no time limit on registration of numbers.*
- *That numbers could be removed from a register only at the request of subscribers.*
- *That subscribers could register all numbers issued in their names.*
- *That subscribers could register numbers on behalf of minors and with the written permission of other individuals.*

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<sup>20</sup> House of Commons Hansard Record, 12 December 1995. Hon Ian Taylor, President, Board of Trade.

<sup>21</sup> Federal Communications Commission. *Report and Order 03-1*. 3 July 2003.

<sup>22</sup> Federal Communications Commission. *Report and Order 03-1*. 3 July 2003.

- 4.1 Who should be eligible to register numbers on a do not call register?
- 4.2 Should mobile numbers be included on a register?
- 4.3 Should there be a limit on how many numbers can be registered overall?
- 4.4 Should there be a time limit set on the period numbers remain on a register?
- 4.5 Should individuals be able to register numbers on behalf of others?

While anecdotal evidence suggests that telemarketing in Australia is not the substantial problem it is in the United States, where consumers can receive up to 15 telemarketing calls a day, telemarketing is of growing concern to many Australians. A do not call register could allow individuals who are concerned about telemarketing to register their home numbers and, as telemarketers also target mobile numbers, their mobile phone numbers.

There is some evidence to suggest that a number of Australian small businesses are similarly concerned about telemarketing practices. For this reason, small businesses could also be eligible to register on a do not call register. Consistent with the Australian Bureau of Statistics definition, small businesses would be defined as those employing 20 or less people. These businesses would be able to register all, or some of their contact numbers, on the register.

To enable registration processes to be completed and telemarketers sufficient time to update their do not call lists, it would be necessary to allow a certain time limit to lapse from the receipt of an application to listing of a telephone number on a do not call register. A period of 30 days would appear to be reasonable.

There could be no time limit on how long numbers remain on a register. Once people indicate they do not wish to receive telemarketing calls it could be assumed that unless they request removal of their numbers from the register, they continue to wish not to receive telemarketing solicitations.

Consumers could be able to list any numbers issued in their names on a do not call register. They could also be able to register phone numbers on behalf of minors and be authorised, in writing, to register numbers on behalf of other persons.

#### *United Kingdom/United States*

The United Kingdom's Telephone Preference Service (TPS) is available to individual subscribers at their residential addresses, sole traders and partnerships (except in Scotland). Mobile phone numbers can also be registered with the TPS, but the service informs consumers that it cannot prevent receipt of SMS.<sup>23</sup>

The United States' Do Not Call Registry is also available to residents to register their telephone land lines and mobile phone numbers. There is no facility in the United States to register small business phone numbers.

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<sup>23</sup> The TPS informs consumers that under the Privacy and Electronic Communications Regulations (EC Directive) 2003, it is unlawful to send SMS messages without prior permission.

Changes to the Privacy and Electronic Communications (EC Directive) Regulations in 2003 make it unlawful in the United Kingdom for persons, including charities or other voluntary organisations, to make unsolicited sales and marketing calls to corporate subscribers whose numbers were registered with the Corporate TPS (CTPS). Corporate subscribers include bodies such as limited companies, schools, government departments and agencies, hospitals and other public bodies.

Do not call listing in the United States is for five years from the date telephone numbers are accepted on the Registry, unless people request removal of their numbers or their phones are disconnected. After five years consumers need to re list their numbers on the Registry. Individuals are able to verify their registration expiry date on the Federal Trade Commission website at any time.

Registration on the TPS under the Privacy and Electronic Communications (EC Directive) Regulations 2003 provides that, once a number is registered, unsolicited telemarketing calls should not be made ‘for the time being’; meaning that numbers remain on the lists until there is a ‘good reason’ for them to be removed.<sup>24</sup> The body responsible for the Corporate TPS must remind a corporate subscriber annually that their number is listed on the register.<sup>25</sup>

### **3.2.3 Coverage/types of calls prohibited**

#### **Prohibit all calls / Allow exemptions**

Ideally for many people, introduction of do not call regulation would mean that all unsolicited calls placed by organisations conducting telemarketing to telephone numbers listed on the Australian register, would be prohibited.

However, as both the United Kingdom and the United States experience illustrates, it is currently impossible to prevent all unwanted telemarketing calls, particularly offshore initiated calls.

There may also be legitimate “public interest” arguments to allow for exemptions from the register for some unsolicited calls. Possible exemptions to a do not call register model will be discussed later in this paper (see section 3.2.4).

#### **Offshore initiated calls**

Possible approach:

*That calls from telemarketers to individuals or small businesses registered on a do not call register would be prohibited if the calls have an Australian link similar to that operating under the Spam Act 2003.*

5.1 Should Australia attempt to regulate offshore telemarketers?

<sup>24</sup> Information Commissioner’s Office *Guidance to the Privacy and Electronic Communications (EC) Regulations 2003*.

<sup>25</sup> See regulation 26(2A) of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

The Australian Government has the power to give its legislation extraterritorial application.<sup>26</sup> Under some existing legislation such as the *Spam Act 2003* (the Spam Act), some type of link to Australia is required for domestic legislation to apply outside the Commonwealth.<sup>27</sup> Section 7 of the Spam Act sets out when a commercial electronic message has an Australian link for the purposes of the Act. It has such a link if the:

- message originates in Australia; or
- the individual or organisation that sent the message or authorised the sending of the message, is:
  - an individual who is physically present in Australia when the message is sent; or
  - an organisation whose central management and control is in Australia when the message is sent;
- a computer, server or device that is used to access the message is located in Australia; or
- the relevant electronic account holder is:
  - an individual who is physically present in Australia when the message is accessed, or
  - an organisation that carries on business or activities in Australia when the message is accessed; or
- the message cannot be delivered because the relevant electronic address does not exist—assuming that the electronic address existed, it is reasonably likely that the message would have been accessed using a computer, server or device located in Australia.

In addition, the Spam Act prohibits aiding, abetting, inducing or being in any way concerned with the sending of prohibited electronic messages.

Similarly, the physical presence of a provider in Australia is not required for the *Telecommunications Act 1997* to apply.

Prosecuting telemarketers that do not have physical presences in Australia could involve applications for extradition if it was concluded that their activities included criminal behaviour, or Federal Court proceedings which, if judgements were recorded against the telemarketers, would need then to be enforced by overseas jurisdictions.

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<sup>26</sup> *Telecommunications Act 1997* (section 9), *Telecommunications (Consumer Protection and Service Standards) Act 1999* (section 7), *Spam Act 2003* (section 14) and *Interactive Gambling Act 2001* (section 14) all provide that they apply outside Australia.

<sup>27</sup> See sections 7, 16(1)(a), 17(1), 18(1)(a), 20(1)(e) and (f), 21(e) and (f) 22(1)(c) and (d) of the *Spam Act 2003* and sections 8, 15(1)(b) 15A(10(a), (6) and (7), 16, 19, 61DA and 61EA of the *Interactive Gambling Act 2001*.

It may be possible, in addressing these problems, to develop agreements to curtail offshore telemarketing between countries which institute do not call registers, but this would be complex and benefits may not be commensurate with the effort these agreements would take to establish and regulate. However, the Spam Act anticipated that Australia would enter into multilateral arrangements with other countries concerned about spam regulation. It is unlikely that such agreements would address the problem of telemarketers acting in countries which do not have similar arrangements.

Comprehensive and effective solutions to the problem of 'rogue' offshore telemarketing are embryonic and require investigation and analysis. Adopting an Australian link concept, similar to that applied under the Spam Act, for a do not call register could provide at least a partial solution to the problem by ensuring not only that telemarketers located in Australia, but also those that have links similar to those set out in the Spam Act, could be subject to do not call restrictions. That is, not only telemarketers, but companies engaging telemarketers to solicit sales on their behalf, could be required to comply with do not call legislation.

#### *United Kingdom/United States*

One argument against introducing the Do Not Call Registry in the United States was that it would encourage American businesses to relocate offshore to avoid complying with the legislation. But while a number of telemarketers did move offshore with the introduction of the Registry, as did their counterparts in the United Kingdom, call restrictions was not the only reason they moved offshore. Cheaper running costs and wages were the principal motivating factors for their relocation. A number of telemarketers also ceased to conduct business once the United States Registry came into force. The Federal Communications Commission (FCC) argued this was because those companies were already financially unviable and that introduction of the Registry highlighted this fact.<sup>28</sup>

Counterbalancing the trend for telemarketing to move offshore, some centres in the United Kingdom have recently looked at expanding their local operations.<sup>29</sup> Others in the United States are moving back onshore in response to complaints from customers about the poor level of service they receive from offshore centres.<sup>30</sup>

While legislation in both the United Kingdom and the United States can only address complaints about offshore telemarketing undertaken on behalf of companies that are incorporated or trade in their jurisdictions, anecdotal evidence suggests that the majority of telemarketing approaches are from companies that fall under this definition. It also suggests that approaches from offshore companies are particularly invasive, causing angst for consumers and marketers alike. One report notes that on any given day at least 300 call centres in India alone violate United States' legislation.<sup>31</sup>

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<sup>28</sup> Federal Communications Commission. *Report and Order 03-153*. 3 July 2003.

<sup>29</sup> 'Nationwide UK Call Centre Plans Kick Against Offshore Trend.' [www.finextra.com](http://www.finextra.com)

<sup>30</sup> Pombriant, D. 'On and Offshore: Call Center Economics.' [www.crbuyer.com](http://www.crbuyer.com)

<sup>31</sup> Mitchell, A. 'The Call Centre Compliance Mess.' [www.EcommerceTimes.com](http://www.EcommerceTimes.com) 14 October 2004.

There are calls in the United States to update law enforcement methods to respond to this situation, but the extent to which these can be effective is debatable. The United Kingdom is also investigating an international agreement option to deal with the problem.

### **Automated / Silent calls / Predictive diallers / Dual purpose calls<sup>32</sup>**

#### **Possible approach:**

- *That all unsolicited telemarketing calls to all registered phone numbers with the exception of calls made by certain exempt organisations as specified could be prohibited.*
- *That sales calls using automated dialling equipment, which may, under any circumstances, result in silent calls, could be specifically prohibited to numbers on the register.*
- *That recorded message calls, the primary or other purpose of which was telemarketing, could be specifically prohibited to numbers on the register.*
- *That message, information or customer satisfaction calls whose primary purpose was telemarketing with similar primary or supplementary purposes could also be prohibited (as could calls which purported to have another purpose, such as offering free goods, but which were actually sales calls).*

- 6.1 Should automated calls be prohibited to numbers on a do not call register?
- 6.2 Should predictive dialling calls be prohibited to numbers on a do not call register?
- 6.3 Should recorded message calls, providing information only, be prohibited to numbers on a do not call register?
- 6.4 Should calls which have dual purposes, that is, to provide information or test customer satisfaction, for example, as well as offer goods or services for sale, be prohibited to numbers on a do not call register?

Advances in technology have resulted in the increasing use of automated calling equipment, predictive diallers and automated recorded messages by a wide diversity of groups. Public perception however appears to be that these innovations are increasingly used by the telemarketing industry.<sup>33</sup>

Automated calling equipment has the capacity to store or produce and dial telephone numbers using a random or sequential number generator. Calls placed by automated equipment can result in call abandonment when the equipment dials more numbers

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<sup>32</sup> See glossary of terms in Appendix A.

<sup>33</sup> Political parties in the United States have made considerable use of these types of calls to deliver messages encouraging people to register and turn out to vote, as well as in promoting their individual party platforms.

than there are operators to take calls. Predictive diallers essentially calculate when operators will be available to take calls.

It is claimed that people find the silent calls that result when automated dialling equipment dials more numbers than there are operators to take calls particularly irritating. Additionally, these calls are said to cause serious distress to the elderly and infirm. To address this problem a do not call register could require that telemarketers ensure that any automated or predictive dialling equipment they employ did not contact numbers on the register.

Some anecdotal evidence suggests that recorded message calls are less offensive than silent calls, but other findings indicate that people often feel powerless to stop these calls, particularly those delivered to answering machines. However, as recorded message calls are also able to provide important information, such as product recall details, only recorded message calls for the purposes of telemarketing would be targeted.

### **Dual purpose calls**

Because some telemarketers use 'dual purpose' calls to sell goods or services, a do not call register could prohibit calls that, while they purport not to be for the purpose of telemarketing, have that purpose, either as a primary or other intention.

These types of calls could include:

- customer satisfaction calls that have any intention to solicit sales;
- calls that offer free goods as part of, or in conjunction with, overall sales campaigns; or
- message, or information calls, the primary or other purposes of which, is for direct marketing.

### *United Kingdom/United States*

Under United Kingdom legislation, attempts to contact phone numbers registered on the TPS for the purposes of unsolicited telemarketing are illegal.<sup>34</sup>

TPS legislation does not cover recorded message calls not intended for marketing purposes, nor does it place any restrictions on telemarketers that use predictive dialling equipment. These aspects of the legislation have been criticised with some people believing, for example, that informative messages can be cleverly structured into effective and cost efficient marketing tools.<sup>35</sup>

Recent investigations have also revealed that silent calls resulting from use of predictive dialling equipment are of increasing concern to consumers.<sup>36</sup> Research

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<sup>34</sup> See Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

<sup>35</sup> Hickson, D. Comments on [www.ofcomwatch.co.uk](http://www.ofcomwatch.co.uk).

<sup>36</sup> The United Kingdom Office of Communications (Ofcom) found that the number of silent calls generated by MKD Holdings in connection with the promotion of its products and services was high, both in absolute terms and as a percentage of total calls made. Ofcom considered that this amounted to

indicates that 37 per cent of United Kingdom phone subscribers have registered with the TPS to avoid these types of calls.<sup>37</sup>

In response, the TPS has introduced a Silent Call Gard (sic) Service which promises a swift response for consumers who have complaints specifically about silent calls.<sup>38</sup> Numbers are registered on Silent Call Gard for 12 months only and are still available for personal contact by telemarketers. The United Kingdom Direct Marketing Association considers this strategy an effective means to address concern about silent calls. It may also be seen as a way to ensure that agitation to ban predictive diallers completely does not escalate.<sup>39</sup>

Under United States' legislation, automated calls and any artificial or recorded voice messages may not be used to contact certain numbers, including emergency phone numbers. However, automated calls can be made to residential numbers if they are not made for commercial purposes and do not include advertisements. These calls are exempt from Do Not Call Registry requirements, as they can be classified by telemarketers, and others, such as political pollsters, as information calls.

In response to concern over the number of abandoned or silent calls United States' telephone subscribers receive, the amended Telemarketing Sales Rule, which introduced the Do Not Call Registry, has made predictive dialling practices illegal.

In doing so, the Federal Trade Commission (FTC) has acknowledged the argument that predictive dialling is more cost effective for business, but has rejected the notion that it also benefits consumers by boosting sales and, in turn, delivering lower costs.

The FTC has rejected further argument that restricting predictive dialling practices would increase costs for United States' companies, making them less able to compete with offshore companies that employ lower paid workforces.<sup>40</sup>

However, telemarketers in the United States are not liable for violating the abandoned/silent call provision if:

- they ensure that no more than three per cent of calls answered by individuals (measured per day per calling campaign) are abandoned;

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a persistent misuse of an electronic communications network under the *Communications Act 2003*. During the period Nov 2003–Feb 2004, MKD made over 26 million calls, of which 11 million were live calls. Of the total number of calls, over 1.5 million were silent calls. MKD has since given written undertakings to Ofcom to address the problem.

<sup>37</sup> Cubitt, E. 'DMA Pushes Service to Curb TPS' in *Precision Marketing Magazine* cited on UK Data IT Website. [www.ukdatait.co.uk/silent.htm](http://www.ukdatait.co.uk/silent.htm)

<sup>38</sup> Silent Call Gard assures consumers that names will be removed from telemarketers' call lists 48 hours after consumers register. There is a 28-day waiting period before consumers can complain about contacts from telemarketers if they register on TPS.

<sup>39</sup> UK Data IT website. [www.ukdatait.co.uk/silent.htm](http://www.ukdatait.co.uk/silent.htm)

<sup>40</sup> For example, argument by Synergy Solutions in a submission to the Federal Trade Commission. *Comments of Synergy Solutions Inc., on the Proposed Revisions to the Telemarketing Sales Rule*. FTC File No R411001.

- they allow telephones to ring for at least 15 seconds or four rings before they disconnect;
- they connect calls to sales representatives within two seconds of consumers' greetings; or
- when sales representatives are not available to speak with subscribers within two seconds of calls being answered, they play a recorded message stating the name and telephone number of the seller, but messages must not solicit sales.

Telemarketers are also required to maintain records indicating compliance with these requirements.

### 3.2.4 Exemptions

Possible approach:

*That certain individuals and organisations would be exempt from the prohibition on calling numbers listed on a do not call register. These individuals or organisations would be:*

- *individuals or companies with which individuals or small businesses have established business relationships;*
- *charities;*
- *religious organisations;*
- *educational institutions (limited exemption for students and alumni);*
- *government bodies;*
- *registered political parties and registered political candidates; and*
- *market researchers undertaking social research.*

7.1	Should exemptions to the prohibition on calling numbers listed on a do not call register be permitted?
7.2	Why do you think exemptions to the prohibition on calling numbers listed on a do not call register should be permitted?
7.3	If you think exemptions should be permitted, what do you think these should be?
7.4	If you think exemptions should not be permitted to the prohibition on calling numbers listed on a do not call register, why do you oppose granting all/some/particular exemptions?
7.5	If you think exemptions should be permitted do you think existing business relationships should be exempted?
7.6	Should this exemption also apply to affiliates or subsidiaries of companies with whom people have existing relationships?
7.7	Should exemptions be granted to charities?

- 7.8 Should exemptions be granted to religious organisations?
- 7.9 Should exemptions be granted to educational institutions?
- 7.10 Should exemptions be granted to government bodies?
- 7.11 Should exemptions be granted to registered political parties and registered political candidates?
- 7.12 Should exemptions be granted to market researchers undertaking social research?

Unsolicited telephone calls come from a range of different sources. Broadly speaking however they can be divided into those that are commercially driven, such as those seeking sale of a product or service, and those that have a “public interest” perspective, such as those promoting charities, social research or enhancing community knowledge.

While either type of unsolicited call can be annoying, a case can be made for possible exemptions in some circumstances.

Possible exemptions that could be considered include:

- **Established business relationships**

Existing business relationships could be defined as those which involve companies and individuals who have purchased goods or services from a company in a period of 12 months prior to telemarketing approaches, or individuals who have made inquiries regarding goods or services in a period of three months prior to telemarketing approaches. For example, a consumer of computer equipment may wish to receive information on new updates available for purchase or on potential problems.

Affiliates or subsidiaries of companies that are considered to have existing business relationships with individuals may not be included under this exemption. This would be because, in many cases, products produced by those companies may bear no similarity to the products consumers have purchased or inquired about when forming business relationships with parent or associated companies.

Consumers could also request in writing that companies with which they have established business relationships cease to contact them for telemarketing purposes.

These relationships could be exempted for similar reasons to those cited by the United States’ Federal Communications Commission (FCC), which notes that it is crucial to the conduct of business to maintain contact with existing customers.

*In favour of this exemption:* This exemption would allow legitimate businesses to continue relationships with their customers.

*Argument against this exemption:* One purchase should not subject consumers to ongoing contact from particular businesses.

- **Charitable organisations**

Charities exist to benefit the Australian community, and while it is not certain what percentage of donations to charities are raised through telephone appeals, anecdotal evidence suggests that telemarketing provides them with an important source of revenue.<sup>41</sup>

*In favour of this exemption:* Charities provide valuable services to the community and need to use various means to raise funds to support their work.

*Argument against this exemption:* There are other, less intrusive means by which charities can seek donations.

- **Religious organisations**

Religious organisations could also be exempt from do not call provisions.

*In favour of this exemption:* Religious organisations provide valuable support and community services as well as moral guidance and need to use a variety of means to raise funds.

*Argument against this exemption:* There are other, less intrusive means by which these organisations would be able to raise funds.

- **Educational institutions**

Generally, public educational institutions qualify as organisations which do not sell tangible goods and services, and for this reason they could be partially exempt from do not call provisions. This exemption could be limited to apply only in the case of current students (or their legal guardians, in the case of minors).

*In favour of this exemption:* Educational institutions should be able to contact their students to inform them of the needs of the institutions and to solicit funds to ensure their viability.

*Argument against this exemption:* There are other, less intrusive means by which educational institutions are able to raise funds.

- **Government bodies**

An exemption may be necessary to ensure that government is able to provide information on important issues such as changes to legislation that may affect citizens, without restrictions.

*In favour of this exemption:* Government bodies should be able to use the most effective means, including telephone contact, to provide information to citizens.

*Argument against this exemption:* There are other, equally effective and less intrusive means for government bodies to convey information to citizens.

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<sup>41</sup> The Fundraising Institute of Australia suggests that cold calls from charities produce 5–10 per cent commitment to support. Submission to the Australian Communications and Media Authority. *Telecommunications (Use of Integrated Public Number database) Industry Standard 2005*.

- **Political parties and candidates**

In keeping with current exemptions in the Spam and Privacy Acts, political organisations and candidates could be exempt from restrictions under a do not call register.

*In favour of this exemption:* Political parties and candidates primarily provide citizens with valuable information they can use to inform their voting behaviour.

*Argument against this exemption:* People may not wish to engage in political discussion and there are other means by which they can gain information.

- **Market researchers undertaking social research**

An exemption would permit research undertaken with the intention of describing, exploring and understanding social life. This type of research could be qualitative attempts to understand the meaning of social phenomena or quantitative attempts to quantify social phenomena by collecting and analysing numeric data. Market research conducted in conjunction with any form of sales campaign, or which had any sales component, may not be exempt.

*In favour of this exemption:* Social research informs important policy making decisions and provides valuable information to a variety of organisations.

*Argument against this exemption:* Anecdotal evidence suggests that a significant percentage of telemarketing calls are market research calls. ‘Sales pitches’ can also be concealed as market research.

#### *United Kingdom/ United States*

People who register their number on the United Kingdom TPS should not receive marketing calls from any organisations, including charities and other voluntary organisations, except from organisations which they have expressly authorised to contact them.<sup>42</sup>

The United States’ Do Not Call Registry is more generous, providing for a number of exemptions to its rules. Calls from telemarketers with whom individuals are deemed to have an existing business relationship are exempt because the FCC considers that the ability for companies to contact existing customers is an important aspect of business. The FCC also notes such calls can be helpful in providing beneficial information.<sup>43</sup>

Under the United States’ legislation existing business relationships are limited to a period of 18 months from any purchase or transaction, and three months from any inquiry or application.

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<sup>42</sup> See regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

<sup>43</sup> Federal Communications Commission. *Report and Order 03-1563*. 3 July 2003.

Other exemptions to the United States' legislation are:

- sellers are able to contact people with numbers listed on the Registry if they have obtained express written permission;
- solicitation calls from tax exempt organisations are also permitted under the United States' legislation as the public good this exemption provides is seen to outweigh any nuisance factor;
- calls from political organisations are exempt as political solicitations do not fall under the definition of telemarketing in the legislation; and
- calls for the sole purpose of conducting surveys are permitted but cannot be made before 8am or after 9pm on any day.

### 3.2.5 Administration

Possible approach:

- *That the Australian Communications and Media Authority would either directly administer a do not call register or would be the body responsible for tendering out the administration function.*
- *That the Australian Communications and Media Authority would be responsible for enforcement of the legislation relating to a do not call register.*

8.1 Should the Australian Communications and Media Authority directly administer a do not call register?

8.2 Should operation of a do not call register be awarded after a tender process?

8.3 What specific tasks should be entrusted to an administrator?

8.4 What specific tasks should be entrusted to an enforcement body?

8.5 What penalties should apply?

It is necessary that an administrator would be appointed to oversee and manage an Australian do not call register. This role could be undertaken by the Australian Communications and Media Authority (ACMA). While ACMA, or some other body would retain oversight of the do not call function, it may be more efficient to tender out the operation to organisations that have experience and background in the operation of database registers.

ACMA is the regulator for the Australian communications industry. Its main roles are to regulate the broadcasting, media, radiocommunications and telecommunications industries and to represent Australian interests in international communications matters.

ACMA would appear an appropriate body to undertake the oversight role because it:

- already plays an important role in informing the public about communications products and services;
- currently administers consumer codes for radio, television and the internet; and
- currently is responsible for enforcement of the *Spam Act 2003*.

A register operator could:

- develop and provide a secure register database of registered names and numbers of individuals and small businesses;
- provide a freecall number by which individuals could access information about a register;
- initiate a secure website that could:
  - provide individuals and small businesses with the opportunity to register phone numbers online;
  - allow telemarketers access to gain relevant information from the register database as required (it is suggested that this would be at least every 30 days);
  - provide telemarketers with information about compliance; and
  - provide individuals with information and links to relevant consumer and marketing websites;
- accept complaints from consumers on the website, by a freecall telephone number, email or post;<sup>44</sup>
- adjudicate on disputes regarding what constitutes sales, information and/or customer satisfaction calls;
- conduct regular public information campaigns;
- calculate potential fees;<sup>45</sup>
- collect fees from telemarketers to access the register;
- prepare and present to the Minister for Communications, Information Technology and the Arts an annual report containing information on:
  - numbers of subscribers and telephone numbers on the register;
  - numbers of telemarketers accessing the register;
  - fees set to access the register; and
  - other matters as appropriate.<sup>46</sup>

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<sup>44</sup> Should ACMA tender out the operation of a register, complaints in the first instance would need to be made to the successful tenderer as operator. The operator could then choose to attempt to resolve the complaints informally or refer them to an enforcement body. Unresolved complaints would need to be referred to the enforcement body as the operator would have no enforcement power.

<sup>45</sup> In the setting of possible fees, considerations are likely to take into account the size of the telemarketing industry and actual usage.

<sup>46</sup> This report would be presented to ACMA in the event of this body tendering out the administration function. ACMA would, in turn, prepare a report on the administration and enforcement of the register to be presented to the Minister for Communications, Information Technology and the Arts.

### *United Kingdom/United States*

The United Kingdom TPS is operated by Telephone Preference Service Limited (TPS Limited), a subsidiary of the United Kingdom Direct Marketing Association, under contract from the Office of Communications (Ofcom), the United Kingdom's communications regulator. The TPS contract requires that the TPS and Corporate TPS lists are maintained and appropriate access granted to telemarketers. Fees for access are set and collected by TPS Limited under the terms of its contract and are subject to the approval of the Secretary of State for Trade and Industry. TPS Limited investigates complaints and provides records of these to the Government Information Commissioner's Office (ICO) which enforces the legislation.

The ICO's powers originate with the European Union Telecommunications Data Protection Directive Regulations. These Regulations oblige member states to ensure that their legislation requires prior consent for unsolicited direct marketing by facsimile and by automated calling systems, and either prior consent or the right to opt out of other forms of unsolicited direct marketing. The choice of scheme is decided by member states.

The United States' Do Not Call Registry is managed by the Federal Trade Commission (FTC), America's national consumer protection agency. Individuals are able to apply for the Registry on the FTC's website or register their phone numbers on an FTC toll free telephone line.

The FTC maintains the secure website that telemarketers are required to access on a monthly basis to download phone numbers on the do not contact list. It also collects annual fees from telemarketers, which are expected to cover the cost of implementation, operation and enforcement of the Registry.

The FTC is required to submit annual written reports on the Registry for the fiscal years 2003–2007. Reports are required to include:

- analysis of the effectiveness of the Registry;
- the number of phone numbers listed on the Registry;
- the number of persons paying fees to access the Registry;
- the amount of fees paid; and
- analysis of progress in coordinating operation of, and enforcement with, similar state registries and other relevant legislation.

### **3.2.6 Enforcement**

Possible bodies that could enforce an Australian do not call register are ACMA, the Office of the Federal Privacy Commissioner and the Australian Consumer and Competition Commission (ACCC).

The Office of the Federal Privacy Commissioner may be an appropriate body to enforce the Register because of its involvement in, and responsibility for the protection of privacy of individuals and its role in enforcing federal legislation. The

ACCC could also be appropriate because it promotes competition and fair trade in the market.

ACMA may however be in the best position to undertake enforcement action because of its:

- particular experience in regulating telecommunications and radiocommunications;
- declared supportive stance for a viable industry and consumer safeguards alike; and
- relevant experience in enforcing other direct marketing legislation such as the *Spam Act 2003*.

In undertaking this role ACMA could:

- investigate suspected non compliance with do not call legislation;
- initiate one or a number of enforcement options to ensure compliance with the legislation, including:
  - providing advice;
  - providing cautionary warnings;
  - issuing infringement notices; or
  - undertaking court proceedings.

#### *United Kingdom/United States*

The United Kingdom Information Commissioner's Office (ICO) investigates alleged breaches of legislation and can issue enforcement notices to individuals or companies. It suggests however that complaints should be lodged initially with the TPS to allow the operators to check that complaints are not the result of inaccurate registration. The operators of the register are then also able to advise that breaches of the do not call regulations may have occurred. It appears that most responsible telemarketers take the necessary remedial action to avoid complaints being taken to the ICO.<sup>47</sup>

However, should complaints proceed to this level and the ICO consider them justified, enforcement notices can be issued. Breaches of these are criminal offences, liable for fines of up to approximately AUD\$12,000 for cases brought before a magistrate, and unlimited fines for cases involving a jury.

In addition to ICO powers under United Kingdom legislation, persons who consider they have suffered damages because the Telecommunications Data Protection Directive Regulations have been breached, have the right to sue those allegedly responsible for the damages, for compensation.

The United States' Do Not Call Registry is enforced by the FTC, the FCC, and state law enforcement officials. The FTC and FCC authority derives from specific, overlapping legislation with the FCC covering intrastate, and the FTC interstate telephone solicitation. In this way, certain entities that are exempt from FTC authority are covered under FCC regulation.

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<sup>47</sup> Information Commissioner's Office, *Guidance to the Privacy and Electronic Communications Directive (EC Directive) Regulations 2003*.

Prior to the implementation of the National Registry, a number of states had introduced their own do not call legislation. Some states continue to maintain their own registers, but others have adopted the national list.

Individuals can complain about telemarketing practices by mail, email, facsimile, over the telephone or on the FTC and FCC websites. The FTC and FCC make it clear that they do not take action on every complaint alleging a violation of National Registry provisions. Rather they consider a number of factors, such as the number of complaints filed against particular telemarketers and the potential that those telemarketers will make future unlawful calls, in determining what action they take.

FTC enforcement is usually accomplished through injunctions to prevent or stop violations under both the Telemarketing Sales Rule and the Federal Trade Commission Act, or redress in the federal court to compensate for harm to individuals. The FCC generally imposes civil penalties which can include forfeiture proceedings to determine appropriate monetary penalties.<sup>48</sup> Fines, if imposed, can be up to AUD\$20,400.

Telemarketers who inadvertently contact numbers on the Registry can refer to a 'safe harbour' provision under the United States legislation. Although it is not labelled as such under the TPS and CTPS, a similar provision applies in the United Kingdom.

Effectively, this means that telemarketers in the United Kingdom who can demonstrate that they have done all they can to comply with appropriate regulations can make a legitimate defence against complaints. In the United States, telemarketers must demonstrate that they have written company compliance procedures in place. These procedures involve providing training to their personnel to ensure they comply with the register requirements, monitoring and enforcing their procedures and maintaining company specific do not call lists.

### 3.2.7 Fees and funding

Possible approach:

- *That funding to administer a do not call register would be obtained through the imposition of subscription fees on telemarketers to access the register.*
- *That individuals or small businesses would not be required to pay fees to list their numbers on a do not call register.*

9.1 Should the telemarketing industry solely fund a do not call register?

9.2 Should the telemarketing industry primarily fund a register?

9.3 Should individuals and small businesses be expected to pay a small fee to be included on a register?

9.4 How should fees to access a register be set?

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<sup>48</sup> United States Government Accountability Office. *Telemarketing. Implementation of the National Do Not Call Registry* January 2005.

An Australian do not call register could follow the pattern established in the United States and United Kingdom for the local telemarketing industry to fund a do not call service on an ongoing basis through subscription fees to access data.

Fees for a register could be imposed based on:

- the extent to which companies required access; and
- whether access was required to all, or a restricted number of, area codes.

Fees to access data could be set from time to time by ACMA, in consultation with the Minister for Communications, Information Technology and the Arts, to ensure that a shortfall in administrative costs did not occur if ACMA was also administering a register. If the administration function had been tendered out, fees could be set by the operator in consultation with ACMA and the Minister.

Fees could be collected by the body operating the Register.

There is a strong case that individuals and small businesses should not have to pay to have their numbers incorporated on a register. It is not considered appropriate that people should have to pay to remove themselves from participating in a marketplace not of their own choosing.

#### *United Kingdom/ United States*

In the United Kingdom, telemarketers pay licensing fees to access Telephone Preference Service (TPS) and Corporate TPS Service data. There are three categories of licence:

##### **Annual Data Licence**

This licence is issued to companies engaged in ongoing telemarketing. These companies may need to obtain Annual Data files, which can contain all number dial codes in the United Kingdom, or partial files, based on the number of codes they wish to access. A full licence file costs approximately AUD\$17,000 per annum.

##### **Ad Hoc Data Licence**

Ad Hoc Data licences are issued to organisations that conduct infrequent marketing campaigns. These too, can be issued as full or partial licences, with a full licence costing about AUD\$2,500 for a 28 day period.

##### **Associate licence**

Associate licences are issued to organisations that use third parties to carry out telemarketing on their behalf. These licences cost approximately AUD\$600 per annum.

The Corporate TPS also offers checking services for smaller companies. These include:

- a service accessed via the internet that allows companies to check up to 500 numbers for a small monthly fee;
- a call barring service to filter sales calls; and
- a premium rate number checking service.

The call barring and premium rate services are charged at a comparable rate to the internet interrogation service. TPS also collects a royalty fee from subscribers that offer third party screening services.

Funding is appropriated annually from the United States' federal budget for the FTC to cover costs associated with the implementation, operation and enforcement of the National United States' Do Not Call Registry. The FTC is required to reduce the appropriation by the amount of fees that it collects from telemarketers.

Fees are imposed on telemarketers to access area code data for numbers on the Do Not Call Registry:

- the first five codes accessed are free;
- a fee of approximately AUD\$75 fee is charged for each further code to a maximum fee of approximately AUD\$20,400.

Payment of fees entitles telemarketers to unlimited access to the codes over a 12 month period.

In the first year of operation of the Registry, 2003, fees raised did not cover costs. The FTC argued that this was because it did not collect fees for the entire year and it over estimated both the numbers of telemarketers accessing the Registry and the areas codes they required.

### **3.2.8 General telemarketing issues**

Possible approach:

*That certain minimum national "contact" standards would be imposed on the telemarketing industry and exempt organisations.*

10.1 Should minimum national contact standards apply to all telemarketing approaches?

10.2 What are the appropriate rules for information disclosure?

10.3 Are there any other standards that should apply to telemarketers?

In addition to a national do not call register, obligations could be put in place that require telemarketers to fulfil certain minimum standards relating to issues such as the time they call and what information they provide about their organisation.

While there is State and Territory Government legislation in relation to these issues, there may be merit in the adoption of a national standard. A national standard could provide more certainty to telemarketers who currently have to deal with different obligations depending on the location of their customers. In addition, a national

standard could provide greater clarity to those people who choose not to list their numbers on a do not call register about what is an acceptable telemarketing approach.

A national standard could apply to all companies and organisations that engage in telemarketing, regardless of whether they were exempt from other restrictions under a do not call register. For example, time of call standards could apply to charities.

Consumer concerns that could be addressed by a national telemarketing standard could include:

- *Unwelcome hours*

A national standard could include a requirement that consumers could only be contacted for the purposes of telemarketing between certain hours and on certain days (such as between 9am and 8pm Mondays to Fridays, 9am and 5pm Saturdays and not on Sundays or any public holiday as in the current Ministerial Council on Consumer Affairs model code).

- *Disclosure of information*

Telemarketers and other groups that contact people by phone with the intention of making sales calls or seeking donations or information could be required to disclose certain basic information to consumers when making sales calls. This could include the names and addresses of the organisation that is calling.

- *Termination of calls*

It could be required that all telemarketing or social research calls were terminated immediately at the request of persons being called.

## 4. Appendices

### 4.1 Appendix A Glossary of Terms/Acronyms

#### 4.1.1 Glossary

**Australia:** This means Australia in the geographical sense and includes the external territories of Norfolk Island, Cocos (Keeling) Islands and Christmas Island.

**Australian link:** Broadly defined as similar to the definition set out in section 7 of the Spam Act.

**Automated calls:** Calls that are made by automated dialling equipment. This equipment has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers. Automated calls can result in **call abandonment** when the equipment dials more numbers than there are operators to take calls.

**Affiliate:** Company related to another company, but not strictly controlled by that company.

**Charity:** Consistent with the *Spam Act 2003*, charity takes the common law meaning of an entity which is for public benefit and which has a charitable purpose.

Charitable purposes are those which the law regards as charitable. The term 'charitable' has a technical meaning which is different from its everyday meaning. Charitable purposes are:

- the relief of poverty or sickness or the needs of the aged;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.

**Consumer:** One who acquires goods or service for direct use or ownership (personal use) as distinguished from for use in production and manufacturing or resale (commercial use).

**Call abandonment:** Applies to calls not answered by telemarketing sales staff as the result of automated dialling equipment/predictive diallers dialling more numbers than there are call centre staff to take calls.

**Direct marketing:** This entails marketing products and services directly to consumers and businesses via telephony, advertising mail and other print media, such as catalogues and magazines, direct response television and radio, the internet and other interactive media.

**Direct marketer:** Any individual or organisation that engages in direct marketing.

**Dual purpose calls:** Calls that, while they purport not to be for the purpose of telemarketing, have that purpose, either as a primary or other intention.

**Educational institution:** An institution that is available or open to the public or a section of the public and whose dominant purpose is providing education.

Any other purpose of the organisation must be incidental or ancillary to providing public education. Education in this context does not extend to merely providing information or lobbying.

Public educational institutions include universities or colleges managed by public bodies, grammar schools, primary and secondary schools run by churches or religious bodies, and non profit business colleges.

Educational institutions do not include private colleges run for profit or associations operated for the professional benefit of members (consistent with the Australian Taxation Office definition).

**Established business relationship:** A relationship which involves:

- a company and a consumer who has purchased goods or services from the company in a period of 12 months prior to a telemarketing approach; or
- a consumer who has made inquiries regarding a company's goods or services in a period of three months prior to a telemarketing approach.

**Government body:** A department of the Commonwealth of Australia or its states and territories or an agency, authority or instrumentality of the Commonwealth or its states and territories; a department of the government of a foreign country or an agency, authority or instrumentality of the government of a foreign country or a department of the government of a part of a foreign country or an agency, authority or instrumentality of the government of a part of a foreign country. This definition is consistent with the *Spam Act 2003*.

**Market researcher:** One who gathers and evaluates data regarding consumers' preferences for products and services.

**Profit organisation:** An organisation whose activities are not carried out primarily for charitable purposes, for public benefit or the relief of poverty; an organisation that is primarily for sporting, recreational or social purposes or for political, lobbying or promotional purposes.

**Predictive dialler:** Equipment that dials numbers, and when certain computer software is attached, also assists telemarketers to predict when a sales agent will be available to take calls (United States Federal Communications Commission explanation).

**Political party:** A group established on the basis of a written constitution that sets out the aims of the party and either a parliamentary party with at least one member of the Parliament of the Commonwealth or a political party with at least 500 members who are entitled to be on the electoral roll and are not relied on by any other party (Australian Electoral Commission definition of eligibility to register as a political party).

**Political candidate:** A person who has been duly nominated and accepted as eligible for election by the relevant Federal or State electoral authority.

**Recorded message calls:** Calls made by automated dialling equipment that leave recorded messages for consumers.

**Religious organisation:** A non profit organisation instituted for religious purposes where religion refers to a set of beliefs that include belief in a supernatural Being,

Thing, or Principle and the acceptance of canons of conduct which give effect to that belief but which do not go against ordinary laws (definition used in reference to state and Commonwealth tax laws).

**Silent calls:** Calls generated by automated calling equipment used by call centres. If there are not enough call centre operators available to connect calls, the equipment terminates calls, resulting in silent or short duration calls.

**Small business:** Businesses employing less than 20 people (Australian Bureau of Statistics definition).

**Social research:** Research undertaken with the intention of describing, exploring and understanding social life. Research can be qualitative attempts to understand the meaning of social phenomena or quantitative attempts to quantify social phenomena by collecting and analysing numeric data.

**Subsidiary:** Company controlled by another, usually larger, corporation.

**Telemarketing:** The approach taken in this paper is to include all activities that relate directly or indirectly to direct marketing and which involve the use of a telephone to contact consumers.

**Telemarketer:** Any individual or organisation who engages in telemarketing.

#### 4.1.2 Acronyms

ACMA.....	Australian Communications and Media Authority
ACCC.....	Australian Competition and Consumer Commission
ADMA.....	Australian Direct Marketing Association
CTPS.....	Corporate Telephone Preference Service
CRTC.....	Canadian Radio-television and Telecommunications Commission
EU .....	European Union
FPS.....	Facsimile Preference Service
FCC.....	Federal Communications Commission
FTC .....	Federal Trade Commission
ICO.....	Information Commissioner's Office
IPND.....	Integrated Public Number Database
MCCA.....	Ministerial Council on Consumer Affairs
NPPs.....	National Privacy Principles
TPS .....	Telephone Preference Service

## **4.2 Appendix B            Summary of international models**

### **4.2.1    United Kingdom**

There has been some form of do not call register in the United Kingdom since 1995 when the Direct Marketing Association (UK) initiated a voluntary, self regulatory scheme under which consumers elected not to receive unsolicited telephones sales calls.

However, following the passage of a 1997 European Union (EU) Directive designed to protect the privacy of individuals, European Union member states were required to introduce statutory provisions for consumer protection.

In considering what would be an effective means to comply with the EU Directive, the United Kingdom Department of Trade and Industry and the Office of Communications consulted publicly before introducing the Telecommunications (Data Protection and Privacy) Regulations 1999.

These Regulations placed obligations on organisations to respect the privacy of individuals when marketing products by telephone and facsimile under the Telephone Preference (TPS) and Facsimile Preference Services.

A Corporate Telephone Preference Service (CTPS) was introduced in June 2004.

The TPS and CTPS prohibit callers, including charities and political organisations, from contacting subscribers to promote their goods or services or aims and ideals. Calls from market researchers are not prohibited by these services as they are considered to be unlikely to involve telemarketing.<sup>49</sup>

Individuals are eligible to register their land line and mobile phone numbers on the on the TPS. CTPS registration applies to corporate bodies such as companies, partnerships and public bodies such as government departments.<sup>50</sup> It should be noted that sequentially dialled automated recorded message calls are not covered under the TPS and CTPS, so telemarketers are free to continue this practice.<sup>51</sup>

Both the TPS and CTPS are free to subscribers who register their objection to receiving unsolicited marketing calls. The services are paid for by the direct marketing industry in the United Kingdom through fees imposed for companies to access the register of TPS and CTPS subscribers.

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<sup>49</sup> The Information Commissioner notes that a call made by a market researcher or opinion pollster is unlikely to be a telemarketing call.

<sup>50</sup> Definition of corporate subscriber as including corporate bodies such as limited companies as defined in the United Kingdom, limited liability partnerships in England, Wales and Northern Ireland or any partnership in Scotland. Also includes schools, government departments and agencies, hospitals and other public bodies such as the Information commissioner's office. *Guidance to Privacy and Electronic Communication (EC Directive) Regulations*, November 2003.

<sup>51</sup> This was defined as telemarketers using automatic equipment to increase their call efficiency by dialling a number of calls at the same time. This may result in call abandonment or a recorded message being delivered when consumers answer the telephone.

Telemarketers are required to access the register to ensure their do not call lists are current. The register is updated four times a year and names remain registered unless consumers request their removal. Applications for the registers will not be accepted on behalf of a second party and can be made by mail or online. They are effective after 28 days.

While the TPS and CTPS are managed by a private company, the Information Commissioner, who has discretion in arbitrating complaints, ensures compliance with the legislation.

Approximately 8 million numbers were registered on the TPS in June 2005.

#### **4.2.2 United States**

The United States Congress passed legislation in 1991 which required the Federal Communications Commission to introduce regulations to protect the privacy of consumers by preventing unsolicited telemarketing calls.<sup>52</sup> But it was not until 2003 that a National Do Not Call Registry (the Registry) was established by the Federal Trade Commission (FTC), the national consumer watchdog, in response to ‘consumer frustration and dissatisfaction with unwanted telemarketing calls’.<sup>53</sup>

Establishing the Registry involved a significant change to the Telemarketing Sales Rule, which had been in operation since 1995, to give the FTC power to impose restrictions on telemarketers.

Like the TPS, the Registry is an ‘opt out’ scheme under which subscribers register to have their telephone numbers removed from telemarketers’ contact lists. Unlike the system in the United Kingdom, only the telephone numbers of individuals can be registered. Businesses are not eligible to participate in the scheme. Up to three personal numbers, including mobile numbers can be registered either online, or by telephoning a toll free number, at any one time.

The FTC maintains the Registry. People can register either online or from the telephone number they wish to nominate for registration and there is no cost for registration. Registration is confirmed by email or at the time a phone request is made. Numbers remain on the Registry for five years from date of confirmation.

Costs for the Registry are primarily covered by fees imposed on telemarketers to subscribe and for access at least once every 31 days for the purpose of updating do not call lists. Enforcement of the regulation is also the responsibility of the FTC in conjunction with the Federal Communications Commission.

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<sup>52</sup> Definition of telemarketing in *Telemarketing and Consumer Fraud and Abuse Prevention Act 1994*: a plan, program or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

<sup>53</sup> United States Government Accountability Office. *Telemarketing. Implementation of the National Do-Not-Call Registry*, January 2005.

A 'safe harbour' provision exists which protects telemarketers from liability if they claim a violation of the Registry was made inadvertently and they can demonstrate that they have written do not call procedures in place that they monitor and enforce.

There are several significant exemptions to the legislation:

- charities;
- market researchers;
- non-profit organisations; and
- political organisations.

Additionally, organisations calling under 'established business relationships' can call customers for up to 18 months after the customers' last purchases or financial transactions or up to three months after customers' last inquiries.<sup>54</sup>

The United States Registry has been remarkably successful. In the three days following its announcement by President George W. Bush in June 2003, some 10 million numbers were submitted for inclusion on the Registry. In July 2005, there were more than 98 million numbers registered.

#### **4.2.3 Canada (proposed legislation)**

A Bill to amend the Canadian Telecommunications Act to give the Canadian Radio-television and Telecommunications Commission (CRTC) the ability to establish a Do Not Call List (the List), levy penalties for non compliance with regulations and to contract a private third party to administer the List is currently under consideration by the Canadian Parliament.

At present, the CTRC requires telemarketers to keep lists of individuals who request not to be contacted by their organisations.<sup>55</sup> Telemarketers that do not comply with CTRC directives may have their telephone service suspended or disconnected for a specific period. Substantial fines can also be imposed under the existing regulations.

The proposed system will give the CRTC power to administer a national do not call list and allow it to delegate this power. It will also gain powers to investigate complaints and enforce the legislation which it will be able to delegate to a third party.

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<sup>54</sup> Even if a business relationship is 'established', consumers can make an entity-specific request that a particular company does not contact them.

<sup>55</sup> The Canadian definition of telemarketing refers to the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation where solicitation is defined as the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another party. This includes solicitation of donations by, or on behalf of, charitable organizations.

These rules apply to all unsolicited calls for the purpose of solicitation. They apply to business-to-business telephone solicitation and calls from businesses to existing customers.

The rules do not extend to calls where there is no attempt to advertise a product or offer a service; for example, calls for emergency purposes, calls to collect overdue accounts, calls for market or survey research, and calls to schedule appointments. Canadian Radio-television and Telecommunications Commission website: [www.crtc.gc.ca/eng/INTRO\\_SHT/t1022.gtm](http://www.crtc.gc.ca/eng/INTRO_SHT/t1022.gtm)

The CRTC proposes to consult with the public and the telemarketing industry should the Bill pass, to determine final operation, administration and enforcement of the List. However, it appears that it is likely to be structured along the lines of the United States Do Not Call Registry. This will require individuals to register to opt out of receiving telemarketing calls, possibly on an 1800 number, or online. Registration will be for a set time with a period of three years having been suggested.

Telemarketers will be required to update their records regularly, and it is expected that access fees will fund the scheme. Penalties are likely to be approximately AUD\$1,700 per offending call for individuals and approximately AUD\$17,000 per call for corporations.

In the case of an unintentional contact, there is also likely to be a means by which telemarketers can avoid penalties if they are able to prove they took all reasonable efforts to avoid the contact and to ensure that their actions were within the law.

The legislation will probably exempt political parties and candidates, charities and market researchers as well as contacts from organisations with which people have existing business relationships.<sup>56</sup>

A 2004 survey suggests that an overwhelming number of Canadians are annoyed by unsolicited telemarketing calls. A majority of those surveyed indicating that they would be likely to register for a do not call service if it is introduced.<sup>57</sup>

#### **4.2.4 New Zealand (Voluntary code)**

The New Zealand Ministry of Consumer Affairs undertook a review of the New Zealand *Door to Door Sales Act 1967* in 1992. The review was in light of questions about the Act's relevancy in dealing with marketing techniques, which had developed since the passage of the legislation, and to which it was not originally intended to apply.

The review was prompted by similar complaints about coercion, targeting of vulnerable consumers by direct marketers, including telemarketers, and the timing of calls, which had surfaced in other jurisdictions as development of technology accompanied growth in the telemarketing industry.

No legislative change has as yet occurred in New Zealand as a result of the review of legislation. The Ministry of Consumer Affairs is continuing to promote retention of voluntary self regulation of the direct marketing industry.

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<sup>56</sup> The Bill defines existing business relationship in similar terms to the United States legislation, as one formed by a voluntary two way communication arising from the purchase of services, lease or rental within 18 months and an inquiry within 6 months.

<sup>57</sup> The survey reported a 97 per cent negative reaction to unsolicited calls, 79 per cent support for a do not call list and 66 per cent indicated they would register for the service. Quoted by Hon David Emerson, Minister for Industry in press release, 13 December 2004.

The New Zealand Direct Marketing Association does promote a code of telemarketing ethics practice for its members, which was introduced in December 2000. The code essentially restates New Zealand consumer law.

There is no evidence that confirms the supposition, but it is possible to assume that there has been no concerted public agitation for a regulatory list in New Zealand until this point, as the telemarketing market is relatively small and voluntary measures, combined with existing consumer protection laws, have been able to address concerns.

This has the potential to change if automated dialling equipment is more extensively used in New Zealand. At present, New Zealand Telecom requires that subscribers who intend to use telephony equipment for unsolicited automated calls must hold a permit.

To gain a permit, a telemarketer must:

- indicate that they will operate during ‘reasonable hours’;
- in no circumstances operate after 9pm on any day of the week; and
- ensure that their equipment will identify itself as automatic dialling equipment, briefly state the reason for calls and invite consumers to hang up, or key a particular digit if calls are of interest. The equipment is to be connected to, and used on business lines only.

The Consumer Advice Service notes that the conditions imposed by Telecom are potentially able to reduce the degree of intrusion caused by telemarketing using automatic dialling equipment. However, as Telecom is unable to police them and it appears that they are not always met if the ratio of these types of calls increases to the extent it has in other jurisdictions, appeals for a legislative solution may increase.<sup>58</sup>

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<sup>58</sup> There may be some indication that this is already occurring. Introduction of the Unsolicited Electronic Messages Bill (to regulate spam) into the New Zealand Parliament 28 July 2005 was accompanied by a call from the New Zealand Greens to include phone marketing in the Bill to prevent abuse of Voice over Internet Protocol technology. Green Party press release, 28 July 2005.

## 4.3 Appendix C Summary of the Australian context

### 4.3.1 Voluntary codes

In 1997, the Ministerial Council on Consumer Affairs (MCCA) released the first version of a voluntary direct marketing model code for Australia. It argued that the Model Code would benefit customers and business alike by enhancing the potential for consumers to benefit from direct marketing, improving the market for reputable business and preventing what it labelled as ‘unreasonably intrusive’ sales practices. Industry associations whose members are involved in direct marketing are encouraged to adopt standards set out in the Model code.

The Model Code was revised in 2003 to extend it *inter alia* to commercial emails and to require participating organisations to comply with National Privacy Principles included in the *Federal Privacy Act 1988*.<sup>59</sup>

Organisations adopting the MCCA Code are required to:

- refrain from making telephone or automatic calling equipment calls to consumers between certain hours and on certain days;
- refrain from contacting consumers more than once in relation to any campaign in a 30-day period;
- refrain from blocking caller identification; and
- release telephone lines promptly at consumers’ requests.<sup>60</sup>

The Model Code does not override relevant Commonwealth, state or territory legislation.

Voluntary codes of conduct in the telemarketing industry are self regulatory in nature and are enforced by the industry. Their success relies solely on compliance of participating organisations.

After the initial release of the Model Code, the Australian Direct Marketing Association (ADMA) developed its own code based on the provisions of the Model Code. ADMA’s code of practice was authorised under section 88(1) of the *Trade Practices Act 1974* by the Australian Competition and Consumer Commission.<sup>61</sup> This authorisation requires ADMA to keep its code up to date with regulatory developments, including amendments to the Model Code.

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<sup>59</sup> Ministerial Council on Consumer Affairs. *Direct Marketing. A Model Code of Practice*. 1997. Discussion of the National Privacy Principles is undertaken later in this section.

<sup>60</sup> Under the code, a telemarketer is required to refrain from contacting consumers before 8am and after 9pm at the consumer’s location, on Sundays and on New Year’s Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Christmas Day and Boxing Day. Organisations adopting the code are advised to consult with ethnic and religious group to determine times when it may also be inappropriate to contact consumers.

<sup>61</sup> Effectively this clears the code from any dispute that it is anti competitive in terms of the *Trade Practices Act 1974*.

ADMA argued when it introduced its code that a behavioural marketing code was essential to enhancing the reputation of the direct marketing industry and, in turn, fostering its expansion in Australia. Hence, it contended that its *Direct Marketing Code of Practice* set out specific standards of conduct and established a benchmark for settling disputes between industry participants and consumers.<sup>62</sup>

Provisions in the ADMA Code require telemarketers:

- to identify themselves to persons they are calling and state the purpose of their calls;
- to ensure their name, address and telephone numbers are listed in an accessible directory;
- to provide, on request, the name of a person responsible for handling customer inquiries;
- to offer to call people back if it appears that they have been interrupted at inconvenient times;
- to provide customers with clear opportunities to accept or decline offers;
- to ensure that all telephone calls to customers are made at times that comply with legislation, and in all other instances, are made between the hours of 8am and 9pm, and not on Christmas Day; Good Friday or Easter Sunday;
- to release telephone lines within five seconds of customers' hanging up or otherwise indicating they require lines to be released;
- not to represent that they are undertaking market research where the purpose of calls is to sell goods or services; and
- not to contact customers more than once in any 30 day period, for the same or similar campaigns, without prior consent of the customers.<sup>63</sup>

In 2004, ADMA expressed support for the introduction of a national legislative regulatory framework to address the inconsistencies it saw in state legislation. It argued that inconsistencies increased costs for the telemarketing industry and made it less competitive. It saw continuing the status quo as resulting in increased costs to consumers and call centre activity having to relocate overseas, which it argued would result in the loss of Australian jobs and cheaper forms of marketing replacing telemarketing.<sup>64</sup>

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<sup>62</sup> Australian Direct Marketing Association. *Direct Marketing Code of Practice*. November 2001.

<sup>63</sup> Australian Direct Marketing Association website [www.adma.com.au](http://www.adma.com.au).

<sup>64</sup> Australian Direct Marketing Association submission to Minister for Communications, Information Technology and the Arts. April 2004.

### 4.3.2 Specific Commonwealth legislation

The major areas of Commonwealth law relevant to telemarketing activities are the *Telecommunications Act 1997* (Telecommunications Act), the *Privacy Act 1988* and the *Trade Practices Act 1974*. Provisions in other Commonwealth Acts may also apply to aspects of telemarketing.<sup>65</sup>

#### *Telecommunications Act 1997*

Australian telecommunications regulation has traditionally been a co regulatory regime involving substantial self regulation by service providers.

Within this framework, the Telecommunications Act contains a number of provisions dealing with the protection of personal information held by carriers, carriage service providers and others. The Act not only provides for the development of industry codes and standards in a range of consumer protection and privacy areas, it also requires that the Federal Privacy Commissioner must be consulted on any industry standards that deal with privacy matters (see section 472 of the Telecommunications Act). In addition, while codes are voluntary in the first instance, breaches are enforceable by the Australian Communications and Media Authority (ACMA). Compliance with industry standards is mandatory

The Act also requires public number directory producers to protect personal information. An industry wide database, the Integrated Public Number Database (IPND), established in 1998 under the Act, contains the names and addresses of all listed and unlisted public numbers in Australia. It is an offence under the Telecommunications Act for service providers to disclose or use information on the IPND for any purposes other than certain proscribed circumstances, which include disclosure to law enforcement agencies and emergency service providers, and publication of a public number directory.

ACMA has been concerned that information on the IPND may have been used by public number directory producers for unapproved purposes. It has issued a draft industry standard to address its concerns, but it is not possible for the standard to prohibit telemarketing as it can only regulate the use of IPND data.

#### *Privacy Act 1988*

Prior to 2001, the *Privacy Act 1988* (Privacy Act) contained eleven information privacy principles relating to the collection, storage, access, use and disclosure of personal information collected and held by agencies of the Commonwealth. These principles provided only limited consumer protection however, as they did not apply to personal information collected by private sector organisations.

Amendments to the Privacy Act, which came into effect on 21 December 2001, extended its operation to apply to personal information collected and handled by many organisations in the private sector.

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<sup>65</sup> The OFPC review of private sector provision in the Privacy Act cites possible acts that have an impact on how organisations comply with privacy obligations for example. These acts include the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. Office of the Federal Privacy Commissioner. *Getting in on the Act: the Review of the Private Sector Provisions of the Privacy Act 1988*. March 2005.

The amendments introduced National Privacy Principles (NPPs), which apply as minimum privacy standards for the private sector. The NPPs regulate collection, use, disclosure and transfer overseas of personal information. They require organisations to ensure that personal information they hold is accurate, up to date and secure.

The NPPs require organisations to be candid about the ways in which they manage personal information, provide access and correction rights to individuals and allow people to deal with them anonymously, where it is practicable and lawful.

One privacy principle in particular allows the use of non sensitive personal information for direct marketing where, among other things, it is impracticable to seek consent. The Office of the Federal Privacy Commissioner has published guidelines which outline circumstances in which it may be impracticable to seek the consent of an individual.<sup>66</sup>

At the same time as the amendments established a co regulatory scheme by setting out the legislative framework for collecting and handling personal information, they also provided organisations and industries with the opportunity to opt for the development of tailored privacy codes.

Most small businesses are currently exempt from the Privacy Act provisions. A small business is defined under the Act as one with an annual turnover of \$3 million or less. The small business exemption does not apply to health services, businesses that trade in personal information, or businesses that provide services under a Commonwealth contract. Small business operators not covered by the legislation can choose to comply with its provisions.<sup>67</sup>

#### *Trade Practices Act*

The *Trade Practices Act 1974* (Trade Practices Act) protects consumers by prohibiting a corporation, in trade or commerce, engaging in conduct that is unconscionable, misleading or deceptive. Under the Trades Practices Act, a corporation is defined as a foreign corporation, a trading or financial corporation formed within the limits of Australia or incorporated in Australia.

Subsection 6 (3) of the Trade Practices Act extends the operation of certain Parts of the Act, including certain Divisions of Part V dealing with consumer protection, to individuals whose conduct involves the use of a telephone service.

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<sup>66</sup> This is under the National Privacy Principle NPP 2.1(c). See Office of the Privacy Commissioner. *Getting in on the Act: the Review of the Private e sector Provisions of the Privacy Act 1988* March 2005. Appendix 4.

<sup>67</sup> Ministerial Council on Consumer Affairs, *Direct Marketing Code of Practice Discussion Paper*. 2002.

### 4.3.3 State and territory legislation

All states and territories have legislation which is applied in relation to telemarketing.<sup>68</sup> But for the most part, as the various state and territory laws have evolved through the extension of door to door sales regulation, they only address specific aspects of telemarketing. They do, however, generally impose restrictions on the times that telemarketers are able to contact people, allow for cooling off periods for telesales and require that telemarketers identify themselves and state the purpose of their calls.

Despite providing some parameters for telemarketers, the significant differences in state and territory laws, including differences in cooling off periods and permitted calling times, only serve to illustrate the current disparate nature of telemarketing regulation.<sup>69</sup>

New South Wales and Victoria enacted legislation in late 2003 to introduce specific restrictions for telemarketing into their Fair Trading Acts, but these Acts are also inconsistent. A recently issued joint discussion paper identifies these inconsistencies and contradictory requirements for telemarketers and outlines options for 'harmonisation'.<sup>70</sup>

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<sup>68</sup> New South Wales and Victoria have more comprehensive legislation than the other states.

<sup>69</sup> Telstra. Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs. *Inquiry into Harmonisation of Legal Systems*. April 2005.

<sup>70</sup> Consumer Affairs Victoria and New South Wales Office of Fair Trading. *Fair Trading Laws Relating to Telemarketing in New South Wales and Victoria. Options for Harmonisation*. August 2005.

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