



Potential for industry self-regulation of the Integrated Public Number Database, the Do Not Call Register and commercial electronic messages

Submission by the Australian Communications Consumer Action
Network to the Australian Communications and Media Association

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Contents

1. Introduction	4
1.1. Background	4
1.2. Preliminary comments	5
2. Integrated Public Number Database.....	6
3. Do Not Call Register	8
4. Commercial electronic messages and spam	11

1. Introduction

The Australian Communications Consumer Action Network (ACCAN) would like to thank the Australian Communications and Media Association (ACMA) for the opportunity to submit to its consultation on the regulation of the Integrated Public Number Database (IPND), the Do Not Call Register (DNCR), and commercial electronic messages and spam.

In drafting its response ACCAN consulted with individual members, the Australian Privacy Foundation (APF), the Office of the Australian Information Commissioner (OAIC), Choice, Communications Compliance Ltd (CCL) and the Association for Data-driven Marketing and Advertising (ADMA).

Following this consultation, ACCAN believes it is in the consumer interest that regulatory functions of the IPND, DNCR, and commercial electronic messages under the *Spam Act 2003* are not referred to industry for self-regulation. As the peak national body representing communications consumers, ACCAN's concern is that any changes to the current regulation of IPND, DNCR, and spam do not negatively affect consumers. Passing regulatory functions currently undertaken by government to industry could have detrimental privacy and cost implications. It also has the potential to impact on complaints handling, enforcement and compliance, and the transparency over the ways in which these activities are undertaken. In addition, ACCAN is not convinced that there exists an adequately resourced industry body to take on the regulatory functions detailed in the consultation document.

1.1. Background

Recommendation 6 of the Department of Communications and the Arts' report *Review of the Australian Communications and Media Authority (ACMA Review)* was that the ACMA should look in to the potential for self-regulation by industry of various functions. Recommendation 6 states:¹

That, within the next 12 months, the ACMA examine whether some or all of the following functions can be referred to industry for self-regulation, in consultation with relevant industry bodies:

- technical Standards
- Integrated Public Number Database
- Do Not Call Register
- Action on unsolicited communications, including Spam.

The ACMA regularly explore further opportunities for self-regulation in consultation with industry.

The key question of the current consultation is “whether the public interest concerns that gave rise to the relevant regulatory responses are still evident, or whether they have been diminished to the point where regulation could be wound back and/or be moved to industry for management.”²

¹ Department of Communications and the Arts, *Review of the Australian Communications and Media Authority* (May 2017), p. 43.

² Consultation paper, p. 1.

1.2. Preliminary comments

Intent of IPND, DNCR, and Spam

The consultation paper states on page 2 that “The IPND, DNCR and commercial electronic messages functions are being considered together due to the relationships and potential synergies between them...”. ACCAN acknowledges that there are potential synergies between the functions, such as improving the accuracy of the DNCR by washing it against the IPND. However, the IPND, DNCR, and spam legislation were all established and are maintained for different reasons. The IPND arguably serves a public interest purpose by providing information to researchers and emergency services, whereas the DNCR and commercial electronic messages relate primarily to marketing. Any consideration of the relationships and synergies between these functions should take into account their original intent and the implications of self-regulation on their accuracy and effectiveness.

Consumer and industry interests do not align enough to justify self-regulation

The ACMA’s assessment framework includes a regulatory continuum with direct government regulation at one end and a market-based response at the other. The framework describes self-regulation as involving “industry voluntarily developing, administering, and enforcing its own solution to address a particular issue without formal oversight from government or legal backstop for enforcement”. It also states that a key element of industry self-regulation is “...a strong alignment between industry interests and the stated public interest or value outcome.”³

ACCAN submits that alignment of consumer and industry interests in the cases of IPND, DNCR, and Spam, is not sufficient to warrant industry self-regulation. All three areas deal with personal information and therefore require government oversight and avenues for enforcement to maintain consumer privacy. Australians are increasingly concerned about privacy: the Office of the Australian Information Commissioner recently published research that found that 40% of survey respondents were not comfortable with their personal information being used for research or policy making purposes, and only 10% are comfortable with businesses sharing their personal information with other organisations. Additionally, 93% of consumers are worried about their information being sent offshore. Only 1% of respondents said that they do not mind receiving unsolicited communications.⁴

³ Consultation paper, p. 26.

⁴ Office of the Australian Information Commissioner, *Australian Attitudes to Privacy Survey 2017*, p. ii.

2. Integrated Public Number Database

Background

As described in the consultation paper, the IPND is a database of all public telephone numbers in Australia and their associated customer details, including name and address (with information provided to the IPND Manager by service providers). It is intended to be a centralised database for emergency services and telephone directory providers. Maintaining the accuracy of the information in the IPND is therefore an important public interest function. It must also be remembered that the original purpose of the IPND was to assist emergency services and law enforcement agencies with only limited tasks.

The ACMA's primary role in relation to the IPND is compliance monitoring and enforcement. This compliance activity improves the quality of the data in the IPND, by ensuring that all service providers do not breach their IPND obligations. As stated on the ACMA website, inaccurate data in the IPND could have life-threatening consequences by delaying emergency responses. It could also have negative implications for telephony-based emergency warning systems, and the investigations of law enforcement and national security agencies.⁵ As such, any changes to the regulation of the IPND must ensure that systems and processes in place for maintaining the accuracy of its data are not weakened.

The consultation paper lists the ACMA's current responsibilities as: providing information to industry and consumers; handling complaints and enquiries; monitoring and enforcing compliance; administering the IPND Scheme and authorising applications for access to IPND data; making instruments and standards and registering industry codes of practice.

Public interest functions justify continued government regulation

Due to the important public interest purposes fulfilled by the IPND, ACCAN submits that it must remain the responsibility of the government to undertake all complaints handling, compliance monitoring and enforcement activities. Government regulation of the IPND means there is transparency over the ways in which the database is kept up-to-date, increasing public confidence in its accuracy and effectiveness in emergency and law enforcement situations. There is clearly still a large and important role for government in the regulation of the IPND, with continued non-compliance with IPND requirements by industry players: the ACMA's 2016-17 Annual Report states that it followed up on compliance issues with 20 Carriage Service Providers and monitored undertakings by a further three providers to address non-compliance.⁶

Potential cost implications

As noted in the consultation paper, the operation of the IPND is currently not directly funded by the Government but rather borne by data users and the telecommunications industry.⁷ The consultation paper does not address how the handling of complaints and enquiries would be resourced by industry if this function were managed by an industry body. It also does not address the issue of costs. It is important that in the case of self-regulation of the IPND that the costs of its

⁵ <https://www.acma.gov.au/Industry/Telco/Numbering/IPND/integrated-public-number-database-numbering-i-acma>

⁶ ACMA, Annual Report 2016-17, p. 88.

⁷ Consultation paper, p.6.

operation are not passed onto consumers and/or researchers (currently access by researchers is free). It is also important that all complaints handling and enforcement mechanisms should remain available, free, and effective.

Privacy and the IPND

ACCAN would like to echo the sentiment of the APF that a move to industry self-regulation of the IPND is not appropriate due to the sensitive personal information contained in the database. In addition, as stated by the APF in its submission, all carriage service providers are required by law to provide the IPND Manager (Telstra) with all listed and unlisted numbers, and no customer consent is required for the collection of this information. It is therefore of particular importance that strict conditions and safeguards that are enforceable by government continue to apply, and that anything that diminishes the privacy protections surrounding IPND is examined seriously as any breach may have life-threatening consequences.

For example, the granting of access to researchers is an activity should continue to be overseen by government to prevent information being released to inappropriate recipients, therefore posing a risk to consumers. Currently the ACMA is authorised to grant access to IPND information for permitted research on health, electoral, or government policy topics. Research access cannot be granted for anything with a commercial purpose.⁸ As mentioned above, OAIC research has shown that only 10% of consumers are comfortable with businesses sharing their personal information with other organisations, and 93% are worried about their information being sent offshore.⁹ There is a risk that if access were regulated and granted by industry, the highly valuable and personal information in the IPND would be used for the commercial advantage of industry players.

⁸ ACMA, Annual Report 2016-17, p. 89.

⁹ Office of the Australian Information Commissioner, *Australian Attitudes to Privacy Survey 2017*, p. ii.

3. Do Not Call Register

Background

The DNCR has a very different purpose to that of the IPND. Unlike the IPND, the DNCR comprises of consumers' numbers that have been given voluntarily in order to avoid unsolicited communications (subject to the political, charity, and educational exemptions). As noted in the consultation paper, currently the ACMA outsources the operation of the DNCR to a private company but carries out the following functions:

- Monitoring and enforcing compliance with the *Do Not Call Register Act 2006* and industry standards
- Handling complaints and enquiries (outsourced operator receives these in the first instance and escalates to the ACMA as required)
- Administering cost-recovery arrangements
- Making instruments and standards and registering industry codes
- Conducting education campaigns, conducting and commissioning research and international liaison.¹⁰

Privacy and data security

In the past ACCAN has submitted that the DNCR be 'washed' against the data in the IPND in order to improve its accuracy and make sure it is up-to-date. The register can become out-of-date currently because numbers remain on the DNCR indefinitely, and are sometimes reassigned to consumers who do not wish to be on the register. Washing the DNCR against the IPND is one way that the quality of the information on the DNCR can be improved to benefit consumers and industry, however this would have to be done with very strict security and privacy conditions. For example, only the minimum of information required to wash the lists against each other could be shared, in order to avoid data matching between datasets. Because of the privacy risks associated with extending the use of the information in the IPND it is important that a regulatory body such as the ACMA maintains complaints handling as well and monitoring, compliance and enforcement functions.

ACCAN is also concerned by the privacy and security risks potentially associated with a move to a 'download model', which would see the register operator giving telemarketers the list of numbers on the DNCR to wash their own lists. The DNCR is currently required to operate on an upload model, where telemarketers provide their lists to the operator for washing against the register. As the consultation paper notes, upload models are likely to be more expensive to operate as it requires the operator to perform the washing function.¹¹ However, the list remains more secure as it is contained in a single location. ACCAN is concerned that industry may shift to a download model for reasons of cost and therefore decrease consumer privacy and security. ACCAN submits that any changes to the regulation of the DNCR must retain the upload model.

¹⁰ Consultation paper, p.10.

¹¹ Consultation paper, p. 12.

Consumer education

It is also arguable that conducting education and research would not be an appropriate function for industry in relation to the DNCR. It could be said that a conflict of interest could arise, as it is not in industry's best interests for consumers to be fully informed of the DNCR, as this may curtail the reach of their telemarketing activities.

Impact of new technologies

The consultation paper also raises the issue of the degree to which new technologies may have mitigated the level of harm involved (i.e. increased consumer ability to screen and block incoming calls). However ACCAN would argue that developments in technology are not a justification for increased self-regulation of the DNCR. This is because in order for new technologies to be effective, consumers need to be informed about them and capable of using them. In addition, apps and new technologies become outdated and less relevant over time, as marketers develop ways of getting around them. Expecting people to manage their own exposure to unsolicited calls and faxes with new technologies places an extra burden on consumers to keep up-to-date, and also pre-supposes the digital ability to do so.

Absence of an appropriate industry body and resourcing

The consultation paper raises the important point that "The Do Not Call Register Act regulates potentially whole-of-economy business activity...[and] this may make it difficult to identify a single industry body that could represent the sector, develop relevant rules, and undertake associated enforcement in a self-regulated environment."¹² ACCAN agrees that no such industry body currently exists and therefore the DNCR should continue to be regulated by Government.

The Association for Data-driven Marketing and Advertising may currently appear to be the most appropriate industry body to manage the DNCR, however the ADMA Code Authority lacks the resources and funding to take on complaints handling functions, and would not consider taking on this responsibility without prior assurance of such. ADMA has also indicated to ACCAN that it is not able to take on any enforcement role.¹³ If the DNCR were to be self-regulated by industry, and adequate funding and resourcing for complaints-handling and compliance activities were not made available, there would be deterioration in processes for consumers. The Government, if it wishes to move DNCR functions to industry for regulation, must first establish how effective, free, and accessible complaints handling will be provided to consumers.

It is also important to consider whether any costs arising from self-regulation of the DNCR could be passed on to consumers. For example, it would clearly not be of benefit to consumers if they were to be charged for adding their number to the register. However, ACCAN acknowledges it would not be in industry's interests to levy charges on consumers as it would mean a negative consumer experience.

Consumer experience of telemarketing calls

The ACMA's latest consumer experience research states that since 2012 people are more likely to perceive telemarketing calls as annoying, that they are made at inappropriate times, and that they

¹² Consultation paper, p.11.

¹³ Discussion with ADMA, 30 November 2017.

receive too many of them. 61% of people perceive that telemarketing calls are a problem.¹⁴ This is evidence that unsolicited marketing calls are still an important issue to consumers, worthy of continued regulation and oversight by government, and reinforces the consultation paper's statement that there continues to be a "high level of community interest in the safeguards provided under the Act".¹⁵

Complaints & compliance

The consultation paper importantly states that there "...is direct and indirect evidence of alleged and actual non-compliance by entities engaged in telemarketing" and that complaints about the DNCR have been increasing in recent years.¹⁶ The ACMA Annual Report states that between 2015-16 and 2016-17 the total number of complaints about the DNCR Act and related standards rose from 23,059 to 28,259 and the total number of compliance warnings issued rose from 1,691 to 2,280.¹⁷ The data released by the ACMA illustrate that there is a need for stronger regulation surrounding telemarketing, especially in complaints, compliance, and enforcement, rather than any move to industry self-regulation. The rising complaints numbers also raise the question of whether there exists any industry body capable or willing to take on complaints and compliance activities.

¹⁴ ACMA, Consumer Experience Research, March 2017, <https://www.acma.gov.au/theACMA/Library/researchacma/Research-reports/telemarketing-calls-in-australia-consumer-experience-research>, p.1.

¹⁵ Consultation paper, p. 12.

¹⁶ Consultation paper, p.12.

¹⁷ Consultation paper, Appendix C, p. 29.

4. Commercial electronic messages and spam

Currently the ACMA regulates unsolicited commercial electronic messages under the *Spam Act 2003*. The Spam Act was originally introduced in response to a growing concern that the increasing quantity of 'spam' was a threat to the effectiveness and efficiency of electronic communication. Industry currently does not regulate any aspect of unsolicited commercial electronic messages, while the ACMA is responsible for: compliance and enforcement; education; research activities; international liaison; complaints and enquiries handling; issuing alerts; making instruments and standards; and registering industry codes (of which there are none currently). All costs are covered by the ACMA's budget appropriation.¹⁸

It is of interest to note that unlike the other two areas under consideration the Spam Act does not involve a centralised database. Consumers must opt-in and consent to receiving communications, and the Spam Act has clear requirements for an opt-out facility to be provided. In light of the comments in the section above about consumer attitudes to unsolicited communications, it is clear that consumers still value highly the protections provided by the Act, and that spam should continue to be directly regulated in this manner.

ACCAN would like to echo the comments made in relation to the DNCR in the section above in that:

- the same issues exist with identifying an appropriate industry body to take on the ACMA's current functions, and in identifying an industry body with adequate resources and funding to take on complaints and compliance activities
- it is arguably not appropriate for industry to take on an education function with regard to unsolicited commercial electronic messages
- changes in technology such as browser spam filters do not mitigate the level of harm to a level where it is appropriate for regulation to be passed to industry
- and as with DNCR, complaints about spam compliance have been rising steadily, necessitating continued strict regulation by government.

ACCAN submits that functions under the Spam Act currently undertaken by the ACMA should not be referred to industry.

¹⁸ Consultation document, p. 14.