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The Director
Consumer Policy and Privacy
Department of Broadband, Communications and the Digital Economy

Via email: DNC.consultation@dbcde.gov.au

November 2009

Re: Do Not Call Register Statutory Review

ACCAN welcomes the opportunity to comment on the operation of the Do Not Call Register.

About ACCAN

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 activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

ACCAN Goals and Activities

1. Improved accessibility, affordability and availability of communications services to all consumers;
2. Better informed consumers with access to Australian information and communications technology resources;
3. A strong, co-ordinated voice which uses our diversity as a point of strength for communications consumers, nationally and internationally;
4. Effective advocacy for consumers to Government, regulators and the industry in the development of policy, legislation and industry practices;
5. Inclusive consultation with stakeholders to identify areas and priorities for industry and/or regulatory responses;

6. Robust research to support evidence based policy development and consumer education programs;
7. Meaningful participation in regulatory and co-regulatory activities including industry codes, standards and guidelines
8. Outreach, campaigns and activities that involve consumers in the communications arena
9. Enhanced capacity for consumer representatives through information seminars, training and international engagement
10. Openness, transparency and inclusion of all parties interested in representing consumers on communications issues

Introduction

ACCAN believes that the Register is working well and has quickly become an important and popular consumer protection tool for Australian consumers. However, we do have some concerns about the effectiveness of the Register in protecting the low income and vulnerable consumers. We also believe that improvements could be made in which the Register manages the types of calls that consumers can elect to block or receive. This submission summarises our main concerns, and includes recommended improvements.

Opt-out

Question 3.1.1 Are there ways that the opt-out structure of the scheme could be improved?

ACCAN is concerned that the opt-out approach adopted for the Do Not Call Register imposes an unnecessary burden on consumers, particularly low income and vulnerable consumers.

We believe that there would be substantial benefits in moving to an 'opt-in' model for telemarketing in Australia.

We note that Australia's approach to the regulation of unsolicited commercial email (spam) in the *Spam Act 2003* (Cth) is based on an opt-in model. This approach achieves a better outcome for consumers and there is no evidence that this form of regulation has had a negative economic impact.

The participation of so many Australians in the Do Not Call Register is a strong indicator of the community's objection to the privacy intrusion caused by telemarketing. The ACMA research notes that 32% of consumers are on the Register AND nearly three out of four people not currently on the Register are interested in joining. This clearly indicates that the 'hassle' of registering is preventing a larger number of people joining. If the majority of the Australian community have expressed a desire to be left alone by telemarketers, then the Register should switch to an opt-in model.

If the Register was opt-in telemarketers would also have a greater success rate when making sales calls.

If the Register was opt-in and people still received sales calls (e.g. from overseas or from organisations breaking the law) they would more clearly recognise the call as illegitimate, and not be duped into a scam.

In addition, ACCAN is extremely concerned about the number of telemarketing campaigns that target low income and vulnerable consumers in Australia. Many of these campaigns are scams and cause significant consumer detriment. This factor should receive greater emphasis when considering the regulation of telemarketing. This is the case in overseas jurisdictions where telemarketing is regulated because of consumer protection concerns as well as privacy concerns. It is our general observation that goods and services sold via telemarketing campaigns represent a much higher risk of consumer detriment than goods and services sold by traditional means.

Some recent case studies may help to illustrate this concern:

Case study 1 – VIPtel 2008 (targeting indigenous consumers)

The Federal Court found that VIPtel Mobile engaged in multiple breaches of the *Trade Practices Act 1974* during telemarketing calls across Australia. Many customers were contracted to 24 month commitments while living in places without network coverage.

The Australian Competition and Consumer Commission (ACCC) took action following complaints from remote indigenous communities in the Northern Territory. More than 150 customers with no network coverage received refunds as a result of the case.

In making the orders Justice Reeves said:

The most egregious aspect of their conduct was in its selling its mobile phones and service plans to people living in remote areas of Australia, including remote Aboriginal communities, when the slightest enquiry on its behalf would have disclosed that those mobile phones could not connect to the GSM network because that network did not provide coverage to those remote areas of Australia.

The ACCC also noted that language problems and the 'agreeable nature' of many indigenous consumers made them an easy target.

Case study 2 – Telstra 2009 (targeting indigenous consumers)

The Indigenous Consumer Assistance Network claimed Telstra was selling inappropriate mobile phone plans to Aboriginal people in remote communities across Australia. A complaint was made after several people from Goulburn Island, off Arnhem Land's north coast, were called by Telstra representatives and sold mobile phone plans they did not understand. They thought the plans would cost \$49 a month but received bills of more than \$1000. Telstra waived the bills.

Case study 3 – Travel Scam 2009 (targeting older persons)

Older persons living mainly in Queensland and the Northern Territory were targeted in a holiday telemarketing scam. A number of people contacted Consumer Affairs authorities saying they received telephone calls about the holiday. The callers are very convincing and persistent. Money had been debited from credit cards despite the person asking the caller not to do so. Consumers received a phone call claiming they had won a free holiday to a resort at Orlando, Daytona Beach in the USA and a 3-day cruise to the Bahamas. A pre-recorded voice message asked them to dial 9. People are then connected to a 'travel consultant'. Consumers provided credit card details in exchange for a "package with more information on the prize" which never arrives. The telemarketers used high pressure tactics.¹

We note that older people are more likely to succumb to telemarketing fraud than younger people in Australia², and a US study found that 50% of telemarketing scams actively targeted older people.³

Case study 4 – Market research scam 2008 (targeting the Chinese community)

The ACCC warned members of Australia's Chinese community to beware of scammers posing as market researchers. Scammers were cold-calling Australians with Asian-sounding names and asking them to participate in some market research. The scammers told many stories, but often say they are considering opening new branches of their electrical, investment or travel businesses in Australia.

As a reward for participating, consumers are entered into a lucky draw with the offer of a chance to win great prizes. Several days later, the scammer contacts the consumer again, to notify them that they have won a cash prize and tell them what they must do to claim it. Sometimes this involved checking a website or attending a function, but it nearly always involved making an upfront payment to have the prize money released. The payment were justified as covering anything from taxes, to insurance, to legal fees.

But the scammers didn't just ask for one upfront payment – they continued to ask for more payments, only stopping when consumers realise they have been scammed. Unfortunately, many victims sent thousands of dollars and very personal details to the scammers.

¹ <http://www.caba.nt.gov.au/justice/consaffairs/media/documents/CA%20press%20release_Holiday14109.pdf>

² See Russell G. Smith, *Fraud & Financial Abuse of Older Persons*, Australian Institute of Criminology, No. 132 91999), <<http://www.aic.gov.au/documents/0/B/7/%7B0B74C6E7-9241-4D54-903D-2B1E084FBE77%7Dt132.pdf>> and Glenn Muscat, Marianne James and Adam Graycar, *Older People and Consumer Fraud*, Australian Institute of Criminology No. 220, <<http://www.aic.gov.au/documents/B/F/4/%7BBF470867-F031-490E-B80C-F05494A7DBA5%7Dt220.pdf>>.

³ United States Congress, *Telemarketing and Consumer Fraud and Abuse Prevention* (2008), <<http://uscode.house.gov/download/pls/15C87.txt>>.

Consent

Question 3.2.1 Are there ways that express consent could be improved?

The *Do Not Call Act* 2006 includes an exception for express consent. Express consent is deemed by the Act to expire after three months, unless there is has been specific consent for a longer period.

ACCAN has significant concerns about relying on consent in relation to telemarketing. In August 2009 ACCAN released a new study on Informed Consent in the Telecommunications Sector.⁴ That report found that there are major problems with the use of consent in Australia:

- Regulators and consumer organisations reported significant concerns regarding consent and vulnerable consumer groups, including the limited capacity of some consumers to consent to communications contracts;
- There is no central / consistent guidance available to industry on consent requirements, or best practice guidance on obtaining consent from consumers; and
- Current industry practice in obtaining consent is extremely diverse and often ineffective.

That report also found that regulators, complaints schemes, community advocacy organisations and casework organisations reported receiving a total of more than 40,000 complaints each year specifically on consent – and that study was limited only to one sector (communications).

Great care should be taken in relying on consumer consent to over-ride a registration on the Do Not Call Register. It is much more likely that membership on the register is more meaningful to the consumer than any purported consent they have ‘signed’ hidden amongst the complex paperwork presented for many goods, services, competitions and surveys. Where a consumer has agreed to a general marketing clause, they may only be expecting to receive marketing materials by mail – not telemarketing (especially if they are on the Register).

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

- Express consent should require specific consent to the receipt of telemarketing calls (general consent to ‘marketing’ should not be acceptable);
- The telemarketing consent clause should be prominent;

⁴ Australian Communications Consumer Action Network, *Informed Consent in the Telecommunications Sector*, August 2009.

- The telemarketing consent clause should be separate from other consent requirements, so that a person can consent to other uses of their information without consenting to telemarketing; and
- Consent requirements should recognise the challenges in ensuring that some vulnerable consumers have the capacity to consent.
- Consent must be recorded and demonstrable.

Question 3.2.2 Are there ways that inferred consent could be improved?

ACCAN believes that the inferred consent exception should be removed. Consumers have to make a conscious effort to register on the Do Not Call Register. This preference should not be over-turned by the vague notion of inferred consent.

Although consumers may expect some follow up and on-going contact from current service providers (such as banks and utility companies), this does not mean or infer that they are willing to receive telemarketing calls. Acceptable contact might include customer service issues and product issues, but should never include sales.

The inferred consent exception is a very poor reflection of the wishes of consumers. It undermines confidence in the Do Not Call Register.

Registration period

Question 3.3.1 Are there ways that the registration period could be improved?

The current Do Not Call Register registration period is 3 years, and many consumers will soon need to renew their registrations in order to stop unwanted telemarketing calls (the third anniversary of the register is May 2010).

This three year registration period is unnecessary. In other jurisdictions (such as the UK and USA), the registration periods have been removed, so that registration remains permanent. If the number is deactivated (for example when a person moves house) then the Register is notified and updated. There is no evidence of any problems with this system in other jurisdictions.

ACCAN submits that consumers will not change their mind about telemarketing. Consumers can already remove their number from the Register at any time and there is no evidence they have chosen to do so. Even if there is a very rare case where a person is living in a household that is on the register without realising it, we submit that there is little possibility that they will be concerned or unhappy about the absence of telemarketing calls.

The registration requirement achieves absolutely no public benefit objective or goal. It does, however, represent a significant risk to the efficiency and popularity of the Register.

It is essential that the renewal requirement is removed immediately, so that no money or effort has to be wasted in May 2010 contacting Register members. ACCAN is also concerned that the requirement for ACMA to contact members regarding renewals will make the register more vulnerable to Internet phishing scams. Phishing scams are a common problem with Do Not Call Registers in other jurisdictions and there are already several phishing scams targeting the Australian register.

Exemptions

Question 3.4.1 Are the current exemptions appropriate and relevant?

ACCAN believes that the entire approach to exemptions should be reviewed.

There are too many broad exemptions in the current *Do Not Call Register Act (2006)* and they do not reflect the wishes of consumers.

ACCAN recommends that the Government consider a more sophisticated approach to exemptions, allowing individual consumers to select and manage the types of calls they are willing to receive. Ideally this approach would occur within an opt-in arrangement, but it can also work in the current opt-out context.

ACCAN would prefer consumers to be able to register their individual preferences (using a slightly expanded version of the current website, mail or phone options). They could block all telemarketing, or they could chose to limit their block to particular categories. For example, it is possible that a reasonable proportion of consumers want to block commercial telemarketing, but may be willing to allow charity calls. However some consumers wish to block all calls, because of the intrusive nature of calls.

This approach will be an excellent protection for privacy, but should also increase the effectiveness of specific campaigns (such as charity or market research), as organisations will not be calling people who have indicated they have no interest in those campaigns.

This approach will also benefit small businesses (who will soon be able to Register their numbers) as some small businesses may wish to manage the categories of calls they receive.

In addition, some of the current categories of exception seem difficult to justify on any public interest grounds. In particular the political parties and candidates exemption cannot be justified, considering the allowances and exemptions which already apply to politicians to support their campaign activities.

Research Calls

Question 3.5.1 Should 'research calls' be defined in the Act to clearly distinguish between calls with a commercial purpose and calls with a research purpose?

ACCAN submits that the Act and relevant guidance should be strengthened to prohibit calls with more than one purpose, where one of the purposes is commercial. Consumer groups suggested at the time that stringent definitions of what constituted a research call was necessary, to ensure dual purpose research calls did not proliferate. Clear definitions are always useful to assist compliance.

Number checking process

Question 4.2.1 Is the registration process effective and easy to use?

The registration process is effective. (See comments below on the Do Not Call Register website).

Question 4.2.2 Is the washing process effective and easy to use?

ACCAN is unable to comment on this issue.

Question 4.2.3 Are there ways to improve either of these processes?

See comments below on the Do Not Call Register website.

Compliance with the Act

Question 4.3.1 Are there ways that the complaints handling process could be improved?

Although there is little experience or data so far, the complaints handling process appears to be effective. We note however that consumers still regularly express dissatisfaction with the broad range of exemptions to the DNCR.

Question 4.3.2 Are the penalties in the Act appropriate and a sufficient deterrent?

Although there is little experience or data so far, the penalties appear to be appropriate. Swift enforcement action appears to be having a positive impact and encouraging adherence to the Act.

Education and Awareness

Question 4.4.1 Do you have any comments on the education and awareness activities undertaken by ACMA?

ACCAN is concerned about the low profile of ACMA and industry education and awareness activities in relation to the Do Not Call Register. In ACMA's recent research it is clear that the main way people learn about the register is through 'word of mouth'.⁵

The number of registrations could be higher and would benefit from a higher profile campaign. Also, removing the registration period would help to make the register more attractive for consumers.

Question 4.4.2 Is information on the Register easy to find and understand?

Most information on the Register is easy to find and understand. However, there are some minor issues with the information provided on the main Do Not Call Register website.

The registration period and the requirement to renew (and the process) do not receive prominent coverage on the website. ACMAs' recent community research has shown that Australian consumers are not aware of the registration period or the process for renewal.⁶ We expect that ACMA has a public awareness campaign planned though, and would be pleased to assist in the promotion of the renewal process where possible. As we noted elsewhere though, the best policy option is to not require renewal, and allow consumers to opt in to receiving telemarketing contacts.

Information on the exclusions is quite limited. For example the website says that 'education institutions' are excluded – but this is not correct. The education exception is, in fact, limited to situations where the education institution calls a current or existing student. The Question and Answer section of the Do Not Call Register website should be reviewed to ensure that the information accurately reflects the details of the *Do Not Call Register Act* (2006), and does not (unintentionally) mislead telemarketers or consumers about the scope of the Register.

The Do Not Call Register website also has many positive features:

- The website is easy to access and is written in plain language that is easy to understand;
- The website includes clear and prominent warnings about current issues and scams;

⁵ Australian Communications and Media Authority, *Community Attitudes to Unsolicited Communications*, 24 August 2009, <http://www.acma.gov.au/webwr/_assets/main/lib310210/unsolicited_communications_report.pdf>.

⁶ Australian Communications and Media Authority, *Community Attitudes to Unsolicited Communications*, 24 August 2009, <http://www.acma.gov.au/webwr/_assets/main/lib310210/unsolicited_communications_report.pdf>.

- The registration process includes facilities for people with disabilities; and
- Information is available in Italian, Greek, Chinese, Arabic and Vietnamese.

In the future, some additional translations could appear on the site. See for example the numerous translations of basic material at www.privacy.gov.au.

Industry codes and standards

Question 4.5.1 Should industry codes and standards apply to organisations outside of the telemarketing industry that are causing telemarketing calls to be made?

The expansion of industry codes and standards would appear to be a useful change.

Question 4.5.2 Should the process for making industry codes and standards be faster, more flexible and more responsive to community needs?

ACCAN and other consumer organisations do have concerns regarding code-making processes. However, these concerns need to be addressed on a national basis, and this current review may not be the best forum for a discussion on this issue.

Question 4.5.3 Should the Register include additional rules requiring telemarketers to:

- keep records of their calls?
- keep internal do not call lists?
- limit the number and frequency of silent calls?

Consumer groups have long argued that marketers should be required to reveal their calling line identification. In our view, silent call marketing should be prohibited, as should missed-call marketing, which is a very unethical approach to marketing. When missed-call marketing arose in Australia several years ago, there was widespread confusion amongst regulators about who complaints should be directed to, and whether or not the practice was in breach of existing laws.

The issue of missed call marketing has been a major problem in other jurisdictions. In the UK the problem has resulted in enforcement action against numerous companies, and the imposition of a 3% limit on abandoned calls. In the UK this practice is treated as a breach of the prohibition on persistent nuisance calls.

In the US the problem has resulted in restrictions on the use of predictive diallers and a 5% limit on abandoned calls.

It is important to prohibit this technique as a deliberate marketing or market research method, which shifts costs onto the consumer. This could be achieved by imposing a prohibition on instructions to staff or contractors to deliberately make silent calls for any marketing related purpose, combined with a prohibition on the inclusion of any marketing material in the returned call message.

The key to stamping out this practice, before it takes hold in Australia, is to address the issue of the returned call message – usually this is an answer machine or interactive message service. The industry should be required to use a standard script in the returned message, stating words to the following effect:

If you are calling this number in an attempt to return a missed call, please note that the original call was only from a marketing company. It was not an important matter and you do not need to take any further action. We apologise for the inconvenience of this call.

If you would like to avoid telemarketing calls you can register on the Government's National Do Not Call Register by calling 1300 792 958. There is no charge for registering.

If you have any concerns or queries about this call you can leave your name and number and a customer service representative will contact you shortly.

This requirement will act as a significant disincentive for missed-call marketing.

It should also be specified (in the Act or the relevant Code) that any returned calls do *not* amount to consent (inferred or express) for further marketing.

It is also important to limit abandoned calls because of the intrusion and nuisance they cause. The limit should be set at 1-2%, not the 5% proposed in the discussion paper. We note that other jurisdictions also prohibit calling the same number again in a 72 hour period, and we recommend this be adopted in Australia.

Concluding comments

ACCAN welcomes the opportunity raised by the statutory review to contribute to the expansion and improvement of the Do Not Call Register.

ACCAN believes it is essential that the Register is amended so that:

- The Register moves to an opt-in model
- Inferred consent is removed as an exemption and the test for express consent is strengthened;
- Consumers can manage exclusions on a category by category basis;
- The 3 year registration period is removed;
- The Register is expanded to include small business numbers and fax numbers; and

— Missed call and silent line marketing is banned.

Should you require more information, please contact the ACCAN office on (02) 9288 4000.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Allan Asher". The signature is written in a cursive, flowing style.

Allan Asher

Chief Executive Officer

Australian Communications Consumer Action Network