

Making the right call



Australian Government
Australian Communications
and Media Authority



Do Not Call
Register

Issue No.6 –August 2008

Welcome to the sixth edition of **Making the right call**, the Do Not Call Register newsletter. This edition focuses on complaints and recent investigations of alleged breaches of the Do Not Call legislation.

ACMA's Telemarketing Investigations Section (TIS) handles consumer complaints and conducts investigations into alleged breaches of the Do Not Call Register Act 2006 (DNCR Act) and the Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 (Industry Standard).

TIS' primary focus is reducing the number of telemarketing calls that people on the register receive. TIS staff are happy to answer questions, discuss any compliance issues you may be having or hear about the work you have done in response to a letter you have received from us. You can contact TIS at dncinvestigations@acma.gov.au.

Complaints about calls received

In the first year of the register's operation, consumers lodged around 30,000 complaints about calls they received. Of these, 24,000 involved potential breaches of the legislation and were forwarded by the register operator to ACMA for action.

TIS' current approach to compliance in the Do Not Call area is to try and resolve a matter informally, where appropriate. This approach generally involves three steps:

- ▶ Advice: ACMA writes to businesses that have been the subject of complaints, informing them that ACMA has received complaints and advising them of their legal obligations.
- ▶ Warning: Where ACMA receives further complaints that suggest that a business has failed to adequately address compliance issues in response to ACMA's initial advice, ACMA issues a warning letter that requires action to be taken to improve compliance by a nominated date, after which further complaints received will be formally investigated.
- ▶ Investigation: ACMA may commence a formal investigation under the Telecommunications Act if ACMA considers that there may be systemic problems with a business' compliance arrangements.

Of course, ACMA may move directly to the warning or investigation stage if the circumstances warrant an immediate response or if the business has previously been the subject of enforcement action.

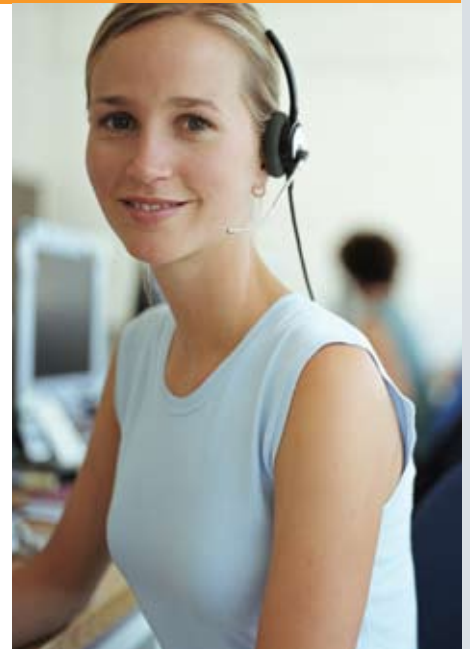
Since the DNCR Act took effect, ACMA has sent more than 800 advisory and warning letters to businesses.

Investigations by ACMA

To date, ACMA has commenced 20 formal investigations into alleged breaches of the DNCR Act—these investigations all relate to cases where ACMA:

- ▶ received complaints from consumers who stated that they received a telemarketing call/s from the business more than 30 days after registering their number;
- ▶ issued an advisory and/or warning letter to the business, recommending that it review its procedures to ensure that it complied with the DNCR Act; and
- ▶ continued to receive complaints about the business.

So far, two of these investigations have been finalised. ACMA found in both cases that the business had caused calls to be made to numbers on the register. ACMA found that the businesses engaged third party call centres to make calls on their behalf, and failed to take adequate steps to ensure that those call centres did not make calls in breach of the DNCR Act.



Important information

For more information contact the Do Not Call Register on 1300 785 749.

www.donotcall.gov.au

Industry assistance line
Tel: 1300 785 749

Post: PO Box 42
North Melbourne VIC 3051

Email: enquiries@donotcall.gov.au

Consumer registrations to date
2,484,610



Investigation case study

During June 2007, ACMA received several complaints about Company A from consumers who stated that, after listing their number on the register, they received calls offering the company's telecommunications products. ACMA sent a warning letter to Company A, advising that the number of complaints received suggested that the company's compliance with the DNCR Act was inadequate. Company A did not make any contact with ACMA about the warning letter.

As ACMA continued to receive complaints from consumers about Company A, ACMA commenced a formal investigation.

During the investigation, it was established that Company A:

- ▶ engaged four offshore call centres to make calls on its behalf;
- ▶ had advised the call centres of the introduction of the DNCR Act and had incorporated DNC-related terms into some of its contracts; and
- ▶ had introduced procedures to comply with the DNCR Act, which included setting up a washing account and forwarding washed lists to its call centres for calling.

ACMA's investigation found that a call centre engaged by Company A had made more than 5,000 telemarketing calls to numbers that had been on the register for more than 30 days. ACMA reviewed Company A's submissions and considered the steps the company had taken to comply with the DNCR Act. ACMA concluded that:

- ▶ Company A had caused telemarketing calls to be made to numbers on the register;
- ▶ while Company A had established some procedures to comply with the DNCR Act, these procedures were not adequate to protect against breaches occurring, and in any event, were not properly implemented or suitably supervised;
- ▶ Company A had not adequately overseen the conduct of its offshore call centres;
- ▶ after receiving ACMA's warning letter, Company A failed to take adequate steps to identify the source of the problem and remedy the issue; and
- ▶ while it had been made aware through ACMA's warning letter that its offshore call centres may not have been complying with the DNCR Act, Company A did not take any steps to enforce the DNC-related terms of its agreements with those call centres.

Company A relied on the defence that it had taken reasonable precautions and exercised due diligence to avoid contraventions of the DNCR Act. Under the DNCR Act, a person who wants to rely on a statutory defence bears the onus of proving that defence. This means that they must adduce or point ACMA to evidence that suggests a reasonable possibility that the matter exists or does not exist. In ACMA's view, and considering the evidence provided in support of the defence, the steps the company took were insufficient to establish that the company's actions had equated to taking reasonable precautions and exercising due diligence to avoid the contraventions.

ACMA is currently finalising its decision regarding enforcement action in this matter. If the matter proceeds to the Federal Court and Company A is found responsible for the alleged calls, the court could impose pecuniary penalties in excess of \$8 million. If ACMA were to issue infringement notices for each of the alleged contraventions, the penalties specified under the Act could exceed \$3 million.

Enforcement of the DNCR Act

If ACMA carries out an investigation and finds that a person has breached the DNCR Act, it has a number of enforcement options available, including:

- ▶ issuing a formal warning;
- ▶ accepting an enforceable undertaking from the person to engage in, or refrain from, certain activities to ensure that they comply with the DNCR Act;
- ▶ giving an infringement notice to the person, which specifies a financial penalty;
- ▶ taking action in the Federal Court or Federal Magistrates Court, seeking to have a pecuniary penalty imposed; and
- ▶ applying to the Federal Court or Federal Magistrates Court for an injunction.



Financial penalties for breaches of the DNCR Act can be substantial. For instance, under the DNCR Act, the penalty that may be imposed in an infringement notice is equal to \$2,200 per call, up to a maximum penalty of \$110,000 per day. ACMA generally investigates the conduct of businesses over a period of four to 12 weeks. Because of the large volumes of calls made by telemarketers, a systemic compliance problem can result in the company being exposed to substantial penalties.

Practical tips for industry

If you are engaging a third party to make calls on your behalf, you may be liable for their conduct if they call registered numbers. If you have an outsourcing arrangement, you should protect yourself by:

- ▶ establishing clear and enforceable contractual provisions that require the third party to comply with the DNCR Act and Industry Standard (as required by subsection 12(1) of the DNCR Act), and enforcing those provisions if you find that the third party is not complying with them;
- ▶ establishing thorough, workable procedures for complying with the DNCR regulatory framework and ensuring that you and the third party understand your respective obligations to wash lists against the register;
- ▶ establishing procedures to ensure that washed lists are not used more than 30 days after being returned by the register operator;
- ▶ carefully overseeing the conduct of the third party to ensure that the procedures you have established are being followed; and
- ▶ ensuring that you are able to easily access and review the disposition records and/or calling data of the third party if necessary, so that you can audit their performance and satisfy yourself that registered numbers are not being called.

Good record keeping is an essential part of due diligence. If you do not retain records of the calls you and/or your outsourced call centre are making, you will not be able to follow up on potential compliance problems and fix procedural issues as they arise.

Good record keeping will also enable you to reconcile the disposition or calling records with your corresponding 'washing' records or the register itself—an easy way of identifying whether you or your outsourced call centre have made any calls inappropriately.

If you receive an advisory or warning letter from ACMA, take it seriously. Even one or two complaints can be a symptom of a much bigger compliance problem. These early warnings provide you with an opportunity to proactively fix a problem before it becomes a bigger problem.



To receive an electronic copy of *Making the right call*, please email donotcalltaskforce@acma.gov.au or call (03) 9963 6888. Please pass on these details to anyone who would like to register for the newsletter. If you would like to be removed from the list to receive *Making the right call*, please email donotcalltaskforce@acma.gov.au with the subject heading 'unsubscribe'.