

Do Not Call Register—Consent

Information for industry

Introduction

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The Do Not Call Register (the register) provides Australians with the opportunity to 'opt out' of receiving most telemarketing calls and marketing faxes.

However, if a person (or a nominee of that person) has provided consent to an organisation to be contacted they may still receive certain telemarketing calls and marketing faxes.

This information sheet provides an overview of the consent provisions of the *Do Not Call Register Act 2006* (the Act).

Types of consent

Consent may be either express or inferred. Consent can only be provided by the relevant account-holder or a nominee of the relevant account-holder. A nominee is a person nominated in writing by the relevant account-holder or a 'deemed nominee'.

If a person provides a number to a business for the purpose of being contacted by that business (either by phone or fax), the person is deemed to be able to provide consent, even if they are not the relevant account-holder.

This means that when obtaining either express or inferred consent from a person, a business is not required to check whether the person is the relevant account-holder.

This 'deeming' arrangement only applies where the person, or someone acting on their behalf, provides a number to an organisation for the purpose of providing consent.

The business has the evidential burden in relation to proving consent. This means that if:

- a business makes a call or sends a fax to a number on the register, on the basis that the consumer 'consented' to receive the call or fax, and

- the consumer does not believe they consented to receive the call or fax,
- The business must be able to provide documentary evidence to satisfy that it had obtained consent at the time the telemarketing call or marketing fax was received.

A consumer can contact a business directly to withdraw their consent to receive future calls from that business.

Express consent

Express consent is where a person clearly tells or indicates to a business that they are happy to receive calls or faxes from them, and directly provides their number to the telemarketer or fax marketer for that purpose.

For example, express consent is provided where a person ticks a box on a form, agreeing to receive future communication (either by phone or by fax) from a particular business (providing that consent was entered into freely).

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

An example of what may not amount to express consent is where a person completes a competition form, and fails to tick a box advising that they do not wish to receive future telemarketing calls or marketing faxes.

Duration of express consent

Express consent will be taken to last for a period of three months from the date it was given, unless the consent was expressed to have been for a specified period or an indefinite period.

Inferred consent

Inferred consent is where a business has reason to believe that a person is willing to receive a call, based on:

- the conduct of the person, and

- the business or other relationship that exists between the person and the business.

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

- Existing business relationships.** A business relationship may continue to exist in the absence of ongoing monetary transactions. For example, a person may pay to join a scheme that entitles them to access benefits or discounts for a fixed period. A business relationship may be taken to exist for the period of the membership, even if the person did not access the benefits or discounts.
- Existing relationships of a non-business kind,** such as a friend or family member.

It is also necessary to look at the nature of the consent on a case-by-case basis, and assess what sort of telemarketing calls or marketing faxes a person would reasonably expect to receive under the inferred consent provisions.

For instance, it is possible that a person who holds a 'XYZ Bank' credit card may reasonably expect to receive calls or faxes about 'XYZ Bank' home loans or 'XYZ Bank' savings products.

It is less likely to be reasonable for a person with a 'XYZ Bank' credit card to be cold called or faxed by 'Lucky's Financial Services', regardless of the subsidiary relationship these entities might share.

Where a person indicates that they do not wish to receive marketing communication from the business, consent ends immediately and can no longer be inferred.

Whether a business relationship continues to exist

Business relationships may end for a number of reasons, including situations in which a customer fails to renew an account or contract. It may not always be clear whether the customer's failure to renew was an oversight or a deliberate choice to end the business relationship. This may affect whether a business can rely on an existing business relationship to infer consent to contact the customer to ascertain whether the customer wishes to renew the account or contract.

In considering whether consent may be inferred in these circumstances, a number of factors will be relevant. These include, but are not limited to, the following.

- The amount of time which has passed between the account or contract ending and the contact from the business being made.** A call (or fax) made shortly after the end of the contract is more likely to fall within the context of an existing business relationship than one made some months after the event.

- The circumstances in which the contract came to an end.** A contract or an account that lapses for failure to renew may provide a legitimate reason to make a reminder call. However, where a contract is ended in circumstances in which the business knew, or ought to have known, that the person was making a deliberate decision to end the business relationship, consent may not be inferred.
- The particular conduct of the person. If a customer has expressed dissatisfaction with a service over time, this may indicate an intention to bring the relationship to an end.

Duration of inferred consent

Inferred consent has no set duration, and will be assessed on a case-by-case basis.

Consent will not be inferred based on:

- the previous acceptance by a person on the register of telemarketing calls from a company, and
- the publication of a number, for instance in the telephone directory, or through an internet site.

Things to remember

- As a business, the burden of establishing a reasonable probability that consent was given lies with you in the event of any complaint.
- Obtaining express consent where possible, as opposed to relying on inferred consent, will provide you with greater certainty in the event of any complaint.
- If you wish to have express consent continue for longer than three months from the date it is given, you will need to make this clear in obtaining consent from the person.
- If you are relying on inferred consent to make telemarketing calls or send marketing faxes to a person the type of contact must be one that would be reasonably expected under those particular circumstances.
- Consent will generally be assessed on a case-by-case basis.

Further information

Further information about the register can be found at www.donotcall.gov.au.

Please note: this document is intended as a guide only and should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases.

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