



# Do Not Call Register—Consent Information for industry

## Introduction

The Do Not Call Register provides Australians with the opportunity to 'opt out' of receiving certain telemarketing calls. However, a person making a telemarketing call or causing a telemarketing call to be made (telemarketer) is still permitted to call a number on the register if the telephone account holder or a person nominated as described below has consented to the call. This information sheet provides an overview of the consent provisions of the *Do Not Call Register Act 2006*.

## Types of consent

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

If a person provides a telephone number to an organisation for the purpose of being contacted by that organisation, the person is deemed to be able to provide consent, even if they are not the telephone 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 telephone account holder.

This 'deeming' arrangement only applies where the person, or someone acting on their behalf provides a telephone number to an organisation for the purpose of providing consent. So, if an organisation obtained a telephone number from elsewhere, it would first have to establish whether the person is the telephone account holder before obtaining consent.

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

- a telemarketer makes a call to a number on the register, on the basis that the consumer 'consented' to receive the call and
- the consumer does not believe they consented to receive the call

the telemarketer must be able to produce evidence that suggests a reasonable probability that the consumer consented to receiving the call. 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 telemarketer that he or she is happy to receive calls from them, and directly provides his or her telephone number to the telemarketer for that purpose.

For example, express consent is provided where a person ticks a box on a form, agreeing to receive future telemarketing calls 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 telemarketer that they consent to receiving telemarketing calls.

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.

## 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 telemarketer 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 telemarketer.

Firstly, there must be an existing relationship between the telemarketer 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 him or her 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.

However, 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 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 about 'XYZ Bank' home loans or 'XYZ Bank' savings products.

However, it is less likely to be reasonable for a person with a 'XYZ Bank' credit card to be cold called 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 telemarketing calls from the organisation, 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 telemarketer can rely on an existing business relationship to infer consent to call 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 telemarketing call being made.** A call made shortly after the end of the contract is more likely to fall within the context of a 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 telemarketer 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 telephone number, for instance in the telephone directory, or through an internet site.

### **Things to remember**

- As a telemarketer, 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 to a person, the type of call made must be one that would be reasonably expected under those particular circumstances.
- Consent will generally be assessed on a case-by-case basis.

### **Note**

The information in this document is intended to provide general guidance only about what may or may not constitute consent under the *Do Not Call Register Act 2006*. You should always seek independent legal advice in considering whether your particular business practices comply with the legislation and other telemarketing requirements.

### **Further information**

Further information about the Do Not Call Register can be found at [www.donotcall.gov.au](http://www.donotcall.gov.au).

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