

Do Not Call Register—Information for the real estate industry

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

The *Do Not Call Register Act 2006* (the Act) prohibits a person from making, or causing unsolicited telemarketing calls to be made to a number on the Register, unless consent has been obtained for the call.

In addition, the Telecommunications and Research Calls Industry Standard 2007 (industry standard) sets rules about when and how telemarketing and research calls may be made. The industry standard applies to any person who makes telemarketing or research calls regardless of whether they are exempt from the requirements of the Act.

Who needs to comply with the requirements?

The Act applies to anyone who makes telemarketing calls, or causes telemarketing calls to be made (telemarketer). The industry standard applies to anyone who makes telemarketing or research calls.

The Act and industry standard apply to all businesses and call centres that operate through telephone marketing. This includes real estate agents.

In broad terms, the Act defines a telemarketing call to be a voice call made to an Australian telephone number with a purpose of:

- offering, supplying, providing, advertising or promoting
 - o goods or services
 - o land or an interest in land,
 - o a business opportunity or investment opportunity, or
- soliciting donations.

Some examples of calls commonly made by the real estate industry that would be considered telemarketing calls include:

- a call to offer a free appraisal of a person's property
- a call to inform a consumer about a property for sale, or a property recently sold
- a follow up call to a person after they have viewed or inspected a listed property, either by appointment or at an open inspection
- a call to solicit the listing of a person's property.

Solicited calls (including calls made in response to an inquiry or request by a customer, or potential customer) are not considered to be telemarketing calls, and may therefore be made to a number on the register.

Consent to make a telemarketing call

A person is permitted to make a telemarketing call or cause a telemarketing call to be made to a number on the register if the telephone account holder or their nominee consented to the call.

Consent may be express or inferred.

Express consent

Express consent is where a person clearly informs a telemarketer that they are willing to receive calls from them, and directly provides his or her telephone number to the telemarketer for that purpose.

A written record of express consent is the best evidence of permission to make telemarketing calls. For example, 'open for inspections' may provide a real estate agent with an opportunity to gain express consent to make follow up calls to people who have attended.

Examples of methods for obtaining express consent include:

- asking people to sign an attendance sheet, which clearly states that, by signing the sheet and providing their telephone number, they agree to receive telemarketing calls
- providing a check box for people to tick, with a clear statement next to the box advising that by ticking the box and signing their name, they consent to receive telemarketing calls on the number they have provided.

The burden of establishing evidence that suggests a reasonable possibility that consent was given rests with a telemarketer in the event of any complaint. This means that it is in a real estate agent's interest to keep clear records of express consent.

Consent obtained by duress or deception would not satisfy the legislative requirements. Examples of methods that may not be adequate to establish express consent include:

- where a person signs an attendance sheet, but it is not made clear to the person that, by doing so, he or she is giving consent to receive telemarketing calls (for example, because the relevant text is too small, or is located at the bottom of the sheet where it may not be apparent to the person signing the sheet)
- where a sign is displayed at an open inspection stating that, by attending the inspection, a person is giving his or her consent to receive telemarketing calls—in such cases, it may not be clear whether a person agreed to, or even saw, the statement on the sign.

Express consent is 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.

Where a real estate agent wishes to rely on express consent to make telemarketing calls for longer than three months, the longer duration must be made clear to the person providing consent.

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 and/or other relationships that exist between the person and the telemarketer.

In order to establish inferred consent, there must be an existing relationship (at the time of the telemarketing call) between the telemarketer and the person called.

It is important to distinguish between a continuing business relationship and a one-off transaction. In the case of a one-off transaction, it is likely that consent can only be inferred for the duration of the transaction.

An example of a one-off transaction may be where an agent is acting for a vendor in selling their house. Once the sale is concluded and the relationship comes to an end, it may no longer be reasonable to infer the person's consent to receive telemarketing calls from the agent.

Likewise, where a person purchases a house sold through an agent, it is unlikely to be reasonable to infer the person's consent to receive a telemarketing calls some months after settlement. However, in a letting situation, where there is an ongoing relationship between the agent and the lessor, it may be reasonable to infer that a lessor may wish to receive a call about the availability of other relevant services offered by the agent.

Of course, in each case, additional circumstances could change whether it is reasonable to infer consent. Telemarketers should seek their own legal advice if they are unsure about whether there is inferred consent in particular circumstances.

It is important for real estate agents to obtain express consent where possible, rather than relying on inferred consent, as this will provide the telemarketer with greater certainty in the event of any complaint.

Checking the Do Not Call Register

The Australian Communications and Media Authority (the ACMA) has established a system for people who make telemarketing calls, or cause telemarketing calls to be made, to check (or 'wash') their calling lists against the register. This system provides an effective way for people to avoid contravening the requirements of the Act by calling numbers on the register. People can access the system to establish a washing account by visiting www.donotcall.gov.au. A subscription fee is payable, depending on the number and size of the washing transactions.

Where a telemarketing call is made to a number on the register, the call recipient can make a complaint to the ACMA. The ACMA will investigate the matter and assess whether a breach has occurred.

Use of external data providers and 'pre-washed' lists

Some real estate agents source calling lists from third parties such as data providers or franchise groups. These lists are often provided on the basis that they have already been washed against the register and are therefore valid for use.

In these cases, liability for any breaches of the Act will lie with the person who made the call or caused the call to be made, not the person who provided the list. For this reason, the ACMA recommends that all businesses should be responsible for washing their own lists against the register.

Agents who use lists provided by external providers may wish to take steps to minimise the risks involved by ensuring that they:

- have appropriate contracts with external list providers that take into account the legislative requirements
- obtain the precise date that the list was washed and proof of the wash
- call the numbers provided within 30 days of the stated washing date.

Further information

Further information sheets are available at www.acma.gov.au/donotcall on the following topics:

- An overview of the Do Not Call arrangements
- What is a telemarketing call?
- Consent
- What calls could I still receive?
- The industry standard
- The ACMA complaints and investigations processes
- Penalties and enforcement
- Calls to business numbers

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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