

Enforceable Undertaking by Dodo Australia Pty Limited

Telecommunications Act 1997

Section 572 B

The commitments in this undertaking are given to the Australian Communications and Media Authority (ACMA) by

Dodo Australia Pty Limited (Dodo)

ACN 097 636 970

Level 14, 600 St Kilda Road

Melbourne, Victoria 3004

1. DEFINITIONS AND INTERPRETATIONS

DNCR Act means the *Do Not Call Register Act 2006*;

Independent Consultant means the Independent Consultation appointed under clause 3.13 of this Undertaking and approved by ACMA.

Industry Standard means *Telecommunications (Do Not Call Register) Telemarketing and Research Calls) Industry Standard 2007*;

Register means the Do Not Call Register established by ACMA under s.13 of the DNCR Act;

Register Operator means Service Stream Pty Limited, the contracted service provider appointed by ACMA to maintain the Register;

Telecommunications Act means the *Telecommunications Act 1997*;

Telemarketing contract, arrangement or understanding means a contract, arrangement, or understanding, between Dodo and another person, where under the contract, arrangement or understanding, any person (whether or not a party to the contract, arrangement or understanding) is:

- a. obliged to make telemarketing calls, or to cause telemarketing calls to be made; or
- b. in fulfilment of the contract, arrangement or understanding, reasonably likely to make telemarketing calls, or to cause telemarketing calls to be made.

Washing means the process by which an access-seeker accesses the Register in accordance with section 19 of the DNCR Act.

For the purposes of this Undertaking, terms that are defined in the *Telecommunications Act* and the *DNCR Act* have the same meaning in this undertaking as they have in the respective Acts.

2. BACKGROUND

2.1 ACMA's Role

Under section 8 of the *Australian Communications and Media Authority Act 2005*, ACMA is, among other things, responsible for promoting responsible practices in relation to the making of telemarketing calls and such other functions as are conferred on it under the *DNCR Act* and the *Telecommunications Act*.

2.2 Details of Conduct

Between 20 July 2007 and 18 October 2007, Dodo made or caused to be made, telemarketing calls to Australian numbers, which included numbers registered on the Register. Dodo engaged three call centres to make calls on its behalf. In doing so, Dodo failed to exercise due diligence to ensure that it did not cause calls to be made to numbers that were registered on the Register.

2.3 ACMA's Investigation

Between 20 July 2007 and 18 October 2007, ACMA received 119 complaints from persons who stated that they received telemarketing calls from Dodo at a time that the number called had been registered on the Register for more than 30 days. On 30 November 2007, ACMA commenced an investigation into alleged contraventions of the *DNCR Act* by Dodo during the period between 20 July 2007 and 18 October 2007 (the relevant period).

In its investigation, ACMA considered whether Dodo had caused telemarketing calls to be made in contravention of the *DNCR Act*.

2.4 ACMA's Concerns

As a result of ACMA's investigation, ACMA has reasonable grounds to believe that Dodo contravened subsection 11(1) of the *DNCR Act* by causing 67 telemarketing calls to be made to Australian numbers that were registered on the Register during the relevant period.

2.5 Acknowledgement of Concerns

Dodo acknowledges ACMA's concerns as set out in paragraph 2.4. It is noted that ACMA has a number of enforcement options as a result of an alleged contravention of subsection 11(1) of the *DNCR Act*, including issuing an Infringement Notice or applying to the Federal Court or Federal Magistrate's Court for civil penalty orders.

3. UNDERTAKINGS

In addition to the issuing of an Infringement Notice, ACMA has, under section 572B of the Telecommunications Act, accepted the following undertakings offered by Dodo to ensure compliance with the Act in the future:

Record Keeping

- 3.1 Dodo undertakes to make and retain electronic records of all telemarketing calls it makes or causes to make for a period of 3 years from the date of this Undertaking (**Call Records**) in accordance with the provisions set out in paragraphs 3.2 to 3.7.
- 3.2 The Call Records must record as a minimum, the following information in relation to each telemarketing call:
 - a. the time and date of the call;
 - b. the telephone number called;
 - c. whether the call was answered;
 - d. the duration of the call;
 - e. the purpose of the call, including:
 - i. whether the call was connected with any particular marketing strategy or campaign and, if so, the details about the strategy or campaign; and
 - ii. whether any other entity was involved in causing the call to be made, or to be attempted.
 - f. if the call was answered – whether the person who answered the call agreed to enter into any contract, arrangement or understanding with Dodo;
 - g. the name or identifier of the call operator who made the call, or attempted to make the call on behalf of Dodo.
- 3.3 Dodo undertakes to retain the Call Records for each telemarketing call for at least 12 months from the date of the call.
- 3.4 Dodo undertakes to make and retain records of all lists of telephone numbers provided to, or obtained or created by, Dodo for a period of 3 years from the date of this Undertaking for the purpose of making telemarketing calls (**List Records**).
- 3.5 Dodo undertakes to retain List Records for at least 12 months from the date on which telemarketing calls to numbers on the List Records are made.
- 3.6 Dodo undertakes to make and retain records of all carriage service providers (CSP) which are used by Dodo or any other person under a telemarketing contract, arrangement or understanding to make telemarketing calls for a period of 3 years from the date of this Undertaking (**CSP Records**).
- 3.7 Dodo undertakes to retain CSP Records for a period of 12 months from the date on which Dodo or another person used carriage services provided by a CSP for the use of making telemarketing calls.

- 3.8 Dodo undertakes to produce to ACMA monthly Call Records for a period of six months from the date of this Enforceable Undertaking. These call records will be provided on the fifth business day following the end of each month.

Engagement of third parties for the making of telemarketing calls

- 3.9 Dodo undertakes that from the date of this undertaking and for a period of 12 months thereafter, Dodo will:

(a) not engage, contract or otherwise enter into an arrangement with a person or company, other than Acquire Asia Pacific Philippines Inc. (AAPP), whereby that person or company undertakes or agrees to make telemarketing calls (either directly or by its employees or agents) to Australian numbers on behalf of Dodo (**call centres**);

(b) ensure that any employee or agent (including any employee or agent of AAPP) directed to make telemarketing calls to promote, advertise or offer to supply Dodo's telecommunications products or Internet services or any other goods or services (**Dodo telemarketing calls**) is given a copy of this Enforceable Undertaking and acknowledges, in writing, that they have read and understood the terms of the Enforceable Undertaking;

(c) ensure that any employee or agent (including any employee or agent of AAPP) directed to make Dodo telemarketing calls attends and completes the education or training program, which has been approved by the Independent Consultant.

- 3.10 If, in the 2 years following the end of the 12 month period referred to in paragraph 3.9, Dodo enters into any telemarketing contract, arrangement or understanding with any other person, Dodo undertakes to do the following at least 30 days prior to any telemarketing calls being made under the contract, arrangement or understanding:

- a. inform ACMA, in writing, of the call centre/s with which it has entered into a telemarketing contract, arrangement or understanding, including:
 - i. the name of the call centre/s;
 - ii. the contact details of the call centre/s, including their registered address, address from which telemarketing calls are to be made (if different), telephone number, and a website where applicable;
 - iii. details of when it is proposed that the call centre/s will commence making telemarketing calls;
 - iv. a copy of all acknowledgements required under paragraph 3.10(b) below;
 - v. a copy of each contract, arrangement or understanding which contains the terms under which the call centre/s will make telemarketing calls.
 - vi. provide a copy of this Enforceable Undertaking to each call centre and obtain a written acknowledgement from the call centre that they have read, and understand the terms of the Enforceable Undertaking;

- b. require that the call centre/s and its employees attend and complete the training or education programme which has been approved by the independent consultant.

Calling Line Identification

- 3.11 Dodo undertakes that whenever it makes or causes a telemarketing call to be made, which originates from a place outside Australia, it will take all reasonable steps to ensure that the call:
- a. passes through a controlled switching facility of a carrier or a carriage service provider that is in Australia and that consists of:
 - i. a switching system used in connection with the supply of a standard telephone service; or
 - ii. a switching system of a kind specified in a determination under section 355(3) of the Telecommunications Act
and was installed after 1 July 1997; or
 - b. otherwise enters Australia in such a manner as to enable calling line identification to identify a telephone number issued to Dodo.
- 3.12 Dodo undertakes that, if a person calls the telephone number displayed by the calling line identification required under clause 3.11(b) above, the person will receive a message identifying Dodo, stating the purpose of the call, and giving a telephone number or process to follow by which the person can contact a representative of Dodo and indicate that the person does not wish to receive any further telemarketing calls from Dodo.
- 3.13 The undertakings made in 3.11 and 3.12 above apply for a period of 3 years from the commencement of this Undertaking

Appointment of Independent Consultant

- 3.13 Dodo undertakes that within 14 days from the date of this Enforceable Undertaking, it will seek ACMA's approval to the appointment of an Independent Consultant, in accordance with terms of reference as annexed hereto and marked 'A'.
- 3.14 Dodo undertakes to fully implement each of the recommendations of the Independent Consultant in accordance with a timetable to be agreed in writing, with ACMA. The recommendations will be implemented within 28 days from the date on which Dodo provides the recommendations to ACMA, or such other time as agreed with ACMA.
- 3.15 Within 21 days of implementing the recommendations of the Independent Consultant, Dodo undertakes to provide to both ACMA and the Independent Consultant, a written report (Implementation Report) which details the steps taken to comply with the recommendations of the Independent Consultant.
- 3.16 If the Independent Consultant recommends further action be taken by Dodo to fully implement the recommendations, Dodo undertakes to take such action within 7 days or such other time as agreed with ACMA.

Training and Supervision of Employees

3.17 Dodo undertakes to ensure that once 21 days have elapsed from the date when an education or training programme has been approved by the Independent Consultant, each of Dodo's employees or agents who are involved in:

- (a) making or attempting to make telemarketing calls, or
- (b) supervising, auditing or managing employees involved in making or attempting to make telemarketing calls:

complete this education or training programme before any telemarketing calls are made or attempted to be made.

Copy of Undertakings

3.18 Dodo will within 14 days from the date of this Undertaking, provide a copy of the Undertaking to, and direct all employees and agents (including any employee or agent of AAPP) identified in paragraph 3.17,

- (a) to comply with the Undertaking; and
- (b) to inform Dodo's Managing Director of any conduct or proposed conduct which the employee or agent believes is or may be in breach of the Act or the Undertaking.

4. ACKNOWLEDGMENTS

4.1 Dodo acknowledges that ACMA may:

- (a) issue a media release on execution of this undertaking referring to its terms;
- (b) publish this undertaking or make this undertaking available for public inspection; and
- (b) refer to this undertaking publicly from time to time.

4.2 Dodo acknowledges that acceptance of this undertaking in no way derogates from any rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future action.

4.3 Dodo acknowledges that ACMA's acceptance of this undertaking does not affect ACMA's power to investigate Dodo or take such action as it considers appropriate against Dodo, in respect of any conduct prior to the commencement of this undertaking, or in relation to future conduct. This includes ACMA's power to issue directions or formal warnings, or accept other enforceable undertakings.

Dated this 18 day of August 2008

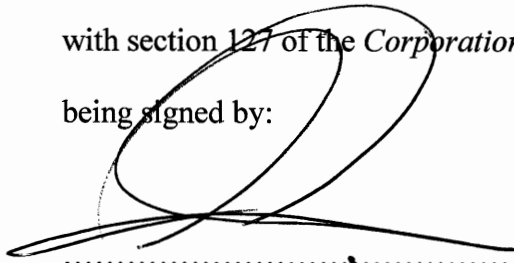
EXECUTED BY DODO

AUSTRALIA PTY LIMITED

in accordance

with section 127 of the *Corporations Act 2001* by

being signed by:



.....

Director

Larry Kestelman
Managing Director

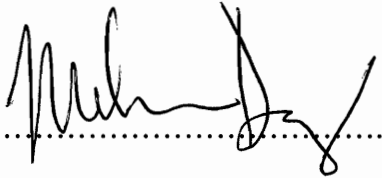
.....

Director/ Company Secretary

In the presence of:

MELANIE DAY
.....

(Specify name of witness)



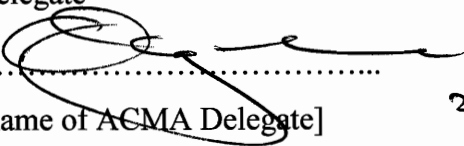
.....

(Signature of witness)

and

The undertaking offered by Dodo is accepted by the Australian Communications and Media Authority pursuant to section 572B of the *Telecommunications Act 1997*, by its

Delegate



.....

[name of ACMA Delegate]

22/8/08.

Grant SYMONS

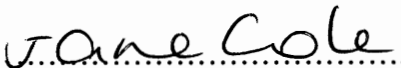
[Position]

Delegate of Australian Communications and Media Authority

in the presence of:

JANE COLE
.....

(Name of Witness)



.....

(Signature of witness)

20/8/08.

Annexure A

Terms of appointment of Independent Consultant pursuant to an Enforceable Undertaking given by Dodo to ACMA on 18 August 2008 (the Enforceable Undertaking)

The Independent Consultant will be appointed by Dodo to review, assess and make recommendations in relation to the items set out in paragraph 1 below:

- 1 (a) to review and assess Dodo's existing processes;
 - (b) in addition to the review conducted under paragraph 1(a) of these Terms of Reference, review the following key compliance systems, processes and procedures of Dodo's telemarketing operations:
 - (i) call list washing processes;
 - (ii) maintenance of an Internal Do Not Call List*;
 - (iii) process for reconciling disposition lists with 'washing' lists of telephone numbers, to determine whether any calls were made in contravention of subsection 11(1) of the DNCR Act;
 - (iv) process for auditing Dodo's internal processes to determine why a number was called in contravention of the DNCR Act and to ensure that numbers are not called in contravention of the DNCR Act, where a contravention has been identified;
 - (v) record keeping processes and procedures;
 - (vi) education and training program for compliance with the DNCR Act, the DNCR Regulations and the Industry Standard (DNCR Regulatory Framework), including the policies and processes relating to the training and competency of staff;
 - (vii) the complaints handling process implemented by Dodo to deal with complaints involving telemarketing, including the identification and rectification of systemic issues; and
 - (viii) compliance governance processes, including accountabilities and reporting processes to management.
- (*Internal Do Not Call List refers to a list of telephone numbers of all numbers to which:
- (a) Dodo has made a telemarketing call; and
 - (b) the call was answered by a person; and
 - (c) the person indicated, whether expressly or by implication, that the person did not wish to receive any further telemarketing calls.
- For the purposes of the Internal List, it is not relevant whether Dodo has received advice from the Register Operator that the telephone number is not registered on the Register.)
- (c) within 2 months of the appointment under these Terms of Reference, make recommendations in writing on the effectiveness of the existing processes and systems to ensure compliance with the DNCR Regulatory framework and how the key compliance processes or systems implemented by Dodo can be improved and provide a copy of the written recommendations to both Dodo and ACMA (**the Implementation Report**).

2. Within 21 days of receiving the Implementation Report referred to in the Enforceable Undertaking, the Independent Consultant is to provide a letter to both ACMA and Dodo, advising whether the steps taken by Dodo are sufficient to implement the recommendations or if not, what further steps should be taken to ensure the recommendations are implemented.
3. The Independent Consultant may report to ACMA at any time about any matter relating to the appointment under the Enforceable Undertaking.
4. By agreeing to the appointment in accordance with these Terms of Reference, the Independent Consultant warrants that the Independent Consultant and the individuals who will assist the review and assessment of Dodo's systems, processes and procedures are independent of Dodo and its related companies, and will at all times be able to exercise objective and impartial judgement in the review, assessment and preparation of recommendations.
5. In carrying out the obligations under this Enforceable Undertaking, the Independent Consultant does not warrant or represent that the compliance systems and processes implemented by Dodo will avoid all future contraventions of the DNCR Act.