

# Report on industry self-regulation of commercial electronic messages, the Do Not Call Register and the Integrated Public Number Database

MAY 2018

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# Contents

<b>Executive summary</b>	<b>1</b>
<b>Approach</b>	<b>5</b>
<b>Overview and context</b>	<b>7</b>
<b>Industry management</b>	<b>12</b>
<b>Broader issues</b>	<b>20</b>
<b>Appendix A—Summary of the functions</b>	<b>31</b>
<b>Appendix B—Assessment framework and principles</b>	<b>36</b>
<b>Appendix C—ACMA administration and compliance data</b>	<b>40</b>
<b>Appendix D—List of submissions</b>	<b>42</b>
<b>Appendix E—Research findings</b>	<b>43</b>
<b>Appendix F—Overview of current legislative requirements: unsolicited communications and direct marketing</b>	<b>46</b>



# Executive summary

In response to Recommendation 6 of the Review of the Australian Communications and Media Authority (the ACMA Review) conducted by the Department of Communications and the Arts (DoCA), the ACMA has examined the potential for self-regulation of:

- > commercial electronic messages under the *Spam Act 2003*
- > the Do Not Call Register (DNCR) and responsibilities for the *Do Not Call Register Act 2006* (DNCR Act) and related industry standards
- > the Integrated Public Number Database (IPND).

To undertake this work, the ACMA has used inputs from:

- > key stakeholders, including consumer groups, industry and government
- > commissioned research from the Social Research Centre into consumer experience and the Andrews Group on international regulatory practice
- > previous reviews by government
- > the ACMA's own regulatory design principles, and experience and data from administering the functions.

## Unsolicited communications

We have found that the unsolicited communications functions should not be referred to industry, and the ACMA should retain its ability to outsource the DNCR, as per current arrangements (**findings 1–4**).

The findings rely on evidence that:

- > there is ongoing consumer concern about the impact and harms involved, with consumers believing the government has a key role in their prevention
- > there is limited industry support for deregulation
- > there is no consensus about which industry group, if any, would take on oversight of self-regulation of the functions
- > alignment between the public and commercial interests involved is not strong, with key stakeholders and ACMA compliance activities indicating the alignment is not direct or extensive
- > there is an ongoing need to underpin enforcement action with formal legal powers
- > the international experience continues to indicate direct regulation is the preferred model across comparable jurisdictions (with the ability to outsource operations of do not call registers).

In reaching these conclusions, we have identified a range of factors that suggest broader reform of the current unsolicited communications regulatory frameworks could be considered in the medium term. These include new and emerging:

- > communications technologies, evolving market practices and convergence on the communications network layers of content, application and transport
- > consumer behaviour and expectations
- > pressures related to the current policy and legislative framework.

The report raises broader reform options for government to consider (**findings 7–9**), including potential drivers for a new unsolicited communications regulatory scheme. Such a scheme could provide a consistent set of consumer safeguards across all communications platforms that is technology-agnostic and aligned with the *Privacy Act 1998* and current Spam Act. This could ensure consumers have improved agency over (and understanding of) the use of their consent, while providing greater clarity to industry.

The report also raises ongoing consumer concern about the marketing activities of current exempt entities under both the DNCR and Spam Acts, including registered charities. Options are discussed to address these concerns, including the potential application of a universal ‘unsubscribe’ or ‘opt-out’ function, to allow consumers to request no repeat contact from an entity.

The report also identifies:

- > a need for more action on scam activity (**finding 10**)
- > the potential for data to underpin innovation in combating unsolicited communications harms (**finding 11**)
- > opportunities for improving the current DNCR arrangements (**findings 12 and 13**).

## Integrated Public Number Database

The ACMA concluded the IPND should not be further devolved to industry (**finding 5**); however, there is scope to explore whether an industry body should be appointed as the IPND Manager (**finding 6**).

Key stakeholders from consumer groups, law enforcement, national security and privacy expressed strong views to the effect that the accuracy, privacy and security of the database remain important factors in any consideration of change. Given these concerns and its critical use functions, the ACMA has found the significant public interest associated with the IPND is greater than any commercial interest in providing it.

In reaching this conclusion, the ACMA has considered submissions from consumer and industry stakeholders, including the IPND Manager, and found there is:

- > scope to streamline the current complex legislative arrangements (**finding 14**)
- > room to consider broader stakeholder representation in the maintenance and future direction of the IPND (**finding 15**)
- > an opportunity to improve the data within the IPND (**finding 16**).

## Conclusion

There is general support from industry and consumers for the continued government delivery of the functions. Further, the public and commercial interests do not align to the extent the functions should be devolved to industry. The direct regulatory model therefore remains appropriate.

Additionally, new and emerging pressures on the current unsolicited communications legislative framework present an opportunity for government to consider broader reform, subject to threshold questions of regulatory and privacy impacts.

In reaching these conclusions, the ACMA has identified a number of actions we will incorporate into our forward work program.

Table 1 provides a full list of the ACMA’s findings.

**Table 1: List of findings**

<b>Industry management</b>	
<b>Industry management of commercial electronic messages, DNCR and telemarketing functions</b>	
1.	The commercial electronic message functions should remain with the ACMA
2.	The DNCR and telemarketing functions should remain with the ACMA
3.	The power to outsource the operation of the DNCR should remain with the ACMA
4.	Fax marketing should not be deregulated at this time
<b>Industry management of the IPND</b>	
5.	The IPND functions should remain with the ACMA
6.	The appointment of an industry body as the IPND Manager should be explored further
<b>Broader issues</b>	
<b>The need for broader reforms to unsolicited communications regulation</b>	
7.	A range of factors support consideration of a revised regulatory framework for unsolicited communications, including: <ul style="list-style-type: none"> <li>&gt; communications technologies, evolving market practices and convergence across the communications network layers of content, application and transport</li> <li>&gt; changing consumer behaviours and expectations</li> <li>&gt; the current policy and legislative framework</li> </ul>
<b>Exemptions from unsolicited communications obligations</b>	
8.	There is ongoing consumer dissatisfaction with the exemptions for certain entities
9.	There is some dissatisfaction that small and medium-sized enterprises (SMEs) are not permitted to register their primary business-use numbers on the DNCR
<b>Responding to scam communications</b>	
10.	Scam unsolicited communications are a significant issue for consumers and ongoing work across government and industry is required to reduce the impact
<b>Encouraging solutions by the private and research sectors</b>	
11.	Release of anonymised compliance and enforcement data could stimulate innovative ways to reduce unsolicited communications, and create other social and economic benefits
<b>Improving the DNCR</b>	
12.	The effectiveness and efficiency of the current DNCR arrangements may be improved by considering changes to the legislative instruments and cost-recovery arrangements
13.	There is the potential for some integration of the IPND and DNCR, subject to appropriate privacy and security arrangements and data integrity considerations

## Improving the IPND

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14. There is scope to streamline the IPND legislative framework

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  15. There is scope to involve a broader group of stakeholders in the future direction of the IPND

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  16. There are opportunities to incorporate greater data validation, reporting and alerts into the IPND to promote compliance by carriage service providers and improve the quality of data
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# Approach

## Scope

In accordance with Recommendation 6 of the ACMA Review, this report covers the potential for the following regulatory functions to be referred to industry for management:

- > regulation of commercial electronic messages under the Spam Act
- > the DNCR and responsibilities under the DNCR Act and related industry standards in force under the *Telecommunications Act 1997*
- > the IPND.

As foreshadowed in the consultation process to inform this examination, the ACMA has also considered whether other regulatory or non-regulatory responses may be appropriate, including any need for broader reforms to ensure policy objectives will continue to be met.

We have considered these functions together, due to the relationships and potential synergies between them, as well as efficiencies in terms of stakeholder consultation. The ACMA's technical regulation framework mandates standards developed by industry (which were also part of Recommendation 6 of the ACMA Review). We are continuing discussions with industry on whether these arrangements remain fit for purpose as part of the implementation of the Spectrum review.

## Inputs

The examination and report has been informed by:

- > an assessment framework and principles (see **Appendix B**)
- > ACMA compliance and enforcement data and other experience in administering the functions (key information is included at **Appendix C**)
- > 15 submissions received in response to a public consultation process (see list at **Appendix D**)
- > targeted consultation with key stakeholders
- > two research projects commissioned by the ACMA—one on the nature and effectiveness of international unsolicited communications regulatory regimes; the other on consumer experiences and expectations about unsolicited phone calls (summarised at **Appendix E**)<sup>1</sup>
- > reviews undertaken by other agencies, including DoCA's 2015 [Review of the IPND](#), and the Australian Law Reform Commission Australian [Privacy Law and Practice](#) 2008.

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<sup>1</sup> Commissioned research was not published at the time of this report being finalised (May 2018). See the ACMA's [research index](#).

## Terminology

In accordance with the ACMA's assessment framework, the term 'regulatory responses' is used to refer to options on the regulatory continuum; namely, market-based regulation, industry self-regulation, co-regulation and direct regulation.

While the terms 'self-regulation' and 'outsourcing' are sometimes used interchangeably, for the purposes of this work, and consistent with regulatory design practice, the following definitions apply:

- > **Self-regulation**—industry voluntarily develops, administers and enforces its own solution to address a particular issue without any formal oversight from government or legal backstop for enforcement. Self-regulation is a response on the regulatory continuum.
- > **Outsourcing**—a regulatory obligation or function sits with one entity, but it has entered into a contract with another entity (usually a private provider) to help fulfil obligation or the delivery of the function.

**Co-regulation** is another point on the regulatory continuum. It involves government and industry sharing the regulatory role, with industry typically developing and administering its own arrangements (such as codes of practice) and government providing the underpinning legislation. The full regulatory continuum is described in **Appendix B**.

## Structure of the report

The remainder of the report is divided as follows:

- > **Part 3: Overview and context**—outlines the policy frameworks and the changing environment
- > **Part 4: Industry management**—contains findings on the functions to be examined for potential self-regulation under Recommendation 6.
- > **Part 5: Broader issues**—discusses broader issues on unsolicited communications and the IPND, as well as actions the ACMA will take in response to a number of the findings.
- > **Appendices**—provides an overview of the functions, information on the assessment framework and principles, a list of the submissions received in the consultation process, information from the ACMA's annual report, top-line findings from the two research projects and a matrix of the current legislative requirements for unsolicited communications and direct marketing.

# Overview and context

## Policy objectives and regulatory responses

The ACMA Review considered:

... that the ACMA should explore further whether it could outsource certain functions, or parts of functions, and report back to the Minister within twelve months on any legislative or other impediments to doing this. In addition, the ACMA should consider whether any of these arrangements could change and look more like self-regulation, thereby giving effect to a key theme of this Review.<sup>2</sup>

The functions are currently discharged under mature enabling legislation. The Spam Act, DNCR Act and two related industry standards in force provide important consumer safeguards and promote responsible industry practices for telemarketing and commercial electronic messaging (collectively, unsolicited communications).

The IPND scheme, established under the Telecommunications Act, and managed by Telstra pursuant to its licence conditions, is also a mature regulatory response that provides, among its functions, safeguards to underpin emergency services and national security matters.

While the policy objectives for these functions are separate and distinct, there are potential relationships and synergies that could be realised between the IPND and DNCR. For this reason, they have been considered together. An overview of the policy objectives and regulatory frameworks is at **Appendix A**.

## The changing environment

The ACMA Review observed that the regulatory framework for communications has not kept pace with the seismic shifts that have occurred in technology and market structure since the majority of Australia's communications legislation was developed.<sup>3</sup> The ACMA has also identified that legacy regulatory frameworks and mechanisms are increasingly ineffective in delivering policy objectives.<sup>4</sup>

The range of economic and social activities that now rely on communications services continues to grow. So too does the importance of the ACMA being able to move beyond the traditional concepts of sector-specific regulation to address new business models and the global nature of entities operating within the broader communications sector.

These changes make it timely to explore whether the public interest concerns that gave rise to the regulatory responses are still evident, or whether they have evolved or diminished to the point where regulation—or aspects of it—should be wound back or be given to industry to manage.

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<sup>2</sup> Department of Communications and the Arts, [Review of the Australian Communications and Media Authority](#) 2017

<sup>3</sup> *Ibid*, p. 6

<sup>4</sup> Identified in all three papers of the ACMA's [Broken concepts series](#), 2010–13.

If the public interest concerns are still applicable, or have evolved, the question of whether the current regulatory responses are still the most efficient and effective way to address them in the contemporary and future communications environment is relevant.

The report examines changes in the environment, consumer expectations and stakeholder views to inform analysis of where the public interest lies and the appropriate regulatory response.

## **New and converging technology and market practices**

The ACMA Review states that for the ACMA to be able to effectively address emerging issues and consumer harms, its remit needs to extend across the network layers.<sup>5</sup> Through the administration of the functions, the ACMA is witness to shifts in technology and changing market practices in unsolicited communications that are demanding consideration of how the regulatory frameworks interact across the application/content, device and transport network layers.

Evolving market practices such as the widespread take-up of VoIP and the use of social media platforms and apps as channels to communicate with consumers all provide particular challenges to the regulatory regime—including identifying responsible parties for unsolicited activity, particularly where malicious actors may be involved. We are also seeing evidence of new practices such as direct-to-voicemail marketing being employed that challenge the current channel-specific regulation.

The convergence of communications channels has also led to the blurring of traditional business marketing models across platforms that is likely to contribute to industry confusion about the application of current unsolicited communications safeguards. Specifically, an increasingly complex array of consent-based marketing practices and business relationships ('affiliate marketing') are being regulated under arrangements that:

- > contemplated more direct relationships (shorter marketing chains) and causality of marketing activity
- > have less complex practical application in terms of consent.

The potential channels for distribution and the type of potential harms is also fundamentally different from that contemplated when the unsolicited communications schemes were enacted, in 2003 and 2006. The first smartphone wasn't commercially available until 2007, yet we now see mobile phone registrations on the DNCR overtaking fixed-line services.<sup>6</sup> Marketing to mobile phones is also increasing, according to 2018 consumer research commissioned by the ACMA.<sup>7</sup>

Since 2010, fax marketing has also changed, with the increased take-up of new technologies that allow 'digital' faxes to be sent and received via email, online mailboxes and multi-functional devices.

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<sup>5</sup> Department of Communications and the Arts, [Review of the Australian Communications and Media Authority](#) 2017 p. 8.

<sup>6</sup> ACMA, DNCR registration data, 2018 (unpublished).

<sup>7</sup> ACMA, *Unsolicited communications: Telemarketing calls consumer research*, Appendix E, 2018.

## Consumer expectations

The intrusion of telemarketing calls and commercial electronic messages remains a key concern for consumers.<sup>8</sup> Consumers see poor alignment between the commercial and public interests involved in unsolicited communications; they feel that industry should do more, with government's role as ensuring this happens through regulation.

Preferences and expectations for managing unsolicited communications have evolved as consumers are influenced by the rapid developments in technology and the convergence of communications services. Consumers want to exercise an increased personal agency in managing communications, especially as they can be received on devices at any time.

In this context, there is some consumer dissatisfaction with the exemptions for certain entities, particularly registered charities. While most consumers understand the public interest reasons for the current exemptions, some still want to play a part in the decision about when the public interest should override their privacy.<sup>9</sup>

Consumers also expect privacy protections to be in place on connected digital platforms. They want to choose the communications they receive. Consent—express, implied, inferred, withdrawal and duration—is confusing to many consumers as they are often not clear when and to whom they gave consent, and how it may then be used across multiple platforms and channels.

The challenges consumers face in understanding the application of their consent, along with their desire to exert more individual control, are drivers in the potential consideration of broader legislative reform. A more consistent, simplified and technology-agnostic approach to unsolicited communications regulation has the potential to promote better understanding of how the safeguards apply among consumers (and industry).<sup>10</sup>

## International regulatory approaches

The international research commissioned by the ACMA establishes that overseas governments in other comparable countries see unsolicited communications as a serious global concern and, as a consequence, they have regulatory responses similar to Australia's. Those surveyed in the research do not see a need to devolve responsibility; rather, they see it is more important to work collaboratively with industry to increase a shared sense of responsibility for managing consumer harms.<sup>11</sup>

The research, and the ACMA's experience as an active and long-time member of the [Unsolicited Communications Enforcement Network](#) (UCENet), indicates that the harms from unsolicited communication are not only a global concern, but require global coordination to combat (particularly where cross-border scam activity is concerned).

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<sup>8</sup> Around 45 per cent of respondents were moderately to extremely concerned about their most recent unsolicited call, with the reasons (prompted) ranging from them being a nuisance/annoying to concerns about their privacy, repeat calls, lack of interest and time. ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>9</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E—Qualitative focus group respondents, 2018.

<sup>10</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E—Summary of key findings, 2018.

<sup>11</sup> ACMA, *A Study of International Best Practice*, Appendix E, 2018.

In this context, we directly engage with a broad range of regulatory counterparts in global jurisdictions dealing with similar regulatory issues and challenges. As part of this engagement, we are actively involved in developing mechanisms to increase coordination and exchange compliance information.

Approaches being taken internationally reflect moves towards more principles-based regulatory frameworks. For example, Canada's anti-spam legislation (CASL), which came into force in 2014, uses technology-neutral language to encompass both existing and emerging communications technologies.<sup>12</sup>

Principles-based approaches such as Canada's extend the scope of legislation, allowing it to consider a wider range of channels and platforms than the current platform-specific legislative frameworks in place in Australia. A similar principles-based, technology-neutral approach is also informing implementation of the Spectrum review recommendations.

There is also tighter regulation imminent in significant international jurisdictions, with the European Union's (EU) [General Data Protection Regulation](#) (GDPR) being implemented across EU countries in May 2018. This will shift the regulatory response in the EU market towards more active regulation with tighter rules for consent, revised penalties and increased jurisdiction outside the EU.<sup>13</sup>

## Scams

In Australia and globally, scams remain one of the biggest unsolicited communications concerns for consumers, governments and industry. Less than one in five Australians felt enough was being done to protect individuals from scam calls.<sup>14</sup> Scams account for a significant proportion of unsolicited communication complaints to the ACMA, with both the current regulatory regimes covering these types of communications by definition.

Through our activities, we have observed that scams differ across platforms, and new technologies are being used to target a wider range of consumers through more sophisticated methods; in turn, increasing the complexity of effective disruption measures.

While many consumers have adopted behaviours or use technology to help them manage some scams, the level of harm, when perpetrated, is often greater than other forms of unsolicited communications. It may involve financial loss and misuse of personal data, with certain groups, such as the elderly, potentially particularly vulnerable.<sup>15</sup>

The Australian Competition and Consumer Commission, in its [Communications Market Sector Study](#) report of April 2018 noted 'there is considerable scope for the telecommunications industry to do more, at the network level, to protect consumers from the significant harm that flows from spoofing and related scams'. The ACMA agrees that industry has a significant role to play in identifying and managing practices to provide greater levels of protection for consumers. Given the likelihood that multiple

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<sup>12</sup> ACMA, *A Study of International Best Practice*, Appendix E, 2018.

<sup>13</sup> Ibid.

<sup>14</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E—Summary of key findings, 2018.

<sup>15</sup> Around three-quarters of Australian adults feel not enough is being done to protect individuals from scam calls. ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E—Summary of key findings, 2018.

responses and solutions may be required, cooperation and coordination on both a domestic and international level is important.

The ACMA is aware there are technological solutions being advanced internationally by industry to potentially deal with some aspects of scams.<sup>16</sup> For example, the New Zealand Telecommunications Forum (TCF) released a draft [Code for Scam Call Prevention](#) for consultation in April 2018. The draft code aims to develop an industry code of practice for network operators to identify, verify and take action on scam calls to landlines and mobile phones in New Zealand.

Approaches such as this are in the relatively early stages of development and may not deal with all matters. However, there is clearly an important role for industry in developing effective solutions. Malicious actors have incentive to try to circumvent new disruption measures as they are implemented, so the problem of scams is likely to require ongoing attention.

As the communications regulator, the ACMA also has a coordination role. The report notes specific actions we will take in exploring greater potential for dealing with scam activity across the communications layers. These include forming a working group to progress relevant matters, such as exploring the release of data to potentially underpin innovative approaches to disruption and/or harm minimisation.

## Integrated Public Number Database

While the above matters do not directly apply to the IPND, environmental considerations such as changes in the communications market structure are still relevant. In this regard, the initial policy intent was for the IPND to provide information for critical and non-critical purposes in an environment where there were significant new telecommunications provider market entrants.

The IPND was established in 1998, with a comparatively small number of providers. Approximately 20 years after its implementation, there are now well over 200 providers and it contains over 70 million numbers.<sup>17</sup>

As key stakeholders have submitted, the policy objectives and use of the IPND continue to underpin critical public interest safeguards.

## Looking forward

The ACMA's examination of the functions has found there is little compelling reason, appetite or agreement from stakeholders to support moves to wholesale industry self-regulation.

The ACMA has, however, found there is cause to consider potential broader reforms to the regulatory frameworks to ensure the policy objectives continue to be served and that the schemes are fit-for-purpose in the future communications environment.

The findings and associated discussions are intended to help government in its consideration of the issues and to inform effective policy formulation.

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<sup>16</sup> The Internet Engineering Taskforce is examining standardising technology used to deliver VoIP calls so that it applies existing internet authentication/authorisation principles to phone numbers. A partnership between the Global Leaders Forum (GLF) and the i3Forum has developed the [code of conduct for the prevention of fraudulent traffic](#). In Australia, Telstra, MNF Group and Vodafone are signatories of the code.

<sup>17</sup> ACMA IPND Compliance data 2018 (unpublished).

# Industry management

In examining the suitability of self-regulatory or outsourced arrangements to manage unsolicited communications, the DNCR and the IPND, the ACMA sought to:

- > identify the risks and harms for different stakeholder groups
- > assess the impact of changes in the environment, and consumer and public interest considerations
- > examine the alignment of public and commercial interests
- > consider what regulatory response—or responses—might be appropriate to address the harms, given changes noted above
- > identify appropriate ways to deliver the proposed regulatory response.

## Commercial electronic messages

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### **Finding 1: The commercial electronic message functions should remain with the ACMA**

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- > Consumer groups remain concerned about unsolicited communications and expect government to play a role in mitigating them. Submissions to the ACMA also identified that consumers see poor alignment between commercial and public interests.<sup>18</sup>
- > Current ACMA-commissioned research of the consumer experience has also indicated consumers remain concerned, in general, about unsolicited communications. Past research has shown specific ongoing concern about commercial electronic messages.<sup>19</sup>
- > While there is some indication of changing consumer behaviours, such as using technology to block SMS spam, there is also evidence that the technology—and use of it—is not adequate or widespread enough to deal with the harms, particularly for consumers in vulnerable circumstances or when malicious actors are involved.<sup>20</sup>
- > There was almost universal support in stakeholder submissions for the ACMA to retain our commercial electronic messages functions, including from industry. Only the Association for Data-driven Marketing and Advertising (ADMA) expressed interest in taking on some responsibilities in a co-regulatory arrangement but indicated it would require funding and support from government.<sup>21</sup>

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<sup>18</sup> The [submissions to the consultation process](#) have been published on the ACMA website.

<sup>19</sup> Including: [Telemarketing calls in Australia: Consumer experience research](#), March 2017; [Unsolicited telemarketing calls & spam: consumer experiences](#), November 2013; [Industry research: Data-driven marketing practices: Australian Industry participants' survey results](#) (undertaken by ADMA), December 2016.

<sup>20</sup> ACMA, *Unsolicited communications: Telemarketing calls consumer research*, Appendix E, 2018

<sup>21</sup> The [submissions to the consultation](#) have been published on the ACMA website.

- > Unsolicited communications is a whole-of-economy activity, engaging a wide range of stakeholders with global supply chains. Submissions noted the global nature of the problem and disparate participants and interests necessitate continued government intervention.<sup>22</sup>
- > International research suggests that comparable jurisdictions are not looking at self-regulation or further outsourcing of functions. Overseas regulators generally see unsolicited communications as a major area of concern that needs to be addressed by government, in partnership or collaboration with industry.<sup>23</sup>
- > Analysis of submissions indicated there is insufficient evidence of shared incentives or agreement to suggest self-regulation should be considered. The ACMA's regulatory design principles identify that consensus within industry is a key factor to underpin a self-regulatory model. Industry consensus helps to ensure a willingness to control any associated risks, allowing for greater alignment of public and commercial interests.
- > Submissions indicated:
  - > There is no clear industry body to take on the functions.
  - > There is the potential for conflict of interests with entities or bodies representing one market sector responsible for regulating different or competing sectors.
- > The Spam Act applies to any entity that sends commercial electronic messages that meet the definition under the Act (with some very limited exceptions)—that is, whole-of-economy business activity. It can also cover messages originating from overseas, making it difficult to identify a single industry body that could represent the full range of stakeholders.
- > There is direct and indirect evidence of alleged and actual non-compliance by entities engaged in commercial electronic messaging, as shown through complaints to the ACMA, and ACMA enforcement outcomes:
  - > Consumer complaints about alleged non-compliance with the Spam Act have been steadily increasing across a number of years.<sup>24</sup>
  - > To date in 2017–18, the ACMA has made four breach findings for investigations into matters under the Spam Act, resulting in the issuing of two formal warnings, a paid infringement notice of \$360,000 and one enforcement outcome currently being finalised. Contraventions have been consistently found across years.<sup>25</sup>
  - > To date in 2017-18, the ACMA has issued 1,059 compliance warnings for matters under the Spam Act.<sup>26</sup>
  - > Reports to the ACMA's Spam Intelligence Database have been rising, consistent with worldwide trends showing increased spam activity.<sup>27</sup>
- > Given the non-compliance we have observed, there is a continued need for an active regulatory regime underpinned by effective legislated compliance and enforcement powers to remedy specific instances of non-compliance and promote responsible industry practises more generally. A lack of formal enforcement powers could provide a perverse incentive to malicious actors, including those based internationally, if Australia was perceived as a 'safe harbour' for spam activity.

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<sup>22</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>23</sup> ACMA, *A Study of International Best Practice*, Appendix E, 2018.

<sup>24</sup> ACMA administration and compliance data, Appendix C.

<sup>25</sup> [acma.gov.au/theACMA/spam-enforcement-actions-1](https://acma.gov.au/theACMA/spam-enforcement-actions-1), viewed April 2018.

<sup>26</sup> ACMA administration and compliance data, Appendix C.

<sup>27</sup> Ibid.

## Do Not Call Register and industry standards

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### Finding 2: The DNCR and telemarketing functions should remain with the ACMA

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- > There is ongoing consumer concern about telemarketing. Recent consumer experience research indicates that an overwhelming majority of Australian adults agree the government has a role to play in managing unsolicited calls.<sup>28</sup> This concern has been consistent across time.<sup>29</sup>
- > While new technologies and services offer welcome new ways for consumers to potentially manage unsolicited contact, they are not always effective. Not all consumers have access to them, they are unlikely to provide comprehensive protections and are generally network- or platform-specific. As such, they do not remove the need for other safeguards to be in place.
- > The Australian Communications Consumer Action Network (ACCAN) commented in its submission that consumers also need to be informed about and capable of using new technologies in order for them to be effective.<sup>30</sup>
- > In submissions, consumer groups opposed industry management of the ACMA's telemarketing functions and the DNCR, although they supported using the IPND to improve the quality of the DNCR under strict conditions.<sup>31</sup>
- > International research suggests that comparable jurisdictions are not looking at self-regulation or additional outsourcing, beyond that already in place for their own do not call register equivalents.<sup>32</sup> There are challenges with identifying an appropriate industry body that could assume the responsibilities in the short to medium term and/or to do so without cost to government:
  - > The DNCR Act regulates whole-of-economy business activity and can cover telemarketing calls originating from overseas, making it difficult to identify a single industry body that could represent the full range of stakeholders.
  - > ADMA expressed interest in assuming some responsibilities under co-regulatory arrangements, but it would require additional funding and support from government.<sup>33</sup>
  - > Communications Alliance (CA) indicated it could operate the DNCR. However, Optus stated that industry has 'no appetite' for taking on auditing and compliance functions, and that self-regulation must not result in the communications sector assuming responsibility for regulatory oversight of other industries.<sup>34</sup>

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<sup>28</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>29</sup> Including: [Telemarketing calls in Australia: Consumer experience research](#), March 2017; [Unsolicited telemarketing calls & spam: consumer experiences](#), November 2013; [Industry research: Data-driven marketing practices: Australian Industry participants' survey results](#) (undertaken by ADMA), December 2016.

<sup>30</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>31</sup> Ibid.

<sup>32</sup> ACMA, *A Study of International Best Practice*, Appendix E, 2018.

<sup>33</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>34</sup> Ibid.

- > Overall, the telecommunications industry suggested waiting for any industry management of numbering to be implemented first (to test any principles-based model that could be implemented for the DNCR).<sup>35</sup>
- > As noted in some submissions, there are potential conflict of interest risks with entities or bodies representing one market sector responsible for regulating different or competing sectors.<sup>36</sup>
- > Some key stakeholders noted it is important that privacy safeguards are maintained, recognising that privacy is a key policy underpinning of the DNCR in terms of the harms it is preventing, as well as the security of the data it contains.<sup>37</sup>
- > As with commercial electronic messaging, analysis of submissions indicated there is insufficient evidence of shared incentives or agreement to suggest self-regulation should be considered. The ACMA's regulatory design principles identify that consensus within industry is a key factor to underpin a self-regulatory model.
- > There is direct and indirect evidence of alleged and actual non-compliance by entities engaged in telemarketing, as evidenced through complaints to the ACMA and ACMA enforcement outcomes:
  - > Consumer complaints about alleged non-compliance with DNCR obligations have been steadily increasing across a number of years.<sup>38</sup>
  - > To date in 2017–18, the ACMA has made public three breach findings for investigations into matters under the DNCR Act, resulting in paid infringement notices totalling \$56,000. Other compliance actions have not been published at the time of preparing this report. Contraventions have been consistently found across years.<sup>39</sup>
  - > To date in 2017-18, the ACMA has issued 1,425 compliance warnings under the DNCR Act.<sup>40</sup>
- > Given the non-compliance we have observed, there is an ongoing need for an active regulatory regime underpinned by effective legislated compliance and enforcement powers to remedy specific instances of non-compliance and promote responsible industry practises more generally. As with spam, a lack of such powers could provide a perverse incentive to malicious actors, including those based internationally.

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<sup>35</sup> The [submissions to the consultation](#) have been published on the ACMA website. The [Communications Legislation Amendment \(Deregulation and Other Measures\) Bill 2018](#) to enable industry-managed numbering is scheduled to be debated by the Senate in June 2018.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> ACMA administration and compliance data, Appendix C.

<sup>39</sup> [acma.gov.au/Industry/Marketers/Do-not-call-register/How-to-comply-with-the-Do-Not-Call-Register/do-not-call-register-enforcement-outcomes](https://acma.gov.au/Industry/Marketers/Do-not-call-register/How-to-comply-with-the-Do-Not-Call-Register/do-not-call-register-enforcement-outcomes), viewed April 2018.

<sup>40</sup> ACMA administration and compliance data, Appendix C.

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### **Finding 3: The power to outsource the operation of the DNCR should remain with the ACMA**

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- > In addition to self-regulation, the ACMA Review stated the ACMA should explore outsourcing of certain functions or parts of functions.
- > The DNCR Act currently allows the ACMA to outsource the operation of the DNCR, with the ACMA responsible for program delivery, cost recovery and compliance and enforcement actions.
- > The DNCR has been outsourced since it began in 2007. The current contract is due to expire in 2020 and includes three one-year options for extension.
- > Continuing to allow the ACMA to outsource the DNCR gives us flexibility to determine the most effective and efficient delivery method.
- > As per finding 7 (below), should a revised regulatory framework for unsolicited communications be considered in future, the need for an outsourced DNCR may be superseded. The timing of contractual arrangements may usefully inform consideration of any revised framework.

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### **Finding 4: Fax marketing should not be deregulated at this time**

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- > Fax number registrations were added to the DNCR in 2010 due to concerns about the impact of fax marketing on business—particularly the small-business community, where there was a demonstrated cost to business (toner and paper) and a burden in terms of additional time and effort dealing with unwanted faxes.
- > There is some evidence that fax marketing has changed with new technologies that allow faxes to be sent and received via email, online mailboxes and multi-functional devices.<sup>41</sup>
- > The trend of paper faxes being replaced by digital forms is likely to continue, resulting in fewer paper faxes being sent to dedicated numbers.<sup>42</sup> If this is the case, the effectiveness of the DNCR as way to manage harms may need to be considered in the medium-term future.
- > In Australia, the industry has consolidated around a small number of fax broadcasters and list-sellers, who distribute the faxes and meet regulatory requirements on behalf of fax marketers through their cloud-based services.<sup>43</sup> This is shown by a decline in DNCR washing accounts for fax marketers since the peak year of 2014.
- > In a recent industry marketing survey, conducted by ADMA for the ACMA, fax marketing was the least preferred direct data-driven marketing channel.<sup>44</sup>
- > While some global industry research <sup>45</sup> asserts that some industries saw a 27 per cent increase in uptake of fax use in 2017 (with 25 per cent annual growth expected for the next two years), most of this is not fax marketing as such but contact for other business-to-business purposes. The research attributes the increase primarily to the growth in the digitalisation of faxes, with faxes sent to

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<sup>41</sup> IDC White Paper, [Fax Market Pulse: Trends, Growth and Opportunities](#), June 2017, viewed April 2018,

<sup>42</sup> Ibid.

<sup>43</sup> ACMA, DNCR fax washing data, 2018 (unpublished).

<sup>44</sup> ACMA, [Data-driven marketing practices: Australian industry participants' survey results](#) (undertaken by ADMA), December 2016.

<sup>45</sup> IDC White Paper, [Fax Market Pulse: Trends, Growth and Opportunities](#), June 2017, viewed April 2018,

dedicated fax machines representing only about one-third of all faxes sent, and expected to drop further.

- > Although complaints to the ACMA about fax marketing are minimal (35 in 2017; down from 960 in 2010, when the scheme first began), this could also be the result of an effective regulatory framework.<sup>46</sup>
- > The international research the ACMA commissioned indicates that overseas governments are not planning changes to the current regulatory arrangements, which they believe are working effectively to reduce fax spam.<sup>47</sup>
- > Should a decision be made to consider a technology-agnostic act under a revised framework (see finding 7), faxes would likely be covered as the majority are already digitally delivered via email or cloud-based software.

## Integrated Public Number Database (IPND)

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### Finding 5: The IPND functions should remain with the ACMA

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- > In submissions, all key stakeholders indicated the public interest reasons that underpin the IPND remain critical:
  - > Consumer groups and privacy stakeholders expect strong privacy protections to be maintained.<sup>48</sup>
  - > Similarly, law enforcement and national security agencies emphasised the importance of maintaining the security and accuracy of the data.<sup>49</sup>
- > While the telecommunications industry supported broader industry involvement in managing the IPND, the research sector has not indicated it is seeking a greater role.<sup>50</sup>
- > Given the critical uses of the IPND, its accuracy, privacy and security should continue to have a legislative underpinning enforced by an independent authority.<sup>51</sup>
- > Additionally, as we continue to find instances of non-compliance with IPND obligations<sup>52</sup>, there is an ongoing need for an active regulatory regime underpinned by effective legislated compliance and enforcement powers to remedy specific instances of non-compliance and promote responsible industry practices more generally.<sup>53</sup>
- > While no wholesale transfer of responsibilities is proposed, there is capacity to make some changes to the distribution of current responsibilities, including where an industry body could be appointed IPND Manager (see finding 6 below).

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<sup>46</sup> ACMA compliance and enforcement data (unpublished).

<sup>47</sup> ACMA, *A Study of International Best Practice*, Appendix E, 2018.

<sup>48</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> See, for example: [Macquarie Telecom's IPND breaches](#); [Lycamobile breach outcome](#); [Lycamobile warned for breaching IPND rules](#).

<sup>53</sup> The ACMA commissioned [reports from the IPND manager](#), which revealed potential compliance issues such as missing or invalid numbers in the IPND. There is also a lack of visibility about whether some NBN retail service providers (RSPs) are complying with their IPND obligations, given another entity may be providing customer data to the IPND on that RSP's behalf.

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## Finding 6: The appointment of an industry body as the IPND Manager should be explored further

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- > The Telecommunications Act allows the minister to appoint an alternative IPND Manager.<sup>54</sup> It was intended that this power be used ‘if the industry can reach agreement for a body other than Telstra to perform the function’.<sup>55</sup>
- > Consumer representatives raised privacy concerns about expanding industry management. While the Office of the Australian Information Commissioner (OAIC) emphasised the need to consider the protection of privacy, it did not oppose greater industry management of the IPND.<sup>56</sup>
- > Similarly, the Attorney-General’s Department (AGD) expressed concerns about costs and the security of data; however, it did not oppose greater industry management.<sup>57</sup>
- > CA indicated there is in-principle agreement within its membership that the operations body it is setting up to potentially manage numbering<sup>58</sup> could assume ‘operational responsibilities’ for the IPND (as well as the DNCR). However, it also noted that industry would need to assess any lessons learnt through taking on the management of numbering first.<sup>59</sup>
- > A theme of industry’s submissions (particularly Telstra’s, as the current IPND Manager) was the need for improved ‘governance’ of the IPND. This appeared to be a call for better coordination among the stakeholders with interests in the IPND, with a view to providing clearer guidance to the IPND Manager (particularly on system upgrades).<sup>60</sup>
- > Notably, the research sector did not make a submission, nor has a research body sought an additional role under the current IPND Scheme.<sup>61</sup>
- > The appointment of an industry body as IPND Manager would address concerns expressed in the IPND review that there is a conflict of interest in having Telstra operate the IPND and that it does so on a commercial basis.<sup>62</sup> (Telstra is required under the current arrangements to manage the IPND on a cost-recovery basis).
- > Appointment of an industry body could potentially improve coordination among industry participants on upgrades to the IPND and may also encourage innovation.
- > It would also be consistent with the government’s proposal to tender for the Emergency Call Person for the new Triple Zero contract, which is also currently Telstra.<sup>63</sup>

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<sup>54</sup> See section 472(1) of the Telecommunications Act. Under section 472(5), a determination has no effect if Telstra is obliged by a condition of a carrier licence to provide and maintain an IPND.

<sup>55</sup> See p. 80 of volume 2 of the explanatory memorandum to the Telecommunications Bill 1996 [1997].

<sup>56</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>57</sup> *Ibid.*

<sup>58</sup> This is dependent on passage of the [enabling legislation](#) to allow industry-managed numbering and Communications Alliance being appointed as Numbering Scheme Manager by the Minister for Communications under this legislation.

<sup>59</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>60</sup> *Ibid.*

<sup>61</sup> ACMA, [Regulation review: IPND, DNCR & spam: public consultation paper](#), 2017, Table 2, p. 7.

<sup>62</sup> See p. 56 of the [IPND Review](#) and paragraph 2.1 of [Acceleon submission](#) to this review.

<sup>63</sup> [minister.communications.gov.au/mitch\\_fifield/news/tenders\\_to\\_be\\_sought\\_for\\_next-generation\\_triple\\_zero\\_emergency\\_call\\_service#.WtkyjUOUm70](#), viewed April 2018. Note also there are two emergency call persons—Telstra is responsible for Triple Zero calls; the Australian Communication

- > The responsibilities of a new manager could largely reflect those of the current IPND Manager. It is not proposed that a new manager take on the ACMA's IPND functions (see finding 5). However, there may be scope to adjust the division of responsibilities. This would rely on establishing that accuracy, privacy and security protections could be appropriately maintained.
- > While any new arrangements could draw on the principles for industry management of numbering<sup>64</sup>, they could potentially be implemented through a legislative instrument or contractual means rather than by amending the Telecommunications Act to create a new scheme.
- > Any appointment would be subject to:
  - > a potential body providing a detailed proposal for managing the IPND
  - > privacy and security assessments
  - > further work on costs.
- > The appointment would also be informed by:
  - > The current IPND Manager making available annual audited financial reports for the IPND, as per Recommendation 8 of the IPND Review, and further work on costs.<sup>65</sup>
  - > The outcome of DoCA's investigation into the need for a new IPND after the implementation of the Triple Zero contract, as per Recommendation 9 of the IPND Review<sup>66</sup>, noting that the tender for the new Triple Zero contract is yet to be finalised.
  - > Any implementation of industry management of numbering.<sup>67</sup>
- > There may be merit in an appointment occurring before the investigation into a new IPND, if this is some time away. It may also be beneficial to consider the potential for greater integration of the IPND and DNCR (finding 11) at the same time as any change to the IPND Manager. However, careful consideration of the different policy objectives, as well privacy, security and data integrity issues, would be critical. The feasibility of this would naturally depend on any broader government decisions on the unsolicited communications regulatory framework (finding 7).

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Exchange is responsible for 106 service calls and provision of the National Relay Service. Both contracts are out for tender.

<sup>64</sup> ACMA, [Regulation review: IPND, DNCR & spam: public consultation paper](#), 2017, Appendix B—Principles-based numbering model, p. 23.

<sup>65</sup> Department of Communications and the Arts, [Review of the IPND](#), 2015.

<sup>66</sup> [minister.communications.gov.au/mitch\\_fifield/news/tenders\\_to\\_be\\_sought\\_for\\_next-generation\\_triple\\_zero\\_emergency\\_call\\_service#.WtkyjU0Um70](http://minister.communications.gov.au/mitch_fifield/news/tenders_to_be_sought_for_next-generation_triple_zero_emergency_call_service#.WtkyjU0Um70), viewed April 2018.

<sup>67</sup> The [Communications Legislation Amendment \(Deregulation and Other Measures\) Bill 2018](#) to enable industry-managed numbering is scheduled to be debated by the Senate in June 2018.

# Broader issues

The focus of this work has been on the potential for self-regulation; however, the ACMA has also identified a range of broader issues relating to the continued effectiveness of the unsolicited communications regimes.

In this context, the report flags options for government to consider, including potential wholesale medium-term reform of the current frameworks.

While there are no equivalent pressures with the IPND, the work has similarly raised potential to improve its management and to carry forward aspects of the IPND Review.

We have also identified actions we will take in response to a number of the findings.

## The need for broader reforms to unsolicited communications regulation

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**Finding 7: There are a range of factors that support consideration of a revised regulatory framework for unsolicited communications, including:**

- > **communications technologies, evolving market practices and convergence across the communications network layers of content, application and transport**
  - > **changing consumer behaviours and expectations**
  - > **the current policy and legislative framework.**
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- > Unsolicited communications are currently regulated under:
  - > the DNCR Act (which allows consumers to ‘opt-out’ of telemarketing calls)
  - > the Telecommunications Act (which provides compliance and enforcement powers and specifies mandatory industry standards to be in force for all telemarketing and fax marketing)
  - > the Spam Act (which prohibits the sending of commercial electronic messages unless the recipient has consented or ‘opted-in’)
  - > Australian Privacy Principle 7 (APP7) in the Privacy Act (which regulates direct marketing—to the extent the DNCR Act and Spam Act don’t apply).
- > As noted previously, a direct regulatory response remains appropriate, given the findings in this report. There are, however, a range of interconnected and parallel factors and drivers that support a revision of the framework in the medium term. The key factors include:
  - > New technologies and services across the platform, content and application communication network layers (including the trends of migrating to mobile devices, use of call-blocking software, and take-up of apps and social media) that are changing marketing models and generally enabling consumers to increasingly manage unsolicited communications. Regulatory lines are also becoming increasingly blurred due to some technologies creating uncertainty as to which Act applies (for example, ‘straight-to-voicemail’ services).
  - > The percentage of services registered on the DNCR continues to rise, with approximately 67 per cent of fixed-line services and 15 per cent of mobile

services currently registered. Between June 2014 and June 2017, the number of mobile numbers added to the register outpaced the number of fixed-line numbers by 39 per cent.<sup>68</sup>

- > This may result in the DNCR eventually reaching a ‘tipping point’, where the vast majority of numbers are registered and/or consent-based telemarketing becomes the industry-standard approach. There are some indications from ACMA administration and compliance data, as well as industry feedback, that practice is already moving in this direction.
- > The move to permanent registration of numbers on the DNCR in 2015 is also a factor in this likely tipping point, as numbers are increasingly unlikely to be removed.
- > This will create pressures on the DNCR as it will no longer be necessary for telemarketers to check their numbers against the DNCR—it will potentially be cheaper and involve less risk or customer annoyance to obtain a consumer’s consent before calling.
- > It is also likely to make the current cost-recovery model unsustainable, as decreased demand by telemarketers would require an increase in fees, which in turn would drive decreasing demand.<sup>69</sup>
- > Key stakeholders support revising the regulatory framework; for example:
  - > ADMA considers ‘a principles-based and technology-agnostic approach to marketing communications activity is preferable to the current channel-specific approach’. ADMA also raised the issue of a decreasing demand spiral due to cost-recovery considerations.<sup>70</sup>
  - > CA supports amendments to the Spam Act ‘to bring it in line with today’s business activities and consumer expectations’ and Telstra supports ‘unification’ of the legislation.<sup>71</sup>
  - > The OAIC noted ‘some foreseeable benefits’ should APP 7 replace the DNCR or Spam Act. However, the full impact (including on the OAIC’s role) would need to be considered. Should APP 7 be extended to all direct marketing activities, this would align with EU regulations.<sup>72</sup>
- > The 2018 consumer research identified that consumers want more control over when and how they give consent, including to telemarketers and charities. When they don’t have an existing relationship with the unsolicited caller, they are more likely to believe that someone has sold their number than believe they might have given express or implied consent by their own action.<sup>73</sup>
- > A key reason for consumer dissatisfaction with the current legislative framework is the complex way consent is framed and authorised across all of the current regimes:
  - > Currently, the DNCR and Spam Acts define ‘express’ and ‘inferred’ consent<sup>74</sup>, while the Privacy Act provides for ‘express’ and ‘implied’ consent. The differences can be particularly incongruous when the communications are all received by the consumer on the same device.

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<sup>68</sup> ACMA and Office of the eSafety Commissioner, [Annual reports 2016–17](#).

<sup>69</sup> ACMA, [Cost Recovery Impact Statement for the ACMA’s Do Not Call Register](#), 2017.

<sup>70</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> ACMA, *Unsolicited communications: Telemarketing calls consumer research*, Appendix E, 2018.

<sup>74</sup> [acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/spam-consent-ensuring-you-dont-spam-i-acma](#) and [acma.gov.au/Industry/Marketers/Do-not-call-register/Telemarketing-standard/do-not-call-register-consent](#), viewed April 2018

- > Research continues to show that consumer understanding of the application of existing consent provisions is limited.<sup>75</sup> This is also evident through the ACMA's compliance and enforcement work, which shows consumers do not readily understand when they have given consent and for what purposes.<sup>76</sup>
- > Given the complexity inherent in the current arrangements, a consolidated and simplified approach would lead to a clearer understanding by both industry and consumers of what is expected.
- > Consolidation and simplification of the rules may also reduce costs, as legislation becomes easier for industry to understand, implement and comply with.
- > There are three broad options for a revised regulatory framework:
  - > greater harmonisation of the DNCR, Telecommunications, Spam and Privacy Acts, while maintaining each as a separate standalone Act
  - > consolidation and greater harmonisation of the DNCR and Spam Acts, and the relevant provisions in the Telecommunications Act, either in the Telecommunications Act or a new unsolicited communications Act
  - > the Privacy Act regulating telemarketing and commercial electronic messages, removing the need for the DNCR and Spam Acts, and parts of the Telecommunications Act.
- > Any new framework could take a technology-agnostic and principles-based approach to regulation, without potential change in the underlying policy objectives, by moving telemarketing to an opt-in or consent-based approach akin to the current regime for commercial electronic messages in the Spam Act.
- > Further specific areas of reform to consider include consistency of consent provisions (to directly align with the definitions in the Privacy Act), appropriate information-gathering powers (that align with current provisions in the Telecommunications Act relevant to Spam Act enforcement) and more incremental penalties within infringement notices.
- > Consideration of the reform options could usefully be informed by the Australian Law Reform Commission's (ALRC's) 2008 report [Australian Privacy Law and Practice](#). While the ALRC considered the DNCR and Spam Acts should continue to regulate telemarketing and spam,<sup>77</sup> it is timely to revisit this, given the changes in the environment that have occurred in the 10 years since the report.
- > Any new or revised legislation would require a regulatory impact statement and privacy impact assessment. While prohibiting unsolicited commercial telemarketing calls without consent would affect industry, there would also be likely offset benefits, including removing industry costs for using the DNCR.
- > Consideration of any new regulatory model should take account of current contractual arrangements for the outsourcing of the DNCR, to ensure there is no legacy deficit to the Commonwealth.
- > The current contract is due to finish on 22 September 2020 and has three one-year options for the Commonwealth to extend. Under the current arrangements, the costs of the contract are cost-recovered against subscription fees paid by telemarketers to wash lists of numbers against those registered on the DNCR.
- > The ACMA will work with DoCA to further explore the above matters, as well as identify potential improvements to the DNCR and Spam Acts that could be made before considering any revised regulatory framework.

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<sup>75</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>76</sup> ACMA, *Unsolicited communications compliance and enforcement data 2018* (unpublished).

<sup>77</sup> ALRC, *Australian Privacy Law and Practice* 2008 [[Para. 73.159](#)].

## Exemptions from unsolicited communications obligations

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### Finding 8: There is ongoing consumer dissatisfaction with the exemptions for certain entities

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- > There are current public interest exemptions in the DNCR and Spam Acts that allow the following entities to make telemarketing calls to numbers on the DNCR or to send commercial electronic messages without consent:
  - > government bodies
  - > charities
  - > political parties (both Acts), election candidates and members of parliament (DNCR Act only)
  - > educational institutions (in specific circumstances).
- > The recent ACMA-commissioned consumer research shows consumer dissatisfaction with unsolicited calls from these exempt entities, particularly charities.<sup>78</sup> Past ACMA commissioned research has also consistently shown consumer concern in this regard:
  - > Unsolicited charity calls are the third highest type of calls being received by Australians adults in 2018.<sup>79</sup>
  - > While some consumers understand and accept the public interest reasons for the exceptions, others want a higher threshold for the public interest to override their privacy and the ability to exercise agency over their consent.
  - > Consumer concern about telemarketing by registered charities was also evident in recent external research by Choice.<sup>80</sup>
- > Specific consumer concern with telemarketing by registered charities includes:
  - > Repeated or frequent calls—69 per cent of Australians had received an unsolicited call from a charity in the last six months on their landline, with a third of these receiving them daily or weekly. Thirty-six per cent had received an unsolicited call from a charity in the last six months on their mobile, with 17 per cent receiving them daily or weekly.<sup>81</sup>
  - > The broad consensus from the qualitative research focus groups was that dissatisfaction with unsolicited charity calls stemmed from the number of calls and that there were often repeat calls from the same charity (whom they may have donated to in the past).<sup>82</sup>
  - > Specific objections to calls from charities included the use of guilt as a way to solicit donations, and that consumers felt they had a right to stop not just that call but future calls as well.<sup>83</sup>
- > The majority of consumers who didn't have an existing relationship with the caller believed their most recent unsolicited telephone call was because their number had been sold to an unsolicited caller (including charities and their intermediaries).<sup>84</sup>

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<sup>78</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>79</sup> Ibid.

<sup>80</sup> Choice, [Who's on the line?](#) Consumer experiences with unsolicited calls, 2016, viewed April 2018.

<sup>81</sup> Ibid.

<sup>82</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

- > Our compliance data shows that the use of intermediaries in direct fundraising activities has increased since the introduction of the DNCR Act. Third-party intermediaries help charities by compiling lists of people who have previously made donations or have an interest in particular causes, and who might be willing to donate.<sup>85</sup>
- > In noting consumer concerns and complaints, ADMA stated in its submission ‘that it is appropriate for registered charities to comply with consumer opt-out requests’.<sup>86</sup> It argued ‘that the partial exemptions afforded to registered charities and political parties result in consumer confusion and account for a significant number of complaints’.<sup>87</sup>
- > On the other hand, the Fundraising Institute of Australia (FIA) asserted that the charity exemptions were vital to the sector’s ability to raise funds for charitable purposes. The FIA also stated that fundraisers take extra care to respect people’s preferences and special needs, in return for the charity exemption.<sup>88</sup>
- > The direct effect of market changes and use of intermediaries on the frequency of call volumes to consumers is not clear. However, the apparent consumer frustration may be a basis for government to reconsider if the public interest exemptions continue to be appropriate.
- > Alternatively, to address consumer concern, the government may wish to consider harmonising current aspects of the regulatory regimes. It could, for instance, consider requiring all entities that make telemarketing calls or send commercial electronic messages (including those currently exempt under the Spam and DNCR Acts) to enable consumers to unsubscribe or opt-out of future contact from that entity. This would preserve the public interest in the case of first contacts from all entities, but would give consumers additional control to prevent subsequent contact.
- > There is currently no uniform or universal rule requiring entities to enable consumers to opt out of future telemarketing calls or commercial electronic messages. The Spam Act and Privacy Act, however, contain obligations that, respectively, apply to non-exempt entities and non-APP entities.
- > The extension could only apply to commercial telemarketing calls and commercial electronic messages, and not cover non-commercial calls or messages, such as those made by researchers or political parties for the purposes of polling or seeking votes.
- > Such an approach would align the regulatory regime with what entities such as the FIA advise is industry best practice for charities (and an obligation on their members under their voluntary code).<sup>89</sup>
- > The approach would also help to harmonise the current arrangements to provide greater clarity to industry and consumers.

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<sup>85</sup> The ACMA understands there are around 3,000–4,000 (and growing) active marketing affiliates, with increased complaints from consumers being registered. ACMA compliance data 2018 (unpublished).

<sup>86</sup> The [submissions to the consultation](#) have been published on the ACMA website.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

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**Finding 9: There is some dissatisfaction that small and medium-sized enterprises (SMEs) are not permitted to register their primary business-use numbers on the DNCR**

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- > A business can register a fax number on the DNCR but cannot register a mobile or landline number unless it is used primarily for private or domestic purposes (which may be the case for some home businesses).
- > At the time the DNCR was initially contemplated, consideration was given to whether businesses should be able to register their numbers on the DNCR.<sup>90</sup> A subsequent Bill also proposed to include businesses.<sup>91</sup> It was decided not to proceed with the proposal 'until further research and consultation with business stakeholders [had] been undertaken.'<sup>92</sup>
- > The fact that some businesses attempt to register numbers on the DNCR shows their wish to opt out of unsolicited telemarketing calls.<sup>93</sup> Recognising the particular challenges faced by SMEs, including them on the DNCR could be considered.
- > Allowing SMEs to register numbers would go some way to aligning the DNCR Act with the Spam Act. The latter generally covers communications to businesses (with some limited exceptions where the communication involves conspicuous publication of contact details and the message is relevant to the role of the person being contacted).<sup>94</sup>
- > It would also be consistent with arrangements for SMEs in other regulatory schemes such as the Privacy Act. These recognise that the size of SMEs means they often have characteristics similar to those of consumers in terms of the level of burden regulation can create and the harm experienced.

## Responding to scam communications

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**Finding 10: Scam unsolicited communications are a significant issue for consumers, and ongoing work across government and industry is required to reduce the impact**

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- > Scam communications are a significant issue for consumers. The 2018 consumer experience research found that scam calls, along with business and telemarketing calls, were being received by more Australians and more frequently than all other types of unsolicited calls:<sup>95</sup>
  - > Over half of Australian adults perceive they are more concerned about scam calls on both landlines and on mobiles than they were five years ago.<sup>96</sup>
  - > Seven in ten Australian adults have received a scam call on their landline in the past six months, with over half of them receiving them daily or weekly.<sup>97</sup>

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<sup>90</sup> See: [Do Not Call Register Legislation Amendment Bill 2009](#), Bills Digest no. 93 2009-10, Parliament of Australia, viewed April 2018.

<sup>91</sup> See: [Do Not Call Register Legislation Amendment Bill 2010](#) [originally 2009], viewed April 2018.

<sup>92</sup> [Supplementary explanatory memorandum, Do Not Call Register Legislation Amendment Bill 2009](#), p. 4.

<sup>93</sup> ACMA DNCR compliance data 2018 (unpublished).

<sup>94</sup> [Spam Act 2003](#), viewed April 2018.

<sup>95</sup> ACMA, *Unsolicited communications—Telemarketing calls consumer research*, Appendix E, 2018.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

- > There was greater concern about scam calls than other types of unsolicited call.<sup>98</sup>
- > Less than a quarter of Australian adults feel enough is being done to protect individuals from scam calls.<sup>99</sup>
- > The level of harm is often greater than from other forms of unsolicited communications, as it may involve financial loss and breach of personal data. Certain groups, such as the elderly, are particularly vulnerable.
- > Scams pose a challenge for the current unsolicited regulatory framework. Although activities with malicious actors fall under the definitions for ‘commercial electronic messages’ in the Spam Act as well as telemarketing under the DNCR Act, the current civil penalty framework is not well-equipped to deal with such activity.
- > As previously noted, scams differ across platforms and new technologies are being used to target a wider range of consumers through more sophisticated methods, in turn increasing the complexity of effective disruption measures. This makes coordination across industry and government at a domestic and international level imperative.
- > Industry involvement in preventing scams or mitigating their harm is critical to future success in this area. The ACMA’s international research shows that most jurisdictions see a greater role for industry. This was supported by our consumer research, with consumers believing that the greatest responsibility for managing unsolicited calls is felt to be with industry.<sup>100</sup>
- > The research suggests the US has had some success fighting scams by developing innovative solutions through competitions—for example, call-blocking technologies and crowdsourcing to create highly visible public campaigns.<sup>101</sup>
- > Use of ‘honey-pot’ techniques, which enable regulators to collect information to identify compliance data and patterns in problem calls, is common in both the US and Canada.<sup>102</sup>
- > There is also work underway in the US to develop industry technical standards that facilitate VoIP number authentication in an end-to-end IP environment.<sup>103</sup>
- > The recent announcement of a Code for Scam Call Prevention, developed by the New Zealand Telecommunications Forum, is a good example of an industry-led initiative.<sup>104</sup>
- > In Australia, accountability for addressing scams is spread across government, including those responsible for consumer protection, law enforcement, cybersafety, cybersecurity, fraud and communications. The ACCC, law enforcement, CERT Australia, AGD, the Australian Securities Investments Commission and the ACMA (among others) all have responsibilities.
- > In line with our functions, the ACMA has a key coordination role as the regulator for unsolicited communications and telecommunications. We currently work cooperatively with industry, other government agencies and international regulators to coordinate responses to scams.

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> ACMA, A Study of International Best Practice, Appendix E, 2018.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> New Zealand Telecommunications Forum (TCF) Draft [Code for Scam Call Prevention](#) 2018. Other examples include the [code of conduct for the prevention of fraudulent traffic](#) to which Telstra, MNF Group and Vodafone are signatories.

- > The ACMA also plays an important role through our connections with international regulators responsible for scam activity, including both members and non-members of UCENet. We have helped develop international agreements on exchanging compliance and enforcement information with key international regulators, and are a signatory to these.<sup>105</sup>
- > While a range of work is being done across industry and government to address scam activity, there is also scope for the ACMA to take a greater role in prevention and disruption that complements our current activity and other broader initiatives.
- > Accordingly, we will establish a working group on unsolicited communication scams to identify and promote new measures to disrupt this activity and, potentially, feed into other government initiatives. This will include ongoing examination of the potential for greater sharing of scam intelligence with other government and non-government entities here and overseas.

## Encouraging solutions by the private and research sectors

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### Finding 11: Release of anonymised compliance and enforcement data could stimulate innovative ways to reduce unsolicited communications and create other social and economic benefits

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- > In its Public Data Policy Statement<sup>106</sup>, the government has committed to:
  - > optimising the use and reuse of public data
  - > releasing non-sensitive data as open by default
  - > collaborating with the private and research sectors to extend the value of public data for the benefit of Australians.
- > Other countries (including the US and Canada) have strong collaborative models and/or partnerships with industry, academia and consumers to address unsolicited communications issues. Many countries encourage greater industry participation in finding solutions, including by releasing appropriate datasets.<sup>107</sup>
- > The ACMA currently releases [high-level information](#) on our unsolicited communications regulatory activities.
- > There is the potential to release more detailed non-sensitive data—that is, data that is anonymised and does not identify an individual, or breach privacy or security requirements. This could involve making the data available through [data.gov.au](https://data.gov.au) and potentially crowdsourcing solutions to specific problems (including scams) using the information.
- > We will explore the potential to publicly release more detailed compliance and enforcement data.

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<sup>105</sup> For example, the ACMA has [a memorandum of understanding](#) with the Canadian Radio-television and Telecommunication Commission.

<sup>106</sup> [Australian Government Public Data Policy Statement](#), 2015.

<sup>107</sup> ACMA, A Study of International Best Practice, Appendix E, 2018.

## Improving the DNCR

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### **Finding 12: The effectiveness and efficiency of the current DNCR arrangements may be improved by consideration of changes to the legislative instruments and cost recovery arrangements**

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- > In the course of preparing this report, the ACMA has identified a number of drivers for improving the effectiveness and efficiency of the DNCR. These include:
  - > Declining subscription demand and wash volumes has implications for the sustainability of cost-recovery mechanisms, as revenue may not meet operational costs in the medium to longer term.<sup>108</sup>
  - > The current complexity of the legislative instruments does not help consumers and industry understand DNCR rules, or the DNCR operator and the ACMA to administer them.
- > Given the above, the ACMA will:
  - > Continue to work with government and industry on ways to improve the cost-recovery arrangements for the DNCR and to reduce DNCR costs.
  - > Streamline DNCR legislative instruments, particularly the Do Not Call Register (Administration and Operation) Determination 2017, noting the importance of maintaining consumer access to the DNCR through a variety of channels.

### **Finding 13: There is potential for some integration of the IPND and the DNCR subject to appropriate privacy and security arrangements**

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- > There is potential for efficiencies from some integration of the IPND and DNCR, which are both databases of telephone numbers under the 2015 Telecommunications Numbering Plan.
- > Industry sees potential synergies from combining the two databases, including increased accuracy of numbers on the DNCR.
- > While submissions from key stakeholders expressed concern about combining the two databases, consumer groups supported using the IPND to improve the accuracy of the DNCR, subject to strict security and privacy conditions.<sup>109</sup>
- > The OAIC also indicated that improving the accuracy of the DNCR would be generally consistent with the accuracy requirements under the Privacy Act.
- > The ACMA is actively examining use of the IPND to potentially identify and remove disconnected numbers from the DNCR. This activity depends on threshold issues related to the accuracy of IPND data and ensuring there is no consumer detriment from any actions taken.
- > Examples of potential integration of the two databases include:
  - > establishing a link between them to enable CSP-identified disconnected numbers to be automatically removed from the DNCR
  - > recording on the IPND whether a consumer wishes to opt out of telemarketing calls (to effectively operate as a portal into the DNCR).

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<sup>108</sup> ACMA, [Cost Recovery Impact Statement for the ACMA's Do Not Call Register 2017](#), viewed April 2018.

<sup>109</sup> The [submissions to the consultation](#) have been published on the ACMA website.

- > The feasibility of any integration would depend on:
  - > any government decisions about the unsolicited communications regulatory framework
  - > more detailed cost-benefits analysis, noting there may be cost-recovery implications for industry
  - > threshold assessments of any security and privacy impacts, and consideration of relevant policy objectives.
- > Accordingly, the ACMA will explore the potential for any integration of the IPND and DNCR in consultation with the relevant sections of industry.

## Integrated Public Number Database

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### Finding 14: There is scope to streamline the IPND legislative framework

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- > As noted in the IPND Review, ‘the IPND is established by a complex interaction of primary legislation, legislative instruments and industry codes and standards.’ Streamlining would reduce the regulatory burden on industry and allow DoCA and the ACMA to more easily administer the framework.<sup>110</sup>
- > The IPND Review noted that, to support any move to a new IPND ‘regulation would be reformed and streamlined with the objective of less regulation and lower costs for data providers and users in the long term’.<sup>111</sup>
- > While major streamlining is likely to require amendments to Part 13 of the Telecommunications Act, there may be scope, for example, to simplify and consolidate the ministerial instruments that relate to the IPND. Any streamlining would need to be mindful of privacy and protections included.
- > The ACMA will work with DoCA to identify how this can be taken forward.

### Finding 15: There is scope to involve a broader group of stakeholders in the future direction of the IPND

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- > A wide variety of stakeholders has responsibilities for, and interests in, the IPND. While a number of stakeholder forums and consultation processes broadly consider the IPND, these are generally disparate and not focused primarily on IPND concerns.
- > The telecommunications industry and IPND Manager have raised the need for improved governance arrangements for the IPND. The main driver of industry’s views appears to be the need for more stakeholder collaboration that gives clearer guidance to the IPND Manager (particularly for system upgrades).<sup>112</sup>
- > In their submissions to the IPND Review, the telecommunications industry and IPND Manager proposed establishing a multi-stakeholder governance committee for the IPND, similar to the proposed Triple Zero Coordination Committee. While such a committee may have merit, further work is required to scope gaps in the existing governance and consultation arrangements, and to develop potential

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<sup>110</sup> Department of Communications and the Arts, [Review of the IPND](#), 2015, viewed April 2018.

<sup>111</sup> Ibid.

<sup>112</sup> The [submissions](#) have been published on the ACMA website.

solutions. These could include, for example, better use of existing consultation forums.

- > The ACMA will work with DoCA and key stakeholders on ways to involve a broader group in the future direction of the IPND.

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**Finding 16: There are opportunities to incorporate greater data validation, reporting and alerts into the IPND to promote compliance by carriage service providers and improve the quality of data held in the IPND**

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- > The ACMA actively works with the IPND Manager and carriage service providers to ensure they comply with their IPND obligations, including the accuracy of data held in the IPND.
- > Some additional validation and reporting recently implemented by the IPND Manager has proven useful in monitoring compliance. Further modifications would provide an automated and efficient way to promote compliance and improve the quality of data held in the IPND.
- > In submissions, law enforcement and national security agencies sought improved compliance with IPND obligations, particularly for data accuracy. Improving IPND data accuracy was also a key theme of the IPND Review.
- > The web-based interface currently being developed by the IPND Manager will improve error feedback and access to reports. However, there is potential for greater data validation, reporting and alerts to further promote compliance. The accuracy of data in the IPND will be a critical consideration for potential use of the IPND to help ensure the data integrity of the DNCR (as per finding 13).
- > Noting potential cost implications, any significant changes may be best considered in the context of the IPND Manager's next major system upgrade or DoCA's investigation into the need for a new IPND, as per Recommendation 9 of the IPND Review.<sup>113</sup>

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<sup>113</sup> Department of Communications and the Arts, [Review of the IPND](#), 2015, viewed April 2018.

# Appendix A— Summary of the functions

## Commercial electronic messages

### Overview and policy objective

The ACMA regulates commercial electronic messages under the *Spam Act 2003*. The Spam Act prohibits the sending of unsolicited commercial electronic messages (such as emails and text messages) with an ‘Australian link’.<sup>114</sup> It also includes requirements for obtaining a recipient’s consent, identifying the sender, providing an ‘unsubscribe facility’ and prohibiting address-harvesting software.<sup>115</sup> The Spam Act partially exempts certain types of messages, including those sent by government bodies, political parties, charities and educational institutions for specified purposes.<sup>116</sup>

The Spam Act was enacted in 2003 as the government was concerned ‘that the exponential growth of what is commonly referred to as spam is threatening the effectiveness and efficiency of electronic communication’.<sup>117</sup>

### Current regulatory response and responsibilities

The Spam Act constitutes direct regulation. The Internet Industry Spam Code of Practice December 2005 was deregistered by the ACMA in 2014.<sup>118</sup> The code required internet and email service providers to undertake certain functions to protect consumers and meet regulatory requirements, including providing a range of services to their customers to help them manage spam. The Minister is responsible for regulations made under the Act<sup>119</sup>, while the ACMA is responsible for all other aspects of the function, including:

- > monitoring and enforcing compliance with the Spam Act
- > conducting education campaigns
- > conducting/commissioning research
- > international liaison
- > handling reports, complaints and enquiries
- > issuing alerts to consumers and industry
- > making instruments and standards, and registering industry codes.<sup>120</sup>

Costs are met from the ACMA’s budget appropriation.

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<sup>114</sup> A message has an Australian link if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia.

<sup>115</sup> Address-harvesting software is software that is specifically designed or marketed for use for: searching the internet for electronic addresses (such as email addresses); and collecting, compiling, capturing or otherwise harvesting those electronic addresses.

<sup>116</sup> These bodies may send commercial electronic messages without consent or the inclusion of an unsubscribe facility; however, identity and contact information must still be provided. [Further information about the Act](#).

<sup>117</sup> [Explanatory memorandum to the Spam Bill 2003](#), p. 1.

<sup>118</sup> The ACMA deregistered the Internet Industry Spam Code of Practice in 2014 as industry practices and technical solutions to spam had evolved and become a part of industry’s core practices.

<sup>119</sup> See the Spam Regulations 2004.

<sup>120</sup> There are currently no instruments, standards or registered codes in place.

## Do Not Call Register and industry standards

### Overview and policy objective

The Do Not Call Register (DNCR) allows individuals to register certain types of telephone<sup>121</sup> numbers to opt out of receiving unsolicited telemarketing calls and marketing faxes. Calls can still be made if an individual has consented or an exemption applies. Exemptions apply to organisations such as charities, educational institutions, government bodies and political parties.<sup>122</sup>

The DNCR was established by the *Do Not Call Register Act 2006* (DNCR Act) in response to a significant growth in unsolicited telemarketing calls and 'rising community concerns about the inconvenience and intrusiveness of telemarketing on Australians, as well as concerns about the impact of telemarketing on an individual's privacy'.<sup>123</sup> Two related industry standards in force under the *Telecommunications Act 1997* establish minimum requirements for telemarketing and research calls, and marketing faxes.<sup>124</sup>

### Current regulatory response and responsibilities

The DNCR Act and related industry standards constitute direct regulation. The minister is responsible for regulations made under the DNCR Act<sup>125</sup>, while the ACMA is responsible for all other aspects of the functions, including the following:

- > operating the DNCR and determining procedural and other requirements<sup>126</sup>—the ACMA has outsourced the operation of the register to Salmat Digital Pty Ltd
- > monitoring and enforcing compliance with the DNCR Act and the two industry standards
- > handling complaints and enquiries (the outsourced operator receives complaints and enquiries in the first instance and escalates them to the ACMA as required)
- > administering cost-recovery arrangements
- > making instruments and standards, and registering industry codes<sup>127</sup>
- > conducting education campaigns, conducting/commissioning research and international liaison.

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<sup>121</sup> Under section 14 of the DNCR Act, a number is eligible to be entered on the DNCR if it is used or maintained primarily for private or domestic purposes, exclusively for transmitting and/or receiving faxes, exclusively for use by a government body, or it is an emergency service number.

<sup>122</sup> Exempt organisations are still required to meet the requirements of the Telecommunications (Telemarketing and Research Calls) Industry Standard 2017 and the Fax Marketing Industry Standard 2011. [Further information about the DNCR.](#)

<sup>123</sup> [Explanatory memorandum to the Do Not Call Register Bill 2006](#), p. 1.

<sup>124</sup> [Telecommunications \(Telemarketing and Research Calls\) Industry Standard 2017](#) and [Fax Marketing Industry Standard 2011](#).

<sup>125</sup> See the [Do Not Call Register Regulations 2017](#).

<sup>126</sup> See the [Do Not Call Register \(Administration and Operation\) Determination 2017](#); the [Do Not Call Register \(Access Fees\) Determination 2017](#) and the [Do Not Call Register \(Access to Register\) Determination 2017](#).

<sup>127</sup> There are currently no registered codes.

The ACMA funds the functions from its budget appropriation and recovers the contract costs and other direct costs of operating the DNCR by charging telemarketers a subscription fee to check numbers against the register.<sup>128</sup> The cost-recovery model complies with the [Australian Government Charging Framework](#). The costs associated with the ACMA's compliance and other activities (for example, awareness-raising initiatives for the DNCR) and the industry standards are not recovered from industry.

## Integrated Public Number Database

### Overview and policy objective

The Integrated Public Number Database (IPND) is an industry-wide database of all public telephone numbers (and associated customer and other details) in Australia.<sup>129</sup> Information in the database is provided by telecommunications providers.

The IPND was established in 1998 due to the entry of new telecommunications providers into the market. It was designed to be a centralised and comprehensive source of telecommunications information for emergency services and directory services, and to allow competition in the telephone directory markets.<sup>130</sup>

Information in the IPND is currently used for both critical and non-critical purposes:

- > critical purposes—provision of the emergency call service and the emergency alert system; and law enforcement and national security investigations
- > non-critical purposes—publication of public number directories; the provision of operator assistance and location-dependent carriage services<sup>131</sup>; and electoral, health and government policy research.
- > Access to the IPND is governed by strict disclosure provisions.

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<sup>128</sup> The current contract is valued at \$15.9 million and runs from 2015 to 2020. In 2016–17, the direct costs were \$2.23 million, \$1.97 million of which was recovered through subscription fees. Direct costs since 2006–07 to the end of 2016–17 totalled \$25.36 million. Revenue from subscription fees since 2006–07 to the end of 2016–17 was \$26.73 million.

<sup>129</sup> Details include customer name, address and phone number, the type of service (fixed or mobile), whether the service is listed or unlisted (only listed services can be accessed for authorised public number directory and research purposes) and details of the service provider.

<sup>130</sup> Department of Communications, 2015 report of the [Review of the IPND](#), p. 2.

<sup>131</sup> A location-dependent carriage service is a carriage service that depends for its provision on the availability of information about the geographic location of the caller in order to route the call to a particular destination, normally the closest destination to the caller. Examples of these types of services include pizza delivery services and taxi services. They are generally services provided using 13 or 1300 numbers.

## Current regulatory response and responsibilities

The IPND is governed by a legislative framework comprising direct regulation and co-regulation.<sup>132</sup> As shown in Table 2, the minister, the ACMA, and the telecommunications and research industries all currently have IPND regulatory responsibilities and/or powers. Our responsibilities centre on compliance and enforcement, and we also administer the IPND Scheme<sup>133</sup>, which deals with authorising access to IPND information by researchers<sup>134</sup> and public number directory publishers.

The government does not directly fund the operation of the IPND. The IPND Manager (Telstra) recovers its costs from data users and the obligation to provide data to the IPND represents a cost to the telecommunications industry.<sup>135</sup> The ACMA does not charge a fee for applications to access information in the IPND under the IPND Scheme and meet our costs from our budget appropriation.

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<sup>132</sup> For further information on the legislative framework, see pp. 2 and 3 of the [IPND Review Report](#).

<sup>133</sup> See the [Telecommunications Integrated Public Number Database Scheme 2017](#).

<sup>134</sup> For the purposes specified by the minister in the [Telecommunications \(Integrated Public Number Database – Permitted Research Purposes\) Instrument 2017](#).

<sup>135</sup> For a further discussion about costs, see pp. 59–60 of the [IPND Review Report](#).

**Table 2: Current regulatory responsibilities and powers—IPND function**

Person/entity	Responsibilities and powers
Minister	<ul style="list-style-type: none"> <li>&gt; Ministerial instruments specifying certain matters relating to the IPND Scheme.<sup>136</sup></li> <li>&gt; Regulations made under the Telecommunications Act.<sup>137</sup></li> <li>&gt; May, by legislative instrument, determine that a specified person (other than Telstra) is to provide and maintain an IPND.<sup>138</sup></li> </ul>
ACMA	<ul style="list-style-type: none"> <li>&gt; Provide information to industry and consumers.</li> <li>&gt; Handle complaints and enquiries.</li> <li>&gt; Monitor and enforce compliance.<sup>139</sup></li> <li>&gt; Administer the IPND Scheme, including authorising applications for access to IPND information under the scheme.</li> <li>&gt; Make instruments and standards, and register industry codes of practice.</li> </ul>
Telecommunications industry	<ul style="list-style-type: none"> <li>&gt; Telstra is the IPND Manager in accordance with conditions of its carrier licence.<sup>140</sup></li> <li>&gt; Telstra has outsourced the operation of the database to LogicalTech.</li> <li>&gt; The telecommunications industry (through its representative body, Communications Alliance) determines procedural and other operational details in the form of an industry code and guideline.<sup>141</sup></li> </ul>
Research industry	<ul style="list-style-type: none"> <li>&gt; Authorised research industry bodies can obtain and disclose certain IPND information to their members under the IPND Scheme.<sup>142</sup></li> </ul>

<sup>136</sup> These instruments are the [Telecommunications \(Integrated Public Number Database Scheme – Criteria for Deciding Authorisation Applications\) Instrument 2017](#); the [Telecommunications \(Integrated Public Number Database Scheme – Conditions for Authorisations\) Determination 2017](#); the [Telecommunications \(Integrated Public Number Database – Permitted Research Purposes\) Instrument 2017](#); the [Telecommunications \(Integrated Public Number Database – Public Number Directory Requirements\) Instrument 2017](#); and the [Telecommunications \(Integrated Public Number Database – Public Number Directory Additional Information\) Instrument 2017](#).

<sup>137</sup> No regulations currently deal directly with the IPND.

<sup>138</sup> See section 472(1) of the [Telecommunications Act](#). Under section 472(5), a determination has no effect if Telstra is obliged by a condition of a carrier licence to provide and maintain an IPND.

<sup>139</sup> See Appendix C for information on compliance and enforcement activities.

<sup>140</sup> See the [Carrier Licence Conditions \(Telstra Corporation Limited\) Declaration 1997](#)

<sup>141</sup> [Integrated Public Number Database Industry Code CA C555:2017](#) and the [IPND Data Industry Guideline CA G619:2017](#).

<sup>142</sup> No relevant authorisations are currently in place.

# Appendix B—Assessment framework and principles

The ACMA has developed a regulatory assessment framework to inform thinking about more efficient and effective regulatory design and administration. The framework incorporates regulatory best-practice theory and draws on our earlier paper [Optimal conditions for self- and co-regulatory arrangements](#).

Additionally, the ACMA Review identified a number of principles, including high-level intervention principles and specific design principles.

## The ACMA's assessment framework

The purpose of the regulatory assessment framework is to provide a high-level, consistent, transparent and flexible tool for assessing potential regulatory design choices that support government policy objectives and outcomes.

In summary, the framework involves:

- > identifying the regulatory issue and the risks and harms for different stakeholder groups
- > considering what regulatory response/s might be appropriate to address the issue, given the external policy environment and characteristics of the market and industry
- > applying 'implementation filters' to identify appropriate ways of delivering aspects of the proposed regulatory response
- > ongoing review in light of changes in the environment and consumer and public interest considerations.

Under the framework, the overall approach is to assess the costs and benefits of the different regulatory responses while taking broader policy considerations into account. This will include an explicit analysis of any risks and incentives. The framework is in line with [The Australian Government Guide to Regulation](#) that works to ensure all policy options are carefully assessed, with the aim of cutting red tape and regulation, where appropriate.

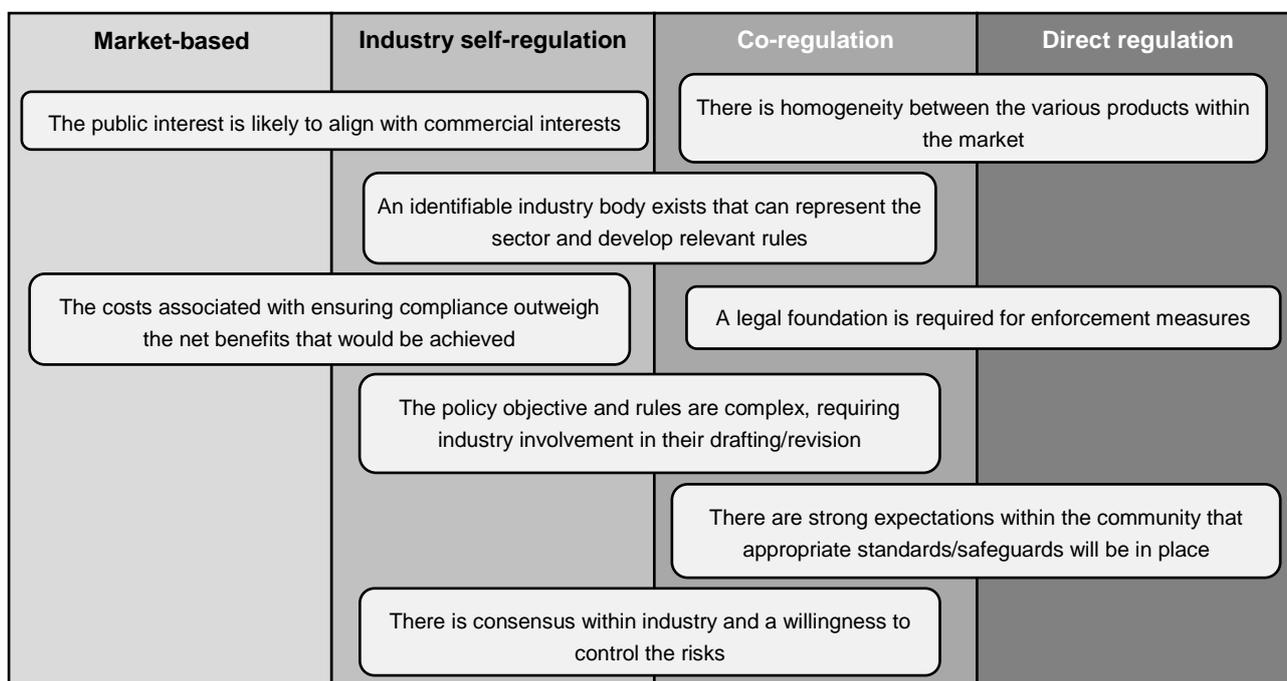
The regulatory responses are considered to sit along a 'regulatory continuum', with a market-based response at one end and direct government regulation at the other. Responses along the continuum, and the market and industry characteristics to which they are suited, are shown in Table 3 and Figure 1 on the following pages.

Governments may also use non-regulatory responses—either on their own, or in combination with a regulatory response. Non-regulatory responses may include education campaigns, facilitation, regulatory forbearance and observation.

**Table 3: Regulatory responses along the regulatory continuum**

Response	Description	Key elements
Market-based	Relies on market solutions—no regulatory action is required	<ul style="list-style-type: none"> <li>&gt; Likely to be appropriate where there are no significant public policy concerns.</li> <li>&gt; Needs to be a reasonable expectation that the market can deliver any public policy objectives.</li> <li>&gt; The cost of imposing the regulatory obligation outweighs the benefit of the public policy objective.</li> <li>&gt; Can be supported by non-regulatory tools (for example, education campaigns).</li> </ul>
Industry self-regulation	Involves industry voluntarily developing, administering and enforcing its own solution to address a particular issue without any formal oversight from government or legal backstop for enforcement	<ul style="list-style-type: none"> <li>&gt; Needs a strong alignment between industry interests and the stated public interest or value outcome.</li> <li>&gt; Often involves a combination of other regulatory design options.</li> </ul>
Co-regulation	Involves government and industry sharing the regulatory role, with industry typically developing and administering its own arrangements (such as codes of practice) and government providing the underpinning legislation to enforce it	<ul style="list-style-type: none"> <li>&gt; Required where the public interest is unlikely to be fully addressed by industry alone.</li> </ul>
Direct regulation	Involves the greatest amount of intervention by the regulator, where black-letter law arrangements are regarded as necessary to support policy objectives	<ul style="list-style-type: none"> <li>&gt; Often appropriate where clear obligations are required that do not need to be readily adjusted to reflect market developments.</li> <li>&gt; Can be supported by a range of non-regulatory tools.</li> </ul>

**Figure 1: Market and industry characteristics suitable for each regulatory response**



## ACMA Review principles

The ACMA Review identified two sets of principles.<sup>143</sup> First, high-level intervention principles that guide decisions about when and how governments should intervene in the market. Second, where it is decided that regulation is the appropriate form of intervention, a set of regulatory design principles are proposed to help guide the way regulation is used. These are outlined below.

### High-level intervention principles

- > The role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals, and then to intervene further only where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market.
- > When government intervenes in the market, it should be done in such a way as to impose the minimum cost in order to achieve the public policy goals. Such interventions should produce benefits that outweigh the costs, including costs imposed on industry (compliance), government (enforcement) and consumers (reduced innovation, choice or competition).
- > When market interventions are necessary, a number of regulatory tools should be considered—policy-makers should not rely exclusively on ‘black-letter’ regulation but also consider other options such as direct and co-investment (for example, NBN, Screen Australia and the Mobile Black Spot Program), contracted service delivery (Universal Service Obligation, National Relay Service), indirect funding (tax incentives), and facilitation and education programs.

<sup>143</sup> Department of Communications and the Arts, [Review of the Australian Communications and Media Authority](#) 2017, p. 87.

- > Government intervention should be considered from a system-wide view of the interdependence, interconnectivity and feedback relationships between different parts of the communications sector and other sectors in the economy.

### **Regulatory design principles**

- > Regulation should establish rules that are clear, simple and practical for all users and that have a sound legal and empirical base.
- > Regulation should be competitively neutral, so that it achieves parity of treatment of similar services regardless of the underlying medium or device used to deliver or receive the service, unless there are clearly articulated and compelling reasons to do otherwise.
- > Regulation should promote the greatest practical use of co-regulation and self-regulation.
- > Enforcement frameworks in legislation should provide remedies that are proportionate to the nature of the relevant breach.

# Appendix C— ACMA administration and compliance data

The following information has been drawn from the ACMA's *Annual report 2016–17* and year-to-date administration and compliance and enforcement reporting.

## IPND

In 2016–17, the ACMA pursued potential compliance issues with 20 carriage service providers. We also monitored enforceable undertakings given by three providers to address non-compliance with IPND requirements. One of the enforceable undertakings ended in May 2017.

## DNCR

**Table 4: Numbers on the DNCR as at 31 March 2018**

Type	Number
Fixed-line	5.7 million
Mobile	5.17 million
Fax	422,444
<b>Total</b>	<b>11.02 million</b>

In the last full reporting year (2016–17), 375,994 fixed-line, mobile and fax numbers were added to the DNCR. Of this increase in registrations, 76.9 per cent were mobile numbers. Nearly 840 million numbers were washed against the DNCR by 1,022 marketers.

## Unsolicited communications

**Table 5: Complaints and reports about unsolicited communications**

Activity	2015–16	2016–17	2017–18 (to 31 March)
Email and SMS complaints	1,737	2,389	2,703
Email and SMS reports	532,210	847,539	695,593
<b>Total Spam Act</b>	<b>533,947</b>	<b>849,928</b>	<b>698,296</b>
Telemarketing complaints	23,014	28,197	27,808
Fax marketing complaints	45	62	32
<b>Total DNCR Act and related industry standards</b>	<b>23,059</b>	<b>28,259</b>	<b>27,840</b>

**Table 6: Risk-based graduated compliance activities and enforcement outcomes**

<b>Activity</b>	<b>2015–16</b>	<b>2016–17</b>	<b>2017–18 (to 31 March)</b>
Spam compliance warnings	2,412	2,769	1,059
Telemarketing compliance warnings	1,691	2,280	1,425
Investigations commenced	12	8	15
Investigations finalised	13	5	11
Formal warnings	3	1	2
Enforceable undertakings	1	0	2
Infringement notices	3	1	5
Federal Court proceedings	1	0	0

# Appendix D— List of submissions

The ACMA received 15 submissions to the public consultation process that finished on 8 December 2017. The [submissions](#) have been published on the ACMA website (under 'Other submissions received' on the right-hand side of the page).

1. Acceleon
2. Association for Data-driven Marketing and Advertising (ADMA)
3. Attorney-General's Department (AGD)
4. Australian Communications Consumer Action Network (ACCAN)
5. Australian Privacy Foundation (APF)
6. Choice
7. Communications Alliance (CA)
8. Fundraising Institute Australia (FIA)
9. GoLogic
10. Legal Aid NSW
11. Marsh, Mr Arthur
12. Office of the Australian Information Commissioner (OAIC)
13. Optus
14. Telstra
15. Vodafone Hutchinson Australia (VHA)

# Appendix E—Research findings

## International regulatory approaches

### *A Study of International Best Practice, Andrews Group, April 2018*

The ACMA commissioned research to understand the various unsolicited communications regulatory practices in the global context, and how they are being applied, in order to identify how international jurisdictions are approaching the management of unsolicited communications. The intention was to identify regulatory practice characteristics and models that have been successfully implemented elsewhere, and which offer benefits in the Australian context.

The research was conducted between January and March 2018, and comprised desk based research of Canada, France, Germany, Japan, Singapore, UK and US, and interviews with Canada, Singapore, UK and US.

The research identified three key components to the approaches that governments are taking to manage unsolicited communications in their jurisdictions:

1. Legislation and regulation that underpins governments' management of the sending of unsolicited communications.
2. Effective enforcement of the legislation and regulation that exists.
3. Non-legislative activities such as:
  - > preventative measures to reduce the amount of unsolicited communications reaching consumers
  - > public and industry educational activities.

Key findings that emerged from studying the seven (four in more depth) jurisdictions' approaches were that:

- > Jurisdictions see 'taking action' on this issue as extremely important, with efforts made to strengthen legislation, increase legal pathways and expand investigative and enforcement powers, such as through information-sharing provisions in legislation and whistle-blower protections.
- > Most are adopting a 'holistic defence' strategy, which describes wide-reaching and proactive approaches that many jurisdictions are following on prevention, monitoring, policing and enforcement activities. Key components of this approach have been
  - > streamlining time- and resource-intensive activities (such as responding to complaints)
  - > implementing technical solutions to block unsolicited communications at the source
  - > expanding the suite of information and intelligence-gathering tools used in monitoring, compliance and enforcement activities.
- > Increased use of non-legislative preventative activities, including promoting compliance by market participants and educating consumers on how to protect themselves against unwanted communications.

- > While most jurisdictions are now at the stage where robust legislation and regulation is in place, jurisdictions continue to adjust their regulatory approaches when issues emerge—for example, to cover a new technology or method of communicating, or to allow for a new channel for information-sharing (such as with a government partner they have not previously shared information with).
- > Most jurisdictions' approaches tend to cross over with the management of other issues, including:
  - > privacy laws
  - > network operation and planning (particularly for transmissions via fixed lines)—the departments and agencies responsible for communications networks can become involved in technical preventative measures to stop telephone scammers
  - > cases where the content of an unsolicited communication brings in other 'players'. Often, the messages transmitted via unsolicited communications are illegal in nature and draw in other government agencies and departments. Examples of this are:
    - > criminal behaviour that warrants police involvement
    - > violations of competition laws
    - > violations of anti-gambling legislation.
- > The study found no evidence of jurisdictions 'deregulating' any aspect of its unsolicited communications.
- > Jurisdictions either share the responsibility for unsolicited communications with other agencies, or are responsible for one of the areas above in addition to unsolicited communications.
- > Technical solutions are a key component to tackling unsolicited communications.

## Consumer experiences with unsolicited calls

Figure 2: Unsolicited communications: Telemarketing calls consumer research—summary of key findings, May 2018 (Final report due June 2018).

Incidence	Behaviour and attitudes	Regulation
<ul style="list-style-type: none"><li>&gt; Unsolicited calls are near ubiquitous for both landline and mobile numbers.</li><li>&gt; Business (telemarketing) and scam calls are the most common and frequent types of unsolicited calls.</li><li>&gt; Awareness of the DNCR is high overall but lower among younger ages.</li><li>&gt; DNCR registration is heavily skewed to landline numbers.</li><li>&gt; Those on the DNCR receive as many, or more unsolicited calls.</li><li>&gt; Around a quarter of the population received a robocall in the last six months.</li></ul>	<ul style="list-style-type: none"><li>&gt; Concern about unsolicited calls is perceived to be stronger than it was five years ago, especially for scam calls.</li><li>&gt; Scam calls are the most concerning type of unsolicited call.</li><li>&gt; Around three-quarters of Australian adults feel not enough is being done to protect individuals from scam calls.</li><li>&gt; Only two-in-five Australian adults understand the rules about unsolicited calls.</li><li>&gt; The most plausible explanation for unsolicited calls is believed to be selling of personal details.</li></ul>	<ul style="list-style-type: none"><li>&gt; The greatest responsibility for managing unsolicited calls is felt to lie with the telemarketing industry.</li><li>&gt; Government, the telemarketing industry, telecommunications providers and individuals themselves all have a degree of responsibility for managing unsolicited calls.</li></ul>

# Appendix F— Overview of current legislative requirements: unsolicited communications and direct marketing

Table 7: Overview of current legislative requirements—DNCR Act, Spam Act and Privacy Act

	DNCR Act	Spam Act	Privacy Act
<b>Prohibits</b>	<ul style="list-style-type: none"> <li>&gt; Telemarketing calls<sup>144</sup></li> <li>&gt; Marketing faxes<sup>145</sup></li> </ul>	Commercial electronic messages <sup>146</sup> with an Australian link <sup>147</sup>	Use/disclosure of personal information for direct marketing (Australian Privacy Principle 7)
<b>To</b>	<ul style="list-style-type: none"> <li>&gt; An Australian number used:               <ul style="list-style-type: none"> <li>&gt; primarily for private or domestic purposes</li> <li>&gt; exclusively for faxes<sup>148</sup></li> <li>&gt; exclusively by a government body</li> <li>&gt; by an emergency service</li> </ul> </li> </ul>	An electronic address (e.g., email address or telephone number) of an individual or organisation	A person through any communication channel
<b>If</b>	A person has registered the number on the DNCR ('opted-out')	A person has not consented <sup>149</sup> ('opted-in')	The person has not consented <sup>150</sup> (opted-in) or would not have reasonably expected their personal information to be used for direct marketing

<sup>144</sup> Telemarketing calls have a commercial purpose, including soliciting donations. They would cover most scams.

<sup>145</sup> Marketing faxes have a commercial purpose, including soliciting donations. They would cover most scams.

<sup>146</sup> Examples include emails, short message service (SMS), multimedia message service (MMS) and instant messaging (IM) with a commercial purpose. This includes scams, but not soliciting donations.

<sup>147</sup> A message has an Australian link if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia.

<sup>148</sup> Includes a business fax number.

<sup>149</sup> Consent can be express or inferred.

<sup>150</sup> Consent can be express or *implied*.

<b>Does not apply to</b>	<ul style="list-style-type: none"> <li>&gt; Calls/faxes:</li> <li>&gt; the person has consented to<sup>151</sup></li> <li>&gt; made/sent by: <ul style="list-style-type: none"> <li>&gt; government</li> <li>&gt; charities</li> <li>&gt; political parties, election candidates and independent members of parliament</li> <li>&gt; educational institutions<sup>152</sup></li> </ul> </li> <li>&gt; relating to product recalls, fault rectification, appointments, payments or an inquiry/order/request (calls only)</li> <li>&gt; that are non-commercial (e.g. research)</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Electronic messages:</li> <li>&gt; the person has consented to<sup>153</sup></li> <li>&gt; made/sent by: <ul style="list-style-type: none"> <li>&gt; government</li> <li>&gt; charities</li> <li>&gt; political parties</li> <li>&gt; educational institutions<sup>154</sup></li> </ul> </li> <li>&gt; that contain only factual information</li> <li>&gt; that are non-commercial (e.g. research)</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Use/disclosure:</li> <li>&gt; where the person has consented<sup>155</sup> or would have reasonably expected its use</li> <li>&gt; by an organisation that is not a APP entity, including: <ul style="list-style-type: none"> <li>&gt; small-business operators (annual turnover of \$3 million or less)<sup>156</sup></li> <li>&gt; political parties</li> <li>&gt; state or territory authorities</li> </ul> </li> <li>&gt; to the extent that the DNCR Act and Spam Act apply<sup>157</sup></li> </ul>
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<sup>151</sup> Consent can be express or inferred.

<sup>152</sup> Where the call or fax is made to a current or past student or to a household of a current or past student.

<sup>153</sup> Consent can be express or inferred.

<sup>154</sup> Where the message is sent to a current or past student or to a household of a current or past student.

<sup>155</sup> Consent can be express or *implied*.

<sup>156</sup> Exceptions apply—for example, to businesses that disclose personal information about another individual for a benefit, service or advantage without consent—such as an entity that sells a list of personal information to another entity the purpose of direct marketing.

<sup>157</sup> If an organisation that is an APP entity is exempt or partially exempt from the Spam Act or DNCR Act, APP 7 will still apply to the acts and practices of that organisation to the extent of that exemption.

**Other requirements**

- > Prohibited times for making a call/fax
- > Provision of information in a call/fax
- > Provision of calling line identification
- > Terminating a (specific) call on request (not opt-out)
- > Opt-out facility for faxes
- > Limit on the number of faxes

NB: These requirements are contained in industry standards<sup>158</sup> and extend to those bodies not covered by the DNCR exemptions above (government, charities, political parties) as well as research calls

- > The message must include:
  - > certain information in the message
  - > an unsubscribe facility (unless it is sent by an exempt organisation)

- > Allow the individual to opt-out
- > On request, inform the person of the source of the personal information

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<sup>158</sup> See the [Telecommunications \(Telemarketing and Research Calls\) Industry Standard 2017](#) and the [Fax Marketing Industry Standard 2011](#) made under the Telecommunications Act.



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