

Investigation report

Summary	
Entity	The Wine Group Pty Ltd
Australian Company Number	ACN 613 076 734
Type of activity	Telemarketing
Relevant Legislation	<i>Do Not Call Register Act 2006</i> <i>Telecommunications Act 1997</i> <i>Telecommunications (Telemarketing and Research Calls) Industry Standard 2017</i>
Revised findings	<p>20 contraventions of subsection 11(1) of the <i>Do Not Call Register Act 2006</i> [Unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register]</p> <p>10 contraventions of subsection 128(1) of the <i>Telecommunications Act 1997</i> [Compliance with industry standards], because of:</p> <ul style="list-style-type: none"> > 1 contravention of paragraph 9(4)(c) of the <i>Telecommunications (Telemarketing and Research Calls) Industry Standard 2017</i> [Information to be provided immediately upon request] > 9 contraventions of paragraph 13(1)(b) of the <i>Telecommunications (Telemarketing and Research Calls) Industry Standard 2017</i> [Terminating a call]
Date	11 March 2021

Background

1. On 18 May 2021, the Australian Communications and Media Authority (**ACMA**) commenced an investigation into the compliance of The Wine Group Pty Ltd (**The Wine Group**) with the *Do Not Call Register Act 2006* (**DNCR Act**) and the *Telecommunications (Telemarketing and Research Calls) Industry Standard 2017* (**Telemarketing Industry Standard**) under the *Telecommunications Act 1997* (**Telecommunications Act**), following consumer complaints.
2. The investigation focused on 2 categories of telemarketing calls alleged to have been made, or caused to be made, by The Wine Group:
 - a. those made, or caused to be made, to specific numbers which were the subject of complaints to the ACMA (made between 2 February and 18 May 2021), and
 - b. those made, or caused to be made, during the period 8 March to 21 March 2021.
3. The ACMA's findings are based on complaints from members of the public and information provided by The Wine Group between 17 June 2021 and 9 March 2022, including in response to:
 - a. a notice dated 18 May 2021, given to it by the ACMA under subsection 522 of the *Telecommunications Act* (**the Notice**)
 - b. a letter dated 21 July 2021 from the ACMA requiring compliance with the Notice

- c. the ACMA's preliminary findings of 8 December 2021, and
 - d. The ACMA's findings made 22 February 2022.
4. The telemarketing calls subject to the contravention findings are collectively referred to as the 'investigated calls', specifically:
 - a. **20** calls made to 7 unique numbers between 17 February and 17 May 2021, and
 - a. **10** calls made to 10 numbers raising issues in relation to the Telemarketing Industry Standard (detailed in Attachment B).
 5. The reasons for the ACMA's revised findings, including the key elements which establish the contraventions, are set out below.

Relevant legislative provisions

Do Not Call Register Act 2006

6. Under subsection 11(1) of the DNCR Act, a person must not make, or cause to be made, a telemarketing call to an Australian number if the number is registered on the Do Not Call Register (**the Register**) for at least 30 days up until the date the call was made, and the call is not a designated telemarketing call.
7. Exceptions apply to the prohibition in subsection 11(1) of the DNCR Act. Specifically, a person will not contravene subsection 11(1) of the DNCR Act where:
 - a. the relevant account-holder or a nominee of the relevant account-holder consented to the making of the call (subsection 11(2) of the DNCR Act),
 - b. the person washed any of the numbers against the Register and the numbers were returned as not registered (subsection 11(3) of the DNCR Act),
 - c. the person made, or caused to be made, telemarketing calls by mistake (subsection 11(4) of the DNCR Act), or
 - d. the person took reasonable precautions and exercised due diligence to avoid the contraventions (subsection 11(5) of the DNCR Act).
8. Under subsection 11(6) of the DNCR Act, The Wine Group bears the evidential burden if it wishes to rely on any of the above exceptions concerning the making of telemarketing calls. This means that The Wine Group needs to provide or point to evidence that suggests a reasonable possibility that the exception applies.

Telecommunications Act 1997

9. The Telemarketing Industry Standard is made under subsection 125A(1) of the Telecommunications Act. It establishes a minimum set of requirements applicable to all telemarketing and research calls.
10. Under subsection 128(1) of the Telecommunications Act, a participant in a section of the telemarketing industry must comply with the Telemarketing Industry Standard. Therefore, a contravention of the Telemarketing Industry Standard is a contravention of the Telecommunications Act.
11. Under paragraph 9(4)(c) of the Telemarketing Industry Standard, a caller must immediately upon request by the call recipient give the name and contact details of the person responsible for dealing with inquiries or complaints about the caller.
12. Under paragraph 13(1)(b) of the Telemarketing Industry Standard, a caller must immediately terminate a call, or ensure that a call is immediately terminated if the call recipient asks for the call to be terminated or otherwise indicates that the call recipient does not want the call to continue.

Reasons for findings

Issue 1: Unsolicited telemarketing calls must not be made to numbers registered on the Do Not Call Register

13. To determine The Wine Group's compliance with subsection 11(1) of the DNCR Act, the ACMA must address the following:
- Is The Wine Group a 'person' to which subsection 11(1) of the DNCR Act applies?
 - If so, did The Wine Group make, or cause to be made, the investigated calls?
 - If so, were the investigated calls telemarketing calls?
 - If so, were the investigated calls made to numbers registered on the Register?
 - If so, were the investigated calls designated as exempt from the prohibition on making telemarketing calls to numbers on the Register?
 - If not, did The Wine Group claim that the investigated calls were subject to any exceptions?
 - If so, did The Wine Group meet the evidential burden in relation to these claims?
14. If the conditions in paragraph 13 are met (and The Wine Group has not raised an exception which is supported by evidence) then The Wine Group has contravened subsection 11(1) of the DNCR Act in relation to the investigated calls.

Is The Wine Group a 'person' to which subsection 11 of the DNCR Act applies?

15. The Wine Group is a company registered under the *Corporations Act 2001* and is therefore a 'person' for the purposes of subsection 11(1) of the DNCR Act.

Did The Wine Group make, or cause to be made, the investigated calls?

16. The Wine Group or its agents were responsible for making each of the calls. The Wine Group provided details of the calls it made, including the purpose, date and time of each call.
17. Therefore, The Wine Group made the investigated calls for the purposes of subsection 11(1) of the DNCR Act.

Were the investigated calls telemarketing calls?

18. Subsection 5 of the DNCR Act defines a telemarketing call as a voice call to an Australian number where, having regard to the content of the call, the purpose includes to offer to supply, advertise or promote goods and services.
19. The purpose of each call was to offer The Wine Group's products to consumers.
20. Therefore, the investigated calls were telemarketing calls for the purposes of subsection 11(1) of the DNCR Act.

Were the investigated calls made to numbers on the Register?

21. The ACMA conducted a point in time check¹ of each number that The Wine Group called between 2 February and 18 May 2021 against the Register to determine whether the number was on the Register for at least 30 days up until the end of the day on which the call was made.

¹ A 'point in time check' is conducted to confirm if a particular number was on the Do Not Call Register on a specific date, such as the date on which that call was made or attempted to be made.

22. This check identified that The Wine Group made **20** telemarketing calls to 7 unique Australian numbers that had been on the Register for at least 30 days at the time the calls were made.
23. Therefore, The Wine Group made the investigated calls to numbers that had been on the Register for at least 30 days up until the time the call was made for the purposes of paragraph 11(1)(a) of the DNCR Act.

Were the investigated calls designated?

24. The investigated calls were not designated telemarketing calls for the purposes of paragraph 11(1)(b) of the DNCR Act because The Wine Group is not an entity of a type set out in clauses 2, 3 or 4 of Schedule 1 to the DNCR Act, i.e., a government body, registered charity, registered political party or an educational institution.

Did The Wine Group claim that any of the investigated calls were subject to any exceptions to subsection 11(1) of the DNCR Act?

25. The effect of subsection 11(2) of the DNCR Act is that if The Wine Group had the consent of the relevant account-holders, it will not have contravened subsection 11(1) of that Act (**the consent exception**). Under subsection 11(6) of the DNCR Act, The Wine Group has the evidential burden of providing or pointing to evidence that suggests a reasonable possibility that it had consent to make the investigated calls.
26. As shown in **Attachment A**, The Wine Group made **20** telemarketing calls to 7 unique numbers between 16 and 586 days after the date the account-holders had withdrawn their consent to receive telemarketing calls. This means that The Wine Group made these 20 calls to relevant account-holders without their consent (i.e. the consent exception in subsection 11(2) of the DNCR Act did not apply to the making of these calls).
27. The Wine Group claims such calls are inconsistent with The Wine Group's policies and staff training and cited a lack of commercial benefit to compel it to make calls in the described circumstances. However, The Wine Group indicated it does not record its telemarketing calls and has no record of such withdrawal of consent.
28. The Wine Group cites its Telemarketing and Marketing Policy and staff compliance training as evidence of it taking reasonable precautions and exercising due diligence to avoid the contraventions.
29. The ACMA has separately considered below whether it was possible, as claimed, that The Wine Group took reasonable precautions and exercised due diligence to avoid the alleged contraventions.

Did The Wine Group provide evidence that the investigated messages were subject to any exceptions to subsection 11(1) of the DNCR Act?

Reasonable precautions and exercise due diligence exception not substantiated

30. The effect of subsection 11(5) of the DNCR Act is that if The Wine Group took reasonable precautions and exercised due diligence to avoid the alleged contraventions, it will not have contravened subsection 11(1) of that Act.
31. Under subsection 11(5) of the DNCR Act, The Wine Group has the evidential burden of providing or pointing to evidence which suggests a reasonable possibility that it took reasonable precautions and exercised due diligence at the time of the alleged contraventions.
32. Prior to the commencement of the investigation, the ACMA sent 4 compliance alerts advising The Wine Group that it may have a compliance problem with its electronic marketing or telemarketing compliance systems, processes, or procedures. Most recently, on 19 February and 17 March 2021, the ACMA alerted The Wine Group to consumer dissatisfaction and complaints about The Wine Group's compliance with the relevant telemarketing legislation. The ACMA subsequently commenced its investigation in May 2021 due to receipt of ongoing consumer complaints.

33. The Wine Group has been conducting telemarketing activities for five years and is therefore an experienced telemarketer. Except for evidence relating to its monitoring of the conduct of sales agents making telemarketing calls (which did not extend to the monitoring of calls), The Wine Group did not provide evidence of quality assurance processes used to test that its telemarketing systems, training, policies and processes were working as intended at the time of the alleged contraventions.
34. In these circumstances, the evidence does not support The Wine Group's claim that it took reasonable precautions and exercised due diligence to avoid the contraventions. It has therefore contravened subsection 11(1) of the DNCR Act by making **20** telemarketing calls to the relevant numbers during the period 17 February and 17 May 2021 (see **Attachment A**).

Issue 2: Compliance with the Telemarketing Industry Standard

35. To determine The Wine Group's compliance with paragraph 9(4)(c) and 13(1)(b) of the Telemarketing Industry Standard, the ACMA must address the following:
- Is The Wine Group required to comply with the Telemarketing Industry Standard?
 - If so, did The Wine Group make the investigated calls?
 - If so, were the investigated calls telemarketing calls?
 - If so, did The Wine Group fail to:
 - provide immediately on request by the call recipient the name and contact details of any person responsible for dealing with inquiries or complaints about the caller?
 - immediately end telemarketing calls after call recipients asked for them to be terminated or otherwise indicated that they did not want them to continue?
36. The ACMA has established, as set out under Issue 1 (above), that The Wine Group made the investigated calls, and the investigated calls were telemarketing calls. (Note that the definition of a telemarketing call under subsection 7 of the Telecommunications Act includes the definition of a telemarketing call under the DNCR Act.) Therefore, the ACMA will not set out these matters again.

Is The Wine Group required to comply with the Telemarketing Industry Standard?

37. The Wine Group is a participant of the telemarketing industry as it carries on telemarketing calls to market, advertise or promote goods or services. Specifically, it employs agents to make telemarketing calls promoting its wine products and services.
38. It must therefore comply with the Telemarketing Industry Standard (see subparagraph 109B(3)(a) and subsection 128(1) of the Telecommunications Act).

Did The Wine Group fail to provide immediately on request the name and contact details of any person responsible for dealing with inquiries or complaints about the caller?

39. As outlined in **Attachment B**, in 1 investigated call, The Wine Group failed to provide immediately on request by the call recipient the name and contact details of any person responsible for dealing with inquiries or complaints about the caller.
40. In making this finding, the ACMA has considered information provided by a complainant to the ACMA of the conduct of a call. The information indicates that The Wine Group agent did not provide the name and contact details of the person responsible for dealing with complaints on request by the call recipient.
41. The Wine Group does not record its telemarketing calls and, accordingly, has not provided evidence to support any potential claim that it provided the required information.

42. The ACMA considers that there are reasonable grounds to believe that The Wine Group contravened paragraph 9(4)(c) of the Telemarketing Industry Standard in relation to the investigated call.

Did The Wine Group fail to immediately end telemarketing calls after recipients asked for them to be terminated or otherwise indicated they did not want them to continue?

43. As outlined in **Attachment B**, The Wine Group failed to immediately terminate **9** investigated calls in circumstances where the call recipients indicated that they did not want them to continue.
44. In making this finding, the ACMA has considered the written descriptions provided by complainants to the ACMA of the conduct of a calls. The descriptions indicate that The Wine Group agents continued the call after the consumer indicated they were not interested.
45. The Wine Group does not record its telemarketing calls and, accordingly, has not provided evidence to support any potential claim that calls were conducted in accordance with the Telemarketing Industry Standard.
46. The ACMA considers that there are reasonable grounds to believe that The Wine Group contravened paragraph 13(1)(b) of the Telemarketing Industry Standard in relation to the **9** investigated calls.

Conclusion

47. The ACMA finds that there are reasonable grounds to believe that The Wine Group has contravened:
- a. subsection 11(1) of the DNCR Act by making **20** telemarketing calls to **7** numbers on the Register between 17 February and 17 May 2021, inclusive. The details are set out in **Attachment A**, and
 - b. subsection 128(1) of the Telecommunications Act on **10** occasions between 3 February and 27 April 2021, inclusive, by:
 - i. contravening paragraph 9(4)(c) of the Telemarketing Industry Standard in relation to **1** telemarketing call, and
 - ii. contravening paragraph 13(1)(b) of the Telemarketing Industry Standard in relation to **9** telemarketing calls.

The details are set out in **Attachment B**.

Attachments

Attachment A – DNCR Act contravention details.

Attachment B – Telemarketing Industry Standard contravention details.

PUBLICATION NOTE: These attachments have been redacted to remove personal information in the form of contact details of consumers.