



***The Do Not Call Register Act 2006  
and  
The Spam Act 2003***

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**Real Estate Industry Initiative - 2009**



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## Presentation overview

- > Main rules in each Act
- > When do the Acts apply?
- > Consent
- > Purchased Contact Lists
- > If non-compliance occur
- > Further information

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## The Acts

- > The **DNCR Act** prohibits a person from making, or causing unsolicited telemarketing calls to be made to a number on the Register, unless consent has been obtained.
- > The **Spam Act** regulates the sending of commercial electronic messages (CEMs) and prohibits the sending of these messages except in certain limited circumstances.

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### **In what circumstances do the acts apply to real estate agents?**

If you use telephone calls, emails or SMS as part of your marketing activities, you may be subject to either or both Acts.

The ***Do Not Call Register Act 2006*** applies if you make telemarketing calls or cause telemarketing calls to be made (e.g., through the use of an outsourced call centre).

The ***Spam Act 2003*** applies if you send commercial electronic messages, or cause such messages to be sent, by either email, SMS, iMS or MMS.

## What is a Telemarketing Call?

A voice call made to an Australian telephone number with a commercial type purpose.

Includes:

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

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The Do Not Call Register Act broadly defines a telemarketing call as a voice call made to a telephone number to offer, supply, provide, advertise:

- goods or services;
- land or an interest in land;
- a business opportunity or investment opportunity; or
- solicit donations.

The purpose of the call is assessed against the content of the call and the presentational aspects of the call. Under this definition, a telemarketing call has two key elements:

- it must be a voice call; and
- it must have a particular commercial-type purpose.

### Voice calls

As defined in the Act, 'voice call' may be a recorded or synthetic voice and includes a telemarketer leaving a message on an answering service. It also includes calls made to people who have a speech or hearing impairment and who use facilities that do not rely solely on voices, such as TTY devices and calls made through the National Relay Service.

### Commercial-type purpose

'Telemarketing calls' are calls made for commercial-type purposes. Even if a call could ordinarily be considered to be telemarketing, it will not be regarded as a 'telemarketing call' for the purposes of the Act unless it falls into the definition specified in the Act.

### Calls that are *not* telemarketing calls

Regulations made under the Act provide that the following calls are not telemarketing calls:

- product recall calls;
- fault rectification calls;
- appointment rescheduling calls;
- appointment reminder calls;
- calls relating to payments;
- solicited calls; or
- one of the above call types that is not answered by the person to whom the call is made.

### Exempt telemarketing calls

Calls made by certain organisations, for example charities, are 'designated telemarketing calls' under the

## What is a Telemarketing Call?

Does **not** include:

- > Appointment rescheduling or reminder calls;
- > Calls relating to payments (e.g. rent); or
- > Solicited calls (calls made in response to enquiries or requests by a customer).

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## What is a commercial electronic message?

Commercial electronic messages can be:

- > Email
- > SMS/MMS
- > Instant Message

Commercial electronic messages are generally any electronic message soliciting a business opportunity.

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**Spam** is the common term for electronic 'junk mail' – unwanted commercial electronic messages (CEMs) sent to a person's email account or mobile phone. Australia's anti-spam legislation – the [Spam Act 2003](#) covers email, instant messaging, SMS (text messages) and MMS (image-based mobile phone messaging) messages of a commercial nature.

CEMs are messages sent for the purpose of offering, supplying, providing, advertising or promoting:

- goods or services;
- land or an interest in land; or
- a business opportunity or investment opportunity OR

To assist or enable a person, by a deception, to dishonestly obtain a gain, financial advantage, or property from another person.

For all commercial electronic messages:

- > **Consent** (express or inferred);
- > **Identify**; and
- > **Unsubscribe**



Any CEM that doesn't meet the following three conditions is defined as spam:

**Consent** – the message must be sent with your consent

**Identify** – the message must contain accurate information about the person or organisation that authorised the sending of the message

**Unsubscribe** – the message must contain a functional 'unsubscribe' facility to allow you to opt out of receiving messages from that source.

Messages do not have to be sent out in bulk to be considered spam. Under Australian law, a single electronic message can be considered spam.

## Consent - express

Express consent is where a person clearly informs a company that they are willing to receive marketing material and directly provides their contact details for that purpose.

Examples include:

- > ticking a box on a form or website;
- > over the phone or face-to-face.

The person must know what they are consenting to.

Express consent can be withdrawn at any time.

### Express consent

Express consent is where a person clearly informs a company or agent that they are willing to receive marketing material, and directly provides his or her contact details (telephone number, email address) to the company for that purpose.

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

Examples of methods for obtaining express consent include:

- asking people to sign an attendance sheet, which states in a conspicuous manner that, by signing the sheet and providing their contact details, they agree to receive marketing material, or
- providing a check box for people to tick, with a clear statement next to the box advising that by ticking the box and signing their name, they consent to receive marketing material to the contact details they have provided.

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

Consent obtained by duress or deception would not satisfy the legislative requirements.

Examples of methods that **may not** be adequate to establish express consent include:

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



## Consent - Inferred

In certain circumstances, consent may be ‘**inferred**’ based on:

- > An existing business or other relationships that exists between the person and the marketer;
- > The conduct of the person; or
- > Through the conspicuous publication of a work related electronic address

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### Inferred Consent

#### DNCR Act

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

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

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

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

#### SPAM ACT

Under the **Spam Act**, you can only infer consent through:

•an **existing business or other relationship**, where there is a reasonable expectation of receiving those commercial electronic messages.

If an organisation has a strong business relationship with the holder of an electronic address – for example, the address holder is a member of a club, a subscriber to a service, or a client it deals with on an ongoing basis – consent to receiving messages from that organisation may be inferred.

If you are not confident that the existing business relationship is strong enough to infer consent, or are unsure that the recipient will want your messages, you will need to obtain express consent.

•**conspicuous publication** if the electronic address is published ‘conspicuously’ – that is, it is accessible to the public, or a section of the public (for example, it appears on a website or in a telephone directory or brochure), and:

- the address is not accompanied by a statement that commercial messages are not wanted
- the subject matter of your message is directly related to the principal role or function of the recipient (electronic account holder).

With conspicuous publication, there must be a strong link between what you are promoting and the recipient’s role or line of business. You cannot infer someone’s consent just because you believe your product would benefit them. Giving someone a business card is not conspicuous publication.

## Third Party Contact Lists

Some agents source marketing lists from third parties with the belief that the list has been 'washed' or that consumers on the list have given 'consent'.

Users of third party lists need to realise that liability rests with them if a contravention occurs, not the provider of the list.

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If your business is using purchased marketing lists, it is your responsibility to find out whether consent has been obtained from each recipient on the list.

ACMA recommends that all businesses should be responsible for washing their own lists against the DNC Register.

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

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

## Protecting your compliance

- > **Both Acts:**
  - > Comprehensive written agreements with third parties (e.g. outsourced call centres, third party list providers);
  - > Comprehensive record keeping (e.g. to record circumstances where consent was obtained);
  - > Comprehensive staff training.
- DNCR:**
  - > Washing
- Spam Act:**
  - > Identify
  - > Unsubscribe

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### Comprehensive Record Keeping

Implementing and maintaining good record-keeping practices is the best way to identify and resolve compliance issues and avoid any repeat of them.

Good record keeping will also enable you to deal more effectively with complaints, and make it less likely that consumers make complaints about your organisation to ACMA.

If you outsource telemarketing calls to a call centre, or use another organisation to send commercial electronic messages on your behalf, be sure that any agreements made are comprehensively recorded.

Further, as the body authorising the sending of the message, you must be certain that consent exists for every recipient – that your database (and any database that a third party uses to send messages on your behalf) is 'clean'.

Businesses should keep a record of all instances where consent is given, including who gave the consent and how.

Under both Acts, you, as the message authoriser, are legally responsible for proving that consent exists.

### Training

All staff who are involved in processes by which telemarketing calls are made or CEM's are sent to consumers, should receive training to ensure that they are familiar with all key compliance issues.

### Washing

The telemarketer access portal, which is housed on the Do Not Call Register site at [www.donotcall.gov.au](http://www.donotcall.gov.au), allows businesses to check or 'wash' their calling lists against numbers on the register. By washing their lists, telemarketers may avoid penalties for calling numbers listed on the register.

## If non-compliance occurs

- > Ultimately you want to market to those who want to do business with you – marketing to people who do not want to hear from you is inefficient and may lead to loss of reputation and business
- > Consumers may complain
- > ACMA staged approach to compliance
- > Enforcement options

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ACMA's general approach to compliance is to seek to resolve a matter, where appropriate, without resorting to formal procedures. ACMA's main focus is to prevent unwanted marketing from continuing or recurring by encouraging marketers to take appropriate action to avoid breaching the Acts. However, if informal resolution is unsuccessful, ACMA will take the appropriate investigatory and enforcement action.

Both the DNCR Act and the Spam Act provide ACMA with a range of enforcement options, which include:

### Formal warnings

- Formal warnings are used by ACMA to indicate concerns about alleged contraventions and allow for the business or individual to take compliance action to prevent any future contraventions.

### Enforceable undertakings

- Enforceable undertakings can be offered to ACMA at any time and provide the opportunity for a business or individual to formalise its commitment to compliance with the Acts.

### Infringement Notice

- ACMA may also give an infringement notice in relation to particular civil penalty provisions (\$\$)

### Federal Court proceedings (including seeking an injunction).

- ACMA may also lodge proceedings in the Federal Court, including seeking an injunction.

**ACMA determines the appropriate action on a case-by-case basis.**

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## Further Information

ACMA maintains detailed information regarding your obligations under the *Do Not Call Register Act* and the *Spam Act 2003*, together with a series of frequently asked questions and fact sheets.

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### **DNCR Act**

[www.donotcall.gov.au](http://www.donotcall.gov.au)

or contact the Do Not Call industry assistance line on 1300 785 749

### Do Not Call Register Act 2006 – Compliance Guide

This document will assist your business in achieving ‘Best Practice’ compliance ([http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_311789](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311789)).

### **Spam Act**

[www.spam.acma.gov.au](http://www.spam.acma.gov.au)

or contact ACMA’s Anti-Spam Team on 1300 855 180