



Do Not Call Register— Information for the real estate industry

The Do Not Call Register (the register) provides Australians with the opportunity to opt out of receiving certain telemarketing calls. The legislative instruments that establish the arrangements include:

- the *Do Not Call Register Act 2006* (the DNCR Act), which establishes the register, outlines rules for making certain telemarketing calls and provides exceptions
- the *Do Not Call Register Regulations 2006* (the regulations), which specify types of calls that are not telemarketing calls and persons who are considered to be deemed nominees of a relevant telephone account holder
- the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* (the industry standard), which sets rules for people who make telemarketing and research calls about when and how such calls may be made, and
- other legislative arrangements concerning the detailed working of the register.

The basic prohibition to not call registered numbers, and the industry standard, took effect on 31 May 2007.

Who needs to comply with the new requirements?

The DNCR Act and industry standard do not only apply to call centres or businesses that operate exclusively through telephone selling. They apply to anyone who makes a telemarketing call or causes a telemarketing call to be made ('telemarketer'). This includes real estate agents. The industry standard also applies to anyone who makes research calls or causes them to be made.

The term 'telemarketing call' is defined in section 5 of the DNCR Act. In broad terms, the Act defines a telemarketing call to be a voice call made to an Australian telephone number with a purpose to:

- offer, supply, provide, advertise or promote
 - goods or services
 - land or an interest in land, or
 - a business opportunity or investment opportunity, or
- solicit donations.

Some specific types of calls are *not* considered 'telemarketing calls' for the purposes of the DNCR Act. These include:

- fault rectification calls
- appointment rescheduling calls
- appointment reminder calls
- calls relating to payments, and
- solicited calls (including calls made in response to an inquiry or request by a customer, or potential customer).

Some examples of calls made by the real estate industry that *would* be considered telemarketing calls under the DNCR Act and industry standard include:

- a call to offer a free property appraisal of a person's property
- 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.

It is against the law to make, or cause to be made, unsolicited telemarketing calls to a number on the register, unless a defence applies. Of the defences available under the DNCR Act, the one likely to be of most relevance to the real estate industry is the defence of consent.

Consent to make a telemarketing call

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

Consent may be express or inferred.

Express consent

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

Express consent is the best evidence of permission to make telemarketing calls and may be particularly useful in the context of the real estate industry. For example, 'open inspections' may provide a real estate agent with an opportunity to gain express consent to make follow-up telemarketing calls to people who

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attend. Examples of methods for obtaining express consent include:

- asking people to sign an attendance sheet, which clearly states that, by signing the sheet, they agree to receive telemarketing calls, 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 telemarketing calls.

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

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

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

Express consent is taken to last for a period of three months from the date it was given, unless the consent was expressed to have been for a specified period or an indefinite period.

Where a real estate agent wishes to rely on express consent to make telemarketing calls for longer than three months, the longer duration must be made clear to the person providing consent. This could be done, for example, by displaying prominent text next to a relevant checkbox or signature line to the effect that 'by signing this form I confirm that XYZ Real Estate may call me on the telephone number I have provided for telemarketing purposes, for a period of six months, unless I withdraw this consent at an earlier time'.

Inferred consent

Inferred consent is where a telemarketer has reason to believe that a person is willing to receive a call, based on:

- the conduct of the person, and
- the business and/or other relationships that exist between the person and the telemarketer.

Whether consent can reasonably be inferred is something that must be judged in each individual case. No 'hard and fast' rules apply.

It is important to distinguish between a continuing business relationship (eg. the relationship between a real estate agent and a lessor) and a one-off transaction (eg. the relationship between a real estate agent and a vendor or purchaser of a property). 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 call 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.

Obtaining a person's telephone number is not in itself sufficient to establish inferred consent. It must be reasonable, from the circumstances in which the number was obtained, to believe that the person would be willing to receive a call. For example:

- it may be reasonable to infer consent where a person gives their number to an agent with the clear expectation of being called about a particular property, or type of property (although, it may not be reasonable to infer that person's consent to be called about other, unrelated, properties listed by the agent)
- it may *not* be reasonable to infer consent where a person provides their number on an open inspection attendance sheet without making clear that they are willing to receive calls (the best way of using an attendance sheet to establish consent, is through the 'express consent' arrangements discussed under the previous heading).

Of course, in each case, additional circumstances could change whether it is reasonable to infer consent.

Telemarketers should seek their own legal advice if they are unsure about whether there is inferred consent in particular circumstances.

Express consent vs inferred consent

A telemarketer can choose to obtain express consent or to rely on consent being inferred. However, obtaining express consent where possible, rather than relying on inferred consent, will provide a telemarketer with greater certainty in the event of any complaint.

Checking the Do Not Call Register

ACMA has established a system for people who make telemarketing calls, or cause telemarketing calls to be made, to check (or ‘wash’) their calling lists against the register. This system provides an effective way for people to avoid contravening the requirements of the DNCR Act by calling registered numbers. People can access the system to establish a washing account by visiting www.donotcall.gov.au. A subscription fee is payable, depending on the volume of washing transactions sought.

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

Use of external data providers and ‘pre-washed’ lists

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

While it is legal to obtain such lists, liability for any breaches of the register will lie with the person who made the call or caused the call to be made, not the person who provided the list.

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 washing date.

One of the defences available under the DNCR Act is that if a person washes a call list and receives a response indicating that the number is not on the register, then the caller may call that number for a period of 30 days. This applies even if a number was added to the register during that 30-day period, and effectively provides a 30-day validity period for list washing. However, *this defence is only available to the person who washed the list*. In cases where a real estate agent obtains an externally provided list and does not carry out their own list wash, they cannot rely on the 30-day defence.

In the event of a complaint about a call being made to a registered number in these circumstances, the telemarketer could establish another defence by showing that they took reasonable precautions and exercised due diligence to avoid the contravention. Where ACMA is investigating a complaint, whether a person has taken reasonable precautions and exercised due diligence will be assessed on the particular facts.

ACMA recommends that real estate agents who use externally provided lists seek their own legal advice regarding this matter.

Research calls

The term ‘research call’ is defined in section 7 of the Telecommunications Act. In broad terms, a research call is a voice call made to an Australian telephone number with a purpose to:

- conduct opinion polling, or
- carry out standard questionnaire-based research.

Research calls can be made to numbers on the register, but must comply with the requirements of the industry standard.

Where a call is for both telemarketing and research purposes—in that it contains opinion polling or research elements, but also has a telemarketing component—then the call is a telemarketing call for the purposes of the Act and must not be made to a number on the register.

For example, if a real estate agent decided to survey consumers in a particular geographical area, asking a series of standard questions about their goals as a home owner, this is likely to amount to a ‘research call’. But if these calls included any type of commercial element – for instance, by asking how much they would be willing to pay for a three-bedroom house in suburb X and then promoting the availability of such properties – it may become a telemarketing call and be prohibited to be made to numbers on the register.

Further information

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

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

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