

ACMA Discussion Paper on the proposed Telemarketing Standard

<http://www.acma.gov.au/acmainterwr/assets/main/lib100844/dncstandarddiscpaper1.doc>

Submission by the Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

Introduction

The APF welcomes the proposal for ACMA to issue a Telemarketing Standard, to complement the Do Not Call Register. We are supportive of all the matters to be covered (as required by the *Telecommunications Act 1997* (TA) s.125A), and broadly supportive of indications in the Discussion Paper (DP) of how these matters will be addressed, including the Principles set out in paragraph 8.2 of the DP.

As the passage of the *Do Not Call Register Act 2006* (DNCRA) demonstrates, the vast majority of the Australian public regard unsolicited telephone calls as an unwelcome nuisance. We note that this is clear from successive privacy surveys – most recently from the ‘phone-in’ organised by the ALRC in June as part of its inquiry into Privacy, in which three quarters of calls related to unsolicited marketing (see <http://www.alrc.gov.au/media/2006/mr0506.htm>).

Terminological confusion

Our main concern is that it is not entirely clear how the Standard will apply to calls from or on behalf of organisations exempt from the Do Not Call Register. The DP explains that it will apply to them, but only in relation to ‘telemarketing’ calls. There is in our view considerable uncertainty as to what is meant by ‘telemarketing’ calls, in the different contexts of the DNCRA and the TA.

The DNCRA has a definition – of ‘telemarketing call’, being

“telemarketing calls are voice calls made with the purpose to offer, supply, provide, advertise or promote goods or services for land or an interest in land; or a business opportunity or investment opportunity; or to solicit donations” (DNCRA s.5)

This is different, and in some respects broader, than definition of ‘telemarketing industry’ in s.7 of the TA which includes “calls to market, advertise or promote goods and services on behalf of themselves or others.”

The DP Introduction talks about:

“calls made ... to market, advertise or promote goods and services, conduct opinion polling and to carry out standard questionnaire-based research.” (DP 1.6)

The DP goes on to explain that

“For the purposes of standards made under Part 6 of the Telecommunications Act the definition of telemarketing contained in section 7 of that Act is expanded beyond calls of a commercial nature to include voice calls to conduct opinion polling and to carry out standard questionnaire-based research. Once again, this is so consumers can expect minimum standards of behaviour from the originators of all unsolicited telemarketing calls” (DP para.7.3)

In our view, this implies a different and wider definition of telemarketing in the proposed Standard from the considerably narrower definition in the DNCRA. We strongly believe that it will be most unhelpful to have two meanings of the same term, and urge ACMA to find a better terminology.

The DP also expressly states that:

“The standard will not apply to non-telemarketing calls, including non-telemarketing calls by persons that also carry out telemarketing activities (for example, non-telemarketing calls from charities)” (1.7).

It is not clear what sorts of calls might be envisaged here – presumably routine ad-hoc ‘administrative’ calls of the sort made by any organization? But are other sorts of ‘bulk’ or ‘volume’ call activity seen as being outside the scope of the Standard?

All interested parties need to be clear about what sorts of calls by charities, registered political parties, and religious organizations etc will be covered by the Standard and what sort won’t.

Why is the terminology so important?

Clarity on coverage is critically important because the exemptions mean that individuals will not have the choice (which we think they should have) of opting-out via the Do Not Call Register. Their only protection will be through the Standard, and to a limited extent by the Privacy Act.

If even the Standard does not apply to a significant proportion of calls from ‘exempt’ organizations, then we submit that it will fail to meet the legitimate expectations of Australians for protection from the ‘nuisance’ of unsolicited calls.

To summarise, we believe there is considerable confusion generated by the different usages of the term ‘telemarketing’ in the different legislation and instruments, which if not clarified could seriously undermine the effectiveness of the entire DNCR/Standard regime.

The draft Standard needs to be much clearer than the Discussion Paper about this fundamental definitional issue.

Specific Issues

The Foundation favours the ‘strictest’ rules for all the matters required to be included, in recognition of the clear community feeling that unsolicited calls are an unwelcome nuisance. We do believe that the so-called rights of organizations to communicate with consumers should not be given the same weight as the rights of consumers – the former are definitely in the nature of interests and not rights, and should be very much a secondary consideration. While we do not support regulation for its own sake, in this context the priority must be to meet community expectations about protection from unwelcome organisational behaviour. The suggested principle of ‘not imposing undue financial and administrative burdens on participants in the telemarketing industry’ (DP 8.2) is acceptable provided it is not used to justify compromising the primary consumer protection function of the Standard.

Hours of calling

In our submission to DOCITA on the draft Bill we suggested that the MCCA Model Code hours seemed a reasonable compromise, but that many individuals are likely to resent calls in the early evening. We now favour a highest common standard, being in this context the most limited range of permitted calling hours taken from all of the current regulatory requirements.

Provision of Contact Information

We favour a highest common standard, being in this context the most detailed amount of information taken from all of the current regulatory requirements. We submit that the Standard should also require Callers to disclose, on request, where the recipients name/number has been obtained. This would ensure that those called can complain both about compliance by the source of the data with the National Privacy Principles, and opt-out of further disclosure by the source (in accordance with NPP 2.1(c)) even where they have chosen not to register with DNCR. We submit that this additional requirement can legitimately be included in the Standard on the basis that it can be seen as ‘specified information about the relevant participant (telemarketer)’ (s.125A(1)(b)(ii)).

Termination of calls

In relation to termination of calls, we support a clear requirement to terminate on request, but re-iterate the point we made in our submission on the DNCR Bill, However, at the same time, there is a need for a safeguard to avoid telemarketing callers using an initial reaction along the lines of ‘I don’t want calls like this’ to immediately terminate the call

and avoid legitimate follow up questions about where information has been obtained, how to opt-out etc.

Calling Line Identification

We strongly support the requirement for organisations in relation to Calling Line Identification – and we favour the more detailed version of this in the current ADMA Code (9.4). The Foundation has been actively involved in the debate over regulation of CLI over the years and specifically in the development and revision of the ACIF Calling Number Display Code.

In our view the requirement for telemarketers to transmit CLI information is an important complement, and back-up, to the requirement to provide contact information, and to some extent acts as a automatic ‘policing’ of that requirement. If recipients of calls in possession of CND equipment can see the calling party’s number then they can match that against any number given orally by the caller, and if the caller fails to orally give a number, CLI may still enable the recipient to contact the caller with any enquiry of complaint.

Telemarketers who breach both the contact information and CLI requirements will have clearly demonstrated a wilful defiance of the law, and if they can be traced should be subjected to the full force of the civil penalties provided in the TA for breaches of a Standard, and, where it applies, sanctions under the DNCRA.

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