

Explanatory Statement

Issued by the authority of the Australian Communications and Media Authority
*TELECOMMUNICATIONS (DO NOT CALL REGISTER) (TELEMARKETING AND
RESEARCH CALLS) INDUSTRY STANDARD 2007*

Telecommunications Act 1997

Legislative Basis

Under subsection 125A(1) of the *Telecommunications Act 1997* (the Telecommunications Act), the Australian Communications and Media Authority (ACMA) must determine a standard that:

- a) applies to participants in each section of the telemarketing industry; and
- b) deals with the following matters relating to the telemarketing activities of those participants:
 - i. restricting the hours and/or days during which telemarketing calls may be made or attempted to be made;
 - ii. requiring that a telemarketing call must contain specified information about the relevant participant;
 - iii. requiring that, if a person other than the relevant participant caused a telemarketing call to be made, the call must contain specified information about the person who caused the call to be made;
 - iv. requiring the relevant participant to terminate a call if a specified event happens;
 - v. requiring the relevant participant to ensure that calling line identification is enabled in respect of the making of a telemarketing call.

The standard is to be known as an *industry standard* and must commence at the same time as the commencement of Part 2 of the *Do Not Call Register Act 2006*.

Background

On 30 June 2006 the *Do Not Call Register (Consequential Amendments) Act 2006* (the Consequential Amendments Act) received Royal Assent. Section 36 of the Consequential Amendments Act amended the Telecommunications Act by inserting section 125A, with the amendment to commence on Royal Assent.

The new arrangements respond to the increasing levels of community concern about the growing number of unsolicited telemarketing calls and industry concerns about the inconsistency in current rules governing the making of telemarketing calls. In particular, the Standard establishes a national framework providing more consistent regulatory arrangements for the telemarketing industry and consumers.

The Register made under the *Do Not Call Register Act 2006* enables persons who do not wish to receive unsolicited telemarketing calls to submit their number for inclusion on the Register. In general, persons undertaking telemarketing activities must not call numbers included on the Register to make telemarketing calls without consent from either the account-holder or the account-holder's nominee.

The Standard sets the minimum requirements for telemarketing calls to numbers not included on the Register, as well as for telemarketing calls exempt from the requirements of the Register. Compliance with the Standard will be enhanced by amendments to the Telecommunications Act made by the Consequential Amendments Act which will commence at the same time as the Standard. These include section 139 which has the effect of requiring agreements for the carrying on of telemarketing activities to contain provisions requiring compliance with the Standard.

Objective of the Standard

The objectives of the development of a national telemarketing standard are to:

- provide consumers with greater certainty regarding the minimum standards of conduct they can expect from unsolicited telemarketing and research callers; and
- reduce compliance and administrative costs for industry and regulators through the introduction of greater consistency in national minimum calling requirements.

Consultation

ACMA commenced the development of the telemarketing standard with the release of a discussion paper, *Industry Standard for the Making of Telemarketing Calls*, in August 2006. ACMA received over 40 public submissions from a variety of areas including private citizens, public authorities, the banking and finance sector, the charitable sector, members of the telecommunications industry, special interest groups, social and market research organisations, consumer groups and small business. Despite some differences between submitters on the manner and form of arrangements to be made under the proposed Standard, all submissions gave in-principle support to the notion of greater regulation by Government of the matters required to be contained in the Standard.

On December 21 2006 ACMA released a draft version of the Standard for public comment. 32 submissions were received from consumers and consumer representative groups, telemarketers (including marketing and social researchers) and telemarketing industry representative bodies. As required by Part 6 of the Telecommunications Act, ACMA also consulted the Australian Direct Marketing Association, the Fundraising Institute Australia Ltd, the Association of Market & Social Research Organisations and the Australian Market and Social Research Society as bodies representing sections of the telemarketing industry, the Australian Competition and Consumer Commission, the Office of the Privacy Commissioner, consumer bodies and the States and Territories.

A number of concerns were raised by submitters particularly in relation to the continued operation of State and Territory laws, the information which must be provided by telemarketers and the provision of calling line identification. Upon consideration of these

submissions, ACMA made a number of changes to the proposed draft Standard (see below).

Telemarketers

9 responses were received from telemarketing organisations - 3 from smaller telemarketers, 5 from larger telemarketers and one from an information supply company.

Common themes from these responses were:

- strong support for a single national standard for the regulation of telemarketing calls so as to reduce industry compliance costs;
- concerns that requiring calling line identification to be enabled may not be practical in all circumstances and may not be consistent with the introduction of some new technologies. Also, there may be some confusion about whether the intention is that calling line identification or calling number display must be enabled; and
- concerns that call operators should not be required to disclose their full name and that a personal identifier should be allowed to be used instead. Also, callers should not be required to disclose a street address but should be able to provide a postal address where contact details are requested.

Telemarketers also argued that if a called party indicated that they were ‘not interested’ in the subject matter of the call this should not be sufficient evidence of a desire to terminate the call to require that the call be terminated, as in many instances consumers may be interested in purchasing the product offered upon receipt of further information. Alternatively consumers may be interested in other products offered by the telemarketer. Also, contrary to the example provided a call should not be required to be terminated immediately if the caller is at an unexpected location and it would be a prohibited time for the call if that location were the usual residential address of the called person. This may otherwise result in calls being terminated where the called person wished to continue with the call.

These concerns were addressed through providing an option that employed call operators may provide on request either their full name or alternatively an individual staff identifier. Callers can also provide a street, postal or email address for consumer contacts.

The example of a called person stating that they were ‘not interested’ in a telemarketing call was removed as an example indicating that a called party had indicated a clear intention to terminate a call. However, this is not to be taken to mean that those words cannot constitute an indication that a call recipient does not want the call to continue, there will be instances when they mean exactly that. However that assessment must be made on the basis of the relevant facts of a particular case. Also, callers need not terminate a call made to consumers at a time which would be a prohibited time if at their usual residential address if the caller expressly states that they wish the call to continue.

Other issues raised by telemarketers were considered to relate to the legislation requiring the making of the Standard and outside the scope of ACMA’s discretion when making the Standard.

Researchers

Four responses were received from organisations which undertake market and/or social research. Their comments particularly concerned the issue of calling hours, especially being able to call until 9pm on weekdays, and 6pm on Saturday and Sundays.

ACMA considers that the cost of prohibiting researchers from making calls from 8.30pm till 9pm on weekdays, from 5pm till 6pm on Saturdays and on Sundays is outweighed by the benefits to consumers from promoting consistency in telemarketing hours.

Industry Bodies

Six responses were received from bodies which represent various sections of the telemarketing industry including charities and market research organisations.

Comments received from industry bodies were generally supportive of a Standard which would impose uniform national standards for telemarketing calls. The following comments were made by one or more submitters:

- the Standard should override State and Territory laws;
- public holidays should be restricted to National public holidays;
- a called party that indicates they are 'not interested' in the subject matter of a call does not necessarily mean that they wish for the call to be terminated by the telemarketer;
- mandating the enabling of calling line identification does not provide for future technologies which may not be able to present calling line identification information;
- the development of separate telemarketing and teleresearch schemes is likely to lead to increased consumer confusion and complaints, with consequent increased compliance related costs for government;
- industry bodies representing research organisations however, supported the differences made for teleresearch calls and supported a further extension of calling hours for research calls;
- the disclosure of information should not require the full name of the call operator, disclosure of street addresses should not be mandated and callers should not be required to disclose the source of information used for the making of a call. This should be done so as to protect the privacy and security of telemarketing operators; and
- hawking of financial products should not be prohibited during hours permitted under regulations made under the *Corporations Act 2001*.

To promote certainty and national consistency in the days on which telemarketing calls are allowed to be made, holidays on which telemarketing calls are prohibited have been restricted to listed national public holidays.

The issues of call operator privacy and the indication by callers that they are 'not interested' have been dealt with on page 3 above.

ACMA believes that the differences between the telemarketing and research call regimes are minimal and are unlikely to result in any significant confusion regarding calling times or the information which must be provided by a caller. However, ACMA also believes that any exceptions made to permit longer calling hours specifically for telemarketers hawking financial products is likely to cause significant confusion for consumers and is unlikely to address existing consumer concerns about telemarketing practices.

Other issues raised by industry bodies were considered to relate to the legislation requiring the making of the Standard and outside the scope of ACMA's discretion when making the Standard.

Consumers and Consumer Representatives

ACMA received four responses from consumers or consumer representative organisations. Their responses included:

- a suggestion that callers should ensure that the Calling Number Display information available when making the call should disclose a number appropriate for handling complaints from called parties;
- a query as to why longer hours have been specified for researchers; and
- a suggestion that the Standard should include political calls in addition to telemarketing calls.

Longer hours have been specified for researchers to facilitate the transition to the new arrangements. Other issues raised by consumers and consumer representatives were considered to relate to the legislation requiring the making of the Standard and outside the scope of ACMA's discretion when making the Standard.

Government and Other

ACMA received nine submissions from government or other regulatory agencies at State, Territory and Federal level. The majority of submitters generally supported the Standard in its current format, but a number of issues were raised:

- the States supported their continued legislative ability to devise stronger requirements than those specified in the Standard in particular circumstances;
- the Standard should make reference to relevant sections of the *Trade Practices Act 1974*, and in particular provisions dealing with consumer protection issues such as unconscionable conduct;
- the provisions of the Standard were not seen as inconsistent with financial service regulations;
- telemarketers should not require the disclosure of personal information of the call operator;
- telemarketers should require express consent in order to make calls during the prohibited calling hours and nominees should not be able to give this consent;

- callers should be required to terminate a call if it becomes obvious that the call recipient is not able to consent to purchasing goods or services offered; and
- references to CLI should be as per ADMA code.

ACMA also consulted with industry representatives and members of the Standing Committee on Consumer Affairs (SCOCA) Working Group on the Development of Uniform Telecommunications Standards. Comments made by SCOCA have been incorporated to the Standard.

As noted above, a number of submitters commented on the privacy implications of the potential disclosure of personal information of call operators and these have been reflected in the Standard. ACMA considers that the making of different rules in respect of consent for the Standard than those under the *Do Not Call Register Act 2006* would introduce significant inconsistencies between different sections of the Do Not Call scheme and an additional confusion for industry and consumers which would outweigh the benefits of this proposal.

ACMA also considers that the issue of whether a caller should be required to terminate a call if it is obvious that the recipient is not able to consent to purchasing goods or services offered is more properly dealt with through the development of an industry code.

Other issues raised by industry bodies were considered to relate to the legislation requiring the making of the Standard and outside the scope of ACMA's discretion when making the Standard.

Notes on the Sections and Subsections

Part 1 – Introduction

Section 1 – Name of Standard

Section 1 provides that the Standard is the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007*.

Section 2 – Commencement

Section 2 sets out that the Standard commences at the same time as Part 2 of the *Do Not Call Register Act 2006*. Under subsection 125A(1)(c) of the *Telecommunications Act 1997*, the Standard must be expressed to commence at the same time as the commencement of Part 2 of the *Do Not Call Register Act 2006*.

Section 3 – Definitions

Section 3 sets out the key definitions used in the Standard. These definitions are discussed below.

Act means the *Telecommunications Act 1997*. This Standard is made under section 125A of the Telecommunications Act. Section 9 of the Telecommunications Act provides for that Act to apply both within and outside Australia. Section 10 and 11 extend the application of the Telecommunications Act to external territories and adjacent areas. It is intended that definitions adopted in the Standard from the Telecommunications Act apply to the same extent as provided for by the Telecommunications Act.

Call means a telemarketing call.

Telemarketing call is defined under this section to have the meaning given by section 7 of the Telecommunications Act.

Caller means a participant in a section of the telemarketing industry that makes, or proposes to make, a call. This distinguishes the caller from the call operator or the person who caused the call to be made. This enables a distinction to be drawn between the information which must be provided about the caller, the call operator and the person who caused the call to be made.

Call operator means an individual who makes or attempts to make a call on behalf of a caller. The call operator may also be a caller in some circumstances, for example where an individual is an independent contractor providing outsourced telemarketing services.

Call recipient means an individual who receives a call from a caller, whether or not the call recipient is a relevant telephone account holder. It includes nominees for that service, persons who may not be an account holder or nominee but who commonly use the service and other persons who may use the service from time to time or on a one off basis. It also refers to the person who receives the call rather than the intended call recipient.

Consent has the same meaning as in Schedule 2 to the *Do Not Call Register Act 2006*. Consent for these purposes includes both express consent and consent which can be reasonably inferred from the conduct and business and other relationships of the individual or organisation concerned.

Nominee has the meaning given by section 39 of the *Do Not Call Register Act 2006*. Nominations are made in relation to a number in writing by the relevant telephone account-holder for a specified individual. For the purposes of this Standard, the concept of a nominee is mainly relevant to the giving of consent for the making of a call during prohibited calling times.

Relevant telephone account-holder has the meaning given by section 4 of the *Do Not Call Register Act 2006*. This means any individuals and/or organisations solely or jointly responsible for the relevant telephone account. For example, an individual or organisation may be responsible for paying for the relevant account, or the telephone account may be jointly held by more than one person in the household. In these cases the relevant account holder is any of these persons. This is relevant to the issue of consent to calls outside of the prohibited hours.

Research call means a call described in paragraph (b) of the definition of telemarketing call in section 7 of the Telecommunications Act. Under paragraph 7(b), this means a voice call (within the meaning of the *Do Not Call Register Act 2006*) made to an Australian number, where having regard to the content and presentational aspects of the call, it would be concluded that at least one of the purposes of the call is to conduct opinion polling or to carry out standard questionnaire-based research.

Unlike other callers, callers making research calls need only provide the name of the person who caused the call to be made on request or before the end of the call. Callers making non-research calls must give the name of the person who caused the call to be made immediately after the call commences. The purpose of this distinction is to cater for circumstances in which early disclosure of the person who caused the call to be made may potentially affect the answer of the call recipient and so affect the validity of the research undertaken.

Research calls may also be made until 8.30pm weekdays, unlike other telemarketing calls which can only be made until 8pm on weekdays.

Telemarketing call has the meaning given by section 7 of the Telecommunications Act. This means a telemarketing call within the meaning of the *Do Not Call Register Act 2006* made to an Australian number, or a research call.

Voice call has the meaning given by section 4 of the *Do Not Call Register Act 2006*. This includes a voice call within the ordinary meaning of the expression, or a call that involves a recorded or synthetic voice or an equivalent call to a voice call for a person with a disability.

Subsections 3(2) and 3(3) set out circumstances when a person will be taken to have *caused* a call to be made. Under subsection 3(2), in addition to any other meaning of cause, a person is taken to have caused a call to be made when a person enters into a contract (other than a contract of employment), arrangement or understanding with another person, whereby the second person undertakes to make calls or to cause any of their employees or agents to make calls, and the second person or an employee or agent of the second person gives effect to the contract, arrangement or understanding by making a call.

Under subsection 3(3), a person is also taken to have caused a call if they are the employer of another person, and the employee makes a call on behalf of the employer, and the call has not been caused to be made by any other person under subsection 3(2).

The purpose of 3(3) is to clarify that the employer of a person making a telemarketing call can only be taken to have caused a call to be made if the call was not caused to be made by another person under 3(2).

Section 4 – Persons to which this industry standard applies

Section 4 sets out that for the purposes of section 125A of the Act, this industry standard applies to participants in each section of the telemarketing industry.

Section 5 – Prohibited calling times

Subsection 5(1) requires that a caller must not make, or cause to be made, a telemarketing call that is not a research call on:

- a weekday before 9am; or
- a weekday after 8pm; or
- a Saturday before 9am; or
- a Saturday after 5pm; or
- a Sunday.

For telemarketing calls that are research calls, subsection 5(2) requires that a caller must not make, or cause to be made, a call on:

- a weekday before 9am; or
- a weekday after 8.30pm; or
- a Saturday before 9am; or
- a Saturday after 5pm; or

- a Sunday.

These times are generally consistent with the current allowable calling hours specified in various State and Territory legislation. As indicated by the note to 5(2), section 9 of the industry standard clarifies that a caller may also be prohibited from making telemarketing calls at other times by State or Territory law.

The prohibited calling times represent the earliest and latest times at which calls may be made or attempted to be made. These subsections do not however require that calls made within the permitted calling times be terminated once a prohibited calling time is reached.

Subsection 5(3) extends prohibited calling times so that no telemarketing calls, including research calls, may be made on the listed national public holidays or a holiday on a weekday given in lieu of a national public holiday.

Subsection 5(4) clarifies that the relevant time and place for the purposes of subsections 5(1), 5(2) and 5(3) is the usual residential address of the relevant telephone account-holder. This is to avoid confusion as to the relevant location for services which are not fixed to a single location, for example mobile or nomadic voice over internet protocol services and consequently the times at which they may be called.

Consequently a telemarketer would not be in breach of sections 5(1), 5(2) or 5(3) if they made a telemarketing call at a time which would have been a permitted time if the called party was at their usual residential address, but the called party was at a location where the time was outside the hours set out in 5(1) or 5(2) (for example, the call was made at 7pm Perth time to a called party located in Sydney where the time was 9pm). However, as indicated in the note to subsection 5(4), section 7 requires that in these circumstances the call be terminated immediately unless the call recipient expressly states that he or she would like the call to be continued.

Subsection 5(5) allows for calls outside the prohibited calling times if the relevant telephone account-holder or their nominee has given consent in advance to receiving a call at the time or day at which the call is made or attempted to be made. In this regard the Standard is not intended to inconvenience consumers by preventing them from consenting or requesting to calls outside the generally prohibited hours. For example, if a telemarketer called on a weekday when the called party was having dinner, the called party may request that the caller terminate the call but also agree to the caller making another telemarketing call after 8pm. However, if required by ACMA, the caller must demonstrate that consent was obtained and the call was made at the time arranged by consent. For example, a caller may cause records to be made of these matters.

Section 6 – Provision of information during a call

Section 6 sets out the information which must be provided by a caller making a telemarketing call. Depending on the information this may need to be provided immediately after the call commences, immediately upon request, before the end of the call or within a reasonable time not exceeding 30 days after being requested to do so. The timing for provision of information may also vary depending on whether the telemarketing call is a research call or a telemarketing call for other purposes (such as for sales of goods or services or to solicit donations).

Information which must be provided includes:

6(1)(a) - The caller's given name

The caller must provide their given name. The caller is not required to disclose their full or family name under this subsection.

6(1)(b) – The call operator's full name, or alternatively an employee or staff identifier that is sufficient to enable the call operator to be identified by the employer, or if there is not contract of employment, by the caller. The purpose of this provision is to ensure that sufficient information is disclosed to identify the individual call operator, for example if an investigation was being carried out into a potential breach of the Standard. Call operators need not disclose their full name but may use a staff identifier where, for example, there are privacy or security concerns about disclosure of a call operator's full name.

6(1)(c)- The purpose of the call. Callers must disclose or caused to be disclosed the purpose of the call. This is relevant to the call times and other information provision requirements, as well as for compliance with the Do Not Call Register Act 2006. It will also be of assistance to called parties when deciding whether or not to continue a call.

6(1)(d) – If the call operator makes the call under a contract of employment, the name of the call operator's employer.

6(1)(e)- If the call operator makes the call under a contract of employment, the contact details of the call operator's employer.

6(1)(f)- If the call operator is also the caller, or another person who is not an employee of the caller, the full name and contact details of the caller.

6(1)(g) – if a person other than the caller has caused the call to be made:

- (i) the other person's name; and*
- (ii) the other person's contact details.*

6(1)(h)- the name and contact details of any person responsible for dealing with consumer inquiries or complaints about:

- (i) the caller; or*
- (ii) another person who caused the call to be made;*
- (iii) another person who has caused the call to be made.*

Information provided under 6(1)(d) to 6(1)(h) will assist called parties who wish to pursue a query or complaint relating to a particular telemarketing call. It will also assist ACMA in the investigation of any potential breach of the Standard.

6(1)(j) – For a call made on or after 1 July 2007 – the following information concerning the call or the caller, in relation to data that was disclosed to the caller after 1 July 2007:

- (i) the source from which the caller obtained the telephone number, or a statement that the source was a private individual;*
- (ii) if applicable – the name of the person for whom the call was intended;*
- (iii) if applicable – the name and contact details of any organisation that disclosed the information to the caller.*

This information will assist ACMA and other regulatory agencies in investigating complaints about the inappropriate use of information for telemarketing purposes.

Under subsection 6(2), for the purposes of 6(1), contact details include a telephone number suitable for receiving telephone calls during normal business hours at the location of the call recipient, together with any one of the following:

- a street address;
- postal or business address, other than a street address;
- email address.

Callers and call operators consequently need not disclose their street address but may provide other contact addresses where concerned about possible staff or business security issues.

Subsection 6(3) provides an exception from the requirement in subsection 6(2) to provide a telephone number. The exception applies to call operators who are also callers, where the caller makes the calls from their residential address and the required telephone number would otherwise be one which is principally used by the caller for residential purposes.

Time for giving information – research calls.

Under subsection 6(4)(a) the caller making a research call must give or cause to be given their name and the purpose of the call immediately after the research call commences. This information is necessary if the called party is to determine whether to continue with the call or to terminate it.

In contrast to other telemarketing call types, under 6(4)(b), a research caller is only required to disclose the name of the person who caused the call to be made immediately upon request or, if the called party does not request the name of the person who caused the call to be made, before the end of the call.

This distinction has been made because of concerns that immediately disclosing the identity of the person who caused the call to be made may affect the called party's response to questions. This may in turn reduce the accuracy of the research or require that a larger number of persons be called to increase sample size.

The information required under 6(1)(b), (d), (e), (f), (h) and (g)(ii) is required to be provided immediately after being requested. The information is not required to be provided if the call recipient does not request it. While this information is not necessarily required for the called party to determine whether to terminate a call, it may be required in order to pursue a query or make a complaint.

Information required under 6(1)(j) must be provided within a reasonable time not exceeding 30 days after being requested. This is because accurate information about the sourcing of personal details may not be immediately available to the caller and the information is unlikely to be necessary for the purpose of determining whether other requirements of the Standard have been breached or to lodge a complaint about a breach of the Standard.

Time for giving information – calls other than research calls

Under subsection 6(5)(a), the caller must give their name, the purpose of the call and the name of the person who caused the call to be made immediately after the call commences.

This information is necessary if the called party is to determine whether to continue with the call or to terminate it.

In contrast to research call types, a caller must disclose the name of the person who caused the call to be made immediately after the call commences. This is because this information may be useful to the called party in determining whether to terminate the call, and there is no potential affect on research.

The information required under 6(1)(b), (d), (e), (f), (h) and (g)(ii) is required to be provided immediately after being requested. While this information is not necessarily required for the called party to determine whether to terminate a call, it may be required in order to pursue a query or make a complaint.

Information required under 6(1)(j) must be provided within a reasonable time not exceeding 30 days from being requested. This is because accurate information about the sourcing of personal details may not be immediately available to the caller and the information is unlikely to be necessary when determining whether other requirements of the Standard have been breached or to lodge a complaint about a breach.

Section 7 – Standard for terminating a call

Section 7 sets out the circumstances in which a caller must immediately terminate a telemarketing call or ensure that a call is terminated. Under subsection 7(1)(a) these include when the caller or call operator receives information that would lead a reasonable person to conclude that the call recipient is not at the relevant telephone account-holder's usual residential address, and that at the time or place the call recipient is located it would meet the requirements of subsection 5(1), 5(2) or 5(3) if that location was the usual residential address of the relevant telephone account-holder. An example of this is included in this section where a caller or call operator makes a call to a mobile phone being used in a different time zone to the usual residential address of the relevant telephone account-holder. In this scenario the caller will not be in breach of the Standard provided they terminate the call immediately or cause the call to be terminated immediately in accordance with this section.

Subsection 7(1)(b) requires that calls must also be terminated if the call recipient hangs up or otherwise attempts to terminate the call, or if the call recipient asks for the call to be terminated or otherwise indicates that he or she does not wish to continue the call.

Subsection 7(2) states that 7(1) does not apply if the call recipient expressly states that he or she would like the call to be continued. This ensures that a called person may continue to receive a telemarketing call in the circumstances listed at 7(1)(a) if they consent to the call's continuation.

Section 8 – Enabling calling line identification for a call

A caller must ensure that calling line identification is enabled at the time that the caller makes, or attempts to make, a call, or causes a call to be made.

Section 9 – Operation of State and Territory laws

This section provides that the industry standard is not intended to exclude the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with the industry standard. The example is given of a State or Territory setting out more restrictive calling hours than those in subsections 5(1), 5(2) or 5(3). In those circumstances the State or Territory law will continue to operate to that extent and the caller must not make a call at the specified time.