

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Do Not Call Register Act 2006

Do Not Call Register (Access Fees) Determination 2017

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Do Not Call Register (Access Fees) Determination 2017* (**the Determination**) under subsection 21(1) of the *Do Not Call Register Act 2006* (**the Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Under subsection 21(1) of the Act, the ACMA may make a determination about the fees payable for the provision of a ‘washed’¹ list or the refunds of fees for those services. Under subsection 21(2) of the Act, the ACMA may make a determination that also makes provision for any exemptions from fees payable. The fees must not amount to taxation, and are payable to the ACMA on behalf of the Commonwealth.

Purpose and operation of the instrument

Under subsection 13(1) of the Act, ACMA must keep or arrange for another person (the contracted service provider) to keep on behalf of the ACMA a register of telephone numbers for the purposes of the Act. The register is known as the Do Not Call Register.

The Do Not Call Register allows individuals to ‘opt out’ of receiving certain unsolicited telemarketing calls by registering their home or mobile telephone numbers that are primarily used for private or domestic purposes. Emergency service numbers, and numbers exclusively used by government bodies or to transmit faxes are also eligible for inclusion on the Do Not Call Register.

It may be an offence under section 11 of the Act to make, or to cause to be made, telemarketing calls to telephone numbers registered on the Do Not Call Register. Further, it may be an offence under section 12B of the Act to send a marketing fax to a number on the Do Not Call Register. However, the Act allows ‘access-seekers’ to submit lists of telephone numbers to the ACMA or the contracted service provider for checking against the Do Not Call Register (section 19 of the Act). The ACMA or the contracted service provider must then inform the access-seeker which numbers (if any) on the access-seekers’ list are (or are not) registered on the Do Not Call Register. This process of ‘washing’ access-seekers’ lists helps access-seekers to avoid breaching the Act (see subsections 11(3) and 12B(3) of the Act).

A description of each provision of the Determination is set out in the notes at **Attachment A**.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Documents incorporated by reference

Section 589 of the *Telecommunications Act 1997* relevantly allows for instruments made under the Act to make provision in relation to a matter by applying, adopting or incorporating matter contained in writing, as existing from time to time, regardless of whether the writing exists at the time the instrument is made. The Determination makes provision in section 10 for the ACMA to specify methods relating to payment of fees. Such methods will, if specified in writing, apply as in force from

¹ Washing is a term used to describe the process by which industry access seekers access the register to check whether particular numbers are registered (and therefore should be excluded from telemarketing activity)

time to time. Any such methods would be available to access free of charge on the ACMA's website or, if there is a contracted service provider, the website of the contracted service provider. The ACMA's website is www.acma.gov.au, and the contracted service provider's website is www.donotcall.gov.au.

The commencement of the Determination is tied to the commencement of the *Do Not Call Register (Access to Register) Determination 2017*. In addition, subsection 8(3) requires registration under subsection 7(3) of the *Do Not Call Register (Access to Register) Determination 2017* in order to obtain or purchase a subscription under the Determination.

The *Do Not Call Register (Access to Register) Determination 2017* is available free of charge at www.legislation.gov.au.

The Determination does not otherwise incorporate any document by reference.

Consultation

The ACMA undertook consultation before the Determination was made in accordance with section 17 of the *Legislation Act 2003*.

On 19 March 2017, the ACMA commenced a consultation process on cost recovery arrangements for the Do Not Call Register and the related sunseting of three determinations which support the operation of the Do Not Call Register. The consultation paper, the draft Cost Recovery Implementation Statement and draft instruments were published on the ACMA's website and provided directly to key industry stakeholders, including associations representing organisations engaged in telemarketing. The ACMA received five submissions to the consultation, although none of these submissions addressed the proposed cost recovery arrangements (including access fees).

Regulatory impact assessment

The Office of Best Practice Regulation has determined that the regulatory change effected by the Determination is minor or machinery in nature and has therefore verified that a Regulatory Impact Statement is not required (Exemption reference ID: 21867).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

The Determination has been made by the ACMA to amend the amount charged to check (or 'wash') lists of telephone and fax numbers against the Do Not Call Register under the Act.

Human rights implications

The ACMA has assessed whether the Determination is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the Determination and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

The Determination is compatible with human rights as it does not raise any human rights issues.

Notes to the *Do Not Call Register (Access Fees) Determination 2017*

Part 1–Preliminary

Section 1 Name of Determination

This section provides for the instrument to be cited as the *Do Not Call Register (Access Fees) Determination 2017*.

Section 2 Commencement

This section provides for the instrument to commence at the start of the day after it is registered on the Federal Register of Legislation, or at the same time as the *Do Not Call Register (Access to Register) Determination 2017*, whichever is the latter. Both of these events need to occur before the instrument commences.

The Federal Register of Legislation may be accessed at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the instrument, namely subsection 21(1) of the *Do Not Call Register Act 2006* (**the Act**).

Section 4 Repeal of the *Do Not Call Register (Access Fees) Determination 2007*

This section provides that the *Do Not Call Register (Access Fees) Determination 2007* (F2007L01240) is repealed.

Section 5 Definitions

This section defines a number of key terms used throughout the Determination. A number of other expressions used in the Determination are defined in the Act.

Section 6 References to legislative and other instruments

This section provides that in the Determination, unless the contrary intention appears, a reference to another instrument or writing is a reference to that other instrument or writing as in force from time to time.

Part 2–Fees for Access to Register

Section 7 Fees

Section 7 sets out a table of the fees for the provision of a ‘washed list’.

The section provides for eight subscription types (A to H) with fees varying according to the maximum amount of numbers that can be submitted for ‘washing’ against the Do Not Call Register. The model allows for incremental quantity discounts; that is, as the quantity per order increases, the unit purchasing cost declines incrementally.

Under the fee regime, an access-seeker who purchases a particular subscription type, identified in column 1, will be allowed to submit lists of numbers for washing until they reach the maximum number of numbers specified for that subscription type.

A number that is submitted counts towards the numbers an access-seeker may wash, even though:

- the number is not an Australian number; or
- the number has already been submitted in the subscription period (for example, if a person submits the same list of 2,000 numbers twice in a subscription period, that amounts to 4,000 numbers).

Section 8 Subscription types

Subsection 8(1) sets out that an access-seeker may hold one or more subscription types subject to:

- (a) payment of the annual subscription fee for each subscription held; and
- (b) the access-seeker being registered under subsection 7(3) of the *Do Not Call Register (Access to Register) Determination 2017*.

Subsection 8(2) describes the limitations associated with holding a type A subscription, in that:

- only one Type A subscription can be held at any one time;
- the holder of a Type A subscription cannot hold any other type of subscription while the Type A subscription is in force.

Subsection 8(3) provides that where an access-seeker holds two or more subscriptions with differing start dates for the subscription periods:

- any numbers submitted for checking are taken to have been submitted for the subscription which commenced first, up to the maximum numbers of numbers able to be submitted for that subscription;
- any remaining numbers submitted for checking are taken to have been submitted for the other subscription or subscriptions, in order of commencement, up to the maximum number of numbers able to be submitted for that subscription, or each of those subscriptions.

Subsection 8(4) provides that where an access-seeker holds a current Type A subscription and purchases an additional Type B or higher subscription before the expiration of the Type A subscription, the Type A subscription will be cancelled from the time of the purchase of the additional subscription and any remaining, unused numbers in the current type A subscription will not be included in the new purchased subscription.

Subsection 8(5) provides that where an access-seeker holds a current Type B (or higher) subscription and purchases an additional Type B or higher subscription before the expiration of the current subscription, any unused numbers on the current subscription will be included in the newly purchased subscription.

Subsection 8(6) clarifies that where an access-seeker holds a current Type A subscription (or higher) subscription which expires, and then obtains another Type A subscription (or higher), any unused numbers from the expired subscription will not be included in the newly obtained subscription.

Section 9 Subscription period

Section 9 sets out the subscription periods for each subscription type.

The subscription period for a Type A (free) subscription commences when the ACMA or the contracted service provider receives the order.

The subscription period for other subscription types (i.e. paid subscriptions) commences when the ACMA or the contracted service provider receives the subscription fee (or, if agreed by the ACMA, when the access-seeker agrees to pay the fee).

The subscription period for all subscription types ends after 12 months unless previously cancelled by the ACMA.

Section 10 Orders for services

Subsection 10(1) specifies that an access-seeker may order a subscription by submitting an order to the ACMA using a method specified by the ACMA.

Subsection 10(2) specifies that the ACMA can cancel a subscription order if it is not paid for in full within 14 days of the order being submitted.

Subsection 10(3) allows the ACMA to specify in writing a method or methods of payment for subscriptions.

Section 11 Suspensions of registration

Section 11 sets out the circumstances in which the ACMA may suspend (and reactivate) an access-seeker's registration.

Suspending the access-seeker's registration will prevent an access-seeker from submitting a list of Australian numbers for checking against the Do Not Call Register.

Section 12 Refunds

Section 12 provides that the ACMA may refund any part of the fee for a service provided under subsection 19(2) of the Act, where an access-seeker applies for a refund.

Part 3—Savings and Transitional Arrangements

Section 13 Application of Part 3

Section 13 sets out that Part 3 applies to a subscription held by an access-seeker under the *Do Not Call Register (Access to Register) 2007* (**the old Determination**).

Section 14 Continued effect of subscription under the old Determination

Subsection 14(1) ensures that access seekers who held a subscription under the old Determination immediately prior to the commencement of the Determination (**the new Determination**) are still able to use that subscription. Subsection 14(2) provides that in such a case the subscription type does not change.

Subsection 14(3) provides that the commencement date of a subscription that is continued by the transitional provision in subsection 14(1) is, for the purposes of subsection 7(1), paragraph 8(3) and section 9, to be calculated by reference to the commencement date for the subscription under the old Determination. This provision clarifies that access-seekers are able to wash the remaining number of Australian numbers attributable to their continued subscription. It also ensures that, where more than one subscription is held by the access-seeker immediately prior to the commencement of the new Determination, the order of use of those subscriptions remains the same.

Subsection 14(4) ensures that orders for service submitted under the old Determination and which have not been fulfilled immediately prior to the commencement of the new Determination are to be treated as orders for service under subsection 10(2) of the new Determination, but that the access-seeker does not as a result obtain any additional period for payment before or suspension can occur under subsection 10(2).

Subsections 14(4) and (5) relate to cases where a subscription is continued due to the transitional provisions, but is suspended under the old Determination immediately prior to the commencement of the new Determination. Subsections 14(4) and (5) have the effect of continuing the relevant suspension under the corresponding provision in the new Determination.