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UNSOLICITED COMMUNICATIONS: RECENT DEVELOPMENTS IN SPAM AND TELEMARKETING LAW

The law in relation to unsolicited communications, such as commercial electronic messages and telemarketing calls, continues to develop at a rapid rate. This briefing discusses the implications of the first successful civil penalty proceedings under the *Spam Act 2003*, followed by an overview of the national Do Not Call Register scheme.

These developments are of significance to all government agencies, including those agencies that might not consider themselves to be involved in unsolicited marketing.

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Commercial electronic messages: complying with the Spam Act

The decision in *Australian Communications and Media Authority v Clarity1 Pty Ltd and Anor* (2006) 150 FCR 494; [2006] FCA 410 (*Clarity1*) is the first significant decision dealing with the *Spam Act 2003*. It highlights the potential dangers to both government bodies and their employees individually in failing to comply with the provisions of the Act.[1]

The decision

The decision in *Clarity1* on 13 April 2006 came almost exactly two years after the *Spam Act 2003* (the Act) came into force.[2] The case involved an application by the Australian Communications and Media Authority (ACMA) to the Federal Court for orders under ss 24, 29 and 32 of the Act, seeking declaratory relief and pecuniary penalties in respect of breaches of certain of the Act's civil penalty provisions. These breaches related to the sending of unsolicited commercial electronic messages (CEMs)[3] by Clarity1 Pty Ltd. Nicholson J found that the company, in contravention of the Act, had successfully sent tens of millions of messages to recipients whose email addresses had been obtained by the use of harvested address lists. He ordered that the company pay penalties of $4.5 million.[4]

The company's director, Wayne Mansfield, was found to have been knowingly concerned in the company's breaches of the Act as an accessory and was ordered to pay substantial penalties of $1 million.[5]

Clarity1 and Mansfield (the respondents) raised a number of defences which were ultimately unsuccessful. The court's reasoning in dealing with these defences highlights the potential dangers in sending commercial electronic messages.

This issue

Consent

The respondents contended that, on a number of grounds, the relevant electronic account-holders consented to the sending of the CEMs. This consent was said by the respondents to arise in several possible ways:

Firstly, by the inclusion in the CEMs of an 'unsubscribe facility', which allowed recipients to 'opt out' from receipt of further messages. The failure by recipients to utilise that feature was said to support an inference that the recipients consented to the receipt of the messages.

Secondly, by the alleged existence of a business relationship between the company and the various recipients.

Thirdly, because the recipients published their electronic addresses on the Internet.

The respondents failed to present evidence concerning consent given by individual account holders,[6] and asked the court to draw inferences that the recipients of the relevant electronic accounts had consented to the receipt of the CEMs. Each of the respondents' main submissions is considered in turn.

Unsubscribe facility

As Nicholson J noted, section 18 of the Act requires the inclusion of an unsubscribe facility in CEMs. To that extent, the respondents had complied with the Act (although no relief was sought in relation to that issue).

The respondents sought to argue that consent to receiving the CEMs should be inferred from the failure of the recipients to use the unsubscribe facility. They relied on material in the *Guidelines to the National Privacy Principles,* produced by the Office of the Privacy Commissioner, in which the Privacy Commissioner had suggested that 'it may be possible to infer consent from the individual's failure to opt out provided that the option to opt out was clearly and prominently presented and easy to take up'.

Nicholson J rejected this argument, finding that non-legislative guidelines cannot assist in the interpretation of Acts of Parliament.[7] More importantly, Nicholson J held that the mere presence of an unsubscribe facility in a CEM does not provide any foundation to support an inference that the recipient consented to the message by failing to utilise the facility. The recipients of CEMs may have used a variety of methods to dispose of the messages without being aware of their contents, and on that basis an inference was equally open that the recipient was unaware of the availability of such a facility.[8] Alternately, evidence was tendered that use of such facilities may increase future propensity to receiving unwanted CEMs, as unsubscribe facilities have been used by unscrupulous entities to confirm valid email addresses.

The respondents' contentions were further hampered by the lack of identification of the company responsible for the CEMs, as well as a failure to adequately explain the high numbers of messages sent, or the sophisticated software utilised by them to make the messages appear more legitimate to recipients.

Existing business relationship

A further argument advanced by the respondents was that consent could be inferred because of an alleged business relationship between them and the recipients of CEMs.

Nicholson J rejected this argument, finding that the act of sending the CEMs could not in itself give rise to a business relationship sufficient to imply consent. A relationship connotes more than unilateral communication from one party to another.[9]

The mere presence of an unsubscribe facility in a message does not provide any foundation to support an inference that the recipient consented to the message by failing to utilise the facility.

However, it should be noted that Nicholson J also held that ordinarily a contract of purchase by way of email order is sufficient to constitute a business relationship, such that (in the absence of contrary evidence) the consent of the purchaser to receive further CEMs about the vendor's business could be inferred.[10]

Publication of addresses on the Internet

As referred to in the judgment, the Act specifically provides that publication of addresses on the Internet does not support an inference of consent: clause 4(1) of Schedule 2 to the Act.[11]

The respondents argued that the addresses to which CEMs were sent satisfied the criteria of conspicuously-published addresses under clause 4(2) of Schedule 2 to the Act and that therefore consent to receiving the CEMs could be inferred.

However, Nicholson J held that a number of elements needed to be satisfied by the respondents in order to make out the defence of conspicuous publication under clause 4(2), and that they had failed to produce any evidence to satisfy the evidential burden upon them.[12]

His Honour also held that from the sheer volume of addresses kept, it was inferable that at the time of compilation Clarity1 did not consider whether the publication of electronic addresses on the Internet was done in circumstances meeting the criteria in clause 4 of Schedule 2 so as to afford the defence of conspicuous publication.[13]

Where the list is being supplied by a third party, warranties as to compliance with the Act should be considered.

Relevance for agencies – consent

Although it is difficult to imagine any government body sending unsolicited CEMs on the scale of the respondents in the *Clarity1* case, the principles expounded by Nicholson J remain relevant to more modest operations.

Nicholson J held that, except in the case of people who had actively engaged the services of the corporate respondent, consent to receipt of the CEMs could not be inferred.[14]

Where government bodies are sending messages that may be CEMs, caution should be taken to ensure that the lists of intended recipients are restricted to people who have expressly requested that such information be sent to them, or who, by virtue of an existing business relationship it can readily be inferred would wish to be kept abreast of the content of the CEMs.

Further, the mere presence of an unsubscribe facility within the CEM itself is insufficient, without anything further, to protect against the operation of s 16 of the Act, although it is mandatory for CEMs to include such a facility.

It is also important for government bodies to be aware of the sources of any email address lists used in sending CEMs. Using lists compiled by means of address-harvesting software (even by third parties), will contravene the Act. If government bodies are utilising such lists, or considering purchasing email lists, careful consideration is required as to the provenance of the email addresses. Where the list is being supplied by a third party, warranties as to compliance with the Act should be considered.

Potential liability of individuals

A further notable feature in *Clarity1* was that an individual, being a director of the corporate respondent, was found personally liable as an accessory under ss 16(9) and 22(3) for the company's breaches of ss 16(1) and 22(1) respectively of the Act. Nicholson J applied *Hamilton v Whitehead* (1988) 166 CLR 121, holding that since that case it is clear that the conduct of a person may result in liability

being imposed on a company as the principal offender, as well as liability being imposed on that individual person as an accessory.[15]

Nicholson J found that Mr Mansfield, as sole director of Clarity1, was responsible for, and was at all relevant times fully aware of, the business carried on by the company.[16] Further, he found that Mr Mansfield intentionally participated in, and knew the essential elements of, Clarity1's conduct, including the conduct which had been found to contravene ss 16(1) and 22(1) of the Act.[17]

Mr Mansfield had argued that under s 8(1) of the Act, it was the company, and not him as an individual, that had authorised sending of the CEMs, and therefore he had no case to answer. Nicholson J rejected this submission, holding that even if s 8(1) applies to result in the finding that Mr Mansfield did not authorise the sending of the electronic message, that cannot protect him against the application of the two subsections providing for accessorial liability (16(9) and 22(3)). The fact that s 8(1) may have the consequence that he is not to be taken to have *authorised* the sending does not answer the question raised by the two subsections on whether he *participated in* the sending of the message in any of the relevant ways. There was no inconsistency between s 8(1) and ss 16(9) and 22(3).[18]

Nicholson J also rejected Mr Mansfield's argument that he should not be found liable as an accessory as he had at no time acted in his own right. It was sufficient that he acted as a director and was the actor in the conduct. For him to be 'knowingly concerned' it is not necessary for him to be acting only 'in his own right'. The essential question in either case is whether he was, on the evidence, 'knowingly concerned' as that phrase and associated descriptions in the two subsections are understood at law.[19]

For government bodies, this raises the prospect that where individual employees are involved in the sending of CEMs, even if such sending is at the request or direction of another, they may be found to be personally liable for a contravention of the Act. According to Nicholson J, individuals involved in the sending of CEMs should take care to ensure that the relevant provisions of the Act are being complied with. From a practical standpoint, this is most effectively ensured by the relevant employees being aware of the legislative provisions, and the organisation having an effective policy or checklist in relation to the sending of CEMs.

Individuals involved in the sending of messages should take care to ensure that the relevant provisions of the Act are being complied with.

Penalty

Following further submissions, Nicholson J imposed pecuniary penalties of $4.5 million in respect of the corporate respondent, and $1 million in respect of the individual director. Injunctive relief was also sought and granted against the further sending of CEMs by the respondents, and against the use of the harvested-address lists.[20]

Nicholson J expressly noted that the penalties were fixed with a view to factors such as the parliamentary intention of imposing penalties of marked general deterrence (the maximum available in this case amounting to $99 million for the corporate respondent and $19.8 million for the individual director), the nature and extent of the contraventions, the specific deterrence of the respondents, and the commercial realism of the particular circumstances of the matter, as well as the innovative nature of the legislation at the time of the offences.[21]

Individuals found to have contravened the Act (even in the course of their employment) might face similar penalties to those imposed against the director in the *Clarity1* case. On the evidence before the court, the contravening conduct generated only minor income for the respondents and the director was found to have only limited assets. The substantial penalties imposed in this case ought therefore be seen to be aimed at promoting general deterrence.

Clarity1 and government bodies

It is important for government bodies to understand their obligations not only against the background of the *Clarity1* case but also with regard to the special considerations that apply to them.[22]

It should be noted that under the Spam Act it is not open to the court to impose pecuniary penalties on Crown departments and agencies,[23] although declarations can still be made. However, by contrast, pecuniary penalties may still be imposed on Crown *authorities*, such as a Commonwealth statutory authority that (under the relevant legislation establishing the authority) is a separate legal entity from the Crown.[24]

In cases where a government body is shown to have contravened the Act and it is open to the court to impose pecuniary penalties, it is possible that the court would impose substantial penalties owing to the high expectations placed on such bodies in respect of compliance with the Act.

The *Clarity1* case highlights a number of the concerns previously raised in AGS *Commercial Notes* No. 9 (6 April 2004). Although the decision occurred in the context of a commercial business sending extreme volumes of CEMs, government bodies should nevertheless reassess whether their current practices in relation to the sending of CEMs are sufficient to prevent contraventions of the Spam Act.

Government bodies should reassess whether their current practices in relation to the sending of commercial electronic messages are sufficient to prevent contraventions of the Spam Act.

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Notes

1 Consideration of these issues was discussed in AGS *Commercial Notes No.* 9, 6 April 2004, 'The Spam Act' pp 8–11.

2 Two other decisions in relation to the matter were handed down, reported at [2005] FCA 1161 (in relation to the interlocutory injunctions sought by the Australian Communications and Media Authority) and [2006] FCA 1399 (in relation to pecuniary penalties, declarations and final injunctions).

3 CEMs are defined in s 6 of the Act. Section 6(1) effectively provides that CEMs are electronic messages (such as emails or text messages) with at least one commercial purpose. See AGS *Commercial Notes No.* 9, 6 April 2004, 'The Spam Act' p 8.

4 See [2006] FCA 1399 in relation to the court's orders and penalties, especially at [59].

5 See especially (2006) FCR 494, 520 at [121] and [2006] FCA 1399 at [59].

6 Section 16(5) of the Act provides that the evidential burden of showing consent rests with the respondent.

7 See (2006) 150 FCR 494, 511 at [76].

8 (2006) 150 FCR 495, 512 at [78]–[80].

9 See headnote para (3), (2006) 150 FCR 494 at 495 and [86]–[98] of the judgment at 513–516.

10 See headnote para (4), (2006) 150 FCR 494 at 495.

11 (2006) 150 FCR 494, 502 at [29].

12 See (2006) 150 FCR 494, 516–517, especially [100] and [107].

13 See headnote para (5), (2006) 150 FCR 494 at 495 and [108] of the judgment at 516.

14 See 'Existing business relationship' at p 2 of this issue.

15 His Honour also refers to the discussion in *Australian Competition and Consumer Commission v Black on White Pty Ltd* (2001) 110 FCR 1 at [17]–[19].

16 See headnote para (8), (2006) 150 FCR 494 at 495 and [121] at 520.

17 (2006) 150 FCR 494, 520 at [121].

18 See (2006) 150 FCR 494, 520 at [123].

19 (2006) 150 FCR 494, 520 at [124].

20 See the Order and Reasons for Judgment of Nicholson J, [2006] FCA 1399.

21 See [2006] FCA 1399 especially [59] of the Reasons for Judgment.

22 See generally the Australian Communications and Media Authority publication *Spam Act 2003: A practical guide for government*, which is designed to assist government bodies to comply with the Act.

23 Section 12(2) of the Act.

24 Section 12(3) of the Act.

The Do Not Call Register scheme: an overview

Government bodies involved in telemarketing activities (including surveys and research) either directly or through contractors, will need to review their policies and contracts. This article explains why.

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Background

The *Do Not Call Register Act 2006* (the DNCR Act) and the *Do Not Call Register (Consequential Amendments) Act 2006* (the DNCR(CA) Act) received Royal Assent on 30 June 2006. Together, these Acts provide for the establishment and maintenance of a national Do Not Call Register (the Register) and the making of an industry standard that applies to participants in each section of the telemarketing industry.

On 22 March 2007, ACMA made the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007*.

Rules regulating conduct in relation to the Register will come into effect on 31 May 2007. The Standard, and rules regulating conduct in relation to it, will also commence on that date.

The Register

Establishment of the Register

Section 13 of the DNCR Act provides that ACMA must keep, or arrange for another person (the register operator) to keep on behalf of ACMA, a register of telephone numbers for the purposes of the DNCR Act. The primary purpose of the Register is to facilitate the prohibition of unsolicited telemarketing calls, other than 'designated telemarketing calls'.

Recently ACMA selected a fully-owned subsidiary of Melbourne-based Service Stream Limited to be the register operator. ACMA will retain responsibility for overseeing the Register's operation and investigating breaches of the DNCR Act in relation to it.

A telephone number[1] is eligible to be entered on the Register if it is Australian, it is used or maintained exclusively or primarily for private or domestic purposes,

and it is not used or maintained exclusively for transmitting and/or receiving faxes (s 14). An application for a telephone number to be entered on the Register may be made to the register operator by the relevant telephone account-holder (s 15). Eligible telephone numbers will be entered on the Register (s 16).

The general prohibition

Section 11 of the DNCR Act generally prohibits a person from making a 'telemarketing call', or causing a telemarketing call to be made, to a registered number unless the call is a 'designated telemarketing call'. For the purposes of this section, a person 'causes' a telemarketing call to be made where the person enters into a contract or arrangement, or arrives at an understanding, with another person and:

— under that contract, arrangement or understanding the other person undertakes to make, or to cause his or her employees or agents to make, telemarketing calls, and

— the other person (or his or her employees or agents) gives effect to the contract, arrangement or understanding by making the call.

Section 11 of the Do Not Call Register Act generally prohibits a person from making a 'telemarketing call', or causing a telemarketing call to be made, to a registered number unless the call is a 'designated telemarketing call'.

What is a 'telemarketing call'?

A 'telemarketing call' is a voice call to a telephone number where, having regard to certain things (including the content of the call), it would be concluded that the purpose (or one of the purposes) of the call is:

— to offer to supply goods or services

— to advertise or promote goods or services

— to advertise or promote a supplier, or prospective supplier, of goods or services

— to offer to supply land or an interest in land

— to advertise or promote land or an interest in land

— to advertise or promote a supplier, or prospective supplier, of land or an interest in land

— to offer to provide a business opportunity or investment opportunity

— to advertise or promote a business opportunity or investment opportunity

— to advertise or promote a provider, or prospective provider, of a business opportunity or investment opportunity

— to solicit donations, or

— a purpose specified in the regulations.[2]

What is a 'designated telemarketing call'?

As we indicated above, designated telemarketing calls are not prohibited.[3] In general terms, a 'designated telemarketing call' includes a telemarketing call which is authorised by:

— a government body, religious organisation, or charity or charitable institution, and where, if the call relates to goods or services, that body is the supplier or prospective supplier

— a registered political party, an independent member of a parliament or a local governing body, or a political candidate, where the purpose (or one of the purposes) of the call is to conduct fund-raising for electoral or political purposes, and where, if the call relates to goods or services, that person or body is the supplier or prospective supplier, or

— an educational institution (i.e. a pre-school, school, college or university) where the call is made to a current or previous student's household, and where, if the call relates to goods or services, that body is the supplier or prospective supplier.

The definition of 'government body' is wide, and includes a department, agency, authority or instrumentality of the Commonwealth, a state or a territory.

Exceptions to the general prohibition

In addition to designated marketing calls, the prohibition on making telemarketing calls does not apply if:

— the individual consents to the making of the call

— the telemarketer has accessed the Register and has received information in the 30-day period prior to the making of the call that the number was not listed on the Register

— the telemarketer has made (or caused to be made) the call by mistake

— the telemarketer has taken reasonable precautions, and exercised due diligence, to avoid the contravention.

The telemarketer will bear the evidential burden if it wishes to rely on any of these exceptions.

A telemarketer who wishes to access the Register may submit a list of telephone numbers to the register operator. If the telemarketer has paid the relevant fee, the register operator will 'wash' that list, by informing the telemarketer which telephone numbers are, or are not, registered.

The definition of 'government body' is wide, and includes a department, agency, authority or instrumentality of the Commonwealth, a state or a territory.

Prohibition against entry into certain telemarketing arrangements

Section 12 of the DNCR Act prohibits a person entering into a contract or arrangement, or arriving at an understanding, with another person whereby that other person undertakes to make telemarketing calls (or cause their employees or agents to make telemarketing calls) where:

— there is a reasonable likelihood that some of those calls will be made to telephone numbers that are eligible to be registered under the DNCR Act, and

— the contract, arrangement or understanding does not contain an express provision to the effect that the other person will comply with the DNCR Act (or, if relevant, take all reasonable steps to ensure its employees and agents comply with the DNCR Act) in relation to calls covered by the contract etc.

Prohibition against certain ancillary actions

Sections 11(7) and 12(2) of the DNCR Act contain ancillary contravention provisions with respect to the primary prohibitions against making certain telemarketing calls and entering into certain telemarketing arrangements. The wording of these sections is very similar to the wording of the ancillary contravention provisions set out in the *Spam Act 2003*. Accordingly, the approach taken by Nicholson J in *ACMA v Clarity1 Pty Ltd* (2006) 150 FCR 494 may be persuasive to any court determining liability under ss 11(7) or 12(2) of the DNCR Act. On this basis, employees of government bodies may incur personal liability if they make or authorise unlawful calls, even if they do so within their official capacities (see the discussion at pages 3–4 of this issue).

Penalties

A range of enforcement powers is available in relation to the prohibitions in the DNCR Act, including the issue of formal warnings, the imposition of civil penalties of up to $1,100,000, orders for the compensation of victims, orders for the recovery of financial benefits attributable to contraventions, and injunctions.

The Standard

The DNCR(CA) Act amended, among other Acts, the *Telecommunications Act 1997* (the TelComms Act). ACMA made the Standard pursuant to new s 125A(1) of the TelComms Act on 22 March 2007. When the Standard comes into effect, it will apply to all telemarketing calls (as defined in the DNCR Act), as well as to calls to conduct opinion polling or to carry out traditional questionnaire-based research (together, 'research calls'). The TelComms Act does not exclude designated telemarketing calls (as defined in the DNCR Act) from the application of the Standard.

The Standard prohibits the making of, the causing to be made, or the attempt to make, relevant calls at particular times and on particular days (s 5).[4] It also requires particular information to be provided to people who receive the relevant calls, including information regarding the caller and any other person who caused the call to be made (s 6).[5] Finally, the Standard requires calls to be terminated in particular circumstances (s 7) and requires callers to ensure that calling line identification is enabled (s 8) with respect to all calls covered by the Standard.

The Standard sets a *minimum* standard for conduct to be observed by people who make telemarketing or research calls. It expressly allows for the continuing operation of state or territory laws that are capable of operating concurrently with the Standard (i.e. to the extent that those laws impose more onerous restrictions on the making of calls) (s 9).

The new industry Standard sets a minimum standard for conduct to be observed by people who make telemarketing or research calls.

The general prohibition

Section 128(1) of the TelComms Act will have the effect that, when the Standard is registered, each participant in a particular section of the telemarketing industry must comply with the Standard. The 'telemarketing industry' is an industry that involves carrying on a 'telemarketing activity' (s 7 of the TelComms Act). Until any determination is made by ACMA under s 110B(3) of the TelComms Act, all of the persons carrying on, or proposing to carry on, telemarketing activities constitute a single section of the telemarketing industry for this purpose (s 110B(2) of the TelComms Act). If a person is a member of a group that constitutes a section of the telemarketing industry, the person is a participant in that section of the telemarketing industry (s 111AA of the TelComms Act). The definition of telemarketing activity is wide, and includes using telemarketing calls to solicit donations, to conduct opinion polling or to carry out standard questionnaire-based research (s 109B of the TelComms Act).

Prohibition against entry into certain telemarketing arrangements

Other rules regulating conduct in relation to the Standard will include new s 139(1) of the TelComms Act, which will prohibit a person entering into a contract or arrangement, or arriving at an understanding, with another person whereby:

— that other person undertakes to carry on one or more telemarketing activities

— the contract, arrangement or understanding does not contain an express provision to the effect that the other person will comply with Part 6 of the TelComms Act (including s 128) in relation to the telemarketing activities covered by the contract etc.

Prohibition against certain ancillary actions

When the Standard comes into effect, ss 128(2) and 139(2) of the TelComms Act will include ancillary contravention provisions with respect to ss 128(1) and 139(1) in the same terms as s 11(7) and 12(2) of the DNCR Act. Accordingly, our comments in relation to those provisions will apply equally in this context.

Contraventions of ss 128 or 139 of the TelComms Act would render a person liable to a pecuniary penalty per contravention of up to $250,000 or $550,000 respectively.

Implications for government bodies

The DNCR Act and the TelComms Act each bind the Crown in each of its capacities, although they also each provide that the Crown cannot be prosecuted for an offence or be held liable for a pecuniary penalty.

The Register

The DNCR Act exempts most types of telemarketing calls that are authorised by government bodies from the general prohibition. For example, telemarketing calls that promote land or solicit donations will be exempt from the general prohibition as long as they are authorised by government bodies. However, telemarketing calls that promote goods or services will only be exempt from the general prohibition if the relevant goods or services will be supplied by the government body that authorises them.

ACMA has not yet released any equivalent to its *Spam Act 2003: A practical guide for government*, setting out the policy issues that should be considered before relying on the exemptions in the DNCR Act. But it may do so in the future; the policy issues appear to be similar.

In any event, a government body could still contravene the DNCR Act in a number of different ways, including:

A government body could still contravene the Do Not Call Register Act in a number of different ways.

— authorising a telemarketing call to a number on the Register that relates to goods or services that are (or will be) supplied by someone other than the government body

— entering into a contract, agreement, or understanding that does not comply with s 12(1) of the DNCR Act

— contravening one of the relevant ancillary contravention provisions set out in ss 11(7) or 12(2) of the DNCR Act with respect to a telemarketing call that has not been authorised by the government body.

The Standard

A government body must comply with the Standard if it is a participant in the telemarketing industry. Some government bodies may not consider themselves to be participants in the 'telemarketing industry' as that expression is commonly understood; but it is clear that for the purposes of the TelComms Act many government bodies will participate in the telemarketing industry, and those bodies will need to comply with the Standard.

In particular, it is clear that even if a particular telemarketing call made by a government body is a 'designated telemarketing call' within the meaning of the DNCR Act,[6] and is therefore not prohibited by s 11 of that Act, the government body will still need to comply with the Standard in making that call (or attempting to make that call).

A government body will also contravene the TelComms Act by:

— entering into a contract, agreement, or understanding that does not comply with s 139(1) of the TelComms Act, or

— contravening one of the relevant ancillary contravention provisions set out in ss 128(2) or 139(2) of the TelComms Act.

Concluding remarks

The DNCR Acts scheme will have a significant effect on the conduct of the telemarketing industry which until this point has been, for the most part, only subject to self-regulation.

The DNCR Act provides some exemptions for certain types of telemarketing calls authorised by government bodies. However, the exemptions do not apply with respect to all types of telemarketing calls, and the Standard imposes restrictions which apply to all telemarketing and research calls, including those covered by exemptions under the DNCR Act.

Checklist for clients

- Ensure your policies and practices do not endorse unlawful activities.
- Ensure any contracts for telemarketing or research services contain clauses which require compliance with the DNCR Act and Pt 6 of the TelComms Act where applicable.
- Keep staff informed through:
  - carefully drafted policies
  - training sessions.
- Consider policy issues before relying on the exemptions in the DNCR Act.

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Notes

1 This includes a landline or mobile telephone number.

2 As at 12 March 2007, no such purposes have been specified in the regulations.

3 Schedule 1 to the DNCR Act provides an extended definition of the expression 'designated telemarketing call'.

4 There are different prohibited calling times for research calls compared to other calls to which the Standard applies: see ss 5(1), (2) and (3).

5 There are different requirements for research calls, compared to other calls to which the Standard applies, concerning when certain information required to be given must be given: see ss 6(4) and (5).

6 For example, a call relating to goods and services, the making of which is authorised by a government body, where that body is the supplier or prospective supplier.

AGS contacts

AGS has a network of lawyers experienced in providing advice to agencies on media and communications law. For further information on the articles in this issue or on other media and communications issues, please contact Robert Orr QC, National Practice Leader Government, Andrew Schatz, leader of AGS's media and communications network, the authors, or any of the lawyers listed below.

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