**Statement of Expectations**

**Use of consent in telemarketing and e-marketing**

**Purpose**

This statement sets out the Australian Communication and Media Authority’s (ACMA) expectations for businesses using consent to conduct telemarketing and e-marketing to improve outcomes for consumers. It covers:

* compliance with the minimum rules in the *Spam Act 2003*, the *Do Not Call Register Act 2006* and subordinate instruments (collectively referred to as **the Rules**), and
* responsible marketing practices.

**Context**

The Rules protect Australians from unwanted intrusion on their privacy and inappropriate use of their personal information for marketing purposes. Consent (or permission) is a central pillar of these protections.

Unwanted marketing communications create distress, anxiety and annoyance for Australians, and, depending on the type of product being marketed, can have significant impacts for people, including those in vulnerable circumstances.

This statement is not legal advice nor is it a definitive compliance guide to the Rules. It is an outcome-focused guide to better practice - to meet consumer expectations while at least meeting the minimum legal requirements. How businesses meet these expectations and comply with the Rules is up to them. We have provided examples to consider, however these may be just some of the potential options. It is each business’ responsibility to have systems, processes and practices in place to comply and, where needed, to seek professional advice about their compliance practices. Compliance arrangements should also be reviewed regularly.

The ACMA will consider all the relevant facts and circumstances of each case when assessing if a business is compliant with the Rules.

**The ACMA’s role**

The ACMA is Australia's regulator for telecommunications, radiocommunications, broadcasting, some online content and telemarketing and e-marketing. We administer and enforce the telemarketing and e-marketing rules and promote responsible telemarketing and commercial electronic messaging practices.

The financial penalties for breaking the Rules can be large and businesses must be aware of their obligations. Breaking the Rules can also damage a business’ reputation and frustrate potential customers.

**What are telemarketing calls?**

Telemarketing is any call where at least one of the purposes is to offer, promote or advertise goods and services, land, a business or investment opportunity, or to solicit donations.

Commercial calls made using an auto-dialler (robocalls) or that use pre-recorded or AI voices are all telemarketing calls.

Calls made by businesses that are requested by a consumer and are made within a reasonable time after the request is made are generally not telemarketing calls. Additionally, calls that are related to product recalls, fault rectification, appointments, and payments are also generally not telemarketing calls.

It is important to understand that where calls have more than one purpose, if one of those purposes is to sell or promote goods or services, the call is commercial and must comply with the Rules.

**What is e-marketing?**

E-marketing includes email, SMS, and instant messages where at least one of the purposes is to offer, promote or advertise goods and services, land, or a business or investment opportunity (or a supplier or prospective supplier or provider of any of those things).

It is important to understand that where messages have more than one purpose, if one of those purposes is to sell or promote goods or services, the message is commercial and must comply with the Rules. In assessing whether a message is commercial, businesses should carefully consider the content of the message, the way in which the message is presented, and the content that can be located using the links, banners, telephone numbers or contact information (if any) set out in the message or. A link to a web page with commercial content is likely to mean the message is also commercial.

**Overview – consent rules**

**Privacy laws**

The Office of the Australian Information Commissioner provides guidance on the four key elements of consent that apply to direct marketing under the *Privacy Act 1988*. They are:

1. the individual is adequately informed before giving consent
2. the individual gives consent voluntarily
3. the consent is current and specific
4. the individual has the capacity to understand and communicate their consent.

While these elements are not specific obligations set out in the Rules, they provide a framework to apply to consent gathering practices to ensure they are consumer friendly. More information about them is available here: [Chapter B: Key concepts | OAIC](https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-b-key-concepts#key-concepts-a-to-d).

**The Rules**

The Rules contain similar obligations, however there are two key differences:

1. for e-marketing, consent must be obtained before messages can be sent, including to businesses
2. for telemarketing, consent must be obtained to call numbers on the Do Not Call Register.

For both telemarketing and e-marketing, there are two types of consent.

The main type is *express* consent that is freely and explicitly given by the consumer.

The less common type is *inferred* consent – this consent is inferred by a business based on an existing relationship and the type of product being marketed.

The ACMA recommends using express consent as it involves a clear and unambiguous choice made by a consumer.

Importantly, businesses are responsible for their consent-related compliance obligations under the Rules, regardless of whether they outsource their telemarketing or e-marketing or consent gathering through third party or affiliate marketing arrangements.

Do not assume third parties working with you will keep/obtain records of consent and marketing. You need to have oversight and assurance processes in place to ensure that these records are reliably kept and maintained by those third parties or yourself. If these records are required by the ACMA using its compulsory information gathering powers, they must be produced.

Records should include the method by which the consent was obtained, the terms that applied and the date and time it was obtained.

**The Do Not Call Register**

The Do Not Call Register is a database where consumers can register their mobile and fixed-line numbers for free if they don’t want to receive telemarketing calls.

Over half of all active numbers in Australia are on the Do Not Call Register.

Telemarketers can subscribe to the Do Not Call Register to check their calling lists to avoid breaking the Rules and attracting what can be large financial penalties.

The Do Not Call Register does not apply to business phone numbers - numbers that are primarily for business use are ineligible to be registered.

**The ACMA’s expectations**

This statement of expectations is to provide guidance to assist businesses to meet consumer expectations and conduct compliant telemarketing and e-marketing.

|  |  |
| --- | --- |
| **Lights On with solid fill** | **Consumer friendly practices** |

The examples below are practices that will generally meet obligations under the Rules and are consumer friendly:

* Use express consent based on clear terms and conditions that are readily accessible to consumers at the point consent is obtained and not hidden away in fine print, lengthy privacy policies or that require multiple click-throughs to find
* Use consent terms and conditions that cover:
  + what it is for (including for what types of products and marketing channels)
  + who will use it (including affiliates and partners)
  + how long it will be used
  + how it can be withdrawn
* Consider using a double opt-in when obtaining consent, such as an email confirmation that consent has been given, possibly with the confirmatory email providing a click-through link or other reference to a ‘manage user preferences’ page
* Consider carefully whether to rely upon the use of inferred consent, for example, use it only where there is a clear, current or ongoing relationship with the individual and the goods or services being marketed are directly related to that relationship
* Terminate a telemarketing call immediately if a recipient indicates in any way that they want it to stop
* Remove a person from call or marketing lists if they ask you to do so
* Have easy to use unsubscribe facilities in all commercial electronic messages
* Action unsubscribe requests as quickly as practicable, and always within a maximum of 5 business days
* Ensure that when an individual wants to unsubscribe, they are given a straightforward option of unsubscribing from all marketing messages (not only some).

|  |  |
| --- | --- |
| **Lights On with solid fill** | **Consumer unfriendly practices** |

The examples below will generally not meet the ACMA’s expectations and are likely to frustrate consumers:

* Do not place contact details on marketing lists or marketing databases without consent (for example, if a consumer visits a website or sends an email to a business it is unlikely to constitute consent to inclusion on a marketing list or in a marketing database)
* Do not use consent that is old, where a consumer would not expect it to still apply (for example, consent to receive telemarketing that is more than 3 months old becomes stale unless a consumer has agreed to a longer period under terms and conditions)
* Do not require consumers to log-in to accounts or provide personal information to unsubscribe (except where it is the electronic address to which the commercial electronic message was sent, or the consumer has agreed to clear terms and conditions requiring the log-in)
* Do not infer consent where there is an unclear relationship with a consumer or where the call or message is not relevant to an established relationship (such as a bank contacting a current savings account customer to advertise insurance products)
* Do not infer consent from one-off purchases by consumers, including in cases where phone numbers or email addresses are obtained to send receipts or tax invoices
* Do not send messages based solely on the fact that the email address or phone number has been published (publication does not mean consent has been given - there are multiple other conditions that must be met as set out in the Rules)
* Do not use pre-checked tick boxes on forms
* Do not use bundled consent (bundled consent is where a single request for consent is to be used for multiple purposes that does not allow a choice about each purpose)
* Do not use refer-a-friend arrangements (consent must be given by the person to whom it applies)
* Do not charge consumers to unsubscribe (other than the routine cost of a message such as SMS)
* Do not provide an unsubscribe facility in a message that only allows a consumer to unsubscribe from some types of marketing messages from the business, unless a universal unsubscribe is also provided and it is very clear what each option does.
* Do not continue to send marketing messages after an unsubscribe request is received on the basis that someone else is using the email address or phone number (the unsubscribe request applies to the address regardless of who may be using it)
* Do not re-contact consumers who have unsubscribed to encourage them to re‑subscribe, unless they have subsequently given their consent to do so.

**More information about compliance**

The following links provide more information about compliance and obligations under the Rules.

* [ACMA website: Avoid sending spam](https://www.acma.gov.au/avoid-sending-spam)
* [DNCR Industry Guide](https://www.donotcall.gov.au/media/1212/dncr-industry-guide.pdf)

**Rules – telemarketing and e-marketing**

* [Do Not Call Register Act 2006](https://www.legislation.gov.au/Details/C2021C00356)
* [Do Not Call Register Regulations 2017](https://www.legislation.gov.au/Details/F2017L00237)
* [Telecommunications (Telemarketing and Research Calls) Industry Standard 2017](https://www.legislation.gov.au/Details/F2017L00323)
* [Spam Act 2003](https://www.legislation.gov.au/Details/C2016C00614)
* [Spam Regulations 2021](https://www.legislation.gov.au/Details/F2021L00285)

**Marketing not covered by the spam or telemarketing rules**

In circumstances where the Spam Act and Do Not Call Register Act do not apply, entities may need to comply with APP 7 of the *Privacy Act 1988* to direct market to an individual. Further guidance on these issues can be found at: OAIC, ‘[Direct marketing](https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/organisations/direct-marketing)’, 1 May 2019 and [Chapter 7 of the APP Guidelines](https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-7-app-7-direct-marketing).