

Privacy Act Review
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Submission to Privacy Act Review

The Australian Communications and Media Authority (ACMA) welcomes the opportunity to make a further submission to the Attorney-General's Department Privacy Act Review (the Review), noting the development of matters first canvassed in the Issues Paper. Our submission is primarily focussed on the consent proposals as they potentially intersect with the ACMA's regulatory responsibilities. We have also provided updated insights from recent consumer experience research commissioned by the ACMA.

Background

The ACMA is responsible for the regulation of broadcasting, radiocommunications, telecommunications and some online content in accordance with 4 principal acts – the *Radiocommunications Act 1992*, *Telecommunications Act 1997*, *Telecommunications (Consumer Protection and Service Standards) Act 1999* and *Broadcasting Services Act 1992*. There are other Acts that confer regulatory jurisdiction on the agency or are otherwise relevant to the ACMA in areas such as spam, telemarketing, and interactive gambling.

As discussed in our previous submission to the Issues Paper, privacy is a matter of enduring relevance in the media and communications environment. Communications services are essential and are increasingly central to our economy and society. Australians' appetite for (and reliance on) communications services and online engagement continues to grow, and, accordingly, regulatory frameworks and settings could be contemporised so that they remain fit-for-purpose in the evolving digital environment.

ACMA research and experience

Communications services in Australia

In the past few years, we have seen the internet become increasingly accessible via mobile phones, streaming services exploding onto the market, and smart TVs switched on in most homes.¹

In 2021, data traffic was at an all-time high, with data-thirsty activities such as video streaming and remote working on the rise – with 61% of employed Australian adults working online from home in the 6 months to June 2021. Many Australians sought to increase their internet speed and upgrade to unlimited data plans. There were 8.2 million active NBN services (up from 7.4 million in 2020).²

¹ ACMA, 2021, [Communications and media in Australia Supply and use of services](#), viewed 2 December 2021.

² *ibid.*

Mobile phones are now used by almost all Australian adults to communicate (99%), with 93% of online adults accessing the internet via their mobile phone in the first half of 2021, up from 87% in 2019. Smartphones are owned by nearly every adult in Australia, providing easy access to voice and internet services for most of the population. Our use of fixed-line home phones has sharply declined – down from 54% in 2017 to 24% in 2021.³

The COVID-19 pandemic has also helped drive rapid growth in Australians' online activity, increasing data downloads and heightening demand for high-speed internet plans. Overall consumer use of communications services has increased over the year, with the effects of the pandemic continuing to encourage a shift towards online services. For example, online shopping has grown considerably, with over a million more Australians shopping online this year, and online retail trade now accounting for over 10% of total retail sales.⁴

New findings on the consumer experience of unsolicited communications

The ACMA has recently undertaken research to explore the contemporary consumer experience of unsolicited communications.⁵ The research found that unwanted communications are negatively impacting on the majority of Australians. This negative experience undermines confidence in legitimate marketing practices and use of Australia's telecommunications services.

Over half (54%) of all Australians felt they rarely or never have control over how their data was used by businesses for marketing purposes. Almost three-quarters (72%) want more control over how their data is used by businesses to contact them.

Almost all Australians (98%) received unsolicited communications in the 6 months prior to the survey. Phone calls were the most common contact channel (97%), followed by email (87%) and text (81%). Two-thirds of Australians (67%) who had access to each of these 3 channels received unsolicited contact on all of them.

Under the *Spam Act 2003* (Spam Act), consumer consent is a precondition for all e-marketing contact, and, under the *Do Not Call Register Act 2006* (DNCR Act), telemarketing calls should not be made to numbers listed on the Do Not Call Register without consent. However, fewer than 6 in 10 (58%) Australians were asked in the 12 months prior to the survey if they consented to receiving marketing communications.

Almost two thirds of Australians agreed to none or only some of the unsolicited marketing communications they received in the 12 months prior to the survey. Just 3% of Australians agreed to all the marketing communications they received.

When Australians were asked to consent to marketing, only 24% said terms and conditions were always provided and 16% said they were easy to find. Additionally, only:

- 25% were told who could contact them
- 30% were told how they could withdraw their consent; and,
- 9% were told how long the consent could be used.

In the 12 months prior to the survey, three-quarters (74%) of Australians asked a business to stop contacting them. Among those who asked a business to stop contacting them, over a half (56%) experienced difficulties unsubscribing. Six in ten (59%) were still being contacted despite withdrawing their consent.

³ ACMA, 2021, [Trends and developments in telecommunications 2020–21 Communications and media in Australia December 2021](#), viewed 15 December 2021.

⁴ *ibid.*

⁵ ACMA, 2021, [Unsolicited Communications in Australia: Consumer experience 2021](#), viewed 18 January 2022.

Consent reform

The Issues Paper sought feedback on the Digital Platforms Inquiry (DPI) report recommendations in relation to consent and whether consent is an effective way for people to manage their personal information.

Generally, the ACMA supports consumers being provided with greater choice and control regarding marketing consent, associated preferences and ease of withdrawing consent.

The concept of consent is a fundamental construct within the regulatory frameworks applying to telemarketing and electronic messaging under the DNCR Act and Spam Act, and associated instruments.

The *Privacy Act 1988* (Privacy Act) does not currently define or clarify consent and Australian Privacy Principle 7 (APP7) covers direct marketing to the extent the DNCR Act and Spam Act do not apply. An associated APP Guideline on consent sets out that several conditions should exist for consent to be valid, including that it be 'informed, voluntary, current and specific, and given with capacity'. There is currently no nexus between the APP Guideline on consent and the definitions for consent set out in the DNCR Act and Spam Act.

The ACMA has previously found there are strong drivers to consider the consolidation and harmonisation of the existing rules in the DNCR Act and Spam Act, and related powers and functions in the *Telecommunications Act 1997*, to align with arrangements in the Privacy Act. This would create a universal consent-based framework under which direct marketing contact (regardless of the channel used) could only occur where consumer consent has first been obtained.

Should the Privacy Act be amended to define consent applicable to all APP entities – to be 'voluntary', 'informed', 'current', 'specific' and 'unambiguous through clear action' – as proposed in the Discussion Paper, the ACMA suggests that consideration could also be given to extending this definition to the DNCR and Spam Acts, either by consequential amendment to these acts and/or direct reference in privacy law.

As noted above, the ACMA's recent research on the consumer experience of unsolicited communications strongly suggests that the majority Australian adults do not believe their consent has been obtained in accordance with the proposed new conditions.

Additionally, the ACMA's unsolicited communications compliance and enforcement actions continue to find instances of entities relying on express consent that has been obtained via terms and conditions that do not identify third-party partners and affiliates that may use consent to conduct marketing. Notably, neither the Spam or DNCR Acts expressly require an entity to name its partners or affiliates when obtaining consent from consumers.

As per our previous submission, the ACMA's recent consumer research and ongoing compliance and enforcement activities suggest Australians can be frustrated when they are not provided with the opportunity to unsubscribe from either solicited or unsolicited direct marketing. We note that the Review is now seeking views on the practicalities of a 'global opt-out mechanism' that could apply to tracking for direct marketing purposes.

While such a proposal is likely to involve practical challenges given the supply chains and commercial arrangements widely used in relation to direct marketing, the ACMA supports further consideration of arrangements that would provide Australians with greater visibility and control over the use of their data.

The ACMA suggests that such a global opt-out mechanism would be most practical to implement and maintain by industry, and enforce by regulators, where any initial consent is informed by the types of conditions discussed directly above. Relatedly, the ACMA suggests that APP7 should only be repealed if other reform proposals are taken forward to strengthen the consent definitions that are applicable to all direct marketing.

Other matters

There are some other areas where the ACMA's remit engages with matters raised in the discussion paper on which the ACMA would be happy to assist if further information would be useful to the review team. These areas are:

1. Compliance and enforcement of privacy protections under broadcasting codes of practice, consistent with the co-regulatory regime established under the *Broadcasting Services Act 1992* (relevant to the discussion about the journalist exemption).
2. Emerging uses of automated decision making around the planning, allocation, and use of radiofrequency spectrum (relevant to the discussion about automated decision making or ADM). The Review noted that the Privacy Act does not expressly regulate the use of personal information ADM systems or otherwise regulate ADM. It asks whether it should be an obligation for privacy policies to include information on whether personal information will be used in ADM with a legal or significant effect on people's lives. The ACMA supports such a proposal in principle; however, more detailed consideration should be given to the intent of the proposal and what circumstances would constitute 'significant effect'. We are also aware that as the sophistication of computer-aided decision-making tools increases, privacy issues may arise in areas not previously subject of privacy concerns (e.g. spectrum management).

We look forward to progress of Review and further opportunities to engage in due course. [REDACTED]

Yours sincerely

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Nerida O'Loughlin PSM

19 January 2022