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CONSULTATION ON SELF-REGULATION OF THE IPND, THE DNCR AND COMMERCIAL ELECTRONIC MESSAGES

Submission to the ACMA

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

The Independent Public Number Database (IPND), Do Not Call Register (DNCR) and spam regulation are all important consumer protections which attempt to balance consumer control over how their contact information is used with providing this information to business and essential services. The following submission focuses primarily on proposed changes to how the DNCR and nuisance calls are regulated, however many of the principles apply equally to the IPND and spam regulation.

Australians have entrusted over 11 million of their phone, mobile and fax numbers to the DNCR in order to protect them from nuisance calls.¹ The DNCR relies heavily on trust; trust that the Register will be effective in stopping calls and trust that a person's number will be protected by the Register. This trust is built on an understanding that the DNCR is run by a government authority.

In contrast, the public has a high level of dislike for direct marketing; as the Office of the Australian Information Commissioner (OIAIC) found, only 1% of people do not mind receiving unsolicited marketing information.² This is backed by CHOICE research, which shows 93% of people find unsolicited calls annoying.³ This dislike is directly related to the way this industry conducts itself. CHOICE research found:

- 55% of people thought callers used guilt to emotionally manipulate them into giving in to requests,;
- 53% of people saw calls as an invasion of privacy;
- 51% of people said calls were made at inappropriate times; and
- 65% of people are concerned that senior family members and friends may sign up to or pay for something they don't need.

Given the extremely high levels of public dislike for the practices of telemarketers, it is highly concerning that this consultation is contemplating allowing the industry to self-regulate. Where the industry has already been allowed to self-regulate it has a poor track record in complaint handling and compliance. Given this experience, CHOICE has no faith that telemarketers are adequately placed to take on more self-regulatory responsibilities.

¹ ACMA, 2017, 'Communications Report 2016-17', p.5

² OAIC, 2017, 'Australian Community Attitudes to Privacy Survey, 2017', p.9

³ CHOICE, 2016, 'CHOICE Report into nuisance calls 2016', p.4

Complaint handling

The overwhelming evidence suggests that giving industry responsibility for complaint handling, even at the initial stage of complaint, is likely to lead to significantly worse outcomes for consumers. Consumers need confidence that a complaint raised will be dealt with fairly and impartially and that there will be repercussions for a breach. Giving the complaint handling responsibility to industry is unlikely to deliver on any of those fronts.

The evidence suggests that the number of complaints about this sector go massively underreported. As the ACCC study into the charity fundraising industry in Australia made clear, given “the option of hanging up the phone during a telemarketing call, there are fewer formal complaints in relation to telemarketing fundraising than face-to-face fundraising.”⁴ The same study surveyed people who had donated and found that only 13% who had a bad experience eventually made a complaint. The study did not look at people who had not made a donation but were unhappy with the call, so the figures are likely to be much worse.

This research is supported by a 2015 study by the Australian Communications Consumer Action Network (ACCAN) into escalated complaints in the related telecommunications sector. This research found only 9% of consumers who were dissatisfied with how their complaint was handled in the first instance chose to escalate their complaint further.⁵ Complaint fatigue is clearly a major issue in the telecommunications sector and more broadly in telemarketing. At its root there is a strong disincentive for industry organisations to adequately deal with complaints. For example, it may put them in conflict with their members or draw attention to practices which reflect poorly on an industry as a whole.

One of the options proposed in the issues paper would see the ACMA’s role in consumer protection confined to dealing with escalated complaints. As the evidence shows, consumers are less likely to make complaints about telemarketing, let alone escalate them through a self-regulatory mechanism. Complaint handling is only effective where consumers have trust that a complaint will be adequately dealt with in a fair and impartial manner.

Handing complaint functions over to industry, who have a proven track record in contributing to complaint fatigue, would significantly weaken the efficacy of the DNCR. Non-escalation of

⁴ Frost & Sullivan, 2017, ‘Research into the Commission-based Charity Fundraising Industry in Australia’, produced for the ACCC, p.58

⁵ ACCAN, 2015, ‘Complaint fatigue persists among telco consumers’, available at: <https://accan.org.au/our-work/1072-complaint-fatigue-release>

complaints will limit the ACMA's visibility of consumer concerns and in turn its ability to adequately assess compliance and take appropriate regulatory action.

Recommendation

- That complaint handling for the DNCR remain within the remit of the ACMA.

Compliance

Given the evidence of poor complaint handling, leaving the ACMA with enforcement powers only for matters referred to it by industry is a frightening prospect. Industry is notoriously poor at making referrals against itself to the regulator. The telecommunications industry compliance body, Communications Compliance, has no evidence in recent history of making a formal referral to the regulator, apart from automatic referrals for members that fail to even lodge 'compliance attestation statements'. This is from a body with an independent governance structure. In the context of high levels of Telecommunications Industry Ombudsman (TIO) complaints, it is astounding that not a single issue has been referred by the industry compliance monitor to the regulator. This is not an industry that is mature enough to be trusted to self-regulate.

Self-regulation often relies on robust transparency measures to bring consumer attention to poorly behaving providers or practices. Although often limited in its efficacy, this is sometimes achieved by public reporting on complaint handling. The telecommunications industry has a poor track record in reporting on internal complaint handling. An adequate performance-reporting framework for internal complaints was proposed by the ACMA in its Reconnecting the Customer report.⁶ In the six years since, the telecommunications sector has yet to produce these performance metrics. Instead it has relied upon 'vanity metrics' of industry-wide customer satisfaction.⁷ These metrics are incapable of highlighting systemic issues arising through internal dispute resolution or identifying issues with particular service providers. Given past experience in telecommunications, we have no faith that the related telemarketing sector would exercise its responsibilities any differently.

⁶ ACMA, 'Reconnecting the Customer Final Report', p.117

⁷ Communications Alliance, 2017, 'Improvements recorded in telecommunications customer satisfaction', available at: <http://www.commsalliance.com.au/Documents/releases/2017-media-release-31>

Fundraising calls are undermining the DNCR's effectiveness

The large rate of sign-up to DNCR is a phenomenal achievement for an opt-in scheme. Yet, its popularity is under threat as the current consumer protections do not allow people to control the calls they receive from fundraisers. CHOICE research showed that, compared to other categories, calls from fundraisers represented the highest number of unsolicited calls consumers received.⁸ 74% of people believed they should be able to control fundraiser calls via the DNCR. However, given the current exemption, it is understandable that 68% of people question the DNCR's effectiveness in stopping unsolicited calls.

The fundraising sector's inability to adequately self-regulate has been at the heart of this problem. Apart from the general annoyance caused by telemarketing calls, CHOICE research found that people were most concerned by high call frequencies from fundraisers. Over 25% of people receive an unwanted call from a fundraiser each week and 5% were receiving calls daily. There was also evidence of people who had previously donated being targeted by new fundraisers. For example, 67% of people who made a donation as a result of an unsolicited call noticed that they received more calls from others asking for donations. This is worrying as it indicates fundraisers are identifying donors and targeting them with increased call volumes.

The fundraising sector has made attempts at self-regulation, producing the Fundraising Institute of Australia (FIA) Code.⁹ However the code is severely wanting both in terms of consultation and content. CHOICE understands that for an industry code to be registered with the ACMA it is required *at a minimum* to ensure public interest considerations are addressed¹⁰ and that consumer organisations are consulted as part of code development.¹¹ While it is unclear if the FIA wishes to commit to registration of its Code, it is clear that the Code would fail to meet those standards.

In terms of consultation, CHOICE and other consumer organisations we spoke to were not invited to consult on the Code during its drafting and only informed about it immediately prior to launch. CHOICE, along with ACCAN, Consumer Action Law Centre, Council of the Aging and

⁸ CHOICE, 2016, 'CHOICE Report into nuisance calls 2016'

⁹ Fundraising Institute Australia Code – 1 July 2017, available at: https://www.fia.org.au/data/FIA_Code_Final_2017.pdf

¹⁰ Telecommunications Act 1997 section 112

¹¹ Telecommunications Act 1997 section 117

National Seniors made a joint submission outlining our concerns about both the content of the Code and the deeply inadequate consultation process

In terms of content, the Code sets an extremely low bar. It lacks basics like adequate enforcement, not even requiring transparency around complaints received and corrective actions taken. This is far below the standard we would expect of a mature industry prepared to embark on self-regulation.

As the ACMA Review made clear:

“It will be necessary for self-regulatory codes to incorporate effective compliance processes, with those processes being supported by the establishment of independent industry bodies to implement complaint-handling procedures.”

In the FIA Code example, its ‘independent’ Code Authority is responsible for compliance monitoring, complaints administration and making recommendations for improvements to self-regulation.¹² However it reports to the FIA board and contains only a single consumer representative on its seven person board. The rest of the board is dominated by industry members and FIA board members. This lack of balance is not a hallmark of an independent industry body which can be entrusted to self-regulate. The interests of the majority of the Code Authority are clearly in conflict with the interests of consumers and we have no confidence that this body could adequately self-regulate.

From the examples provided it is clear that existing self-regulatory bodies within the telecommunications and telemarketing sectors struggle with independence and those that potentially meet independence requirements, in a governance sense, have a poor track record in referring issues to the regulator. It is therefore concerning that the model under consideration relies so heavily on this type of self-reporting for regulator action. There is an inherent conflict of interest in any self-regulatory scheme, for this reason and the real world experience outlined above, this proposal should be abandoned.

Recommendation

- That the ACMA retain its existing responsibilities in regulating the DNCR.

¹² <https://www.fia.org.au/pages/dr-ursula-stephens-to-chair-fia-code-authority.html>

Cost recovery of awareness raising

We note the consultation paper states that the ACMA does not currently recover the costs of raising awareness about the existence of the DNCR from industry. It should be remembered that over 90% of Australians actively dislike telemarketing calls and that some telemarketing practices cause active harm to vulnerable groups, particularly when aggressive sales tactics are used. The existence of the DNCR is a compromise which allows telemarketers the ability to operate by assuaging what is overwhelming community opposition to their practices. Given this compromise it is entirely reasonable for telemarketers to pay for the very service which allows them the cover to continue to operate.

Despite the large numbers of sign-ups to the DNCR these numbers are still below the high levels of reported annoyance caused by telemarketers. This indicates that there is a portion of the population unaware of the DNCR. We maintain that not only should industry be responsible for funding awareness-raising, but that existing funding levels should be increased.

Recommendations

- That the ACMA recover the costs of awareness-raising in relation to the DNCR from industry.
- That the level of funding devoted to awareness-raising be increased.