

The Auditor-General
Audit Report No.16 2009–10
Performance Audit

Do Not Call Register

The Australian Communications and Media Authority

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of Australia 2009

ISSN 1036-7632

ISBN 0 642 81100 8

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Canberra ACT
16 December 2009

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in the Australian Communications and Media Authority in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to *Senate Standing Order 166* relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *Do Not Call Register*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name and title.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Contents

| | |
|--|-----------|
| Abbreviations..... | 7 |
| Glossary | 9 |
| Summary and Recommendations | 11 |
| Summary | 13 |
| Audit objective and scope | 17 |
| Overall conclusion..... | 18 |
| Key findings by Chapter | 22 |
| The ACMA's response | 25 |
| Recommendations | 26 |
| Audit Findings and Conclusions | 27 |
| 1. Introduction | 29 |
| Background | 29 |
| Previous audit coverage | 37 |
| Audit objectives, scope and methodology..... | 38 |
| 2. Consumer Awareness and Access to the Register | 41 |
| Introduction | 41 |
| Consumer awareness of the Register..... | 41 |
| Promotion of the Register | 44 |
| Registration processes | 49 |
| 3. Industry Use of the Register | 59 |
| Introduction | 59 |
| Telemarketers access to the Register | 60 |
| Washing service..... | 62 |
| Security and integrity of the Register transactions, infrastructure and data | 65 |
| Integrity of the Register..... | 68 |
| 4. Industry Awareness and Compliance | 73 |
| Introduction | 73 |
| Industry education and guidance | 73 |
| Compliance strategy | 75 |
| Complaint handling | 77 |
| Informal response to complaints | 84 |
| Addressing substantial non-compliance through formal enforcement action | 86 |
| Effectiveness of the ACMA's compliance strategy | 88 |
| Liaison with overseas bodies | 91 |
| 5. Contract Management and Cost Recovery..... | 92 |
| Introduction | 92 |
| Managing risks that contract outcomes are not achieved..... | 94 |
| Managing and monitoring the contractor's performance | 95 |

| | |
|--|------------|
| Identifying and responding to any requirement for change in the services | 97 |
| Cost recovery | 99 |
| Appendix | 105 |
| Appendix 1: The ACMA's Response | 107 |
| Index..... | 109 |
| Series Titles..... | 110 |
| Current Better Practice Guides | 112 |
| Tables | |
| Table 1.1 National Do Not Call Registers in other countries | 36 |
| Table 2.1 Budget for promotion of the Register: 2006 to 2010 | 46 |
| Table 3.1 TAP accounts subscription types and take up | 61 |
| Table 4.1 Number of complaints and the number of calls made to registrants | 79 |
| Table 4.2 The ACMA's investigation outcomes..... | 87 |
| Table 5.1 Cost recovery performance and forward estimate | 100 |
| Table 5.2 Annual subscription fees | 101 |
| Table 5.3 Bad debts and invalid accounts impacts on revenue | 102 |
| Figures | |
| Figure 1 Operation of the Register | 15 |
| Figure 1.1 Operation of the Register | 32 |
| Figure 2.1 Monthly registrations on the Register: May 2007 to September 2009 | 42 |
| Figure 2.2 Number of complaints about the registration process: June 2007 to June 2009..... | 51 |
| Figure 2.3 Registrant application verification by registration channel | 53 |
| Figure 3.1 Numbers submitted for washing by month: May 2007 to June 2009 | 63 |
| Figure 4.1 Complaints received by the ACMA that indicate a potential contravention of the DNCR Act: June 2007 to June 2009 | 78 |
| Figure 4.2 Reviewed complaints where the Register Operator gave incorrect or insufficient advice | 81 |
| Figure 4.3 Complaints made against companies after an advisory letter is sent: June to August 2007 | 85 |
| Figure 4.4 Compliance monitoring actions taken by the ACMA from commencement of the Register to June 2009..... | 89 |
| Figure 5.1 Register's approved expenditure according to the initial contract and each revision and additional expenditure approval | 98 |

Abbreviations

| | |
|-------------------|--|
| ACMA | The Australian Communications and Media Authority |
| ACMA Act | <i>Australian Communications and Media Authority Act 2005</i> |
| ADMA | Australian Direct Marketing Association |
| ANAO | Australian National Audit Office |
| CEI | Chief Executive's Instruction |
| CLI | Calling Line Identification |
| CPGs | Commonwealth Procurement Guidelines |
| DNCR Scheme | Do Not Call Register Scheme |
| DNCR Act | <i>Do Not Call Register Act 2006</i> |
| Finance | The Department of Finance and Deregulation |
| FMA Act | <i>Financial Management and Accountability Act 1997</i> |
| FTC | Federal Trade Commission |
| ICT | Information and Communications Technology |
| Industry Standard | <i>Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007</i> |
| IPND | Integrated Public Number Database |
| ISM | Information Security Manual |
| IVR | Interactive Voice Response |
| MMS | Multimedia Message Service |
| PSM | Protective Security Manual |

| | |
|-----------|------------------------------------|
| Register | Do Not Call Register |
| SMS | Short Message Service |
| TAP | Telemarketer Access Portal |
| Telco Act | <i>Telecommunications Act 1997</i> |
| VoIP | Voice over Internet Protocol |

Glossary

| | |
|-----------------------------|---|
| Cold call | Where a consumer does not invite or expect a sales call. Telemarketers will source consumer contact details from a list or directory. A cold call may involve direct personal contact or a recorded message. |
| Direct marketing | The practice of delivering promotional messages directly to potential customers on an individual basis as opposed to through a mass medium. |
| Fixed-line telephone number | A fixed-line, landline or a main line is a telephone line which travels through either metal wire or optical fibre. This is distinguished from a mobile cellular line, where the medium used is the airwaves. |
| Inbound call centre | A physical environment where agents receive calls from consumers requesting assistance with processing an application, placing an order or the provision of information. |
| List washing service | Process where telemarketers submit for checking (or 'washing') their calling lists to the Do Not Call Register (the Register) before calls are made. The calling lists are returned showing the numbers that are: on the Register and have elected to not be called; not on the Register; and invalid numbers. Invalid numbers include those which are not eligible to be listed on the Register (such as those prefixed with 00, 06, 09, 13, 18 and 19) or numbers that are not submitted in the correct format. |
| Outbound telephone sales | Proactive telemarketing in which prospective and pre-existing customers are contacted directly. |

Summary and Recommendations

Summary

Telemarketing in Australia

1. In response to increasing levels of community concern about the growing number of unsolicited telemarketing calls, the then Australian Government established a national Do Not Call Register (the Register) in May 2007 that enabled individuals to elect not to receive unsolicited telemarketing calls.¹
2. Telemarketing can be a cost-effective and legitimate method by which businesses market their products or services. Compared to the more expensive advertising mediums of commercial television, radio, newspapers and magazines, often only a small number of calls need to result in a sale to cover the costs of making them.
3. Telemarketing provides a medium to connect and communicate directly and personally with a prospective customer. Reflecting its increased popularity as a sales method, in the period between 1996 and 2005, employment in call centres grew by 62 per cent from 9400 persons to 15 100; with approximately 1.1 billion telemarketing calls being made from Australia's 30 000 call centres in 2004.²
4. As the prevalence of telemarketing activity increased, so too did the widespread public criticism of some telemarketing practices. Some telemarketing sales techniques can be high-pressure, aggressive or deceptive³, which can confuse or take advantage of the more vulnerable members of the community. Consumers' concerns have principally related to the use of personal information for purposes which they did not intend or provide permission for; and the intrusive and invasive manner of telemarketing, particularly with calls often occurring repeatedly and at inconvenient times.
5. Until 2006, the Australian telemarketing industry was subject to self-regulatory arrangements in the form of a voluntary industry code of

¹ Telephone numbers that are eligible for registration must be used or maintained exclusively or primarily for private or domestic purposes.

² Do Not Call Register Bill 2006 Explanatory Memorandum, Canberra, 2006, p. 3.

³ Telemarketing has been negatively associated with deceptive sales campaigns such as those that offer unexpected prizes or free gifts, which are designed either to obtain personal information or otherwise obtain a financial benefit by disingenuous means.

practice and a range of Commonwealth and State legislation. The differing regimes resulted in those businesses that conducted telemarketing on a national basis incurring operational complexities and additional costs to comply with the different requirements.⁴

6. The absence of unified policy and regulation also meant that there was no single avenue for consumer complaints and address by an enforcement authority, and consequently created confusion for both telemarketers and consumers of their respective obligations and rights.

Regulatory response – the Do Not Call Register

7. In response to the uncertainty and criticisms of telemarketing practices, the then Australian Government identified three key policy objectives to be addressed, namely:

- provide a more consistent and efficient operating environment for the telemarketing industry;
- reduce the inconvenience and intrusiveness of telemarketing calls by enabling people to opt-out of receiving those calls; and
- establish an effective complaints handling mechanism to deal with poor telemarketing activities.⁵

8. Consistent with these policy objectives, the Register was established under the *Do Not Call Register Act 2006* (DNCR Act). The DNCR Act allows individuals to opt-out of receiving unsolicited telemarketing calls through listing their fixed-line or mobile phone numbers⁶ on the Register. There is no charge for listing a number, with each listing remaining on the Register for a period of three years⁷ unless it is removed by the consumer beforehand.

9. Before conducting a calling campaign telemarketers are required to submit their call lists to the Register for ‘washing’ – a process whereby the list is checked against the Register and any matching numbers are identified.

⁴ Report of the Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, Canberra, 2006, p. 56.

⁵ Do Not Call Register Bill 2006 Explanatory Memorandum, op. cit., p. 8.

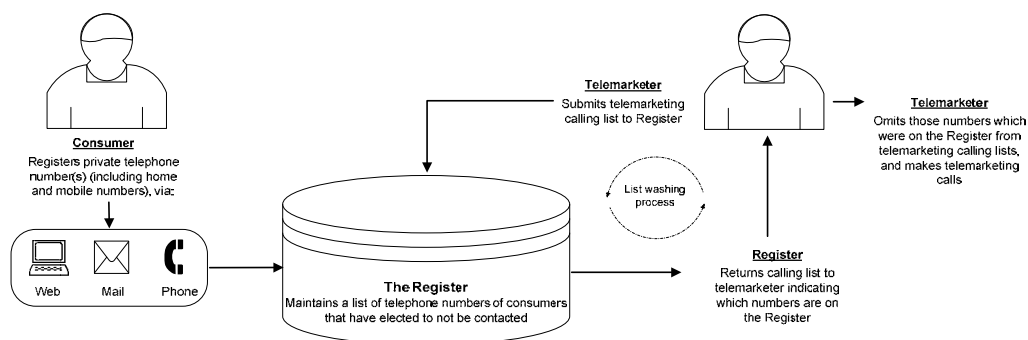
⁶ Satellite and Voice over Internet Protocol (VoIP) are also eligible to be registered. However, business and fax numbers are currently ineligible to be registered.

⁷ At which time an individual may re-list their number on the Register. Consumers can re-register for a new three year period at any time.

Telemarketers create an account with the Register and pay an annual subscription fee for this service, which in aggregate is designed to allow for full cost recovery for the operation of the Register. Figure 1 illustrates the operation of the Register.

Figure 1

Operation of the Register



Source: ANAO analysis.

10. The prohibition on making unsolicited telemarketing calls to a registered number is wide reaching as it applies to calls that originate from both Australian and offshore telemarketers.⁸ However, the Register does not aim to prevent all unsolicited calls but instead seeks to regulate the telemarketing industry, and minimise unsolicited sales and marketing calls made to those individuals who have elected not to receive them.

11. Unsolicited telemarketing calls may originate from a range of different sources, including from organisations considered to have a ‘public interest,’ rather than those that are commercially driven. When introducing the DNCR Act, it was acknowledged that some consumers would not wish to receive any unsolicited calls, even those made by organisations operating in the public interest. However, it was considered important to strike a balance between allowing specific organisations to undertake socially important work while maintaining the rights of consumers.⁹ Therefore the DNCR Act provides for certain organisations, such as charities, religious organisations, government bodies and educational institutions, to contact numbers listed on the Register.

⁸ To address the potential difficulty of imposing Australian requirements on telemarketers who operate from offshore but contact Australian consumers, contractual arrangements for the making of telemarketing calls must ensure that they comply with the DNCR Act.

⁹ Do Not Call Register Bill 2006 Explanatory Memorandum, op. cit., p. 1, 11, 21, 24.

12. The model adopted by Australia is also consistent with the international response to rising complaint levels relating to telemarketing practices. For example, the United Kingdom and United States of America both legislated Do Not Call Schemes in 1999 and 2003 respectively.

The Australian Communications and Media Authority

13. The Australian Communications and Media Authority (the ACMA) is a statutory authority within the Broadband, Communications and the Digital Economy portfolio and is Australia's regulator for broadcasting, the Internet, radio communications and telecommunications.

14. As part of its regulatory role, the ACMA is responsible for establishing and overseeing the operation of the Register including compliance and enforcement matters. The ACMA's role in administering and operating the Register differs from the co-regulation arrangements that govern its other regulatory roles. In co-regulation, industry takes a lead role in developing and administering its own arrangements through underpinning codes or standards, with the ACMA providing legislative backing to enable the arrangements to be enforced. Whereas the DNCR Act and associated legislative instruments¹⁰ prescribe a regulatory regime that directly and explicitly sets out and imposes the rules that govern the making of telemarketing calls.

15. On this basis, the operational requirements, responsibilities and accountabilities of the ACMA and telemarketers are well defined with the Do Not Call Register Scheme (DNCR Scheme) being relatively simple; reducing the scope for misinterpretation of compliance requirements.

16. The Parliament has also stipulated that it intends for the ACMA, in exercising its powers, to act in a manner that enables public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telemarketing industry.¹¹

¹⁰ Including the: *Do Not Call Register (Consequential Amendments) Act 2006*; *Telecommunications Act 1997*; *Do Not Call Register (Administration and Operation) Determination 2007*; *Do Not Call Register (Access to Register) Determination 2007*; *Do Not Call Register (Access Fees) Determination 2009 (No.1)*; and the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007*.

¹¹ *Telecommunications Act 1997*, Section 112 (2).

Recent developments

17. To allow businesses and emergency service organisations to access the protections provided by the Register, in the 2009–10 Commonwealth Budget the Government announced that the ACMA would receive \$4.7 million over four years to widen the scope of the Register from private and domestic telephone numbers, to include all telephone and fax numbers.¹² Legislation was introduced in Parliament in relation to the proposed expansion of the Register in November 2009, and is yet to be passed.

18. The DNCR Act requires a review of the legislation and relevant provisions of the *Telecommunications Act 1997* to be conducted before or as soon as possible, after May 2010. The Department of Broadband, Communications and the Digital Economy released a discussion paper for public comment in October 2009, to inform the review. Following the review, a report will be tabled in Parliament.

Audit objective and scope

19. The objective of the audit was to assess the ACMA's effectiveness in operating, managing and monitoring the Register, including compliance with legislative requirements.

20. In conducting the audit and addressing the objective, four key areas were identified for review, namely:

- consumer awareness and access to the Register;
- industry use of the Register;
- compliance and enforcement; and
- contract management and cost recovery arrangements.

21. The audit report examines the Register since its implementation in May 2007. The audit did not review the tender process for selecting the Register operator other than to inform consideration of the contractual arrangements.

¹² Australian Government, *Budget 2009–10, Budget Paper No. 2, Part 2: Expense Measures*, 2009, available from http://www.aph.gov.au/budget/2009-10/content/bp2/html/bp2_expense-07.htm [accessed on 15 July 2009].

Overall conclusion

22. The Register came into effect on 31 May 2007, from which point it became illegal for non-exempt telemarketers in Australia and overseas to contact a number listed on it. Prior to this, on 1 February 2007, the ACMA contracted Service Stream Solutions Pty Limited (the Register Operator) at a cost of \$13.3 million¹³ to establish, operate, manage and maintain the Register for an initial four year period.¹⁴

23. Consumers were able to register their numbers from 3 May 2007 and as at 30 September 2009, 3.83 million numbers were listed on the Register.¹⁵ While a number of registration options are available to consumers, the Register website has proved to be by far the most common method, accounting for approximately 83 per cent of registrations. In its first month of operation, the Register achieved the highest number of new registrations, at 1.04 million; with the subsequent monthly number of registrations averaging approximately 100 000. While lower than the Government's initial expectations¹⁶, registration levels have been in line with expert advice based on international experience that was commissioned by the ACMA prior to commencement.

24. As the ACMA has contracted a service provider to establish, operate and keep the Register on its behalf, at a day-to-day operational level, the ACMA is more directly involved in: education and awareness raising activities; managing the contract with the Register Operator; administering the cost recovery arrangements; and investigating complaints about possible breaches of the legislation and taking enforcement action where appropriate.

25. Overall, the ACMA has implemented arrangements that effectively support its regulatory oversight of the Register. Registration uptake has met the ACMA's expectations and the promotional and awareness raising activities have been relatively effective in maintaining a high level of consumer

¹³ Due to contract variations the revised value of this contract has increased to \$14.5 million.

¹⁴ With an option to extend the contract for a period of up to three years.

¹⁵ ACMA, *Do Not Call Register statistics*, available from <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310882> [accessed on 20 October 2009].

¹⁶ It was expected that of the 20 million home and mobile numbers eligible to be placed on the Register that there would be one million registrations in the first week of operation and four million registrations after the first year. Senator the Hon. Helen Coonan (Minister for Communications, Information Technology and the Arts), *An End to Nuisance Calls – A National Do Not Call Register*, media release, Canberra, 4 April 2008.

awareness and interest in the Register, and developing telemarketers' understanding of the DNCR Scheme.

26. Research conducted by the ACMA indicates that consumers are generally satisfied with the registration process as are telemarketers with the process for submitting call lists for checking (washing) to identify those numbers on the Register.

27. Despite these results, the ACMA's research also shows that the promotional activities have been limited in effectively educating consumers on how the Register and the DNCR Scheme operate. Without an understanding of the types of calls that a registrant may continue to receive, how long it takes for a registration to take effect and the duration of the registration period, there is an increased risk that consumers could make misinformed complaints and be dissatisfied with the effectiveness of the Register in reducing unwanted calls.

Contract management

28. The Register Operator delivers services direct to the public and hosts and keeps the Register in its technology infrastructure on behalf of the ACMA. Given these arrangements, it is the ACMA's responsibility to remain accountable for all regulatory decisions and ensure that the Register Operator observes values relating to service delivery, such as being fair, effective and impartial.

29. The ACMA has implemented a structured approach to managing the contract with the Register Operator, which is established through clear performance expectations and complemented by a regular regime of reporting and monitoring. As a result, the relationship between the parties is well established. However, the ACMA's monitoring of the contractor's performance is largely reliant on the Register Operator reporting its performance against the contract performance standards correctly as it does not have in place regular processes to independently verify the Register Operator's performance.

30. It remains important that the ACMA has sufficient oversight of the Information Communication and Technology (ICT) arrangements so as to be able to verify the performance of the Register and have confidence in the integrity and security of transactions. The Australian National Audit Office (ANAO) found that the ACMA had limited visibility in some of these areas such as the security standards and requirements as set out in the Protective Security Manual and the Information Security Manual (ISM). As a result, the Register Operator's non-compliance with password requirements for some of

the software applications supporting the database has gone unaddressed. Consistent with the ISM, the ACMA in consultation with the Register Operator should perform a risk assessment of the system configuration and implement appropriate technical or manual controls to reduce identified security risks.

Funding and cost recovery arrangements

31. In 2006–07, the ACMA received \$33.1 million over four years to establish and maintain the Register. It was anticipated that the net cost would be less than this amount due to the gradual introduction of cost recovery arrangements from the telemarketing industry, with full cost recovery commencing on 1 July 2008.

32. To date the performance of the cost recovery arrangements has resulted in an over-recovery of \$0.83 million in 2007–08, and an under-recovery of \$0.3 million in 2008–09 against initial estimates. The over-recovery in 2007–08 resulted from the demand for services by industry being significantly greater than the initial modelling. Following consultation with industry, the ACMA determined that the over-recovered fees would be returned to industry evenly over three years through minimising fee increases.

Managing complaints and compliance arrangements

33. Despite a general downward trend in the number of complaints the ACMA has received regarding the receipt of unwanted telemarketing calls, consumers' awareness of how they should make a complaint is low; and the ACMA's data shows that there is a relatively high number of registrants who do not make a complaint when they potentially have a valid reason to do so. Capturing and using complaints that are received presents a valuable resource to the ACMA as they provide the information on which it bases and targets its compliance efforts. It is therefore important that it collects more complete complaint information and that complainants have confidence in the complaint handling process.

34. Consistent with better practice, the ACMA's compliance strategy and tiered monitoring and enforcement model allows it to either escalate action if a company does not respond appropriately to initial regulatory action, or recognise a company for improved compliance performance. While this strategy allows the ACMA flexibility in its approach, it is also important that any actions are transparent to complainants and telemarketers and that the desired flexibility is balanced with minimising the risks of inconsistent decision making which can arise in such a system. The ACMA has

implemented a range of controls to treat the risks, however the inclusion of established standards for escalating regulatory actions in enforcement procedures and improving the reporting of compliance enforcement outcomes would provide greater information, transparency and help to build on consumer and industry confidence in the ACMA's enforcement of the DNCR Act.

Effectiveness of the Register

35. The ACMA commissioned research that indicates a majority of the consumers surveyed, who had their number on the Register, received fewer telemarketing calls after registering. Further, the ACMA has recorded the number of complaints, made by registrants who had received telemarketing calls in 2008–09, has reduced by 60 per cent from those received in 2007–08. In the absence of any comprehensive data on the effectiveness of the Register, these results are indicative of the Register's overall performance in reducing the incidence of unwanted calls and improvement in industry compliance.

36. There is little information published on the telemarketing industry and the number of calls made prior to the introduction of the Register, from which a baseline can be derived to measure if there has been a reduction in unwanted calls.¹⁷ Since the inception of the Register, the ACMA has surveyed all new registrants to establish how many telemarketing calls they received in the two weeks prior to registering, from which a baseline could be established. More recently the ACMA has requested that registrants using the website channel give their consent to participate in a follow up survey a few months after they register, which will enable them to better measure the Register's effectiveness in reducing unwanted calls.

Ongoing success

37. The ongoing success of the Register and the DNCR Scheme relies on consumers and telemarketers understanding how they operate (such as the three year registration period and the complaints and compliance regime) and the limitations (such as they will not prevent all unsolicited calls). A key upcoming test for the ACMA will be when the three year registration period

¹⁷ One industry survey has estimated that over one billion telemarketing calls were made in 2004. The Commercial Economic Advisory Service of Australia, *Direct Marketing in Australia, Year ended December 31st 2005*, St Leonards, p. 8, 16.

for those approximately 1 million people who registered at commencement, expires in May 2010. To this end, undertaking activities to improve consumers' understanding of the Register and the DNCR Scheme will be important. Further, building on the confidence of consumers and telemarketers in the complaints handling and compliance regime through improved transparency of processes and increased reporting will assist the ACMA in achieving its objectives.

Key findings by Chapter

Consumer awareness and access to the Register (Chapter 2)

38. It is the ACMA's responsibility to promote awareness of the DNCR Scheme as opposed to encouraging people to place their numbers on the Register. The ACMA's research shows that consumers' awareness and interest levels are relatively high and this has been achieved through a broad media campaign that has leveraged off consumers' inherent interest in the Register. However, this approach has been limited in its ability to educate consumers on how the Register and the DNCR Scheme operate.

39. Consumers' understanding of the DNCR Scheme is important to the success of the Register because without an appreciation of the critical aspects (such as the Register is designed to prevent some, not all, unsolicited phone calls), consumers are less likely to consider the Register to be an effective means of reducing unwanted calls. Accordingly, to improve the effectiveness and targeting of promotional activities, the ACMA should implement better monitoring and evaluation procedures; and then use this information to further improve the success of activities in meeting the communications strategy objectives.

40. The mechanisms and arrangements that have been introduced to provide for individuals to register their telephone numbers are accessible, simple to use and able to handle the volume of registrations. A range of controls have been implemented to assure that registrations are made by an eligible person and reduce the potential for erroneous removal of numbers. To improve the effectiveness of the registration process, the ACMA could undertake further work to determine the number of applications that expire without confirmation and the reasons why those applications were unsuccessful.

Industry use of the Register (Chapter 3)

41. Industry access to the Register to enable the washing of calling lists against the numbers registered is well structured. The washing service has performed to the standards expected and most telemarketers have been satisfied with the timeliness of the service. While there is no evidence that the washing service is inaccurate, the washing process is subject to user error, which results in a cost to the telemarketer. Although telemarketers can make an application to the ACMA for the subscription credits related to an invalid washing result to be refunded, there is no information made available to inform telemarketers of this.

42. Security of the Register's transactions, infrastructure and data are being adequately provided by the Register Operator. The integrity of the Register is supported by processing protocols that are designed to record unique and valid numbers. However, it remains important that the ACMA has sufficient oversight of the Register's ICT arrangements to ensure itself that security, integrity and performance standards are being met. In that respect the ANAO identified one area of non-compliance with the ISM that the ACMA had not addressed through a security risk assessment and implementation of appropriate technical or manual controls.

43. As part of the integrity measures being implemented, the ACMA has sought to identify registered numbers that are ineligible and has removed the majority of them. The ACMA has considered additional integrity measures to provide greater assurance over the Register if it is expanded to allow business and fax numbers. On a preliminary cost and benefit assessment, the ACMA does not consider that the mechanism through which it could obtain and confirm telephone account holders' information to address integrity issues, is warranted at this time. Monitoring the bulk registration of business numbers and, if necessary, strengthening verification controls would provide greater assurance over the bulk registration of business numbers.

Industry awareness and compliance (Chapter 4)

44. Telemarketers generally rate their level of awareness and understanding of the DNCR Scheme as high. To engage with industry through resources that meet their needs, the ACMA has recently released a compliance guide that provides practical examples of measures that can improve telemarketers' compliance arrangements.

45. While consumers' general awareness and interest levels in the Register are relatively high, the ACMA's data shows awareness of how they should make a complaint is low; with there being a relatively high number of registrants who do not make a complaint when they potentially have a valid reason to do so.

46. The ACMA's complaint handling process and compliance regime is based on a tiered system of escalation. The ACMA does not undertake to resolve individual complaints or necessarily provide a remedy for all complainants. Instead, it is based on the compilation of complaint information to monitor the level of company compliance, which then informs the appropriate enforcement response. While this approach provides the ACMA flexibility in their approach, it can also reduce the transparency of the process. Therefore, it remains important that clear advice on the compliance monitoring regime and the feedback that will be provided on the complaint outcome, is available to complainants.

47. To further improve transparency and build on public and telemarketer confidence that the ACMA is exercising enforcement action proportionately and consistently, the ACMA would benefit from including minimum standards in its procedures for escalating regulatory action. In addition, improved annual reporting of complaints and compliance enforcement outcomes (such as how many complaints were investigated by the ACMA; how many of those complaints established on reasonable grounds that companies had contravened the DNCR Act; and how many were resolved through compliance enforcement action), would provide greater information and further increase confidence in the ACMA's enforcement of the DNCR Act.

Contract management and cost recovery (Chapter 5)

48. There are cooperative and constructive formal and informal communications between the ACMA and the Register Operator, which in turn contribute to reducing the risks that contract outcomes are not achieved.

49. Contract variations and additional expenditure approvals have provided mixed results in delivering value for money outcomes. Despite some services not necessarily being fully realised, the ACMA has implemented a contractual arrangement with the Register Operator within the original budget estimates. Should the proposed expansion to the Register involve a contract revision to include new services, this provides an opportunity for the ACMA to incorporate a review of the contract performance standards in this process.

50. The annual subscription fees for telemarketers to use the Register have been set to allow costs to be recovered on a user-pays basis. Instituting different fee options has also recognised the variability in use by telemarketers.

51. The telemarketer account creation process was open for some time to misuse by telemarketers due to the lack of validation of company details prior to their accessing of the washing service. As a result, the ACMA has had to write off some telemarketers debts as unrecoverable. To assure telemarketers that the fees and charges they are paying are fair and reflect a user-pays basis, the controls and validation processes over telemarketers account creation have been improved.

The ACMA's response

52. The Australian Communications and Media Authority (ACMA) has appreciated the opportunity to participate in the performance audit of the Register and welcomes the findings and recommendations presented by the ANAO.

53. The Register is a valuable consumer protection mechanism, which has been operating effectively since its commencement in May 2007. This performance audit provides the ACMA with insightful guidance that will further enhance the Register's value to the Australian public and increase the overall effectiveness of the scheme.

54. The ACMA accepts each of the three recommendations contained within the report, and has already commenced work on implementing these matters.

Recommendations

Recommendation No.1

Para 3.31

The ANAO recommends that the ACMA undertake a risk assessment of the Register's information technology security management practices, including password controls, against the requirements of the Information Security Manual, to ensure that there are effective information security governance arrangements in place.

The ACMA response: *Agreed.*

Recommendation No.2

Para 4.40

To improve the complaints handling process, the ANAO recommends that the ACMA take steps to:

- (a) increase registrants' awareness of how to make a complaint; and
- (b) provide further advice to complainants on the compliance monitoring regime and the feedback they can expect to receive depending on the compliance enforcement outcome.

The ACMA response: *Agreed.*

Recommendation No.3

Para 4.64

To further improve transparency and minimise the risk of inconsistency in compliance enforcement decision making, the ANAO recommends that the ACMA set minimum standards in its procedures for escalating regulatory action.

The ACMA response: *Agreed.*

Audit Findings and Conclusions

1. Introduction

This chapter provides background information about the audit and the Do Not Call Register, and explains the audit approach.

Background

1.1 In response to increasing levels of community concern about the volume, inconvenience and intrusiveness of unsolicited telemarketing calls, the then Australian Government established a national Do Not Call Register (the Register) in 2007 under the *Do Not Call Register Act 2006* (DNCR Act). The Register enables individuals to opt-out of receiving unsolicited telemarketing calls on their home, mobile, satellite and Voice over Internet Protocol (VoIP) phones.¹⁸

1.2 Telemarketing is a method of direct marketing in which outbound telephone calls are made to sell or promote products and services, or promote potential suppliers, to prospective customers.¹⁹ Direct marketing differs from the traditional advertising methods such as commercial television, radio, newspapers and magazines, by being more intrusive through demanding a stronger claim to the customer's attention and requiring a reply.

1.3 Under the DNCR Act, the Australian Communications and Media Authority (the ACMA) is responsible for establishing and overseeing the operation of the Register, including compliance and enforcement matters.

The Australian Communications and Media Authority

1.4 The ACMA is Australia's regulator for broadcasting, the Internet, radio communications and telecommunications. The agency is part of the Communications, Broadband and the Digital Economy portfolio and has a statutory basis as a body corporate²⁰ under the *Australian Communications and Media Authority Act 2005* (the ACMA Act), which also establishes the

¹⁸ Telephone numbers that are eligible for registration must be used or maintained exclusively or primarily for private or domestic purposes, and cannot be used or maintained exclusively for transmitting and/or receiving faxes.

¹⁹ Other direct marketing techniques include mail, faxes, email spam, face-to-face marketing and door-to-door sales.

²⁰ Section 18 of the ACMA Act provides that the ACMA is a body corporate that can sue and be sued in its own name.

organisation's membership and functions.²¹ The day-to-day administration of the agency, including its financial management, however, operates under the ACMA Chair, who is the Chief Executive of the agency for purposes of the *Financial Management and Accountability Act 1997* (FMA Act).²²

1.5 The DNCR Act requires the ACMA to keep, or arrange for another person (the contracted service provider) to keep on its behalf, an electronic register of telephone numbers of people who do not wish to be contacted by telemarketers. On 1 February 2007, Service Stream Solutions Pty Limited (the Register Operator) was contracted to establish, operate, manage and maintain the Register for an initial four year period with an option of up to an additional three years.

1.6 The DNCR Act also makes the ACMA responsible for the additional functions of:

- conducting and/or coordinating community education programs about unsolicited telemarketing calls, in consultation with relevant industry and consumer groups and government agencies;
- conducting and/or commissioning research into issues relating to unsolicited telemarketing calls; and
- liaising with regulatory and other relevant bodies overseas about cooperative arrangements for the prohibition or regulation of unsolicited telemarketing calls.²³

The Do Not Call Register

1.7 The relevant account holder of a telephone number, who is the person responsible for the telephone account, or their nominee, can list their private telephone number(s) on the Register. Numbers can be placed on the Register via the Internet, in writing or by telephone, at no cost to consumers. As at 30 September 2009 there were 3.83 million telephone numbers on the Register.

²¹ Section 19 of the ACMA Act provides that the ACMA members consist of a chair, deputy chair and one to seven other appointed members. The ACMA's functions are established by Division 2 of the ACMA Act and are vested in the ACMA members.

²² The ACMA Chair, Deputy Chair and staff, have been prescribed as an agency for the purposes of the FMA Act.

²³ DNCR Act, Section 41.

1.8 From 31 May 2007, when the Register came into force, it was illegal for non-exempt telemarketers in Australia and overseas to contact a number listed on the Register.²⁴ To avoid calling listed telephone numbers, telemarketers can establish an account through the Telemarketing Access Portal (TAP) and then have their calling lists checked ('washed') against the numbers listed on the Register for a fee. Figure 1.1 illustrates the operation of the Register.

1.9 The Register will not prevent all unsolicited calls but aims to regulate the telemarketing industry and minimise unsolicited sales and marketing calls made to those individuals who have elected not to receive them.²⁵ The DNCR Act provides for several types of organisations that can make designated telemarketing calls to consumers, even if their telephone numbers are on the Register. Exempt organisations include Government bodies, religious organisations, charities, registered political parties, political candidates and independent Members of Parliament, and educational institutions.²⁶ In addition, businesses calling with the consumer's consent to receive calls, which can be expressly stated or inferred, are also exempt.²⁷

²⁴ DNCR Act, Section 3, specifies that the main remedies for breaches of the Act are civil penalties and injunctions. Refer to paragraphs 4.54 and 4.56 to 4.59 for further information on enforcement options and penalties.

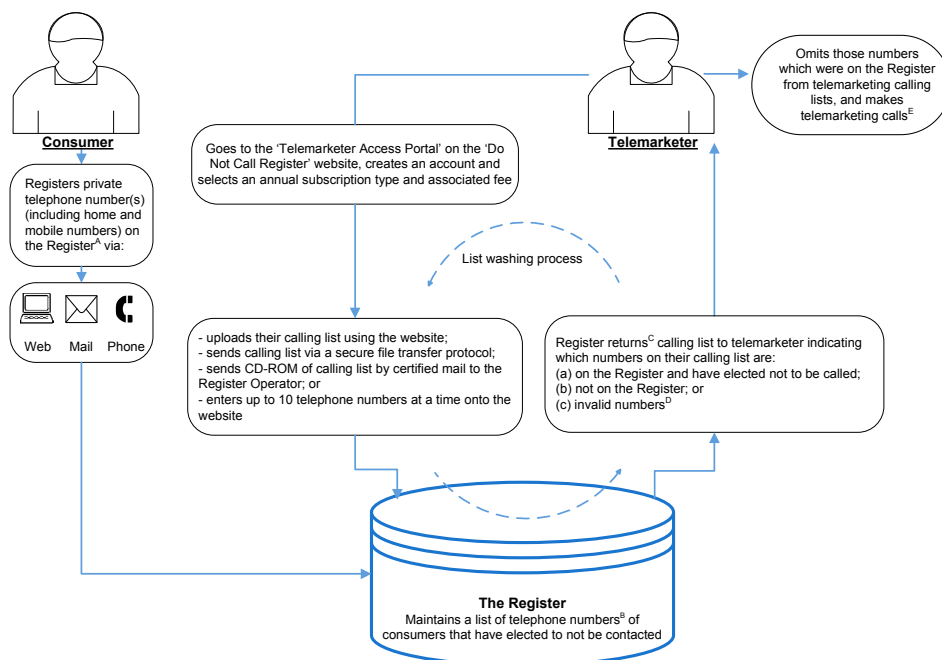
²⁵ Where a call is made solely to conduct a survey, it is considered a market research call and not telemarketing. Market research calls are permitted to be made to registrants.

²⁶ DNCR Act, Schedule 1. Exemptions exist so these organisations and individuals can continue to provide services to the community.

²⁷ DNCR Act, Schedule 2. Express consent is provided where a person ticks a box on a form, agreeing to receive future telemarketing calls from a particular business. Where there is an existing relationship between the telemarketer and the person called, such as a person who has an account with a bank, a telemarketer promoting other banking services from the same bank can infer consent.

Figure 1.1

Operation of the Register



- Notes:
- (A) Registration may take up to 30 days to become effective.
 - (B) The registration of a telephone number is valid for three years, unless removed sooner. Consumers can re-register for a new three year period at any time.
 - (C) Telemarketers will receive their returned calling list according to their preferred format, which may include any or all three indicators.
 - (D) Invalid numbers include those which are not eligible to be listed on the Register (such as those prefixed with 00, 06, 09, 13, 18 and 19) or numbers that are not submitted in the correct format.
 - (E) The returned calling list can be relied on for a maximum of 30 days.

Source: ANAO analysis.

Regulatory approach

1.10 Prior to the introduction of the Register, the telemarketing industry was self-regulated in the form of a voluntary Direct Marketing Code of Practice, developed by the Australian Direct Marketing Association (ADMA). An important consideration in the decision to introduce legislation to regulate the telemarketing industry was the observation that the self-regulation model did not adequately address the Government's key policy objectives of:

- providing a consistent and efficient operating environment for the telemarketing industry;

- reducing the inconvenience of telemarketing calls by enabling individuals to avoid receiving such calls; and
- establishing an effective complaint-handling mechanism to deal with poor telemarketing practices.²⁸

1.11 The regulatory approach chosen with the introduction of a Do Not Call Register Scheme (DNCR Scheme) reflects a combination of:

- regulation to address key issues through introduction of:
 - an ‘opt-out’ Register to help individuals avoid unsolicited telemarketing calls;
 - an industry standard to help ensure that all telemarketing and research calls are made in accordance with four key consumer interest rules (refer paragraph 1.14); and
- providing for future regulatory issues to be addressed in accordance with the self-regulatory principles of the industry codes and standards framework as part of the *Telecommunications Act 1997* (Telco Act).

Relevant Legislation

1.12 The Register has been established under the:

- DNCR Act;
- *Do Not Call Register (Consequential Amendments) Act 2006*, which amended the Telco Act to support the Register; and
- Telco Act, which establishes the ACMA’s investigatory, information gathering and prosecution powers, and enables the development of industry codes and standards in relation to the telemarketing industry.

1.13 Under the DNCR Act, the ACMA can make determinations about the administration and operation of the Register.²⁹ As at June 2009, three such determinations had been made:

- the *Do Not Call Register (Administration and Operation) Determination 2007*, amended by the *Do Not Call Register (Administration and Operation) Amendment Determination 2007 (No. 1)*, which sets out the process for

²⁸ Do Not Call Register Bill 2006 Explanatory Memorandum, op. cit., p. 9.

²⁹ DNCR Act, Section 18 (2) specifies that a determination is a legislative instrument.

applying to have a number registered, applying for the correction of register entries and for removing entries and ineligible numbers on the Register;

- the *Do Not Call Register (Access to Register) Determination 2007*, which sets out how a list of telephone numbers must be submitted for washing against the Register (refer Figure 1.1), and how a person will be informed about the outcomes of the washing process; and
- the *Do Not Call Register (Access Fees) Determination 2007*, which has been amended by the *Do Not Call Register (Access Fees) Amendment Determination 2008 (No.1)* and *Do Not Call Register (Access Fees) Amendment Determination 2009 (No.1)*, which sets out the fees for washing lists against the Register.

1.14 The *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* (the Industry Standard), was made by the ACMA in accordance with the requirements of the Telco Act, and sets out rules about:

- the hours during which telemarketing and research calls may be made;
- information that telemarketers and researchers must provide to the people they call;
- circumstances in which telemarketers or researchers must terminate calls; and
- the use of Calling Line Identification (CLI).³⁰

1.15 The rules in the Industry Standard apply to all telemarketing and market research calls, regardless of whether: the calls are made by an exempt organisation (refer paragraph 1.9); or the number called is listed on the Register.

International comparisons

1.16 National Do Not Call Registers established in five other countries: United States; United Kingdom; India; Hong Kong; and Canada, are generally comparable to the Australian model in providing an 'opt-out' telephone

³⁰ CLI is encoded data that is sent down the telephone line when a call is made that contains the information of the telephone number of the caller.

register.³¹ A comparison of the registers is set out in Table 1.1. The United Kingdom and Hong Kong have established more than one register to regulate different methods of direct marketing.

1.17 All registers in these five countries accept individual's private telephone numbers (including those that are accessed through fixed-line, mobile, satellite and Voice over Internet Protocol (VoIP)). The Canadian register accepts private fax numbers and one of both the United Kingdom's and Hong Kong's registers is dedicated to fax numbers, accepting both private and business fax numbers. Only the United Kingdom, India and Hong Kong registers provide protection for business telephone numbers. There is no registration cost to consumers in all of the jurisdictions, with telemarketers paying a fee to access the registers. Only India offers a service to industry to 'scrub' their calling list, which is similar to the Register's 'washing' service. In the remaining countries telemarketers download the registered telephone numbers to compare to their calling lists.

³¹ Marketing Industry Associations in New Zealand and Belgium voluntarily provide equivalent Do Not Call Registers to reduce calls from their members.

Table 1.1

National Do Not Call Registers in other countries

| Country | Date of effect | Time for registration to become effective | Registration period | Registration uptake |
|----------------|--|---|--------------------------------------|--|
| United States | October 2003 | 31 Days | Indefinite ^A | July 2008: over 168 million registered |
| United Kingdom | Telephone Preference Service (TPS) May 1999 | 28 Days | Indefinite | June 2008: 14.7 million land line numbers registered on the TPS |
| | Extension of the TPS to include Corporate telephone numbers June 2004 | | Annual renewal for corporate numbers | |
| | Facsimile Preference Service May 1999 | | Indefinite | |
| India | September 2007 | 45 Days | Indefinite | March 2008: 6.7 million registered |
| Hong Kong | Pre-recorded messages ^B December 2007 | 10 Days | Indefinite | June 2009: 0.86 million on pre-recorded register; 0.52 million on fax register; and 0.45 million on the short messages register |
| | Fax December 2007 | | | |
| | Short Messages ^C January 2008 | | | |
| Canada | September 2008 | 31 days | 5 years ^D | April 2009: 6.7 million registered |

Notes: (A) In February 2008 the original five year registration period was made indefinite.

(B) Covers voice and/or video calls.

(C) Covers text messaging by short message service (SMS), and multimedia messages (MMS) over the fixed-line network.

(D) In April 2009 the registration period was extended from three to five years.

Source: ANAO analysis.

Recent developments

1.18 In the 2009–10 Commonwealth Budget, the Government announced that the ACMA would receive \$4.7 million over four years to widen the scope of the Register to include all telephone and fax numbers.³² This will allow all organisations including businesses (particularly small business) and emergency service organisations to access the protections provided by the Register. Legislation was introduced in Parliament in relation to the proposed expansion of the Register in November 2009, and is yet to be passed.

1.19 The DNCR Act requires a review of the legislation and relevant provisions of the *Telecommunications Act 1997* to be conducted before or as soon as possible, after May 2010. In October 2009, the Department of Broadband, Communications and the Digital Economy released a discussion paper for public comment to inform the review. Following the review, a report will be tabled in Parliament.

Previous audit coverage

1.20 In 2007, the ANAO conducted an audit of ACMA's discharge of its regulatory responsibilities under the *Broadcasting Services Act 1992*, in respect of commercial broadcasting services. The audit found that there were opportunities for the ACMA to improve in relation to investigations, broadcasters' complaints handling processes, monitoring compliance with industry Codes of Practice, compliance and enforcement action and performance management and reporting. The audit made five recommendations.³³

1.21 The ACMA's internal auditor conducted a post-implementation review of the Register and reported its findings in March 2008. The objectives of the review were to establish whether the project delivered on its original business requirements and to identify any areas for improvement for future projects.³⁴ The review concluded that the Register and washing service was successfully implemented on time and within budget with minimal problems. The

³² Australian Government, *Budget 2009–10, Budget Paper No. 2, Part 2: Expense Measures*, available from <http://www.aph.gov.au/budget/2009–10/content/bp2/html/bp2_expense-07.htm> [accessed on 15 July 2009].

³³ ANAO Audit Report No.46 2007–08, *Regulation of Commercial Broadcasting*, p. 29.

³⁴ The scope of this audit was limited to the Register project and implemented solutions by the Register Operator. It did not include a review of the procurement process to engage the Register Operator.

complaints system and debt management interface were found to have been allocated low priorities and this resulted in re-work post launch to deliver an acceptable service. Seven recommendations were made in relation to:

- developing a corporate project management methodology and framework;
- improving contract management and procurement processes; and
- developing a DNCR operational manual to outline key responsibilities and processes.

1.22 In response to the internal audit, the ACMA reported in May 2009 that it had completed three of the recommendations and actions were in progress to address the remaining four recommendations. The ANAO did not explicitly validate the ACMA's progress against the recommendations as part of this audit.

Audit objectives, scope and methodology

1.23 The objective of the audit was to assess the ACMA's effectiveness in operating, managing and monitoring the Register, including compliance with legislative requirements. The audit criteria used to assess the audit objective were:

- the registration process and washing service are understood, accessible, reliable and timely;
- the ACMA has managed the contract with the Register Operator to ensure services are delivered on time to the required standard and cost; and
- the ACMA has implemented compliance and performance monitoring arrangements that are consistent with its regulatory role.

Audit scope

1.24 In assessing the ACMA's performance, the ANAO examined whether:

- there has been sufficient awareness raising of the Register through educational and promotion activities;
- the registration process and washing service is accessible, timely, reliable and meets users needs, and controls protect and secure the integrity of the Register infrastructure, data and information;

- the contract with the Register Operator is managed to ensure that deliverables are provided to the required standard, within the agreed timeframe and achieve value for money;
- fees and charges have been appropriately set and collected to recover the costs of the Register in accordance with Government policy; and
- industry compliance is maximised through education and guidance to advise telemarketers of their responsibilities under the DNCR Scheme and the compliance strategy appropriately resolves consumer complaints, addresses potential contraventions of the DNCR Act and enforces compliance.

1.25 The audit report examines the Register since its implementation in May 2007. The audit did not review the tender process for selecting the Register operator other than to inform consideration of the contractual arrangements.

Audit methodology

1.26 The audit methodology included:

- an analysis of the ACMA's records and documents, including relevant internal audit reviews;
- interviews with the ACMA staff members, representatives from the Register Operator and industry stakeholders;
- visiting the Register Operator's premises and observing its operations;
- undertaking analytical procedures and testing of ICT security controls, including reviewing the Register data for completeness and accuracy; and
- discussing the audit findings with the ACMA.

1.27 Fieldwork was conducted from April to July 2009. This audit was conducted in accordance with ANAO Auditing Standards at a cost of approximately \$237 000.

Structure of the report

1.28 The matters identified during the audit are set out in the following four chapters:

- Consumer awareness and access to the Register (chapter two);

- Industry use of the Register (chapter three);
- Industry awareness and compliance (chapter four); and
- Contract management and cost recovery (chapter five).

2. Consumer Awareness and Access to the Register

This chapter examines the ACMA's efforts to inform consumers of the existence and functions of the Register and assesses the ACMA's arrangements for facilitating consumer access to the Register for the purpose of listing their telephone numbers.

Introduction

2.1 The effectiveness of the Register relies on consumers being aware of it, understanding its purpose, knowing how to list a phone number on the Register and easily being able to do so.

2.2 Sound management of these aspects of the Register's operation requires:

- measuring the level of awareness of the Register;
- planning, implementing, monitoring and evaluating the promotion of the Register; and
- easily accessible, reliable and well-controlled processes for registration.

Consumer awareness of the Register

Registration uptake

2.3 One measure of the level of consumer awareness of the Register is registration uptake. From 3 May 2007³⁵ to 30 September 2009, 3.83 million telephone numbers had been listed on the Register.³⁶

2.4 After the initial surge of registrations at the launch of the Register, registrations have averaged around 100 000 numbers per month. An exception to this was in March 2009, when an email began circulating in Australia that incorrectly claimed that mobile phone numbers were being made public and also that mobile users would be charged for calls made by telemarketing companies to their mobile service. This resulted in a substantial increase in the

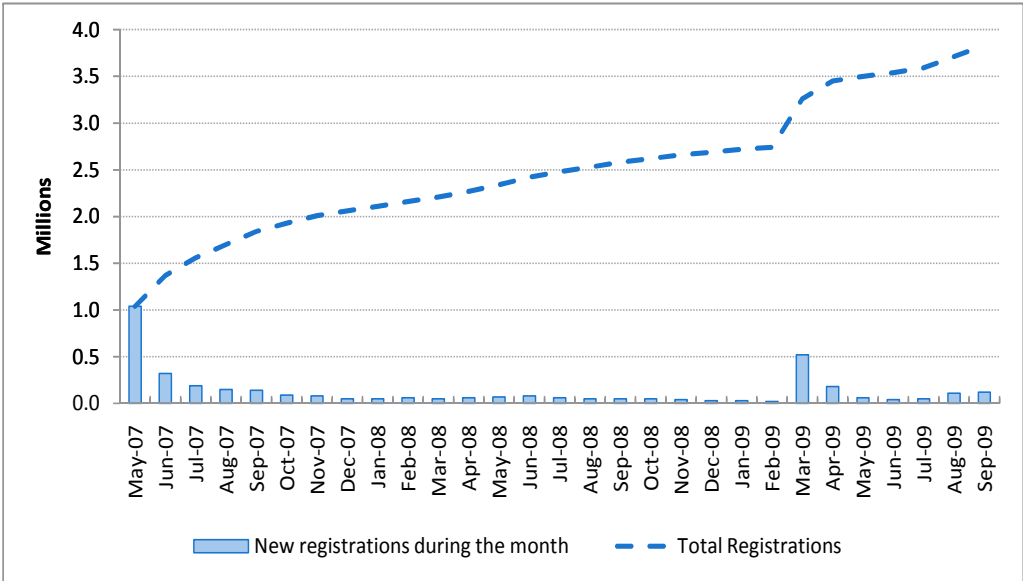
³⁵ When consumers were first able to register their numbers.

³⁶ ACMA, *Do Not Call Register Statistics*, available from <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310882> [accessed on 20 October 2009].

number of registrations to the highest rate since the start of the Register. Figure 2.1 shows the relatively steady increase in the number of registrations per month since the Register’s commencement.

Figure 2.1

Monthly registrations on the Register: May 2007 to September 2009



Source: ANAO presentation of the ACMA data.

2.5 When announcing in 2006 that a nationally legislated Do Not Call Register was to be created, the Australian Government indicated that of the 20 million home and mobile numbers eligible to be placed on the Register, it expected there would be one million registrations in the first week of operation and four million registrations after the first year.³⁷

2.6 The ACMA obtained expert advice in the lead up to the launch of the Register which projected that registration uptake, based on international experience, could vary widely with between 0.4 million to 3 million in the first year and 0.5 million to 5 million by the end of the second year of operation. In operation, the number of registrations has been above the mid point of the ranges, with 2.34 million numbers listed after the first year and 3.5 million numbers listed after the second.

³⁷ Senator the Hon. Helen Coonan (Minister for Communications, Information Technology and the Arts), *An End to Nuisance Calls - A National Do Not Call Register*, media release, Canberra, 4 April 2006.

2.7 The ACMA did not set a target for registration uptake beyond a contractual bonus fee payment which was subject to the achievement of one million or more telephone numbers registered at the end of June 2007. This target was achieved with 1.37 million being completed by 30 June 2007.

Measuring awareness levels

2.8 It is the ACMA's responsibility to promote awareness of the DNCR Scheme as opposed to encouraging people to place their numbers on the Register. On this basis, it is important that consumers receive sufficient information so that they are able to make an informed decision whether to register their telephone number(s) or not.

2.9 The ACMA has conducted two surveys of consumer awareness and understanding of the Register. The most recent survey was conducted in June 2009³⁸ and produced findings that included:

- 75 per cent of those surveyed were aware of the Register, with awareness higher for respondents aged 50-64 (84 per cent were aware of the Register) than for those aged 18-34 (65 per cent were aware of the Register);
- the main source of awareness was friends and family or word of mouth (69 per cent), followed by: television (48 per cent); radio (37 per cent); and newspapers (35 per cent);
- 32 per cent of households surveyed were on the Register;
- the top three reasons for not registering among respondents who were aware of the Register were:
 - lack of interest or motivation and/or not well informed about the Register (57 per cent);
 - high level of tolerance for telemarketing calls or management of these calls in another way (40 per cent);
 - scepticism or low confidence that the Register was effective in reducing the number of telemarketing calls (5 per cent); and

³⁸ The survey was conducted by an outsourced provider by computer assisted telephone interview of 1625 randomly selected households (with national quotas for areas). Survey results were post-weighted to the Australian Bureau of Statistics data on age, highest level of schooling completed, sex and area, to reflect the population's profile. The survey allowed multiple answers to some questions, such as sources of awareness, and so some aggregated percentages exceed 100.

- of all respondents who had not put a number on the Register, 73 per cent would be very or somewhat interested in placing a number on the Register.

2.10 Overall, the survey results show that after two years of operation, the community interest in and awareness of the Register remains relatively high.

Promotion of the Register

2.11 The Department of Finance and Deregulation's *Business Planning Processes for Campaign Information and Advertising Activities*³⁹, indicates that the usual processes for developing comprehensive and integrated advertising and information campaigns include the key stages of campaign development, campaign implementation and tracking, and campaign evaluation.⁴⁰

2.12 The ANAO examined whether the promotion of the Register was well managed, including whether the ACMA had clearly delineated responsibilities, systematically planned and implemented activities, and monitored and evaluated the impact of the promotion activities.

Responsibilities for promoting the Register

2.13 Responsibilities for promoting the Register are shared between the ACMA and the Register Operator. The ACMA is legislatively responsible for conducting and coordinating community education programs about unsolicited telemarketing calls and therefore has overall accountability for the effectiveness of the promotional activities.

2.14 Under its contract with the ACMA, the Register Operator has responsibility for developing and implementing the Register's promotion and awareness raising activities. The Register Operator has in turn subcontracted a specialist communications company to provide the promotion services. As a result of sharing the responsibilities, in practice both the ACMA and the Register Operator are involved in communications planning and decisions.

³⁹ The *Business Planning Processes for Campaign Information and Advertising Activities* was published in February 2009. Applied in conjunction with the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies (Guidelines)*, issued in June 2008, these Guidelines and principles were not in place when the main campaign for launching the Register was developed and implemented.

⁴⁰ Department of Finance and Deregulation, *Business Planning Processes for Campaign Information and Advertising Activities*, Canberra, 2009, p. 14.

Communications strategy, planning and implementation

2.15 The primary aim of the communications strategy is to raise awareness of the Register and educate consumer and industry⁴¹ audiences about their rights, roles and responsibilities under the DNCR Scheme.

2.16 In developing a communications strategy it is important to actively consider the relative costs and benefits of a campaign and the likely effectiveness of different publicity methods, mediums and volumes, in the context of the known information needs of the target audience(s).⁴² The strategy is limited, however, to the available funding.

2.17 The budget for promoting the Register was determined at the establishment of the Register. Table 2.1 shows that the budget allocation was weighted so that 70 per cent of the funding was to be spent in 2006–07 on the launch of the Register, relatively small amounts spent in 2007–08 and 2008–09 and a further 22 per cent spent in 2009–10 to support the three year re-registration process.⁴³

⁴¹ Industry education and guidance is discussed in paragraphs 4.4 to 4.8.

⁴² *ibid.*, p. 17.

⁴³ The aim of the activity in 2009–10 is to inform consumers that registrations automatically expire three years from the date registered, and if they do not renew their registrations they may receive telemarketing calls again.

Table 2.1**Budget for promotion of the Register: 2006 to 2010**

| Year | Budget | | | Expenditure ^A |
|--------------|-------------------|------------------|--------------------|--------------------------|
| | Register Operator | The ACMA | Total | The ACMA |
| 2006–07 | \$579 871 | \$451 819 | \$1 031 690 | \$168 383 |
| 2007–08 | \$54 000 | \$10 000 | \$64 000 | \$25 323 |
| 2008–09 | \$48 000 | TBC | \$48 000 | \$ 4762 |
| 2009–10 | \$228 129 | \$100 000 | \$328 129 | - |
| Total | \$910 000 | \$561 819 | \$1 471 819 | \$198 468 |

Notes: (A) The ACMA pays the Register Operator agreed contract fees through base monthly fees and quarterly bonus fees for maintaining and operating the Register. From these agreed contract payments, the Register Operator pays the subcontracted specialist communications company to undertake its specified public relations and education activities.

Source: The ACMA.

2.18 Although the Register Operator's promotion budget provides an indication of the anticipated expenditure in fulfilling the deliverables listed in the contract, it does not form part of the actual contract. Without an agreed contractual commitment to promotional spending there is a risk that the Register Operator has little incentive and cannot be compelled to dedicate funds to the delivery of promotional services.

2.19 The ACMA advised that they do not confirm the Register Operator's actual expenditure on promotional activities. This limits its ability to assess the costs and benefits of the promotional activities, or the extent to which the publicity methods have effectively contributed towards the primary aims of the communication strategy.

2.20 Accordingly, closer monitoring of the financial performance of the promotional activities by the ACMA, particularly given the shared delivery arrangements with the Register Operator, would enable the ACMA to better allocate funding in forward years in line with the communications strategy and priorities.

Communication planning and implementation

2.21 To achieve the aims of the communication strategy, the planning for the Register promotion and awareness activities was based around the first contract period from 2007 to 2010. A communications plan for the Register has been developed each year since its establishment.

2.22 The ACMA has employed a number of approaches to promote the Register to consumers since its launch including: a broad media relations campaign (including press, radio and television); the development of the consumer website, and the publication of a consumer brochure, information sheets and frequently asked questions.

2.23 A Register logo and tag line were developed along with press advertisements that were used in May 2007 to announce and alert the community about the launch of the Register. After commencement the ACMA has relied primarily on press releases and public relations to emphasise and promote achievements, such as the two millionth registration milestone on the Register's first anniversary, or relevant compliance outcomes such as major fines.

2.24 Together with the strong influence of personal communication (by word of mouth), the mix of publicity methods and mediums has been reasonably effective in maintaining consumer interest in and awareness of the Register. However, there is limited evidence that these approaches have best met the information needs of the target audiences (refer paragraphs 2.27 to 2.31).

Communications tracking and evaluation

2.25 As the Register's promotion and awareness activities are implemented in phases, tracking the effectiveness of the activities in each period is important for informing future phases. The Register Operator is contractually required to evaluate the consumer campaign every year and provide a report to the ACMA in a timely manner. However, only one such evaluation report has been prepared following the launch of the register in July 2007.⁴⁴ The ACMA advised the ANAO that an evaluation report for the period July 2007 to June 2009 was provided in November 2009.

2.26 In order to measure whether the various promotion and awareness activities were coordinated and managed in a way that achieved the primary aim of the communication strategy, the communication plan should set out specific, measurable objectives against which to evaluate outcomes.⁴⁵ One

⁴⁴ The evaluation report describes the industry and consumer campaigns and measures a number of the campaign objectives.

⁴⁵ *ibid.*, p. 17.

source of information against which the communication plan could benchmark effectiveness measures is the ACMA's consumer survey results (refer paragraph 2.9).

2.27 While the survey found that there was a high level of interest in and awareness of the Register, it also found that consumers' understanding of how the Register operates was generally low. In particular, the survey found that younger age groups were less aware of the Register, and knowledge about the rules which direct when a telemarketing or research call can be made was low.

2.28 The ACMA's survey data shows that approximately half of those who were on the Register believed that having their number listed on the Register would prevent unsolicited survey and research calls, despite these calls not being covered by the DNCR Act. Further, 40 per cent were unaware that they may still get calls from telemarketers within the first 30 days of registration and only 25 per cent understood that registration was only valid for three years.

2.29 It is important that consumers are aware that while the Register aims to reduce the number of telemarketing calls they receive it will not prevent all unsolicited calls. Without an understanding of the types of calls that a registrant may continue to receive, how long it takes for a registration to take effect and the duration of the registration period, there is an increased risk that consumers may make misinformed complaints and be dissatisfied with the effectiveness of the Register in reducing unwanted calls.

2.30 In response to the survey results, the Register's most recent communication plan aims to target its awareness raising activities to less well informed groups and to deliver specific messages concerning the Industry Standard. The plan identifies strategies for achieving its objectives but does not specify benchmarks or targets, for example in regard to the overall awareness and understanding of the Register, or suggest other indicators against which the effectiveness of the communications plan could be evaluated.

2.31 The ANAO suggests that the ACMA update the Register communications plan to include target levels for consumer understanding or other effectiveness measures in order to provide a basis for assessing the achievements of the promotion and awareness activities and to inform future activities.

Registration processes

Registration channels

2.32 Individual telephone account holders or their nominees can register their home and mobile telephone numbers.⁴⁶ The registration process is managed by the Register Operator under contract to the ACMA.

2.33 The *Do Not Call Register (Administration and Operation) Determination 2007*, amended by the *Do Not Call Register (Administration and Operation) Amendment Determination 2007 (No. 1)*, sets out the processes for applying: to have a number registered; for the correction of Register entries; and for removing entries and ineligible numbers⁴⁷ on the Register.

2.34 Numbers can be placed on the Register via:

- the Do Not Call Register website <www.donotcall.gov.au>;
- mail/fax⁴⁸; and
- telephone on 1300 792 958 (registrations by telephone are handled by interactive voice response (IVR)⁴⁹, or by an inbound contact centre).⁵⁰

2.35 The most common method of registration has been via the Register website, accounting for 83 per cent of registrations. Registrations by telephone via the IVR account for 14 per cent and assisted registrations by the contact centre agent (which include mail applications and telephone assisted registrations) account for the remaining three per cent.

Ease of access by consumers

2.36 The Register Operator is contractually required to make the website and IVR telephone registration channels continuously available.⁵¹ In all States

⁴⁶ VoIP and satellite phones are also eligible to be registered.

⁴⁷ Ineligible numbers are discussed in paragraphs 3.33 to 3.45.

⁴⁸ Consumers can obtain hard copies of the registration form by contacting the ACMA or the Register Operator, or by downloading the form from the website.

⁴⁹ IVR is a technology that allows a computer to detect voice and keypad inputs. IVR systems can be used to control almost any function where the interface can be broken down into a series of simple menu choices. In telecommunications, IVR allows customers to service their own enquiries by following the instructions, where the IVR system responds with pre-recorded audio prompts to further direct users on how to proceed.

⁵⁰ An inbound contact centre is a physical environment where agents receive calls from consumers requesting assistance with processing an application or the provision of information.

and Territories, the inbound contact centre channel must be made available between 8.30am and 5.00pm Monday to Friday (local time), except on public holidays.

2.37 The Register Operator's registration service performance is measured quarterly against five standards that set out the timeliness measures for processing applications, availability of application channels, and the time periods in which registration controls are to be performed. The Register Operator has reported its performance against the standards and has generally been assessed by the ACMA to have met or exceeded the performance standards, indicating that the Registration channels have been fully available and able to cope with the volume of registrations.

2.38 One exception has been on the day that the Register was launched⁵², when access to the website was slow and a person's ability to progress through the web registration service quickly was significantly reduced. The delays were caused by the randomly generated security code graphic (known as a CAPTCHA⁵³) that acts as a verification step in the registration process to ensure that a human is completing the registration. Once identified, a software modification to address the limitation was implemented, resolving the issue on the day of the launch.

2.39 The site has subsequently managed to deal with large variations in demand. For example, despite the surge in registrations in March 2009 (refer paragraph 2.4) the Register Operator reported that the site operated within the performance standards.

Complaints about the registration process

2.40 One indicator of consumer satisfaction with the registration process is the number of complaints made by those attempting to register. Figure 2.2 shows the number of complaints made about the registration process since commencement. Over 100 complaints were made in the first month of the

⁵¹ That is, 24 hours a day, 7 days a week over 52 weeks, subject to reasonable downtime associated with repairs or scheduled maintenance and/or upgrades.

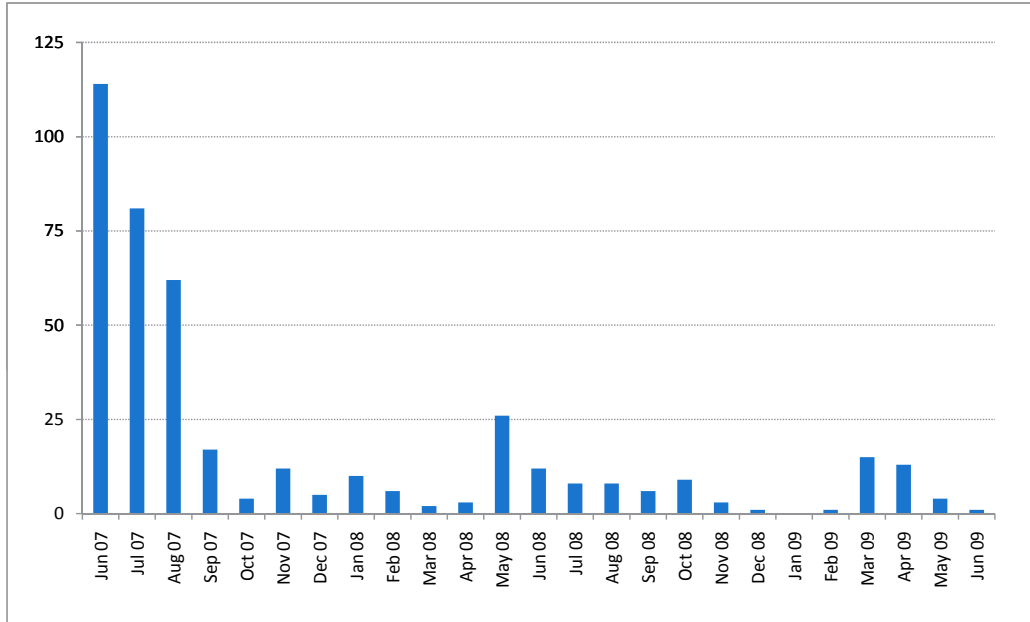
⁵² The website registration channel was launched on the 3 May 2007, prior to the legislated start date of the Register on 31 May 2007. A total of 174 351 registrations were received on this day, which is the highest daily number of registrations recorded.

⁵³ A CAPTCHA (completely automated public turing test to tell computers and humans apart), aims to distinguish humans from computer generated automated mechanisms.

Register's operation with complaints then dropping to an average of eight per month since September 2007.

Figure 2.2

Number of complaints about the registration process: June 2007 to June 2009.



Source: ANAO analysis.

2.41 The common causes of complaint were difficulties with the use of some web browsers or email addresses to register, the security verification step and the receipt of and response to the activation email (refer paragraph 2.45).

2.42 The availability of the registration channels, capacity of the channels to handle the volume of registrations (including significant variation in registration volumes at different times), and low level of consumer complaints about the registration process indicate that the registration processes are accessible and simple to use.

Controls over registration

2.43 The Register's availability and ease of access should be supported by appropriate controls to ensure its reliability and accuracy. This helps to balance the interests of individuals in avoiding unwelcome telemarketing calls with the legitimate commercial interests of the telemarketing industry. The accuracy of registrations can be secured through processes that:




- ensure that only Australian numbers used or maintained exclusively or primarily for private or domestic purposes are registered by the telephone account holder, or by a nominee with their consent;
- provide for consumers who have their numbers registered to:
 - correct their registration details;
 - remove their numbers; and
- identify and remove numbers that become inaccurate over time (due to disconnection and re-assignment).

Processes that assure appropriate registrations

2.44 The ACMA has a number of processes in place to provide assurance that a person is eligible to register a number (the telephone account holder or an authorised nominee), and that the number is eligible to be placed on the Register (an Australian number used or maintained exclusively or primarily for private or domestic purposes). The registration verification requirements vary depending on the registration channel and are summarised in Figure 2.3.

Figure 2.3

Registrant application verification by registration channel

| Registration channel | Registration process initiation | Personal information collected | Verification |
|--|---|---|---|
|  | Complete online registration form | <ul style="list-style-type: none"> • First name • Last name • Email address • Telephone number | Registrants make standard statement ^D , plus state that: <ul style="list-style-type: none"> - numbers submitted are not used primarily for business purposes; - no more than ten numbers in a three year period have been submitted using the same email address; and - they understand that providing false or misleading information is a serious criminal offence. |
|  | Calls 1300 792 958 | <ul style="list-style-type: none"> • Telephone number | Registrants make standard statement ^D , plus confirm that they are calling from the number that is to be registered. |
|  | Account holder, and nominee where relevant, complete application form | <ul style="list-style-type: none"> • First name^A • Last name • Email address^B • Postal address^C • Telephone account^C • Telephone number | Registrants make standard statement ^D , plus state that: <ul style="list-style-type: none"> - they understand that providing false or misleading information is a serious criminal offence; and - they have attached a copy of a bill for each telephone account associated with the telephone numbers to be registered (only the portion showing the name of the account holder and the telephone number needs to be provided). |

- Note:
- (A) An application to register a telephone number by a nominee on behalf of an account holder can only be made in writing. Where a nominee is registering on someone else's behalf, then the nominee's details are required and not the account holder's.
 - (B) If the consumer or nominee has noted their preferred method of contact is email, then they are required to provide an email address.
 - (C) The postal address and telephone account information is not retained in the Register database.
 - (D) Standard Statement: 'I am the relevant telephone account holder for the above telephone numbers submitted for registration (or the nominee of the telephone account holder); and the telephone numbers submitted are used or maintained exclusively or primarily for private or domestic purposes and are not used or maintained exclusively for transmitting or receiving faxes'.

Source: ANAO analysis.

Registration applications expired without confirmation

2.45 After a registration application is submitted, there are a range of system checking routines or manual operations that are performed before a registration is complete. Depending on the registration channel and the information supplied at the time of submitting the application, there may be an additional step in the registration application process which requires the applicant to confirm the registration.⁵⁴

2.46 Registration applications that are not confirmed expire. An expired registration application could represent either the applicant deciding not to register, the registration control being missed by the applicant, a frivolous/ineligible application, or an error in the details included in the application. The ACMA has advised that from inception to the end of June 2009, 241 185 registration applications have expired without confirmation (representing seven per cent of the total numbers registered). The number of expired registration applications by channel is: 239 905 online (99.5 per cent); 1193 telephone (0.5 per cent); and 87 contacting the call centre (0.0 per cent).

2.47 One issue identified with the online registration channel in other countries is the email activation step where it was found that some consumers assume that once the online application has been completed no other action is needed. If a consumer believes that a registration has been completed but it has not because it has not been confirmed, this can have a number of impacts including: an increase in complaints; and a negative perception of the Register's effectiveness in reducing calls when a customer continues to receive telemarketing calls while under the impression they have registered their number.

2.48 It is possible that consumers who have an expired registration application make a subsequent application that is successful. However, based on international experience, the possibility that consumers misunderstand the status of their registration application suggests there would be merit in the ACMA periodically checking the expired registration applications against the

⁵⁴ Following receipt of all website registration applications, an activation email is generated that requires the registrant to click on an embedded link to confirm the registration. A call back is generated within ten minutes of a registration application that is made by telephone where the calling line identification blocks the telephone number of the registrant. Mailed or faxed registration applications with incomplete information are followed up by a contact centre agent.

numbers on the Register and investigating the reasons for non-activation from a sample of those numbers that continue to not be registered.

2.49 Further, given the volume of online registration applications that expire without confirmation, the ANAO suggests that the ACMA investigate how it can more clearly inform consumers that through this registration channel, the process involves the receipt and action of an activation email and that this email may be captured in the recipient's junk mail filter.

Registrations made by the person who is eligible to register (the telephone account holder or an authorised nominee)

2.50 The ACMA advised that it considered there was a low likelihood of persons other than the telephone account holder or their nominee registering numbers, as there was no incentive to do so. It is however relatively straightforward to register another person's telephone number via the website channel as no evidence of ownership is required and there is no confirmation that the person has current access to the telephone number. This reduces the assurance that numbers on the Register have been placed there by the relevant telephone account holder.

2.51 This issue has also been recognised internationally. Hong Kong and India do not provide an online registration channel, with the Hong Kong regulators specifically taking into account that online registration could not allow verification to be done in an efficient manner to an acceptable standard. The risk that a person registers online a telephone number for which they are not the account holder is not isolated to individuals who may be registering on behalf of a relative or friend without providing the required nominee authorisation. In the United States there has been anecdotal evidence that businesses who have an established relationship with their consumers⁵⁵, have registered these consumers' telephone numbers so that their competitors cannot call those numbers.⁵⁶

2.52 There would be costs associated with the introduction of any additional controls to provide greater assurance that registrations via the website are made by the telephone account holder, which may also impact on the accessibility and ease of use of this registration channel. The ACMA advised

⁵⁵ Through an established business relationship a business can infer consent to contact these individuals.

⁵⁶ Telephone Preference Service Brookmead Report, *TPS Report on Unwelcome Calls*, London, 2008, p. 55.

the ANAO that because of the low risk rating, investing in additional controls to address the issue is not warranted.

Correcting and removing numbers

2.53 The accuracy of registrations is also dependant on processes that minimise the opportunity for numbers to be corrected or removed from the Register by persons other than the account holder or their nominee. A registrant may require their number to be corrected when an error is made in their application⁵⁷ or when they are assigned a new telephone number.⁵⁸ In practice, where a correction applies to the registered telephone number, the Register Operator removes the incorrect entry from the Register and registers the correct number.

2.54 The only method by which a consumer can de-register their telephone number directly is via the IVR or phoning the Register Operator from the number that is to be de-registered. All other applications to de-register a number are assessed by the Register Operator, with the additional control that a telephone account is required to establish that the applicant is the telephone account holder. As of 30 June 2009, 25 738 applications to de-register a number had been processed (representing 0.7 per cent of the total numbers registered).⁵⁹

2.55 The additional controls over the de-registration process reduces the potential for registered numbers being erroneously removed and provides greater protection of the interests of those individuals who have elected to not receive telemarketing calls, by ensuring that they remain registered.

Numbers that become inaccurate over time

2.56 One of the key controls that reduces the likelihood that telephone numbers remain on the Register after they are disconnected or re-assigned is the three year registration period. That is, three years after registration the telephone account holder must re-register their number to continue to opt-out

⁵⁷ Registrations are confirmed by email for online registrations and by letter for postal registrations where no email address was provided. This is a potential source of information that there was an error made in the application.

⁵⁸ Where a registrant relocates house or changes a home or mobile provider or plan, this may result in the assignment of a new telephone number.

⁵⁹ The number of processed de-registration applications does not necessarily represent numbers that have been removed from the Register. This is because a telephone number may be registered, re-registered and de-registered multiple times.

of receiving unsolicited telemarketing calls. This in effect is confirmation that the registered telephone number is current.

2.57 Comparatively, in those countries with indefinite registration periods (United States, United Kingdom, India, and Hong Kong), the method used to maintain the accuracy of registered numbers is through telephone companies informing the regulators of any changes to telephone accounts (disconnections or changes).

2.58 In Australia an industry-wide database of all listed and unlisted public telephone numbers, the Integrated Public Number Database (IPND), is maintained and managed by Telstra. The IPND contains all public numbers and associated information such as the customer's name and location of the service and the name of the company providing the carriage service. The IPND data may only be accessed and used for a range of approved purposes such as providing directory or operator assistance services; public number directories; operation of or assistance to emergency call services; telephony-based emergency warning systems; assistance to enforcement agencies or to safeguard national security; and for undertaking approved research.

2.59 The ACMA is responsible for the *Integrated Public Number Database Scheme 2007*, which details the processes by which the ACMA may grant authorisation to access and use information in the IPND. The ACMA's internal advice has been that accessing the IPND for the purposes of ensuring that registered numbers are accurate would require legislative amendment and may involve a cost and on balance consider the registration process to be an appropriate control.⁶⁰

2.60 The Register is leading up to its third anniversary in May 2010, which will affect the status of the 1.04 million numbers that were registered in the first month. Although consumers registering via the website are given the option to be reminded (by email) to renew their registrations before they expire, only around 30 per cent have nominated to receive the reminder email. The ACMA's 2009 survey found that of those respondents who had registered a number, three quarters did not know that registrations are only valid for three years.

⁶⁰ As part of a compliance investigation the ACMA may request information from the IPND to identify who a particular number is allocated to for use.

2.61 This emphasises the importance of the ACMA monitoring and evaluating its earlier promotional activities and budget commitments to inform the planning and implementation of the promotional activities to support the three year re-registration event. At the time of audit fieldwork, the ACMA advised that work had commenced on communications planning for the third anniversary, including development of key messages and drafting of the reminder email, media release and call centre scripts.

3. Industry Use of the Register

This chapter examines industry access to the Register and whether services are timely and reliable. It also examines if system controls provide for the security and integrity of the Register's transactions, infrastructure and data.

Introduction

3.1 To assist the telemarketing industry⁶¹ to minimise the possibility of breaching the DNCR Act, telemarketers must access the Register to check their calling lists against the numbers listed on the Register before they start making calls. In practice, a telemarketer's access to the Register is provided via the Internet, with support provided by the Register Operator's call centre.

3.2 Increased use of the Internet has led to greater demand for more streamlined online government service delivery. Given the high reliance on ICT systems in the delivery of services and the constant change in these technologies, sound ICT security controls can enhance an agency's confidence that their systems are secure, reliable and are able to meet users' expectations.

3.3 The industry's use of the Register is dependant on:

- telemarketers' ability to access the Register;
- timely and reliable delivery of call list washing services;
- ICT security controls which secure the Register's transactions, infrastructure and data; and
- controls and processes that support the integrity of the register.

⁶¹ The telemarketing industry includes call centres that engage in telemarketing on behalf of other organisations, a range of businesses that use telemarketing to increase sales of products and services (such as telecommunications companies, banks, travel agents, real estate agents and small businesses such as a roofing restorer that may seek to increase business in slow periods), and data suppliers and list brokers who sell data of potential marketable people. A reference to telemarketers includes all of the different industry participants mentioned.

Telemarketers access to the Register

Telemarketing Access Portal

3.4 The Telemarketing Access Portal (TAP) website⁶² provides for telemarketers to perform the key functions of: registering as an access-seeker and creating an account (including the selection of a subscription type with an associated fee); and the washing of call lists.

3.5 The *Do Not Call Register (Access to Register) Determination 2007* sets out how a list of telephone numbers must be submitted for washing against the Register, and how a person will be informed about the outcomes of the washing process.

Telemarketers accounts and subscriptions

3.6 The online account creation process was designed as an automated multi-step process involving: completing a registration form and agreeing to the terms of use; receiving an activation email with an initial password; and signing into the TAP and changing the password. After setting up an account, telemarketers select the subscription type(s) that is most likely to cover their estimated annual list washing requirements.

3.7 As at 30 June 2009, there were 3080 administration accounts⁶³ and 5490 subscription types had been selected by the account holders (on average 1.8 per account holder). The subscription types and subscription type take up are set out in Table 3.1

⁶² ACMA, *Telemarketing Access Portal*, available from <<https://www.donotcall.gov.au/dncrtelem/index.cfm>> [accessed on 14 July 2009].

⁶³ An administration account provides for account administration and call list washing. A wash only account can be linked to an administration account and is used for washing call lists only. Wash only accounts enable a number of different users in the same business to access the washing service at the same time.

Table 3.1**TAP accounts subscription types and take up**

| Subscription type | Maximum numbers that can be submitted for checking | Number of subscription type taken up | Annual subscription fee 2009–10 (\$) |
|-------------------|--|--------------------------------------|--------------------------------------|
| A ^A | 500 | 1139 (20.7%) | 0 |
| B | 20 000 | 1901 (34.6%) | 78 |
| C | 100 000 | 1546 (28.2%) | 360 |
| D | 1 000 000 | 844 (15.4%) | 3100 |
| E | 10 000 000 | 36 (0.7%) | 26 400 |
| F | 20 000 000 | 8 (0.1%) | 44 000 |
| G | 50 000 000 | 7 (0.1%) | 66 000 |
| H | 100 000 000 | 9 (0.2%) | 88 000 |

Notes: (A) Account holders may only have one subscription type A at a time. If any other subscription type(s) is subsequently taken out, the subscription type A is cancelled.

Source: The ACMA data and the *Do Not Call Register (Access Fees) Amendment Determination 2009 (No. 1)*, June 2009.

3.8 Telemarketers and industry representatives interviewed by the ANAO⁶⁴ advised that the process for establishing a TAP account and selecting a subscription type was straightforward and simple. The process of estimating the annual volume of numbers account holders will wash is not difficult and in the event of an under or over estimation the system is flexible enough so that additional subscriptions can be taken out, a subscription type can be upgraded or downgraded, or unused washes credited onto a new subscription in the next period.⁶⁵

3.9 The costs of compliance with the Register are additional and because of this the DNCR Scheme has had a financial impact on telemarketers. The management of compliance with the Register has required some telemarketers to appoint compliance officers and other ongoing costs include staff time to

⁶⁴ The ANAO approached six telemarketers, two industry associations, one consumer group and two independent oversight bodies to gain their perspectives on the administration of the Register. A response was received from five telemarketers and the two industry associations. In the case of industry associations, their responses represented feedback that was canvassed from their members.

⁶⁵ The crediting of unused washes is dependant on another subscription been taken out before the previous subscription expires.

prepare calling lists and submit them for washing, the engagement of data consultants and obtaining legal advice.

3.10 In addition to the compliance costs, telemarketers have had to make changes to their systems and processes so that they are able to comply with the DNCR Scheme. The changes required ranged from the development of systems, updating of policy and procedures, and training of staff.

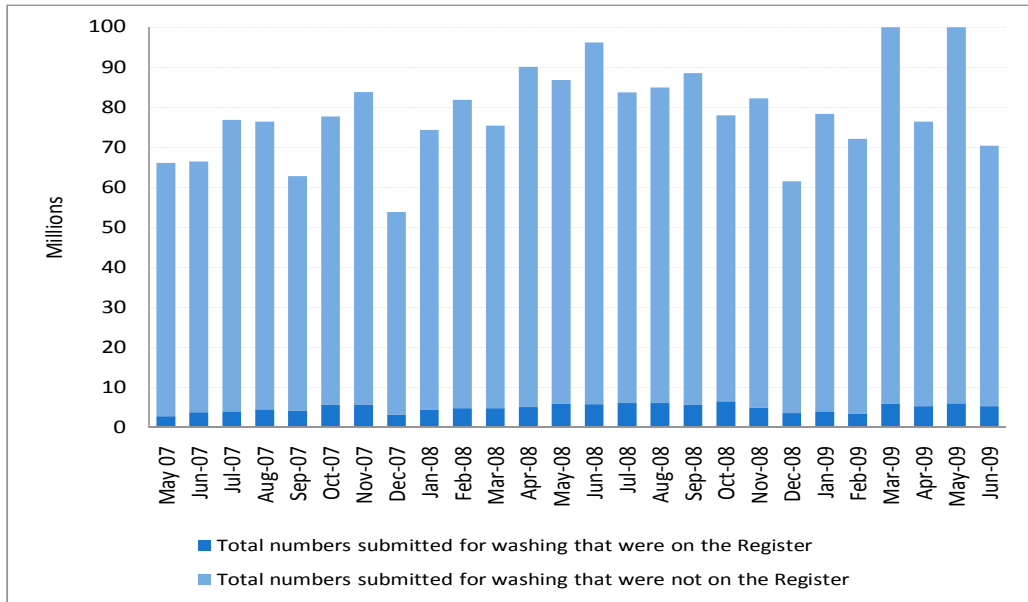
3.11 The TAP accounts and subscription structure facilitate telemarketer's access to the Register. Although access to the Register is at a cost, the potential benefit to industry from checking their calling lists against the Register is that they are able to focus their telemarketing by not calling consumers who are unlikely to be receptive to receiving unsolicited calls.

Washing service

3.12 As at 30 June 2009, 2.026 billion numbers had been submitted by the telemarketing industry for checking against the Register (washing).⁶⁶ Of the total numbers submitted for washing, six per cent (128 million) were identified as being on the Register.⁶⁷ The account holder who was the heaviest user of the washing service totalled 199.3 million numbers, in the same period. The total amount of numbers submitted for washing each month has varied between 48.2 million to 102.9 million, with an average of 79.9 million. Figure 3.1 shows the numbers submitted for washing by month.

⁶⁶ ACMA, *Do Not Call Register statistics*, available from <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310882> [accessed on 30 June 2009].

⁶⁷ Once a telemarketer has identified that a telephone number is on the Register, they may record this information and then choose not to include that number in any subsequent lists submitted for washing over the next three years.

Figure 3.1**Numbers submitted for washing by month: May 2007 to June 2009**

Source: ANAO presentation of the ACMA data.

Timeliness of the washing service

3.13 Under the contract with the ACMA, the Register Operator is measured against the performance standard of processing 90 per cent of calling list washing requests and returning lists to the relevant account holder within one minute, and processing the remaining 10 per cent within one working day.⁶⁸ The Register Operator has reported to the ACMA that it has consistently met the washing performance standards. The ACMA does not undertake any independent checks of the Register Operator's performance but advised that it is satisfied that the washing service has performed in excess of the standards expected.

3.14 Telemarketers and industry representatives who had used the washing service, advised the ANAO that they were satisfied with the service provided. Consistent with this, the ACMA's recent survey of TAP account holders found that around three quarters of respondents rated the washing service and its turn around times as good to excellent.⁶⁹ While the survey was limited by a

⁶⁸ The performance standard does not include the time taken to upload and download calling lists.

⁶⁹ In June 2009 the ACMA approached all TAP account holders to participate in an online survey. There were 180 completed responses to the survey, representing a 5.6 per cent response rate.

small response rate, these views are also supported by the low number of complaints about the list washing process.⁷⁰

Accuracy of the washing service

3.15 The ANAO did not find any incidences where a telemarketer has relied on a washing result that has incorrectly advised them of the status of a registered number.⁷¹

3.16 While telemarketers were satisfied with the timeliness of the washing service, a number considered that the formatting requirements for submitting calling lists for washing were overly complex. When a submitted list of telephone numbers does not satisfy the format criteria, the list will be returned advising that the numbers are invalid. Where an incorrectly formatted number is washed, it will be counted and deducted from the account holder's subscription credits. These numbers need to be corrected and resubmitted before any assurance can be obtained as to their registration status.

3.17 Information on the list format requirements is available on the TAP website and additional advice and assistance is available from the Register Operator. The advice provided emphasises the importance of correctly preparing calling lists before they are submitted for washing, advises new users that prior to washing larger lists that they test a smaller one to become familiar with the process, and informs users that the consequences of incorrectly formatted numbers being submitted is that subscription credits are debited.

3.18 Since inception, telemarketers have made 116 list washing reversal applications⁷² that affected 4.6 million credits (0.2 per cent of the total numbers that have been submitted by the telemarketing industry for checking against the Register).⁷³ These applications indicate that inaccuracy in washing transactions usually occurs as a result of user error and mostly happen when the account holder has had little or no experience with the washing process or a new staff member takes over the washing process.

⁷⁰ A total of 35 complaints have been made about the list washing process up to the end of June 2009.

⁷¹ This may be limited by the ability of a telemarketer to identify such incidences occurring.

⁷² A list washing reversal application can be made to the ACMA where a file of telephone numbers is not successfully washed and the user is seeking to have the quantity of numbers affected by the transaction to be credited to their subscription.

⁷³ Eighty seven per cent of the credits were reversed by the ACMA.

3.19 The ACMA considers applications for list washing reversals on a case by case basis against a set of internal guidelines. However, there is no information made available on the TAP website to advise account holders how they can make an application or the time period that the ACMA will take to consider the application.⁷⁴

3.20 The ACMA's policy is that it may, on application by an account holder, refund any part of the fee for the washing service. As such, the ANAO suggests that information, including the time frames for processing refund applications, be made available to TAP account holders to provide greater transparency of, and accessibility to, the application process.

Security and integrity of the Register transactions, infrastructure and data

3.21 The Register Operator hosts and keeps the Register in its technology infrastructure on the ACMA's behalf.⁷⁵ Contracting with the private sector can lead to improvements in efficiency and program effectiveness, but can also introduce new levels of complexity and risk to public service agencies, and presents challenges for accountability.⁷⁶ Although the ACMA has outsourced the information technology services and functions to a contractor, it is accountable for ensuring that the Register's ICT arrangements meet the requirements for the protection of information that it stores, processes and communicates. In particular, it is the ACMA's responsibility to ensure that the Register's information is protected to the same standard that would be expected from its own internal information technology infrastructure.

Security of systems

3.22 Systems and networks are to be designed, implemented and coordinated with the incorporation of security as an essential element. In practice this is achieved through the design and adoption of appropriate safeguards and solutions (controls) that avoid or limit potential harm from

⁷⁴ The average time taken by the ACMA to process list washing reversal applications is around four weeks.

⁷⁵ The Register Operator is contractually obliged to provide to the ACMA a current electronic copy of the Register on a weekly basis and upon request.

⁷⁶ Australian Public Service Commission, *APS Values and Code of Conduct in Practice*, available from <<http://www.apsc.gov.au/values/conductguidelines9.htm>> [accessed on 30 October 2009].

threats and vulnerabilities. The controls which are required are proportionate to the value of the information that is to be retained.

3.23 There are two primary business processes that are integral to the Register functioning adequately, where there is also a risk of inappropriate access that could result in disruption to services, failure of systems and release of sensitive information. These are:

- registration of telephone numbers; and
- registration of telemarketers and the washing of numbers.

3.24 On this basis, the consumer and industry web transactions of registration and washing, and the underlying Register infrastructure (including four software at the application, database, network and operating system layers) were examined against the ICT security control objectives to determine if:

- critical and confidential information is withheld from those who should not have access to it;
- automated business transactions and information exchanges can be trusted;
- the integrity of information and processing infrastructure is maintained;
- ICT assets are protected;
- ICT services and infrastructure can resist failures due to deliberate attack; and
- permit access to critical and sensitive data is restricted to authorised users.⁷⁷

3.25 The Australian Government's protective security policy, standards and minimum requirements relating to the security of information are set out in the Protective Security Manual (PSM). The PSM is supplemented by the *Australian Government Information Security Manual (ISM)* 2009.⁷⁸ The ISM requires that agencies perform a security risk assessment for information that is processed,

⁷⁷ Information Systems Audit and Control Association, *Control Objectives for Information and related Technology (COBIT) 4.1*, 2007.

⁷⁸ The ISM has been developed by the Defence Signals Directorate. The current version was released in September 2009 and is accessible at <http://www.dsd.gov.au/library/infosec/is_m.html>.

stored or communicated by government systems, and sets out requirements that form a baseline of information security requirements.

Security of the Register's transactions and infrastructure

3.26 Examination of the Register's end-to-end business process for data capture at registration; data sharing with telemarketers and any other stakeholders; and physical security of information (applicable to the environment in which the infrastructure resides), against the ICT security control objectives and the ISM, established that there were adequate security measures in place to secure these transactions, infrastructure and data.⁷⁹

3.27 Review of the Register's logical security⁸⁰ identified that password parameters for system accounts⁸¹ on two of the four applications⁸² supporting the Register, did not comply with the ISM password management requirements.

3.28 The Register Operator advised that if passwords were set to expire as required, the application servers would stop connecting to the database which would result in the Register application and website coming to a halt in operations until the password is reset. Based on this, the Register Operator had determined that it was more appropriate to have passwords set at an unlimited lifetime.

3.29 The Register Operator is contractually obliged to comply with all applicable security requirements specified in the PSM and ISM. The noncompliance of password settings increases the likelihood of security vulnerabilities being introduced to, or remaining unaddressed, in a system. To be consistent with the ISM, the ACMA in consultation with the Register Operator should perform a risk assessment of the system configuration to identify threats and vulnerabilities, and implement appropriate technical or manual controls to reduce identified security risks.

⁷⁹ This included an examination of the controls over major inputs, outputs and interfaces between systems and transmissions.

⁸⁰ Logical security is the software safeguards for a system which includes user identification and password access, authentication, access rights and authority levels.

⁸¹ A system account is not associated to a unique individual user and can access ICT resources or information on a network, system, database or other software.

⁸² Relating to the UNIX operating system and the Oracle database.

3.30 Given the identified weaknesses and the importance of the ACMA having sufficient oversight of the Register's ICT arrangements to ensure itself that the security, integrity and performance standards are being met, the ACMA would benefit from having a better understanding of the infrastructure, its utilisation in the end-to-end business process and the security management practices supporting the Register.

Recommendation No.1

3.31 The ANAO recommends that the ACMA undertake a risk assessment of the Register's information technology security management practices, including password controls, against the requirements of the Information Security Manual, to ensure that there are effective information security governance arrangements in place.

The ACMA response

3.32 The ACMA agrees with this recommendation.

Integrity of the Register

3.33 The integrity of the Register is dependant on controls that ensure consumers' registrations are appropriate and accurate (refer to paragraph 2.43); the registration processing protocols are constructed so that only unique, valid telephone numbers are recorded; and processes are in place to identify and remove numbers that are currently ineligible (such as business and fax numbers).

Unique, valid numbers are recorded

3.34 To determine whether the Register maintains a record of unique, valid numbers, a copy of the registered numbers table was sourced by the ANAO in late June 2009, from the database that is used in the daily processing of registration and washing transactions. The registered numbers table recorded a total of 3 518 083 numbers. Of the total registered numbers, there were no duplicate or blank records, with only one record appearing to be invalid (it was recorded in the format of '800000000').

Processes to identify ineligible numbers

3.35 Numbers that are not used exclusively or primarily for domestic purposes (such as business and fax numbers) are currently ineligible for registration. The ACMA's business planning processes acknowledges the

potential risk of the integrity of the Register being compromised by inclusion of business numbers.

3.36 To maintain the integrity of the Register, the contract with the Register Operator was varied in January 2008 to include the option for the Register to be periodically washed against a directory of business numbers. However, the ACMA advised that this was later determined to be impractical to implement as a single number can legitimately be used for business and personal purposes.⁸³

3.37 Without a source business directory against which to identify business numbers, the ACMA invited industry to submit any purportedly ineligible numbers that were registered, with supporting evidence, for assessment of eligibility and potential removal.

3.38 As of March 2008, the ACMA determined that 42 345 registered numbers had been submitted by telemarketers with a claim that they were business numbers (representing two per cent of total registrations as of March 2008). To assess the telemarketers claim⁸⁴ the ACMA attempted to contact the telephone account holders to obtain additional information to assist it in assessing if the numbers were primarily used for personal purposes.

3.39 No reply was received from 20 207 of the ACMA's requests for additional information and a further 2325 were unable to be contacted or confirmed. This means that 53 per cent of the telephone numbers that telemarketers claimed to be business numbers remain on the Register as the ACMA was unable to assess if the numbers were ineligible⁸⁵, and therefore presents an ongoing risk to the integrity of the Register and its intended purpose.

3.40 Of the remaining 19 813 numbers where additional information was supplied, the ACMA assessed that 5281 were ineligible (representing 12 per

⁸³ The ACMA considers that demonstrating that a number is used 'primarily' for private or domestic purposes requires that at least half of the time be spent on personal calls.

⁸⁴ To assess a claim that a phone number is ineligible to be listed on the Register, the ACMA requires the claimant to provide: the name and contact details of the business or commercial entity which uses or maintains the telephone number; the name of the directory the business or commercial entity is listed in (if any); the section of the directory the business or commercial entity is listed in; and the edition of that directory.

⁸⁵ The ACMA considered that the low response rate was due to the accuracy of the contact details provided.

cent of the numbers claimed to be ineligible, and 27 per cent of those numbers which were able to be assessed).⁸⁶

Removal of ineligible numbers

3.41 Where the ACMA is satisfied that a number is ineligible to be registered⁸⁷ it must remove the number, or require the Register Operator to remove it. Before removing an entry from the Register, the ACMA or the Register Operator must inform the person identified as the relevant telephone account holder that the entry is to be removed.⁸⁸

3.42 To address the ongoing potential for telephone numbers that have been assessed by the ACMA as ineligible re-appearing on the Register, the January 2008 variation to the contract with the Register Operator included a review of the Register against a record of ineligible numbers to occur at least once every three months.

3.43 Despite the implementation of the periodic review, the Register Operator's monthly reporting to the ACMA showed that 688 ineligible numbers remained on the Register from March 2008 to October 2008. The ACMA advised that it did not have a process in place to regularly review the Register Operator's reports of ineligible numbers appearing on the Register and subsequently did not identify that the numbers had remained until September 2008.

3.44 Although 688 ineligible telephone numbers remaining on the Register is not significant in the context of the total of all telephone numbers on the Register, it does represent 688 telephone numbers that were protected from receiving telemarketing calls for up to eight months when they were not eligible to. Where processes are developed to control and minimise identified risks, it is important that they are implemented and monitored in a timely manner.

3.45 To determine the number of registrants that continue to disregard the registration rules, the ANAO compared the registered number table to the ineligible numbers list in August 2009 and found that 171 matching numbers

⁸⁶ Since March 2008, the ACMA advised it has received subsequent information from 11 registrants which resulted in a reconsideration of the eligibility of the number, resulting in a total of 5270 assessed to be ineligible.

⁸⁷ The ACMA has a policy and checklist against which they base assessments of numbers eligibility.

⁸⁸ *Do Not Call Register (Administration and Operation) Determination 2007*, Section 8.

(three per cent of 5281 identified ineligible numbers) reappeared on the Register. Although there has been an improvement in the number of ineligible registrations, the presence of some examples demonstrates that it continues to be an issue that requires attention.

Maintaining integrity of the expanded Register over time

3.46 The ACMA understands that the industry's concerns associated with the integrity of the Register over time are that:

- the telephone account holder of a registered number may change;
- a registered number may be disconnected (either temporarily or permanently); or
- the purpose of use for a registered number may change.

3.47 While the ACMA expects that the third issue would no longer apply if the Register is expanded through legislative or regulatory amendment to allow business and fax numbers to be registered⁸⁹, the first and second issues will remain.

3.48 The ACMA has considered whether or not to incorporate additional integrity measures when the Register is expanded to include all number types. A preliminary feasibility assessment of whether to use a third party provider⁹⁰ to obtain current information on changes to telephone account holders' details found that these additional measures would be:

- expensive;
- subject to formal legal advice being obtained, and may be either legally complicated and/or not allowed;
- potentially technically complicated as appropriate interfaces and data validation procedures will need to be established; and
- burdensome on industry if this data reporting requirement is placed directly on the carriage service providers via changes to their carrier licences.

⁸⁹ Paragraph 1.18 discusses the proposed expansion to the Register.

⁹⁰ Such as accessing the IPND (as discussed in paragraphs 2.58 to 2.59) or Sensis data.

3.49 On a preliminary cost and benefit assessment the ACMA does not consider that the use of a third party provider to obtain telephone account holders information to address the integrity issues is warranted at this time.

3.50 One way to treat the risks to the integrity of the Register if it is expanded to include business and fax numbers is through strengthening the validation controls attached to the processes that will allow for the registration of ten or more business numbers at the one time. This would provide greater assurance over the integrity of these registrations at the outset. It would involve consideration of the channels through which these registrations will be accepted and the methods by which the ACMA will establish that these registrations are made by the telephone account holder.

3.51 Going forward, it remains important that the ACMA continues to monitor the integrity of the Register, in consultation with industry, including examining the options available to address any integrity issues and the costs and benefits of implementing any remedial solutions.

4. Industry Awareness and Compliance

This chapter examines the ACMA's efforts to educate and maximise industry compliance with the Register.

Introduction

4.1 A key policy objective of the DNCR Scheme is to establish an effective compliance framework to deal with poor telemarketing practices. If compliance activities are not effective the overall aim of the Register, to reduce the incidence of unwanted telemarketing calls to those individuals who have elected not to receive them, is unlikely to be met.

4.2 Current guidance suggests a flexible approach to non-compliance is most likely to deliver the desired regulatory outcomes and balance costs with risk.⁹¹ A graduated response allows a regulator to escalate or de-escalate regulatory action and match effort to the level of non-compliance.

4.3 The ANAO examined the steps taken by the ACMA to encourage compliance including:

- the extent to which the ACMA had engaged in appropriate education and communication activities with industry to inform them of the DNCR Scheme and their responsibilities;
- the compliance strategy and approach to complaints handling and compliance enforcement, including whether consumer complaints are resolved and if the ACMA was monitoring complaints and bringing apparent contraventions of the legislation to the attention of companies for action; and
- the extent of the ACMA's liaison with overseas bodies to develop cooperative arrangements for the regulation of unsolicited telemarketing calls.

Industry education and guidance

4.4 Fundamental to the graduated response that a regulator uses to address non-compliance amongst regulated entities are education, guidance and

⁹¹ ANAO *Better Practice Guide - Administering Regulation*, March 2007, Canberra, p. 64.

training. In practice, education can be a more cost effective strategy to encourage compliance than investigation and enforcement.⁹² Following the introduction of the Register, the ACMA gave the telemarketing industry a period of several months in which to adapt processes and systems to ensure compliance.⁹³

4.5 Complementing the consumer promotion activities discussed in chapter two, the ACMA maintains a series of topic specific information sheets, brochures and other educational material for industry on the Register website. In addition, the ACMA has published seven industry newsletters, *Making the Right Call*, to provide telemarketers with information about compliance trends and strategies, investigation outcomes and other relevant matters.⁹⁴ Articles on the Register have also been published in the ACMA magazine *ACMASphere*.

4.6 The ACMA's survey of telemarketers with TAP accounts found that there was however, a low level of awareness of the industry newsletter (63.5 per cent of respondents were not aware) and that there was a proportion who never referred to the information on the TAP website to help them understand their obligations (33 per cent of respondents). Irrespective of the industry not making use of the information resources provided by the ACMA, telemarketers rated their level of awareness and understanding of the DNCR Scheme as high.

4.7 In June 2009, the ACMA released *The Do Not Call Register Act Compliance Guide*. The guide addresses the top ten key elements of best practice, based on information gathered from a series of industry liaison visits conducted during 2007–08, coupled with the experience the ACMA has gained through its complaint handling and investigations. The release of the compliance guide was publicly supported by the Australian Direct Marketing Association (ADMA) with acknowledgement that 'it will serve as an extremely useful resource for organisations in ensuring they meet the requirements of the legislation'.⁹⁵

⁹² *ibid.*

⁹³ ACMA, *Do Not Call Register – Information for Industry*, available from <http://www.acma.gov.au/WEB/STANDARD/pc=PC_300340> [accessed on 20 June 2009].

⁹⁴ Four issues of the newsletter were published in 2007, two in 2008 and one in 2009.

⁹⁵ ADMA, *ADMA welcomes the release of ACMA's Do Not Call Register Act 2006 Compliance Guide*, media release, 6 July 2009.

4.8 As the guide was not released until the conclusion of audit fieldwork, it was not possible to gain telemarketer's views on its usefulness. However, given that telemarketers consider that they have a good understanding of the legislation, such a resource which is designed to provide practical guidance on measures telemarketers can implement to improve their compliance arrangements, is likely to better meet telemarketer's current needs.

Compliance strategy

4.9 The overall approach of the ACMA in responding to complaints about the receipt of telemarketing calls to registered numbers is:

to seek to resolve a matter, where appropriate, without resorting to formal enforcement procedures. The ACMA's main focus will be to act to prevent unwanted calls from continuing or recurring by encouraging telemarketers to take appropriate action to avoid breaching the legislative scheme. However, where informal resolution is unsuccessful or inappropriate, the ACMA will take appropriate investigatory and enforcement action. While the focus of the ACMA's compliance approach is on systemic breaches, the ACMA retains the discretion to decide to act more urgently on a case-by-case basis.⁹⁶

4.10 Applying a tiered compliance model through the three steps of: advise; warn; and investigate⁹⁷, compliance monitoring is primarily driven by the number of complaints received about particular companies over time. As opposed to seeking to resolve individual consumer complaints, the ACMA focuses on systemic non-compliance to identify and take enforcement action against the alleged major and repeat offenders, who have had the greatest impact on registrants.

4.11 In addition to pursuing specific companies, the ACMA also seeks to address patterns of non-compliance in particular industries. For example, in the first year of the Register's operation the ACMA identified that over half of complaints they received related to calls promoting phone plans and other related services. The ACMA subsequently focused on telecommunications companies over a 12 month period, including carrying out formal investigations that resulted in enforcement action, and conducting an industry

⁹⁶ ACMA, *Do Not Call Register – Complaints and investigations, Information for consumers*, June 2009, p. 1.

⁹⁷ The first and second steps in the compliance model are informal approaches to encourage compliance. The third step is instigated in order for the ACMA to take formal enforcement action.

education campaign through media publicity and inclusion in an edition of *Making the Right Call* newsletter.

4.12 Resource constraints are likely to restrict a regulator's ability to pursue and confirm that all regulated entities are complying with regulatory requirements all the time.⁹⁸ The ACMA is able to target its compliance strategies and potentially optimise resource efficiency as it is not legislatively obliged to resolve individual complaints and has some discretion to decide what to investigate.⁹⁹

Measuring the Register's effectiveness in reducing calls

4.13 A means through which the ACMA can gauge the level of industry compliance with the DNCR Act is by measuring the effectiveness of the Register in reducing telemarketing calls. Of those consumers surveyed in 2009 that had registered their numbers, 79 per cent responded by indicating they were receiving fewer telemarketing calls on their home phones.

4.14 As from June 2009, new registrants using the online channel have been requested to provide feedback on the effectiveness of the Register in reducing the number of telemarketing calls they receive, and are able to give their consent to participate in a survey a few months after they register. This should enable the ACMA to better measure the Register's effectiveness in reducing calls by collecting information relating directly to existing registrants and establishing a baseline of data for future comparison purposes.

4.15 It is important that the ACMA measures registrants' opinion and satisfaction with the Register's effectiveness in reducing the incidence of telemarketing calls to ensure that DNCR Scheme and its operation remains aligned with community expectations and the intent of the legislation.

⁹⁸ ANAO, opt. cit., p. 56.

⁹⁹ Section 509 and 510 of the Telco Act establishes that the ACMA may investigate a complaint that relates to a voice call being made, or attempted to be made, to an Australian number that is registered, if it has reason to suspect that a person may have contravened the DNCR Act or regulations and it thinks that it is desirable to investigate the matter.

Complaint handling

4.16 Consumers can complain about the receipt of certain types of calls on two main grounds. The first is if they receive a sales call, in the absence of consent, from a non-exempt telemarketer¹⁰⁰ after their number has been placed on the Register for more than 30 days (a potential contravention of the DNCR Act). The second is if they receive a call from a telemarketer or market researcher which did not abide by the rules, such as it was made outside the times allowed, or if the caller did not identify themselves (a potential contravention of the Industry Standard).

4.17 Complaints can be made on the Register's website, or by calling or writing to the Register Operator. The more information registrants are able to provide about the call, the more effectively the matter can be investigated by the ACMA. In particular, useful information includes: the time and date of the call; company name and contact details of the person that called; and the matters that the caller wanted to talk about.

4.18 In the two years since the Register's establishment there has been over 40 000 complaints (32 946 in 2007–08¹⁰¹ and 10 639 in 2008–09). Of the total complaints, 37 428 of these (86 per cent) have related to the receipt of unwanted telemarketing calls.

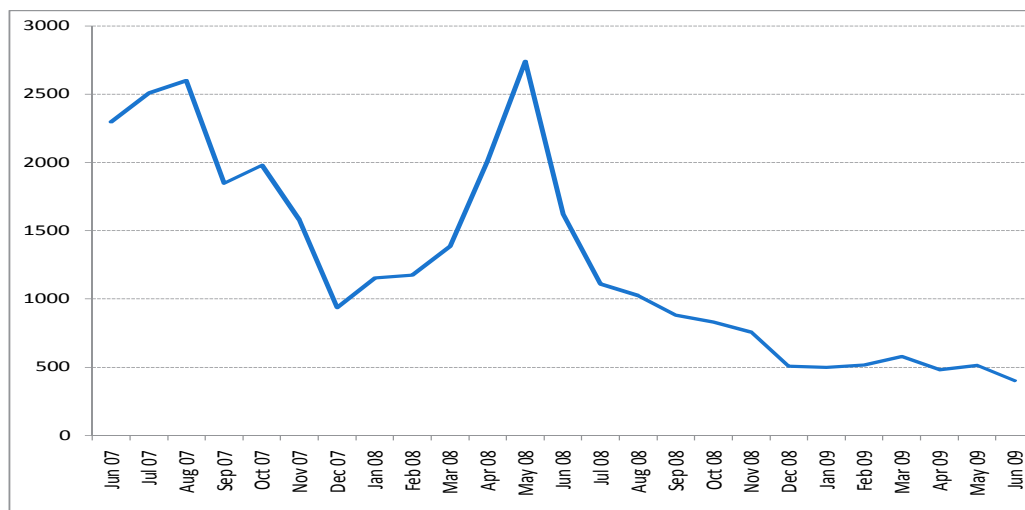
4.19 Figure 4.1 shows the trend in complaints made in relation to the receipt of unwanted telemarketing calls since the Register's establishment, where an initial assessment determined that there was a potential contravention of the DNCR Act. It shows a general downward trend, with the exception of the period from March to June 2008. The ACMA advised that the increase in complaints at this time coincided with a specific telemarketing campaign offering 'free' mobile phones, where the calls in most cases were made by offshore call centres.

¹⁰⁰ Exempt organisations are explained in paragraph 1.9.

¹⁰¹ Also includes the first month of operation being the period of 31 May 2007 to 30 June 2007.

Figure 4.1

Complaints received by the ACMA that indicate a potential contravention of the DNCR Act: June 2007 to June 2009



Source: ANAO analysis.

Consumer awareness of complaint mechanisms

4.20 Notwithstanding the number of complaints made, consumer propensity to make a complaint and awareness of the opportunity and means to complain is low.

4.21 One indication of this is the ACMA's June 2009 consumer survey which found that 47 per cent of respondents did not know to whom they should make an official complaint about an unwanted telemarketing call on a home phone, with only seven per cent of respondents indicating that they would make a complaint to the Do Not Call Register.

4.22 Consistent with the survey, available data suggests that there are relatively few complaints made by consumers who have their number on the Register and receive telemarketing calls.

4.23 For example, Table 4.1 shows three examples of companies that have been investigated by the ACMA as a result of complaints being made. In these cases the ACMA's review of the companies call records found that on average

the company being investigated had attempted¹⁰² more than one call to each complainant, and that many other attempted calls were made to registrants who had not complained.

Table 4.1

Number of complaints and the number of calls made to registrants

| Company investigated | Complaints made by registrants | Total number of attempted calls made to registrants who complained | Numbers on the Register that were attempted to be called | Total number of attempted calls made to telephone numbers on the Register |
|----------------------|--------------------------------|--|--|---|
| 1 | 8 | 24 | 2808 | 10 185 |
| 2 | 25 | 67 | 3952 | 7581 |
| 3 | 14 | 16 | 10 994 | 13 360 |

Source: ANAO presentation of the ACMA data.

4.24 There are some factors that influence the reduced incidence of complaints being made. For example, in some circumstances consumers will be unaware that a telemarketer attempted to make a call to their number as it may not have connected or been answered. As the calls were unsuccessful, they will not be subject to a complaint.

4.25 The ACMA will also receive complaints where the consumer is not able to identify the company that called them. In these cases it is possible that the calls were identified to have been made through the course of investigating a company's call records without attributing the potential contravention to the complaint. The ACMA's complaint data shows that over one third of the complainants (37 per cent of the complaints where an initial assessment determined that there was a potential contravention of the DNCR Act) could not provide sufficient information for the ACMA to investigate. Regardless of this, there are a high number of registrants who do not make a complaint when they potentially have a valid reason to do so.

4.26 Consumers may face a range of potential barriers to complaining, including a lack of time, complaint fatigue, or a perception that complaining

¹⁰² Attempted telemarketing calls include calls that may not have been connected or answered by a consumer. Consumers will often receive multiple calls as the telemarketer will continue to attempt to call until contact with a consumer is made. The fact that a call is not answered does not necessarily preclude it from being a contravention of the DNCR Act.

will be too much trouble or that the complaint will not be acted on.¹⁰³ As the ACMA is reliant on complaint information to ensure that its compliance activities are appropriately targeted, there would be benefit in the ACMA taking a stronger role in making registrants aware of how they can complain about the receipt of telemarketing calls and the steps in the complaint system. This could include the ACMA reviewing the effectiveness of the information that is provided to new registrants and those re-registering when the three years registration period expires.

4.27 To support this work, more broadly, the ACMA could benefit from gaining a better understanding of why consumers do or do not make complaints; and determining complainants levels of satisfaction with the complaints handling process through mechanisms such as post complaints surveys.

Initial receipt and assessment of complaints by the Register Operator

4.28 All complaints are initially received by the Register Operator, whose staff make a preliminary assessment to confirm if the:

- number is registered;
- number was registered for more than 30 days before the telemarketing call was received; and
- call was not made by an exempt organisation (refer paragraph 1.9).

4.29 If the complaint does not meet all of these conditions it does not involve a contravention of the DNCR Act. The Register Operator responds directly to the consumer advising them of this and suggesting they place their number on the Register, wait further time before complaining or inform them of the exemptions. A small number of the complaints are resolved by the Register Operator in this manner, with the majority (85 per cent of the complaints that relate to the receipt of unwanted telemarketing calls) referred to the ACMA for further consideration.

4.30 In order to verify the accuracy of the Register Operator's assessment to not refer a complaint to the ACMA, a sample of these complaints is

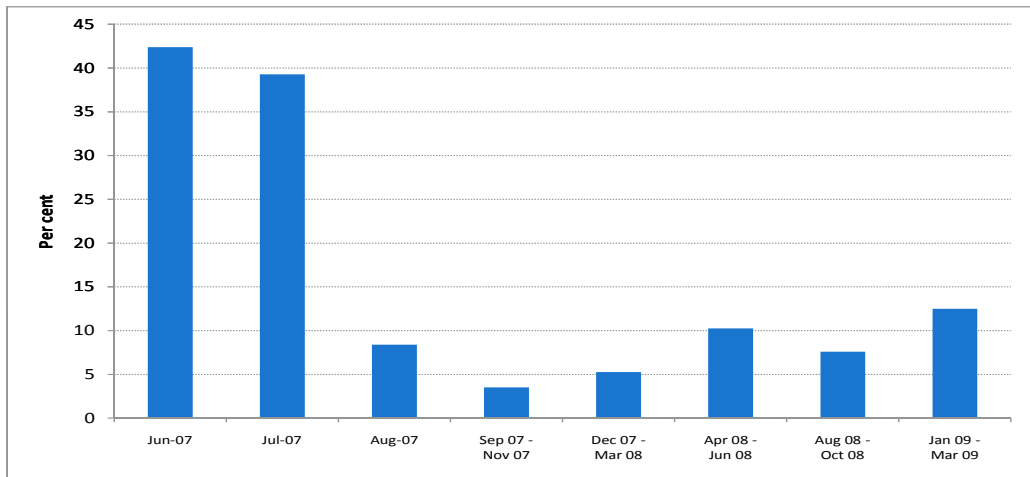
¹⁰³ Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, Canberra, 2009, p. 12.

periodically selected by the ACMA who then reviews whether the decision not to refer them was appropriate and correctly actioned.

4.31 Figure 4.2 shows that the Register Operator's performance in this area has varied. For example, in the early months of the Register's operation, over 40 per cent of the reviewed complaints resolved by the Register Operator were assessed by the ACMA to have resulted in incorrect or insufficient correspondence or advice being provided to the complainant. Following further discussions between the ACMA and the Register Operator, and additional training of staff, performance improved and the proportion of inaccuracy declined to around five per cent in December 2007. However, since then the percentage has gradually increased, rising above 10 per cent for the first time since August 2007 in the period January to March 2009.¹⁰⁴

Figure 4.2

Reviewed complaints where the Register Operator gave incorrect or insufficient advice



Source: ANAO analysis.

4.32 As the Register Operator is delivering services direct to the public on behalf of the ACMA, the values relating to exercising reasonable care in giving information and advice are critical. Notwithstanding the importance of this step in the complaints management process, complaints relating to the receipt of unwanted telemarketing calls are not subject to a contract related

¹⁰⁴ The Register Operator advised that changes during this period to the review sample size and the review's methodology and procedures impacted on the results.

performance standard, reducing the ability of the ACMA to influence the Register Operator's performance in this area. The ANAO suggests that the ACMA consider including in any future iterations of the contract with the Register Operator a performance standard that addresses the quality of complaints assessment, response, closure and referral.

Responding to complaints

4.33 On receipt of complaints from the Register Operator, the ACMA determines whether: the complainant has lodged a previous complaint or enquiry; and if it is possible to identify the company responsible for making the call raised in the complaint. This initial analysis assists with identifying the appropriate correspondence to send in response to the complaint, and determines the complaint outcome.

4.34 Where the responsible company can be identified, the ACMA responds to complainants and advises, depending on the company's status in the compliance monitoring regime, that the subject of the complaint:

- is being monitored for ongoing compliance problems (at level 1);
- has been advised that complaints have been received and that the ACMA is monitoring ongoing compliance problems (at level 2);
- has been advised that complaints have been received, is being closely monitored and information is being gathered to support an investigation (at level 3); or
- is currently under investigation.

4.35 Once a response has been provided to the complainant, the ACMA closes the complaint. While the ACMA's initial response to complainants broadly outlines its compliance strategy and acknowledges that the complaint has assisted it to build a compliance profile, it does not undertake to resolve the complaint or necessarily provide a suitable remedy.

4.36 Where complaints about a company reduce or cease, and it has not progressed to being subject of an investigation (at level 3 and above), it will no longer be actively monitored by the ACMA (refer paragraphs 4.43 to 4.44). In these cases there is no additional feedback provided to complainants on the outcome of their complaint and the company's compliance monitoring status.

4.37 When action against a company that is subject to complaints escalates to the investigation level, the ACMA may advise the complainants of the

outcome of the investigation.¹⁰⁵ Where enforcement action has been taken, the ACMA will consider what notifications to provide to complainants on a case by case basis.

4.38 The ACMA advised that its focus is on providing information on enforcement action outcomes through publicity mediums such as media releases and making information available publicly.¹⁰⁶ Given the time period of an investigation (refer paragraph 4.53), it can be some time before a complainant receives feedback on the outcome of their complaint, where the ACMA determines to provide such notification.

4.39 The complaints handling process has a degree of complexity given the number of compliance enforcement options and steps involved. Complaints are a valuable information resource for the ACMA and provide the opportunity to gain customers' experiences, perceptions and expectations of the DNCR Scheme and identify areas for improvement. Given this, and the general low level of customer awareness of how to make a complaint, it is important that complainants have confidence in, and visibility of, the compliant handling process.

Recommendation No.2

4.40 To improve the complaints handling process, the ANAO recommends that the ACMA take steps to:

- (a) increase registrants' awareness of how to make a complaint; and
- (b) provide further advice to complainants on the compliance monitoring regime and the feedback they can expect to receive depending on the compliance enforcement outcome.

The ACMA response

4.41 The ACMA agrees with this recommendation.

¹⁰⁵ Under Section 513 (1) of the Telco Act, the ACMA must inform a complainant where it decides not to investigate a matter further.

¹⁰⁶ In some cases it may not be appropriate to publicise a company's non-compliance as it may unfairly prejudice the company, or it could compromise the ACMA's ability to undertake further compliance enforcement action. In other cases it may not be possible to publicise the outcome as there may be terms of a compliance enforcement settlement that are confidential.

Informal response to complaints

4.42 The ACMA's general practice is firstly to informally notify companies where compliance issues are identified as a result of complaints being received, to enable them to address these issues on a voluntary basis. In practice the first and second steps in the ACMA's compliance monitoring model are acted on through advisory and warning letters.

Advisory and warning letters

4.43 Where a company is subject to a complaint for the first time it is sent an advisory letter. The letter notifies that complaints have been received, provides information on the DNCR Act and requirements, and suggests that the company review its procedures to prevent a re-occurrence. At this stage, no formal response is sought, but companies are provided with an ACMA staff member's contact details and are invited to make contact should they require additional information, or consider that the calls were not made by them or were made under an exemption.

4.44 The ACMA tracks the numbers of complaints made against companies after an advisory letter has been sent for a period of 90 days. If there is no reduction in the complaints during this period it is general practice for the ACMA to send a warning letter. As there is no guidance in place to indicate the minimum level of ongoing complaints that warrant a warning letter being issued, the decision to escalate compliance monitoring is based on a subjective judgement.

4.45 A warning letter provides more detailed information to the company about the complaints received and specifies a date by which the company must have addressed its compliance issues. After the expiration of the compliance date, the company is advised that it may be investigated at any time should further complaints be received. As with advisory letters, companies are invited to contact an ACMA staff member to discuss resolution.

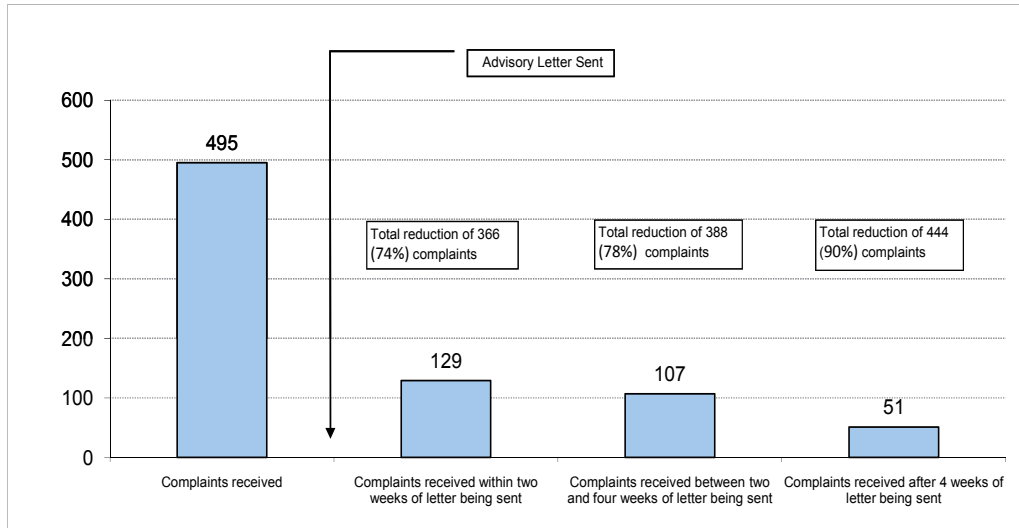
4.46 For both advisory and warning letters the ACMA can become involved in extensive discussions with the company involved in order to work through the compliance issues. The ACMA advised that in some cases a company will remain in regular contact over a period of time to ensure that it addresses its compliance issues.

4.47 During 2007–08, the ACMA sent 626 advisory letters and 233 warning letters. In 2008–09 the number of letters sent declined to 322 advisory letters and 68 warning letters.

4.48 The ACMA's analysis of the effectiveness of issuing advisory letters to 249 companies that were subject to complaints from the Register's commencement to August 2007 is presented in Figure 4.3. This shows that over time there was a steady reduction in recorded complaints once a company has received an advisory letter.

Figure 4.3

Complaints made against companies after an advisory letter is sent: June to August 2007



Source: ANAO presentation of the ACMA data.

4.49 This analysis has not been conducted by the ACMA for subsequent periods due to an increased complexity as the volume of letters has increased. The ACMA considers the reduction in the number of warning letters it issues as compared to the number of advisory letters, and the reduction in complaints, are indicators that its compliance strategy and monitoring regime is effectively addressing telemarketers non-compliance.

4.50 With a more structured approach to compliance monitoring, including minimum standards that apply to the escalation of regulatory action (such as the number of complaints following an advisory letter that will lead to a warning letter), the ACMA would have more reliable indicators with which to measure the effectiveness of the regime.

Addressing substantial non-compliance through formal enforcement action

Investigations

4.51 The ACMA may commence an investigation where the level of complaints continue after the company has been sent a warning letter or if there appears to be a pattern of sustained non-compliance and the company is reluctant to engage with the ACMA and take cooperative steps to address compliance issues.

4.52 The ACMA aims for the enforcement action taken in a particular case to be proportionate and reasonable to the circumstances in which the contraventions occurred. The ACMA seeks, through its investigations, to deter both the respondent, sections of the industry, and the telemarketing industry as a whole from engaging in conduct that contravenes the legislation.

4.53 The ACMA aims to close the majority of telemarketing investigations within six to 12 months. In the period from 1 May 2007 to the 30 June 2009, the ACMA had completed 24 of the 33 investigations it conducted. Of the 24 completed investigations, it took the ACMA over 12 months to close three investigations, with an average time of 40 weeks.¹⁰⁷

Investigation outcomes

4.54 Where an investigation establishes on reasonable grounds that a telemarketer has contravened the DNCR Act, the ACMA has a number of enforcement options available to it, depending on the individual circumstances of the case. The enforcement options include: issuing a formal warning; negotiating an enforceable undertaking; issuing an infringement notice; seeking a restraining or performance injunction¹⁰⁸ from the Federal Court; or making an application to the Federal Court or Federal Magistrates Court for an order that a person pay a financial penalty.

¹⁰⁷ Investigations commenced during the first 12 months of the Register's operation took an average of 46 weeks to close. In the second year of the Register's operation, investigations took on average 32 weeks to close.

¹⁰⁸ A restraining injunction restricts a person from engaging in any conduct that contravenes the DNCR Act, and a performance injunction ensures that a person who is refusing or failing to comply with the DNCR Act does so.

4.55 The 24 completed investigation outcomes are set out in Table 4.2. This shows that in some investigations, more than one enforcement option was utilised.

Table 4.2

The ACMA's investigation outcomes

| Investigation outcomes | Number |
|---|-----------|
| Formal warnings | 8 |
| Infringement notices | 8 |
| Enforceable undertakings | 10 |
| Investigations closed with no findings | 6 |
| Preparing to commence proceedings in the Federal Court seeking a penalty order, after a respondent has failed to pay an infringement notice | 1 |
| Total | 33 |

Source: ANAO analysis.

Application of penalties

4.56 Under Schedule three of the DNCR Act, the ACMA may issue an infringement notice to telemarketers. The ACMA issues an infringement notice when it has reasonable grounds to believe a telemarketer has breached the DNCR Act; and it outlines those alleged contraventions in the notice. In response to an infringement notice a telemarketer can either pay the amount specified (in which case no further action will be taken by the ACMA); or dispute the contraventions and/or payment amount specified in the notice and take further action, such as additional discussions with the ACMA. If the penalty is not paid, it is open to the ACMA to commence legal proceedings with respect to the alleged contraventions.

4.57 In determining which contraventions are to be specified in an infringement notice, the ACMA's internal advice is that it is open to limit the number of contraventions included, as opposed to applying the total number of contraventions. In practice, the ACMA generally confines the contraventions it includes in an infringement notice to a specific period or those that were actually the subject of a complaint.

4.58 Under the DNCR Act, the penalty for each contravention by a body corporate is \$2200.¹⁰⁹ Accordingly, where there are reasonable grounds that a telemarketer has contravened the DNCR Act on numerous occasions, an infringement notice can apply a high administrative penalty. In the examples of companies that have been investigated by the ACMA shown in Table 4.1, if the total number of attempted calls made to registered numbers was used as the alleged number of contraventions, the financial penalties would have ranged from \$3.3 million to \$5.1 million.

4.59 In setting the financial penalty to be included in the infringement notice, the ACMA seeks to indicate the seriousness of the non-compliance and provide sufficient inducement for future compliance. It also takes into the account the telemarketer's ability to pay. Of the eight infringement notices issued by the ACMA (refer Table 4.2), one of these was not paid and the ACMA advised it is currently preparing to commence proceedings in the Federal Court seeking a penalty order. Of the remainder, the penalties ranged from \$2200 to \$147 400. As at 30 June 2009, \$305 200 in penalties had been paid.

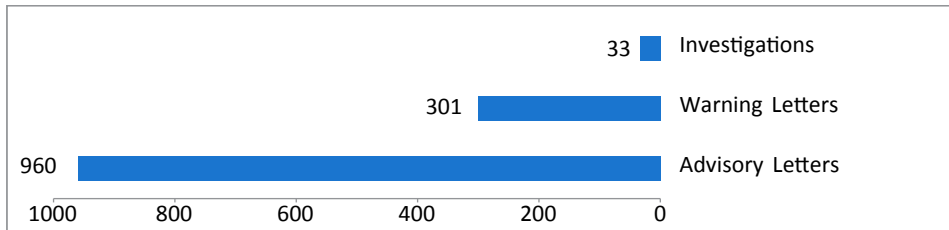
Effectiveness of the ACMA's compliance strategy

4.60 Consistent with better practice, the ACMA's compliance strategy provides for the escalation or de-escalation of regulatory action to match effort to the level of non-compliance.¹¹⁰ The ACMA's flexibility in responding to non-compliance is enhanced through the range of enforcement options and investigation outcomes available to it.

4.61 Figure 4.4 shows the total number of actions taken by the ACMA in response to complaints since commencement of the Register to 30 June 2009.

¹⁰⁹ The penalty for any person other than a body corporate is \$440. The maximum penalty for 50 or more contraventions occurring on the one day by a body corporate is \$110 000, and \$22 000 or any person other than a body corporate. Under penalties applied by the Federal Court, the maximum penalty is \$1.1 million for each day on which the contraventions occurred.

¹¹⁰ ANAO, opt. cit., p. 64.

Figure 4.4**Compliance monitoring actions taken by the ACMA from commencement of the Register to June 2009**

Source: ANAO presentation of the ACMA data.

4.62 A regulator's ability to administer regulation effectively and gain credibility is through public and regulated entity confidence that the regulator is exercising its powers fairly and lawfully.¹¹¹ There are risks associated with a discretionary approach to enforcement, even when consistent with legislative authority, if there is insufficient transparency of the processes and consistency in decision making.

4.63 The ACMA has reduced these risks by defining and documenting its operational procedures, fully documenting enforcement decisions and delegating compliance and enforcement decisions to senior management. However, the procedures outline the general practice of compliance monitoring which is designed to be flexible in application and based on a case by case basis assessment. The procedures are therefore limited in their ability to reduce the scope for subjectivity and do not necessarily provide for the consistent treatment of companies that contravene the DNCR Act. One effective measure to balance the desired flexibility with minimising the risks of the existing approach would be to clearly articulate the standard where complaint levels are unacceptable and will result in an escalation in compliance action.

Recommendation No.3

4.64 To further improve transparency and minimise the risk of inconsistency in compliance enforcement decision making, the ANAO recommends that the ACMA set minimum standards in its procedures for escalating regulatory action.

¹¹¹ *ibid.*

The ACMA response

4.65 The ACMA agrees with this recommendation.

Reporting compliance enforcement outcomes

4.66 The ACMA considers that publicising details of enforcement actions will:

- inform and educate the regulated community of its expectations and the consequences of failing to comply with their obligations imposed under the law; and
- inform the public of what it is doing to ensure compliance with the law.

4.67 As discussed in chapter two, the ACMA has publicised a range of its compliance investigations outcomes¹¹² in order to alert the community and promote successful compliance enforcement outcomes.¹¹³

4.68 To provide information to the public, the ACMA publishes a range of information on compliance enforcement actions and outcomes in its annual reports and Communications Report. However, from the information reported, it is unclear how many of the complaints: were investigated by the ACMA; established reasonable grounds that companies had contravened the DNCR Act; and were resolved through compliance enforcement action. Providing this information would help demonstrate the ACMA's commitment and accountability to resolving complaints.

4.69 The ANAO suggests that the ACMA review the compliance enforcement information that it includes in its annual reports and Communications Report, and consider options to provide greater transparency in relation to actions it is taking to ensure compliance with the law. For example, at an aggregate level, the ACMA could include information such as the number of complaints where there was insufficient information to investigate and the number of companies and associated complaints that are being monitored at each stage in the compliance monitoring regime.

¹¹² Of the 24 completed investigations, enforcement action was taken and an outcome was achieved with 17 companies. The enforcement outcome for nine of the companies has been publicised in media releases. In addition, one media release has provided aggregate information on the total number of warnings, enforceable undertakings and amount collected in penalties.

¹¹³ The ACMA also publishes the full text of enforceable undertakings on its website, available from <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310869#dnrcr> [accessed 30 July 2009].

Liaison with overseas bodies

4.70 The DNCR Act makes the ACMA responsible for liaising with regulatory and other relevant bodies overseas about cooperative arrangements for the prohibition or regulation of unsolicited telemarketing calls.¹¹⁴

4.71 The ACMA has advised that calls made by overseas call centres on behalf of Australian businesses account for a significant proportion of consumer complaints about contraventions of the DNCR Act. Liability for telemarketing calls made in contravention of the DNCR Act rests with both the overseas call centre and the person who causes the call to be made, for example the business located in Australia that contracts an overseas call centre.

4.72 To address complaints about calls from overseas call centres, the ACMA has undertaken a number of actions which include:

- informing Australian companies and telemarketers that they are liable for calls made by overseas call centres on their behalf;
- providing guidance on third party provider agreements, the management of outsourced arrangements and monitoring of compliance levels, in the *Do Not Call Register Act Compliance Guide*;
- publicising where it has taken action against Australian companies because of calls made by overseas call centres engaged by them; and
- negotiating an enforceable undertaking with companies to improve management of overseas call centres, such as by requiring the use of caller line identification or to use, or not use, specific call centres.

4.73 The ACMA made contact with the United States Federal Trade Commission (FTC) in June 2008 and sought its assistance with addressing a Florida based company that appeared to be responsible for more than 2000 complaints for a free holiday prize telemarketing campaign it was conducting in Australia. With the FTC's assistance complaints declined to 44 between the period of January to May 2009.

4.74 In addition, the ACMA has established contact with five overseas regulators: the United States; Hong Kong; United Kingdom; India; and Canada, and plans to establish ongoing liaison and collaboration arrangements later in 2009–10, which will be administered by the ACMA on an ongoing basis.

¹¹⁴ DNCR Act, Section 41.

5. Contract Management and Cost Recovery

This chapter examines the ACMA's management of the contracted Register Operator and whether the cost recovery procedures and practices comply with relevant Government guidelines.

Introduction

5.1 The 2006–07 Commonwealth Budget allocated \$33.1 million over four years to establish and manage the Register. When establishing the Register, the then Australian Government decided that its costs would be recovered from industry, initially under a partial cost recovery arrangement, with phasing in of full cost recovery in 2011–12.¹¹⁵ Following a change in Government, the *Savings for Labor's Better Priorities* election commitment and Budget measure¹¹⁶ required the Register's full cost recovery arrangements be brought forward to operate from 1 July 2008.

5.2 On 1 February 2007 the Commonwealth¹¹⁷, for the benefit of the ACMA, contracted the Register Operator to establish, operate, manage and maintain the Register for an initial four year period, with an option of up to an additional three years. The services to be performed or provided by the Register Operator include: registration (including telemarketer's access to the Register to wash contact lists); ICT systems and development; complaints and enquiry handling; promotion and awareness raising; and reporting.

5.3 On the conclusion or termination of the contract, the Commonwealth can exercise an option to compel the Register Operator to provide the Register and its associated software, applications, database and network. The delivery

¹¹⁵ In accordance with the Department of Finance and Deregulation's *Cost Recovery Guidelines*, cost recovery was considered to be initially justified on the basis that industry had created the need for regulation, so it should contribute to the costs associated with the scheme.

¹¹⁶ Australian Government, *Budget 2008-09, Budget Paper No. 2, Part 1 Revenue Measures*, 2008. Available from <<http://www.budget.gov.au/2008-09/content/bp2/html/revenue-01.htm>> [accessed on 15 July 2009].

¹¹⁷ Section 12 of the ACMA Act sets out that any contract entered into will be between the Contractor and the Commonwealth of Australia. The Commonwealth of Australia is represented by the Chief Executive of ACMA. In accordance with section 44 of the FMA Act, the Chief Executive of ACMA will be responsible for managing any contract on behalf of the Commonwealth.

and transition of the Register to the ACMA or a successor is at the price set out in the contract.

5.4 Under the current contract there are four payment types: establishment fees; base fees; bonus fees; and additional service fees. Under the fee payment regime, establishment fees were paid on achievement of key milestones, base fees are paid on a monthly instalment (subject to compliance against the contract), bonus fees on a quarterly instalment (subject to meeting ten agreed performance standards included in the contract), and additional service fees are paid when they arise.

5.5 As the Register Operator fees represent the greater proportion of the Register's costs to be recovered from industry (refer Table 5.1), good contract management can restrain cost increases and improve the ACMA's capacity to achieve value for money. In order to assure telemarketers that the fees and charges they are paying are fair and reflect only those costs incurred in the provision of the services, the ACMA should have processes in place that enable it to charge the correct amount under the cost recovery regime.

Contract management

5.6 Contract management is the process that ensures both parties to a contract meet their obligations. It involves developing and maintaining workable relationships with contractors while behaving legally and ethically. The nature and extent of contract management practices should be appropriate to the size, complexity and risk profile of each contract.¹¹⁸ It is necessary to have processes and guidelines to manage contracts and to comply with legislation and government policy.

5.7 The contract with the Register Operator is the ACMA's third highest value contract and has been classified by the ACMA as a medium to long term contract. The majority of services are delivered through a technological solution which brings a degree of complexity.¹¹⁹ In this context, it is important that the contract is being actively managed so that there is reasonable assurance that contract outcomes are being achieved and the continuity of services is maintained.

¹¹⁸ ANAO *Better Practice Guide - Developing and Managing Contracts*, February 2007, Canberra, p. i.

¹¹⁹ This complexity will potentially increase if forecast changes to the policy environment (such as including business and fax numbers) are adopted.

Legislation and government procurement policy

5.8 Government has a range of legislation and related policies that set out the basis for agency contracting. The main legislation and policy affecting agency procurement are:

- the FMA Act and regulations, which provide the basis for the proper management of public money and public property; and
- the *Commonwealth Procurement Guidelines* (CPGs), which establish the Government's procurement policy for departments and agencies subject to the FMA Act. The CPGs are based on the FMA Act principles of value for money, efficient, effective and ethical use of resources, and accountability.

5.9 Sound management of the contracted Register Operator and the associated cost recovery arrangements would include:

- managing risks that contract outcomes are not achieved;
- managing and monitoring the contractor's performance;
- identifying and responding to any requirement for a change in services; and
- identifying and recovering costs in accordance with cost recovery policy and guidelines.

Managing risks that contract outcomes are not achieved

5.10 Under the contract, part of the Register Operator's first key milestone deliverables was a risk management sub-plan. It was the Register Operator's responsibility to implement the risk management sub-plan and maintain a risk register to track and manage the exposure to risks. The identification and treatment of the strategic, tactical and operational risks associated with the Register's development and implementation was integrated with the project management approach during this phase.

5.11 While the ACMA documented the strategic risks throughout the Register's development and implementation, the process of identifying and documenting the strategic risks to the contract has since been subsumed by the ACMA's business planning processes at a divisional and business group level.

5.12 After establishing the Register, the ACMA commissioned the Australian Government Solicitor to develop a contract management guide and associated contract management training for the Register, to mitigate the risks

that the contract is not well managed or administered. The contract management guide also provides for an audit trail of documentation that supports and justifies contract management decisions made during the life of the procurement.

5.13 As the Register has been in place for over two years it is now in a business as usual phase of operations. The ACMA has addressed the potential tactical and operational risks throughout the service period of the contract through formal and informal communication mechanisms with the Register Operator. For example, where there is a significant disruption to services due to an unplanned incident occurring, the Register Operator firstly informs the ACMA informally by email or a telephone call. Significant outages are documented in an incident report and reported monthly to the ACMA as part of a contractual requirement for the Register Operator to advise of any events that affect the provision of services under the contract.

5.14 The ACMA has implemented a structured approach to managing the relationship with the Register Operator and there is cooperative and constructive informal and formal communications between the parties. On this basis the relationship between the ACMA and the Register Operator appears to be well established, which in turn contributes to reducing the risks that contract outcomes are not achieved.

Managing and monitoring the contractor's performance

5.15 The contract with the Register Operator includes ten standards that measure the overall performance of the delivery of the services covering: registration; washing; maintenance of ICT systems; and complaints handling. The contract performance management and monitoring regime has two main aspects which require the Register Operator to submit:

- a contract compliance sign-off form confirming that it has complied with the terms and conditions of the contract; and
- reports setting out its performance against the performance standards.

5.16 While the regime occurs on a monthly and quarterly cycle, satisfactory performance against the standards generates the payment of the quarterly bonus fees only. The total value of the monthly base fees over the period of the first four years of the contract is \$10.6 million and the quarterly fees are valued at \$1.6 million (total value of the installment fees is \$12.2 million). Therefore,

13 per cent of the total contract installment fees are subject to the Register Operator meeting the performance standards.

5.17 Using a comprehensive checklist, the ACMA conducts a monthly contract compliance assessment. On a monthly and quarterly basis it also reviews and reconciles all of the Register Operator's calculations against the ten contract performance standards. On this basis, the ACMA has assessed the Register Operator to have met or exceeded the quarterly performance standards since the Register's inception.¹²⁰

5.18 Although the ACMA tests the reasonableness of the performance information provided by the Register Operator, it is reliant on the Register Operator reporting its performance against the standards correctly as it does not independently verify the level of performance achieved. Given that the data used to monitor the Register Operator's performance is embedded in its operating systems, the ACMA could benefit from periodically conducting end-user surveys or audits of the data to provide some independent verification of the Register Operator's performance at intermittent intervals.

5.19 The performance standards are static throughout the contract period and although at a constant level they may support consistent and stable service delivery measures, they do not necessarily recognise any expectation in improved performance (such as that gained through experience in service delivery) and therefore drive efficiency. This suggests that the standards are achievable and relate to predefined expected levels of performance, as opposed to instituting stretch targets that challenge or encourage improved performance.

5.20 As observed in chapters two and three¹²¹, the contract performance standards measure the timeliness, availability and capacity of the services delivered under the contract and not necessarily the quality of the service delivery. Better practice suggests that performance measures should be reviewed periodically during the life of the contract as both parties gain experience about the measures that work in practice and to ensure the ongoing

¹²⁰ With the exception of the first period where the Register Operator withdrew its claim against one of the ten performance standards as a result of the slowdown in performance of the web registration service (as discussed in paragraph 2.38).

¹²¹ Paragraph 2.37 discusses the registration standards and paragraph 3.13 discusses the washing standards.

relevance of the measures.¹²² Should the proposed expansion to the Register involve a contract revision to include new services, this provides an opportunity for the ACMA to incorporate a review of the contract performance standards in this process.

Identifying and responding to any requirement for change in the services

5.21 Since the contract with the Register Operator was executed in February 2007 at a cost of \$13.3 million¹²³, it has been varied four times increasing the value of the contract to \$14.5 million.¹²⁴ Three of the variations occurred in the period leading up to when the Register came into force on 31 May 2007. The fourth variation was made eight months later in January 2008. Only the third contract variation did not acquire additional services and incur further costs.

5.22 The upgrade to services or additional service that were acquired under the contract variations included temporarily increasing the IVR capacity (refer paragraph 5.26), providing industry with an additional automated means for submitting contract list for washing and processing of ineligible numbers (refer paragraph 3.42).

5.23 To streamline the procurement of minor technical upgrades and additional services, and reduce the need to make changes to the contract, the fourth contract variation implemented a schedule of rates for time and materials based work. This provided for additional services to be acquired through a process where the ACMA identifies its requirements and the Register Operator quotes for the development and implementation of the additional services in accordance with the schedule of rates.

5.24 In June 2008 an expenditure approval for a funding pool was authorised for the life of the contract, to provide for prospective procurement

¹²² ANAO, opt. cit., p. 28.

¹²³ All costs include goods and services tax (GST).

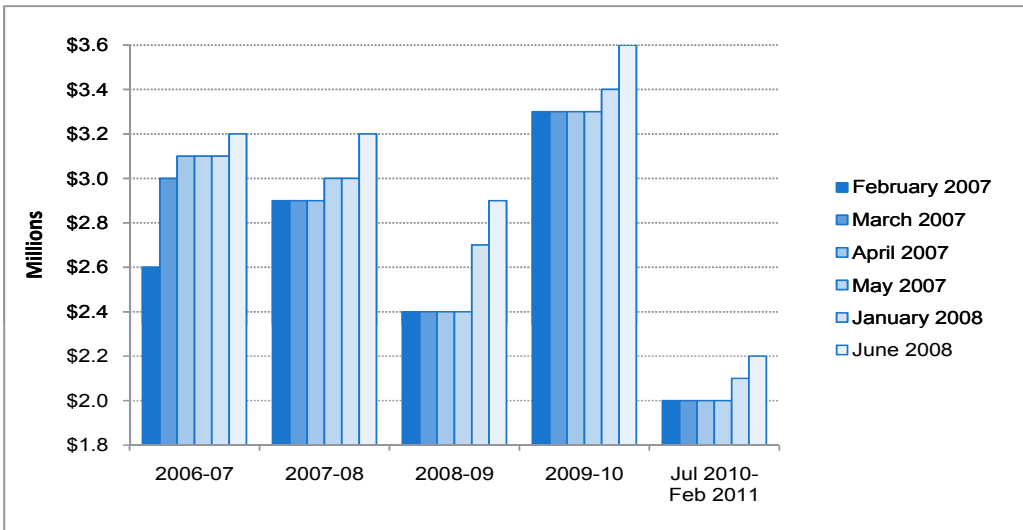
¹²⁴ The value of the contract does not include three additional services that may be taken up by the ACMA in the future. These services include purchasing the Register's ICT systems and software from the Register Operator on conclusion or termination of the contract, services to wash the Register against a business directory (see paragraph 3.36) and an option for telemarketers to obtain real time access to the Register to check whether a telephone number is registered prior to dialing.

of additional services under these arrangements.¹²⁵ The additional services that have been acquired through these arrangements includes enhancements to the complaints handling system and TAP, introduction of call recording, revision to the TAP account validation process (refer paragraph 5.39) and new registrants consent to participate in a survey (refer paragraph 4.14).

5.25 Figure 5.1 shows the approved annual contract expenditure over the initial four year contract period, according to the original contract and each of the revisions or additional expenditure approvals made over time.

Figure 5.1

Register’s approved expenditure according to the initial contract and each revision and additional expenditure approval



Source: ANAO analysis.

5.26 The contract variations and additional expenditure approvals have provided mixed results in delivering value for money to the ACMA and the Commonwealth in managing the DNCR Scheme. For example potential savings arose through the incorporation of a discount to the schedule of rates included in the fourth contract variation.¹²⁶ In contrast, the variations have in some instances funded excess capacity. For example the first contract variation included an additional IVR capacity for the first two months after the

¹²⁵ There is additional controls built into the acquiring of additional services where all proposals are reviewed by a probity adviser, internal audit and the ACMA Legal to ensure that the services are appropriate from a probity perspective and do not alter the scope of the contract.

¹²⁶ A discount of 10 per cent applies for any task where the total number of hours of work exceeds 50.

Register's launch to receive at least 900 000 registration applications per week and 50 000 per hour, at a cost of \$371 142.¹²⁷ However, since inception to June 2009 a total of 497 192 registration applications have been made by IVR, which is well below the additional weekly capacity.

5.27 Despite the capability of some variation enhancements not necessarily being fully realised, the ACMA has implemented a contractual arrangement with the Register Operator that is within the original Budget estimates.¹²⁸

Cost recovery

5.28 The primary sources of funding for administering regulation are:

- general government revenue from the annual budget process; and
- cost recovery charges collected by a regulator.¹²⁹

5.29 The Register's cost recovery charges are in the form of fees that are collected from telemarketers for washing lists against the register. The DNCR Act provides the legal authority for the imposition of charges¹³⁰, and the *Do Not Call Register (Access Fees) Amendment Determination 2009 (No.1)* sets out the fees that applied from 1 July 2009.

5.30 Australian Government cost recovery policy is administered by the Department of Finance and Deregulation (Finance). The *Australian Government Cost Recovery Guidelines* set out a better practice management framework to assist agencies to design and implement cost recovery arrangements.

Identifying and recovering costs

5.31 The ACMA has implemented a cost recovery methodology that involves quantifying the Register's direct costs¹³¹ and forecasting telemarketers' subscription demand, over the contract period from 2007 to 2011.

¹²⁷ The ACMA advised that given the unknown quantity of registrations that would occur in this period, it increased the IVR capacity in order to minimise the risk of consumers not being able to register.

¹²⁸ The costs associated with implementing the Register, the ACMA's monitoring and enforcing compliance, consumer education and research are Budget funded and in addition to the Register Operator costs.

¹²⁹ ANAO *Better Practice Guide - Administering Regulation*, March 2007, Canberra, p. 37.

¹³⁰ Under Section 21 of the DNCR Act.

¹³¹ Direct costs are costs that can be directly and unequivocally attributed to a product, including labour (including on-costs) and materials used to deliver products.

5.32 The Register's cost recovery arrangements are monitored annually by the ACMA, by comparing the revenue collected from telemarketers for accessing the register with the actual costs of the Register. Table 5.1 shows the performance of the cost recovery arrangements. This shows that in the first year of the arrangements the ACMA over-recovered \$0.83 million, and in the second year it under-recovered \$0.30 million.

5.33 The surplus collected in the first year was largely due to the demand for services by industry being significantly greater than the initial modelling of revenue from access fees. Following consultation with industry, the ACMA determined that the excess fees collected in 2007–08 would be returned to industry evenly over three years through the minimisation of fee increases. As shown in Table 5.1, the ACMA anticipates that by 30 June 2011 the total revenue collected will equal the total costs to be recovered over the four year period.

Table 5.1

Cost recovery performance and forward estimate

| Cost item (Revenue collected and the difference between costs and revenue) | 25/5/07 - 25/5/08 ^B Actual (\$m) | 25/5/08 - 30/6/09 ^C Estimate (\$m) | 2009–10 Estimate (\$m) | 2010-11 Estimate (\$m) | Total (\$m) |
|---|--|--|---------------------------|---------------------------|--------------|
| Register Operator contract | 0.98 | 2.14 | 2.60 | 1.60 | 7.32 |
| Contract management | 0.22 | 0.73 | 0.88 | 0.83 | 2.66 |
| Industry n | 0.00 | 0.00 | 0.07 | 0.00 | 0.07 |
| Other ^A | 0.09 | 0.10 | 0.04 | 0.05 | 0.28 |
| Total costs to be recovered | 1.29 | 2.97 | 3.59 | 2.48 | 10.33 |
| (Revenue collected) | 2.12 | 2.67 | 2.66 | 2.88 | 10.33 |
| (Difference between total costs and revenue) | 0.83 | - 0.30 | - 0.93 | 0.04 | 0.00 |

Notes: (A) Other costs include those associated with the ACMA maintaining the integrity of the Register through processing ineligible numbers and administering the debtor management function. Also included in other costs are the consultancy charges for: developing the fees for accessing the Register; probity advice relating to four contract variations; and legal advice relating to four contract variations.

(B) Cost recovery was set at 30 per cent in the first year, in accordance with the initial partial cost recovery arrangements.

(C) Cost recovery was set at 50 per cent in the period from 25 May 2008 to 30 June 2008, with 100 per cent cost recovery applying as from 1 July 2008.

Source: The ACMA, *Updated Cost Recovery Impact Statement (June 2009)*, *Do Not Call Register*.

Register fee structure

5.34 The annual subscription fees have been set to: allow costs to be recovered from industry on a user-pays basis; minimise the impact on businesses that use telemarketing on an ad-hoc basis and do not require regular access to the Register; and to cater for larger users with significant demand for washing services.

5.35 Table 5.2 shows the non-linear annual subscription fee price structure, which is applied to reflect the varying costs of telemarketers' use of the Register. Telemarketers purchasing a higher level subscription type incur a lower per wash unit cost, or a percentage discount. Following a review of the 2007–08 and 2008–09 periods, the ACMA has adjusted the fees to align with the total revised costs to be recovered from industry over the remaining years of the contract. The price increase between the periods is also shown.

Table 5.2

Annual subscription fees

| Type | Maximum numbers that can be submitted for checking | Annual subscription fee 2007–08 | Annual subscription fee 2008–09 | | Annual subscription fee 2009–10 | |
|------|--|---------------------------------|---------------------------------|------------|---------------------------------|------------|
| | | (\$) | (\$) | % increase | (\$) | % increase |
| A | 500 | 0 | 0 | 0 | 0 | 0 |
| B | 20 000 | 71 | 74 | 4 | 78 | 5 |
| C | 100 000 | 320 | 340 | 6 | 360 | 6 |
| D | 1 000 000 | 2800 | 3000 | 7 | 3100 | 3 |
| E | 10 000 000 | 24 000 | 25 200 | 5 | 26 400 | 5 |
| F | 20 000 000 | 40 000 | 42 000 | 5 | 44 000 | 5 |
| G | 50 000 000 | 60 000 | 63 000 | 5 | 66 000 | 5 |
| H | 100 000 000 | 80 000 | 84 000 | 5 | 88 000 | 5 |

Source: Do Not Call Register (Access Fees) Determinations.

5.36 The methodology used to calculate the subscription fees is documented in a cost recovery impact statement, which is approved by Finance and accessible to telemarketers. The statements describe the relationship between the fees and the costs incurred in delivering the activity.

Financial administration

5.37 Under the contract, the Register Operator was required to collect access fees on behalf of the ACMA. However in March 2007 the ACMA decided to

undertake the Register's financial administration. After the financial administration arrangements had been in place for over a year, the ACMA Finance section¹³² raised issues with the TAP account creation processes (refer paragraph 3.6), which provided telemarketers access to the washing service without any validation of the company details or before an invoice was raised for the services or payment was received. This left the process open to misuse by some telemarketers who entered false company details or failed to pay the annual subscription fee.

5.38 Subsequently, the ACMA has needed to write off some telemarketers' debts as unrecoverable as a result of closing 42 TAP accounts (representing 2 per cent of total administration accounts). As at 30 June 2009, 159 accounts were suspended due to the ACMA's unsuccessful attempts at recovering the subscription fees after 90 days.¹³³ Table 5.3 outlines the impact of the unrecoverable debts on the ACMA's revenue.

Table 5.3

Bad debts and invalid accounts impacts on revenue

| | Amount |
|--|------------------|
| Unrecoverable debts | \$197 646 |
| Doubtful debts (as at 31/5/09) | \$ 86 162 |
| Invoices cancelled due to invalid accounts | \$213 274 |
| Total | \$497 082 |

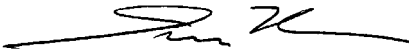
Source: The ACMA.

5.39 In response to the account validation issues, the ACMA revised the process in November 2008. The new process interrupts the automation after a telemarketer completes a registration form online, and introduces the manual processes of: verification of the company details by the Register Operator and application of account risk assessment against set criteria; additional verification of high risk account applications; and credit account approval by ACMA Finance.

¹³² The ACMA Finance section is responsible for creating telemarketer client accounts, issuing invoices and managing overdue debts.

¹³³ Should payment be received after suspension the account is re-instated. Continued non-payment of the subscription fee will result in referral of the debt to a debt collection agency without further contact with the account holder.

5.40 To minimise the level of unrecoverable debts as a result of invalid accounts and non-payment of subscription fees, the ACMA has investigated implementing a prepayment arrangement. After scoping the ICT and business requirements of the upfront payment arrangements, the ACMA advised that the quotation for the work was significantly higher than anticipated which would have resulted in a substantial increase in the access fees. The ACMA has advised that it is currently re-scoping and re-considering alternative means to implement prepayment arrangements that are more cost-effective.



Ian McPhee

Auditor-General

Canberra ACT

16 December 2009

Appendix

Appendix 1: The ACMA's Response



20 November 2009

Mr Matt Cahill
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Chairman



Dear Mr Cahill

Performance Audit: the Do Not Call Register

I refer to your letter of 11 November 2009, enclosing the Australian National Audit Office (ANAO)'s proposed audit report relating to the performance of the Do Not Call Register (the Register).

The Australian Communications and Media Authority (ACMA) has appreciated the opportunity to participate in the performance audit of the Register and welcomes the findings and recommendations presented by the ANAO.

The Register is a valuable consumer protection mechanism, which has been operating effectively since its commencement in May 2007. This performance audit provides the ACMA with insightful guidance that will further enhance the Register's value to the Australian public and increase the overall effectiveness of the scheme.

The ACMA accepts each of the three recommendations contained within the report, and has already commenced work on implementing these matters.

For inclusion in the body of the ANAO's report, the ACMA formally responds to each of the recommendations as follows:

Recommendation 1:

The ACMA agrees with this recommendation.

Recommendation 2:

The ACMA agrees with this recommendation.

Recommendation 3:

The ACMA agrees with this recommendation.

communicating | facilitating | regulating

Page 1 of 2

I would like to thank the ANAO and its staff for their assistance and the high level of professionalism displayed throughout this audit process.

Australian
Communications
and Media Authority
www.acma.gov.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Chapman', followed by a horizontal flourish line.

Chris Chapman
Chairman

Australian Communications and Media Authority

Index

A

Awareness, promotion and education, 9,
17–20, 22–24, 26, 30, 38–41, 43–48, 58,
73–74, 76, 78, 83, 92, 99, 112

C

Complaint, 16, 20, 24, 26, 33, 51, 74, 76–80,
82–84, 87, 89
Compliance, 16–17, 19–21, 23–4, 26, 29,
37–40, 47, 57, 61–62, 73–76, 80, 82–86,
88–91, 93, 95–96, 99, 111
Contract management, 17, 19, 24, 38, 40,
93–94, 100
Cost recovery, 15, 17, 18, 20, 24–25, 40, 92–94,
99–101

D

Do Not Call Register Act 2006, 7, 14–17, 21, 24,
29–31, 33, 37, 39, 48, 59, 74, 76–80, 84, 86–
91, 99
Do Not Call Register Scheme, 16, 19, 21–23, 33,
39, 43, 45, 61–62, 73–76, 83, 98

E

Enforcement, 14, 16–18, 20, 24, 26, 29, 31, 37,
57, 73–75, 83, 86–90
Exempt organisation, 31, 34, 77, 80

I

Information and Communication Technology,
7, 19, 23, 39, 59, 65, 66–68, 92, 95, 97, 103

R

Register Operator, 18–19, 23–24, 30, 37–39,
44, 46–47, 49–50, 56, 59, 63–67, 69–70, 77,
80–82, 92–97, 99–102
Registrants, 20–21, 24, 26, 31, 70, 75–77,
79–80, 83, 98
Registration, 13, 18–19, 21–23, 29, 32, 35–36,
38, 41–43, 45, 47–58, 60, 64, 66–70, 72, 80,
92, 95–96, 98–99, 102

T

Telemarketer, 8, 9, 13–16, 18–21, 23–25,
30–35, 39, 48, 51, 59–64, 66–67, 69, 74–75,
77, 79, 85–88, 91–93, 97, 99–102
Telemarketer Access Portal, 8, 31, 60, 61–65,
74, 98, 102
Telemarketing, 7, 9, 13–16, 20–21, 29–34, 41,
43–45, 48, 51, 54–57, 59–60, 62, 64, 70, 73,
74–81, 86, 91, 101

W

Washing, 9, 14, 19, 23, 25, 31, 34–35, 37–38,
59–66, 68–69, 92, 95–97, 99, 101–102

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