



CLIENT INFORMATION BULLETIN

MACGILLIVRAYS

S O L I C I T O R S



CHECK NOW BEFORE YOU COLD CALL PROSPECTIVE CLIENTS!

You have already dealt with the *Privacy Act 1988*, but now the *Do Not Call Register Act 2006* is poised to affect your lead generation.

The *Do Not Call Register Act 2006 (DNCRA)* has been with us for almost a year and to date it has had little impact on businesses capacity to telephone prospective clients and offer or promote services or products... until now. On 31 May 2007, the provisions of the DNCRA will commence. The provisions directly affect businesses' capacity to make telemarketing calls.

WHY WORRY?

The definition of what constitutes a **Telemarketing call** has been widely drafted so that it captures telephone calls offering, promoting or advertising your business services, products, land and investment opportunities. It effectively covers most of the reasons for cold calls to prospective clients.

Under the DNCRA, you will be prohibited from:

- making unsolicited telemarketing calls to an Australian number if it is on the Do Not Call Register; and
- entering into a contract, arrangement or understanding for another person to make telemarketing calls to Australian numbers on your behalf unless that contract contains a clause requiring that other person to comply with the DNCRA.

The second prohibition effectively prevents Australian businesses engaging overseas telemarketers to call Australian numbers.

The definition of **Australian number** also captures internet telephone systems. Interestingly, the prohibition does not apply to certain telemarketing calls from politicians, government, religious and educational institutions and charities.

Maximum penalties as a result of a prosecution for breach of the DNCRA vary dramatically depending upon whether the offence is the caller's first offence and numbers on the Do Not Call Register rung. The minimum fine is \$11,000 and the maximum is \$1,100,000.

Infringement notices may be issued by the Australian Communications and Media Authority's (ACMA). The ACMA may impose penalties under the infringement notice regime however, these are significantly lower than the maximum penalties a court may impose. Infringement notices give the recipient the opportunity to pay a set penalty and avoid having the matter dealt with by the court.

Infringement notices must be given within 12 months of the alleged breach of the DNCRA.

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CHECK NOW BEFORE YOU COLD CALL PROSPECTIVE CLIENTS!

CIRCUMSTANCES WHERE TELEMARKETING IS NOT A BREACH OF THE DNCRA?

A telemarketing call to a number on the Do Not Call Register is not a breach of the DNCRA where:

Exception	Limits on the exception	Onus of proof on caller
Consent of the relevant account-holder or account-holder's nominee to call has been given even though the number is on the Register	Consent: <ul style="list-style-type: none"> • can be from one of the account-holders (or account-holder's nominee) if there are two or more account-holders; and • may be express or implied. Consent expires 3 months after it is given.	Yes
A search of the register indicates the number was not on the Register (whether or not that number is in fact on the Register)	This exception expires 30 days after the search is received.	Yes
The telemarketing call was made by mistake		Yes
The person took reasonable precautions and exercised due diligence to avoid the breach		Yes
Designated telemarketing calls	Telemarketing calls described in Schedule 1 of the DNCR, that is, telemarketing calls from politicians, government, religious and educational institutions and charities.	No

WON'T THE PRIVACY ACT FORMS PROTECT ME FROM BREACHING THE DNCRA?

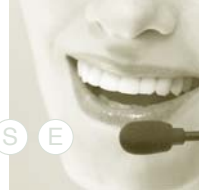
It **may** be dangerous to just rely on your existing telemarketing consents obtained for the purpose of the *Privacy Act 1988* as a means of complying with the DNCRA, as consents are only valid for a 3 month period from the time it is given. This is because the DNCRA does not focus on the person to whom the information relates, but instead focuses on who holds the account for the number being called (the account-holder).

More people can consent to you using the phone number under the *Privacy Act* than can consent to you calling the phone number for the purposes of DNCRA. For example, a couple with adult children living at home may be the account-holders but do not give their consent. Some or all of the children however, may give consent. When you telephone you may not in fact speak to the person who gave the consent which could result in a breach of the DNCRA. A Regulation has been introduced to provide some relief in this instance. The Regulation deems a person (a prospective client) to be the account-holder's nominee if the prospective client gives you a telephone number for the purpose of allowing you to contact them.

If you structure your lead generation forms so that they contain a positive request to contact the person giving you the telephone number to call, that person will be deemed to be a nominee of the account-holder and the consent exception is likely to apply.

Although implied consent is permitted by the Regulation it is then difficult to prove the purpose for which you received the phone number. Clear statements on the consent form will help. Remember, the consent is only valid for 3 months from when it is given to you and if a person later contacts you to ask not to be contacted, you must treat the consent as being revoked.

E X P E R T I S E



REGISTER SEARCHES PROVIDE SAFETY FOR A LIMITED TIME

You can search the Register by submitting a list of numbers to the entity maintaining the Register (ACMA or a contracted service provider). ACMA will then 'wash the list', that is, cross off or delete numbers on that list which are on the Register. You can then call the numbers remaining on the list for up to 30 days after you receive the washed list.

In the case of electronic delivery, you should also note the time your computer system receives the "washed list" as the 30 days commences at that time and not when you read or access the list.

THE COST OF SEARCHES

ACMA has just published the fee schedule on the ACMA website (www.acma.gov.au). The scheduled fees relate to the total volume of telephone numbers on the 'washed lists' during one year. A 'washed list' has a 30 day life span so a telemarketing company washing for example a list of 2 million numbers 12 times in one year, would 'wash' 24 million numbers. The annual subscription fee for this quantity would be \$60,000. Excess charges apply for any quantities in excess of the subscribed number. The charge for excess is \$0.004 for each number.

IS THE MISTAKE EXCEPTION A USEFUL TOOL?

The difficulty you will face in seeking to rely upon the mistake exception is that you may not become aware that a mistake has occurred until some time after the alleged breach.

The onus will be on you to prove that you phoned a number on the Do Not Call Register by mistake; you need to consider therefore introducing a mistake recording process to your telemarketing activities. If you do, you should also regularly review those records and see if you can take measures to prevent future mistakes.

WHAT IS A REASONABLE PRECAUTION AND EXERCISING DUE CARE TO AVOID THE BREACH?

Since the relevant sections of the DNCRA have not yet commenced, there are no cases or instances of non-compliance available to provide guidance.

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HOW CAN YOU MINIMISE DNCRA'S IMPACT ON YOUR LEAD GENERATION?

Make sure you:

- have your telemarketing lists "washed", that is, conduct searches of the Do Not Call Register; or
- get a person's consent for you to contact them on the telephone number they give you and the consent is for the strict purpose of promoting/discussing your services and products (etc).

Revise your telemarketing and lead generation systems to make sure you, at least:

- keep records of who you contact;
- have a system for recording mistakes; and
- if you are relying on consent as the method for complying with DNCRA, you have a system for recording withdrawal of that consent (requests not to call) and promptly updating your records.

In March this year, ACMA also introduced an industry standard for telemarketing and research calls, titled the "Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007". This Standard regulates, among other things, when you may make a telemarketing call, what information you should give and when you must terminate such a call.

If you engage in telemarketing activities, we recommend you download a copy of the Standard from ACMA's website, and that you introduce compliance processes tailored to address the DNCRA requirements.

For further advice on these matters contact: Richard Williams, Banking Partner, Melbourne, Nicholas Diacos, Banking Partner, Sydney or Gordon Perkins, Banking, Legal & Compliance Manager, Brisbane.

BY RICHARD WILLIAMS
Banking Partner



AND GORDON PERKINS
Banking, Legal & Compliance Manager



ABOUT US

LITIGATION... NEW TEAM MEMBER



The MacGillivrays Litigation Team welcomes the arrival of solicitor Hannah Riggs to its practice.

Hannah has a Masters of Law and was admitted to the Roll of Practitioners in December 2006 after completing two years of Articled Clerkship. Hannah's legal areas of interest are in general commercial litigation.

Previously, Hannah worked as a secondary teacher but is now enjoying her transition into law. In her spare time Hannah runs, restores furniture and, when she has the time... travels.

ROW! ROW! ROW!

MacGillivrays is once again sponsoring ten brave female employees to row in Brisbane's "2007 Crews in the Stream" Regatta on Sunday 27 May.



The crew making up MacGillivrays Women's 1st VIII have been training twice a week on the Brisbane River since late April courtesy of the Commercial Rowing Sheds at West End. Whilst all eight rowers haven't quite yet come together and rowed as a full crew, Coach Juratowitch (also our CEO and affectionately referred to as 'Coach J') thinks the crew isn't too far away - although it may not happen until race day!

The crew consisting of: Renee Conti (Cox), Jo Schmidt, Tamahra Dempsey, Katie Rowling, Sian Payne, Clare Kenny, Ashlee Davis, Meredith Clarke, Temmony Hahn and Rachel Connors (who fills in at the last minute when a crew member fails to hear the 4:30am alarm) are excited about the prospect of bringing the Regatta Fest Trophy back to MacGillivrays' Brisbane Boardroom.

To watch our Women's VIII fly down the river on Sunday 27 May 2007 from 8am keep an eye out for the MacGillivrays tent and BBQ which will be located on the West End side of Milton Reach.

MACGILLIVRAYS TRI-SERIES COMPULSORY CPD SUBJECTS - NEXT SESSION JULY 16TH, 2007 - TRUST ACCOUNTING

The second of the three seminars, Trust Accounting will be presented by Bill Hourigan, Manager Audit Branch, Professional Standards of the Queensland Law Society.

This seminar is an excellent opportunity for in-house lawyers to attend, along with MacGillivrays legal staff, and gain the mandatory compulsory professional development points required by the QLS. (Solicitors holding a practising certificate since January 2005 are required by the QLS to obtain 2 CPD points in each of the compulsory topics of Risk Management, Trust Accounting and Ethics) by 31 March 2008).

The lecture will go from 4pm to 6pm and will be followed by light refreshments.

For further information or to register your interest in attending the session please contact us on 3228 5205 or email: events@macgillivrays.com.au

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NEW INDEPENDENT CONTRACTORS LEGISLATION

On 1 March 2007 the following new Federal legislation came into place:

- the **Independent Contractors Act 2006**;
- the **Independent Contractors Regulations 2007** and;
- the **Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth)**

These new Acts bring greater certainty to contractual arrangements (especially within the building and construction industries which rely heavily on subcontracting) by providing a statutory definition of 'independent contractor'.

This definition is in essence written proof of what was in the past the common law test of 'independent contractor'. This will make it easier for parties to tell the difference between contracting arrangements and employment arrangements.

The definition provides that an independent contractor is a person engaged to work under a contract for services. An independent contractor does not have the legal status of an employee; they are responsible for their own taxation, superannuation and insurance. Independent contractors have significant control over the work and how it is done.

The new Act does not affect the State legislation that applies to owner-drivers in the transport sector, however the Federal Government has stated that the Act will be reviewed so that there will eventually be consistency across Australia.

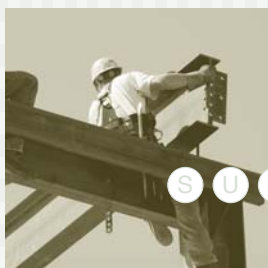
The Acts also set up a new federal unfair contracts jurisdiction which means that differences of opinion about independent contracting agreements are now able to be brought before the Federal Court or Federal Magistrates Court (as opposed to State Courts). Under the new Act, the Federal Court and the Federal Magistrates Court have been given the power to set aside or vary contracts between a principal and independent contractor if the Court holds the contract to be heavy-handed or unfair. Having Federal court jurisdiction will ensure that judgments and outcomes are consistent and should help to reduce the pressures on the State courts.

Note: the new Act does not reduce the common law remedies or remedies available under the *Trade Practices Act 1974*.

The *Workplace Relations Act 1996* has also been amended to ensure stronger protection for workers from employers who might try to change working conditions. Under the amended Act, independent contracts cannot be used to avoid employment obligations and it will be offence for an employer to:

- misrepresent the employment relationship as an independent contracting arrangement;
- dismiss, or threaten to dismiss an employee for the main reason of signing them on as an independent contractor to perform basically the same work;
- make a deliberate false statement with the aim of getting a person to enter into an independent contractual arrangement.

Breaches of law carry substantial fines; up to \$33,000 for a corporation and \$6,600 for an individual.



If you have questions about Work Choices or other workplace matters, please contact our Workplace Relations Partner, Gary Woodman.

S U C C E S S F U L

WHAT'S NEW?

MacGillivrays has been successful in its tender to be appointed to the Energex panel.

Energex is a Queensland Government Owned Corporation (GOC) and is responsible for the State's electrical power. In a time where climate change is increasing the pressure upon our energy sources, energy companies are forced to focus upon experienced and cost efficient law firms to provide them with accurate advice and representation. MacGillivrays looks forward to providing Energex with its range of services.

THE LIGHTER SIDE

A big city lawyer went duck hunting in rural British Columbia, Canada. He shot and dropped a bird, but it fell into a farmer's field on the other side of a fence. As the lawyer was climbing over the fence, an elderly farmer drove up on his tractor and asked what he was doing. The litigator responded, "I shot a duck and it fell in this field, and I'm just going over to retrieve it." The old farmer replied, "This is my property, and you are not coming over." The indignant lawyer said, "Listen, I'm one of the best trial litigators in Canada and, if you don't let me get that duck, I'll sue you and take everything you own." The old farmer smiled and said, "Apparently, you don't know how we settle disputes in Peace River BC. We settle small disagreements like this with the *Peace River Three Kick Rule*."

The lawyer asked, "What's the *Peace River Three Kick Rule*?" The Farmer replied, "Well, because the dispute occurs on my land, first I kick you three times and then you kick me three times and so on back and forth until someone gives up."

The lawyer quickly thought about this rule and decided that he could easily take the old farmer. So he agreed to abide by the local custom. The old farmer slowly climbed down from the tractor and walked up to the attorney.

His first kick planted the toe of his heavy steel toed work boot into the lawyer's groin and dropped him to his knees. His second kick to the midriff sent the lawyer's last meal gushing from his mouth. The lawyer was on all fours when the farmer's third kick to his rear-end sent him face-first into a fresh cow pie. The lawyer summoned every bit of his will and managed to get to his feet. Wiping his face with the arm of his jacket, he said, "Okay, you old coot. Now it's my turn."

The old farmer smiled and said, "Naw, I give up. You can have the duck."

Here at MacGillivrays, we recommend the Small Claims Tribunal to settle small disputes!

PLEASE NOTE: This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or emailing list, contact Rachel Connors on (07) 3221 4550 or rachelc@macgillivrays.com.au