

Overseas Regulatory Regime on Direct Marketing

1. The Office of the Privacy Commissioner for Personal Data (“PCPD”) has researched into the regulatory regime of direct marketing in selected overseas jurisdictions (the United Kingdom, Australia, New Zealand, France, Canada, Germany and the United States) and the details can be found in the attached Schedule.

2. The following is a summary of the overseas experiences and practices which should serve as useful reference for considering PCPD’s proposals.

Proposal (a) : Requiring data user to obtain explicit and voluntary consent of data subject to use personal data for direct marketing purpose (“Opt-in” regime)

In the United Kingdom, Canada, the United States and France, consent of individual or subscriber is required if automated marketing calls containing pre-recorded messages are to be made to him.

In Germany, telemarketing to consumers is subject to opt-in consent. The German Parliament also approved in 2009 penalties up to €50,000 for failure to obtain such consent prior to contacting consumers.

In Australia, the Australian Law Reform Commission in the *Australian Law Reform Commission Report 108* (“ALRC Report”) released on 11 August 2008 concerning the law reform on the *Privacy Act 1988* recommended that sensitive information, including health information, should only be used or disclosed for direct marketing purposes with the individual’s consent in all circumstances. The Australian Government has already accepted the recommendation.

Proposal (b) : Setting up a territory-wide “Do-not-call’ register

In the United Kingdom, Australia, Canada, New Zealand, France and the United States, a central do-not-call register has already been set up prohibiting unsolicited telemarketing calls (including person-to-person marketing calls) to be made to a number duly registered with the register.

Proposal (c) : Conferring on individuals a right to be informed of the source of personal data by direct marketers

3. The Australian Government has accepted another recommendation made in the ALRC Report that individuals should have the right to be so informed by the organization of the source of their personal data if they have not had a customer relationship with the organization. The implication is that individuals may then trace the source of personal data and take appropriate measures. It will enhance transparency in how individuals' personal data are handled and promote the handling of personal data in accord with the requirements under the data protection laws.

*Office of the Privacy Commissioner for Personal Data
December 2010*

Schedule

<u>Jurisdiction</u>	<u>Relevant Regulatory Regime on Direct Marketing Activities</u>
United Kingdom	<p>1. 《Data Protection Act 1998》 : - An individual is entitled at any time <i>by notice in writing</i> to a data controller <i>to require</i> the data controller at the end of such period as is reasonable in the circumstances <i>to cease, or not to begin, processing for</i> the purposes of <i>direct marketing</i> personal data in respect of which he is the data subject. (Section 11(1))</p> <p>If the court is satisfied, on the application of any person who has given a notice under subsection (1), that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit. (Section 11(2))</p> <p>“Direct Marketing” means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals (Section 11(4))</p> <p>2. 《The Telecommunications (Data Protection and Privacy) Regulations 1999》 : -</p> <p>(a). Automated calling systems: A person shall not use publicly available telecommunications services, and a subscriber to such services shall not permit his line to be used, by means of an <i>automated calling system</i> for the communication of material for direct marketing purposes, except where the called line is that of a subscriber who has <i>previously notified the caller</i> that for the time being he <i>consents</i> to such communications (regulation 22(2)).</p> <p>(b). Fax (unsolicited communications): A person <i>shall not use</i> publicly available telecommunications services, and a subscriber to such services shall not permit his line to be used, for the unsolicited communication of material, for direct marketing purposes, by means of facsimile transmission, <i>where</i> (a) the called line is that of a subscriber who has <i>previously notified the caller</i> that such unsolicited communications as are so mentioned <i>should not be sent on that line</i>, or (b) the number allocated to a subscriber in respect of the called line is one <i>listed in the record</i> kept by the Director General of Telecommunications. (regulation 23(2))</p> <p>(c). Fax: A person <i>shall not use</i> publicly available telecommunications services, and a subscriber to such services shall not permit his line to be used, for the communication of material, for direct marketing purposes, by means of facsimile transmission, where the called line is that of a <i>subscriber</i> who is an individual, except where the called line is that of a subscriber who has previously notified the caller that he consents for the time being to such communications as are there mentioned being sent by the caller in question on that line. (regulation 24(2))</p>

	<p>(d). Unsolicited calls: A person <i>shall not use</i> publicly available telecommunications services, and a subscriber to such services shall not permit his line to be used, for the purposes of making unsolicited calls, for direct marketing purposes, otherwise than by means of facsimile transmission <i>where</i> (a) the called line is that of a subscriber who has <i>previously notified</i> the caller that such unsolicited calls are there mentioned <i>should not</i> for the time being <i>be made</i> on that line, or (b) the number allocated to a subscriber in respect of the called line is one <i>listed in the record</i> kept by the Director General of Telecommunications. (regulation 25(2))</p> <p>3. 《The Privacy and Electronic Communications (EC Directive) Regulations 2003》 : -</p> <p>(a). Automatic calling systems: cannot call except that subscriber has previously <i>consented</i> to such communication (regulation 19).</p> <p>(b). Facsimile machines: -</p> <ol style="list-style-type: none"> (1) individual subscriber: cannot send fax except that subscriber has previously consented; (2) corporate subscriber: cannot send if subscriber has previously objected to such communication; (3) Do-Not-Call list: Office of Communications shall maintain and keep up-to-date a register of the numbers allocated to subscribers, in respect of particular lines, who have notified them that they do not for the time being wish to receive unsolicited communications for direct marketing purposes by means of facsimile machine on the lines in question. (regulations 20 & 25) <p>(c). Unsolicited calls: cannot call if subscriber has previously objected to such communication and if the number is on a Do-Not-Call list. (regulation 21 & 26)</p> <p>(d). Email: cannot send email unless the recipient has previously consented to such communication except in circumstances where: -</p> <ol style="list-style-type: none"> (1) sender obtained contact details in the course of sale or negotiations for the sale of a product or service of that sender; (2) direct marketing is in respect of sender’s similar products or services only; and (3) recipient has been given a simple means of refusing the use of his contact details for direct marketing. (regulation 22) <p>(e). Mailing: there is also a <i>do-not-contact register</i> applying to <u>mailing-marketing</u>.</p> <p>Australia</p> <ol style="list-style-type: none"> 1. The existing 《Australian Privacy Act》 do not contain provision to deal with specifically the use of personal data in direct marketing. 2. The 《Australian Law Reform Commission Report 108》 (“ALRC Privacy Report”) released on 11th August 2008 recommended a <i>distinction between existing and perspective customers</i> and adopting an “opt-out” approach, which was generally accepted by the Government in 《Australian Government First
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Stage Response to ALRC Privacy Report dated 14 October 2009 (*except* for *sensitive information* which should only be used or disclosed for direct marketing with the individual's consent).

(a). **Existing customer:** personal information may be used for direct marketing only where it is in the reasonable expectation of the individual and a simple and functional means for opting out has been provided.

(Recommendation 26-3)

(Australian Government's response: Agreed. Sensitive data (e.g. health data) can only be used if consented in all circumstances including existing customer.)

(b). **Non-existing customer:-**

(1) personal information may be used for direct marketing if (a) either the individual has *consented*, or (if the information is not sensitive) it is *impracticable to seek such consent*; (b) in each direct marketing communication, the organization draws attention or prominently displays a *notice* advising the individual that he may express a wish *not to receive* any such communication; and (c) the organization provides a simple and functional means for *opting out*.

(Recommendation 26-4)

(2) if requested, the organization must, where reasonable and practicable, *advise the individual of the source* from which it acquired the relevant personal information. **(Recommendation 26-6)**

(Australian Government's response: Agreed that non-existing customers should be told that they can "opt out" and such right should be simple to exercise.)

(Australian Government has accepted the recommendation that "*individuals should have the right to be so informed*" by the organization of the source of the personal data if they have not had a customer relationship with the organization.)

3. <Do Not Call Register Act 2006> :-

"A person must not make, or cause to be made, a telemarketing call to an Australian number if (a) the number is registered on the Do Not Call Register; and (b) the call is not a designated telemarketing call." **(Section 11(1))**

"A person must not (a) aid, abet, counsel or procure a contravention of subsection (1); or (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or (d) conspire with others to effect a contravention of subsection (1)." **(Section 11(7))**

"If the Federal Court or the Federal Magistrates Court is satisfied that a person has contravened a civil penalty provision (i.e. sections 11(1) and 11(7)), the court may, on the application of Australian Communications and Media Authority, order the person to pay to the Commonwealth a pecuniary penalty" (i.e. a civil penalty order). **(Section 24(1))**

"The maximum penalty payable under subsection 24(1) by a person in respect of a contravention of a civil penalty provision depends on (a) whether the person has a prior record in relation to the civil penalty provision; and (b) whether the

<p>Canada</p>	<p>person is a body corporate; and (c) whether the civil penalty provision is subsection 11(1) or (7).” (Section 25(1))</p> <p>1. 《Personal Information Protection and Electronic Documents Act》 does not have any provisions particularly dealing with direct marketing. Under Principle 3 in Schedule 1 to the Act, the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate (e.g. for legal, medical or security reasons, etc).</p> <p>2. 《Telecommunications Act 1993》 : - “The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression” (Section 41)</p> <p>“The Commission may, for the purposes of section 41, (a) administer databases or information, administrative or operational systems; and (b) determine any matter, and make any order, with respect to the databases or the information, administrative or operational systems” (i.e. create a legislative framework for a National Do Not Call List). (Section 41.2)</p> <p>“A person who has sustained loss or damage as a result of any act or omission that is contrary to this Act or any special Act or a decision or regulation made under either of them may, in a court of competent jurisdiction, sue for and recover an amount equal to the loss or damage from any person who engaged in, directed, authorized, consented to or participated in the act or omission.” (Section 72(1))</p> <p>“Every contravention of a prohibition or requirement of the Commission under section 41 constitutes a violation and the person who commits the violation is liable (a) in the case of an individual, to an administrative monetary penalty of up to \$1,500; or (b) in the case of a corporation, to an administrative monetary penalty of up to \$15,000.” (Section 72.01)</p> <p>3. 《Canadian Radio-television and Telecommunications Commission Unsolicited Telecommunications Rules》 : -</p> <p>(a). National Do Not Call List Rules:A telemarketer shall not initiate, and a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does not initiate, a telemarketing telecommunication to a consumer's telecommunications number that is on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer or the client of that telemarketer. (Part II, para. 4)</p> <p>(b). Telemarketing Rules: A telemarketer shall not initiate a telemarketing telecommunication on its own behalf to a consumer who is or should be on its do not call list. (Part III, para. 14)</p> <p>(c). Random dialing for the purpose of initiating a telemarketing telecommunication, including to a non-published or a non-listed</p>
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	<p>telecommunications number, is permitted except to telecommunications numbers that (a) are registered on the National DNCL; (b) are emergency lines; (c) are associated with healthcare facilities; (d) in the case where a telemarketer initiates a telemarketing telecommunication on its own behalf, are on the telemarketer's do not call list; and (e) in the case where the telemarketer initiates a telemarketing telecommunication on behalf of a client of the telemarketer, are on the client's list. (Part III, para. 27)</p> <p>(d). Automatic Dialing-Announcing Device (ADAD) Rules: A telemarketer shall not initiate, and a client of a telemarketer shall make all reasonable efforts to ensure that the telemarketer does not initiate, a telemarketing telecommunication via an ADAD unless express consent has been provided by the consumer to receive a telemarketing telecommunication via an ADAD from that telemarketer or the client of that telemarketer. For greater certainty and without limiting the generality of the foregoing, this prohibition includes telemarketing telecommunications via an ADAD that are initiated by or on behalf of a charity, for the purpose of requesting a consumer to hold until a telemarketer is available, for activities such as radio station promotions, or for referring consumers to 900 or 976 service numbers. (Part IV, para. 2)</p>
<p>New Zealand</p>	<ol style="list-style-type: none"> 1. 《Privacy Act 1993》 do not contain express provision to deal with direct marketing. Under Principle 10 of the Privacy Act 1993, personal information that was obtained in connection with one purpose shall not be used for any other purpose unless the agency believes on reasonable grounds that (1) the use for that purpose is authorized by the individual concerned; or (2) the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained. Under Principle 11, personal information shall not be disclosed except under similar conditions. The Privacy Commissioner of New Zealand has recently recommended an “opt-out” approach in her submission (dated 14 June 2010) to the Law Commissioner’s Review of the Privacy Act 1993: Stage 4 (Page 89, Privacy Commissioner’s Submission). 2. The New Zealand Marketing Association has set up a free Do Not Call Service in order to decrease the number of unwanted, unsolicited phone calls consumers receive from organizations.
<p>U.S.A.</p>	<ol style="list-style-type: none"> 1. There are federal laws (mainly 《Telemarketing and Consumer Fraud and Abuse Prevention Act – Telemarketing Sales Rules》 (“TSR”) and 《Telephone Consumer Protection Act of 1991》 (“TCPA”) and state laws (e.g. California Civil Code) and sometimes there may be conflicts between them. In general, the more restrictive laws may take precedent over the others. However, those conflicts will have to be resolved on a case-by-case basis. <ol style="list-style-type: none"> (a). Telemarketing Calls: - <ol style="list-style-type: none"> (1) National Do Not Call Registry (under TSR) and Company-Specific Do Not Call List (under TCPA Sec 64.1200 (d)) (2) most solicitation calls are covered by the National Do Not Call Registry except the calls made by charities, survey researchers, political campaigns and companies with which the subscriber have established business relationship, etc

	<p>(3) if the subscriber has an ongoing account or an existing business relationship with a company, the subscriber may be telemarketed by its affiliates. The subscriber can only be contacted by an affiliate of a company if the name of the affiliate is similar and if it provides similar service. (TCPA Sec 64.1200 (f)(4)(ii))</p> <p>(4) written permission to receive prerecorded calls is required (from 1 September 2009)</p> <p>(5) both TSR and TCPA allow aggrieved parties to sue telemarketers who violate the laws</p> <p>(b). Mail: -</p> <p>(1) Direct Marketing Association's Mail Preference Service is designed to assist consumers who wish to decrease the amount of unsolicited advertising mail they receive at home from companies that market nationwide.</p> <p>(2) credit card companies shall provide notice to cardholders prior to disclosure of personal information to marketers (California Civil Code Section 1748.12)</p> <p>(3) supermarkets are prohibited from selling or sharing club card holders' personally identifiable data to third parties (California Civil Code Section 1749.65)</p> <p>(c). Fax: -</p> <p>(1) unlawful to send unsolicited advertisements to any fax machine without the recipient's prior express invitation or permission, unless the sender has an established business relationship with the recipient and the fax number was provided voluntarily by the recipient (TCPA Sec 64.1200 (a)(3))</p> <p>(d). Email: -</p> <p>(1) registration with Direct Marketing Association's Email Preference Service.</p> <p>France</p> <p>1. 《Act N 78-17 of 6 January 1978 on data Processing, Data files and Individual Liberties》 :- The Act requires that processing of personal data must have received the consent of the data subjects or met with one of the conditions. (Article 7)</p> <p>2. 《Consumer Code》 :-</p> <p>(a). states that direct canvassing, via an automatic calling machine, a fax machine or an electronic mail system using the contact details of a natural person who has not consented is prohibited. (Article L 34-5)</p> <p>(b). the sending of any message intended to directly or indirectly promote goods, services or the image of a person selling goods or providing service constitutes direct canvassing.</p> <p>3. 《Postal Code》 :- Requires prior consent of data subjects for the use of a natural person's personal data for direct marketing by means of an automated calling system, fax or</p>
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<p>Germany</p>	<p>electronic messaging system. (Article 33(4)(1))</p> <p>4. 《Post and Electronic Communications Code》 :-</p> <p>The use of personal data contained in the list of subscribers who have expressed their opposition for direct marketing is prohibited and a fine shall be imposed. (Rule R10-1)</p> <p>1. Under the Act against Unfair Trade Practices (the Unlauterer Wettbewerbsgesetz, or UWG), telemarketing to consumers is subject to opt-in consent. The German Parliament approved in 2009 :-</p> <ul style="list-style-type: none"> (a) penalties amounting to €50,000 for failure to obtain opt-in consent prior to contacting consumers; (b) amending the UWG to the effect that such consent contain “a declaration of will”, and may not be determined merely based on the individual’s behaviour. The wording of the bill also clearly states that each and every call by telemarketers, even the first one, would be covered by these restrictions. (article by Karin Petzer, <i>“New Rules, Pending Laws on Credit Scoring, Telemarketing, Location Devices”</i> in BNA Privacy & Security Law Report June 2009).
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