



Dirty Leads

Consumer protection in online lead generation



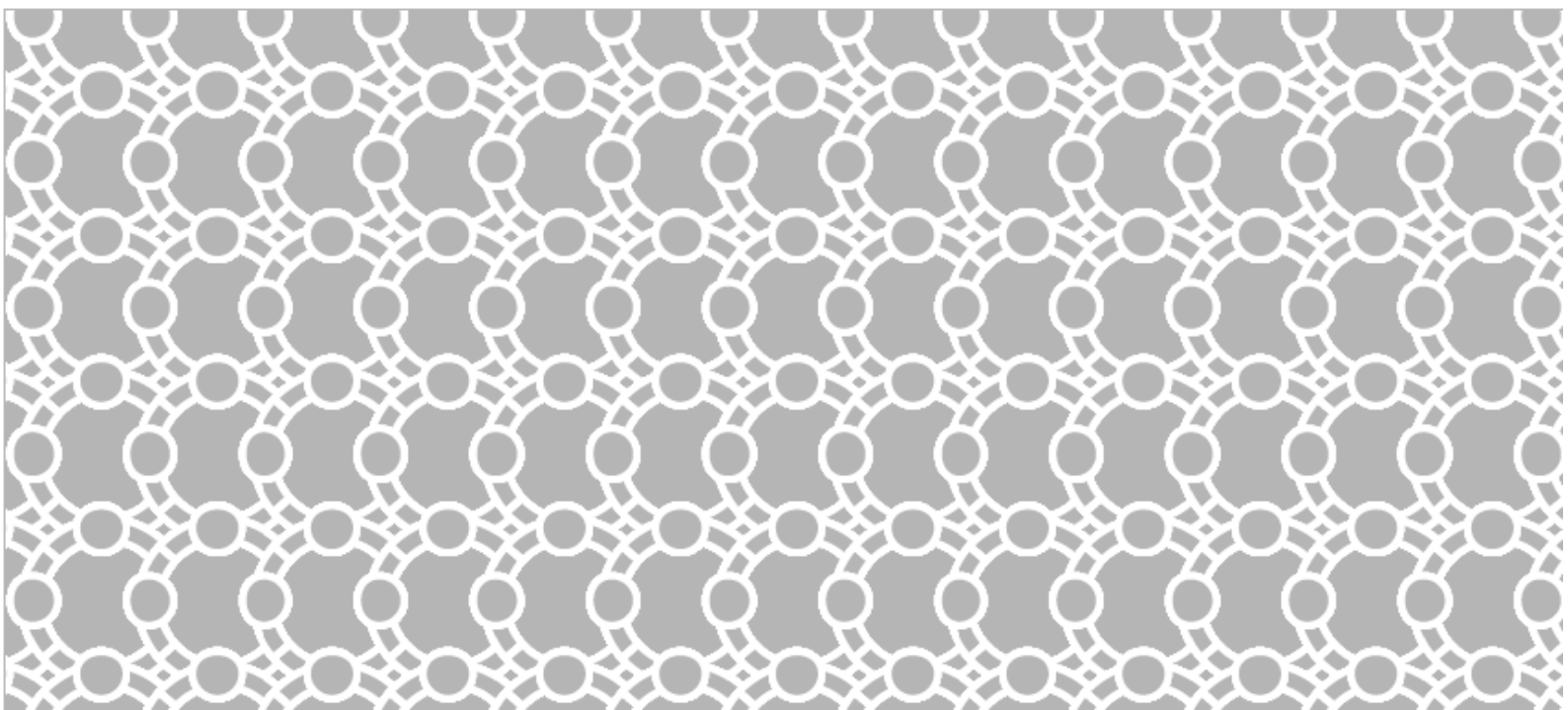
March 2018



Dirty leads: consumer protection in online lead generation

Report prepared by Elissa Freeman
commissioned by Consumer Action Law Centre

March 2018



CONTENTS

1. Executive Summary	3
2. Introduction.....	4
2.1 About lead generation.....	4
2.2 Online lead generation.....	6
2.3 The consumer protection framework.....	6
3. Current issues in lead generation	9
3.1 United States of America	9
Financial markets.....	9
Education services.....	10
Other sectors.....	11
3.2 United Kingdom.....	11
Nuisance and consent concerns.....	11
3.3 Australia.....	13
Vocational education	13
Payday lending lead trading.....	15
Cold-calling complaints.....	16
4. Benefits and risks of online lead generation.....	17
4.1 For businesses	17
4.2 For consumers	18
5. Improving consumer outcomes in online lead generation.....	20
5.1 Identify vulnerable consumers.....	20
5.2 Give consumers more control	23
5.3 Review payday lead generation practices.....	24
5.4 Strengthen unsolicited marketing protections	26
6. Conclusion	29
Appendix A: OAIC Flowchart	30

1. EXECUTIVE SUMMARY

Lead generation is the process of identifying people who are potential sales targets or “leads”. This marketing strategy is not new but has re-engineered itself in the digital landscape.

Online lead generation can be associated with evasive techniques designed to entice people to share their personal information, employing deliberately vague consent and using digital trading platforms enabling leads to be sold between lead sellers and buyers. These aspects of online lead generation have significantly increased the risks for businesses and consumers.

With valuable personal information being extracted and traded, it is not surprising that lead generation (particularly in the US financial services sector) has been associated with scams and other fraudulent activity costing US citizens millions of dollars in losses.

Lead generation in Australia and overseas has also been associated with aggressive marketing targeting vulnerable people with products or services that are ill-suited to their needs. Scandals in the Australian vocational education sector and US for-profit colleges have exposed how lead generation can be used to exploit and manipulate vulnerable people.

Poor standards of marketing consent is a recurring theme in lead generation practices documented throughout this report. In the UK, the Information Commissioner’s Office has linked high levels of unsolicited marketing complaints to poor consent and lead generation. The sorts of consent practices that give rise to concern include pre-checked consent boxes; marketing consent and terms and conditions bundled into a single consent (or bundled with other mandatory actions); marketing consent obtained solely via terms and conditions consent; and, unreasonably broad consent to any marketing over an unlimited period of time.

In considering ways to update our regulatory and policy settings to reflect evolving market practices, improving consent is an obvious first step. Inconsistencies in consent requirements between the *Spam Act 2003* (Cth), *Do Not Call Register Act 2006* (Cth) and the direct marketing provisions of the Australian Privacy Principles (Schedule 1 of the *Privacy Act 1988* (Cth)) make it difficult for people to understand and act on their rights. A new approach should enshrine specific, voluntary and time limited consent.

Relatively little is known about the lead generation market in Australia. Publishing more information about unsolicited marketing complaints in Australia (currently the responsibility of the Australian Communications & Marketing Authority) would be a useful way to understand market trends and to identify potentially vulnerable consumer communities.

Even without this data, lead generation in the payday lending sector should be investigated as a priority. There is already evidence to suggest that lead generation activity in the Australian payday market is substantial. It is important that consumer protections are in place to protect vulnerable consumers in this market.

Strengthening consumer protection in relation to unsolicited selling is also needed. Enhancements to the Australian Consumer Law, the Do Not Call Register legislation and Spam Act will fill gaps in the regulatory framework.



2. INTRODUCTION

Most people would be unaware of exactly how Australian businesses use lead generation services and yet they are likely to have experienced its presence and impact in some way. They might have filled out an online form to be put in touch with multiple solar installers, or ticked a box when they applied for a job agreeing to terms and conditions that included third party marketing or wondered why they received an email about an insurance product. Maybe that experience worked well for them, enabling them to access goods and services that met their needs, or perhaps they felt confused, pressured or misled by the marketing they received.

International experiences suggest that Australian consumers are going to have a lot more of these and similar experiences as lead generation becomes more pervasive.

The lead generation industry in Australia is difficult to quantify. There are no reliable indicators of the size of the industry, its growth rate or the markets it targets. We don't know how many leads are sourced each year or how many consumer complaints can be traced back to concerns about lead generation.

Regulatory agencies have, however, seen its impacts. The Australian Competition and Consumer Commission (**ACCC**) and the Australian Communications and Media Authority (**ACMA**) have identified compliance failures in lead generation activities in the vocational education and solar industries respectively. Some of these failures have affected highly marginalised and vulnerable people.

At the beginning of 2017 the chairman of the ACCC flagged lead generation as an area of interest in the ACCC's annual enforcement priorities.¹ The announcement signals a shift in the way Australian regulators and policy makers are engaging with lead generation and its impact on markets and consumers.

2.1 About lead generation

Lead generation is the process of identifying individual consumers who are potentially interested in purchasing a product or service. The goal of lead generation is to connect companies with those people so they can convert these "leads" into sales. Leads can be highly valued by businesses looking for ready and willing customers and in Australia leads can be obtained for a wide range of products and services. This report has a particular focus on third party sourcing of sales leads in the business-to-consumer (B2C) market.

Lead generators use a variety of techniques to entice and induce a person to share their name, contact information and sometimes much more personal information at a point of interaction. Lead generation will identify leads of varying quantity and quality depending on the techniques used in the campaign. Typically, the lead is more highly valued the more accurate and timely the personal information that is available. This can create incentives to maximise the collection of personal information or to combine data sets to enrich the value of the lead. Depending on the market, even older sales leads (known as aged leads) can be sold at discounted prices.

¹ ACCC, "CCA compliance in interesting times", Speech by ACCC Chairman Rod Sims to CEDA, 24 February 2017, available at: <https://www.accc.gov.au/speech/cca-compliance-in-interesting-times>.

This acquisition of personal information directly from the individual distinguishes lead generation from data (or information) brokering. Data brokers collect information from a much wider variety of sources including public databases, social media and search engine histories and use this information to build detailed dossiers for potentially wider use than sales leads.

Lead generation can be undertaken in-house or outsourced to a third party. It is common for an advertiser to pay third parties on a 'per lead' generated basis, which can add to pressures on third party lead generators to take risks when they source leads.

Businesses may also have private arrangements to share unwanted leads between themselves. In some industries intermediaries operate to allow leads to be bought and sold between parties who may not necessarily know one another.

A 2013 study found that UK advertisers spent £130 million in online lead generation (representing 13% of a total £1 billion spent in online performance marketing) which resulted in 60 million lead enquiries.² The US market is bigger still, with a 2010 study estimating that \$US1.3 billion was spent on lead generation, accounting for 5% of the total \$US26 billion advertising industry.³

There is no definitive data available about the size of the Australian lead generation industry. A recent survey conducted jointly by the ACMA and the Australian Data-driven Marketing Association (ADMA) found that, on average, 23% of businesses source customer contact details from external sources, with third party list providers being the most common source of customer contact details.⁴

Externally-sourced data

Table 15: Acquisition of externally-sourced customer contact details

Source	%	n
Acquired from an external party (purchased from a list broker)	52	50
Acquired from public data (e.g. social media, telephone book)	40	39
Acquired from a partnership with external party (e.g. a competition run on behalf of multiple parties)	37	36
Acquired from a survey	29	28
Acquired from a partnership with external party (a swap of lists)	15	15

Question: Q16 'For externally-sourced data, where you sourced customer contact details? (Tick all that apply)' (Multiple response).

Source: ADMA industry survey 2016 (n=97).

² PwC, *The value of online performance marketing 2014*, report for Internet Advertising Bureau UK, accessed at: <https://iabuk.net/sites/default/files/research-docs/OPM%20booklet%202014%E2%80%8B> on 6 July 2017.

³ PwC, *IAB Internet Advertising Revenue Report An Industry Survey*, report for Internet Advertising Bureau, p 13, available at: https://www.iab.com/wp-content/uploads/2015/05/IAB_Full_year_2010_0413_Final.pdf.

⁴ ACMA, *Data-driven marketing practices: Australian industry participants survey results*, December 2016, available at: <http://apo.org.au/system/files/72026/apo-nid72026-40936.pdf>.



2.2 Online lead generation

Lead generation has been around for a long time but its techniques have changed as it moves online to use internet traffic to source leads.

The online lead lifecycle typically starts with a consumer-facing online publication that encourages consumers to submit information about themselves. At its simplest online lead generation could be a click-through advertisement, promotion or offer published on a website with a form asking you to submit your contact details. Some common online lead generation strategies are:

- **Host and post:** an advertiser collects internet leads by allowing affiliates to host the advertisers web form.
- **Lifestyle survey:** used to collect specific information from a sample of individuals. Profiles can then be created, providing marketing opportunities. Sponsored questions may be included to deliver marketing leads for the sponsoring company.
- **Co-registration:** consumers may opt-in for multiple offers while registering for one primary offer. For example, while signing up for a newsletter, a consumer might see a checkbox with a sign up for a related newsletter from another company.
- **Lead aggregators:** websites that collect and distribute leads for a particular product or service to buyers based on specific criteria (e.g. consumer will submit information on a form requesting to be matched with up to four mortgage brokers for quotes.)

In other instances, it may not be obvious that a website is generating a lead. For example, an entry to an online competition or online tools, such as mortgage calculators can be used to generate sales leads. Raffle sites that offer weekly prizes or cash giveaways are another popular way of sourcing leads. Many lead generation websites are not explicit about their commercial purpose but operate by generating revenue through selling leads to third parties.

Some publishers will sell leads directly to the end-buyer merchants. In other instances, publishers sell leads to intermediaries like lead aggregators that are not visible to consumers. The publisher who sourced the lead may have limited knowledge of or control over what business purchases the lead from the aggregator. Lead aggregators may use online trading platforms that enable real-time online bidding to sell a lead, possibly multiple times. This is known as the “Pingtree model” and is a feature of the payday lead generation market.

2.3 The consumer protection framework

Lead generation activities are subject to a range of consumer protections laws and regulations that include:

1. General and specific provisions of the Australian Consumer Law (**ACL**),
2. Industry-specific provisions relating to Spam, the Do Not Call Register and Telemarketing standards,
3. Australian Privacy Principles (**APPs**), including general and specific direct selling provisions,
4. Voluntary industry self-regulatory schemes including the ADMA Code of Practice and Data Governance Australia Code of Practice, and
5. In the case of consumer credit lead generation there are also licensing requirements.

When a lead generation campaign is published online (whether it is a survey, game, job offer, website or advertisement) the general provisions of the ACL are critically important to prevent misleading or deceptive claims.⁵

The purpose of a lead generation campaign is to collect personal information with an intent to undertake some form of direct marketing, which means the lead generator will need to have a privacy policy that is compliant with the APPs explaining how personal information will be used.

The APPs require businesses that buy or sell personal information to be compliant with APP 7 (relating to direct marketing) and so—unless the Spam Act or Do Not Call Register provisions apply—the lead generator will be required to obtain consent for the direct marketing to occur, offer opt-out arrangements, and be able to explain the source of the personal information. Appendix A reproduces the Office of the Australian Information Commissioner (**OAIC**) guidance for businesses about how direct marketing rules apply in different circumstances.

If the intention is to nurture the lead via email, SMS, MMS or on instant message, the Spam Act requires the business to meet its consent requirements. In the case of online lead generation activities, this would typically require a person to actively and deliberately give consent (e.g. to check a box themselves or type their email address into a consent field).⁶ The subsequent electronic message would also be required to include an appropriate opt out message.⁷

If the intention is telemarketing, there are additional protections for people who have listed their number on the Do Not Call Register (DNCR). In this case, the lead generation company will need to obtain express consent prior to telemarketing the person.⁸ However, the express consent requirements under the Do Not Call Register are slightly different than the Spam Act and consent can be gained, for example, by ticking a box online to accept terms and conditions that allow for the telephone contact for a specified or ongoing period of time.

Once consent is obtained and marketing takes place, if a sale does occur, the consumer should be protected under the ACL's unsolicited consumer agreements (UCA) protections.⁹ UCAs are currently limited to: circumstances where lead generation ends with a sale via telephone or in person; at a place other than the supplier's premises; and where the consumer did not "invite the dealer" to approach them.

Voluntary industry codes of conduct provide an avenue for achieving best practice in legal compliance and adopting ethical approaches to data collection and are typically adopted by businesses that place a high value on reputation. Data Governance Australia, for example, takes a principles-based approach that uses "reasonable community expectations" as a benchmark for data collection activities.¹⁰ The USA's Lead Council has adopted standards that require its members not to offer or use incentives (including but not limited to earning rewards points,

⁵ Section 18, Australian Consumer Law (Schedule 1 to *Competition & Consumer Act 2010* (Cth)).

⁶ Section 16(2) and Schedule 2, *Spam Act 2003* (Cth). Lead generation activities are unlikely to be covered by the inferred consent provisions of the Spam Act as they are exclusively seeking to establish new sales relationships. The ACMA has published guidance about the Spam Act consent requirements, available at: <https://www.acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/spam-consent-ensuring-you-dont-spam-i-acma>.

⁷ Section 18, *Spam Act 2003* (Cth).

⁸ Section 11(2) and Schedule 2, *Do Not Call Register Act 2006* (Cth).

⁹ Division 2, Australian Consumer Law, Schedule 1 of *Competition & Consumer Act 2010* (Cth).

¹⁰ Data Governance Australia, DGA Code of Practice, available at: <http://datagovernanceaus.com.au/dga-code-of-practice/>.



coupons, promotional contests, money, gift cards, or free items) to encourage consumers to submit consumer data.¹¹

One final industry-specific protection is the requirement for lead generators in the credit sector to hold an Australian Credit Licence where they provide credit services such as acting as an intermediary between a credit provider and a consumer (in relation to a credit contract).¹² The Australian Securities and Investments Commission (**ASIC**) explains that an intermediary can be a 'go-between' who prepares or passes on information and can include persons who refer the consumer to another person who engages in credit activities and aggregators where they act as a conduit between a broker and a credit provider in arranging the credit.¹³

¹¹ Lead Council, 2017 Lead Generation Standards Guide, available at: <https://www.leadscouncil.org/leadscouncil-standards/>.

¹² Part 2-1, *National Consumer Credit Protection Act 2009* (Cth).

¹³ ASIC, *Regulatory Guide 203: Do I need a credit licence?* May 2013, p 24, available at: <http://download.asic.gov.au/media/1241288/rg203-published-29-may-2013.pdf>.

3. CURRENT ISSUES IN LEAD GENERATION

3.1 United States of America

Financial markets

Recent litigation by the Federal Trade Commission (**FTC**) has exposed a range of consumer protection issues in online lead generation marketing in the financial services sector. In 2015, the FTC hosted a lead generation workshop in an attempt to understand the issues in the sector. In her opening remarks to the workshop, the FTC's Director of the Bureau of Consumer Protection highlighted the collection of leads with highly personal and sensitive information and their subsequent sale for profit to scammers and fraudsters as a significant consumer protection issue.¹⁴

Since 2010, the FTC has pursued at least seven so-called "Phantom debt" cases, where scammers purchased payday loan leads and used the information contained within the leads to mount aggressive debt collection activities for loans that never existed.

As recently as July 2017, the FTC was pursuing lead generation companies that enticed consumers to complete loan applications that were subsequently sold as leads to a variety of entities "without regard for how the information would be used or whether it would remain secure".¹⁵ That case (FTC v. Blue Global, LLC and Christopher Kay) alleged the lead generation company was operating 38 internet domains that were being run to harvest loan leads for sale to virtually anyone willing to pay for the leads. The company made representations about the confidentiality and security of personal information along with the promise of securing a lender. The FTC alleges that more than 15 million loan applications were collected of which just 2% were sold to lenders.

In the FTC v. Ideal Financial Solutions et al [2016], the defendants bought payday loan applications, which included Social Security and bank account numbers, and used the information to defraud consumers.¹⁶ The loan applications were purchased from data brokers and lead generation websites. Until the FTC filed its lawsuit in 2013, Ideal Financial operated a massive fraud that skimmed money from consumers' bank accounts without their authorisation

¹⁴ Jessica Rich, Former Director, Bureau of Consumer Protection, Federal Trade Commission, *Introductory Remarks to Follow the Lead: An FTC Workshop on Lead Generation*, 30 October 2015, available at: <https://www.ftc.gov/public-statements/2015/10/introductory-remarks-follow-lead-ftc-workshop-lead-generation>.

¹⁵ FTC, Press Release, *FTC halts operation that unlawfully shared and sold consumers' sensitive data*, 5 July 2017, available at: <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-halts-operation-unlawfully-shared-sold-consumers-sensitive>.

¹⁶ FTC, Cases and proceedings, *Ideal Solutions, Inc., et al.*, last updated 6 March 2016, available at: <https://www.ftc.gov/enforcement/cases-proceedings/1123211-x130044/ideal-financial-solutions-inc-et-al>.



resulting in millions of dollars of consumer losses. The FTC has sued several of the businesses who sold consumers' information to Ideal Financial.¹⁷

There are two further worrying case of debt brokers publishing highly sensitive personal information of 70,000 leads in an attempt to demonstrate the value of their leads.¹⁸

In the cases above, people willingly handed over very detailed and sensitive personal information to businesses that they assumed would exercise due care and diligence with their sensitive information.

In other cases of consumer deception, lead generators have been accused of engaging in misleading advertising. For example, in September 2014 the FTC charged a lead generation company (Intermundo Media) with running deceptive ads that overstated the financial benefits of refinancing, eligibility requirements and costs of refinancing as part of its online lead generation service.¹⁹ The ads were placed on its own website as well as on Google, Microsoft, AOL and Yahoo.

In *United States of America v. GoLoansOnline.com Inc* [2014], the lead generator misrepresented the type of loan that was available (claiming it was fixed rate when it was in fact it was a much riskier adjustable rate loan).²⁰ And in 2012, a lead generator in the debt settlement market was found to have placed deceptive advertising about the ability of the debt settlement services to address debt problems.²¹

Financial services feature prominently in the FTC's enforcement action against lead generation businesses. Given the highly sensitive nature of information that is collected in loan applications, it is not surprising that fraudsters have targeted this sector and yet even basic due diligence has failed to protect consumers. Deceptive representations about the underlying financial services points to wider cultural and compliance failures.

Education services

In 2016 the FTC undertook its first action against an education lead generator.²² The operator, Gigats, settled charges that it operated a deceptive scheme to generate sales leads for its clients. Instead of "pre-screening" job applicants for hiring employers it was actually gathering information for other purposes, including lead generation for post-secondary schools and career training programs.

¹⁷ See, eg, FTC, Press Release, *Data broker defendants settle FTC charges they sold sensitive personal information to scammers*, 18 February 2016, available at: <https://www.ftc.gov/news-events/press-releases/2016/02/data-broker-defendants-settle-ftc-charges-they-sold-sensitive>.

¹⁸ FTC, Cases and proceedings, *Cornerstone and Company, LLC*, last updated 21 April 2015, available at: <https://www.ftc.gov/enforcement/cases-proceedings/142-3211-x150005/cornerstone-company-llc>; *Bayview Solutions, LLC*, available at: <https://www.ftc.gov/enforcement/cases-proceedings/142-3226-x140062/bayview-solutions-llc>.

¹⁹ FTC, Cases and proceedings, *Intermundo Media, LLC (Delta Prime Refinance)*, last updated 12 September 2014, available at: <https://www.ftc.gov/enforcement/cases-proceedings/122-3225/intermundo-media-llc-delta-prime-refinance>.

²⁰ FTC, Cases and proceedings, *GoLoansOnline.com Inc.*, last updated 14 May 2014, available at: <https://www.ftc.gov/enforcement/cases-proceedings/122-3228/goloansonlinecom-inc>.

²¹ FTC, Cases and proceedings, *Golembiewski, Ryan and United Debt Associates, LLC, et al.*, last updated 17 October 2012, available at: <https://www.ftc.gov/enforcement/cases-proceedings/112-3079/golembiewski-ryan-united-debt-associates-llc-et-al>.

²² FTC, Cases and proceedings, *Expand, Inc. (Gigats)*, last updated 15 September 2016, available at: <https://www.ftc.gov/enforcement/cases-proceedings/152-3124/expand-inc-gigats>.

The flow of government education funding to returning servicemen (via the G.I. Bill) has also attracted the attention of unscrupulous lead generation activities. In 2012, a group of state attorneys shut down the website GIBill.com which was operated by QuinStreet, a lead generation company.²³ The website was deemed to deliberately give the impression it was a government website and yet it was used exclusively to deliver leads to its for-profit colleges associated with predatory enrolment practices.

In both these instances, the lead generation companies took risks with their advertising models that their clients couldn't or wouldn't take. It suggests that lead generation is used to push the boundaries of acceptable marketing practices.

In an effort to crack down on broad concerns about marketing practices in the college system, the Department of Education imposed a prohibition on incentive payments based on securing enrolments or financial aid.²⁴ This was supported by President Obama's Executive Order 13607 of 27 April 2012 which among other measures, sought to, "end fraudulent and unduly aggressive recruiting techniques on and off military installations, as well as misrepresentation, payment of incentive compensation".²⁵ Interestingly, the regulations made the client schools responsible for the lead generators acting as their agents, although the regulation does not extend to instances where lists are bought from lead generators.

Other sectors

The FTC has brought cases in the solar and tech support sectors that involve lead generators channelling prospective customers into telephone call centres based on misrepresentations such as that the call relates to an energy bill or is required to activate a software service.²⁶ The customer who has contacted the call centre on the basis of this initial misrepresentation is subsequently subject to very aggressive sales techniques.

3.2 United Kingdom

Nuisance and consent concerns

In the UK, lead generation companies account for a large number of complaints about nuisance calls and texts that breach privacy and electronic communications regulations. In February 2016, for example, the UK's Information Commissioner's Officer (**ICO**) fined lead generation company

²³ Attorney General of Massachusetts, Press Release, "GIBill.com" to pay \$2.5 million for allegedly misleading veterans, 27 June 2012, available at: <http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-06-27-gibill-veterans-settlement.html>.

²⁴ Section 487(a)(20) of the Higher Education Act (20 U.S.C. § 1094(a)(20)).

²⁵ White House, Executive Order – Establishing Principles of excellence for Educational Institutions Serving Service Members, Veterans, Spouses and Other Family Members, available at: <https://obamawhitehouse.archives.gov/the-press-office/2012/04/27/executive-order-establishing-principles-excellence-educational-instituti>.

²⁶ FTC, Press Release, *Solar Panel lead generation robocallers who pitched energy savings settle FTC charges*, 8 November 2017, available at: <https://www.ftc.gov/news-events/press-releases/2017/11/solar-panel-lead-generation-robocallers-who-pitched-energy>; FTC, Cases and Proceedings, Inbound Call Experts LLC, last updated 28 August 2017: <https://www.ftc.gov/enforcement/cases-proceedings/132-3135/inbound-call-experts-llc>.



Prodiat £350,000 for making 46 million nuisance calls.²⁷ In the past ICO has prosecuted multiple lead generation companies for criminal breaches of the Data Protection Act.

The level of complaints and fines are indicative of a broader set of concerns about the way in which lead generation companies operate in the UK. The ICO has in the past stated that it believes lead generation companies have “a concerning culture whereby individuals’ information has been changing hands without appropriate controls or basic compliance”.²⁸

ICO complaints have are concentrated in the following markets:

- Text message complaints: accident claims, payday loans and debt management (and, until recently, payment protection insurance)
- Live calls complaints: accident claims, lifestyle surveys and computer scams
- Automated call complaints: Boilers, solar panels and insulation

Questions have been raised by regulators and consumer groups about the legality of lead acquisition techniques, the way in which leads are distributed to advertisers and how advertisers can validate consumer consent of the leads they buy.

A 2014 government sponsored taskforce conducted by consumer group *Which?* raised further concerns about how advertisers can ensure that marketing data about potential customers bought from lead generators has been secured from consumers in compliance with the law (see a summary of the taskforce in Box 1 below).²⁹ *Which?* asserts that the majority of automated text messages and calls sent without specific consent are by lead generators knowingly breaking the law.

Box 1: Nuisance Calls and Texts Taskforce on Consent and Lead Generation

The Taskforce was convened by consumer organisation *Which?* in 2014 at the request of the UK’s Department of Culture, Media and Sports following extraordinary high levels of consumer complaints. The focus of the Taskforce was to investigate how organisations use consumer consent to carry out direct marketing activities and to buy and sell leads.

The Taskforce documents confusing practices regarding consumer consent. It also raises concerns about marketing consent tied to other consent such as to complete a transaction, register for product safety notices or when registering a product for consumer guarantees.

The Taskforce’s 15 recommendations identify actions for individual businesses, industry, regulators and government, with a focus on improving consent and encouraging industry best practice through non-legislative mechanisms.

Report of the Nuisance Calls and Texts Taskforce on Consent and Lead Generation December 2014 available at <http://www.which.co.uk/documents/pdf/nuisance-calls-task-force-report-388316.pdf>

²⁷ ICO, Press Release, *Record fine for company behind ‘staggering’ 46 million nuisance calls*, 28 February 2016, available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2016/02/record-fine-for-company-behind-staggering-46-million-nuisance-calls/>.

²⁸ ICO, Response to the consultation: Guidance on digital marketing practices and promotions in support of the Phonepay Plus Code of Practice, June 2013, available at: <https://ico.org.uk/media/about-the-ico/consultation-responses/2013/2170/ico-response-to-consultation-on-digital-marketing-practices-20130614.pdf>.

²⁹ *Which? Report on the Nuisance Calls and Texts Task Force on consent and lead generation*, December 2014, available at: <https://www.which.co.uk/documents/pdf/nuisance-calls-task-force-report-388316.pdf>.

Another focus for the UK regulator has been the way in which personal information, once disclosed, can be cycled through marketers over a long period of time. The ICO has taken a novel approach to demonstrating the extent of this problem by mimicking the real-life experience of entering online competition and surveys, both with and without granting marketing consent. Box 2 below outlines the outcomes of the project, known as Operation Bowler 2.

Box 2: Operation Bowler 2

During April 2016 to March 2017 the ICO conducted a proactive intelligence gathering exercise to demonstrate how personal data can be collected and passed between companies leading to individuals being inundated by unsolicited communications.

Using 76 mobile phones seeded onto marketing sites, with an email address for each registered phone, the ICO tracked calls, texts and marketing emails received over this period of time.

The result was 81 live calls, 22 automated calls, 221 text messages and 43 missed calls. The greatest contacts were received from the gambling, payday loan and accident claim industries. The exercise demonstrated poor business disclosure of the source of the contact information. A further 25,353 emails were received during this period demonstrating the deep extent of the data cycle of personal information.

ICO, *Operation Bowler 2*, Enforcement Hub report, March 2017 available at <https://ico.org.uk/media/2013928/operation-bowler-2-report-1617.pdf>

3.3 Australia

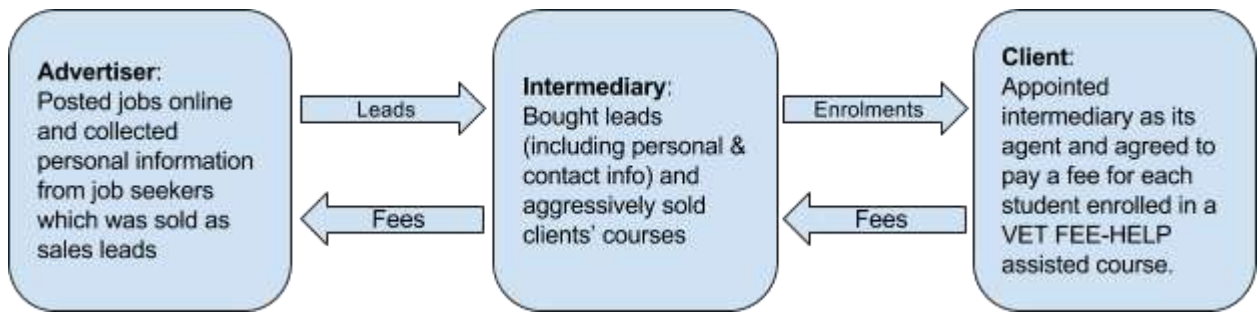
Vocational education

ACCC litigation in the vocational education sector has highlighted the role that lead generation can play in predatory marketing activities.

In the case of Acquire, leads were purchased from a job advertiser (although Acquire also posted their own job advertisements to harvest leads) and Acquire went on to mislead, deceive and act unconscionably as they aggressively sold vocational education courses to those leads.³⁰ Acquire was ordered to pay \$4.5 million in penalties for extensive breaches of the Australian Consumer Law. The model looks like this:

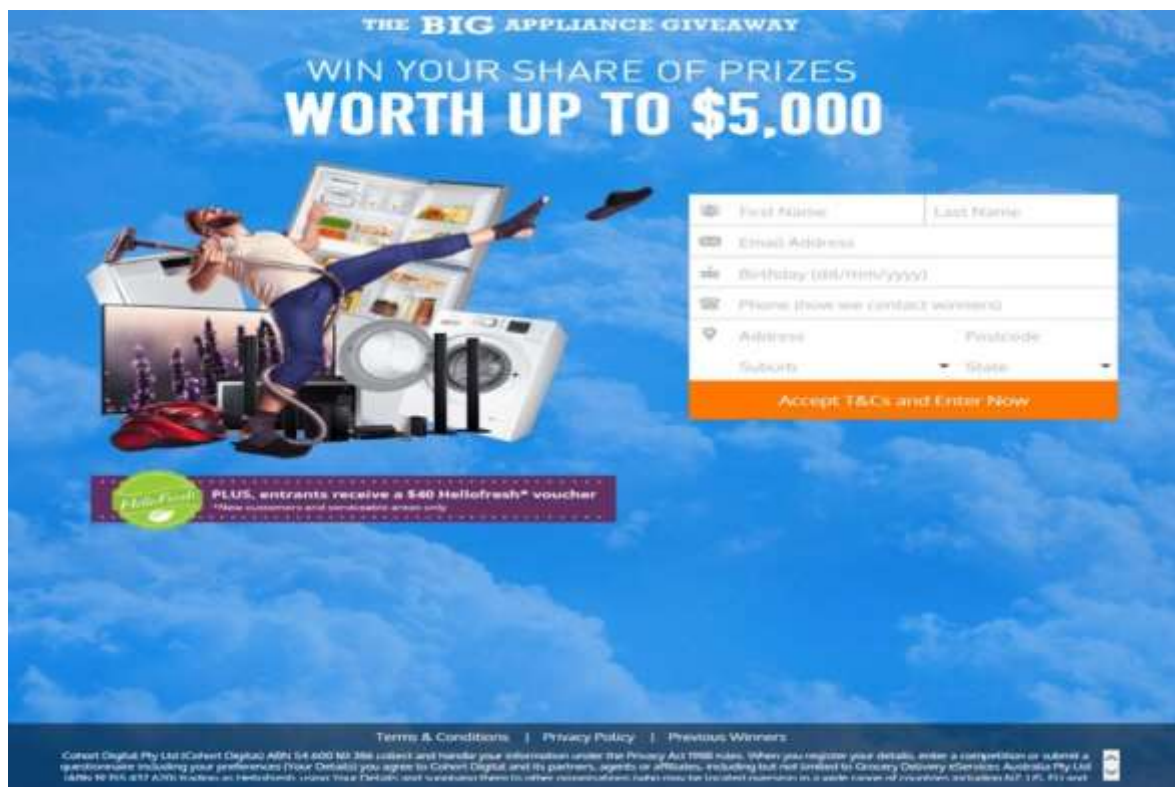
³⁰ *ACCC v Acquire Learning & Careers Pty Ltd* [2017] FCA 602





In the case against Careers Australia, similar extensive breaches of the Australian Consumer Law were alleged in relation to aggressive telemarketing employed by the vocation education provider.³¹

Careers Australia has confirmed that it bought leads from job search website Jobify which it believes were legally acquired because people had consented to receive vocational education marketing. The Australian Broadcasting Commission (ABC) has also documented cases where online games and prize giveaways were used by Careers Australia to generate leads and led to cases of considerable consumer detriment.³²



It can be hard to see a connection between games or competition and the service ultimately marketed (vocational training) and yet these competitions may in fact be extremely well targeted to attract the attention of the relevant group of potential customers.

³¹ ACCC, Undertaking against Careers Australia Group Pty Ltd, 16 May 2016, available at: <http://registers.accc.gov.au/content/index.phtml/itemId/1195880>.

³² ABC, Careers Australia Promo, 26 May 2017, available at: <http://www.abc.net.au/news/2017-05-26/careers-australia-promo.jpg/8563964>.

The website Jobify appears to have acted as a significant supplier of vocational education leads. Career One, in defending its use of Jobify leads, has argued that "like many businesses, Careers Australia use lead generation data where people opt in to be contacted by third parties, to market their services".³³

Careers Australia said their records showed that one complainant (who featured in ABC reports) had used Jobify and agreed to be contacted by opting into the following:

- "I agree to being contacted to have job alerts, career advice and resume templates.
- I also agree to being contacted by or on behalf of Education groups to discuss potentially enrolling in education and training courses with 3rd party education providers.
- By using our services you agree to our terms and conditions and privacy policy."³⁴

The current Jobify Privacy Policy reveals that the consent to receive marketing is implied by the consent to terms and conditions. It is unclear whether an additional consent is required at any point during the registration process.

Lead Holdings Pty Ltd ("jobify.com.au") privacy policy dated 2017 (accessed 5 September 2017)

By accepting jobify.com.au's terms of service and the terms of this policy and by providing jobify.com.au with information or seeking its services, you consent to direct marketing to you of relevant services or opportunities identified by jobify.com.au, its related entities or third-party service providers dealing with jobify.com.au.

If any phone number you have provided to us is registered on the Do Not Call register you consent to jobify.com.au or its direct marketing providers calling that number or those numbers. jobify.com.au may continue to contact you for an indefinite period unless and until you advise us otherwise.

If you do not want to receive any of this information, you may opt out of receiving direct marketing at any time by contacting our privacy officer whose details are set out below.

Source: http://www.jobify.com.au/privacy_policy.html

Payday lending lead trading

Payday lending lead generation has grown alongside the phenomenal growth in the online payday market.³⁵ One leading commentator has argued that the size of the online payday lead market has grown to be larger than the small loan market in Australia.³⁶

³³ Atkin M and Branly A, *Careers Australia allegedly enrolling vulnerable students into expensive courses over the phone*, ABC 730, 13 July 2016, available at: <http://www.abc.net.au/news/2016-07-13/careers-australia-allegedly-recruiting-vulnerable-students/7557360>.

³⁴ Ibid.

³⁵ Ali J & Banks M, 'Into the Mainstream: The Australian payday loans industry on the move', *JASSA*, issue 3 (2014), pp 35-42.

³⁶ Banks M et al, *Trends in the Australian Small Loan Market 2015*, Commission Paper Series, Australian Centre for Financial Studies, available at: <https://australiancentre.com.au/wp-content/uploads/2015/10/Commissioned-paper-Trends-in-the-Australian-small-loan-market.pdf>



There are three ways that payday leads are generated. Firstly, through licensed lenders undertaking their own lead generation activities. Secondly, by lenders selling unwanted leads to other lenders. And lastly, from independent loan generation companies operating predominantly online. Alongside payday lead generation are some “affiliate” marketing activities such as the “decline and introduce” model where lenders have a commercial arrangement to suggest another payday lender to declined applicants (but do not sell the lead to the other lender). Depending on how they are structured and remunerated, comparison websites can either operate as an affiliate model, or if personal information is collected and sold, as a lead generation model.

There are a number of online payday loan generation companies (or payday loan brokers) currently operating in the Australian market operate under a credit licence. For example, Monevo Pty Ltd (trading as, among other names, MoneyGuru, Kangaroo Payday, Get Paid Today, Perfect Payday and Purple Payday) operates under Australian Credit Licence 434380 to provide credit services. The sites operated by this payday lead generator typically present their service in the same way as mortgage brokers, i.e. that their service is free to consumers, will enable access to a panel of lenders, reduce consumers’ search costs and generally making life easier.

These activities have attracted the attention of policy experts. The *Final Report of the 2016 Review of Small Amount Credit Contracts (SACC)* reported that, “it seems inappropriate that the SACC provider give the consumer’s details to another SACC provider, whether directly or through an intermediary” and recommended that SACC providers should not receive a payment or any other benefit for a referral made to another SACC provider.³⁷ This recommendation was not supported by the government.

Cold-calling complaints

Complaints about unsolicited telephone calls, such as those that call numbers listed on the Do Not Call Register, are rising. There are indicators that some of these complaints may be driven by lead generation.

The ACMA Communications Report 2016/17 states that there has been a 22 percent increase in telemarketing complaints between 2015/16 and 2016/17 (see more information in Table 1 in Section 5.1).³⁸ Research published by consumer organisation CHOICE finds that 89 percent of Australians are receiving unsolicited calls, and unwanted calls are largely from charities or commercial companies that represent them.³⁹

The CHOICE reports notes that there are exceptions in the Do Not Call Register for charities as well as companies that a consumer has an existing relationship with. It states, however, ‘the majority of unsolicited calls were made by companies or organisations that the consumer did not have a relationship with’.

³⁷ The Treasury, *Review of the small amount credit contract laws*, Final Report, March 2016, available at: <https://treasury.gov.au/consultation/review-of-small-amount-credit-contracts-final-report/>.

³⁸ ACMA, Communications Report 2016/17, November 2017, available at: <https://www.acma.gov.au/theACMA/communications-report>.

³⁹ CHOICE, Who’s on the line? Unsolicited phone calls and the consumer experience, September 2016, available at: https://aaf1a18515da0e792f78-c27fdabe952dfc357fe25ebf5c8897ee.ssl.cf5.rackcdn.com/1965/CHOICE+Unsolicited+Calls+Report_LR_REV.pdf?v=1475039899000

This, together with the finding that '68 percent of people feel that the Do Not Call Register is not effective in stopping unsolicited calls', suggests that some businesses are calling numbers on the Do Not Call Register. Informal consumer forums also suggest that many Australians are receiving unsolicited calls from commercial businesses with which they do not have a relationship.⁴⁰

One explanation for this is that the call centre that makes the call to a number on the Do Not Contact Register is located overseas. While the Do Not Call Register legislation applies extraterritorially, it can be challenging for Australian regulators to enforce compliance upon errant businesses operating from overseas.

Leading consumer advocate Carolyn Bond has published on this issue, suggesting that some Australian businesses may be purchasing lists from overseas entities that are breaching the Do Not Call register.⁴¹ These Australian businesses then use those lead-generated contacts to make unsolicited approaches, including by visiting someone at home.

Online forums suggest consumers are receiving calls from business names which appear not to exist. If the consumer agrees to be visited, the visit is from a business with a different name than that provided during the initial call. This is indicative of a lead generation arrangement. The ACMA has named solar industry telemarketing which may involve such lead generation as a compliance priority for 2017/18,⁴² and recently took action against a solar power business noting inadequacies in its purchasing of lists.⁴³

4. BENEFITS AND RISKS OF ONLINE LEAD GENERATION

4.1 For businesses

The arguments in favour of online lead generation focus on the efficiencies delivered to businesses. The advantage of using third party lead generation is tapping into specialised skills, technologies and strategies to find new customers. Online lead generation is constantly evolving in the digital environment and specialised agencies are able to respond with SEO and data analytic techniques to cost effectively pinpoint target customers. That specialisation, it follows, can reduce business costs and ultimately flow through to lower costs of goods and services. In this way, online lead generation can help businesses to cost-effectively find new customers in a crowded digital marketplace.

But online lead generation also poses compliance risks and reputation challenges for businesses.

⁴⁰ Whirlpool, see <https://forums.whirlpool.net.au/forum-replies.cfm?t=2024909&p=-1&#bottom>.

⁴¹ Carolyn Bond, Naysayer blog, 'Telemarketing, 'Do Not Call', and the Property Investment Link', available at: <https://thenaysayer.net/2016/02/25/telemarketing-do-not-call-and-the-the-property-investment-link/>.

⁴² ACMA, Unsolicited communications priority compliance 2017-18, 23 January 2018, available at: <https://www.acma.gov.au/theACMA/unsolicited-communications-priority-compliance-areas-for-2017-18>.

⁴³ ACMA, Media Release, Instyle Solar penalised for calling numbers on the Do Not Call Register, available at: <https://www.acma.gov.au/Industry/Marketers/Do-not-call-register/How-to-comply-with-the-Do-Not-Call-Register/instyle-solar-penalised-for-calling-numbers-on-the-do-not-call-register>.



Businesses must ensure they are compliant with unsolicited marketing laws as they use leads to undertake their own marketing activities. This requires documented, legally compliant consumer consent for each and every lead. Yet data from the recent ACMA/ADMA survey suggests that businesses are not particularly rigorous in managing consent.

Third party lead generators have an imperative to identify leads but the absence of reputation risks and the disconnection between the product-seller and the marketer can all contribute to misrepresentations made to consumers. Lead buyers can be affected by representations or aggressive sales techniques used by third party lead generators. These risks can be difficult to manage where there is not a clear line of sight between lead buyer and lead seller, for example where a lead aggregator is involved or leads have been resold on multiple occasions.

Lead buyers also have to contend with the reputation risk that the way that personal information is captured by lead generators may not meet community expectations. The Career One experience revealed community dissatisfaction in the use of games and prize giveaways to identify sales leads for government supported vocational education programs.

4.2 For consumers

Lead generation can instantly connect people with personalised product and service offerings and provide a simple purchase pathway. In this way, online lead generation brings products and services to consumer's digital door. These offers, it follows, can inform and stimulate consumer demand.

The risks for consumers in the lead generation process are that they are disempowered, manipulated or misled.

The main disempowerment risk is that a person has not voluntarily and knowingly elected to share personal information for the purposes of receiving further contact about products or services. When marketing consent is hidden behind unrelated online activities, bundled with mandatory terms and conditions, is overly broad or simply not sought, consumers are denied their opportunity to protect their privacy and can lose control of how their personal information is used.

The distance between the online publisher and the lead buyer (sometimes with multiple intermediaries standing between them) can also obfuscate consent. If a publisher, who initially interacts directly with customer, doesn't know how the lead will be used, how can a consumer give full and proper consent?

Lead generation does not offer a promise of consumer suitability and so there is no guarantee that the goods and services on offer through lead generation activities are appropriate to an individual's circumstances. Like all marketing, lead generation uses skilled advertisers and salespeople to influence consumer decision making. The experience of the vocational education sector in Australia demonstrates that while a product may be personalised and presented as a compelling offer, it could lead to situations where consumers feel manipulated into purchasing products or services that are ill-suited to their situation.

Consumer manipulation can also occur earlier in the lead lifecycle where people's behavioural biases are exploited in order to source the lead. An offer of free goods or a chance to win prizes

or money can deflect attention from the marketing consequences that will arise. Another issue documented in the UK is the “privacy paradox”, which finds that people will typically provide much more information online than they would be rationally expected to share.⁴⁴ In many lead generation activities, people are sharing quite personal information without knowing who will use their data, whether their data will be on sold, what data it might be combined with, how salespeople may approach them or over what period of time that information will remain on a marketers list.

There is also a growing body of evidence that third party lead generators are willing to take greater risks with their advertising than their clients would, increasing the risks that consumers can be misled.

Online lead generation is fast, sophisticated and risky.

⁴⁴ Williams M and Nurse J, 'Optional Data Disclosure and the Online Privacy Paradox: A UK perspective', *Human Aspects of Information Security, Privacy and Trust*, 2016, pp 186-197.



5. IMPROVING CONSUMER OUTCOMES IN ONLINE LEAD GENERATION

5.1 Identify vulnerable consumers

Key points

- Complaints about unsolicited marketing are likely to be a good indicator of where problems are occurring in lead generation practices.
- We can build a picture of the impact on vulnerable consumers by encouraging the ACMA to publish more data about who makes unsolicited marketing complaints and what products or services they are complaining about.

Consumer complaints are a powerful way to understand community experiences and industry trends and regulators are increasingly seeing the value of publicly sharing their data in an effort to change behaviours and improve compliance. The NSW Office of Fair Trading, for example, now publishes a monthly list of its most complained about traders.⁴⁵

People are unlikely to complain about “lead generation” but are likely to complain about its downstream impacts—that is the unwanted marketing they receive. Complaints about unsolicited marketing are the best source of information about lead generation. There is a need to understand how lead generation activities contribute to unsolicited marketing complaints and to be able to pinpoint the consumer communities who are negatively impacted by the types of marketing that arises from lead generation.

The ACMA is responsible for compliance and enforcement of the *Do Not Call Register Act*, the *Spam Act*, the *Telemarketing and Research Industry Standard 2007* and the *Fax Marketing Industry Standard 2011*. These laws and regulations seek to minimise the impact on Australians of unsolicited marketing and electronic messaging.

In 2016 the ACMA reported the following data about complaints under these laws and regulations, showing a large spike in email and SMS reports and a significant rise in telemarketing complaints in 2015/16.

Table 1: Unsolicited Marketing Complaints

	2014-15	2015-16	2016-17
Telemarketing complaints	18,081	23,014	28,197
Fax marketing complaints	99	45	62

⁴⁵ NSW Fair Trading, Complaints Register, available at: http://www.fairtrading.nsw.gov.au/ftw/About_us/Online_services/Complaints_Register.page?

	2014-15	2015-16	2016-17
Email complaints	1,341	1,275	1,820
Email reports	342,607	514,604	828,184
SMS Complaints	388	462	569
SMS reports	6,689	17,606	19,355

Source: ACMA *Communications Report* 2015/16, p129, & 2016/17, p122

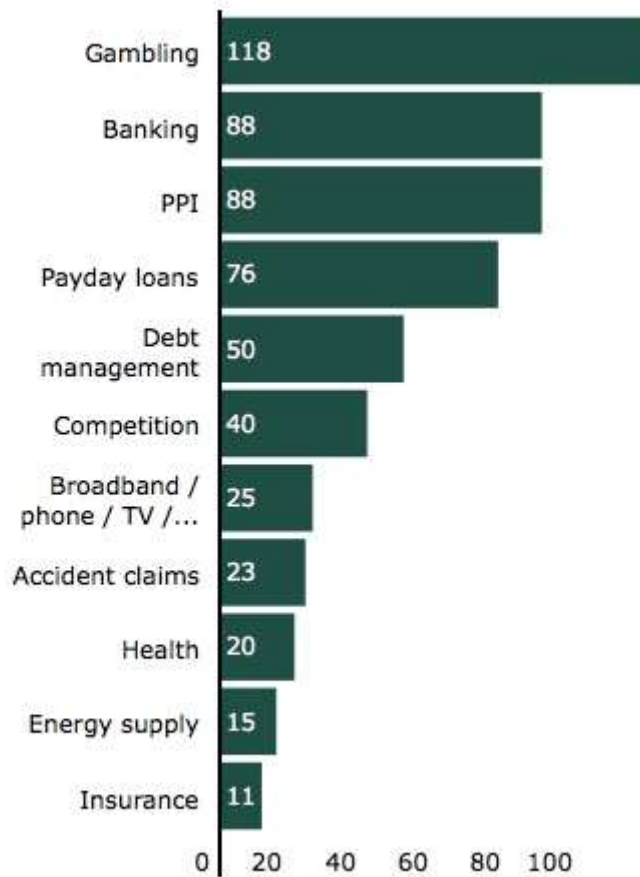
The ACMA does not disaggregate this data beyond the overall level of complaints/reports, but does publish a quarterly report with further information about compliance warnings, investigations and enforcement activities.⁴⁶

By comparison, the UK's Information Commissioner's Office (**ICO**) publishes a breakdown of industries that have had SMS complaints, monthly statistics on telemarketing complaint numbers and also a postcode heatmap of complaints. The ICO's SMS complaint data by industry, for example, reveals a high concentration of complaints in industries that disproportionately impact low income and vulnerable households including gambling, payday loans and debt management (see Figure 1).

⁴⁶ ACMA, Action on unsolicited communications, July to September 2017, available at: <https://www.acma.gov.au/theACMA/ACMAi/Investigation-reports/Statistics/action-on-unsolicited-communications-july-to-september-2017>.



Figure 1: UK nuisance calls and messages⁴⁷



Similarly, the US FTC releases a data book annually for do not call registry complaints.⁴⁸ This includes complaint figures by topic and state, as well as information about organisations which access the Do Not Call Registry.

More detailed publication of the industries and postcodes impacted by unsolicited marketing complaints would be valuable in the Australian context. Such data would help to identify vulnerable communities, thereby assisting organisations that seek to educate vulnerable consumers about their rights to better target their activities. It would also put greater pressure on industries to work to improve compliance with their legal obligations.

Additional information about complaint data would also inform discussions about the effectiveness of current unsolicited marketing policy settings. It would be useful to understand more about the root causes of these complaints and in particular the role of lead generation in Spam, Do Not Call and telemarketing complaints, making it difficult for consumers and businesses to understand their rights and responsibilities.

⁴⁷ ICO, Nuisance calls and messages, available at: <https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/>.

⁴⁸ FTC, National Do Not Call Registry Data Book for Fiscal Year 2017, December 2017, available at: <https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2017>.

In 2016 the ACMA issued a formal warning to a solar supplier and lead generation company after the ACMA reported a spike in solar-related complaints during 2015.⁴⁹ Very little else is known about the contribution of lead generation to unsolicited marketing complaints. Given recent international experience, it is probable that leads bought from lead generation companies or lead generators acting as agents for advertisers are at the root cause of consumer dissatisfaction.

An analysis of a representative sample of unsolicited marketing complaints and reports would establish the prevalence of lead generation in disputes. The investigation should seek to establish how the advertiser obtained the personal information (name, phone number and/or email address), whether third party lead generation were involved and what mechanism was used to obtain consent.

Lead generation companies haven't been prosecuted for large-scale marketing misconduct as occurred in the UK. But telemarketing, SMS and spam complaints are rising and are not far off per capita UK levels. Further research will establish how lead generation activities are contributing to unsolicited marketing complaints. And publishing more information about unsolicited marketing complaint data will identify communities that are vulnerable to the downstream impacts of poorly executed lead generation.

5.2 Give consumers more control

Key points:

- The policy framework for marketing consent is confusing, inconsistent and not consumer-friendly.
- A new and consistent “no surprises” approach is needed that gives people full control over how their personal information can be used.

The UK has drawn an unequivocal line between unwanted selling and problematic consent in the lead generation industry. In the Australian online marketplace, a mixture of good and bad consent practices can be observed. There are lead generators that do a good job of seeking specific and voluntary consent for third party marketing in their digital activities and who promote the value of their leads on the quality of the consumer consent. Voluntary industry schemes are driving reputable business practices in this direction.

Less satisfactory processes that can be observed online include: pre-checked consent boxes; marketing consent and terms and conditions bundled into a single consent (or bundled with other mandatory actions); marketing consent obtained solely via terms and conditions consent; and, unreasonably broad consent to any marketing over an unlimited period of time.

The risk of being inappropriately sold goods or services increases when a person's consent to marketing is not clearly established. Consent is a critical consumer protection when lead generation companies are obtaining personal information. Yet the policy framework for consent is inconsistent, confusing and not consumer-friendly. The Spam Act, Do Not Call Register and APPs require different forms of consent.

⁴⁹ ACMA, Media Release, Double fault: two formal warnings issued for Do Not Call breaches in the solar industry, 2 February 2016, available at: <https://acma.gov.au/Industry/Marketers/Do-not-call-register/How-to-comply-with-the-Do-Not-Call-Register/double-fault-two-formal-warnings-issued-for-do-not-call-breaches-in-the-solar-industry>.



Industry practices have continued to evolve in the digital environment since these frameworks were established. The ways in which lead generators seek out leads has expanded significantly, sometimes making it less clear that personal information is in fact being obtained for the purpose of selling it as a sales lead.

In a digital context, it has become simple and low-cost for lead generators to obtain separate, voluntary, clear, specific and time-limited consent. This is the direction that digital consent for marketing needs to be moving.

Supporters of the status quo will tend to focus on the options available for people to opt out of marketing. But experience shows that it is often very vulnerable people who are targeted by predatory businesses using aggressive sales techniques to convert leads into sales. In these circumstances opt-out provisions are practically ineffective. Good quality consent is the first line of defence in protecting vulnerable consumers from unwanted selling.

In 2012, the US adopted new rules under its Telephone Consumer Protection Act that requires marketers to identify each specific company to whom consent is being provided.⁵⁰ This means that marketers can't use sweeping language in consent forms referring broadly to affiliates, partners, or brands. The rules also require a disclosure that the consumer is not required to provide consent as a condition of purchasing goods or services. This level of detail is absent in Australia's consent frameworks.

Consumers will be empowered in a digital environment in which they know exactly what to expect when they share their personal information. To achieve this, there needs to be a unified approach across the Spam Act, Do Not Call Register and APPs to express consent for marketing that is separate, voluntary, clear, specific and time-limited.

5.3 Review payday lead generation practices

Key points:

- International experience suggests that payday lead generation could develop to occupy a large proportion of the payday market.
- A review of the payday lead generation in Australia would be the first step in ensuring adequate consumer protections in a highly vulnerable consumer community.

In 2015, the UK's Competition and Market Authority (**CMA**) published its market study into the payday sector.⁵¹ The CMA specifically considered the role of lead generation in the payday industry. It found that a significant proportion of people applying for a payday loan online in the UK do so via the website of a lead generator. In 2012, there were 130 lead generators operating in the UK, who dealt with more than 43 million leads of which 9 million leads were sold to

⁵⁰ FCC, Press Release, FCC Strengthens Consumer Protections Against Telemarketing Robocalls, 15 February 2012, available at: <https://www.fcc.gov/general/telemarketing-and-robocalls>.

⁵¹ CMA, Payday lending market investigation: Final Report, 24 February 2015, available at: <https://www.gov.uk/cma-cases/payday-lending-market-investigation#final-report>.

lenders.⁵² The three largest lead generators accounted for 50-60% of total revenue and all operated a “pingtree” model.

The CMA’s final report recommended increasing the transparency of lead generators. It argued that by “requiring lead generators to provide clear and prominent information on the nature of their service and details of the commercial basis on which they sell customer details, this remedy seeks to ensure customers are informed about the basis of how they may be offered a loan”.⁵³

The intensity of payday lead generation activity in Australia is not known. Payday lead generation and lead trading is occurring in Australia and at least one of the largest UK’s online lead generators has set up operations in Australia. Understanding more about this sector is critically important.

The licensing requirements of our credit laws could prevent the market developing as aggressively as it has in the US but there are practices occurring that warrant review. Some of these concerns are outlined here.

One online lead trading platform promotes its service on the basis that lenders can:

*“Recover value from your non-conforming applicants.
Put the customer in touch with another lender who is truly interested in their application, and get the best price.”⁵⁴*

However, the presence of a willing buyer doesn’t mean that the applicant would want their personal information sold to that lender. It is unclear what consent lenders are obtaining prior to selling an unwanted application to another payday lender.

A complication is what type of consent should be sought from consumers. One online lead trading platform explains that “all sales are made in a blind environment i.e. the seller does not know who the buyer is and vice versa.”⁵⁵ The question here is whether a consumer would consent to their application, including detailed personal information—including bank statements—being sold to any licensed lender.

All the payday lead generators (including payday loan brokers) reviewed for this study held current Australian Credit Licences. The loan aggregation sites we reviewed also stipulated that leads could only be bought and sold by licensed ACL holders. However, a matter for consideration by the regulator ASIC is whether the trading platforms are required to be licensed as providers of credit services.

Following the recent review of mortgage broker remuneration,⁵⁶ it is also timely to consider how financial benefits received by payday lead generators need to be managed under conflict of interest requirements, especially in an environment where they claim to match customers with the most suitable loan.

⁵² Ibid, p 72.

⁵³ Ibid, p 282.

⁵⁴ Lead Market Australia website, accessed 27 September 2017, available at: <https://leadmarketonline.com/>.

⁵⁵ Lead Market Australia, accessed 27 September 2017, see: <https://leadmarketonline.com/clients>.

⁵⁶ ASIC, *Report 516: Review of mortgage broker remuneration*, March 2017, available at: <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-516-review-of-mortgage-broker-remuneration/>.



It would be useful to assess the appropriateness of claims made by payday lead generators, for example that a wide range of lenders are available, that the most suitable loan will be identified or that the service is free.

A review of payday lead generation should focus on how payday lenders, brokers and aggregators are meeting their credit licence obligations in the context of payday leads being bought and sold (including leads in the form of unsuccessful loan applications). The review would usefully focus on consumer consent, application of unsolicited marketing laws, marketing claims and representations and conflicts of interest. It could also identify other problematic related sectors, for example, debt management.

Given the sensitivity of this market, there is a need to ensure there are adequate protections for vulnerable consumers and that payday lead generators are held to a high standard.

5.4 Strengthen unsolicited marketing protections

Key points:

- Access to unsolicited consumer agreement consumer protections should be technology neutral.
- Businesses and consumers will benefit from clarity that the unsolicited consumer agreement provisions will apply wherever third-party sales leads form the basis of a sale.
- Do Not Knock legislation needs to be strengthened to enable action to be taken against businesses that make unsolicited approaches following a call that breaches the register.
- An opt-in requirement for unsolicited marketing would reduce the incentive for lead generation.

The recent review of the ACL recommends “Ensuring that the unsolicited selling provisions operate as intended by clarifying that the provisions: ... capture suppliers in their negotiations with consumers where the suppliers obtain, from a third party (sometimes referred to as a “lead generator”), a consumer’s contact details or permission to be contacted”.⁵⁷ The Consumer Affairs Forum endorsed this recommendation at its August 2017 meeting.⁵⁸ These are welcome reforms that will provide certainty to businesses buying and selling leads and to consumers receiving marketing.

Lead generation has a broad digital footprint. A crucial element of the implementation of this recommendation will be its technology neutrality both in the mechanism used to obtain leads and the means used to direct sell to the consumer.

⁵⁷ Consumer Affairs Australian and New Zealand, Final Report: Review of the Australian Consumer Law, March 2017, proposal 12, available at: <http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/final-report/>.

⁵⁸ Consumer Affairs Forum, Communique, Meeting of Ministers for Consumer Affairs, 31 August 2017, available at: <http://consumerlaw.gov.au/communiques/meeting-9-2/>.

As the introduction to this report explains, online lead generation can take many different forms. In some instances, there is a clear disclosure about what sort of direct selling the consumer can expect—a name of a business and a product being sold.

But in much of the online lead generation activities people are providing their contact details to lead generators without clear knowledge of which industry sectors or business will contact them or what products will be sold to them, either because such information is buried deep within a privacy policy or because the focus of the online activity (a game, calculator or competition) distracts from the direct selling process. Despite providing their own contact details and potentially also consenting to being contacted, the consumer is often in a position of ignorance when they are subsequently subject to direct selling.

Consumer protections under the unsolicited consumer agreement provisions of the ACL should be available to people wherever a third party is used to source a sales lead—irrespective of whether the lead generator is independent or acting as an agent for the trader.

The protections should also apply no matter what form the direct marketing takes. The current restrictions to telephone marketing and physical location (other than the trader's place of business) do not reflect current and future practices.

In the same vein, there is a need to strengthen Do Not Call Register and Spam legislation, which does not regulate unsolicited visits following a marketing call or spam email. Currently, a business which purchases and telephones a list of contacts which were developed through breaches of the register by a separate (perhaps overseas-based) lead generation marketing business will also be in breach of the legislation.⁵⁹ Further, the Do Not Call Register legislation prohibits agreements for the making of telemarketing calls that breach the register—that is, if a business enters into an arrangement with a marketing company that breaches the register, the initial business will also be in breach.⁶⁰

However, a business which purchases a list developed through breaches of the register or the Spam Act and visits those leads will unlikely to have breached the legislation. In this case, there may not have been any arrangement or agreement between the business and the marketing company that made the calls or emails—the business simply bought the list following the breaches leading to its collation.

This practice of in-home visits following a telemarketing call appears to be common in the solar industry.⁶¹ Imposing specific obligations on businesses who purchase lead-generated lists to ensure that those lists were not generated through Do Not Call register or Spam Act breaches will fill a gap in the regulatory framework.

Consumer Action has previously suggested that the regulatory framework for unsolicited selling would be further enhanced through an 'opt-in' requirement to replace cooling-off protections.⁶² An 'opt in' mechanism would allow the consumer to confirm the sale, without further contact by the trader, within a certain time period. If this was adopted, it would reduce the incentive for marketing businesses to generate leads, as it would likely affect the effectiveness of follow-up marketing.

⁵⁹ *Do Not Call Act 2006* (Cth), section 11.

⁶⁰ *Do Not Call Act 2006* (Cth), section 12.

⁶¹ Consumer Action, Westjustice & Loddon-Campaspe Community Legal Centre, *Knock it off: door-to-door sales and consumer harm in Victoria*, November 2017, available at: <https://policy.consumeraction.org.au/2017/11/20/knock-it-off/>.

⁶² As above.



6. CONCLUSION

Online lead generation is forcing us to re-appraise our approaches to obtaining consent for marketing purposes and making unsolicited consumer agreements in a digital environment.

To inform this re-appraisal, we need to find out more about consumer complaints about unsolicited marketing. As more is understood about this sector, it is likely that specific vulnerable consumer communities and industry sectors will be targeted for education campaigns and compliance audits.

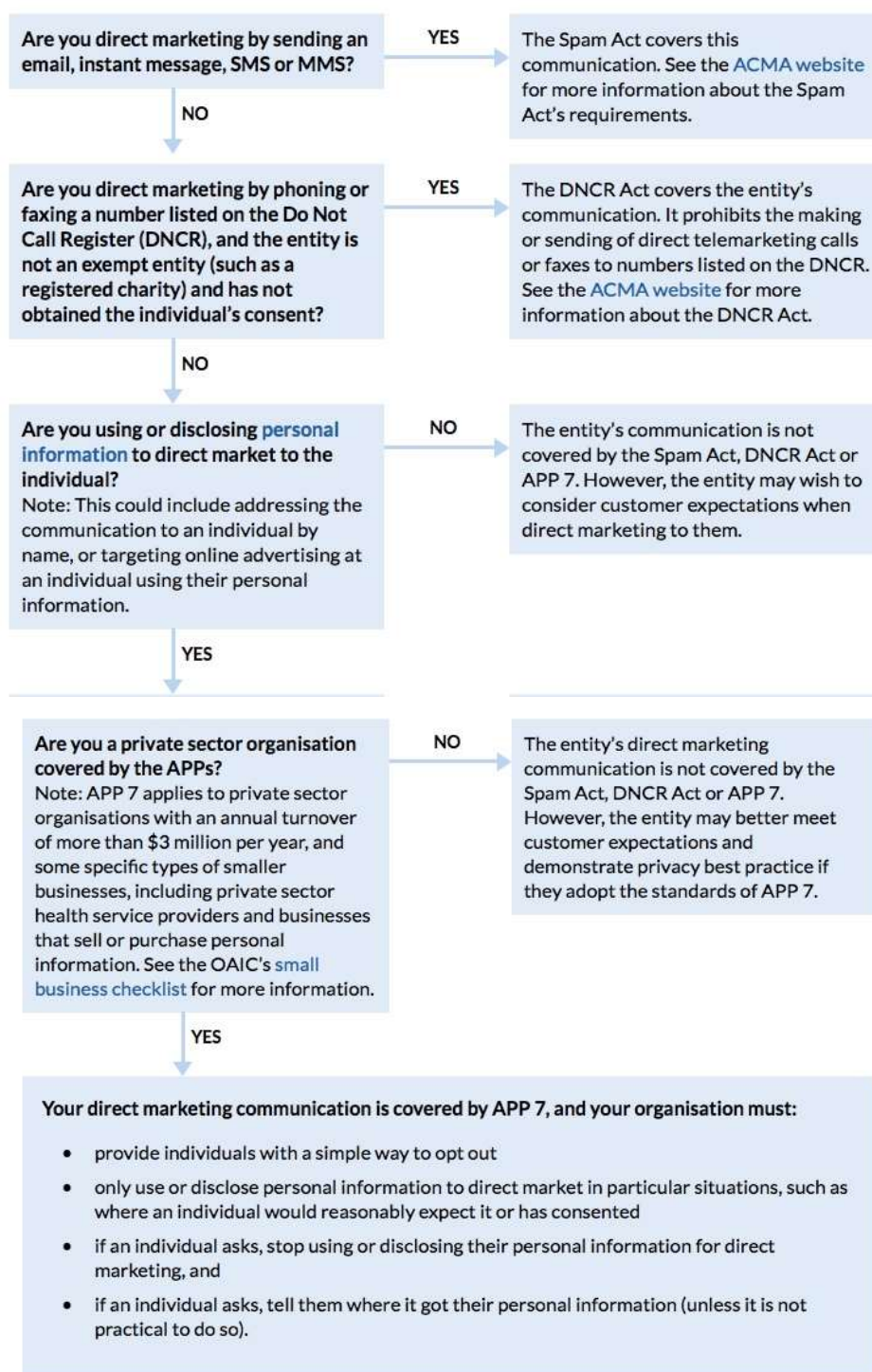
In the payday sector, there is an opportunity now to shape how lead generation develops and to possibly prevent considerable consumer harm by articulating how payday lead generators and lead aggregators meet their licence obligations to act efficiently, honestly and fairly.

We also need to enhance consumer protections relating to unsolicited sales. Protections should not depend upon the nature of the marketing, for example, whether telephone or an in-person visit. An opt-in requirement for unsolicited selling would further reduce the incentive for risky and harmful lead generation activities.



Appendix A: OAIC Flowchart

Appendix A: Flowchart – what requirements apply to direct marketing communications?



Source: Office of Australian Information Commissioner, available at: <https://www.oaic.gov.au/agencies-and-organisations/business-resources/privacy-business-resource-19>



Consumer Action Law Centre

Our vision: a **just marketplace** where
people have power and **business plays fair**

Level 6, 179 Queen Street
Melbourne VIC 3000
AUSTRALIA
consumeraction.org.au