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INQUIRY INTO FEASIBILITY OF PROHIBITING CHARGING FOR SILENT NUMBER SERVICE

This submission responds to the Committee's invitation to comment on the feasibility of a prohibition on the charging of fees for an unlisted (silent) phone number service.

In summary, a prohibition is both feasible and desirable. It is within the Commonwealth government's power. It is necessary because telecommunication service providers have demonstrated that they will not abandon the fee unless required to do so by regulation. Prohibition is consistent with both Australia's human rights obligations and with recommendations by a range of bodies. It reflects consumer expectations in a global telecommunications environment. It will not have an adverse impact on public safety, law enforcement or the operation of small business.

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Summary

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Basis and Independence

The following paragraphs reflect the author's experience as an academic teaching competition & consumer law, communications law and privacy law. They also reflect experience in the Commonwealth government (including reports to the Online Ministers Council) and consulting to public/private sector entities regarding electronic communications, markets and regulation.

Work by the author has been cited in several hundred monographs and government reports, including studies by the ITU and OECD, and has appeared in leading peer-reviewed legal journals such as *Melbourne University Law Review* and *International Journal of Communications Law & Policy*.

The submission does not necessarily represent the views of the University of Canberra.

The author has no affiliations that would be reasonably construed as representing a conflict of interest.

Silent Numbers

The public directory – ie publicly-accessible print and electronic listings of telephone numbers – allows potential callers in Australia and overseas to identify householders and other consumers through their telephone numbers.

The expectation is that such identification will enable those callers to find the consumer/s of interest to them and direct their calls to relevant people rather than ringing at random or contacting everyone with the same name listed in an overall directory, city or suburb.

In practice access to the directory is used for a range of purposes, with for example marketers integrating collections of directory data with one or more collections of data from print and electronic sources as a basis for marketing, social research and the shaping of public opinion through selective polling in electoral campaigns.[1] In isolation a phone number is a fuzzy identifier. When merged with other identifiers it

[1] Note for example the claim by the Australian Institute of Mercantile Agents in Australian Law Reform Commission, *For Your Information: Australian Privacy Law & Practice* (ALRC Report 108) (Australian Law Reform Commission, 2008) 2470 at para 72:234

enables very granular and often very accurate profiling of specific individuals rather than merely a group of people – such as a family or flatmates who share a number.

In recent decades many consumers have chosen to go 'ex directory' by requesting that their numbers not appear in the public directory, ie not be included in the print version of the directory, not be accessible through online searching of the web versions of the directory and not be provided through 'directory assistance' (an employee of a telecommunications service provider searching the directory on behalf of the potential caller).[2] Most service providers charge a fee for that 'silent number' or 'silent line'. The fee is discussed below.

Why do people choose to get a silent number? Some have gone ex-directory in an effort to minimise intrusions in their private life associated with unwanted calls from marketers and other entities. In essence, the silent line functions as the equivalent of curtains or doors: if you've been given the number you have an invitation to come inside, if you don't have the number you are expected to respect the consumer's privacy and stay outside.

Other people rely on silent lines because publication of the number provides the basis for electronic harassment (eg recurrent calls from an angry ex-partner when a baby is going to sleep or recurrent calls at 2am and 3am)[3] and for determination of the consumer's location by a stalker or other person who has criminal intentions, ie the directory information is used for the address rather than used for an improper call.

Other people – an undetermined but apparently growing minority – use silent numbers as an exercise of autonomy in minimising what they consider to be inappropriate profiling by Australian and overseas entities, ie profiling for purposes over which they have no control, by entities that are unknown, and that takes place without their knowledge (and thus without their consent).[4]

It is important to note that having a silent number does **not** preclude access to numbers by law enforcement, national security, emergency services or other agencies with a legitimate need to know.

It is also important to note that several criticisms of silent numbers are unfounded.

One criticism, reflecting naïve criticisms of privacy that are explored below, is that only 'bad' people – those with something to hide or evading obligations – will seek to go ex-directory. That criticism is demonstrably fallacious, given that Senators, parliamentary staffers, judges, corporate executives, victims of domestic violence and parents of young children often rely on silent numbers for a quiet life.

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[2] Estimates on the basis of peer-reviewed studies in particular locations (eg Brisbane, all of Queensland, all of South Australia) indicate that at a national level the number of households with unlisted numbers has climbed from around 2.5% (in 1985) to 13.5%, 15%, 18% and then 22% in 2002. James Katz, 'Understanding Communication Privacy: Unlisted Telephone Subscribers in the United States' (1995) 12(4) *The Information Society: An International Journal* 407-423 reported that over 36% of private numbers in California were unlisted, up from 6% in the 1970s. Clearly there is considerable demand by consumers for silent numbers, a demand that should be respected.

[3] The shape of legislation regarding such harassment and, more importantly, the commitment of law enforcement agencies in taking action over complaints by consumers varies from jurisdiction to jurisdiction. From a public policy perspective it is more expensive to pay for police and other action than it is for individuals to protect themselves by going ex directory

[4] See for example Eleonora Dal Grande, Anne Taylor and David Wilson, 'Is there a difference in health estimates between people with listed and unlisted telephone numbers?' (2005) 29(5) *Australian and New Zealand Journal of Public Health* 448-456

Another criticism is that silent numbers are not necessary, because consumers can use answering machines or other mechanisms for screening incoming calls. Screening mechanisms are unfortunately crude and do not, of course, deal with the problem of unwanted disclosure of the consumer's address.

A third criticism is that numbers are a public rather than private resource, sometimes expressed in terms that consumers have an obligation to disclose their numbers to the public at large without any consideration of who is accessing the information and how the information is being used. Such claims have no basis in Australian law. There is no obligation to disclose your phone number (or your email address or physical address or PO Box number) to everyone; the silent number regime recognises that some people do not want to share. It allows them not to share. Their choice not to share with the community at large hasn't been challenged in court and is unlikely to be successfully challenged in future. Phone number portability under the *Telecommunications Act 1997* (Cth) recognises consumer autonomy: people are able to exercise choice about their service provider and about their numbers. Autonomy is a foundation of Australian law and of the liberal democratic state.

In any regulatory question it is useful to ask who benefits and ask whether the benefits inappropriately reward particular interests (eg an individual enterprise or industry sector) rather than the community at large.

In thinking about fees for silent numbers we should recognise that there is no inherent reason to charge a fee or to a charge a fee at a particular scale.

Some service providers charge fees. Those fees vary and in response to sustained criticisms by bodies such as ACCAN and the Australian Privacy Foundation there may be dispensations for particular groups of consumers.[5] The fees do not necessarily reflect the administrative cost of processing a request for a silent number.[6] Other providers do **not** charge a fee, even though they are operating in the same industry, have the same consumer demographics and are subject to the same regulatory framework.

Imposition of a charge appears to reflect the desire of particular service providers to generate revenue on a monthly basis, ie go well beyond cost recovery (given that costs are one off rather than recurrent). That revenue is likely to amount to several million dollars. It is equivalent to the 'gouging' by card processors that has recently been restricted by the Reserve Bank. It does not benefit the economy and society as a whole.

Fundamentally, imposition of a fee involves consumers paying service providers for what should be freely available. Consumers should not have to pay for respect of their privacy. People who are careful about their privacy should not have to subsidise those who have 'open' numbers.

The fee benefits the service provider. The fee as such does not benefit consumers. It is not a regulatory requirement and, as Optus has demonstrated, could be easily forgone. Particular service providers, such as Telstra, have however given no sign that they will respect consumer privacy. We can assume that the fee will continue to be imposed unless it is prohibited. Regrettably Australian corporations are deaf when they choose to be and ignore suggestions from Parliamentary committees, law

[5] Telstra's dilatory response in remitting the fee for people deemed to be at particular risk appears to coincide with referral to the Senate Committee and raises questions about the organisation's good faith.

[6] It is arguable that service providers can and should reduce their processing costs through a positive approach to business process reengineering, eg with a tickbox indicating the request for a silent number featuring in all phone contracts.

reform bodies, regulatory agencies and civil society advocates that they should voluntarily forgo inappropriate charges rather than having to be formally restricted through a statutory provision or through a regulatory code underpinned by statute law and supervised by a regulatory body such as the Reserve Bank or Australian Communications & Media Authority. In essence, we cannot rely on Telstra doing the right thing; prohibition is necessary.

The Committee should accordingly consider a range of public submissions, evaluate claims by Telstra and other commercial enterprises with a vested interest in the fee as a substantial revenue generator, and encourage the Government to formally prohibit continued imposition of the fee if those enterprises disregard the public interest by continuing to charge for silent numbers.

Does the Commonwealth have the power?

A threshold question is whether the Commonwealth has the power to prohibit the charging of fees for silent numbers. The answer is yes.

The Commonwealth has clear power under s 51(v) of the Commonwealth Constitution, ie regarding posts and telecommunications. That power has been upheld on several occasions and is recognised by Telstra and other leading service providers. Prohibition is feasible under Australian statute law and codes of practice regarding telecommunications, in particular licensing of telecommunication service providers by the Australian Communications & Media Authority.

That power is complemented by a more general authority under the corporations head of power in the Constitution, ie s 51(xx).

A prohibition is not contrary to Australian human rights law. It is not in conflict with international agreements at a global or bilateral basis (eg the US FTA). It is consistent with Article 12.2 of the EU *Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector,* which is currently being strengthened and is widely regarded as embodying global best practice.[7]

The ALRC report

The Committee's terms of reference refer to the 2008 Australian Law Reform Commission report on privacy.[8] That report specifically considered the imposition of fees for silent numbers. It noted disagreement about the fee, including suggestions that the fee was contrary to Australian privacy law.

The Commission recommended[9] that the fee not be imposed. Consumer privacy should be respected. Consumers should not have to pay. Their privacy is a right – as indicated in Australian law and in a range of international agreements to which Australia is a signatory – rather a privilege or an indulgence or an evasion of obligations. It is a right that is properly enjoyed by members of the Senate Committee, senior officers of the Australian Federal Police and executives of corporations such as Telstra. It is a right that should be enjoyed by all Australians.

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[7] European Parliament, *Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector*, Directive 2002/58/EC (2002).

[8] Australian Law Reform Commission, *For Your Information: Australian Privacy Law & Practice* (ALRC Report 108) (Australian Law Reform Commission, 2008) 2470-2475.

[9] Recommendation 72.17 by Australian Law Reform Commission, *For Your Information: Australian Privacy Law & Practice* (ALRC Report 108) (Australian Law Reform Commission, 2008) 2475.

There has been **no** development since the 2008 report that undermines the Commission's recommendation. Indeed, the increasing sophistication and pervasiveness of data collection and data mining in the emerging age of 'Big Data' means that silent lines are becoming increasingly important.

There have been no authoritative studies demonstrating that removal of the fee will seriously erode competitiveness in the telecommunications sector or otherwise have deleterious effects.

As the Commission indicated in 2008, directories are still in operation in Europe (where imposition of a fee is prohibited). Claims by Telstra that its directory operations are in crisis should be viewed skeptically, with the Committee for example noting suggestions that problems are not serious (ie have been hyped as a way of legitimating offshoring of directory jobs to low cost overseas locations) or are attributable to Telstra inefficiency relative to its chief competitor Optus.[10]

The Committee should not reward inefficiency by endorsing ongoing imposition of an inappropriate fee.

The Fee

The Committee's terms of reference refer to the fee. As noted above, the fee is recurrent and appears to go well beyond cost recovery for electronic amendment of directory data, ie the few keystrokes by an operator to make a directory entry silent.

There is no statutory requirement for Telstra or another service provider to impose a fee. Optus accordingly does not impose a fee and the Committee might reasonably conclude that the fee is, in essence, a revenue generation device for Telstra and associates rather than a true cost recovery mechanism.

There is no reason to believe that a prohibition would lead to a tangible reduction of competition in the Australian telecommunications market or seriously erode the commercial viability of billion dollar corporation, in particular a corporation that as other committees and inquiries have found has on occasion been prepared to act on anti-competitive basis and with little regard for small enterprises.[11]

The Impact

Would prohibition of the fee have a fundamental negative effect on the telecommunications sector, for example by reducing the viability of service providers and reducing competition? The answer is **no**.

A year after the ALRC report Telstra reported revenue of over $25.5 billion, EBITDA of $10.9 billion and profits of over $4 billion. Earlier this year it reported that first-half net profit after tax rose 8.8% to $1.6 billion on a 1.7% increase in total income to $12.7 billion. The fee is an easy source of revenue but its removal will not cripple Australia's telcos. Optus, in contrast to Telstra, does not charge a 'silent line' fee for landline and mobile phone. As noted above, practice at Optus implies that the fee is not a prerequisite for success in the Australian telecommunications market.

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[10] Last month Sensis Managing Director John Allan, foreshadowing reduction of over 648 Australian positions through offshoring, indicated that "Until now we have been operating with an outdated print-based model – this is no longer sustainable for us. As we have made clear in the past, we will continue to produce Yellow and White Pages books to meet the needs of customers and advertisers who rely on the printed directories, but our future is online and mobile where the vast majority of search and directory business takes place".

[11] Note for example the COTs (Casualties of Telstra) disputes and inquiries.

The Committee should be wary about pleading by enterprises with a vested interest in rent seeking and might consider seeking specific data from proponents of the fee about a) costs and b) profitability.

Implications for the NPND

A prohibition would have no negative implications for the National Public Number Directory.

Prohibition does **not** force people to go ex-directory. It simply means that Telstra and associates cannot charge for silent numbers.

Prohibition does not stop people disclosing unlisted numbers through personal email, business cards, word of mouth, letters, post-it notes or other mechanisms.

Importantly, prohibition does not preclude access by law enforcement agencies and other legitimate bodies from accessing directory information on a lawful basis where there is a pressing need. Prohibition is about telco revenue rather than about law enforcement. It is about inducing commercial entities to respect the autonomy and privacy of all Australians

Other Relevant Matters

Preceding paragraphs have indicated that the rationale for a prohibition is privacy, specifically the unwillingness of Telstra to end the fee in the absence of action by Parliament.

It is fashionable to deride privacy as something that is antiquated,[12] that is antithetical to law enforcement[13] or that is a middle class indulgence.[14] In 2007 Mirko Bagaric for example claimed that

> privacy is a middle-class invention by people with nothing else to worry about. Normally they would have every right to live in their moral fog, but not when their confusion permeates the feeble minds of law-makers and puts the innocent at risk. The right to privacy is the adult equivalent of Santa Claus and unicorns.[15]

Contrary to Bagaric I do not think that the members of the Standing Committee on Environment & Communications have "feeble minds", or are in a "moral fog" or believe in the equivalent of unicorns and Santa.

Privacy matters to most Australians, including Bagaric.[16] It is enshrined in a succession of foundational international agreements.[17] It is a basis of the liberal

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[12] For example Scott McNealy's quip "It's gone, get over it", quoted in Polly Sprenger, 'Sun on Privacy: 'Get Over It'', 7(1) *Wired* (January 2009).

[13] For example testimony by Australian Federal Police Assistant Commissioner Gaughan in the Senate Legal & Constitutional Affairs Legislation Committee 16 October 2012 Estimates hearing.

[14] Mirko Bagaric and James Allan, 'The vacuous concept of dignity' (2006) 5(2) *Journal of Human Rights* 257 and Mirko Bagaric, 'Rights Must Yield To Prosperity' in Brett Mason & Daniel Wood (eds) *Future Proofing Australia* (Melbourne University Press, 2013).

[15] Mirko Bagaric, 'Privacy Is The Last Thing We Need', *The Age* 22 April 2007.

[16] One test of that statement is that neither Bagaric nor the Senators have chosen to place all aspects of their own lives – and those of their families – on public display. There are times when everyone wants to shut the door, exclude the cameras, not be bothered by Michelle Grattan or Alan Jones and have some personal time. That desire should and can be respected; it is about being human rather about being feeble-minded.

democratic state, in which people rightly expect to live without arbitrary interference by the state and to be able exercise choice in decisions about employment, consumption, travel, religious and political affiliation and so forth.

Silent numbers are one way that ordinary Australians have sought to be left alone.[18] That is their choice. It is a choice that should be respected. A prohibition on charging does not force every to have a silent number. Some people will choose to remain in a publicly-accessible directory. Other people either are currently silent or will go ex-directory, for example because they settle down and have children or because they get tired of telemarketing and scam calls from India and other locations outside the Australian Do Not Call regime or (like 'refugees from Facebook') they are exercising their autonomy in drawing a line between public and private lives. People who want to be unlisted should not have to pay a penalty, especially a penalty that benefits corporate entities rather than the overall community. Their right to be left alone is a right, not a privilege. It is not a luxury or an indulgence.

As a society we do not impose a fee on people who refuse to invite voyeurs into their bathroom, who are careful to lock their front door and who draw the curtains before getting undressed. We respect – and encourage – such responsible behaviour. Imposition of the silent number fee discourages self-help. It is contrary to respect for privacy and autonomy. It commodifies privacy.

If people choose to go ex-directory they should be able to do so, without concern about a fee. If prohibition is required to persuade particular enterprises to remove the fee, given that those businesses are resistant to encouragement by MPs and calls for social responsibility, the Committee should indeed recommend prohibition.

In doing so it can address perceptions within the overall the overall community that none of the leading political parties have a genuine respect for privacy or a realistic appreciation of new world of Big Data. The Government for example, has signaled its contempt for both the Australian Law Reform Commission – which has suffered from ongoing cuts – and the Australian community by referring to the ALRC consideration of the privacy tort that was recommended by the ALRC in 2008 (and recommended by the NSW and Victorian Law Reform Commissions). That exercise in 'jellyback policymaking' tells us what the Government thinks of privacy and large corporations.[19] I urge the Committee to have more spine: stand up to Telstra and prohibit the fee.

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[17] Examples include the *Universal Declaration of Human Rights* Art 12; *International Covenant on Civil and Political Rights* Art 17; and United Nations *Convention on the Rights of the Child* Art 16.

[18] Another indication of the desire to be left alone is the strong support of ordinary Australians – irrespective of class, ethnicity, education or location – for the national Do Not Call register under the *Do Not Call Register Act 2006* (Cth).

[19] Bruce Arnold, 'Reform that wobbles like jelly: A spineless approach to privacy protection' (2013) at https://theconversation.edu.au/reform-that-wobbles-like-jelly-a-spineless-approach-to-privacy-protection-12787