

Submission 01

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Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into Do Not Knock Register Bill 2012

In this submission I address only the question of whether the Bill might be validly enacted by the Federal Parliament under the Australian Constitution. I make no comment on the policy considerations otherwise raised by the Bill.

Parliament only has the capacity to enact the Bill if the terms of the Bill fall under one or more of Parliament's heads of power set out in the Australian Constitution.

It is clear that the Bill has been drafted so as to fall under heads of power. This is evident in the key definition of 'marketing call' in section 5. It establishes that a marketing call is a 'visit' and that:

- (2) The visit is made:
 - (a) by, on behalf of, or for the benefit of, a corporation to which paragraph 51(xx) of the Constitution applies; or
 - (b) as part of, in relation to, or in connection with, trade and commerce:
 - (i) between Australia and places outside Australia; or
 - (ii) among the States; or
 - (iii) within a Territory, between a State and a Territory or between 2 Territories; or
 - (c) in connection with the use of a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution.

Section 5(5) states that the regulations may provide that a specified kind of visit is not a marketing call. By inference, it is also clear that the regulations cannot expand the definition of marketing call beyond the requirements set out in section 5(2). Further exceptions are made through the definition of 'designated marketing call' in Schedule 1.

The terms of section 5(2) establish a link between the types of marketing calls to which the Bill applies and heads of constitutional power. In particular, the section forges a link with the following powers:

- Section 51(xx): ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’;
- Section 51(i): ‘Trade and commerce with other countries, and among the States’;
- Section 122: ‘The Parliament may make laws for the government of any territory ...’; and
- Section 51(v): ‘Postal, telegraphic, telephonic, and other like services’.

The operative provisions of the Bill depend upon the definition of marketing call. In particular, section 8 states that a person must not make a marketing call in certain circumstances. Section 9 in dealing with agreements to make marketing calls is also similarly dependent on the concept.

Other matters dealt with by the Bill, such as the creation of a Do Not Knock Register, the imposition of civil penalties and the investigation of complaints, can be seen as incidental to the matters covered by sections 8 and 9.

The Bill may be unconstitutional even if it falls under head of power if it otherwise infringes a limit imposed by the Constitution. One possible limit might be the implied freedom of political communication.

However, the Bill has been drafted to avoid breaching that guarantee. The Bill exempts through the definition of designated marketing call the actions of candidates for office, political parties and the like. It also contains a savings clause in section 32 to ensure that it does not operate to the extent it might infringe the implied freedom.

My view is that, if passed, the Bill would be a valid enactment under the Australian Constitution.

Yours sincerely

George Williams