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**ADMA Submission to
Senate Standing Committee on the Environment,
Communications and the Arts on
the *Do Not Call Register Amendment Bill 2009***

22 January 2010

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2 EXECUTIVE SUMMARY

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to comment on the *Do Not Call Register Legislation Amendment Bill 2009* (the Bill) to the Standing Senate Committee for the Environment, Communications and the Arts.

Overall, ADMA supports the proposed extension of the Do Not Call Register (DNCR) to include fax numbers and some emergency service numbers. ADMA is however extremely concerned by the proposal to extend the DNCR to include business and government numbers.

To promote a well informed and evidence based discussion ADMA has commissioned an Access Economics study into the consequences of extending the DNCR. Access Economics has found that,

“Access Economics has been able to clearly identify a number of adverse consequences that would result from this legislation. While only some of the costs to businesses and the economy can be quantified with confidence, they clearly exceed any benefits. For example, total compliance costs are estimated to be \$71 - \$108 million in the first year of operation, and then \$47 - \$87 million in each subsequent year. Costs such as the reductions in revenues, employment, competition, innovation and market efficiency are all likely to be significantly higher than those that have been identified.”¹

The reasons put forward for the extension of the DNCR to business and government numbers have been a desire to increase productivity and address productivity and privacy concerns. In addition, the concept of privacy does not apply to corporations or government bodies.

Given the body of evidence now available an on-balance assessment points strongly to towards a conclusion that an extension of the DNCR to business and government numbers is unfounded.

The extension of the DNCR to business and government numbers will dampen, not increase, productivity. This places the business and government component of the DNCR extension at odds with the target of 2% productivity growth set by the Australian Government.

Whilst ADMA understands the annoyance of telemarketing calls the proposed cure to this problem will be worse than the perceived ill.

ADMA submits that the body of evidence now available calls into question whether the proposed extension to business and government numbers meets the threshold question of providing a net benefit to the community. As a result ADMA queries whether, under the Best Practice Regulation framework, this initiative should have proceeded to Bill stage without a proper Regulatory Impact Analysis having been completed.

ADMA notes that there are already significant protections in place for micro-businesses which are eligible under the current provisions of the *Do Not Call Register Act 2006* (the

¹ Access Economics, Economic impacts of an extension of the Do Not Call Register, 22 January 2010, page 19

DNCR Act) to place numbers on the DNCR. In addition, there should be some admittance of the fact that a business or government entity by fulfilling its function in the community and the marketplace should by its very nature be considered 'open for business'.

ADMA submits that not all 'problems' justify (additional) government action and we urge the Senate Committee to examine if there are alternatives, other than resorting to the blunt instrument of the DNCR through black letter law, that would address the issue of unwanted telemarketing calls but avoid the extensive problems associated with extending the DNCR to include business and government numbers.

There are also areas of significant concern with the Bill. Should the Bill proceed then these areas of concern, particularly the unsatisfactory treatment of legitimate business-to-business calls through the Registered Consent provisions, would have to be satisfactorily addressed. Areas of concern with the current Bill include:

- a) rectification of the current issues with ensuring only the telephone account holder can register telephone numbers
- b) the proposed implementation timeframe of six months is too short and a period of 12 months is required for industry to understand and implement any new obligations if the DNCR is extended
- c) the limitations of consent
- d) provision of information

3. THIS SUBMISSION

3.1 In this submission ADMA examines:

- the Productivity and Economic Implications of extending the DNCR to include business and government numbers
- the concept of privacy and its application to business and government entities
- the far reaching and little understood consequences of extending the DNCR to include business and government numbers
- the proposed extension of the DNCR to include business and government numbers from a best practice regulation perspective
- International benchmarks
- Areas of concern with the Bill

4. ABOUT THE AUSTRALIAN DIRECT MARKETING ASSOCIATION

- 4.1 The Australian Direct Marketing Association is the peak industry body of the Australian direct marketing industry.
- 4.2 ADMA's goal is to help companies achieve better marketing results through the enlightened use of direct marketing.
- 4.3 ADMA has over 500 member organisations including major financial institutions, telecommunications companies, energy providers, travel service companies, major charities, statutory corporations, recruitment firms, educational institutions and specialist suppliers of direct marketing services.
- 4.4 Direct marketing is used by almost every Australian company and not-for-profit organisation as a normal and legitimate part of its business activities and the ability to continue to conduct this activity underpins a good proportion of Australia's economic activity.
- 4.5 Telemarketing, as defined by the DNCR Act, is a key communication tool for almost every Australian organisation.
- 4.6 The Australian Direct Marketing Association sees frequent evidence that successful marketing relies heavily on the ability of businesses to approach potential customers through multiple channels and that the telephone is a vital component of this marketing mix.
- 4.7 Large and small organisations rely on the telephone as a personal and effective sales and customer service channel regardless of whether they consider themselves to be engaged in telemarketing or not. The reliance of business on traditional telemarketing in the business to consumer area is evidenced by the fact that:
- a) more than 3705 organisations and individuals are registered with the DNCR operator to check telephone numbers; and
 - b) more than 2.03bn telephone numbers have been washed against the DNCR since its inception in 2006 and 30 June 2009.²

² ACMA Communications report 2008-09, page 145

5 ADMA'S VIEW WITH RESPECT TO THE PROPOSED EXTENSION OF THE DNCR

- 5.1 The Australian Direct Marketing Association supports the proposed extension of the DNCR to include:
- a) fax marketing; and
 - b) some emergency service numbers on the DNCR.
- 5.2 ADMA's views with respect to our qualified support for the extension of the Do Not Call Register to include emergency service numbers are detailed in Section 14.
- 5.3 ADMA also strongly supports the Government's decision to retain the current provisions in the DNCR Act that require telephone numbers to be re-registered every three years. Without this rule 40% of the telephone numbers on the DNCR would be out of date within five years. That is, 40% of telephone numbers would no longer be used by the individual who registered the telephone number on the DNCR. ADMA's views with respect to the three year expiry are further detailed in Section 13.
- 5.4 However ADMA is extremely concerned by the consequences of extending the DNCR to include business and government numbers. The two main areas of justification for extending the DNCR to include business and government numbers, productivity and privacy, appear to be unfounded because:
- a) any productivity gains for business and government will be exceeded by cost to business;
 - b) the concept of privacy does not extend to corporations and government bodies.
- 5.5 As noted above, micro-businesses are already eligible to register telephone numbers on the DNCR.
- 5.6 ADMA recognises that on initial consideration the extension of the DNCR to business and government numbers might be considered a benefit to business and acknowledges the Government is trying to solve concern in relation to the rate of telemarketing and fax marketing to business and government numbers.
- 5.7 However further in-depth investigation reveals that, overall, the inclusion of business and government numbers on the DNCR will harm not help business, including small business.

6 PRODUCTIVITY AND THE ECONOMIC IMPACT OF EXTENDING THE DNCR TO INCLUDE BUSINESS AND GOVERNMENT NUMBERS

6.1 OBJECTIVES OF THE BILL

- 6.1.1 The Second Reading speech of the Bill outlines the expected benefits of the Bill to be,

“[The] bill will benefit those organisations that currently experience losses in productivity or other expenses by prohibiting unsolicited marketing calls or faxes.”³

and the compliance costs to be

“there are expected to be some compliance costs for business-to-business telemarketers and fax marketers who have not previously been required to use the register. However, these compliance costs are expected to be in line with the costs that telemarketers incurred with the introduction of the original DNCR and are not expected to be large. For example, the current cost to check 20 000 numbers against the register is \$78 per year. A 2009 independent study conducted by the call centre industry found that 90 per cent of call centres surveyed experienced no change in gross revenues following the introduction of the original register, and none experienced decreased gross revenues.”⁴

- 6.1.2 This submission examines in detail the benefits and costs associated with extending the DNCR to business and government numbers. Significantly the benefits are outweighed by the costs, in large measure, and it has been demonstrated that the costs outlined in the Second Reading Speech are significantly understated and over-simplified.
- 6.1.3 As a result the extension of the DNCR will reduce not improve the productivity of business and will not achieve the objectives that the Government is trying to achieve.

³ Second Reading Speech, House of Representatives, Do Not Call Register Legislation Amendment Bill 2009, Thursday 26 November 2009

⁴ Second Reading Speech, House of Representatives, Do Not Call Register Legislation Amendment Bill 2009, Thursday 26 November 2009

6.2 KEY FINDINGS OF ACCESS ECONOMICS

6.2.1 To promote a balanced and informed discussion and ensure that the full range of consequences of extending the DNCR are taken into consideration ADMA commissioned Access Economics to investigate and report on the economic consequences of extending the DNCR to include business and government numbers.

6.2.2 Access Economics' Final and Preliminary Reports are provided as Attachments A and B of this submission respectively.

6.2.3 In summary, Access Economics has found that

“Access Economics has been able to clearly identify a number of adverse consequences that would result from this legislation. While only some of these costs to businesses and the economy can be quantified with confidence, they clearly exceed any benefits. For example, total compliance costs are estimated to be \$71-\$108 million in the first year of operation, and then \$47 - \$87 million in each subsequent year. Costs such as the reductions in revenue, employment, competition, innovation and market efficiency are all likely to be significantly higher than those that have been identified.”⁵

“More generally, however, the proposed extension of the DNCR aims to address concerns raised by some businesses that the receipt of unsolicited telemarketing calls leads to a loss in productivity.

However these productivity concerns must be weighed against the wide-reaching impacts that are likely to flow from the inclusion of business numbers on the DNCR. It is important to note here that, in addition to traditional ‘telemarketing’ organisations, many businesses that do not recognise their current selling or promotion activities as ‘telemarketing’ would also be affected by the new legislation. These impacts include the following:

- *the flow-on economic impacts on competition and innovation will be significant, for example new entrants may find it more difficult to gain a sustainable market share, in turn reducing competitive pricing and innovative products and services.*
- *Telemarketing is an efficient means of providing businesses with information and leads to improved efficiencies.*
- *For some organisations, telemarketing is the only effective means of promoting their goods and services and losing a substantial proportion of this ability to market themselves will result in a loss of competitiveness and revenue.*
- *For other organisations, complementary marketing channels are less effective without the addition of telemarketing, resulting in a rise in the average cost of new account acquisitions. These*

⁵ Access Economics, Impacts of an extension of the Do Not Call Register, 22 January 2010, page 19

higher costs will be expected to result in reduced revenues and/or to be passed on to consumers.

- *While some organisations report the effective use of alternative marketing channels, typically these have lower conversion rates and higher costs associated with acquiring new accounts.*
- *Organisations that call other businesses in order to sell or promote their goods or services will be adversely impacted through increased compliance costs, largely due to internal process changes.”⁶*

6.3 THE BENEFITS OF EXTENDING THE DNCR TO INCLUDE BUSINESS AND GOVERNMENT NUMBERS

6.3.1 Access Economics has estimated that estimated cost of unwanted calls is between \$34.4m and \$47.1m per annum based on a total volume of 356 million B2B calls.

6.4 THE COST OF EXTENDING THE DNCR TO INCLUDE BUSINESS AND GOVERNMENT NUMBERS

6.4.1 In addition to its overall findings, Access Economics has also confirmed that the cost to business of extending the DNCR will exceed any productivity benefits that may be achieved.

6.4.2 Its report found that the impact of extending the DNCR included:

- a) impact to competition and innovation;
- b) compliance costs;
- c) increased marketing costs;
- d) flow on impacts;
- e) impact to employment.

⁶ Access Economics, Economic impacts of an extension of the Do Not Call Register, 22 January 2010, pages 1-2

6.4.3 A table from Access Economics' Final Report summarising the costs and benefits of expansion of the DNCR to B2B calls is included below.

Table 1: Summary of costs and benefits of expansion of the DNCR to B2B Calls⁷

Impacts		Costs/Benefits	
Low	Call washing costs	Cost	\$1.4m - \$2.2m per annum
Moderate	Compliance – increased costs to business of complying with legislation (in addition to washing)	Cost	Establishment costs \$23.7 million Ongoing costs: \$46 - \$82 million per annum
	Reduced employment	Cost	Two thirds of survey respondents reported that they would reduce employees as a direct result of the DNCR expansion
	Productivity gains due to reduction in number of unwanted calls	Benefit	\$34-47 million per annum
High	Decline in market efficiency due to reduction of competition, information and innovation	Cost	Unable to be quantified
	Loss of revenues via flow-on effects to end-users of products sold through telemarketing	Cost	Unable to be quantified

6.5 IMPACT TO COMPETITION AND INNOVATION

6.5.1 ADMA submits that there will be significant economic consequences with respect to competition and innovation if the DNCR is extended to include business and government numbers.

6.5.2 The DNCR, due to the existence and structure of the consent provisions, favours incumbents with well established customer databases. These provisions also disadvantage small businesses and new entrants.

6.5.3 In its Final Report Access Economics states,

- *“the flow-on economic impacts on competition and innovation will be significant, for example new entrants may find it more difficult to gain a sustainable market share, in turn reducing competitive pricing and innovative products and services.”⁸*

⁷ Access Economics, Economic impacts of an extension of the Do Not Call Register, 22 January 2010, page ii

⁸ Access Economics, Economic impacts of an extension of the Do Not Call Register, insert date, page 1

6.5.4 In the Second Reading Speech of the Bill, the potential impact to competition and innovation was noted and the Registered Consent mechanism was advanced as the solution to address these concerns.

6.5.5 This solution involves a two step process. The individual registering a number places the number on the DNCR and then has to take an active step to opt in to receive telemarketing calls from specific industry sectors.

6.5.6 Access Economics, in its Final Report, stated,

“Extension of the DNCR will have important ramifications for competition and innovation. In particular, there is likely to be a disproportionate impact on those businesses that cannot rely on ‘existing business relationships’, especially small businesses and those that are unlikely to generate repeat business from customers.

In addition, market entry for new players will be hindered through lack of access.”⁹

6.5.7 Access Economics also considered the Registered Consent proposal and found

“The Registered Consent (‘opt in’) mechanism requires businesses to actively nominate which industries they would like to receive telemarketing calls from. This is counter-intuitive because businesses may not know what sort of products or services they may be offered that would be beneficial to their business operations. Businesses have incomplete information about the potential opportunities to, for example, reduce costs or improve systems that they may be foregoing by choosing to receive telemarketing calls from some industries and not from others.

In addition, businesses that make the decision to place their number on the DNCR are likely to have strong reservations about receiving any telemarketing calls ie they are unlikely to actively nominate to receive telemarketing calls from certain industries. Several survey respondents expressed concern that SMEs in particular are not well-enough informed about the potential disadvantages of opting out from all telemarketing calls.

Case study: Business opportunity through telemarketing

One company, which uses telemarketing to set up meetings with potential clients, noted that they approached a particular firm in the entertainment industry that was in difficulty and showed them how their product could improve cash flows by effectively “re-engineering the business”. After successfully selling the product, the client’s

⁹ Access Economics, Economic impact of an extension of the Do Not Call Register, 22 January 2010, page 15

business improved dramatically. However the client in question would not have thought to purchase the product had they not been approached directly.”¹⁰

6.6 COMPLIANCE COSTS

6.6.1 Access Economics also found that compliance costs arising from washing numbers are only a small component of compliance costs. The greater compliance costs include establishment of compliance systems and the cost of maintaining compliance once the DNCR is extended.

Table 2: Compliance costs of DNCR, excluding licences (\$m)¹¹

	Establishment	On-going	Total
Survey results (actual)	\$23.7	\$81.9	\$105.7
Survey results (adjusted small cost = 2 x large)	\$23.7	\$45.7	\$69.4

6.7 INCREASED MARKETING COSTS

6.7.1 The telephone is one of the most cost effective means of direct marketing. This applies to both small and large business.

6.7.2 Whilst costs of telemarketing vary, telemarketing is the most effective channel (24% conversion rate), direct mail (16% conversion rate). By eliminating the ability to use this channel for a significant proportion of the market, businesses (of all sizes) will have an increase in marketing costs.

6.7.3 Access Economics in its Final Report states,

“For some companies, telemarketing is the only viable marketing option. For example, a company whose product or service is complex and/or requires a significant capital outlay typically requires several discussions with potential customers to explain fully the benefits the client may receive. These companies may not have the option to target clients via email or direct mail, and conversion rates for different marketing channels may be significantly less.

Companies may also have used other forms of marketing in the past with very low to negligible success rates. For these companies, experience has shown that telemarketing is the only viable method for selling their product or service.

¹⁰ Access Economics, Economic impacts of an extension of the Do Not Call Register, 22 January 2010, page 5

¹¹ Access Economics, Economic impacts of an extension of the Do Not Call Register, 22 January 2010, page 15

Case study: Telemarketing as the only viable marketing option

For one company that sells subscriptions to a loyalty scheme, telemarketing is the only effective marketing channel. Other marketing channels such as direct mail, print advertising and television advertising have been unsuccessful.

In fact, a television advertisement that ran for two weeks made no difference to the number of sales made. This company also cited the example of an overseas subsidiary that ran advertisements to promote the loyalty scheme: this form of marketing led to a decrease in the number of sales made through telemarketing because some potential customers were already aware of the scheme and were less likely to listen to the telemarketing agent's pitch.”¹²

6.8 FLOW-ON IMPACTS

- 6.8.1 In addition to the costs to business including the impact to competition and innovation, Access Economics has also identified other costs to business that will arise as a result of flow on impacts. These costs include direct loss of revenues to telemarketing call centres as well as to the providers of the goods and services,

“An expansion of the DNCR would also have flow-on impacts for the wider economy. To the extent that B2B telemarketing is restricted, there will be a direct loss of revenues to telemarketing call centres as well as the providers of goods and services that employ telemarketing as part of their overall marketing strategy. Given the uncertainties surrounding both a definition of the industry itself and the rate of take-up under the proposed legislation, it is not possible to quantify the loss of revenues. It could, however, be expected to exceed any benefits gained through increased productivity by a very significant margin.”¹³

- 6.8.2 The case study below illustrates the nature of flow on impacts through lost revenues,

“Case Study: Impact on regional Australia

A business that sells entertainment services, primarily to customers in regional and remote areas of Australia, revealed that in some cases the purchase of their services by a regional business had increased the viability of their business; importantly, this also had a wider positive impact on the country town.

¹² Access Economics, Economic Impacts of the extension of the Do Not Call Register, 22 January 2010, page 14

¹³ Access Economics, Economic Impacts of the extension of the Do Not Call Register, 22 January 2010, page 16

This business relies heavily on B2B telemarketing calls to arrange appointments with potential customers. Should an extension of the DNCR restrict the sales activity of this business, there may be significant implications for not only the business, but also the regional and remote areas where the majority of the sales activities occur.”¹⁴

6.9 IMPACT TO EMPLOYMENT

6.9.1 The survey conducted by Access Economics indicated that

“An extension of the DNCR will also have negative consequences for employment. Two-thirds of survey responses indicated that they would expect to lay off staff if the DNCR were expanded to include B2B telemarketing.

Anecdotaly, industry has also expressed concern about how the proposed DNCR extension will affect employment, as noted in the following case study.

Case Study: Closure of call centres

One business that operates a number of small call centres in both metropolitan and regional areas stated that a significant take-up rate by business following an expansion of the DNCR would probably lead to staff redundancies. Furthermore, the business would be more likely to close whole centres, which at a minimum could result in the loss of about 20 jobs in one regional centre.

6.10 IMPACT TO CALL CENTRE INDUSTRY

6.10.1 *callcentres.net 2009 Australian Contact Centre Industry Benchmarking Report* reports that the entire call centre industry generated \$13.7bn revenue in 2009 and has more than 192,800 seats in Australia.

6.10.2 Outbound sales activity represents 8% of all call centre activity.

6.10.3 26% of all staff are part-time agents with 11% of call centres allowing telebased workers. The hourly rate of part-time agents is \$23.7 per hour and the primary motivation of the work force is the flexible working arrangements.

6.10.4 The call centre industry provides important employment for people with carer responsibilities and those with children.

¹⁴ Access Economics, Economic impact of an extension of the Do Not Call Register, 22 January 2010, page 17

- 6.10.5 The importance of call centres to such states as Tasmania was recently noted on Monday 18th January 2010¹⁵ by the Premier of Tasmania, David Bartlett.
- 6.10.6 The *callcentres.net 2009 Australian Contact Centre Industry Benchmarking Report* reports that fewer than one third of Contact Centre Managers support the extension of the DNCR to business and government numbers. 9% of Contact Centre Managers believe this will negatively impact their gross revenue and 7% believe that this will decrease their headcount.

6.11 IMPACT TO SMALL BUSINESS

- 6.11.1 There will be significant consequences for small business if the DNCR is extended to include business and government numbers.
- 6.11.2 ADMA notes that

*“Restrictions on competition and the cost to business of complying with regulation are areas of particular concern to the Australian Government. The cumulative impact of government regulation (Australian Government, state/territory and local) on business and individuals imposes significant direct costs, and diverts management from core business activities. Small businesses are often disproportionately affected, lacking the resources to dedicate to such activities. While compliance costs are not the only costs that regulation imposes on business, or the wider community, the Government has recognised that they deserve particular attention.”*¹⁶

- 6.11.3 Access Economics reports

*“They [small business] consistently reported that it would be “a major impost” and “a restriction of trade” that would inhibit their ability to acquire new business.”*¹⁷

- 6.11.4 To illustrate the additional costs that small business will incur as a result of the proposed extension of the Do Not Call Register a case study is outlined below.

Case Study: lawn mowing service wants to call a government office in the local area to offer their services.

¹⁵ David Bartlett, MP, Media release, Data centre industry development strategy to create more jobs, Monday 18 January 2010

¹⁶ Australian Government 2007, *Best Practice Regulation Handbook*, Canberra, page 32

¹⁷ Access Economics, Economic Impact of an extension of the Do Not Call Register, Final Report, 22 January, page 11

The owner of a lawn mowing service is advised by a friend that a government office in his local area is just about to lose its grounds person. The friend provides the name and number of the relevant manager to the government office. The owner checks the number on the DNCR and finds that the number is on the DNCR.

On the advice provided by ACMA, the owner then asks his friend to provide written confirmation from the Manager that they are happy to receive his call so he can keep a record of express consent. After a second follow up call to the friend the email is provided and the owner proceeds to make the phone call.

It costs the owner time to chase down the consent prior to making the call whereas prior to the extension of the DNCR Act the owner would have simply picked up the phone.

7 THE CONCEPT OF PRIVACY DOES NOT EXTEND TO BUSINESSES AND GOVERNMENT

- 7.1 The conceptual framework that supports privacy is human rights. Human rights, including those encompassed by the International Covenant on Civil and Political Rights by their very nature accrue to individuals, they do not accrue to corporations or governments.
- 7.2 The *Privacy Act 1988* (Cth) only protects the privacy rights of individuals. Section 6(1) of the Privacy Act defines an individual to be a natural person.
- 7.3 Indeed the Preamble to the *Privacy Act 1988* specifically gives effect to the right of persons not to be subject to arbitrary or unlawful interference with their privacy, family home or correspondence.
- 7.4 The Australian Law Reform Commission in its report *For your information: Australian Privacy Law and Practice* noted
- “The Privacy Act 1988 (Cth) only protects the rights of individuals. This means that entities, such as groups of people and corporations, are unable to obtain direct protection of the Act.”¹⁸*
- 7.5 Therefore the in-principle justification for introducing the DNCR for consumers, which was on the basis of privacy, does not apply in a business and government context.
- 7.6 ADMA also notes that a business or government entity by fulfilling its function in the community and the marketplace should by its very nature be considered ‘open for business’.
- 7.7 Any justification for the extension of DNCR to business and government numbers therefore must be done on the basis of economic or productivity arguments.

¹⁸ Australian Law Reform Commission, *For your information: Australian Privacy Law and Practice*, Page 337

8 FAR REACHING AND LITTLE UNDERSTOOD CONSEQUENCES THAT THE DNCR WILL AFFECT COMMERCE IN GENERAL

8.1 THE DEFINITION OF TELEMARKETING CALL IS EXTREMELY BROAD

8.1.1 Due to the broad definition provided under the DNCR Act for telemarketing calls an extension to include business and government numbers will affect commerce in general.

8.1.2 Telemarketing calls, as defined by section 5 of the DNCR Act, include a myriad of different commercial activities including:

- a) calls offering goods and services such as banking and financial products, telecommunications, office equipment
- b) calls offering the services of a supplier or contractor

8.1.3 However the definition of a telemarketing call includes many business-to-business calls which wouldn't ordinarily be classified as a telemarketing call. Examples of these types of calls include:

- a) a CEO calling a senior member of another firm to discuss the provision of services;
- b) calls by business development managers to companies with whom their organisation doesn't have an existing business relationship;
- c) media organisations (including magazine publishers) asking people to write an article in a publication that promotes their business;
- d) newspapers calling companies to see if they want to obtain advertising space;
- b) indeed, calls made by this association and many other similar organisations seeking sponsors for events or conferences.

8.1.4 Access Economics advises that

“The telemarketing industry is extremely diverse in nature, particularly in the business-to-business (B2B) sector. For example, a company’s telemarketing operations could entail one part-time employee using publicly available information to contact potential clients, or an out-sourced call centre using purchased contact lists. Indeed, many small businesses do not recognise their marketing activities as “telemarketing”, even though they would be so defined under the Act. Furthermore, the nature of the product being sold and its target market will affect the success rate and cost structure of a firm’s telemarketing activities, making industry-wide benchmarks impossible to define. The telemarketing industry is therefore yet to be precisely measured.”¹⁹

¹⁹ Access Economics, Economic impact of extending the Do Not Call Register, 22 January 2010 , page i

8.2 LIMITED AWARENESS OF THE IMPACT OF EXTENDING THE DNCR

8.2.1 As a result of the role that ADMA has in relation to the DNCR, we have had the opportunity to canvass the proposed extension of the DNCR with a number of businesses, both large and small. These discussions have occurred with members of ADMA and also a broad variety of organisations who are not members of ADMA.

8.2.2 In most cases we have found that many businesses (both large and small) are not aware that by extending the DNCR the activities that they engage in with respect to make phone calls will be subject to DNCR requirements.

8.2.3 In general the reaction of these businesses includes:

- a) disbelief that their activities fall into the classification of telemarketing call;
- b) considerable concern at the cost and imposition the extension of the DNCR will have on their daily operations;
- c) regrettably sometimes a determination to continue business operations as normal without checking the register in the belief that it wont get caught or wont be reported.

8.2.4 Clearly this last point is not a position sanctioned by ADMA.

8.2.5 ADMA submits that the level of support for the extension of the DNCR would be significantly reduced if there was a better understanding of the real consequences for business if the DNCR was extended to include business and government numbers.

8.2.5 Notwithstanding the above, the creation of regulatory obligations that a significant proportion of businesses are unlikely to be aware of, or have no intention of complying with, cannot be a satisfactory outcome from a best practice regulatory perspective.

8.2.6 Certainly it will make the legislation irrelevant in some instances and extremely difficult to enforce in others as has happened in the United Kingdom.

8.3 ACMA IS A WELL RESOURCED, DILIGENT AND EFFECTIVE REGULATOR

8.3.1 Regardless of whether some businesses will want to ignore their legislative obligations, businesses will need to comply with an extended DNCR or they will face regulatory scrutiny from the Australian Communications and Media Authority (ACMA).

8.3.2 The ACMA is a well resourced, diligent and effective regulator.

8.3.3 During the period 2008-2009 ACMA:

- a) issued 390 advisory or warning letters

- b) issued seven infringement notices, with the largest penalty paid being \$147,400
- c) accepted eight enforceable undertakings
- d) issued six formal warnings

8.3.4 ACMA also reported a 60 per cent decrease in the number of complaints received during 2008-2009 relative to the number of complaints received during 2007-2008.

8.4 SUBSTANTIVE PENALTIES APPLY

8.4.1 ACMA also has substantial powers to enforce the DNCR Act including the ability to:

- a) issue formal warnings;
- b) conduct formal investigations;
- c) issue infringement notices with a maximum penalty of \$110,000 for each day on which contraventions occur;
- d) take action in Federal Court for the imposition of maximum penalties of \$1.1m for each day on which contraventions occur.

8.5 ALL BUSINESSES THAT MAKE TELEMARKETING CALLS WILL HAVE TO COMPLY WITH THE EXTENDED DNCR AND CARRY THE COMPLIANCE COST

8.5.1 This means that many businesses that expect to receive benefit from reduced telemarketing calls will have to carry the cost of complying with the DNCR.

8.5.2 In many cases, these businesses will not be aware of the additional compliance burden this legislation will place on them until the DNCR for business and government is established.

9. FROM A BEST PRACTICE REGULATION PERSPECTIVE

- 9.0.1 As stated previously whilst the initial idea of preventing telemarketing calls may be appealing the practical application of a law that will achieve this has some significant drawbacks and will have far reaching unintended consequences.
- 9.0.2 ADMA submits that the privacy and productivity arguments for the extension of the DNCR to include business and government numbers are unfounded.
- 9.0.3 It is essential, in a case such as this, where there is uncertainty about the overall economic consequences that the utmost care is taken with respect to ensuring that this component of the Bill, if it proceeds, delivers both effective and efficient regulation.

9.1 THE CONSULTATION PAPER

- 9.1.1 Although, it has been reported that 86% of respondents, to the Department of Broadband, Communications and the Digital Economy's *Discussion Paper on the Eligibility Requirements for the registration on the Do Not Call Register*, August 2008 (Discussion Paper) indicated that they supported the extension of the DNCR, provision of a greater level of granularity with respect to responses to the Discussion Paper would assist the legislative development process.
- 9.1.2 For example:
- a) respondents indicated that the number of calls on average was in the order of 5 a week however those respondents that were against the extension indicated that there would be significant negative consequences for their business including job losses.
 - b) No data has been provided with respect to the breakdown of the respondents. For example some respondents concentrated on the proposal to extend the DNCR to emergency service numbers or fax numbers but did not comment on telemarketing.
 - c) Not one submission from large business indicated support for the extension of the DNCR to provide them with protection from telemarketing.
- 9.1.3 Further, at no time has data been made available quantifying the level of complaint in relation to:
- a) fax marketing;
 - b) telemarketing to business and government numbers;
 - c) telemarketing to emergency service numbers.

9.2 REGULATORY IMPACT STATEMENT

- 9.2.1 In seeking to solve the issue of productivity concerns associated with telemarketing calls the Bill will increase the costs to business overall and it will not deliver a net benefit to Australia.
- 9.2.2 ADMA submits that not all 'problems' justify (additional) government action and we urge the Senate Committee to examine if there are other alternatives to black letter law that would avoid the imposition of another set of regulations on Australian business.
- 9.2.3 ADMA notes with concern that a Regulatory Impact Statement including a full (quantitative) assessment of the costs using the Business Cost Calculator was not released with the Bill or Explanatory Memorandum contrary to good regulatory process.
- 9.2.4 Given the far reaching consequences for business a full assessment of the impact of this legislation should be conducted and a Regulatory Impact Statement should be made available before this legislation proceeds.
- 9.2.5 ADMA submits that a Regulatory Impact Statement should have been prepared during the preliminary analysis of the regulation and prior to the policy decision being made.

"Transparency Stage

*After policy approval has been given, the final RIS and BCC report, which should be of a standard suitable for publication, is made available to the public."*²⁰

- 9.2.6 Further the Australian Government 2007, *Best Practice Regulation Handbook*, Canberra states that only the option that generates the greatest net benefit for the community taking into account all the impacts should be adopted.

In 2006 the Government endorsed the following six principles of good regulatory process identified by the Taskforce on Reducing Regulatory Burdens on Business.

- *Governments should not act to address 'problems' until a case for action has been clearly established.*
 - *This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognizing that not all 'problems will justify (additional) government action.*
 - *A range of feasible policy options (including self-regulatory and co-regulatory approaches) need to be identified and their benefits*

²⁰ Australian Government 2007, *Best Practice Regulation Handbook*, Canberra, page 35

and costs (including compliance costs) assessed within an appropriate framework.

- *Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.*
- *Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.*
- *Mechanisms are needed to ensure that the regulation remains relevant and effective over time.*
- *There needs to be effective consultation with regulated parties at all stages of the regulatory cycle.”²¹*

²¹ Australian Government 2007, *Best Practice Regulation Handbook*, Canberra, page 2-3

10 INTERNATIONAL BENCHMARKS – THE UNITED KINGDOM CORPORATE TPS

- 10.1 The United Kingdom operates a Corporate Telephone Preference Service (CTPS) that allows business and government numbers to opt out of telemarketing.
- 10.2 By extending the DNCR to include business and government numbers, Australia will become the second country in the world to attempt to introduce a choice mechanism for telemarketing for business and government numbers.
- 10.3 It is ADMA's understanding is that:
- a) the Corporate TPS has a low rate of awareness and low profile;
 - b) there are a very low rate of complaints made in relation to alleged breaches of the CTPS despite a relatively large number of telephone numbers being included on the register;
 - c) in reality the CTPS makes little difference as people who are telephoned in large organisations are unaware that their number is registered and many small organisations have a low awareness of the Corporate TPS and its operation;
 - d) large businesses not small businesses are more likely to be aware that they can register their numbers on the Corporate TPS and therefore more telephone numbers used by large businesses are registered on the Corporate TPS.
- 10.4 The United Kingdom's industry's view is that the CTPS, as currently implemented, does not work in the way Government envisaged and is, in fact, damaging rather than helpful, to British business as a whole and to SMEs in particular.
- 10.5 The very people that the Corporate TPS was designed to protect have been materially disadvantaged by the introduction of the Corporate TPS.
- 10.6 Specifically, the CTPS has:
- a) unnecessarily restricted the normal conduct of business development;
 - b) increased the cost associated with the normal conduct of business and commerce in the UK;
 - c) had a detrimental effect on small business in particular.
- 10.7 It has become clear that CTPS imposes on small businesses a new operational cost. The Regulations apply equally to all businesses. Any small business wishing to make sales calls must validate the numbers they wish to call against the CTPS file.
- 10.8 On the basis of the above, it would seem that even adjusting for cultural differences the advancement of an Australian model warrants careful consideration before steps are taken to implement an Australian equivalent.

11 AREAS OF THE BILL REQUIRING ADDITIONAL CONSIDERATION

11.0.1 ADMA wishes to draw attention to a number of areas of concern in the current Bill. These include:

- a) legitimate business-to-business calls
- b) unauthorized registration of telephone numbers
- c) implementation timeframes
- d) consent
- e) provision of information

11.1 TREATMENT OF LEGITIMATE BUSINESS – TO – BUSINESS CALLS

11.1.1 ADMA submits that the inclusion of Registered Consent provisions in Section 11 (3a) of the Bill does not adequately deal with the serious and complex issue of the impact extending the DNCR will have on legitimate business-to-business calls.

11.1.2 On 12 May 2009 Senator Conroy's announcement indicated that the legislation would allow for 'legitimate business-to-business calls'.

11.1.3 The Second Reading Speech of the Bill outlines the Government's intention not to impinge on business-to-business communications,

"This change is not intended to impinge on business-to-business communications which are an important part of everyday business activity. Businesses can still contact other businesses with whom they have a relationship under the current inferred consent provisions. Businesses can still contact other businesses with whom they have a relationship..... However 'cold calls' and marketing faces to businesses that do not fall under the express or inferred consent provisions in the act will be prohibited for numbers that are listed on the Do Not Call Register."²²

11.1.4 The effects on competition and innovation of the Registered Consent are discussed in more detail in Section 6.5.7.

11.1.5 In addition to the Competition and Innovation concerns, the Registered Consent approach is unworkable for three main reasons:

- a) In the context of a government website where the advantages of receiving unspecified telephone calls are not likely to be clearly apparent ADMA believes that the take-up rate of this opt-in function will be extremely low. That is in the low single figure range;
- b) The cost associated with assessing what industry sector a product may fall into will be prohibitive;

²² Second Reading Speech, Do Not Call Register Legislation Amendment Bill 2009, House of Representatives, 26 November 2009

- c) Significant uncertainty about what industry sector a product falls into may lead to an organisation not wanting to take the risk of having complaints made against it.

11.1.6 To illustrate, a health insurer may have difficulty in determining whether their product is a medical product or a financial product. It may choose not to use the Registered Consent provisions because consumers or businesses may also have trouble determining which industry sector category this product belongs to and the uncertainty will result in complaints being made to ACMA.

11.1.7 Whilst ADMA does not support the extension of the DNCR to include business and government numbers, if the Bill were to proceed the serious deficiency in the treatment of legitimate business-to-business calls must be rectified.

11.1.8 Other possible alternatives to the Registered Consent approach provided in the Bill are the introduction of:

- a) a business-to-business consent provision that allows telemarketing calls to be made to business and government entities that are related to the operation of the business;
- b) a Registered Consent regime that operates on an opt-out basis.

11.1.1 [A BUSINESS-TO-BUSINESS CONSENT PROVISION \(WHERE THE CALL IS RELATED TO THE OPERATION OF THE BUSINESS\)](#)

11.1.1.1 This option would involve 'Opting Out' from all calls but extending the consent provisions of the DNCR Act to include calls that relate to the operation of the business. Such a mechanism would allow business to withdraw consent to be called by individual companies on a per organisation basis.

11.1.1.2 Access Economics found that

"The majority of businesses surveyed (73%) indicated that the second expansion option above most closely meets the definition of 'legitimate B2B calls.'" ²³

where the second expansion option was 'Opting out' from all calls but inferred consent exists where the call relates to the operation of the business, unless the business has withdrawn consent to be called on a per organisation basis.

11.1.1.3 This option most accurately describes business-to-business calls but nonetheless, would still be a significant impost on industry.

²³ Access Economics, Economic impacts of an extension to the DNCR, insert date, page 5

- 11.1.1.4 Industry would still have to implement compliance systems. However the economic consequences of extending the DNCR to business and government numbers would be substantially mitigated as business would still be able to continue to make telemarketing calls to business and government entities (so long as the product was related to the operation of the business).
- 11.1.1.5 Additional complexity would still occur for business as it would have to determine the nature of the company before making a call.
- 11.1.1.6 Additionally, the new regime would provide business and government with the ability to control unwanted telemarketing calls over and above what is available today.
- 11.1.1.7 Notwithstanding the advantages above, business and government would have to withdraw consent on a per organisation basis which would significantly undermine the effectiveness of the DNCR.

11.1.2 REGISTERED CONSENT ON AN OPT-OUT BASIS

- 11.1.2.1 This option involves 'opting out' from selected industries (as opposed to opting out from all calls and then opting in for selected industries. There would be no 'select all' button.
- 11.1.2.2 This solution is the probably the most workable in terms of its ability to balance the desire to provide additional and effective control to business and government entities with respect to the receipt of telemarketing whilst limiting the substantive competitive and innovation and loss of revenue flow-on effects of extending the DNCR on business.
- 11.1.2.3 There are still substantial issues with this approach. For example, industry would still need to assess each product against industry sectors and the same compliance costs would still apply. Nonetheless, it does provide a possible way forward.
- 11.1.2.4 As a result, ADMA submits that the re-engineering of the Bill such that business and government registrants have to opt-out of industry sectors as a possible way forward, if the Bill was to proceed.

11.2 UNAUTHORISED REGISTRATION OF TELEPHONE NUMBERS

- 11.2.1 Under the DNCR Act, only the telephone account holder may register a telephone number on the DNCR.
- 11.2.2 With the exception of a requirement to tick a box to confirm that the registrant is the telephone account holder and an email activation step, the DNCR registration process allows anyone to register anyone's telephone on the DNCR.

- 11.2.3 This loophole gave rise to a substantial number of numbers which not allowed under the DNCR Act being placed on the register with ACMA reporting
- “Up to 31 January 2008, of the numbers assessed by the ACMA arising from these complaints, 73 per cent were found to be eligible to remain on the DNCR, with the remainder assessed as ineligible and subsequently removed from the DNCR.”²⁴*
- 11.2.4 Industry resolved not to pursue this matter further with ACMA , not because business numbers aren't on the DNCR, but to reduce the number of complaints made by businesses that were forced to remove their numbers from the DNCR thus providing additional impetus for the DNCR to be extended to business and government numbers.
- 11.2.5 However, the issue of ensuring that only the telephone account holder or an authorised representative of a company can register a number becomes vitally important in a business and government context.
- 11.2.6 The registration of a business' numbers on the DNCR will have significant ramifications for the number and nature of beneficial business offerings and opportunities provided to this business.
- 11.2.7 A DNCR that allows business and government numbers to be registered must have suitable protections to stop unauthorised employees of organisations registering a company's number and/or their direct dial number contrary to company policy and without the appropriate authorisation.
- 11.2.8 This action could be taken by employees who view this through a limited perspective and do not understand the full range of consequences for their firm if it does not receive business opportunities by the telephone.
- 11.2.9 The DNCR does not provide a facility for businesses or government agencies to check or be notified that their numbers have been included on the DNCR. As a result it will be extremely difficult for a business or government to identify that a drop off in calls is the result of its numbers being placed on the DNCR.
- 11.2.10 ADMA notes that given the potential implications for business, it is not outside the realms of possibility that a competitor or a supplier to an important customer may be tempted to take the step of registering its competitor's or customer's numbers on the DNCR. Certainly the current processes would allow such an activity to occur.
- 11.2.11 Further, ADMA understands that in the United States, the Federal Trade Commission has had to contend with the problem of companies placing their entire customer database on the Do Not Call Register to prevent competitors from calling them.

²⁴ ACMA Communications report 2008-09 page 146

11.2.12 To prevent these problems from arising, ADMA proposes that the Bill should be amended such that any registrant should, at a very minimum, mandatorily provide an account number and a telephone number when registering a business or government telephone number.

11.3 IMPLEMENTATION TIMEFRAMES

11.3.1 Section 2 of the Bill states that the provisions of the Bill will commence on a single day to be fixed by Proclamation or at least within the period of six months beginning on the day of the Act receiving Royal Assent.

11.3.2 This is an insufficient time for industry to implement such a far reaching and complex set of regulatory requirements.

11.3.3 A 12 month timeframe was provided for the introduction of the original DNCR and the same timeframe should be provided if the DNCR is extended.

11.4 THE LIMITATIONS OF CONSENT UNDER THE CURRENT DNCR REGIME

11.4.1 Schedule 2, Section 2 (b) of the DNCR Act specifies that inferred consent exists if consent can reasonably be inferred from the conduct and the business and other relationships of the individual or organisation concerned.

11.4.2 As a result there is significant uncertainty around the extent and duration of consent.

11.4.3 The ACMA in its Information Sheet on Consent states

“it is necessary to look at the nature of the consent on a case-by-case basis and assess what sort of telemarketing call a person would reasonably expect to receive under the inferred consent provisions.”²⁵

11.4.4 Certainly doubt arises where an individual or business has engaged in a transaction but there could be a general expectation of continued contact. For example a conference or training organisation may have a business or individual enroll in a course or attend a conference. In many cases, the business and individual would expect the continuation of the relationship through the notification of additional courses or events.

11.4.5 Uncertainty of this nature increases the cost of the DNCR and this will apply if the DNCR is extended to business and government calls.

11.4.6 In addition to this there is a level of uncertainty and the complexity around whether the legislation does permit organisations to call individuals or

²⁵ Australian Communications and Media Authority, Do Not Call Register – Consent Information for consumers, IS 124 – June 2009

business after a contract has ceased and this has resulted in many organisations taking the view that they cannot, with certainty, call individuals once a contract has ceased to operate.

- 11.4.7 In many cases it is in a customer's interest to know that contracts have expired because people forget and want to be reminded of this. This outcome is also to the detriment of consumers and businesses that would benefit from a counter offer by obtaining lower prices.
- 11.4.8 This area of the legislation should be properly clarified if the DNCR is to be extended to include business and government numbers.
- 11.4.9 It would be far more preferable and ADMA would fully support clarification in the Act that inferred consent on the basis of an existing business relationship expires a certain period of time after a contract ceases such as three months.
- 11.4.10 ADMA contends that this period of time should be longer if the nature of the product warrants this. For example, a company should be able to infer consent to call an individual who has attended the last eight annual conferences held by that company in relation to the upcoming ninth conference.

11.5 PROVISION OF INFORMATION

- 11.5.1 Section 6 of the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* specifies the minimum amount of information that must be provided in each telemarketing call made to Australian numbers. These information requirements are overly onus and particularly impractical in a business to business context.
- 11.5.2 ADMA accepts and supports the concept that appropriate information to allow a recipient of a call to be identified is a sensible component of the Do Not Call Register however we do not accept that the sheer volume of information to be provided on a call is practical.
- 11.5.3 If taken all together each caller recipient should be advised of:
- a) call operator's given name;
 - b) the call operator's:
 - i) full name;
 - ii) employee or staff identifier
 - c) the purpose of the call;
 - d) the name of the call operator's employer;
 - e) contact details of the employer including a telephone number suitable for receiving telephone calls and either street address, postal or business address, email address;
 - f) another organisations name and contact details (including a telephone number suitable for receiving telephone calls and either street address, postal or business address, email address) if that

- organisation is different to the call operators employer and caused the call to be made;
- g) the name and contact details of any person responsible for dealing with consumer inquiries or complaints about the call operator or the organisation;
 - h) as well as:
 - i) the source from which the caller obtained the telephone number;
 - ii) the name of the person for whom the call is intended;
 - iii) name and contact details of any organisation that disclosed the information to the caller.

11.5.4 This is an extraordinary amount of information to mandatorily provide in each telemarketing call. ADMA submits that the Industry Standard should be changed such that at least some of this information need only be provided on request. The information that should be provided on request rather than in each phone call, should be:

- a) the name and contact details of any person responsible for dealing with consumer inquiries or complaints about the call operator or the organisation;
- b) the source from which the caller obtained the telephone number;
- c) name and contact details of any organisation that disclosed the information to the caller.

12 EXTENSION OF THE DNCR TO INCLUDE FAX NUMBERS

- 12.1 ADMA fully supports the extension of the DNCR to include fax marketing.
- 12.2 Fax marketing involves significant resource from the recipient including:
 - a) blocking commercial faxes
 - b) wasted paper and toner
- 12.3 The implementation of a choice mechanism to allow users to opt out of receiving fax marketing is an appropriate and adequate response to community concerns.
- 12.4 Fax marketing is not a mainstream marketing channel and it is ADMA's understanding that the extension of the DNCR to fax numbers will not have the far reaching consequences for commerce that are expected to arise from the extension to business and government numbers.

13 THREE YEAR EXPIRY RULE

- 13.1 Approximately 10% of all Australian households move and change telephone numbers per annum.
- 13.2 Special care should be taken to ensure that business is not subject to unnecessary restrictions on telemarketing which is not linked to a specific users preference.
- 13.3 A situation where numbers can remain on the Register indefinitely would lead to the Do Not Call Register being 40% out of date within five years (based on registration numbers since 2006).
- 13.4 A registration period of three years is appropriate given the dynamism of telephone number ownership.

14 EXTENSION OF THE DNCR TO INCLUDE EMERGENCY SERVICE NUMBERS

- 14.1 ADMA fully supports the extension of the DNCR to include numbers that are used in association with emergency service call centre numbers including '0' and '1' numbers.
- 14.2 There is no question that telemarketing calls should not be made to call centres whose purpose is to respond to life threatening or time critical emergency situations in Australia.
- 14.3 As stated previously ADMA's remit is to encourage the enlightened use of direct marketing. This is particularly achieved through the use of information that ensures targeted communications, ensuring the right message is delivered to interested potential and existing customers. Clearly a telemarketing call to a '000' operator doesn't satisfy this criteria.
- 14.4 ADMA's Direct Marketing Code of Practice has for some time included a prohibition on the use of random or sequential dialing equipment to generate telemarketing calls. ADMA members are required to comply with this Code of Practice however not all telemarketers are ADMA members.
- 14.5 ADMA notes however the not all elements of emergency service organisations are engaged in responding to life threatening or emergency situations. Examples of this may include administrative functions or procurement areas.
- 14.6 ADMA therefore submits that the concerns that justify the placement of the emergency service call centres on the DNCR do not extend to these administrative areas and therefore DNCR eligibility should not extend beyond numbers associated with emergency service call centres.
- 14.7 ADMA supports the imposition of additional serious penalties for telemarketers who call emergency service call centre operations.
- 14.8 ADMA would be pleased to raise the awareness of our members and the broader marketing community of any new requirements imposed with respect to telemarketing to emergency call centres.