

**Submission to: Senate Standing Committee on Environment,
Communications and the Arts**

from: dLook Pty Ltd ACN 116908546

in response to: Committee's request for submissions in relation to its inquiry
and report on the proposed ***Do Not Call Register
Legislation Amendment Bill 2009.***

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1. Introduction & Summary

This submission presents some views of *dLook Pty Ltd* (*dLook*) in relation to the *Do Not Call Register Legislation Amendment Bill 2009* (the “Amendment Bill”).

dLook is an *access seeker*, as currently defined in the Act, and accordingly pays fees to ACMA to “wash” lists of numbers and thereby ensure compliance.

In April 2009 *dLook* made a submission to the Australian Communications and Media Authority (ACMA) in relation to its March 2009 Discussion Paper on the Do Not Call (DNC) Register.

Some of the issues raised in that April 2009 submission remain pertinent to the current inquiry by the Senate Standing Committee (hereinafter the “Committee”), and accordingly are included in this present submission. Those elements of our April 2009 submission fall under two general headings, viz

- Charges for use of the DNC Register, and
- Administration of the Act by ACMA

The question of charges is relevant to the current discussion as the changes now proposed in the Amendment Bill are seen by us as leading to more costs, which can be expected under the prevailing mechanisms to result in higher charges for *access seekers*.

The question of administration is relevant in that the Amendment Bill would effect changes not contemplated in the original Act, but which have come to apply *de facto* as a result of suboptimal administrative practice in ACMA. It is our view that the planned changes contained in the Amendment Bill, which it is separately argued here are undesirable and economically inefficient, are seen as being wrought to legitimise an administrative regime which has failed to properly enforce the terms of the original Act, and in fact supported illegitimate DNC registrations.

The additional arguments introduced here identify the economic inefficiency of the proposed changes. The Amendment Bill will lead to anti-competitive outcomes and reduced utility of the telecommunication networks; it will also introduce a costly bureaucratic filtering process designed to improve the utility of a subset of users at no cost to those beneficiaries.

On the positive side, an alternative and simpler path is suggested by *dLook* in line with the intents of the original Act, more closely in accord with historical norms, and also more directly addressing the problems identified in the second reading speech.

This submission proceeds with a brief background on *dLook*, followed by a statement of what *dLook* views as the general economic case against the proposed Amendments.

The succeeding sections elaborate some of the elements of that general case against the particulars of the DNC Register, as presently operated and as proposed for the future.

dLook’s alternative suggestions are briefly outlined in the Conclusion section.

2. Background on dLook

dLook is an electronic directory services company, using internet-based technology to provide its business-only customers with enhanced and rapid directory-based business search and subsequent exposure on the internet. It commenced operations in Sydney in 2005 and has steadily grown and updated its user base, which consists of businesses, with public service, community and charity organizations provided an equivalent service *gratis*.

By the end of 2009, the *dLook* directory indexed in search engines in excess of 3,000,000 web pages and over 1.5 million business entries.

The service provided by *dLook* uses proprietary technology and offers the particular advantage to users of a specialised directory listing and indirectly a web presence in a timely fashion. Among other advantages offered by the service, customers are able, through the directory, to match marketing campaigns for their products more concisely to their product availability and delivery schedules.

dLook utilises telemarketing as a part of its continuous database update for more relevant customer information *inter alia* using methods which fall within the definition of *telemarketing calls* detailed in Section 5 of the Act. However, *dLook* does not normally make telemarketing calls which would require it to be an *access seeker* as indicated in Section 19 of the Act.

dLook is a member of the Telecommunications Industry Ombudsman (TIO), as a carriage service provider.

3. General Social Economic Argument

It is argued here that the utility of a telecommunications network is positively related to service ubiquity, and that the extension of the DNC Register as currently structured reduces ubiquity and accordingly has a negative impact on the utility of telecommunications networks.

Network Value

The power and value of telecommunications lies significantly in the network effect multiplier or highway effect. The economy of scale derived from large numbers is achieved precisely because the infrastructure is shared, and this in turn is possible because the same protocols and same products apply across the networks.

Whilst the private value of the network can be enhanced for the individual user in customising the service, the value lost in the network can exceed the private gain if ubiquity is impacted.

The DNC Register arrangements as presently structured we believe have this effect.

Thus, a new user joining an existing network decides to keep his access details private - effectively what the DNC Register enables. He can make outbound calls to anyone, but

prevents all inbound calls, or accepts calls only from pre-selected parties. His decision is optimal for him, but the value for others in the network is sub-optimal.

Historically, those choosing to join the network participated in a cooperative exercise delivering a social utility which was a function of the size of the network. Those electing to be excluded from the public directory were expected to pay for the privilege (presumably for enjoying the shared public utility on their own private terms). This exclusion from access reduces the number of readily addressable nodes and thus the overall potential traffic volume available to amortise the cost of the network. This raises the cost for all other users and underlines the need to charge the service beneficiary.

Role of DNC Register in Network Value

The DNC Register is a construct reacting to a nuisance phenomenon of recent years arising from new ubiquitous technology. At this distance it presents as a 'proportionate response', enabling residential users whose private network utility was being diminished by nuisance calls to opt out, and forcing some change on the telemarketing industry ahead of self regulation.

The processes involved for telemarketers have contributed to changes in industry practices, and a manifest reduction in the scale of the nuisance (60% in one year) identified by the Minister in his second reading speech.

Proposed Changes

However, the success of the DNC does not obviously point to the extension of the Register to business numbers as the logical next step. There are a number of arguments against such an extension, bearing in mind the ubiquity issue identified above.

- First, the 'problem' addressed by the DNC Register Act 2006 is now much diminished, as acknowledged by the Minister. Accordingly, there is a lesser requirement for further action, which anyway can only be expected to deliver a diminishing return;
- Second, the Amendment Bill represents a form of bracket creep in the direction of more, and more complex, regulation, where apparently unconsidered social and economic outcomes are subordinated to the noisy individuals demanding a private benefit;
- Third, the costs of administering what amounts to a customised filtering of inbound calls for individual users, operated by ACMA and funded by the telemarketing industry, is a gross impost on business.

The proposed processes, which will offer to those opting out on to the DNC Register the opportunity to selectively opt back in for certain industry segments under "registered consent" provisions administered by ACMA, look like unwieldy bureaucratic make-work.

The Minister's suggestion in his second reading speech that this particular change "may also assist the telemarketing and fax marketing industries in targeting their campaigns" is no more than a sop to the industry which will have to bear the costs.

- Fourth, the costs of these impediments to normal business practice are unconsidered against the private benefit ascribed to the individual opting out. Whilst a 'cold call' can still be made, to numbers either not on the Register or indicating through the ACMA process their "registered consent", the salami-style progress of this regulation suggests it is likely to become a thing of the past.
- Fifth, the particular call cases identified by government ministers in the government media releases on the Amendment Bill are those involving faxes - with particular reference to their use of consumables on the terminal equipment - and those to emergency services.

These cases, and doubtless other special cases, can be targeted by regulation with much greater precision, as a cheaper more efficient route than lumping voice reception with fax or teleprinter services, and emergency services with business generally, in an undifferentiated policy response.

An additional argument, which relates to the particular business of *dLook*, involves electronic directories. The Amendment Bill potentially raises a further barrier to competition in the oligopolistic directories services business. Any telephone number is publicly 'owned' in that it exists within the national numbering plan, but the operating licensed carrier enjoys a *de facto* monopoly in terminating the calls to that number, and a relationship with the customer. Whilst nominally separate, the carrier-owned Directories constitute an adjunct monopoly for the incumbent carrier, for whom they generate considerable revenues and access in a tilted field.

Competitive electronic directory services are seeking to make inroads into this monopoly: the Amendment Bill represents a further impediment and financial impost, which benefits the incumbent carrier monopoly at the expense of incipient competitors. To this extent, the Amendment Bill is anticompetitive, and thus economically inefficient.

The follow sections elaborate some of the issues identified and summarized above.

4. An Unwieldy Regulation

4.1 Lax Administration of the Current Act

The current Act has required that telephone numbers which are used primarily for business are ineligible for inclusion on the DNC Register.

This is a simple criterion, which would seem simple to administer.

However, and as advised in our submission last year to ACMA, *dLook* found that some of its directory entries were also on the DNC Register even though they had been listed or updated in one or more business directory. This meant that *dLook* appeared to have made, authorised or facilitated Section 5 telemarketing calls to numbers included on the DNC Register via a listing in its Directory. The position was similar for other directories.

dLook's position as to the acceptance and display of numbers listed in its Directory is based upon submissions from the business supplier, verified by follow up correspondence or telephone call. dLook's policy in respect of telephone based "telemarketing calls" has been as follows:

- dLook only makes telemarketing calls to business numbers which were listed in a published business directory;
- dLook only makes telemarketing calls during normal business operating hours;
- dLook does not make telemarketing calls on weekends or public holidays.

In sum, dLook considered its operations in the business-only areas meant it could not (inadvertently) breach the Act in any way. However dLook was given to understand from ACMA that the above calling policy of dLook would not ensure that calls were not being made to numbers on the DNC Register.

The reason, in our understanding, was that the Act was inadequately administered. ACMA has had responsibility under the *Do Not Call Register (Administration and Operation) Determination 2007* Section 8 to "remove... an entry from the Do Not Call Register if ACMA is satisfied that:

- (a) the telephone number associated with that entry is not eligible to be entered on the Do Not Call Register; or
- (b) the person who applied to register the telephone number associated with that entry was not eligible, under section 15 of the Act, to register the telephone number on the Do Not Call Register"

dLook was obliged to pay fees as an access seeker and carry other associated processing costs because of ACMA's failure to fulfil its responsibilities under the Act, per the above.

In its submission last year dLook included some suggestions to improve the administration process.

However, rather than institute improved administration, the industry is now faced with the Act being changed in a way which will legitimise the status of those numbers which ACMA has included on the DNC Register in breach of the Act.

Conclusion: Legitimisation of a status quo brought about illegally by inadequate administration of existing legislation is a poor foundation for public policy changes

4.2 Prospects for future Administration of the Amendment Act

The legislation now being considered will place with ACMA the role of devising a scheme which, per the second reading speech, enables:

‘..... businesses to list their number on the register and continue to receive telemarketing calls or marketing faxes relating to specific industry classifications. As a part of the registration process, new registrants will be provided with the option to nominate to receive calls or faxes relating to a list of industry classifications.’

This ‘additional consent mechanism’ to be known as ‘registered consent’, is to be added to the existing categories of ‘express consent’ and ‘inferred consent’.

The Explanatory Memorandum issued by the Department identifies among the ‘main elements’ of the Amendment Bill that it will be:

- conferring powers on the ACMA to make a determination setting out the industry classifications for the purposes of enabling registrants to choose the telemarketing calls and marketing faxes they wish to receive (if any);
- conferring powers on the ACMA to make a determination or determinations about the circumstances in which consent will be inferred for unsolicited telemarketing calls and marketing faxes to business numbers. This is a reserve power and there will be no change to the existing inferred consent provisions under the Act;

Given that determining whether telephone numbers were not primarily for business purposes, as required of ACMA under the current Act, was not administratively achievable, there can be little prospect for these new rules.

The Second Reading speech indicates costs of \$4.7 million over four years ‘to make the necessary changes to the scheme’. Of this, \$3.5 million will be recovered via access fees from the telemarketing industry. The ‘necessary changes’ are unlikely to be a one-off; the industry will be faced with a continuing impost for this bureaucratic load.

Conclusion: Implementation of relatively simple provisions required under the current Act has not been achievable by ACMA. The new provisions are more complex and more fuzzy - meaning the already high cost is likely to grow as bureaucratic processes extend to deal with this fuzziness.

The new “registered consent” provisions offer a telephone user a free inbound call customised filtering service: this is not an appropriate role for ACMA.

5. The User Pays principle

5.1 Price mechanism

It is a tenet of the free market that the user pays, and it makes the price mechanism work. Any external factors which distort prices *ipso facto* reduce market efficiency.

However, it is also understood in the modern world that transactors in markets are not wedded to any free market principles, but rather to the pursuit of profit. This is why governments regulate markets - to keep them operating more like free markets, and restrain their tendencies to extremes such as monopoly.

The DNC Register comes as regulation, intended to deliver the benefits. To the extent that there are costs, for greatest market efficiency they should be met by those receiving the benefits.

dLook is forced to be a “user” of the DNC Register, and pays for that use. But the real “user” of the DNC Register is the person who receives some value, who uses it voluntarily and would be willing to pay for use: in short, those wishing to be entered onto the Register.

Instead, those beneficiaries pay nothing. There is no particular logic to the costs being met by the telemarketing industry, except possibly that it is administratively easier. In terms of microeconomics, it is an imposed distortion on market process.

This argument says that those who seek to be placed on the DNC Register should pay fees sufficient to cover the operating costs of the Register (and also, taken perhaps to an extreme, to compensate telemarketers who are forced to use it).

If those registered do not pay - the service is free - there is no nexus between the DNC Register and its *raison d'être*. There is no ‘message’ from supplier to consumer: that message, in a market, is conveyed via dollars (price).

5.2 Historical Precedent

The telecommunications market offers an apt analogy to this current issue of exclusion from call lists.

The principle in the past in relation to allocation of a telephone number (where the numbering plan is a base public asset in the hands of the Commonwealth) has been that the publishing of that number in a publicly available directory is automatic, and exclusion from the directory is possible only on payment of a fee (the “ex-directory” status) to the publisher.

Thus expunging the number from the public directory was identified as a benefit for which the subscriber paid a premium, with a related cost to the number issuer and a loss of potential revenue by the network operators to which these numbers are allocated. Under the current regime, it has become treated as a right of the subscriber, the cost of which has to be met by third parties.

Additionally, services such as Calling Line Display (CLD) are paid for by the party who has identified a (private) benefit. A fee is charged to the B-party who wishes to receive CLD - Telstra charges \$6 per month. It would be patently unreasonable to charge the other party: e.g. you make a call to someone who has elected to have CLD (and who is not charged for it), and you, the A-party, are charged a fee for the B-party’s calling line number display.

Conclusion: Price mechanism efficiency points to user pays as the fair and reasonable basis for charging - if a service is free, it is not properly valued and may not be used sensibly.

The value of the Register is derived by those electing to join the DNC Register, and accordingly they should bear the cost to match the benefit. This approach is consistent with long-established charging mechanisms for directories, such as the ex-directory fee.

6. Conclusion, Summary Views and Alternatives

dLook's comments on the proposed Amendment Act for the DNC Register in summary are:

- The proposed changes represent a further and material regulatory interference with ordinary market processes.
- Placing restrictions on who can call who will damage the utility of the network as a public asset.
- Nonetheless, an inbound call filtering process, customised for individual users, can be expected to provide (private) utility to some users, and is thus not an inherently bad idea. It can be seen as a legitimate product, but it should be operated on market principles: those who want it should pay for it.
- However, development of an inbound call filtering process, customised for individual users and delivering private utility to them, is not an appropriate role for government or ACMA.
- It follows that a third party, in this case the telemarketing industry, should not be obliged to bear the cost for a product offered free to a self-selecting sub-set of user-beneficiaries. To impose the cost on the telemarketing industry is to impose a selective tax which further distorts market processes.
- In our view the ACMA has failed to adequately administer the provisions of the 2006 Act, and the Amendment Act implies more bureaucratic and potentially arbitrary procedures, and the prospect of even greater and uncontrolled costs.

Some positive suggestions from *dLook* are summarised below - but on a package basis (in particular, 1, 2 and 3 go together - *dLook* only "suggests" item #1 if items #2 & #3 apply also):

1. Keep the DNC Register simple - e.g. remove the various consent provisions; make eligibility open to any person or business.

2. Require those on the DNC Register to pay for the “service” which they will receive.
3. Require telemarketers to use the DNC, and make the Register available to telemarketers at no cost (or nominal fee).
4. Make definitive prohibitions on telemarketing calls to emergency and other services considered to be appropriately outside the commercial arena.
5. Make separate rules for fax marketing calls, recognising the different nature of the perceived problems caused by fax as distinct from voice telemarketing calls (e.g., they use ink and paper).
6. If a more complex product (relative to the current DNC) is to be offered, government should outsource/privatise the DNC Register, and the private operator can develop and offer subscribers (“customers”) supplementary value add products (e.g. per the “registered consent”) on the basis of deals built with the telemarketing industry, or via specially developed call screening products.