Do Not Call Register Legislation Amendment Bill 2009

Telstra and Sensis joint submission to the Senate Standing Committee on Environment, Communications and the Arts inquiry

Introduction

Telstra and Sensis welcome the opportunity to provide comments to the inquiry of the Senate Standing Committee on Environment, Communications and the Arts on the Do Not Call Register Legislation Amendment Bill 2009 (**Bill**).

Telstra is Australia's leading telecommunications and information services company offering a full range of services in all Australian telecommunications markets. Sensis is a wholly owned subsidiary of Telstra and manages several leading Australian brands including Yellow Pages, White Pages, CitySearch, Whereis, Sensis and MediaSmart. Sensis is one of the largest providers of contact information for business and consumers in Australia and has an extensive knowledge of small to medium enterprises.

Executive Summary

Telstra and Sensis publicly supported the establishment of the initial Do Not Call Register Act (**DNCR Act**) in 2006. However, the proposed changes to the DNCR Act should recognise and accommodate the fact that almost all business to business (**B2B**) contact involves an element of promotion or advertisement, and that in many scenarios, this is actually expected and appreciated rather than unwelcome. Additionally, B2B telemarketing can benefit consumers by reducing the cost to business of acquiring customers thus exerting downward pressure on prices.

Telstra and Sensis believe that the amendments proposed in the Bill as it currently stands are not workable in a B2B context and are likely to increase the risk of unintentional breaches of the Act. In light of this, Telstra and Sensis have outlined some suggestions that we believe would go some way to easing the regulatory burden and allowing for simpler administration of the DNCR Act, were the extension to occur. In summary, these suggestions involve:

1. Improving the definition of telemarketing;
2. Clarifying the concept of inferred consent;
3. Defining who is authorised to register a business on the DNCR;
4. Limiting the length of business registrations on the Register;
5. Clarifying the definition of 'reasonable precautions and due diligence'; and
6. Enhancing the procedures for handling complaints made to the ACMA.

Furthermore, in our view, the amendments proposed in the Bill are likely to add to the economic burden for business. Telstra and Sensis strongly believe that, similar to the time from the passage of the original DNCR Act to its implementation, a time period of 12 months should be allowed between the passage of the Bill and its implementation. This would allow the ACMA to conduct an extensive public information campaign on the legislation and its implications for business, as well as allowing the business community itself to prepare for the implementation of the legislation. This should assist in mitigating the risk of unintentional breaches of the Act.

1. *Definition of telemarketing*

The purpose test that defines telemarketing calls under the existing DNCR Act should be changed to reflect the nature of business interactions. The current definition of 'telemarketing call' in section 5 of the DNCR Act employs a purpose test that would hinder the ability of businesses to service their existing customers where those customers have opted out of receiving telemarketing calls. It should be recognised that interactions between businesses and customers often contain a mix of service and promotion, and that there is a material difference between calls of which the express purpose is marketing and service calls that might lead naturally to an element of promotion.

The purpose test that defines a telemarketing call should be changed so that only calls of which the sole or dominant purpose is marketing are defined as telemarketing. Under the current definition, a call need only have as 'one of its purposes' any of the matters listed in subsections 5(e) to 5(o) to be classified as a telemarketing call. In our view, a call should only be classified as a telemarketing call if its sole purpose is any one of the matters listed in subsections 5(e) to 5(o) (at least in the case of calls to business numbers). This would allow businesses to make service calls to their existing customers that might develop naturally to include elements of promotion without risk of breaching the DNCR Act (for those existing customers which have opted out of telemarketing). Alternatively, the definition could be changed so that a call is classified as a telemarketing call only if its dominant purpose is one of the matters listed in subsections 5(e) to 5(o).

The importance of changing the purpose test as it applies to B2B calls is evident in the following example, which reflects a typical B2B relationship. Consider a Telstra customer that has incurred excess data charges on their monthly broadband bill, and who has opted out of telemarketing. Telstra's current practice is to call the customer to inform them of the excess charges and provide options for minimising those charges in future. However, without a sole or dominant purpose test under the extended legislation, Telstra would be unable to provide options for minimising charges where those options could be considered to be promotional. Even if one of those options was to inform the customer about a free online tool that could assist them to better manage their data usage, Section 5 of the DNCR Act would prevent Telstra from providing that information. The result would be poorer service for customers rather than greater protection.

Utility of 'registered consent' exception

Telstra and Sensis query how valuable the new 'registered consent' exception will be for many businesses unless it allows exceptions for general or utility suppliers as a single category. In the current Bill clause 26 inserts proposed subsection 11(3A) into the DNCR Act, which provides a further exception to section 11(1) where the number registered on the DNCR includes a consent to receive telemarketing calls about an activity covered by a particular industry classification. We support the intent of the exception, which is to allow businesses to tailor their marketing preferences via registration on the DNCR, and we note the comments in the second reading speech to the Bill that this is an attempt to address concerns that the expansion of the DNCR Act could stifle commercial activity. However, the way the exceptions list is presented to listing businesses will need close attention.

It should be recognised that the services of general or utility providers can be equally important to the operation of a business as the services of suppliers in the same industry. Whereas a business registering their number on the DNCR may be inclined to register a consent to receive calls from the industry they are engaged in (for example, a building

business might register a consent to receive telemarketing calls from trade suppliers), Telstra and Sensis doubt that businesses will turn their minds to registering consents to receive calls from general providers such as their telecommunication and utility suppliers, notwithstanding that such calls may be highly valuable to that business. The exception should include a facility for listing businesses to opt in to marketing from general or utility suppliers as a single category.

2. *Clarification of the meaning of Inferred Consent*

Telstra and Sensis believe that the existing inferred consent exception is not well understood by consumers or even by many businesses, partly because there is no absolute rule as to when inferred consent can be relied upon under the current DNCR Act. This lack of clarity could undermine the expectation, expressed in the second reading speech accompanying the Bill, that the extension of the Act to business numbers will not impinge on existing B2B relationships. As the example in section 1 above illustrates, this may not always be the case. We suggest that the uncertainty around the inferred consent exception can be removed by specifying the circumstances in which businesses are deemed to have consented.

Telstra and Sensis therefore propose that consent should be inferred where:

- there is an existing business relationship with a customer, or
- there has been a business relationship with a customer in the last 12 months, or
- a business, by its conduct, solicits telemarketing calls (for example, where it invites other businesses to respond to a tender), or
- a business which has opted out of receiving telemarketing solicits further information about the calling company's products during a service call.

Rules about the circumstances in which consent can be inferred should be included in the legislative regime governing the application of the DNCR (either in the Act itself, or in the Regulations). Administration of the Act would then be much easier for the ACMA because the task of investigating allegations of non-compliance would be simpler and businesses would be able to verify their compliance simply by producing lists of their customers rather than requiring detailed evidence (and engaging lawyers) to prove why they had inferred consent.

Telstra and Sensis also believe the Act should be amended to expressly provide that consent can extend to calls from the company, its related bodies corporate and third parties authorised to sell its products and services, to cater for situations where a customer relationship is actually managed by a related body corporate or third party acting on behalf of the company.

Proposed determination power not appropriate to rely on

Telstra and Sensis do not believe that the inclusion of this determination power relieves the need to enact further clarification of the inferred consent exception in either the DNCR Act or in supporting Regulations. The need for further clarification of the inferred consent exception has been a long-standing issue with the DNCR Act, so whilst we note that the Bill includes proposed new clause 6 of Schedule 2, which would give the ACMA the power to make determinations that the consent of a relevant account-holder of a business number to receive telemarketing calls may or may not be inferred in certain circumstances, it is noted

that the Explanatory Memorandum to the Bill makes it clear that this power is intended as a "reserve power" to deal with unintended consequences of expansion.[1]

3. *Authorisation to register on the DNCR*

There could be conflicting views within a customer business about whether it should be registered on the DNCR. To prevent a situation where a junior officer of a business registers numbers on the DNCR even though a more senior officer would prefer to know about the opportunities that telemarketing calls can make available in the context of the expansion of the DNCR Act to businesses, we would support retention of section 15 of the DNCR Act, which currently provides that only the relevant telephone account holder or a person nominated in writing under section 39 can register a number on the DNCR.

4. *Length of registration on the DNCR*

Telstra and Sensis are of the view that business registrations on the DNCR should be limited to 12 months (instead of the current 3 years) and that the ACMA should check the Integrated Public Number Database (IPND) every month and remove numbers which have been disconnected. These measures would ensure that businesses always know whether or not they are registered on the DNCR. According to the 2003 to 2007 ABS statistics, between 16 per cent and 36 per cent of businesses in Australia do not survive the first 12 months of operation and exit the market. Their telephone numbers are then re-allocated by carriers (generally within about 6 months of disconnection). Accordingly, a number could be listed on the DNCR by one business and then be reassigned 6 months later to another business which wants to receive telemarketing and does not know that its number is still registered on the DNCR.

[1] See Explanatory Memorandum: *Do Not Call Register Legislation Amendment Bill 2009*, p 31

5. *Meaning of 'reasonable precautions and due diligence'*

Telstra and Sensis believe that there is still a great deal of uncertainty within the industry as to how the exception for taking "reasonable precautions and due diligence" in subsection 11(5) of the DNCR Act is intended to apply. The expansion of the DNCR Act to include business numbers is likely to increase the need for this exception to be understood, as far more calls have the potential to be caught by the legislation.

Although the ACMA has produced a substantial amount of information for the corporate community about the operation of the DNCR Act and the Register, it has yet to provide any further guidance for telemarketers on the scope of subsection 11(5). Indeed, an introductory note at the start of the ACMA's *Do Not Call Register 2006 Compliance Guide* expressly states as follows:

> *This booklet is also not a list of measures that, if applied, would necessarily ensure... that a person could demonstrate that they had taken reasonable precautions and exercised due diligence to avoid a contravention of the DNCR Act, within the meaning of subsection 11(5) of the Act.*

In Telstra's and Sensis's view, the uncertainty surrounding the meaning of these terms undermines the effective operation of the DNCR Act. Legitimate businesses who have implemented comprehensive and appropriate compliance measures to comply with the DNCR Act should be able to invoke this exception, particularly in situations where an inadvertent breach of the Act occurs.

Given it is a stated intention of the Government to deliver certainty to businesses as a result of any expansion of the DNCR Act, Telstra and Sensis submit that the ACMA should be required to confirm that businesses who can demonstrate they are in compliance with the requirements of the Compliance Guide will be considered to have taken sufficient action to fall within the requirements of subsection 11(5).

Ideally, in addition to this the ACMA should commit to producing detailed information for the telemarketing industry that outlines its view as to the operation of the exceptions in both subsections 11(4) and 11(5), and its views on what telemarketers can do to give themselves further certainty that their practices are in compliance with the Act. In formulating such guidance, the ACMA would need to take into account the varying nature of business relationships that arise in different commercial situations and as such, it would be beneficial for the ACMA to consult relevant industry participants in the preparation of such guidance.

6. *Complaints made to ACMA*

In addition to the proposals above regarding the operation of the DNCR laws, Telstra and Sensis also believe that the ACMA should provide businesses with detailed information about the complaints made against them about unwelcome telemarketing calls at the time these complaints are received by the ACMA. Information including the complainant's telephone number and the times and dates of the alleged calls are essential information a calling business requires to undertake an investigation into any allegation of a breach of the DNCR Act (and to addresses any issues in the event that such an allegation is substantiated).

As not all complaints are made to the business responsible for the telemarketing call, in the circumstances where the complainant is actually an existing customer, the business responsible should be provided the opportunity to offer the customer the opportunity to

register a marketing 'opt out' and these instances should not be viewed by ACMA as a non-adherence to the DNCR Act.

Further information
Telstra and Sensis would be happy to provide further information in support of our submission to the Committee if required.

Please contact Jamie Snashall, senior adviser government relations Telstra on (02) 6129 4649 or at PO Box 6308 Kingston ACT 2604 for further information.