



## Do Not Call Register Bill 2006

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Law and Bills Digest Section

### Contents

Purpose.....	1
Background.....	1
Basis of policy commitment .....	1
Current regulation of telemarketing in Australia.....	2
Commonwealth legislation.....	2
State and territory legislation.....	2
Codes .....	2
Features of the Bills .....	3
Position of significant interest groups/press commentary .....	4
Australian Direct Marketing Association (ADMA).....	4
Council of Small Business Organisations of Australia .....	5
Direct Selling Association of Australia.....	5
Office of the Federal Privacy Commissioner .....	6
Australian Privacy Foundation .....	6
ALP/Australian Democrat/Greens/Family First policy position/commitments .....	6

Financial implications .....	8
Main provisions .....	8
Part 1—Introduction .....	8
What is a telemarketing call .....	8
Part 2—Rules about making telemarketing calls .....	9
Specified defences to an offence .....	10
Telemarketing contracts.....	10
Exemptions .....	10
Exemptions for designated telemarketing calls.....	10
Exemptions for existing business relationships.....	11
Exemptions for opinion poll and market based research calls .....	12
Part 3—Do Not Call Register .....	12
Part 4—Civil penalties .....	13
Part 5—Injunctions.....	14
Part 6—Miscellaneous.....	14
Concluding comments .....	15
Endnotes.....	15

## Do Not Call Register Bill 2006

**Date introduced:** 25 May 2006

**House:** House of Representatives

**Portfolio:** Communications, Information Technology and the Arts

**Commencement:** Sections 1–9, 41, 46 and Part 3 commence on Royal Assent. The remaining provisions commence 12 months after Royal Assent unless commenced earlier by proclamation (clause 2).

### Purpose

The purpose of the Bill is to regulate unsolicited and unwanted telemarketing calls.

### Background

#### Basis of policy commitment

On 30 October 2005, the Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan released a discussion paper canvassing options for a national, legislated Do Not Call Register.<sup>1</sup>

The accompanying media release stated:

Australian consumers are increasingly frustrated by interruptions from telemarketers, particularly unsolicited calls that come from call centres overseas.

But in formulating a way to cut down on unsolicited calls there are a number of important issues to consider including how bodies such as charities and legitimate market researchers can continue to operate.

The discussion paper I am releasing today is a vital step in formulating how a national, legislated Do Not Call register would work in Australia. A Do Not Call register would give consumers the right to ‘opt-out’ of telemarketing approaches at any time.

For instance, people could put their number on a register, and telemarketers, including telemarketers from overseas, would face penalties if they phoned a number on the register.<sup>2</sup>

On 4 April 2006, following release of the discussion paper and the receiving of submissions, the Minister announced the Government’s intention to establish a national,

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legislated Do Not Call Register which would protect consumers from nuisance telemarketing phone calls. In the media release, the Minister stated that more than 90 per cent of the 495 submissions received in response to the discussion paper supported the creation of a Register.<sup>3</sup>

## Current regulation of telemarketing in Australia

One of the arguments favouring a national legislated Do Not Call Register is the disparate nature of telemarketing regulation currently applying in Australia. The current rules governing telemarketing practices are contained in various instruments, including voluntary codes, state and territory legislation and Commonwealth law. A fuller explanation can be found in the Explanatory Memorandum and the Government's discussion paper.

### Commonwealth legislation

At Commonwealth level, the regulation of telemarketers is governed to a degree by the relevant provisions in the *Telecommunications Act 1997*, the *Trade Practices Act 1974* and the *Privacy Act 1988*. There have been claims that these Acts need revision to accommodate new operating situations and technological innovations.<sup>4</sup> The Office of the Federal Privacy Commissioner has suggested that it is possible that many of the telemarketing phone calls that individuals currently receive either comply with the Privacy Act or are made by companies that are not required to comply.<sup>5</sup>

### State and territory legislation

Legislation in states and territories also regulates aspects of direct marketing, however the legislation is not consistent across Australia, and is not generally specifically targeted to address telemarketing activities.

### Codes

For organisations that are members of the Australian Direct Marketing Association (ADMA), compliance with their Code of Practice is compulsory. A key feature of the code which relates to telemarketers states:

#### Telemarketing Standards of Practice

Direct marketers who use the telephone must ensure they identify themselves to the person they are calling and state the purpose of the call. They must also ensure their name address and telephone number is listed in an accessible directory. They must also:

- on request, provide the name of a person responsible for handling customer inquiries,

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- offer to call the person back if it appears that a customer has been interrupted at an inconvenient time,
- provide the customer with a clear opportunity to accept or decline the offer,
- ensure that all telephone calls to a customer are made at times that comply with specific legislation and in all other instances are made between the hours of 8am and 9pm and are not made on the following public holidays: Christmas Day; Good Friday; and Easter Sunday,
- release the customer's telephone line within five seconds of their hanging up or otherwise indicating they require the line to be released.

In addition, they must not represent that they are undertaking market research where the purpose of the call is to sell goods or services, or contact a customer more than once in any 30 day period for the same or similar campaign without that customer's prior consent.

ADMA also maintains its own Do Not Call Register. Consumers wishing to reduce the number of telemarketing calls received may register on ADMA's Do Not Contact Opt Out Service<sup>6</sup>. Under the Code, use of the Do Not Contact Opt Out Service is mandatory for all ADMA members. This requires members to purge from marketing campaigns the names and contact details of consumers who have registered for the service.

## Features of the Bills

The Bill is drafted in similar terms to the *Spam Act 2003*. Its key features are:

- a prohibition on making unsolicited telemarketing calls to an Australian number which is registered on the Do Not Call Register, subject to certain exemptions. The penalty provision is aimed at calls made from an Australian number, or from overseas to an Australian number
- an extensive list of exemptions from the general prohibition for telemarketing calls from charities, registered political parties, independent members of parliament and candidates, religious organisations, educational institutions, government bodies, businesses with an existing business relationship with customers, and for calls conducting opinion polls or carrying out questionnaire based research
- a requirement that agreements or contracts for the making of telemarketing calls must require compliance with the Do Not Call Register Act
- a requirement for a Do Not Call Register to be established, enabling individuals to register their private or domestic numbers on the Register
- civil penalties and injunctions for breaches of the legislation, and
- a tiered enforcement regime to be initiated by the Australian Communications and Media Authority (ACMA), depending on the seriousness of the breach of a penalty provision.

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The main regulatory framework for the administration of the legislation by the ACMA is found in the accompanying Bill, the Do Not Call Register (Consequential Amendments) Bill 2006. The main elements of that Bill are:

- a requirement that the ACMA develop an industry standard which would set out the various minimum contact standards that all telemarketers would have to comply with (including those exempt from the general prohibition on making certain telemarketing calls)
- a framework to enable the development of telemarketing industry codes, and
- an investigative, compliance and enforcement role for the ACMA to support the operation of the proposed *Do Not Call Register Act 2006*.

The Explanatory Memorandum states that the Bill takes the best features of overseas Do Not Call Register schemes but is based primarily on the United States model. Further discussion of comparative overseas legislation is contained in the Discussion Paper.

The Senate has referred the provisions of the Bills to the Senate Environment, Communications, Information Technology and the Arts Committee for inquiry and report by 19 June 2006. This Digest incorporates material from submissions to the Senate Committee inquiry.

### Position of significant interest groups/press commentary

Australian Direct Marketing Association (ADMA)

ADMA is the peak association representing the Australian direct marketing industry and currently administers the self-regulatory Do Not Mail and Do Not Call Registers.

In its submission to the Senate Committee inquiry, ADMA states that it is 'broadly supportive of an industry run, Government backed Do Not Call register recognising the benefit of extending the existing ADMA Scheme to the broader industry'. However ADMA states that the Department of Communications, Information Technology and the Arts (DCITA) has drafted the Bill with great haste and lack of consultation and that the Bill fails significantly in the following respects:

**Regulatory burden:** Contrary to the Government and the Council of Australian Government's intentions, the Bill will impose such severe restrictions on telephone marketing that it will no longer be a viable mechanism for organisations to establish new relationships in addition to having a negative and undesirable impact on contact with existing customers and clients.

**Inconsistency:** Most of the Bill's problems stem from it being based on the Spam Act which was enacted to deal with a different, online channel of marketing communication. This has resulted in a number of major inconsistencies with other legislation such as the Privacy Act 1988 particularly the definition of 'consent'. The issue of inconsistency between communications and privacy legislation was

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specifically addressed in the recent review of the Privacy Act but has been ignored by DCITA.

**Expectations:** The Bill has such broad ranging exemptions and significant verification difficulties that that consumers will continue to receive an unacceptably high volume of unsolicited calls.<sup>7</sup>

Media reports have suggested that ADMA has had some influence on the final form of the Bill, particularly in relation to the decision to exclude businesses from participating in the Do Not Call Register scheme.<sup>8</sup> ADMA's CEO Rob Edwards was reported as saying:

We will be taking this up with the Government to ensure that business-to-business marketing in Australia is not jeopardised. The effect could be catastrophic.<sup>9</sup>

Council of Small Business Organisations of Australia

The Council's deputy chairman, Tony Steven was reported in the Australian Financial Review as saying the Council was disappointed with the Government's last minute decision to exclude businesses from participation in the Do Not Call Register scheme:

Constant calls from telemarketers are a time imposition for small businesses. We don't want to restrict business-to business marketing, but we should be protected from mass-market telemarketing campaigns run by call centres in India.<sup>10</sup>

Direct Selling Association of Australia

The Direct Selling Association of Australia in its submission to the Senate Committee inquiry supports the principle of a Do Not Call Register but expresses the following concerns:

The Bill will have far reaching and seemingly unintended consequences for small business activity based on family and social relationships in direct selling.

The telemarketing activity of the sales people engaged in the direct selling industry is not within the mischief outlined throughout the development of the Bill

The concepts of 'nominee' and 'consent' used in the Bill to exclude certain telemarketing, the lack of assistance in interpreting taking 'reasonable precautions' and exercising 'due diligence' in avoiding contraventions, and the accompanying burden of proof, do not give direct selling sales people the certainty needed to engage in telemarketing activity.

Achieving desired levels of compliance with the Bill will require a significant and ongoing investment in education, and subject the industry to the cost of register searches.<sup>11</sup>

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Office of the Federal Privacy Commissioner

In its submission to the Senate Committee inquiry, the Office of the Federal Privacy Commissioner stated that it ‘strongly supports the introduction of the Register, and welcomes the Australian Government taking this step in implementing Recommendation 25 of *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*’.

The Office’s recommendations regarding the provisions of the Bill are:

- telephone numbers remain on the register until such time as the individual chooses to de-register the telephone number, or the telephone number moves to a different subscriber
- public awareness raising, including a Government or business driven educational campaign, be undertaken
- individuals who register their telephone numbers on the Do Not Call Register be provided with clear notice about the details of the handling of their information
- the three-year review of the Bill should look particularly at whether the exemptions from the Bill have had an adverse impact on the effectiveness of the Register, and
- consideration be given to preventing bundled consents applying to telemarketing calls to telephone numbers on the Register.

Australian Privacy Foundation

The Australian Privacy Foundation has welcomed the Bill and states that the basic design of the scheme, based on the existing Spam Act regime appears sound. The Foundation in its submission to the Senate Committee inquiry did however state that the exemptions are far too broad:

Many if not most of the unwelcome calls which are received will fall within one or other of the exemptions. There is no justification for the exemptions for political parties, charities and educational institutions – there are many other ways for these organisations to achieve their legitimate objectives without making unsolicited phone calls.

#### **ALP/Australian Democrat/Greens/Family First policy position/commitments**

The Australian Labor Party, in its Telecommunications Policy released before the last federal election on 22 September 2004 promised to introduce a National Do Not Call List:

Stricter rules for telemarketers

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Many Australians are sick of the unwarranted intrusion of telemarketers into their homes at inappropriate times. Current codes allow telemarketers to call from 7am to 9pm on any day of the year except Christmas Day, Good Friday and Easter Sunday. These rules only apply to companies that have signed up to the self-regulatory Australian Direct Marketing Association Code.

Labor will introduce a national legislated 'Do Not Call' List. The list will be managed by the ACCC. Telemarketing companies calling numbers on the 'Do Not Call' list will be subject to fines of up to \$10,000.

Charities, political organisations and telephone survey companies making non-sales calls will be exempt from the list. A similar list in the USA now has over 50 million registered phone numbers.

Labor will reform existing rules to ensure that telemarketers do not call people on public holidays or on Sundays. Labor will also ensure these rules apply to all telemarketers and that adequate penalties exist for those found breaking the rules.

The Opposition Leader, the Hon. Kim Beazley, MP welcomed the Government's announcement proposing the introduction of a Do Not Call Register but suggested the Government's proposal is a backflip. The ALP has also criticised the Government for not allowing a debate on the private member's telemarketing bill introduced by ALP MP Anna Bourke six months ago and for delaying the implementation of the scheme until 2007.

When the Member for Chisholm, Anna Burke, gave notice that she would be introducing a Private Member's Bill into the House of Representatives last year creating such a National Do Not Call [Register], the Government refused to even allow a vote on the Bill. The Government then cynically released a discussion paper on the issue on the day before the Bill was scheduled for debate.

Now after almost six months of delay, the Howard Government has fully adopted Labor's policy.

Senator Coonan should explain why she has made Australian families endure six months of annoying telemarketing calls just to allow her to take the political credit for this policy. She should also explain why the nuisance calls will go on until 2007.<sup>12</sup>

Senator Natasha Stott Despoja, Australian Democrats Spokesperson for Attorney Generals, has stated that the Democrats support politicians being subject to the Do Not Call Register and that they will move to amend the Bill to remove the exemption for politicians. The Senator also indicated that at the same time the Democrats would move an amendment to the Privacy Act to remove the exemption under that Act for political acts and practices:

It is utterly hypocritical for politicians to expect business, industry and community groups to comply with privacy laws which they, themselves, are unwilling to comply with<sup>13</sup>

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The Family First Party has stated that it opposes special treatment for politicians and pollsters. While supporting the Government's plan to set up a national Do Not Call Register they will move an amendment to overturn the exemption.<sup>14</sup>

## Financial implications

Budget funding of \$33.1 million has been provided over four years, for the arrangements in both this Bill and the Consequential Bill. The Explanatory Memorandum states that it is expected that approximately \$15.9 million will be recovered from the telemarketing industry through the payment of fees to access the Register.<sup>15</sup> Details of the access fees are as yet unknown but are to be released by determination.

## Main provisions

### Part 1—Introduction

Part 1 commences on Royal Assent.

**Clause 3** provides a simplified outline for the legislation.

**Clause 4** provides the definitions of words and expressions used in the legislation.

### What is a telemarketing call

**Clause 5** is a key provision in the Bill. It provides an extended definition of what is a telemarketing call. A 'telemarketing call' is a voice call made to a telephone number that has a 'commercial type purpose'.

A voice call is defined to mean a voice call within the ordinary meaning of that expression or a call that uses recorded or synthetic messages, whether or not the recipient responds by way of pressing buttons on a telephone handset or similar thing (**clause 4**).

The particular types of commercial purposes are set out in **paragraphs 5(1)(e) to (n)**. They are calls for which the *purpose or one of the purposes* is:

- to offer to supply:
  - goods or services
  - land
  - a business or investment opportunity
- to advertise, or to promote:
  - goods or services, or a supplier of goods or services

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- land, or a supplier of land
- a business or investment opportunity, or a provider of a business or investment opportunity
- to solicit donations, or
- some other purpose as specified in the regulations.

The Explanatory Memorandum at pages 52 to 55 provides practical examples of what calls would fit the definition of telemarketing calls.

Regulations may provide that a specified kind of voice call is not a telemarketing call for the purposes of this Act (**subclause 5(7)**). The Explanatory Memorandum points out that calls without a commercial element (such as calls conducting opinion polls or carrying out questionnaire-based research) will not be covered by this Act even if they may ordinarily be considered to be telemarketing.<sup>16</sup>

The purpose of the call is to be determined by having regard to the content of the call, the presentational aspects of the call, the content that can be obtained using the telephone numbers, URLs or contact information mentioned in the call, and the content that can be obtained from calling the telephone number from which the call was made (for example by calling line identification) (**subclause 5(1)**).

The effect of **clause 9** is that the prohibitions on the making of unsolicited telemarketing calls (as set out in Part 2 below) will apply to telemarketing calls made from overseas numbers and calls made from external Territories, with the exception of Norfolk Island.

## Part 2—Rules about making telemarketing calls

Part 2 commences 12 months after Royal Assent unless commenced earlier by proclamation.

**Clause 11** is the primary provision. It provides that a person must not make, or cause to be made a telemarketing call to an Australian number which is registered on the Do Not Call Register and is not a designated telemarketing call. Designated telemarketing calls are dealt with in Schedule 1 and provide exemptions for telemarketing calls made by certain persons and organisations (see below under Exemptions).

**Subclause 11(7)** covers aiding, abetting, conspiracy and inducing the sending of telemarketing calls by threats or promises.

**Subclause 11(8)** provides that the offences under clause 11 are civil penalty provisions

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## Specified defences to an offence

The defences (with the evidential burden on the caller<sup>17</sup>) to an offence under the legislation are specified as:

- the relevant telephone account–holder (or nominee) consented to the making of the call (consent is defined in Schedule 2 and nominee is defined in clause 39) (**subclause 11(2)**)
- the caller had ‘washed’ their lists of telephone numbers in the last 30 days and the number was not on the Do Not Call Register<sup>18</sup> (**subclause 11(3)**)
- the call was made by mistake (**subclause 11(4)**)
- the caller took reasonable precautions and exercised due diligence to avoid the contravention (**subclause 11(5)**).

## Telemarketing contracts

**Clause 12** prohibits a person or organisation entering into a telemarketing contract, arrangement or understanding unless the contract, arrangement or understanding contains an express obligation requiring the other party to comply with the Do Not Call Register Act. This is a civil penalty provision.

The Explanatory Memorandum states that this provision is likely to assist where a business operating in Australia contracts with an overseas telemarketer to provide telemarketing services to Australian numbers. ‘While the overseas telemarketer will be covered by the prohibition in clause 11, this provision puts a further obligation on persons outsourcing their telemarketing calls to assist in ensuring that such persons will comply with the Do Not Call Register Act by making it a contractual requirement.’<sup>19</sup>

## Exemptions

Exemptions for designated telemarketing calls

**Paragraph 11(1)(b)** provides an exemption from the prohibition on making unsolicited telemarketing calls for ‘designated telemarketing calls’. Designated telemarketing calls are dealt with in **Schedule 1**. They are telemarketing calls made by or authorised by:

- government bodies (as defined in clause 4, Part 1)
- religious organisations
- charities or charitable institutions
- registered political parties, independent members of parliaments of the Commonwealth, state, territory and local government, or nominated candidates for these parliaments. Calls would be exempt when the purpose is to conduct fundraising for electoral or political purposes.

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- educational institutions as defined (but only calls to students or former students).

In all these exempt categories, if the call relates to goods or services, then the exemption only applies if the relevant body is the supplier or prospective supplier of the goods or services concerned (**paragraphs 2(b), 3(1)(c), 3(2)(c) and 4(2)(e)**). The Explanatory Memorandum explains that this qualifier has been included to ensure the exemption is not abused. In relation to charities it states:

[The exemption] would not cover the situation where a charity is simply onselling goods or services for a non-exempt organisation for a commission. For example if a charity is approached by a company to sell their goods or services in return for the charity receiving a commission then this would not be covered by the exemption as the charity would not be the supplier of the goods or services.<sup>20</sup>

Regulations may also be made specifying that certain calls are ‘designated telemarketing calls’ for the purposes of the legislation (**Schedule 1, clause 5**).

Exemptions for existing business relationships

An exemption will also apply to persons or companies with an existing business relationship with an individual, for example with existing accounts or contracts. This exemption is not a designated telemarketing call but rather is brought into the legislation via the definition of ‘inferred consent’ found in **Schedule 2**.

As stated above, one of the defences to an offence of making an unsolicited telemarketing call is that the relevant telephone account-holder (or nominee) consented to the making of the call. Consent is defined in **Schedule 2, clause 2** to mean:

- express consent, or
- consent that can be reasonably inferred from the conduct and the business relationships of the individual or organisation concerned.

The Explanatory Memorandum states that the extent of inferred consent will be a matter of fact to be determined on the particular factual circumstances. It states that a one-off casual type purchase, normally made without exchange of details would not give rise to an expectation of receiving telemarketing calls. However a person purchasing goods or services which involved ongoing warranty, or a bank and a bank account holder would be considered an existing business relationship and thus consent to telemarketing calls could be inferred.<sup>21</sup>

It is of note that express consent is taken to last for 3 months (**Schedule 2, clause 3**), while there is no specified time limit for inferred consent.

Several submissions to the Senate Committee inquiry are critical of the drafting of this exemption. The Direct Marketing Association in its submission stated:

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[...] the Bill should include a separate, clear exemption for ‘existing business relationships’, providing both business and consumer with clear parameters as to the type of relationships that fall in this category.

The Australian Privacy Foundation argues that the exemption based on inferred consent through pre-existing business relationships is far too wide and will allow for many unwelcome calls purely on the basis that the consumer has made enquiries or had minor dealings a long time ago.<sup>22</sup>

Exemptions for opinion poll and market based research calls

The exemption covering opinion poll and market based research calls is not found in the provisions dealing with ‘designated telemarketing calls’. As discussed above<sup>23</sup> the exemption comes via the definition of a telemarketing call (**clause 5, Part 1**) which essentially provides that for the purposes of this Act, a telemarketing call must have a commercial type purpose.

### Part 3—Do Not Call Register

Part 3 commences on Royal Assent—the rationale being that the Do Not Call Register must be established before the regulation of telemarketing calls commences.

**Clause 13** provides for the ACMA to establish the Do Not Call Register or alternatively, for the ACMA to contract it out to a contract service provider to operate on its behalf. Telephone numbers eligible to be entered on the Do Not Call Register are Australian numbers used either exclusively or primarily for private or domestic purposes and not used exclusively for receiving or transmitting faxes (**clause 14**). There is no provision for businesses to register, although it is of note that the Government’s telemarketing discussion paper and the Minister’s media releases up to 4 April 2006 indicated that small businesses would be able to participate in the scheme.<sup>24</sup> Media reports suggest that the direct marketing lobby and particularly the ADMA exerted some last minute pressure on the Government to exclude businesses from registering with the Do Not Call Register.<sup>25</sup>

**Clauses 15 and 16** set out the requirements for registering telephone numbers in the Do Not Call Register. If registration is done in accordance with the correct forms and if the ACMA (or the contract service provider) is satisfied the number is eligible for entry into the Register, then the ACMA (or service provider) must enter the number in the Register. There is no fee required for registration.

Registration of a telephone number on the Register lasts for 3 years unless removed earlier by a determination of the ACMA. A number may be re-registered if the three year period has expired or if the number has been previously removed (**subclause 17**). Both the Office of the Privacy Commissioner and the Australian Privacy Foundation in their submissions to the Senate Committee inquiry recommend that telephone numbers remain on the register until such time as the individual chooses to de-register the telephone number. The

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Office of the Privacy Commissioner argues that automatic de-registration of telephone numbers after three years is an unnecessary barrier for individuals seeking to use a privacy-enhancing tool such as the Register and may ultimately reduce the Register's effectiveness.<sup>26</sup>

**Clause 19** sets out rules regarding access to the Register by telemarketers. A person (described as the access seeker) must firstly fulfil the administrative requirements regarding the application form and payment of fees. The ACMA or service provider must then check the access seeker's telephone number or list of numbers against the Register and either inform that person which numbers are registered on the Do Not Call Register, or alternatively which numbers are not registered.

The ACMA may make determinations regarding:

- administration of the Register (**clause 18**)
- method of accessing the Register (**clauses 19 and 20**) and
- fees to be paid for accessing the Register (**clause 21**).

Determinations made under clauses 18, 20 and 21 would be legislative instruments. In other words they must be registered and tabled in Parliament and would be subject to disallowance.

## Part 4—Civil penalties

Part 4 commences 12 months after Royal Assent unless commenced earlier by proclamation.

**Clauses 24 to 31** provide the details of the application of the series of civil penalties that are payable for contraventions of the legislation. The penalties escalate for repeat offences. Proceedings for the recovery of penalties are instituted in the Federal Court of Australia or the Federal Magistrates Court. Ancillary orders for compensation to a victim and for payment to the Commonwealth of the amount of any financial benefit obtained by the person are covered in this Part under **clauses 30 and 31**.

The unit rate for a penalty is currently set at \$110 per penalty unit. The summary of current maximum penalty amounts is provided in the Explanatory Memorandum at pages 64 to 65. They range for an individual from \$1,100 to \$220,000 (repeat offender) and for a corporation from \$5,500 to \$1.1 million (repeat offender).

**Clause 32** provides a link to **Schedule 3** to the Bill which sets up a system of infringement notices as an alternative to proceedings in the Federal Court or the Federal Magistrates Court.

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The ACMA is empowered by **clause 24** to initiate proceedings in the Federal Court or the Federal Magistrates Court and to issue infringement notices (**Schedule 3**).

## Part 5—Injunctions

Part 5 commences 12 months after Royal Assent unless commenced earlier by proclamation.

**Clauses 34 to 38** authorise the Federal Court or the Federal Magistrates Court to issue a range of injunctions for contraventions of the legislation. These injunctions include orders to restrain conduct and to compel a person 'to do something'. The ACMA is empowered to apply to the courts for injunctions.

## Part 6—Miscellaneous

**Clauses 39, 40, and 42 to 45** commence 12 months after Royal Assent unless commenced earlier by proclamation. **Clauses 41 and 46** commence on Royal Assent.

**Clause 39** provides that telephone account-holders may appoint, either verbally or in writing, any number of nominees in relation to their telephone number. This provision is drawn into the main provisions of the Bill in several ways. For example the rules prohibiting the making of telemarketing calls in clause 11 do not apply where the relevant telephone account-holder or their *nominee* has consented to the making of the call. The Telecommunications Industry Ombudsman has commented that the Bill does not appear to contain any guidance as to how the authenticity of that nominee is established. 'In this respect, a telemarketing company may seek to argue that any person who answers the telephone at an address and engages in a conversation could be a nominee for the purposes of the exemption. The Bill may benefit from some guidance as to how the authenticity of the nominee can be established, to ensure that the relevant telephone account holder's wishes to be included on the Register can only be overridden by either themselves or their legitimate nominee.'<sup>27</sup>

**Clause 40** empowers the ACMA to issue formal warnings if a person contravenes the legislation and if the matter is assessed as a minor infringement.

**Clause 41** provides additional functions for the ACMA in telemarketing-related matters, including:

- community education programs
- research, and
- conducting liaison with other regulatory bodies in Australia and overseas.

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**Clause 42** allows the concurrent operation of any state or territory laws that are capable of applying together with the provisions of this Bill.

**Clause 43** prevents the Bill applying to the extent that it would infringe the freedom of political communication as implied from the Constitution.<sup>28</sup>

**Clause 44** authorises the making of regulations that would give effect to an international convention that deals with telemarketing calls. This Clause foreshadows that Australia is looking at the possibility of concluding agreements with other countries to deal with the global impact of telemarketing. Regulations are subject to a tabling and disallowance procedure in the Parliament.

**Clause 45** specifies that the operation of the legislation will be reviewed 3 years after the commencement of the legislation. A report of the review must be tabled in Parliament by the Minister.

**Clause 46** is a general regulation making power. It provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Bill or necessary or convenient to be prescribed for carrying out or giving effect to the Bill.

## Concluding comments

The Bill is likely to receive bipartisan support in the Parliament. Viewed overall, it is not controversial legislation, although further attention may be merited in relation to the exemptions. Members of the minor parties have indicated their intention to move amendments in relation to political party and member of parliament exemptions. The Government expects that given the apparent broad community support for a Do Not Call Register, consumers will move quickly to join the Register. There may however be some confusion amongst consumers, if they find, that due to the extent of the exemptions to compliance, the number of unsolicited telemarketing calls they receive does not diminish significantly.

## Endnotes

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1. Department of Communications, Information Technology and the Arts, *Introduction of a Do Not Call Register: Possible Australian Model: Discussion Paper*, 2005.
2. Senator the Hon. Helen Coonan, 'A solution for nuisance calls: Options for an Australian Do Not Call register', *Media release*, 30 October 2005.
3. Senator the Hon. Helen Coonan, 'An end to nuisance calls', *Media release*, 4 April 2006.

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4. Office of the Federal Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, March 1995.
5. Office of the Federal Privacy Commissioner, Submission: Introduction of a Do Not Call Register: Possible Australian Model: Discussion Paper, 2005.
6. It includes Do Not Mail and Do Not Call services.
7. Australian Direct Marketing Association, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Do Not Call Register Bills, 9 June 2006.
8. For further information see p. 13 of the Digest.
9. 'Telemarketing sector finds 'do not call' plan somewhat disturbing', *Age*, 15 April 2006, p. 21. See also p. 13 of the Digest.
10. 'Business gets unexpected call', *Australian Financial Review*, 26 May 2006.
11. Direct Selling Association of Australia, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Do Not Call Register Bills, June 2006.
12. The Hon Kim Beazley MP, 'Victory for Labor and families over nuisance phone calls', *Media release*, 4 April 2006.
13. 'Politicians do not call', *Media release*, 30 May 2006.
14. Senator Steve Fielding, 'Family First opposes special treatment for politicians and pollsters', *Media release*, 29 May 2006.
15. Explanatory Memorandum, p. 3.
16. *ibid.*, p. 54. It is of note by way of contrast, that the definition of a telemarketing call in the accompanying Do Not Call Register (Consequential Amendments) Bill 2006, incorporates the meaning given to it in this Bill and is broadened to include calls for which one of the purposes is to conduct opinion polling, or to carry out standard questionnaire-based research.
17. An evidential burden in relation to a matter is defined in clause 4 of the Bill. It requires the person to point to evidence that suggests a reasonable possibility that the matter exists or does not exist.
18. 'Washed' is a term used in the Explanatory Memorandum and is the process whereby telemarketers submit their contact list of numbers to the operator of the Register who then compares that list with the Register and provide the telemarketer with a clean list on which the registered numbers have been deleted.
19. Explanatory Memorandum, p. 63.
20. *ibid.*, p. 86.
21. *ibid.*, p. 96.
22. Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Do Not Call Register Bills, 9 June 2006.

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23. pages 9–10 of this Digest.
24. In a media release of 4 April 2006, Senator the Hon. Helen Coonan stated: ‘A Do Not Call register, open to individuals and small businesses, will enable people to opt out from receiving unsolicited telemarketing calls. Once a telephone number is registered, it will be prohibited for telemarketers to contact that number.’
25. For example ‘Business gets unexpected call’, *Australian Financial Review*, 26 May 2006, p. 13.
26. Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Do Not Call Register Bills, June 2006, pp. 5 and 7.
27. Telecommunications Industry Ombudsman, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Do Not Call Register Bills, 13 June 2006.
28. Three High Court cases in the 1990s – *Australian Capital Television* (1992), *Nationwide News* (1992) and *Lange* (1997) established an implied constitutional right of political communication. The cases established that:
  - limits on the Commonwealth's law making powers may be implied in and from the text of the Constitution;
  - the key principle of the Constitution is representative democracy - expressed and constitutionally entrenched in sections 7 and 24;
  - a necessary condition of representative democracy is the freedom to discuss and communicate information regarding political and economic matters; and
  - this freedom extends beyond election periods to all political discussions generally.

A law cannot restrict freedom of political communication unless:

- (i) it is enacted to fulfil a *legitimate purpose* (of Australia's constitutional system); and
- (ii) the restriction is *appropriate* and *adapted* to fulfilment of that purpose.

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