



Do Not Call Register Legislation Amendment Bill 2009

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Do Not Call Register Legislation Amendment Bill 2009

Date introduced: 26 November 2009

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: The substantive provisions commence 6 months after Royal Assent unless commenced earlier by proclamation (clause 2).

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill amends the *Do Not Call Register Act 2007* (the DNCR Act) with the purpose of expanding the Do Not Call Register to enable all Australian telephone and fax numbers to be registered, including those used by businesses and emergency services.

Background

The Do Not Call Register ('the Register') was established in May 2007 by the Howard Government in response to community concern about the volume and intrusiveness of unsolicited telemarketing calls.¹

The Register enables Australians to opt out of receiving unsolicited commercial marketing calls by listing their fixed line and mobile telephone numbers that are used primarily for private and domestic purposes. As at November 2009 there were over 3.99 million registered telephone numbers.² There is no charge for listing a number, with each listing

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1. For background on the introduction of the DNCR Act, the reader is referred to: M A Nielsen, *Do Not Call Register Bill 2006*, Bills Digest, no. 160, 2005–06, Parliamentary Library, Canberra, 19 June 2006, viewed 25 January 2010, http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/IK0K6/upload_binary/ik0k64.pdf;fileType=application/pdf#search=%22nielsen%20do%20not%20call%22
 2. Australian Communications and Media Authority, *Do Not Call Register statistics*, viewed 8 January 2010, http://www.acma.gov.au/WEB/STANDARD/pc=PC_310882

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remaining on the Register for a period of three years at which time an individual may then re-list his or her number.³

Under the DNCR Act, the Australian Communications and Media Authority (ACMA) is responsible for establishing and overseeing the operation of the Register including compliance and enforcement matters. On 1 February 2007 the ACMA contracted with Service Stream Solutions Pty Ltd to build and operate the Register until February 2011.⁴

Under the DNCR Act, a person both in Australia and overseas, must not make a telemarketing call to a number on the Register. To avoid calling listed telephone numbers, telemarketers can establish an account on the ACMA website and then for a fee, have their calling lists checked or ‘washed’⁵ against the numbers listed on the Register.⁶ As at November 2009, 2479.3 million numbers had been submitted for checking or ‘washing’.⁷

The listing of a telephone number on the Register will not prevent all unsolicited calls to that number, as the DNCR Act provides for several types of organisations that can make ‘designated telemarketing calls’ to consumers. Exempt organisations include government bodies, religious organisations, charities, registered political parties, political candidates, independent Members of Parliament and educational institutions.⁸ In addition businesses calling with the consumer’s consent to receive calls are also exempt. That consent can be expressly stated (for example by ticking a box agreeing to receive calls) or it may be inferred by a business if it has an existing relationship with a person.⁹

At present, telephone numbers not used primarily for private or domestic purposes, and all numbers used exclusively to send or receive faxes, may not be listed on the Register. This effectively excludes businesses and other entities from being able to take advantage of the Register.¹⁰

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3. Australian National Audit Office, *Do Not Call Register*, Audit report, No. 16, 2009–10, p. 14.
 4. Department of Broadband, Communications and the Digital Economy, *Discussion paper: eligibility requirements for registration on the Do Not Call Register*, August 2008, p. 6.
 5. ‘Washing’ 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 provides the telemarketer with a clean list on which the registered numbers have been deleted. Australian National Audit Office, *op. cit.*, p. 9.
 6. *Ibid.*, p. 31.
 7. Australian Communications and Media Authority, *op. cit.*
 8. Section 11 and Schedule 1 of the DNCR Act.
 9. Section 11 and Schedule 2 of the DNCR Act.
 10. Department of Broadband, Communications and the Digital Economy, *Discussion paper: eligibility requirements*, *op. cit.*, p. 5.

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Basis of policy commitment

In the 2009–10 Budget, the Rudd Government announced plans to widen the scope of the Register to allow the registration of all telephone and fax numbers, including the numbers used by businesses and emergency service operators.¹¹ This announcement followed a release in August 2008 of a discussion paper by the Department of Broadband, Communications and the Digital Economy (the Department) on the potential expansion of the Register.¹² The Minister's second reading speech states that a large proportion of respondents (86 per cent) to this paper supported allowing the registration of all Australian telephone and fax numbers including business and emergency numbers.¹³

Reviews of the DNCR Act

The DNCR Act requires a review of the legislation to be conducted by May 2010.¹⁴ In October 2009 the Department released a discussion paper for public comment to inform that review.¹⁵ This statutory review is quite separate and unrelated to this Bill and is to cover a much broader range of subjects including the overall structure of the DNCR Act, the status of exempt organisations, the consent provisions in the Act, the operation of the Register, and compliance issues.

Apart from this statutory review, the Australian National Audit Office (ANAO) has recently undertaken an audit to assess the ACMA's effectiveness in operating, managing and monitoring the Register, including compliance with legislative requirements.¹⁶

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11. Senator S Conroy (Minister for Broadband, Communications and the Digital Economy), *Budget 2009: Proposed expansion of the Do Not Call Register*, media release, May 2009.
 12. Department of Broadband, Communications and the Digital Economy, *Discussion paper: eligibility requirements*, op. cit.
 13. A Albanese, 'Second Reading Speech: Do Not Call Register Legislation Amendment Bill 2009', House of Representatives, *Debates*, 26 November 2009, p. 10. As at 25 January 2010 those submissions appear to be no longer available on the Department's website. (Note these submissions are a different set to the submissions on the Discussion paper for the statutory review mentioned at footnote 15.)
 14. Section 45 of the DNCR Act.
 15. Department of Broadband, Communications and the Digital Economy, *Discussion paper: Do Not Call Register Statutory Review*, October 2009, viewed 25 January 2010, http://www.dbcde.gov.au/telephone_services/do_not_call/statutory_review. To date, 68 submissions responding to the discussion paper are publicly available on the Department's website.
 16. Australian National Audit Office, op. cit. ANAO made three recommendations which are listed at p. 26 of the report.

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Outline of the Bill

The principal elements in the Bill are to make provision for:

- the eligibility of all businesses, government and emergency service operator telephone and all fax numbers to be included in the Register
- a prohibition on sending unsolicited marketing faxes to numbers recorded on the Register including faxes originating from overseas (subject to certain exemptions)
- a new mechanism of registered consent which will allow new registrants the option of expressly consenting to receive telephone calls or marketing faxes relating to particular industry classifications, or alternatively, choosing the default option of opting out from receiving all telemarketing calls and marketing faxes, and
- the conferral of power on the ACMA to make determinations for a number of related purposes.¹⁷

The Main Provisions section of this Bills Digest provides more detail.

Committee consideration

The Bill has been referred to the Senate Standing Committee on Environment, Communications and the Arts for inquiry and report by 24 February 2010 ('the Senate inquiry'). Details of the inquiry are at:

http://www.aph.gov.au/Senate/committee/eca_ctte/do_not_call_register/index.htm

Key issues and the position of significant interest groups

The question of whether businesses should be able to opt out of telemarketing through registration on the Register was on the agenda when the original legislation, the Do Not Call Register Bill 2006 (the 2006 Bill), was first introduced into Parliament in May 2006. Media reports at that time suggested that the Australian Direct Marketing Association (ADMA) had some influence on the final form of the 2006 Bill, particularly in relation to the decision to exclude businesses from participating in the Do Not Call Register scheme.¹⁸ It was also reported that the Council of Small Business Organisations of Australia was disappointed with the Howard Government's last minute decision to exclude businesses from participation in the Do Not Call Register scheme.¹⁹

Submissions to the Senate inquiry into the current Bill cover a range of views. Privacy advocates and consumer groups support the amendments in the Bill and in some cases use

17. Office of the Privacy Commissioner, *Do Not Call Register Legislation Amendment Bill 2009: submission to the Senate Standing Committee on the Environment, Communications and the Arts*, January 2010, p. 2.

18. M A Neilsen, *op. cit.*, p. 5.

19. *Ibid.*

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their submissions as an opportunity to call for further amendments. For example, Consumer Credit Legal Centre NSW supports the inclusion of businesses in the Register because it argues ‘there is a clear cost to business in efficiency of receiving unwanted business calls and faxes’.²⁰ Its submission recommends further amendments: to widen the scheme to remove some of the current exemptions; to make registration permanent, without the need for a three-yearly re-registration; and to make it an opt-in scheme (as opposed to the existing opt-out scheme).²¹

However the majority of the submissions to the Senate inquiry so far,²² are from businesses strongly opposed to the provisions that would allow businesses to list their numbers on the Register thereby opting out of receiving unsolicited telemarketing calls. The most substantial submission is from ADMA which has commissioned Access Economics to investigate and report on the economic consequences of extending the Register to include businesses and government numbers. That report is included as part of the ADMA’s submission.²³

In relation to costs, the ADMA submission points to the Access Economics report where it concludes:

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 business 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 to \$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.²⁴

ADMA states that the extension of the Register to business and government will dampen, not increase productivity, and concludes that the body of evidence now available calls into question whether the extension meets the threshold question of providing a net benefit to the community. The submission continues:

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20. Consumer Credit Legal Centre NSW, *Submission to the Senate inquiry into the Do Not Call Register Legislation Amendment Bill 2009*, January 2010.
 21. *Ibid.*
 22. As at 27 January 2010.
 23. Australian Direct Marketing Association, *Submission to the Senate Standing Committee on the Environment, Communications and the Arts on the Do Not Call Register Legislation Amendment Bill 2009*, January 2010 and Access Economics, *Economic impacts of an extension of the Do Not Call Register Act*, January 2010.
 24. *Ibid.*, quoting Access Economics, *op. cit.*, p. 19.

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ADMA queries whether under the Best Practice Regulation framework [used by the Government], this initiative should have proceeded to Bill stage without a proper Regulatory Impact Analysis having been completed.²⁵

The Access Economics report points to several problems with the mechanics of the Bill, including the cumbersome registered consent provisions and the broad definition of ‘telemarketing’ relied on in the DNCR Act. It argues that the telemarketing definition would mean that a very broad range of business marketing activities would be affected, the effect being that many small businesses would not recognise their marketing activities as telemarketing even though they would be considered so under the Act.²⁶ In relation to registered consent the report states that the provisions are 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.²⁷

The Council of Small Business Organisations of Australia in its joint submission with TrueLocal.com.au also opposes the Bill, arguing its effect would be to:

- reduce competition and favour large businesses. The submission claims small businesses will be unable to contact 30 to 50 per cent of the prospective market by telephone
- disadvantage new entrants to the market who do not have existing business relationships
- increase compliance costs. For example, small businesses would have to subscribe to the ‘Do Not Call Register’; establish procedures to record and manage express consents received; check each number that has no express consent against the ‘Do Not Call Register’, and set up opt-out lists for those businesses that have indicated they do not want to be contacted again, and
- reduce innovation for small business due to lack of ability to promote new products to businesses listed on the Register.²⁸

Financial implications

Budget funding of \$4.7 million has been provided over four years for the arrangements contained in the Bill. The Explanatory Memorandum states that it is anticipated that

25. Australian Direct Marketing Association, op. cit., p. 3.

26. Access Economics, op. cit., p. 7.

27. Ibid., p. 5.

28. TrueLocal.com.au and the Council of Small Business Organisations of Australia, *Submission to the Senate Standing Committee Inquiry into the Do Not Call Register Legislation Amendment Bill 2009*, January 2010. TrueLocal.com.au is News Limited’s online business.

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approximately \$3.5 million will be recovered from the telemarketing and fax marketing industries through the payment of fees to access the Register.²⁹

Main provisions

Schedule 1, Part 1—Amendment of the *Do Not Call Register Act 2006*

Items 3 to 19 propose amendments to section 4, the definitions provision in the DNCR Act. Relevant definitions are discussed below.

What are ‘faxes’ and ‘marketing faxes’?

Item 22 inserts **proposed sections 5A** and **5B** which define ‘faxes’ and ‘marketing faxes’ respectively for the purposes of the DNCR Act. These are key definitions that underlie the new provisions in the Bill.

The term ‘fax’ is defined broadly to include a fax whether or not it is a facsimile of a physical document or was created by computer software, and whether or not the sending of the fax involves the use of a fax machine, a fax server, a fax gateway, a mail-to-fax system or a system or equipment specified in the regulations.

In general terms a ‘marketing fax’ is a fax that has a ‘commercial type purpose’.³⁰ The particular types of commercial purposes are set out in **proposed paragraphs 5B(1)(d) to (n)**. They are faxes for which the *purpose, or one of the purposes* is:

- to offer to supply:
 - goods or services
 - land or an interest in land
 - a business or investment opportunity
- to advertise, or to promote:
 - goods or services, or a supplier of goods or services
 - 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 specified in the regulations.

29. Explanatory Memorandum, Do Not Call Register Legislation Amendment Bill 2009, p. 2.

30. *Ibid.*, p. 10.

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The purpose of the fax is to be determined by having regard to the content and presentational aspects of the fax and the content that can be obtained using the numbers, URLs or contact information mentioned in the fax (**proposed subsection 5B(1)**).³¹

Regulations may provide that a specified kind of fax is not a ‘marketing fax’ for the purposes of the DNCR Act (**proposed subsection 5B(7)**).

Rules about sending ‘marketing faxes’

Item 29 inserts a **new Part 2A** that sets out the rules regarding the sending of marketing faxes.

Proposed section 12B is the primary provision. It provides that a person must not send,³² or cause to be sent,³³ a marketing fax to an Australian number which is registered on the Register and the fax is not a designated marketing fax. Designated marketing faxes are dealt with in **new Schedule 1A (item 71)** and provide exemptions for marketing faxes sent by certain persons and organisations (see below under Exemptions).

Proposed subsection 12B(8) covers the ancillary offences of aiding, abetting, conspiracy and inducing the sending of marketing faxes by threats or promises.

Proposed subsection 12B(9) provides that the offences under **proposed section 12B** are civil penalty provisions. The penalties are set out in Part 4 of the DNCR Act.

The Explanatory Memorandum makes clear that this penalty provision, dealing with fax marketing, covers the person who actually sent the fax (by dialling the relevant number and pressing send), the author of the content of the fax (who caused the fax to be made), or another person who authorised the fax to be sent by contracting with a fax marketer to provide the fax marketing services.³⁴

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31. The Explanatory Memorandum at p. 11 provides practical examples of what faxes would fit the definition of ‘marketing faxes’.
 32. ‘Send’ is defined as including ‘attempt to send’ (**item 19**), clarifying that the concept of sending a marketing fax does not require the sender to have successfully sent a fax. It is intended that faxes which are sent, but not successfully received, are to be caught by the Act. See Explanatory Memorandum, p. 9.
 33. The extended meaning of ‘cause’ is set out in **proposed subsection 12B(10)**. It covers the situation where a person (referred to as the *first person*) enters a contract or arrangement with another person under which that other person undertakes to cause its employees or agents to send marketing faxes. In that case, the first person is taken to have caused the marketing fax to be sent.
 34. Explanatory Memorandum, p. 14.

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Exceptions to the prohibition on sending marketing faxes

The exceptions to an offence under **proposed section 12B** are specified as:

- the relevant fax account-holder (or nominee) consented to the sending of the fax (**proposed subsection 12B(2)**)³⁵
- the sender had checked or ‘washed’³⁶ his or her lists of numbers in the last 30 days and been advised the number was not on the Register (**proposed subsection 12B(3)**)
- the fax was sent by mistake (**proposed subsection 12B(5)**), or
- the person took reasonable precautions and exercised due diligence to avoid the contravention (**proposed subsection 12B(6)**).

Under **proposed subsection 12B(7)**, a person who wishes to rely on one of these exceptions bears the evidential burden in relation to the matter contained in the relevant provision.³⁷ These exceptions replicate the exceptions to the prohibition on making telemarketing calls in existing subsections 11(3) to 11(5) of the DNCR Act.

‘Registered consent’ defence

Proposed subsection 12B(4) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register where there is relevant ‘registered consent’. ‘Registered consent’ is defined as consent that has been entered on the Register (**item 16**).³⁸ Under **proposed subsection 12B(4)**, there will not be a prohibition on sending marketing faxes to numbers on the Register where:

- the fax marketer has washed their contact list and has been advised that the number was registered
- registered consent applied for that number to receive calls and faxes about an activity covered by a particular industry classification, and
- the actual fax sent fell into an industry classification that had been registered with respect to that number.

For a telemarketer to be able to claim this exception, the content or purpose of the fax must fall within the particular industry classification which the registrant selected. The

35. ‘Consent’ is defined in Schedule 2 of the DNCR Act and ‘nominee’ is defined in section 39. Consent is further described below at pp. 13–14.

36. ‘Washed’ is described above at footnote 5.

37. An ‘evidential burden’ in relation to a matter is defined in section 4 of the DNCR Act. It requires the person to point to evidence that suggests a reasonable possibility that the matter exists or does not exist.

38. Note that *registered consent* differs to express consent and implied consent for the purposes of the DNCR Act.

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ACMA will have power under **proposed section 5C** to make industry classification determinations for the purposes of the Act (**item 22**).³⁹

Item 26 amends section 11 and provides an equivalent exemption in relation to telemarketing calls. Its effect is to allow telemarketing calls to numbers that have been registered and where relevant registered consent applies.

The Minister's second reading speech states that the purpose of these provisions is to allow businesses to list their numbers on the Register while continuing to receive telemarketing calls and marketing faxes relating to specific industry classifications.⁴⁰

Fax marketing contracts

Proposed section 12C prohibits a person or organisation entering into a fax marketing contract, arrangement or understanding unless the contract, arrangement or understanding contains an express obligation requiring the other party to comply with the DNCR Act. This is a civil penalty provision (**proposed subsection 12C(3)**).

The Explanatory Memorandum states that this has been included to ensure that people causing marketing faxes to be sent through outsourcing arrangements specifically require the fax marketer to comply with the Act.⁴¹ Existing section 12 provides an equivalent requirement for contracts and agreements relating to telemarketing calls.

Exempt organisations or 'designated marketing faxes'

As stated above, **proposed paragraph 12B(1)(b)** provides an exception from the prohibition on sending unsolicited marketing faxes in regard to 'designated marketing faxes'. 'Designated marketing faxes' are dealt with in **proposed Schedule 1A**.⁴² They are marketing faxes made by or authorised by:

- government bodies (as defined in section 4 of the DNCR Act)
- religious organisations
- charities or charitable institutions
- registered political parties; independent members of any Commonwealth, state, territory or local government parliament/governing body; or nominated candidates for these parliaments. Faxes would be exempt when the purpose is to conduct fundraising for electoral or political purposes, and

39. The determinations will be legislative instruments and will therefore be subject to parliamentary disallowance under Part 5 of the *Legislative Instruments Act 2003*.

40. A Albanese, 'Second Reading Speech', op. cit., p. 10.

41. Explanatory Memorandum, p. 17.

42. See **item 71** of **Schedule 1** to the current Bill.

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- educational institutions (as defined in section 4 of the DNCR Act), but only in relation to faxes to students or former students.

In all these exempt categories, if the fax 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 (**proposed paragraphs 2(b), 3(1)(c), 3(2)(c), 3(3)(c) and 4(2)(e) of proposed Schedule 1A** to the DNCR Act). 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] is designed to enable charities to undertake their normal fundraising work. It enables charities to sell goods for which they are the supplier for a profit for the purpose of raising funds for the organisation. However, it does not enable them to provide marketing services for non-exempt organisations. This limitation ensures that the exemption is not abused by unscrupulous operators setting themselves up under the auspices of a charity and taking advantage of the exemption to send marketing faxes on behalf of non-exempt organisations.⁴³

Regulations may also be made specifying that certain faxes are ‘designated marketing faxes’ for the purposes of the Act (**Schedule 1B, proposed clause 5**).

By way of comparison, the organisation exemptions in **proposed Schedule 1B** replicate the Schedule 1 organisation exemptions that currently apply in relation to telemarketing calls.

The Do Not Call Register

Part 3 of the DNCR Act deals with the Register. In particular section 13 provides for the ACMA to establish the Register or alternatively, for the ACMA to contract it out to a contract service provider to operate on its behalf. Currently, the only numbers eligible to be entered on the Register are Australian telephone numbers used either exclusively or primarily for private or domestic purposes and not used exclusively for receiving or transmitting faxes (section 14).

Items 30, 31, 33 and 37 to 39 of the Bill are key amendments to the Part 3 provisions dealing with the Register.

Item 33 repeals **section 14** which sets out the criteria that currently must be met for a number to be eligible to be entered on the Register. The effect of the repeal is to broaden the scope of the Register so that all fax numbers and telephone numbers that are not used or maintained exclusively for private or domestic purposes, and all fax numbers, can also be entered on the Register.

43. Ibid, p. 24.

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Item 30 replaces the word ‘telephone’ with ‘Australian’ in relation to numbers in subsection 13(1). Its effect is that the ACMA will be required to include fax numbers as well as telephone numbers on the Register.

Item 31 also amends subsection 13(1) extending the existing obligation of the ACMA to keep a register of numbers. The ACMA would now also be required to keep a record of ‘registered consent’ by registrants on the Register. For the meaning and purpose of ‘registered consent’ see pages 5, 10–11, and 14 in this Digest.

Sections 15 and 16 of the DNCR Act deal with the process of registering numbers on the Register. **Items 37 to 39** propose amendments to these sections to take account of the new process of registering consent according to industry classifications. The amendments are:

- applications for registration could include a statement:
 - that the applicant consents to the making of telemarketing calls (or the sending of marketing faxes) to the number, if the call (or fax) is about an activity covered by a specified industry classification, and
 - that the applicant wishes to have that consent entered on the Register (**item 37, proposed paragraphs 15(1)(ba) and (bb)**)
- applications can be made even if the number is already registered (thus giving those applicants already on the Register an opportunity to use the new registered consent option) (**item 38**), and
- when registering numbers on the Register, the ACMA, or the relevant contract service provider, must include the additional information relating to registered consent (**item 39**).

Existing section 19 of the DNCR Act deals with accessing the Register and sets out the process for checking numbers against the Register. **Item 52** repeals and replaces **paragraph 19(2)(d)**, which has the effect of requiring the ACMA to allow those seeking access to the Register (that is telemarketers and fax marketers) to be provided with information in a number of different formats. For example, applicants may request a list showing only numbers that are not on the Register or alternatively a list showing a yes or no against each number and also the particular industry classification that has been selected.⁴⁴

Several of the amendments to Part 3 of the DNCR Act replace the words ‘telephone’ with ‘Australian’ (for example **items 46 and 49**). These are consequential to the fact that the Register would now include fax numbers as well as telephone numbers.

44. Ibid, p. 20.

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Consent

Items 72 to 84 propose amendments to existing Schedule 2 to the DNCR Act, which deals with the concept of consent. As noted above, one of the exceptions to an offence of making an unsolicited telemarketing call or sending an unsolicited marketing fax is that the relevant account-holder (or nominee) consented to the making of the call. ‘Consent’ is defined in Schedule 2, clause 2 of the DNCR Act to mean:

- express consent, or
- consent that can be reasonably inferred from the conduct and the business relationships of the individual or organisation concerned (for example where a person purchases goods or services which involved ongoing warranty).

Item 75 adds a note to the basic definition of ‘consent’, to make it clear that the new concept of ‘registered consent’ is different from ‘express consent’.

Item 76 inserts **proposed clause 3A** which deals with the duration of registered consent. Registered consent lasts for the duration of registration. It cannot be withdrawn unless the person withdraws the number and re-registers.⁴⁵

Item 84 inserts **proposed clauses 6 and 7** into Schedule 2 to enable the ACMA to make determinations setting out the circumstances in which the consent of a business or other organisation to receive telemarketing calls or marketing faxes will be inferred or will not be inferred. Such determinations will be legislative instruments⁴⁶ and must be made in consultation with the Minister. Draft determinations will be published on the ACMA’s website to allow public comment. The Explanatory Memorandum states that this determination-making power is intended to operate as a reserve power, which will give the ACMA the ability to respond to unintended problems arising from the introduction of business numbers on the Register.⁴⁷

Schedule 1, Part 2 —Amendment of the *Telecommunications Act 1997*

Primarily, Part 2 of Schedule 1 to the Bill makes amendments to Part 6 of the *Telecommunications Act 1997* (the Telecommunications Act)⁴⁸ to enable the fax marketing

45. Registration of a telephone number on the Register lasts for three 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 (section 17 of the DNCR Act).

46. In other words they must be registered and tabled in Parliament and would be subject to disallowance according to the *Legislative Instruments Act 2003*.

47. Explanatory Memorandum, p. 31.

48. Part 6 of the Telecommunications Act deals with industry codes and standards and provides that bodies representing sections of the telecommunications industry, the e-marketing industry, or the telemarketing industry may develop industry codes. Under Part 6 the ACMA

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industry to develop industry codes and the ACMA to make industry standards relating to fax marketing activities. These amendments are consistent with existing arrangements which allow codes and standards to be made for the telemarketing industry.⁴⁹

Items 97 to 100 insert definitions of ‘fax marketing industry’ and ‘marketing fax’. A ‘marketing fax’ incorporates the meaning given to it in **proposed section 5B** of the DNCR Act (**item 22** of **Schedule 1** to the Bill) and is broadened to include faxes for which one of the purposes is:

- to conduct opinion polling, or
- to carry out standard questionnaire-based research.

Item 100 inserts **proposed section 109C** of the Telecommunications Act to specify criteria that identify what a ‘fax marketing activity’ is, for the purposes of industry codes and standards that are developed by fax marketing industry bodies. It is also drafted to maintain consistency with the definition of a ‘marketing fax’ in **proposed section 5B** of the DNCR Act, inserted by **item 22** of **Schedule 1** to the Bill.

Item 101 inserts **proposed section 110C** to clarify that there are sections of the fax marketing industry that may develop relevant codes and standards. Similarly, **item 102** inserts **proposed section 111AB** to define ‘participants’ in a section of the fax marketing industry.

Division 3 of Part 6 of the Telecommunications Act deals with matters such as the statement of regulatory policy applicable to the general principles relating to industry codes and standards. The administration of the policy rests with the ACMA. **Item 103** inserts **proposed subsection 112(1C)** to state expressly that it is Parliament's intention that the ACMA's regulation extends to the examination of industry codes prepared by sections of the fax marketing industry. **Item 106** inserts **proposed subsection 112(3D)** to provide criteria that the ACMA must take into account when determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in the fax marketing industry. The criteria include factors such as the number of persons likely to benefit from the code or standard; the extent to which those persons are householders or small business operators; and the legitimate business interests of participants in sections of the fax marketing industry.

Existing subsection 113(3) gives examples of the matters that industry codes and industry standards may deal with. **Item 110** inserts **proposed paragraphs 113(3)(z)** and **113(3)(za)** to provide additional examples relevant to the fax marketing industry namely:

- recording keeping practices to be followed in relation to marketing faxes sent or attempted to be sent, and

also has a reserve power to make an industry standard if there are no industry codes or if an industry code is considered deficient.

49. Explanatory Memorandum, p. 2.

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- action to be taken to restrict the number of faxes sent by the relevant participant during a particular time to a particular Australian number.

Item 131 inserts **proposed section 125B** that gives the ACMA the power to determine an industry standard for participants in each section of the fax marketing industry. The industry standard will be a legislative instrument and must be in place at all times after commencement of this section. The standard will set out matters such as:

- the time and/or days during which marketing faxes may be sent
- the specific information about the person authorising the message that must be included in the fax
- a restriction on the number of faxes that can be sent by the relevant participant during a particular time to a particular Australian number, and
- a requirement that marketing faxes must contain information about how to unsubscribe from further marketing faxes.

Many of the remaining amendments in Part 2 are consequential, inserting references to the fax marketing industry where appropriate in the Telecommunications Act.

Concluding comments

Telemarketing is a subject that arouses strong debate. By some it is seen as frustrating and intrusive, by others it is a necessary part of business and marketing.

The expansion of the Register to include fax numbers and emergency numbers appears uncontroversial. However there is a more mixed reaction to the proposal to allow businesses to list their numbers on the Register and no longer receive unsolicited telemarketing calls. While the Rudd Government indicates that consultation has shown there is wide support for the proposal, others, such as the Australian Direct Marketing Association, Access Economics, and the Council of Small Businesses of Australia strongly oppose the Bill and question the extent of that consultation.

Parliament may ask why the Government is pursuing a significant amendment at this time when a more comprehensive statutory review of the Do Not Call Register scheme is underway. That review is to look at the existing exemptions for organisations such as charities and political parties. Surveys and studies indicate that unsolicited calls from these exempt organisations are still a source of frustration to those consumers who have registered their phone numbers on the Register.⁵⁰

50. The Australia Institute, *Submission to the Do Not Call Register Statutory Review*, October 2009, p. 25, viewed 25 January 2010, http://www.dbcde.gov.au/telephone_services/do_not_call/statutory_review/submissions_to_DNC_register_statutory_review.

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There may, too, be a contradiction in a government and members of parliament curtailing business-to-business telemarketing when they themselves are exempt from any prohibition on making telemarketing calls.

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