

Chapter 1

Referral to the committee

1.1 On 11 May 2006, the Senate referred, upon the introduction of the Bills into the House of Representatives, the provisions of the Do Not Call Register Bill 2006 (the bill) and the Do Not Call Register (Consequential Amendments) Bill 2006 (the consequential amendments bill) to the Environment, Communications, Information Technology and the Arts (ECITA) Legislation Committee for inquiry and report by 13 June, the reporting date subsequently being amended to 19 June 2006.

1.2 In accordance with its usual practice, the committee advertised the inquiry in *The Australian*, calling for submissions by Friday 9 June. The committee also directly contacted a number of relevant organisations and individuals to invite submissions.

1.3 Submissions were received from 33 organisations and individuals, as listed in Appendix 1.

Acknowledgements

1.4 The committee thanks all those who contributed to its inquiry by preparing submissions, and thanks officials of the Department of Communications, Information Technology and the Arts (DCITA) for their cooperation during a very busy period.

Notes on references in this report

1.5 References in this report are to individual submissions as received by the committee rather than to a bound volume of submissions.

Background to the bills

1.6 Recent years have seen a rapid rise in telemarketing phone calls to people's homes. Many people have complained that unsolicited phone calls are an inconvenience and an invasion of their privacy. A recent phone-in organised by the Australian Law Reform Commission (ALRC) regarding citizens' privacy issues reported that around three-quarters of the 1300 calls they received related to telemarketing calls.¹ The ALRC President Professor David Weisbrot remarked that 'An overwhelming majority of callers were unhappy with the number and the timing of calls they received from telemarketers'.² When the New South Wales and Victorian

1 Australian Law Reform Commission, 'Telemarketing, information privacy top community concerns', Media release, 5 June 2006.

2 Australian Law Reform Commission, 'Telemarketing, information privacy top community concerns', Media release, 5 June 2006.

governments conducted a four week phone poll, they received over 20 000 calls supporting the existence of a do not call register.³

1.7 In October 2005 the Commonwealth released a discussion paper on options for creating a national 'do not call' register.⁴ The proposed model is a legislated national register to enable consumers to 'opt out' from telemarketing approaches at anytime by placing their numbers (basic fixed line and mobile phone) on a Do Not Call Register (the register).

1.8 In the month of public consultation that followed the release of the government's discussion paper, the Department received 495 submissions, approximately 90 per cent of which supported the establishment of a register.

The government's preferred approach

1.9 There are several key features of the government's preferred approach set out in the bills currently before the committee. They are:

- With some exceptions, use of the register will be mandatory for telemarketers.
- A co-regulatory approach: the government will regulate some aspects of telemarketing, the Australian Communications and Media Authority (ACMA) will develop standards for operations and oversight of the register, and the industry can develop an industry code which would be registered by the Australian Communications and Media Authority, under Part 6 of the *Telecommunications Act 1997*.⁵
- Consumers who do not want to receive telemarketing calls will apply to have their numbers on a register, opting out of receiving unsolicited calls.
- Registration of phone numbers (via account holders or nominees) rather than of individuals.
- Limited registration periods: a number will have to be re-registered every three years to ensure telemarketers do not use it for calls.
- Scope limited to phones (landlines and mobile phones) primarily used for private purposes.
- A range of exemptions: some individuals and organisations will be exempt from the Act, under certain circumstances.

3 Victorian and NSW Governments, Submission No. 487 on the DCITA Discussion Paper, October 2005, http://www.dcita.gov.au/_data/assets/pdf_file/35131/v.pdf, accessed June 2006.

4 Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, 'A solution for nuisance calls: Options for an Australian Do Not Call register', Media release 123/05, 30 October 2005.

5 See the Consequential Amendments Bill 2006.

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- Some calls from businesses with existing relationships with customers will be allowed, depending on the nature of the call and the nature of the existing relationship.
 - A legislative review. The Act guarantees that there will be a review of the operation of the register at the end of three years.

1.10 Several of the features listed above were the focus of comment in the submissions to the ECITA committee's inquiry into the bills.

Issues

1.11 Submissions to this inquiry raised a number of concerns about the detail of the bill. Submissions were, in general, supportive of a national do not call register. While some submissions raised concerns about the proposed register being restrictive of business in different ways, the committee believes these concerns must be weighed against the overwhelming public dislike of unsolicited telemarketing calls and support for the existence of a register. The committee acknowledges the work of responsible telemarketing businesses and industry associations such as the Australian Direct Marketing Association (ADMA) in taking the first steps toward the management of unsolicited phone calls.

Registering to not receive calls

1.12 Submissions from companies and associations involved in direct marketing raised concerns that the register would be a register of phone numbers. They argued that it should be a register of individuals rather than of numbers.⁶ The Australian Bankers Association argued that 'any individual sharing a number should be able to give an organisation express consent to call'.⁷ Some other groups argued that individuals signing on to the register should be able to agree to receive certain types of calls, and this is discussed in the section on exemptions, below.

1.13 The committee understands that the current bill places the decision of whether to be on the Do Not Call Register in the hands of telephone account holders rather than individuals. This is consistent with consumer expectations that being on the register will mean that they will no longer have to answer unsolicited marketing calls. Even in those instances where one individual in a household might consent to receiving calls, others may still end up answering the phone. Given that one of the main complaints of the public is that their time is wasted by such calls, the most appropriate way to ensure that this is not a problem would appear to be registration of phone numbers rather than individuals.

1.14 The Department made clear that:

6 Australian Wine Selectors, *Submission 24*, p. 2.

7 Australian Bankers' Association, *Submission 13*, p. 4.

The Government's key reason for adopting the model was to protect the privacy of individuals on the register. A register based on numbers ensures that the only consumer information that telemarketers will be able to receive from the Register will be the telephone number of the registrant, No corresponding name or address will be released.⁸

1.15 Both the United States and the UK take the approach of registering numbers rather than individuals (though individuals can now provide their names in the UK). This approach provides the strongest protection for privacy, and means that the person with responsibility for the account is the person responsible for the decision to place a number on the register. The committee also notes that it is not aware of any complaints from individuals opposed to the scheme on the grounds that they might not be able to receive telemarketing calls.

1.16 The committee notes that the bill requires account-holders to re-register their telephone number every three years if they want to stay on the register. The committee notes that the Office of the Privacy Commissioner opposes this approach:

The Office recommends that 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.⁹

The explanatory memorandum states that regular re-registration is needed because 'It is likely that as people move addresses and telephone numbers, they may neglect to remove the previously held number from the register'.¹⁰

1.17 Numbers will remain on the register for a period of three years before they will require re-registration, unless they are removed earlier. With approximately 17 per cent of the Australian population moving home each year, three years is considered an appropriate time frame to strike a balance between the need for accuracy of information and the need to require registrants to re-register each year.

Recommendation 1

1.18 That the Government examine options to ensure that telephone account holders receive an effective reminder prior to the expiry of their registration on the Do Not Call Register.

Nominees

1.19 Clause 39 of the bill allows account-holders to nominate individuals to act as nominees. It also allows the regulations to specify circumstances in which a person can be deemed to be a nominee. The status of nominee has two main purposes under the bill. First, under clause 15, a nominee may apply on behalf of the account-holder

8 DCITA, *Submission 33*, p. 1.

9 Office of the Privacy Commissioner, *Submission 8*, p. 5.

10 Explanatory Memorandum, p. 69.

to place a number on the register. This provision allows, for example, 'for individuals to register on behalf of others who are incapable or incompetent'.¹¹ Second, under subclause 11(2) of the bill, a telemarketing call to a number that is on the Do Not Call Register is acceptable if a nominee of the account-holder consented to the call. Schedule 2 of the bill sets out the meaning of consent, allowing the regulations to specify conditions under which consent may or may not be inferred (see also below), and this includes the consent of nominees.

1.20 Concerns were raised by both industry stakeholders and the Telecommunications Industry Ombudsman (TIO) about the operation of the nominee provisions. The TIO suggested that the bill might contain more guidance:

as to how the authenticity of the nominee can be established, to ensure that the relevant telephone account holder's wish to be included on the Register can only be overridden by either themselves or their legitimate nominee.¹²

1.21 The committee notes that the Bill provides for 'oral' and 'written' consent to be provided.

Recommendation 2

1.22 In order to ensure appropriate and legally certain authorisation, the committee recommends that consent be given by 'written' means only.

1.23 The TIO based its concerns on complaints it receives regarding transfers of telephony services between providers. Currently subclause 39(2) indicates that a nomination may be made, or withdrawn, orally or in writing. The bill does not actually say that the nomination has to be made to the body administering the register. It may be that consideration should be given to making it clear that a person has to be nominated to the administrator of the register, if that is the intention. Regardless, however, the problems experienced by the TIO in relation to transfer of telephone services are unlikely to be reproduced in the case of the do not call register. The complaints received by the TIO are the product of a situation where competitors stand to receive a commercial gain from seeking to act as 'nominees'. There are no similar incentives in the case of the register.

1.24 The ADMA was concerned about the system of nominees. It argued that:

As an organisation will be unable to determine whether their existing customer is a Relevant Telephone Account Holder or 'nominated' individual it will not be able to call any customer whose telephone number is listed as there is the possibility that the customer is not a 'nominated' individual and therefore unable to provide inferred consent.

1.25 The committee believes this concern to be exaggerated. The nominee provisions help ensure that a caller making a phone call to an individual who is *not* the

11 ADMA, *Submission 23*, p. 17.

12 TIO, *Submission 14*, p. 1.

telephone account holder will not be in breach of the legislation, provided that the caller has the consent of the person they are calling, and the person they are calling is a nominee. The ADMA expressed concern that a telemarketer would not be able to verify whether an individual is a nominee or not. However, this concern appears unwarranted. Following a query from the committee, the Department confirmed that a telemarketer will be able to confirm that a person is a nominee by:

... asking the person consenting to receive telemarketing calls if they are the relevant account holder or have been nominated by the account holder. The telemarketer would be able to rely on the nominee's assertion that they have the appropriate authority to give consent to use of the number, unless there are reasons to suspect that the person consenting is not a nominee. If a person does not have appropriate authority, the Bills provide telemarketers with the defence of using reasonable precautions and exercising due diligence to comply with their legislative obligations: see clause 11(5). If proceedings are commenced against a telemarketer, they will be able to rely on the fact they questioned the individual, there was no reason to suspect that the individual was not a nominee, and they acted in good faith on the advice received from the individual.

Alternatively, the most certain way a company can confirm that a person is a nominee is to contact the person holding the account who has nominated the person.

If the nomination is in writing, a telemarketer would be able to request a copy of a written nomination.¹³

1.26 The committee notes that this provides a further cogent justification for its recommendation that consent to be a nominee should be via written means only.

1.27 The scenarios outlined by the ADMA where individuals who may not be account holders ought to be able to consent to receiving calls – 'a family with adult children, flat-share arrangements and blended households'¹⁴ – are exactly the kinds of situations in which account holders can make use of the nominee provisions, allowing individuals to choose to receive telemarketing calls. The committee is very surprised that the ADMA is thus opposed to the nominee provisions. The committee notes that the regulatory framework is designed not only to allow the account holder to identify nominees, but for the regulations to specify situations in which individuals can be deemed to be nominees.¹⁵ The committee also draws attention to subclause 11(5) which states that people who take reasonable precautions and exercise due diligence will not be prosecuted if, despite their efforts, they call a registered number in breach of subclause 11(1).

13 DCITA, *Submission 33*, p. 3.

14 ADMA, *Submission 23*, p. 10.

15 Subclause 39(4).

1.28 The committee believes that the nominee provisions will aid in avoiding telemarketing companies being penalised for making calls to individuals from whom they had received consent to make contact, even though the number might be on the register. The committee supports giving the industry this protection.

Inferred consent and business relationships

1.29 Some submitters expressed concern that calls made to people with whom a caller has an existing business relationship are not adequately protected under the bill.¹⁶ Calls arising from an existing relationship are addressed through Schedule 2 of the bill, which deals with consent. There are two ways in which consent to receive calls can be given: express consent and inferred consent. Inferred consent is defined in the bill as:

consent that can reasonably be inferred from:

(i) the conduct; and

(ii) the business and other relationships;

of the individual or organisation concerned.¹⁷

1.30 Optus argued that the inferred consent provisions:

confer consent in very limited circumstances. Schedule 2 does not provide an exemption for organisations to contact their customers as it is not possible to contact a customer about any product other than a product they have already purchased.¹⁸

1.31 The committee received evidence from some submitters that calls should be able to be made to existing customers, making them aware of 'discounts or special offers'.¹⁹ Some submitters suggested that instead of relying on the consent provisions in Schedule 2, calls arising out of existing business relationships should be addressed in Schedule 1, making such calls 'designated telemarketing calls', thus exempting them from the prohibitions in the bill.²⁰ They argued that such a separate exemption was in use in the US, UK and Canada.²¹

1.32 Despite these concerns, other groups held a contradictory view. The National Credit Union Association considered that:

The inclusion of the concept of “consent” as an exemption to making “telemarketing calls” to persons on the “do not call” register (s.11(2) of the

16 Australian Bankers' Association, *Submission 13*; Optus, *Submission 15*.

17 Do Not Call Register Bill 2006, Schedule 2, Clause 2(b).

18 Optus, *Submission 15*, p. 7.

19 Australian Bankers' Association, *Submission 13*, p. 5.

20 Optus, *Submission 15*, p. 8; Telstra, *Submission 25*, p. 2.

21 ADMA, *Submission 23*, p. 15.

Bill) will provide our members with sufficient comfort to continue with contacting existing clients.²²

1.33 There appears to be some confusion over the period for which consent is valid. Some submitters appeared concerned that express consent would be valid for only three months.²³ Schedule 2 of the bill clearly says that express consent is taken to be granted for three months *only if a different time period is not agreed to by the consumer*. A different time period can include specifying that consent is given indefinitely. If a person consents to being contacted until they make arrangements to the contrary, this consent will remain valid. The explanatory memorandum also makes clear that the three month limit does not apply if 'consent has been inferred from the particular conduct or relationship'.²⁴ In these situations, duration of consent depends on the circumstances. As the explanatory memorandum goes on to point out:

For example if a person has an existing relationship with an optometrist which involves annual eye check ups then it may be reasonable to infer that consent to receive reminder calls extends indefinitely, unless consent is withdrawn.²⁵

1.34 The committee notes that simply because an organisation can establish a pre-existing business relationship it does not mean that it would be reasonable to infer that a person has consented to receiving all telemarketing related calls from that organisation. The committee endorses the view of the Department that:

The average consumer has a daunting number of established business relationships. Given this, there are significant concerns that a blanket exemption for established business relationships has a real potential to undermine the effectiveness of the Register.²⁶

1.35 As enunciated in the Explanatory Memorandum:

The extent of the consent will be a matter of fact to be determined on the particular factual circumstances. A person will be taken to have consented to receiving the types of telemarketing call that a reasonable person would expect to receive based on the nature of the consent given.²⁷

1.36 Similarly, the Department stated that:

Under the proposed Australian model, businesses would be able to call individuals on the Do Not Call Register with whom they have a relationship

22 *Submission 10*, p. 2.

23 ADMA, *Submission 23*, pp 9, 12; Westpac, *Submission 20*, p. 2; Acxiom, *Submission 26*, p. 2.

24 Explanatory Memorandum, p. 97.

25 Explanatory Memorandum, p. 97.

26 DCITA, *Submission 33*, p. 4.

27 Explanatory Memorandum, p. 95.

as long as it would be reasonable for them to infer that the individual has consented to the call.²⁸

1.37 The committee notes that there is a fundamental difference between a customer that has pre-existing accounts or contracts with an organisation and a one off casual purchase from that organisation.

1.38 In the context of its letter to the committee, the Department expanded further on the concept of existing business relationships and implied consent, stating that:

For example, in the following types of relationship, as long as the individual had not suggested from their conduct that they did not wish to be called, it would be reasonable to infer that the individual had consented to a telemarketing call from the business:

- where a person has purchased goods or services that involve ongoing warranty and service provisions (eg purchase of a car with a three year warranty from the dealer;
- a shareholder and the companies in which they hold shares;
- a subscriber to a service and the service provider eg a telephone service provider and its customers; and
- a bank and the bank account holder.

Of course, the extent of a person's consent would depend on what could reasonably be inferred from the conduct and the relationship. For example, if a person has provided their telephone number to their bank (with whom they have a mortgage, transaction account and credit card), it would be reasonable for the person to expect to receive telemarketing calls about the bank's available mortgage products or credit card arrangements. However, it would not be reasonable to infer the bank could call the person about purchasing a new car.

If a person makes a one-off, casual purchase from a shop or website, it is unlikely to be reasonable to infer that the person consents to receiving unsolicited telemarketing calls from the relevant business simply because there was a pre-existing connection between the two parties.²⁹

1.39 The committee endorses the view of the Department that:

The proposed Australian model is preferred for the flexibility it affords the registrants and businesses. Businesses may contact their clients – but only where reasonable. The approach protects consumers while recognising the legitimate interests of business.³⁰

28 DCITA, *Submission 33*, p. 4.

29 DCITA, *Submission 33*, pp 4–5.

30 *Submission 33*, p. 5.

Exemptions

1.40 Under clause 11 of the bill, once a number is on the register, a person cannot make, or cause to be made, a telemarketing call to that number. However, there are certain exceptions proposed to this provision, set out in detail in Schedule 1 of the bill. These include exemptions for:

- government bodies,
- religious organisations, and
- charities or charitable institutions

and limited exemptions for:

- political parties,
- independent members of parliament,
- candidates for election, and
- educational institutions.

1.41 Some groups raised concerns about the breadth and nature of the exemptions.³¹ The ADMA argued that the exemptions were too broad and that 'consumers will continue to receive a high volume of unsolicited calls'.³² The Office of the Privacy Commissioner suggested that it would be better if exemptions were made on the basis of the nature of calls rather than for types of organisation or individual. The Australian Privacy Foundation argued that customers should be able to register to receive some types of calls (eg. 'charity fundraising and genuine market research') while rejecting others (eg. 'commercial marketing or political').³³ This approach was endorsed by the Fundraising Institute Australia, the national peak body for professional fundraisers.³⁴

1.42 Submissions from charities were strongly supportive of exemptions for their sector.³⁵ When the Department conducted its consultations on the register, it received numerous submissions from individuals indicating there should be no exemptions, but there was also some support for exemptions for charities. The ADMA indicated that its research had demonstrated 'that consumers do not differentiate between the 'types' of unsolicited calls received', suggesting that total call volume is the key issue, not the nature of the organisations or individuals making unsolicited calls.³⁶ The committee

31 Office of the Privacy Commissioner, *Submission 8*, p. 6; Australian Privacy Foundation, *Submission 9*.

32 ADMA, *Submission 23*, p. 2.

33 Australian Privacy Foundation, *Submission 9*.

34 Fundraising Institute Australia, *Submission 7*.

35 Royal Institute for Deaf and Blind Children, *Submission 3*; Fundraising Institute Australia, *Submission 7*; Oncology Children's Foundation, *Submission 11*.

36 ADMA, *Submission 23*, pp 6–7.

notes that individuals will still be able to make use of the private sector provisions of the Privacy Act, and this means that they will also be able to ask many exempt organisations not to call them, should they so wish.³⁷

1.43 The Royal Institute for Deaf and Blind Children was concerned that organisations which were allowed to make telemarketing calls under Schedule 1, but which wished to voluntarily respect the wishes of people who had signed up to the Do Not Call Register, might not be able to access the register owing to the effect of the Privacy Act.³⁸ Clause 13(6) of the bill says that

For the purposes of the Privacy Act 1988, the primary purpose of the Do Not Call Register is to facilitate the prohibition, under section 11, of unsolicited telemarketing calls (other than designated telemarketing calls).
[emphasis added]

1.44 The Royal Institute for Deaf and Blind Children expressed concern that this clause would prevent organisations such as charities from accessing the do not call register, because they are not prohibited from making telemarketing calls to numbers on the register. The committee believes that charities wishing to access the register voluntarily would be able to do so. This would be because implied consent to such access has been provided under Information Privacy Principle 11(1) in the *Privacy Act 1988*.

1.45 The committee believes that some types of calls should not be blocked as a result of registering a number on the do not call register. The exemptions are designed to facilitate calls that serve public interest objectives. The committee understands the point made by Fundraising Institute Australia, that people may regard charities in a different way to for-profit callers.³⁹ It also recognises that the reduction in unwanted telemarketing calls may have benefits for charities, whose efforts will be undertaken in a situation where people will be experiencing fewer unsolicited calls. The exemptions also recognise the constitutional principle of freedom of political communication. If exempted calls prove problematic, the committee believes this is an issue that will be able to be addressed in the review of the legislation that must take place after three years.

How often must a telemarketer check the register for banned numbers?

1.46 The TIO raised the question of whether someone engaged in telemarketing would have to check their lists regularly, ensuring that numbers recently added to the register were not called. The committee would be concerned if the bill had the effect of allowing organisations to check a number once and then call it thereafter, regardless of whether the account-holder subsequently signed on to the register. Subclause 11(3)

37 Office of the Privacy Commissioner, *Submission 8*, p. 4.

38 Royal Institute for Deaf and Blind Children, *Submission 3*, p. 2.

39 Fundraising Institute Australia, *Submission 7*, p. 4.

addresses this issue. It effectively means that a telemarketer is required to use a list of numbers checked against the register in the last 30 days.⁴⁰

1.47 Westpac argued that, because customers could agree to different periods of consent, expiring on different dates, business wanting to make telemarketing calls could find themselves having to 'wash' their customer lists constantly to ensure compliance with the laws. This is not an issue. The bill gives 30 days grace for an organisation to have checked whether a number is on the register (subclause 11(3)), and this is the case whether or not they are dealing with cases of temporarily granted consent. A telemarketing organisation simply needs to ensure its lists are 'washed' at least once every 30 days and it will be in compliance.

1.48 A number of groups raised the question of how often a telemarketing organisation should need to check its lists. Telemarketers suggested promotional campaigns typically span over one month,⁴¹ two months⁴² or three months.⁴³ These have led to suggestions that the washing of lists be required every 45 days (Optus), 60 days (Australian Bankers' Association), or somewhere in this range.⁴⁴ The diversity of what each submitter regarded as a 'normal' or 'typical' marketing campaign suggests that each submitter is largely drawing on their own business experience, rather than generalising across the industry. However, the key point is that the provisions are not being drafted for the convenience of telemarketers, but for the protection of consumers. The committee believes 30 days is a reasonable grace period in which marketers can have their lists 'washed'.

Penalties

1.49 Optus' submission has raised some concerns in relation to the penalties contained in the Bill, including the provisions relating to compensation, and the recovery of a financial benefit. In relation to single errors that result in contraventions over multiple days, Optus has advocated 'that penalties should be imposed on a per incident basis rather than on a per call, per day (contravention) basis'.⁴⁵ The committee draws these concerns to the attention of the Minister, and suggests that they be given due consideration.

Conclusion

1.50 The committee strongly supports the introduction of an opt-in do not call register, and believes the bill represents a regulatory approach that will have

40 See also Explanatory Memorandum, p. 59.

41 Optus, *Submission 15*, p. 12.

42 Australian Bankers' Association, *Submission 13*, p. 7.

43 GE, *Submission 21*, p. 3.

44 Telstra, *Submission 25*, p. 3.

45 Optus, *Submission 15*, p. 18.

widespread community support. Those issues that have been raised by submitters can be addressed through the regulations, and through the legislative review that is included in the bill (clause 45).

Recommendation 3

1.51 The committee recommends that the bill be passed, with an amendment stipulating that consent for a person to act as a nominee can only be provided in writing.

**Senator Alan Eggleston
Chair**

