

9th June 2006

Mr. Ian Holland
Committee Secretary
Senate Environment, Communications, Information Technology and the Arts Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Email: ecita.sen@aph.gov.au

Dear Mr. Holland,

Re: Inquiry into the provisions of the Do Not Call Register Bill 2006

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to respond to the above inquiry.

The Department of Communications, Information Technology and the Arts (DCITA) has proceeded to draft this Bill with such haste and lack of consultation that the Committee has a considerable task at hand to ensure the Act meets the Government's, Parliament's and community's expectations. As introduced into Parliament, 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 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 consumers will continue to receive an unacceptably high volume of unsolicited calls.

The above failures are a direct result of inadequate consultation. ADMA is concerned to note that DCITA only released one Discussion Paper on this issue, which merely floated the concept of a Do Not Call register and sought feedback on whether such a scheme was suitable for the Australian market. No further consultation was undertaken and, as a result, legislation has been introduced in to Parliament without any stakeholder being provided the opportunity to consider or respond to the Government proposals or policy.

As the peak association representing the Australian direct marketing industry, ADMA acts on behalf of both direct marketers and advertisers, who market their products using direct marketing techniques, and specialist suppliers of direct marketing services to those advertisers, including for example outsourced call centre operations. According to recent CEASA¹ research, direct marketing is currently responsible for \$16.5 billion in advertising media spending annually with \$2.9 billion attributable to telephone marketing.

ADMA currently administers self-regulatory Do Not Mail and Do Not Call registers, which have been in operation for over 15 years. During this time ADMA has gained extensive experience in both managing the services and understanding their application in the market. ADMA also has well established relationships with the UK, and US Direct Marketing Associations. These Associations have played a pivotal role in the development of their national 'Do Not Call' schemes and have provided insights that have greatly assisted ADMA in developing its position with regard to the proposed Australian 'Do Not Call' register. This information would have proven invaluable in the formulation of the Bill if consultation had occurred.

In responding to the Senate Committee Inquiry, ADMA has consulted extensively with member organisations, of which there are currently over 500, to ensure that they are both aware of the issues raised and supportive of ADMA's position.

ADMA 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 thereby providing consumers with control over the unsolicited calls received in their home. However, throughout the consultation process ADMA has continually asserted the necessity for the Do Not Call register to effectively deliver on consumer expectations whilst minimising the detrimental impact on legitimate business - this would require the Scheme to be developed taking into account the manner in which telemarketing is utilized by responsible organisations and the dynamics of the industry.

DCITA has failed with regard to both these objectives. The Bill has such broad ranging exemptions that consumers will continue to receive a high volume of unsolicited calls. Furthermore, the Bill has the effect of denying, rather than providing, consumer choice and introduces provisions that have such a profound negative effect on legitimate telephone marketing that in many instances it will no longer be viable mechanism through which organisations can establish new relationship, or even retain contact with existing customers and clients.

It should be noted that ADMA has continually offered to assist DCITA with the development of Australian Do Not Call legislation to ensure that the scheme adopted effectively addresses the requirements of consumers and industry. Such offers were made in good faith, but cast aside, to avoid the exact predicament that we now find

¹ CEASA Commercial Economic Advisory Services Direct Marketing Report 2004

ourselves – trying to correct and amend legislation that is fundamentally flawed due lack of any understanding of the dynamics of the industry.

ADMA is dismayed that the Bill has been developed with complete disregard to the needs of consumers or businesses. In short, ADMA contends that the irresponsible approach taken in developing this legislation will result in significant backlash from both consumers and businesses as it will not deliver on consumer expectation and will stifle the ability for legitimate organisations to conduct telephone marketing operations.

In conclusion, ADMA would like to draw attention to the review of the Privacy Act 1988, announced on 30 January 2006 and currently being undertaken by the Australian Law Reform Commission. Included in the terms of reference for the review were the following provisions "... (f) the need of individuals for privacy protection in an evolving technological environment (g) the desirability of minimising the regulatory burden on business in this area ...". ADMA fully supports an individual's right to privacy and asks only that the Government commit to its stated aim of also minimising the regulatory burden on business.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Edwards', with a long horizontal stroke extending to the right.

Rob Edwards
Chief Executive Officer

**Senate Committee Inquiry into the provisions of
the Do Not Call Register Bill 2006**

ADMA SUBMISSION

JUNE 2006

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EXECUTIVE SUMMARY

In the submission below, ADMA has provided a detailed response to the Senate Committee Inquiry. The format of the submission follows the layout of the Bill, except insofar as ADMA's comments regarding 'consent' are dealt with under the heading "Part 2 – Rules about making telemarketing calls" due to the inherent link between the S11(1) prohibition against calling telephone numbers listed on the Do Not Call register and the S11(2) exemption where 'consent' has been obtained.

Throughout the submission ADMA has recommended amendments to the current Do Not Call Bill. These recommended amendments address the major inconsistencies, errors and unintended consequences that have arisen through the Bill. However, ADMA is of the opinion the current Bill is so fundamentally flawed that even where the major concerns are resolved through amendment, there will continue to be issues and discrepancies that will preclude the effectiveness of legislation. Therefore In ADMA's opinion, it would be preferable to redraft the legislation from scratch, this time developing legislation for the specifically for the Do Not Call Register rather than merely reconfiguring existing, unsuitable legislation.

In formulating this submission, ADMA has consulted extensively with its members and wider industry. The following provides a summary of ADMA's response:

- Although ADMA broadly supports the introduction of an industry run, Government backed national 'Do Not Call' register, it appears that the desire to introduce legislation expeditiously has resulted in poorly drafted, ill-considered legislation, the impact of which could decimate the telephone marketing sector and severely impact organisations that are dependent upon use of the telephone to establish and maintain customer relationships.
- The Do Not Call Register Bill 2006 is identical in many respects to the Spam Act 2003 - this suggests that the Bill has *not* been developed with the notion of a Do Not Call register in mind but instead has been based on existing legislation that was created for a very different marketing channel. This approach is inappropriate as it attempts to superimpose the requirements of the Spam Act on to the practice of telephone marketing without taking into account the differences between the two marketing channels². This has resulted unworkable outcome that has the effect of removing rather than providing customer choice.
- If the Do Not Call register is to meet consumer expectation and deliver on one of its main objectives - i.e. intrusion, the diverse and wide-ranging exemptions proposed in the Bill need to be reconsidered. Consumers that complain about the intrusive nature of the telephone are not complaining about the content of the call or the fact they are being marketed to. Instead they are concerned about the interruption it causes to their home life. This is confirmed by the ADMA Consumer Insights Research 2005 which demonstrated that consumers do not differentiate between the 'types' of unsolicited calls received and therefore

² In particular, it should be noted that under a single email account there will be a number of email addresses that are personal in nature and relate to specific individuals. Therefore the individual has control over the specific email address. This is not the case in relation to a telephone number.

consider all unsolicited calls, regardless of commercial nature, to fall within the term 'direct marketing'.

- The definitions should be consistent with existing Federal legislative provisions. In particular, it is important that the definition of 'consent' remains consistent between the proposed Do Not Call Register Act and the Privacy Act 1988.
- Registration should relate to an individual within a household rather than to the telephone number. This approach provides all individuals with the ability to control the telemarketing calls they receive rather than allowing the telephone account holder to make a decision on behalf of the individuals that utilise the telephone number.
- Where registrations are going to be accepted from the Relevant Telephone Account Holder it is essential that measures be adopted that allow for the account holder to be verified. This is necessary to prevent misuse of the Do Not Call Register.
- The concept of nominee should be withdrawn from the Bill. This is due to the significant verification difficulties arise and the extent to which it exposes the Register to abuse.
- It is essential that consent to receive telephone marketing calls can be given at an individual level. I.e. where the telephone account holder has registered the telephone number on the Do Not Call register, the other adults co-habiting at the address may consent to receiving calls on the telephone number despite the registration.
- ADMA strongly opposes to the proposal to place a 3-month time limitation on express consent. Instead, ADMA recommends that consent should persist until withdrawn by the consumer. However, with this recommendation ADMA submits that the Bill should include an additional safeguard that provides the individual with the right to opt-out of future telephone call from a specific company at any time. This approach saves the consumer and the organisation from the inconvenience that will result from having to re-establish express consent every 3 months but will provide the consumer with the ability to withdraw any express or inferred consent that was previously granted.
- ADMA further submits that the proposal to provide the individual with the right to opt-out of future telephone call from a specific company at any time should apply to all organisations, including those that are exempt under the Bill.
- For the reasons outlined in paragraph 27 below, the rules applying to 'existing business or other relationships' should not be dealt with within the concept of 'inferred consent'. Instead, 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 exemption for 'existing business relationships' needs to recognise that (a) an 'existing business relationship' extends beyond the date of the last transaction; and (b) an 'existing business relationship' exists for a limited time after a consumer has made an enquiry.

- ADMA submits that definition of 'inferred consent' needs to be readdressed so that it is consistent with the concept of 'implied consent' outlined in the Privacy Act 1988. This would take into account both the 'conduct' and the 'reasonable expectations' of the individual as well as recognizing the variety of relationships that exist between businesses and consumers.
- Telephone marketing lists should not have to be screened by a single, central agency. Instead, organisations should be provided with a choice on how telephone marketing contact lists are screened, including (a) access to a website through which they can download the Do Not Call file; and (b) a service through which an organisation can submit the contact list to a 'registered' service provider who can provide screening services on its behalf.
- The penalty structure should be revised to impose fines on a 'per incident' basis rather than a 'per call' basis.
- The compensation provisions contained in S30 of the Bill are inappropriate and should be deleted.

PART 1 - DEFINITIONS

CONSISTENCY

1. The definitions included in the Do Not Call Bill are inconsistent with existing Federal legislative provisions – not only will this cause industry confusion and uncertainty but will make compliance exceedingly complex. Such inconsistencies contradict the Government's own stated aim of reducing the regulatory compliance burden.
2. Of particular concern is the discord between the definitions proposed in the Do Not Call Bill and those that currently exist in the Privacy Act 1988³. Considering that most organisations conducting telephone marketing campaigns will be within the remit of the Privacy Act including the National Privacy Principles, this inconsistency is unacceptable. ADMA strongly recommends that the definitions in the Do Not Call Bill be amended to accord with the existing definitions included in the Privacy Act 1988.
3. This position is supported by the Privacy Commissioners Report⁴ entitled "Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988" , published on 18th May 2005, which clearly recommends consistency in all privacy related legislation.

PROPOSED DEFINITIONS

4. "Consent": The proposed definition of consent included in the Do Not Call Bill is irreconcilable with the definition of consent outlined in the Privacy Act 1988. The definition of 'consent' in the Privacy Act is based upon the concepts of 'informing' the individual about how their data will be used and permitting use that is within the

³ Also see paragraph 4 below

⁴ "Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988"

individuals 'reasonable expectation'. Both of these concepts are absent in the Do Not Call Bill. Instead they have been replaced by unnecessarily restrictive rules that limit consumer choice and introduce tiresome administrative requirements that do not benefit the consumer. For example, placing a three-month time limit on express consent would require a customer who wants to be kept informed of new products and services received in a retail outlet to contact the shop every three months to ensure they continue to receive the information. Such restrictions are unnecessary, particularly if ADMA's recommendations in paragraph 22 and 23 are adopted.

5. "Organisation": The definition of organisation should be extended to include "body corporate and related companies".

PART 2 – RULES ABOUT MAKING TELEMARKETING CALLS

REGISTRATION OF TELEPHONE NUMBER ONLY – S11(1)

6. The Bill states that "a person must not make, or cause to be made, a telemarketing call to an Australian number if the number is listed on the Do Not Call register". As currently drafted, the Bill envisages that a Do Not Call registration will relate to the telephone number only rather than to the individual who has requested no further contact. Therefore, where a telephone number is registered, it cannot be used to contact the individual who made the registration OR any other individual that utilises the telephone number, unless consent has been given.
7. For this reason, ADMA submits that registration should relate to an individual within a household rather than to the telephone number⁵. This approach provides each individual within a household with the ability to control the telemarketing calls they receive. Registering telephone number alone removes consumer choice by allowing the telephone account holder to make a decision on behalf of all individuals who utilise the telephone number.
8. The approach suggested by ADMA in paragraph 7 above is consistent with the approach adopted by the UK Telephone Preference Service⁶ and by ADMA with regard to its current Do Not Call service. Both the UK Telephone Preference Service and the ADMA Do Not Call Service accept registrations from individuals, thereby providing each individual within a household the ability to opt-out of receiving unsolicited marketing phone calls. ADMA submits that this approach is preferable as it is providing all consumers with true choice and control rather than placing control in the hands of a selected individuals within household whilst denying others the opportunity to express a preference.

⁵ A proportion of ADMA members support the alternative approach that registration should relate to telephone number. Notwithstanding the above, there is full agreement that which ever approach adopted it remains essential that consent to receive telephone marketing calls can be given at an individual level. I.e. where the telephone account holder has registered the telephone number on the Do Not call register, the other adults co-habiting at the address may consent to receiving calls on the telephone number despite the registration.

⁶ The UK Telephone Preference Service is a legislated service that is equivalent to the proposed Australian Do Not Call Service.

9. There are significant problems with the current Bill as it attempts to reconcile (a) the registration of a phone number only – which applies in an impersonal manner to all individuals in the household; with (b) the ability to provide ‘consent’ – which is provided on a personal, individual level. This does not work for the reasons set out in paragraph xx. ADMA recommends that the problems raised by this disparity can be overcome by adopting a UK style approach and allowing registrations on an individual level.

REGISTRATION BY RELEVANT TELEPHONE ACCOUNT HOLDER OR NOMINEE

10. The Bill currently requires that the registrations on the Do Not Call register should be made by the ‘relevant telephone account holder’ or a ‘nominee’ of the relevant telephone account holder’.
11. ADMA’s concerns regarding the registrations made by the ‘Relevant Telephone Account Holder’ are outlined in paragraphs 36-37 below. The issue that relate to registrations made by of a ‘nominee’ of the relevant telephone account holder’ are covered in paragraphs 38-40 below.

CONSENT CAN ONLY BE PROVIDED BY RELEVANT TELEPHONE ACCOUNT HOLDER OR THE NOMINEE

12. Section 11(2) of the Bill states that the prohibition against calling a number listed on the Do Not Call register does not apply where the ‘Relevant Telephone Account Holder’ or the ‘nominee’ of the account holder ‘consented’ to the making of the call’.
13. To clarify, only the Relevant Telephone Account Holder or nominated individual may give (a) express consent – i.e. request information from a company with whom they have no relationship but about which they would like to receive information from (b) inferred consent – i.e. receive a telephone marketing call from a company with whom they have an established relationship e.g. their bank, telco, energy company.
14. Permitting only the Relevant Telephone Account Holder or nominee to give ‘consent’ fails to take account of the many household arrangements where adults co-habit under one roof and use a single telephone account. For example, a family with adult children, flat-share arrangements and blended households. In these scenarios, an individual who is not the ‘relevant telephone account holder’ or ‘nominated’ person, will be unable to consent to receiving calls from organisations that he has an established relationship with such as his bank, car dealership, insurance company, energy supplier, gym, travel agent etc or from an organisation where he has an interest in the products or services they are offering. Therefore, they cannot:
 - (a) request a call from an organisation to find out information about products and services – for example: it would be a breach of the legislation for a company to make a telephone call in response to a voicemail or email from a consumer inquiring about the features or availability of a particular product or service. Another common example is where a consumer, in responding to a television advertisement, makes a call to the telephone number displayed on the screen. Where call volumes are high the consumer is often asked to leave a contact

telephone number so an operator can return the call. This would not be possible of the consumer had not been 'nominated'⁷.

(b) receive calls from organisations with whom they have an existing relationship – for example: it would be a breach of the legislation for a car company to phone a customer and remind them that their car is due for servicing. Similarly, unless the individual is 'nominated' they could not receive a call from their insurance company if their insurance is due to lapse, from their mobile phone provider to offer a reduced rate plan or from their local gym telling them about a new class that is operating.

15. ADMA presumes that it was not the intention of the legislation to remove consumer choice – in fact, this would seem to directly contradict the Government objective. ADMA submits that it is essential for the ability to give consent to belong to any individual living at the address serviced by the telephone number. This will ensure that businesses can maintain contact with their current customers and individuals who have requested information.

CONSENT REQUIRED TO OVERRIDE DO NOT CALL REGISTRATION

16. Pursuant to Section 11(2) of the Bill, the prohibition against calling a number listed on the Do Not Call register is overridden where the relevant telephone account holder or the nominee of the account holder provides 'consent'.
17. This provision effectively introduces an 'opt-in' approach for telemarketing for the following reasons. When an organisation collects data from an individual for future marketing purposes, it will not know whether the individual's telephone number is listed on the 'Do Not Call' register. The current industry practice is for the organisation to inform the individual that their contact details will be used for marketing purposes and provide an opportunity to opt-out. However, under the current Bill this practice will no longer be sufficient as the Bill requires that, where there is no 'business or other relationship' between the organisation and individual, **express** consent must be obtained to override a 'Do Not Call' registration. As a result, the only way for the organisation to ensure they can contact the individual who has provided their contact details is to get the individual to provide express consent for telephone contact – in other words, the Bill effectively introduces an opt-in regime for telephone marketing.
18. Again, this directly contradicts the intention of the legislation, which was to maintain an opt-out approach for telephone marketing, with the protective backing of a Do Not Call register

EXPRESS CONSENT

19. ADMA strongly opposes the proposal to place a three-month time limitation on express consent.

⁷ Also cross refer with paragraph xx which demonstrates the inability for an organisation to establish or verify whether the individual is 'nominated' and the ramifications that flow from this inability.

20. Such a restriction is unprecedented. It does not exist in any Australian Federal or State legislation nor in any international Do Not Call legislation. ADMA contends that it is entirely unnecessary and an example of gratuitous, unwarranted over regulation.
21. The three-month time limitation only introduces inconveniences for both consumers and businesses. Consumers will have to continually request ongoing contact and businesses will be required to place more telephone marketing calls in order to maintain the consent. For example:
- (a) an organisation, such as a car leasing company, that would generally only contact an individual once or twice in a three-year period, however, under the Do Not call Bill it would be required to telephone a consumer every three months to re-establish consent.
 - (b) retail outlets such as bookshops and other specialist suppliers will often, on request of the consumer, maintain ongoing courtesy calls to notify the consumer of 'latest arrivals' and stock deliveries relating to nominated items or goods/ services that match the interests or specifications of the individuals. This service could only be maintained for a maximum of three-months unless the individual makes ongoing requests for continuation.
22. ADMA submits that the three-month limitation on express consent should be removed. **INSTEAD** the following should apply:
- (i) express consent should continue until withdrawn by the consumer; **AND**
 - (ii) the Bill should provide the individual with the right to opt-out of future telephone call from a specific company **at any time**.
- This approach saves the consumer and the organisation from the inconvenience that will result from having to re-establish express consent every 3 months but will provide the consumer with the ability to withdraw express or inferred consent at any time.
23. ADMA further submits that the proposal in paragraph 22 above should apply to **all** organisations, including those that are exempt under the Bill.

INFERRED CONSENT - DEFINITION

24. ADMA is concerned that the definition of 'inferred consent' outlined in Schedule 2, Clause 2(b) of the Bill, is severely limited and will have a substantial negative impact on the ability for organisations to conduct business and for accepted business practices to continue. With regard to 'inferred consent' ADMA submits the following:
- (i) the rules applying to 'existing business or other relationships' should **not** be dealt with within the concept of 'inferred consent' for the reasons outlined in paragraph 26-28 below. Instead, the Bill should include a separate, clear exemption for existing business relationships and provide both business and consumer with clear parameters as to the type of relationships that fall in this category.

(ii) The remaining definition of 'inferred consent' needs to be readdressed so that it is consistent with the concept of 'implied consent' outlined in the Privacy Act 1988, thereby taking into account both the 'conduct' and the 'reasonable expectations' of the individual as well as recognizing the variety of relationships that exist between businesses and consumers. The definition is currently severely limited and has unacceptable consequences such as the following:

- **Consent can only be inferred where there is an existing and ongoing business relationship.** To establish inferred consent under the current Bill you need to consider both the conduct AND business and other relationships of the individual. Therefore, it would not be possible to infer consent through conduct alone. This is not only more restrictive than any other international jurisdiction but is also entirely inconsistent with the Privacy Act 1988. Furthermore, it goes further than the Spam Act 2003, which, through the Australian eMarketing Code of Practice (registered with ACMA), provides that consent can be inferred where an individual has provided their contact details in the last two years with the reasonable expectation of being contacted.

The result of this restrictive definition is that it is not possible to infer consent through existing industry practices, despite the fact that such practices comply with the requirements of the Privacy Act 1988. For example, the limited definition of 'inferred consent' prevents consent being obtained through ordinary opt-out channels, such as competition entry forms.

Current industry practices permit an organisation to infer consent where the consumer has been informed that their details will be used for marketing purposes and provided an opportunity to opt-out. This practice is clearly no longer acceptable as the Explanatory Memorandum states "where a person has entered a competition then this would not of itself be sufficient to establish a relationship which infers consent to receive future telephone marketing calls....however, if a person has specifically ticked a box ...consenting to receiving future telemarketing calls, then this conduct could amount to consent".

This lends weight to ADMA's assertion that, in effect, the Bill introduces an opt-in for telephone marketing.

It is important to view the implications of this restrictive approach to inferred consent from a consumer standpoint. When supplying contact information, the consumer is now going to be provided a series of 'opt-in' and 'opt-out' choices depending on the marketing channel. For example, when filling-in a competition entry form a consumer will need to be provided:

- An opportunity to 'opt-out' of future direct mail
- An opportunity to 'opt-in' to telephone,
- An opportunity to 'opt-in' to, or a condition relating to, email or mobile marketing
- An opportunity to 'opt-out' of having data disclosed to third parties

Consumers should simply be aware that they have the right to opt out, they should not need to turn their minds to the nature of the communication and whether they must opt-in or opt-out nor should they need to appraise

themselves of the intricacies of legislation. They should know only that if they do not wish to be called that they have the right and the capacity to request that no further contact be made. ADMA believes this could be most effectively achieved by:

- Maintaining an opt-out approach
- Having a national Do Not Call register
- Allowing calls to be made to individuals that have provided express or inferred consent as currently defined by the Privacy Act 1988
- Providing the individual with the opportunity to withdraw consent at any time as outlined in paragraph 22 and 23 above.

- **Inferred consent is limited to specific product line.** The Explanatory Memorandum suggests that inferred consent is limited to the specific product or service. I.e. even where there is an existing business relationship the organisation is only permitted to contact a customer who is registered on the Do Not Call service about the products or services that are already being supplied. Again, this is inconsistent with the Privacy Act, which allows data to be used for a 'related purpose'. It also goes further than the Spam Act, under which inferred consent relates to the organisation, not to the products/ services offered by the organisation. This has absurd consequences, for example:

- it would not allow a company to make a telephone call to an existing customer to offer a discounted 'package' deal (for example, a discounted telephone, mobile and broadband package deal), as the telephone call may refer to products or services that are not currently being supplied to the consumer.
- Where an organisation contacts a customer about a product it provides to the customer, if that customer hears promotional material for another product offered by that organisation (e.g. during a recorded message whilst the consumer is on hold), the organisation will be deemed to have contravened the *Do Not Call Register Act 2006*.

'EXISTING BUSINESS OR OTHER RELATIONSHIPS'

25. As outlined in paragraph 24(i) above, ADMA recommends that 'existing business or other relationships' should not be included within the concept of 'inferred consent', but instead the Bill should include a separate, clear exemption for existing business relationships⁸.

26. The UK, US and Canadian Do Not Call regimes all include a separate exemption for existing business relationships.

27. The need to provide a separate, clear exemption for 'existing business or other relationships' is two-fold. Firstly, it is necessary to provide business and consumers with clear parameters around what constitutes an existing business relationship. This addresses the issue of consumer expectation as it provides individuals with clarity on the type of calls they can expect to receive. Secondly, it will assist businesses with compliance rather than leaving the business to speculate whether the relationship

⁸ Should this recommendation not be adopted, ADMA proposes that the alternative approach outlined in paragraph XX.

they have fits within the definition of inferred consent. The latter is unacceptable considering the level of penalties that will be imposed if an organisation evaluates the relationship incorrectly.

28. Furthermore, consistent with all other jurisdictions⁹, the exemption for 'existing business relationships' needs to recognise that:

- (i) an 'existing business relationship' extends beyond the date of the last transaction: This provides organisations with a limited timeframe to win a customer back after they have lapsed. Preventing such contact would have significant ramifications in industries such as insurance, financial services, automotive and telecommunications as it would prohibit reminders to renew or reinvest. It should be noted that many consumers would view such calls as customer service.
- (ii) an 'existing business relationship' exists for a limited time after a consumer has made an enquiry: This provides organisations with a limited timeframe during which they can respond to the consumer enquiry with details of their products or services.

29. Consistent with the above requirements, ADMA included a proposed definition of 'existing business relationship' in its submission to DCITA dated November 2005. This definition was developed with input from a variety of industries thereby taking into account the relationships that exist between consumers and business in sectors such as financial services, insurance, travel & tourism and telecommunications. The resulting definition of 'existing business relationship' was where:

- (i) an individual:
 - has purchased goods and services from an organisation or
 - has received a statement, bill or invoice from an organisation that has supplied goods or services¹⁰; or
 - is a shareholder or financial member of the organisation or body corporate; in the period of 18 months prior to the unsolicited telephone approach; or
- (ii) an individual that has made enquiries to the organisation within the last 6 months prior to the unsolicited telephone contact

30. Alternatively, the US definition of 'existing business relationship' could be adopted. Here, an existing business relationship exists if an *"individual makes an inquiry, application, purchase, or transaction regarding products or services offered by the individual or organization making the telemarketing call. For the purposes of this Act, the established business relationship shall expire 18 months after the individual's last business transaction or 3 months after the individual's last inquiry or application."*

31. Should the Senate Inquiry reject ADMA's proposal that the Bill include a separate, clear exemption for existing business relationships, ADMA's recommends, as an alternative, that:

⁹ Do Not Call legislation in the UK, US and Canadian all recognise that (a) an 'existing business relationship' extends beyond the date of the last transaction; and (b) an 'existing business relationship' exists for a limited time after a consumer has made an enquiry.

¹⁰ This relates to loyalty schemes where the consumer may not have 'purchased' but will receive a regular statement. It also addresses circumstances where the consumer is billed subsequent to the supply of products and services.

- (i) the definition of consent contained in Schedule 2 be amended as follows:
consent means (a) express consent; or (b) consent that can be reasonably inferred from (i) the conduct; ~~and or~~ (ii) existing business ~~relationships; and~~ or (iii) other relationships; of the individual ~~or organisation~~ concerned: and
- (ii) a definition of 'existing business relationship' consistent with paragraph 33 or 34 above be included in within the Bill ¹¹.

NOMINEE

32. ADMA is opposed to concept of 'nominee' being included in the Do Not Call Bill and strongly recommends that it be removed. This is due to the following:

- (i) **It is not possible to verify whether an individual has been nominated:** If the nomination is only made to the selected individual (orally or in writing) it will not be possible for an organisation to (a) determine who has been nominated or (b) to verify the nomination. If it is proposed that the nomination is made to a central register it will become entirely unworkable for both the DNC administrator and industry as both would be required to screen against the nominations register prior to accepting a registration or placing a telephone marketing call. This is unduly complex, over burdensome and cannot be justified in terms of the additional consumer protection provided.
- (ii) **Organisations will be prevented from contacting their customers:** As outlined in paragraph 14 above, an individual who is not 'nominated' cannot provide inferred consent to receive a telephone marketing call. As an organisation will be unable to determine whether their existing customer is an 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.
- (iii) **Organisation will inadvertently breach the Act** if a call is made to an individual who has consented to the call but has not been nominated by the account holder: For example - A household telephone number is on the 'Do Not Call' register. An individual within the house (not the account holder) has requested a call from an organisation regarding its products or services. Here, the individual will only be able to provide 'consent' if he/she is the account holder or has been 'nominated' by them. If it a call is placed to an individual who is neither the account holder nor nominated individual, the organisation will have breached the Act AND as nominations can be given orally there is no ability for the organisation to check whether the individual has been nominated.
- (iv) **ALL organisations will be required to screen ALL numbers prior to making a telephone marketing call:** Organisations will not be able to rely on express or inferred consent as the consent may have been provided by an individual who has not been 'nominated' by the account holder. Therefore ALL contact databases will need to be screened prior to making calls and telephone contact cannot be made to ANY individuals listed at the telephone number, regardless of consent being provided.

¹¹ Within Section 3, Part 1 under the heading 'Definitions'

33. ADMA believes that the concept of ‘nominee’ was introduced to provide the ability for individuals to register on behalf of others who are incapable or incompetent. ADMA believes such situations would be most effectively dealt with through technical safeguards (e.g. requiring registrants to dial from the telephone number that is being registered). The Bill may also, in limited circumstances, recognise the ability for a third party to make a registration on behalf of an individual that is incapable or incompetent, providing that the third party is an individual that is managing the individuals estate¹² and not a trading or corporate entity.

PART 3 – DO NOT CALL REGISTER

APPLICATIONS FOR REGISTRATION

34. S15 of the Bill provides that an application for a telephone number to be included on the Do Not Call Register may be made by the Relevant Telephone Account Holder or a ‘nominee’ of the Relevant Telephone Account Holder.
35. As outlined in paragraph 7 and 8 above, ADMA’s preference is that registrations relate to individual within a household rather than to a telephone number. This would permit each individual within a household to apply for their name and telephone number to be included on the Do Not Call Register
36. ADMA has a number of concerns regarding the requirement that the Relevant Telephone Account Holder register with on the Do Not Call service – in particular, how it will be possible to verify that the person making the registration is indeed the account holder. Verification is extremely important taking into account (1) the registration Relevant Telephone Account Holder will have implications for all other individuals using the telephone account (2) the need to safeguard against falsified registrations and abuse e.g. companies registering the details of current customers to prevent contact from competitors.
37. It has been suggested that the Integrated Public Number Database could be used as a verification tool. However, the IPND contains limited information on the individual, such as name and address, most of which can be obtained from a White Pages directory. This information alone would therefore be insufficient to verify the identity of the Relevant Telephone Account Holder. A more robust approach would be to require the individual to provide details, such as telephone account number. However, if this approach is to be adopted, the IPND database would need to be extended to include telephone account information. Alternatively, the Do Not Call legislation or regulations would need to establish a central repository of telephone account details against which registrants can be verified. This in itself raises a privacy issue.
38. ADMA strongly opposes the proposition that a ‘nominee’ of the relevant telephone account holder’ should have the authority to register a number on the Do Not Call register. For the reasons outlined in paragraphs 32 above, ADMA reiterates that the concept of ‘nominee’ should be removed entirely from the Do Not Call Bill.

¹² such as a Power of Attorney

39. The reasons for ADMA's opposition to 'nominee' registrations is due to the Bill allowing 'nominations' to be made verbally or in writing resulting in a complete inability to verify that the registrant has been 'nominated' by the Relevant Telephone Account Holder. This leaves the register open to significant abuse and over registration as effectively anyone can register on someone else's behalf.
40. Furthermore, privacy issues would be raised if it was envisaged that the Relevant Telephone Account Holder could 'nominate' the individual to a central database, against which the registrant could be verified.

SCREENING OF CONTACT LISTS

41. S19 of the Bill suggests that a person wishing to access the Do Not Call register (the access-seeker) may 'submit' a list of telephone numbers to ACMA or the contracted service provider.
42. ADMA members have raised significant concerns over the requirement for telephone numbers to be 'submitted'. These are as follows:
- (i) **Timeframes:** To ensure the needs of industry are addressed, it is essential that lists submitted for screening are screened and returned to the organisation within 24 hours. It is unlikely that this requirement could be met if all screening needs to be undertaken by a single, central agency.
 - (ii) **Protection measures:** The Bill needs to include provisions that protect an organisation where breaches of the Do Not Call Register Act occur due to (a) a malfunction by the screening agency that prevents the screening from being completed within the prescribed timeframe (b) a malfunction by the screening agency that results in inaccurate screening.
 - (iii) **No way for organisation to check accuracy:** Where the Do Not Call register is not visible it will not be possible for organisations to check whether the dedupe has been accurately administered.
 - (iv) **Industry uncomfortable about disclosing data:** There needs to be obligations on the party receiving the data.
 - (v) **Consumer protection opportunities not optimised:** If organisations have access to the Do Not Call file then they have the capacity to load these numbers into their PABX systems and physically block their operators from calling registrants. Providing the file to organisations is unlikely to cause any major concerns as (a) the scope of data will be limited, (b) the organisation is likely to already hold the registrants name and number (the only additional information then being that they do not wish to be called) and (c) any inappropriate conduct will be discouraged by the onerous nature of the civil penalties proposed by the Bill.
 - (vi) **The proposed screening process fails to recognise that the presence of numbers which may legitimately be called by the party "washing" their list:** The Bill should acknowledge that a party washing numbers against the register may legitimately call some registrants (for example, those account holders who have provided the

- requisite consent) and that these numbers will have to be then reinserted into the list following the washing process.
43. The UK and the US schemes have dealt with this issue in different ways. It is proposed that the Australian scheme adopts both approaches, providing organisations with a choice on how to screen telephone marketing contact lists.
44. **UK:** Companies that pay for access to the Do Not Call register sign a licence undertaking that they will not misuse the data. On payment they receive access to a website through which they can download the Do Not Call file. The organisation will screen on its own behalf or employ a third party service provider to conduct this on its behalf.
45. **US:** The Do Not Call file is released to a number or 'registered' service providers who provide screening services for organisations that are subject to the Do Not Call legislation.

PART 4 – CIVIL PENALTIES

FINES STRUCTURE

46. ADMA submits that the proposed penalty structure needs to be revised.
47. A fines structure based on a 'per call' basis unfairly penalises large organisations that make a high volume of telephone marketing calls rather than organisations that fail to screen against the Do Not Call register prior to conducting an unsolicited telemarketing campaign. If fines are applied on a 'per call' basis, the risk of breaching the Act increases with the number of calls placed. This is not the intention of the legislation. Instead, the fine needs to relate to the failure to screen against the Do Not Call register – i.e. on an 'incident' basis.
48. Imposing fines on a 'per incident' basis rather than a 'per call' basis addresses the mischief that the Bill is intending to address – i.e. rogue telephone marketers that have failed to screen against the Do Not Call file prior to conducting an unsolicited campaign.

COMPENSATION

49. ADMA is extremely concerned by the inclusion of compensation provisions and submits that that S30 of the Bill be deleted¹³.
50. Compensation provisions will lead to vexatious, superfluous claims for compensation, which will be extremely costly for all parties involved. It is also difficult to envisage what type of loss a 'victim' could suffer as a result of receiving a telephone marketing call and how this could be calculated.

¹³ It appears that this section may constitute a drafting error as it relates to business-to-business environment.

51. In the event this section is retained, it should be amended so that the capacity to make an application for compensation lies solely with ACMA and not extended to the individual. ACMA has the experience to assess the viability of an action and whether it is warranted. Limiting the right of action to ACMA will also avoid vexatious claims for compensation.
52. Concern has also been raised that S31 appears to include a criminal type penalty for a breach of privacy when even the Privacy Act doesn't contain a similar provision.

PART 6 – MISCELLANEOUS

NOMINEES

53. For the reasons outlined in paragraphs 14, 32 and 38-40 above, ADMA submits that the concept of 'nominee' be removed from the Do Not Call Bill.

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