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(...)

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Dear Sir/Madam

RESPONSE TO THE SENATE ECONOMICS COMMITTEE INQUIRY INTO THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO. 2) 2010

Sensis Pty Ltd ("**Sensis**") is pleased to provide comments to the Senate Economics Committee in relation to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 ("**Bill**") and the associated Explanatory Memorandum ("**EM**").

Sensis is a wholly owned subsidiary of Telstra Corporation Ltd ("**Telstra**") (formerly the Australian Telecommunications Commission) and publishes the well-known White Pages® and Yellow Pages® directories. The White Pages® and Yellow Pages® brands are among the most recognised and trusted brands in Australia. The White Page® directory was first published in 1880 and the Yellow Pages® directory has been published for over 80 years.

Sensis publishes the White Pages® directory as agent of Telstra in order for Telstra to comply with its regulatory obligations under the *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* (Cth). In order to comply with these obligations, Sensis also obtains listing information, including updates and changes, from other carriers and carriage service providers in the order of approximately 10,000 automated requests per day.

The Yellow Pages® books comprise the following suite of products: Yellow Pages® Metropolitan and Regional directories, Yellow Pages® Living Local directories and Yellow Pages® In the Car directories. In addition, Sensis operates the White Pages® Mobile, Yellow Pages® Mobile, White Pages® Online and Yellow Pages® Online directories, as well as the Telstra Directory Assistance, Call Connect and 1234 voice information services, which all draw on Sensis' extensive White Page® and Yellow Page® databases to provide consumers with directory information.

In addition to the free entries provided in the directories, Sensis offers paid advertising. Presently, Sensis has approximately 600,000 business advertisers who pay for placement in the directories, 90% of which are small-to-medium advertisers. Many advertisers pay for advertising across multiple directories or on a national basis. Paid advertising can secure better placement or more eye-catching advertisements for advertisers. To efficiently manage the sheer volume of business advertisers and advertising contracts, Sensis' employs various methods to contract with and confirm the advertising requirements of its business advertisers, such as:

- having a large sales force that liaises with business advertisers in the most convenient way for the particular business advertiser, such as face-to-face, over the telephone or, in some circumstances, electronically; and



White Pages®



- providing a perpetual billing (or automatic renewal) option with many products to those business advertisers who are happy for their entry or advertisement to reappear in subsequent edition of the relevant directory (subject to any changes they request) without disruption. Such options take the pressure of the business advertiser having to remember to renew their advertising in the directories and risk missing out.

Given the sheer volume of advertisers and the length of advertising contracts, proofs and purchase confirmations, Sensis tries, where possible, to reduce the amount of paper given to advertisers and minimise its impact on the environment.

(a) *Incomplete exemptions*

Prima facie, Sensis' view is that the proposed new provisions on asserting a right to payment for unauthorised entries or advertisements are unnecessary given the prohibitions on unsolicited services under the current section 64 of the *Trade Practices Act 1974* (Cth) ("TPA").

However, if the Committee believes the new provisions are necessary, Sensis is most concerned about how these provisions (which are based on existing State laws) have been adapted and transposed into the ACL. If passed as presently drafted, these new provisions threaten to undermine legitimate business activities by reputable directory providers such as Sensis and cause significant uncertainty, cost and disruption without proper justification.

In particular, Sensis is concerned that the proposed sections 43 and 163 of the ACL:

- reflect all exemptions currently available under equivalent provisions in State existing regimes **except for** the exemption for "a large proprietary company or subsidiary of such a company or a listed corporation or a subsidiary of such a corporation"¹ ("large proprietary company" and "subsidiary" are defined according to the Corporations Act 2001 (Cth));² and
- does not include the long-standing exemption for "a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission" (now Telstra), which is currently the case under section 64(10) of the TPA and under section 58(9) of the NSW regime.³

No explanation has been given as to why these existing, long-standing exemptions have not been included in the ACL provisions and no assurance has been provided that Sensis will be named in the Regulations that will support the Australian Consumer Law provisions. This is serious omission and Sensis requests the Committee give this careful consideration.

The objective of this law is to target scammers. Indeed, the Regulation Impact Statement in relation to sections 43 and 163 of the ACL refers to "scams" and distinguishing between "genuine offers and scams."⁴ Sensis wholly supports this objective and takes a vigilant approach to monitoring and reporting "scam" directory providers.

Further, the policy rationale behind the exemptions in NSW and Victoria (including those contained in sections 43(3) and 163(4)) is to ensure that businesses that "could never realistically be regarded as

¹ Fair Trading Act 1999 (Vic), s 27(5) and Fair Trading Act 1987 (NSW), s 58A(7).

² Under section 45A(3) of the Corporations Act 2001 (Cth), a "proprietary company is a large proprietary company or a financial year if it satisfies at least 2 of the following paragraphs:

(a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is \$25 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(a), or more;

(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is \$12.5 million, or any other amount prescribed by the regulations for the purposes of paragraph (2)(b), or more;

(c) the company and the entities it controls (if any) have 50, or any other number prescribed by the regulations for the purposes of paragraph (2)(c), or more employees at the end of the financial year.

Under section 9 of the Corporations Act 2001 (Cth), a "subsidiary" in relation to a body corporate means a body corporate that is a subsidiary of the first-mentioned body by virtue of Division 6.

³ Fair Trading Act 1987 (NSW), s 58(9).

⁴ Regulation Impact Statement to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, section 23.170-171.

scammers” are not subject to the prohibitions⁵ and that “legitimate publications which carry large numbers of advertisements are not subject to time-consuming written authority requirements.”⁶ Similarly, the current exemption under section 64 of the TPA for the Australian Telecommunications Commission is to ensure that the provision does not encroach on “some legitimate publications that publish large numbers of advertisements”⁷ Yet the proposed exemption only contemplates publications that have an audited circulation of 10,000 copies or more per week, which would not cover legitimate publications with an annual circulation in the many millions, such as the White Pages® and Yellow Pages® books.

Without the existing exemptions being included in the ACL, the scope of the ACL provisions is unjustifiably widened to capture legitimate business activities. Widening the provisions to capture legitimate business activities by reputable organisations does not do anything to target the conduct or mischief these provisions seek to address; it merely places increased regulatory burdens on businesses (including exposure to significant penalties) that are doing the right thing and for no good reason, which flies in the face of the deregulation agenda. It is also contradicts the Regulation Impact Statement, which states that regard has been had to “the minimal impact that this proposal would have on legitimate business activities...”⁸ However, absent these exemptions, there is no demonstrable evidence of this.

Sensis can think of no sound reason why at least the exemption for “a large proprietary company or subsidiary of such a company or a listed corporation or a subsidiary of such a corporation” should not be carried forward into the ACL. Accordingly, Sensis’ view is that the ACL must *at least* include the exemption for “a large proprietary company or subsidiary of such a company or a listed corporation or a subsidiary of such a corporation.” It is important to note that this exemption is limited to large proprietary companies, so will not widen the scope of the provisions to exempt small, itinerant traders or scammers.

(b) *“Authorisation” requirements are unclear*

In addition, Sensis is concerned by the unclear “authorisation” requirements in sections 43 and 163. Given the significant penalties and strict liability involved for breach of sections 43(1) and 163(1), it is vital that businesses be given clear guidance as to what is and is not an acceptable authorisation. It is also vital that the “authorisation” requirements are consistent with accepted industry practice.

Sections 43(5) and 163(6) provide that “a document authorising the placing of the entry to advertisement” must be “signed” by the person or another person authorised by that person.

A non-exhaustive definition of “document” is used in section 2 of the ACL, which clearly contemplates not just material documents (eg paper) that can be physically signed but also “a disc, tape, paper or other device from which sounds or messages are capable of being reproduced.”

In the context of directory advertising, advertisers would typically request and agree to advertising in a variety of ways, such as face to face signing paper contracts, verbally via voice signature recordings (eg over the telephone) and/or via electronic forms of signature. These would all be forms of documents that are capable of being “signed” via means other than written physical signature and Sensis considers it appropriate that the ACL expressly reflects these accepted and legitimate industry practices.

Importantly, these varied forms of “documents” reflect the changing needs of business customers and the growing trend in businesses utilising the Internet to purchase goods and services. In fact, 78 per cent of SMEs surveyed in our recent *Sensis® e-Business Report – The Online Experience of Small and Medium Enterprises – August 2009* placed orders for products and services online in the past year. Customers also expect to be able to discuss and agree their advertising requirements over the phone – many of our small business customers spend much of their time out of the office or on the road, where it is impractical for them to receive and/or sign a hard copy advertising contract.

⁵ Standing Committee on Consumer Affairs, “An Australian Consumer Law - Fair Markets - Confident Consumers”, 2009, p 78.

⁶ Explanatory Memorandum to the Fair Trading Amendment Bill 2006 (NSW).

⁷ Regulation Impact Statement to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, section 23.140.

⁸ Regulation Impact Statement to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, section 23.173.

The second authorisation requirement is that “a copy of the document has been given to the person before the right to payment of a charge for placing of the entry or advertisement is asserted.” This “document” is the document that has been “signed.” In Sensis’ view, it is incongruous and impracticable to require a directory service provider to provide a “copy of the document” authorising the placement of the advertisement to the person before a right to payment is asserted, particularly in circumstances where the authorisation has been made via voice signature or other electronic means.

Apart from these logistical issues, the requirement could significantly disrupt and prolong the process of finalising a business’ advertising requirements.

In Sensis’ experience, business customers often have limited time to attend to their advertising needs and are looking for the most efficient processes to confirm their listing requirements. There is also a growing awareness of environmental issues amongst business customers and an increasing expectation that their business suppliers will support their efforts to reduce their overall impact on the environment. In Sensis’ view, the proposed ACL could increase the administrative burden on small businesses and unnecessarily increase the paperwork and steps required to complete what most of them would consider an important part of their advertising program each year. It could also result in a frustrating situation where businesses are not able to finalise their advertisements and authorise the relevant payments in the course of a single telephone conversation or electronic transaction.

Accordingly, Sensis recommends that the law reflects actual industry practice and recognises the environmental need to reduce high-volume paper contracting procedures. This is an excellent opportunity for the drafting of the authorisation requirement to be modernised and clarified, as has been done for other consumer protection provisions as part of the ACL.

To that end, Sensis recommends that the Committee consider an amendment to the requirement for a “copy of the document” to be given to the customer to:

- allow other forms of confirmation of the customer’s entry or advertising to be given to them, such as a letter to the customer confirming the particulars of the customer’s advertising and associated charges; and
- only require directory providers to provide such confirmation before the right to payment is asserted “where it is practicable to do so”.

In addition, Sensis recommends that the requirement that documents be “signed” be clarified so that it expressly allow other forms of effective confirmation, in particular, signatures obtained electronically via email or voice recordings as Sensis understands is intended to be the case.

We would be very pleased to provide further information to the Committee or discuss our submission in more detail.

Please do not hesitate to contact me for further information.

Yours sincerely
— (...) —

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Sensis Pty Ltd

