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3 February 2010

Dr Ian Holland
Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts
PO Box 6100
Parliament House
CANBERRA ACT 2600

By e-mail: eca.sen@aph.gov.au

Dear Dr Holland,

COMMITTEE INQUIRY- DO NOT CALL REGISTER LEGISLATION AMENDMENT BILL 2009 – ELIGIBILITY REQUIREMENTS - REGISTRATION ON THE DNC REGISTER

The Australian Finance Conference (AFC) appreciates the extension of time provided to enable us to provide comment for the Committee's consideration on the Do Not Call Register Legislation Amendment Bill 2009 [the Bill].

AFC Background

By way of background, AFC members (current membership list attached) provide the full range of financial services and, most relevant to the Bill, credit and other finance to business customers [including small business] and to emergency service organisations. A method of marketing credit and other finance products to these customers utilised by at least some of our members has been by way of telephone. While the initiatives proposed in the Bill are not specifically directed at the financial services sector, they will potentially have impact:

- directly on AFC members' operations, where it encompasses the telemarketing of credit or finance products; and
- indirectly where credit or finance is involved with the provision of other goods or services marketed over the phone (eg an insurance product and finance application to fund the premium).

AFC Position

We have been pleased to have had the opportunity to have the potential impact on AFC Members' telemarketing operations considered through participation in the development of the policy reflected in the Bill, including through our responses to earlier discussion papers

produced by the Department as a pre-cursor to the Bill. In line with our earlier submissions and for the reasons following, the AFC:

- supports the proposed amendments in the Bill to the extent that, if enacted, they would enable the registration of Emergency Service Organisation phone numbers on the DNC Register;

- queries whether amendment of the DNC Register legislation in preference to the Spam Act and Regulations is the appropriate means of pursuing a policy to include controls on contact with customers through faxes; and

- submits that, in the context of the original **consumer** protection policy underpinning the enactment of the Do Not Call Register Legislation coupled with the Government's policy of red tape reduction and best practice regulation, the regulatory response reflected in the Bill of enabling **all** Australian numbers (consumer and commercial; individual, corporate or government; phone and fax) and the additional compliance obligations it will impose on our Members and others is not justified by the market failure or consumer risk to small business that has been identified or established by the Government.

  The registered consent process, in particular, raises significant potential complex compliance issues (and therefore cost) for our Members including with customers with whom they have an existing relationship. This is because of the interface of the amendments with other existing laws (including the Privacy Act and the Financial Services Reform anti-hawking provisions). In practice, the result of the Bill will be effectively a requirement for our Members (and any entity that seeks to market using the phone) to wash lists of potential (or **existing**) customers against the DNC Register and to develop and utilise a highly sophisticated system to enable any washed marketing list to be able to distill customers that have registered consent to receiving calls from the industry classification under which our Member (or the marketing entity) falls.

  In our view, in line with best practice regulation principles, other non-regulatory responses to address small business concerns, including guidance from ACMA to educate industry on telemarketing best practice (eg maintenance of internal do not contact lists) should be pursued rather than the proposed expansion in the Bill of the DNC Register to numbers other than emergency service organisations (and the consumer numbers already covered).

Proposal to Amend DNCR Act to Enable Emergency Service Organisations Phone Numbers to be Registered

As a matter of policy, the inclusion of Emergency Service Organisation phone numbers would appear to align with the "consumer-protection" policy underpinning the DNC Register legislation. For this reason, the AFC supports expansion of the eligibility requirements for

registration on the DNC Register to include these numbers. In doing so, we acknowledge the importance and challenge of setting clear parameters around the type of organisations that fall within the term "Emergency Service Organisation."

Proposal to Amend DNCR Act to Allow Registration of Fax Numbers

We query whether amendment of the DNC Register Legislation in preference to the Spam Act and Regulations is the appropriate means of pursuing a policy to include controls on contact with customers through faxes.

Proposal to Amend DNCR Act to All Numbers

Based on the information provided, (eg in the various Departmental Discussion Papers and the Explanatory Memorandum accompanying the Bill), in our view, a case for amending the DNCR leglislation to impose greater compliance obligations on our Members in their telemarketing contact with potential customers other than consumers [and Emergency Service Organisations] would not appear to have been established by the Government. Consequently, we submit that there is no identified need or market failure to be addressed through additional regulation and consequently compliance for our Members. Further, based on material surrounding consultation on the development and implementation of the DNC Register, the predominant policy underpinning its enactment would appear to be **consumer protection**; in short, to give individuals control over which businesses contact them on an unsolicited basis and to regulate the hours and days contact can be made by any business. A consumer protection argument for expansion to business broadly (or, even more specifically to small business) would not appear to have been established or warranted.

Extending the registration eligibility requirements to allow any number to be registered will bring cost to **all** industries that use the telephone to market products to either existing or potential customers not just the "telemarketing industry". Costs include those associated with determining the extent of the application of the compliance obligation on the business, consequent changes to process, documentation, training through to subscription and washing costs. Given the failure to determine the nature of the problem and justification for expansion, we submit no case to justify these costs has been made. We do not believe it is appropriate for business to quantify cost when Government has apparently failed to justify the need for it to be incurred.

As a matter of principle, we believe that Government should respond in a timely and appropriate manner to address identified or proven areas of market failure or consumer risk. Enactment of regulation is one avenue of response. However, Government at both the Commonwealth and State level has committed to an agenda to "reduce red tape" on Australian businesses. A key element of the deregulation agenda includes:

> "*a strengthening of procedures that means new or amended regulation will only be enacted where necessary and at a minimum cost to business, non-profit organisations and consumers. This includes maintaining and improving the best practice regulation requirements. As well, a one-in-one-out principle has been*

introduced that requires that in bringing forward new regulatory proposals, Ministers identify other areas where regulation can be modified or removed to reduce compliance costs for business, thereby addressing the cumulative burden of regulation"[1]

In relation to best practice regulation requirements, we understand that the Government has endorsed a set of principles of good regulatory process which include the following:

- *"Governments should not act to address 'problems' until a case for action has been clearly established. - This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all 'problems' will justify (additional) government action.*
- *A range of feasible policy options - including self-regulatory and co-regulatory approaches - need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework.*
- *Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted".*

It is against this background that we have considered the expansion proposals contained in the Bill. We understand that the Government has received representations from small business and that these provided the basis for consideration of the proposals. However, without intending to detract from the concerns expressed, we question, given the Government's commitment to deregulation, why the proposals have focused on a regulatory solution, namely amendment of the DNCR legislation to address the concerns, without any consideration of self-regulatory or co-regulatory approaches, for example.

Further, the extent of the problem remains unclear to us. As we understand, Government has a clear obligation to establish the case before Government acts to address the problem. In establishing a case, Government should *inter alia* consider existing measures and determine why these currently fail to address the problem. In this regard we note that our members (and others in the financial services sector) are already subject to layers of general regulation that applies to their telemarketing or direct marketing operations. These include the anti-hawking provisions introduced as part of the Financial Services Reform and regulation in Victoria and NSW under their fair trading laws. The Privacy Act also contains a compliance hierarchy that our members (and others in a range of industries) must comply with when using personal information of an individual (whether in their consumer or commercial capacity [ie a sole trader]) to direct market their products or services. In effect, where it is not practicable to obtain consent prior to direct marketing the individual, the organisation is able to make an unsolicited approach provided it gives the individual the option of opting-out of future direct marketing. In practice, this limits direct marketing on an unsolicited basis to a single occasion. In this regard we note that the Government has

[1] From Department of Finance & Deregulation: http://www.finance.gov.au/deregulation/index.html

supported the adoption of recommendations for the reform of the Australian privacy laws. These include a set of general information handling principles (called UPPs) which will specifically include a principle on direct marketing. The Government is also considering the removal of the small business exemption from the reformed privacy legislation. If adopted, the result would see regulation of the use of personal information of individuals for direct marketing purposes by **all** business subject to the UPP requirements. In this regard we also note the commitment by the Government, through COAG, to the enactment of the Australian Consumer Law which will include national harmonised regulation of unsolicited sales practices, including through telemarketing (*albeit* to the extent not already covered by the DNCR legislation).

Registered Consent vs. Existing Consent Requirements

We note that the Bill is not intended to impact on the inferred consent provisions contained in the originally enacted DNCR Legislation.

As we understand, the amendments contained in the Bill will provide the basis of enabling not just new registrants (ie businesses / government) but **all** new registrants (ie consumers) with the ability to opt-in to receiving calls from entities within particular industry classifications. This process (the registered consent process) is to be arrived at through further consultation and development of a Determination by ACMA. We therefore note that detail of this process remains to be finalised.

Nevertheless, as proposed, the registered consent process, in particular, raises significant potential complex compliance issues (and therefore cost) for our Members including with customers with whom they have an existing relationship. This is because of the interface of the amendments with other existing laws (including the Privacy Act and the Financial Services Reform anti-hawking provisions). For example, should our Member have obtained the consent of a customer (as part of obtaining a loan) to the marketing of products by other members within its corporate group (eg an insurance entity), and the customer post-enactment of the Bill subsequently registers their number on the DNC Register and fails to opt-in to calls from the industry classification that covers insurers, would our Member nevertheless be able to market insurance products to that customer in reliance on the consent originally obtained or are they legally obliged to first wash the number against the list and then be dictated by the default opt-out outcome?

In practice, the result of the Bill will be effectively a requirement for our Members to wash lists of potential (or **existing**) customers against the DNC Register and to develop and utilise a highly sophisticated system to enable any washed marketing list to be able to distill customers that have registered consent to receiving calls from the industry classification under which our Member falls. In contrast, at present, on the basis of the existing express / inferred consent provisions, our Members may have no obligation to wash their list against the DNC Register before marketing to existing customers.

This outcome would appear to be in direct contradiction to the policy underpinning the original DNCR Act which focused on **unsolicited** telemarketing and was not intended to intrude on existing relationships between our Members and their customers.

Other Regulatory Responses

In lieu of Government looking at a regulatory intervention response, we recommend that a better approach is allocation of resources (eg to ACMA) to facilitate an education or enhanced awareness program for participants in the telemarketing industry.

Conclusion

In conclusion, in a practical sense, any regulatory proposal to expand the DNCRegister to include all numbers coupled with a registered consent opt-in process will just add red-tape and consequently compliance costs to AFC members (and others who utilise telemarketing to non-consumer customers) which they, in turn, will pass on to their customers (including small business customers). A proven market failure may justify this cost. However, in relation to the proposed expansion to cover all numbers (including for individuals, corporate and government; consumer or commercial; phone or fax) the case has not been made and a regulatory response would be at odds with Governments red-tape reduction and best practice regulation policies. We would therefore strongly urge the Committee to consider recommending against the proposed expansion in favour of the allocation of adequate resources to facilitate a program to educate industry in relation to telemarketing best practice. However, in line with the policy of consumer protection which underpinned the enactment of the DNC Register, expansion to facilitate registration of Emergency Services Organisations should be supported.

We would be happy to appear before the Committee to elaborate on our comments if required. Please feel free to contact me via e-mail ron@afc.asn.au or Helen Gordon, Corporate Lawyer, via helen@afc.asn.au or both through 02 9231 5877.

Kind Regards.

Yours truly,

Ron Hardaker
Executive Director

Attachment:
AFC Member List

AFC MEMBER COMPANIES

Advance Business Finance	Max Recovery Australia
Alleasing	Members Equity Bank
American Express	Mercedes-Benz Financial Services
Australian Finance & Leasing	Nissan Financial Services
Automotive Financial Services	Once Australia t/as My Buy
Bank of Queensland	PACCAR Financial
BMW Australia Finance	Profinance
Capital Finance Australia	RABO Equipment Finance
Caterpillar Financial Australia	RAC Finance
CBA Asset Finance	RACV Finance
Centrepoint Alliance	Resimac Limited
CIT Group	Retail Ease
Citi Australia	Ricoh Finance
CNH Capital	RR Australia
Collection House	Service Finance Corporation
Credit Corp Group	Sharp Finance
De Lage Landen	SME Commercial Finance
Dun & Bradstreet	Solar Financial Solutions
Enterprise Finance Solutions	St. George Bank
Esanda	Suncorp
FlexiGroup	Suttons Motors Finance
Ford Credit	The Leasing Centre
GE Capital	The Rock Building Society
Genworth Financial	Toyota Financial Services
GMAC	United Financial Services
HP Financial Services	Veda Advantage
HSBC Bank	Volkswagen Financial Services
Indigenous Business Australia	Volvo Finance
Institute of Mercantile Agents	Westlawn Finance
International Acceptance	Westpac
John Deere Credit	Wide Bay Australia
Key Equipment Finance	Yamaha Finance
Komatsu Corporate Finance	
Leasewise Australia	
Liberty Financial	<u>Professional Associate Members</u>:
Lombard Finance	Allens Arthur Robinson
Macquarie Consumer Finance	Bartier Perry
Macquarie Equipment Rentals	CHP Consulting
Macquarie Leasing	Clayton Utz
	Henry Davis York