

The Senate

Environment, Communications
and the Arts
Legislation Committee

Do Not Call Register Legislation Amendment Bill 2009

February 2010

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Abbreviations

AANA	Australian Association of National Advertisers
ACCAN	Australian Communications Consumer Action Network
ACMA	Australian Communications and Media Authority
ADMA	Australian Direct Marketing Association
B2B	business-to-business
DBCDE	Department of Broadband, Communications and the Digital Economy
DNC Register	Do Not Call Register

Chapter 1

Referral to the committee

1.1 On 30 November 2009, the Senate referred the Do Not Call Register Legislation Amendment Bill 2009 to the Senate Environment, Communications and the Arts Legislation Committee for inquiry and report by 24 February 2010.

1.2 On 9 December 2009, in accordance with usual practice, the committee advertised the inquiry in *The Australian*, calling for submissions by 22 January 2010. The committee also directly contacted a range of individuals and organisations to invite submissions.

1.3 The committee received 35 submissions, listed at Appendix 1.

1.4 The committee held a public hearing in Canberra on 5 February 2010. The participants are listed at Appendix 2.

1.5 The committee thanks those organisations and individuals that made contributions to the committee's inquiry.

Purpose of the bill

1.6 The Do Not Call Register Legislation Amendment Bill 2009 seeks to extend the existing Do Not Call Register, which is currently limited to the registration of residential phone numbers, to allow the registration of all Australian telephone and fax numbers, including business, government and emergency service operator numbers.

1.7 The bill proposes to amend the *Do Not Call Register Act 2006* and the *Telecommunications Act 1997*.

1.8 The Department of Broadband, Communications and the Digital Economy explained that the bill is intended to address, amongst other issues, costs associated with unsolicited telemarketing calls and marketing faxes incurred by the recipient, and in particular costs to businesses:

Since the introduction of the Register there have been wide-ranging concerns raised by businesses and other organisations about the impact of unsolicited telemarketing calls and marketing faxes on their time and productivity. As a consequence of not being able to register a number, businesses, particularly small businesses, have stated they have experienced losses in productivity caused by responding to unsolicited telemarketing calls and marketing faxes...

Much of the 'cost' of a telemarketing call is transferred from the telemarketer making the call to the call's recipient, mainly in terms of lost time, productivity and the tying up of telecommunications equipment.

These costs apply equally to unsolicited marketing faxes, and there are additional costs through wasted toner and paper.¹

1.9 The main provisions of the bill seek to:

- Make all Australian telephone and fax numbers (including business, government and emergency service operators numbers) eligible to register on the Do Not Call Register;
- Prohibit unsolicited marketing faxes to an Australian number registered on the Do Not Call Register;
- Impose civil penalties for breaches of the new provisions;
- Introduce 'registered consent' enabling new registrants the option of consenting to receive telemarketing calls or marketing faxes relating to particular industry classifications; and
- Confer powers on the Australian Communications and Media Authority (ACMA) regarding the industry classifications above.²

Outline of the bill

1.10 Schedule 1 of the bill outlines amendments proposed to be made to the *Do Not Call Register Act 2006* and consequential amendments to the *Telecommunications Act 1997*.

Business numbers

1.11 Item 4 inserts a definition of a 'business number' as 'an Australian number other than a number that is used, or maintained, exclusively or primarily for private or domestic purposes'.³

Fax numbers

1.12 Item 9 inserts the new term 'designated marketing fax', defined in schedule 1A as:

For the purposes of this Act, a marketing fax is a ***designated marketing fax*** if:

- (a) the sending of the fax is authorised by any of the following bodies;
 - (i) a government body;
 - (ii) a religious organisation;
 - (iii) a charity or charitable institution; and

1 DBCDE, *Submission 23*, pp 3–4.

2 Explanatory Memorandum, pp 1–2.

3 Do Not Call Register Legislation Amendment Bill 2009, clause 4.

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- (b) if the fax relates to goods or services—the body is the supplier, or prospective supplier, of the goods or services; and
 - (c) the fax is not of a kind specified in the regulations.⁴

1.13 Designated marketing faxes are exempt from certain rules relating to the sending of marketing faxes.⁵

1.14 The bill defines marketing faxes as a fax sent to an Australian number where taking into consideration the content and presentation of the fax it would be concluded that the purpose, or one of the purposes of the fax, was:

- To offer to supply, advertise or promote goods or services, or a supplier, or a prospective supplier, of goods or services;
- To offer to supply, advertise or promote land or an interest in land or a supplier, or prospective supplier, of land or an interest in land;
- To offer to provide, advertise or promote a business opportunity or investment opportunity or a provider or prospective provider, of a business opportunity or investment opportunity;
- To solicit donations; or
- A purpose specified in the regulations.⁶

Registered consent

1.15 Item 16 introduces a new type of consent, 'registered consent', in addition to the two existing types of consent (express and inferred).⁷ Section 4 of the bill defines registered consent as 'consent entered on the Do Not Call Register'.⁸

1.16 Registered consent applies where a registrant has chosen, at the time of registering their number, particular industry classifications about which they wish to receive telemarketing calls or marketing faxes.⁹

1.17 Proposed new section 5C introduces the industry classifications for the purposes of registered consent and enables the ACMA, by legislative instrument, to 'determine that an activity is ascertained in accordance with the determination is an industry classification'.¹⁰

4 Do Not Call Register Legislation Amendment Bill 2009, clause 4.

5 Explanatory Memorandum, pp 22–23.

6 Explanatory Memorandum, pp 11–12.

7 Do Not Call Register Legislation Amendment Bill 2009, clause 4.

8 Explanatory Memorandum, p. 8.

9 Explanatory Memorandum, p. 8.

10 Do Not Call Register Legislation Amendment Bill 2009, subclause 5C(1).

1.18 Item 26 inserts new subsection (3A) which provides an exception to the general prohibition, in section 11(1) of the Act, against unsolicited telemarketing calls to numbers registered on the Do Not Call Register:

The exception covers circumstances where the number was included on a list that was submitted by the telemarketer...and consent for that number was registered in relation to receiving telemarketing calls made about an activity covered by a particular industry classification and the actual call fell into an industry classification that had been registered in respect of the number.¹¹

1.19 Part 2 of the bill outlines amendments to the *Telecommunications Act 1997*. It is intended that these amendments will 'enable the fax marketing industry...to develop codes relating to fax marketing activities'.¹²

Issues raised during the inquiry

1.20 There was general support for the addition of emergency service operators to the Do Not Call Register and the prohibition of unsolicited marketing faxes to numbers on the register. The committee is supportive of these aspects of the bill.

1.21 The committee heard support for the extension of the DNC Register from consumer organisations and privacy advocates such as the Australian Communications Consumer Action Network (ACCAN) and the Australian Privacy Foundation.¹³ ACCAN, however, felt that the bill should go further and recommended that exemptions under the bill be removed and the provisions for express consent be strengthened.¹⁴

1.22 Opposition to the bill was expressed by companies currently involved in telemarketing and advertising, small businesses and industry associations such as the Australian Direct Marketing Association (ADMA), Australian Association of National Advertisers (AANA) and the Australian Information Industry Association (AIIA).¹⁵ The concerns raised focussed on the impact of the bill on telemarketing businesses, including the costs of implementation and compliance, and the potential impact on B2B activities.

1.23 This report concentrates on the two key issues raised by numerous submitters relating to telemarketing businesses and business-to-business (B2B) activities; and the three year registration period for numbers enrolled on the Do Not Call Register.

11 Explanatory Memorandum, p. 12.

12 Explanatory Memorandum, p. 34.

13 See ACCAN, *Submission 12* and Australian Privacy Foundation, *Submission 24*.

14 ACCAN, *Submission 12*, p. 2.

15 See ADMA, *Submission 20*; AANA, *Submission 8*; AIIA, *Submission 22*.

Impact on businesses

1.24 Submitters opposed to the bill claimed that the provisions of the bill enabling businesses to register their number(s) on the Do Not Call Register (DNC Register) would have negative impacts on many businesses. These concerns were said to include the costs associated with companies implementing and complying with the bill and the impact of the bill on B2B activities.

1.25 For example the AIIA told the committee:

Added compliance and checking requirements for SMEs will make the proposed extension to all businesses a genuine burden and it may well be that business self-management or self-regulation could be sufficient to deal with the alleged nuisance value of telemarketing or cold calling. This is because commercial relationships developed between businesses through telemarketing rely for their long-term sustainability on responsible management of a customer relationship and their expectations. If a business does not manage its contact, such relationships and the ability to make such calls will fall or be discontinued completely. This would have such a negative impact on the businesses that they would often not be able to continue to succeed.¹⁶

1.26 Along similar lines, Fairfax Media submitted:

We note that one of the justifications for the Bill is the protection of privacy and in particular, to minimize the intrusions relating to telemarketing activity. Whilst Fairfax supports these objectives in the context of private individuals, it remains very concerned about the impact of the Bill on legitimate business to business interaction, including telemarketing activities.¹⁷

Implementation and compliance

1.27 Numerous submitters to the inquiry claimed that the costs to business of implementing and complying with the bill would be significant. Further, the committee heard that these costs would be borne both by businesses currently engaged in telemarketing and those that will be captured for the first time by extensions to the DNC Register under the bill.

1.28 ADMA suggested that the total compliance cost incurred by business in the first year following introduction of the bill would be \$23.7 million, with an ongoing

16 Mr Phil Sloper, Chair (ACT Branch), Australian Information Industry Association, *Committee Hansard*, 5 February 2010, p. 2.

17 Fairfax Media Ltd, *Submission 7*, p. 1.

cost of \$46 to \$82 million per annum.¹⁸ In addition, ADMA calculated the total cost to business of 'call washing' under the bill to be \$1.4 to \$2.2 million.¹⁹

1.29 ADMA also argued that there would be reduced employment and 'unquantifiable costs' associated with a '[d]ecline in market efficiency due to reduction of competition, information and innovation' and '[l]oss of revenues via flow-on effects to end-users of products sold through telemarketing' if the bill were enacted.²⁰

1.30 The AIIA indicated that enactment of the bill would result in significantly increased marketing costs for small and medium enterprises, adding '25 per cent cost to their marketing efforts'.²¹ The AIIA further stated that some businesses may spend up to \$25 000 engaging a third party to wash telephone numbers on their behalf but that this cost could be as low as \$5000 to \$6000 if conducted in-house.²²

1.31 On an individual business scale, companies currently engaged in telemarketing activities, such as Accor Advantage Plus and Singtel Optus Pty Ltd, indicated that complying with the bill would adversely affect their commercial operations.²³ Singtel Optus Pty Ltd stated:

The proposed legislation will impose substantial costs and requirements on Optus as a commercial entity in its day-to-day commercial dealings with other businesses, both as a supplier and as a customer. Optus will need to implement new administrative processes, record keeping and internal education and training. This is in addition to the implementation costs, IT changes, lost marketing opportunities and associated potential job losses relative to a diminished marketing pool.²⁴

1.32 Galexia refuted claims that the bill would have a substantial impact on telemarketing activity and therefore employment:

...only eight per cent of call centre activity is outgoing or outbound cold calls...Eight per cent is very low. The industry has submitted to you that only 20 per cent of marketing activity is business to business. So we are down to 20 per cent of eight per cent, which means that we are down to just 1.6 per cent of all call centre activity. Then we expect that to reduce by around 30 to 50 per cent because that is how many businesses will register.

18 Mrs Melina Rohan, Director, Corporate and Regulatory Affairs, Australian Direct Marketing Association, *Committee Hansard*, 5 February 2010, p. 17.

19 ADMA, *Submission 20*, Attachment 1, p. ii.

20 ADMA, *Submission 20*, Attachment 1, p. ii.

21 Mr Phil Sloper, Chair (ACT Branch), Australian Information Industry Association, *Committee Hansard*, 5 February 2010, p. 4.

22 Mr Phil Sloper, Chair (ACT Branch), Australian Information Industry Association, *Committee Hansard*, 5 February 2010, p. 6.

23 See Accor Advantage Plus, *Submission 1* & Singtel Optus Pty Ltd, *Submission 5*.

24 Singtel Optus Pty Ltd, *Submission 5*, p. 2.

So, overall, the reduction in call centre activity and, therefore employment, could be as low as 0.05 per cent. That is a tiny reduction in activity in exchange for quite a big benefit to small business in not having to receive the nuisance calls.²⁵

1.33 The Department of Broadband, Communications and the Digital Economy (DBCDE) advised the committee that it did not believe the costs of compliance would be high. The department stated:

There will be some compliance costs for businesses undertaking telemarketing or fax marketing. These costs are expected to be in line with the costs associated with the current form of the Register, which are estimated at an average \$3000 per year based on a lower level subscription, staff training costs and record keeping flowing from compliance with the legislation.

The existing subscription levels provide for a telemarketer to call up to 500 numbers a year without incurring a fee. In 2009–10 a marketer can check up to 20 000 numbers a year against the Register for only \$78. The ACMA will undertake a review of the subscription fees, in consultation with industry, to determine the fees for 2010–11.

Marketers may need to set up internal systems to ensure that they are complying with the legislation. The complexity of these systems will depend on the number of telemarketing calls made by the business. It is likely that larger businesses already have systems in place to manage their telemarketing calls, including record keeping. Small businesses are also likely to keep records of their current customers.²⁶

1.34 The committee acknowledges that businesses are likely to face varying costs for implementing and complying with the bill. These costs will largely depend upon the size of the business, and therefore the resources available to it, and whether or not the business currently has systems in place to meet the requirements of the DNC Register Act.

1.35 The committee notes that prior to the introduction of the DNC Register Act 2006, similar claims were made by industry that 'armageddon would befall the telemarketing industry, and that in fact has not happened' and that this has since been acknowledged by the telemarketing industry.²⁷

1.36 On balance, the committee does not believe that the costs of complying with the bill will be excessive or prohibitive. The committee believes that the costs outlined by the DBCDE are likely to be representative of the costs businesses can expect to incur implementing and complying with the bill.

25 Mr Chris Connolly, Director, Galexia, *Committee Hansard*, 5 February 2010, pp 41–42.

26 DBCDE, *Submission 23*, pp 6–7.

27 Mr Rob Edwards, Chief Executive Officer, Australian Direct Marketing Association, *Committee Hansard*, 5 February 2010, p. 16.

1.37 The committee also notes that compliance costs for businesses making calls captured by the extension of the DNC Register need to be balanced against the benefits to businesses that will no longer receive unsolicited telemarketing calls.

Impact on business-to-business activities

1.38 The Do Not Call Register Act 2006 prohibits unsolicited telemarketing calls being made to telephone numbers registered on the DNC Register.²⁸ Under the Act, only Australian telephone numbers used exclusively or primarily for private or domestic purposes can be registered on the DNC Register.²⁹

1.39 The act defines a telemarketing call as one where:

...it would be concluded that the purpose, or one of the purposes, of the call is:

- (e) to offer to supply goods or services; or
- (f) to advertise or promote goods or services; or
- (g) to advertise or promote a supplier, or prospective supplier, of goods or services; or
- (h) to offer to supply land or an interest in land; or
- (i) to advertise or promote land or an interest in land; or
- (j) to advertise or promote a supplier, or prospective supplier, of land or an interest in land; or
- (k) to offer to provide a business opportunity or investment opportunity; or
- (l) to advertise or promote a business opportunity or investment opportunity; or
- (m) to advertise or promote a provider, or prospective provider, of a business opportunity or investment opportunity; or
- (n) to solicit donations; or
- (o) a purpose specified in the regulations.³⁰

1.40 To date, the DNC Register Act has been applicable mostly to the activity of companies actively engaged in the business of telemarketing.

1.41 Concerns were raised during the inquiry that expansion of the DNC Register to include business numbers would extend the reach of the DNC Register beyond companies actively engaged in telemarketing to virtually every business in Australia. It was suggested to the committee that most telephone communication between businesses contained elements of a telemarketing call as defined under the Act but that

28 Do Not Call Register Act 2006, s. 11.

29 Do Not Call Register Act 2006, s. 14.

30 Do Not Call Register Act 2006, s. 5.

many businesses were unaware that the Act would apply to them if the bill was enacted, as they did not consider themselves to be involved in telemarketing:

You might note from our submission that we found that there is actually a very low awareness within the business community that the Do Not Call Register legislation would actually even apply to them. There seems to be a view that the telemarketing call is something which you get from a call centre and that is it.

In actual fact I think we need to point to this because it was a significant issue for the business-to-consumer register which in fact led to the introduction of Do Not Call Register regulations... I will not quote it exactly but if you look at the definition of a telemarketing call it actually is any call by any individual or organisation to promote or advertise or propose to supply or supply any good or service or supplier or business opportunity or investment opportunity, any land, or any interest in land whether real or not. So it is a very, very broad definition. I think particularly in relation to small businesses, because large businesses are hopefully more likely to be made aware through the work industry associations do, that it even applies to the phone calls that they are making now which they consider just to be normal business-to-business calls.³¹

1.42 The AANA agreed stating:

The obligation once the bill is enacted is on virtually all businesses, if they are making any type of business call within the definition of a telemarketing call, to ensure that the number they are calling is not on the list.³²

1.43 Other witnesses such as Galexia felt that this was an issue easily overcome and that once businesses were aware that the bill applied to them and understood the definition of a telemarketing call, businesses could easily comply:

I think that the definition provides certainty. It says that, if there is a sales element to the call, if the reason I am calling is to sell you something, I have to wash the number. Once that definition is known and used regularly a few times by businesses, it will become simple. I will be making a call and I will think, 'Well, is this a sales call that is caught or is it something else?' The bill only applies to cold calling. We are not talking about warm calls and follow-up calls et cetera; it is just the cold call.

I can see that the industry has made a strong argument that there might be unintended consequences, but they are actually saying that their members, the people who make the marketing calls, somehow cannot distinguish between a sales call and other calls. I just do not think that is true, especially when a lot of people who work in this industry are on sales commission and are only going to be remunerated if they get a lead or make

31 Mrs Melina Rohan, Director, Corporate and Regulatory Affairs, Australian Direct Marketing Association, *Committee Hansard*, 5 February 2010, p. 18.

32 Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 31.

a sale. So they know exactly what types of calls are sales calls and what types of calls are for general business.³³

1.44 The DBCDE informed the committee that should the bill be enacted, an education campaign would be undertaken to ensure that the business community was aware of the bill and their obligations under it:

There was a similar process [education campaign] when the original legislation was enacted. The ACMA has been appropriated funds as part of the bill. One of the purposes of that appropriation is to undertake an education campaign to ensure that people are aware of the changed provisions in the register and to educate them about how these new provisions will operate.³⁴

1.45 In relation to how the education campaign will be rolled out, officials explained that it:

...will be a matter for the ACMA to determine how it will go about doing that. But, when the original register was put into place, my understanding is that there was some advertising in the press, there were press releases and the ACMA did interviews and also provided information in a variety of targeted forms. So, while it would be a matter for the ACMA to decide how to target that to have the greatest effect, they are the kinds of activities that we would expect them to undertake.³⁵

1.46 Since the inception of the DNC Register in 2007, ACMA has had to take very few actions to enforce compliance. For example, during 2008–09, the ACMA issued seven infringement notices; accepted eight enforceable undertakings and issued six formal warnings.³⁶ This tends to suggest that there is a high degree of understanding and appreciation amongst telemarketers of the operation of the DNC Register.

1.47 The committee is confident, given its earlier track record in this regard, that adequate education of those affected by the bill will be undertaken by the ACMA and notes that budget funding has been specifically allocated for this purpose.

1.48 The committee does feel that care must be taken to ensure that businesses that may not be currently aware of the bill are informed of the bill's applicability to them and their obligations under the bill. This will help to ensure a smoother transition to the new arrangements proposed by the bill and greater compliance.

33 Mr Chris Connolly, Director, Galexia, *Committee Hansard*, 5 February 2010, p. 43.

34 Mr Duncan McIntyre, Assistant Secretary, Consumer Policy and Post Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 5 February 2010, p. 50.

35 Mr Duncan McIntyre, Assistant Secretary, Consumer Policy and Post Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 5 February 2010, p. 50.

36 ADMA, *Submission 20*, pp 20–21.

Consent provisions

1.49 Some witnesses expressed concern about the consent provisions of the bill. In particular, witnesses took issue with the opt-in registered consent provisions, and the impact this would have on the ability of businesses to forge new commercial relationships.

1.50 The issues raised by the Printing Industries Association of Australia were representative of these concerns:

By allowing businesses to opt-in into the “Do Not Call Register” the printing industry will be affected directly and indirectly.

- The direct impact will arise from an inability of printing businesses to market to businesses that are listed on the “Do Not Call Register”...
- Any measure to provide business to business exemption enabling a business to contact other businesses where the content of the call is significantly related to the core activity of the operation of the recipient business will not be helpful to the printing industry. The reason is that printing businesses are not significantly related to the core activity of their clients. This means printing businesses will not be able to call businesses or potential clients that are on the “Do Not Call Register” as they will fail to satisfy the “significantly related” provision.³⁷

1.51 Witnesses were concerned about the scope of industry classifications and were keen to ensure:

...that ACMA determines the industry groupings on a narrow basis so that businesses are given a proper opportunity to opt in to receiving telemarketing calls where relevant and appropriate.³⁸

1.52 This was particularly true for businesses that supplied goods and/or services to other businesses across a wide range of industries. These businesses were concerned that they would fail to meet the 'significantly-related' exemption test.³⁹ This exemption allows a number on the Do Not Call Register to be contacted for the purposes of telemarketing where the registrant consented to receive telemarketing calls made about an activity covered by a particular industry classification and the *actual call* fell within an industry classification registered for the number, that is 'the content or purpose of the call must fall within the particular industry classification which the registrant selected'.⁴⁰

37 Printing Industries Association of Australia, *Submission 4*, pp 2–3.

38 Fairfax Media Ltd, *Submission 7*, p. 5.

39 See for example Printing Industries Association of Australia, *Submission 4*, pp 2–3 and AIIA, *Submission 22*, p. 2.

40 Explanatory Memorandum, p. 12.

1.53 Some submitters also raised concerns about the bill's inferred consent arrangements.⁴¹ DBCDE officials told the committee the inferred consent arrangements would be the same as those for the existing register which 'seemed to be working quite well'.⁴² Officials explained that:

It would be a matter for a business to make a judgement as to whether it would be reasonable to assume that there was inferred consent based on the previous relationship that they had had. If their judgement was that it was reasonable for them to make that assumption, they could make those calls. So, if an advertiser had previously advertised [their product or services], they would have to make a judgement regarding the strength of that business relationship and whether it was reasonable for them to infer consent...⁴³

Committee view

1.54 Whilst acknowledging the concern of various submitters, the committee is of the view that the bill strikes an appropriate balance between the interests of those businesses that object to unsolicited telemarketing calls and faxes, and the interests other businesses that conduct telemarketing and fax marketing activities.

1.55 The committee notes that the bill 'is not intended to impinge on business-to-business communications which are an important part of everyday business activity'.⁴⁴ Businesses will still be able to contact other businesses with whom they have a relationship under the current inferred consent provisions or where express consent to receive calls or faxes is given. However, the bill will prevent the use of 'cold calls' and marketing faxes to businesses that have opted-in, in instances where the express or inferred consent provisions do not apply.

1.56 This will enable businesses that utilise telemarketing and fax marketing as a legitimate method of business engagement, to continue to contact any business that does not opt-in to the DNC Register or where the express or inferred consent provisions apply.

1.57 The committee further notes that businesses that choose to register their number(s) under the extension to the DNC Register clearly do not wish to receive unsolicited telemarketing calls and therefore are unlikely to respond favourably to

41 For example Fairfax Media Ltd, *Submission 7*, p. 4.

42 Mr Duncan McIntyre, Assistant Secretary, Consumer Policy and Post Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 5 February 2010, p. 51.

43 Mr Duncan McIntyre, Assistant Secretary, Consumer Policy and Post Branch, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 5 February 2010, p. 51.

44 The Hon. Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, *House of Representatives Hansard*, 26 November 2009, p. 12976.

these unsolicited calls in the current environment. By including themselves on the DNC Register, businesses that do not wish to receive unsolicited telemarketing calls will decrease the size of the pool of businesses which could be contacted. Consequently, the number of businesses in that pool which are likely to respond favourably to unsolicited telemarketing calls will increase, which is likely to lead to an increase in the success rate of those engaged in telemarketing.

1.58 Overall therefore, the committee is of the opinion that the bill should be supported.

Recommendation 1

1.59 The committee recommends that the bill be passed.

Three year registration period

1.60 Various submitters both in support of and in opposition to the bill recommended changes to the three year registration period for numbers enrolled on the Do Not Call Register.⁴⁵

1.61 At present, telephone numbers enrolled on the DNC Register are registered for a period of three years.⁴⁶ The bill intends that this registration period will also apply to fax, business and government numbers when registered.

1.62 Various submitters to the inquiry suggested that this registration period be changed. Some witnesses felt the registration period should be removed entirely so that numbers remain on the register indefinitely, whilst other witnesses argued that the registration period be shortened.

1.63 May 2010 marks the three year anniversary of the Do Not Call Register and as such, also the time at which large volumes of private telephone numbers will be de-registered. ACCAN indicated that from May, the ACMA would be required 'to get up to 4.2 million numbers back on the system' and that re-registering would be a 'huge annoyance' for those having to do so.⁴⁷ ACCAN also alerted the committee to ACMA research that shows that only 25 percent of registrants know that registration is valid for only 3 years.⁴⁸

1.64 ACCAN argued that the current three year registration period should be revoked on the basis that it:

45 See for example ACCAN, *Submission 12*, pp 3–4 & Fairfax Media Ltd, *Submission 7*, p. 4.

46 *Do Not Call Register Act 2006*, s. 17.

47 Mr Allan Asher, Chief Executive Officer, Australian Communications Consumer Action Network, *Committee Hansard*, 5 February 2010, pp 9 & 13.

48 ACCAN, *Submission 12*, p. 2.

...achieves no public benefit objective or goal. It does, however, represent a significant risk to the efficiency and popularity of the Register. It should be revoked before significant resources are spent on renewal procedures.⁴⁹

1.65 ACCAN believed that industry concerns about disused or deactivated numbers remaining on the register could be addressed, and described the situation in the United States of America and the United Kingdom where:

If the number is deactivated (for example when a person moves house) then the Register is notified and updated, meaning that new number owners won't be registered without their knowledge. There is no evidence of any problems with this system in other jurisdictions.⁵⁰

1.66 In its supplementary submission ACCAN provided further details on how this arrangement could operate in practice:

The *Telecommunications Numbering Plan 1997* (mandated in Section 455 of the *Telecommunications Act 1997*) requires that numbers disconnected from their owner go into quarantine for 6 months (12 months if this is due to nuisance calls) before they can be re-allocated to another customer (see Part 4). This number is returned to the telco that initially allocated the number to a customer.

A requirement that quarantined numbers be supplied to the DNCR operator and removed from the Register would be a highly efficient way of ensuring the DNCR remains up to date without creating any additional burden (this information must already exist due to the requirements of the Numbering Plan). It's a simple and straightforward solution that will help ensure the Register remains accurate, in the same way as other jurisdictions address the issue.⁵¹

1.67 Conversely, Fairfax Media Ltd suggested that the three year registration period be reduced to one year for business numbers. Fairfax Media Ltd claimed

...that [three years] may be too long in a business context, given the turnover of employees and the evolving nature of many business' size, scale and strategic drivers.⁵²

1.68 Fairfax Media Ltd suggested that reducing the registration period to one year would improve their ability to contact other businesses and mitigate some of the company's concerns about the inclusion of business numbers on the register:

We are saying that one year is better than three years because of the pace of change in most businesses. It may be a well intentioned decision to go for a three-year listing on the Do Not Call Register, but that industry may be

49 ACCAN, *Submission 12*, p. 3.

50 ACCAN, *Submission 12*, p. 3.

51 ACCAN, *Supplementary Submission 12*, p. 1.

52 Fairfax Media Ltd, *Submission 7*, p. 4.

impacted rapidly. The pace of change is faster—which we are all experiencing, and media is experiencing it faster than many—and you have less time to worry about, ‘Did I register for something a little while ago and is it on my list?’⁵³

1.69 The committee also notes that the DBCDE is currently conducting a statutory review of the DNC Register Act and relevant provisions of the Telecommunications Act.⁵⁴ The Act requires this review to be conducted before, or as soon as possible after, May 2010. Following the review, a report must be tabled in Parliament within 15 sitting days of the completion of the report.⁵⁵

Committee view

1.70 In the committee's view the current DNC Register is operating effectively in protecting registered householders from unsolicited telemarketing calls. The committee sees merit in ACCAN's proposal to move to a permanent or longer term registration arrangement, particularly for residential registrants, provided other practical difficulties of keeping the register accurate can be overcome.

1.71 As part of its statutory review, the committee believes that the DBCDE should specifically consider ACCAN's proposal to use the Telecommunications Numbering Plan 1997 in order to remove 'quarantined' numbers from the DNC Register.

Recommendation 2

1.72 The committee recommends that in its statutory review of the *Do Not Call Register Act 2006*, the Department of Broadband, Communications and the Digital Economy specifically consider extending the period of registration provided the practical difficulties of keeping the Register accurate can be overcome. The department should give consideration to ACCAN's proposal to use the Telecommunications Numbering Plan 1997 in order to remove 'quarantined' numbers from the Do Not Call Register.

**Senator Anne McEwen
Chair**

53 Mr Robert Whitehead, Director, Marketing and Newspaper Sales, and Director, Fairfax Enterprises, Fairfax Media Ltd, *Committee Hansard*, 5 February 2010, p. 37.

54 As required under section 45 of the *Do Not Call Register Act 2006*.

55 DBCDE, *Do Not Call Register*, available: www.dbcde.gov.au/telephone_services/do_not_call (accessed 19 February 2010).

Coalition Senators' Additional Comments

Coalition Senators participating in the inquiry have serious concerns about the impact of the Do Not Call Legislation Amendment Bill 2009 on businesses, particularly on compliance costs and legitimate business-to-business activities.

The Department of Broadband, Communications and the Digital Economy could not provide critical data by which to assess any demand for extending the Register, and the impact of the extension on business.¹

Coalition Senators question the Government's claim that the Bill will 'benefit those organisations that currently experience losses in productivity'² through unsolicited marketing calls or faxes.

Coalition Senators note that submissions to this inquiry from businesses and industry associations oppose the bill on the basis that the:

Extension of the do not call to business and government will strike at the very heart of commerce and put significant limitations on it.³

Stakeholder consultation – who wants the Bill and why?

Coalition Senators were further troubled by the apparent lack of current and representative consultation conducted by the Department:

The Department has based its answers on research and consultation with Australian consumers and industry stakeholders. This included the 2008 public discussion paper *Eligibility Requirements for Registration on the Do Not Call Register* from which approximately 85% of the 186 respondents supported the extension of the Register to all telephone and fax numbers.⁴

Coalition Senators do not consider that submissions, now two years old, constitute either current or adequate consultation about the Bill.

The Australian Association of National Advertisers noted:

For example, as to the earlier consultation responses—I note the minister's second reading speech I think stated that 86 per cent or 76 per cent of submissions were in

¹ Department of Broadband, Communications and the Digital Economy, *Response to Question on Notice*, Question No 1-4

² Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, *House of Representatives, Second Reading Speech Hansard*, 26 November 2009

³ Mr Rob Edwards, Chief Executive Officer, Australian Direct Marketing Association, *Committee Hansard*, 5 February 2010, p. 16.

⁴ Department of Broadband, Communications and the Digital Economy, *Response to Question on Notice*, Question No 4

support of the proposal. When that is broken down, most of those were either individuals or individual small businesses—120 or so.⁵

Evidence given by the ACMA Chair, Mr Chris Chapman, during Additional Estimates hearings of the Senate Standing Legislation Committee on Environment, Communications and the Arts verified concerns of Coalition Senators that the Minister had not adequately consulted about the Bill:

Senator FISHER—Who wants the proposed Do Not Call Register, and what percentage of businesses—not numbers—do you expect would register to not be called?

Mr Chapman—We simply do not have a view about that.⁶

When pressed by Coalition Senators, the Minister was unable to deliver any evidence as to who wants the Bill, and why:

Senator FISHER—This bill applies to all business, not just small business. Big business, the likes of Fairfax, told the inquiry last week that they did not like it a lot.

Senator Conroy—It has been a particular concern of mine that unwanted and unsolicited calls and faxes are wasting valuable business resources and could potentially affect the operation of emergency service organisations.

Senator FISHER—That is a view of yours. Do you have evidence from business?

Senator Conroy—Businesses that choose to register their number clearly want protection against telemarketing calls. If they do not, then they do not have to.⁷

Coalition Senators are troubled that the motivation behind imposing the Bill on Australian business seems to rest on the basis of 'a particular concern' of the Minister.

Indeed, the Committee heard evidence that a business operator could be derelict in their duty were they to place their business on the Do Not Call Register.

Senator TROETH—As you say, business should be open for business. I would have thought that this—as you have correctly remarked—went against the Privacy Act by default.

Mr Edwards—Looking at my job, if I put ADMA's number on the Do Not Call Register—which would be a little bit funny—and organisations were trying to sell my organisation products and services that could improve the productivity I could actually be held in dereliction of duty of my job. The fact is that I am open for business so I expect to receive calls. If I do not want to talk to them I will not talk to them.

Impact on business – net negative

The Government intends that the Bill benefit businesses currently experiencing losses in productivity or incurring additional expenses through unsolicited telemarketing calls and marketing faxes. The Department stated:

⁵ Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 31.

⁶ Mr Chris Chapman, Chair, Australian Communications and Media Authority, *Committee Hansard*, 8 February 2010, p. 57

⁷ Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Committee Hansard*, 8 February 2010, pp. 57-58

...businesses, particularly small businesses, have stated they have experienced losses in productivity caused by responding to unsolicited telemarketing calls and marketing faxes.⁸

However, Coalition Senators do not believe that the changes to the Do Not Call Register proposed in the bill would provide a net benefit to business. In fact, witnesses suggest the Bill is more likely to lead to productivity and job losses as a result of increased costs, diminished revenues and additional compliance requirements.⁹

As the Australian Association of National Advertisers explained:

Our concerns are the implications across the board that have not been quantified as a benefit overall for the economy.¹⁰

Impact on business – increased costs and red tape

Evidence to the Inquiry noted concern at the ability of business to meet additional costs imposed by the extended reach of the Register.

Fairfax Media Ltd noted:

We are very concerned about the costs... We are fortunate enough to have a very sophisticated database, probably more sophisticated than those of most companies in Australia. I do not know how it would be handled within a business on infrastructure that was not as automated as ours, not as connected as ours and not as well developed as ours.

That would be a bigger cost to many businesses that are unfortunately not in a position to be able to use automated databases in the way that we can. There is an undeniable cost.¹¹

The Australian Information Industry Association (AIIA) indicated that an individual business would experience a 25 per cent increase in their marketing costs to implement systems to comply with the bill.¹²

An Access Economics report commissioned by the Australian Direct Marketing Association (ADMA) and provided to the committee calculated that the total

⁸ Department of Broadband, Communications and the Digital Economy, *Submission 23*, pp 3–4.

⁹ Mr Robert Whitehead, Director, Marketing and Newspaper Sales and Director, Fairfax Enterprises, Fairfax Media Ltd, *Committee Hansard*, 5 February 2010, pp 36-40.

¹⁰ Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 26.

¹¹ Mr Robert Whitehead, Director, Marketing and Newspaper Sales and Director, Fairfax Enterprises, Fairfax Media Ltd, *Committee Hansard*, 5 February 2010, pp 37.

¹² Mr Phil Sloper, Chair (ACT Branch), Australian Information Industry Association, *Committee Hansard*, 5 February 2010, p. 6.

compliance cost incurred by business in the first year following introduction of the bill would be \$23.7 million, with an ongoing cost of \$46–82 million per annum.¹³

Comparison of these costs with the benefits of \$34–47 million per annum as a result of productivity gains due to reduced unsolicited telemarketing calls demonstrates that the costs to business associated with the bill greatly outweigh the potential benefits.

The Department estimated that:

There will be some compliance costs for businesses undertaking telemarketing or fax marketing. These costs are expected to be in line with the costs associated with the current form of the Register, which are estimated at an average \$3000 per year based on a lower level subscription, staff training costs and record keeping flowing from compliance with the legislation.

Marketers may need to set up internal systems to ensure that they are complying with the legislation. The complexity of these systems will depend on the number of telemarketing calls made by the business. It is likely that larger businesses already have systems in place to manage their telemarketing calls, including record keeping.¹⁴

The Government's figures grossly underestimate the financial impact of the bill on businesses.

This is in part because Government figures are based on the existing "Do Not Call" regime, which imposes obligations to businesses which place calls to private numbers, and assumes those trends can be transferred to this Bill, which potentially imposes obligations on all businesses for 'every day' business calls.

This is particularly evident when unquantifiable costs associated with a reduction in competition, information and innovation; unemployment due to reduced telemarketing business, and

[l]oss of revenues via flow-on effects to end-users of products sold through telemarketing¹⁵

are also taken into consideration.

The Australian Association of National Advertisers referred to the possibility of the majority of business bearing the cost of additional red tape and compliance requirements, for the benefit of the relative few:

If you have only, say, a thousand or a couple of thousand businesses wanting to put their name on the register, but two million businesses have to have compliance systems in place to ensure that they do not inadvertently capture one of the 1,000 businesses, I am not sure there would be very many people in business or even among the Australian public who would think that to be a very good balance.¹⁶

¹³ ADMA, *Submission 20*, Attachment 1, p. 9.

¹⁴ Department of Broadband, Communications and the Digital Economy, *Submission 23*, pp 6–7.

¹⁵ ADMA, *Submission 20*, Attachment 1, p. ii & Singtel Optus Ltd, *Submission 5*, p. 2.

¹⁶ Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 31.

Coalition Senators believe the Bill, if enacted, would significantly increase red tape and everyday costs of doing business.

Coalition Senators are unconvinced by evidence to the Inquiry that any potential benefits of the bill, in terms of neutralising productivity losses, would outweigh the new cost imposts and productivity losses experienced by business.

Impact on business – uncertainty about "telemarketing"

The Bill fails to clarify the difference between "day-to-day" business and telemarketing, potentially applying to "routine" business. The Department was unable to satisfy Coalition Senators to the contrary.

This uncertainty, of itself, comes at a cost to business.

The Australian Association of National Advertisers explained many businesses would be unaware of the ramifications of the extension:

...many businesses across the board do not understand that the bill will apply to them and that telemarketing is what a lot of businesses currently consider just normal business calls. That goes to not just small businesses, but the micro and home based businesses as well, who are very unlikely to have any idea.¹⁷

Fairfax Media Ltd succinctly explained the issue in evidence to the Committee:

...‘telemarketing’ is a word that means different things to different people...¹⁸

Mr Whitehead continued:

What it means in a business context is that most people who accept business calls from other businesses do not regard them as telemarketing calls. When a divisional chief rings someone else who is not currently a business partner and wants to sound them out about a completely new opportunity that may arise for both companies, neither of those people would ever imagine they would be called telemarketing calls.¹⁹

ADMA also agreed that many businesses are unaware that the Bill would apply to them, let alone the impact it would have:

You might note from our submission that we found that there is actually a very low awareness within the business community that the Do Not Call Register legislation would actually even apply to them. There seems to be a

¹⁷ Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 26.

¹⁸ Mr Robert Whitehead, Director, Marketing and Newspaper Sales and Director, Fairfax Enterprises, Fairfax Media Ltd, *Committee Hansard*, 5 February 2010, p. 38.

¹⁹ Mr Robert Whitehead, Director, Marketing and Newspaper Sales and Director, Fairfax Enterprises, Fairfax Media Ltd, *Committee Hansard*, 5 February 2010, pp 38.

view that the telemarketing call is something which you get from a call centre and that is it...²⁰

In practical terms, the Bill would extend the Do Not Call Register beyond companies which regard themselves as in the business of telemarketing, to potentially every business in Australia.

Businesses contact each other for a multitude of reasons, in the course of day-to-day operations. Coalition Senators are concerned that the Bill will impose upon an unquantified number of Australian businesses an obligation to "wash" phone numbers of those with whom they conduct routine business.

Coalition Senators believe that the Bill would "over-reach", hindering the ability of businesses to conduct "routine" business, and to establish and maintain commercial relationships.

Lack of empirical analysis

Coalition Senators are concerned at the lack of evidence quantifying the net beneficiaries derived by extending coverage of the Register.

The Australian Association of National Advertisers agreed:

There will be a cost to businesses and to the economy. Is that really outweighed by the benefits that are received by those companies? I do not think there has been any quantification, even in a few of the scenarios presented, of what those figures might be overall.²¹

In particular, Coalition Senators are concerned at the lack of quantitative data about the anticipated take up rate of the "extended" Register:

Question No: 1

Senator Fisher:

How many businesses will register one or more numbers on the 'do not call' register, and what percentage of Australian businesses is that/are they?

Answer:

It is difficult to estimate how many businesses in Australia will choose to put one or more of their numbers on the Do Not Call Register, however, submissions to the Department and consultations undertaken with industry associations and small

²⁰ Ms Melina Rohan, Director, Corporate and Regulatory Affairs, Australian Direct Marketing Association, *Committee Hansard*, 5 February 2010, p. 16.

²¹ Ms Trixi Madon, Manager, Codes and Self-Regulation, Australian Association of National Advertisers, *Committee Hansard*, 5 February 2010, p. 31.

business groups, together with the experience of business registrations in the UK indicate that the numbers could be substantial...²²

And the Department was unable to clarify how many businesses would face the additional compliance obligations of 'washing' call lists against the Register:

Question No: 2

Senator Fisher:

How many businesses will need to access the register to have numbers 'washed', in order to ensure they do not breach the new provisions, and what percentage of Australian businesses is that/are they?

Answer:

All businesses making unsolicited telemarketing calls or sending unsolicited marketing faxes to Australian telephone or fax numbers will be required to comply with the legislation...

As at 30 June 2009 there were 2 948 telemarketers registered to use the service provided by the register operator to wash their numbers against the numbers on the Do Not Call Register. As there may be businesses that make telemarketing calls or send marketing faxes to businesses only and that therefore are not already registered to use the washing service, it is likely that this number will increase.²³

Nor was the Department able to quantify how often a business would face new obligations under the Bill.

Question No: 3

Senator Fisher:

(In respect of 2 above) how often, and over what period of time?

Answer:

A 'washed' list remains valid for 30 days. Any organisation that wishes to make telemarketing calls or send marketing faxes on a regular basis will need to wash their list of numbers against the Register at least every 30 days. However this may vary amongst organisations, as some may undertake telemarketing or fax marketing activities less than once every 30 days. This will affect how often they would need to 'wash' the numbers against the Register.²⁴

²² Department of Broadband, Communications and the Digital Economy, *Response to Question on Notice*, Question No 1

²³ Department of Broadband, Communications and the Digital Economy, *Response to Question on Notice*, Question No 2

²⁴ Department of Broadband, Communications and the Digital Economy, *Response to Question on Notice*, Question No 3

Coalition Senators are concerned by the lack of evidence substantiating:

- a. How many businesses will seek to benefit from the Bill (by registering "do not call" numbers), and,
- b. How many businesses will carry new obligations from the Bill (by having to "wash" numbers against the register), and how often.

Coalition Senators remain to be convinced that the Bill will do anything other than burden most businesses, yet benefit very few (if any) businesses.

Concluding Remarks

Coalition Senators remain concerned at uncertainty about the scope and impact of the Bill and corresponding ramifications for business, especially the probably majority of businesses which have not previously interacted with the current Do Not Call Register.

Any difference between day-to-day business calls and "telemarketing" remains unclear. Further, the Department and the Minister have been unable to quantify the businesses which will benefit from, or the businesses to be burdened by, the extended reach of the Register.

Without appropriate data to assess any alleged demand for the extension, Coalition Senators are not convinced the Bill will deliver the stated objective of benefiting those organisations currently experiencing losses in productivity or incurring additional expenses as a result of unsolicited marketing calls or faxes.

Recommendation 1

1.2 At this stage, for the reasons outlined above, Coalition Senators are yet to be convinced that the Bill should proceed.

**Senator Mary Jo Fisher
Deputy Chair**

Senator the Hon. Judith Troeth

Appendix 1

Submissions, tabled documents and answers to questions taken on notice

Submissions

- 1** Accor Advantage Plus
- 2** The Hon. Dr Bob Such MP, Member for Fisher
- 3** Consumer Affairs Victoria
- 4** Printing Industries Association of Australia
- 5** Singtel Optus Pty Ltd
- 6** Corporate Express Australia Limited
- 7** Fairfax Media Limited
- 8** Australian Association of National Advertisers
- 9** Telstra Corporation
- 10** Combined Insurance Company of Australia
- 11** Office of Consumer and Business Affairs, Government of South Australia
- 12** Australian Communications Consumer Action Network
- 13** Austar United Communications Ltd
- 14** Office of the Privacy Commissioner
- 15** Real Estate Institute of Australia
- 16** TrueLocal.com.au and the Council of Small Business Organisations of Australia
- 17** Salmat
- 18** Galexia Pty Ltd
- 19** Consumer Credit Legal Centre (NSW) Inc
- 20** Australian Direct Marketing Association
- 21** Consumer Protection, Department of Commerce, Government of Western Australia
- 22** Australian Information Industry Association
- 23** Department of Broadband, Communications and the Digital Economy
- 24** Australian Privacy Foundation
- 25** Australian Finance Conference
- 26** The Write Response
- 27** DirectIT Pty Ltd
- 28** McCorkell and Associates

- 29 Mr Ralph Pirozzo
- 30 Ms Anna Kollar
- 31 dLook Pty Ltd
- 32 Name Withheld
- 33 Nerida Byron
- 34 Ms Fiona MacRae
- 35 Mr Michael Webb

Tabled documents

Concern with Department's approach in assessing whether a net benefit exists from extending the Do Not Call Register to include business and government numbers, tabled by Australian Direct Marketing Association (public hearing, Melbourne, 5 February 2010).

Answers to questions taken on notice

Department of Broadband, Communications and the Digital Economy (from public hearing, 5 February 2010, Canberra)

Appendix 2

Public hearings

Friday, 5 February 2010 – Canberra

Australian Information Industry Association

Mr Phil Sloper, Chair (ACT Branch)

Mr Rhett Somers, Communications Manager

Australian Communications Consumer Action Network

Mr Allan Asher, Chief Executive Officer

Ms Sarah Wilson, Campaigns and Community Liaison Officer

Australian Direct Marketing Association

Mr Rob Edwards, Chief Executive Officer

Mrs Melina Rohan, Director, Corporate and Regulatory Affairs

Australian Association of National Advertisers

Ms Trixi Madon, Manager, Codes and Self-Regulation

Fairfax Media Ltd

Mr Robert Whitehead, Director, Marketing and Newspaper Sales, and Director, Fairfax Enterprises

Galexia

Mr Chris Connolly, Director

Department of Broadband, Communications and the Digital Economy

Mr Andrew Maurer, Acting First Assistant Secretary, Digital Economy Services Division

Mr Garry Croker, Director, Consumer Policy and Privacy Branch

Mr Duncan McIntyre, Assistant Secretary, Consumer Policy and Post Branch