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Committee Secretary
Senate Environment, Communications,
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Do Not Call Register Bill 2006 (Bill)

The Australian Bankers' Association (ABA) is pleased to have the opportunity to make a submission to the Committee on the Bill.

Subject to the ABA's comments in this submission the ABA supports the introduction of a Do Not Call register in Australia that is founded on an "opt out" model with an effective exemption for existing customers of banks that takes account of the continuing nature of the bank and customer relationship.

About the ABA

The ABA is the national representative body for 26 banks authorised by the Australian Prudential Regulation Authority (APRA) to carry on the business of banking in Australia.

Members of the ABA include the four major banks, regional and a number of foreign banks. The role of the ABA is to work with its members to provide analysis, advice and advocacy and contribute to the development of public policy on banking and other financial services. With the active participation of its members, the ABA works to foster an environment in which financial services are valued and can prosper. In communicating the industry's views, the ABA works with Commonwealth and State and Territory Governments, regulators, other industry associations, the community, community groups and the media.

The mission of the ABA is to:

"Improve the economic wellbeing of Australians by fostering a banking system recognised as one of the safest, dynamic and most efficient in the world".

Regulatory Approach to the Bill Adds to Regulatory Patchwork

The Bill appears to have been characterised according to the technological nature of telemarketing. However, the substantive issue under consideration is the intrusive or unwelcome nature of some telemarketers' activities. These activities have an equally relevant association with privacy protection given the private sector provisions of the Privacy Act (National Privacy Principle 2.1(c)) dealing with direct marketing.

This overlap is mentioned because of a similar situation concerning the Spam Act 2004 where existing Privacy Act related provisions were overridden creating a different regime of consumer protection and compliance. The issue of establishing a nationally consistent approach to privacy protection that is technologically neutral is considered by the ABA to be an important objective. The March 2005 report by the Privacy Commissioner on the operation of the private sector provisions of the Privacy Act *"Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988"* covered at some length the potential patchwork of privacy related regulation faced by business and consumers.

The ABA is concerned about the potential risk that the Bill could further add to this patchwork and the potential for a Do Not Call register to add to the regulatory burden and compliance costs borne by banks and other businesses at a time when the Government is exploring ways to reduce the regulatory imposts on the business sector. Banks are already subject to what are in effect "Do Not Call" obligations under the law in respect of their existing customers.

The majority of deposit, investment, advisory and transaction services relationships other than credit are regulated by Chapter 7 of the Corporations Act 2001 (FSRA) which covers both individuals and small businesses. Section 992A of the FSRA deals with the hawking of FSRA regulated financial products. Section 992A prohibits a person offering to issue or sell a financial product in the course of or because of an unsolicited telephone call unless certain legislated conditions are satisfied. One of those conditions is that contact can only be made during specific hours and excludes Sundays and some public holidays and that the consumer be given the opportunity to be listed on a "No contact/No call" register and to select the time/frequency of any future contacts. Banks and other entities subject to the FSRA have implemented compliance arrangements to meet the requirements of section 992A.

Under the Privacy Act a person is able to conduct direct marketing to a consumer unless the consumer has requested the direct marketing to cease. The consumer has the option to instruct that direct marketing should cease. Financial services organisations also need to keep a record of persons who have opted out of direct

marketing under the Privacy Act and maintain registers for this purpose (and for the purposes of the FSRA). In some cases the same register is used.

The uniform Consumer Credit Code regulates consumer credit facilities such as personal loans, credit cards and home loans. Section 145 of the Consumer Credit Code prohibits harassment of a person in attempting to get that person to apply for credit.

Under both the Trade Practices Act (section 60) and the Australian Securities and Investments Act (section 12DJ) there is a prohibition on a person using undue harassment or coercion in connection with the supply or possible supply of goods or services (TPA) or financial services (ASIC).

It can be seen that there is some overlap in the existing regulatory arrangements making it important that the addition of a national "Do Not Call" register is introduced in a way that recognises the sunk compliance costs to banks and other financial services providers and additional costs occasioned with the introduction of a national register. Otherwise there is the risk that the register if not properly introduced will add to the compliance burden and cost impost without providing a proportionate benefit to consumers.

Further, the approach of the Bill effectively reverses the original intention of the Do Not Call register, which was to maintain an opt out approach for telemarketing. Currently, individuals are informed of their ability to opt out of receiving marketing material when an organisation collects their personal information. Under the Bill, express consent will be required to override a Do Not Call registration. This means that the only way an organisation can ensure that they can contact the individual is for the individual to give express consent for telephone contact (given the uncertainty around the 'existing business relationship' exemption and inferred consent noted below). This effectively introduces an opt in regime for telephone marketing.

Specific comments on the Bill

1. Existing business relationship exemption

The Minister's media release announcing the decision of the government to proceed with legislation to establish a Do Not Call register said:

"Exemptions will also apply to companies with an existing business relationship with an individual, for example with existing accounts or contracts."

Unfortunately, the manner in which the exemption has been drafted has the potential to create considerable uncertainty for our members in applying the exemption. This in turn creates a compliance risk and burden and the potential for wide variations by banks and other organisations in how the exemption is interpreted. This would be an undesirable outcome for business and consumers.

The proposed exemption relies upon either express consent or through the inference of consent that may or may not arise from conduct and the business and other relationships existing between the individual and the organisation concerned.

Taking first express consent, the exemption is complicated and difficult to apply because the registration of the telephone number is initiated by the account holder or the account holder's nominee. A bank's customer may or may not be the account holder. There may be a bank's customers who are members of the household who avail themselves of the same telephone number. But consent to disregard the register listing is required from the account holder (or nominee). Unless the bank knows that the person giving consent is the account holder (or nominee) it would not be able to rely on express consent.

Also, it means there would be a category of people who would not be able to give their consent to be contacted for telemarketing because they happened not to be the owner of the telephone account where they lived.

In order to avoid this situation, any individual sharing a number should be able to give an organisation express consent to call.

Another possible means of reducing the complexity might be to add the name of the account holder to the Do Not Call register in connection with the registration of the telephone number to make identification easier for existing customer relationships. However, as explained below this will not remove the uncertainty surrounding the application of the existing business relationship in relation to inferred consent.

In order to use the inferred consent exemption and to be certain about compliance with the legislation, a bank would have to make individual judgements in relation to each customer to determine whether consent may reasonably be inferred. This is confirmed by the Explanatory Memorandum to the Bill. Given the uncertainty of whether consent has can be reasonably inferred, the ABA believes the only way for financial institutions to safely contact their customers for telemarketing purposes would be for the customer to provide express consent.

This also will add to the costs and complexity for banks in interpreting a customer's position in relation to telephone contact.

It will be virtually impossible for a bank to interpret a customer's act of registering their telephone number on the Do Not Call Register as an act that discriminates between telemarketers at large and their bank or between one customer and other customers sharing the same household all using the one telephone number. The very act of registering a telephone number on the Do Not Call Register is conduct that clearly informs all organisations that telemarketing calls are unwelcome to that number and must cease. In fact, this aspect alone prevents any inference of consent and renders the proposed exemption unworkable, if not redundant.

The nature of a banking relationship is centred on account, transaction and other on-going facilities, such as on-going financial advisory services over indeterminate periods of time. Many of these relationships are transactional such as a typical deposit account where there is an on-going account relationship with statements of account being sent to the customer at periodic intervals. Typically, customers maintain these account relationships with their bank and welcome information and the opportunity to learn from their bank of new or improved facilities that a customer might want to consider as an alternative to their existing facility. The bank and customer relationship generally endures at the will of the customer. There are other relationships that are of a more fixed duration.

For example, banks will often call a customer about a term deposit that is soon to mature to ascertain the customer's intentions whether to roll over the deposit into another term deposit or opt for a different investment product. Fixed rate, fixed term loans for periods of say up to 5 years might all involve a telemarketing call (as defined) to the client to discuss options once the loan falls due at the expiration of the loan term. While the customer may not have purchased a product or service, or performed a transaction for the term of the deposit, the bank should be permitted to call the customer to discuss the customer's election before maturity, which may include a discussion about products and services which are alternatives to simply a "roll over". Also there are circumstances where a bank needs to contact the customer because an account that has remained dormant for years is liable to be transferred to the unclaimed monies fund.

Other examples include:

- existing customers are often eligible for discounts and special offers by virtue of being customers – they should be able to be made aware of these offers;
- the bank should have the freedom to call customers on a 'customer care' basis, intended to be a general inquiry into the satisfaction/needs of the customer and arising out of this, depending on the conversation, a request or suggestion to consider a product/service which may suit the customer;
- a reason for the bank to call the customer to query unusual transaction activity on the customer's account indicating possible unauthorised or fraudulent activity by a third party on the account where the conversation might lead to other products or services the bank might make available to the customer;
- The products and services offered by banks are often upgraded as a result of technological change and other developments. Banks often use telephone contact as a means by which to communicate information about improved products and services for the benefit of customers.

All of these examples illustrate the importance of an unambiguous rule for applying the existing business relationship exemption where the customer may

have logged their telephone number on the Do Not Call register. The ABA submits that compliance with this exemption should not be left to the vagaries of inference.

An unambiguous exemption for existing business relationships will not cause consumer detriment. Customers are already protected against unwanted marketing approaches from their existing providers under the Privacy Act 1988. National Privacy Principle 2.1(c) requires private sector organisations to provide their customers with the ability to opt out of marketing contact at any time.

Therefore the existing business relationship exemption should permit a bank to make unsolicited telephone calls to its existing customers by virtue of the existence of that relationship unless its customer has specifically instructed the bank not to do so.

There is also protection for existing customers in relation to financial services regulated under Chapter 7 of the Corporations Act 2001 (section 992A). There is the prohibition on a person making an offer to issue or sell a financial product in the course of, or because of, an unsolicited telephone call to another person if, among other things, the other person is listed on a "no contact/no call register" maintained by the organisation in relation to the person making the call.

2. Definition of "Telemarketing Calls"

In the alternative to broadening the application of the existing business relationship exemption, the definition of "Telemarketing Calls" should be amended in order to allow for the customer service type calls to existing customers as discussed above. Sec 5 (1) should read "it would be concluded that the **primary** purpose or one of the **primary** purposes of the call..."

The existing definition would severely impact on a financial institution's ability to proactively service its existing customers.

3. Possible conflict with Corporations Act 2001 Section 992A

It is unclear how the Bill will interact with section 992A of the Corporations Act 2001. The concept of "consent" differs materially from the concept of "an unsolicited telephone call". Consent inferred from a business relationship does not necessarily lead to the conclusion that a telephone call has been solicited.

To deal with the potential conflict between an existing business relationship exemption under the Bill and section 992A of the Corporations Act 2001 the ABA submits that the Bill should make it clear that the Do Not Call register to be established by the Bill is not the "no contact/no call register" referred in section 992A that is independently maintained by a financial services organisation for the purposes of compliance with section 992A.

4. Associated Issues of complexity with existing business relationship exemption

4.1 Interaction with other registers

If a telephone number is registered on the Do Not Call Register it will be necessary for an organisation to first cross check its list against the organisation's customer base to identify the relevant customers by reference to telephone number (which may have changed since it was first recorded with the organisation). Secondly, it will be necessary to also cross check the list against the organisation's own "opt out" register that has been established for the purposes of compliance with the Privacy Act and the FSR. This will be a complicated exercise (particularly where nominees may also have been nominated) and there are likely to be system compatibility issues and increased costs, given that this process assumes that all databases are in a similar format. The point is that there are separate obligations on banks and other organisations to keep "do not call/contact" lists that also have to be taken into account and which would not be substituted by the Do Not Call register.

4.2 Expiry of express consent after 3 months

The proposed expiry date of 3 months for express consent unless the giving of that consent is expressly stated to be for a finite or indefinite period will impose additional "red tape" and costs on organisations. For instance, an organisation will have to establish and maintain records of when express consent was given by a customer, when that consent expires and, before the consent expires, contact the customer to enquire whether the customer wishes to refresh their consent otherwise they will risk not receiving further telemarketing messages from the organisation concerned, possibly to their detriment. This will impose an avoidable regulatory burden on organisations that are small and those that have large customer bases such as major retailers and banks and is not in the interests of customers. If a customer no longer wishes to receive further telemarketing calls after providing express consent, the customer can provide a simple, legally binding instruction to the organisation to discontinue calls at any time.

5. 30 day period

The 30 day window for the washing of the Do Not Call register data is insufficient to allow for a typical marketing campaign cycle.

A typical marketing period, encompassing the data wash and file validation, mailing of any promotional material preceding calls, and the actual marketing calls, may span over 2 months.

The period should be extended to at least 60 days.

6. Access to the Do Not Call Register

The requirement for organisations to submit their marketing files to ACMA for checking against the Do Not Call register may adversely impact on campaign timings and the cost of business compliance. Issues may also arise relating to data file formatting.

Also there is the important aspect of privacy and confidentiality. Banks are bound by a common law duty to keep the affairs of their customers confidential. The duty is a duty not to disclose information that extends to the very existence of the bank and customer relationship. Disclosure of a customer's telephone number held by a bank would be an unauthorised disclosure of a customer's information and disclosing the existence of a banking relationship with the account holder. One exception to the duty is that a bank is under compulsion of law to make the disclosure. The terms of the Bill are permissive only (clause 19).

Also it is not clear whether the Bill deals with National Privacy Principle 2.1 (g) concerning the restriction on disclosure of an individual's personal information unless the "disclosure is required or authorised by or under law". The permissive nature of clause 19 in relation to the submission of a list of telephone numbers does not directly address that it is overriding a law relating to privacy whereas, by contrast, clause 22 does specifically address the issue of privacy in relation to a contracted service provider "for the avoidance of doubt".

Accordingly, the ABA requests that the Bill specifically provides that the submission of a telephone list by an organisation to ACMA in order to comply with the legislation does not contravene any law of Australia relating to the privacy or confidentiality of such information.

7. Payment/access

The ABA questions the proposal that industry should bear a significant proportion of the costs of establishing and maintaining the register on top of the costs of complying with the Do Not Call register without some contribution from the community on whose behalf the register is to be developed and the members of the community who avail themselves of the service.

8. Implementation timeframes

The intention is for the Do Not Call register to be implemented by 2007.

In order to allow for the necessary technology enhancements required in a typically large organisation, a minimum of 12 months implementation period would be required.

9. Other matters

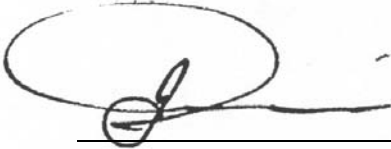
The ABA is aware that the Australian Direct Marketing Association has identified a number of other concerns with the Bill that it proposes to submit to the

Committee. The ABA agrees with those concerns as needing attention and recommend that relevant parties be consulted on suggestions for addressing these concerns.

Finally, in the administration of the regime the ABA recommends that ACMA makes it clear to consumers that the registration of a telephone number on the Do Not Call register will not result in the immediate cessation of telemarketing calls and that a reasonable time will have to be allowed for organisations to adjust their records accordingly. Three months should be regarded as a minimum period of time for this to occur.

The ABA trusts that its comments are of assistance to the Committee in this inquiry.

Yours sincerely,

A handwritten signature in black ink, consisting of a large loop followed by a series of smaller loops and a horizontal stroke.

Ian Gilbert