



Optus Submission to the Senate Environment, Communications,
Information Technology and the Arts Legislation Committee
Inquiry into the provisions of the Do Not Call Register Bill 2006 and the
Do Not Call Register (Consequential Amendments) Bill 2006

1. Table of Contents

1.	Table of Contents	2
2.	Executive Summary	3
3.	Introduction	4
4.	About Optus	5
5.	Assessment of the Do Not Call Register Bills	6
	(a) Lack of Consultation	6
	(b) Consent	7
	(i) Existing Business Relationship Exemption	7
	(ii) Unintended Consequences of Schedule 2	8
	(iii) Inability to respond to an Inquiry	9
	(iv) Express Consent	9
	(v) Nominations	9
	(1) The process for nomination is unclear	9
	(2) Nominations does not adequately cover other individuals in a household	10
	(c) Small Business	11
	(d) Section 19 – Access to the Do Not Call Register	11
	(i) Timeframes and Reliability	11
	(ii) Business should have access to the Do Not Call Register	12
	(iii) Timeframe to Implement a Do Not Call Request	12
	(iv) Suggested Changes for the operation of the register	12
	(e) Consultation on subsequent Determinations	13
	(f) Use of Body Corporate included in the definition of Organisation	13
	(g) Safeguards against abuse	14
	(h) Penalties	15
	(i) Overall Structure of Penalties	15
	(ii) Infringement Notices	15
	(iii) Part 4 – Civil Penalties	16
	(1) Clause 30 Ancillary Orders – Compensation	16
	(2) Clause 31 Ancillary Orders – recovery of financial benefit	17
	(3) Single Errors that result in contraventions over Multiple Days	18
	(i) Consequential Amendments Bill	18
	(i) Telemarketing Standards	18
	(ii) Conduct of the ACMA’s Investigations	18

2. Executive Summary

- 2.1 Optus supports the introduction of a Do Not Call Register however, as with the introduction of the Australian privacy legislation, it is vitally important that the *Do Not Call Register Bill 2006* (“the Bill”) and the *Do Not Call Register (Consequential Amendments) Bill 2006* (“the Consequential Amendments Bill”), together known as the Bills, achieve a balance between the privacy concerns of individuals and the rights of business to operate.
- 2.2 Optus considers that the Bills contain many positive provisions that will contribute to the introduction of a successful Do Not Call Register. However, Optus has identified seven fundamental elements of the scheme that require further consideration and resolution prior to the passage of the Bills.
- 2.3 The first is the adoption of the same process to obtain consent as used in the *Spam Act 2003*. Optus considers that this is an unnecessarily narrow and unworkable approach in the context of the Do Not Call register for a number of reasons. It is vitally important that the issues around the consent provisions are addressed.
- 2.4 Secondly, Optus supports the inclusion of an additional exemption to protect businesses that operate in a business to business environment. This exemption will provide protection to businesses that inadvertently contravene the *Do Not Call Register Act 2003*, by contacting a number that is promoted as a business that is primarily used for residential purposes but is listed on the Do Not Call Register.
- 2.5 Thirdly, the Bill should also ensure that any telemarketing lists submitted to the ACMA are processed efficiently; within 24 hours. The legislation must also oblige the ACMA to take steps to prevent severe outages and delays.
- 2.6 Fourthly, the Bill must also permit organisations to obtain telephone numbers on the Do Not Call Register, so that existing business processes are not disrupted.
- 2.7 Fifthly, the definition of organisation should be extended from “body corporate” to “body corporate and related companies”.
- 2.8 Sixthly, Optus welcomes the inclusion of safeguards against abuse already incorporated in the Bill; however there are two potential loopholes that need to be resolved.
- 2.9 Finally, Optus considers that the penalty provisions, which are based on the *Spam Act 2003*, are not appropriate to a Do Not Call Register regime. It is recommended in some instances that it is more appropriate that the penalty provisions are aligned with the approach adopted in the *Privacy Act 1988*.

3. Introduction

- 3.1 Optus welcomes the opportunity to make a submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee's Inquiry into the provisions of the Do Not Call Register Bill 2006 and the Do Not Call Register (Consequential Amendments) Bill 2006.
- 3.2 Optus supports both the introduction of telemarketing standards and the ability of an informed public being able to opt out of being telemarketed. These outcomes are not inconsistent with a robust and viable direct marketing sector.
- 3.3 Optus is vitally interested in ensuring the successful operations of the Do Not Call Register as it is engaged in direct marketing telesales on a national basis.
- 3.4 This submission is divided into two main sections:
 - a) Part A provides information about Optus, our association with the Australian Direct Marketing Association (ADMA);
 - b) Part B provides an assessment of the Bills and Optus' comments on the draft legislation

Part A

4. About Optus

- 4.1 Optus is an integrated communications provider– serving more than six million customers each day.
- 4.2 Optus specialises in a broad range of communications services including mobile, local, national and long distance telephony, business network services, internet and satellite services and subscription television.
- 4.3 Direct marketing is an important customer acquisition activity for Optus and we already have well developed opt out and data washing procedures in place.
- 4.4 Optus is a member of the ADMA and we support its submission to this Inquiry.

Part B

5. Assessment of the Do Not Call Register Bills

- 5.1 It is extremely important that the Bills provide a fair and equitable balance between the rights of individuals to privacy and the needs of business to operate.
- 5.2 Optus welcomes the inclusion of many of the current provisions of the Bill including those that:
- a) Specify that small business should not be eligible to enrol on the Do Not Call Register;
 - b) Include safe harbour provisions that recognise that even though responsible corporations will make every effort to ensure compliance with the Do Not Call Register legislation, there is no system or process that operates at 100% accuracy all the time;
 - c) Contain safeguards against abuse that will ensure that organisations are prevented from registering telephone numbers on behalf of individuals;
 - d) Specify that a telephone number should remain valid on the register for three years. This is an important mechanism to ensure that the register does not contain inaccurate and out of date information to which Australian business has to comply.

There are, however, seven fundamental elements of the scheme that Optus has identified require that required focused and urgent attention prior to the passage of the Bills.

(a) Lack of Consultation

- 5.3 Optus is extremely concerned that the approach to:
- a) consent; and
 - b) the procedures by which telephone numbers would be removed from telemarketing lists,
- were not canvassed in the *'Introduction of a Do Not Call Register – Possible Australian Model Discussion Paper'*.
- 5.4 This means that interested parties were not given the opportunity to provide feedback on these issues in terms of the practical implications for current

business operations and that the Bills have been framed without the benefit of this input.

- 5.5 Given that both of these points have only just been released for consideration it is extremely important that the Committee give additional focus to feedback received on these matters during the review of the Bills.

(b) Consent

- 5.6 Australian businesses with existing relationships with customers should be able to maintain contact with these customers yet there is little evidence in Schedule 2, of the Bill, of this being accommodated or taken into account.
- 5.7 As presently drafted, the Bill will have unintended consequences that will disrupt Australian business far beyond what should be the scope of the Do Not Call Register.

i) Existing Business Relationship Exemption

- 5.8 The inferred consent provisions in Schedule 2, Clause 2 of the Bill confer consent in very limited circumstances. Schedule 2 does not provide an exemption for organisations to contact their customers as it is not possible to contact a customer about any product other than a product they have already purchased.
- 5.9 The approach adopted in the Bill is inconsistent with the approach taken in the *Privacy Act 1988* that allows organisations that obtain information from customers for a primary purpose to use their information for the secondary purpose of direct marketing. These provisions apply so long as the customer has made a request not to receive direct marketing communications.
- 5.10 As presently drafted, the consent provisions are significantly more restrictive than the approach adopted by the US and the UK in relation to the provisions that cover an existing business relationship.
- 5.11 Limited inferred consent in an environment where one organisation can communicate with many people by a single action (as in the case of Spam) may be appropriate. However, in a telemarketing environment where a single action of calling involves a much higher level of effort and cost and results in a communication with a single person, inferred consent as currently contained in the Bill is far too restrictive.
- 5.12 It is not unusual for companies to offer discounts to customers that buy more than one of their related products (eg telephone and a mobile, health insurance and life insurance, car insurance and house insurance). Therefore it is

unreasonable to structure legislation on the basis that different products offered by the same organisation are separate and distinct from other product offerings of that organisation.

- 5.13 Optus submits that the Bill should be amended so organisations can contact their customers for a period of 18 months after the organisation has last provided goods or services to that customer. Schedule 1 of the Bill should be amended so that existing business relationships are specified as a designated telemarketing call. The existing business relationship should be defined as follows:

An existing business relationship exists where an individual:

- a) has purchased goods and services from an organisation; or*
- b) has received a statement, bill, or invoice from an organisation that has supplied goods or services;*
- c) is a shareholder or financial member of the organisation or body corporate; or*
- d) has made a charitable donation to the organisation,*

in the period of 18 months prior to the unsolicited telephone approach; or

an individual that has made inquiries to the organisation within the last six months prior to the unsolicited telephone contact.

- 5.14 In keeping with the provisions of the *Privacy Act 1988*, the legislation should not permit organisations to contact customers if these individuals advise an organisation that they do not want to receive telemarketing contacts from that organisation.

ii) *Unintended consequences of Schedule 2*

- 5.15 The current provisions of Schedule 2, Clause 2 of the Bill combined with the provisions defining telemarketing calls contained in Part 1, Clause 5 appear to have unintended consequences that will disrupt normal business operations that should remain unaffected by the introduction of a Do Not Call Register.

- 5.16 For example, Optus contacts one of its local telephony customers to confirm that a fault on the line has been resolved. Unfortunately the customer is not available and Optus leaves a message for the customer to contact us. The customer calls our customer fault management service line and while on hold hears a promotion of an Optus mobile product. Under the Bill, Optus would have contravened Clause 11(1) of the Bill if the customer was on the Do Not Call Register. This is clearly an unintended outcome of the Bill. Business should not be required to remove advertising on our customer service lines because of the introduction of a Do Not Call Register.

- 5.17 The Bill should not disrupt business' ability to conduct normal business operations. In this context, the Bill is overly restrictive because the definition of consent is defined too narrowly with respect to an existing business relationship and the consent that a relationship of this nature infers.
- 5.18 The appropriate solution to this issue is to include a broader definition of existing business relationship in the Bill.

iii) *Inability to respond to an Inquiry*

- 5.19 Schedule 2, Clause 3 of the Bill is also problematic because it does not properly allow organisations to respond to inquiries from an individual where the individual does not specify that they can be contacted by phone. This is overly restrictive and clearly overlooks the rights of business to operate properly. Surely it is reasonable for an organisation to contact an individual by whatever means suits an organisation if that individual makes an inquiry to that organisation and does not give express consent to be contacted by phone.
- 5.20 The Bill should include provisions that exempt an organisation from observing the Do Not Call Register legislation if an individual has made an inquiry to the organisation about their products. This exemption should apply for a period of six months from the time of the inquiry.

iv) *Express Consent*

- 5.21 Schedule 2, Clause 3 is also overly restrictive with respect to express consent. If an individual says to an organisation that they do not mind if the organisation contacts them, then this should not be restricted by a three month time limit. If an individual gives permission to an organisation to contact them about its goods or services then that express consent should apply until such time as the individual revokes their consent. Of course, the individual should be able to revoke their consent at any time.

v) *Nominations*

(1) The process for nomination is unclear

- 5.22 Part 6, clause 39 (2) of the Bill specifies that a nomination may be made, or withdrawn, orally or in writing.

- 5.23 This provision is very broad and introduces a significant amount of uncertainty about how the process of nomination and removal of a nomination will work. If a nomination is made orally, who will this nomination be made to? Will the process be recorded? Will the name of nominee and the account holder be recorded during this process and will this information be made available to organisations as part of the Do Not Call Register? What processes will be followed to ensure that an account holder has nominated an individual? How will organisations be able to confirm whether they have consent from an account holder or a nominee or even know that an individual is a nominee?
- 5.24 These are important issues that need to be satisfactorily resolved to ensure that adverse consequences such as abuse of the register are not introduced as a result of the nomination process.
- 5.25 Optus submits that the Do Not Call legislation and associated regulations should be framed so as to require verification of requests to ensure that only those parties permitted under the legislation are registering telephone numbers on the register. Provision should be made to ensure that these verification processes can be strengthened if evidence emerges that organisations are abusing the register for competitive purposes.
- (2) Nominations does not adequately cover other individuals in a household
- 5.26 Part 2, section 11 of the Bill specifies that relevant account holders and nominees can provide consent to be called by an organisation. This however does not consider the situation where there may be other members of a household that may provide either inferred or express consent under Schedule 2 of the Bill. In this case an organisation that contacts an individual on the basis of express consent or an existing business relationship could easily find it has contravened the Do Not Call Register legislation because the individual is neither the relevant account holder nor a nominee of the account holder.
- 5.27 This is a particularly serious problem if the Do Not Call regime is established such that organisations are not provided the details of either the relevant account holder or the nominee.
- 5.28 Should the concept of nominee be retained, a fairer and more practical approach would be to amend clause 11(2) of the Bill so that the exemption provisions apply equally to a relevant account holder, nominee, a resident at the house of a telephone number or a user of a mobile phone. This should include the exceptions that apply where an individual has consented to the making of the call, has an existing business relationship with an organisation or has made an inquiry to an organisation.

(c) Small Business

- 5.29 Optus recognises and welcomes the Government's acknowledgement that the scope of the Do Not Call Register should not include business-to-business dealings.
- 5.30 However, Optus is concerned that the small home-business operator, where the phone service is sometimes used as a personal service and sometimes promoted as a business service, could cause compliance problems for companies solely engaged in business-to-business transactions.
- 5.31 For example, a company that sells business supplies obtains the number of a small home-business operator who has a business that operates at a very low level of activity but promotes itself as a business. This will mean the company that conducts business to business contacts would need to scrutinise each number to confirm it is not on the Do Not Call Register.
- 5.32 Optus submits that in the case where a small home-business operator promotes their number as a business number (eg through the distribution of business cards or other types of promotions) then an organisation should not be held to have contravened clause 11 (1) of the Bill if it can prove that it was responding to an activity where that telephone number was being promoted as a business.

(d) Section 19 – Access to the Do Not Call Register

- 5.33 Section 19 of the Bill requires all organisations to submit telemarketing data to the ACMA (or its contractor) to remove those telephone numbers on the Do Not Call Register. Whilst Optus has no objection in principle to this approach there are two important issues that we request the Committee to consider:
- a) if lists are submitted to the register then these must be processed efficiently, within 24 hours and not be subject to outages, delays or error;
 - b) that centralised washing of telemarketing lists is not compatible with all business models

i) Timeframes and Reliability

- 5.34 Optus is concerned that the Bill does not specify how quickly a list must be processed by the ACMA and returned to an organisation. If the ACMA (or its contractor) is washing the lists then they must do this as quickly as industry members can conduct the washing themselves. It would be unacceptable for this activity to take any longer than 24 hours. This timeframe should be specified in the Do Not Call Register legislation.

- 5.35 The legislation should oblige the ACMA to ensure that there is adequate protection against outages. An outage could have serious consequences for Australian businesses because they would be unable to conduct normal acquisition practices. If this occurs it could have a significant, costly and detrimental impact to many Australian businesses.

ii) *Business should have access to the Do Not Call Register*

- 5.36 Optus is concerned that the legislation only contemplates one business model for telemarketing. Optus operates two different business models. The first involves the use of telemarketing lists. The second model involves our partners collecting customer information and then checking the customer's telephone number against an Optus system to ensure that the individual hasn't opted out via Optus' opt out processes or ADMA's Do Not Contact Service. This system is designed to meet best industry practice in terms of data security.
- 5.37 Provisions that require all lists to be submitted to the ACMA assume only one business model and are also inconsistent with the approach adopted by the US and the UK.
- 5.38 The US and the UK both allow organisations to obtain the Do Not Call Register and conduct their own processing. The approach proposed under the Bill will mandate a significant change to existing business practices that support proper opt out procedures.
- 5.39 In the case that the ACMA (or its contractor) is required to process a large number of lists, it is likely that lists submitted by one company may accidentally be provided to another. Such an outcome would have disastrous consequences and organisations should the option of removing telephone numbers on the Do Not Contact Register themselves if they consider errors of this nature to be an unacceptable risk.
- 5.40 Optus also notes that this approach was not canvassed in the *Introduction of a Do Not Call Register – Possible Australian Model Discussion Paper* and no other indication was provided to industry that this approach was being considered.

iii) *Timeframe to Implement a Do Not Call Request*

- 5.41 Optus has consistently argued that usual business operations involve using telemarketing lists for 30 days. On this basis, Optus has previously requested that a maximum of 45 days be allowed between when a registration is requested and when organisations must cease calling.

iv) *Suggested changes for the operation of the register*

- 5.42 Optus submits that Part 3 of the Bill be amended to:

- a) allow organisations to:
 - i. submit telemarketing lists to the ACMA to process; and
 - ii. access the Do Not Call Register for the sole purpose of ensuring compliance with the Do Not Call Register legislation;
- b) require the ACMA (or its contractor) to process and return a list to an organisation with 24 hours of the list being submitted;
- c) in the case of an outage where lists cannot be processed, provide an additional exemption so that organisations can continue to use existing lists even if they have not been processed in the 30 day period specified in clause 11 (3) (b) of the Bill;
- d) allow organisations a maximum 45 days between registration and a telephone number to cease making phone calls to an individual;
- e) require the ACMA (or its contractor) to put in place suitable arrangements to ensure that the Register does not suffer outages greater than four hours and that suitable secondary backup processes are available in the event of outages;
- f) ensure that the legislation will cater for a model whereby the Do Not Call Register can be sent by the ACMA to licensed organisations at a frequency specified by the organisation.

(e) Consultation on subsequent Determinations

- 5.43 Part 3 specifies that a number of lower level but important matters will be resolved by determinations developed by the ACMA.
- 5.44 These are matters on which industry can provide practical advice based on experience. Optus submits that the legislation should specify that the ACMA should closely consult with business and industry groups when developing these determinations.

(f) Use of Body Corporate included in the definition of Organisation

- 5.45 Many large corporations including banks and telecommunications companies are comprised of many bodies corporate. For example, companies which most

people would view as a single entity is comprised of a number of smaller companies. In many of these cases, the company will represent themselves as one company.

- 5.46 The use of a single body corporate will create significant complexity in terms of administration and execution of many of the aspects of the Do Not Call Register legislation. To resolve this matter the definition of organisation should be extended to include the body corporate and its related companies.

(g) Safeguards against abuse

- 5.47 A critical success factor for a National Do Not Call Register is its impact on the ability of Australian business to promote goods and services.
- 5.48 In this context it is important to ensure that the register is not open to abuse. Specifically, organisations should not be permitted to request that telephone numbers of their customers are placed on the Do Not Call Register to prevent competitors from contacting their customers. If this type of activity was permitted under the regime then the impact to the telemarketing industry and unrelated industries would be significant. This would particularly be the case if large industry players such as Telstra and Optus register all their customers on the Do Not Call Register. It would result in virtually every other industry not being able to contact individuals who have not requested that their telephone number be included on the Do Not Call Register.
- 5.49 Optus applauds the Government's inclusion of safeguards against abuse contained in the legislation that requires only the relevant account holder or their nominee to be eligible to request that a telephone number is placed on the register. However these provisions need be extended and revised as described below to ensure that potential loopholes do not exist in the legislation.
- 5.50 Optus submits that the Bill should be amended so that:
- a) clause 39 specifies that an individual acting on behalf of an organisation may not be nominated by a relevant telephone account-holder;
 - b) an additional clause is added to clause 11 that prohibits an organisation from causing or otherwise inciting an individual to request that their telephone number be placed on the Do Not Call Register. An example of this might be an organisation paying its customers \$5 to place their telephone numbers on the Do Not Call Register.
 - c) as these types of actions could have a significant impact on Australian business Optus submits that these clauses should be subject to civil penalty provisions that apply to clause 11 (1) of the Bill.

(h) Penalties

i) Overall Structure of Penalties

- 5.51 The use of the penalty provisions used in the *Spam Act 2003* are, in some cases, inappropriate to a Do Not Call Register context.
- 5.52 Optus is concerned that the same approach used for Spam penalties has been adopted for the Do Not Call Register. A review of the ACMA's Compliance Policy indicates that normally at the outset of a new set of regulations, the ACMA may choose a path of providing advice or issuing formal warnings before resorting to more formal instruments such as infringement notices and court proceedings.
- 5.53 The implementation aspects of a Do Not Call Register differ from those required for Spam legislation. Compliance with Spam legislation is entirely within the control of a single organisation and it requires an organisation not to send electronic messages to non consenting individuals. The organisation can elect to send electronic marketing messages to individuals who have given consent.
- 5.54 In contrast, the Do Not Call Register will be dependant on the ACMA (or its contractors) to process telemarketing lists. It also requires the incorporation of additional steps and proactive measures in large scale business practices. Therefore the implementation of Do Not Call Register legislation will be more complex and interdependent than for the *Spam Act 2003*.
- 5.55 In recognition of this difference, an enforcement mechanism prior to the imposition of an infringement notice should be included in the Bill. Such a mechanism might be similar to the processes in place for the investigation of a breach of an industry standard, for example issuing a formal warning as contemplated in section 129 of the *Telecommunications Act 1997*.

ii) Infringement Notices

- 5.56 Schedule 2, clause 5 does not include a specific allowance for organisations to defend themselves if issued with an infringement notice. To address this issue additional provisions should be added to the Schedule that formalise a process where an organisation is given the right to respond to the allegation of a breach contained in an infringement notice.

5.57 Optus suggests that specific wording should be included in the Bill that acknowledges that:

- a) The ACMA may issue an interim infringement notice to an organisation in the event that an authorised officer believes that a person has committed one or more contravention of a particular civil penalty;
- b) an organisation may respond to the ACMA in writing within 21 days of receipt of the interim infringement notice outlining any relevant evidence regarding the alleged breach;
- c) the ACMA must give due consideration to the evidence provided by the organisation and then issue a conclusion as to whether there was a contravention within 7 days;
- d) if a contravention is confirmed then an infringement notice will be issued;
- e) if a contravention is not confirmed then the ACMA must withdraw the interim infringement notice.

iii) Part 4 – Civil Penalties

5.58 Detailed below are three areas that the Committee should give further consideration to in relation to Part 4 of the Bill. These include:

- a) Clause 30 Ancillary Orders – Compensation;
- b) Clause 32 Ancillary Orders – recovery of financial benefit;
- c) Treatment of single mistakes that result in contraventions over multiple days.

(1) Clause 30 Ancillary Orders - Compensation

5.59 Given that the Bill does not apply to those telephone numbers that are primarily used for business purposes the intention of this clause seems unclear. If compensation was to be awarded to an individual in a residential context then it is difficult to see what if any costs would be incurred, other than perhaps a small charge associated with retrieving a voicemail or returning a call.

5.60 Optus submits that this section should either be removed or aligned with the provisions contained in the *Privacy Act 1988* that relate to personal loss or damage, including any injury to a complainant's feelings or humiliation.

- 5.61 Optus notes that clause 30 (4) allows a victim six years to lodge an application for compensation. The flow on effect of this would be to require organisations to spend significant amounts of money storing information regarding their telemarketing activity. This is an unreasonable and unnecessary burden to business.
- 5.62 Clause 30 (4) should be amended such that individuals have 12 months to lodge an application.

(2) Clause 31 Ancillary Orders – recovery of financial benefit

- 5.63 Optus opposes the inclusion of Clause 31 for a number of reasons. These provisions simply go too far given the heavy fines that an organisation will attract if it contravenes the Bill as drafted.
- 5.64 It is absolutely inappropriate that a Bill that contains civil penalties contain clauses that are based on the principle used for the proceeds of crime for criminal offences.
- 5.65 Consumers who are on the Do Not Call Register who object to receiving a telemarketing call have the option to make a complaint, do nothing or accept the commercial offer. Those consumers who accept the commercial offer have agreed to accept the offer. Optus assumes that it is more likely that these individuals will lodge a complaint, rather than take up an offer.
- 5.66 It is misconceived to require an organisation to return the financial benefit obtained from a contravention. It is unclear how these penalties would apply in these cases. Would an organisation be required to continue to provide these products to consumers where the penalty involves us providing the profits from these products to the Commonwealth for the entire time that the organisation provides the product to the individuals involved?
- 5.67 Optus notes that these same provisions are included in the Spam Act. This does not justify the inclusion of these penalties in the Bill. These provisions are inconsistent with the provisions of the *Privacy Act 1988*. It is also entirely inconsistent that the penalties associated with making an incorrect telephone call are higher than those associated with breaching someone's privacy (for potentially far more serious actions in terms of the impact to the individual involved).
- 5.68 Optus notes that the clause 31 (3) allows the ACMA six years to lodge an application for compensation. The flow on effect of this would be to require organisations to spend significant amounts of money storing information regarding their telemarketing activity. This is an unreasonable and unnecessary burden to industry.
- 5.69 Clause 31 (3) should be amended such that the ACMA has 12 months to lodge an application.

- 5.70 This clause should be removed from the legislation. If it is thought necessary to include some mitigation for this situation, then the legislation should require that consumers be relieved of paying a cancellation fee or other applicable liability for breach of contractual obligations for a specified period of time, eg. six months, similar to the fair trading provisions.

(3) Single Errors that result in contraventions over Multiple Days

- 5.71 Optus notes that a single error may result in contraventions over a number of days before a problem is identified. For example, if an administrator was to mistake that a list had been submitted to the ACMA for processing and forward the list to a telemarketing centre, it may be a few days before the organisation will identify that this mistake has been made and presumably take immediate action to remove the list from use.
- 5.72 Optus submits that penalties should be imposed on a per incident basis rather than on a per call, per day (contravention) basis.

(i) Consequential Amendments Bill

i) *Telemarketing Standards*

- 5.73 Item 36 amends section 125A the *Telecommunications Act 1997* to require the ACMA to determine a standard in relation to telemarketing standards. Clause 125A(1) (v) requires relevant participants to ensure that calling line identification is enabled in respect of the making of a telemarketing call.
- 5.74 Unfortunately, in some instances it is not technically possible to provide an accurate calling line identification for a telemarketing call.
- 5.75 Optus submits that the legislation should be amended such that relevant participants must ensure that calling line identification is enabled in respect of the making of a telemarketing call, where technically possible.

ii) *Conduct of the ACMA's Investigations*

- 5.76 Optus is concerned about item 56 of the Consequential Amendments Bill. Item 56 has the effect of not requiring the ACMA to give notice to an organisation that it:

- a) is investigating a contravention of the Do Not Call Register legislation ;
 - b) has found an organisation has breached the Do Not Call Register legislation as part of an investigation; or
 - c) is making an adverse finding in a report to the Minister.
- 5.77 The explanatory memorandum advises that individual complaints may potentially be numerous and identifying and establishing contravening behaviour may be achieved through the examination of a number of apparently unrelated complaints over a period of time. Responding to each one will potentially risk the destruction of valuable evidence and be prohibitively resource intensive.
- 5.78 The effect of the changes is that the ACMA does not have to advise the organisation that it is conducting an investigation or the findings of that investigation. The Consequential Amendments Bill also envisages that the ACMA may issue a report to the Minister with adverse findings about an organisation without having to notify that organisation.
- 5.79 Optus submits that these provisions deny an organisation natural justice. The ability for an organisation to defend itself does not prevent the ACMA from taking further action with respect to serious offenders.
- 5.80 Further, if an organisation is aware that it is being investigated and this results in the organisation taking appropriate remedial action to prevent non-compliance, then visibility of the investigation should be provided to the organisation.
- 5.81 A framework that allows an organisation to defend itself from allegations ensures that there is a process for confirming that systemic breaches have occurred. If these provisions remain in the legislation then there should be clear guidance to the ACMA that these are only to be used in exceptional circumstances.

End.