Australian Government

**Department of Communications,
Information Technology and the Arts**

Secretary

Helen Williams AO

Senator the Hon Alan Eggleston
Chairman
Senate Environment, Communications,
Information Technology and the Arts
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Eggleston

Do Not Call Register Bills 2006

Thank you for your letter of 15 June 2006 in relation to the Do Not Call Register Bill 2006 and the Do Not Call Register (Consequential Amendments) Bill 2006 ('the Bills'). Your letter raises a number of questions concerning the Committee's current inquiry into the provisions of the Bills. I trust you will find the following adequately answers the Committee's questions.

1 *Register of numbers*

Question 1 of your letter requests clarification of why the Register should be a register of telephone numbers, rather than a register of individuals and telephone numbers. As you have noted, a number-based register is the preferred model in other countries.

The Government's key reason for adopting the model was to protect the privacy of individuals on the register. A register based on numbers ensures that the only consumer information that telemarketers will be able to receive from the Register will be the telephone number of the registrant. No corresponding name or address will be released.

This is of particular importance where people with silent (unlisted) telephone numbers register their numbers. In this case, an individual with a silent number is more likely to place their number on the Register as the number by itself will not identify the individual who uses the number. A register of names and numbers will clearly provide telemarketers with the name of individuals with a silent number.

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The simplicity of the number-based model also presents advantages to telephone users and businesses. Telephone users need only register a number once rather than registering the name and number of each member of a household. The current Australian Direct Marketing Association Register uses names and numbers and this has led to confusion for some consumers who have not understood that every individual in a house must be included on the Register for unsolicited calls to be reduced.

Businesses need only compile lists of numbers to be washed by the Register, rather than numbers and names. Many businesses, particularly small businesses, are likely to call numbers based on area codes rather than names, for example if they are looking for new clients in the local area. Requiring these businesses to start compiling lists of names and numbers would add unnecessary complexity.

A further advantage is that by minimising the information (i.e. the phone number) that needs to be checked, there is less scope for errors on the part of the Register operator and businesses that submit lists. It also reduces the potential for confusion on behalf of telemarketers. For example if both names and numbers are used, the inclusion of W Smith at 02 3456 7890 on the Register might mean that a telemarketer can call Bill Smith at that number, but not William Smith or Wendy Smith. However a name, unlike a number, is not a unique identifier.

In addition, a Register of names and numbers is likely to be more costly to establish and run than a register of numbers because of the potential for several individuals to be listed per household.

In light of the privacy protection and administrative simplicity offered by the model, and having regard to its successful operation in other jurisdictions, a number-based registration model was strongly preferred over a name-based model.

2 *Three year registration renewal*

Your letter notes that the reason for proposing a registration period of three years is to ensure the accuracy of the Register.

This decision to limit registrations for three years was made following consideration of submissions made by a number of organisations in response to the Department's discussion paper (including submissions by the telemarketing industry) which raised concerns that the Register would become out of date.

Data suggests that approximately 17 per cent of Australians move each year. On this basis, potentially 85 per cent of the numbers on the Register will be out of date after five years. Therefore, the three year timeframe was chosen as an appropriate period of time to balance the requirement for individuals to act and re-register their numbers against the need to maintain an accurate Register.

The need for accuracy of Register data is fundamental to the effective operation of the Register. If it becomes apparent that a significant amount of data held by the Register is out of date, it seems likely that many businesses will stop washing their marketing lists

and simply chance the possibility of prosecution. This would clearly be an undesirable outcome and would undermine both business and consumer confidence in the Register and the policy objectives of reducing unsolicited telemarketing calls.

3 *Nominee consent to telemarketing*

The Committee has requested further information on how telemarketers might practically be able to confirm if a person purporting to give consent to a telemarketing call has the appropriate authority to do so (or, in other words, that they have been genuinely nominated by the account holder to consent to receiving calls). Clause 39(2) of the Do Not Call Register Bill 2006 provides that '[a] nomination may be made, or withdrawn, orally or in writing'.

Where a nomination is made orally – for example where an entire family shares the one fixed line service and the mother, who is the account holder, orally agrees to each member of the family receiving specified commercial calls on the fixed line – the telemarketer will need to satisfy itself that consent has been validly given by the account holder or their nominee.

It is expected in these situations that telemarketers would do this by asking the person consenting to receive telemarketing calls if they are the relevant account holder or have been nominated by the account holder. The telemarketer would be able to rely on the nominee's assertion that they have the appropriate authority to give consent to use of the number, unless there are reasons to suspect that the person consenting is not a nominee. If a person does not have appropriate authority, the Bills provide telemarketers with the defence of using reasonable precautions and exercising due diligence to comply with their legislative obligations: see clause 11(5). If proceedings are commenced against a telemarketer, they will be able to rely on the fact they questioned the individual, there was no reason to suspect that the individual was not a nominee, and they acted in good faith on the advice received from the individual.

Alternatively, the most certain way a company can confirm that a person is a nominee is to contact the person holding the account who has nominated the person.

If the nomination is in writing, a telemarketer would be able to request a copy of a written nomination.

4 *Inferred consent and existing business relationships*

The Committee has questioned whether the approach adopted in the Bill to address 'existing business relationships' is consistent with the approach taken in other jurisdictions. The proposed approach differs from both the United States and United Kingdom in a number of key respects.

In developing the Bill, Australia has had the benefit of reviewing existing models that have been in place in the United States and United Kingdom for a number of years. The Do Not Call Bill has not only adopted the successful elements of existing models, but has also built on and improved those models where possible.

The Department understands that in the United States, businesses that have an existing business relationship with a subscriber on the Do Not Call list are automatically exempt from the Do Not Call requirements. Broadly, an established business relationship will be found where:

- a subscriber has made a purchase from or transacted with the business within 18 months immediately preceding the call; or
- a subscriber has made an inquiry or application in relation to the products or services of the business within 3 months immediately preceding the call.

In either of these circumstances, the business will be free to telemarket the subscriber until the subscriber specifically advises the business not to call. The advantage of this approach is the certainty it affords to business. Businesses know for certain that they are free to telemarket any of their customers or any person who has made an inquiry to them for the prescribed period, as long as the individual has not expressly objected to such calls. However, the approach also requires businesses to record the dates of all transactions, all inquiries and to maintain their own internal Do Not Call lists.

The US approach also opens the Register to significant abuse that may undermine the effectiveness of the register: - businesses may call people who have registered on the Do Not Call list *irrespective of the circumstances or the appropriateness of the call.* Thus, for example, Woolworths would be able to telemarket any person who bought goods from them for the previous 18 months, notwithstanding that a person's number was provided solely in conjunction with the delivery of home shopping. The average consumer has a daunting number of established business relationships. Given this, there are significant concerns that a blanket exemption for established business relationships has a real potential to undermine the effectiveness of the Register.

A further difficulty with the United States' approach is the difficulty posed by the imposition of arbitrary time limits on certain businesses. For example, an 18 month time limit would prevent optometrists from calling their customers for bi-annual check-ups. However, if a longer period were adopted, it would mean that a hotel chain a person stayed in two years previously could telemarket that person for an extended period after all business between the individual and hotel had concluded. Unlike the Do Not Call Bill which allows for indefinite periods, there is no flexibility in the United States approach to reflect a consumer's expectations of what is reasonable.

In the United Kingdom, no exemption is provided for established business relationships. Businesses will only be able to call individuals on the Telephone Preference Service with whom they have a relationship if the call is solicited. While this approach is very simple, it fails to take into account the legitimate needs of businesses to contact clients.

To overcome the difficulties posed by the United States and United Kingdom models, the proposed model in the Bill provides flexibility to respond to the different needs of businesses and individuals. Under the proposed Australian model, businesses would be able to call individuals on the Do Not Call Register with whom they have a relationship as long as it would be reasonable for them to infer that the individual has consented to the call. For example, in the following types of relationship, as long as the individual had not suggested from their conduct that they did not wish to be called, it would be

reasonable to infer that the individual had consented to a telemarketing call from the business:

- where a person has purchased goods or services that involve ongoing warranty and service provisions (eg purchase of a car with a three year warranty from a dealer);
- a shareholder and the companies in which they hold shares;
- a subscriber to a service and the service provider eg a telephone service provider and its customers; and
- a bank and the bank account holder.

Of course, the extent of a person's consent would depend on what could reasonably be inferred from the conduct and the relationship. For example, if a person has provided their telephone number to their bank (with whom they have a mortgage, transaction account and credit card), it would be reasonable for the person to expect to receive telemarketing calls about the bank's available mortgage products or credit card arrangements. However, it would not be reasonable to infer the bank could call the person about purchasing a new car.

If a person makes a one-off, casual purchase from a shop or website, it is unlikely to be reasonable to infer that the person consents to receiving unsolicited telemarketing calls from the relevant business simply because there was a pre-existing connection between the two parties. This approach is similar to that under the *Spam Act 2003.*

The proposed Australian model is preferred for the flexibility it affords to registrants and businesses. Businesses may contact their clients – but only where reasonable. The approach protects consumers while recognising the legitimate interests of business.

I trust the committee will find the above information to be of assistance.

Yours sincerely

Helen Williams
16 June 2006