

Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts

By email: eca.sen@aph.gov.au

22 January 2010

Re: Do Not Call Register Legislation Amendment Bill 2009

Thank you for the opportunity to provide comment on the Do Not Call Register Legislation Amendment Bill 2009 (the Bill).

About ACCAN

Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians. Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

Introductory comments

We welcome the general direction of reform and acknowledge that the government has incorporated a number of measures of importance to consumers. We strongly support the expansion of the Do Not Call Register (DNCR) to allow all telephone and fax numbers to be registered. We are pleased to see previous ACCAN recommendations for consumers to have a degree of customisation in choosing to receive contacts from nominated industries, are reflected in the proposed amendments.

A major shortcoming in the Bill is the failure to deal with the imminent lapsing of more than 4 million 'do not call' registrations. The absence of evergreen registration will make Australia one of only two countries with outdated and bureaucratic registration schemes, the other being Canada which has a five 5 year registration period. A simple fix for this failing is the removal of s17(1[b]) which requires renewal of registrations every three years. The Australian Communications and Media Authority (ACMA) recently undertook research that shows only 25% of registrants know that registration is valid for only 3 years, and a paltry 15% know they can re-register anytime before registration expires.¹

This renewal requirement was arbitrarily attached to registrations, and imposes an unnecessary regulatory burden that is inconsistent with international best practices in Do Not Call registers and the wishes of consumers to be protected from telemarketers.

In summary our recommendations are:

- *That the Bill be amended to remove clause s17(1[b]) of the Do Not Call Register Act (2006) requiring the renewal of registrations every three years, such that registrations remain permanent*
- *That all existing registrations be transitioned to permanent registration and advised accordingly*
- *Remove the exempt categories so consumers can maximise the customisation elements of registration that will exist when ACMA determines classes of industry*
- *That the test for express consent should be further strengthened by the inclusion of the following additional requirements:*
 - *Express consent should require specific 'opt-in' consent to the receipt of telemarketing calls (general consent to 'marketing' should not be acceptable);*
 - *The telemarketing consent clause should be prominent;*
 - *The telemarketing consent clause should be separate from other consent requirements, so that a person can consent to other uses of their information without consenting to telemarketing; and*
 - *Consent requirements should recognise the challenges in ensuring that some vulnerable consumers have the capacity to consent.*
 - *Consent must be recorded and demonstrable.*
- *Remove the proposal in clause 3A of Schedule 2 that intends to prevent consumers being able to revoke their 'registered consent', and ensure that consumers are able to amend their registration at any time. Alternatively, additional consideration needs to be given to ensure registrants are informed of the processes to change their registration.*

¹ Australian Communications and Media Authority, *Community Attitudes to Unsolicited Communications*, 24 August 2009, p22 <http://www.acma.gov.au/webwr/_assets/main/lib310210/unsolicited_communications_report.pdf>.

- *If the renewal requirement is not revoked, that the Committee seek (and make publically available) information from ACMA about:*
 - *How consumers will be personally advised that their registration is about to expire and the timeframe they will have to re-register;*
 - *ACMA's overall strategy for dealing with over 4.1 million DNCR registrations which fall due at different times;*
 - *The budget for all DNCR re-registration activities to June 2010, including advertising, administrative costs of updating the website, staffing costs, printing, etc;*
 - *Estimates about the annual allocations for future re-registration promotion; and*
 - *Annual promotion and awareness raising campaigns about the DNCR (distinct from re-registration processes).*
- *That the ACMA conduct a feasibility study into an opt-in telemarketing model, as an alternative to the DNCR*

Registration period needs to be revoked

The registration renewal requirement 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.

The current registration period on the DNCR is 3 years, and many consumers will soon need to renew their registrations in order to stop unwanted telemarketing calls (the third anniversary of the register is 3 May 2010).

This three year registration period is unnecessary. In other jurisdictions (such as the UK and USA), the registration periods have been removed, so that registration remains permanent (or not imposed in the first place). 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.

ACCAN submits that consumers will not change their mind about telemarketing. Consumers can already remove their number from the Register at any time and there is no evidence they have chosen to do so. Even if there is a very rare case where a person is living in a household that is on the register without realising it, we submit that there is little evidence that they will be concerned or unhappy about the absence of telemarketing calls.

Promotion and re-registration will surely incur unnecessary administrative costs for industry. It is essential that the renewal requirement is removed immediately, so that no money or

effort has to be wasted contacting Register members to renew a service that is proving highly valuable to members of the community.

ACCAN is also concerned that the requirement for ACMA to contact members regarding renewals will make the register more vulnerable to Internet phishing scams. Phishing scams are a common problem with Do Not Call Registers in other jurisdictions and there are already several phishing scams targeting the Australian register.

Recommendation: That the Bill be amended to remove clause s17 (1[b]) of the Do Not Call Register Act (2006) requiring the renewal of registrations every three years, such that registrations remain permanent

Recommendation: That all existing registrations be transitioned to permanent registration and advised accordingly

Exemptions

ACCAN believes that the entire approach to exemptions should be reviewed. There are too many broad exemptions in the current DNCR Act and they do not reflect the wishes of consumers.

Some of the current categories of exception seem difficult to justify on any public interest grounds. In particular the political parties and candidate exemption cannot be justified, considering the allowances and exemptions which already apply to politicians to support their campaign activities.

Allowing individual consumers to select and manage the types of calls they are willing to receive is a distinct improvement on the 'all-or-nothing' approach that currently exist – although ideally this approach would occur within an opt-in arrangement as outlined previously.

The amendment notes that for the purposes of registered consent, a proposed new section 5C gives the ACMA the power to make a determination that a certain activity is an industry classification.

It also creates new possibilities for all exempt categories to be removed, because consumers will now be able to opt-in to telemarketing based on classes of industry determined by the ACMA.

Recommendation: Remove the exempt categories so consumers can maximise the customisation elements of registration that will exist when ACMA determines classes of industry

Express Consent provisions should significantly strengthened

The *Do Not Call Act* 2006 (the Act) includes an exception for express consent. Express consent is deemed by the Act to expire after three months, unless there is has been specific consent for a longer period.

ACCAN continues to have significant concerns about relying on consent in relation to telemarketing. In August 2009 ACCAN released a new study on Informed Consent in the Telecommunications Sector². That report found that there are major problems with the use of consent in Australia:

- Regulators and consumer organisations reported significant concerns regarding consent and vulnerable consumer groups, including the limited capacity of some consumers to consent to communications contracts;
- There is no central / consistent guidance available to industry on consent requirements, or best practice guidance on obtaining consent from consumers; and
- Current industry practice in obtaining consent is extremely diverse and often ineffective.

That report also found that regulators, complaints schemes, community advocacy organisations and casework organisations reported receiving a total of more than 40,000 complaints each year specifically on consent – and that study was limited only to one sector (communications).

Great care should be taken in relying on consumer consent to over-ride a registration on the DNCR. It is much more likely that membership on the register is more meaningful to the consumer than any purported consent they have ‘signed’ hidden amongst the complex paperwork presented for many goods, services, competitions and surveys. Where a consumer has agreed to a general marketing clause, they may only be expecting to receive marketing materials by mail – not telemarketing (especially if they are on the DNCR).

Although consumers may expect some follow up and on-going contact from current service providers (such as banks and utility companies), this does not mean or infer that they are willing to receive telemarketing calls. Acceptable contact might include customer service issues and product issues, but should never include sales.

The inferred consent exception is a very poor reflection of the wishes of consumers. It undermines confidence in the DNCR and should be removed. Consumers have to make a conscious effort to register on the DNCR. This preference should not be over-turned by the vague notion of inferred consent.

Recommendation: That the test for express consent should be further strengthened by the inclusion of the following additional requirements:

² Australian Communications Consumer Action Network, *Informed Consent in the Telecommunications Sector*, August 2009.

- *Express consent should require specific ‘opt-in’ consent to the receipt of telemarketing calls (general consent to ‘marketing’ should not be acceptable);*
- *The telemarketing consent clause should be prominent;*
- *The telemarketing consent clause should be separate from other consent requirements, so that a person can consent to other uses of their information without consenting to telemarketing; and*
- *Consent requirements should recognise the challenges in ensuring that some vulnerable consumers have the capacity to consent.*
- *Consent must be recorded and demonstrable.*

Registered consent

The amendment precludes “registered consent” from being adjusted by consumers. The explanatory memorandum notes that:

Item 76 inserts new clause 3A in Schedule 2 to the DNCR Act, explaining that registered consent cannot be withdrawn. If a person has registered consent for a particular industry classification, such consent will remain for the duration of the registration unless the person re-registers their number. The act of re-registering a particular number (and any related consents) has the effect of deleting the previous registration and replacing it with the new registration.

Essentially this means a customer will have to re-register, rather than amend their customised registration. We question whether it would not be far more straightforward to require that consumers be able to amend their “registered consent” arrangements on the DNCR. At the very least there needs to be more detail about how and when this information will be communicated to the registrant.

Recommendation: Remove the proposal in clause 3A of Schedule 2 that intends to prevent consumers being able to revoke their ‘registered consent’, and ensure that consumers are able to amend their registration at any time. Alternatively, additional consideration needs to be given to ensure registrants are informed of the processes to change their registration.

Education and Awareness Strategies

3 years ago, consumer groups were critical that the practicalities of requiring re-registration were not comprehensively thought through or planned for.

ACCAN understands that ACMA has some plans to undertake promotional activities around registration renewal prior those registrations beginning to expire. We question how effective this will be, given that the 4.1 million registrations have been staggered over a 3 year period.

It is our understanding that not all consumers who have registered will be personally advised when their registration nears expiration. We urge the Committee to seek detailed information about this matter from the ACMA, and ensure that individual notification will occur.

Through ACMA's recent research, it is clear that the main way people learn about the register is through 'word of mouth' and that Australian consumers are largely not aware of the registration period or the process for renewal³. As we noted elsewhere though, the best policy option is to not require renewal. Removal of the renewal period will ensure that ACMA resources are directed toward the effective promotion and enforcement of the Register.

Recommendation: If the renewal requirement is not revoked, that the Committee seek (and make publically available) information from ACMA about:

- *How consumers will be personally advised that their registration is about to expire and the timeframe they will have to re-register;*
- *ACMA's overall strategy for dealing with over 4.1 million DNCR registrations which fall due at different times;*
- *The budget for all DNCR re-registration activities to June 2010, including advertising, administrative costs of updating the website, staffing costs, printing, etc;*
- *Estimates about the annual allocations for future re-registration promotion; and*
- *Annual promotion and awareness raising campaigns about the DNCR (distinct from re-registration processes).*

An opt-in model remains the best approach

We believe that there would be substantial benefits in moving to an 'opt-in' model for telemarketing in Australia.

Australia's approach to the regulation of unsolicited commercial communications (spam) in the *Spam Act 2003* (Cth) is based on a default model that deems all unsolicited commercial communications to be spam unless there is express (or inferred) consent to receive the communication. This approach achieves a better outcome for consumers and there is no evidence that this form of regulation has had a negative economic impact.

The participation of so many Australians in the DNCR is a strong indicator of the community's objection to the privacy intrusion caused by telemarketing. The ACMA research notes that 32% of households are on the Register and nearly three out of four people not currently on the DNCR are interested in joining. This clearly indicates that the 'hassle' of registering is preventing a larger number of people joining. If the majority of the Australian community have expressed a desire to be left alone by telemarketers, then the DNCR should switch to an opt-in model.

³ Australian Communications and Media Authority, *Community Attitudes to Unsolicited Communications*, 24 August 2009, <http://www.acma.gov.au/webwr/_assets/main/lib310210/unsolicited_communications_report.pdf>.

Given that the legislation introduces new provisions that allow registrants to consent to contacts from particular industry classifications, an opt-in telemarketing model would allow for a much greater degree of consumer control over telemarketing contacts – an outcome that is surely in the best interests of businesses and consumers.

We strongly recommend that the Committee direct the ACMA to conduct a feasibility study into an opt-in telemarketing model, as an alternative to the DNCR, including consumer demand for this approach.

Recommendation: That the ACMA conduct a feasibility study into an opt-in telemarketing model, as an alternative to the DNCR

Conclusion

ACCAN urges the Committee to improve the function of the Do Not Call Register by implementing the recommendations made in this submission. We would be pleased to discuss this matter in any public hearings you may hold.

Should you require more information, please contact myself or Sarah Wilson, Campaigns and Community Liaison Officer, on 02 9288 4000.

Yours sincerely,



Allan Asher
Chief Executive Officer

Australian Communications Consumer Action Network