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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DO NOT CALL REGISTER BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan)

DO NOT CALL REGISTER BILL 2006

OUTLINE

The Do Not Call Register Bill 2006 (the Bill) sets up a scheme to enable individuals who have an Australian number to opt out of receiving unsolicited telemarketing calls. The proposed framework contained in the Bill is aimed at regulating and minimising unsolicited telemarketing calls made to Australian telephone numbers that originate from overseas numbers or Australian numbers.

The Government is concerned that the rate of unsolicited telemarketing calls has grown significantly in recent years. There have been rising community concerns about the inconvenience and intrusiveness of telemarketing on Australians, as well as concerns about the impact of telemarketing on an individual's privacy. While telemarketing is a legitimate method by which businesses can market their services or seek donations, the Bill will enable individuals to express a preference not to be called by telemarketers.

In October 2005, the Minister for Communications, Information Technology and the Arts released a departmental discussion paper to facilitate discussion in relation to the possible establishment of a Do Not Call Register. Following the receipt of submissions strongly supportive of a legislated Do Not Call Register, the Government has decided to introduce legislation for its establishment.

The main penalty provision in the Bill prohibits the making of unsolicited telemarketing calls to a number registered on the Do Not Call Register. The Bill provides for a number of limited exemptions to this prohibition to enable certain public interest organisations to make telemarketing calls.

The Bill provides for the establishment of a Do Not Call Register. The Register would be kept by the Australian Communications and Media Authority (ACMA) or outsourced to a third party who would operate the Register on behalf of the ACMA. It provides a system whereby individuals can register their home and mobile numbers on the Register. Telemarketers who wish to make telemarketing calls will in effect be required to check their calling lists against the numbers registered on the Do Not Call Register to ensure that they do not contact numbers of individuals who have opted out of receiving telemarketing calls. The details relating to the operation and administration of the Register will be provided for by a determination made by the ACMA.

Complaints relating to the Do Not Call Register and breaches of the Bill can be made to the ACMA.

The Bill is accompanied by the Do Not Call Register (Consequential Amendments) Bill 2006 (the Consequentials Bill) which makes various amendments to the *Telecommunications Act 1997* (Telecommunications Act), the *Australian Communications and Media Authority Act 2005* (the ACMA Act) and the

Telecommunications (Carrier Licence Charges) Act 1997, to provide an appropriate regulatory framework for the ACMA to investigate complaints relating to telemarketing calls and to enforce the scheme.

In addition, the Consequentials Bill enables the development of relevant industry codes and standards relating to telemarketing calls. It requires the ACMA to make national standards regulating the making of all telemarketing calls. The mandatory standards will relate to certain conduct matters such as the time at which telemarketing calls may be made, the information which must be provided to recipients and the termination of such calls.

The main elements contained in the Bill are:

- a prohibition on making telemarketing calls to an Australian number which is registered on the Do Not Call Register, subject to certain exemptions. The penalty provision is aimed at calls made from an Australian number or from overseas to an Australian number;

- a requirement that agreements for the making of telemarketing calls must require compliance with this Act. This requirement is aimed at organisations which may contract with another party to provide telemarketing services on their behalf;

- a requirement for a Do Not Call Register to be established, enabling individuals to register their private or domestic numbers on the register;

- a civil sanctions regime. These prohibitions are civil penalty provisions, not criminal offences. Breach of a provision may attract a substantial monetary penalty.

- a tiered enforcement regime which provides for a range of enforcement measures to be initiated by the ACMA, depending upon the seriousness of the breach of a penalty provision. The enforcement measures available to the ACMA include a formal warning, acceptance of an enforceable undertaking, or the issuing of an infringement notice. The ACMA may also apply to the Federal Court for an injunction.

- The ACMA may institute proceedings in the Federal Court or the Federal Magistrates Court for breach of a civil penalty provision. As well as ordering a person to pay a substantial monetary penalty, the Court may make an order to recover financial benefits that are attributable to the contravention of the civil penalty provision, or may order compensation to be paid to a victim who has suffered loss or damage as a result of the contravention.

The Consequentials Bill which accompanies this Bill makes various amendments to the Telecommunications Act and the ACMA Act to enable the effective investigation and enforcement of breaches of this Bill. The main elements proposed in the Consequentials Bill are:

- a requirement that the ACMA develop an industry standard which would set out various minimum contact standards relating to issues such as the time telemarketers are permitted to call and what information they must provide about their organisation. These standards would apply to all telemarketers, including those exempt from the general prohibition on making certain telemarketing calls;

- a framework to enable industry to develop codes to deal with the making of telemarketing call, based on Part 6 of the Telecommunications Act;

- an investigation role and appropriate information gathering powers for the ACMA to investigate complaints relating to breaches of the Do Not Call Register Bill and regulations made under the Bill, based on Parts 26 and 27 of the Telecommunications Act.

FINANCIAL IMPACT STATEMENT

Budget funding of $33.1 million has been provided over four years for the arrangements contained in this and the Consequentials Bill. It is anticipated that approximately $15.9 million will be recovered from the telemarketing industry through the payment of fees to access the Register. Clause 21 provides that ACMA may make a determination in respect of fees for accessing to the Do Not Call Register.

The expected impact on the fiscal balance will therefore be $17.2 million over four years.

REGULATION IMPACT STATEMENT

Telemarketing in Australia

The Government has recently observed an increase in the frequency of complaints relating to telemarketing practices in Australia. Complaints are generally raised by consumers and focus on the frequency and intrusive nature of unsolicited telemarketing calls due to the dramatic rise in telemarketing activity observed over the past ten years. This growth is demonstrated by the industry's employment figures which show that while there were 9,400 persons employed as telemarketers in Australia in 1996, by January 2005, the figure had risen to 15,100:[1]- an increase of 62 per cent. The Commercial Economic Advisory Service of Australia has recently reported that in 2004, 1,065,000,000 telemarketing calls were made from Australia's 30,000 call centres. With

[1] Source: ABS Labour Force Survey, Australia.
NB: As call centres provide a range of services apart from out-bound telemarketing, it is difficult to differentiate between the type of calls made or received in call centres. Statistics are not available to provide a clear understanding of the number of in-bound customer service calls compared to out-bound telemarketing calls.

newer technologies such as Voice over Internet Protocol reducing call costs this number of calls is expected to continue to increase.

The Australian telemarketing industry is subject to self-regulatory arrangements as well as some State and Commonwealth legislation.

International response
Internationally, Australia is out of step with comparable countries in failing to have a 'Do Not Call' register. Successful schemes have been operating in many countries including in the United States of America (USA) since 2003 and the United Kingdom (UK) since 1999 and Canada introduced legislation in 2004 to establish a Do Not Call List to reduce the volume of unsolicited telemarketing calls. The proposed model for Australia takes the best features of schemes already operating in other countries but is based primarily on the USA model.

In response to rising complaint levels in their respective jurisdictions, the USA and the UK introduced registers and Canada is still working on the details for its registry to record the telephone numbers of consumers that do not wish to receive telemarketing calls. Under each country's legislation, telemarketers are prohibited from contacting a person using a number listed on the register.

What is a telemarketing call?
Telemarketing calls are voice calls made with the purpose to offer, supply, provide, advertise or promote goods or services for land or an interest in land; or a business opportunity or investment opportunity; or to solicit donations. Telemarketing calls include messages for which the commercial/marketing element may be a secondary purpose, not necessarily the primary purpose of the call, such as calls which may be primarily designed to gauge customer satisfaction, but have a secondary purpose of soliciting sales.

1. ISSUE IDENTIFICATION

Two distinct, but interrelated issues have been identified in relation to telemarketing activities in Australia. First, there is increasing dissatisfaction within the community about telemarketing activities (including privacy concerns). Second, the fragmentation and inconsistency in current rules governing the telemarketing industry has lead to industry and consumer calls for a more unified policy approach to telemarketing issues.

1) *Community concern*

Significant community concern in relation to the volume, inconvenience and intrusiveness of telemarketing practices has been observed by a number of different sources in recent times, including government bodies at the Federal and State level, as well as private sector organisations. For example:

- in 2005, the Office of the Privacy Commissioner's report, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* recommended the Government introduce a legislated right for consumers to opt-

out of receiving direct marketing approaches. In support of its recommendation, the Office noted the findings of a 2004 survey it had undertaken into community attitudes towards unsolicited marketing material.[2] In that survey, some 61% of respondents reported feeling 'angry and annoyed' or 'concerned' when they receive marketing material. In general, submissions made to the Review by consumers supported the establishment of 'opt-in' requirements which would prohibit all forms of direct marketing, including telemarketing, without the express consent of consumers. While the Office did not favour the more extreme 'opt-in' approach, it considered the level of community concern sufficient to warrant the introduction of legislation governing direct marketing practices;

- in 2005, the Senate Legal and Constitutional References and Legislation Committee recommended the development of a 'do not contact' register that would prohibit direct marketing calls to persons who had registered their preference not to receive such calls. This recommendation was made following the Committee's consideration of the Office of the Privacy Commissioner's report;
- the 2005 Telecommunications Industry Ombudsman's (TIO's) *Annual Report* stated that privacy complaints received during the 2004-05 financial year more than doubled from 908 to 2,135, with the largest number (887) about telemarketing by members of the TIO scheme. The report noted that 'many of the complaints referred to instances where complainants claimed to have asked the company to cease calling and remove their details from marketing lists, yet the calls continued'.[3] In a May 2005 media release, the Ombudsman noted that some consumers complained of receiving as many as 10 calls in a two week period and that repeated telemarketing calls from telecommunications companies are 'becoming a more frequent source of complaint' to the TIO;[4]
- in early 2006 with Department of Communications, Information Technology and the Arts (DCITA) staff, Telstra representatives reported that a significant number of complaints about telemarketers are regularly received by Telstra's 'Unwelcome Calls' unit. It was estimated that of the approximately 1,500 calls received each day by the unit, between 700 and 800 calls related to telemarketing. Most of these complaints related to the failure of telemarketers to adhere to industry codes of practice and conduct, such as privacy codes and the Australian Direct Marketing Association's (ADMA) 'Do Not Contact' arrangements;
- between June 2004 and April 2006 330 ministerial representations complaining about telemarketing calls have been referred to DCITA for response. Roughly half of those representations have been received since October 2005 following the release of a DCITA discussion paper outlining a possible Do Not Call register. In response to the discussion paper, 495 submissions were received, the majority of which supported the development of a register and standards.

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[2] *Getting into the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (March 2005), 96.
[3] *Telecommunications Industry Ombudsman Annual Report 2005*, 28.
[4] TIO Media Release, 'TIO calls on industry to improve telemarketing call practices' (4 May 2005).

- Since the announcement on 4 April 2006 that the Government intends to establish a Do Not Call Register, 108 ministerial representations have been referred to DCITA for response with a common theme of support for the proposed Do Not Call Register.
- in November 2005, the Victorian and NSW Governments established a phone petition to allow consumers to list their support for a national Do Not Contact register that would prevent unwanted and unsolicited telemarketing calls. The Victorian Minister for Consumer Affairs and the NSW Minister for Fair Trading reported that 20,082 calls were made in support of a register during the month-long poll;[5] and
- in a February 2006 discussion paper *Consumer Protection and Telemarketing in South Australia*, the South Australian Government reported that its consumer affairs body receives a large amount of correspondence related to telemarketing. The paper noted that 'in the main, enquiries from individuals are generally about wanting to find out how to be removed from marketing lists or their seeming inability to do this'.

The above examples highlight the existence of widespread community concern about telemarketing activities.

However, as there is no central agency to address telemarketing complaints it is difficult to accurately quantify the scope and scale of the problem. Telemarketers operate under a number of different rules established by industry bodies on a voluntary basis, State and Territory laws, as well as some Commonwealth legislation. Given this, complaints about telemarketing are received by several different agencies and classified in different ways making it difficult to create a unified picture of the problem. At issue is that anecdotal evidence suggests that a considerable number of complaints are about the practices of telemarketers operating from other countries, but there is no way of gathering such data.

2) *Lack of unified policy surrounding telemarketing activity in Australia*

It is probable that the general level of community concern about telemarketing is exacerbated to some extent by the lack of unified policy and regulation surrounding telemarketing activity in Australia. The rules governing telemarketing practices are contained in various instruments, including voluntary codes developed by industry, State and Territory legislation and Commonwealth law. This fragmented and sometimes inconsistent approach has resulted in confusion for both agencies that utilise telemarketing practices and consumers as they are unsure of their respective obligations and rights.

While consumers may register their telephone and mobile numbers on the ADMA Do Not Contact Register, the requirement to refrain from calling these listed numbers is only mandated for members of ADMA. Compliance with the arrangements is voluntary for the estimated 20 per cent of telemarketers who are not members of ADMA and should a

[5] Media Release from the Victorian Minister For Consumer Affairs, Marsha Thomson 'More than 20,000 petition Coonan on telemarketing' (5 December 2005).

complaint be made about receiving a call from one of these telemarketers, ADMA has no enforcement authority.

The governing rules are more complex in relation to the time at which telemarketers can contact consumers. Under ADMA's *Direct Marketing Code of Practice*,[6] telemarketers must ensure that all telephone calls to customers are made at times that comply with legislation, and in all other instances, are made between the hours of 8 am and 9 pm. Different hours of contact are prescribed in NSW and Victoria. In NSW, telemarketers must not telephone consumers between the hours of 8pm and 9am seven days a week.[7] In Victoria,[8] contact is prohibited:

- at any time on a public holiday;
- between the hours of 5pm and 9am on a Saturday or a Sunday; or
- between the hours of 8pm and 9am on any other day.

Other States and Territories prescribe different permitted calling hours in general State and Territory fair trading and door-to-door sales legislation as detailed in Attachment A, noting there is currently no legislation regulating calling hours for telemarketers in Tasmania or South Australia.

Where telemarketers sell financial products, they also need to comply with the requirements of the *Corporations Act 2001* (Cth), which sets specific requirements in relation to times at which consumers may be contacted.

Other rules affecting telemarketing activity are contained in the *Privacy Act 1988* (Cth).

As a consequence of the variety of rules applied by different bodies to telemarketing activities, there exists no single avenue for consumer complaints. A number of submissions to DCITA's Do Not Call Discussion Paper from consumers indicated that the fragmented approach is both confusing and frustrating. While consumers can register with the ADMA's Do Not Contact register, this scheme is only used by businesses belonging to that association. The TIO and the Australian Competition and Consumer Commission (ACCC) and State and Territory fair trading agencies also provide some recourse for consumers in certain circumstances.

The difficulties generated by different, and sometimes inconsistent governing arrangements was also noted in industry submissions to DCITA's Do Not Call Discussion Paper. As noted by ADMA in its submission there is a need for national telemarketing standards to address the issue of inconsistency and to provide organisations with more operational certainty and consumers with more effective complaint handling mechanisms.

Providing a consistent regulatory regime/why is regulatory intervention required?

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[6] November 2001.
[7] *Fair Trading Act 1987* (NSW) s40I.
[8] *Fair Trading Act* (Vic) s67C.

As noted above, there is currently no national legislative framework dealing with unsolicited telemarketing calls. A national legislative framework for telemarketing would provide a more consistent regulatory framework for the telecommunications industry and consumers and provide consumers with an ability to control unsolicited telemarketing calls to some extent.

2. OBJECTIVES

To address the issues identified above, a number of key policy objectives have been identified to:

- provide a more consistent and efficient operating environment for the telemarketing industry;
- reduce the inconvenience and intrusiveness of telemarketing calls by enabling people to opt-out of receiving those calls; and
- establish an effective complaints handling mechanism to deal with poor telemarketing activities.

It is appropriate to respond to community concern with an assurance that effective action is being taken to address the intrusiveness and inconvenience of telemarketing calls. Providing community certainty is therefore in itself an important objective.
These objectives are consistent with general Government policy objectives to minimise the burden of regulation and to promote commercial and competitive outcomes.

Stakeholders
The key stakeholders who are affected by these issues and responses to them are:

- the telemarketing industry and its shareholders – in terms of additional costs, benefits and impact on shareholder value of any changes to the regulatory arrangements;

- persons employed by the telemarketing industry – in terms of the potential for job losses;

- domestic telecommunications users – as potential beneficiaries from improvements in telemarketing arrangements;

- the Australian Communications and Media Authority (ACMA) – as the organisation that would be responsible for administering a proposed national response, monitoring compliance and undertaking enforcement action; and

- organisations whose main business is not telemarketing but who may use telemarketing on an ad hoc basis.

3. OPTIONS

The identification of options available to the Government has been influenced by a number of key variables, in particular the:

- cost of developing, implementing and administering arrangements to address the problem;
- potential impact on the economy of arrangements that could restrict the flow of business;
- need to protect the privacy of information submitted to a register; and
- potential difficulty of imposing Australian requirements on telemarketers who operate from offshore, but contact Australian consumers.

Four options were considered to address the identified objective:

1. Do Nothing;
2. Co-Regulatory Approach – minimal regulatory approach;
3. Establish an 'opt-out' Do Not Call Register and National Standards; and
4. Establish an 'opt-in' Call Register and National Standards

Option 1: Do Nothing

This option would maintain the status quo and not attempt to increase regulation or change the telemarketing industry.

The industry would continue to be subject to a range of regulatory requirements set by State and Territory laws and Commonwealth legislation. As noted, a number of State and Territory laws impose differing requirements on telemarketing activity and telemarketers who operate at a national level will need to continue to ensure compliance with local State and Territory laws. Nevertheless, some States have recognised the need to harmonise the arrangements in light of the national scope of telemarketing activity[9] and it is possible that there may be activity at the State level to achieve greater consistency of approach over time.

The telemarketing industry also has some voluntary self-regulatory mechanisms in place such as the voluntary ADMA *Direct Marketing Code of Practice*[10] that sets specific standards of conduct and establishes a benchmark for settling disputes between industry participants and consumers. Under the code, telemarketers must (among other requirements):

- refrain from calling persons registered on ADMA's Do Not Contact Register;

[9] See eg Media Release from the Victorian Minister For Consumer Affairs, Marsha Thomson 'More than 20,000 petition Coonan on telemarketing' (5 December 2005).
[10] November 2001.

- identify themselves to persons they are calling and state the purpose of their calls;
- ensure their name, address and telephone number are listed in an accessible directory;
- ensure that all telephone calls to customers are made at times that comply with legislation, and in all other instances, are made between the hours of 8 am and 9 pm;
- provide customers with clear opportunities to accept or decline offers; and
- not contact customers more than once in any 30 day period, for the same or similar campaigns, without prior consent of the customers.

It is estimated that approximately 80 per cent of Australian telemarketing organisations have volunteered to come under the ADMA arrangements and are bound by the above requirements.

Under this option, consumers who experience displeasure in relation to telemarketing calls would continue to be able to join ADMA's Do Not Contact Register to reduce the volume of telemarketing calls received. Consumers also have the option to adopt technological solutions such as caller line identification and answering machines that enable consumers who do not wish to receive telemarketing calls to screen their inbound calls and only answer those calls they wish to take, to reduce the number of unwanted calls.

This option leaves it to the market, State and Territory Governments and consumers to develop appropriate solutions to the identified problems. Alternatively, the Government could introduce regulatory arrangements to achieve the identified objectives at a national level. Possible regulatory solutions are: the development of a co-regulatory regime; the imposition of an 'opt-out' Do Not Call Register; and the imposition of an 'opt-in' Call Register.

Option 2: Co-Regulatory Approach – minimal regulatory approach

Under this approach, the Government could impose a mandatory requirement on the telemarketing industry to comply with an existing industry code of practice, such as the ADMA Code of Practice.

The existing ADMA Code of Practice would be developed and expanded to apply to the whole of the telemarketing industry operating in Australia through a co-regulatory mandatory Code of Practice. This option would involve registration of the code under Part 6 of the *Telecommunications Act 199* and would provide additional enforcement mechanisms and enhance the existing self regulatory arrangements. Alternatively, under section 51AE of the *Trade Practices Act* 1974, a code of practice may be declared mandatory. Either approach would potentially bind all those involved in the telemarketing industry in Australia but not the off-shore telemarketing industry. Notably, it is possible that State and Territory legislation would have prevalence over code requirements but it would depend on the particular circumstances.

Option 3: Establish an 'opt-out' Do Not Call Register and Standards

Under this option, a national Do Not Call Register scheme would be legislated and administered by ACMA, either directly or by tendering out the delivery of the service and overseeing performance of the successful contract.

People who do not wish to receive unsolicited telemarketing calls (subject to certain exemptions) would have the option of applying for their fixed and/or mobile numbers to be recorded on the Register. It is anticipated that this registration could be by telephone or via a purpose built website. Once a number is recorded, it would be prohibited for telemarketers to contact that number, except in specific circumstances.

The legislation would apply to unsolicited telemarketing calls made within Australia, and to calls made from offshore telemarketers to Australian telephone numbers. Some ongoing costs would be recovered from industry on a user-pays basis.

This option reflects the approach taken in the US and UK. The US legislation has a number of significant exemptions to its legislation, including charities, market researchers, non-profit organisations, political organisations and calls between organisations and existing clients. Similar exemptions to those applying in the US are also appropriate to the Australian environment. Unsolicited telemarketing calls may originate from a range of different sources, including from organisations considered to have a 'public interest' perspective.

DCITA's Do Not Call Discussion Paper raised the issue of allowing exemptions to a legislated Do Not Call Register. The exemptions were similar to those applying in the US and covered:

- individuals or companies with which individuals or small businesses have established business relationships;
- charities;
- religious organisations;
- educational institutions (limited exemption for contacting students and alumni);
- government bodies;
- registered political parties and registered political candidates; and
- market researchers undertaking social research.

In addition to establishing a Do Not Call Register, a consistent regulatory framework, would set out minimum 'contact' standards for telemarketers, covering such matters as permitted calling hours, minimum information requirements and termination of calls.

Option 4: Establish an 'opt-in' Call register and Standards

Under this option, a national Call register scheme would be established by legislation and administered by ACMA, either directly or by tendering out the delivery of the service and overseeing performance of the successful contract.

People who wish to receive telemarketing calls would have the option of applying by telephone or via a purpose built website for their fixed and/or mobile numbers to be recorded on the register. Unless a number was recorded on the register indicating the consumer's consent to receive telemarketing calls, it would be prohibited for telemarketers to contact that number.

The legislation would apply to telemarketing calls made within Australia, and to calls made from offshore telemarketers to Australian numbers.

Further assessment of the costs and benefits of each option and an impact analysis are in the attached tables.

4. CONSULTATION

In response to an increasing number of complaints received by Government and non-Government agencies such as the TIO and Telstra, a discussion paper was released by DCITA for public comment in late October 2005 on the possible establishment of a national Do Not Call Register. 495 submissions from members of the public, consumer groups, telemarketing companies, telecommunications companies, charities and small businesses were received. The majority of submissions supported the development of a Register.

121 submissions were received from organisations, in response to the discussion paper.

Small Businesses
12 submissions were received from small business and organisations representing the interests of business that do not use telemarketing. The trend was supportive of a Do Not Call Register and did not support a self-regulation scheme. Many small businesses indicated that unsolicited telemarketing call approaches are time consuming and costly for their businesses as they use valuable resources that congest fax and telephone lines potentially resulting in loss of business opportunities.

Charity Organisations
28 submissions were received from charity organisations and organisations representing the interests of charities. The trend was supportive of a Do Not Call Register that included exemptions for charities and telemarketers operating on behalf of charities.

Telemarketing Organisations
32 submissions were received from telemarketing organisations and businesses that use telemarketing and organisations representing the interests of telemarketers. The trend was supportive of a Do Not Call Register noting that self regulation is a suitable solution with concerns about the cost of operation, compliance issues and possible loss of jobs.

Telephone Carriers
8 submissions were received from telephone carriers and organisations representing the interests of telephone carriers. The trend was supportive of a Do Not Call Register and exemptions for existing business relationships noting that domestic companies should be accountable for overseas telemarketers acting on their behalf. There should be a harmonisation of legislation to ensure that it is easier for organisations to understand and apply.

Consumer Groups
5 submissions were received with total support for a Do Not Call Register and to regulate offshore telemarketing but did not support exemptions and maintained that consumers and small business should not have to pay a fee to be included on the Register.

Government (Federal and State)
8 submissions were received from Federal and State Government agencies. The trend was supportive of a Do Not Call Register with the majority supporting an opt-out register. The Office of the Privacy Commissioner noted the prohibition of unsolicited telephone calls is an important step towards regaining individual control and the most important objective for the Register from a privacy perspective is the handling of personal information.

Special Interest Groups (Miscellaneous)
20 submissions were received from special interest groups. The trend was supportive of a register with the majority supporting an opt-out register and noted the negative effect of unsolicited telemarketing on the elderly as they are particularly vulnerable to this form of direct marketing.

Social and Market Research Organisations
One submission was received from this group as a joint submission from the Australian Market and Social Research Organisation and the Australian Market and Social Research Society. The submission supports a Do Not Call Register on the condition that social and market researchers are exempt as noted in the summary provided in the previous brief.

Individuals
377 submissions were received from individuals supporting the establishment of a Do Not Call Register.

Other (Complaint Handling Bodies)
One submission was received from the TIO supporting the establishment of the Do Not Call Register and notes that the number of complaints that the TIO received regarding telemarketing has increased significantly over the last year. The TIO prefers an opt-out register to include offshore calls and that certain organisations should be exempt.

5. IMPACT ANALYSIS

Option 1: Do Nothing

Overview
This option maintains the status quo with no attempt to increase regulation or change the telemarketing industry. This option relies on the market, State and Territory Governments and consumers to develop their own solutions to the identified problems.

Approximately 80 per cent of telemarketing organisations are already members of ADMA's self-regulatory regime. Under this option membership of ADMA may increase leading to increased protection for consumers and greater harmony in the rules governing telemarketing practices. Without regulatory intervention, there is likely to remain a small but significant proportion of businesses that refuse to join industry arrangements. If telemarketing continues to pose a problem and no Federal action is taken, it is possible that State and Territory Governments may act.

The South Australian Government has recently issued a discussion paper that canvasses a number of options to further regulate telemarketing activity in that State. While there are some moves to harmonise State legislation regulating telemarketing,[11] it is considered that the different constraints applying to the various States and Territories make this unlikely to occur on a national scale.

The adoption of technological solutions, such as caller line identification by consumers to resolve some of the difficulties experienced in relation to telemarketing calls is promising. The difficulty with this approach is that while the volume of calls from telemarketers that are answered may be reduced, the inconvenience and cost of screening calls and the intrusion that is felt by some consumers receiving telemarketing calls remains.

Summary
This option is unlikely to resolve the level of community concern in relation to telemarketing activity and it is likely that the industry will remain subject to fragmented and inconsistent governing arrangements without intervention at a federal level.

Impact on the Telemarketing Industry
If left unchecked the telemarketing industry is likely to grow significantly, particularly as newer technologies, such as Voice over Internet Protocol, continue to reduce call costs.

[11] In late 2005, the Victorian and NSW governments issued a discussion paper on options for harmonising their telemarketing laws.

It is expected there will be a corresponding growth in non-skilled labour positions within the industry, as more staff are needed to manage the higher volume of calls. It is questionable if this job growth will be seen in Australia. As newer technologies have dramatically reduced the cost of international calls, it is probable that more call centres will be relocated offshore to take advantage of lower labour costs.

The industry will remain subject to inconsistent regulation, including State-based legislation and various voluntary industry codes. ADMA notes these inconsistencies have added substantially and unnecessarily to the cost of compliance. Compliance costs could grow further should individual States adopt stronger action in respect of telemarketing conduct in the absence of a national regime.

Approximately 20% of Australian telemarketers are not members of ADMA and are not subject to the ADMA code of contact. This results in inconsistencies with some telemarketers subject to higher standards of conduct than others.

Compliance costs
Compliance with higher standards has reportedly resulted in these telemarketers incurring higher costs. Should no action be taken, this situation is likely to continue, disadvantaging those telemarketers who are members of the ADMA scheme. As the ADMA scheme is voluntary, there is the potential for current members of ADMA to withdraw their membership in order to remain competitive against non-members of the scheme. Offshore telemarketers are unlikely to be members of ADMA.

Impact on Business
Businesses are likely to continue to rely on telemarketing as an effective marketing practice for commercial and non-commercial purposes.

Impact on Consumers
Without regulatory intervention, all consumers will continue to receive telemarketing calls. The volume of calls is likely to increase with the expected growth in the telemarketing industry.

This option only benefits those subscribers who are comfortable with, and take advantage of, this form of marketing. For other subscribers, the inconvenience associated with an increasing volume of calls is expected to rise. This is predicted to lead to further growth in the number of complaints to government and industry about telemarketing practices.

While consumers can register with ADMA's Do Not Contact register, this scheme is only used by businesses who are members of ADMA. Evidence indicates the current self-regulatory scheme is not providing enough protection for consumers.

Key difficulties with the scheme are its limited scope: only members of ADMA need to comply with ADMA's Do Not Contact register; lack of penalties; and lack of an underlying consumer protection framework.

Some small scale 'Do Not Call' registers are being established, but enforcement powers and levels of protection of personal information are unclear as these small scale registers are largely unregulated.

Impact on Government
This is consistent with the Government's broader policy objective of free and open competition. It involves no initial costs, however the expected increase in the number of disputes over telemarketing practices is likely to result in a need for greater funding of dispute resolution processes over time.

This option is not preferred.

Option 2: Co-Regulatory Approach – minimal regulatory approach

Overview
Allows the Government to develop and expand the ADMA code of practice to apply to all industry participants. It has the practical effect of requiring all telemarketers to refrain from calling consumers registered with ADMA's Do Not Contact scheme and to adhere to conduct standards set out in ADMA's Code of Practice. This option is likely to be effective in reducing community concern in respect of the inconvenience and intrusiveness of telemarketing calls.

Summary
This option will potentially create consistency of conduct across the telemarketing industry. It is expected to improve consumer confidence and customer service in the industry. However, depending on the circumstances the Code of Practice may not have legislative supremacy and may not override State or Territory telemarketing legislation. It is unlikely to address the difficulties of fragmented legislative instruments and the costs associated with compliance will not be resolved.

An industry Code of Conduct will not operate extra-territorially and so will be unable to influence and penalise the conduct of overseas telemarketers. Overall, while an industry co-regulatory scheme may provide some positive outcomes for the telemarketing industry, it seems unlikely to achieve the level of protection for consumers or the consistency of industry arrangements identified as key policy objectives.

Impact on the telemarketing industry
The establishment of a mandatory co-regulatory Code of Practice, which includes a requirement for all telemarketers to use an industry-run Do Not Call Consumer Preference Service and minimum contact standards, is likely to have a considerable impact on the telemarketing industry.

The ADMA Do Not Call register is mandatory for ADMA members, but not for the rest of the industry. A Code of Practice and its Code of Conduct would be mandatory for telemarketers.

Compliance costs
Costs[12] may be involved with changes to the operation and conduct of many telemarketers' businesses in order to maintain industry standards and train staff to comply with these standards.

Telemarketers will be provided with consistent industry guidelines and a point of reference to comply with relevant State, Territory and Commonwealth legislation. This is likely to improve the efficiency of the telemarketing industry and provide greater scope for consistency in conduct and training practices.

While this option will provide greater consistency than exists under the current arrangements, a mandatory industry code could be subordinate to State and Territory legislation and may not provide legislative consistency across the industry. As a consequence, telemarketers would still be required to negotiate several legislative schemes.

More consumers would be likely to join ADMA's Do Not Contact register. While the register currently has only 113,000 Australians registered[13], the US experience shows that the level of consumer registration for a similar register increased dramatically once the register was given mandatory status by the US Federal Government.

If more people sign up to the register, the volume of outgoing telemarketing calls will be reduced and this could affect employment levels. Efficiency is likely to increase, as only those consumers who wish to be contacted will be called leading to higher success rates and more efficient calling.

Impact on business
A mandatory Code of Practice will create efficiency gains for businesses engaging in telemarketing. The creation of a consistent code of conduct and guidelines in relation to State and Territory legislation will be beneficial for small businesses engaging in telemarketing. Small businesses will also be able to conduct more efficient direct marketing campaigns and only contact those consumers who wish to be called.

Impact on consumers
This option provides consumers with increased Australia-wide protection against unwanted telemarketing calls. It will reduce the inconvenience some individuals experience in respect of telemarketing calls.

The code is not likely to be effective in regulating calls made to Australian consumers from overseas telemarketers. These calls are likely to continue under this option.

[12] It is difficult to estimate compliance costs due to a range of variables such as ACMA imposing subscription fees and costs associated with internal administrative and operational arrangements.
[13] Source: ADMA website www.adma.com.au/asp/index.asp?pgid=1982 at 16 February 2006.

Impact on the Government

The Government is likely to incur some administrative costs under this option. Monitoring arrangements would need to be established to measure the effectiveness of the co-regulatory regime and some costs would be incurred in developing and expanding the code to apply to the telecommunications industry.

This option is not preferred.

Option 3: Establish an 'opt-out' Do Not Call Register and Standards

Overview
A Do Not Call Register and standards of conduct would be established by legislation. The Register would have the effect of prohibiting telemarketing calls made to fixed line and mobile numbers listed on the Register. The Register could have extra-territorial affect (i.e. applies to telemarketers operating outside of Australia who call Australian consumers), it would apply to calls from both Australian and offshore telemarketers.

Complaints in relation to the general conduct of telemarketers, such as permitted calling hours, minimum information requirements and requirements relating to the termination of calls would be addressed by the legislated standard of conduct, providing a more holistic approach to the regulation of telemarketers.

Impact on the telemarketing industry
This option is likely to have a significant impact on the telemarketing industry. The potential costs and benefits to the industry include:

Reduction of regulatory compliance costs
The current regulatory environment for telemarketers is largely based on State and Territory legislation. ADMA notes the inconsistencies that currently exist between State-based telemarketing laws have added substantially and unnecessarily to the cost of compliance. Telemarketing, and all other forms of unsolicited telephone calling, is predominately conducted on a national basis.

These differences in approach cause confusion for business and inhibit the ability of some telemarketers to operate on a national level. The Register will include legislation to ease some of this regulatory burden on telemarketers by establishing industry-wide standards which will include time of call standards. A national standard could harmonise these requirements.

Efficiency gains for telemarketers
The Register is likely to create efficiency gains for those businesses engaging in telemarketing activities by allowing them to target consumers more effectively. Companies will only be able to call consumers who, by not registering their numbers, indicate their willingness to receive telemarketing calls. The approach is unlikely to affect the total sales revenue of telemarketing businesses because only those persons who

would be unlikely to use telemarketing services would register and persons who wish to continue to use telemarketer's services will continue to do so.

Level playing field for all operators in the telemarketing industry
ADMA estimates that 80 per cent of direct marketers are members of its organisation. Telemarketers that operate within the current self-regulatory framework currently experience general consumer dissatisfaction from consumers weary of the behaviour of telemarketers that operate outside this framework. Telemarketers that operate outside of this framework do not incur the costs of self-regulated telemarketers and therefore are more cost-effective operators. Capturing all telemarketers within the same regulatory framework will mean that those telemarketers that set high standards for their operation will no longer be disadvantaged in relation to lower-cost, lower regulated competitors.

Possibility of reduced size of the telemarketing industry
There is a medium level risk that the Register could reduce the size of the telemarketing industry in Australia resulting in the loss of jobs and closure of some businesses. Evidence from submissions to the DCITA discussion paper indicates that outbound telemarketing accounts for less than 20 per cent of all calls made from call centres. It is the volume of only these calls that will be affected by the introduction of a register. Evidence from the US, where a similar regime has been introduced, suggests that the regime has had little impact on marketers, who have merely changed their sales tactics from cold-calling to placing greater emphasis on managing existing customer relationships, despite the large number of registrations.

Compliance costs
Compliance costs[14] incurred by telemarketers will include register access fees to be recovered from organisations that choose to engage in telemarketing. Costs to telemarketers may vary accordingly and could include training staff, changes to internal administrative systems and record-keeping requirements.

Reduction in the value or utility of telemarketing as a sales method for businesses
Telemarketing is a cost-effective means of marketing as only a small number of calls made need to result in a sale in order to cover the costs of making them. The costs to telemarketers do not reflect the hidden costs to consumers in lost productivity and time in answering an unwanted telephone call. Telemarketing is a low cost marketing option to businesses as these wider costs to the economy are not borne by telemarketers. It is likely that the Register will result in a reduction in the value of telemarketing, as there will be a smaller pool of consumers to call, meaning that the percentage of successful calls will have to be increased.

The potential benefits to the telemarketing industry could outweigh the possible costs. The efficiency gains, and increases in productivity as a result of more targeted telemarketing campaigns will improve the telemarketing activities of Australian small

[14] It is difficult to estimate compliance costs due to a range of variables such as ACMA imposing subscription fees and costs associated with internal administrative and operational arrangements.

businesses. Creating national standards for businesses engaged in telemarketing will provide greater consistency of practice across an entire business at a national level, reduce compliance and administrative costs and provide better protection for consumers. Telemarketing organisations will still be able to operate on behalf of exempted organisations. These improvements will most likely outweigh potential costs associated with the increased compliance costs and possibility of a reduced telemarketing industry in Australia.

Impact on business
The establishment of a Do Not Call Register will have an impact upon Australian businesses that, while not a part of the telemarketing industry, use it as a marketing tool. While much of the discussion in relation to the telemarketing industry remains relevant to business in general, additional potential costs of a Do Not Call Register include:

Reduction in the value or utility of telemarketing as a sales method for business
The Do Not Call Register discussion paper received submissions from small businesses that engage in telemarketing. These businesses contended that telemarketing is a highly successful means of gaining customers and of marketing their business. The introduction of a Do Not Call Register, while providing for existing business relationships, would reduce the number of consumers willing to be contacted by telemarketing by businesses thereby reducing the value of telemarketing as a sales method for business.

Impact on consumers
The establishment of a Do Not Call Register will have a significant impact on consumers. The potential costs and benefits include:

Increase in consumer choice
Currently, if consumers do not wish to receive telemarketing calls, they must respond to each call they receive by asking to be removed from the telemarketer's list. There is no legislative requirement to enforce telemarketers to comply with this request. The Register would ensure that consumers need only register once in order not to receive further calls from certain direct marketers attempting to sell a good or service. Anyone who wishes to continue to receive telemarketing calls may continue to do so.

While there are only 113,000 people registered on ADMA's voluntary Do Not Contact Register, this figure is expected to rise significantly as consumers become more aware of the existence of a mandatory scheme. The mandatory nature will increase consumer confidence in the arrangements. The US Do Not Call Register experienced 100 million registrations by the end of its second year of operation. Prior to the US Federal Government's introduction of this scheme, smaller State-based schemes existed but the numbers of consumers registered only rose significantly in response to the national, mandatory scheme. The US has a population of 300 million and has experienced 100 million registrations on its Do Not Call Registry and the UK, with a population of 60 million has experienced 20 million registrations on its mandatory Telephone Preference Service. Given these figures, it is reasonable to expect that an Australian register will experience similar levels of registrations.

Possibility that consumers will continue to receive unwanted calls
Under this option, exemptions will be put in place for organisations that operate in the "public interest". These include organisations such as charities, companies with who consumers have an existing business relationship, religious organisations, educational institutions and government bodies. It is likely that some consumers will not wish to receive any unsolicited calls, even those made by organisations operating in the "public interest". The public benefit in allowing some exemptions is considered to be greater than the potential risk that some consumers may continue to receive some unsolicited calls.

Potential for personal data to be used illegally
There is a low-level risk that data contained within the Do Not Call Register could be obtained and used illegally. A privacy protection mechanism under the *Privacy Act 1988* will be established in relation to the access, ownership and distribution of the information contained in the Register.

Single method available for consumer complaints
There is currently no single method available to consumers to complain about unwanted telemarketing calls. While the TIO, the ACCC and State and Territory fair trading agencies provide some recourse for consumers in certain circumstances, consumers are often unaware which organisation they must approach depending upon the nature of their complaint. A Do Not Call Register would address this uncertainty and provide consumers with a single complaint-handling mechanism.

The benefits to consumers of a Do Not Call Register outweigh the potential costs. Consumer complaints regarding unsolicited telemarketing have been steadily increasing and the introduction of a legislated Do Not Call Register provides the most efficient way for consumers to opt out of receiving a large number of these calls. In addition, the lack of a single complaint-handling mechanism is of concern to consumers. The introduction of the Register would redress this situation.

Impact on the Government
Medium impact on the Government and potential costs and benefits include:

Ongoing funding for register functions
ACMA will either administer the Register or be responsible for tendering out the administration function. This option proposes partial cost recovery from the telemarketing industry. There are also costs for Government in ongoing functions associated with the existence of a register.

The estimated costs for DCITA are anticipated to be $800,000 for the first financial year and $300,000 for each subsequent year. As the administrator ACMA is expected to incur a cost of $8.4 million in the first year, $9.8 million in the second year as the cost recovery systems are in place and less than $8 million for subsequent years.
There is a medium level risk that the Register could reduce the size of the telemarketing industry in Australia and that fees recovered from the industry may decrease overall.

Decrease in the number of consumer complaints
The Government receives a substantial number of consumer complaints in regard to unwanted telemarketing. It is anticipated that this option will lead to a substantial decrease in these complaints as consumers exercise their ability to register their telephone numbers.

This is the preferred option.

Option 4: Establish an 'opt-in' Call Register and Standards

Overview
Under this option, the Government would establish an 'opt-in' telemarketing call register and standards under legislation. The standards would operate similarly and have the same effect as discussed in Option 3.

The legislation would prohibit all telemarketing calls to consumers unless they had registered their number/s on the Call Register and given consent to be contacted by telemarketers. As with Option 3, this approach addresses many of the complaints received by consumers about telemarketing activities and would provide consistency in the arrangements governing telemarketing practices. This option would be likely to impact negatively on the telemarketing industry and business using telemarketing practices by significantly reducing their potential customer base.

Impact on the telemarketing industry
This option is likely to be extremely detrimental to the telemarketing industry. The pool of consumers available to telemarketers would initially be reduced to zero and only increased as consumers sign onto a call register. Low levels of registration would be expected, as consumers who currently do not object to receiving telemarketing calls are likely to be concerned by the potential of registration to result in a sharp increase in the number of calls received.
Compliance costs
Compliance costs[15] for the telemarketing industry would be reduced with this national approach, but these cost savings are unlikely to offset the amount of revenue likely to be lost as the potential consumer base reduces dramatically. A Call Register is likely to lead to a significant loss of jobs in the telemarketing industry.

Impact on business
This option could have a negative affect on businesses using telemarketing practices by significantly reducing their potential customer bases.

[15] It is difficult to estimate compliance costs due to a range of variables such as ACMA imposing subscription fees and costs associated with internal administrative and operational arrangements.

Impact on consumers
Consumers opposed to telemarketing practices will benefit immediately as there will be no calls from telemarketers. Consumers using telemarketing services are likely to be adversely affected as there is likely to be an impact on the telemarketing industry as some organisations might close or choose other marketing strategies. The choice of services and convenience provided by telemarketing sales for these consumers is likely to be reduced. Those who do register are likely to see a significant increase in the number of calls they receive.

Impact
Similar to Option 3 the implementation of this option is likely to result in administration costs for the Government. There would be fewer complaints made to Government about telemarketing practices. Complaints from the telemarketing industry and business would expect to rise dramatically.

This option is not preferred.

6. CONCLUSION AND RECOMMENDED OPTION

Option 1: Do Nothing

Option 1 meets none of the key policy objectives and is unsatisfactory. It fails to resolve the level of community concern in relation to telemarketing activity and it is likely that the industry will remain subject to fragmented and inconsistent governing arrangements without Federal intervention.

Option 2: Co-regulatory Approach – minimal regulatory approach

Option 2 is unlikely to achieve the level of protection for consumers or the consistency of industry arrangements identified as key policy objectives. Creating a universal mandatory Code of Conduct will potentially create consistency across the telemarketing industry in Australia but does not address the key issue of consumer protection as it has no influence over and cannot penalise the conduct of overseas telemarketers.

Option 3: Establish an 'opt-out' Do Not Call Register and Standards

Option 3 meets all key policy objectives by prohibiting telemarketing calls to fixed line and mobile numbers listed on the Do Not Call Register and is applicable to unsolicited telemarketers operating within and outside of Australia that call an Australian telephone number. It provides consistency of standards across the industry with an effective enforcement regime and balances the interests of the telemarketing industry with potential for increased efficiency. The provision for exemptions for certain organisations provides a balance between allowing specific organisations to undertake socially important work in the public interest and maintaining the rights of consumers to privacy. It is in line with similar successful opt-out schemes used by the USA and the UK. This option is a positive response to submissions received on the establishment of a Do Not Call Register for the Government to take action on this issue.

Inclusion of exemption provisions for designated telemarketing calls
Option 3 includes exemption provisions for certain organisations operating in the public interest from the requirement not to contact numbers listed on the Do Not Call Register. Option 3 includes exemption provisions for designated telemarketing calls from the general prohibition against calls to numbers on the Do Not Call Register. Designated telephone calls are certain calls from government bodies, registered political parties, nominated political candidates, religious organisations, charities or charitable institutions and educational institutions.

Such exemptions are appropriate for the following reasons:

- Charities provide valuable services to the community and rely on various ways to raise funds to support their work;
- Religious organisations provide valuable support and community services as well as moral guidance to many people in the community;
- Educational institutions need to contact their students to inform them of the needs of the institutions and to solicit funds to ensure their viability;
- Government bodies to use the most effective means, including telephone contact, to provide information on important issues such as changes to legislation that may affect citizens[16]; and
- Political parties and candidates provide citizens with valuable information they can use to inform their voting behaviour (this is in keeping with the Spam and the Privacy Act exemptions[17]) and provide a mechanism for undertaking fundraising.

[16] Telephone calls are an important mechanism through which the Government is able to directly contact the public to inform them about Government policies and programs e.g. policies relating to income support programs, health and safety and national security issues.
[17] Introduction of Do Not Call Register: *Possible Australian Model,* Discussion Paper, (October 2005), Department of Communications, Information Technology and the Arts.

Option 4: Establish an 'opt-in' Call register and Standards

Option 4 meets all key policy objectives by addressing consumer complaints about unsolicited telemarketing calls but unlike Option 3, this option would be likely to impact negatively on the telemarketing industry and businesses using telemarketing practices by significantly reducing their potential customer base.

RECOMMENDATION

It is recommended that Option 3 be adopted.

7. IMPLEMENTATION AND REVIEW

Implementation
Administration of the proposed legislation to establish the Do Not Call Register will be undertaken by ACMA[18] with the option to administer or to tender out the delivery of the Do Not Call Register. It is expected that some ongoing costs would be recovered from industry on a user-pays basis.

The amendments to the *Telecommunications Act 1997* and the *ACMA Act* will require ACMA to make minimum 'Contact' Standards which will apply to all of the telemarketing industry, including exempt organisations.

ACMA will be required to consult with specified bodies to set out detailed rules of conduct to apply to the telemarketing industry (not just those accessing the Register). The Minimum Standards will specify permitted calling hours, establish minimum information to be provided to recipients of calls and set out minimum requirements surrounding termination of calls.

In addition, industry will be able to develop industry codes on matters relating to telemarketing not covered by a standard. ACMA will be empowered by legislation to make additional standards in relation to telemarketing activities where a request for an industry code is not complied with and where industry codes fail.

ACMA will have the power to make a determination to establish operational requirements for the Do Not Call Register to be administered by ACMA and may include who can apply to the Register, what information must be provided by applicants, registration timeframe and how registration may be withdrawn. ACMA will have responsibility for enforcing the scheme. Regulations may be made to give effect to international agreements on telemarketing, specify cases where consent may, and may not be implied, specify that a call will be deemed a telemarketing call if made for a particular purpose, and to establish incidental rules as required.

[18] ACMA will need to discuss the need for a Regulation Impact Statement to analyse how it intends to implement the Government's decision with the Office of Regulation Review.

Review

There will be a review of the operation of the Do Not Call Register three years following its implementation. The review may include an evaluation of the number of complaints received by the Government, the level of compliance by telemarketers with the legislation and financial indicators.

The Minister would table a copy of the report in each House of Parliament within 15 sitting days of the report being prepared.

Cost Recovery Impact Statement

A Cost Recovery Impact Statement will be prepared by the ACMA in accordance with the Government's Cost Recovery Policy prior to the implementation of cost recovery arrangements.

Attachment A

Existing rules/laws governing

Hours of Contact for Telemarketers

The rules governing the hours in which telemarketers may call individuals are contained in various instruments, including voluntary industry codes and state and territory legislation.

There is currently no legislation regulating calling hours for telemarketers (or telephone dealers) in Tasmania or South Australia.

Instrument	Prohibited Hours of Contact
Fair Trading Act 1987 (NSW) Section 40I.	Calls may not be made • between 8pm and 9am seven days a week
Fair Trading Act (Vic) Section 67C	Calls may not be made: • at any time on a public holiday • between 5pm and 9am on a Saturday or Sunday • between 8pm and 9am between Monday to Friday
Fair Trading Act 1989 (Qld) Section 63 (included in door-to-door sales provisions)	Calls may not be made: • at any time on a public holiday • at any time on a Sunday • before 9 am or after 5pm on a Saturday; • between 6pm and 9 am on any other day
Door to Door Trading Act 1991 (ACT) Section 9 (included in door to door sales provisions)	Calls may not be made: • at any time on Good Friday, Easter Sunday or Christmas day • between 5pm and 9am on a Saturday, Sunday and any other public holiday • between 8pm and 9am Monday to Friday.
Door to Door Trading Act 1987 (WA) Section 9 (included in door to door sales provisions)	Calls may not be made: • at any time on a Sunday or a public holiday • between 5pm and 9 am on a Saturday • between 8pm and 9am Monday to Friday.
Consumer Affairs and Fair Trading Act (NT) Section 103 (included in door to door sales provisions)	Calls may not be made: • at any time on a public holiday • at any time on a Sunday • between 5pm and 9 am on a Saturday • between 8pm and 9am Monday to Friday.
ADMA *Direct Marketing Code of Practice* (2001)	Calls may not be made: • between 9pm and 8am; or • on Christmas, Good Friday, Easter Sunday.
Direct Marketing Model Code of Practice (2003) Prepared by the Ministerial Council on Consumer Affairs	Calls may not be made: • between 9pm and 8am (Mon-Sat) • at any time on a Sunday; and • on specified public holidays.

Table: Costs and Benefits

Option	Costs (Magnitude)	Benefits (Magnitude)	Comment
1. Do Nothing	○ Frustration felt by some segments of the community about telemarketing is not addressed & likely to rise (high). ○ Lack of single complaints mechanism not addressed (high). ○ Telemarketing industry concern over compliance costs in respect of inconsistent rules not addressed (high). ○ Telemarketing industry concern over 'level playing field' not addressed (high).	○ Will not impede ability of businesses to access community for commercial and non-commercial reasons (low). ○ Likely growth in telemarketing industry (low). ○ Likely growth in the availability of non-skilled labour positions (low). ○ Low cost option (medium).	Option not generally supported by consumers or telemarketing industry. Will not address any of the identified objectives. High risk option.
2. Co-Regulation	○ Does not address community concern in relation to the activities of offshore telemarketers (medium). ○ A risk that any State/Territory legislation that is inconsistent with code will have supremacy and a degree of inconsistency in relation to governing rules will remain (high). ○ Telemarketing industry concern over compliance costs in respect of inconsistent rules not addressed (high). ○ Risk of job losses in telemarketing industry (low-medium). ○ Possible reduction in the value or utility of telemarketing as a sales method for businesses (low). ○ Potential for personal	○ Partially relieves frustration felt by some segments of the community regarding telemarketing (medium). ○ Partially addresses telemarketing industry concern over compliance costs in respect of inconsistent rules (medium). ○ Partially addresses telemarketing industry concern over 'level playing field' (high). ○ Efficiency gains for telemarketers (high). ○ Medium cost option (low). ○ Some decrease in number of consumer complaints likely (low-medium).	Will go some way to addressing difficulties experienced by: ○ consumers regarding the volume/intrusive nature/inconvenience of telemarketing calls. ○ industry and consumers in respect of a single complaints-handling mechanism. ○ industry in respect of 'level playing field'. However, will not fully address objectives. Key difficulties with approach are that: ○ the rules governing the telemarketing industry will not be harmonised. ○ offshore telemarketers will not be subject to the requirements.

Option	Costs (Magnitude)	Benefits (Magnitude)	Comment
	data to be used illegally (low).		
3. Do Not Call Register (opt out)	○ Risk of job losses in telemarketing industry (medium). ○ Possible increased costs for telemarketers – accessing register (medium). ○ Possible reduction in the value or utility of telemarketing as a sales method for businesses (low). ○ Possibility that consumers will continue to receive unwanted calls (low). ○ Potential for personal data to be used illegally (medium). ○ Ongoing funding required (medium).	○ Relieves frustration felt by some segments of the community regarding telemarketing (high). ○ Establishes a single complaints mechanism (high). ○ Addresses telemarketing industry concern over compliance costs in respect of inconsistent rules (high). ○ Addresses telemarketing industry concern over 'level playing field' (high). ○ Efficiency gains for telemarketers (high) ○ Significant decrease in number of consumer complaints likely (medium).	General approach supported by industry and consumers. Will address the difficulties experienced by: ○ consumers regarding the volume/intrusive nature/inconvenience of telemarketing calls. ○ industry and consumers in respect of fragmentation of policy and the inconsistent rules governing the telemarketing industry. ○ industry in respect of 'level playing field'. ○ industry and consumers in respect of a single complaints-handling mechanism. The main difficulty with the approach is the ongoing funding requirements.
4. Call Register (opt in)	○ Immediate impact of stopping all telemarketing activity in Australia (extremely high). ○ High risk of significant job losses in telemarketing industry (high) ○ High reduction in value or utility of telemarketing as a sales method of businesses (medium). ○ Possibility that consumers will continue to receive unwanted calls (low). ○ Potential for personal	○ Relieves frustration felt by some segments of the community regarding telemarketing (high). ○ Establishes a single complaints mechanism (high). ○ Addresses telemarketing industry concern over compliance costs in respect of inconsistent rules (high). ○ Addresses telemarketing	General approach supported by consumers. Option not supported by industry. Will address the difficulties experienced by: ○ consumers regarding the volume/intrusive nature/inconvenience of telemarketing calls. ○ industry and consumers in respect of fragmentation of policy and the inconsistent rules governing the telemarketing industry. ○ industry in respect of 'level playing field'. ○ industry and consumers in respect of a single complaints-handling

Option	Costs (Magnitude)	Benefits (Magnitude)	Comment
	data to be used illegally (medium). o Ongoing funding required (medium).	industry concern over 'level playing field' (high). o Significant decrease in number of consumer complaints likely (medium).	mechanism. The key difficulty with the approach is that it is likely to immediately have an extremely adverse impact on the telemarketing industry and there is a high risk of significant job losses in the telemarketing industry.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA:	Australian Communications and Media Authority
ACMA Act:	*Australian Communications and Media Authority Act 2005*
Bill:	Do Not Call Register Bill 2006
Consequentials Bill:	Do Not Call Register (Consequential Amendments) Bill 2006
Crimes Act:	*Crimes Act 1914*
Legislative Instrument Act:	*Legislative Instruments Act 2003*
Minister:	Minister for Communications, Information Technology and the Arts
Privacy Act:	*Privacy Act 1988*
Spam Act:	*Spam Act 2003*
Telecommunications Act:	*Telecommunications Act 1997*
TPA:	*Trade Practices Act 1974*

NOTES ON CLAUSES

Part 1 - Introduction

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Do Not Call Register Act 2006*.

Clause 2 – Commencement

Clause 2 sets out when each of the provisions in the Bill will commence.

It provides that the following provisions will commence on Royal Assent:

- clauses 1 to 9 of the Bill, and anything else not covered by the table. These are the introductory provisions, including the short title of the Bill, these commencement provisions and the definitions (see items 1 and 2 of the table);
- Part 3 of the Bill. Part 3 provides for the establishment of the Do Not Call Register. These provisions are to commence immediately from Royal Assent to enable the ACMA to start processes for establishing the Register and accepting registrations. ACMA is not required to have in place a register from Royal Assent. Subclause 13(5) provides that a register must be in place as soon as practicable after the Bill receives the Royal Assent. This recognises that it will take some time to establish a register (item 4 of the table);
- clauses 41 and 46. These clauses provide for the additional ACMA functions and the regulation-making power (items 7 and 9). This will enable an education program to be conducted about the scheme provided for in the Bill prior to any enforcement action being undertaken.

The following provisions will commence on a date to be fixed by Proclamation, or within 12 months after Royal Assent if not proclaimed beforehand.

- Part 2 (item 3). This Part relates to rules about making unsolicited telemarketing calls;
- Parts 4 and 5 (item 5). These Parts include the civil penalties provisions and the injunctions provisions. This delayed commencement will ensure that an education program can be conducted prior to the penalty provisions coming into effect.
- clauses 39, 40, 42 to 45 (items 6 and 8). These are miscellaneous provisions.
- Schedules 1, 2 and 3 (item 10). The Schedules set out the meaning of ‘designated telemarketing calls’, the meaning of consent, and the infringement notice scheme provisions.

It is intended that the passage of the legislation would be accompanied by a significant information and educational campaign for both industry and the general public. Allowing a date to be set by Proclamation enables this campaign to be undertaken and ensures that individuals or companies that currently participate in telemarketing activities will be able to correct their behaviour without penalty prior to the Bill's commencement.

If any of the provisions of the Bill do not commence within 12 months of the Bill receiving the Royal Assent, they will commence on the next day after this period. It has been necessary to provide for this possible extended timeframe for certain provisions to come into operation to enable sufficient time for the ACMA or relevant register operator to establish the Do Not Call Register. There is likely to be a significant amount of public interest in the Register, with up to one million registrations expected in the first twelve months of its operation. It is therefore important to allow the ACMA, or the relevant register operator, time to establish the Register (which must be in electronic form), and to fully test the Register before individuals can commence registering their numbers.

Subclause 2(2) makes it clear that column 3 of the table contains additional information that is not part of this Bill.

Clause 3 – Simplified outline

Clause 3 provides a simplified outline of the Bill. It is not a comprehensive statement of the measures contained in the Bill, but is designed to assist people in understanding the broad elements in the Bill.

It provides that the Bill, when enacted, will set up a scheme for regulating unsolicited telemarketing calls. In particular the Bill provides that:

- unsolicited telemarketing calls must not be made to an Australian number registered on the Do Not Call Register (see clause 11 of the Bill); and
- the main remedies for breaches of this Bill are civil penalties and injunctions (see Parts 4 and 5 of the Bill).

The outline also notes that the Telecommunications Act contains additional provisions relevant to telemarketing calls. Those provisions relate to industry codes and standards (Part 6), investigations by the ACMA (Part 26), information-gathering powers of the ACMA (Part 27) and enforceable undertakings (Part 31A). These provisions are proposed to be amended by the Consequentials Bill to apply to telemarketing calls.

Clause 4 – Definitions

Clause 4 sets out the key definitions used in the Bill. These definitions are discussed below.

account

The term 'account' is defined to include a free account, a pre-paid account and anything that may be reasonably regarded as the equivalent of an account. This term is used in the definition of 'relevant telephone account-holder'.

This definition of 'account' is intended to put beyond doubt that calls made to free accounts (for example, where a SIM card has been provided free of charge as part of a promotion)**,** or to a pre-paid mobile account, come within the meaning of an account in this Bill. Post-paid accounts will also come within this meaning.

ACMA

The term 'ACMA' is defined to mean the Australian Communications and Media Authority. Under this Bill and the Consequentials Bill, the ACMA is responsible for establishing the Do Not Call Register or outsourcing this to another register operator. The ACMA also has a role in investigating complaints about the making of unsolicited telemarketing calls and taking appropriate enforcement action (see Parts 4 to 6 of this Bill and the Consequentials Bill, which set out the various enforcement options available).

acquire

The term 'acquire', when used in relation to goods or services, is defined to have the same meaning as in the TPA.

Subsection 4(1) of the TPA defines 'acquire' to include:

(a) in relation to goods – acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and

(b) in relation to services – accept.

The meaning of the term 'goods', as defined in the TPA is discussed below under the definition of goods in clause 4 of this Bill.

The definition of 'acquire' is an inclusive definition which does not limit the ordinary meaning of the term. It would cover the exchange of goods without any payment.

The term 'acquire' is used in clause 5 of the Bill. This clause defines a telemarketing call for the purpose of the Bill. Subclause 5(3) makes it clear that a call may be a telemarketing call, notwithstanding that it may be unlawful to buy whatever is on offer.

agency

The term 'agency' is defined to include an armed force and a police force. This term is used in the definition of a 'government body' in clause 4, which in turn is relevant to the various exclusions to the penalty provisions (as part of the definition of a 'designated telemarketing call' in Schedule 1). The definition is included to ensure that armed forces and police forces come within the meaning of a government body for the purposes of the Bill. The definition is necessary, as these forces would not ordinarily come within the meaning of an agency.

Australia

The term 'Australia', when used in a geographical sense, is defined to include an eligible Territory.

An 'eligible Territory' is defined in clause 4 to mean the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and an external Territory prescribed for the purposes of clause 8. It does not include Norfolk Island.

The term 'Australia' is used in clause 9 of the Bill which relates to the extra-territorial application of the Bill. The term is also used on the definition of 'Australian number' in clause 4 of the Bill.

One of the effects of this definition is that the Bill is not extended to apply to Norfolk Island. Norfolk Island currently has its own system of allocating numbers. Therefore a person with a Norfolk Island number could not register their number on the Do Not Call Register.

Australian number

This term is defined by reference to the numbering plan referred to in section 455 of the Telecommunications Act. An Australian number is a number specified in the Numbering Plan that has been allocated by the ACMA for use in connection with the supply of carriage services to the public in Australia. These are the numbers that are normally understood to be a person's telephone number or fax number.

The Numbering Plan covers private home telephone numbers, mobile telephone numbers, satellite numbers, and Voice over Internet Protocol (VOIP) numbers, including nomadic VOIP numbers.

This term is used in the general prohibition on making unsolicited telemarketing calls to an Australian number in clause 11. The definition of 'Australian number' is also relevant to a person's eligibility to register a telephone number on the Do Not Call Register (see clause 14). A person can only register an Australian number on the Do Not Call Register.

It is necessary to define an Australian number through reference to numbers that are for use in connection with the supply of carriage services to the public in Australia to ensure that the definition only picks up numbers allocated to persons in Australia. For example, it is possible that a person in Australia could be allocated a telephone number that has the same digits as a telephone number which a person has been allocated in another country. However the definition of Australian number ensures that the Bill would only apply to a number allocated to the person in Australia (ie a number with the +61 country code). It does not cover overseas numbers (ie numbers with any other country code), notwithstanding that they may have the same digits as a number allocated under the ACMA numbering plan.

authorise

The term 'authorise', when used in relation to the making a telemarketing call, is defined to have a meaning affected by proposed clause 6 of Schedule 1.

Proposed clause 6 of Schedule 1 provides that if an individual authorises the making of a telemarketing call and does so on behalf of an organisation then the organisation rather than the individual is taken to have authorised the making of the call. This will not apply in the case where an individual purports to act on behalf of an organisation but goes beyond his or her authority. In this case the organisation will not be taken to have authorised the call.

In addition, if a telemarketing call is made by an individual or organisation without being authorised by any other individual or organisation, then the first-mentioned individual or organisation is taken to authorise the making of the call. This concept of self-authorisation has been included to remove any argument that there has been no authorisation when an individual or organisation has made a call on his or her own behalf.

The term 'authorise', in relation to the making of a telemarketing call, is used in Schedule 1, which defines designated telemarketing calls as calls authorised to be made by certain bodies.

authorised officer

An authorised officer is the Chair of the ACMA, or a member of the ACMA staff who is appointed in writing as an authorised officer for the purposes of Schedule 3 (under clause 8 of that Schedule).

The definition of an authorised officer is central to the scheme of issuing infringement notices. Only an authorised officer can issue infringement notices under clause 3 of Schedule 3.

business

The term 'business' is defined in clause 4 to include a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis. The settled legal meaning of 'carrying on a business' is to conduct some form of commercial enterprise, systematically or regularly, with a view to a profit: *Hyde v Sullivan* [1956] SR (NSW) 113. The definition of 'business' in clause 4 varies the ordinary meaning of 'business' so it is clear that, for the purposes of the Bill, it is not necessary to establish that a commercial enterprise is carried on in a regular or continuous manner. It would cover one off commercial enterprises.

The term 'business' is used in the basic definition of telemarketing call (in clause 5) and in Schedule 2 of the Bill (which defines the concept of consent). The definition of a telemarketing call includes an offer to provide a business opportunity or to advertise or promote a business opportunity or provider, or prospective provider of a business opportunity. For the purposes of the Bill consent includes consent that can be reasonably inferred from a pre-existing business relationship (see subparagraph 2(b)(ii) of Schedule 2).

This definition has been included to make it clear that a call would be a telemarketing call where it includes an offer to provide a business opportunity even if the offeror is conducting a one-off or irregular commercial activity.

candidate

This definition provides that a candidate is a person who has been nominated as a candidate under the Commonwealth Electoral Act or a relevant State or Territory law that deals with electoral matters.

Clause 3 of Schedule 1 to the Bill includes certain telemarketing calls authorised by candidates for a Commonwealth, State, Territory or local government election in the meaning of a 'designated telemarketing call'. This has the effect that such calls authorised by candidates are exempt from clause 11 of the Bill and consequently they may make unsolicited telemarketing calls.

carriage service

The term 'carriage service' is defined to have the same meaning as in the Telecommunications Act. A carriage service is defined in section 7 of the Telecommunications Act to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy. The reference to the carriage of communications by means of 'guided electromagnetic energy' includes the carriage of communications by means of a wire, cable, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with the carrying of the communication. The reference to the carriage of communications by means of

'unguided electromagnetic energy' includes communications by means of radiocommunications.

This term is used in the definition of an 'Australian number' in clause 4.

cause

Cause is defined to have a meaning affected by proposed subsection 11(9), which makes it clear that a person who contracts another person to make telemarketing calls on their behalf causes a telemarketing call to be made for the purposes of clause 11.

This is an inclusive definition.

civil contravention

This is defined to mean a contravention of a civil penalty provision. Clause 4 of the Bill defines a civil penalty provision. They are:

- proposed subsections 11(1), and (7) which set out the rules relating to the making of unsolicited telemarketing calls;
- proposed subsections 12(1) and (2) which require arrangements for the making of telemarketing calls to require compliance with this Bill; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

This definition is used in the infringement notice scheme in Schedule 3. An infringement notice can be given when an authorised officer has reasonable grounds to believe that a person has committed one or more civil contraventions (see clause 2 of Schedule 3).

civil penalty order

A civil penalty order is an order under proposed subsection 24(1). This is an order which the Federal Court or the Federal Magistrates Court may make if a person has contravened a civil penalty provision.

A civil penalty provision is defined below. They are:

- proposed subsections 11(1) and (7) which set out the rules relating to the making of unsolicited telemarketing calls;
- proposed subsections 12(1) and (2),which require arrangements for the making of telemarketing calls to require compliance with this Bill; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

civil penalty provision

This definition sets out those clauses in the Bill which are civil penalty provisions. Civil penalty provisions are provisions which may attract a pecuniary penalty if breached. The following provisions are civil penalty provisions:

- proposed subsections 11(1) and (7) which set out the rules relating to the making of unsolicited telemarketing calls;
- proposed subsections 12(1) and (2), which require arrangements for the making of telemarketing calls to require compliance with this Bill; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with proposed paragraph 44(2)(c).

Part 4 of the Bill sets out the penalties which apply for contravention of these civil penalty provisions, and the action which may be taken to recover these penalties. In essence civil penalty provisions may attract pecuniary penalties (as set out in clause 25 of the Bill). They do not attract a term of imprisonment. Criminal proceedings may not be brought against a person only for contravention of a civil penalty provision (see clause 29 of the Bill).

consent

The term 'consent', in relation to the making of a telemarketing call, is defined to have the meaning given by proposed Schedule 2 to the Bill.

Consent may be express consent or inferred consent. If a person has a pre-existing business relationship or other relationship such as a family relationship, consent may be inferred (subparagraph 2(b)(ii) of Schedule 2) from this relationship and from the conduct of the person. The definition of consent is discussed in greater detail below in the notes to Schedule 2.

The concept of consent is a key element in the exception to the penalty provisions relating to the making of unsolicited telemarketing calls in proposed section 11. Subclause 11(2) of the Bill provides an exception to the prohibition on making unsolicited telemarketing calls to numbers on the Register, if the caller points to evidence that the relevant telephone account-holder, or an individual nominated (either orally or in writing) by the account-holder, consented to the call. The effect of this exception is that a person may make a telemarketing call where that other person has consented to receiving it.

contracted service provider

If the ACMA enters into an arrangement with another person to keep the Do Not Call register under paragraph 13(1)(b), that person is referred to as the 'contracted service provider' for the purposes of this Bill.

data processing device

The term 'data processing device' is defined to have the same meaning as in the Telecommunications Act. Section 7 of the Telecommunications Act defines it as any article or material (for example a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

This definition is relevant to the infringement notice provisions in subparagraph 3(1)(c)(ii) and subclause 3(3) of Schedule 3. It enables details of an alleged civil contravention to be provided on a 'data processing device' as part of an infringement notice.

dealing with

Under Part 4 of the Bill, a Court may make an ancillary order for compensation where a person has suffered loss or damage as a result of a contravention of a civil penalty provision. In determining whether a person has suffered loss or damage and in assessing the amount of compensation, a Court may take into account a number of factors relating to dealing with the telemarketing calls.

This definition provides that 'dealing with' a telemarketing call includes retrieving the call from a voicemail system or similar system. This ensures that costs incurred by a person in returning a telemarketing call can be taken into account. For example, this may be relevant where a telemarketer has left a message on an answering machine with a number to call, and when the person calls back they are greeted with a telemarketing message and charged for the call.

A 'similar system' could cover an example where a person has dialled a number following a missed call message.

designated telemarketing call

The term 'designated telemarketing call' is defined to have the meaning given by Schedule 1 to the Bill.

In essence, certain calls made or authorised to be made by government bodies, religious organisations, charities, registered political parties, independent members of Parliament, political candidates, as well as certain calls made or authorised to be made by educational institutions are designated telemarketing calls for the purposes of this Bill.

The meaning of 'designated telemarketing call' is discussed in greater detail below in the notes to Schedule 1 to the Bill.

The concept of a 'designated telemarketing call' is relevant to the prohibition on making unsolicited telemarketing calls to numbers on the Do Not Call Register in clause 11 of the Bill. 'Designated telemarketing calls' are exempt from clause 11. The effect of these

provisions is that certain calls can be made to Australian numbers, even if such numbers are registered on the Do Not Call Register. It is worthwhile noting that a lot of such calls would fall outside the meaning of a 'telemarketing call' as defined in clause 5 of this Bill, even without a specific exemption, as they would not be commercial in nature.

director

The term 'director' is defined to include a member of the governing body of an organisation. This definition is included to ensure that the term 'director' is not limited to persons who have been appointed to the position.

The term 'director' is used in subclause 7(1) of Schedule 1 to the Bill (which provides an extended meaning of employee and employer for the purposes of clause 4 of Schedule 1). This subclause provides that if an individual is a member of a board (eg board of directors) of a body corporate, then this person is taken to be an employee of the body corporate. This definition is relevant to determining who educational institutions may call. This is discussed in greater detail under the notes to Schedule 1.

Do Not Call Register

This is defined to mean the register kept under proposed section 13. This section requires a register of telephone numbers to be kept by the ACMA or another person on behalf of the ACMA.

The Do Not Call Register is a critical element of this Bill. The purpose of the Bill is to establish a scheme whereby people can register their numbers on the Do Not Call Register for the purpose of ensuring that they do not receive unsolicited telemarketing calls.

The establishment and operation of the Register is discussed in greater detail under the notes to Part 3 of the Bill.

educational institution

The term 'educational institution' is defined to include a pre-school, a school, a college and a university. It is an inclusive definition, and does not preclude the inclusion of other institutions which would come within the ordinary meaning of educational institutions, within this definition. This definition would include both private and public educational institutions. For example it would include Bond University as well as Melbourne University, Catholic high schools and TAFEs. It would not cover individuals who are conducting training courses on a particular subject matter, for example a person offering private French lessons.

This term is used in the definition of 'designated telemarketing call' in clause 4 of Schedule 1 to the Bill. This clause provides that certain calls made by educational institutions are 'designated telemarketing calls'. This means that such calls are exempt

from the prohibition in clause 11 of the Bill on making unsolicited telemarketing calls to numbers on the Do Not Call Register. The definition of 'designated telemarketing call' is discussed in greater detail below under Schedule 1.

eligible Territory

An 'eligible Territory' is defined to mean the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and an external Territory prescribed for the purposes of clause 8. It does not include Norfolk Island.

This term is used in the definition of Australia, which is relevant to the extra territorial application of the Bill provided for in clause 9.

employee

The common law definition of the term 'employee' is amended by the meaning given to the term in clause 7 of Schedule 1. In addition to those persons covered by the common law meaning of employee, it is defined to include a range of persons not ordinarily considered to be employees.

In particular clause 7 includes members of the executive body of a body corporate, contractors, Members of Parliament, local councillors, and office holders, such as an individual who is in the service of an armed force, or a police force, in the meaning of an employee.

This term is used in clause 4 of Schedule 1 to the Bill, which relates to when a telemarketing call made by or authorised by an educational institution is a 'designated telemarketing call' and exempt from the prohibition on making unsolicited telemarketing calls. The circumstances in which such calls can be made will ordinarily depend upon whether the relevant telephone account-holder has a certain connection with the educational institution (for example a current student).

However this situation is somewhat different in the case where an employer is the relevant telephone account-holder. Subclause 4(2) of Schedule 1 is designed to cover the circumstances where an employee's personal telephone account may be paid for by an employer as part of a package and consequently the employer is the relevant account holder. In this case, it is the relationship of the employee with the educational institution, not the relevant account-holder (ie the employer) which is relevant in determining whether or not call falls within the 'exempt' category for the purposes of proposed section 11.

This extended definition has been included as it is considered possible that certain employment-type situations, such as the ones described in this extended meaning, could involve a person receiving the benefit of a personal telephone account paid for by the employer and should consequently be covered.

employer

The common law definition of the term ‘employer’ is amended by the meaning given to the term in clause 7 of Schedule 1. As discussed above in relation to the extended meaning of ‘employee’, in addition to those persons covered by the common law meaning of employer, it is defined to include a range of persons not ordinarily considered to be employers.

In particular clause 7 includes bodies corporate, contractees, the Commonwealth, State or local governing bodies (in relation to Members of Parliament and local governments), and certain offices such as the armed forces, or police forces, in the meaning of an employer.

As discussed above in relation to the extended meaning of ‘employees’, this term is used in clause 4 of Schedule 1 to the Bill, which relates to when telemarketing calls made by or authorised by an educational institution is a ‘designated telemarketing call’ and exempt from the prohibition on making unsolicited telemarketing calls. The circumstances in which such calls can be made will ordinarily depend upon whether the relevant telephone account-holder or household member has a certain connection with the educational institution (for example a current student).

However this situation is somewhat different in the case where an employer is the relevant telephone account-holder. Subclause 4(2) of Schedule 1 is designed to cover the circumstances where an employee’s personal telephone account may be paid for by an employer as part of a package and consequently the employer is the relevant account holder. In this case, it is the relationship of the employee with the educational institution, not the relevant account-holder (ie the employer) which is relevant in determining whether or not call falls within the ‘exempt’ category for the purposes of proposed section 11.

This extended definition has been included as it is considered possible that certain employment-type situations, such as the ones described in this extended meaning, could involve a person receiving the benefit of a personal telephone account paid for by the employer and should consequently be covered.

evidential burden

The term ‘evidential burden’ in relation to a matter, is defined to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This is the same as the definition of an evidential burden in criminal matters (see subsection 13.3(6) of the *Criminal Code*).

This term is used in the penalty provisions in subclause 11(6), which provides that the initial burden of pointing to evidence in relation to the exceptions in subclauses 11(2) to 11(5) rests with the defendant, rather than the prosecution.

Federal Court

This term is defined to mean the Federal Court of Australia. This term is used in Parts 4 and 5 of the Bill. Under Part 4, the Federal Court may order a person to pay a pecuniary penalty if the Court is satisfied that a person has contravened a civil penalty provision. The rules regulating telemarketing calls and any provision of the regulations declared to be a civil penalty provision are civil penalty provisions. Under clause 24 of the Bill the ACMA or any other person may institute proceedings in the Federal Court or the Federal Magistrates Court for the recovery of a pecuniary penalty.

In addition to an order for payment of a pecuniary penalty under clause 24 of the Bill, the Federal Court or the Federal Magistrates Court may make certain ancillary orders. The Court may direct a person to pay compensation where another person has suffered loss or damage (see clause 30) or pay to the Commonwealth the amount of the financial benefit the person has obtained from breaching the provision (see clause 31).

Part 5 of the Bill provides for the Federal Court, on the application of the ACMA, to grant injunctions in relation to contraventions of civil penalty provisions.

goods

The term 'goods' is defined to have the same meaning as in the TPA.

Section 4 of the TPA defines goods as including ships, aircraft and other vehicles; animals, including fish; minerals, trees and crops, whether on, under or attached to land or not; and gas and electricity.

This definition is relevant to the meaning of 'telemarketing call' in clause 5 of the Bill.

government body

The term 'government body' is defined to mean a department, agency, authority or instrumentality of the Commonwealth, State or Territory or of the government of a foreign country or of part of a foreign country (eg. a State or province of a foreign country). The term 'agency' is defined above to include armed forces and police forces.

It includes a Commonwealth department, such as the Department of Communications, Information Technology and the Arts, a statutory authority such as the ACMA and includes foreign government and authorities. A part of a foreign country means, for example, one of the States of the United States of America.

The term 'government body' is used in the definition of 'designated telemarketing call' in clause 2 of Schedule 1 of the Bill. This is relevant to the exceptions to clause 11 (the prohibition on making unsolicited telemarketing calls to numbers registered on the Do Not Call Register). Certain calls made or authorised by government bodies are exempt

from these provisions. The definition of 'telemarketing call' is discussed in greater detail below under Schedule 1.

infringement notice

An infringement notice is defined to mean an infringement notice under clause 2 of Schedule 3. Schedule 3 to the Bill sets out the infringement notice scheme for contraventions of civil penalty provisions. Infringement notices will enable a more efficient means of dealing with minor contraventions as an alternative to instituting court proceedings for breach of a penalty provision.

international convention

The term 'international convention' is defined to mean a convention to which Australia is a party, or an agreement between Australia and a foreign country. This term is used in clause 46 of the Bill which enables regulations to make provision for giving effect to an international convention that deals with telemarketing calls. The term 'telemarketing call' is defined in clause 5.

The definition of international convention includes a treaty which Australia has signed and/or ratified. It also includes other agreements between Australia and a foreign country.

Once a legislative basis has been provided and the Australian enforcement arrangements are in place, the focus will shift to agreements which will facilitate mutual investigations and enforcement activities.

investment

The term 'investment' is defined broadly to mean any mode of application of money or other property for the purpose of gaining a return (whether by way of income, capital gain or any other form of return).

This term is used in the basic definition of a 'telemarketing call' in clause 5 of the Bill, which includes calls which offer to provide investment opportunities or which advertise or promote investment opportunities or providers or suppliers of investment opportunities. It is defined to ensure that offers to provide investment opportunities or to advertise investment opportunities may come within the meaning of a telemarketing call even if there is no guaranteed income return for the investment. For example, an offer to buy land could come within the meaning of an investment opportunity, notwithstanding that there may be no direct income return for the investment of money, but may merely be an opportunity for a capital gain.

make

The term make is defined to include 'attempt to make'. This clarifies that the concept of making a telemarketing call does not require a person to have received a voice call.

The concept of making a telemarketing call is central to the penalty provisions in Part 2 of the Bill which broadly prohibit the making of unsolicited telemarketing calls (clause 11).

This definition has been included to ensure that 'silent calls' are captured by the penalty provisions. It means that a person will have contravened these provisions even if they have not been successful in making the call.

The use of particular technology such as automated calling equipment and predictive diallers by the telemarketing industry often result in 'silent calls'. Such equipment has the capacity to store or produce and dial telephone numbers using a random or sequential number generator. Calls placed by automated equipment can result in call abandonment when the equipment dials more numbers than there are operators to take the calls. Predictive diallers essentially calculate when operators will be available to take calls.

There is a concern that people find silent calls that result when automated dialling equipment dials more numbers than there are operators to take calls particularly irritating or in some instances distressing.

This extended definition will ensure that if a telemarketer uses such equipment which results in silent calls being made to numbers registered on the Do Not Call Register, they will be subject to the same penalty provisions, as if the call had been successful.

mistake

The term 'mistake' is defined to mean a reasonable mistake of fact. This term is relevant to the defence provided in subclause 11(4). This provision provides a defence to the rules prohibiting the making of an unsolicited telemarketing call to a registered Australian number, if the person made the call or caused the call to be made by mistake.

This definition ensures that the defence is only available if the mistake was reasonable and it removes any possible argument that the defence is available if the person has made a mistake as to the law.

nominee

Nominee is defined to have the meaning given by clause 39. Clause 39 provides a definition which is relevant to nominations by the relevant telephone account-holder. Under clause 39, consent to receiving a telemarketing call can be made by a nominee.

organisation

An organisation is defined to include a body corporate, a partnership, a government body (as defined in clause 4 of this Bill), a court or tribunal and an unincorporated body or association.

This term is used in various provisions in the Bill, including Schedule 1 to the Bill (which relates to designated telemarketing calls, which include calls made by or authorised by religious or charitable organisations), and Schedule 2 to the Bill (which relates to consent).

Paragraph 22(1)(a) of the *Acts Interpretation Act 1901* provides that in any Act, unless the contrary intention appears, the word 'person' includes a body politic (such as a Commonwealth, State or Territory government) or a body corporate (such as a company or an incorporated association) as well as an individual. To avoid the possibility of a court finding a contrary intention in the Bill, the Bill makes it clear that express references in the Bill to organisations do not imply that references in the Bill to persons do not include bodies politic or bodies corporate.

penalty unit

This term is taken to have the meaning given by section 4AA of the *Crimes Act 1914* (Cth), which provides that in a law of the Commonwealth, unless the contrary intention appears, penalty unit means $110. This term is used in clause 25 (maximum penalties for contravention of civil penalty provisions) and clause 4 of Schedule 3 (amount of penalties under the infringement notice scheme).

person

A person is defined to include a partnership. A person would also include individuals as well as bodies politic or corporate (as provided for in paragraph 22(1)(a) of the *Acts Interpretation Act 1901*).

The note to this definition provides that section 585 of the Telecommunications Act sets out rules relating to the treatment of partnerships. Section 585 of the Telecommunications Act will also apply to this Bill, by virtue of proposed amendments to this section by the Consequentials Bill.

Section 585 of the Telecommunications Act (as amended by the Consequentials Bill) will provide that this Bill applies to a partnership as if the partnership were a person, with some changes. Namely, obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners, and any contravention of this Bill that would otherwise be contravened by the partnership is taken to have been contravened by each partner who aided, abetted, counselled or procured the relevant act or omission or was in any way knowingly concerned in or party to the relevant act or omission.

publish

The term 'publish' is defined to include publish on the Internet and publish to the public or a section of the public. This term is used in the context of determining consent for the purposes of the Bill, see clause 4 of Schedule 2 to the Bill. Clause 4 of Schedule 2 provides when consent may, or may not, be inferred from publication of a person's number. It provides that the mere fact that a person's number has been published does not imply consent for the purposes of receiving unsolicited telemarketing calls under this Bill.

This definition ensures that the meaning of publish cannot be limited to telephone numbers published in hard copy and not on the Internet. Nor can its meaning be limited to addresses published to the public broadly. It includes publication to a limited or restricted audience, for example on a subscription based web page. Therefore publication of numbers includes where a number has been published on the Internet, either on a restricted section of the Internet (for example on a subscription service website) or on a generally accessible place on the Internet. This is an inclusive definition. It also includes a number which has been published in the white pages.

registered political party

This term is defined to mean a political party, or branch or division of a political party, that is registered under the *Commonwealth Electoral Act 1918*, or a State or Territory electoral law.

The term 'registered political party' is used in the definition of 'designated telemarketing call' in clause 3 of Schedule 1 of the Bill. This is relevant to the exception to clause 16 (the prohibition on sending unsolicited telemarketing calls to a number registered on the Do Not Call Register). Calls made or authorised by registered political parties are exempt from these provisions. This definition has been included so as to avoid persons who are not legitimately considered to be political parties attempting to take advantage of the exemption.

relevant telephone account-holder

The relevant telephone account-holder means the person (either an individual or an organisation) who is responsible for the relevant account.

For example, this may be the individual or organisation who has paid for the relevant account (for example Brand X Company Pty Ltd paying a telephone account for its employees) or the person who initiates the account for free.

In the case where a telephone account is held jointly by 2 or more persons, for example a group household has three people responsible for the account, or a husband and wife are joint account holders, the relevant account-holder is any of these persons.

This term is relevant to the concept of consent which is defined in Schedule 2 to the Bill. The rules relating to the making of telemarketing calls set out in clause 11 (prohibiting the making of unsolicited telemarketing calls to a registered Australian number) do not apply where the relevant telephone account-holder or their nominee has consented to the making of the call.

services

The term 'services' is defined to have the same meaning as in the TPA.

Section 4 of the TPA defines services as follows:

> ***services*** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
>
> (a) a contract for or in relation to:
>
> (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
>
> (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
>
> (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
>
> (b) a contract of insurance;
>
> (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
>
> (d) any contract for or in relation to the lending of moneys;
>
> but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

The concept of 'services' is used in clause 5 of the Bill which sets out the basic definition of a 'telemarketing call'. Paragraphs 5(1)(e) to (g) include calls which offer to supply services or advertise or promote services or suppliers or prospective suppliers of services.

supply

The term 'supply' is defined to have the same meaning as in the TPA, when used in relation to goods or services.

Section 4 of the TPA defines 'supply' as follows:

> ***supply***, when used as a verb, includes:
>
> (a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
>
> (b) in relation to services—provide, grant or confer;
>
> and, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings.

When supply is used in relation to land it is defined to include transfer. This definition is included as the term 'services' is limited under the definition of section 4 of the TPA to rights, benefits, or facilities occurring in trade or commerce (see discussion of definition of services above in clause 4). In *O'Brien and Another v Smolonogov and Another* (1984) 53ALR107 the Federal Court found that the private sale of land does not occur in trade or commerce. Therefore it would not be a supply of a service under the TPA. This definition of supply in relation to land is therefore necessary to ensure that it includes the private sale of land (which would not be included in the meaning of a service, as it has not occurred in trade or commerce).

When supply is used in relation to an interest in land it is defined to include transfer or create.

The term 'supply', in relation to goods or services, and in relation to land or an interest in land is used in the definition of a telemarketing call in clause 6 of the Bill. Paragraphs 5(1)(h) to (j) include calls which offer to supply land and or an interest in land, or which advertise or promote land or an interest in land, and or a supplier of land or an interest in land.

The term 'supply' when used in relation to software (which is a good) includes an exchange for no money.

telemarketing call

The term 'telemarketing call' is defined to have the meaning given by proposed section 5. For the purposes of the Bill, whether a call is a telemarketing call will be determined by having regard to its purpose or one of its purposes as determined by the content of the call, the way it is presented and the content located at any associated links, such as links to other websites, or telephone numbers, or numbers dialled in the case of a call back. The definition of a 'telemarketing call' is discussed in more detail below under the notes to clause 5.

A telemarketing call is one of the key concepts in the Bill. It is central to the prohibition on making telemarketing calls to an Australian number registered on the Do Not Call Register (see clause 11).

voice call

The term 'voice call' is defined in clause 4 to mean a voice call within the ordinary meaning of the expression, or a call that involves a recorded or synthetic voice or an equivalent call to a voice call for a person with a disability.

This definition will include calls made using recorded or synthetic messages (for example, where a pre-recorded message is played to the recipient of the call) as well as calls that are received on an answering machine. Calls made using VOIP technologies will also be included.

The reference to an equivalent call to a voice call for a person with a disability has been included to ensure that it is clear that use of the National Relay Service and a teletypewriter by hearing impaired persons is considered to be a voice call for the purposes of the definition of 'voice call'.

This term is used in the definition of 'telemarketing call' in clause 5. The meaning of a voice call is a key concept in the definition of a telemarketing call, which is broadly a voice call which has a particular 'commercial purpose' (see clause 5 of the Bill). As discussed above, under the definition of a telemarketing call, this definition in turn is critical in the penalty provisions in the Bill, which regulate unsolicited telemarketing calls.

Clause 5 – Telemarketing calls

Clause 5 of the Bill sets out the basic definition of a telemarketing call for the purposes of the Bill.

This term is a key concept of the Bill, which has a primary purpose of setting up a scheme for regulating the making of unsolicited telemarketing calls. This term is a key element in the penalty provisions of the Bill (see discussion below in relation to Part 2 of the Bill which sets out various rules applying to the making of unsolicited telemarketing calls).

In general terms, a 'telemarketing call' is a telephone call which has a 'commercial-type' purpose. It is defined as a 'voice call' made to a telephone number which has a particular purpose as set out in paragraphs 5(1)(e) to (o).

A 'voice call' is defined in clause 4 of the Bill and includes calls which do not necessarily involve voice to voice communication. For example it would include a telemarketer leaving a message on an answering machine, or a pre-recorded

telemarketing message being received by an end-user of a phone or on an answering machine.

The purpose of the call is to be determined by having regard to the content of the call (5(1)(a)), the presentational aspects of the call (5(1)(b)), the content that can be obtained using the telephone numbers, URLs or contact information (if any) mentioned in the call (5(1)(c)), and the content that can be obtained from calling the telephone number from which the call was made if it is disclosed (for example by calling line identification) (5(1)(d)).

For example, if the call itself contains nothing of a 'commercial nature', but it leaves a telephone number, which if called contains a message which is 'commercial in nature' then this will be a telemarketing call for the purposes of this Bill (see paragraph 5(1)(c)). It will also cover the situation where a telemarketer uses missed call techniques to encourage the receiver to call back to hear a recorded marketing message (see paragraph 5(1)(d)).

If a call does not have content that can be obtained by using numbers, URLs or contact information or calling back a number (ie (1)(c) or (d)), then the purpose of the call will be determined from the content of the call and its presentational aspects ((1)(a) and (b)). Paragraphs 5(1)(c) and (d) make it clear that these are only to be taken into account if any such contact-type information is provided or disclosed.

It is then necessary to consider the purpose of the call. It is sufficient for the meaning of a 'telemarketing call' if one of the purposes of the call is a commercial purpose. It need not be the primary or sole purpose of the call. Many telemarketing calls have a 'dual purpose'. For example customer satisfaction calls that have an intention to solicit sales, calls that offer free goods as part of, or in conjunction with an overall sales campaign, or message or information calls which are aimed at direct marketing. If one of the purposes of the call is for a 'commercial-type' purpose as set out in paragraphs 5(1)(e) to (o), it will be covered by the definition of a 'telemarketing call'.

What amounts to a 'commercial purpose'?

Paragraphs 5(1)(e) to (o) set out the various purposes which would bring a call within the meaning of a 'telemarketing call' for the purposes of the Bill.

It includes the following purposes:

- to offer to supply, advertise or promote goods or services, or a supplier, or prospective supplier, of goods or services (paragraphs 5(1)(e) to (g)). The terms 'goods', 'services' and 'supply' are defined in clause 4 of the Bill. Common examples of calls which would be covered by this definition are calls: offering to supply telecommunications services; selling wine; selling tickets in a promotional competition (such a call would amount to supplying a service); and calls seeking to sell insurance;

- 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 (paragraphs 5(1)(h) to (j)). This would cover calls which advertise real estate. The term 'supply' in relation to land or interest in land is defined in clause 4 of the Bill. This would cover calls from promoters asking whether you wish to attend an information seminar, the purpose of which is to sell unit trust properties;
- 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 (paragraphs 5(1)(k) to (m)). This would, for example, include calls from investment companies promoting particular portfolios and scams;
- to solicit donations (paragraph 5(1)(n)). Many calls made to solicit donations are likely to be made by or on behalf of exempt organisations such as charities (see proposed section 16 and Schedule 1 which enables certain organisations to make telemarketing calls to numbers registered on the Do Not Call Register). However, it is possible that other organisations would also call seeking donations. Such calls would ordinarily be considered to be 'telemarketing', and consequently have been included;
- a purpose specified in the regulations (paragraph 5(1)(o)). This regulation-making power has been included to enable other types of calls to be included within the meaning of telemarketing calls. For example it is proposed that following consultation with industry the regulation-making power could be used to make regulations specifying certain types of market research calls to be included in the definition of telemarketing calls. The regulations making power could also be used as a reserve power to enable regulations to be made at a later date if a particular type of call became apparent which was not covered by this definition.

If a call does not come within any of the above paragraphs (ie it does not have a 'commercial element'), it will not be covered by this Bill even if it may ordinarily be considered to be telemarketing.

Examples of telemarketing calls

The following paragraphs set out examples of calls which would be covered by the definition of a telemarketing call in this Bill.

Some common examples are:

- calls offering to sell goods or services (eg calls made to promote the sale of 'health products' or switch telecommunications provider);
- calls offering to sell tickets in a competition;
- calls requesting the recipient to attend information seminar, the purpose of which is to sell goods or services, land or an interest in land, or a business or investment opportunity;
- customer satisfaction calls that have any intention to solicit sales;
- calls that offer free goods as part of, or in conjunction with, overall sales campaigns;

- messages, or information calls, with a primary or secondary purpose of direct marketing;
- calls that invite subscription to a contact list that will be used as a basis for future sales calls;
- calls offering trialware - free use of a product for a set period, with an option for financial subscription/purchase afterwards;
- calls offering anything for "free" which are conditional on expenditure on another item;
- offers for credit and mortgage arrangements; and
- calls to solicit donations.

A call made for the purpose of determining whether or not a recipient is happy to receive further telemarketing calls from the organisation would come within the meaning of a 'telemarketing call'. Such a call would be considered to be a call with one of the commercial purposes set out in paragraphs (1)(e) to (o) notwithstanding that the call itself simply requested advice on whether or not future telemarketing calls would be allowed. The clear purpose of this is for a future commercial benefit.

Subclause 5(2) provides that a call will still be considered to be a 'telemarketing call' for the purposes of this Bill even if the goods, services, land, interest or opportunity, described in paragraphs 1(e) to (m) do not exist. Therefore if a person is seeking to sell land which does not exist (for example, a scam call) then the call could still be classified as a 'telemarketing call'.

Similarly, it is immaterial whether it is lawful to acquire the goods, service, land or interest or to take up the opportunity for the purposes of paragraphs 1(e) to (m) (subclause 5(3)). For example a call offering to supply a prohibited pharmaceutical would still come within the meaning of a 'telemarketing call' for the purpose of this Bill, notwithstanding that the supply of such a pharmaceutical is not legal.

Subclause 5(4) is included to avoid doubt that the persons mentioned in subparagraphs (1)(g), (j) and (m) may be the individual or organisation who made the call or authorised the making of the call. This subclause has been included to avoid any argument that the person mentioned cannot be the person who made the call or authorised the making of the call.

Subclause 5(5) makes it clear that the purposes specified in paragraphs (1)(e) to (o) are to be read independently of each other. That is, a call does not have to have all the purposes set out in these paragraphs. It may come within the meaning of a telemarketing call if it has one or more of these purposes.

It is possible to exclude specified kinds of voice calls from the meaning of a telemarketing call for the purposes of this Bill by regulation (subclause 5(7)). This regulation-making power is designed to be used as a reserve power to give certainty to industry if it is unclear whether or not a particular type of call would come within the meaning of a telemarketing call for the purposes of this Bill. This power would enable

regulations to specify the content for the purposes of excluding the call from the meaning of a telemarketing call.

The ability to include calls with a certain purpose within the meaning of a telemarketing call is provided for in subparagraph 5(1)(o).

Clause 6 – Continuity of partnerships

This clause provides that for the purpose of this Bill, a change in the composition of a partnership does not affect the continuity of the partnership. This means for example that if one partner leaves a partnership, any obligations or rights of the remaining partners are not affected.

Clause 7 – Crown to be bound

Subclause 7(1) means that the Bill binds the Crown in the right of the Commonwealth and each of the State and Territories.

Subclause 7(2) provides that the Bill does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence.

Subclause 7(3) provides that the protection in subclause (2) does not apply to an authority of the Crown. This means that an authority of the Crown, for example a statutory authority such as the ACMA, may be liable to a pecuniary penalty or to be prosecuted for an offence under the Bill.

Clause 8 – Extension to external Territories

Clause 8 provides that the Bill extends to the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and such other external Territories (if any) as prescribed.

It does not extend the operation of this Bill to Norfolk Island. Norfolk Island currently has its own system of allocating numbers. Therefore a person with a Norfolk Island number could not register their number of the Do Not Call Register.

Proposed paragraph 8(c) enables regulations to include other external Territories in the application of the Bill at a later date.

Clause 9 – Extra-territorial application

Clause 9 provides that, unless a contrary intention appears, the Bill extends to acts, omissions, matters and things outside Australia. 'Australia' is defined in clause 4 of the Bill to include the eligible territories which are defined to mean the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands and an external territory prescribed for the purposes of clause 8.

It does not extend the operation of this Bill to Norfolk Island. Norfolk Island currently has its own system of allocating numbers. Therefore a person with a Norfolk Island number could not register their number on the Do Not Call Register.

The penalty provisions in Part 2 are extra-territorial in their application, see the explanatory notes below under Part 2. This provision is necessary to ensure that there can be a contravention of the Do Not Call Register Act irrespective of whether conduct occurs within or outside Australia. Under Part 2 persons calling from overseas numbers are covered by the rules about making telemarketing calls and are prohibited from making telemarketing calls to an Australian number registered on the Do Not Call Register.

Part 2 – Rules about making telemarketing calls

Part 2 sets out the principal penalty provisions in the Bill. These are civil penalty provisions. Part 4 and Schedule 3 of the Bill set out the penalties which apply for contravention of these civil penalty provisions and the action which may be taken to recover these penalties.

Clause 10 – Simplified outline

Clause 10 sets out a simplified outline of Part 2 of the Bill to assist readers. It is not designed as a comprehensive statement of the provisions in Part 2. It is simply a broad overview.

Clause 10 outlines the prohibitions and requirements set out in Part 2 which are as follows:

- unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register; and
- arrangements for the making of telemarketing calls must require compliance with this Act.

Clause 11 – Unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register

Clause 11 prohibits a person making, or causing to be made, a telemarketing call to an Australian number if the number is registered on the Do Not Call Register, subject to various exceptions set out in subclauses 11(2) to (5) (such as if there is prior consent of the relevant account-holder or their nominee).

Subclause 11(1) provides that a person must not make, or cause to be made, a telemarketing call to an Australian number which is registered on the Do Not Call Register and is not a designated telemarketing call. The following terms, which are discussed elsewhere in these notes, are relevant to the interpretation of subclause 11(1): the definition of 'make' in clause 4, 'telemarketing call' in clause 5, 'the extended meaning of 'cause' in subclause 11(9), and 'designated telemarketing call' in Schedule 1.

This penalty provision would cover the person who actually made the call (ie by dialling the relevant telephone number), the author of the content of the call (who caused the call to be made), or another person who authorised the call to be made by contracting with a telemarketer to provide the telemarketing services (see meaning of causing telemarketing calls to be made in subclause 11(9)).

Clause 11 would not cover persons who merely transmitted the call without any knowledge or involvement in its content. That is a carriage service provider who supplies the carriage service for making the call would not themselves be making the call or causing the call to be made. For example a telephone service provider who simply transmits a call which contravenes this clause would not be found to have made or caused the call to have been made.

This prohibition covers attempted calls (see definition of 'make' in clause 4). Therefore a call which resulted in a silent call, or a call back would be covered by the penalty provision, notwithstanding that the call had no commercial type content.

Under subclause 11(1) the making of the call will only be prohibited if it is made to an Australian number. The meaning of an Australian number is defined in clause 4.

It covers calls which originate anywhere which are made to Australian numbers. For example, it would cover overseas telemarketers calling an Australian number as well as an Australian telemarketer calling an Australian number. It also covers a person who has contracted a person to make telemarketing calls on their behalf (see extended meaning of 'cause' in 11(9)).

This prohibition would cover:

- a call made to an Australian number (which is registered on the DNC Register) from an Australian number; and

- a call made to an Australian number (which is registered on the DNC Register) from an overseas number.

This prohibition does not apply to calls made from an overseas number to an overseas number, or calls made to an Australian number which is not registered on the Do Not Call Register.

Under paragraph 11(1)(b), a 'designated telemarketing call' is exempt from clause 11. 'Designated telemarketing call' is defined in Schedule 1 and includes certain telemarketing calls made by religious organisations, charities or political parties, independent members of Parliament and candidates and certain calls from educational institutions is not prohibited. The meaning of 'designated telemarketing call' is discussed in greater detail below under Schedule 1.

Exceptions

There are four exceptions to this prohibition:
- if the relevant telephone account-holder, or their nominee, consented to the call;
- if the caller had washed their lists in the last 30 days and the number was not on the Register;
- if the call was made, or caused to be made by mistake; or
- if the person took reasonable precautions, and exercised due diligence, to avoid the contravention.

Subclause 11(2) provides an exception to the prohibition on making unsolicited telemarketing calls to a number registered on the Do Not Call Register, if the telemarketer adduces evidence that the relevant account-holder, or their nominee, consented to the making of the call. The effect of this provision is that a telemarketer may make a telemarketing call to a number on the Register where that other person has consented to receiving them. The term 'relevant telephone account-holder' is defined in clause 4. The concept of 'consent' is defined in Schedule 2 of the Bill. It is discussed in greater detail below under Schedule 2.

Consent is tied to the relevant account holder as they have responsibility for the number. Situations will arise, particularly in relation to fixed telephones, where more than one person uses a number (for example, a couple where the fixed telephone account is in one name only). In these situations, the account holder may choose to nominate other persons to consent to receiving telemarketing calls. The telemarketer may rely on consent given by the relevant telephone account-holder or their nominee. Clause 39 sets out the meaning of a 'nominee'.

The telemarketer bears an evidential burden in relation to proving consent (see subclause 11(6)). An evidential burden requires the person to adduce evidence that suggests a reasonable possibility that the matter exists or does not exist (see definition in clause 4). Consent may be demonstrated by a person showing a pre-existing business relationship with the person to whom the call was made, which together with the particular conduct

may infer consent. It is necessary for the defendant to bear the initial burden in relation to proving consent as he or she will have the relevant evidence showing consent of the relevant telephone account-holder. If the burden rested with the plaintiff it would have to prove a negative fact, that is, that there was no consent. This may only be possible where the relevant account-holder has specifically withdrawn consent, or has requested no such messages.

Subclause 11(3) of the Bill provides an exception to the prohibition on making an unsolicited telemarketing call if the person had 'washed' their list with the relevant register operator in the previous 30 days prior to making the call, and had been advised that the number they called was not on the Do Not Call Register. This in effect enables a 30 day 'grace period' for telemarketers to enable telemarketers sufficient time to update their do not call lists.

It also ensures that if the register operator mistakenly provided information that a particular number was not on the Register, and the number was in fact listed on the Register, then the telemarketer who relied on this information would not contravene section 11.

As with the other exceptions the evidential burden of proving this would rest with the defendant (see subclause 11(6)). An evidential burden requires the person to adduce evidence that suggests a reasonable possibility that the matter exists or does not exist (see definition in clause 4).

Subclause 11(4) provides an exception if the person made the call, or caused the call to be made, by mistake. For example if a person mistakenly dials an incorrect number when making a telemarketing call and this results in a call being made to a number on the Do Not Call Register, then they will not contravene section 11. The evidential burden of proving the mistake would rest with the respondent (see subclause 11(6)). An evidential burden requires the person to adduce evidence that suggests a reasonable possibility that the matter exists or does not exist (see definition in clause 4).

'Mistake' is defined in clause 4 to make it clear that this relates to a reasonable mistake of fact. It would not enable a person to argue, for example, that they were unaware that a number was on the register when they had not checked the Register, and therefore that they had made a mistake.

Subclause 11(5) provides an exception if the person took reasonable precautions, and exercised due diligence, to avoid the contravention. For example, if a person contracted a third party to undertake telemarketing services on their behalf, and they included a contractual provision which required the telemarketer to comply with the provisions of this Bill, then this may be used to point to evidence that they had taken reasonable precautions to avoid a contravention, and could not be said to have caused a telemarketing call to be made in contravention of clause 11. However, if the contracting party became aware that the telemarketer was contravening clause 11 and did nothing to

enforce the contract, then it could not be said that they had exercised due diligence in avoiding the contravention, and they could not make use of this exception.

The evidential burden of proving that they had taken reasonable precautions and exercised due diligence in avoiding a contravention would rest with the defendant (see subclause 11(6). An evidential burden requires the person to adduce evidence that suggests a reasonable possibility that the matter exists or does not exist (see definition in clause 4). The measures taken by the defendant to avoid a contravention will necessarily be in his or her knowledge.

Ancillary contraventions

As well as the main penalty provisions of making an unsolicited telemarketing call (in subclause 11(1)), subclause 11(7) provides that a person must not:

- aid, abet, counsel or procure a contravention of subclause 11(1); or
- induce a contravention of this provision; or
- be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of this provision; or
- conspire with others to effect a contravention of this provision.

The ancillary liability provision in subclause 11(7) is also a civil penalty provision which gives rise to the same penalty as a contravention of subclause 11(1).

These ancillary contravention provisions are the same as those in subsection 68(2) of the Telecommunications Act, and subsections 16(9), 17(5), 18(6), 20(5) and 21(3) of the Spam Act which relate to civil penalty provisions. They are similar to the offences in Part 2.4 of the *Criminal Code* (aiding and abetting and conspiracy) which provide for the extension of responsibility in criminal offences.

Penalties

Subclause 11(8) provides that subclauses 11(1) and (7) are civil penalty provisions.

Part 4 of the Bill provides for pecuniary penalties for breaches of these civil penalty provisions. If the Federal Court or the Federal Magistrates Court is satisfied, on the application of the ACMA, that a person has contravened a civil penalty provision, it will be able to order the person to pay to the Commonwealth such pecuniary penalty as the Court determines to be appropriate (see clause 24 of the Bill).

Clause 25 of the Bill sets out the maximum penalty payable. The amount will depend on:

- whether or not the person has a prior record, that is whether or not they have previously been found by the Court to have contravened the particular provision. The

ratio between a maximum penalty payable for a person with no prior record and a person with a prior record is five times;

- whether or not the breach is by a body corporate or an individual. The maximum penalties for bodies corporate are five times that for an individual. This is consistent with criminal offences which provide for the maximum penalties for corporations to be five times that for an individual (see subsection 4B(3) of the Crimes Act); and
- whether the civil penalty provision that has been breached is subclause 11(1) or 11(7) (which sets out ancillary contraventions of subclause 11(1)).

The concept of a prior record for which a person is liable for a larger penalty is discussed in greater detail below under clause 25.

A daily ceiling for penalties has been set that may be charged for all contraventions against a particular provision that have occurred in one day. This has been included to ensure that a meaningful penalty may be charged for a single contravention without causing an unrealistically large penalty payable for multiple contraventions. For example, dedicated telemarketers may make hundreds of unsolicited telemarketing calls each day. Without a ceiling amount for daily contraventions, such a telemarketer could potentially be liable for hundreds of contraventions. The ratio between the penalty payable for a person for a single contravention and the ceiling amount is 20 times.

Body corporate or individual with no prior record

The maximum pecuniary penalty payable by a body corporate with no prior record for each contravention of subclauses 11(1) or (7) will be 100 penalty units, currently $11,000 (subparagraph 25(3)(a)(i)).

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with no prior record will be 20 penalty units, currently $2,200 (subparagraph 25(4)(a)(i)).

Body corporate or individual with prior record

The maximum pecuniary penalty payable by a body corporate with a prior record, for each contravention of subclauses 11(1) or (7) will be 500 penalty units, currently $55,000 (subparagraph 25(5)(a)(i)).

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with a prior record will be 100 penalty units, currently $11,000 (subparagraph 25(6)(a)(i)).

Ceiling amount - body corporate or individual with no prior record

The maximum ceiling amount payable for a body corporate with no prior record, for contraventions on a particular day for subclauses 11(1) or (7) will be 2,000 penalty units, currently $220,000 (subparagraph 25(3)(b)(i)).

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with no prior record, will be 400 penalty units, currently $44,000 (subparagraph 25(4)(b)(i)).

Ceiling amount - body corporate or individual with prior record

The maximum ceiling amount payable for a body corporate with a prior record, for contraventions of subclauses 11(1) or (7) on a particular day will be 10,000 penalty units, currently $1.1 million (subparagraph 25(5)(b)(i)).

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with a prior record, will be 2,000 penalty units, currently $220,000 (subparagraph 25(6)(b)(i)).

A penalty unit is defined in clause 4 as having the meaning as in section 4AA of the Crimes Act. It is currently $110.

Ancillary orders

In addition to an order for payment of a pecuniary penalty under clause 24 of the Bill, the Federal Court or the Federal Magistrates Court may make certain ancillary orders. The Court may direct a person to pay compensation to a person who has suffered loss or damage as a result of the contravention, or to pay to the Commonwealth the amount of the financial benefit the person has obtained from breaching the provision (see clauses 30 and 31).

Subclause 11(9) is designed to put beyond doubt, that where a person has contracted or entered into an arrangement or understanding with another party to provide telemarketing services on their behalf, the first person is taken to have caused the telemarketing call to be made for the purposes of this Bill.

This is a critical concept in the primary penalty provision in the Bill, which prohibits a person from making, or causing to be made, a telemarketing call to a number registered on the Do Not Call Register (see proposed subsection 11(1)).

Therefore where a person has contracted a telemarketer to provide telemarketing services, on their behalf, and the call is made in contravention of proposed section 11, the contracting party will also be potentially contravening the main penalty provision in section 11, as they have caused the call to be made. There are exceptions available which may be available to a contracting party, for example if they have relevant procedures or contract provisions in place to minimise the risk of unsolicited telemarketing calls being made (see 11(6)).

Proposed paragraph 11(9)(c) makes it clear that a contracting party will only cause a telemarketing call to be made if such a call is in fact made. The very fact of entering into

a contract or arrangement cannot amount to causing a telemarketing call to be made if no such call is made.

Proposed subsection 11(10) makes it clear that this applies to contracts, arrangements or understandings made prior to this Bill coming into operation. Therefore if a company has a contract in place with a telemarketer to provide telemarketing services to them, and the contract was entered into before this provision commenced, the company could be in breach of proposed section 11 if the telemarketer makes a telemarketing call in contravention of section 11 after this provision commences.

Clause 12 – Agreements for the making of telemarketing calls must require compliance with this Act

This clause puts a positive obligation on persons entering into telemarketing contracts arrangements or understanding to require the contract, arrangement or understanding to include a requirement that the other party must comply with this legislation.

This has been included to ensure that people causing telemarketing calls to be made through outsourcing the making of the calls, specifically require the telemarketer to comply with this Act.

This is likely to assist in instances where a business operating in Australia contracts with an overseas telemarketer to provide telemarketing services to Australian numbers. While the overseas telemarketer will be required to comply with this legislation and will be covered by the prohibition in clause 16 if they make telemarketing calls to registered Australian numbers, this provision puts a further obligation on persons outsourcing their telemarketing calls to assist in ensuring that such persons will comply with the Do Not Call Register Act by making it a contractual requirement.

In particular subclause 12(1) prohibits a person from entering into a contract or arrangement, or arrive at an understanding with another person if:

- the agreement relates to the making of telemarketing calls to numbers eligible to be registered on the Do Not Call Register; and
- the contract does not contain an express provision to the effect that the person will comply with this Act and take all reasonable steps to ensure that their employees and agents will comply with this Act, in relation to the making of telemarketing calls covered by the contract, arrangement or understanding.

This provision only applies to future contracts, arrangements or understandings. If a party already has in place, prior to the commencement of this provision, an arrangement for the making of telemarketing calls which does not require a person to comply with this Act, then they will not be in breach of this provision. The provision does not operate retrospectively.

Subclause 12(4) makes it clear that a failure to include such a requirement does not affect the validity of any contract, arrangement or understanding.

Penalties

Subclause 12(3) provides that subclauses 12(1) and (2) are civil penalty provisions.

Part 4 of the Bill provides for pecuniary penalties for breaches of these civil penalty provisions. If the Federal Court or the Federal Magistrates Court is satisfied, on the application of the ACMA, that a person has contravened a civil penalty provision, it will be able to order the person to pay to the Commonwealth such pecuniary penalty as the Court determines to be appropriate (see clause 24 of the Bill).

Clause 25 of the Bill sets out the maximum penalty payable. The amount will depend on:

- whether or not the person has a prior record, that is whether or not they have previously been found by the Court to have contravened the particular provision. The ratio between a maximum penalty payable for a person with no prior record and a person with a prior record is five times;
- whether or not the breach is by a body corporate or an individual. The maximum penalties for bodies corporate are five times that for an individual. This is consistent with criminal offences which provide for the maximum penalties for corporations to be five times that for an individual (see subsection 4B(3) of the Crimes Act); and
- whether the civil penalty provision that has been breached is subclause 11(1) or 16(7).

The concept of a prior record for which a person is liable for a larger penalty is discussed in greater detail below under clause 25.

A daily ceiling for penalties has been set that may be charged for all contraventions against a particular provision that have occurred in one day. This has been included to ensure that a meaningful penalty may be charged for a single contravention without causing an unrealistically large penalty payable for multiple contraventions. For example, dedicated telemarketers may make hundreds of unsolicited telemarketing calls each day. Without a ceiling amount for daily contraventions, such a telemarketer could potentially be liable for hundreds of contraventions. The ratio between the penalty payable for a person for single contravention and the ceiling amount is 20 times.

Body corporate or individual with no prior record

The maximum pecuniary penalty payable by a body corporate with no prior record for each contravention of subclauses 12(1) or (2) will be 50 penalty units, currently $5,500 (subparagraph 25(3)(a)(ii)).

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with no prior record will be 10 penalty units, currently $1,100 (subparagraph 25(4)(a)(ii)).

Body corporate or individual with prior record

The maximum pecuniary penalty payable by a body corporate with a prior record, for each contravention of subclauses 12(1) or (2) will be 250 penalty units, currently $22,500 (subparagraph 25(5)(a)(ii)).

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with a prior record will be 50 penalty units, currently $5,500 (subparagraph 25(6)(a)(ii)).

Ceiling amount - body corporate or individual with no prior record

The maximum ceiling amount payable for a body corporate with no prior record, for contraventions on a particular day for subclauses 12(1) or (2) will be 1,000 penalty units, currently $110,000 (subparagraph 25(3)(b)(ii)).

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with no prior record, will be 200 penalty units, currently $22,000 (subparagraph 25(4)(b)(ii)).

Ceiling amount - body corporate or individual with prior record

The maximum ceiling amount payable for a body corporate with a prior record, for contraventions of subclauses 12(1) or (2) on a particular day will be 5,000 penalty units, currently $550,000 (subparagraph 25(5)(b)(ii)).

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with a prior record, will be 1,000 penalty units, currently $110,000 (subparagraph 25(6)(b)(ii)).

A penalty unit is defined clause 4 of the Bill as that defined in section 4AA of the Crimes Act. It is currently $110.

Ancillary orders

In addition to an order for payment of a pecuniary penalty under clause 24 of the Bill, the Federal Court may make certain ancillary orders. The Court may direct a person to pay compensation to a person who has suffered loss or damage as a result of the contravention, or to pay to the Commonwealth the amount of the financial benefit the person has obtained from breaching the provision (see clauses 30 and 31).

As well as the main penalty provision relating to arrangements for the making of telemarketing calls (in subclause 12(1)), subclause 12(2) provides that a person must not:

- aid, abet, counsel or procure a contravention of subclause 12(1); or
- induce a contravention of this provision; or
- be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of this provision; or
- conspire with others to effect a contravention of this provision.

These ancillary contravention provisions are the same as those in subsection 68(2) of the Telecommunications Act, and subsections 16(9), 17(5), 18(6), 20(5) and 21(3) of the Spam Act which relate to a civil penalty provision. They are similar to the offences in Part 2.4 of the *Criminal Code* (aiding and abetting and conspiracy) which provide for the extension of responsibility in criminal offences.

Subclause 12(2) is also a civil penalty provision (see subclause 12(3)).

The penalties for breach of this ancillary liability provision are the same as that for subclause 12(1). These are outlined above.

Part 3 – Do Not Call Register

The Do Not Call Register will enable individuals to opt-out of receiving certain unsolicited telemarketing approaches. Individuals would be able to register not to receive telemarketing calls on their home or mobile phones.

Clause 13 – Do Not Call Register

This clause provides for the ACMA to establish the Do Not Call Register or to contract it out to another person to operate on its behalf.

This provision allows for the establishment a Do Not Call Register on which people can register their telephone numbers to enable them to opt out of receiving unsolicited telemarketing calls.

This provision commences on Royal Assent to enable the ACMA (or another person) to undertake work to establish a Register immediately. However in recognition that it will take some time to develop the Register, particularly if this function is contracted out to a third party, subclause 13(5) provides that ACMA must comply with the requirement to keep a Register, as soon as practicable after the commencement of clause 13.

Subclause 13(6) makes it clear that for the purposes of the Privacy Act the primary purpose of the Do Not Call Register is to facilitate the prohibition on the making of unsolicited telemarketing calls to numbers registered on the Do Not Call Register (other than designated telemarketing calls).

Any personal information which may be kept on the Register, or as part of the registration process, which may include an applicant's names, address and telephone number, is subject to the protections afforded under the privacy principles set out in the Privacy Act.

If the ACMA establishes and operates the Register, they fall within the meaning of an 'agency' for the purposes of the Privacy Act and therefore will be subject to the Information Privacy Principles. These principles will ensure that personal information collected for the purposes of the Do Not Call Register are afforded appropriate privacy protections.

If the operation of the register is contracted out to another person (a contracted service provider), they too will be subject to the Privacy Act (see clause 22 which provides for the application of the Privacy Act to the contracted service provider).

Subclause 13(6) is designed to facilitate the operation of appropriate privacy protections afforded to this information under the Privacy Act by making it clear what is the primary purpose for the information.

Subclause 13(4) has been included to make it clear that the register is not a legislative instrument. This has been included for the avoidance of doubt.

The Register is to be kept electronically (see subclause 13(3).

Clause 14 – Eligibility for registration

Clause 14 sets out which telephone numbers may be entered on the Do Not Call Register.

A telephone number can be entered on the register if:

- it is an Australian number;
- it is used or maintained primarily for private or domestic purposes; and
- it is not used or maintained exclusively for transmitting and/or receiving faxes.

An 'Australian number' is defined in clause 4. It includes land lines, mobile telephone numbers, VOIP numbers and satellite numbers. An overseas number cannot be registered on the Do Not Call Register (paragraph 14(a)).

A business number cannot be registered on the Do Not Call Register. Paragraph 14(b) makes it clear that only those numbers that are used or maintained primarily for private or domestic purposes can be registered.

Where a person has a single telephone number from which they make personal and business calls, it would be necessary to consider which is the primary use of the phone. For example if a person works from home and the home number is also the business number, then it would be a matter of considering each particular circumstance to determine whether or not the number could be included on the Register. For example if

the person only works a couple of days and the majority of calls are of a personal nature, then this number could be registered. However where the business operates out of home on a large scale, and the number is primarily for work related purposes then the number could not be included on the Register.

The ACMA may make a determination under section 18 which may spell out the type of information which must be provided by a person applying to place a number on the Register. For example, ACMA may require an applicant to specify what type of number is being registered, to verify that a number is used or maintained primarily for domestic purposes. The information gathered may relate primarily to the functioning of the Register or may be used to assess the efficiency of the arrangements over time.

The provision includes numbers which are maintained primarily for private or domestic purposes. This is intended to cover numbers which may not be used. For example a person may have a mobile phone which they keep in the car for emergency purposes, but which has never been used. This telephone number could be entered on the Register, notwithstanding that it may not currently be in use.

Fax numbers cannot be included on the Do Not Call Register. Currently there is scope for the Spam Act to cover unsolicited fax messages. While, the *Spam Regulations 2004* currently exclude fax messages from the operation of the Act, it is possible that such messages would be covered by that legislation in the future.

Clause 15 – Applications for registration

Clause 15 limits who can apply to list a telephone number on the Do Not Call Register to the relevant telephone account-holder or their nominee (paragraph 15(a)).

A 'relevant telephone account-holder' is defined in clause 4. The definition includes both people in the case of joint accounts. For example, if a husband and wife held a joint phone account, either could register the number on the DNC Register.

The concept of a nominee of the account-holder is provided for in clause 39. A nominee of the account-holder must be an individual (see clause 39). This is designed to ensure that large companies could not register all their existing customers on the Do Not Call Register so as to ensure that their competitors cannot call them.

The application must be made to the relevant register operator, either the ACMA or a person they have contracted to keep the register (see paragraph 15(b)).

Paragraphs 15(c) and (d) require the application to be in the form and manner (if any) as determined by the ACMA under proposed section 19D.

Clause 15 does not limit the number of telephone numbers a particular person may register. It would enable a person who holds several telephone account (such as a mobile

and a land line) to register both numbers, so long as they were eligible for registration (see clause 14).

Clause 16 – Registration

This clause requires the relevant register operator, either the ACMA or the person contracted to keep the register on ACMA's behalf, to enter the number on the Do Not Call Register where the operator is satisfied that the number is eligible to be registered.

Clause 16 sets out the eligibility requirements for numbers to be placed on the Register.

Clause 17 – Duration of registration

Clause 17 provides that a listing on the Register expires three years after registration, or sooner if it is removed earlier than three years (subclause 17(1)).

This means that consumers need to reregister their numbers every three years to remain on the Do Not Call Register. This is necessary to ensure that numbers on the Register remain current. It is likely that as people move addresses and telephone numbers, they may neglect to remove the previously held number from the Register.

Subclauses 17(2) and (3) make it clear that a number may be re-registered on the Do Not Call Register after it has ceased to be in force after three years, or after it has been removed.

Clause 18 – Administration of the Do Not Call Register - determinations

Clause 18 enables the ACMA to make a determination relating to the administration and the operation of the Do Not Call Register.

In particular subclause 18(1) provides that the ACMA may make a determination in relation to:

- the form of applications for telephone numbers to be entered on the Do Not Call Register;
- the manner in which such an application is to be made;
- the manner in which entries are to be made on the Do Not Call Register;
- the correction of entries in the Do Not Call Register;
- the removal of entries from the Do Not Call Register; and
- any other matter relating to the administration or operation of the Do Not Call Register.

A determination made under this section is a legislative instrument for the purposes of the Legislative Instruments Act. This means it is subject to Parliamentary disallowance and must be registered on the Federal Register of Legislative Instruments.

Clause 19 – Access to the Do Not Call Register

Clause 19 sets out the process by which a telemarketer can 'wash' their contact list against numbers listed on the Do Not Call Register, to ensure that they do not call numbers on the Register.

Under subclause 19(1) a person who wishes to access the Register will submit a list of telephone numbers to the relevant register operator (either the ACMA or a contracted service provider, where ACMA has contracted another person to keep the register) in the applicable manner (see clause 20 which enables the ACMA to determine the manner in which a list is to be provided), along with the applicable fee (see proposed subsection 21(1) which enables the ACMA to determine a fee payable to access the register).

This clause makes it clear that the telemarketer may provide their contact list of numbers to the relevant register operator for the operator to 'wash'. Rather than providing telemarketers with a copy of the list of numbers on the Do Not Call Register, the register operator may 'wash' the list and provide the telemarketer with a 'clean' list on which the registered numbers have been deleted.

This is designed to ensure greater protection of privacy for individuals who have listed their number on the Do Not Call Register.

Subclause 19(1) makes it clear that a list may consist of a single number. Therefore a person can check if a single number is registered on the Do Not Call Register.

Subclause 19(3) makes it clear that the register operator (either ACMA or the contracted service provider) may inform the telemarketer which numbers are and are not registered on the Do Not Call Register by returning the telemarketer's submitted list with the numbers registered on the Do Not Call Register deleted from the list.

Clause 20 – Access - determinations

Clause 20 enables the ACMA to make a determination relating to the way in which a person wishing to access the Do Not Call Register may submit a list of telephone numbers for washing (20(1)(a)), and the manner in which the register operator is to provide the information to the access seeker (20(1)(b) and (c)).

In addition, the ACMA may make a determination that makes provision for any other matter relating to access to the Do Not Call Register (20(1)(d)).

For example the ACMA may determine that lists are to be submitted electronically in a particular data format.

A determination made under this section is a legislative instrument for the purposes of the Legislative Instruments Act. This means it is subject to Parliamentary disallowance and must be registered on the Federal Register of Legislative Instruments.

Clause 21 – Access - fees

Clause 21 enables the ACMA to make a determination setting the amount of any fee payable for accessing the Register and any refunds of these fees.

Subsection 21(5) makes it clear that a fee determined under this provision cannot amount to a tax.

In addition, provision is made for an ACMA determination, or a Ministerial determination to provide exemptions from the fees. For example, an exemption determination could enable specified small businesses or other specified persons to get access to the Register to wash up to 50 numbers for free. To ensure that such an exemption was not abused, the determination may tie the arrangements to a time period (eg each month or quarter) to ensure that people, did not simply break up their lists into numbers below 50 so as to fall within the exemption from fees.

It is anticipated that the ACMA would exercise this determinations power to provide for exemptions from fees. However, if it was not exercised, the Minister has a power to make a determination (under subclause 21(3)). If the Minister does make an exemption determination under subclause 21(3), an ACMA exemption determination will not be able to be inconsistent with a Ministerial exemption determination. ACMA could still provide for further exemptions, but it could not derogate from a Ministerial exemption determination (subclause 21(4)).

A determination made under this section is a legislative instrument for the purposes of the Legislative Instruments Act. This means it is subject to Parliamentary disallowance and must be registered on the Federal Register of Legislative Instruments.

Subclause 21(7) provides that section 60 of the ACMA Act does not apply in relation to services provided in relation to accessing the register. Section 60 of the ACMA Act deals with charges relating to ACMA's expenses. It is preferred to keep the Register costs and recovery arrangements completely separate from ACMA's other functions. In addition, fees may relate to services provided by a contracted service provider.

All fees for accessing the Register are to be paid to the ACMA. If another party is the register operator, an access seeker would pay the relevant fee to ACMA who would pay the register operator.

Clause 22 – Application of the *Privacy Act 1988* to the contracted service provider

This clause has been included to ensure that if the ACMA has contracted out its function of keeping the Do Not Call Register to another person (the contracted service provider),

then the contract would be a Commonwealth contract for the purposes of section 95B of the Privacy Act.

This avoids any argument as to whether or not the contracted service provider would be subject to the Information Privacy Principles under the Privacy Act.

Under section 95B of the Privacy Act an agency entering into a Commonwealth contract must include a contractual provision to ensure that a contracted service provider does not breach the Information Privacy Principles.

The ACMA is an agency for the purposes of the Privacy Act. Therefore this provision makes it clear that if ACMA contracts out its function of keeping the Do Not Call Register to another party, then as part of that contract it must include a requirement that the contracted service provider complies with the relevant Information Privacy Principles.

Subsections 95B(3) and (4) of the Privacy Act also deal with provisions relating to subcontractors to ensure that a Commonwealth contract does not enable subcontractors to breach the Information Privacy Principles.

Part 4 – Civil penalties

Part 4 deals with pecuniary penalties that are payable for contraventions of the civil penalty provisions of the Bill. Clause 4 of the Bill defines those provisions that are civil penalty provisions. They are contained in Part 2 - rules about making telemarketing calls and a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

Part 4 of this Bill is based on Part 4 of the Spam Act.

Clause 23 – Simplified outline

Clause 23 provides a simplified outline of Part 4. It is a general guide that is designed to assist readers. The outline provides that:

- pecuniary penalties are payable for contraventions of civil penalty provisions;
- proceedings for the recovery of penalties are to be instituted in the Federal Court or the Federal Magistrates Court.

The note to this provision provides that Schedule 3 sets up a system of infringement notices relating to contraventions of civil penalty provisions.

It is anticipated that many proceedings brought under this Bill relating to telemarketing calls may be relatively straightforward. Consequently an action may be brought in either the Federal Magistrates Court or the Federal Court of Australia. It is expected that the Federal Magistrates Court could deal with the less complex and shorter disputes.

Clause 24 – Civil penalty orders

If the Federal Court or the Federal Magistrates Court is satisfied that a person has contravened a civil penalty provision it will be able, on the application of the ACMA, to order the person to pay the Commonwealth such pecuniary penalty as the Court determines to be appropriate (subclause 24(1)).

The following are civil penalty provisions (as defined in clause 4):

- subclauses 11(1) and (7) relating to making unsolicited telemarketing calls;
- subclauses 12(1) and (2) relating to arrangements for unsolicited telemarketing calls; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

In determining the pecuniary penalty, the Court will be required to have regard to all relevant matters including:

- the nature and extent of the contravention;
- the nature and extent of any loss or damage suffered as a result of the contravention;
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Court in proceedings under the Act to have engaged in any similar conduct. This would not enable a Court to take into account previous infringement notices given to the person, as these are not proceedings under the Act; and
- if the Court considers that it is appropriate to do so – whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct. This would enable the Court to take into account any findings of courts in other countries which has similar telemarketing laws. However, if the prohibited behaviour is significantly different, then the Court may decide not to take such findings into account (subclause 24(3)).

Clause 25 – Maximum penalties for contravention of civil penalty provisions

Subclause 25 sets out the maximum pecuniary penalty payable for breaches of the civil penalty provisions.

The following are civil penalty provisions (as defined in clause 4):

- subclauses 11(1) and (7) relating to making unsolicited telemarketing calls; and
- subclauses 12(1) and (2) relating to arrangements for the making of telemarketing calls;
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

Subclause 25(1) sets out that the maximum penalty payable will depend upon:

- whether or not the person has a prior record, that is whether or not they have previously been found by the Court to have breached the particular provision. The ratio between a maximum penalty payable for a person with no prior record and a person with a prior record is five times;
- whether or not the breach is by a body corporate or an individual. The maximum penalties for bodies corporate are five times that for an individual. This is consistent with criminal offences which provide for the maximum penalties for corporations to be five times that for an individual (see subsection 4B(3) of the Crimes Act); and
- the nature of the contravention (contraventions of the main penalty provisions in subclauses 11(1) or (7) may attract a higher maximum penalty than contraventions of other civil penalty provisions).

Prior record

Subclause 25(2) sets out what amounts to a prior record for the purposes of determining the maximum penalty payable by a person for a civil contravention. Where a person has been found by the Federal Court or Federal Magistrates Court to have contravened a particular civil penalty provision they will be found to have a prior record if they contravene the same penalty provision after the day in which the Court has made an order in relation to the first contravention, and they will be liable for an aggravated penalty.

This aggravating penalty for a prior record will not come into effect until after the Court has found that a person has contravened a particular provision. For example, if a person has contravened subclause 11(1) on Monday and then contravenes the same provision the next day, he or she will not be subject to an aggravated penalty for the contravention on the Tuesday, unless the Court had by the Tuesday made a finding that they were in breach of the penalty provision on Monday.

If a person has been given an infringement notice under Schedule 3 in relation to an alleged contravention of a civil penalty provision, this does not amount to a prior record. A prior record is only established from a previous court finding.

Daily ceilings for penalties

A daily ceiling for penalties has been set that may be charged for all contraventions against a particular provision that have occurred in one day. This has been included to ensure that a meaningful penalty may be charged for a single contravention without causing an unrealistically large penalty payable for multiple contraventions. For example, dedicated telemarketers may make hundreds of unsolicited telemarketing calls each day. Without a ceiling amount for daily contraventions, such a telemarketer could potentially be liable for hundreds of contraventions. The ratio between the penalty payable for a person for single contravention and the ceiling amount is 20 times.

For example if a person has called 100 numbers in contravention of subclause 11(1) on a particular day (and consequently is liable for 100 contraventions of subclause 11(1)) then

he or she is liable to a maximum pecuniary penalty for this 24 hour period, equal to the amount that may be ordered for 20 contraventions.

Summary of maximum penalties

Body corporate with no prior record

The maximum pecuniary penalty payable by a body corporate with no prior record for each contravention of:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls), will be 100 penalty units, currently $11,000 (subparagraph 25(3)(a)(i));
- in any other case will be 50 penalty units, currently $5,500 (subparagraph 25(3)(a)(ii)).

Individual with no prior record

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with no prior record will be:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls) – 20 penalty units, currently $2,200 (subparagraph 25(4)(a)(i));
- in any other case –10 penalty units, currently $1,100 (subparagraph 25(4)(a)(ii)).

An additional maximum penalty is provided for bodies corporate and individuals who have a prior record (as described above under subclause 25(2)).

Body corporate with prior record

The maximum pecuniary penalty payable by a body corporate with a prior record, for each contravention of:

- subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls), will be 500 penalty units, currently $55,000 (subparagraph 25(5)(a)(i));
- any other case will be 250 penalty units, currently $27,500 (subparagraph 25(5)(a)(ii)).

Individual with prior record

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with a prior record, will be:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls) – 100 penalty units, currently $11,000 (subparagraph 25(6)(a)(i));
- in any other case –50 penalty units, currently $5,500 (subparagraph 25(6)(a)(ii)).

In addition, a ceiling penalty amount has been set that may be charged for all contraventions against a particular provision that have occurred in one day (see discussion above).

Ceiling amount - body corporate with no prior record

The maximum ceiling amount payable for a body corporate with no prior record, for contraventions on a particular day:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls), will be 2,000 penalty units, currently $220,000 (subparagraph 25(3)(b)(i));
- in any other case will be 1,000 penalty units, currently $110,000 (subparagraph 25(3)(b)(ii)).

Ceiling amount - individual with no prior record

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with no prior record, will be:

- subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls)– 400 penalty units, currently $44,000 (subparagraph 25(4)(b)(i));
- any other case –200 penalty units, currently $22,000 (subparagraph 25(4)(b)(ii)).

Ceiling amount - body corporate with prior record

The maximum ceiling amount payable for a body corporate with a prior record, for contraventions on a particular day:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls), will be 10,000 penalty units, currently $1.1 million (subparagraph 25(5)(b)(i));
- in any other case will be 5,000 penalty units, currently $550,000 (subparagraph 25(5)(b)(ii)).

Ceiling amount - individual with prior record

The corresponding maximum ceiling amount payable for contraventions of these provisions by an individual with a prior record, will be:

- for subclauses 11(1) or (7) (prohibition on making unsolicited telemarketing calls) – 2,000 penalty units, currently $220,000 (subparagraph 25(6)(b)(i));
- in any other case – 1,000 penalty units, currently $110,000 (subparagraph 25(6)(b)(ii)).

A penalty unit is defined clause 4 of the Bill to have the same definition as in section 4AA of the Crimes Act. It is currently $110.

Clause 26 – 2 or more proceedings may be heard together

The ACMA will be able to institute a proceeding in the Federal Court or the Federal Magistrates Court for the recovery of a pecuniary penalty referred to in clause 24 (subclause 24(1)). Clause 26 makes it clear that the Court may direct that two or more proceedings under subclause 24 may be heard together.

Clause 27 – Time limit for application for an order

A proceeding must be bought within 6 years of the contravention. This is designed to give some finality to the defendant.

Clause 28 - Civil evidence and procedure rules for civil penalty orders

This provision ensures that the rules of evidence and procedure for civil matters are to be applied by the relevant Court when hearing proceedings for a civil penalty order.

Clause 29 – Criminal proceedings not to be brought for contravention of civil penalty provisions

This clause provides that criminal proceedings will not be able to be brought only because of a contravention of a civil penalty provision. This does not prevent criminal proceedings being brought if the conduct involved in breach of a civil penalty provision might also amount to breach of a criminal offence. It simply provides that the mere fact of contravening a civil penalty proceeding does not amount to a criminal offence.

Clause 30 – Ancillary orders – compensation

Clause 30 enables the ACMA or a person who has suffered loss or damage as a result of a contravention of a civil penalty provision to apply to the Federal Court or the Federal Magistrates Court for an order directing a person who has been found to have contravened a civil penalty provision to compensate a victim if the Court is satisfied that the victim has suffered loss or damage as a result of a contravention of a civil penalty provision.

Subclause 30(2) sets out those matters that the Court may have regard to in determining whether a person has suffered loss or damage as a result of a contravention of clause 11 (relating to making an unsolicited telemarketing call) and in assessing the compensation. They include:

- the extent to which any expenses incurred by the victim are attributable to dealing with the calls;
- the effect of dealing with the calls on the victim's ability to carry on business or other activities;
- any loss of business opportunities suffered by the victim as a result of dealing with the calls; and
- any other matters that the Court considers relevant.

These matters which the Court may take into consideration are very broad and would enable the Court, for example, to consider the costs a person has incurred in dealing with telemarketing calls, such as the time taken to respond to such calls. This is an inclusive list. It does not limit the matters which a Court may take into account.

An ancillary order for compensation may be made by the Federal Court even if they have not made an order to pay a pecuniary penalty in respect of the contravention, under subclause 24(1) (see subclause 30(3)).

As with a proceeding under clause 27, an application for an ancillary order must be made within 6 years of the contravention (subclause 30(4)).

Clause 31 – Ancillary orders – recovery of financial benefit

Clause 31 enables the Commonwealth to recover the financial benefits which a person has received as a result of a contravention of one or more of the civil penalty provisions.

Clause 31 provides that the Federal Court or the Federal Magistrates Court may make an order directing a person who has been found to have contravened a civil penalty provision to pay to the Commonwealth an amount up to the amount of the financial benefit the person has obtained that is reasonably attributable to the contravention. The order may be made on the application of the ACMA (subclause 31(1)).

For example if a person has received a financial benefit in the order of one thousand dollars from persons responding to a prohibited telemarketing call then the Court may order that person to pay up to one thousand dollars to the Commonwealth. This is similar to the principle behind the proceeds of crime for criminal offences.

An ancillary order for recovery of a financial benefit may be made by the Court even if they have not made an order to pay a pecuniary penalty in respect of the contravention, under subclause 24(1) (see subclause 31(2)).

As with a proceeding under clauses 27 and 30, an application for an ancillary order must be made within 6 years of the contravention (subclause 29(3)).

Clause 32 – Schedule 3 (infringement notices)

Clause 32 provides that Schedule 3 has effect. Schedule 3 sets up a system of infringement notices relating to contraventions of civil penalty provisions. It is anticipated that such notices could be given where the ACMA is of the view that there has been a minor breach which could be adequately dealt with by way of an infringement notice, instead of initiating Court proceedings.

Part 5 – Injunctions

Part 5 enables the Federal Court or the Federal Magistrates Court to grant injunctions in relation to contraventions or proposed contraventions of the Bill.

This Part is based on Part 5 of the Spam Act.

Clause 33 – Simplified outline

Clause 33 provides a simplified outline of Part 5 to assist readers. It provides that Part 5 enables the Federal Court or the Federal Magistrates Court to grant injunctions in relation to contraventions of civil penalty provisions.

The following are civil penalty provisions (as defined in clause 4):

- subclauses 11(1) or (7), dealing with making unsolicited telemarketing calls;
- subclauses 12(1) or (2), dealing with arrangements for telemarketing calls;
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

It is anticipated that injunctions could be used in addition to a civil proceeding under Part 4 of the Bill, where the ACMA wished not only to require an order for payment of a penalty for a breach, but also wanted an order which could prevent a person from contravening the provision in the future. Alternatively, an injunction may be sought instead of a prosecution. For example, if the ACMA is of the view that a person has been involved in a minor breach of the Bill and wishes to ensure that they do not do so in the future.

Clause 34 – Injunctions

Restraining injunctions

If a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of the Act, the ACMA will be able to apply to the Federal Court or the Federal Magistrates Court for an injunction to restrain the person from engaging in the conduct. If, in the Court's opinion, it is desirable to do so, the Court will also be able to require the person to do something (paragraph (34(1)(b)).

Performance injunctions

If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing and the refusal or failure was, is or would be a contravention of the Act, the ACMA will be able to apply to the Federal Court or the Federal Magistrates Court for an injunction requiring the person to do that act or thing (subclause 34(2)).

Clause 35 – Interim injunctions

Grant of interim injunction

Provision is also made for the Federal Court or the Federal Magistrates Court to grant interim injunctions before the Court considers an application for an injunction (subclause 35(1)).

No undertaking as to damages

The Court will not be able to require an applicant for an injunction under clause 34, as a condition of granting an interim injunction, to give any undertakings as to damages (subclause 35(2)).

Clause 36 – Discharge etc. of injunctions

This clause provides that the Federal Court or the Federal Magistrates Court may discharge or vary an injunction granted under Part 5.

Clause 37 – Certain limits on granting injunctions not to apply

Restraining and performance injunctions

The power of the Federal Court or the Federal Magistrates Court to grant an injunction restraining a person from engaging in conduct (restraining injunction) or requiring a person to do an act or thing (performance injunction) will be able to be exercised whether or not:

- it appears to the Court that the person intends:
  - to engage again, or continue to engage, in conduct of that kind; or
  - to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
- the person has previously engaged in conduct of that kind or has previously refused or failed to do that act or thing.

Clause 38 – Other powers of the Federal Court or the Federal Magistrates Court unaffected

The powers conferred on the Federal Court or the Federal Magistrates Court under Part 5 will not limit any other powers of the Court, whether conferred by the Bill or otherwise.

Part 6 – Miscellaneous

Clause 39 - Nominees

Clause 39 applies where a telephone account-holder nominates an individual to act as their nominee. The relevant telephone account-holder is defined in clause 4 and means the person (either an individual or an organisation) who is responsible for the relevant account.

This term is relevant to the concept of consent which is defined in Schedule 2 to the Bill. The rules relating to the making of telemarketing calls set out in clause 11 (prohibiting

the making of unsolicited telemarketing calls to a registered Australian number) do not apply where the relevant telephone account-holder or their nominee has consented to the making of the call.

Clause 39(2) provides that the relevant telephone account holder may nominate, or withdraw a nomination, of a nominee orally or in writing. Two or more individuals may be nominated in relation to the same telephone number, for example, all the members of a family that use the same fixed telephone number: see subclause 39(3).

The regulations may deem an individual to be a nominee of a relevant telephone account holder in specified circumstances, for example, where they have a particular relationship with the account holder: see subclause 39(4).

Clause 40 – Formal warnings – breach of civil penalty provision

This clause enables the ACMA to issue a formal warning if a person contravenes a civil penalty provision (as defined in clause 4).

It is intended to enable the ACMA to formally indicate its concerns about a contravention of a civil penalty provision. It may, for example, be issued in relation to minor contraventions where a simple warning is likely to suffice to cause a change in behaviour. However, in the case of a serious, flagrant or recurring breach, the ACMA may decide to take action under Part 4 or 5 without giving a prior formal warning.

The issuing of a formal warning does not prevent the ACMA from initiating proceedings under Part 4 of the Bill for contravention of a civil penalty provision or seeking an injunction under Part 5 of the Bill.

Clause 41 – Additional ACMA functions

Clause 41 provides that the ACMA's functions include:

- to conduct and/or co-ordinate community education programs about telemarketing calls, in consultation with relevant industry and consumer groups and government agencies;
- to conduct and/or commission research into issues relating to unsolicited telemarketing calls;
- to liaise with regulatory and other relevant bodies overseas about co-operative arrangements for prohibition or regulation of unsolicited telemarketing calls.

These functions form part of the ACMA's 'telecommunications' functions, which are set out in section 8 of the ACMA Act (see item 42 of Schedule 1 to the Consequentials Bill, which inserts proposed subparagraph 8(1)(j)(ia) to include functions conferred on the ACMA under the Do Not Call Register Act in its telecommunications functions).

The conferring of these functions on the ACMA does not in any way limit the executive powers of the Commonwealth. This provision simply enables the ACMA to carry out

certain functions. It is possible for the executive government to also carry out these functions in relation to unsolicited telemarketing calls. Paragraph 41(a) specifically envisages that the ACMA will conduct and co-ordinate community education programs about telemarketing calls in consultation with government agencies (for example DCITA), as well as relevant industry and consumer groups.

Clause 42 – Operation of State and Territory laws

Clause 42 provides that the Bill is not intended to exclude or limit the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with the Bill.

This clause has been included to ensure that any State or Territory law that is capable of operating concurrently with the Bill is not affected by the Bill in this regard. However, if a State or Territory Act is inconsistent with the provisions in this Bill then it would not be able to operate concurrently and the provisions in this Bill would override the relevant State or Territory provisions.

Clause 43 – Implied freedom of political communication

Clause 43 provides that this Bill does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

Clause 44 – Giving effect to international conventions

Clause 44 provides that the regulations may make provision for and in relation to giving effect to an international convention that deals with telemarketing calls.

This provision has been included as it is anticipated that Australia will enter into multilateral arrangements with other countries concerned about the regulation of telemarketing. This will enable regulations to be made giving effect to these agreements once in place.

The term ‘international convention’ is defined in clause 4 to mean a convention to which Australia is a party, or an agreement between Australia and a foreign country. An international convention may mean a treaty which Australia has signed and/or ratified. It also includes other agreements between Australia and a foreign country.

A ‘telemarketing call’ is defined in clause 5 of the Bill. The meaning of this term is discussed in greater detail above under this clause.

Subclause 44(2) specifically provides that the regulations may vest the Federal Court with jurisdiction in a matter arising under the regulations, may prescribe penalties (up to a maximum of 50 penalty units (a penalty unit is currently $110, so it would be a maximum of $5,500 for offences against the regulations), or declare that a specified provision of the regulations is a civil penalty provision for the purposes of the Bill.

Clause 45 – Review of operation of Act

Clause 45 provides a review provision. It provides that as soon as practicable after three years of the commencement of this provision (that is, three years starting from the date of proclamation, see item 8 of the table in clause 2 of the Bill) the Minister must cause a review of the Do Not Call Register Bill to be conducted. The review is to consider the operation of:

- the Do Not Call Register Bill;
- the Telecommunications Act to the extent to which that Act relates to the Do Not Call Register Bill;
- Part 6 of the Telecommunications Act (which deals with industry codes and standards) to the extent to which Part 6 relates to telemarketing activities.

A report must be prepared and tabled in each House of Parliament within 15 sittings days of its completion (subclauses 45(3) and (4)).

Clause 46 - Regulations

Clause 46 is a general regulation-making power. It provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by this Bill or necessary or convenient to be prescribed for carrying out or giving effect to the Bill.

Numerous provisions throughout the Bill set out certain things that the regulations may provide for. For example paragraph 5(1)(o), subclause 5(7), clause 44 clauses 2(c), 3(1)(d), 3(2)(d), 3(3)(d), 4(1)(e), 4(2)(f) and 5 of Schedule 1, clause 5 of Schedule 2, and paragraph 3(1)(f) of Schedule 3.

Schedule 1 – Designated telemarketing calls

Schedule 1 sets out the meaning of a 'designated telemarketing call' for the purposes of this Bill. 'Designated telemarketing calls' are exempt from the prohibition on making unsolicited telemarketing calls to a number registered on the Do Not Call Register (in clause 11 of the Bill).

In essence there are three categories of telemarketing calls which are 'designated telemarketing calls' and excluded from certain rules relating to the making of such calls. They are:

- certain calls authorised to be made by government bodies, religious organisations and charities;
- certain calls authorised by a registered political party, independent members of Parliament, or political candidates; and
- certain calls authorised to be made by educational institutions.

Clause 1 - Object

Clause 1 of Schedule 1 provides that the object of Schedule 1 is to define the expression 'designated telemarketing call'. The notes to this clause point out that a designated telemarketing call is exempt from clause 11 (prohibiting the making of unsolicited telemarketing calls to a number registered on the Do Not Call Register). However, such calls will still be subject to the mandatory conduct standards made by the ACMA (see the Consequentials Bill), relating to things such as calling times and disclosure of information.

Clause 2 – Government bodies, religious organisations and charities

Clause 2 of Schedule 1 to the Bill provides that for the purposes of the Bill a telemarketing call will be a 'designated telemarketing call' if:

- the making of the call is authorised by:

    - a government body (as defined in clause 4);
    - a religious organisation; or
    - a charity or charitable institution; and

- if the call relates to goods or services, the government body, religious organisation, charity or charitable institution is the supplier or prospective supplier of the goods or services; and

- the call is not of a kind specified in the regulations.

This clause is intended to exclude certain calls made by government bodies, religious organisations and charities from the prohibition on making unsolicited telemarketing calls to a number on the Do Not Call Register. Certain limits are placed on the exception to ensure that such bodies do not abuse their 'exempt' status and allow inappropriate telemarketing.

This exemption is broadly aimed at ensuring that calls which have a 'public interest' perspective, such as promoting charities or enhancing community knowledge, rather than those that are commercially driven, are not limited. Charities and religious organisations exist to benefit the Australian community and provide valuable support and community services. Evidence suggests that telemarketing provides such organisations with an important source of revenue. This exemption is aimed at ensuring that such organisations are appropriately able to continue to raise funds to support their work. It also aims to ensure that there is no unintended restriction on government to citizen communication.

A 'government body' is defined in clause 4 of the Bill. It means a department, agency, authority or instrumentality of the Commonwealth, State, Territory or of a foreign government or a government of part of a foreign country. The term 'religious organisation' is to have its ordinary meaning. A religious organisation would not include

a person who argues that they believe in an ‘unknown’ god of healing. The term ‘organisation’ implies a level of structure and organisation, rather than simply a collection of individuals with similar beliefs.

The terms ‘charity’ and ‘charitable organisation’ are to be given their ordinary meaning. Ordinarily a ‘charity’ is an entity that is not-for-profit and has a dominant purpose or purposes that are charitable and for the public benefit. Where the organisation has other purposes, those purposes must further, or are in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes. The organisation must have activities that further, or be in aid of its charitable purpose or purposes and must not have purposes or engage in activities that are illegal. Organisations that have a dominant purpose that is advocating a political party or cause, supporting a candidate for political office or attempting to change the law or government policy would not be a charity within its ordinary meaning.

‘Charitable purposes’ covers purposes relating to the advancement of health, education, social and community welfare, religion, culture or the natural environment or other purposes beneficial to the community. ‘Advancement’ includes protection, maintenance, support, research, improvement or enhancement.

To be for the ‘public benefit’ a purpose must be aimed at achieving a universal or common good, have practical utility and be directed at the benefit of the general community or a sufficient section of the community.

An individual, a partnership, a political party, a superannuation fund, the Commonwealth, a State or Territory or a body controlled by the Commonwealth or a State or Territory or a foreign government or a body controlled by a foreign government are not charities.

An entity is taken to be ‘not-for-profit’ if and only if it is not carried on for the profit or gain of particular persons and it is prevented, either by its constituent documents or by the operation of law, from distributing its assets for the benefit of particular persons either while it is operating or upon winding up.

It may be noted that many of the calls made by such bodies and organisations are likely to fall outside the meaning of a ‘telemarketing call’ and therefore not be subject to this Bill anyway. For example, calls made by the Australian Electoral Commission (a government body) relating to enrolment and voting information would not be a telemarketing call as it does not have a ‘commercial purpose’.

However in other cases, it may not be so clear whether or not the message has a commercial element. For example, local government often provides services on a fee-for-service basis which are essential to the community, but calls relating to these services might potentially be restricted, but for this exclusion. In addition, charities and religious organisations will often make telemarketing calls as an important means of raising funds.

This exclusion covers calls made on behalf of these bodies or organisations. For example if a charity contracted a third party to make calls on its behalf to solicit donations for the charity then these calls would also be covered by the exclusion. The relevant test in clause 2 is if the relevant body authorised the making of the call.

This exemption does not apply however to individuals acting on their own motion within government, religious or charitable organisations. For example if an individual within a church organisation promoted their own business through telemarketing, this exception would not apply. The exception only applies to calls authorised by the organisation as a whole.

Not all calls made by government bodies, religious organisations and charities, will be exempt from clause 16. The exclusion is limited by paragraph 2(b). This paragraph provides that in the case of the sale of goods or services, the exception only applies if the relevant body is the supplier or prospective supplier of goods or services concerned. For example it would apply where an anti-cancer organisation was promoting their own range of anti-cancer products.

A body would be the relevant supplier of goods or services, notwithstanding that they themselves did not manufacture the goods, where they have bought these goods from a third party and are supplying them to customers. For example a charity which owned a stock of Christmas cards could make telemarketing calls relating to these cards.

However it would not cover the situation where a charity is simply onselling goods or services for a non-exempt organisation for a commission. For example if a charity is approached by a company to sell their goods or services in return for the charity receiving a commission then this would not be covered by the exemption as the charity would not be the supplier of the goods or services.

Paragraph 2(b) has been included to ensure that the exemption is not abused. It is designed to enable charities to undertake their normal fundraising work. It would enable them to sell goods of which they are the supplier for a profit for the purpose of raising funds for the organisation. However it does not enable them to simply provide telemarketing services for non-exempt organisations. This is an important limitation to ensure that the exemption could not be abused by unscrupulous operators setting themselves under the auspices of a charity and taking advantage of the exemption to telemarket on behalf of non exempt organisations.

A specific regulation making power has been included in paragraph 2(c) which could be used to specify that a call does not fall within the exemption. This has been included to ensure that the Government can act swiftly if it becomes evident that this exemption is being abused. The Government does not intend that exempt organisations can simply set themselves up to provide telemarketing services for other non-exempt organisations. The Government intends to monitor this very closely and ensure that exempt organisations do not abuse this exemption.

Clause 3 – Political parties, independent members of parliament, candidates etc

Clause 3 of Schedule 1 to the Bill sets out that certain types of calls that have been authorised by political parties, independent members of Parliament or candidates for political office, are 'designated telemarketing calls' for the purpose of the Bill. This means that such calls may be made to numbers registered on the Do Not Call Register. However, these calls will still be subject to the mandatory conduct standards made by ACMA (see the Consequentials Bill), relating to calling times.

Political Parties

Subclause 3(1) of Schedule 1 sets out the meaning of the phrase 'designated telemarketing call' in the context of calls authorised by registered political parties. It provides that for the purposes of the Bill a telemarketing call is a 'designated telemarketing call' if:

- the making of the call is authorised by a registered political party; and
- having regard to the content and presentational aspects of the call it would be concluded that the purpose (or one of the purposes) of the call is to conduct fundraising for electoral or political purposes; and
- if the call relates to goods or services, the registered political party is the supplier or prospective supplier of the goods or services; and
- the call is not of a kind specified in the regulations.

The exemption would enable political parties to make calls which have a fundraising purpose. For example a party may make a call selling tickets to a fundraising dinner. It would also enable membership drives.

Calls relating to opinion polling or information calls could still be made. This is because they would not fall within the definition of a 'telemarketing call' in proposed section 6 as they have no commercial element.

This exemption for political parties does not apply however to individuals acting on their own motion within the party. For example if a party member promoted their own business through telemarketing calls for their own benefit, this exception would not apply.

The term 'registered political party' is defined in clause 4 of the Bill. It requires the appropriate registration process to have been undertaken. This minimises the risk of persons attempting to come within this exemption by arguing that they are a political party, for example because they are a collection of individuals who believe in the same political ideas.

A regulation making power has been included to enable the types of calls covered by the exemption to be limited. This power has been included as a safeguard to ensure that this exemption could be limited further if necessary.

Independent members of parliament

Subclause 3(2) of Schedule 1 sets out the meaning of the phrase 'designated telemarketing call' in the context of calls authorised by independent members of Parliament. This means that such calls may be made to numbers registered on the Do Not Call Register. However, these calls will still be subject to the mandatory conduct standards made by ACMA (see the Consequentials Bill), relating to calling times.

The first criterion that must be met for such a call to be a 'designated telemarketing call' is that the making of the call is authorised by a person specified in paragraph 3(2)(a) (who is not affiliated with any registered political party). Paragraph 3(2)(a) specifies a person who is a member of:

- the Parliament of the Commonwealth;
- the parliament of a State,
- the Legislative Assembly for the Australian Capital Territory or of the Northern Territory or Norfolk Island; or
- a local governing body established by or under a law of a State or Territory.

The second criterion that must be met for such a call to be a designated telemarketing call is that, having regard to the content and presentational aspects of the call it would be concluded that the purpose (or one of the purposes) of the call is to conduct fundraising for electoral or political purposes (see paragraph 3(2)(b)).

The third criterion that must be met for a call authorised by an independent member of parliament to be a designated telemarketing call is that, if the call relates to goods or services, the person specified in paragraph 3(2)(a) is the supplier or prospective supplier of the goods or services (see paragraph 3(2)(c)).

The fourth criterion is that the call is not of a kind specified in the regulations.

As set out above in relation to the exemption applying to registered political parties, the exemption would enable independent members of Parliament to make calls which have a fundraising purpose. For example a member may make a call selling tickets to a fundraising dinner.

Calls relating to opinion polling or information calls could still be made. This is because they would not fall within the definition of a 'telemarketing call' in proposed section 5 as they have no commercial element.

This exemption does not apply however to enable independent members of Parliament to promote their own business through telemarketing calls for their own benefit. This

exception only applies where the call is for the purpose of fundraising for electoral or political purposes.

A regulation making power has been included to enable the exempt calls to be limited if necessary. This could be used if it was found that the provision was being abused.

Candidates

Subclause 3(3) of Schedule 1 to the Bill sets out the meaning of the phrase 'designated telemarketing call' in the context of calls authorised by a candidate in certain elections. This means that such calls may be made to numbers registered on the Do Not Call Register. However, these calls will still be subject to the mandatory conduct standards made by ACMA (see the Consequentials Bill), relating to calling times. Consistent with subclause 3(2) above, it sets out four criteria that must be met for a call authorised by a candidate to be a 'designated telemarketing call'.

The first criterion that must be met for such a call to be a designated telemarketing call is that the making of the call is authorised by a person who is a candidate for an election that is specified in paragraph 3(3)(a). Paragraph 3(3)(a) specifies elections for:

- the House of Representatives;
- the Senate;
- a house of the Parliament of a State;
- the Legislative Assembly for the Australian Capital Territory;
- the Legislative Assembly of the Northern Territory;
- the Legislative Assembly of Norfolk Island; or
- a local governing body established by or under a law of a State or Territory.

The second criterion that must be met for such a call to be a designated telemarketing call is that, having regard to the content and presentational aspects of the call it would be concluded that the purpose (or one of the purposes) of the call is to conduct fundraising for electoral or political purposes (see paragraph 3(3)(b)).

The third criterion that must be met for a call authorised by a person who is a candidate for an election to be a designated telemarketing call is that, if the call relates to goods or services, the person who authorised the call is the supplier or prospective supplier of the goods or services (see paragraph 3(3)(c)).

The fourth criterion is that the call is not of a kind specified in the regulations (paragraph 3(3)(d)).

As set out above in relation to the exemption applying to registered political parties, and members of parliament, the exemption would enable political candidates to make calls which have a fundraising purpose. For example a candidate may make a call selling tickets to a fundraising dinner for the purpose of raising funds for their candidature.

Calls relating to opinion polling or information calls could still be made. This is because they would not fall within the definition of a 'telemarketing call' in proposed section 5 as they have no commercial element.

This exemption does not apply however to enable candidates to promote their own business through telemarketing calls for their own benefit. This exemption only applies where the call is for the purpose of fundraising for electoral or political purposes.

A person is not covered by this exemption until they have nominated as a candidate in a Commonwealth, State or local government election with the relevant electoral authority. The various Commonwealth, State and Territory electoral laws provide a nomination process whereby a person can nominate for candidature for an election. It does not enable a person to use this exemption simply because they have stated their intention to stand as a candidate for an upcoming election for which nominations have not yet been called by the relevant electoral authority. Therefore a potential candidate could not use this exemption to fundraise for any future election a year or months in advance of an election where nominations have not been called, even if the fundraising is for the purpose of standing for the election. In practice it is likely that this will enable political candidates to make fundraising calls in a relatively short period leading up to an election, that is the time from which nominations are made to the relevant electoral authority and the date of the election.

A regulation making power has been included to enable the exempt calls to be limited if necessary. This could be used if it was found that the provision was being abused.

Clause 4 – Educational institutions

Clause 4 of Schedule 1 to the Bill provides that a telemarketing call is a 'designated telemarketing call' if the sending of the message is authorised by an educational institution and certain conditions apply. An 'educational institution' is defined in clause 4 of the Bill. It includes a pre-school, primary school, high school, college, TAFE and university.

In essence this exemption would enable an educational institution to make certain calls to students or past students, or members of their household. To take into account circumstances where an employee's private phone account is paid by an employer (with the employer being the relevant telephone account-holder), clause 4 of Schedule 1 makes special rules to in effect deem the employee to the be relevant account-holder for the purposes of clause 4 (see subclause 4(2)).

This exemption has been provided in recognition that public educational institutions benefit Australian society and should be able to contact their students to inform them of the needs of the institutions and to solicit funds to ensure their viability.

A telemarketing call authorised by an educational institution will only be a designated telemarketing call if:

- the relevant telephone account-holder is, or has been enrolled as a student in that institution;
- a member or former member of the household of the relevant account-holder is, or has been, enrolled as a student in that institution;
- if the call relates to goods or services, the institution is the supplier, or prospective supplier of the goods or services; and
- the call is not of a kind specified in the regulations.

The term 'relevant telephone account-holder' is defined in clause 4 of the Bill. It is the person, or persons, responsible for the relevant telephone account.

The following are examples of calls which would come within this exclusion:
- a call from a primary school made to parents of its students regarding a school fete;
- a call made to graduates of an institution regarding upcoming postgraduate courses.

The following are examples of calls which would not be covered by this exclusion and consequently would be subject to clause 16 of this Bill:
- a call to promote a law conference held at a university which is made to all numbers at a specific postcode, a call made to random numbers, or numbers with a specific postcode, rather than former students, by a private university advertising its courses or events.

To minimise the risk of this exception being abused, only certain types of calls are exempt. If the call relates to goods or services, it will only cover where the institution is the supplier or prospective supplier of the goods or services. A specific regulation making power is included in paragraph 4(1)(e) which could be used to limit the exemption further if this exemption was being abused.

Subclause 4(2) relates to calls made where the relevant telephone account-holder is an employer. It enables an educational institution to make calls to a student, former student, or member of the household, even if the student is not the relevant telephone account-holder, but his or her employer is the relevant account-holder.

This provision has been included in recognition of the fact that some organisations offer as part of a salary package, the payment of an employee's personal telephone account. In these cases the employer is the relevant telephone account-holder, not the employee as it is the employer who is responsible for the account.

However, in the case of calls made by educational institutions, it is the employee's relationship with the relevant educational institution which is relevant, not the employers.

Without this specific provision, if an educational institution made a call to a former student who had provided them with their telephone number, if the relevant account holder of this number was an employer then the educational institution would not have been covered by the exemption provided under subclause 4(1).

Clause 7 of Schedule 1 to the Bill provides for an extended meaning of employee and employer. It is designed to cover persons, who do not ordinarily fall within the meaning of employee/employer, including members of an executive body of a body corporate, contractors, members of Parliament, office holders, and members of the police force and armed services. The extended meaning of employee and employer is discussed in greater detail below under the explanatory notes to clause 7 of Schedule 1.

Clause 5 – Regulations

Clause 5 allows the regulations to provide that a specified kind of telemarketing call is a 'designated telemarketing call' for the purposes of this Bill. This regulation-making power has been included to ensure that if there are any unintended consequences of this Bill, regulations may be made to include calls which should not appropriately be covered by the Bill.

The effect of providing that a telemarketing call is a 'designated telemarketing call' for the purposes of the Bill would be that the call would be exempt from the prohibition on making unsolicited calls to numbers listed on the Do Not Call Register (in clause 11).

Clause 6 – Authorising the making of telemarketing calls

Clause 6 provides for the circumstances in which the making of telemarketing calls will be taken to be authorised for the purposes of Schedule 1 to the Bill. The term 'authorise', in relation to the making of a telemarketing call, is used in the provisions which set out the 'designated telemarketing calls'. They are broadly, calls authorised by certain bodies or organisations.

Proposed subclause 6(1) provides that if an individual authorises the making of a telemarketing call and does so on behalf of an organisation then the organisation rather than the individual is taken to have authorised the making of the call. An organisation is defined in clause 4 of the Bill.

For example if an employee authorises the making of a telemarketing call in the course of his or her employment then the organisation will be taken to have authorised the making of the call for the purposes of Schedule 1 to the Bill. This will not apply where a person purports to make a call on behalf of an organisation but goes beyond his or her authority. In this case the organisation will not be taken to have authorised the call for the purposes of Schedule 1. This attribution of authorisation to the organisation rather than the individual is necessary to ensure that a call made following authorisation from an individual within an exempt organisation will still come within the meaning of a designated telemarketing call.

Proposed subclause 6(2) provides that if a telemarketing call is made by an individual or organisation without being authorised by any other individual or organisation, then the first-mentioned individual or organisation is taken to authorise the making of the call. This has been included to avoid any argument that self-authorisation does not amount to

authorisation, that is an argument that an individual or organisation cannot authorise something on his or her or their own behalf. The effect of this provision is that if Joe Bloggs makes a call on his behalf (and no one else has authorised its making) then Joe Bloggs is taken to have authorised the making of the call for the purposes of this Bill.

Clause 7 – Extended meaning of *employee* and *employer*

The common law definition of the terms 'employee' and 'employer' is amended by the meaning given to the terms in clause 7 of Schedule 1. In addition to those persons covered by the common law meaning of employee and employer, it is defined to include a range of persons not ordinarily considered to be employees or employers.

In particular clause 7 includes the following persons in the meaning of an employee and their respective employers in the meaning of employer:

- members of the executive body of a body corporate (subclause 7(1));
- contractors (subclause 7(2));
- members of Parliament (subclause 7(3) to 7(7));
- local councillors (subclause 7(8)); and
- office holders, such as an individual who is in the service of an armed force, or a police force (subclause 7(9)).

This term is used in clause 4 of Schedule 1 to the Bill which relates to when a telemarketing call made by or authorised by an educational institution is a 'designated telemarketing call' and exempt from the prohibition on making unsolicited telemarketing calls. The circumstances in which such calls can be made will ordinarily depend upon whether the relevant telephone account-holder has a certain connection with the educational institution (for example a current student).

However this situation is somewhat different in the case where an employer is the relevant telephone account-holder. Subclause 4(2) is designed to cover the circumstances where an employee's personal telephone account may be paid for by an employer as part of a package and consequently the employer is the relevant account-holder. In this case, it is the relationship of the employee with the educational institution, not the relevant account-holder (ie the employer) which is relevant in determining whether or not the call falls within the 'exempt' category for the purposes of proposed section 11.

This extended definition has been included as it is considered possible that certain employment-type situations, such as the ones described in this extended meaning, could involve a person receiving the benefit of a personal telephone account paid for by the employer and should consequently be covered.

Schedule 2 – Consent

Clause 1 - Object

Clause 1 sets out the object of Schedule 2, which is to set out the basic definition of 'consent' when used in relation to the making of a telemarketing call. The concept of consent is a key element in the primary penalty provision in the Bill which prohibits the making of unsolicited telemarketing calls to numbers listed on the Do Not Call Register (see clause 11). Subclause 11(2) provides that an exception to this rule if the relevant telephone account-holder or their nominee consented to the making of the call.

Schedule 2 sets out:

- the basic meaning of consent;
- rules relating to the duration of express consent;
- rules relating to when consent may be inferred from the publication of a telephone number, and
- certain matters relating to the treatment of consent via regulations.

Clause 2 - Basic definition

Clause 2 of Schedule 2 sets out the basic definition of consent for the purposes of this Bill. Essentially consent can be express consent (paragraph 2(a)) or 'inferred consent' (paragraph 2(b)).

Express consent

Express consent would cover the situation where a person has specifically requested the making of telemarketing calls by the caller. It covers the situation where the recipient has specifically relayed to the telemarketer his or her consent to receiving telemarketing calls from the telemarketer and has directly provided his or her number (either orally or in writing) to the telemarketer for that purpose. For example, the following are examples of what would amount to providing explicit consent:

- the recipient has ticked a box in information provided to the recipient which consents to future receipt of telemarketing calls on that number;
- the recipient has phoned a company seeking information on a particular product and has requested a sales assistant call them back with the relevant information.

Consent can only be provided by the relevant telephone account-holder (as defined in clause 4) or a person nominated (orally or in writing, see clause 39) by the account-holder.

Clause 3 of Schedule 2 sets out how long consent is taken to last. This is discussed in detail below in the explanatory notes to clause 3.

Inferred consent

Paragraph 2(b) also makes it clear that certain conduct and relationships can give rise to an 'inferred consent'. It provides that consent includes consent that may reasonably be inferred from the conduct and the business and other relationships of the individual or organisation concerned.

It is necessary to enable consent to be inferred in certain limited circumstances to take into account commercial realities.

Whether or not a person has consented to receive a telemarketing call will be a question of fact to be determined according to each particular set of circumstances. The extent of the person's consent will depend on what can be reasonably inferred from the conduct and the relationship.

Firstly consent may be inferred from an existing business relationship, taking into account the particular conduct and nature of the relationship.

The following are examples of what may amount to an existing business relationship:

- a person has purchased goods or services which 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 (for example a telephone service provider and their customers);
- a bank and the bank account holder.

In addition to a pre-existing business relationship, consent may be inferred where another relationship, such as a family relationship exists. For example if a person is selling their car and calls up their friends to let them know and ask if they know anyone who may be interested in buying the car, then, notwithstanding that a recipient may not have expressly consented to receiving such a call, consent may be reasonably inferred in this circumstance because of the relationship between the caller and the recipient.

However consent will not always be inferred where there is a pre-existing relationship between a person and a business. Simply because a pre-existing relationship can be established does not mean that it would be reasonable to infer that a person has consented to receiving all telemarketing related calls from the organisation or its related entities. The extent of the consent will be a matter of fact to be determined on the particular factual circumstances. A person will be taken to have consented to receiving the types of telemarketing call that a reasonable person would expect to receive based on the nature of the consent given.

It is always necessary to consider the particular factual circumstances. For example if a person:

- purchases a t-shirt or groceries from a shop;

- attends a concert, performance or movie; or
- makes a purchase or transaction as an anonymous entity;

then it would not be reasonable to infer that the person consented to receiving unsolicited telemarketing calls from the relevant shop or business simply because there was some pre-existing connection between the two parties. This one off casual type purchase is ordinarily made without any exchange of details such as a telephone number and would not give rise to an expectation of receiving telemarketing calls.

If a person has purchased a product and they have provided their telephone number to the business, then it may be possible to infer consent to receive particular marketing calls in the future. However, each particular case will depend upon its own peculiar factual circumstances.

For example, if a person has provided a telephone number to a bank for the express purpose of receiving information about the bank's available mortgage products, this would not enable consent to be inferred for the making of calls to the person for the purposes of promoting the organisation's insurance products.

Similarly if consent has been inferred through a pre-existing relationship, such as a shareholder of a company, then it may be reasonable to expect to receive telemarketing calls related to that company. However it would not be reasonable to infer that all related companies could make telemarketing calls to the shareholder.

Where a person has entered a competition then this would not of itself be sufficient to establish a relationship which infers consent to receiving future telemarketing calls from the organisation promoting the competition. However, if the person has specifically ticked a box, as part of the competition entry consenting to receiving future telemarketing calls, then this conduct could amount to consent. It would be necessary to consider the particular factual circumstances in each case.

If a person was considered to have consented to receiving telemarketing calls simply by taking part in a competition, then it would be possible for them to withdraw such consent at any time.

Consent to receive telemarketing calls cannot be inferred if a person has received previous telemarketing calls and not complained about their receipt. For example if a telemarketer makes a telemarketing call to a person whose number is registered on the Do Not Call Register and the person does not initially object to the call, if the telemarketer then calls the number again, the telemarketer cannot suggest that the recipient's acceptance of the previous telemarketing call (without an express request or acceptance of receiving future telemarketing calls) infers consent to receive future telemarketing calls.

The fact that a person has registered their telephone number on the Do Not Call Register does not point to conduct that infers that consent to telemarketing calls can never be

inferred. It is possible to infer consent (for example, from an established business relationship) notwithstanding that a person has registered their number on the Register.

Clause 3 of Schedule 2 deals with how long consent is taken to last. This is discussed in detail below in the explanatory notes to clause 3.

If a person can establish that the relevant telephone account-holder or their nominee has consented to the making of the call (for example through establishing a pre-existing business relationship), then he or she will not be contravene clause 11 (see subclause 11(2)). The defendant bears the evidential burden of establishing consent (see subclause 11(6)). This is discussed in greater detail under clause 11.

Clause 3 – Duration of express consent

This clause provides that for the purposes of the Bill, where express consent is given, but such consent is not expressed to be for a specified period or for an indefinite period, then the consent is taken to have been withdrawn at the end of the period of three months beginning on the day on which the consent was given.

Where consent has been inferred from the particular conduct and relationship, there is no specified duration of the consent. The duration of the consent will be determined according to the nature of the relationship and the conduct. For example if a person has an existing relationship with an optometrist which involves annual eye check ups then it may be reasonable to infer that consent to receive reminder calls extends indefinitely, unless consent is withdrawn.

A period of three months for the duration of express consent unless the account-holder or their nominee have indicated otherwise is considered reasonable. It provides registrants with the right to consent to ongoing or longer periods of contact, but where this has not been specified by the account-holder or their nominee, it ensures that telemarketers cannot continue to contact them on an ongoing basis.

Clause 4 - Consent may not be inferred from publication of a telephone number

Subclause 4(1) makes it clear that for the purposes of this Bill, the mere fact that a telephone number has been published does not mean that a person can infer that the relevant account-holder or nominee consents to receiving unsolicited telemarketing calls.

Therefore if a person's number has been published in a public resource such as a telephone directory, it cannot be inferred that consent has been given by that person to receive unsolicited telemarketing calls.

'Publish' has been defined in clause 4 to include publish on the Internet and publish to the public or a section of the public. This is included to ensure that not only numbers published in print, such as a paper telephone directory, are included. For example if a person places their telephone number on a web page which is not generally available to

the public, such as a chatroom or a subscriber webpage, then it cannot be inferred that the holder of the account to which the telephone number relates (or their nominee) has consented to receiving unsolicited telemarketing calls.

Clause 5 – Regulations about consent

Clause 5 enables regulations to be made that set out the circumstances in which the consent of a relevant telephone account-holder, or a nominee of the relevant telephone account-holder, may and may not be inferred.

This regulation-making power is intended to be used as a reserve power to remove any uncertainties in interpretation if necessary or to cover circumstances which would reasonably be considered to amount to inferred consent which may not yet be apparent.

Schedule 3 – Infringement Notices

Clause 1 – Object

This clause sets out the general object of Schedule 3, which is to set up a system of infringement notices for contraventions of civil penalty provisions. Infringement notices will enable a more efficient means of dealing with minor contraventions as an alternative to instituting court proceedings for breach of a penalty provision.

Clause 4 defines the civil penalty provisions. They are:

- proposed subclauses 11(1), and (7) which set out the rules relating to making unsolicited telemarketing calls to numbers listed on the Do Not Call Register, and to ancillary contraventions of those rules;
- subclauses 12(1) and (2) which relate to agreements for making telemarketing calls; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with proposed paragraph 44(2)(c).

Clause 2 – When an infringement notice can be given

This clause sets out when an infringement notice may be issued. It provides that an infringement notice may be issued by an 'authorised officer' (the Chair of the ACMA or a member of the ACMA staff appointed under proposed clause 8 of Schedule 3, see definition in clause 4), if he or she has reasonable grounds to suspect that a person has contravened a civil penalty provision in the Bill.

An infringement notice must be given within 12 months of the day that the contravention is alleged to have happened (subclause 2(2)).

Subclause 2(3) provides that this clause does not authorise the giving of two or more infringement notices to a person in relation to contraventions of a particular civil penalty provision that allegedly occurred on the same day.

Clause 3 – Matters to be included in an infringement notice

Clause 3 of Schedule 3 sets out the matters which must be included in an infringement notice. In particular it provides that an infringement notice must:

- set out the name of the person to whom the notice is given, that is the person who has allegedly contravened the civil penalty provision;
- set out the name of the authorised officer who gave the notice. It is anticipated that as a matter of administrative practice the authorised officer would sign the notice;
- set out brief details of each of the alleged contraventions, or include the details on a data processing device (defined in clause 4 of the Bill) in electronic form which accompanies the notice. It must include the date of when the contravention is alleged to have occurred and the particular provision that was allegedly contravened (see subclause 3(2) of Schedule 3);
- set out that the Federal Court or the Federal Magistrates Court will not deal with the matters in the alleged contraventions if the penalty is paid to the ACMA within the notified period (either 28 days after the notice is given or longer, if an extension of time for payment is granted by the ACMA);
- explain how the penalty may be paid;
- set out any other matters (if any) which are specified in the regulations.

Subclause 3(2) sets out that the notice must include the date of the contravention and the civil penalty provision that was contravened, as part of the brief details about the alleged contravention (under paragraph (3)(1)(c)). This does not limit the details which may be included under this paragraph.

Subclause 3(3) provides that information cannot be included in a data processing device (under subparagraph 3(1)(c)(ii)) unless, at the time that the notice was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference. A data processing device is defined in clause 4 of the Bill. This provision ensures that if the infringement notice is accompanied by a data disk, for instance, that contained details of the alleged civil contraventions, that the contained data would have to be in a readily readable form, or accompanied with a program that would make the data readily readable.

This clause does not in any way limit the operation of the *Electronic Transactions Act 1999* (subclause 3(4)).

Clause 4 – Amount of penalty

Clause 4 sets out two tables indicating the pecuniary penalties payable under an infringement notice. The first table deals with notices given to a body corporate and the second table deals with notices given to an individual.

The following are civil penalty provisions (as defined in clause 4) for which an infringement notice may be payable:

- subclauses 11(1) and (7) relating to making unsolicited telemarketing calls to numbers listed on the Do Not Call Register, and to ancillary contraventions of those rules;
- subclauses 12(1) and (2) relating to agreements for the making of telemarketing calls; and
- a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

The penalty payable will depend upon:
- whether or not the breach is by a body corporate or an individual. The penalties for bodies corporate are five times that for an individual. This is consistent with criminal offences which provide for the penalties for corporations to be five times that for an individual (see subsection 4B(3) of the Crimes Act);
- the nature of the contravention (contraventions of the main penalty provisions in subclauses 11(1) or (7) attract a higher penalty than contraventions of other civil penalty provisions); and
- whether the notice relates to a single alleged contravention, between one and fifty alleged contraventions, or more than 50 alleged contraventions. The penalty payable for more than 50 alleged contraventions is 50 times that for a single contravention.

Summary of penalties

Body corporate for single alleged contravention

The pecuniary penalty payable by a body corporate for a single alleged contravention:
- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call), will be 20 penalty units, currently $2,200 (item 1 of table 1); and
- subclauses 12(1) and (2) (agreements for making telemarketing calls) will be 10 penalty units, currently $1,100 (item 4 of table 1).

Individual for single alleged contravention

The corresponding pecuniary penalty payable for contraventions of these provisions by an individual for a single alleged contravention will be:
- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call) – 4 penalty units, currently $440 (item 1 of table 2);

- subclauses 12(1) and (2) (agreements for making arrangements for telemarketing calls) – 2 penalty units, currently $220 (item 4 of table 2).

An additional penalty is provided for bodies corporate and individuals where the infringement notice relates to between one and fifty alleged contraventions.

Body corporate – 1-49 alleged contraventions

The pecuniary penalty payable by a body corporate where the notice relates to more than one but fewer than fifty contraventions:

- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call), will be the number obtained by multiplying 20 times by the number of alleged contraventions (item 2 of table 1);
- subclauses 12(1) and (2) (agreements for making telemarketing calls) will be the number obtained by multiplying 10 times by the number of alleged contraventions (item 5 of table 1).

Individual – 1-49 alleged contraventions

The corresponding maximum pecuniary penalty payable for contraventions of these provisions by an individual with a prior record, will be:

- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call) – the number obtained by multiplying four times by the number of alleged contraventions (item 2 of table 2);
- subclauses 12(1) and (2) (agreements for making telemarketing calls) – the number obtained by multiplying two times by the number of alleged contraventions (item 5 of table 2).

Body corporate – 50 or more alleged contraventions

The penalty payable for a body corporate where the notice relates to 50 or more contraventions:

- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call), will be 1,000 penalty units, currently $110,000 (item 3 of table 1);
- subclauses 12(1) and (2) (agreement relating to telemarketing calls) will be 500 penalty units, currently $55,000 (item 6 of table 1).

Individual – 50 or more alleged contraventions

The corresponding penalty payable for an individual where the notice relates to 50 or more contraventions will be:

- subclauses 11(1) or (7) (prohibition on making an unsolicited telemarketing call) – 200 penalty units, currently $22,000 (item 3 of table 2);
- subclauses 12(1) and (2) (agreement relating to telemarketing calls) – 100 penalty units, currently $11,000 (item 6 of table 2).

A penalty unit is defined in clause 4 to have the meaning as in section 4AA of the Crimes Act. It is currently $110.

Clause 5 – Withdrawal of an infringement notice

This clause provides for an authorised officer (the Chair of the ACMA or a member of the ACMA staff appointed under proposed clause 8 of Schedule 3, see definition in clause 4 of this Bill), to withdraw an infringement notice that has been given to a person in relation to a contravention of a civil penalty provision (subclauses 5(1) and (2)). The withdrawal notice must be in writing.

A withdrawal of a previously issued infringement notice may be considered for example where further evidence has come to light since the issuing of the infringement notice to suggest that a person has not contravened a civil penalty provision, or alternatively that further evidence suggests that the breach is more serious than initially believed and consequently would be more appropriately dealt with by a court rather than an infringement notice.

This withdrawal notice may be given by someone other than the person who authorised the infringement notice in the first instance.

If an infringement notice is withdrawn after the penalty specified in the notice has already been paid, then the Commonwealth is liable to refund this amount (subclause 5(4)). Section 28 of the *Financial Management and Accountability Act 1997* provides for the appropriation of the Consolidated Revenue Fund for the purposes of paying such a refund.

Clause 6 – What happens if the penalty is paid

If a person has been given an infringement notice and the penalty has been paid in accordance with the notice, and the infringement notice has not subsequently been withdrawn, then any liability of the person for the alleged contravention is discharged (subclauses 6(1) and (2)).

The ACMA cannot institute proceedings under Part 4 of this Bill for any alleged contravention of a civil penalty provision which has already been dealt with by way of an infringement notice (subclause 6(3)).

Clause 7 – Effect of this Schedule on civil proceedings

Clause 7 specifically provides that nothing in Schedule 3:

- requires an infringement notice to be given in relation to an alleged civil contravention. The decision whether or not to issue an infringement notice is at the discretion of the authorised person;

- affects the ability of a person to have court proceedings brought against them under Part 4 if the person does not comply with an infringement notice, an infringement notice is not given to a person, or an infringement notice is withdrawn;
- limits the Federal Court's or the Federal Magistrates Court's discretion to determine the amount of a penalty to be imposed on a person who is found in proceedings under Part 4 to have committed a civil contravention.

Part 4 of the Bill sets out the penalties which apply for contravention of civil penalty provisions, and the action which may be taken to recover these penalties. In essence civil penalty provisions may attract pecuniary penalties (as set out in clause 24 of the Bill). Criminal proceedings may not be brought against a person for breach of a civil penalty provisions (see clause 29 of the Bill).

Clause 8 – Appointment of authorised officer

This clause enables the ACMA to appoint, in writing, a member of the ACMA staff as an authorised officer for the purposes of Schedule 3. An authorised officer is able to issue infringement notices under this Schedule, under clause 2, and may withdraw notices (clause 5).

In addition to those staff specifically appointed as authorised officers under this clause, the Chair of the ACMA is an authorised officer for the purpose of this Schedule as a result of the definition of an authorised officer in clause 4.

Clause 9 – Regulations

This clause provides that the regulations may make further provision in relation to infringement notices. A general regulation-making power is provided in clause 46 of the Bill.