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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DO NOT CALL REGISTER (CONSEQUENTIAL AMENDMENTS) 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 (CONSEQUENTIAL AMENDMENTS) BILL 2006

OUTLINE

The Do Not Call Register (Consequential Amendments) Bill 2006 (the Bill) accompanies the Do Not Call Register Bill 2006 (the Do Not Call Register Bill).

The Do Not Call Register Bill contains regulatory measures aimed at minimising the number of unsolicited telemarketing calls made to Australian numbers where the person has indicated their preference not to receive telemarketing calls. It contains a civil penalties regime which regulates the making of unsolicited telemarketing calls. This Bill makes various consequential amendments to the *Telecommunications Act 1997* (the Telecommunications Act), the *Australian Communications and Media Authority Act 2005* (the ACMA Act) and the *Telecommunications (Carrier Licence Charges) Act 1997* to provide for an appropriate regulatory framework for the Australian Communications Authority (ACMA) to investigate and enforce the scheme, and to enable the development of relevant industry codes and standards relating to telemarketing.

In addition to the prohibition in the Do Not Call Register Bill on the making of unsolicited telemarketing calls to numbers registered on the Do Not Call Register, this Bill will provide for the ACMA to make national standards which will regulate aspects of the making of telemarketing calls. Currently, 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. A national legislative framework for telemarketing would provide a more consistent regulatory framework for the telemarketing industry and to consumers.

The national standards would apply to all telemarketers, including those organisations which are exempt from the prohibition on making unsolicited telemarketing calls.

The main elements contained in the Bill are:

- a requirement on the ACMA to make a mandatory industry standard imposing rules on the telemarketing industry relating to the hours at which telemarketing calls may be made, the disclosure of information a telemarketer must make as part of a call, and the termination of calls;
- a framework to enable industry to develop codes that relate to the making of telemarketing calls. Currently Part 6 of the Telecommunications Act provides for the development of codes by the telecommunications and e-marketing industries in relation to telecommunications and e-marketing activities respectively. This is to be extended to enable the development of codes by the telemarketing industry in relation to telemarketing activities. An industry code will not be able to deal with a matter dealt with by a standard developed by the ACMA. The ACMA will also have a reserve power to make industry standards where there is no relevant industry body or if an industry code has failed;

- an investigation role and appropriate information gathering powers for the ACMA to investigate complaints relating to contraventions of the Do Not Call Register Bill and regulations made under the Bill. Parts 26 and 27 of the Telecommunications Act give the ACMA powers to gather information and investigate complaints relating to certain breaches of the Telecommunications Act and the *Spam Act 2003*. These powers will be extended to enable investigations of contraventions of the Do Not Call Register Bill and regulations.

Clauses 1 to 3 of the Bill contain the introductory provisions.

Schedule 1 contains the amendments to the ACMA Act, the Telecommunications Act and the Carrier Licence Charges Act. Part 1 of Schedule 1 includes those amendments commencing on Royal Assent and Part 2 contains those amendments commencing at the same time as Part 2 of the Do Not Call Register Bill (that is a date fixed by Proclamation, or 12 months after the Bill receives Royal Assent).

FINANCIAL IMPACT STATEMENT

Budget funding of \$33.1 million has been provided over four years for the implementation of the regulatory and legal measures proposed in this Bill and the Do Not Call Register Bill. It is anticipated that approximately \$15.9 million of the costs associated with the Do Not Call Bill will be recovered from the telemarketing industry.

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

The Regulation Impact Statement for the arrangements contained in this Bill and the Do Not Call Register Bill is contained in the Explanatory Memorandum of the Do Not Call Register Bill.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA:	Australian Communications and Media Authority
ACMA Act:	<i>Australian Communications and Media Authority Act 2005</i>
ACCC:	Australian Competition and Consumer Commission
Bill:	Do Not Call Register (Consequential Amendments) Bill 2006
Carrier Licence Charges Act:	<i>Telecommunications (Carrier Licence Charges) Act 1997</i>
Do Not Call Register Bill:	Do Not Call Register Bill 2006
Legislative Instruments Act:	<i>Legislative Instruments Act 2003</i>
Minister:	Minister for Communications, Information Technology and the Arts
TPA:	<i>Trade Practices Act 1974</i>

NOTES ON CLAUSES

Clause 1 – Short title

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

Clause 2 – Commencement

Clause 2 sets out when each of the provisions in the Bill will commence. It provides that clauses 1 to 3 of the Bill, and anything else not covered by the table, will commence on the day on which the Bill receives Royal Assent. Clauses 1, 2 and 3 of the Bill are the introductory provisions including the short title of the Bill, commencement provisions and the schedule application provision.

Item 2 of the table provides that Part 1 of Schedule 1 of the Bill also commences on the day that the Bill receives Royal Assent. Part 1 of Schedule 1 of the Bill provides for amendments to Part 6 of the Telecommunications Act to enable industry codes and standards relating to telemarketing to be made. These provisions are to commence on Royal Assent to enable the ACMA to immediately commence work on developing a national standard relating to certain conduct standards for telemarketing calls, and to enable the industry to develop codes where appropriate.

Item 3 of the table provides that Part 2 of Schedule 1 of the Bill will commence at the same time as Part 2 of the Do Not Call Register Bill commences, that is a date to be fixed by Proclamation, or 12 months after Royal Assent, whichever is the sooner (see clause 2 of the Do Not Call Register Bill). Part 2 of Schedule 1 of this Bill includes amendments to the ACMA's investigation and information-gathering powers in relation to contraventions of the Do Not Call Register Bill and other miscellaneous amendments. These provisions appropriately commence at the same time as the penalty provisions in the Do Not Call Register Bill.

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

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other item in a Schedule has effect according to its terms. Schedule 1 to the Bill amends the ACMA Act, the Telecommunications Act and the Carrier Licence Charges Act.

Schedule 1 – Amendments

Part 1 – Amendments commencing on Royal Assent

This Part primarily amends Part 6 of the Telecommunications Act to enable industry codes and standards to be made relating to telemarketing calls. Part 6 of the Telecommunications Act sets out arrangements for industry codes and industry standards. It enables industry sections to develop codes and register them with the ACMA. The ACMA has safety net powers which may be used if self-regulation in an industry section has serious failings.

The telecommunications and the e-marketing industries currently have the ability to develop industry codes to deal with telecommunications and e-marketing activities. The ACMA has an ability to make standards to regulate these industries where self-regulation is inappropriate.

The proposed amendments to this Part are designed to provide for the establishment of a national industry standard to regulate the conduct of all telemarketers. The ACMA will be required to develop a national standard that applies to all of the telemarketing industry in relation to their telemarketing activities. It will cover telemarketing activities of those organisations exempt from the prohibition on making telemarketing calls to numbers registered on the Do Not Call Register (see Schedule 1 of the Do Not Call Register Bill). It is appropriate that even organisations which have a legitimate public interest in making such calls should be subject to certain standards in relation to the conduct of telemarketing calls. The application of these standards to all telemarketing calls is necessary in order to provide consumers and telemarketers with a comprehensive framework for expected behaviour from telemarketers. This will result in a level playing field for telemarketers and will provide consumers with certainty in relation to the times that telemarketing calls can be made, the contact information that consumers can obtain from persons making such calls, and other matters such as providing for the termination of unsolicited calls.

In addition, the provisions providing for the development of industry codes and standards are proposed to be extended to enable the telemarketing industry (defined in item 6 of Schedule 1 to the Bill) to develop codes relating to telemarketing activities (defined in item 8 of Schedule 1 to the Bill). This would appropriately enable a body such as the Australian Direct Marketing Association (ADMA) to develop a code relating to telemarketing. Such a Code could not relate to matters already regulated under an industry standard developed by the ACMA.

In addition to the mandatory industry standard which the ACMA must develop relating to certain conduct standards to apply to telemarketers, the ACMA will retain a reserve power to make an industry standard if there is no industry code or in the event that an industry code is deficient (under proposed amendments to section 106 of the Telecommunications Act) - see further discussion under item 5 below.

These amendments commence on Royal Assent to enable the ACMA and industry to begin developing standards and codes relating to telemarketing as soon as possible.

Part 1 of Schedule 1 of the Bill also makes other miscellaneous amendments to the Telecommunications Act, such as inserting necessary definitions.

Telecommunications Act 1997

Item 1 – At the end of subsection 3(2)

This item amends subsection 3(2) of the Telecommunications Act, which sets out the secondary objects of the Act. This amendment includes the promotion of responsible practices in relation to the making of telemarketing calls in the objects of the Act. ‘Telemarketing call’ is defined in item 5 of Schedule 1 to the Bill. It is a slightly broader definition than the definition of ‘telemarketing call’ in the Do Not Call Register Bill. This is because it is appropriate for certain types of calls which are not considered to have a commercial-type purpose (one of the necessary elements of a telemarketing call for the purposes of the Do Not Call Register Bill), such as conducting opinion polling, to be subject to certain minimum conduct standards, notwithstanding that the making of such calls are not restricted under the Do Not Call Register Bill. All unsolicited telephone calls should be subject to minimum standards in order to encourage best practice by industry and to ensure that consumers have a comprehensive framework that ensures that all unsolicited phone calls must be subject to permitted calling time, the provision of contact information for the person or organisation making the call and other matters, such as providing for the termination of unsolicited calls.

Item 2 – Section 5

Item 2 amends section 5 of the Telecommunications Act, which is the simplified outline for the Act.

It amends the provision that states ‘bodies and associations that represent sections of the telecommunications industry and e-marketing industry may develop industry codes’, to include a reference to sections of the telemarketing industry being able to develop industry codes.

It also amends the statement that ‘compliance with an industry code is voluntary unless the ACMA directs a particular participant in the telecommunications industry or e-marketing industry to comply with the code’, to include a reference to a particular participant in the telemarketing industry.

These amendments are consequential upon amendments being made to Part 6 of the Telecommunications Act to enable the telemarketing industry to develop industry codes.

The ‘telemarketing industry’ is defined in item 6 of the Bill.

Item 3 – Section 7

This item inserts a new definition into the definition section, section 7 of the Telecommunications Act.

It defines an ‘Australian number’ as having the same definition as in the Do Not Call Register Bill.

An ‘Australian number’ is defined in the Do Not Call Register Bill by reference to the Numbering Plan referred to in section 455 of the Telecommunications Act. It is a number that has been allocated by the ACMA for use in connection with the supply of carriage services to the public in Australia.

Item 4 – Section 7

Item 4 inserts a new definition into the definition section, section 7 of the Telecommunications Act.

The definition of ‘standard questionnaire-based research’ is used in the definition of ‘telemarketing call’ in item 5 of this Bill.

Item 4 defines ‘standard questionnaire-based research’ as research involving people being asked to answer one or more standard questions. While opinion polling may involve ‘standard questionnaire-based research’, this type of research is excluded as it is already covered in the definition of ‘telemarketing call’ (see item 5).

This definition would cover research calls which involve a series of standard questions. The questions need not be identical. For example, if the questions asked depended upon the answers received, this could still amount to standard questionnaire-based research.

The following sets out examples of what would be ‘standard questionnaire-based research’, where they involve standard questionnaires:

- a call surveying individuals on their attitude to law and order priorities in a community for the purposes of determining appropriate educational campaigns;
- calls seeking information on a person’s use of local library facilities for the purposes of determining the adequacy of local library facilities;
- calls seeking information on a person’s experiences of immigrating for the purposes of an academic study.

This definition is not designed to cover private research. For example it would not cover students undertaking general research for school or university where it does not involve questionnaires.

A regulation-making power is included to exclude additional types of calls from the meaning of ‘standard questionnaire-based research’. This has been included to enable

regulations to be made to cover any situation where a particular type of research is not appropriately included. It can deal with any unintended consequences.

Item 5 – Section 7

Item 5 inserts a new definition into the definition section, section 7 of the Telecommunications Act.

It defines a ‘telemarketing call’ for the purpose of this Bill. The definition of telemarketing call includes a telemarketing call within the meaning of the Do Not Call Register Bill that is made to an Australian number, but is wider than that.

An ‘Australian number’ is defined in item 3 to have the same meaning as in the Do Not Call Register Bill. An Australian number is defined in clause 4 of that Bill as 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.

The Do Not Call Register Bill defines a ‘telemarketing call’ in proposed section 5. In essence the definition of a telemarketing call is a voice call made to a telephone number which has a ‘commercial-type’ purpose.

In addition, the definition of telemarketing calls in this Bill would cover voice calls made to an Australian number to conduct opinion polling, and to carry out standard questionnaire-based research.

The meaning of standard questionnaire-based research is discussed above in relation to item 4.

Although these types of calls may not have the ‘commercial-type’ purpose that is ordinarily understood to be an element of a ‘telemarketing call’, it is considered desirable to regulate the conduct of such calls. This is so that consumers can expect minimum standards of behaviour from all unsolicited telephone calls.

The term ‘telemarketing call’ is used in the definition of ‘telemarketing activity’ (in proposed new section 109B), in proposed new subsection 113(3) which sets out additional examples of things that a code may deal with, including matters relating to telemarketing calls, and proposed new section 125A which requires the ACMA to determine industry standards relating to certain aspects relating to telemarketing calls.

Item 6 – Section 7

This item inserts a new definition into the definition section, section 7 of the Telecommunications Act.

It defines the ‘telemarketing industry’ as an industry that involves carrying on a telemarketing activity. A ‘telemarketing activity’ is defined in proposed new section

109B of the Telecommunications Act (to be inserted by item 8 of Schedule 1 to this Bill). It is discussed in greater detail below under this item.

Broadly speaking the telemarketing industry is that industry that uses telemarketing calls to market, advertise or promote on the behalf of others, or that uses telemarketing calls as the principal means of marketing, advertising or promoting their own goods or services.

This definition is relevant to the proposed amendments to Part 6 of the Telecommunications Act which would enable ACMA to make a mandatory industry standard regulating certain aspects of telemarketing calls, and to enable industry codes to be developed by the telemarketing industry.

Item 7 – Section 106

This item amends section 106 of the Telecommunications Act to include references to the ‘telemarketing industry’. The term ‘telemarketing industry’ is proposed to be defined in section 7 of the Telecommunications Act (see item 6 above).

Section 106 of the Telecommunications Act provides a simplified outline of Part 6. It currently provides that:

- bodies and associations that represent sections of the telecommunications industry or e-marketing industry may develop industry codes;
- industry codes may be registered by the ACMA;
- compliance with an industry code is voluntary unless the ACMA directs a particular participant in the telecommunications or e-marketing industry to comply with the code;
- the ACMA has a reserve power to make an industry standard if there is no industry codes or if an industry code is deficient; and
- compliance with industry standards is mandatory.

These amendments are proposed to reflect that, in addition to the development of industry codes by the telecommunications and e-marketing industry, the amendments proposed in this Bill will enable the telemarketing industry to also develop industry codes.

Item 8 – After section 109A

This item inserts a proposed new section 109B into the Telecommunications Act which defines a ‘telemarketing activity’ for the purposes of Part 6.

A telemarketing activity is essentially an activity that consists of making telemarketing calls to market, advertise or promote on behalf of others.

Under subclause 109B(2), a telemarketing activity is defined as an activity that:

- (a) is carried on by a person under a contract or arrangement (other than a contract of employment); and
- (b) consists of using telemarketing calls:

- to market, advertise or promote goods or services, or advertise or promote a supplier, or prospective supplier, of goods or services, where the first person is not the supplier or prospective supplier; or
- to market, advertise or promote land or an interest in land, or advertise or promote a supplier, or prospective supplier, of land or an interest in land, where the first person is not the supplier or prospective supplier; or
- to market, advertise or promote a business opportunity or investment opportunity, or advertise or promote a provider or prospective provider, of a business opportunity or investment opportunity, where the first person is not the provider or prospective provider.

These activities are essentially those as covered by the meaning of telemarketing call in clause 5 of the Do Not Call Register Bill. Some aspects of telemarketing calls covered by clause 5 are included in the meaning of a telemarketing activity under proposed paragraph 109B(4)(a).

In addition a telemarketing activity is an activity carried on by a person if the activity consists of making telemarketing calls:

- to market, advertise or promote goods or services, or advertise or promote a supplier, or prospective supplier, of goods or services, where the person is the supplier or prospective supplier; or
- to market, advertise or promote land or an interest in land, or advertise or promote a supplier, or prospective supplier, of land or an interest in land, where the first person is the supplier or the prospective supplier; or
- to market, advertise or promote a business opportunity or investment opportunity, or advertise or promote a provider or prospective provider, of a business opportunity or investment opportunity, where the first person is the provider or prospective provider.

This would apply in circumstances where a person was marketing, advertising or promoting their own goods or services, rather than under contract.

Proposed new subsection 109B(4) also includes using telemarketing calls to:

- a) solicit donations;
- b) conduct opinion polling; and
- c) carry out standard questionnaire-based research.

Paragraphs 109B(4)(a) is included to ensure that all types of telemarketing calls as covered by the Do Not Call Register Bill are covered. It also includes calls which fall outside the commercial-type calls, but for which it is appropriate to regulate certain conduct of the calls. 'Standard questionnaire-based research' is defined in item 4 of the Bill.

These are the activities to which industry codes and industry standards under this Part may relate.

Proposed subsection 109B(5) provides that an expression used in this section and in proposed section 5 of the Do Not Call Register Bill have the same meaning in this section as it has in that section, except for the definition of ‘telemarketing call’, which has an extended meaning in this Bill (see proposed definition to be inserted by item 5 of this Bill).

Item 9 – After section 110A

This item inserts a proposed new section 110B into the Telecommunications Act, which defines ‘sections of the telemarketing industry’ for the purposes of Part 6.

The concept of industry sections is used in Part 6 relating to developing industry codes. Such sections are used so that codes will be developed by, and applied to, relevant sections, and so that requests for codes by the ACMA (under section 118) may be directed to representatives of relevant sections. The definition of ‘industry sections’ is important in ensuring that it is clear for compliance and enforcement purposes to whom a particular code or standard applies.

Subsection 110B(2) indicates that if the ACMA had not made a determination that determines persons to constitute a section of the telemarketing industry, then the whole telemarketing industry or industries constitute a single section of the telemarketing industry for the purposes of this Part.

Subsection 110B(3) allows the ACMA to determine that persons carrying on, or proposing to carry on a specified telemarketing activity constitute a section of the telemarketing industry for this Part. The section must be identified by a unique name and/or number (subsection 110A(4)). The sections of the industry need not be mutually exclusive, may be formed of two or more sections, or may be subsets of sections (subsection 110B(6)). Subsection 110A(7) provides that subsection 110A(6) does not limit the ACMA’s options for determining sections under subsection 110A(3).

An ACMA determination made under subsection 110A(3) is a legislative instrument for the purposes of the Legislative Instruments Act (subsection 110B(3)). This means that it must be registered on the Federal Register of Legislative Instruments and is subject to Parliamentary disallowance.

Item 10 – After section 111A

This item inserts proposed new section 111AA into the Telecommunications Act.

Proposed section 111AA defines a ‘participant’ in a section of the telemarketing industry for the purposes of Part 6. A ‘participant’ is a person who is a member of a group that constitutes a section of the telemarketing industry. The ‘telemarketing industry’ is defined in item 6 of Schedule 1 to the Bill.

This provision establishes a link between persons and industry sections and is important for compliance and enforcement purposes.

Item 11 – After subsection 112(1A)

This item amends section 112 of the Telecommunications Act.

Section 112 is a statement of the Parliament’s regulatory policy and provides important guidance to the ACMA in performing its functions under Part 6.

Subsection 112(1) provides that it is the Parliament’s intention that industry codes be developed by bodies or associations that the ACMA is satisfied represent sections of the telecommunications or e-marketing industry. An industry body or association set up to represent an industry section does not need to be incorporated to develop a code.

This item inserts a similar statement of regulatory intent in relation to the telemarketing industry. It provides that the Parliament’s intention is that industry codes be developed by bodies or associations that the ACMA is satisfied represent sections of the telemarketing industry. These codes are to apply to participants in the sections of that industry in relation to their telemarketing activities.

The terms ‘telemarketing industry’ and ‘telemarketing activity’ are defined in items 6 and 8 of Schedule 1 to the Bill.

Item 12 – Subsection 112(2)

This item amends subsection 112(2) of the Telecommunications Act. Subsection 112(2) provides that the Parliament intends that the ACMA, in exercising certain powers will act in a manner that, in the opinion of the ACMA, will enable public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the relevant industry.

This item includes the ACMA’s standards-making power under proposed section 125A of the Telecommunications Act (to be inserted by item 36 of Schedule 1 to this Bill) in this provision. Therefore in making this mandatory standard the ACMA must enable public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telemarketing industry

Item 13 – Subsection 112(2)

This item amends subsection 112(2) of the Telecommunications Act to provide that it is the Parliament’s intention that the ACMA exercise specified powers in this Part in a manner that, in the opinion of the ACMA, enables public interest considerations to be addressed without imposing undue financial or administrative burdens on the telemarketing industries. In forming its opinion, the factors the ACMA must have regard

to are the number of persons who are likely to benefit from the code or standard concerned and the legitimate business interests of participants in sections of the telemarketing industry.

The powers specified in subsection 112(2) are those in sections 117, 118, 119, 123, 124 125 and proposed section 125A of the Telecommunications Act. These are powers to register industry codes, request codes, publish notices where no body or association represents a section of the industry, and determine industry standards.

Item 14 – After subsection 112(3B)

This item inserts proposed new subsection 112(3C). This provision relates to those matters that the ACMA must have regard to in determining whether public interest considerations are being addressed in a way that does not impose undue financial or administrative burdens on participants in sections of the telemarketing industry.

The matters that the ACMA must take into account are:

- the number of persons who would be likely to benefit from the code or standard concerned;
- the extent to which those persons are householders or small business operators; and
- the legitimate business interests of participants in sections of the telemarketing industry.

The term ‘telemarketing industry’ is defined in item 6 of Schedule 1 to the Bill.

Item 15 – Subsection 112(4)

This item makes a consequential amendment to subsection 112(4) of the Telecommunications Act to provide that subsection (3C) does not, by implication, limit the matters to which the ACMA may have regard in determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telemarketing industry.

This item is consequential upon amendments proposed in item 14 which provides for what matters the ACMA must have regard to in determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telemarketing industry (see discussion above).

Item 16 – Subsection 113(2)

This item amends subsection 113(2) of the Telecommunications Act to add a reference to the telemarketing industry. The telemarketing industry is defined in item 6 of Schedule 1 to the Bill.

Subsection 113(3) gives examples of the matters that industry codes and industry standards may address, however, the applicability of a particular example will depend on the section of the industry concerned (see subsection 113(2)).

The list in subsection 113(3) consists of examples of matters for industry codes. Many may not be applicable to particular industry sectors and not all matters may need to be addressed in codes. Moreover, codes and standards need not be limited to the matters identified.

Item 17 – At the end of subsection 113(3)

Subsection 113(3) gives examples of the matters that industry codes and industry standards may deal with. This item adds to this list to provide that industry codes and standards may deal with:

- record-keeping practices to be followed in relation to telemarketing calls made or attempted to be made. For example this allows industry to develop codes which regulate how a telemarketer must keep certain records relating to the types of calls they make, who they are made to and the duration of the calls. It could also regulate the length of time for which such records must be kept. These types of rules could facilitate enforcement of breaches of codes;
- action to be taken to limit the total number of telemarketing calls attempted to be made, by a particular participant in a section of the telemarketing industry, during a particular period, where the recipient answers the attempted call, but the attempted call does not have any content. For example, a telemarketer may use automatic dialling equipment to call more telephone numbers than there are operators available to take the calls, taking into account the possibility that not all the telephone calls are likely to be answered. However, if all the calls are answered, some can result in silent calls because there is not operator to greet the recipient. The recipient experiences a period of silence until an operator is free;
- action to be taken to limit the total number of telemarketing calls made, or attempted to be made, by a particular participant in a section of the telemarketing industry, during a particular period to a particular telephone. For example an industry code could impose a rule limiting the numbers of calls which can be made to a particular number during a 30 day period in relation to a single sales campaign.

The list in subsection 113(3) consists of examples of matters for industry codes. Many may not be applicable to particular industry sectors and not all matters may need to be addressed in codes. Moreover, codes and standards need not be limited to the matters identified.

Item 18 – Paragraph 117(1)(a)

This item amends paragraph 117(1)(a) of the Telecommunications Act to insert a reference to the telemarketing industry to enable a body or association representing a section of the telemarketing industry to submit a draft code, that applies to participants of the section and deals with one or more matters relating to the telemarketing activities of that section, to the ACMA for registration.

The ‘telemarketing industry’ is defined in item 6 of Schedule 1 to the Bill.

Subsection 117(1) requires the ACMA to register a code if the ACMA is satisfied that:

- the code provides appropriate community safeguards or deals with the matters in an appropriate manner, depending on the nature of the matters;
- the body or association has published a draft code, and invited participants in that section and members of the public to make submissions within a period of at least 30 days (subsection 117(3)) and considered any submissions;
- where a code relates to privacy issues, the Privacy Commissioner has been consulted about the development of the code; and
- the ACCC does not object to the code.

The public comment requirements are additional to any opportunities the industry may provide for the involvement of the public or consumer representatives in the code development process.

Subsection 117(4) provides that when a new code is registered under this Part and it is expressed to replace another industry code, the other code ceases to be registered.

A decision to refuse to register a code is subject to merits review under Part 29 of the Telecommunications Act (see Schedule 4).

Item 19 – Paragraph 117(1)(b)

This item makes consequential amendments to paragraph 117(1)(b) of the Telecommunications Act to include a reference to telemarketing activities. The effect of section 117 is discussed above under item 18.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 20 - Paragraph 117(1)(h)

This item amends paragraph 117(1)(h) to provide that before registering an industry code that relates to the telemarketing industry, the ACMA need not be satisfied that the Telecommunications Industry Ombudsman (TIO) has been consulted.

Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1997* provides for the establishment of the TIO Scheme. Under this scheme the TIO may investigate complaints about carriage services by end-users. As the codes relating to the telemarketing industry will not ordinarily relate to carriers and carriage services providers, and the codes will not extend the types of matters that the TIO may deal with, it is not necessary to consult with the TIO prior to making these standards.

Item 21 – Subparagraph 117(1)(k)(iii)

This item makes consequential amendments to subparagraph 117(1)(k)(iii) of the Telecommunications Act to include a reference to the telemarketing industry. The effect of section 117 is discussed above under item 18. It ensures that the ACMA must consult with the Privacy Commissioner before registering a Code which deals with certain privacy matters.

The term ‘telemarketing industry’ is defined in item 6 of Schedule 1 to the Bill.

Item 22 – Subsection 118(1)

This item amends section 118 of the Telecommunications Act to include references to the telemarketing industry.

Section 118 provides a formal trigger for the development of an industry code. The failure to develop a code which has been requested justifies the ACMA developing an industry standard (see section 123).

This section provides that if the ACMA is satisfied that a body or association represents a particular section of the telemarketing industry, it may request them to develop a code that would apply to participants of the section that deals with one or more specified matters. The ACMA must specify a period of at least 120 days for a code to be developed and a copy be given to it.

The ACMA is not permitted to make a request under this section unless it is satisfied that the development of the code is necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of participants in that industry section and it is unlikely that an industry code would be developed within a reasonable period without such a request.

The ACMA may vary the request by extending the period (subsection 118(5)) and may specify indicative targets for progress in developing the code. The targets are binding and may be used to guide the timing of the development process (subparagraph 123(1)(b)(ii)).

Item 23 – Paragraph 118(1)(a)

This item makes a consequential amendment to paragraph 118(1)(a) of the Telecommunications Act to include a reference to telemarketing activities. The substance of section 118 is discussed above under item 22.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 24 - Subsection 118(3)

This item makes a consequential amendment to paragraph 118(3) of the Telecommunications Act to include a reference to the ‘telemarketing industry’.

This amendment means that the ACMA is not permitted to make a request under section 118 for an industry code to be developed by the telemarketing industry unless it is satisfied that the development of the code is necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of participants in that industry section, and it is unlikely that an industry code would be developed within a reasonable period without such a request.

Item 25 – Paragraph 118(4A)(c)

This item makes a consequential amendment to subparagraph 118(4A)(c) of the Telecommunications Act to include a reference to the telemarketing industry.

This amendment means that the ACMA must consult the Privacy Commissioner before making a request under section 118 for an industry code to be developed by the telemarketing industry where the code could deal with certain privacy matters.

Item 26 – Subsection 119(1)

This item amends section 119 of the Telecommunications Act to include references to the telemarketing industry.

Section 119 provides that if the ACMA is satisfied that there is no body or association in existence that represents a particular industry section, it may publish a notice in the *Gazette* to the effect that if such a body were to come into existence, the ACMA would be likely to request it to develop a code under section 118 about the matters in the notice. The notice must set a period of at least 60 days for the section to develop a representative body.

This section supports section 118 by encouraging the formation of necessary industry bodies or associations to support the development and implementation of industry codes. If no such body or association is formed within the period set out in the notice, this would be a consideration in whether an industry standard is to be made under section 124.

Item 27 – Paragraph 119(1)(b)

This item makes consequential amendments to paragraph 119(1)(b) of the Telecommunications Act to include a reference to ‘telemarketing activities’. The substance of section 119 is discussed above under item 26.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 28 – Subparagraph 123(1)(a)(i)

This item amends subparagraph 123(1)(a)(i) of the Telecommunications Act to include references to the telemarketing industry.

Section 123 enables the ACMA to make a standard where it has requested industry to develop a code and it has failed to do so or to have made satisfactory progress. This back up standards-making provision is in addition to the mandatory standards power ACMA has under proposed new section 125A.

This section, as amended, provides that if the ACMA requests a code to be developed by a particular section of the telemarketing industry under subsection 118(1) and this request has not been complied with; indicative targets have not been met; or a code has been developed that the ACMA subsequently refused to register, then the ACMA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise adequately regulate that industry section.

Subsection 123(3) requires the ACMA to consult the body or association to which it made the request before determining an industry standard.

Item 29 – Subparagraph 123(1)(a)(ii)

This item makes consequential amendments to subparagraph 123(1)(a)(ii) of the Telecommunications Act to include a reference to ‘telemarketing activities’. The substance of section 123 is discussed above under item 28.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 30 – Paragraph 124(1)(a)

This item amends paragraph 124(1)(a) of the Telecommunications Act to include a reference to the ‘telemarketing industry’.

Section 124 of the Telecommunications Act enables the ACMA to make a standard where no industry representative body has been established.

If the ACMA is satisfied that a particular section of the industry is not represented by a body or association, has published a notice under subsection 119(1) and no such body or association comes into existence within the period in the notice, then the ACMA may determine an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise regulate adequately that industry section.

Item 31 – Subparagraph – 124(1)(c)(ii)

This item makes consequential amendments to subparagraph 124(1)(c)(ii) of the Telecommunications Act to include a reference to ‘telemarketing activities’. The substance of section 124 is discussed above under item 30.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 32 – Subparagraph 125(1)(a)(i)

Item 26 amends section 125 of the Telecommunications Act to include references to the telemarketing industry.

Section 125 of the Telecommunications Act enables the ACMA to make a standard where a code has clearly failed.

If the ACMA is satisfied that an industry code is deficient; a written notice has been given to the developer of a code to address these deficiencies within a period of at least 30 days; and after that period the ACMA is satisfied that it is necessary or convenient to determine a standard, the ACMA may determine an industry standard. This section only applies to codes registered for at least 180 days to ensure that the code has been implemented for an adequate period before its success is judged and is intended to reinforce the preference for industry self-regulation.

If the ACMA is satisfied that a body or association represents that industry section, subsection 125(4) requires the ACMA to consult with the body or association before determining an industry standard. The industry code ceases to be registered on the day the industry standard comes into force.

An industry code is deficient if, and only if it is not operating to provide appropriate community safeguards or not otherwise operating to adequately regulate that industry section (subsection 125(7)).

Item 33 – Subparagraph 125(1)(a)(ii)

This item makes a consequential amendment to subparagraph 125(1)(a)(ii) of the Telecommunications Act to include a reference to ‘telemarketing activities’. The substance of section 125 is discussed above under item 32.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 34 – Subsection 125(7)

This item makes a consequential amendment to subsection 125(7) of the Telecommunications Act to include a reference to the ‘telemarketing industry’. The substance of section 125 is discussed above under item 32.

The term ‘telemarketing industry’ is defined in item 6 of Schedule 1 to the Bill.

Item 35 – Subsection 125(7)

This item makes a consequential amendment to subsection 125(7) of the Telecommunications Act to include a reference to telemarketing activities. The substance of section 125 is discussed above under item 32.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 36 – After section 125

This item inserts a proposed new section, section 125A.

This new section requires that the ACMA make certain industry standards that apply to the telemarketing industry relating to the telemarketing activities. Proposed subsection 125A(1) sets out matters which the standard must relate to. They are:

- restricting the calling hours/days for making telemarketing calls;
- requiring specified information about the telemarketer or the authorising party to be provided;
- providing for the termination of telemarketing calls;
- requiring telemarketers to enable calling line identification when making telemarketing calls.

These minimum conduct standards will apply to all persons and organisations making telemarketing calls, including those exempt from the general prohibition in clause 16 of the Do Not Call Register Bill.

Before determining a conduct standard under this provision the ACMA must consult with the following persons or bodies:

- any relevant industry body or association (s125A(3));
- the general public in accordance with s132 of the Telecommunications Act;
- the ACCC (section 133 of the Telecommunications Act);
- the Privacy Commissioner, where the standard relates to certain privacy matters (section 134 of the Telecommunications Act);
- at least one consumer body (section 135 of the telecommunications Act); and
- States and Territories (see proposed section 135A).

To ensure that there are national contact standard applying to telemarketers from the time that Part 2 of the Do Not Call Register Bill comes into operation, proposed new subsection 125A(4) provides that there must always be a standard in force.

A standard is a legislative instrument for the purposes of the Legislative Instruments Act. This means that it must be registered on the Federal Register of Legislative Instruments and is subject to Parliamentary disallowance.

Item 37 – Subsection 130(1)

This item amends subsection 130(1) of the Telecommunications Act to include references to the telemarketing industry.

Section 130 provides that the ACMA may vary an industry standard if it is satisfied that it is necessary or convenient to do so to provide appropriate community safeguards or otherwise adequately regulate participants.

Item 38 – Paragraphs 130(1)(a) and (b)

This item makes a consequential amendment to paragraphs 130(1)(a) and (b) of the Telecommunications Act to include a reference to ‘telemarketing activities’. The substance of section 130 is discussed above under item 37.

The term ‘telemarketing activity’ is defined in item 8 of Schedule 1 to the Bill.

Item 39 – Subsection 133(1)

This amendment removes the requirement on the ACMA to consult the Telecommunications Industry Ombudsman in all instances where they are determining or varying a standard. This is a consequential amendment upon item 40.

Item 40 – After subsection 133(1)

This amendment provides that the ACMA must consult the Telecommunications Industry Ombudsman (TIO) prior to determining or varying an industry standard, except in relation to a telemarketing industry standard made under s125A.

Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1997* provides for the establishment of the TIO Scheme. Under this scheme the TIO may investigate complaints about carriage services by end-users. As the codes relating to the telemarketing industry will not ordinarily relate to carriers and carriage services providers, and the codes will not extend the types of matters that the TIO may deal with, it is not necessary to consult with the TIO prior to making these standards.

Item 41 – At the end of Division 5 of Part 6

This item inserts a proposed new subsection 135A. This subsection requires the ACMA to consult with State and Territory governments before determining or varying an industry standard relating to telemarketing.

Currently the States and Territories regulate certain conduct of telemarketers such as the times of calling which will be regulated by the ACMA under an industry standard under s125A.

An industry standard will override the State and Territory laws to the extent of any inconsistency. Consequently it is requires that the ACMA consult with the States and Territories prior to making a mandatory conduct standard under section 125A.

Part 2 – Amendments commencing at the same time as Part 2 of the Do Not Call Register Act 2006 commences

Part 2 of Schedule 1 to the Bill sets out those amendments in the Bill that commence at the same time as Part 2 of the Do Not Call Register Bill (that is a date fixed by Proclamation or 12 months after Royal Assent, see clause 2 of the Do Not Call Register Bill). The provisions include amendments relating to:

- investigations by the ACMA;
- the ACMA's information-gathering powers; and
- miscellaneous amendments to the Telecommunications Act, the ACMA Act and the Carrier Licence Charges Act.

These investigative powers are not necessary until the penalty provisions in the Do Not Call Register Bill come into operation.

Australian Communications and Media Authority Act 2005**Item 42 – After subparagraph 8(1)(j)(i)**

This item amends the meaning of the ACMA's telecommunications functions as defined in section 8 of the ACMA Act, to include its functions under the Do Not Call Register Bill.

Item 43 – Section 7 (after paragraph (h) of the definition of *civil penalty provision*)

This item includes subsection 139(1) and 139(2) in the definition of 'civil penalty provision' in section 7 of the Telecommunications Act. Subsections 139(1) and (2) are new civil penalty provisions to be inserted by item 49 of this Bill.

Telecommunications Act 1997

Item 44 – Section 7 (after paragraph (c) of definition of ACMA’s telecommunications powers)

This item makes a consequential amendment to the definition section of the Telecommunications Act, section 7, to include a reference to the ACMA’s powers under the Do Not Call Register Bill in the definition of the ACMA’s ‘telecommunications powers’.

Item 45 – Paragraph 121(1)(a)

Item 45 amends paragraph 121(1)(a) of the Telecommunications Act to include references to the telemarketing industry.

It is intended that compliance with industry codes be voluntary or as determined by the industry section subject to the code. It is envisaged, however, that where a code is effective and being complied with by a majority of participants to whom it applies, it may be appropriate to direct non-compliant persons to comply with the code. This may particularly apply when the person can give no good reason for non-compliance with the code. In this context, section 121 allows the ACMA to direct the person to comply with a code. This provides a back-up to self-regulation by allowing a person who refuses to comply with otherwise successful self-regulatory arrangements to be directed to comply with a code. In effect, compliance with the code becomes mandatory for that person.

A decision to give or vary a direction, or refuse to revoke a direction under this section is subject to merits review under Part 29 of the Telecommunications Act (see Schedule 4 of that Act).

Under Part 31 the Minister, the ACMA or the ACCC may institute a proceeding in the Federal Court for the recovery of a pecuniary penalty on behalf of the Commonwealth (subsection 571(1)). If the Court is satisfied that a civil penalty provision has been contravened, it may order that a pecuniary penalty be paid in respect of each contravention (subsection 570(1)). In determining the pecuniary penalty, the Court must have regard to all relevant matters, including these matters listed in subsection 570(2):

- 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 Telecommunications Act to have engaged in any similar conduct.

Item 46 – Subsection 122(1)

This item amends subsection 122(1) of the Telecommunications Act to include references to the telemarketing industry.

Section 122 provides that if an industry participant contravenes an industry code, the ACMA may issue a formal warning to the industry participant. It is intended to enable the ACMA to formally indicate its concerns about a contravention of a code to a person. Such a warning may be a precursor to making a compliance direction under section 121. However, in the case of a serious, flagrant or recurring breach the ACMA may decide to give a direction under section 121 without prior formal warning.

Item 47 – Subsection 128(1)

This item amends subsection 128(1) to include references to the telemarketing industry. Section 128 provides that compliance with an industry standard developed by the ACMA is compulsory for participants in the relevant section of the industry. Contravention of an industry standard is subject to pecuniary penalties under Part 31.

Breaches of a direction are subject to pecuniary penalties under Part 31 of the Telecommunications Act. Under Part 31 the Minister, the ACMA or the ACCC may institute a proceeding in the Federal Court for the recovery of a pecuniary penalty on behalf of the Commonwealth (subsection 571(1)). If the Court is satisfied that a civil penalty provision has been contravened, it may order that a pecuniary penalty be paid in respect of each contravention (subsection 570(1)). In determining the pecuniary penalty, the Court must have regard to all relevant matters, including these matters listed in subsection 570(2):

- 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 Telecommunications Act to have engaged in any similar conduct.

Item 48 – Subsection 129(1)

This item amends subsection 129(1) of the Telecommunications Act to include references to the ‘telemarketing industry’.

Section 129 provides that if an industry participant contravenes an industry standard, the ACMA may issue it with a formal warning. It is intended to enable the ACMA to formally indicate its concerns about a contravention of an industry standard, possibly as a precursor to considering seeking a sanction under section 128, if the person does not heed the warning. However, in the case of a serious, flagrant or recurring breach the ACMA may decide to take action under Part 30 or 31 without prior formal warning.

Item 49 – At the end of Division 7 of Part 6

This item inserts proposed new section 139. This section requires agreements for the carrying out of telemarketing activities to require compliance with this Part. It puts a positive obligation on persons entering into telemarketing contracts, arrangements or understandings to require the contract, arrangement or understanding to include a requirement that the other party must comply with Part 6 of the Telecommunications Act.

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 the relevant telemarketing standards and are subject to the industry codes covered by Part 6 of the Telecommunications 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, as well as the Do Not Call Register Bill, this provision puts a further obligation on persons outsourcing their telemarketing calls to assist in ensuring that such persons will comply with Part 6 of the Telecommunications Act by making it a contractual requirement.

In particular subclause 139(1) prohibits a person from entering into a contract or arrangement, or arriving at an understanding with another person if:

- the agreement relates to the carrying on one or more telemarketing activities; and
- the contract does not contain an express provision to the effect that the person will comply with Part 6 of the Telecommunications Act.

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 139(4) makes it clear that a failure to include such a requirement does not affect the validity of any contract, arrangement or understanding.

Subclause 139(3) provides that this is a civil penalty provision. Part 31 of the Telecommunications Act provides for the recovery of pecuniary penalties in relation to the contravention of a civil penalty provision. However item 60 of this Bill will amend the application of section 570 to ensure that the same penalties that apply to the contravention of a similar provision in clause 12 of the Do Not Call Register Bill (which requires a person to include as part of an contract or arrangement relating to telemarketing calls a requirement that a person comply with the Do Not Call Register Bill) also apply in this instance.

Item 50 – Subsection 492(5) (definition of *this Act*)

This item amends subsection 492(5) of the Telecommunications Act to include a reference to the proposed *Do Not Call Register Act 2006* and regulations under that Act in the meaning of ‘this Act’ for the section.

Section 492 relates to the ACMA conducting hearings under Part 25 of the Telecommunications Act. Part 25 enables the ACMA to hold public inquiries about certain matters relating to telecommunications. The definition of the performance of the ACMA’s telecommunications functions and powers covers holding inquiries relating to certain telemarketing matters. As a general rule, hearings will be required to be held in public (subsections 492(1) and (2)). If the hearing is to be conducted in public, the ACMA will be required to give reasonable public notice of the conduct of the hearing (subsection 492(4)).

A hearing, or part of a hearing can be conducted in private if the ACMA is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or that hearing a matter, or part of a matter in public would not be conducive to the due administration of the Act (subsection 492(3)).

Under this section, ‘this Act’ is currently defined to include not only the Telecommunications Act, but also the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and regulations under that Act and the *Spam Act 2003* and regulations under that Act. This amendment includes the Do Not Call Register Bill and regulations under that Bill in this definition.

Item 51 – Subsection 502(5) (definition of *this Act*)

This item amends subsection 502(5) of the Telecommunications Act to include a reference to Do Not Call Register Bill and regulations under that Bill in the meaning of ‘this Act’ for the section.

Section 502 relates to the ACCC conducting hearings under Part 25 of the Telecommunications Act. Part 25 enables the ACCC to hold public inquiries about certain matters relating to telecommunications. As a general rule, hearings will be required to be held in public (subsections 502(1) and (2)). If the hearing is to be conducted in public, the ACCC will be required to give reasonable public notice of the conduct of the hearing (subsection 502(4)).

A hearing, or part of a hearing can be conducted in private if the ACCC is satisfied that confidential evidence may be given or other confidential matters may arise during the hearing, or that hearing a matter, or part of a matter, in public would not be conducive to the due administration of the Act (subsection 502(3)).

Under this section, ‘this Act’ is currently defined to include not only the Telecommunications Act, but also the *Telecommunications (Consumer Protection and*

Service Standards) Act 1999 and regulations under that Act, and the *Spam Act 2003* and regulations under that Act. This amendment includes the Do Not Call Register Bill and regulations under that Bill in this definition.

Item 52 – After paragraph 508(ab)

This item amends section 508 of the Telecommunications Act to refer to a contravention of the Do Not Call Register Bill or regulations under that Bill.

Under Part 26 of the Telecommunications Act (which includes section 508), the ACMA is able to investigate certain matters relating to telecommunications and spam, on its own initiative or in response to written complaints made to the ACMA. The ACMA is required to investigate any matter concerning carriage services or the telecommunications industry if requested to do so by the Minister.

Section 508 specifies those matters that the ACMA may investigate of its own volition and must investigate if so requested by the Minister.

This proposed amendment will also enable the ACMA to investigate a contravention of the Do Not Call Register Bill or regulations under that Bill.

Item 53 – At the end of section 509

This item inserts a new subsection 509(5). This is intended to allow a person to make a complaint to the ACMA about a possible contravention of the Do Not Call Register Bill where that person does not know who made the call.

This is intended to cover the situation where a person wishes to make a complaint to the ACMA in relation to a contravention of an industry code or standard relating to telemarketing matters or a contravention of the Do Not Call Register Bill and the person has insufficient information to identify who made or attempted to make the call.

For example this would enable a person to make a complaint about the receipt of silent calls. In such cases the ACMA must take reasonable steps to assist the person to identify the person who made the call. For example it may be possible in repeated cases of missed calls for the ACMA to seek information on call data to assist in determining the caller.

Item 54 – After paragraph 510(1)(ab)

This amendment enables the ACMA to investigate a contravention of the Do Not Call Register Bill or regulations made under that Bill where the ACMA has reason to suspect that a person may have contravened the Act. This is in addition to those matters referred to in 508 where:

- in the case of a contravention of the Act, the ACMA has reason to suspect that a person may have contravened the Act;
- a complaint is made to the ACMA under section 509; or
- the ACMA thinks that it is desirable to investigate the matter.

The ACMA is not able to conduct such an investigation if it thinks that the subject matter of the investigation would not be a matter relevant to the performance of any of its functions (subsection 510(2)).

If the Minister requests the ACMA to investigate a matter relating to a contravention of the Do Not Call Register Bill the ACMA is required to investigate that matter (subsection 510(3)).

Item 55 – Paragraph 512(1A)(a)

This item amends subsection 512(1A) of the Telecommunications Act to limit the circumstances in which the ACMA must inform the respondent about its upcoming investigation of a complaint relating to the respondent for possible breaches of the Do Not Call Register Bill or regulations under that Bill.

Under section 512, before the ACMA begins to investigate a matter to which a complaint relates, the ACMA is required to inform the respondent identified by the complainant that the matter is to be investigated. This item amends this requirement to provide that the ACMA will not be required to inform the respondent if the matter relates to possible contraventions of the Do Not Call Register Bill or regulations under that Bill where the ACMA has reasonable grounds to believe that informing the respondent is likely to result in the concealment, loss or destruction of a thing connected with a breach of this Act.

The ACMA is able to conduct an investigation under Part 26 in such manner as the ACMA thinks fit (subsection 512(2)).

For the purposes of an investigation, the ACMA is empowered to obtain information from such persons, and to make such inquiries, as it thinks fit (subsection 512(3)). For example, the ACMA may seek information from carriage service providers or a call centre operator about calls made at a certain time or to certain numbers.

Item 56 – Paragraph 512(6)(a)

This item substitutes a new paragraph 512(6)(a) into the Telecommunications Act to provide that the ACMA is not required to give the respondent an opportunity to make submissions if the matter relates to a possible contravention of the Do Not Call Register Bill or regulations under that Bill, if the ACMA has reasonable grounds to believe that doing so is likely to result in the concealment, loss or destruction of a thing connected with a breach of the Do Not Call Register Bill.

As a general rule, the ACMA is not required to give a complainant or a respondent an opportunity to appear before the ACMA in connection with an investigation. The exception to this rule is if the ACMA, as a result of an investigation, makes a finding that is adverse to a complainant or a respondent. In such a case, the ACMA will be required to give the complainant or respondent an opportunity to make submissions about the matter to which the investigation relates, subject to the proposed new paragraph 512(6)(a), except if the matter relates to a possible contravention of the Do Not Call Register Bill and the ACMA has reasonable grounds to believe that giving the respondent such an opportunity is likely to result in the concealment, loss or destruction of a thing connected with the breach (subsections 512(4) and (5)).

Evidence of a contravention of the Bill will often be in the sole possession of the alleged contravener, and readily destroyed, and it is therefore important it is provided a greater degree of protection than might otherwise be the case, from destruction by the contravener.

Item 57 – Paragraph 513(2)(a)

This item substitutes a new paragraph 513(2)(a) which limits the requirement on the ACMA to inform the complainant and respondent of its decision not to investigate a complaint.

Under section 513 of the Telecommunications Act, if the ACMA decides not to investigate a matter to which a complaint relates, or not to investigate it further, it is required, as soon as practicable and in such manner as it thinks fit, to inform the complainant and the respondent of its decision and of the reasons for it, except in relation to contraventions of the Spam Act.

Proposed new paragraph 513(2)(a) provides that the ACMA is not required to inform the respondent of the decision and the reasons for the decision if the matter relates to a possible breach of the Do Not Call Register Bill or regulations under that Bill and the ACMA has reasonable grounds to believe that to do so is likely to result in the concealment, loss or destruction of a thing connected with a contravention of the Do Not Call Register Bill.

Overseas experience indicates that individual complaints may potentially be numerous, and identifying and establishing contravening behaviour may be achieved through the examination of a series of apparently unrelated complaints from different complainants over a period of time. Responding individually to every complaint and advising those involved of its existence would both potentially risk the destruction of valuable evidence and be prohibitively resource intensive.

Item 58 – After section 515

This item inserts proposed new section 515A in order to enable the ACMA to transfer certain complaints to the Privacy Commissioner if the ACMA forms the opinion that the matter could have been made to the Privacy Commissioner under section 36 of the *Privacy Act 1988* and could be more conveniently or effectively dealt with by the Commissioner. Proposed new section 515A applies to a complaint about any of the following matters set out in proposed new paragraph 515A(1)(a):

- a contravention of a code registered under Part 6 of the Telecommunications Act, where the code applies to participants in a section of the telemarketing industry and deals with one or more matters relating to the telemarketing activities of those participants;
- a contravention of section 128 in relation to an industry standard, where the standard applies to participants in a section of the telemarketing industry and deals with one or more matters relating to the telemarketing activities of those participants;
- a contravention of the Do Not Call Register Bill or regulations under that Bill.

A complaint transferred in this manner is taken to be a complaint made to the Privacy Commissioner under section 36 of the *Privacy Act 1988*.

Item 59 – Paragraph 518(3)(a)

This item includes proposed new paragraph 518(3)(a) which limits the requirement on the ACMA to give a person adversely affected by a report an opportunity to comment.

Under section 518 of the Telecommunications Act if the publication of a matter in a report or part of a report about an investigation would, or would be likely to, adversely affect the interests of a person, the ACMA is not permitted to publish the report or the part of the report, as the case may be, until the ACMA has given the person a reasonable period (of up to 30 days) to make representations in relation to the matter, except in relation to possible breaches of the Spam Act (subsections 518(1) and (2)).

Proposed new paragraph 518(3)(a) provides that the ACMA is not required give the person a reasonable period to make representations to the ACMA if the matter relates to a possible breach of the Do Not Call Register Bill and the ACMA has reasonable grounds to believe that to do so is likely to result in the concealment, loss or destruction of a thing connected with a breach of the Do Not Call Register Bill.

This ensures that evidence which may readily be amended or destroyed is not destroyed. This provision only applies if the ACMA has reasonable grounds to believe that evidence would be concealed, lost or destroyed if they gave a person an opportunity to comment on a report.

Item 60 – After subsection 570(4)

This item inserts a new subclause 570(4) into section 570 of the Telecommunications Act.

Section 570 provides for the pecuniary penalties payable for contraventions of civil penalty provisions in the Telecommunications Act.

This amendment provides that the penalties set out in subsections 570(3) and (4) do not apply in relation to a contravention of clause 139(1) or (2) (which are to be inserted by item 49 of this Bill). These civil penalty provisions provide that agreements for the carrying on of telemarketing activities must require compliance with Part 6 of the Telecommunications Act. This provision is similar to a penalty provision in clause 12 of the Do Not Call Register Bill which require agreements for the making of telemarketing calls to require compliance with the Do Not Call Register Bill. Consequently it is appropriate that the penalty levels for the contraventions of these provisions are the same.

Item 61 – Subsection 572B(6) (definition of *this Act*)

This item substitutes new subsection 572B(6) which provides that the definition of ‘this Act’ includes the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the Do Not Call Register Bill for the purposes of section 572B.

Section 572B provides that the ACMA may accept written undertakings from a person to take or refrain from taking specified action in order to comply with this Act, or take specified action directed towards ensuring that the person does not, or is unlikely to contravene this Act in the future (subsection 572B(1)). Undertakings may only be varied or withdrawn with the consent of the ACMA (subsection 572B(3)) and may be cancelled by a written notice issued by the ACMA (subsection 572B(4)).

The effect of this amendment is that the ACMA may accept written undertakings from a person to ensure compliance with, or prevent contravention of the Do Not Call Register Bill. For example the ACMA may accept an undertaking from a person that they will not make any further telemarketing calls.

In addition, Part 31A of the Telecommunications Act (relating to enforceable undertakings) will enable undertakings to be accepted in relation to ensuring that a person does not contravene telemarketing industry codes and standards under Part 6 of the Telecommunication Act.

This permits the ACMA to accept formal administrative undertakings in appropriate circumstances, rather than instituting proceedings. This Part does not preclude the ACMA instituting proceedings against a person who has given such an undertaking for a breach of the Bill. However, it is likely that in most cases the ACMA will accept an undertaking instead of instituting proceedings.

It is anticipated that the terms of an undertaking relating to an alleged contravention of a civil penalty provision would bear a clear relationship with the contravention and would be proportionate to the contravention.

Section 572C of the Telecommunications Act provides for the enforcement of undertakings where a person is in breach of an undertaking. If a person breaches an undertaking then the ACMA may apply to the Federal Court for an order.

If the Court is satisfied that a person has breached a term of the undertaking then it may:

- direct the person to comply with the term of the undertaking;
- direct the person to pay the Commonwealth an amount up to the amount of any financial benefit the person has obtained that is reasonably attributable to the breach;
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order that the Court considers appropriate (subsection 572C(2)).

Item 62 – Section 574A (definition of *this Act*)

Item 62 amends section 574A of the Telecommunications Act to include the Do Not Call Register Bill and regulations under the Bill in the definition of ‘this Act’ for the purposes of Part 32 of the Telecommunications Act.

Part 32 deals with the proof of matters that involve directors of corporations, employees and agents in connection with civil and criminal proceedings under the Act.

The effect of this amendment is that if a corporation has breached a civil penalty provision in the Do Not Call Register Bill and it is necessary in proceedings to establish the state of mind of the corporation, it will be sufficient to show that:

- a director, employee or agent of the corporation, acting within the scope of his or her authority, engaged in that conduct; and
- the director, employee or agent had that state of mind (subsection 575(1)).

For the purposes of this provision, the state of mind of a person will include the person’s knowledge, intention, opinion, belief or purpose and the person’s reasons for the intention, opinion, belief or purpose (subsection 575(3)).

If conduct is engaged in on behalf of a corporation by a director, employee or agent of the corporation and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Do Not Call Register Bill, to have been engaged in by the corporation unless the corporation establishes that it took reasonable precautions and exercised due diligence to avoid the conduct (subsection 575(2)).

A reference in section 575 to a director of a corporation will include a reference to a constituent member of a body corporate incorporated for a public purpose by Commonwealth, State or Territory law (subsection 575(4)).

A reference in section 575 to ‘engaging in conduct’ includes a reference to refusing to engage in conduct (subsection 575(5)).

In addition, if in proceedings under the Do Not Call Register Bill in respect of conduct engaged in by a person other than a corporation, it is necessary to establish the state of mind of the person, it is sufficient to show that the conduct was engaged in by an employee or agent of the person within the scope of his or her authority and the employee or agent had that state of mind (subsection 576(2)).

If conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person and the conduct is within the scope of his or her authority, the conduct will be taken, for the purposes of a proceeding under the Do Not Call Register Bill to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct (subsection 576(3)).

For the purposes of section 576, the state of mind of a person will include the person’s knowledge, intention, opinion, belief or purpose and the person’s reasons for the intention, opinion, belief or purpose (subsection 576(5)).

A reference in section 576 to ‘engaging in conduct’ will include a reference to refusing to engage in conduct (subsection 576(6)).

Item 63 – Section 582

Item 63 amends section 582 of the Telecommunications Act to refer to the proposed Do Not Call Register Bill and regulations under that Bill.

Section 582 provides a simplified outline of Part 35. The following parts are amended to refer to the Do Not Call Register Bill and regulations:

- Partnerships are to be treated as persons for the purposes of the Act (section 585).
- Instruments under the Act will be able to apply, adopt or incorporate the provisions of certain other instruments (section 589);
- constitutional protections to avoid invalidity on the basis of the operation of provisions of the Act in contravention of paragraph 51(xxxi) of the Constitution (section 591); and
- certain Acts do not affect the performance of State or Territory functions (section 592).

Item 64 – Section 582

Item 64 similarly makes a consequential amendment to the simplified outline to reflect that section 589, which provides for instruments under the Act to apply, adopt or incorporate provisions of certain other instruments also applies to instruments under the Do Not Call Register Bill and regulations under the Bill.

Item 65 – Subsection 585(2) (definition of civil penalty provision)

Subsection 585(2) defines an offence to include a breach of a civil penalty provision. This item amends subsection 585(2) so that a civil penalty provision includes a civil penalty provision within the meaning of the Do Not Call Register Bill.

Section 585 is relevant to persons that are in partnerships. It provides that the Do Not Call Register Bill applies to a partnership as if the partnership were a person, with the following changes:

- obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
- any breach of a civil penalty provision in the Do Not Call Register Bill that would otherwise be committed by the partnership is taken to have been breached by each partner who:
 - aided or 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 (whether directly or indirectly and whether by any act or omission of the partner).

Item 66 – Subsection 585(2) (at the end of the definition of *this Act*)

Item 66 amends the definition of ‘this Act’ in subsection 585(2) of the Telecommunications Act to include the Do Not Call Register Bill and regulations under that Bill.

The substance of section 585 is discussed above at item 65.

Item 67 – Subsection 586(2) (definition of *this Act*)

Item 67 amends the definition of ‘this Act’ in subsection 586(2) of the Telecommunications Act to include the Do Not Call Register Bill and regulations under that Bill.

The effect of section 586 is that, for the purposes of the Do Not Call Register Bill, if a document is delivered personally to the partner of a partnership or is left, or posted to, the

partner's last known residential or business address, the document is taken to have been given to the partnership.

Item 68 – Subsection 587(4) (definition of *this Act*)

Item 68 amends the definition of 'this Act' in subsection 587(4) of the Telecommunications Act to include the Do Not Call Register Bill and regulations under that Bill.

The effect of this amendment is that for the purposes of the Do Not Call Register Bill a person may nominate an address in Australia for service in an application made by the person under the Act or any other document given by the person to the ACCC or the ACMA. If this is done, a document may be given to the person for the purposes of the Act by leaving it at, or by posting it to, the nominated address for service. The document may also be delivered to the person personally or left at, or posted to, the person's last known residential or business address.

Item 69 – Subsection 589(6) (definition of *this Act*)

Item 69 amends the definition of 'this Act' in subsection 589(6) of the Telecommunications Act to include the Do Not Call Register Bill.

The effect of this amendment is that notwithstanding anything in the *Acts Interpretation Act 1901* or the Legislative Instruments Act, regulations or any other instrument made under the Do Not Call Register Bill will be able to make provision in relation to a matter by applying, adopting, or incorporating (with or without modifications) provisions of any Commonwealth Act or of any regulations or rules under a Commonwealth Act as in force at a particular time or as in force from time to time (subsections 589(1), (5) and (6)).

In addition, notwithstanding anything in the Acts Interpretation Act or the Legislative Instruments Act, regulations or any other instrument made under the Act will be able to make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matter contained in any other instrument or writing whatever was in force or existing at a particular time or from time to time even if the other instrument or writing does not yet exist when the instrument under the Do Not Call Register Bill is made (subsections 589(2), (5) and (6)). This power is essential for the ACMA's delegated legislation making, including the making of standards.

The reference in subsection 589(2) to 'writing' will include any mode of representing or reproducing words, figures, drawings or symbols in a visible form (see section 25 of the *Acts Interpretation Act 1901*).

A reference in subsection 589(2) to any other instrument or writing is defined widely to include a reference to an instrument or writing made by any person or body in Australia or elsewhere (including, for example, the Commonwealth, a State or Territory or one of

its officers or authorities or an overseas entity) whatever its nature and whether or not it has legal force or effect. Examples will include:

- regulations or rules under a Commonwealth Act;
- a State Act, a Territory law or regulations or any other instrument made under such an Act or law;
- an international technical standard or performance indicator; or
- a written agreement such as a contract or an arrangement or an instrument or writing made unilaterally (subsection 589(3)).

Nothing in section 589 limits the generality of anything else in it (subsection 589(4)).

Item 70 – Subsection 591(3) (definition of *this Act*)

Item 70 amends the definition of ‘this Act’ in subsection 591(3) of the Telecommunications Act to include the Do Not Call Register Bill and regulations under that Bill.

The effect of this amendment is that if, apart from section 591, the operation of the Do Not Call Register Bill would result in the acquisition of property from a person otherwise than on just terms in contravention of paragraph 51(xxxi) of the Constitution, the Commonwealth will be liable to pay reasonable compensation to the person in respect of the acquisition (subsections 591(1) and (3)). If the Commonwealth and the person cannot agree on the amount of the compensation, the person will be able to institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines (subsection 591(2)).

Item 71 – Subsection 592(2) (definition of *this Act*)

Item 71 amends the definition of ‘this Act’ in subsection 592(2) of the Telecommunications Act to include the proposed Do Not Call Register Bill and regulations under that Bill. The effect of this amendment is that section 592 provides that a power conferred by the Do Not Call Register Bill must not be exercised in such a way as to prevent the exercise of the powers, or the performance of the functions, of government of a State, the Northern Territory, the Australian Capital Territory or Norfolk Island.

Telecommunications (Carrier Licence Charges) Act 1997

Item 72 – Subsection 15(4) (definition of ACMA’s telecommunications functions)

The Carrier Licence Charges Act imposes charges in relation to carrier licences under the Telecommunications Act. The amount of the charge imposed on a carrier licence is determined by the ACMA. Section 15 of the Carrier Licence Charges Act sets out the maximum total charge that can be imposed by the ACMA as determined by a range of factors. One factor which must be taken into account is the amount of the ACMA’s costs for its telecommunications functions and powers. These include ACMA’s functions and powers under the Do Not Call Register Bill (see item 42 of this Bill which amends paragraph 8(1)(j) of the ACMA Act to include functions conferred under the Do Not Call Register Bill in the definition of ACMA’s functions, and item 43 which amends section 7 of the Telecommunications Act to include powers conferred on ACMA under the Do Not Call Register Bill in the definition of ACMA’s telecommunications powers).

This item amends the definition of ACMA’s telecommunications functions in subsection 15(4) of the Carrier Licence Charges Act so as to remove the functions conferred on the ACMA by or under the Do Not Call Register Bill, and the Telecommunications Act to the extent that it relates to the Do Not Call Bill and Part 6 of the Telecommunications Act to the extent that it relates to telemarketing activities.

This appropriately ensures that the carriers do not fund ACMA’s telecommunications powers, which relate to telemarketing.

Item 73 – subsection 15(4) (definition of ACMA’s telecommunications powers)

The Carrier Licence Charges Act imposes charges in relation to carrier licences under the Telecommunications Act. The amount of the charge imposed on a carrier licence is determined by the ACMA. Section 15 of the Carrier Licence Charges Act sets out the maximum total charge that can be imposed by the ACMA as determined by a range of factors. One factor which must be taken into account is the amount of the ACMA’s costs for its telecommunications functions and powers. These include ACMA’s functions and powers under the Do Not Call Register Bill (see item 42 of this Bill which amends paragraph 8(1)(j) of the ACMA Act to include functions conferred under the Do Not Call Register Bill in the definition of ACMA’s functions, and item 43 which amends section 7 of the Telecommunications Act to include powers conferred on ACMA under the Do Not Call Register Bill in the definition of ACMA’s telecommunications powers).

This item amends the definition of ACMA’s telecommunications powers in subsection 15(4) of the Carrier Licence Charges Act so as to remove the powers conferred on the ACMA by or under the Do Not Call Register Bill, and the Telecommunications Act to the extent that it relates to the Do Not Call Bill and Part 6 of the Telecommunications Act to the extent that it relates to telemarketing activities.

This appropriately ensures that the carriers do not fund ACMA's telecommunications powers, which relate to telemarketing.