



**Submission to Productivity Commission
Annual Review of Regulatory Burdens on Business:
*Business and Consumer Services***

2 March 2010

1. Executive Summary

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to provide comment to the Productivity Commission on the vitally important issue of Regulatory Burdens on Business.

ADMA is significantly concerned by the variability in process for legislative review and design. This variability substantively increases the risk of the introduction of poor regulation that will impose undue burdens and ill-formed legislative obligations on business.

There is clear evidence that is this occurring.

ADMA submits that the necessary action to countervail such risks is to extend the Productivity Commission's remit to:

- a) 'regulate the regulators' including Departments and Regulatory Authorities.
- b) inquire into systemic issues as well as specific sectors and categories of business.

2. About the Australian Direct Marketing Association

ADMA is the peak industry body of the Australian direct marketing industry.

ADMA was formed in 1966 and has during its 44 years of operation has been involved in the formulation of law relevant to the direct marketing industry. Predominantly our focus has been the *Privacy Act 1988*, the *Spam Act 2003* and the *Do Not Call Register Act 2006*.

ADMA has also been involved in co-regulatory and self-regulatory solutions over many years.

ADMA developed, along with other industry associations, the e-Marketing Code of Practice which is a registered code under the *Telecommunications Act 1997* and supplements the Spam Act.

ADMA also operates a self regulatory code called the Direct Marketing Code of Practice. Compliance with the Direct Marketing Code of Practice is a pre-requisite of ADMA membership. The Direct Marketing Code of Practice is overseen by an independent Code Authority.

ADMA's primary objective is to help companies achieve better marketing results through the enlightened use of direct marketing.

ADMA has over 500 member organisation including major financial institutions, telecommunications companies, energy providers, travel service companies, major charities, statutory corporations, educational institutions and specialist suppliers of direct marketing services.

Almost every Australian company and not-for-profit organisation directly markets to its current and potential customers as a normal and legitimate part of its business activities and the ability to continue to conduct this activity underpins a good proportion of Australia's economic activity.

3. Introduction

ADMA welcomes the opportunity to comment on the *Annual Review of Regulatory Burdens on Business: Business and Consumer Services, Issues Paper, December 2009* (the Issues Paper).

As outlined in Appendix A the activities of ADMA members and the Association itself are directly relevant to many of the business categories germane to this inquiry.

4. Who Should Regulate the Regulators?

4.1 Who Should Regulate the Regulators?

ADMA submits that the Regulators are in need of regulation and that the appropriate body to do this is the Productivity Commission.

ADMA contends that the process of legislative review and creation significantly influences the level of efficiency, legislative over-reach and the level of unnecessary cost of regulation.

The creation or review of legislation through an open, transparent and considered framework is vital to ensuring that legislative initiatives deliver least cost, highest net benefit outcomes to the Australian community and the Australian economy.

Poor regulatory outcomes are more likely to and do occur, if the Departments and Regulatory Authorities responsible for the future administration of pieces of legislation, are solely responsible for the development or review of legislation.

Without independent oversight, a naturally occurring conflict of interest can result in legislative responses that are inefficient, excessively heavy-handed and biased and lead to the Departments and Regulatory Authorities being accorded significant powers and ability to over-regulate inconsistent with the economic and social interests of Australia.

The issues that arise in these situations are likely to be diffused or at least kept in measure if independent review and oversight is incorporated into the normal regime that applies to Departments and Regulatory Authorities.

ADMA submits that the quality of legislative and regulatory outcomes is significantly increased when effective and continuous independent oversight is a feature of the system. At the very least a system that is subject to independent scrutiny can only increase the likelihood of superior or at least reasonable legislative outcomes.

Further, the administration of legislation by regulators should also be subject to independent review.

On this basis, ADMA submits that the Productivity Commission be given a new and expanded brief to 'regulate the regulators' including Departments and Regulatory Authorities.

Further the Productivity Commission should be provided with a new brief before the current rolling five-year program of business regulation reviews finishes next year. The new brief

should give the Productivity Commission a mandate to inquire into systemic issues as well as specific sectors and categories of business.

ADMA submits that these measures are necessary to ensure that regulation and its enforcement does not become a significant burden on business with no prospect of relief.

4.2 How is legislation and regulation operating in practice from the perspective of burdens to business?

There are a number of instances where disparate, uncoordinated or poorly devised legislation are being introduced, contemplated or enforced.

In some instances regulators are operating without any effective controls and over-stepping the policy intentions of the base legislation or are heavy handed in their regulation of an industry, causing significantly more cost to business than was ever intended or contemplated by parliament.

Examples of this are included below.

- a) Whilst the harmonisation of State and Territory fair based legislation is imminent, South Australian and the Australian Capital Territory are still introducing new telemarketing regulation
- b) Whilst the introduction of a single Australian Consumer Law will produce significant legislative efficiency, the telemarketing industry will still have two regulators; the Australian Communications and Media Authority and the Australian Consumer and Competition Commission
- c) Whilst there are heartening signs that the Australian Communications and Media Authority (ACMA) is adapting its approach to enforcement of the *Spam Act 2003* and *Do Not Call Register Act 2006*, ADMA still receives occasional reports of heavy-handed enforcement by ACMA
- d) ADMA has received reports from its members stating that despite the *Do Not Call Register Act 2006* specifying that only numbers that are primarily used for domestic purposes can be placed on the Do Not Call Register, organisations have been subject to regulatory scrutiny for calling numbers used by businesses. The result is that costs of compliance are driven up and there is over-reach of the original intentions of parliament.

4.3 Poor legislative outcomes occur without regulatory oversight or independent input

As an industry association that participates across multiple portfolios, ADMA has visibility of various processes for the review and creation of legislation that are adopted by different portfolios.

In this section we will compare and contrast the processes adopted for the:

- a) review of the *Privacy Act 1988*
- b) the development of the *Do Not Call Register Legislation Amendment Bill 2009*

The former was conducted by an extensive study and consultation by the Australian Law Reform Commission (ALRC). As the Productivity Commission will be aware, the Australian Law Reform Commission is a permanent, independent federal statutory corporation. The

ALRC provides intellectual independence and makes research findings and recommendations without fear or favour. However this process always results in recommendations being issued on how a law may be reviewed without automatically becoming law.

There is then a second step of review whereby the Government conducts another round of open consultations with multiple stakeholders and then responds to the recommendations.

This process has been open and transparent and the consultation process has been truly consultative. It has not involved a mere tick box approach to consultation, rather, serious consideration is given to the obligation to take on board or consider carefully the concerns raised by multiple stakeholders.

As a result, the review of the Privacy Act has been a resounding success with well considered and thought-through recommendations being subject to external scrutiny and then another round of comment and consultation.

As the Productivity Commission will be aware, striking the right balance is vital for each and every piece of legislation. In the case of privacy it is vital that the legislation provides individuals with suitable levels of protection whilst not stopping the significant economic benefits that business derives from being able to use personal information. Measured against this benchmark, the outcomes of the review have been excellent.

In contrast, the process used to develop legislation to extend the Do Not Call Register to include business, government, fax and emergency service numbers has been opaque; lacking visibility and a true willingness to understand the legitimate and genuine concerns raised by industry.

Despite warnings from ADMA, other industry associations and significant numbers of organisations about the difficulties with proposed solutions, the Department of Communications, Broadband and the Digital Economy failed to identify that there would be significant compliance costs to industry to the extent that it failed to conduct a Regulatory Impact Statement.

It was, instead, left to industry to fund an Access Economics report to substantiate the concerns of industry that the extension of the Do Not Call Register to business and government numbers would cost business more than it would benefit business through productivity gains.

ADMA notes that Best Practice Regulation and the central concerns of the Productivity Commission are that regulation should not be unnecessarily burdensome or complex especially in the area of small business. Even without these thresholds, legislation that purports to increase productivity should be subject to the rigours of Regulatory Impact Statement that at least confirms that this objective will be met.

To demonstrate why independent oversight is required and that Departments should not be left to progress matters on their own, ADMA wishes to highlight that the Department of Communications, Broadband and the Digital Economy elected to rely on a piece of research that assumed that the full benefit of extending the Do Not Call Register to all business and government numbers was \$1.58bn per annum. Unfortunately this figure was based on the assumption that every man, woman and child was engaged in full time employment. Clearly this is not the case.

In addition the solution which has been put forward appears to have been designed in accordance with the views of privacy and consumer advocates and without reference to the concerns expressed by business and industry associations. This is extraordinary given that it is business that will have to comply with the legislation and that privacy and consumer advocates do not represent business.

We note also that the resultant Bill has been so inferior that it has failed to win the support of the Council of Small Business of Australia, with COSBOA flagging its concern with the initiative because it will increase the red tape that applies to small business and expose small business to additional significant fines and regulatory scrutiny.

In summary, if an independent body had been involved, it would be unlikely that a piece of legislation designed to improve productivity would have been introduced in a form that will actually reduce productivity and would have been formed in a manner which is inconsistent in terms of Best Practice Regulation.

A copy of the Access Economics report has been provided as an addendum to this document.

4.4 The Rise of Super Regulators

Regulators being given greater powers and responsibilities has the potential to lead to significant productivity gains.

For example, the consolidation of administration of the Australian Consumer Law to the Australian Consumer and Competition Commission (ACCC) instead of it being administered by several different state and territory fair trading offices has the potential to significantly reduce government overhead and standardise enforcement and industry understanding of these legislative requirements.

The creation of an Information Commissioner to oversee a Freedom of Information Commissioner and the Privacy Commissioner has the potential to increase the resources available for the administration and enforcement of the *Privacy Act 1988* and *Freedom of Information Act 1982*. ADMA strongly supports a regime that will facilitate time-effective resolution of privacy complaints enabled by the assignment of sufficient resources to the Office of the Federal Privacy Commissioner.

However 'super-regulators' such as the ACMA and ACCC need to be subject to constant overview to ensure efficiency, adequate consultation with stakeholders and consistency of approach.

4.5 Oversight of Departments

ADMA submits that the same scrutiny that needs to be applied to 'super-regulators' should also be extended to the departments which oversee the work of regulators and provide advice to government.

There is an overwhelming need for this sort of oversight and review, especially in the communications area.

As described above, the failure of the Department of Broadband, Communications and the Digital Economy to produce a Regulatory Impact Statement for a new regulatory measure which would obviously impose additional costs to business clearly points to the need for independent oversight.

This is also especially important as the Department and the regulators that are responsible for developing policy and administering legislation for the Digital Economy. As we know the Digital Economy is increasingly important for communications and productivity growth in the future.

Therefore ADMA recommends that the Productivity Commission be given a new and expanded brief to oversee the Department of Communications, Broadband and the Digital Economy as well as ACMA and the ACCC.

Appendix A Business and Consumer Services: Activities under Reference in 2010

The activities of ADMA members and of the Association itself are directly relevant to the business categories under inquiry in the 2010 Business Regulation Review as follows:

Division H, Category 44 - Accommodation services

ADMA's membership includes market leaders in both accommodation and travel-related services.

Division K - Financial and Insurance Services

Most major banks and many other financial institutions including finance and insurance companies are ADMA members.

Division M, Category 694 - Advertising agencies

Nearly all full service agencies which offer direct marketing as part of their offering as well as the overwhelming majority of specialist direct marketing agencies are members.

Division S - Business Associations

ADMA is a national association representing more than 500 companies and not-for-profit organisations whose common activity is data-based marketing.