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

4 August 2010

1. Executive Summary

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to comment on the vitally important issue of Regulatory Burdens on Business and specifically on the *Annual Review of Regulatory Burdens on Business: Business and Consumer Services, Draft Research Report, June 2010* (the Draft Research Report).

This submission covers three main areas:

a) 'regulation of the regulators'
b) Extension of the Do Not Call Register to business numbers
c) Significant failures in the development of the second tranche of Australian Consumer Law.

Firstly, ADMA would like to report that we have witnessed positive signs from the Australian Communications and Media Authority (ACMA) with respect to it approaching regulation of the industry in a more facilitative and constructive way.

Secondly, ADMA welcomes the Productivity Commission's recommendation in its Draft Research Report that a regulatory impact statement should be conducted should there be future consideration of an extension of the Do Not Call Register to business numbers.

Finally, ADMA wishes to express significant concerns about the process employed in the development of the second tranche of Australian Consumer Law and the inferior overly burdensome legislation that has resulted.

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, 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 also operates a self regulatory code called the ADMA Direct Marketing Code of Practice which includes provisions relevant to Trade Practices legislation and state and territory fair trading legislation. 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 Draft Research Report.

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

4. Key Comments

4.1 Who Should Regulate the Regulators?

In previous ADMA submissions we have raised concerns in relation to super-regulators overstepping their mandate with overly prescriptive and heavy handed regulation. ADMA proposed that these super-regulators should be overseen by an independent body such as the Productivity Commission. ADMA notes that this suggestion has not been included as a recommendation in the Draft Research report.

ADMA continues to monitor the activities of regulators with respect to our members closely and notes that the ACMA appears to have made substantive efforts to address concerns raised by industry.

ACMA's initiatives include:

a) increased focus on working with industry to facilitate compliance rather than stepping immediately to strong compliance remedies
b) increased communication with the industry through the introduction of the Do Not Call Register Compliance and Enforcement Bulletin
c) issuing a Do Not Call Register Complaint Handling Policy

4.2 Extension of the Do Not Call Register to Business Numbers

ADMA welcomes the recommendation in the Draft Research Report that any future proposal to extend the reach of the Do Not Call Register to business numbers should not proceed without a Regulatory Impact Statement that fully explores the costs and benefits of the proposal (Section 6.2 of the Draft Research Report).

As per ADMA's previous submissions, the extension of the Do Not Call Register to business numbers would have a significant impact to commerce in general and the unintended consequences of the extension of the Do Not Call Register would have been significant.

On the basis of the research that ADMA conducted and the input of other submitters on this issue, it was possible to establish that only 1 in 10 telemarketing calls received by businesses were initiated by call centres and the rest were initiated by small business and were of the kind that the caller would not consider to be a telemarketing call.

In consideration of the serious negative impact to business, if efforts to extend the Do Not Call Register to include business numbers were reignited, ADMA fully supports and welcomes the Productivity Commission's recommendation that a full Regulatory Impact Statement be conducted to assess the full economic consequences of making such a change.

ADMA submits that such a Regulatory Impact Statement must be conducted in a thorough and meaningful way and be accompanied by appropriate consultation. ADMA will outline in the next section where issues have arisen that have lead to poor regulatory outcomes and unnecessary regulatory burden even when a Regulatory Impact Statement has been conducted.

4.3 Significant failure in the consultation process and the development of the second tranche of Australian Consumer Law leading to inferior Regulatory Outcomes

The rushed approach and lack of suitable consultation with industry for the development of the second tranche of the Australian Consumer Law has lead to inferior and ill-considered regulatory outcomes that will needlessly burden industry. In addition there are still significant issues with respect to the second tranche of the Australian Consumer Law that remain unsolved and this creates significant uncertainty for business in its efforts to implement systems to comply with the new requirements.

An example of this includes uncertainty about whether contracts for the same goods and services, for example recontracting an existing customer that revises or renews their contract or even making a minor change to an existing contract, is subject to the unsolicited selling provisions of the Australian Consumer Law provisions. These issues haven't been resolved even though the legislation comes into effect on 1 January 2011. This is because the accompanying regulations have not been released and will not be finalised until late this year.

In addition, the second tranche of the Australian Consumer Law, through its reduction of door knocking times to 6pm has significantly curtailed the operations and success of the door to door channel with substantive negative flow on effects for marketing organisations and consumers where many successful transactions are conducted on a vast scale.

ADMA submits that such a fundamental shift to unsolicited selling practices was not considered by the Productivity Commission in its initial analysis of the benefits that would flow from the harmonisation of federal, state and territory laws for trade practices and fair trading. Therefore we expect that benefits to the Australian economy that were initially estimated are significantly smaller than originally expected due to the final form of the legislation.

Despite the extensive and lengthy consultation process that initiated the review of Australian consumer policy the final stage that brought the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2)* into legislation was too rushed and its accompanying consultation process opaque.

Signification issues with the process included:

a) Release of Regulatory Impact Statements and provision of two weeks for industry to consider and respond
b) The Regulatory Impact Statements that were issued that stated the problem at such a high level that it rendered the process almost useless in trying to appropriately ascertain the impact to business
c) Failure to release an exposure draft to allow industry to properly consider the nature and impact of the changes involved

d) The release of over 900 pages of draft legislation and explanatory memorandum and the provision of three weeks for industry to consider and respond to the Senate Economics Committee inquiry
e) A serious lack of meaningful engagement with industry

Of most concern with the process for the development of the second tranche of the Australian Consumer Law was the fact that even though there were four major groups impacted by the proposed changes – Federal Government, State and Territory Governments, Consumers and Business – the negotiation process appeared to only take place between the Federal and State and Territory Governments. Business and its associated industry associations were in most part treated as a cursory afterthought in the consultation and negotiation process. This can be demonstrated by the fact that the Regulatory Impact Statement for such a wide ranging and significant piece of legislation was issued, without any warning, on 16 November 2009 and comments were required by 27 November 2009. Business was advised that extensions could not be granted as the input was required for a Council of Australia Governments meeting in early December 2009.

Difficulties with the consultation process have also occurred because there has been no meaningful engagement on the key measures that would have the most impact on business. These significant changes to existing federal, state and territory legislation were not identified in the Regulatory Impact Statement process. On the contrary the Regulatory Impact Statement consultation gave a misleading impression that the resultant legislation would reflect best practice in state and territory legislation. Instead the resultant legislation has introduced measures that exceed current requirements in state and territory fair trading legislation by large measure.

Examples of this included:

a) reduction of all permitted knocking times to 6pm;
b) an extension of the cooling off period to 10 business days
c) introduction of a blanket prohibition of providing goods and services or accepting consideration during the cooling off period;
d) introduction of a general requirement to provide agreement documents within five business days
e) introduction of strict liability for suppliers for contraventions by dealers; and
f) introduction of unusually broad rights for consumers to terminate a contract during the cooling off period (including oral notices that could be given to anyone within an organisation).

At no point in time has there been an acknowledgement that the vastly revised requirements for unsolicited sales will mean that organisations will have to radically revise existing procedures which had already been established at great expense in response to a complex regime. The expense to business will be both writing off some of the monies already expended on compliance as well as the costs of now implementing the new regime.

In addition, it appears that the overall estimated benefits to the Australian economy have been used to justify the introduction of more, often needless, restrictions on business. An example of this is the extension of the cooling off period to 10 business days when the longest cooling off period is currently 10 days under current state and territory legislation. The expected $4.5bn per year benefit to the Australian economy has been used to justify draconian changes that will be to the detriment of consumers and businesses. Consumers will be detrimentally impacted because they will have to wait longer for a service or good and businesses because of the delay in revenues.

As mentioned previously, even at this late stage of the implementation is still without certainty on significant issues because some of the key issues and exemptions will be dealt with in the accompanying regulations. These regulations are not expected to be released in final form until November 2010[1] one or two months prior to the implementation of legislation.

The lack of meaningful consultation and the opaqueness of the process has meant that such practical issues such as the length of time to delivery agreement documents, specified at 5 business days, was not lengthened to take into consideration that Australia Post only guarantees delivery within 4 business days leaving very little margin for error for business. Failure to meet these timeframes will subject business to the risk of pecuniary penalties and open to rescission for six months after the sale which is very onerous – particularly considering that consumers are provided with a safeguard against postal failures.

Overall, ADMA suggests that the promised benefits to the Australian economy should not have been used to justify a process where all the key stakeholders were not fully engaged and inferior and impractical legislation has resulted.

[1] Implementing the Australian Consumer Law, p8, http://www.treasury.gov.au/consumerlaw/content/downloads/Implementing_ACL_information_note.pdf

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.