AUSTRALIAN DIRECT MARKETING ASSOCIATION SUBMISSION

ON

PRODUCTIVITY COMMISSION

DRAFT RESEARCH REPORT

ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS:

SOCIAL AND ECONOMIC INFRASTRUCTURE SERVICES

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2. ABOUT THE AUSTRALIAN DIRECT MARKETING ASSOCIATION

The Australian Direct Marketing Association (ADMA) is the peak industry body of the Australian direct marketing industry.

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

ADMA has over 500 member organisations including:

a) major financial institutions
b) telecommunications companies
c) energy providers
d) travel service companies
e) major charities
f) statutory corporations
g) specialist suppliers of direct marketing services

According to recent CEASA[1] research 715 385 Australians were employed in the direct marketing industry in 2006 and it had revenues of $12.8 billion per annum.

However, direct marketing is more important to Australian business and the national economy than these statistics would imply.

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.

[1] Commercial Economic Advisory Service of Australia Report, Direct Marketing in Australia 2006

3. INTRODUCTION

ADMA welcomes the opportunity to comment on the Productivity Commission 2009, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services,* Draft Research Report, Canberra (the Draft Report).

The work done by the Productivity Commission is vital to Australian business and not-for-profit organisations.

Particularly in these uncertain economic times it is important that Australian business is not subject to complex, unproductive legislative requirements or heavy handed regulation. ADMA is concerned that sometimes there is a propensity for regulation to be enforced to the letter of the law with limited consideration for the incremental social benefit against the cost it imposes on business.

ADMA's submission focuses on the impact of legislation relevant to the direct marketing activity conducted by organisations within the social and economic infrastructure services sector including telecommunications and energy providers.

In summary it is ADMA's view that

a) section 4 should be expanded to reference ADMA in the telecommunications regulatory landscape
b) telemarketing legislation should be incorporated under the *Do Not Call Register Act 2006* (the DNCR Act)
c) the proposed extension of the Do Not Call Register to include business numbers will significantly increase the regulatory burden on business, have a significant anti-competitive effect and stymie normal business commerce
d) notwithstanding our view telemarketing legislation should be incorporated into a single code there are issues with how the DNCR Act is currently regulated and these need to be resolved

As ADMA did not input to the draft report ADMA seeks a meeting with the Productivity Commission to discuss the content of our submission.

4. OVERVIEW OF REGULATION

The Australian Communications and Media Authority (ACMA), along with the Australian Communications and Consumer Commission and the Office of the Privacy Commissioner, has become one of the primary regulators of the direct marketing industry by virtue of its role as regulator of the *Spam Act 2003* (the Spam Act) and the the DNCR Act.

As a consequence of the convergence referred to in the Draft Report, the Spam Act and the DNCR Act covers a significant proportion of business-to-business and business-to-consumer communications via a variety of channels including mail and telephone as well as the ever increasing use of digital marketing channels such as internet, email and mobile marketing.

All data-driven marketing (which is the primary consideration of direct marketing) is subject to the provisions of the *Privacy Act 1988* (the Privacy Act), and in the case of telecommunications carriers and carriage service providers customer data, Part 13 of the *Telecommunications Act 1988*.

ADMA plays an active role in self regulation of the direct marketing industry through the creation and administration of the ADMA Direct Marketing Code of Practice (the Direct Marketing Code). ADMA also plays a role in co-regulation of the direct marketing industry through the development of the Australian e-marketing Code of Practice (e-marketing Code) and its role as a Recognised Industry Body for this code.

4.1 ADMA DIRECT MARKETING CODE OF PRACTICE

ADMA has developed and enforces the Direct Marketing Code. The Direct Marketing Code covers legislative obligations and additional obligations to promulgate fair and honest conduct in telemarketing, email marketing and electronic commerce, consumer preferences.

The Direct Marketing Code seeks to promote and encourage honest and fairness in customer dealings for information based marketing in Australia. As such it forms a useful component of the Australian consumer protection framework.

Organisations that become ADMA members agree to comply with the Direct Marketing Code. ADMA handles inquiries and complaints from the public in relation to the Direct Marketing Code.

The ADMA Code Authority oversees complaints made about ADMA members in relation to the Direct Marketing Code. The ADMA Code Authority is composed of industry and consumer representatives and is chaired by an individual from outside the direct marketing industry. The ADMA Code Authority investigates unresolved consumer complaints about ADMA members, and in limited cases, non-member companies.

The ADMA Code Authority has a number of sanctions available to it in the case of a breach of the Direct Marketing Code.

4.2 AUSTRALIAN E-MARKETING CODE OF PRACTICE

ADMA chaired the code development committee that created the e-marketing Code. The e-marketing Code is a code that is registered by the Australian Communications and Media Authority under the *Telecommunications Act 1997*.

ADMA is a Recognised Industry Body for the referral of complaints and enquiries in relation to this code.

4.3 ADMA'S ROLE IN THE REGULATORY LANDSCAPE

Noting the reference to the DNCR Act and the Spam Act in Figure 4.3 (page 110) of the Draft Report, ADMA submits that the Productivity Commission may wish to include ADMA as a relevant regulatory body along with Free TV Australia, the Australian Subscription Television and Radio Association, Internet Industry Association, Telephone Information Service Standards Council and the Communications Alliance.

5. REGULATION OF TELEMARKETING

ADMA notes that the most significant area of regulatory burden, complexity and over-regulation for the direct marketing industry continues to be the state based fair trading legislation.

Under the current state based fair trading legislation, the direct marketing industry is subject to variable laws across some states and no laws in others. Australian organisations have to contend with legislation that varies in different states for:

a) different calling times
b) different cooling off periods
c) whether the sale is to an incorporated or unincorporated small business
d) whether the contact is in relation to an existing contractual arrangement or not

The level of complexity in interpreting and understanding these variable requirements has now placed this into an area that requires specialist knowledge, particularly for firms seeking to operate in multiple state jurisdictions.

More importantly, a complex regulatory environment makes it difficult for willing organisations to comply with legislative requirements simply due to levels of uncertainty created by differing legislative regimes. This specifically is a risk where organisations need to apply the myriad of business practices to legislation to determine what obligations apply in what instances.

On this basis ADMA is generally supportive of the Government's plan to introduce a single Australian Consumer Law so long as the new regime does not unfairly or overly restrict businesses' engagement with consumers.

The creation of a single code that groups obligations with respect to telemarketing will significantly ease the regulatory burden on business. It will also promote better understanding and compliance amongst Australian business because all necessary obligations will reside in one place.

On this basis, it is ADMA's view that the Government should repeal all state and territory fair trading, door-to-door legislation and that standards for outbound telemarketing should be incorporated under the DNCR Act rather than the new Australian Consumer Law.

6. CREATING NEW REGULATIONS

The DNCR Act was introduced in 2006 and implemented the following year. ACMA's subsequent administration of the DNCR Act is addressed below.

The Do Not Call Register legislation includes a provision for a review in 2010 however the Government has also announced its intention to extend the Do Not Call Register to respond to concerns expressed by some small businesses about telemarketing and fax marketing.

The Government proposal is to extend the ability to register to all business and government numbers, fax numbers and emergency service numbers. ADMA has grave concerns about the impact this will have on businesses particularly small businesses.

The implications of extending the register are:

a) to prevent phone calls that promote, advertise or propose to supply goods, services, land, business and investment opportunities where there is no consent
b) to have an anti-competitive impact that favours large business and incumbents
c) to impose additional compliance burdens and costs on business
d) to expose more businesses (large and small) to significant fines and other formal regulatory sanctions

ADMA strongly urges that full and thorough consideration is given to the breadth of business activity that the proposed extension will apply to. In ADMA's view proper research needs to be undertaken to determine whether there is indeed a net benefit to Australia through the reduction of telemarketing calls when considered in the context of how vital the ability to pick up the phone to discuss business opportunities is to the Australian economy.

ADMA submits that consideration should be given in the context to the extent of the full cost of compliance this will impose on business. To understand the full extent of the regulatory burden ADMA recommends consideration is given to the ACMA DNCR Act 2006 Compliance Guide which outlines those activities which ACMA recommends to organisations seeking to comply with the current Do Not Call Register legislation.

7. ADMINISTRATION OF THE DO NOT CALL REGISTER ACT

ADMA fully supports the Productivity Commission's Key Points in relation to the information and telecommunications industry that,

a) there is a propensity to approach every issue by creating new regulations, often leading to unco-ordinated, overlapping or duplicative regulation
b) the Australian Communications and Media Authority's approach to regulation results in overly prescriptive regulation and a focus on legalistic interpretation.

ADMA fully supports steps taken by ACMA in pursuit of organisations that willfully and continually flout the law however we are concerned by the consistent and steady feedback from members that ACMA's management of compliance with the Do Not Call Register has been unjustifiably overly prescriptive and overly legalistic.

The main areas of concern are:

a) the significant cost to members of formal investigations of alleged breaches of the Do Not Call Register
b) the cost and operational implications of a zero tolerance requirement in relation to complaints to the regulator
c) failure to share complaints data with organisations to assist them in complying
d) the prescriptive nature of the Compliance Guide and its status as 'soft law' without being subject to due legislative process

7.1 SIGNIFICANT COST OF FORMAL INVESTIGATIONS

Whilst ADMA does not in any way condone breaches of the DNCR Act, ADMA is seriously concerned by reports of the cost burden on organisations that are subject to a formal investigation for alleged breaches of the DNCR Act.

It is understood that organisations under formal investigation are subject to requests for extensive amounts of information. These requests are necessitating the formation of teams at significant cost to organisations[2].

In some cases formal investigations have resulted in requests for call recordings for a million calls on the basis of less than 100 complaints when the provision of complaints data would have been sufficient to progress the matter.

This approach is overly intrusive, expensive and unwarranted.

7.2 THE COST AND OPERATIONAL IMPLICATIONS OF A ZERO TOLERANCE APPROACH

The regulator of the DNCR Act regularly takes the view that organisations should have no complaints made against them for alleged breaches of the DNCR Act.

[2] In one instance the cost of an investigation team has been in excess of $500 000.

It is ADMA's understanding that organisations are being actively scrutinized by the regulator where the total (unconfirmed) complaint rate against that organisation represents 0.02% - 0.06% of total call volumes.

Whilst in the context of an individual complaining there has been a telemarketing call to a number on the Do Not Call Register it might seem necessary for ACMA to take action.

However ADMA submits that this should be tempered with a certain degree of perspective in terms of the overall telemarketing activity taken by organisations and the proportionate cost to organisations of trying to comply with a zero complaint rate threshold.

That is, there is evidence that ACMA considers complaint rates or error rates of 0.05% of the total telemarketing activity undertaken by a company are indicators of:

a) an organisation's unwillingness to comply with the legislation
b) a generally non-compliant organisation

when this is simply not the case.

ADMA now regularly receives reports that members are having to take extra-ordinary and costly measures to not have any complaints reported to ACMA. Examples of these measures include:

a) washing lists every five days instead of thirty days (as envisaged by the legislation)
b) creating a team of people to disseminate opt out requests from wherever they are received in the business from all operative dialing lists regardless of how distributed these lists. This is being done to satisfy an interpretation by ACMA that withdrawal of consent means that immediate withdrawal no matter how resource intensive or technologically difficult it is to implement this

7.3 FAILURE TO SHARE COMPLAINTS DATA WITH ORGANISATIONS TO ASSIST THEM IN COMPLYING

Since the inception of the Do Not Call Register consumers have directed complaints relating to calls to numbers on the DNCR or failure to opt out to ACMA instead of organisations as was the case prior to the introduction of the Do Not Call Register.

Further, it has been ACMA's approach not to provide complaints data to organisations.

These two changes to the complaint handling environment mean that organisations who wish to comply with Do Not Call Register legislation are left without a vital mechanism by which to monitor and manage their compliance with the legislation and this places unnecessary additional regulatory burden on business.

In addition to this ACMA will not provide complaints data to an organisation once a formal investigation is underway.

ADMA submits that ACMA's approach in relation to complaints handling and compliance is sub-optimal in this regard and undermines superior compliance outcomes in relation to the DNCR Act.

ACMA's approach seems to be predicated on the assumption that disclosure of complaints data may in some way undermine their compliance efforts and compliance with Do Not Call Register in general. The opposite is actually the case.

Many organisations expend significant time, resource and money seeking to comply with the DNCR Act. They do this as a rational business response to the threat to corporate reputation, formal sanctions and possibility of fines that formal regulatory action by ACMA entails. In keeping with this organisations are likely to respond positively to the provision of complaints data if it is provided by ACMA.

A change in ACMA's approach would:

a) allow organisations to quickly identify and remedy any compliance issues at a reasonable cost
b) directly benefit consumers as compliance issues will be identified and remedied sooner and less telemarketing calls will be made to numbers on the Do Not Call Register
c) reduce the number of resources required by ACMA to manage compliance with the Do Not Call Register because there will be less complaints and compliance issues
d) reduce the risk to organisations that complaints can build up over an extensive period of time, without their knowledge, and result in the risk of significant financial penalties
e) not reduce ACMA's ability to take other formal regulatory action as necessary against organisations who fail to take remedial action.

7.4 ACMA DO NOT CALL REGISTER ACT 2006 COMPLIANCE GUIDE

ADMA concurs with the opinion that regulation can be overly prescriptive and legalistic. This has particularly been the case with the publication of ACMA's Do Not Call Register Act 2006 Compliance Guide.

ADMA notes that the compliance guide includes more than 185 different instructions on ways to achieve compliance. Whilst it has been stated that 'This booklet is not a statement of what telemarketers must do to comply with the DNCR Act' experience of ADMA members has been that they are compelled to adopt measures described in the Compliance Guide if there are any complaints for alleged breaches of the Do Not Register Act. As such the requirements contained in the compliance guide have taken on the status of 'soft law'. The example of immediate withdrawal of consent and the cost implications are outlined in the section above.

These requirements go far beyond the measures that were considered as part of the original introduction of the legislation and therefore it is unlikely the true cost of the legislation was fully appreciated with the DNCR Act was passed by parliament.

For example, the Explanatory Memorandum of the DNCR Act stated that meeting the obligations under Section 11(5) of the DNCR Act would be satisfied by including appropriate contractual provisions when contracting third parties to perform telemarketing. However the original version of the Compliance Guide (subsequently revised in response to ADMA's input) and ACMA's overall approach compels organisations not only to have appropriate contractual arrangements in place and to enforce these contractual arrangements but also steps further to compel organisations to oversee contractual arrangements[3]. ADMA remains concerned that Australian business is being forced into excessive compliance measures to meet a zero complaint tolerance level and this is a disproportionate response to social ill which the Do Not Call Register was designed to prevent.

[3] Refer ACMA Media Release 6 August 2009, Neighbourhood Energy penalised for calls made to numbers on the Do Not Call Register