

31 July 2009

Ms Angela MacRae
Commissioner
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2600

Dear Ms MacRae

**ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS—SOCIAL AND
ECONOMIC INFRASTRUCTURE SERVICES**

Please find enclosed a supplementary submission from the Australian Communications and Media Authority (ACMA) to the Productivity Commission's Annual Review of Regulatory Burdens on Business.

This supplementary submission addresses comments made by the Australian Direct Marketing Association (ADMA) to the draft *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (the ADMA submission).

Specifically, the ACMA wishes to:

- provide background information to the Commission regarding the ACMA's approach to overseeing compliance with the *Do Not Call Register Act 2006* (DNCR Act);
- correct a number of factual errors contained within the ADMA submission; and
- respond to the broad assertions presented by ADMA regarding the ACMA's administration of the DNCR Act.

The ACMA appreciates the opportunity to provide additional material to the Commission.

Yours sincerely

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Annual review of regulatory burdens on business—Social and economic infrastructure services

Supplementary submission to the
Productivity Commission's Annual Review
of Regulatory Burdens on Business

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Do Not Call Register and the ACMA's role

Background

The Do Not Call Register Scheme (the DNCR Scheme) was introduced in May 2007 in response to community concern about the volume, inconvenience and intrusiveness of telemarketing practices, and confusion arising from the lack of unified policy and regulation in relation to telemarketing in Australia.

The ACMA's role in relation to the compliance and enforcement of the DNCR Scheme is to:

- > educate members of the telemarketing industry about their obligations under the DNCR Scheme;
- > deal with complaints about alleged contraventions of the *Do Not Call Register Act 2006* (DNCR Act) and the Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 in accordance with section 509 of the *Telecommunications Act 1997* (Telco Act);
- > investigate alleged contraventions of the DNCR Act and the industry standard in accordance with Part 26 and Part 27 of the Telco Act; and
- > where contraventions are found to have occurred, apply enforcement measures as appropriate in accordance with the various enforcement provisions in the DNCR Act and the Telco Act.

DNCR Act—The ACMA's approach to compliance

The ACMA's general approach to DNCR Act compliance is a facilitative one—seeking to resolve a matter, where appropriate, without resorting to formal procedures. The ACMA's main focus is to act to prevent unwanted calls from continuing or recurring by encouraging telemarketers to take appropriate action to avoid breaching the legislative scheme. However, if facilitation is unsuccessful or inappropriate, the ACMA will take appropriate investigatory and enforcement action.

The ACMA's overall approach generally involves three steps:

- > **Advise:** The ACMA writes to businesses that have been the subject of complaints, informing them that complaints have been received and advising them of their legal obligations.
- > **Warn:** Where the ACMA receives further complaints that suggest that a business has failed to adequately address compliance issues in response to the ACMA's initial advice, the ACMA issues a warning letter that provides specific complaint details and encourages the business to take action to improve compliance by a nominated date, after which any further complaints received may be formally investigated.
- > **Investigate:** The ACMA may commence a formal investigation under the Telco Act if it considers that there may be ongoing and/or systemic problems with a company's compliance arrangements.

The ACMA may of course, move more quickly to the investigation stage if the circumstances warrant an immediate response or if the company has previously been the subject of enforcement action.

To provide some context, please find below some statistics about the number of complaints received for the 25 months between 31 May 2007 and 30 June 2009, and the level of action taken by the ACMA:

Number of complaints received that raised potential contraventions	34,720
Number of advisory letters sent	969
Number of warning letters sent	301
Number of formal investigations commenced	33

This graduated approach has been effective in quickly improving industry compliance, as evidenced by the 60 per cent drop in consumer complaints during the second year of the Register's operation compared to the first year of operation.

There have, of course, been instances where businesses have failed to adequately address the compliance issues identified by the ACMA in Advisory and Warning letters.

In these cases, the ACMA has needed to conduct formal investigations and take enforcement action as appropriate—to act as a deterrent to that particular business, as well as the telemarketing industry as a whole. The approach balances a willingness to work with industry to informally address compliance issues, with a readiness to take formal action where necessary.

Matters raised in the ADMA submission

The ADMA submission references four areas of concern. The ACMA has set out below some comments regarding each of these areas.

Cost of formal investigations

ADMA expresses concern about the cost burden to businesses that are subject to a formal investigation for alleged contraventions of the DNCR Act—referring specifically to the amount of information requested by the ACMA of a respondent.

In the context of the Commission's review, it is highly relevant to consider the low number of formal investigations commenced by the ACMA to date. The vast majority of compliance issues are addressed through the informal advisory and warning stages of the ACMA's process. This has meant that in the first two years of the Register's operation, only 33 businesses became the subject of a formal investigation. In each of these cases, the business had been provided with an opportunity to address its apparent compliance problems through the informal process, but had failed to take advantage of that facility.

Where an investigation is commenced, the ACMA utilises its evidence-gathering powers under part 27 of the Telco Act to collect information and evidence from the respondent and other third parties where relevant. All information requests are made in line with the ACMA's relevant power under the Telco Act and the amount of information required varies, depending on the scale and severity of the matter under investigation. Given that an investigation may result in the ACMA commencing proceedings in the Federal Court, evidence gathering performance is undertaken carefully and thoroughly.

The ACMA rejects the bald and unsubstantiated assertion made in the ADMA submission that its approach to formal investigations is overly intrusive, expensive and

unwarranted. While it is not necessary for the ACMA to conduct formal investigations in the majority of instances, investigations are conducted where it appears to the ACMA that there may be significant, ongoing compliance problems and attempts at informal resolution have been unsuccessful. Investigations are conducted thoroughly and in line with the relevant Telco Act provisions.

Cost and operational implications of a ‘zero tolerance approach’

The ADMA submission states that the ACMA has a ‘zero tolerance’ approach to compliance and takes the view that businesses should not have any complaints made against them. This is simply inaccurate. In fact, quite the opposite is true—the ACMA’s graduated approach to compliance recognises that businesses may be the subject of complaints for several reasons—for example, the business may simply not be aware of its obligations under the DNCR Scheme, or an error may have occurred which led to a calling list being dialled without first being checked against the Register.

The ACMA tailors the level of regulatory intervention to the number of complaints received, the apparent seriousness of the compliance problem and extent to which the business is actively working to address the problem. The commencement of only 33 investigations in two years (in the context of the receipt of more than 34,000 complaints, and the sending of more than 1,200 informal warning letters) is so completely at odds with the concept of a ‘zero tolerance’ approach as to suggest that the ADMA submission is lacking in probative value.

The ADMA submission appears to suggest that the ACMA should not be taking any action where the complaint rate against a business represents a small proportion of that entity’s total telemarketing activity. The ACMA works to continually improve the level of compliance with the DNCR Scheme, and encourages telemarketers to assess whether individual complaints may be indicative of a broader systemic issue. The ACMA’s investigations have identified that very few consumers complain to the ACMA about prohibited telemarketing calls—where a telemarketer makes 1,000 prohibited calls, the ACMA generally only receives one or two complaints. The ACMA takes consumer complaints seriously (as its obligations under the DNCR Act require) and encourages telemarketers to use complaints to improve their processes. It is inaccurate to suggest however, that this equates to a zero tolerance approach.

Failure to share complaints data with organisations

The ADMA submission states that the ACMA does not provide complaints data to organisations—which, in ADMA’s view, limits a business’ ability to monitor their compliance, and increases the regulatory burden. Again, this statement is simply not accurate. Complaint information is provided to businesses through the advisory and warning stage of the ACMA’s process. Where a telemarketer contacts the ACMA in response to an advisory or warning letter, the ACMA is very willing to engage with them about their telemarketing practices and identify potential solutions. This routinely involves the provision of additional complaint information.

It is important to note that when a consumer on the Register receives an unsolicited telemarketing call, they invariably respond with dissatisfaction, ‘I am on the Do Not Call Register—why are you calling me?’ This provides an opportunity for the telemarketer to assess the complaint, identify the cause of the call, and take action to address the issue. From the ACMA’s experience, some businesses have inadequate internal complaint handling systems, which can contribute to ongoing compliance problems as they are not capable of identifying and remedying compliance issues.

The ACMA is very focused on encouraging telemarketers to enhance their complaint handling capabilities, and use consumer complaints to identify and remedy compliance problems. The ACMA also assists telemarketers that have been the subject of complaints, by providing complaint information during the informal process. Naturally, the ACMA is more limited in the information it provides to parties subject to a formal

investigation—however, these entities have already received complaint information through the advisory and warning stages of the process.

Do Not Call Register Act 2006 Compliance Guide

The ACMA is surprised in the extreme at the dissatisfaction expressed in the ADMA submission regarding the *Do Not Call Register Act 2006 Compliance Guide* (the guide). ADMA was involved in the development of the guide, provided valuable input during the process and has previously voiced its support for the guide. Please refer to the ADMA media release titled 'ADMA welcomes release of ACMA's *Do Not Call Register Act 2006 Compliance Guide*', 6 July 2009, a copy of which is attached.

By way of background, the ACMA developed the guide in response to queries from telemarketers about what measures they could put in place to comply with the DNCR Act, particularly where they had engaged an outsourced call centre. The ACMA found that while the majority of telemarketers were willing to comply, some of them simply didn't know how to go about it.

The guide was developed in close consultation with industry participants, and is a collection of 'best practice' measures based on procedures and systems that telemarketers have actually implemented. Depending on the size and complexity of a particular business, it may adopt one of the measures in the guide, or it may adopt a dozen of the measures in the guide.

The ACMA does not, as the ADMA submission suggests, 'compel' telemarketers to adopt the measures set out in the guide. The ACMA made this point very clear in its discussions with ADMA during the development, and subsequent publicity, of the guide. The status of the guide is also made very clear on the first page of the document under the heading 'Important: Please read', an extract of which is attached for your reference.

The ACMA believes it is important to give telemarketers practical, helpful tools to assist them in complying with the DNCR Act. The *Do Not Call Register Act 2006 Compliance Guide* does precisely that.

Other matters—Proposed expansion of the register

The ADMA submission comments on the proposed expansion of the register, expressing the view that this will have a significant impact upon the regulatory burden imposed on the telemarketing industry. The ACMA notes that the discussion paper released by the Department of Broadband, Communication and the Digital Economy can be accessed at www.dbcde.gov.au. The proposed expansion is a matter for the government, not the ACMA.

Summary

The ACMA disagrees with ADMA's assertion that its administration of the DNCR Act is overly prescriptive and has led to an unnecessary regulatory burden for the telemarketing industry. It is quite unfortunate that the broad, unwarranted assertions made in the ADMA submission were not grounded in fact. The ACMA trusts that this has clarified some of the issues.