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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DO NOT CALL REGISTER LEGISLATION AMENDMENT BILL 2009**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for Broadband, Communications  
and the Digital Economy, Senator the Honourable Stephen Conroy)

## **DO NOT CALL REGISTER LEGISLATION AMENDMENT BILL 2009**

### **OUTLINE**

The Do Not Call Register Legislation Amendment Bill 2009 (the Bill) amends the *Do Not Call Register Act 2006* and the *Telecommunications Act 1997*. Under the Bill, the Do Not Call Register will be expanded to enable all Australian telephone and fax numbers to be registered.

While telemarketing and fax marketing are legitimate methods by which businesses can market their services, the Australian Government is concerned at the rate that unsolicited marketing faxes have grown in recent years. As a result, there have been rising community concerns about the inconvenience and intrusiveness of telemarketing and fax marketing on Australians. In response to these concerns, this Bill will extend the Register to enable all persons, including individuals, businesses, government and organisations to express their preference not to receive telemarketing calls or marketing faxes.

On 15 August 2008, the Department of Broadband, Communications and the Digital Economy released a discussion paper seeking community views on potential changes to the types of numbers that are eligible for registration on the Do Not Call Register. In particular, the discussion paper sought views on whether:

- fax numbers should be allowed to be listed on the Register;
- emergency service operators should be allowed to list their telephone numbers on the Register;
- all Australian telephone numbers should be allowed to be listed on the Register (that is, including business numbers); and
- unsolicited, but 'legitimate' business to business telephone calls should be allowed to continue if businesses were eligible to register their business numbers.

Following the receipt of a large number of submissions supporting the proposal that the Register cover all Australian telephone and fax numbers, the Government has decided to introduce legislation to implement this proposal.

The main elements contained in the Bill are:

- a provision that makes all Australian telephone and fax numbers eligible to register on the Do Not Call Register;
- a prohibition on sending unsolicited marketing faxes to an Australian number which is registered on the Do Not Call Register, subject to certain exemptions;
- a requirement that agreements for the sending of unsolicited marketing faxes must require compliance with this Act. This requirement is aimed at organisations which may contract with another party to provide fax marketing services on their behalf;
- civil penalty provisions for breaches of the new provisions;
- the introduction of 'registered consent' which will give all new registrants the option of consenting to receive telemarketing calls or marketing faxes relating to

particular industry classifications at the time of listing their number on the Register. The default position will continue to be that registrants are opting out of all telemarketing calls and marketing faxes, unless they take positive action to opt-in to receive certain types of telemarketing calls and marketing faxes. Registrants will be able to change their options at any time if they later choose to opt-out of these calls/faxes;

- conferring powers on the Australian Communications and Media Authority (ACMA) to make a determination setting out the industry classifications for the purposes of enabling registrants to choose the telemarketing calls and marketing faxes they wish to receive (if any);
- conferring powers on the ACMA to make a determination or determinations about the circumstances in which consent will be inferred for unsolicited telemarketing calls and marketing faxes to business numbers. This is a reserve power and there will be no change to the existing inferred consent provisions under the Act; and
- consequential amendment to Part 6 of the *Telecommunications Act 1997*, to allow the fax marketing industry to make industry codes, and the ACMA to make industry standards for the 'fax marketing industry', consistent with the existing arrangements which allow codes and standards to be made for the telemarketing industry. The ACMA will have the power to make an industry standard relating to the fax marketing industry.

It is anticipated that these arrangements will be in operation during the second half of 2010.

### **FINANCIAL IMPACT STATEMENT**

Budget funding of \$4.7 million has been provided over four years for the arrangements contained in this Bill. It is anticipated that approximately \$3.5 million will be recovered from the telemarketing and fax marketing industries through the payment of fees to access the Register. Section 21 of the *Do Not Call Register Act 2006* provides that the ACMA may make a determination in respect of fees for accessing the Do Not Call Register.

## ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA: Australian Communications and Media Authority

Bill: Do Not Call Register Legislation Amendment Bill 2009

DNCR Act: *Do Not Call Register Act 2006*

Minister: Minister for Broadband, Communications and the Digital Economy

Register or Do Not Call Register: The Do Not Call Register established under the *Do Not Call Register Act 2006*

Spam Act: *Spam Act 2003*

Telecommunications Act: *Telecommunications Act 1997*

## NOTES ON CLAUSES

### Clause 1 – Short title

Item 1 provides that the Bill, when enacted, may be cited as the *Do Not Call Register Legislation Amendment Act 2009*.

### Clause 2 – Commencement

Item 2 sets out when each of the provisions in the Bill will commence.

It provides that the following provisions will commence on Royal Assent:

- Sections 1 to 3 of the Bill, and anything else not covered by the table.

The following provisions will commence on a date to be fixed by proclamation, or within 6 months after Royal Assent if not proclaimed beforehand:

- Schedule 1 of the Bill.

Sections 1 to 3 of the Bill are introductory provisions, including the short title of the Bill, the commencement provisions and the description of the effect of the schedules (see Item 1 of the table). These provisions are to commence immediately on Royal Assent.

Schedule 1 sets out the amendments that are to be made to the *Do Not Call Register Act 2006* to allow for any Australian telephone or fax number to be registered on the Register, the prohibition against the sending of marketing faxes to numbers on the Register and compliance requirements for agreements relating to the sending of marketing faxes. Schedule 1 sets out the provisions relating to designated marketing faxes, determinations about consent and the consequential amendments to Part 6 of the Telecommunications Act. These provisions will commence on a date to be fixed by Proclamation, or within 6 months after Royal Assent if not proclaimed beforehand.

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

The ACMA will be undertaking an education initiative prior to the commencement of the changes.

### 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. There is one Schedule to the Bill which amends the DNCR Act and the Telecommunications Act.

## **Schedule 1 – Amendments**

### **Part 1 – Amendment of the *Do Not Call Register Act 2006***

#### ***Division 1 – Amendments***

##### **Item 1 – Section 3**

Item 1 amends the simplified outline in section 3 of the DNCR Act to include a statement about the general prohibition against the sending of unsolicited marketing faxes to a number registered on the Register. The simplified outline is designed to assist people in understanding the broad elements in the Act.

##### **Item 2 – Section 3 (note)**

Item 2 amends the note which immediately follows section 3 of the DNCR Act to include a reference to marketing faxes.

##### **Item 3 – Section 4 (definition of *authorise*)**

Item 3 repeals the definition of ‘authorise’ in section 4 of the DNCR Act and replaces it with a new definition. The new definition retains the original definition in the context of making telemarketing calls but includes a new definition relating to the sending of marketing faxes.

##### **Item 4 – Section 4**

Item 4 inserts a definition of the term ‘business number’. This definition is relevant to the proposed addition to Schedule 2 of the Act which gives the ACMA the power to make a determination to infer consent for business numbers to receive telemarketing calls and marketing faxes (see the explanatory notes for Item 84 of Schedule 1 to the Bill).

A business number is an Australian number. The term ‘Australian number’ is defined in the DNCR Act as a number that is specified in the numbering plan referred to in section 455 of the Telecommunications Act and for use in connection with the supply of carriage services to the public in Australia. There is no technical distinction between a fax number and a telephone number. Both fax numbers and telephone numbers are included under the definition of an Australian number.

This is relevant to the prohibition on sending marketing faxes proposed under Item 22 to an Australian number and the prohibition on making a telemarketing call to an Australian number.

The term ‘Australian number’ is also relevant to the types of numbers that can be registered on the Do Not Call Register.

This definition ensures that the Act covers the sending of a marketing fax to a number on the Register, whether a telephone or fax number. Similarly, the Act covers the making of a telemarketing call to a telephone or fax number that is registered.

**Item 5 – Section 4 (definition of *cause*)**

Item 5 makes a minor consequential amendment to the definition of ‘cause’. The term ‘cause’ has the meaning affected by subsections 11(9) and 12B(10).

**Item 6 – Section 4 (after paragraph (d) of the definition of *civil penalty provision*)**

Item 6 makes minor consequential amendments to the definition of ‘civil penalty provision’. These are required as a result of the introduction of new civil penalty provisions regarding the sending of unsolicited marketing faxes.

**Item 7 – Section 4 (definition of *consent*)**

Item 7 makes a minor consequential amendment to the definition of ‘consent’. It will now deal with the sending of marketing faxes in addition to telemarketing calls. This is required as a result of the new provisions prohibiting the sending of unsolicited marketing faxes.

**Item 8 – Section 4 (definition of *dealing with*)**

Under Part 4 of the DNCR Act, a Court may make an ancillary order for compensation where a person has suffered loss or damage as a result of a contravention of a civil penalty provision. In determining whether a person has suffered loss or damage and in assessing the amount of compensation, a Court may take into account a number of factors relating to ‘dealing with’ the unsolicited telemarketing call.

Item 8 extends the existing definition of ‘dealing with’ to include action relating to a marketing fax (which includes the printing and retrieving of the fax from a device or computer system).

**Item 9 – Section 4**

Item 9 inserts a new term ‘designated marketing fax’. This term is defined to have the meaning given by Schedule 1A to the Bill. In essence, certain faxes sent or authorised to be sent by government bodies, religious organisations, charities, registered political parties, independent members of Parliament, political candidates, as well as certain faxes sent or authorised to be sent by educational institutions are designated marketing faxes for the purposes of this Bill.

The meaning of ‘designated marketing fax’ is discussed in greater detail below in the notes to Schedule 1 to the Bill. ‘Designated marketing faxes’ are exempt from section 12B. The effect of these provisions is that certain faxes can be sent to Australian numbers, even if the numbers are registered on the Do Not Call Register. It is worthwhile

noting that many of these faxes may fall outside the meaning of a ‘marketing fax’ as defined in Item 15 of this Bill, even without a specific exemption, as they would not be commercial in nature.

#### **Item 10 – Section 4 (definition of *employee*)**

Item 10 of Schedule 1 to the Bill makes a consequential amendment to the definition of ‘employee’. The term ‘employee’ is used in clause 4 of Schedule 1A of the Bill, which relates to when a marketing fax that is sent or authorised to be sent by an educational institution is a ‘designated marketing fax’ and exempt from the prohibition on sending unsolicited marketing faxes.

Under new Schedule 1A to the Bill, employees include members of the executive body of a body corporate, contractors, Members of Parliament, local councillors, and officeholders such as an individual who is in the service of an armed force or a police force.

In addition, the Item provides clarification of the current definition of ‘employee’ when used in relation to ‘designated telemarketing calls’ by referring to the meaning given at clause 7 of Schedule 1 to the Act.

#### **Item 11 – Section 4 (definition of *employer*)**

Item 11 makes a consequential amendment to the definition of ‘employer’.

The term ‘employer’ is used in clause 4 of Schedule 1A of the Bill, which relates to when a marketing fax that is sent or authorised to be sent by an educational institution is a ‘designated marketing fax’ and exempt from the prohibition on sending unsolicited marketing faxes.

Clause 7 of Schedule 1A includes bodies corporate, contractors, the Commonwealth, State or local governing bodies (in relation to members of Parliament and local governments), and certain offices such as the armed forces, or police forces, in the meaning of an employer.

In addition, Item 11 of the Bill provides clarification of the current definition of ‘employer’, when used in relation to ‘designated telemarketing calls’ in Schedule 1 by referring to the meaning given at clause 7 of Schedule 1.

#### **Item 12 – Section 4**

Item 12 provides a definition of express consent. Express consent is treated as a separate form of consent, distinct from the new concept of ‘registered consent’. Registered consent is defined under proposed new section 4 of the Act (refer Item 16 below).

#### **Item 13 – Section 4**

The term ‘fax’ is broadly defined as having the meaning given by proposed section 5A.

#### **Item 14 – Section 4**

Item 14 inserts a definition of industry classification. This provision enables the ACMA to make a determination setting out industry classifications that relate to an activity, for the purposes of registered consent. If the ACMA makes such a determination, this classification may be used to determine whether or not registered consent has been given to receive certain telemarketing calls or marketing faxes.

#### **Item 15 – Section 4**

The term ‘marketing fax’ is defined as having the meaning given by section 5B (refer to the commentary on Item 22 below).

#### **Item 16 – Section 4**

Registered consent is a new type of consent proposed under the Bill. It is in addition to the existing two types of consent: express and inferred consent. Section 4 defines ‘registered consent’ as consent that has been entered on the Do Not Call Register.

Registered consent applies where a registrant has chosen particular industry classifications about which they wish to receive telemarketing calls or marketing faxes. The consent remains valid for the duration of a registration on the Register and ceases to apply after a registration has been removed. Unlike express consent and inferred consent, registered consent is unable to be withdrawn without re-registering the number. If a person has registered their consent on the Register and wishes to change that consent, they will need to cancel the existing registration, or re-register their number on the Register without including such a consent.

#### **Item 17 – Section 4**

The term ‘relevant account-holder,’ in relation to an Australian number, is defined by reference to the individual or organisation that has responsibility for the account. If an individual or organisation is solely responsible for the relevant account, that individual or organisation is the relevant account-holder. In contrast, if two or more individuals or organisations are jointly responsible for the relevant account, any of those individuals or organisations will be the relevant account-holders.

Under proposed subsection 12B(2), the sending of a marketing fax which would otherwise be a breach of proposed subsection 12B(1) will be permitted under the amended DNCR Act if the relevant account-holder or a nominee of the relevant account-holder has consented to the sending of the fax (see proposed subsection 12B(2) discussed at Item 29 below).

#### **Item 18 – Section 4 (definition of *relevant telephone account-holder*)**

Item 18 repeals the term ‘relevant telephone account-holder’ from the DNCR Act. This term, which implies reference to traditional telephony services, is replaced by the broader

term ‘relevant account-holder’ to encompass communications services other than traditional telephony services.

#### **Item 19 – Section 4**

The term ‘send’ is defined to include an attempt to send. This clarifies that the concept of sending a marketing fax does not require the sender to have successfully sent a fax (i.e. the fax need not be received as a fax message by an end user).

It is intended that faxes which are sent, but not successfully received, are caught by the Act. For example, faxes sent to a telephone number that is not connected to a fax machine are captured by the extended definition of send. The fax may be received as a series of incoherent beeps, rather than as a meaningful communication. It means that a person will have contravened these provisions even if they have not been successful in sending the fax in the ordinary sense.

The concept of sending a marketing fax is central to the penalty provisions in Part 2 of the Bill which broadly prohibit the sending of unsolicited marketing faxes to numbers on the Register.

#### **Item 20 – Subsection 5(1)**

Item 20 makes a consequential amendment by replacing the reference to ‘a telephone’ number with reference to ‘an Australian’ number. This amendment ensures that numbers other than telephone numbers (for example, fax numbers) are included in the scope of the DNCR Act.

#### **Item 21 – Paragraphs 5(1)(c) and (d)**

Item 21 makes consequential amendments to references to ‘telephone numbers’ by removing the term ‘telephone’. This expands references to numbers to include other types of numbers, such as fax numbers.

#### **Item 22 – After section 5**

##### ***Proposed new section 5A – Faxes***

Under new section 5A, the term ‘fax’ is defined broadly to include a fax whether or not it is a facsimile of a physical document or was created by computer software, and whether or not the sending of the fax involves the use of a fax machine, a fax server, a fax gateway, a mail-to-fax system or a system or equipment specified in the regulations.

The ordinary usage of the term ‘fax’ is reference to a communication sent using telecommunications technology to transfer copies of documents over a telephone network. However, the proposed definition of ‘fax’ will expand this concept so as not to exclude new forms of communications that can be used for sending fax messages. This broad approach to defining the concept of ‘fax’ is to ensure that a range of existing

technologies are covered and that the Act is ‘future-proofed’ in the event that new systems or technologies for transmitting and receiving faxes are established.

It is intended that a fax will cover communications that are transmitted using a fax protocol, even if they originated as a different form of technology. This will also include faxes that are received through other technologies, but have been transmitted as a fax. There are multiple technologies and equipments which are capable of receiving the fax, such as a computer, a traditional fax machine or a telefax machine. A telephone may also receive the fax, but not in a meaningful way.

Where a recipient uses a system that converts the fax to a different form of technology, it does not prevent the fax from being covered by the Act. For example, a fax may be sent using a fax machine, computer or fax gateway, but may be received as an email due to software set up by the recipient. In this case because the fax was transmitted as a fax and the conversion to email occurred at the point of receipt, the sending of the fax would be covered by the Act.

Marketing faxes sent and received in any of the ways set out below will be covered by the DNCR Act. There is also provision in the Act for the regulations to specify additional systems or equipment for sending marketing faxes.

<b>Sent</b>	<b>Received</b>
Fax machine	Fax machine
Computer (mail-to-fax system to convert an email to a fax)	Computer (fax-to-mail system that converts the fax to an email)
Fax gateway	Telephone
Fax server	

The *Spam Regulations 2004* specifically exclude fax messages from the definition of an electronic message under the *Spam Act 2003*. This excludes messages sent as a fax from coverage under the Spam Act. A message that is not sent using fax protocol, but is converted to a fax by the recipient’s system will not be covered by the DNCR Act, but may be subject to the Spam Act if it is sent as an electronic message. For example, if a person sends an email that is received as an email in the recipient’s system and is then sent to a fax machine for the purpose of printing, it will not be covered by the DNCR Act.

***Proposed new section 5B – Marketing faxes***

In respect of marketing faxes, proposed new section 5B (refer Item 22 of Schedule 1 to the Bill) sets out the basic definition of ‘marketing fax’ for the purposes of the Bill. This term is a key concept in the Bill, which has a primary purpose of setting up a scheme for regulating the sending of unsolicited marketing faxes. Also, this term is a key element in the penalty provisions of the Bill (see the discussion below in relation to Part 2 of the Bill which sets out various rules applying to the sending of unsolicited marketing faxes).

In general terms, a ‘marketing fax’ is a fax which has a ‘commercial-type’ purpose. It is defined as a fax sent to a number which has a particular purpose as set out in

paragraphs 5B(1)(d) to (n). The purpose of the fax is to be determined by having regard to the content of the fax (paragraph 5B(1)(a)), the presentational aspects of the fax (paragraph 5B(1)(b)), and the content that can be obtained using the telephone numbers, URLs or contact information (if any) mentioned in the fax (paragraph 5B(1)(c)). For example, if the fax itself contains nothing of a ‘commercial nature’, but it includes a telephone number, which if called contains a message which is ‘commercial in nature’ then this will be a marketing fax for the purposes of this Bill (see paragraph 5B(1)).

If a fax does not have content that can be obtained by using numbers, URLs or contact information (i.e. paragraph 5B(1)(c)), then the purpose of the fax will be determined from the content of the fax and its presentational aspects (paragraphs 5B(1)(a) and (b)).

Paragraphs 5B(1)(d) to (n) set out the various purposes which would bring a fax within the meaning of a ‘marketing fax’ for the purposes of the Bill. It includes the following purposes:

- to offer to supply, advertise or promote goods or services, or a supplier, or prospective supplier, of goods or services (paragraphs 5B(1)(d) to (f)). The terms ‘goods’, ‘services’ and ‘supply’ are defined in section 4 of the DNCR Act. Common examples of faxes which would be covered by this definition are faxes offering to supply telecommunications services; selling computer equipment; selling tickets in a promotional competition; and marketing financial products such as insurance;
- to offer to supply, advertise or promote land or an interest in land or a supplier, or prospective supplier, of land or an interest in land (paragraphs 5B(1)(g) to (i)). This would cover faxes which advertise real estate. The term ‘supply’ in relation to land or an interest in land is defined in section 4 of the DNCR Act. This would cover faxes promoting an information seminar, the purpose of which is to sell unit trust properties;
- to offer to provide, advertise or promote a business opportunity or investment opportunity or a provider or prospective provider, of a business opportunity or investment opportunity (paragraphs 5B(1)(j) to (l)). This would, for example, include faxes from investment companies promoting particular portfolios and scams;
- to solicit donations (paragraph 5B(1)(m)). Faxes sent to solicit donations are likely to be sent by or on behalf of exempt organisations such as charities (see proposed Schedule 1A which enables certain organisations to send marketing faxes to numbers registered on the Do Not Call Register). However, it is possible that other organisations would also send faxes to procure donations. Such faxes would ordinarily be considered to be ‘marketing’, and consequently are included;
- a purpose specified in the regulations (paragraph 5B(1)(n)). This regulation-making power has been included to enable other types of faxes to be included within the meaning of ‘marketing fax’. The regulation-making power could be

used as a reserve power to enable regulations to be made at a later date if a particular type of fax became apparent which was not covered by this definition.

If a fax does not come within any of the above paragraphs (that is, it does not have a 'commercial-type' purpose), it will not be covered by the amendments set out in Schedule 1 to the Bill, even if it may ordinarily be considered to be fax marketing.

### ***Proposed new section 5C – Industry classification***

For the purposes of registered consent, proposed new section 5C gives the ACMA the power to make a determination that a certain activity is an industry classification.

### **Item 23 – Paragraphs 11(2)(a) and (b)**

Item 23 removes the term 'telephone' in relation to account-holders as a consequence of the new term 'relevant account-holder' inserted by Item 17.

### **Item 24 – Paragraph 11(3)(b)**

Item 24 repeals the previous paragraph 11(3)(b) of the DNCR Act and replaces it with a new paragraph which updates references to a number of paragraphs in the Act to reflect the proposed changes contained in the Bill.

### **Item 25 – Subsection 11(3)**

The change at Item 25 has the effect of changing references to 'telephone number' to the broader concept of 'Australian number'. This change is necessary in order to include other numbers, for example, fax numbers, in the scope of subsection 11(3).

### **Item 26 – After subsection 11(3)**

Item 26 inserts new subsection (3A) which provides an exception to the general prohibition under subsection 11(1) which prohibits calls to numbers registered on the Do Not Call Register.

The exception covers circumstances where the number was included on a list that was submitted by the telemarketer (under subsection 19(1)), subject to the 30-day timeframe, and consent for that number was registered in relation to receiving telemarketing calls made about an activity covered by a particular industry classification and the actual call fell into an industry classification that had been registered in respect of the number. For a telemarketer to be able to claim this defence against the prohibition in subsection 11(1), the content or purpose of the call must fall within the particular industry classification which the registrant selected.

This exception is consistent with others in the Act relating to consent and the number checking or 'washing' process. As with these other exceptions, the onus is on the person claiming the exception to establish that it applies.

The Register will be kept as one list combining the different classes of numbers and allowing marketers to check their contact lists against all numbers on the Register. This will enable fax marketers to remove telephone numbers that have been incorrectly added to their contact list. It will prevent registrants from receiving faxes to their telephone number as a series of incoherent beeps or other sounds. It will also prevent telemarketers from making telemarketing calls to fax numbers that may result in the recipient's communications equipment being tied up.

#### **Item 27 – Subsection 11(6)**

Item 27 inserts a reference to subsection 11(3A) into subsection 11(6) in order to provide greater clarity and consistency for the Act.

#### **Item 28 – Paragraph 12(1)(b)**

Item 28 amends paragraph 12(1)(b) of the Act by inserting a broad reference to 'Australian numbers' as a substitute for the comparatively narrower previous reference to 'telephone numbers that, under section 14, are eligible to be entered on the Do Not Call Register'.

The effect of this amendment is to prohibit a person from making any agreement or contract, or arriving at an understanding with a second person, whereby under that agreement, contract or understanding the second person will undertake to make telemarketing calls or cause agents or employees of the second person to make telemarketing calls. It applies to circumstances where there is a reasonable likelihood that some or all of those calls will be made to Australian numbers, and the contract, agreement or understanding does not include an express provision requiring the second person (and the second person's employees and agents where relevant) to take reasonable steps to comply with the Act.

#### **Item 29 – After Part 2**

Item 29 inserts proposed Part 2A into the DNCR Act and includes a simplified outline of the new Part 2A of the Act. This outline provides a broad overview to assist readers. It is not designed as a comprehensive statement of the provisions in Part 2.

### **Proposed Part 2A – Rules about sending marketing faxes**

#### ***Proposed section 12A – Simplified outline***

Proposed section 12A outlines the prohibitions and requirements set out in Part 2 which are as follows:

- unsolicited marketing faxes must not be sent to a number registered on the Do Not Call Register; and
- agreements for the sending of marketing faxes must require compliance with this Act.

***Proposed section 12B – Unsolicited marketing faxes must not be sent to a number registered on the Do Not Call Register***

Proposed section 12B prohibits a person sending, or causing to be sent, a marketing fax to an Australian number if the number is registered on the Do Not Call Register, subject to various exceptions set out in proposed subsections 12B(2) to (5) (such as if there is prior consent of the relevant account-holder or their nominee).

Proposed subsection 12B(1) provides that a person must not send, or cause to be sent, a marketing fax to an Australian number which is registered and if the fax is not a designated a marketing fax. The following terms, which are discussed elsewhere in these notes, are relevant to the interpretation of proposed subsection 12B(1):

- the definition of ‘send’ in proposed section 4;
- ‘marketing fax’ in proposed section 5B;
- the extended meaning of ‘cause’ in proposed section 4; and
- ‘designated marketing faxes’ in proposed Schedule 1A.

This penalty provision covers the person who actually sent the fax (by dialling the relevant number and pressing send), the author of the content of the fax (who caused the fax to be made), or another person who authorised the fax to be sent by contracting with a fax marketer to provide the fax marketing services. This prohibition covers the attempted transmission of faxes (see the definition of ‘send’ discussed at Item 19). Therefore a fax which was not successfully received or which was received on a telephone as a series of beeps would be covered by the penalty provision.

Under proposed subsection 12B(1), the sending of the fax will only be prohibited if it is sent to an Australian number that is on the Do Not Call Register. The meaning of an Australian number is defined in section 4 of the DNCR Act and includes telephone and fax numbers. This means that the Act prohibits the sending of a marketing fax to a fax number or a telephone number that is listed on the Register.

Proposed subsection 12B(1) covers marketing faxes regardless of their origin that are sent to Australian numbers. For example, it would cover overseas fax marketers sending faxes to an Australian number as well as Australian fax marketers sending faxes to an Australian number. It also covers a person who has contracted a person to send marketing faxes on their behalf (see the extended meaning of ‘cause’ in Item 5 of the Bill).

This prohibition does not apply to faxes sent from an overseas number to an overseas number, or faxes sent to an Australian number which is not registered on the Do Not Call Register.

Under proposed paragraph 12B(1)(b), a ‘designated marketing fax’ is exempt from proposed section 12B. ‘Designated marketing fax’ is defined in proposed Schedule 1A and includes certain marketing faxes sent by religious organisations, charities or political parties, independent Members of Parliament and candidates and certain faxes sent by

educational institutions. The meaning of ‘designated marketing fax’ is discussed in greater detail below under Schedule 1A.

The Act is not intended to cover carriage service providers who simply provide the carriage service to transmit a fax. However, where a person provides a carriage service and has knowledge of or involvement in its contents, they may be liable for the sending of a marketing fax under the ancillary contravention provisions of the Act. Further, a person who causes or sends a marketing fax and provides the carriage service for the fax may be liable for sending or causing the marketing fax to be sent. For example, if a carriage service provider was sending or causing marketing faxes to be sent that promote its goods or service it may be covered by the Act.

This is consistent with the treatment of carriage service providers in relation to the making or causing of telemarketing calls. ‘Carriage service’ is defined in the Act by reference to the definition in the Telecommunications Act.

Under the Act, more than one person may be taken to have sent or caused a marketing fax to be sent. For example, a number of people may be involved in the sending of a marketing fax or a number of people may have authorised the sending of the fax.

#### *Exceptions*

There are four exceptions to the new prohibition against the sending of unsolicited marketing faxes to numbers on the Register:

- if the relevant account-holder, or their nominee, consented to the fax;
- if the sender had washed their lists in the last 30 days and the number was not on the Register at that time;
- if the fax was sent, or caused to be sent by mistake; or
- if the person took reasonable precautions, and exercised due diligence, to avoid the contravention.

As with the current exceptions under the Act, the onus is on the person claiming the exception to establish that it applies.

New subsection 12B(2) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register, if the fax marketer adduces evidence that the relevant account-holder, or their nominee, consented to the sending of the fax. The effect of this is that a fax marketer may send a marketing fax to a number on the Register where that the recipient has given their express or inferred consent to receive the fax. The concept of ‘consent’ is defined in Schedule 2 of the Act.

Subsection 12B(3) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register, if the fax marketer has ‘washed’ or checked their contact list with the relevant register operator in the previous 30 days before the fax was sent and had been advised that the number to which they sent the fax to was not on the Register. This gives fax marketers a 30-day grace period to update their contact lists and ensure that they are not sending faxes to numbers on the Register. If the Register

Operator provides incorrect information that the number was not on the Register and the number was listed, the fax marketer will be able to rely on this exception and will not be in breach of section 12B.

The Register will be kept as one list combining the different classes of numbers and allowing marketers to check their contact lists against all numbers on the Register. This will enable fax marketers to remove telephone numbers that have been incorrectly added to their contact list. It will prevent registrants from receiving faxes to their telephone number as a series of incoherent beeps or other sounds. It will also prevent telemarketers from making telemarketing calls to fax numbers that may result in the recipient's communications equipment being tied up.

Subsection 12B(4) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register if:

- the fax marketer has washed their contact list;
- the fax marketer has been advised that the number was registered;
- registered consent applied for the number to receive calls and faxes about an activity covered by a particular industry classification; and
- the actual fax sent or attempted to be sent fell into an industry classification that had been registered with respect to that number.

For a telemarketer to be able to claim this exception, the content or purpose of the fax must fall within the particular industry classification which the registrant selected.

Subsection 12B(5) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register if the fax was sent, or caused to be sent, by mistake. 'Mistake' is defined in section 4 as a reasonable mistake of fact. This exception may apply where a person dials an incorrect number when sending a marketing fax. A person cannot rely on the exception to argue that they were unaware that a number was on the Register, if they had not checked the Register.

Subsection 12B(6) provides an exception to the prohibition on sending unsolicited marketing faxes to numbers on the Register if the person took reasonable precautions, and exercised due diligence, to avoid the contravention. For example, if a person contracted a third party to undertake fax marketing on their behalf, and they included a contractual provision which required the telemarketer to comply with the provisions of the Act, then this may be used to demonstrate that they had taken reasonable steps to avoid a contravention of section 12B. However, if the contracting party became aware that the telemarketer was contravening section 12B and did nothing to enforce the terms of the contract, they cannot be said to have exercised due diligence and they could not make use of this exception.

New subsection 12B(8) sets out ancillary provisions. New subsection 12B(9) provides that subsections (1) to (8) are civil penalty provisions.

### *Extended meaning of cause*

Subsection 12B(10) extends the meaning of ‘cause’. If a person enters into a contract, arrangement or arrives at an understanding with another person under which the other person undertakes to cause its employees or agents to send marketing faxes, the other person is taken to have caused the marketing fax to be sent.

### ***Proposed section 12C – Agreements for the sending of marketing faxes must require compliance with this Act***

New section 12C requires that agreements for the carrying out of fax marketing activities require compliance with the Act.

The effect of this amendment is to prohibit a person from making an agreement or contract, or arriving at an understanding with a second person, whereby under that agreement, contract or understanding the second person will undertake to send marketing faxes or cause agents or employees of the second person to send marketing faxes. It applies to circumstances where there is a reasonable likelihood that some or all of those faxes will be sent to Australian numbers, and the contract, agreement or understanding does not include an express provision requiring the second person (and the second person’s employees and agents where relevant) to take reasonable steps to comply with the Act.

This has been included to ensure that people causing marketing faxes to be sent through outsourcing arrangements, specifically require the fax marketer to comply with the Act. Ancillary contraventions are set out in subsection 12C(2).

New subsection 12C(3) provides that subsections 12C(1) and (2) are civil penalty provisions. Subsection 12C(4) makes it clear that a failure to include such a requirement does not affect the validity of any contract, arrangement or understanding.

### **Item 30 – Subsection 13(1)**

Item 30 replaces the word ‘telephone’ with ‘Australian’ in reference to numbers. This amendment means that the ACMA or third party (the contracted service provider) will be required to include numbers other than telephone numbers on the Do Not Call Register. This includes fax numbers.

### **Item 31 – Subsection 13(1)**

Item 31 extends the existing obligation of the ACMA to keep a register of numbers contained on the Do Not Call Register. The ACMA is now also required to keep a record of consent provided by registrants on the Do Not Call Register. Refer to the new definition of ‘registered consent’ in Item 16.

### **Item 32 – Subsection 13(6)**

Item 32 makes a consequential amendment to section 13(6) of the DNCR Act by including as a primary purpose of the Do Not Call Register the purpose of facilitating the prohibition on the sending of unsolicited marketing faxes, under section 12B (other than designated marketing faxes).

This amendment is for the purposes of the *Privacy Act 1988* which (among other things) requires an organisation such as the ACMA or a third party authorised by the ACMA under subsection 13(1) of the DNCR Act to use personal information, such as the personal information contained on the Do Not Call Register, for the purpose for which it was collected. In this instance, that purpose is specified at proposed subsection 13(6) of the DNCR Act.

### **Item 33 – Section 14**

Item 33 repeals section 14 which sets out the criteria that must be met for a number to be eligible to be entered on the Do Not Call Register and thus avail itself of the protections afforded by the DNCR Act. The repeal of this eligibility criteria means that fax numbers and telephone numbers that are not used or maintained exclusively for private or domestic purposes can be entered on the Do Not Call Register.

### **Item 34 – Section 15**

Item 34 makes a minor amendment to section 15 by inserting ‘(1)’ before ‘An application for’.

### **Item 35 – Section 15**

Item 35 makes a consequential amendment to section 15 by replacing the words ‘a telephone’ with ‘an Australian’ in reference to numbers eligible for entry on the Do Not Call Register.

### **Item 36 – Subparagraphs 15(a)(i) and (ii)**

Item 36 of the Bill makes a consequential amendment to subparagraphs 15(a)(i) and (ii) by removing the term ‘telephone’.

### **Item 37 – After paragraph 15(b)**

Item 37 includes additional subparagraphs after paragraph 15(b) to allow applicants to consent to receiving telemarketing calls and marketing faxes to their number as long as the call or fax relates to the specified industry classification.

### **Item 38 – At the end of section 15**

Item 38 allows registrants to register a number even if it is already listed on the Do Not Call Register. This gives registrants the opportunity to use the new registration option

provided through the Bill to register their consent for telemarketing calls and marketing faxes about particular industry classifications, regardless of whether the number is already registered. Proposed subsections 15(3) and 15(4) allow applicants to register as many or as few consents as they wish.

Registration of a number can be undertaken by the relevant account-holder (as defined in section 4), a nominee of the relevant account-holder, or an agent of the relevant account-holder.

In registering a number, a person is provided with the choice to register their consent to receive telemarketing calls and marketing faxes regarding particular industry classifications. Registrants will be able to opt in to receive these calls or faxes by selecting from the list of industry classifications made available on the DNCR website. Registrants have the choice of selecting no industry classifications or selecting one or more. If a registrant chooses to opt in to more than one industry classification they can do so through a single registration. Multiple selections do not need to be entered on the Register separately.

Registered consents can be changed at any time by re-registering the relevant telephone or fax number or removing a registration altogether. Re-registering a number replaces the existing entry of a number and consents (if any) on the Register.

#### **Item 39 – Section 16**

Item 39 of the Bill repeals section 16 of the DNCR Act and inserts a new provision regarding registration. It outlines the general conditions for the maintenance of the Do Not Call Register, with reference to any potential future service provider that may be contracted by the ACMA to maintain the Register. It allows for additional information to be provided, particularly the addition of consent for telemarketing calls and marketing faxes.

#### **Item 40 – Subsection 17(1)**

Item 40 makes consequential amendments to subsections 17(1), (2) and (3) by replacing the words ‘a telephone’ with ‘an Australian’.

#### **Item 41 – Subsection 17(1)**

Item 41 makes a minor addition to subsection 17(1) in order to make it clear that the Act covers both the registration of numbers and the registration of consent for all applicants. Registration of a number and related consents (if any) are for three years, unless removed from the Register before this time.

#### **Item 42 – Paragraph 17(1)(b)**

Item 42 defines the timing arrangements for items registered on the Do Not Call Register. It includes a reference to the removal of registrations under paragraph 16(f) of the Act.

**Item 43 – Subsection 17(2)**

Item 43 makes consequential amendments to subsection 17(2) by replacing the words ‘a telephone’ with ‘an Australian’.

**Items 44 and 45 – Subsection 17(2)**

Items 44 and 45 make minor additions to subsection 17(2) in order to make it clear that the Act covers both the registration of numbers and, if desired, one or more consents for each applicant.

**Item 46 – Subsection 17(3)**

Item 46 makes consequential amendments to subsection 17(3) by replacing the words ‘a telephone’ with ‘an Australian’.

**Items 47 and 48 – Subsection 17(3)**

Items 47 and 48 make minor additions to subsection 17(3) in order to make it clear that the Act covers both the registration of numbers and, if desired, the registration of consent(s) for any account-holder.

**Item 49 – Paragraph 18(1)(a)**

Item 49 makes consequential amendments to paragraph 18(1)(a) by replacing the word ‘telephone’ with ‘Australian’.

**Item 50 – Subsection 19(1)**

**Item 51 – Paragraph 19(2)(c)**

Items 50 and 51 of the Bill make consequential amendments to subsection 19(1) and paragraph 19(2)(c) by replacing the word ‘telephone’ wherever occurring with ‘Australian’.

**Item 52 – Paragraph 19(2)(d)**

Item 52 repeals existing paragraph 19(2)(d) and substitutes a new paragraph which is designed to provide access-seekers (typically telemarketers and fax marketers) with information detailing whether numbers contained within a list are or are not on the Register, in the format they prefer.

For example, the access seeker may prefer a list showing all numbers with a ‘yes’ or ‘no’ against each number and also the particular industry classifications that have been selected. Alternatively, the access-seeker may prefer a list that shows only numbers that are not on the Register. This is achieved by creating an obligation on the ACMA to provide this information. It is intended that telemarketers may continue to access the current process for washing lists where the list is returned to the access-seeker identifying

numbers that are registered, but not taking into account if any consents for industry classifications are registered for each number.

**Item 53 – Subsection 19(3)**

Item 53 repeals subsection 19(3), as it is no longer necessary with the introduction of subsection 19(2)(d), which is discussed in Item 52 above.

**Item 54 – Paragraph 20(1)(b)**

This Item amends the Item references in paragraph 20(1)(b) to take into account new paragraphs 19(2)(e) and (f).

**Item 55 – Paragraph 20(1)(c)**

This Item makes a consequential amendment to a reference in paragraph 20(1)(c), in light of the repeal of subsection 19(3).

**Item 56 – Paragraph 21(1)(a)**

**Item 57 – Subsections 21(2), (3) and (7)**

Item 56 and Item 57 make consequential amendments, necessary as a result of the repeal of subsection 19(3).

**Item 58 – Subsections 25(1), (3), (4), (5) and (6)**

Item 58 of the Bill inserts after ‘11(1) or (7)’ the reference ‘12B(1) or (7)’ at subsections 25(1), (3), (4), (5), and (6). This is necessary as a result of the new rules about sending marketing faxes, inserted by Item 29 above.

**Item 59 – After subsection 30(2)**

Item 59 inserts new subsection 30(2A) which relates to the loss a person (the victim) has suffered as a result of a contravention of section 12B. New subsection 30(2A) sets out matters which the Federal Court or the Federal Magistrates Court may have regard to in determining whether a person has suffered loss or damage as a result of a contravention of section 12B and in assessing the amount of compensation payable.

**Item 60 – Subsection 39(1)**

**Item 62 – Subsection 39(3)**

**Item 63 – Subsection 39(4)**

Item 60 makes consequential amendments to subsection 39(1) by replacing the words ‘a telephone’ with ‘an Australian’, as does Item 63 in respect of subsection 39(4). Similar word changes are made under Item 62 where the word ‘telephone’ occurs in subsection 39(3).

**Item 61 – Subsection 39(1)**

**Item 64 – Subsection 39(4)**

Item 61 makes consequential amendments to subsection 39(1) by replacing the words ‘relevant telephone’ with ‘relevant’. A similar change is made in Item 64, in respect of the occurrence of the words ‘relevant telephone’ in subsection 39(4). This change is made as a result of the introduction of the new concept of Australian number in place of telephone number.

**Item 65 – At the end of section 39**

New subsection 39(5) is inserted to make it clear that the references to a nominee in the Act do not limit the application of the common law principles of agent. This means that the agent of a person (applying general principles of law) is permitted to register a number on behalf of their principal.

**Item 66 – Paragraphs 41(a), (b) and (c)**

Item 66 inserts a reference to unsolicited marketing faxes in paragraphs 41(a), (b) and (c).

**Item 67 – At the end of subsection 44(1)**

Item 67 makes a consequential amendment by inserting at the end of subsection 44(1) the term ‘or marketing faxes’.

**Item 68 – Paragraph 4(1)(b) of Schedule 1**

**Item 69 – Subparagraph 4(1)(c)(i) of Schedule 1**

**Item 70 – Paragraph 4(2)(b) of Schedule 1**

These Items omit references to ‘telephone’ in paragraph 4(1)(b), subparagraph 4(1)(c)(i) and paragraph 4(2)(b) of Schedule 1 to the DNCR Act. These are consequential amendments.

**Item 71 – After Schedule 1A**

Item 71 inserts new Schedule 1A after Schedule 1.

***Schedule 1A– Designated marketing faxes***

‘Designated marketing faxes’ are exempt from the prohibition on sending unsolicited marketing faxes to a number registered on the Do Not Call Register (see the proposed new section 12B discussed at Item 29 above). Schedule 1A sets out the comprehensive meaning of a ‘designated marketing fax’ for the purposes of the DNCR Act.

In essence there are three categories of marketing faxes which are ‘designated marketing faxes’ and excluded from certain rules relating to the sending of such faxes. They are:

- certain faxes authorised to be sent by government bodies, religious organisations and charities;
- certain faxes authorised to be sent by a registered political party, independent members of Parliament, or political candidates; and
- certain faxes authorised to be sent by educational institutions.

### **Clause 1 – Object**

Item 1 of Schedule 1A provides that the object of Schedule 1A is to define the expression ‘designated marketing faxes’. The notes to this Item point out that a designated marketing fax is exempt from section 12B (prohibition against the sending of unsolicited marketing faxes to a number registered on the Do Not Call Register).

### **Clause 2 – Government bodies, religious organisations and charities**

This Item is intended to exempt certain faxes relating to goods and services sent by government bodies, religious organisations and charities from the prohibition on sending unsolicited marketing faxes to a number on the Do Not Call Register. Certain limits are placed on the exemption to ensure that such bodies do not unfairly exploit their ‘exempt’ status and allow inappropriate fax marketing to occur.

This exemption is broadly aimed at ensuring that faxes with a ‘public interest’ perspective, such as promoting charitable activities or enhancing community knowledge, are not limited. Charities and religious organisations exist to benefit the Australian community and provide valuable support and community services. This exemption is aimed at ensuring that such organisations are able to continue to raise funds to support their activities. It also aims to ensure that there is no unintended restriction on government-to-citizen communication.

#### *Meaning of ‘government body’*

A ‘government body’ is defined in section 4 of the DNCR Act. It means a department, agency, authority or instrumentality of the Commonwealth, State, Territory, or of a foreign government or a government of part of a foreign country.

#### *Meaning of ‘religious organisation’*

The term ‘religious organisation’ is to have its ordinary meaning.

#### *Meaning of ‘charity’ and ‘charitable purposes’*

The terms ‘charity’ and ‘charitable organisation’ are to be given their ordinary meaning. Ordinarily a ‘charity’ is an entity that is not-for-profit and has a dominant purpose or purposes that are charitable and for the public benefit. Where the organisation has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes.

Organisations that have a dominant purpose to advocate a political party or cause, support a candidate for political office or attempt to change the law or government policy, would not be a charity within its ordinary meaning. The charitable organisation must not engage in activities that are illegal.

‘Charitable purposes’ covers purposes relating to the advancement of health, education, social and community welfare, religion, culture or the natural environment, or other purposes beneficial to the community. ‘Advancement’ includes protection, maintenance, support, research, improvement or enhancement.

Not all faxes sent by government bodies, religious organisations and charities will be exempt from section 12B. The exclusion is limited by paragraph 2(b). This paragraph provides that in the case of the sale of goods or services, the exemption only applies if the relevant body is the supplier or prospective supplier of the goods or services concerned. For example, the exemption would apply where a diabetes support organisation was promoting its own range of support services.

Paragraph 2(b) of Schedule 1A to the Bill has been included to ensure that exempt categories are not abused. It is designed to enable charities to undertake their normal fundraising work. It enables charities to sell goods for which they are the supplier for a profit for the purpose of raising funds for the organisation. However, it does not enable them to provide marketing services for non-exempt organisations. This limitation ensures that the exemption is not abused by unscrupulous operators setting themselves up under the auspices of a charity and taking advantage of the exemption to send marketing faxes on behalf of non-exempt organisations.

A specific regulation-making power has been included in paragraph 2(c) of Schedule 1A, which could be used to specify when a fax does not fall within an exempt category. This has been included to ensure that the Government can act appropriately if it becomes evident that a claim of exemption is being abused.

### **Clause 3 – Political parties, independent members of parliament, candidates etc.**

Clause 3 of Schedule 1A to the Bill sets out that certain types of faxes that have been authorised by political parties, independent members of Parliament or candidates for political office, are ‘designated marketing faxes’ for the purpose of the DNCR Act. This means that such faxes may be sent to numbers registered on the Do Not Call Register.

#### *Political parties*

Subclause 3(1) of Schedule 1A sets out the meaning of the phrase ‘designated marketing faxes’ in the context of faxes authorised by registered political parties. It provides that for the purposes of the Bill a marketing fax is a ‘designated marketing fax’ if:

- the sending of the fax is authorised by a registered political party;
- having regard to the content and presentational aspects of the fax, it would be concluded that the purpose (or one of the purposes) of the fax is to conduct fundraising for electoral or political purposes;

- that if the fax relates to goods or services, the registered political party is the supplier or prospective supplier of the goods or services; and
- the fax is not of a kind specified in the regulations.

The exemption would enable political parties to send faxes which have a fundraising purpose. For example, a political party may send a fax advertising tickets to a fundraising breakfast or other event.

Faxes relating to opinion polling are allowed. This is because they do not fall within the definition of a 'marketing fax' as they have no commercial element. This exemption for political parties does not apply to individuals acting on their own volition within the party.

The term 'registered political party' is defined in section 4 of the DNCR Act. It requires the appropriate registration process to have been undertaken.

A regulation making power in paragraph 3(1)(d) has been included to limit the types of faxes covered by the exemption. This power has been included as a safeguard to ensure that this exemption could be limited further if necessary.

*Independent members of parliament etc.*

Subclause 3(2) of Schedule 1A sets out the meaning of the phrase 'designated marketing fax' in the context of marketing faxes authorised by independent members of Parliament. This means that such faxes may be sent to numbers registered on the Do Not Call Register.

Paragraph 3(2)(a) specifies a person who is a member of:

- the Parliament of the Commonwealth;
- the Parliament of a State;
- the Legislative Assembly for the Australian Capital Territory or of the Northern Territory or Norfolk Island; or
- a local governing body established by or under a law of a State or Territory.

The second criterion that must be met for such a fax to be a designated marketing fax is that, having regard to the content and presentational aspects of the fax, it would be concluded that the purpose (or one of the purposes) of the fax is to conduct fundraising for electoral or political purposes (see paragraph 3(2)(b)) of Schedule 1A.

The third criterion that must be met for a designated marketing fax authorised by an independent member of parliament is that, if the fax relates to goods or services, the person specified in paragraph 3(2)(a) is the supplier or prospective supplier of the goods or services.

The fourth criterion is that the fax is not of a kind specified in the regulations.

As set out above in relation to the exemption applying to registered political parties, the exemption would enable independent members of Parliament to send faxes which have a fundraising purpose.

### *Candidates*

Subclause 3(3) of Schedule 1A to the Bill sets out the meaning of the phrase ‘designated marketing fax’ in the context of faxes authorised by a candidate in certain elections. This means that such faxes may be sent to numbers registered on the Do Not Call Register.

The first criterion that must be met for such a fax to be a designated marketing fax is that the sending of the fax is authorised by a person who is a candidate for an election that is specified in paragraph 3(3)(a). Paragraph 3(3)(a) specifies elections for:

- the House of Representatives;
- the Senate;
- a house of the Parliament of a State;
- the Legislative Assembly for the Australian Capital Territory;
- the Legislative Assembly of the Northern Territory;
- the Legislative Assembly of Norfolk Island; or
- a local governing body established by or under a law of a State or Territory.

The second criterion that must be met for such a fax to be a designated marketing fax is that, having regard to the content and presentational aspects of the fax, it would be concluded that the purpose (or one of the purposes) of the fax is to conduct fundraising for electoral or political purposes (see paragraph 3(3)(b)).

The third criterion that must be met for a designated marketing fax authorised by a person who is a candidate for an election is that, if the fax relates to goods or services, the person who authorised the fax is the supplier or prospective supplier of the goods or services (see paragraph 3(3)(c)).

The fourth criterion is that the fax is not of a kind specified in the regulations (paragraph 3(3)(d)).

The exemption would enable political candidates to send faxes which have a fundraising purpose, for example a candidate sending a fax advertising tickets to a fundraising event for the purpose of raising funds for their candidature. Faxes relating to opinion polling could still be sent, as they would have no commercial element.

This exemption does not enable candidates to promote their own business through marketing faxes for their own benefit. It only applies where the nature of the fax is for the purpose of fundraising for electoral or political purposes.

A person is only covered by this exemption if they have nominated as a candidate in a Commonwealth, State, Territory or local government election with the relevant electoral authority. The various Commonwealth, State and Territory electoral laws provide a

nomination process whereby a person can nominate for candidature for an election. It does not enable a person to use this exemption simply because they have stated their intention to stand as a candidate for an upcoming election for which nominations have not yet been called by the relevant electoral authority.

A regulation-making power has been included to limit the exempt faxes if necessary. This could be used if it was found that the provision was being misused.

#### **Clause 4 – Educational institutions**

Clause 4 of Schedule 1A to the Bill provides that a marketing fax is a ‘designated marketing fax’ if the sending of the message is authorised by an educational institution and certain conditions apply. An ‘educational institution’ is defined in section 4 of the DNCR Act. It includes a pre-school, primary school, high school, college, TAFE and university.

This exemption would enable an educational institution to send certain faxes to students or past students, or members of their household. This exemption has been provided in recognition that public educational institutions benefit Australian society and should be able to contact their students to inform them about the needs of the institutions and to solicit funds to ensure their viability. A marketing fax authorised by an educational institution will only be defined as a designated marketing fax if:

- the recipient is the relevant account-holder who is, or has been enrolled, as a student in that institution;
- the recipient, who is a member or former member of the household of the relevant account-holder, is or has been, enrolled as a student in that institution;
- if the fax relates to goods or services where the institution is the supplier, or prospective supplier, of the goods or services; and
- the fax is not of a kind specified in the regulations.

The term ‘relevant account-holder’ is defined in section 4 of the DNCR Act. It is the person, or persons, responsible for the relevant service account for the Australian number.

To minimise the risk of this exemption being abused by entities falling within the category of educational institutions, only certain types of faxes are exempt. If the fax relates to goods or services, this exemption will only apply where the institution is the supplier or prospective supplier of the goods or services. A specific regulation-making power is included in paragraph 4(1)(f) which can be used to limit the exemption further if this exemption is being misused.

Subclause 4(2) relates to faxes sent where the relevant account-holder is an employer and the sending of the fax is authorised by an educational institution. It enables an educational institution to send faxes to a student, former student, or member of the household, even if the student is not the relevant account-holder, but his or her employer is the relevant account-holder.

This provision has been included in recognition of the fact that some organisations offer to pay for an employee's personal fax number account as part of their salary package. In these cases the employer is the relevant account-holder, not the employee as it is the employer who is responsible for the account. It is common for people to have combined telephone and fax numbers at their home for after hours work. However, in the case of faxes sent by educational institutions, it is the employee's relationship with the relevant educational institution that is relevant, not the employer's.

Without this specific provision, if an educational institution sent a fax to a former student who had provided them with their fax number, if the relevant account-holder of this number was an employer then the educational institution would not have been covered by the exemption provided under subclause 4(1).

### **Clause 5 – Regulations**

Clause 5 allows the regulations to provide that a specified kind of marketing fax is a 'designated marketing fax' for the purposes of the Act. This regulation-making power has been included to ensure that, if there are any unintended consequences of this Bill, regulations may be made to include faxes which should not appropriately be covered by the Bill. The effect of this would be that a class of fax specified in regulations would be exempt from the prohibition on sending unsolicited marketing faxes to numbers listed on the Register.

### **Clause 6 – Authorising the sending of marketing faxes**

Clause 6 provides for the circumstances in which the sending of marketing faxes will be taken to be authorised for the purposes of Schedule 1A to the Bill.

The term 'authorise', in relation to the sending of a marketing fax, is used in the provisions which set out the definition of a 'designated marketing fax'.

Proposed subclause 6(1) provides that if an individual authorises the sending of a marketing fax and does so on behalf of an organisation then the organisation rather than the individual is taken to have authorised the sending of the fax. An organisation is defined in section 4 of the DNCR Act.

For example, if an employee sends a marketing fax in the course of his or her employment then the organisation will be taken to have authorised the sending of the fax for the purposes of Schedule 1A to the Bill. This will not apply where a person purports to send the fax on behalf of an organisation but goes beyond his or her actual authority. In that case, the organisation will not be taken to have authorised the sending of the fax for the purposes of Schedule 1A.

Proposed subclause 6(2) provides that if a marketing fax is sent by an individual or organisation without being authorised by any other individual or organisation, then the first-mentioned individual or organisation is taken to have authorised the sending of the fax. The effect of this provision is that if an individual sends a fax on his/her own behalf

(and no one else has authorised its sending) then the individual is taken to have authorised the sending of the fax for the purposes of the DNCR Act.

### **Clause 7 – Extended meaning of *employee* and *employer***

The common law definition of the terms ‘employee’ and ‘employer’ are amended by the meaning given to the terms in clause 7 of Schedule 1A. In addition to those persons covered by the common law meaning of employee and employer, the definition is extended to include a range of persons not ordinarily considered to be employees or employers. In particular, clause 7 includes the following persons:

- members of the executive body of a body corporate (subclause 7(1));
- contractors (subclause 7(2));
- members of Parliament (subclauses 7(3) to 7(7));
- members of local governing bodies (subclause 7(8)); and
- office holders, such as an individual who is in the service of an armed force, or a police force (subclause 7(9)).

The circumstances in which marketing faxes can be sent will ordinarily depend upon whether the relevant account-holder has a certain relationship with the intended recipient of the fax (for example, an educational institution may contact a current student). However, this situation is somewhat different in the case where an employer is the relevant account-holder. Subclause 4(2) is designed to cover the circumstances where an employee’s personal account may be paid for by an employer as part of an employment package and consequently the employer is the relevant account-holder. In this case, it is the relationship of the employee with the organisation sending the fax, not the relevant account-holder (i.e. the employer) which is relevant in determining whether or not the fax falls within the ‘exempt’ category for the purposes of proposed section 12B.

This extended definition has been included as it is considered possible that certain employment-type situations, such as the ones described in this extended meaning, could involve a person receiving the benefit of a personal fax account paid for by the employer and should consequently be covered.

### **Item 72 – At the end of clause 1 of Schedule 2 (before the note)**

Item 72 of the Bill makes a consequential amendment by inserting the phrase ‘or the sending of a marketing fax’ at the end of clause 1 of Schedule 2 (before the note).

### **Item 73 – Clause 1 of Schedule 2 (at the end of the note)**

Item 73 makes a consequential amendment by adding ‘and section 12B (unsolicited marketing faxes must not be sent to a number registered on the Do Not Call Register)’ at the end of the note to clause 1 of Schedule 2.

**Item 74 – After paragraph 2(a) of Schedule 2**

In the basic definition of consent in Schedule 2 to the DNCR Act, Item 74 adds the new type of consent, namely ‘registered consent’.

**Item 75 – At the end of clause 2 of Schedule 2**

Following the basic definition of ‘consent’ in Schedule 2, Item 75 of this Bill inserts a note to make it clear that express consent does not include registered consent to emphasise that, for the purposes of the DNCR Act, these two types of consent are different.

**Item 76 – After clause 3 of Schedule 2**

Item 76 inserts new clause 3A in Schedule 2 to the DNCR Act, explaining that registered consent cannot be withdrawn. If a person has registered consent for a particular industry classification, such consent will remain for the duration of the registration unless the person re-registers their number. The act of re-registering a particular number (and any related consents) has the effect of deleting the previous registration and replacing it with the new registration.

**Item 77 – Clause 4 of Schedule 2**

Item 77 makes consequential amendments to clause 4 of Schedule 2 by replacing the words ‘a telephone’ with ‘an Australian’.

**Item 78 – Paragraphs 4(a) and (b) of Schedule 2**

This Item omits references to ‘telephone’ in subclauses 4(a) and (b) of Schedule 2.

**Item 79 – Clause 4 of Schedule 2**

Item 79 omits the words, ‘the telephone number’ and substitutes with ‘the number’, in clause 4 of Schedule 2. This is a consequential amendment as a result of the introduction of the fax marketing prohibition in the Bill. The intention is that the amended Act covers all Australian numbers.

**Item 80 – Subclause 5(1) of Schedule 2**

**Item 82 – Subclause 5(2) of Schedule 2**

Item 80 makes a consequential amendment to subclause 5(1) of Schedule 2 by replacing the words ‘a telephone’ with ‘an Australian’. A similar change is made by Item 82, in relation to subclause 5(2) of Schedule 2.

### **Item 81 – Paragraphs 5(1)(a) and (b) of Schedule 2**

Item 81 makes consequential amendments to paragraphs 5(1)(a) and (b) of Schedule 2 by removing the word ‘telephone’. This is required as a result of the new approach to defining ‘account’, which has been extended to cover all Australian number accounts.

### **Item 83 – Paragraphs 5(2)(a) and (b) of Schedule 2**

Item 83 makes consequential amendments to paragraphs 5(2)(a) and (b) of Schedule 2 by removing the word ‘telephone’.

### **Item 84 – At the end of Schedule 2**

Item 84 inserts new clauses 6 and 7 into Schedule 2.

Clauses 6 and 7 give the ACMA the power to make a determination or determinations setting out the circumstances in which the consent of a business or other organisation to receive telemarketing calls or marketing faxes will be inferred or will not be inferred. This is intended to operate as a reserve power, which will give the ACMA the ability to respond to unintended problems arising from the introduction of business numbers on the Register. The Act enables the ACMA to make separate determinations applying to telemarketing calls and marketing faxes, to ensure that the ACMA can respond to specific problems as they arise. For example, following the commencement of the changes, if problems are identified relating to business to business communications within a particular industry, the ACMA would be able to make a determination relating to communications within that industry.

The determination-making power applies to business numbers on the Register. ‘Business number’ is defined as an Australian number other than a number that is used or maintained exclusively or primarily for private or domestic purposes. This definition excludes residential landline and personal mobile phone numbers, but applies to all other telephone and fax numbers.

The ACMA is required to consult with the Minister prior to making a determination relating to telemarketing calls or marketing faxes. In addition to this, the ACMA is required to release the draft determination on its website for 14 days to allow public comments. The ACMA is required to consider any submissions received through this process when making the draft determination. The ACMA may also decide to place the draft determination on the website for the Do Not Call Register.

When making minor variations to a determination that has been made under one of the provisions, the ACMA is not required to comply with subclauses 6(3) or (4) or 7(3) or (4) (which require the ACMA to consult with the Minister and to release a draft determination for public comment). Minor variations are intended to cover issues such as correcting typographical or innocuous errors.

**Item 85 – After subclause 2(2) of Schedule 3**

Schedule 3 of the DNCR Act currently sets out the provisions relating to infringement notices, including a requirement that an infringement notice is issued no later than 12 months from the date of the alleged breach. The ACMA has the power to issue infringement notices in relation to contracts, arrangements or understandings for telemarketing or fax marketing services that do not require compliance with the Act.

Under the Act a person must not enter into a contract or arrangement or arrive at an understanding for the making of telemarketing calls or the sending of marketing faxes that does not require that the parties comply with the Act.

Item 85 proposes an exception to the usual 12-month timeframe within which an infringement notice relating to an alleged contravention of section 12 or section 12C must be issued. The reason for this amendment is that if the ordinary 12-month period applied, it would mean that the contravention would need to be discovered within the first few months of the term of the contract or arrangement, and there would generally not be enough time to investigate the matter and issue an infringement notice. Further, many contraventions are discovered as a result of complaints by members of the public and the ACMA may not become aware of such a contract for some time after the contract was entered into, making it difficult to meet the timeframes associated with the infringement notice provisions.

To overcome problems with the enforcement of the existing provision, this provision removes the timeframe for issuing an infringement notice in relation to contracts that do not require compliance with the Act. This will improve the ability of the ACMA to take enforcement action in relation to this provision.

Therefore, new clause (2A) of Schedule 3 would provide that the 12 month limitation on issuing an infringement notices would not apply to a contravention of subsections 12(1) or (2) or 12C(1) or (2).

The provision only applies to contracts, arrangements or understandings that were entered into after commencement. The Attorney-General's Department supports the removal of the 12 month timeframe in these circumstances.

**Item 86 – Subclause 4(1) of Schedule 3 (table items 1, 2, 3, 4, 5 and 6)**

**Item 87 – Subclause 4(2) of Schedule 3 (table items 1, 2, 3, 4, 5 and 6)**

Item 86 and 87 to the Bill insert in the respective subclauses 4(1) and (2) of Schedule 3, the references '12B(1) or (8)'. This is necessary as a result of the new rules about sending marketing faxes as discussed above.

## ***Division 2 – Application***

### **Item 88 – Application–agreements for the making of telemarketing calls**

Item 88 provides that the new paragraph 12(1)(b) of the DNCR Act applies after the commencement of this Item.

### **Item 89 – Application–continuity of the Do Not Call Register**

Item 89 provides that the amendments to section 13 of the DNCR Act would not affect the continuity of the Do Not Call Register. This provision makes it clear that the Register will continue to operate seamlessly.

### **Item 90 – Application–registration of an Australian number**

An application to register on the Do Not Call Register that has been made before the commencement of this item under section 15 of the DNCR Act (which refers to registration) will have effect as if the registration had been made after commencement. The application must have been pending immediately before commencement. The registration will be subject to any changes that have come into effect upon commencement.

### **Item 91 – Application–access to the Do Not Call Register**

Item 91 provides that the repeal of paragraphs 11(3)(b), 19(2)(d) and 19(3), and the amendments to paragraphs 20(1)(c), 20(1)(d) and section 21 made by the Bill apply in relation to a list submitted under subsection 19(1) of the Act after the commencement of this Item.

### **Item 92 – Application–continuity of a nomination**

Item 92 provides that the amendments to subsections 39(1) and (3) of the DNCR Act made by this Part do not affect the continuity of a nomination in force under that section immediately before the commencement of this Item.

### **Item 93 – Application–principles of agency**

Item 93 provides that new subsection 39(5) which reserves the principles of agency, applies in relation to a matter arising under the Act before or after commencement.

### **Item 94 – Application–infringement notices**

Item 94 provides that to the extent to which it relates to a contravention of subsection 12(1) or (2) of the DNCR Act, subclause 2(2A) of Schedule 3 of the Act as amended by this Part applies in relation to a contravention that occurs at or after, the commencement of this Item.

## **Part 2 – Other Amendments**

### ***Telecommunications Act 1997***

Part 2 of the Bill makes other miscellaneous amendments to the Telecommunications Act. It will enable the fax marketing industry (defined in Item 97) to develop codes relating to fax marketing activities.

This would enable an appropriate body that represents the fax marketing industry to develop a code relating to fax marketing. Such a code could not relate to matters already regulated under an industry standard developed by the ACMA.

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

### **Item 95 – At the end of subsection 3(2)**

Item 95 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 sending of marketing faxes in the objects of the Act. ‘Marketing fax’ is defined in Item 98. It is a slightly broader definition than the definition of ‘marketing faxes’ in Item 22 of Schedule 1 of the Bill.

This provision ensures that all unsolicited marketing faxes are subject to minimum standards that encourage best practice by the fax marketing industry and provide a comprehensive framework to consumers that makes all unsolicited marketing faxes subject to permitted sending times, provides contact information for the person or organisation sending (or authorising the sending of) the fax and other matters.

### **Item 96 – Section 5**

Item 96 amends section 5 of the Telecommunications Act, which is the simplified outline for the Act. Reference to ‘the telemarketing industry’ (wherever occurring), is amended by substituting ‘the telemarketing industry or the fax marketing industry’.

### **Item 97 – Section 7**

Item 97 inserts a new definition into section 7 of the Telecommunications Act. It defines the ‘fax marketing industry’ as an industry that involves carrying on a fax marketing activity. A ‘fax marketing activity’ is defined in proposed new section 109C of the Telecommunications Act (to be inserted by Item 100 of the Bill).

### **Item 98 – Section 7**

Item 98 inserts a new definition into section 7 of the Telecommunications Act. It defines a ‘marketing fax’ for the purpose of this Bill. The definition of marketing fax includes a

marketing fax within the meaning of the DNCR Act that is sent to an Australian number, but is wider than that. It also covers a fax that is sent to an Australian number, where, having regard to its content and its presentational aspect, it would be concluded that the purpose, or one of the purposes, of the fax is to conduct opinion polling, or to carry out standard questionnaire based research.

The broader definition is inserted because it is appropriate for certain types of faxes which are not considered to have a commercial-type purpose (one of the necessary elements of a marketing fax for the purposes of the DNCR Act), such as conducting opinion polling, to be subject to certain minimum conduct standards, notwithstanding that the sending of such faxes is not restricted under the Bill.

### **Item 99 – Section 106**

Item 99 amends section 106 of the Telecommunications Act to include references to the ‘fax marketing industry’. It is proposed that the term ‘fax marketing industry’ is defined in section 7 of the Telecommunications Act (see Item 97 above).

### **Item 100 – After section 109B**

#### ***Proposed new section 109C – Fax marketing activity***

Item 100 inserts a proposed new section 109C into the Telecommunications Act which defines a ‘fax marketing activity’ for the purposes of Part 6.

A fax marketing activity is essentially an activity that consists of sending marketing faxes to market, advertise or promote on behalf of others. Under subsection 109C(2), a fax marketing activity is defined as an activity that is carried on by a person (the first person) under a contract or arrangement (other than a contract of employment); and consists of:

- using marketing faxes to market, advertise or promote goods or services,
  - where the first person is not the supplier or prospective supplier of the goods or services; or
  - where the first person is not the supplier or prospective supplier of the goods or services;
- using marketing faxes to market, advertise or promote land or interests in land (or a supplier or prospective supplier of land),
  - where the first person is not the supplier or prospective supplier of the land or interests in land; or
  - where the first person is not the supplier or prospective supplier of the land or interests in land;
- using marketing faxes to market, advertise or promote business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities; or
- using marketing faxes to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities.

These activities are essentially those covered by the meaning of marketing faxes in new section 5B inserted by Item 22.

#### **Item 101 – After section 110B**

##### ***Proposed new section 110C – Sections of the fax marketing industry***

Item 101 inserts a proposed new section 110C into the Telecommunications Act, which defines ‘sections of the fax marketing industry’ for the purposes of Part 6. The concept of industry sections is used in Part 6 in relation 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 industry sections. The definition of ‘sections of the fax marketing industry’ ensures that it is clear for compliance and enforcement purposes to whom a particular code or standard applies.

Subsection 110C(2) indicates that if the ACMA has not made a determination on whether a person constitutes a particular section of the fax marketing industry, then the whole fax marketing industry constitutes a single section of the fax marketing industry for the purposes of Part 6 of the Telecommunications Act.

Subsection 110C(3) allows the ACMA to determine that persons carrying on, or proposing to carry on a specified fax marketing activity constitute a section of the fax marketing industry for the purposes of Part 6. Such a section must be identified by a unique name and/or number (subsection 110C(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 110C(6)). Subsection 110C(7) provides that subsection 110C(6) does not limit the ACMA’s options for determining sections under subsection 110C(3).

An ACMA determination made under subsection 110C(3) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This means that it must be registered on the Federal Register of Legislative Instruments and is subject to Parliamentary disallowance.

#### **Item 102 – After section 111AA**

##### ***Proposed new section 111AB – Participants in a section of the fax marketing industry***

Item 102 inserts proposed new section 111AB into the Telecommunications Act. This new provision defines a ‘participant’ in a section of the fax marketing 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 fax marketing industry. A definition of ‘fax marketing industry’ is inserted by Item 97 of the Bill.

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

### **Item 103 – After subsection 112(1B)**

Item 103 inserts new subsection 112(1C) in 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 are developed by bodies or associations that the ACMA is satisfied represent sections of the telecommunications, e-marketing, telemarketing industries. An industry body or association set up to represent an industry section does not need to be incorporated to develop a code.

Item 103 inserts a new subsection which provides a similar statement of regulatory intent in relation to the fax marketing industry, namely that industry codes should be developed by industry participants in the first instance.

The terms 'fax marketing industry' and 'fax marketing activity' are defined in Items 97 and 100 of the Bill respectively.

### **Item 104 – Subsection 112(2)**

Item 104 makes a consequential numbering amendment to subsection 112(2), to provide for new subsection 125B (refer Item 131 of the Bill).

### **Item 105 – Subsection 112(2)**

Item 105 makes a consequential amendment to subsection 112(2) of the Telecommunications Act by inserting a reference to 'fax marketing industry'.

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.

### **Item 106 – After subsection 112(3C)**

Item 106 inserts proposed new subsection 112(3D), which sets out the 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 fax marketing 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 fax marketing industry.

The term 'fax marketing industry' is defined in Item 97 of the Bill.

**Item 107 – Subsection 112(4)**

Item 107 amends subsection 112(4) to add a reference to subsection 112(3D). This will ensure that subsection (3D) 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 fax marketing industry.

**Item 108 – Subsection 113(2)**

Item 108 amends subsection 113(2) of the Telecommunications Act to add a reference to the 'fax marketing industry'.

**Item 109 – Paragraph 113(3)(y)**

Item 109 amends subsection 113(3)(y) of the Telecommunications Act to add a reference to the 'fax marketing industry'. The 'fax marketing industry' is defined in Item 97 of the Bill.

**Item 110 – At the end subsection 113(3)**

Subsection 113(3) gives examples of the matters that industry codes and industry standards may deal with. Item 110 adds to this list to provide that industry codes and standards may also deal with:

- record keeping practices to be followed in relation to marketing faxes sent or attempted to be sent; and
- action to be taken to limit the total number of marketing faxes sent or attempted to be sent, by a particular participant in a section of the fax marketing industry, during a particular period to a particular Australian number.

Codes and standards need not be limited to the matters listed.

**Item 111 – Paragraph 117(1)(a)**

Item 111 amends paragraph 117(1)(a) of the Telecommunications Act to insert a reference to the 'fax marketing industry'. This enables a body or association representing a section of the fax marketing industry to submit a draft fax marketing industry code to the ACMA for registration.

**Item 112 – Paragraph 117(1)(b)**

Item 112 makes consequential amendments to paragraph 117(1)(b) of the Telecommunications Act to include a reference to 'fax marketing activities'.

### **Item 113 – Paragraph 117(1)(h)**

Item 113 repeals paragraph 117(1)(h) and substitutes a new paragraph that covers both ‘telemarketing activities’ and ‘fax marketing activities’.

The provision provides that before registering an industry code that relates to the telemarketing industry or fax marketing industry, the ACMA need not be satisfied that the Telecommunications Industry Ombudsman (TIO) has been consulted. This is because codes relating to the telemarketing industry and fax marketing industry would 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.

### **Item 114 – Subparagraph 117(1)(k)(iii)**

Item 114 makes consequential amendments to subparagraph 117(1)(k)(iii) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

The effect of section 117 is discussed above. It ensures that the ACMA must consult with the Privacy Commissioner before registering a Code which deals with certain privacy matters.

### **Item 115 – Subsection 118(1)**

Item 115 amends subsection 118(1) of the Telecommunications Act to include references to the ‘fax marketing industry’. Section 118 provides a formal trigger for the ACMA to request 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).

### **Item 116 – Paragraph 118(1)(a)**

Item 116 makes a consequential amendment to paragraph 118(1)(a) of the Telecommunications Act to include a reference to ‘fax marketing activities’.

### **Item 117 – Paragraph 118(3)**

Item 117 makes a consequential amendment to subsection 118(3) of the Telecommunications Act to include a reference to the ‘fax marketing 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 or the fax marketing 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 118 – Paragraph 118(4A)(c)**

Item 118 makes a consequential amendment to paragraph 118(4A)(c) of the Telecommunications Act to include a reference to the ‘fax marketing 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 fax marketing industry where the code could deal with certain privacy matters.

**Item 119 – Subsection 119(1)**

Item 119 amends section 119(1) of the Telecommunications Act (and the accompanying note) to include references to the ‘fax marketing 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.

**Item 120 – Paragraph 119(1)(b)**

Item 120 makes a consequential amendment to paragraph 119(1)(b) of the Telecommunications Act to include a reference to ‘fax marketing activities’.

**Item 121 – Paragraph 121(1)(a)**

Item 121 makes a consequential amendment to paragraph 121(1)(a) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 122 – Subsection 122(1)**

Item 122 makes a consequential amendment to subsection 122 of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 123 – Subparagraph 123(1)(a)(i)**

Item 123 makes a consequential amendment to subparagraph 123(1)(a)(i) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 124 – Subparagraph 123(1)(a)(ii)**

Item 124 makes a consequential amendment to subparagraph 123(1)(a)(ii) of the Telecommunications Act to include a reference to ‘fax marketing activities’.

**Item 125 – Paragraph 124(1)(a)**

Item 125 makes a consequential amendment to paragraph 124(1)(a) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 126 – Subparagraph 124(1)(c)(ii)**

Item 126 makes a consequential amendment to subparagraph 124(1)(c)(ii) of the Telecommunications Act to include a reference to ‘fax marketing activities’ and the ‘fax marketing industry’.

**Item 127 – Subparagraph 125(1)(a)(i)**

**Item 128 – Subparagraph 125(1)(a)(ii)**

Items 127 and 128 make consequential amendments to subparagraphs 125(1)(a)(i) and (ii) of the Telecommunications Act to include references to the ‘fax marketing industry’ and activities, as appropriate.

**Items 129 and 130 – Subsection 125(7)**

Items 129 and 130 make consequential amendments to subsection 125(7) of the Telecommunications Act to include a reference to the ‘fax marketing industry’ and a reference to ‘fax marketing activities’.

**Item 131 – After section 125A**

***Proposed new section 125B – ACMA must determine certain industry standards relating to the fax marketing industry***

Item 131 inserts new section 125B which provides the ACMA with the power to make an industry standard setting out particular requirements for the fax marketing industry. The ACMA must ensure that the standard is in place at all times after commencement.

The standard will apply to participants in the fax marketing industry, which is defined under new section 7 of the Telecommunications Act (which covers marketing faxes as defined under the DNCR Act and other faxes which have a purpose of conducting opinion polling or carrying out standard questionnaire-based research).

The standard applies to marketing faxes that are sent to any Australian number, including telephone numbers, and is not limited to numbers that are listed on the Do Not Call Register. The standard will set out requirements for the fax marketing industry relating to a range of activities, such as:

- restricting the hours or days during which marketing faxes may be sent or attempted to any Australian number. This will enable the ACMA to set out times and days during which it will be prohibited to send or attempt to send a marketing fax.
- requiring that a marketing fax sent to an Australian number must contain specified information about the person who authorised the message. This will enable the ACMA to set out certain information about the person who authorised the marketing fax to be sent that must be included in the marketing fax.

- restricting the total number of marketing faxes sent, or attempted to be sent, by the relevant participant during a particular period to a particular Australian number. This will enable the ACMA to restrict marketing faxes from being sent or attempted to be sent to the same number by a fax marketer within a defined period. It will prevent recipients from being inundated with marketing faxes.
- requiring that marketing faxes contain information about how the recipient can unsubscribe from further marketing faxes from the person that authorised it. This will enable the ACMA to include requirements for marketing faxes to specify how a person can unsubscribe from further faxes.

**Item 132 – Subsection 128(1)**

Item 132 makes a consequential amendment to subsection 128(1) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 133 – Subsection 129(1)**

Item 133 makes a consequential amendment to subsection 129(1) of the Telecommunications Act to include a reference to the ‘fax marketing industry’.

**Item 134 – Subsection 130(1)**

Item 134 makes a consequential amendment to subsection 130(1) of the Telecommunications Act to include a reference to the ‘fax marketing 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 135 – Paragraphs 130(1)(a) and (b)**

Item 135 makes consequential amendments to paragraphs 130(1)(a) and (b) of the Telecommunications Act to include a reference to ‘fax marketing activities’.

**Item 136 – Subsection 133(1A)**

**Item 137 – Section 135A**

Items 136 and 137 make consequential amendments to sections 133(1A) and 135A to include a reference to new section 125B.

**Item 138 – Paragraphs 139(1)(a) and (b)**

Item 138 makes consequential amendments to paragraphs 139(1)(a) and (b) of the Telecommunications Act to include a reference to ‘fax marketing activities’.

**Item 139 – At the end of section 509**

Item 139 inserts a new subsection 509(7). This subsection is intended to allow a person to make a complaint to the ACMA about a possible contravention of the DNCR Act or regulations under that Act, where that person does not have sufficient information to identify the person who sent, or attempted to send, the fax, or the person who caused the fax to be sent or attempted to be sent. For example, this would enable a person to make a complaint about the receipt of unsolicited faxes to a telephone number. In such cases the ACMA must take reasonable steps to assist the person to identify the person who sent the fax.

**Item 140 – After paragraph 515A(1)(b)**

Section 515A enables the ACMA to transfer certain matters to the Privacy Commissioner if the ACMA forms the opinion that the complaint 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.

Item 140 is a consequential amendment to include complaints relating to the following contraventions under section 515A:

- a code registered under Part 6, where the code applies to participants in a section of the fax marketing industry and deals with one or more matters relating to the fax marketing activities of those participants; and
- section 128 in relation to an industry standard, where the standard applies to participants in a section of the fax marketing industry and deals with one or more matters relating to the fax marketing activities of those participants.